

Case No. 02A530

**IN THE SUPREME COURT OF THE  
UNITED STATES OF AMERICA**

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**DVD COPY CONTROL ASSOCIATION, INC., Applicant,**

v.

**MATTHEW PAVLOVICH, Respondent.**

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*On Application for Stay of the Judgment  
of the Supreme Court of California*

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RESPONDENT MATTHEW PAVLOVICH'S OPPOSITION  
TO DVD CCA'S APPLICATION FOR STAY OF JUDGMENT OF  
THE SUPREME COURT OF CALIFORNIA

-- Jurisdiction Contested --

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TO: THE HONORABLE SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT.

**I.**

**PREFATORY STATEMENT**

Thirty-One days after the California Supreme Court issued a ruling finding that California lacks jurisdiction over respondent, and without first applying to the court below for such a stay, DVD Copy Control Association, Inc. (hereafter "DVD CCA") asks this Court to exercise its discretionary power to compel the California Supreme Court to stay enforcement of it's judgment. DVD CCA argues that but for a stay it will be irreparably harmed because its alleged trade secret may become public. Their position ignores the fact that the information claimed to be secret has been publicly available for at least the past two years and that a stay of the lower court's judgment will have no effect on the availability of the information. Thus, this Court should deny the application for stay and permit the decision of the court below, which is in accord with the great weight of similar cases, to be enforced.

**II.**

**STATEMENT OF FACTS**

In this action, DVD CCA seeks to require non-resident Matthew Pavlovich to defend a claim of trade secret misappropriation in California. DVD CCA's assertion of jurisdiction does not rest on any personal contacts that Mr. Pavlovich had in California, is not based on any violation of agreement between the defendant and plaintiff, nor on any allegation of a specific, targeted, intentional act. Instead, DVD CCA's assertion of jurisdiction over Pavlovich rests on the allegation that a passive web site Mr. Pavlovich had input on was involved in the republication of already publicly-available information on the Internet and that Pavlovich could have known that his acts could have an impact on "industries" located in California. Neither this

high Court, nor any other court Respondent is aware of, has ever permitted the exercise of jurisdiction on this basis.

DVD CCA is an entity that began to administer the licensing of the Content Scrambling System (CSS) in December of 1999<sup>1</sup>. Opn.<sup>2</sup> at p.266. CSS is a system of information in the form of keys and algorithms that collectively act to encrypt and decrypt data on motion picture Digital Versatile Disks (DVDs). Lawfully purchased DVDs that are encrypted with CSS cannot be played on DVD players that are not equipped with CSS decryption capabilities.

DeCSS is a separate computer program that mimics the decryption capabilities of CSS. DVD CCA contends that DeCSS “embodies, uses, and/or is a substantial derivation of confidential proprietary information which DVD CCA licenses.” Opn. at p.267. It is unknown who created CSS. It is believed that Jon Johanson, a youth in Norway was involved in the initial publication of DeCSS.

Matthew Pavlovich was a student at Purdue University in Indiana in October of 1999 and was the founder and project leader of the Linux Video project known as LiVid. Opn. at pp.266-7. The goal of the LiVid project was to improve video and DVD support for Linux and to combine the resources and efforts of various individuals that were working on related things. *Id.* According to DVD CCA, as early as October of 1999, DeCSS was posted on the LiVid web site<sup>3</sup>. Pavlovich never new DVD CCA was located in California until after this action was filed. Opn. At p.267.

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<sup>1</sup> As illustrated below, DVD CCA began administering the licenses two months after the republication complained of occurred.

<sup>2</sup> “Opn.” refers to citations to the California Supreme Court opinion issued in this case on November 25, 2002, reported at *Pavlovich v. Superior Court*, 29 Cal.4<sup>th</sup> 262 (2002).

<sup>3</sup> Because Pavlovich neither hosted nor had root access control for the LiVid web site, it is unknown who posted DeCSS to the site, where it was posted, or how long it remained there. DVD CCA has never provided any evidence to clarify this issue.

In reversing the Court of Appeal, the California Supreme Court held that Pavlovich had not purposefully and voluntarily directed his activities toward the forum so that he should expect, by virtue of the benefit received, to be subject to the Court's jurisdiction. *Id* at 6.

### III.

#### PROCEDURAL HISTORY

On December 27, 1999, DVD CCA filed a complaint against 21 named individuals and other unnamed parties for allegedly re-publishing DeCSS on various web sites around the world<sup>4</sup>. Following a properly filed motion and discovery voluntarily provided by Matthew Pavlovich, on August 30, 2000, the Superior Court of Santa Clara County denied Petitioner's motion to quash service of summons. Following a petition for Writ of Mandate timely filed by Pavlovich, on October 11, 2000, the Sixth District Court of Appeal summarily denied Petitioner's writ petition. Following a timely petition, the California Supreme Court granted review and directed the Court of Appeal to issue an Order to Show Cause why petitioner's requested relief should not be granted.<sup>5</sup> Following briefing and oral arguments, the Sixth District Court of Appeal issued a written opinion again denying relief.<sup>6</sup> The California Supreme Court again granted review and, following briefing and argument issued its decision reversing the Court of Appeal on November 25, 2002.

On December 17, 2002, without prior notice to opposing counsel, DVD CCA filed a motion to Delay the Finality of the decision of the Supreme Court of California by 60 days. Following an opposition by Pavlovich and subsequent reply by DVD CCA, on December 23,

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<sup>4</sup> Subsequently, DVD CCA amended its complaint to add Jon Johanson to the complaint. Johanson is the only defendant alleged to have been involved in the initial creation or publication of DeCSS.

<sup>5</sup> On December 19, 2000.

<sup>6</sup> On August 7, 2001.

2002, the California Supreme Court denied DVD CCA's motion. DVD CCA filed the instant application on December 26, 2002.

#### IV.

#### ARGUMENT

DVD CCA has moved This Court for a stay pursuant to U.S. Supreme Court Rule 23 and 28 U.S.C. §2101. Supreme Court Rule 23.3 requires that under normal circumstances the applicant have applied to the lower court for a stay before this Court will consider its application. In addition to this procedural requirement, the Court has distilled the following substantive factors in analyzing stay applications:

1. Whether the applicant will suffer irreparable injury if a stay is not granted. Courts weigh expected injury suffered by the applicant against both injury to the respondent and injury to the public.
2. Whether the applicant has a reasonable probability of prevailing on the merits of the case, meaning that a majority of the court is likely to both grant review and reverse the lower court's decision.
3. Whether any prior ruling on the application by another judge of a lower court or the same court was a reasonable one. In other words, deference is given to any decision by the lower court not to grant the requested relief.

See generally *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980), and in accord *California v. American Stores Co.*, 492 U.S. 1301 (1989) (opinion by Justice O'Connor).

#### **A. This Court Should Summarily Deny The Application As Procedurally Defective.**

U.S. Supreme Court rule 23.3, which addresses stay applications, provides in pertinent part:

Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.

California Rules of Court 25(c) explicitly authorizes the California Supreme Court to stay the enforcement of its decision upon a showing of good cause. Yet, DVD CCA declined to request such a stay from the California Supreme Court. Furthermore, this case does not fall within the "extraordinary circumstances" envisioned by the Court's rules, since any urgency in obtaining a stay from this court was caused solely by DVD CCA's lack of diligence rather than by external factors. *Cf. Western Airlines, Inc. v. Teamsters*, 480 U.S. 1301 (1987)

(urgency caused by lower court's decision 12 hours before enjoined event was to occur).

Therefore, this Court should deny the application as procedurally defective due to DVD CCA's failure to request a stay of the California Supreme Court's decision from that court.

**1. In The Event The Court Finds Rule 23.3 Has Been Satisfied, This Court Should Give Deference to The Lower Court's Decision.**

To the Extent the Court considers DVD CCA's motion to Extend the Date of Finality of Decision filed with the California Supreme Court to satisfy the requirement that a stay request be first addressed to the lower court, great deference should be afforded the California Supreme Court's decision to deny the motion. *Breswick & Co. v. United States* 75 S.Ct. 912, 915 (1955). Indeed, some Justices have noted that a denial of a stay by the lower court is "presumptively correct" with a heavy burden to be born by an applicant seeking a stay despite the adverse prior order. See *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975); and in accord, *Holtzman v. Schlesinger*, 414 U.S. 1304, 1314 (1973); *Winters v. United States*, 89 S.Ct 57 (1968) (lower court's denial entitled to prima facie respect, to be set aside only if deemed clearly erroneous).

Here, the California Supreme Court denied DVD CCA's motion by a vote of 6-1<sup>7</sup>, meaning that the evidence provided by Pavlovich<sup>8</sup> persuaded two of the justices who dissented on the merits that the majority's decision should *not* be delayed. This Court should therefore give deference to the lower court's conclusion that no irreparable injury exists (as demonstrated below) and that the November 25, 2002 decision should be immediately enforced.

**B. DVD CCA Cannot Demonstrate That It Will Suffer Irreparable Injury Unless This Court Issues A Stay.**

That denial of the stay will not work an irreparable injury on the applicant, is a sufficient ground for denying the application irrespective of any other basis argued by the applicant. *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983). As demonstrated below, a denial of this application for stay will have little (if any) injurious effect on DVD CCA.

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<sup>7</sup> See Supreme Court order of December 23, 2002 attached as Exhibit B to the Declaration of Allonn E. Levy.

<sup>8</sup> This evidence has been provided anew to this Court as Exhibit A to the Declaration of Allonn E. Levy filed concurrently herewith.

DVD CCA's assertion that relief is necessary to maintain the secrecy of DeCSS and/or CSS is demonstrably false. In reality, DeCSS remains ubiquitously available throughout the world from countless sources not named in this action. As demonstrated by the accompanying declarations submitted to the trial court by respected computer scientists at Princeton, U.C.-Berkeley, Carnegie-Mellon, and Sweden's Luleå University of Technology, there has been unlimited public disclosure of DeCSS and the CSS algorithms and keys. DeCSS itself is available at the very least, at *hundreds* of locations on the Internet. The contents of DeCSS and CSS have been taught and discussed at universities and within the computer science community worldwide, have been published in print in the *Wall Street Journal*, *Wired Magazine* and MIT's *Technology Review*, as well as in course materials and widely distributed technical papers. This information is available not only in the form of the original DeCSS computer program, but also in other forms as well, including narrative, mathematical, graphical, animated, and musical representations. Thus, there is nothing secret about DeCSS or CSS and its algorithms and keys, all of which are widely and readily available to the public<sup>9</sup>. Therefore, even if Pavlovich were subject to the trial court's injunction<sup>10</sup>, delaying finality would have no effect upon the public availability (or lack of secrecy) of either CSS or DeCSS.

The accompanying declaration of Allonn E. Levy attaches as Exhibit A the "Non-confidential Evidence In Support of Defendant Andrew Bunner's Motion For Summary Judgment," filed with the trial court in this action (DVD CCA v. McLaughlin, et al., Santa Clara County Superior Court Case No. CV 786804) on November 28, 2001. The evidence contained therein demonstrates that:

- DeCSS remains available, at the very least, at *hundreds* of locations on the Internet, in both source code and object code versions. Prof. Wagner Decl. ¶¶ 6-21; Dr. Touretzky Decl. ¶¶ 13-15, 18-23; Prof. Felten Decl. ¶¶ 14-15.
- Numerous additional computer programs performing the CSS decryption function have been created in a variety of programming languages. Dr. Touretzky Decl. ¶¶ 14-15, 29;

<sup>9</sup> See Declaration of Allonn E. Levy filed concurrently herewith and exhibits thereto: Prof. Felten Decl. ¶¶ 12-21; Prof. Wagner Decl. ¶¶ 6-26, 28-33; Dr. Touretzky Decl. ¶¶ 10-32, Exs. A-C; Kesden Decl. ¶¶ 1-8, Exs. A, B; Parviainen Decl. ¶¶ 1-5.

<sup>10</sup> Naturally, it is respondent's position that because California lacks jurisdiction over his person, he has never been subject to the trial court's injunction.

Prof. Wagner Decl. ¶¶ 22-25.

- In addition, DVD decryption programs have been published in print by both MIT's journal *Technology Review* and *Wired Magazine*, and the *Wall Street Journal* published one of the CSS master keys. Dr. Touretzky Decl. ¶¶ 10, 29 & Exs. A, B, C.
- CSS and its algorithms and keys have been the subject of research, discussion, and teaching worldwide within the computer science community, both academic and non-academic. Prof. Felten Decl. ¶¶ 12-13, 16-21; Prof. Wagner Decl. ¶¶ 26, 28-33; Dr. Touretzky Decl. ¶¶ 14, 26-32; Kesden Decl. ¶¶ 1-8 & Ex. A; Parviainen Decl. ¶¶ 1-5.
- Other descriptions and representations of the CSS algorithms and keys have been created in a vast variety of formats. Cryptographer Frank Stevenson's technical paper describing the CSS algorithms and keys is widely known in cryptographic circles and is available on the Internet. Prof. Felten Decl. ¶¶ 17-20; Dr. Touretzky Decl. ¶¶ 11-12, 14-18, 28; Kesden Decl. ¶ 8 & Ex. B. Others have created narrative descriptions, mathematical descriptions, and graphical, animated, and musical renderings of the CSS algorithms and keys. Dr. Touretzky Decl. ¶¶ 14-18, 28.
- DVD CCA has frankly confessed it had given up any serious attempt to police its trade secrets. After identifying 72 of the "thousands of web sites and file transfer sites apparently claim[ing] to be posting materials containing Plaintiff's trade secrets," DVD CCA explained it was making no attempt to locate and identify, much less suppress, all of these thousands of sources publishing information about the CSS algorithms and keys, stating "Plaintiff cannot reasonably be expected to perform this process to verify the contents of thousands of web sites claiming to be posting Plaintiff's trade secrets." See Declaration of Allonn E. Levy.

For more than a year now<sup>11</sup>, DVD CCA has been aware of the evidence conclusively demonstrating the falsity of its contention to this Court that DeCSS and CSS remain secret and undisclosed. DVD CCA has never attempted to refute this evidence and has never denied or contested its truth, either in the trial court or to the California Supreme Court when Pavlovich presented this same evidence in opposition to DVD CCA's application to extend the finality of that court's judgment. Nor has it attempted to rebut this evidence, or even acknowledged its existence, in its motion to this Court. Once the California Supreme Court saw this undisputed evidence of the ubiquitous public availability of DeCSS and the alleged CSS trade secrets, it denied forthwith DVD CCA's application. This Court is respectfully urged to do the same.

The evidence presented, including DVD CCA's admissions, merely confirm the indisputable: There is nothing secret about DeCSS or the CSS algorithms and keys. Thus, the claimed sense of urgency and the assertion of possible harm DVD CCA seeks to convey in its

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<sup>11</sup> This evidence was first presented to DVD CCA and to the trial court in November 2001.

motion are illusory. As such, the application should be denied.

**1. DVD CCA's failure to act expeditiously to file this application and its petition for Certiorari detracts further from its assertion of impending harm and counsels against the grant of a stay.**

This Court has repeatedly held that an applicant's failure to apply for a stay or for certiorari with greater dispatch "tend[s] to blunt [the applicant's] claim of urgency and counsel against the grant of a stay." *Ruckelshaus v. Monsanto, supra*, at 1318, and in accord *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) and *Brown v. Gilmore*, 533 U.S. 1301 (2001) (denying application for injunction pending certiorari based upon failure to request injunction earlier).

Here, DVD CCA received the Supreme Court's decision reversing the Court of Appeal on November 25, 2002. If, as they now claim, they faced impending irreparable injury, one would have expected DVD CCA to have immediately filed for a stay in both courts and to have filed their petition for certiorari in order to expedite review. However, instead of taking action, DVD CCA waited to seek a stay from this Court until the day that the California decision would become final; fully 31 days from the date of the decision. DVD CCA's failure to act for over a month is inconsistent with the urgency they now assert and counsels against the granting of their application.

**C. This Court Is Unlikely To Grant Review And Reverse The California Supreme Court's Decision.**

The California Supreme Court's decision issued November 25, 2002 is in keeping with established principles of jurisdiction and existing cyber-jurisdiction jurisprudence. California's high court adopted the well accepted *Zippo* test for Internet interactivity (Opn. at p.274; *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* 952 F.Supp.1119, 1124 (W.D.Pa. 1997) and correctly noted that the *Calder* effects case requires that the defendant commit an intentional act expressly aimed at or targeting the forum state, with knowledge that the conduct would cause harm in that

forum state<sup>12</sup>, and which actually causes harm, the brunt of which is felt in the forum state. *Opn.* at pp. 269-272; *Bancroft and Masters Inc. v. Augusta Nat'l Inc.* 223 F.3d 1082, 1087 (9<sup>th</sup> Cir. 2000), *IMO Industries v. Kiekert*, 155 F.3d 254, 266 (3 Cir. 1998) and generally *Calder v. Jones*, 465 U.S. 783 (1984), *Griffis v. Luban* 646 N.W.2d 338 (Minn 2002).

In the court below, DVD CCA argued for near universal jurisdiction for injuries alleged to flow from information passively posted on an Internet web site. Its position was that jurisdiction should exist wherever information posted on the Internet could foreseeably cause harm<sup>13</sup>. This Court, of course, has long and consistently rejected the position that foreseeability of injury alone is sufficient for jurisdiction. See generally *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). Like every other jurisdiction to consider the question, the California Supreme Court rejected DVD CCA's extreme position and found that it conflicted with the clear precedents of this Court.

The majority's decision accords with the national trend regarding Internet based jurisdiction and is in keeping with this Court's dictates regarding jurisdiction. Therefore, it is unlikely that This Court will both grant certiorari and reverse the lower court's decision.

#### **D. In The Event A Stay Is Issued, The Court Should Require A Substantial Undertaking.**

Both 28 U.S.C. §2101 and U.S. Supreme Court rule 23 authorize The Court to require an undertaking as a condition of any stay order. Pavlovich never appeared generally in this matter, did not have default or default judgment entered against him, and did not argue or address the injunction in any way. His liability has, therefore, never been adjudicated. Mathew Pavlovich's

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<sup>12</sup> In attempting to manufacture a split of authority, DVD CCA seriously misreports the California Supreme Court's decision here by asserting that the Court held that personal jurisdiction requires that the defendant aim his or her out-of-state conduct at the plaintiff and not just at the forum state. No such holding is to be found in the California Supreme Court's opinion, and not surprisingly DVD CCA fails to quote any such holding.

<sup>13</sup> Notably, DVD CCA has never presented any evidence of any actual harm from DeCSS, either in California or anywhere else in the world. It has never provided evidence of harm to any of the non-party movie and computer industries whose alleged unsubstantiated "injuries" it seeks to use as the basis for jurisdiction over its own quite different claims against Pavlovich. DVD CCA has only offered its own unsubstantiated rhetoric that such harm is possible.

decision not to personally post DeCSS neither prior to, nor subsequent to, the issuance of the injunction has always been, and continues to be, purely voluntary<sup>14</sup>. The majority below correctly concluded that any effort by California to exercise jurisdiction over Pavlovich would be violative of the U.S. Constitution. By seeking this stay, DVD CCA would exacerbate the constitutional and actual injury by prolonging this action against Mr. Pavlovich. A substantial undertaking is required to guard against the constitutional and actual injury that Pavlovich would suffer if a stay were to issue.

## V.

### CONCLUSION

A denial of the requested stay will affect no rights of the applicant because the information complained of is ubiquitously available to the public. As such, no stay should issue. See *Barthuli v. Board of Trustees*, 434 U.S. 1337, 1339 (1977) (holding that to grant a stay where no future irreparable injury is shown might constitute an abstract judicial act offensive to the Article III “case or controversy” limitation), and see *Capital Square Review and Advisory Board v. Pinette*, 510 U.S. 1307 (1993) (denial of stay on basis that any injury claimed by the applicant had already occurred).

A majority of the Supreme Court of California has determined that an exercise of jurisdiction in this case would violate the Constitution of the United States. This Court should not now accept DVD CCA’s invitation to prolong the Constitutional injury by pre-empting the

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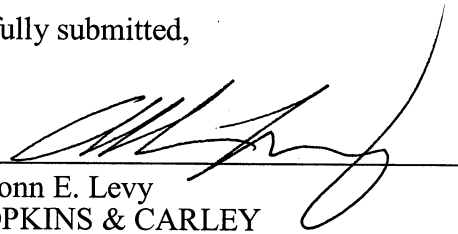
<sup>14</sup> Nor has Matthew Pavlovich posted, or indicated he intends to post, DeCSS since this Court rendered its decision on November 25, 2002.

lower Court's decision. It is therefore respectfully requested that This Court deny DVD CCA's application in its entirety.

DATED: 1/2, 2003

Respectfully submitted,

By:

  
Allonn E. Levy  
HOPKINS & CARLEY  
A Law Corporation  
Attorney for Petitioner  
MATTHEW PAVLOVICH

**PROOF OF SERVICE**

I, Maudie A. Johns, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is The Letitia Building, 70 S First Street, San Jose, CA 95113-2406. On January 2, 2003, I served the within documents:

**RESPONDENT MATTHEW PAVLOVICH'S OPPOSITION TO DVD CCA'S APPLICATION FOR STAY OF JUDGMENT OF THE SUPREME COURT OF CALIFORNIA AND DECLARATION OF ALLONN E. LEVY IN SUPPORT THEREOF.**

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California addressed as set forth below.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 2, 2003, at San Jose, California.

\_\_\_\_\_  
Maudie A. Johns