

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

FORD MOTOR COMPANY,

Plaintiffs

v.

Case No. 01-CV-71685-DT
~~Case No. 01-CV-60084-DT~~

**2600 ENTERPRISES, and ERIC
CORLEY p/k/a EMMANUEL
GOLDSTEIN,**

Hon. Robert H. Cleland
United States District Judge

Defendants.

**MOTION AND SUPPORTING MEMORANDUM OF DEFENDANTS
EMMANUEL GOLDSTEIN AND 2600 ENTERPRISES
FOR A PROTECTIVE ORDER**

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2600 MAGAZINE AND ERIC
CORLEY (pseudonymously known as
EMMANUEL GOLDSTEIN).

Note: The relief requested in this Motion is not necessarily opposed by Plaintiff, but Plaintiff is unwilling to authorize Defendants' counsel to represent the Motion is unopposed.

Plaintiff has proposed a verbal promise not to serve Mr. Goldstein and 2600 with "second summons" in the courtroom, but has not assented to the accompanying Protective Order, without which Mr. Goldstein – with good reason (see below) – will not be present for the May 18, 2001 hearing.

Papers fully explaining Plaintiff's position should be filed by Plaintiff's counsel on or before Tuesday, May 15, 2001.

It is only reasonably prudent for Defendants and counsel to request that this Court consider and rule definitively on this Motion in advance of the May 18 hearing – particularly in light of the First Circuit's recent decision, see Northern Light Tech. v. Northern Lights Club, 236 F.3d 57 (1st Cir. 2001), *petition for writ of certiorari filed*, No. 00-1651 (Apr. 30, 2001) (the Certiorari petition is attached at Tab A), suggesting that there is "a relatively heavy presumption against granting [process] immunity," id. at 63 – at least when Internet publishers happen to be the parties contesting personal jurisdiction.

QUESTIONS PRESENTED

Context in which questions are raised: Plaintiff has moved for a preliminary injunction and noticed a live hearing for May 18, 2001. Defendants expect they will oppose the injunction on the ground (among several others)¹ that injunctive relief requires jurisdiction over the person to be enjoined and Eric Corley p/k/a Emmanuel Goldstein is not

¹A partial (but non-exhaustive) list of other defenses that Defendants now raise, and expect to argue at greater length at the appropriate time (established in accordance with Rules 4(d) and 12), is set forth in note 21, *infra*.

subject to personal jurisdiction in Michigan. Nor is 2600 Enterprises subject to Michigan jurisdiction. Mr. Goldstein, however, has a right as both a party and a material witness to be present for the hearing (either in his personal capacity or as a representative of 2600, although he will be present on May 18, 2001 only in his personal capacity and not as a Rule 30(b)(6) witness). Moreover, Mr. Goldstein should testify if the Court takes testimony.

Based on recent cases² (including one pending before the Supreme Court on a Certiorari petition), Mr. Goldstein has every reason to fear (even though he has already elected to proceed under FED. R. CIV. P. 4(d)),³ that Plaintiff may nevertheless attempt to secure jurisdiction by serving a “second summons.” Accordingly, it is necessary to ask:

1. Is a party who properly asserts a personal jurisdiction defense,⁴ and who enters the forum for no other reason than to be present for a live hearing in the same case in which the defense is asserted, nevertheless required to obtain a protective order in advance of entering the forum, in order to claim the traditional immunity that parties, lawyers and witnesses enjoy to be free from service of process while attending court proceedings and for a reasonable time coming and going?
2. If such a “process immunity” protective order is required, may Mr. Goldstein please have a protective order securing his right to enter the state of Michigan on court business (and for a reasonable time coming and going) and ensuring that he cannot be subjected to Michigan jurisdiction based on service of process (including, without limitation,

²Northern Light Tech., 236 F.3d at 63; LaCroix v. American Horse Show Ass'n, 853 F. Supp. 992, 994-95 (N.D. Ohio 1994) (jurisdiction taken over **both** defendant and counsel based on counsel’s appearance at personal jurisdiction hearing).

³His Answer and/or Rule 12 Motion should not be due until June 30, 2001.

⁴This defense is hereby asserted, along with the other defenses set forth in note 21, *infra*. Defendants respectfully reserve the right to raise any other available defenses when they file their formal Rule 12 Motion.

“second service” of summons in the same case), while he is present in the state of Michigan on court business?

MOST RELEVANT AUTHORITIES

Michigan Consolidated Laws Ann. § 600.1835 (2001) provides that:

Sec. 1835. (1) All persons going to, attending, or returning from, any court proceedings in any action in which their presence is needed are privileged from service of process if service could not have been made on them had they not gone to, attended, or returned from the proceedings.

Mi. Stat. Ann. § 600.1835(1) (2001). This mirrors the traditional rule that “suits as well as witnesses coming from another state or jurisdiction are exempt from the service of civil process while in attendance upon court and during a reasonable time in coming and going.” Stewart v. Ramsay, 242 U.S. 128, 129-30 (1916); see also Meyers v. Barlock, 281 Mich. 629, 275 N.W. 656 (1937); Lingemann v. Dehnke, 247 Mich. 597, 226 N.W. 259 (1929).

Michigan state law should provide the relevant rule of process immunity. FED. R. CIV. P. 4(e)(1), 4(k)(1)(a); see also 28 U.S.C. § 1652; Wilson v. Garcia, 471 U.S. 261 (1985); Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

The clear majority of courts addressing **this precise issue** hold that a Defendant who attends a hearing subject to the defense of lack of personal jurisdiction, does not lose that very defense by way of a “second summons.” Bailey v. Transportation-Communication Employees Union, 45 F.R.D. 444, 447-48 (N.D. Miss. 1968); Kelly v. Pennington, 78 Colo. 482, 484, 242 P. 681, 682, 45 A.L.R. 339 (1926); Singer v. Reising, 154 Misc. 239, 240-41, 276 N.Y.S. 714, 715-17 (N.Y. Mun. Ct. 1935). See also Chase Nat’l Bank v. Turner, 269

N.Y. 397, 199 N.E. 636, 637 (1936).

Opposing Authorities: However, the First Circuit has taken a different view, and determined that a U.S. Supreme Court case from 1932, Lamb v. Schmitt, 285 U.S. 222 (1932), trumps Massachusetts law,⁵ and establishes both (1) a “same or similar case” exception to process immunity – such that a defendant cannot claim process immunity in the same lawsuit in which he is named, and (2) a “protective order rule” that preconditions process immunity upon a pre-hearing application to the trial court for a protective order, which protective order must be granted as a precondition for travel. See Northern Light Tech., 236 F.3d at 63 (relying principally on LaCroix v. American Horse Show Ass'n, 853 F. Supp. 992, 994-95 (N.D. Ohio 1994)).

The Majority Rule Differs From the One Adopted by the First Circuit: Most courts interpreting Lamb v. Schmitt have adopted a much narrower interpretation than did the First Circuit. American Centennial Ins. Co. v. Handal, 901 F. Supp. 892, 895-97 (D.N.J.

⁵Prior to the Northern Light decision, Massachusetts law was absolutely clear that the formality of seeking or obtaining a court order, authorizing travel into the forum, was not required as a precondition of asserting or securing process immunity. Valley Bank & Trust Co. v. Marrewa, 354 Mass. 403, 404-05, 237 N.E.2d 677, 678-79 (1968); Diamond v. Earle, 217 Mass. 499, 500, 105 N.E. 363, 363 (1914); In re Thompson, 122 Mass. 428, 428, 1877 WL 10168, at *1, 23 Am. Rep. 370 (1877); May v. Shumway, 16 Gray 86, 82 Mass. 86, 1860 WL 8502 (1860).

It has long been settled that parties and witnesses attending in good faith any legal tribunal, **with or without a writ of protection**, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning.

Larned v. Griffin, 12 F. 590, 590 (C.C. Mass. 1882) (emphasis added).

1995); International Plastic Harmonica Corp. v. Harmonic Reed Corp., 69 F. Supp. 515, 516 (E.D. Pa. 1946); Shapiro & Son Curtain Corp. v. Glass, 348 F.2d 460, 461-62 (2d Cir. 1965); Fun-Damental, Too v. Hwung, 1997 WL 289712, at *3-*5 (S.D.N.Y. May 30, 1997); Viking Penguin, Inc. v. Janklow, 98 F.R.D. 763, 765-67 (S.D.N.Y. 1983); NASL Marketing, Inc. v. de Vries, 94 F.R.D. 309, 309-11 (S.D.N.Y. 1982).

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**2600 ENTERPRISES, and ERIC
CORLEY, p/k/a EMMANUEL
GOLDSTEIN,**

Hon. Robert H. Cleland
United States District Judge

Defendants.

MOTION FOR A PROTECTIVE ORDER

Defendants 2600 Enterprises, Inc. ("2600") and Eric Corley (p/k/a Emmanuel Goldstein) ("Goldstein") respectfully move for a protective order granting and/or preserving immunity from service of process for Goldstein and/or any representative of 2600 – either in **this case** or in any related or unrelated case – while attending the hearing the Court has noticed for May 18, 2001. The immunity for which they pray includes, but is not limited to, “second service” of summons in the same litigation for which they appear.

SUPPORTING MEMORANDUM

In support, Defendants Goldstein and 2600, through counsel, respectfully state:

PRELIMINARY STATEMENT

FORD has no standing to complain about anybody's reference in speech to the trademark GENERAL MOTORS. Nor does plaintiff's objection to the allegedly provocative "lexical context" of this particular Domain Name remove it from the protection of the First Amendment. Hess v. Indiana, 414 U.S. 105 (1973); Cohen v. California, 403 U.S. 15 (1971) ("fuck the draft" is protected speech); see also Wooley v. Maynard, 430 U.S. 705 (1977) (covering "live free or die" license plate slogan is protected expression).

Not only that, but a **trivially easy** technological self-help technique – namely, insertion of a single line of software code (a computer instruction) into the ".htaccess" file on FORD's Website server computer – is available to FORD and would enable FORD to secure the functional equivalent of the relief it seeks without any need for court intervention.

As an important illustration, according to the customs and norms of the Internet community, unless FORD puts the appropriate codes into a file called "robot.txt" on its Website server, then FORD grants an implied license to any Internet search engine to use "robot," "crawler" or "spider" software to index the content of FORD's Website. In other words, an implied license (permission) is presumed unless FORD takes the initiative of availing itself of a simple, technological "opt-out" technique. Likewise, the default setting for purposes of hyperlinking or "pointing" of Website addresses is that FORD (by the **very act** of publishing a Website) grants an **Implied License** to the entire world (anyone,

anywhere, for any purpose whatsoever) to publish “links” to Ford’s Website, or even to point the entire traffic from any address (“URL”)⁶ at the IP address of FORD’s Website server computer (the address to which the Domain Name (“URL”) at issue in this case points is the IP address 164.109.71.245 – emphatically **not** a string of numbers on which FORD has any trademark). Unless and until FORD avails itself of the “.htaccess” file, then FORD communicates to the entire world (including Defendants) that traffic is welcome and invited.

Setting aside special cases that are not alleged here (*i.e.*, defamation), there simply exists no generalized legal “right not to be referred to” on the Internet (either for natural or artificial persons), granting entities like FORD the power (right to go to court) to pick and choose among the entities that may link to FORD’s Website, and enjoin the speech of disfavored speakers. The importance of this issue **cannot be overstated**, and is perhaps the most widely understood of all “Axioms of Web Architecture” accepted by the Internet community and by all Web publishers as a condition of participating in this “unique and wholly new medium of worldwide human communication.” Reno v. American Civil Liberties Union, 521 U.S. 844, 850 (1997).

We cannot regard anyone as having the "right not to be referred to" without completely pulling the rug out from under free speech.

Tim Berners-Lee,⁷ Axioms of Web Architecture 4 -- Links and Law: Myths, *published at* <

⁶Ordinarily, this would be considered a generous gift. On the Internet, additional “traffic” (euphemistically called “eyeballs”) is not only appreciated, but coveted.

⁷Mr. Berners-Lee, who now heads the World Wide Web Consortium (W3C), was personally responsible for inventing the World Wide Web in the early 1990s, when he was at CERN, the European Particle Physics Laboratory.

<http://www.w3.org/DesignIssues/LinkMyths.html> >; see also Tim Berners-Lee, Axioms of Web Architecture 2 -- Links and Law, *published at* < <http://www.w3.org/DesignIssues/LinkLaw> >. “The ability to refer to a document (or a person or any thing else) is in general a fundamental right of free speech to the same extent that speech is free. Making the reference with a hypertext link is more efficient but changes nothing else. . . . **There is no reason to have to ask before making a link to another site.**” Links and Law: Myths (emphasis in original).

So why is FORD in court instead of conforming its conduct to accepted customs and norms of the Internet community? Because FORD (possibly, still smarting from the Blue Oval News case,⁸ and this Court’s rejection of most of FORD’s efforts to exercise editorial control over a Website) has a legislative agenda. When big companies are up to no good, and want to persuade courts to cut broad paths through the law – by laying down new rules that enable the FORDs of the world to trample the speech rights of all Internet users – they choose defendants expected to trigger certain emotional responses from courts. Increasingly, the Defendants in this case seem to be the Devil-of-choice for Corporate America in Internet cases – an easy target to sue when a corporate plaintiff’s objective is essentially legislative (here, trying to engineer an unprecedented new “right not to be referred to”).

In this context, it is especially important to remind the Court of a scene in literature it doubtless has committed to memory:

MORE: [to *ROPER*]. . . The currents and eddies of right and wrong, which you

⁸Ford Motor Co. v. Lane, 67 F. Supp. 2d 745 (E.D. Mi. 1999).

find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I am a forester. I doubt if there's a man alive who could follow me there, thank God. . . .

(He says this last to himself.)

ALICE: *(Exasperated, pointing after RICH).* While you talk, he is gone.

MORE: And go he should, if he was the Devil himself, until he broke the law.

ROPER: So now you'd give the Devil the benefit of law!

MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MORE: *(Roused and excited).* Oh? *(Advances on ROPER).* And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? *(He leaves him).* This country's planted thick with laws from coast to coast – man's laws, not God's – and if you cut them down – and you're just the man to do it – d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of the law, for my own safety's sake.

ROBERT BOLT, *A MAN FOR ALL SEASONS* 65-66 (First Vintage Int'l ed. 1990). Whether the Ropers of this world be in England, or Salem, or Salt Lake City, the central theme is all too familiar, even though each “Devil” offered as reason for courts to “cut a great road through the law to get after the Devil,” is not always the same one.

Thus, many different “Devils” have triggered legal misadventures throughout history. At several times and in many places, “the Devil” offered to justify hewing highways through the law has been given the name “witches” – accused of having powers to manipulate the laws of nature, which powers ordinary people fear and cannot understand. At other times,

“the Devil” has taken the form of “Communists,”⁹ Hell-bent on confiscating and redistributing the property of propertied classes, or Jews, or “Heretics,” “Infidels,” Tutsis, Hutus, Japanese Americans,¹⁰ or accused Confederate saboteurs.¹¹

With the advent and popularization of the Internet, true to George Santayana’s injunction that “those who fail to learn from history are doomed to repeat it,” history is repeating itself with a vengeance. On the Internet, yet another host of “Devils” has been identified for political and propaganda purposes in an effort to persuade courts and legislatures¹² to “cut a[n Information Superhighway] through the law”¹³ in order to “get after

⁹E.g., Schware v. Board of Bar Examiners of N.M., 353 U.S. 232, 238-39 (1957); Communist Party of Ind. v. Whitcomb, 414 U.S. 441 (1974); Lamont v. Postmaster General, 381 U.S. 301, 307 (1965); Greene v. McElroy, 360 U.S. 474 (1959); United States v. Brown, 381 U.S. 437, 445, 447 (1965).

¹⁰Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

¹¹Ex parte McArdle, 74 U.S. 506 (1868); see also WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (Knopf ed. 1998).

¹²See JESSICA LITMAN, DIGITAL COPYRIGHT (Prometheus Books, ed. 2001) (describing extraordinary historical revisionism, and the tactic of backdoor lawmaking through treaties, that led to the Digital Millennium Copyright Act, and how the DMCA violates the historic bargain between holders of copyrights and the general public).

¹³The “[Information Superhighway] through the law” presently under construction includes breathtaking revisions to “traditional notions of fair play and substantial justice” governing extraterritorial jurisdiction through peculiar theories about *in rem* jurisdiction and extraordinary distortion of the Calder v. Jones “effects test.” The French and German governments (concluding that present-day “Nazis” are the Devil) have set about regulating the speech of Americans by way of the Internet, and Latvia has asked for even more stringent regulation of “hate speech” by the United States government itself. The World Intellectual Property Organization has set itself up both as an advocacy organization for a certain point of view on how much power “intellectual property” owners should exercise (often, over pure speech) on the Internet, and (simultaneously) as

the Devil.” This time, “the Devil” has been assigned pejorative labels like “Hackers,”¹⁴ who are accused of having powers to manipulate computers and communications networks in ways that may that appear confusing or even threatening to those who lack technical knowledge, or “cybersquatters,” who are accused of “appropriating” and redistributing the “intellectual property” of multinational corporations (setting aside, of course, all the problems associated with the mistaken idea that trademarks are “property” that can be “taken away” from a trademark registrant when others use a trademark – thrust into public consciousness by the trademark “owner” – in speech). Alarmist rhetoric about these new

global judge to resolve contested cases about the same issues it advocates. The United States government through a law known as CALEA has mandated the installation of eavesdropping and position-tracking mechanisms in new digital mobile communications networks. Unsatisfied with the extent of the reach given to law enforcement by Congress in CALEA, the Department of Justice has also gone to the European Commission to attempt to get its wish list adopted as a “cybercrime treaty” in Europe, and to backdoor this violation of civil liberties into U.S. law by reproposing its wish list to Congress as a “harmonization measure.” The list of alarmist and excessive legislative and judicial lawmaking calculated to “get after the Devil” becomes more troubling by the day.

¹⁴However, when “Hackers” have the opportunity to describe themselves, or their contributions to society are chronicled by writers who study this community with care, the picture that emerges is dramatically different from the alarmist demonization that has dominated mainstream media portrayals (arguably as a result of the political agenda of those in control of mass media outlets). *See, e.g.*, PIKKA HIMANEN, WITH LINUS TORVALDS & MANUEL CASTELLS, *THE HACKER ETHIC* (Random House ed. 2001); ERIC RAYMOND, *THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND THE OPEN SOURCE COMMUNITY* (O’Reilly ed. 2001); STEPHEN LEVY, *CRYPTO: HOW THE CODE REBELS BEAT THE GOVERNMENT, SAVING PRIVACY IN THE DIGITAL AGE* (Viking Penguin ed. 2001); JON KATZ, *GEEKS: HOW TWO LOST BOYS RODE THE INTERNET OUT OF IDAHO* (Villard Books ed. 2000); STEVEN LEVY, *HACKERS: HEROES OF THE COMPUTER REVOLUTION* (Penguin USA 1984), *reprinted at* < <ftp://indian.cse.msu.edu/pub/mirrors/Gutenberg/etext96/hckrs10.txt> > (Project Gutenberg distribution of text of HACKERS).

high-tech “Devils” has fooled not only Congress,¹⁵ but also even ordinarily circumspect and scholarly jurists,¹⁶ to use astonishingly hyperbolic language – such as:

- Comparing the expressive function of computer code,¹⁷ and expression using that code, to “expressive motives of an assassin;” slip op. at 3;¹⁸

¹⁵See Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 335 n.230 (S.D.N.Y. 2000) (listing hyperbolic exaggerations by Congress), *appealed sub nom. Universal City Studios v. Corley*, No. 00-9185 (*argued* May 1, 2001). We note that the Panel in the DeCSS case has had some interesting follow-up questions for counsel. See < <http://cryptome.org/mpaa-v-2600-caa.htm> > (list of questions below at note 18).

¹⁶**These remarks only serve as criticism of certain ideas that are in error; we do not now nor have we in the past ever criticized or intended to criticize any people (no matter what ideas those people may happen to have expressed in the past).**

¹⁷See Junger v. Daily, 209 F.3d 481(6th Cir. 2000) (publication of cryptographic computer code is protected expressive activity); Bernstein v. United States Dept. of Justice, 176 F.3d 1132, *reh’g granted and opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999); Karn v. United States Dept. of State, 925 F. Supp 1 (D.D.C. 1996).

¹⁸Universal Studios Corp. v. Reimerdes, No. 00-CV-0277 (S.D.N.Y. 2000), *slip opinion published at* < <http://www.nysd.uscourts.gov/courtweb/pdf/D02NYSC/00-08592.PDF> >. The questions asked by the Second Circuit by letter a week after argument (see note 15, *supra*) are as follows:

The panel modifies the oral instruction for supplemental letter briefs in the captioned case, given at the close of the argument on May 1, 2001, by authorizing the parties and the Intervenor to augment their responses to no more than 25 pages, and inviting responses to the following questions:

1. Are the anti-trafficking provisions of the Digital Millennium Copyright Act content-neutral? See 111 F. Supp. 2d 294, 328-29 (S.D.N.Y. 2000).
2. Does DeCSS have both speech and non-speech elements?
3. Does the dissemination of DeCSS have both speech and non-speech elements?
4. Does the use of DeCSS to decrypt an encrypted DVD have both speech and non-speech elements?
5. Does the existence of non-speech elements, along with speech elements, in an activity sought to be regulated alone justify intermediate level scrutiny?
6. If DeCSS or its dissemination or its use to decrypt has both speech and non-speech elements and is not subject to intermediate level scrutiny simply because of the non-speech elements, is intermediate level

- Suggesting the dissemination of certain forms of computer code (even for purposes that are not illegal) might transform the Constitution into “a suicide pact;” id. at 3;
- Suggesting that availability of certain kinds of software (even if incapable of any destructive functions like a computer virus, and even if no evidence is presented of any individual using it for any unlawful purpose) to an “epidemiological” phenomenon resembling “the spread . . . of [a] disease;” id. at 60-62;
- Suggesting the *Los Angeles Times* could publish exactly the same expressive content as a publisher that is a “hacker” magazine, but that the *Los Angeles Times* would be blameless, and the “hacker” magazine guilty, due to the identity of the particular speakers and assumptions about their mental states and presumed opinions; id. at 48;
- Describing computer software as “burglary tools;” id. at 55; or

scrutiny appropriate because of the close causal link between dissemination of DeCSS and its improper use? See 111 F. Supp. 2d at 331-32.

7. If the District Court is correct that the dissemination of DeCSS "carries very substantial risk of imminent harm," 111 F. Supp. 2d at 332, does that risk alone justify the injunction? In other words, does that risk satisfy the requirements for regulating speech under *Brandenburg v. Ohio*, 395 U.S. 444 (1969), thereby rendering unnecessary an inquiry as to whether non-speech elements of DeCSS or its dissemination or its use (if such exists) may be regulated under *United States v. O'Brien*, 391 U.S. 367 (1968)?
8. Are the three criteria identified at 111 F. Supp. 2d 333 the correct criteria for determining the validity, under intermediate level scrutiny, of the use of DeCSS that has been enjoined?
9. If not, what modification or supplementation would be required to conform to First Amendment requirements?
10. Are the three criteria identified at 111 F. Supp. 2d 341 and the "clear and convincing evidence" standard the correct criteria and the correct standard of proof for testing the validity of the injunction's prohibition of posting on the defendant's website and of linking?
11. If not, what modification or supplementation would be required to conform to First Amendment requirements?

The references to the District Court's opinion are intended only to identify some passages that concern the question posed and not to imply that no other passages in the opinion are pertinent to the question. Responses need not be amplified if a "yes" or "no" will suffice.

- Suggesting that “protection of the monopoly granted to copyright owners” is “of constitutional dimension;” Reimerdes, 111 F. Supp. 2d 1t 335; but that the public interest side of the bargain – providing a robust public domain through “limited terms” for the purpose of “promot[ing] the progress of science and useful arts,” U.S. CONST. Art. I, § 8, does not enjoy the corresponding Constitutional importance. See Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001) (allowing retroactive windfall 20-year extension of already-existing copyrights – even for works whose creators are dead).

In short, Goldstein and 2600 seem to be favorites of certain economic and political interests to single out for special treatment (e.g., the Motion Picture Association of America and the DVD Copy Control Association haven’t touched thousands of others – such as university professors or the New York Times – that have distributed or linked to computer code for DeCSS) when the objective is, through a selective prosecution strategy, to arouse passions to “cut a great road through the law to get after the Devil.”

Mr. Goldstein¹⁹ is essentially a performance artist and social critic who pokes fun

¹⁹The name Emmanuel Goldstein, which seems to have provoked perhaps a stronger reaction than it should have in New York federal court, is taken from the novel 1984 by George Orwell. See Q&A with Emmanuel Goldstein of 2600: The Hacke[r] Quarterly, < <http://www.cnn.com/TECH/specials/hackers/qandas/goldstein.html> >. In 1984, Goldstein does not necessarily even exist, but is commonly portrayed in state-sponsored propaganda rallies as the leader of a resistance movement to the totalitarian surveillance state in which the protagonist lives. Arguably, Orwell’s Goldstein (much like modern-day myth-making about the threat of “Hackers”) is merely a hoax used by the political elite as a foil to justify and facilitate surveillance and repression:

The next moment a hideous, grinding speech, as of some monstrous machine running without oil, burst from the big telescreen at the end of the room. It was a noise that set one's teeth on edge and bristled the hair at the back of one's neck. The Hate had started.

at institutions that take themselves far too seriously and that attempt unnecessarily to exercise control over ordinary individuals. His medium of expression is technology and the language and machinery of technological “progress.” Goldstein is especially critical of efforts to exercise social control through mechanisms that depend on enforced ignorance (such as new legislation and certain software licenses that prohibit “reverse engineering” of complicated technological devices and software). Both as social commentary and criticism, and as a source of technical information (available to anyone)

As usual, the face of Emmanuel Goldstein, the Enemy of the People, had flashed on to the screen. There were hisses here and there among the audience. . . . Goldstein was the renegade and backslider who once, long ago (how long ago, nobody quite remembered), had been one of the leading figures of the Party, almost on a level with Big Brother himself, and then had engaged in counter-revolutionary activities, had been condemned to death, and had mysteriously escaped and disappeared. The programmes of the Two Minutes Hate varied from day to day, but there was none in which Goldstein was not the principal figure. He was the primal traitor, the earliest defiler of the Party's purity. All subsequent crimes against the Party, all treacheries, acts of sabotage, heresies, deviations, sprang directly out of his teaching. Somewhere or other he was still alive and hatching his conspiracies:

Winston's diaphragm was constricted. He could never see the face of Goldstein without a painful mixture of emotions. . . . Goldstein was delivering his usual venomous attack upon the doctrines of the Party — an attack so exaggerated and perverse that a child should have been able to see through it, and yet just plausible enough to fill one with an alarmed feeling that other people, less level-headed than oneself, might be taken in by it. He . . . was advocating freedom of speech, freedom of the Press, freedom of assembly, freedom of thought, he was crying hysterically that the revolution had been betrayed — and all this in rapid polysyllabic speech which was a sort of parody of the habitual style of the orators of the Party, and even contained Newspeak words: more Newspeak words, indeed, than any Party member would normally use in real life.

GEORGE ORWELL, 1984 (1949). Given the symbolic roles that Mr. Goldstein has had thrust upon him by the Motion Picture Association of America, and now by the Ford Motor Company (namely, the role of the “bad hacker” that the MPAA or FORD believes should be used to set precedents to be used to control the next speaker – who may or may not be a “bad hacker”), perhaps the literary allusion is about as apt as it possibly could be.

at least as valuable to industry and government²⁰ as to hobbyists and amateurs, 2600 has been published by Mr. Goldstein and others as a labor of love since January, 1984.

ARGUMENT

Neither of the Defendants is subject to jurisdiction in the state of Michigan.²¹ In

²⁰Counsel for the Defendants attended an American Bar Association meeting some time ago at Fort Meade, involving Public Key Infrastructure issues, at which a speaker from the National Security Agency (the nation's leading source of signals intelligence and communications counterintelligence methods) had a counterintuitive (but, on reflection, absolutely right) view of amateur "hackers" and "script kiddies." The NSA has started to view various "hacker" communities that use the Internet as a much greater asset than a threat. See also Q&A with Emmanuel Goldstein of 2600: The Hacke[r] Quarterly, < <http://www.cnn.com/TECH/specials/hackers/qandas/goldstein.html> > (explaining security advantage of closing holes discovered and publicized by "hackers," instead of leaving them open for exploitation by some exponentially more malicious intruder). The reason for NSA's change of viewpoint is that the NSA has no better resource to examine and test the security, reliability and integrity of computer systems exposed to the Internet (and, thereby, to resist more serious threats like foreign governments, terrorists, and criminal organizations) than to monitor the communications among amateur (and generally harmless) "hackers" who identify otherwise-overlooked security exploits.

²¹Likewise, a case in the U.S. District Court for the Northern District of California – involving parallel issues to the DeCSS case – has proceeded against 2600 in New York instead of California on account of jurisdiction issues. Universal City Studios, Inc. v. Reimerdes, Civil Action No. 00-MC-7024 (N.D. Cal. *filed* July 6, 2000). Another action by the DVD Copy Control Association, in which Defendants were not named, was filed in California state court. A partial but non-exhaustive list of other defenses that Defendants respectfully assert includes: (1) Implied license: The creator of the World Wide Web (Tim Berners-Lee), in setting up the governing rules and technology, made it clear that anyone who elects to post content on the Web grants an implied license to anyone and everyone else in the world to "link to" or "refer to" his or her Website. FORD, by choosing to have a Website, assented to this implied license and has no "right not to be referred to." (2) Fair use: The use of the domain name in question is protected speech and is protected according to principles of "fair use," commentary, expression and criticism. (3) Standing: FORD lacks standing to complain because FORD has no rights to the trademark "General Motors." (4) FORD lacks standing because neither the Lanham Trademark Act nor the Federal Trademark Dilution provides any cause of action whatsoever when the Domain Name in question (a) is not used as a trademark, (b) is not "used in commerce" as that term of art has been given meaning in the trademark context,

light of the Supreme Court's decision in Burnham v. Superior Court of Cal., 495 U.S. 604 (1990), the best way for the Defendants not to become subject to jurisdiction is to remain outside Michigan for the duration of any proceedings. If they venture into Michigan, they risk "second service" in the same case, which at least two courts (erroneously, in our view), have held could trigger personal jurisdiction over a person who is not otherwise subject to jurisdiction in Michigan. Northern Light Tech. v. Northern Lights Club, 236 F.3d 57 (1st Cir. 2001), *petition for writ of certiorari filed*, No. 00-1651 (Apr. 30, 2001); LaCroix v. American Horse Show Ass'n, 853 F. Supp. 992, 994-95 (N.D. Ohio 1994).

Although a Michigan statute may possibly render Defendants immune from service of process when in Michigan, the prospect of entering Michigan, and then being subjected to a post-hoc determination as to whether they actually followed the right procedure (e.g., the First Circuit changed the rules retroactively in the Northern Light case) is not an appealing one. Accordingly, so long as uncertainty about Defendants' process immunity status remains unclear, then Defendants must remain outside Michigan – even if this Court believes their testimony or presence to be necessary or helpful.

(c) is not used to designate the source or origin of any goods or services, and (d) does not have anything to do with any FORD trademark. (5) Confusion and/or tarnishment are facially impossible because no reasonable person could possibly believe that Ford registered or pointed this Domain Name. (6) The FTDA "fair use" defense and case this general Lanham Act "fair use" defense recognized in the New Kids on the Block and this Court's Rosa Parks decision both permit and protect exactly the kind of expressive activity in which Defendants are engaged. (7) FORD fails to state a claim upon which relief can be granted. (8) FORD's lawsuit should be dismissed as a Strategic Lawsuit Against Public Participation ("SLAPP"). (9) Subject-matter jurisdiction is lacking. (10) FORD may not sue on an *in rem* theory in Michigan, based on the FleetBoston Financial case and other authorities with which this Court is by now quite familiar.

The clear majority of courts addressing **this precise issue** of same-suit process immunity hold that a Defendant who attends a hearing subject to the defense of lack of personal jurisdiction, does not lose that very defense by way of a “second summons.” Bailey v. Transportation-Communication Employees Union, 45 F.R.D. 444, 447-48 (N.D. Miss. 1968); Kelly v. Pennington, 78 Colo. 482, 484, 242 P. 681, 682, 45 A.L.R. 339 (1926); Singer v. Reising, 154 Misc. 239, 240-41, 276 N.Y.S. 714, 715-17 (N.Y. Mun. Ct. 1935). See also Chase Nat’l Bank v. Turner, 269 N.Y. 397, 199 N.E. 636, 637 (1936).

And even in New York (and some other states recognizing a limited Lamb v. Schmitt exception to process immunity), there is no exception to process immunity that would apply in this case. American Centennial Ins. Co. v. Handal, 901 F. Supp. 892, 895-97 (D.N.J. 1995); International Plastic Harmonica Corp. v. Harmonic Reed Corp., 69 F. Supp. 515, 516 (E.D. Pa. 1946); Shapiro & Son Curtain Corp. v. Glass, 348 F.2d 460, 461-62 (2d Cir. 1965); Fun-Damental, Too v. Hwung, 1997 WL 289712, at *3-*5 (S.D.N.Y. May 30, 1997); Viking Penguin, Inc. v. Janklow, 98 F.R.D. 763, 765-67 (S.D.N.Y. 1983); NASL Marketing, Inc. v. de Vries, 94 F.R.D. 309, 309-11 (S.D.N.Y. 1982). As the Second Circuit correctly recognized:

[T]he rule of immunity can serve [its] purpose only if it is sufficiently definite that prospective witnesses and their legal advisors can determine the scope of its protection with some degree of reliability. A witness will hardly be induced to come into a foreign jurisdiction to testify if all his lawyer can tell him is that he will be immune from process unless a judge determines that this would impede justice rather than aid it.

In re Equitable Plan Co., 277 F.2d 319, 320 (2nd Cir. 1960). Accordingly, in light of the

uncertainty that the First Circuit's Northern Light decision has interjected into the law, it is necessary to have this Court rule on the issue of immunity in advance.

Michigan state law should provide the relevant rule of process immunity. FED. R. CIV. P. 4(e)(1), 4(k)(1)(a); see also 28 U.S.C. § 1652; Wilson v. Garcia, 471 U.S. 261 (1985); Walker v. Armco Steel Corp., 446 U.S. 740 (1980). However, the general rule that state law governs has been called into question by First Circuit, in light of its reliance upon a U.S. Supreme Court case (appealed out of Mississippi), Lamb v. Schmitt, 285 U.S. 222 (1932), to trump Massachusetts law.

We are optimistic (but far from certain) that the United States Supreme Court will grant Certiorari, and eliminate the confusion by resolving this state-federal question, as well as the split between the First and Second Circuits. In the meantime, the only prudent course is to pray for a protective order authorizing Mr. Goldstein to be present on May 18, 2001, without fear that he might thereby lose his immunity from service of process.

CONCLUSION

For the foregoing reasons, Defendants Goldstein and 2600 respectfully pray for a protective order, granting or preserving process immunity to the extent requested in the foregoing Motion.

Respectfully submitted,

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May 14, 2001

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CERTIFICATE OF SERVICE

I certify that the foregoing **MOTION AND SUPPORTING MEMORANDUM OF DEFENDANTS EMMANUEL GOLDSTEIN AND 2600 ENTERPRISES FOR A PROTECTIVE ORDER** was served on the following counsel of record, by facsimile on May 14, 2001, and by depositing them with the United States Postal Service, with First Class Mail or more expeditious means of delivery prepaid, on or before May 14, 2001:

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