

1 John A. Stottlemire
 2 33103 Lake Garrison Street
 3 Fremont, CA 94555
 4 Telephone: (614) 358-4185
 5 Email: jstottl@comcast.net
 6 Defendant, *pro se*

7 UNITED STATES DISTRICT COURT
 8 NORTHERN DISTRICT OF CALIFORNIA
 9 SAN JOSE DIVISION

9	COUPONS, INC., a California corporation,)	Case No. 5:07-cv-03457 HRL
10	Plaintiff,)	REPLY TO PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS THIRD AMENDED COMPLAINT
11	v.)	
12	JOHN STOTTELMIRE, and DOES 1-10,)	
13	Defendant)	Date: November 4, 2008
14)	Time: 10:00 AM
15)	Courtroom: 2, 5 th Floor
)	Judge: Hon. Howard R. Lloyd
)	

16 Pursuant to Civil Local Rule 7-3(c), defendant John Stottlemire (“Defendant”) submits this
 17 reply to Plaintiff Coupons, Inc.’s (“Plaintiff”) Opposition to Defendant’s Motion to Dismiss Third
 18 Amended Complaint (“Opposition”).

19
 20 Respectfully submitted,

21
 22 Dated: October 21, 2008

23 _____
 24 /s/
 25 John A. Stottlemire, *pro se*

1 Opposition to Defendant’s Motion for Sanctions is a coupon Plaintiff claims its technological
2 measure controls access to. Several members of the Court and any person who has access to the
3 Court’s PACER system now have initial access to this coupon yet none have to navigate through
4 Plaintiff’s technological measure to gain access to that coupon. Causing the coupon to be printed
5 on ordinary paper necessarily leaves another route wide open for third parties to gain access to its
6 coupon, a fact Plaintiff cannot deny.

7 Plaintiff opposes Defendant’s Motion by ignoring the Court’s analysis in *Lexmark*
8 *International, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004). Plaintiff
9 claims the *Lexmark* Court concluded “Because no security device was in place to protect access to
10 the program, there was nothing to be circumvented.” (Opposition Pg 7, Line 22-23). As argued
11 by the Defendant, the *Lexmark* Court actually concluded since Lexmark left another route wide
12 open to the printer engine program, the chip used to control access to the program did not
13 effectively control access to Lexmark’s Printer Engine Program. The standard set in *Lexmark* and
14 echoed in *Storage Technology Corp. v. Custom Hardware Engineering & Consulting, Ltd.*, 2006
15 U.S. Dist. LEXIS 43690 (Mass. 2006) is a very simple test: If the copyrighted work can be
16 accessed and copied without navigating through a technological measure which controls access,
17 the technological measure does not effectively control access to the copyrighted work.

18 Plaintiff attempts to escape the *Lexmark* standard by arguing “One could video record the
19 movie [stored on DVD] while it is playing on a screen. One could also rent a hall and invite
20 friends and neighbors, and charge them to view it. Nothing about the encryption technology
21 precludes this unauthorized copying or public performance.” (Opposition Pg 9, Line 13-16).
22 Here is what Plaintiff ignores: the “authorized DVD player” first decrypts and provides access to
23 the DVD. Consumers do not circumvent a technological measure to gain access or to make the
24 unauthorized copy or to give the unauthorized public performance described by the Plaintiff.
25 With its coupons, however, any third party can access and copy without having to navigate
26 through Plaintiff’s technological measure. Thus Plaintiff’s technological measure does not
27 effectively control access to its coupons.

1 To claim access is controlled effectively, the work Plaintiff claims is protected by
2 copyright must be accessible to third parties only by navigating through Plaintiff's technological
3 measure which controls access. Plaintiff initially controls access to its coupons with a
4 technological measure. Since those coupons are printed on paper, Plaintiff's legal conclusion that
5 it controls that access effectively is in error. Not only is this fact inescapable, for Plaintiff's
6 coupons to have any value to consumers who print them, it is required. Cashiers must have the
7 ability to obtain Plaintiff's coupons in order for consumers to receive the discount offered on that
8 coupon. Manufacturers must have the ability to obtain Plaintiff's coupons so they may reimburse
9 retailers for honoring the coupons. It is impossible to escape the fact that access to Plaintiff's
10 coupons is unrestricted once Plaintiff no longer has possession of the coupon. Thus Plaintiff errs
11 in its conclusion that its technological measure effectively controls access to its coupons.

12 Technology does not currently exist that would effectively protect access to any work
13 printed on a piece of paper. Plaintiff, by causing those coupons to be printed directly on a piece
14 of paper cannot effectively control access to those coupons with a technological measure.
15 Plaintiff's claim for relief pursuant to 17 U.S.C. § 1201(a) has no arguable basis in law and must
16 be dismissed without leave to amend.

17 **REPLY TO OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**
18 **PLAINTIFF'S 17 U.S.C. § 1201(b) CLAIM**

19 Plaintiff's entire argument in opposition to Defendant's Motion to Dismiss Plaintiff's 17
20 U.S.C. § 1201(b) claim rests on the following: (1) a decision by the Central District of California
21 in *Ticketmaster LLC v. RMG Technologies, Inc.*, 507 F.Supp.2d 1096 (C.D. Cal. 2007) and (2)
22 Plaintiff's misinterpretation of Senate Report No. 105-190.

23 In his Motion, Defendant cites four different United States Courts of Appeals, the United
24 States Court of Federal Claims, one District Court, The United States Senate and The United
25 States House of Representatives in support of his argument. In Opposition, Plaintiff's lone cite is
26 the *Ticketmaster* ruling, in which the *Ticketmaster* defendants made no arguments that 1201(b)
27 did not apply. As noted recently by the Ninth Circuit, when the parties do not educate the Court
28 in the substantive areas of law surrounding the cases they litigate, the Court could enter a finding

1 without considering relative law¹. That happened in *Ticketmaster*. The defendant failed to
2 exhaustively marshal the determinative decisions, which led the Court to rule in favor of the
3 plaintiff. The *Ticketmaster* defendant's only argument before the Court was that solving
4 CAPTCHA was not circumvention. The *Ticketmaster* defendant did not argue that 1201(b) did
5 not apply for other reasons. The Court decided that CAPTCHA was circumvented, as defined by
6 the DMCA, and no other argument existed to oppose a finding under 1201(b), the Court found
7 Ticketmaster would likely succeed in its claims under 1201(a) and 1201(b) against RMG
8 Technologies. *Ticketmaster* did not analyze the distinctions between 17 U.S.C. § 1201(a) and §
9 1201(b) under the authorities cited by Defendant in this immediate Motion. *Ticketmaster's* one
10 sentence decision is exactly opposite to every citation provided by the Defendant.

11 “Here, CAPTCHA both controls access to a protected work because a user cannot
12 proceed to copyright-protected webpages without solving CAPTCHA, and protects
13 rights of a copyright owner because by preventing automated access to the ticket
purchase webpage, CAPTCHA prevents users from copying those pages.”
Ticketmaster at *33, *34

14 The *Ticketmaster* ruling is inapposite to every citation provided by the Defendant in his Motion to
15 Dismiss. This Court should review Defendant's argument *de novo*.

16 Plaintiff cherry-picked one sentence from Senate Report 105-190 to support its argument
17 made in opposition to Defendant's Motion. The Senate stated “The two sections are not
18 interchangeable and *many* devices will be subject to challenge only under one of the subsections.”
19 (Opposition Fn. 6 quoting Defendant's Motion to Dismiss). Plaintiff opposes using this sentence
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21 ¹ “Put simply, the current justice system and the various rules of civil, criminal and appellate
22 procedure, as well as the rules of evidence that govern trials, are all fashioned to serve the “adversary
23 system.” Central to the adversary model of judicial administration is the idea of the trial judge as a
24 “generalist” neutral whose areas of expertise are procedure, both civil and criminal, and evidence.
25 The model does not expect trial judges to know much about the specific areas of substantive law
26 involved in the cases that come before them. Rather, the model assigns to each party's lawyer the
27 responsibility of knowing the substantive law involved in the cases they litigate. It is the lawyer's
28 task to educate the generalist judge to the specifics of a particular case. Even in those cases where the
lawyers are not specialists, counsel do, under this model, recognize their responsibilities to study the
law involved in a case thoroughly before bringing it or responding to it. Under the adversary model,
judges expect that lawyers will recognize the legal problems their cases pose and then through the
master of research will exhaustively marshal the determinative decisions, speeding the way to a swift
and fair result.” (*Final Report, Ninth Circuit Judicial Council, Task Force on Self-Representative
Litigants*, Page 9) (October 2005)

1 to argue “the legislative history explicitly leaves room for technology coming within both
2 sections” (Id at 12, Line 12-13). Defendant agrees.² However, as here, when a defendant is
3 accused of circumventing the access control only, the defendant’s circumvention devices can only
4 be challenged under 17 U.S.C. § 1201(a).

5 “if an effective technological protection measure limits access to the plain text of a
6 work only to those with authorized access, **but provides no additional protection**
7 **against copying, displaying, performing or distributing the work**, then a
8 potential cause of action against the manufacturer of a device designed to
9 circumvent the measure lies under subsection 1201(a)(2), but not under subsection
10 1201(b).” *S. Rep. No. 105-190* at 12 (1998). (emphasis added).

11 Although the exact function of Plaintiff’s technological measure may have been blurred in the
12 past, the Court has instructed Plaintiff to clearly define its technological measure as an access
13 control if Plaintiff intends to pursue an action against Defendant under 17 U.S.C. § 1201(a). In
14 amending its Complaint, Plaintiff has cast its technological measure as controlling access to its
15 coupons from *computers* that are authorized to have access. Plaintiff provides no additional
16 protection against copying, displaying, performing or distributing the work. By only controlling
17 access to its coupons, Plaintiff cannot pursue a claim for relief under 17 U.S.C. § 1201(b):

18 Plaintiff’s technological measure is designed to control access to its coupons. By
19 controlling that access, it automatically protects its rights to copy those coupons, but as the case
20 law shows, the statute requires more than that. Without claiming the Defendant circumvented a
21 technological measure that protects its rights with something other than an access control,
22 Plaintiff cannot pursue an action under section 1201(b) of Title 17.

23 **REPLY TO OPPOSITION TO DEFENDANT’S MOTION TO DISMISS**
24 **PLAINTIFF’S CB&PC § 17200**

25 Standing requirements under California Business and Professions Code § 17200 require
26 Plaintiff to show that he has “suffered injury in fact *and* has lost money or property as a result of
27 _____
28

² Some circumvention devices would be subjected to challenge under both sections of 17 U.S.C. § 1201. i.e. if a copyright holder deploys technology which effectively controls access to its works and technology which prevents the work from being saved on a third party’s hard drive. In this instance, devices designed to circumvent both technology measures would easily be challenged under both sections of 17 U.S.C. § 1201.

1 unfair competition” *Cal. Bus. & Prof. Code § 17204*. (emphasis added). The key word is “and.”
2 Not only must Plaintiff establish it has suffered injury in fact, Plaintiff must also establish it has
3 lost money or property as a result of unfair competition. Plaintiff does not oppose Defendants
4 argument that Plaintiff fails to claim it has lost money. On that basis Plaintiff’s claim under
5 California Business and Professions Code § 17200 et seq must be dismissed without leave to
6 amend.

7 Lost money or property must be restitutionary in nature for a party to have standing under
8 California Business and Professions Code § 17203:

9 “the People are presumed to have intended that the “loss of money or property”
10 they require for standing would be interpreted in accordance with the construction
11 already given to “lost money or property” required to seek restitution under section
12 17203” *Johnnie Walker v. USAA Casualty Insurance Company*, 474 F.Supp.2d
13 1168 at 1172 (E.D. Cal, 2007)

14 Accordingly, Plaintiff must establish it has lost money or property which is currently in
15 possession of the Defendant as a result of the unfair competition:

16 “an order for restitution is one compelling a UCL defendant to return money obtain
17 through an unfair business practice to those persons in interest from whom the
18 property was taken, that is, to persons who had an ownership interest in the
19 property or those claiming through that person.” *Korea Supply Company v.*
20 *Lockheed Martin Corporation*, 29 Cal.4th at 1149, 131 Cal.Rptr.2d 29, 63 P.3d
21 937 (2003).

22 Plaintiff argues that it suffered injury in fact because it has spent significant sums to upgrade
23 systems. If anything, these losses are damages, which are not restitutionary in nature. Plaintiff
24 can never claim Defendant is in possession of money or property that Plaintiff has lost.

25 Accordingly, Plaintiff will never be able to establish standing under section 17204 of the
26 California Business and Professions Code and Plaintiff’s claim must be dismiss without leave to
27 amend.

28 **REPLY TO OPPOSITION TO DEFENDANT’S MOTION TO DISMISS
PLAINTIFF’S COMMON LAW, UNFAIR COMPETITION**

Plaintiff’s Opposition to Defendant’s Motion relies on a citation to the codified unfair
competition claim published at California Business & Professions Code § 17200 and not the
Common Law of the State of California. Requirements to pursue an action under the two sections

1 are not the same. Plaintiff cannot establish Defendant attempted to secure Plaintiff's trade and
2 Plaintiff's claim under the Common Law, Unfair Competition must be dismissed without leave to
3 amend.

4 Under the Common Law of the State of California a Plaintiff can only pursue an action for
5 unfair competition if Plaintiff can establish Defendant attempted to secure the trade of Plaintiff
6 and made such an attempt through an act of fraud, coercion or other conduct prohibited by law.
7 (*See Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* 20 Cal. 4th 163 at
8 192-93 (1999).

9 Plaintiff contends that "The only defect the Court found in Coupons' Second Amended
10 Complaint is that Coupons did not clearly allege that Stottlemire himself (as opposed to Doe
11 Defendants) engaged in a business." (Opposition Pages 15-16). Defendant argued, in his Motion
12 to Dismiss Plaintiff's Second Amended Complaint, that Plaintiff failed to establish standing and
13 since Plaintiff had not established standing Defendant's argument stopped there. Defendant felt it
14 was pointless to review if Plaintiff had alleged the facts necessary to pursue a claim against the
15 Defendant when Plaintiff had not even established standing. Plaintiff's TAC establishes standing
16 under the Common Law Unfair Competition tort. Defendant now argues Plaintiff has not alleged
17 the facts necessary to bring a claim for relief under Common Law Unfair Competition. Plaintiff
18 must allege Defendant attempted to secure Plaintiff's trade. Plaintiff's TAC claims its clients are
19 "many of the country's most prominent consumer product manufacturers, advertising agencies,
20 retailers, promotional marketing companies [or] internet portals." (TAC ¶ 10). Plaintiff does not
21 claim Defendant attempted to secure trade from any of these clients. Thus, Plaintiff has failed to
22 state a claim for relief under the Common Law of California Unfair Competition.

23 CONCLUSION

24 Plaintiff's entire Third Amended Complaint has no arguable basis in law. Plaintiff
25 continues to argue the Digital Millennium Copyright Act somehow extends to works which are
26 distributed to third parties on ordinary paper. No technological measure exist which could
27 possibly control access to works printed on paper. The DMCA cannot protect technology that
28 does not exist.

1 Plaintiff also *urges* the Court to allow its frivolous claims against the Defendant to move
2 forward so that this case can be adjudicated fairly. Fair adjudication of Plaintiff's frivolous
3 claims is to put a halt to their lawsuit. The Plaintiff has wasted enough of this Court's time and
4 resources. The Plaintiff has maliciously pursued Defendant for 16 months. As Defendant has
5 shown, Plaintiff will never be able to state a claim for relief against the Defendant because
6 Plaintiff clearly has no cause of action against Defendant. Plaintiff's entire Third Amended
7 Complaint must be dismissed without leave to amend for failure to state a claim upon which relief
8 may be granted.

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