

# EXHIBIT A

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8 **UNITED STATES DISTRICT COURT**  
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN FRANCISCO DIVISION**

11 SONY COMPUTER ENTERTAINMENT  
12 AMERICA LLC, a Delaware limited  
liability company,

13 Plaintiff,

14 v.

15 GEORGE HOTZ; HECTOR MARTIN  
16 CANTERO; SVEN PETER; and DOES 1  
through 100,

17 Defendants.

**CASE No.: CV 11-00167 SI**

**MOTION FOR RECONSIDERATION**

Date: February \_\_\_\_, 2011

Time: 9:00 a.m., or as soon as can be heard

Courtroom: 10, 19th Floor

Judge: Hon. Susan Illston

1 Without consenting to personal jurisdiction, now comes Mr. George Hotz by and  
2 through his attorney of record specially appears and respectfully moves this Court for  
3 reconsideration of the Court's January 27, 2011 Order (Dkt. No. 50) granting Plaintiff's ex parte  
4 Motion for Temporary Restraining Order. The undersigned bring this motion for  
5 reconsideration because, as will be shown below, the Temporary Restraining Order requires a  
6 hearing on the TRO itself, the TRO is both overbroad and impermissibly vague, does not  
7 preserve the status quo, and amounts to prior restraint on speech, and the Order of Impoundment  
8 therein is likewise overbroad and unwarranted. Accordingly, movant asks the Court to grant  
9 this Motion for Reconsideration and hold a hearing on the matter.

### 10 ARGUMENT

#### 11 **I. THE TEMPORARY RESTRAINING ORDER WAS ISSUED WITHOUT A** 12 **HEARING ON THE RESTRAINING ORDER ITSELF.**

13 "The entry or continuation of an injunction requires a hearing. Only when the facts are  
14 not in dispute, or when the adverse party has waived its right to a hearing, can that significant  
15 procedural step be eliminated." *Charlton v. Estate of Charlton*, 841 F2d 988, 989 (9th Cir  
16 1988). The Temporary Restraining Order ("TRO") entered requires a hearing. The facts are  
17 sharply in dispute and Mr. Hotz has not waived his right to a hearing. That hearing was not had.  
18 Although a hearing was held on January 14, 2010, the hearing was limited to the question of  
19 personal jurisdiction over Mr. Hotz and neither the merits of the TRO nor its terms were points  
20 of discussion. The absence of a hearing on this matter has had the prejudicial effect of  
21 preventing Mr. Hotz the right to a hearing on the overbroad and vague nature of the TRO, as  
22 discussed below.

#### 23 **II. THE TEMPORARY RESTRAINING ORDER IS OVERBROAD AND IS** 24 **IMPERMISSIBLY VAGUE AND IS IMPOSSIBLE TO PERFORM.**

##### 25 **A. The Temporary Restraining Order is Overbroad**

26 The TRO as written requires Mr. Hotz to "retrieve any Circumvention Devices or any  
27 information relating thereto which Hotz has previously delivered or communicated to . . . **any**  
28 **third parties.**" TRO Page 3, lines 23-27 (emphasis added). The TRO further restrains Mr.

1 Hotz from engaging in “any circumvention technology, products, services, methods, codes,  
2 software . . . and/or **any other technologies that enable unauthorized access to and/or**  
3 **copying of PS3 Systems and other copyrighted works (hereinafter, "Circumvention**  
4 **Devices").**” *Id.* Page 2, ¶ 1, lines 18-24 (emphasis added). Using the same broad definition of  
5 “Circumvention Devices,” the TRO further prohibits Mr. Hotz from “[p]roviding links . . .  
6 promoting . . . [or] posting any Circumvention Devices.” *Id.* Pages 2-3, ¶ 2, lines 25-1. The  
7 TRO also prohibits “encouraging others to engage in the conduct set forth above . . . .” *Id.* at  
8 Page 3, ¶ 6, lines 10-11. These restraints are overbroad.

9       The Federal Rules of Civil Procedure require that every restraining order shall be  
10 specific in terms and shall “describe in reasonable detail—and not by referring to the complaint  
11 or other document—the act or acts sought to be restrained.” Fed. R. Civ. P. 65(d)(1)(B)-(C).  
12 The Supreme Court has stated “one basic principle built into Rule 65 is that those against whom  
13 an injunction is issued should receive fair and precisely drawn notice of what the injunction  
14 actually prohibits.” *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 444 (1974);  
15 See also *Reno Air Racing Ass'n v. McCord*, 452 F3d 1126, 1132-1134 (9th Cir. 2006). An  
16 injunction, such as a TRO, must be “tailored to eliminate only the specific harm alleged. An  
17 overbroad injunction is an abuse of discretion.” *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967  
18 F2d 1280, 1297 (9th Cir. 1992).

19       Mr. Hotz cannot retrieve the internet. Yet the TRO calls for Mr. Hotz to retrieve any  
20 information previously “communicated . . . to any third parties.” As has been stated by both  
21 Sony and Mr. Hotz, the acts alleged in this matter involve publication via the internet. The  
22 TRO is clearly overbroad because it requires Mr. Hotz perform an impossible mandatory act, to  
23 effectively retrieve the internet. The TRO is also overbroad because it restrains Mr. Hotz from  
24 engaging in any “technologies that enable unauthorized access to . . . other copyrighted works.”  
25 The TRO is not tailored to eliminate the specific harm alleged because it prohibits action with  
26 regard to “other copyrighted works” without limitation. The Library of Congress has recently  
27 determined that circumvention of firmware or software on mobile phones by the owner of that  
28 copy of the program, although unauthorized by the copyright owner, is exempted from the

1 DMCA’s prohibition against circumvention. 37 C.F.R. § 201.40; 75 FR 43825, 43829. Under  
2 the language of the overbroad TRO, Mr. Hotz would be restrained from engaging in these  
3 plainly authorized acts of circumvention. The language prohibits Mr. Hotz from engaging in a  
4 broad range of circumvention activities explicitly exempted from the DMCA such as  
5 circumvention of DVDs, wireless telecom firmware and software, malfunctioning computer  
6 access dongles and even ebook literature. *Id.* Additionally, restraining Mr. Hotz from  
7 encouraging others to engage in plainly authorized acts of circumvention having no relation to  
8 Sony or the Playstation computer is not narrowly tailored to eliminate the specific harm alleged  
9 by Sony and is thus, overbroad.

10 **B. The Temporary Restraining Order is Impermissibly Vague**

11 As shown above, the TRO requires Mr. Hotz retrieve any information about  
12 Circumvention Devices (including devices for “other copyrighted works”) from third parties  
13 and further restrains Mr. Hotz from engaging in technologies accessing “other copyrighted  
14 works.” “Other copyrighted works” is not a defined term yet is implemented into Sony’s  
15 conclusory definition “Circumvention Devices,” a term that is used throughout the TRO to  
16 define restrained conduct. The terms “other copyrighted works” and “Circumvention Devices”  
17 are not sufficiently specific. Therefore, the TRO restraining Mr. Hotz does not provide  
18 sufficient notice of prohibited conduct and is impermissibly vague.

19 Under Fed. R Civ. P. 65(d), "an ordinary person reading the court's order should be able  
20 to ascertain from the document itself exactly what conduct is proscribed." *Hughley v. JMS*  
21 *Dev.*, 78 F.3d 1523, 1531 (11th Cir. 1996). Those subject to a TRO face the threat of judicial  
22 contempt for noncompliance. A federal court must therefore “frame its orders so that those who  
23 must obey them will know what the court intends to require and what it means to forbid.”  
24 *International Longshoremen's Assn. v. Philadelphia Marine Trade Assn.*, 389 U.S. 64, 76  
25 (1967).

26 The undefined term “other copyrighted works” does not provide Mr. Hotz with adequate  
27 notice of what copyrighted works are subject to the TRO. Prohibiting access to “other  
28 copyrighted works,” without further clarification, means that Mr. Hotz is restrained from

1 accessing “*all copyrighted works.*” Such a restraint would clearly be overbroad in these  
2 circumstances. In the absence of a definition for “other copyrighted works,” the TRO’s  
3 prohibitions with regard to “Circumvention Devices” are impermissibly vague.

4  
5 **III. THE MANDATORY IMPOUNDMENT ORDER IS OVERBROAD,  
6 UNWARRANTED, SHOULD BE STAYED, AND DOES NOT PRESERVE THE  
7 STATUS QUO OR PREVENT IRREPARABLE HARM.**

8 The Mandatory Impoundment Order is overbroad and unnecessary. The alleged  
9 Circumvention Devices relating to Sony are less than 100 kilobytes in file size. See Declaration  
10 of Bricker [Dkt. No. 42] Exh. T Page 2. Mr. Hotz’ hard drives and other storage devices amount  
11 to several terabytes of storage. Ordering impoundment of Mr. Hotz’s storage devices to obtain a  
12 100 kilobyte file is like starting a forest fire to cut down a single tree. Put another way, 100  
13 kilobytes is to a single terabyte as one apple is to *one billion apples*. For cases “in which a party  
14 seeks mandatory preliminary relief that goes well beyond maintaining the status quo *pendente*  
15 *lite*, courts should be extremely cautious about issuing a preliminary injunction. *Stanley v.*  
16 *University of S. Cal.*, 13 F3d 1313, 1319 (9th Cir. 1994).

17 The Mandatory Impoundment Order within the TRO is unwarranted because Mr. Hotz’s  
18 alleged acts are software-based and result in no infringing copies of copyrighted works as is  
19 typically required for impoundment orders. In fact, all cases cited by Sony in support of  
20 impoundment regard physical items or circumvention devices used to *create* infringing content.  
21 See Motion for TRO [Dkt. No. 2] Pages 24-25, lines 15-7 (respectively citing impoundment of  
22 copies of video game software, infringing software, equipment for *making* infringing video  
23 games, infringing video games, infringing information in FCC application, infringing toys (lamb  
24 dolls) and equipment used to make dolls, cassette tape recordings and machines for making  
25 cassettes). The “Circumvention Devices” alleged here are not hardware based dongles or media-  
26 - rather, the “Circumvention Devices” consist of less than 100kb of information, with such  
27 information being readily available on the internet prior to Sony initiating this current action. To  
28 put matters in perspective, the keys and entire information which Sony seeks to impound would  
only take *a few lines on this page* of this document if they were written here in their entirety.

1 Moreover, while certain cases support impoundment of hardware based devices, no cases support  
2 the notion that impoundment is proper when the alleged infringing material is software based or  
3 consists merely of keys or information. See Sony's reliance on *Sega Enters. v. MAPHIA*, 857 F.  
4 Supp. 679, 691 (N.D. Cal. 1994); *Rebis v. Universal CAD Consultants, Inc.*, 1998 U.S. Dist.  
5 LEXIS 12366, (N.D. Cal. 1998); *Yamate USA Corp.*, 1991 U.S. Dist. LEXIS 20701; *Nintendo of*  
6 *America, Inc. v. Elcon Indus., Inc.*, 564 F. Supp. 937, 938 (E.D. Mich. 1982); *WPOW, Inc. v.*  
7 *MRLJ Enters.*, 584 F. Supp. 132, 139 (D.D.C. 1984); *Dollcraft Industries, Ltd. v. Well-Made Toy*  
8 *Mfg. Co.*, 479 F. Supp. 1105, 1118 (E.D.N.Y 1978); *Duchess Music Corp. v. Stern*, 458 F.2d  
9 1305, 1308 (9<sup>th</sup> Cir. 1972), *cert. denied*, 409 U.S. 847 (1972). Thus, impoundment is  
10 unwarranted.

11 The Impoundment Order should be stayed pending a preliminary injunction decision.  
12 TROs "should be restricted to . . . preserving the status quo and preventing irreparable harm just  
13 so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc.*, 415 US at  
14 439. The Impoundment Order is a mandatory injunction, requiring Mr. Hotz within 10 business  
15 days to turn over his computers, hard drives and "any other storage devices on which any  
16 Circumvention Devices [including "other copyrighted works"] are stored." TRO Page 4, lines 6-  
17 10. The Order provides for only 10 business days to deliver storage devices to a location of  
18 Sony's choosing. This does not maintain the status quo or prevent irreparable harm. Further,  
19 this does not assure Mr. Hotz will receive adequate time for a hearing on the Preliminary  
20 Injunction before impoundment compliance is required under the TRO. The TRO provision  
21 requiring Mr. Hotz "preserve, and not destroy, erase, delete, dispose of, or alter any documents  
22 or records" is sufficient to prevent irreparable harm to Sony. *Id.* at Page 3, lines 12-22.

23 The TRO here requires that Mr. Hotz remove information from the internet which has  
24 already been accessed and discussed by thousands of people. If Mr. Hotz were to post additional  
25 information on the internet, that would not preserve the status quo. However, removing  
26 information already posted by Mr. Hotz and publicly mirrored by several other websites does not  
27 preserve the status quo. Any harm alleged to have been suffered by Sony has already been  
28 suffered and this TRO will not prevent that which has already happened. The Courts have

1 consistently held that TROs are meant to prevent future harms-- not harms that have already  
2 taken place. *Dvd Copy Control Ass'n Inc. v. Bunner*, 116 Cal.App.4th 241, 254 (2004). Where a  
3 party has presented no evidence that the disclosure or activities it seeks to prohibit would cause  
4 more or different harm than it claims it has suffered by the general disclosure of the program or  
5 information, a TRO is improper. *Id.* at 255. Such is particularly apt when the information has  
6 allegedly been posted on the internet, as Sony alleges here. *Id.* Accordingly, any harm alleged  
7 to have been suffered by Sony has already been suffered and this TRO will not prevent that  
8 which has already happened.

9  
10 **IV. THE TEMPORARY RESTRAINING ORDER VIOLATES MR. HOTZ' FIRST AMENDMENT RIGHTS AS A PRIOR RESTRAINT ON SPEECH.**

11 Restraints within the TRO amount to prior restraint on Mr. Hotz right to free speech  
12 because they are overbroad and are issued without a preliminary determination . “An order  
13 issued in the area of First Amendment rights must be couched in the narrowest terms that will  
14 accomplish the pin-pointed objective permitted by constitutional mandate.” *Carroll v. President*  
15 *and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968). An injunction issued "before an  
16 adequate determination that it is unprotected by the First Amendment" presents the "special vice  
17 of a prior restraint." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S.  
18 376, 390 (1973). “First Amendment concerns in copyright are allayed by the presence of the  
19 fair use doctrine.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001);  
20 See 17 U.S.C. § 107. Under DMCA analysis, fair use is available as a defense. See Nimmer on  
21 Copyright § 12A.06(D)(1) (2010).

22 Under the TRO, Mr. Hotz is restrained from “Offering to the public, creating, posting  
23 online, marketing, advertising, promoting, installing, distributing, providing, or otherwise  
24 trafficking in any circumvention technology” which includes circumvention of undefined “other  
25 copyrighted works.” TRO Page 2, lines 17-24. This restraint places a burden on Mr. Hotz’s  
26 right to free speech beyond the pin-pointed objective of the TRO. No determination has been  
27 made that Mr. Hotz’s speech is not protected speech. Additionally, the inclusion of “any  
28 circumvention technology” does not take into account fair use defenses and the above-



