

**Karen A. Confoy (KC-0848)**  
**STERNS & WEINROTH**  
**A Professional Corporation**  
**50 West State Street, P.O. Box 1298**  
**Trenton, NJ 08607-1298**  
**(609) 392-2100**

**David E. Kendall**  
**Robert J. Shaughnessy**  
**Kevin Hardy**  
**WILLIAMS & CONNOLLY LLP**  
**725 Twelfth Street, N.W.**  
**Washington, D.C. 20005**  
**(202) 434-5000**

**Attorneys for Defendant Recording Industry Association of America, Inc.**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

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<b>EDWARD W. FELTEN, et al.,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	<b>Civil Action No. CV-01-2669 (GEB)</b>
	)	
<b>RECORDING INDUSTRY</b>	)	
<b>ASSOCIATION OF AMERICA,</b>	)	
<b>INC., et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

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**DEFENDANT RECORDING INDUSTRY  
ASSOCIATION OF AMERICA, INC.'S  
MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS**

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## **I. INTRODUCTION**

Defendant Recording Industry Association of America, Inc. (“RIAA”), did everything it reasonably could to assure Plaintiffs there was no controversy between them and the RIAA with respect to matters identified in the original Complaint. Plaintiffs’ true agenda, however, is not to adjudicate a real dispute but to obtain favorable press attention and to secure an advisory opinion on the constitutionality of the Digital Millennium Copyright Act. Plaintiffs have therefore filed an Amended Complaint full of vaporous imaginings and chimerical fears. We respectfully submit that even the Amended Complaint fails to pass muster, and must be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

The indispensable requisite of any justiciable case or controversy is a genuine conflict of interest between adverse parties. Such adversity is a necessary precursor to the Court’s subject-matter jurisdiction, and it is completely lacking in this case. Plaintiffs’ Amended Complaint seeks a declaration of their right to publish and present three specifically identified academic papers, as well as certain unwritten, future academic papers. With respect to the former, Defendant RIAA has repeatedly expressed publicly and in correspondence with Plaintiffs’ counsel – both before and after this lawsuit was filed – that it has no objection whatsoever to Plaintiffs publishing or presenting their three papers. Thus, as to that aspect of the Amended Complaint, there is no adversity of interests between Plaintiffs and the RIAA (or any other defendant). As to papers that may be written in the future, those too present a non-justiciable dispute – Plaintiffs have no standing to assert

unripe, speculative claims based on hypothetical papers, not yet written, to which no one has ever objected. For the reasons stated herein, the Amended Complaint presents no justiciable case or controversy within the meaning of Article III, Section 2 of the Constitution, and accordingly, it should be dismissed for want of subject-matter jurisdiction.

## **II. BACKGROUND**

### **A. General Background**

To understand Plaintiffs' Amended Complaint, it is useful to set forth a few undisputed facts. The RIAA is a trade association representing more than 400 recording companies. Its members create, produce, and/or distribute approximately 90 percent of all legitimate sound recordings in the United States and own the copyrights in those works. See Amended Complaint ¶ 13 (hereinafter "Am. Compl."). Most sound recordings today are sold in digital formats such as compact discs (CDs). Digital formats are highly susceptible to piracy, because, unlike analog formats, they can be easily, endlessly, and perfectly copied with no degradation in sound quality. See *id.* ¶ 29. The advent of the Internet and file-compression techniques has made it possible for digital versions of sound recordings to be illegally reproduced and distributed on an enormous and unprecedented scale – *e.g.*, though "peer-to-peer" technologies such as the notorious Napster service. See, *e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Among its other missions, the RIAA seeks to reduce such piracy.

The rise of digital piracy via the Internet has rendered traditional tools of copyright enforcement significantly less effective. Traditional *ex post* infringement actions simply lack the speed and dexterity necessary to deal effectively with the rapid, widespread, and decentralized nature of digital piracy. By the time a content owner learns of an infringement, brings an enforcement action, and obtains relief, the pirated work has often already been disseminated to many other people who can themselves make and disseminate perfect copies of that work, further compounding the piracy. And even that scenario presumes that the content owner could identify and find the pirate – a questionable assumption in light of the anonymity available to and widely utilized by Internet users. Unchecked, such piracy threatens to destroy the legitimate marketplace for works of art, music, film, software, and literature, and will deter the development and distribution of new works in state-of-the-art digital media.

Both Congress and private industry have endeavored to find effective ways to protect copyrighted works from illegal copying. To that end, the RIAA helped form the Secure Digital Music Initiative,<sup>1</sup> a multi-industry standard-setting body composed of over 180 companies in the information technology, consumer electronics, security technologies, and recording industries, as well as Internet service providers. See Am. Compl. ¶ 14. The SDMI's goal is to develop widely accepted technologies that protect the playing, storing, and distribution of digital

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<sup>1</sup> The Secure Digital Music Initiative Foundation (“SDMI”) is a not-for-profit corporation created by the founding members of the Secure Digital Music Initiative

music. As part of that mission, Defendants RIAA, SDMI, Verance Corporation (“Verance”), and a host of other entities, many of which participate in the SDMI, have worked to develop protective technologies, such as the watermarking technology that became the focus of Plaintiffs’ attention. *See id.* ¶ 29.

To complement and reinforce private efforts to thwart illegal digital copying, Congress in 1998 enacted the Digital Millennium Copyright Act (“DMCA”). The DMCA forbids, *inter alia*, trafficking in the implements of piracy – specifically, technology designed to defeat or circumvent private copyright protections. *See* 17 U.S.C. § 1201(a)(2); Am. Compl. ¶¶ 88-89. In addition, the DMCA prohibits the removal or alteration of any “copyright management information” unless authorized by the copyright owner or permitted by law. *See* 17 U.S.C. § 1202(b); Am. Compl. ¶ 90. In enacting the DMCA, Congress accurately determined that the spread of digital piracy threatens not only the rights of copyright holders but also the fundamental promise of both the First Amendment and the Internet – that works of music, video, and literature should become more abundant, more readily accessible, and more widely distributed in state-of-the-art digital form. In the words of the Senate Judiciary Committee:

Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy. [The DMCA] provides this protection and creates the legal platform for launching the

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– the record companies. SDMI is the legal entity that supports the Secure Digital Music Initiative’s efforts.

global digital on-line marketplace for copyrighted works. It will facilitate making available quickly and conveniently via the Internet the movies, music, software, and literary works that are the fruit of American creative genius.

S. Rep. No. 105-190, at 8 (1998). *See also* Report of the House Judiciary Committee, H.R. Rep. No. 105-551, pt. 1, at 10 (1998).

Notwithstanding Congress's reasoned judgment, Plaintiffs would like this Court to declare the DMCA unconstitutional as it applies to all "scientific, academic or technical speech, including the publication of computer programs." Am. Compl. ¶ G. Plaintiffs purport to base that sweeping request on their alleged inability to publish certain papers regarding the SDMI Phase II CfP Public Challenge (hereinafter "Public Challenge" or "SDMI Public Challenge"). But, as explained below, Plaintiffs are tilting at windmills: they labor under no such inability. And Plaintiffs have no legal basis for dragging the RIAA into this foray.

### **B. The SDMI Public Challenge**

As the Amended Complaint alleges, on September 6, 2000, the SDMI initiated an invitation to the public to participate in a challenge – subject to certain rules – to attack proposed protective technologies for copyrighted digital content. Am. Compl. ¶ 24. This so-called Public Challenge is the genesis of these proceedings, *see id.* ¶¶ 1, 24-34 – an effort on the part of SDMI to involve the public at large in SDMI's determination of which protective technology to adopt. *See id.* ¶ 24. The RIAA's role in these events was quite limited.

As set forth in the Amended Complaint, participants in the Public Challenge were required to accept the terms of the "Click-Through Agreement"

before gaining access to the technologies included in the Challenge. *See id.* ¶¶ 28-33. Because it was designed for public consumption, the Click-Through Agreement was intentionally made very short and easy to read.

Plaintiffs allege that they were successful in attacking some of the technologies subject to the Public Challenge. *See id.* ¶ 35; *but see infra* n.4. After participating, Plaintiffs wrote an academic paper, entitled “Reading Between the Lines: Lessons from the SDMI Challenge” (hereinafter the “Felten Paper”), regarding their efforts in the Public Challenge. *See id.* ¶ 37. That paper was circulated by its authors during the “peer review process.” *Id.* ¶ 38.

Eventually, the existence of the Felten Paper apparently became known to Dr. Joseph M. Winograd, the Executive Vice President and Chief Technology Officer of Verance. *See id.* ¶ 40. According to the Amended Complaint, Professor Felten forwarded a pre-publication copy of the paper to Dr. Winograd on March 31, 2001. *See id.* ¶ 41. After reviewing the Felten Paper, Dr. Winograd is alleged to have expressed his concern that the Paper would needlessly reveal the trade secrets of the participating technology companies and suggested that “there could be ways in which our individual objectives can be met without potentially compromising the academic value of your work or the security of any technologies that were included in the SDMI Challenge.” *Id.* (internal quotation omitted).

### **C. The Response of the RIAA and SDMI to the Felten Paper**

According to ¶ 41 of the Amended Complaint, Dr. Winograd forwarded a pre-publication copy of Professor Felten’s paper to the SDMI, and that

organization responded with a strongly-worded reply from its Secretary. See Am. Compl. ¶¶ 42-43. The RIAA and SDMI have since explained, however, that its response “was far too strong and threatening.” Cary Sherman, *Letter to the Editor*, INDUSTRY STANDARD, June 11, 2000 (hereinafter “Industry Standard Letter”) (a copy is attached as Exhibit A to the Declaration of Kevin Hardy).<sup>2</sup> The response was motivated by a good-faith desire to protect the research efforts of companies who had submitted their technologies to the Public Challenge at the SDMI’s behest and to prevent the companies’ trade secrets from being unfairly compromised by widespread publication. It was an attempt to catalyze a dialogue between the Felten group and Verance.

Plaintiffs have alleged that “there was never any indication . . . that [the SDMI’s] threat of suit was anything other than one to be taken with great seriousness.” Am. Compl. ¶ 49. Based on that alleged “pressure,” “the authors [of the Felten Paper] decided . . . to withdraw the [Felten] paper” from an academic conference in Pittsburgh.<sup>3</sup> *Id.*

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<sup>2</sup> It bears noting that when deciding a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction, “the court [i]s not confined to allegations in the plaintiff’s complaint, but [can] consider affidavits, depositions, and testimony to resolve factual issues bearing on jurisdiction.” *Gotha v. United States*, 115 F.3d 176, 179 (3d Cir. 1997); see also *Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 410 n.10 (3d Cir. 1992) (“In reviewing a motion to dismiss for lack of subject matter jurisdiction, the district court must accept as true the allegations in the plaintiff’s complaint, except to the extent federal jurisdiction is dependent on certain facts”) (emphasis added).

<sup>3</sup> Nevertheless, Plaintiffs concede, as they must, that the decision to withdraw the paper was entirely theirs. They received permission to present the paper from the

But the undisputed facts are otherwise. In their Amended Complaint, Plaintiffs (¶ 50) concede that on April 26, 2001, the date on which the paper was to be presented at the academic conference in Pittsburgh, Matthew J. Oppenheim, Secretary of the SDMI and Senior Vice President of Business and Legal Affairs of the RIAA, issued a press release on behalf of the SDMI and RIAA expressly stating that the SDMI “does not – nor did it ever – intend to bring any legal action against Professor Felten or his co-authors.” Matthew J. Oppenheim, Press Release (April 26, 2001) (a copy is attached as Exhibit B to the Declaration of Kevin Hardy). That statement was widely reported. See, e.g., Editorial, *Code Crackers and Free Speech*, WASH. POST, May 1, 2001, at A22 (reporting same); John Markoff, *Scientists Drop Plan to Present Music-Copying Study that Record Industry Opposed*, N.Y. TIMES, April 27, 2001, at C5 (reporting same); Staff Reporter, *Professor Opts Against Presentation of Report on Foiling Music Security*, WALL ST. J., Apr. 27, 2001, at B6 (reporting same).

Now Plaintiffs wish to publish the Felten Paper at the 10<sup>th</sup> USENIX Security Symposium, scheduled for mid-August, 2001. See Am. Compl. ¶¶ 51-52. Plaintiffs also would like to publish two additional papers, identified in ¶¶ 53-54 of the Complaint respectively: first, Plaintiff Min Wu’s paper entitled “Analysis of Attacks on SDMI Audio Watermarks;” and second, Chapter 10 of Plaintiff Wu’s doctoral dissertation (hereinafter collectively the “Wu Papers”). Defendants RIAA

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academic conference, which had been notified of the controversy, on April 24, 2001. See *id.* ¶ 48.

and SDMI have plainly and unequivocally stated and repeat again that they have no objection to the publication of the Felten Paper or the Wu Papers at the USENIX Conference or elsewhere.

**D. Post-Filing Events**

Not surprisingly, having expressly disavowed any intent to sue the Plaintiffs, neither the RIAA nor SDMI was expecting this lawsuit. In response to the Complaint, RIAA General Counsel Cary Sherman reiterated that the RIAA and SDMI “have unequivocally and repeatedly stated that we have no intention of bringing a lawsuit against Professor Felten or his colleagues.” Cary Sherman, Press Release (June 6, 2001) (emphasis added) (a copy is attached as Exhibit C to the Declaration of Kevin Hardy). As with Mr. Oppenheim’s press release of April 26, 2001, Mr. Sherman’s comments were widely reported. See, e.g., Elizabeth Douglass, *Technology Professor Sues for Right to Publish Encryption Paper*, L.A. TIMES, June 7, 2001, at C3 (reporting same); David P. Hamilton, *Digital-Copyright Law Faces New Fight*, WALL ST. J., June 7, 2001, at B10 (reporting same); Janet Kornblum, *Code-Cracking Prof Fights for Music Paper*, USA TODAY, June 7, 2001, at D3 (reporting same); Mike Musgrove, *Group Sues to Publish Flaws Found in Anti-Piracy Technology*, WASH. POST, June 7, 2001, at E8 (reporting same).

Indeed, immediately before receiving notice of the original Complaint, Defendants RIAA and SDMI again stated “that it was never our intention to bring any kind of action against Felten. . . . In fact, we felt Felten should publish his

findings, because everyone benefits from research into the vulnerabilities of security mechanisms.” Industry Standard Letter (emphasis added) (Exhibit A).

Following Mr. Sherman’s comments in the *Industry Standard*, Mr. Oppenheim reiterated, this time in a letter to Plaintiffs’ counsel, that the RIAA and SDMI do not object to the publication of the academic papers identified in the Complaint (at ¶¶ 37, 53, and 54) either at the USENIX Security Symposium, scheduled for August 13-17, 2001, in Washington, D.C., or elsewhere. See Letter from Matthew J. Oppenheim to Gino J. Scarselli, dated June 15, 2001 (a copy is attached as Exhibit D to the Declaration of Kevin Hardy).<sup>4</sup> Mr. Oppenheim attached to his letter a lengthy list of published statements in which the RIAA and SDMI have explicitly disavowed any intention of initiating litigation against the Plaintiffs, and commented that “[we] frankly don’t know how we could have been any clearer.” *Id.*

Mystifyingly unsatisfied by Mr. Oppenheim’s straightforward and unequivocal representations, counsel for the Plaintiffs wrote to the Court on June 15, 2001, requesting a conference to discuss the prospect of emergency relief. See Letter from Grayson Barber to The Honorable Freda L. Wolfson, dated June 15,

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<sup>4</sup> Defendant Verance Corporation has also written to Plaintiffs’ counsel, and it too has no objection to the publication of the Felten Paper or the Wu Papers. See Letter from David E. Leibowitz to Gino J. Scarselli, dated June 18, 2001 (a copy is attached as Exhibit E to the Declaration of Kevin Hardy). In addition, the letter from Verance calls “false and misleading” Plaintiffs’ representation (in ¶ 35 of the Complaint) that they were “successful” in defeating the protective technologies that were the subject of the Public Challenge. Since Verance has indicated it does not object to the publication of the papers identified in the Complaint, however, this factual dispute is irrelevant to the disposition of this motion.

2001 (a copy is attached as Exhibit F to the Declaration of Kevin Hardy). In response, the RIAA and SDMI wrote to the Court objecting to any expedited pleading or discovery schedule in light of their unambiguous representation to Plaintiffs' counsel and the Court that they have no intention whatever of filing any lawsuit over the Felten or Wu Papers. See Letter from David E. Kendall and Karen A. Confoy to The Honorable Garrett E. Brown, Jr., dated June 21, 2001 (a copy is attached as Exhibit G to the Declaration of Kevin Hardy).<sup>5</sup> Counsel reiterated (perhaps tediously) that no justiciable case or controversy exists between the RIAA, SDMI, and the Plaintiffs.

In their June 15 letter to the Court (Exhibit F), Plaintiffs expressed a desire "to explore other options for resolving this dispute in a timely fashion." To that end, Plaintiffs proposed a stipulation which reflected the substance of Mr. Oppenheim's letter of June 15 (Exhibit D), and the RIAA and SDMI have negotiated in good faith with the Plaintiffs to reach a speedy resolution of this case. As a result of those negotiations, the RIAA, SDMI, and Plaintiffs confirmed their complete agreement with respect to the publication of the Felten Paper and the Wu Papers.

See E-mail from Gino J. Scarselli to David E. Kendall, Matthew J. Oppenheim, and

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<sup>5</sup> Defendant SDMI has since confirmed the representations made in Mr. Kendall's June 21 letter to the Court. See Letter from Thomas E. Wack to The Honorable Garrett E. Brown, Jr., dated July 2, 2001 (a copy is attached as Exhibit H to the Declaration of Kevin Hardy). Verance Corporation has also written to the Court expressing its objection to the Plaintiffs' request for an expedited pleading and discovery schedule. See Letter from David E. Leibowitz and Karen A. Confoy to The Honorable Garrett E. Brown, Jr., dated June 25, 2001 (a copy is attached as Exhibit I to the Declaration of Kevin Hardy). Verance too indicated that it "will not file any lawsuit over the plaintiffs' papers identified in the complaint."

David Leibowitz, dated June 22, 2001 (enclosing proposed stipulation) (a copy is attached as Exhibit J to the Declaration of Kevin Hardy); Letter from David E. Kendall to Gino J. Scarselli, dated June 22, 2001 (a copy is attached as Exhibit K to the Declaration of Kevin Hardy). Indeed, Defendants RIAA and SDMI expressed a willingness to stipulate that certain prior drafts of those papers could be published. The RIAA, SDMI, and Plaintiffs also sensibly agreed, however, that they cannot stipulate as to future events. As Plaintiffs apparently concede, because neither party can boast clairvoyance, it is simply impossible for either Defendants or Plaintiffs to have any meaningful discussion with respect to future work or work in progress.<sup>6</sup>

At this point, the parties remain in disagreement with respect to one issue – the justiciability of this case. In light of the numerous statements identified in the aforementioned letters to both Plaintiffs’ counsel and the Court, there is plainly no justiciable case or controversy within the meaning of Article III, Section 2 of the Constitution as to the RIAA, SDMI, and Verance, on the one hand, and the Plaintiffs, on the other.

### **III. ARGUMENT**

The Constitution of the United States limits “[t]he Judicial power” of the federal courts to “Cases” and “Controversies.” U.S. CONST. art. III, § 2. That limitation is based, in part, on the notion that, as Justice Frankfurter observed, “the

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<sup>6</sup> As discussed with Plaintiffs’ counsel, with respect to subsequent versions of the Felten Paper and Wu Papers, the RIAA has no objection to the publication of subsequent translations or versions with immaterial, grammatical changes.

adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity.” *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (plurality opinion). These considerations are of particular importance in cases, such as this one, challenging the constitutionality of an act of Congress. Accordingly, the Supreme Court has fashioned various doctrines to protect against the premature exercise of the federal courts’ counter-majoritarian judicial-review power. *See id.* at 503-04. Of those constitutional doctrines, two have relevance to this proceeding: the requirements of truly adverse interests and standing. Each is a prerequisite for the existence of federal subject-matter jurisdiction, and neither is present here. Accordingly, Defendant RIAA respectfully submits that the Amended Complaint should be dismissed.

**A. There Is No Adversity of Interests with Respect to the Felten Paper or the Wu Papers.**

The Supreme Court has consistently found non-justiciable any case that “does not assume the ‘honest and actual antagonistic assertion of rights’ to be adjudicated – a safeguard essential to the integrity of the judicial process, and one which [the Court] ha[s] held to be indispensable to adjudication of constitutional questions . . . .” *United States v. Johnson*, 319 U.S. 302, 305 (1943) (quoting *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)); *see also Poe v. Ullman*, 367 U.S. at 505 (plurality opinion) (referencing “the Court’s refusal to entertain cases which disclosed a want of a truly adversary contest”); *see generally* Erwin Chemerinsky, *FEDERAL JURISDICTION* §§ 2.2, 2.4 (2d ed. 1994). While

Plaintiffs' Amended Complaint primarily seeks declaratory relief,<sup>7</sup> Article III's case-or-controversy requirement, including the requirement of adverse parties, "must be met regardless of the type of relief sought, including declaratory relief."<sup>8</sup> *Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 410 (3d Cir. 1992); see also *St. Thomas-St. John Hotel & Tourism Ass'n v. Gov't*, 218 F.3d 232, 240 (3d Cir. 2000) (same). Indeed, the majority of cases in this Circuit in which the Court of Appeals has found insufficiently adverse interests involve declaratory judgment actions, where invariably plaintiffs who have not yet suffered harm nevertheless seek an early resolution of their rights.

The seminal Third Circuit case regarding the justiciability of declaratory judgment actions is *Step-Saver Data Systems, Inc. v. Wyse Technology*, 912 F.2d 643 (3d Cir. 1990). See *St. Thomas-St. John Hotel*, 218 F.3d at 240 (referencing the *Step-Saver* analysis as the governing rule). In *Step-Saver*, the Court of Appeals relied on the maxim in *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941), that "the question in each [declaratory judgment] case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." See also

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<sup>7</sup> The Amended Complaint seeks declaratory relief for each of its four causes of action. See Am. Compl. ¶¶ A-I. To the extent the Complaint seeks injunctive relief (¶¶ J-M), it is only to enforce the declaratory judgments.

<sup>8</sup> The Declaratory Judgment Act, 28 U.S.C. § 2201, limits its applicability to cases of "actual controversy."

*Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (“The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . .”). From these cases and others, the Court distilled the following:

None of these discussions gives us a readily applied test. However, we are able to glean from them certain basic principles which guide our disposition. The most important of these principles are the adversity of the interest of the parties, the conclusiveness of the judicial judgment and the practical help, or utility, of that judgment.

*Step-Saver*, 912 F.2d at 647. It is the first of those principles that has particular relevance here.<sup>9</sup>

Shortly after *Step-Saver* was decided, the Court of Appeals addressed the justiciability issue in *Salvation Army v. Dept. of Community Affairs*, 919 F.2d 183 (3d Cir. 1990), a case analogous to this one. In *Salvation Army*, a religious group that operated family centers for disadvantaged persons sought exemption, on First Amendment grounds, from a New Jersey statute regulating boarding houses. Notably, the defendants agreed to waive certain portions of the statute, and the record reflected “not only the absence of a threat of enforcement but an express assurance that there [would] be no enforcement against [plaintiff] of the waived provisions of the statute.” *Id.* at 192 (emphasis added).

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<sup>9</sup> It bears noting that the factors identified by the Court in *Step-Saver* are not exhaustive. The Third Circuit has also recognized that the principle calling “for the avoidance of ruling on federal constitutional matters in advance of the necessity of deciding them” is a factor in the justiciability calculus. *Armstrong World Indus.*, 961 F.2d at 413.

The Third Circuit began its analysis by noting that “[w]here a plaintiff seeks a declaratory judgment with respect to the constitutionality of a state statute, even where the attack is on First Amendment grounds, there must be a real and immediate threat of enforcement against the plaintiff[,] . . . [and] this threat must remain . . . throughout the course of the litigation.” *Id.* (internal quotations omitted). Accordingly, the Court held that, unless and until the express assurances were rescinded, the case presented no justiciable controversy with respect to the waived provisions.<sup>10</sup> Finally, in response to plaintiff’s argument that the statute’s private enforcement remedy might result in the award of damages against it, the Court noted that “the Supreme Court has held that allegations of chilling injury are not [a] sufficient basis for standing to challenge a government action, at least when the chill is ‘subjective’ and not substantiated by evidence that the government action has a present and concrete effect.” *Id.* at 193; *see also Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (“Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm”).

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<sup>10</sup> The District Court of Delaware was presented with a similar set of facts in *Delaware Women’s Health Org. v. Wier*, 441 F. Supp. 497 (D. Del. 1977). There, plaintiffs sought declaratory and injunctive relief against enforcement of Delaware’s abortion statutes. However, the Attorney General of Delaware had issued an opinion stating that many of the Delaware abortion statutes were unconstitutional and issued a statement of policy indicating that they would not be enforced. The Court dismissed the case for lack of jurisdiction, holding that “[i]f the prosecutor expressly agrees not to prosecute, a suit against him for declaratory relief . . . is not such an adversary case’ as will support Article III jurisdiction.” *Id.* at 501 (quoting *Poe v. Ullman*, 367 U.S. 497, 507 (1961)).

The present case is governed by the foregoing Supreme Court and Third Circuit precedent. In this case, as in *Salvation Army, supra*, Defendant RIAA (among others) has expressly represented – to the public, Plaintiffs’ counsel, and the Court – that it would not enforce any rights it might have under the DMCA or Click-Through Agreement against the Plaintiffs for publishing the Felten Paper or the Wu Papers. In *Travelers Ins. Co. v. Obusek*, 72 F.3d 1148, 1154 (3d Cir. 1995), the Third Circuit, applying the *Step-Saver* test, emphasized that the “[p]arties’ interests are adverse where harm will result if the declaratory judgment is not entered.” But were a declaratory judgment to be entered with respect to the Felten Paper and the Wu Papers, absolutely nothing would change; Plaintiffs are (and have been) able freely to publish those papers and will continue to be so. There is simply no threat of enforcement from Defendant RIAA – real, threatened, or otherwise – against the Plaintiffs. As noted, the Court of Appeals in *Salvation Army*, 919 F.2d at 193, expressly rejected the argument that allegations of a subjective chilling effect create a justiciable controversy where the alleged chill has had no present and concrete effect.

The law is clear in this Circuit, and the precedents lead inexorably to one conclusion – no justiciable case or controversy exists with respect to the Felten Paper or Wu Papers, because there is no adversity of interests. The Supreme Court has admonished that “federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged

action.” *Poe v. Ullman*, 367 U.S. at 504. Plaintiffs simply are not “immediately harmed” by Defendants RIAA, SDMI, and Verance. These Defendants have expressly consented to the publication of the Felten Paper and Wu Papers, and therefore, action by this Court will have no effect on the Plaintiffs’ rights with respect to those papers.<sup>11</sup> Because true adversity between the parties is a necessary precursor to the exercise of federal jurisdiction, the Amended Complaint should be dismissed for lack of subject-matter jurisdiction.

**B. Plaintiffs Do Not Have Standing to Pursue Claims Based on Hypothetical Future Academic Papers.**

In addition to addressing the specific papers discussed *supra*, the Amended Complaint conjures up future academic papers that apparently have not yet been written. *See* Am. Compl. ¶¶ 55-86, 94, 98-99, 103, C-E, G, and J. Plaintiffs appeared to concede in their proposed stipulation that any meaningful discussion of unknown future events is simply not possible.<sup>12</sup> Notwithstanding the fact that there is not now even the remotest threat of injury or of any lawsuit, they

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<sup>11</sup> This point also relates to the second *Step-Saver* factor, conclusiveness. For a judgment to be conclusive, “the legal status of the parties must be changed or clarified by the declaration.” *Travelers Ins. Co. v. Obusek*, 72 F.3d 1148, 1155 (3d Cir. 1995). This is plainly not the case here, and since the Court’s judgment will not affect the parties’ rights, “the court is left to render an advisory opinion.” *Id.*; *see also NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 344 (3d Cir. 2001) (indicating that the conclusiveness prong prevents against the issuance of advisory opinions).

<sup>12</sup> *See* Proposed Stipulation ¶ 6 (Exhibit I) (“Defendants RIAA, SDMI or Verance do not waive any right to raise claims against future work or work in progress, including academic papers not yet written, and specifically reserve the right to assert jurisdictional defenses, as well as any other defenses or claims available under the law, in this action”).

nevertheless maintain that the Court should invalidate a recent act of Congress in response to their hypothetical concerns. Under well-settled standing principles, Plaintiffs' claims are non-justiciable, no matter how many times they profess "fear" (Am. Compl. ¶¶ 3, 54, 67, 75), "concern" (*id.* ¶¶ 51, 58, 60, 72, 75), or "chill" (*id.* ¶¶ 1, 2, 55, 56), because Plaintiffs simply cannot satisfy the injury-in-fact requirement, pursuant to which the injury must be "concrete and particularized, and actual or imminent, as opposed to conjectural or hypothetical." *The Pitt News v. Fisher*, 215 F.3d 354, 360 (3d Cir. 2000) (internal footnote omitted).

The standing requirement embodied in Article III was recently described by the Court of Appeals for this Circuit as "an integral part of the governmental charter established by the Constitution." *ACLU-NJ v. Township of Wall*, 246 F.3d 258, 261 (3d Cir. 2001). "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "If plaintiffs do not possess Article III standing, [the federal courts] lack subject matter jurisdiction to address the merits of plaintiffs' case." *ACLU-NJ*, 246 F.3d at 261. In *Lujan*, the Supreme Court established the current framework for evaluating a plaintiff's standing to bring suit in the federal courts:

[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged

action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Lujan*, 504 U.S. at 560-61 (internal citations and quotations omitted); *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 180-81 (2000) (applying the *Lujan* formulation); *Fair Housing Council v. Montgomery Newspapers*, 141 F.3d 71, 74 (3d Cir. 1998) (same). “The party invoking federal jurisdiction bears the burden of establishing these elements.” *Lujan*, 504 U.S. at 560. But Plaintiffs here cannot meet the threshold requirement of an injury in fact.<sup>13</sup>

After laying out the framework, the Court in *Lujan* went on to elaborate on the injury-in-fact requirement. It made clear that “[b]y particularized [injury], we mean that the injury must affect the plaintiff in a personal and individual way.” *Id.* at 560 n.1. With respect to claims in which the harm has not yet occurred but allegedly will occur in the future, the Court emphasized the requirement of imminence. The plaintiffs in *Lujan* were environmental groups who

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<sup>13</sup> Plaintiffs also cannot meet the causation requirement of standing. *See Friends of the Earth*, 528 U.S. at 180 (“to satisfy Article III’s standing requirements, a plaintiff must show . . . the injury is fairly traceable to the challenged action of the defendant”); *The Pitt News*, 215 F.3d at 360 (the Court “must ascertain whether the alleged injury-in-fact is causally connected and traceable to an action of the defendants”). Any injury Plaintiffs allege they will suffer in the future cannot possibly be traced to the actions of the RIAA, as it has never suggested it would try to prohibit or sanction any future scholarly work by the Plaintiffs. While Plaintiffs apparently would like an advisory opinion with respect to the RIAA to serve as a *de facto* insurance policy against future disagreements, a private party in a litigation is not an insurance (or assurance) company.

were challenging agency interpretations of the Endangered Species Act of 1973. To support standing, two of the groups' members submitted affidavits regarding their intent to observe certain threatened habitats. The Court rejected plaintiffs' arguments:

[T]he affiants' profession of an intent to return to the places they had visited before – where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species – is simply not enough. Such “some day” intentions – without any description of concrete plans, or indeed any specification of *when* the some day will be – do not support a finding of the actual or imminent injury that our cases require.

*Id.* at 564 (emphasis in original) (internal quotations omitted); *see also id.* at 564 n.2

(“It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff’s own control. In such circumstances, we have insisted that the injury proceed with a high degree of immediacy . . .”). In a footnote, the Court clarified that by “imminent” it means “*certainly impending.*”<sup>14</sup> *Id.* at 564 n.2 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added)); *see also City of Los Angeles v. Lyons*, 461 U.S.

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<sup>14</sup> Although technically a component of the standing doctrine, the imminence requirement also relates to the ripeness requirement of Article III. “The basic rationale of the ripeness requirement is ‘to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements.’” *Artway v. Attorney General*, 81 F.3d 1235, 1246-47 (3d Cir. 1996) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). It “prevents courts from interfering with legislative enactments until it is necessary to do so . . . .” *Id.* at 1247. Irrespective of whether they are analyzed under the rubric of standing or ripeness, however, Plaintiffs’ claims relating to their future work are non-justiciable.

95, 101-02 (1983) (“[t]he plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury”) (emphasis added) (internal quotation omitted).

In apparent recognition of the deficiency of their initial Complaint, Plaintiffs filed an Amended Complaint, adding over 30 new allegations relating to their future work or work in progress. But Plaintiffs’ timorous imaginings represent nothing more than their latest attempt to create a controversy where none exists. The absence of any controversy is revealed most tellingly by Plaintiffs’ allegations themselves – not one even mentions any threat by the RIAA (or any other defendant) with respect to Plaintiffs’ future work. See Am. Compl. ¶ 98 (fear is of possible “future” threats). Plaintiffs’ allegations plainly fall far short of the constitutional requirement of an imminent injury.

Plaintiffs have alleged their “concern[]” about liability under the DMCA. See Am. Compl. ¶¶ 58, 60, 69, 72, 84. But that is all they allege – a general “concern” about hypothetical threats that may or may not occur in the future with respect to papers that are not yet written and may never be written.<sup>15</sup>

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<sup>15</sup> Plaintiff Scott Craver has alleged that he is “reluctant to follow his normal practice of asking others to join him in working on [his] project.” Am. Compl. ¶ 59. He does not, however, allege that he is forbearing from asking others to participate. In addition, Plaintiff Min Wu has alleged that she “has withheld [her] proposal from Kluwer [Publishers] because she is afraid of prosecution.” *Id.* ¶ 67. Even if those allegations were sufficient to satisfy the injury-in-fact requirement, they cannot be fairly traced to any conduct on the part of the RIAA or other private defendants and are, therefore, non-justiciable as to those defendants. See *supra* n.13.

Plaintiffs also allege that they “are fearful of losing in litigation” and also fearful of the “cost of litigation.” Am. Compl. ¶ 75. Of course, if the fear of losing

Plaintiffs do not identify any immediate threat of enforcement, and none can reasonably be inferred from the facts alleged. And while most of the Plaintiffs now point to specific projects which may or may not be affected by the DMCA, Plaintiff USENIX concedes that it simply “will not know of specific future papers that could cause DMCA difficulties until shortly before they are to be published or presented.” *Id.* at ¶ 77. USENIX, therefore, requests that this Court adjudicate the constitutionality of the DMCA’s criminal provisions without reference to any concrete facts.<sup>16</sup> By requesting relief before they are injured and before they are even remotely threatened with injury, and without any reference to a concrete conflict between the parties, Plaintiffs are asking this Court to render an advisory opinion regarding the constitutionality of the DMCA. *Cf. Schmidheiny v. Weber*, --- F. Supp.2d ---, 2001 WL 543757, at \*1 (E.D. Pa. May 18, 2001) (“federal courts use standing to limit their jurisdiction in accordance with the statement in Article III that only cases or controversies are to be adjudicated and its corollary rule prohibiting advisory opinions”).

The Court of Appeals has recognized that “pre-enforcement review [of a statute] is the exception rather than the rule . . . .” *Artway v. Attorney General*, 81

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were sufficient to satisfy the injury-in-fact requirement, then every litigant to come before the Court would have standing. As for litigation costs, the Court of Appeals for the Third Circuit has clearly held “that litigation expenses alone do not constitute damage sufficient to support standing.” *Fair Housing Council v. Montgomery Newspapers*, 141 F.3d 71, 79 (3d Cir. 1998).

<sup>16</sup> Plaintiffs allege that “[s]ince USENIX receives revenues from organizing conferences and publishing papers presented at its conferences, it is subject to criminal liability under 17 U.S.C. § 1204 . . . .” Am. Compl. ¶ 97.

F.3d 1235, 1247 (3d Cir. 1996). To protect against the premature exercise of the Article III judicial power, the Supreme Court has held that pre-enforcement review of a statute may occur only “[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder . . . .” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (emphasis added); see also *Navegar, Inc. v. United States*, 103 F.3d 994, 998 (D.C. Cir. 1997) (only a “credible threat of imminent prosecution . . . provides the foundation for justiciability”) (emphasis added); *Salvation Army v. Dept. of Community Affairs*, 919 F.2d 183, 192 (3d Cir. 1990) (“[w]here a plaintiff seeks a declaratory judgment with respect to the constitutionality of a state statute, even where the attack is on First Amendment grounds, there must be a real and immediate threat of enforcement against the plaintiff[,] . . . [and] this threat must remain . . . throughout the course of the litigation”) (emphasis added) (internal quotations omitted).<sup>17</sup> Accordingly, “[w]hen plaintiffs ‘do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,’ they do not allege a dispute susceptible to resolution by a federal court.” *Babbitt*, 442 U.S. at 298-99 (quoting *Younger v.*

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<sup>17</sup> In *Salvation Army, supra*, the Court of Appeals addressed a set of facts similar to those at issue here. As discussed in Section III-A, the plaintiffs there were given an express assurance that certain provisions of a statute would not be enforced against them. See *Salvation Army*, 919 F.2d at 192. In dismissing plaintiffs’ claims, the Court noted that the mere “theoretical possibility” of a future lawsuit, absent any indication that the plaintiffs had been threatened with suit, did not create a justiciable case or controversy. *Id.* at 193.

*Harris*, 401 U.S. 37, 42 (1969)). Any other rule “would mean that any person could bring a declaratory judgment action to determine the meaning of a statute or regulation whenever its effect is uncertain or there is a vague specter of enforcement.” *Cities Service Co. v. Dept. of Energy*, 520 F. Supp. 1132, 1143 (D. Del. 1981).

With respect to their future work, Plaintiffs do not – and cannot – allege that they have ever been threatened with enforcement of the DMCA or that such enforcement is imminent.<sup>18</sup> Indeed, because the papers have not even been written, it is simply impossible to know whether they will or will not violate the DMCA (or other laws, such as those protecting trade secrets), and any discussion of them involves pure speculation. As the Supreme Court has recognized, “[a]llegations of possible future injury do not satisfy the requirements of Art. III.” *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added). Any injury which will allegedly occur in the future must be “certainly impending” to constitute a judicially cognizable injury in fact. *Id.* (emphasis added); *see also Babbitt*, 442 U.S. at 298 (same). Plaintiffs’ vague allegations of “concern,” unaccompanied by

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<sup>18</sup> Plaintiffs cannot point to the Defendants’ initial response to Professor Felten’s paper as a basis for standing with respect to their future work. First, the RIAA and SDMI have explained that they never intended to bring any legal action against Professor Felten or his co-authors. Second, the Court of Appeals specifically held in *Salvation Army* that any threat of enforcement “must remain ‘real and immediate’ throughout the course of the litigation.” *Salvation Army*, 919 F.2d at 192; *see also O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) (even “[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects”).

any suggestion that enforcement of the DMCA is remotely likely, let alone imminent, plainly do not meet that standard.

Despite the fact that there is no credible threat of enforcement of the DMCA with respect to Plaintiffs' future work, Plaintiffs nevertheless ask the Court to invalidate an act of Congress as it applies to the "publication or presentation of [all] scientific, academic or technical speech, including the publication of computer programs." Am. Compl. ¶ G (emphasis added). Such a holding would effectively eviscerate the DMCA. But Congress' efforts in this area deserve special deference. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) ("Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology"). Under the circumstances, the Plaintiffs' efforts should be unequivocally rejected. *See Int'l Longshoremen's & Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 223-24 (1954) ("Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function"); *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89-90 (1947) ("The power of courts, and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of the litigants require the use of this

judicial authority for their protection against actual interference. A hypothetical threat is not enough) (emphasis added).

Nor does the fact that Plaintiffs are alleging an infringement of their First Amendment rights affect the analysis.<sup>19</sup> See *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) (holding that plaintiff must satisfy the injury-in-fact requirement in order to bring an overbreadth challenge); *Bischoff v. Osceola County*, 222 F.3d 874, 884 (11th Cir. 2000) (“even under the more lenient requirements for standing applicable to First Amendment overbreadth challenges, it still remains the law that plaintiffs must establish that they have suffered some injury in fact as a result of the defendant’s actions”) (emphasis omitted); *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1112 (9th Cir. 1999) (holding that plaintiff in an overbreadth case must nevertheless satisfy the injury-in-fact requirement); *Nat’l Council for Improved Health v. Shalala*, 122 F.3d 878, 882 (10th Cir. 1997) (“Although the overbreadth doctrine permits a party to challenge a statute or regulation that has not been unconstitutionally applied to that party, it does not dispense with the requirement that the party itself suffer a justiciable injury”); *Bordell v. General Electric Co.*, 922 F.2d 1057, 1060-61 (2d Cir. 1991) (the “slender [overbreadth] exception to the prudential limits on standing . . . does not

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<sup>19</sup> We do not, of course, contest that “[u]nder the overbreadth doctrine, . . . a litigant may assert rights of individuals not before the court whose First Amendment rights may otherwise be infringed by an overly broad statute or regulation.” *Nat’l Council for Improved Health v. Shalala*, 122 F.3d 878, 882 (10th Cir. 1997).

affect the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court’s jurisdiction”).

It is thus clear that, even in an overbreadth case, an injury in fact sufficient for standing “must be concrete and particularized, and actual or imminent, as opposed to conjectural or hypothetical.” *The Pitt News v. Fisher*, 215 F.3d 354, 360 (3d Cir. 2000) (internal footnote omitted). But here the alleged harm is neither actual nor imminent. Indeed, Plaintiffs cannot point to even a *remote* threat of injury, let alone an imminent one. Having failed to allege any threat of enforcement by the RIAA, or any harmful conduct fairly traceable to the RIAA, Plaintiffs’ allegations should be held insufficient to confer standing on the Plaintiffs to seek generalized redress for future papers they have not even written and may not ever write.<sup>20</sup>

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<sup>20</sup> One final point bears mentioning. Even if the Court were to conclude that it had subject-matter jurisdiction over this case, it still need not exercise that jurisdiction. The Declaratory Judgment Act is discretionary – it “only gives a court the *power* to make a declaration regarding ‘the rights and other legal relations of any interested party seeking such declaration,’ 28 U.S.C. § 2201; it does not *require* that the court exercise that power.” *Step-Saver*, 912 F.2d at 646-47 (emphasis in original). The present case involves a recent act of Congress in the increasingly important and highly technical field of copyright protection in the digital era. The RIAA has no objection to the publication of the specific papers at issue and has never even remotely threatened Plaintiffs with respect to their future work. Thus, any adjudication of Plaintiffs’ rights (or lack thereof) under the DMCA will not involve a real, concrete controversy. Accordingly, Defendant RIAA respectfully submits that, even if the Court determines it has jurisdiction, the Court should exercise its discretion and decline to exercise that jurisdiction in this case.

#### **IV. CONCLUSION**

For the reasons stated herein, Defendant RIAA respectfully submits that its motion to dismiss should be granted.

Respectfully submitted,

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Karen A. Confoy  
STERNS & WEINROTH  
A Professional Corporation  
50 West State Street, P.O. Box 1298  
Trenton, NJ 08607-1298  
(609) 392-2100

David E. Kendall  
Robert J. Shaughnessy  
Kevin Hardy  
WILLIAMS & CONNOLLY LLP  
725 Twelfth Street, N.W.  
Washington, D.C. 20005  
(202) 434-5000

Attorneys for Defendant Recording Industry  
Association of America, Inc.

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