

1 KARIN G. PAGNANELLI (174763)
kgp@msk.com
2 MARC E. MAYER (190969)
mem@msk.com
3 BRADLEY MULLINS (274219)
bym@msk.com
4 MITCHELL SILBERBERG & KNUPP LLP
11377 West Olympic Boulevard
5 Los Angeles, CA 90064-1683
Telephone: (310) 312-2000
6 Facsimile: (310) 312-3100

7 Attorneys for Plaintiffs
Nexon America, Inc. and NEXON Korea
8 Corporation

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11

12 NEXON AMERICA, INC., a Delaware
13 corporation, and NEXON KOREA
14 CORPORATION, a Korean
corporation,

15 Plaintiffs,

16 v.

17 GAMEANARCHY, LLC, a Georgia
Limited Liability Company, DAVID
18 ALLEN BAKER, a/k/a "Drunken
Cheetah," an individual, and DOES 1
through 10,

19 Defendants.
20

Case No. CV12-02083 MWF (PLAx)

Honorable Michael W. Fitzgerald

**OPPOSITION OF PLAINTIFFS TO
MOTION TO DISMISS OF
DEFENDANT DAVID ALLEN
BAKER (INDISPENSABLE PARTY/
STANDING)**

Date: December 3, 2012

Time: 10:00 a.m.

1 **Introduction**

2 This lawsuit has been brought by the owners and exclusive licensees of the
3 popular multiplayer online computer game “Combat Arms” (collectively, “Nexon”)
4 against the developers and distributors of a software product and service (known as
5 “Game Anarchy”) that enables players to cheat in the game and gain unfair
6 advantages vis-à-vis other players. Among the claims asserted against Defendants
7 are claims for trafficking in circumvention devices, copyright infringement (direct
8 and secondary), and intentional interference with contract. Baker’s¹ Motion, filed
9 many months after he answered the Complaint and appeared in the action, addresses
10 Nexon’s claims under the DMCA, 17 U.S.C. §1201, for trafficking in circumvention
11 devices.

12 The anti-circumvention provisions of the DMCA, enacted in 1998, “provide
13 ‘legal protection and effective legal remedies’ against circumventing technological
14 measures, e.g., encryption and password protection, that are used by copyright
15 owners to protect their works from piracy” S. Rep. No. 105-190, at 8 (1998).
16 HackShield technology (developed by a third party, AhnLabs, and licensed to
17 Nexon), is one of the technical security measures that Nexon has incorporated into
18 Combat Arms. Compl., ¶¶ 23-24. HackShield is an anti-hacking and anti-cheating
19 technology that prevents users of Combat Arms from engaging in a variety of
20 prohibited hacking activities or from running software programs or cheats, including
21 the type of cheats made possible by Game Anarchy. *Id.*, ¶ 24. Game Anarchy
22 circumvents HackShield in a number of respects, including by incorporating into its
23 software code various features that have no purpose other than to render its software
24 undetectable by HackShield. As such, Defendants’ distribution of the Game
25 Anarchy product violates the DMCA and entitles Nexon to damages and injunctive
26 relief.

27
28

¹ The other defendant, GameAnarchy LLC, is not represented by counsel and thus cannot appear in this action.

1 Baker's claim that Nexon lacks standing to bring its DMCA claims (or,
2 alternatively, that Ahnlab must be added as a party to this dispute) is plain wrong.
3 AhnLab is not the "real party in interest," and, indeed, is not the party that has been
4 injured by Defendants' conduct. Nexon is. Nexon owns the copyright and all
5 related rights in Combat Arms. Nexon has spent millions of dollars developing,
6 operating, and maintaining Combat Arms. Defendants' activities, namely, its
7 creation and distribution of GameAnarchy, have caused severe damage to Combat
8 Arms and has caused Nexon to lose customers as a result of the rampant cheating
9 made possible by GameAnarchy. It is Nexon (not Ahnlab) that will continue to
10 suffer severe and irreparable injury in the absence of injunctive relief.

11 Baker's motion actually is cribbed from a motion that was filed in September
12 2000 by the defendant in Universal City Studios, Inc. v. Hughes, Case No. 300CV72
13 (D.Ct.) (Hughes' motion was made available online by the Berkman Center for
14 Internet and Society at Harvard University²). See Request for Judicial Notice in
15 Support of Opposition of Plaintiffs to Motion to Dismiss of Defendant David Allen
16 Baker (Indispensable Party/Standing) ("RJN"), Ex. 1. That Motion was summarily
17 denied by the Court. See RJN, Ex. 1. For good reason. The rambling arguments
18 that Baker copied from Hughes' brief were frivolous then, and are even more
19 frivolous now. The arguments ignore the plain language of the statute and relevant
20 caselaw. The law is absolutely clear (and has become even more clear over the last
21 several years) that Nexon, as the owner of copyright in Combat Arms, has standing
22 to bring an action under the DMCA and that Ahnlab need not be added as a party to
23 this action. Baker's position is not supported by any authority.

24 DMCA actions are routinely brought by copyright owners (the injured party),
25 and in none of these cases did the Court ever require that the maker of the access-
26 control or copy-control technology be added as a party. See Universal City Studios,
27 Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), aff'd sub. nom. Universal

28 _____
² <http://cyber.law.harvard.edu/openlaw/DVD/CT/0922-motion.pdf>

1 City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001); Realnetworks, Inc. v.
2 DVD Copy Control Ass'n, 641 F. Supp. 2d 913 (N.D. Cal. 2009) (developers and
3 marketers of copy-protection systems that RealNetworks' product was alleged to
4 have circumvented were not joined as indispensable parties); 321 Studios v. Metro
5 Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004) (motion
6 picture studios filed claims against distributor of DVD copy software). Moreover,
7 just this past September, Judge Wu rejected an almost identical argument made by
8 the defendant in another case brought by Nexon involving HackShield
9 circumvention, holding that "HackShield's absence would not prevent complete
10 relief among the existing parties as required under Rule 19(a)(1)(A)" and that "other
11 district courts have not required that third-parties who create security technologies,
12 be joined as plaintiffs." Nexon America, Inc. v. Cornwall, CV 12-160-GW (Sept.
13 18, 2012), RJN, Ex. 2, at p. 3. This Court likewise should deny Baker's Motion.

14
15 **I. PLAINTIFFS HAVE STANDING TO BRING THEIR DMCA CLAIMS.**

16 Baker does not dispute that Nexon owns the copyright in Combat Arms, that
17 HackShield is employed by Nexon to protect Combat Arms, and that his
18 circumvention technologies cause harm (or at least are alleged to cause harm) to
19 Nexon and Combat Arms. Nevertheless, Baker's first argument is that Nexon, as
20 the owner of copyright in Combat Arms, somehow lacks standing to assert claims
21 for violation of Section 1201 of the DMCA (the anti-circumvention provisions).
22 That is not the law.

23 Section 1203 of the DMCA specifically provides that "*any person* injured by
24 a violation of section 1201 or 1202 may bring a civil action in an appropriate United
25 States district court for such violation." 17 U.S.C. § 1203(a) (emphasis added). The
26 legislative history makes clear that Congress intended to confer standing on
27 copyright owners to bring actions under the DMCA: "[Section 1201(a)] is *designed*

1 *to protect copyright owners.*” H.Rep. 105-551, at 18; see also id. at 10 (“When
2 copyrighted material is adequately protected in the digital environment, a plethora of
3 works will be distributed and performed over the Internet. In order to protect the
4 owner, copyrighted works will most likely be encrypted and made available to
5 consumers once payment is made for access to a copy of the work.”). In fact, the
6 DMCA standing requirement is so broad that even those who merely provide access
7 to copyrighted material, such as cable companies and satellite television providers
8 (who have *nonexclusive* rights to distribute copyrighted content) may bring DMCA
9 claims. See EchoStar Satellite, L.L.C. v. Viewtech, Inc., 543 F. Supp. 2d 1201,
10 1206 (S.D. Cal. 2008) (“Because EchoStar contracted and purchased the distribution
11 rights of the programming, it is reasonable to infer that EchoStar also has the
12 authority to control the measures protecting the programming.”); CoxCom, Inc. v.
13 Chaffee, No. CIV A 05-107S, 2006 WL 1793184, at *10 (D.R.I. June 26, 2006)
14 (“the entity which controls access to copyrighted material” could assert a claim
15 under the DMCA).

16 The broad standing provision of Section 1203 is logical, because it is the
17 *content owner* and provider, not the maker of the access-control technology, that
18 has suffered injury to the copyrighted work as a result of the distribution of the
19 circumvention software. For example, DVDs and digital copies of movies sold on
20 iTunes or Amazon.com generally are encrypted to ensure that they are not copied or
21 improperly accessed by those who have not paid for them. Entities that sell DVD
22 decryption or circumvention technology and thereby enable members of the public
23 to unlawfully copy and digitally distribute motion picture content cause direct harm
24 to the copyright owner, who is entitled to recover for that injury. Likewise here,
25 Nexon uses HackShield to control access to Combat Arms and ensure that only
26 legitimate players may play the game. Thus, it is Nexon, the owner of copyright in
27 Combat Arms – not Ahnlabs – that has been directly injured by Defendants’
28 activities. Such harm includes, but is not limited to, harm to the value of Combat

1 Arms and the integrity of the game, loss of customers and sales of related Combat
2 Arms products and enhancements, and harm to Nexon's reputation. This is not
3 indirect or abstract injury (as Baker apparently claims); it is direct and tangible
4 injury directly attributable to the circumvention.

5 Copyright owners, such as motion picture studios and video game companies,
6 routinely bring actions under the DMCA. In the seminal DMCA case, Universal
7 City Studios, Inc. v. Reimerdes, the major motion picture studios brought an action
8 against individuals engaged in the distribution of computer software that
9 circumvented a content protection system (known as CSS) that restricted access to
10 and copying of commercial DVDs. 111 F. Supp. 2d at 303-15. Specifically, the
11 defendants' technology (DeCSS) decrypted DVD content and converted it into a
12 unencrypted, plain text format that could be further copied and disseminated over
13 the Internet. Id., at 311-12. As here, the motion picture studios did not create or
14 manufacture CSS; rather, that technology was created by Toshiba and Matsushita
15 Electric Industrial Co., administered by the DVD Copy Control Association, and
16 licensed to the studios. Id., at 309; see DVD Copy Control Ass'n, Inc. v. Bunner, 31
17 Cal. 4th 864, 871 (2003). Nevertheless, because the studios and their copyrighted
18 movies were injured by DeCSS, they had standing to bring the action, and the
19 owners of CSS were not required to be joined as parties to the lawsuit. As the Court
20 noted:

21 "The DMCA provides that '[a]ny person injured by a
22 violation of section 1201 or 1202 may bring a civil action
23 in an appropriate United States court for such violation.'
24 For the reasons set forth above, plaintiffs obviously have
25 suffered and, absent effective relief, will continue to suffer
26 injury by virtue of the ready availability of means of
circumventing the CSS access control system on their
DVDs."

27 Reimerdes, 111 F. Supp. 2d at 341-42. The same was true in several other cases
28 involving the same or similar technology. See also Realnetworks, Inc., 641 F. Supp.

1 2d at 927-30 (developers and marketers of copy-protection systems that
2 RealNetworks' product was alleged to have circumvented were not joined as
3 indispensable parties); 321 Studios, 307 F. Supp. 2d at 1090 (motion picture studios
4 filed claims against distributor of DVD copy software).

5 By contrast, Baker does not cite *any* authority to support his novel claim that
6 Nexon's injury is insufficient or that the plaintiff in a Section 1201 anti-
7 circumvention action "must be able to claim ownership of the technological measure
8 at issue." Motion at 6. The two DMCA cases cited by Baker – both of which were
9 decided before Reimerdes – are irrelevant. Those cases stand, at most, for the
10 proposition that the owner of the technology that has been circumvented *also* has
11 standing to bring suit under the DMCA; not that *only* the owner of the access-
12 control technology has standing to bring suit.

13 Finally, Baker's claim that to allow this case to proceed would unfairly enable
14 "the hundreds of licensees of Hackshield" to bring "a near infinite succession of
15 harassing lawsuits" is wrong. Motion at 13. Only Nexon has the right and ability to
16 bring a lawsuit arising from injury to *Combat Arms* as a result of Defendants'
17 unlawful trafficking in circumvention devices. To the extent that Defendants have
18 injured *other* copyright owners as a result of their circumvention activities, those are
19 different claims and different injuries that must be separately proven. Such injuries
20 to those other copyrights do not overlap or duplicate the injuries caused by
21 Defendants to Combat Arms.

22 23 **II. AHNLAB IS NOT A NECESSARY OR INDISPENSABLE PARTY.**

24 Under Federal Rule of Civil Procedure 19(a), a person is a "required party"
25 who must be joined if feasible, only if:

26
27 (A) in that person's absence, the court cannot accord
28 complete relief among existing parties; or

1 (B) that person claims an interest relating to the subject
2 of the action and is so situated that disposing of the action
3 in the person's absence may:

- 4 (i) as a practical matter impair or impede
5 the person's ability to protect the interest; or
6 (ii) leave an existing party subject to a
7 substantial risk of incurring double, multiple,
8 or otherwise inconsistent obligations because
9 of the interest.

10 Fed. R. Civ. P. 19(a)(1).

11 The party advocating joinder has the burden of demonstrating, through the
12 production of evidence, that "the person who was not joined is needed for a just
13 adjudication." 7 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane,
14 Federal Practice and Procedure § 1609 (3d ed. 2001); Am. Gen. Life & Accident
15 Ins. Co. v. Wood, 429 F.3d 83, 92 (4th Cir. 2005) (same); see also City of New
16 York v. Milhelm Attea & Bros., Inc., 550 F. Supp. 2d 332, 353 (E.D.N.Y. 2008)
17 (party seeking dismissal "has the burden of producing evidence showing the nature
18 of the interest possessed by an absent party and that the protection of that interest
19 will be impaired by the absence" (citation omitted)). "[C]onclusory statements,
20 without any evidence showing that [the persons] are, in fact, indispensable parties as
21 defined in Rule 19(a)" are insufficient. Imperial v. Castruita, 418 F. Supp. 2d 1174,
22 1178 (C.D. Cal. 2006).

23 Additionally, a finding that a party is indispensable is not the end of the
24 inquiry. If the Court determines that a party was required to be joined, it "must
25 order that the person be made a party." Fed. R. Civ. P. 19(a)(2). An action may
26 only be dismissed if a person who is required to be joined cannot be joined, *and* the
27 Court determines, "in equity and good conscience, [that] the action . . . should be
28 dismissed," rather than proceed among the existing parties. Fed. R. Civ. P. 19(b).³

³ In making this determination, the Court should consider: "(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be

1 “A nonparty in whose absence an action must be dismissed is one who ‘not only
2 [has] an interest in the controversy, but [has] an interest of such a nature that a final
3 decree cannot be made without either affecting that interest, or leaving the
4 controversy in such a condition that its final termination may be wholly inconsistent
5 with equity and good conscience.’” E.E.O.C. v. Peabody W. Coal Co., 610 F.3d
6 1070, 1078 (9th Cir. 2010) (quoting Shields v. Barrow, 58 U.S. 130, 139 (1855)).

7 The Court need not determine whether Ahnlab can or cannot be joined to this
8 action because Baker has not presented *any* evidence to support its claim that
9 Ahnlab is a party required to be joined in this lawsuit, including that Ahnlab claims
10 an interest in this lawsuit, that complete relief cannot be accorded it its absence, or
11 that Baker will be subject to a risk of multiple or inconsistent obligations. Nor can
12 Baker do so.

13 *First*, Ahnlab has never claimed *any* interest in the subject of this lawsuit.
14 That alone mandates denial of Baker’s motion. Cornwall, RJN, Ex. 2, at p. 3
15 (“Here, the owners and operators of HackShield technology have not claimed any
16 interest in this lawsuit, and they are therefore not necessary.”).

17 *Second*, Baker provides no reason (far less evidence) why the absence of
18 Ahnlab would prevent this Court from according complete relief in this action to
19 render them necessary parties under Rule 19(a)(1)(A). As set forth above, *Nexon*
20 (not Ahnlab) is the owner of the copyright in Combat Arms and is the entity injured
21 by Defendants’ trafficking of circumvention devices. To the contrary, HackShield
22 does not possess *any* interest in Combat Arms. Thus, Ahnlab has no standing to
23 seek damages for Nexon’s lost customers, loss of goodwill, or loss of investment in
24 Combat Arms. Any speculative relief that could theoretically be sought by Ahnlab
25 would necessary be entirely distinct and independent of Nexon’s claims here.
26 Complete relief plainly can be accorded in this action. See, e.g., Gwartz v. Jefferson

27
28 adequate; and (4) whether the plaintiff would have an adequate remedy if the action
were dismissed for nonjoinder.” Fed. R. Civ. P. 19(b).

1 Mem'l Hosp. Ass'n, 23 F.3d 1426, 1428 (8th Cir. 1994) (Rule 19(a)(1) “requires
2 joinder only when the absence of the unjoined party prevents complete relief among
3 the *current* parties The focus is on relief between the parties and not on the
4 speculative possibility of further litigation between a party and an absent person.”
5 (emphasis added) (citation omitted)); Estate of McFarlin ex rel. Laass v. City of
6 Storm Lake, 277 F.R.D. 384, 390-91 (N.D. Iowa 2011) (individual was not a
7 necessary party where her claims were entirely independent of the plaintiffs’
8 claims).

9 *Third*, there is no risk of double or multiple obligations. As noted, this action
10 involves *only* Combat Arms, and not any other computer game or software product
11 protected by HackShield. See Cornwall, RJN, Ex. 2, at p. 3 (“Plaintiffs have not
12 alleged and no proof has been proffered that the actions of HackShield affect
13 Defendant’s potential liability.”) There is no dispute that no person or entity other
14 than Nexon (far less HackShield) has any right to bring the claims asserted in this
15 action. Thus, to the extent HackShield even arguably has any right or ability to
16 bring an anti-circumvention claim, such a claim would not (and could not) seek to
17 redress injury to Combat Arms.

18 This lawsuit is in no way similar to the cases cited by Baker, all of which
19 involved absent parties that would be able to bring the same or similar claims as
20 those at issue, and would be able to seek essentially the same damages. See Smith
21 v. Kessner, 183 F.R.D. 373, 375 (S.D.N.Y. 1998) (defendant could be subject to
22 multiple obligations on the same claim where absent party could bring separate
23 claims “seeking essentially the same damages”); Avon Cosmetics (FEBO) Ltd. v.
24 New Hampton, Inc., No. 90 Civ. 7208 (RLC), 1991 WL 90808, at *4 (S.D.N.Y.
25 May 22, 1991) (entity was a necessary party where it could sue the defendant on the
26 basis of the same subject matter, and “for some of the same amounts”). To the
27 contrary, as noted above, in the numerous cases brought by copyright owners for

1 DMCA anti-circumvention violations, none of them ever has required that the owner
2 of the access-control or copy-control technology be joined as a plaintiff.

3 *Finally*, Baker's suggestion that failure to join Ahnlab somehow would
4 deprive it of discovery in this action is meritless. There is no reason why Baker
5 cannot seek discovery from Ahnlab as a non-party, including to seek the
6 "specifications" and "source code" he claims he needs to defend the case. To the
7 contrary, in the more than 6 months since this case has been pending, Baker has not
8 attempted to seek *any* discovery from Ahnlab.

9 As Baker has failed to show that the owners and operators of HackShield are
10 parties required to be joined under Rule 19(a), they are not indispensable under Rule
11 19(b), and their absence provides no basis to dismiss this action. See Temple v.
12 Synthes Corp., 498 U.S. 5, 8 (1990) ("[N]o inquiry under Rule 19(b) is necessary,
13 because the threshold requirements of Rule 19(b) has not been satisfied.").

14
15 **Conclusion**

16 For the foregoing reasons, Baker's motion should be denied.

17
18 DATED: November 9, 2012

RESPECTFULLY SUBMITTED,
MITCHELL SILBERBERG & KNUPP LLP

19
20
21 By: /s/ Marc M. Mayer
22 Marc E. Mayer
23 Attorneys for Plaintiffs Nexon America,
24 Inc. and NEXON Korea Corporation
25
26
27