

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT NEW YORK**

ADVANCED ACCESS CONTENT SYSTEM  
LICENSING ADMINISTRATOR, LLC,

Plaintiff,

v.

LANNY SHEN d/b/a DVDFAB AND  
FENGTAO SOFTWARE INC., SUNREG  
TECHNOLOGIES LTD. d/b/a DVDFAB AND  
FENGTAO SOFTWARE INC., FENG TAO  
d/b/a DVDFAB AND FENGTAO SOFTWARE  
INC., SHEN XINLAN d/b/a AUDIO-DVD  
CREATOR, and JOHN DOE, JANE DOE and/or  
XYZ COMPANY d/b/a DVDFAB, RIPPERBLU-  
RAY.COM, DVDFABB.COM and  
DVDFFFAB.COM,

Defendants.

**NO. 14-cv-1112 (VSB)**

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF ADVANCED ACCESS  
CONTENT SYSTEM LICENSING ADMINISTRATOR, LLC'S APPLICATION FOR  
AN ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN  
CONTEMPT OF THIS COURT'S MARCH 17, 2015 AMENDED PRELIMINARY  
INJUNCTION ORDER AND WHY A SECOND AMENDED PRELIMINARY  
INJUNCTION ORDER SHOULD NOT BE ISSUED**

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS .....	3
ARGUMENT .....	9
A. Defendants Are In Contempt Of The Amended PI Order .....	10
1. The Amended PI Order Clearly And Unambiguously Bars Defendants From Manufacturing, Importing, Offering To The Public, Providing, Or Otherwise Trafficking In Circumvention Products.....	10
2. The Evidence Showing Defendants’ Non-Compliance With The Amended PI Order Is Clear And Convincing .....	12
3. Defendants Have Not Diligently Attempted To Comply With The Amended PI Order In A Reasonable Manner .....	12
4. This Court Should Impose Compensatory And Coercive Sanctions On Defendants For Their Contempt .....	13
B. This Court Should Enjoin Defendants From Marketing, Selling And Distributing Their New VidOn Products And Operating Related Websites In Violation Of The Amended PI Order .....	16
CONCLUSION.....	19

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Federal Cases</b>	
<i>Atlantic Recording Corp. v. BCD Music Grp., Inc.</i> , No 08 Civ. 520, 2009 WL 1390848 (S.D.N.Y. May 7, 2009).....	13
<i>Berger v. Heckler</i> , 771 F.2d 1556 (2d Cir. 1985).....	10, 16
<i>CBS Broad. Inc. v. FilmOn.com Inc.</i> , 814 F.3d 91 (2d Cir. 2016).....	10, 13
<i>CBS Broad. Inc. v. FilmOn.com, Inc.</i> , No. 10 Civ. 7532, 2014 WL 3702568 (S.D.N.Y. July 24, 2014), <i>aff'd</i> , No. 14-3123-CV, 2016 WL 611903 (2d Cir. Feb. 16, 2016) .....	16
<i>Chere Amie, Inc. v. Windstar Apparel, Corp.</i> , 175 F. Supp. 2d 562 (S.D.N.Y. 2001).....	16
<i>CSX Transp., Inc. v. Emjay Envtl. Recycling, LTD.</i> , No. 12-CV-1865(JS)(AKT), 2016 WL 755630 (E.D.N.Y. Feb. 25, 2016) .....	14
<i>EEOC v. Local 28, Sheet Metal Workers Int’l Ass’n</i> , 247 F.3d 333 (2d Cir. 2001).....	15
<i>Fendi Adele S.R.L. v. Burlington Coat Factory Warehouse Corp.</i> , 642 F. Supp. 2d 276 (S.D.N.Y. 2009).....	13
<i>Fendi Adele S.R.L. v. Burlington Coat Factory Warehouse Corp.</i> , No. 06 Civ. 0085, 2007 WL 2982295 (S.D.N.Y. Oct. 10, 2007) .....	14
<i>Flaherty v. Filardi</i> , No. 03-civ-2167, 2009 WL 3762305 (S.D.N.Y. Nov. 10, 2009) .....	13
<i>GMA Accessories, Inc. v. Eminent, Inc.</i> , No. 07 Civ. 3219, 2008 WL 2355826 (S.D.N.Y. May 29, 2008).....	13
<i>Gucci Am., Inc. v. Li</i> , No. 10-CV-4974 (RJS), 2015 WL 7758872 (S.D.N.Y. Nov. 30, 2015).....	16, 17
<i>Handberry v. Thompson</i> , No. 96 Civ. 6161, 2003 WL 1797850 (S.D.N.Y. Apr. 4, 2003).....	18

*Koninklijke Philips Elec. N.V. v. KXD Tech., Inc.*,  
 539 F.3d 1039 (9th Cir. 2008) .....16

*Levin v. Tiber Holding Corp.*,  
 277 F.3d 243 (2d Cir. 2002).....12

*McComb v. Jacksonville Paper Co.*,  
 336 U.S. 187 (1949).....18

*Mingoia v. Crescent Wall Sys.*,  
 No. 03 Civ. 7143, 2005 WL 991773 (S.D.N.Y. Apr. 26, 2005).....11, 12

*Perfect Fit Indus. v. Acme Quilting Co., Inc.*,  
 673 F.2d 55 (2d Cir. 1982).....18

*Philip Morris USA, Inc. v. Otamedia, Ltd.*,  
 331 F. Supp. 2d 228 (S.D.N.Y. 2004), Mar. 16 M&O at 34 .....9, 17

*Spallone v. United States*,  
 493 U.S. 265 (1990).....10

*Swann v. Charlotte-Mecklenburg Bd. of Educ.*,  
 402 U.S. 1 (1971).....17

*Utica College v. Gordon.*,  
 389 F. App'x 71 (2d Cir. 2010) .....15

**Federal Statutes**

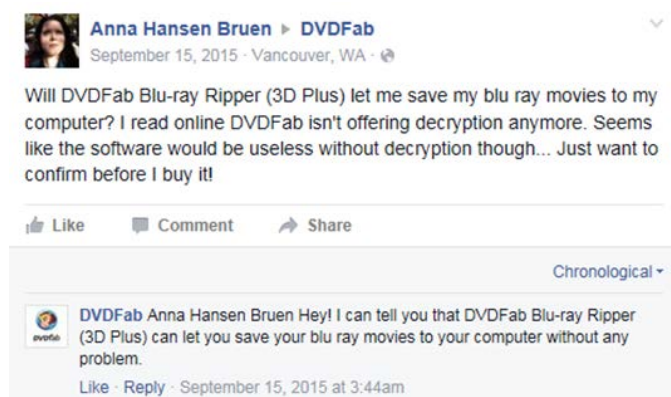
17 U.S.C. § 1201 *et sec*.....1

18 U.S.C. § 401.....10

Plaintiff Advanced Access Content System Licensing Administrator, LLC (“AACCS LA” or “Plaintiff”), by its undersigned attorneys, submits this memorandum of law in support of AACCS LA’s application for an order to show cause why Defendants should not be held in contempt of this Court’s Amended Preliminary Injunction Order, entered March 17, 2015 [Doc. No. 88] (the “Amended PI Order”) and why a Second Amended Preliminary Injunction Order providing relief described below should not be issued.

**PRELIMINARY STATEMENT**

Plaintiff recently learned that Defendants continue to violate this Court’s preliminary injunction—and the anti-trafficking provisions of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. §§ 1201(a)(2) & (b)(1)—by marketing, selling and/or distributing into the United States its DVDFab software, including DVDFab Passkey for Blu-ray, Passkey Lite and DVDFab Blu-ray Ripper (3D Plus) (the “Circumvention Products”) using a sales portal on a website (DVDFab.cn) that was specifically enjoined by this Court. Moreover, Defendants have opened new social media accounts and continue to market the Circumvention Products through Facebook and YouTube, again in direct violation of the existing preliminary injunction. There is no doubt that these actions are aimed at consumers in the United States. Through social media, Defendants assure their users located in the United States that the DVDFab Circumvention Products still circumvent AACCS LA’s access and copy protection technology provided to audiovisual content on Blu-ray discs (“AACCS Technology”):



Using examples of copyrighted motion pictures, Defendants also tout the DVDFab Circumvention Products, including that they can “rip Blu ray to” various formats and for various devices “with DVDFab,” e.g.:



Additionally, Defendants are now selling a new set of products, under the label “VidOn” and including VidOn DVDWatchBox, VidOn Import Utility, VidOn Server and VidOn Cloud (“VidOn Products”), that are configured to access and extract the audiovisual content on Blu-ray discs, in circumvention of Plaintiff’s AACS Technology, by working in conjunction with add-on

circumvention software, including DVDFab Passkey. Defendants market and sell the VidOn Products through their website VidOn.me as well as social media outlets and through third party retailers such as Amazon and Best Buy.

Defendants have a history of violating this Court's preliminary injunction orders. As such, Plaintiff seeks the following relief:

- an amendment of the Amended PI Order to enjoin Defendant from marketing, selling, and/or distributing the VidOn Products that it currently offers in its continuing activities to evade the existing PI Order, and
- a finding of contempt to support an amendment of the Amended PI Order that, to the best of this Court's ability, ensures compliance
  - by creating a safety zone around Plaintiff's rights to ensure that its rights are not further circumvented,
  - by providing damages to compensate Plaintiffs pursuant to the Court's authority to require Defendant to pay Plaintiff's attorneys' fees expended in connection with enforcement of the Court's injunction and
  - by providing for coercive contempt sanctions.

### **STATEMENT OF FACTS**<sup>1</sup>

Plaintiff instituted this action because Defendants market, sell and distribute software that circumvents the access and copy protection provided to audiovisual content on Blu-ray discs by Plaintiff. On Plaintiff's motion, made simultaneously with its filing of the Complaint, this court entered the PI Order on March 4, 2014,<sup>2</sup> *inter alia*:

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<sup>1</sup> The background facts of this case are set forth in the complaint in this action and prior briefing and orders of this Court.

<sup>2</sup> Transcript of Proceedings, dated Mar. 4, 2014 [Doc. No. 24] ("Mar. 2014 Tr."), at 6:6-14:7; PI Order, dated Mar. 4, 2014 [Doc. No. 21], at 5:13-14:7; *see also* Memorandum & Order, dated Mar. 16, 2015 [Doc. No. 87]

- i. enjoining and restraining Defendants from “manufacturing, importing offering to the public, providing, or otherwise trafficking in any technology, product, service, device, component, or part thereof capable of circumventing the AACS Technology – including but not limited to” Defendants’ “DVDFab” software, including DVDFab Passkey for Blu-ray and Passkey Lite, (the “Circumventing Activities”);
- ii. requiring that Defendants disable domains, websites and social media where they were “conduct[ing] or participat[ing] in any of the Circumventing Activities;” and
- iii. requiring that third-party service providers, receiving actual notice of the PI Order, cease providing services enabling Defendants’ Circumventing Activities, including through domain names, websites and social media accounts and by processing payments.<sup>3</sup>

After the issuance of the PI Order, Defendants purported to sell and distribute only “non-AACS-decryption” or “NAD” versions of their “DVDFab”-branded software into the United States but Plaintiff learned that Defendants continued to market, sell and distribute other software programs that circumvented Plaintiff’s AACS Technology under the brand names “TDMore,” “BluFab,” “Boooya” and “Wookao.”<sup>4</sup> Defendants created new websites and new social media accounts to market, sell and distribute this circumvention software while attempting to hide their association with these new products and websites.<sup>5</sup> Specifically, Defendants actively marketed the Boooya- and Wookao-branded add-on products, which, paired with the NAD versions of DVDFab software, circumvented the AACS Technology.<sup>6</sup>

Plaintiff sought to modify the PI Order to address Defendants’ violations of that Order.<sup>7</sup> While Feng Tao Defendant, the only Defendant to appear in this action, admitted that he had continued trafficking circumvention software in the United States in violation of the law and the

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(“Mar. 16 M&O”), at 3. Capitalized terms not defined herein are given the meaning assigned to them in the Mar. 16 M&O.

<sup>3</sup> PI Order at 1-4.

<sup>4</sup> See Mar. 16 M&O at 7.

<sup>5</sup> See *id.*

<sup>6</sup> See Nov. 16 M&O at 7; Declaration of Matthew Hewlett, dated Oct. 3, 2014 [Doc No. 60] (“Oct. 2014 Hewlett Decl.”), ¶¶ 9-17, Exs. C-E.

<sup>7</sup> See Mar. 16 M&O at 4 (citing Pl. Amend Mem.)



PI Order, he sought to narrow the PI Order to exclude his websites located at domains using registries located outside the United States (including DVDFab.cn, DVDFab.jp and DVDFab.de) and vacate his default, “repeatedly aver[ring] to this Court that he had ceased trafficking” such unlawful software into the United States.<sup>8</sup>

This Court denied Feng Tao Defendant’s motions to modify the PI Order and to vacate its default and granted Plaintiff’s motion to modify the PI Order,<sup>9</sup> expanding the scope of the original injunction to cover additional software products (BluFab, TDMore, Wookao and Boooya), domain names and websites (including DVDFab.cn) and a long list of DVDFab Social Media Accounts.<sup>10</sup> The Court noted “Defendants’ staunch refusal . . . to comply with the terms of the Preliminary Injunction” thus making it “necessary and appropriate in the public interest” to incidentally proscribe certain lawful conduct or conduct that may be entirely extraterritorial. The Court also noted that “sales of circumvention software such as DVDFab . . . Passkey for Blu-ray, and Passkey Lite also violate the laws of other countries.”<sup>11</sup>

While Defendants, in continuing violation of the Amended PI Order, never disabled or ceased use of the DVDFab Domain Names or DVDFab Websites,<sup>12</sup> they did appear, for a time, to block the ability to purchase and download the Circumvention Software into the United States. That has now changed. Defendants are again offering DVDFab software that circumvents AACS Technology for purchase and download from the United States via their enjoined website at DVDFab.cn.<sup>13</sup> Plaintiff has been able to purchase and download DVDFab Passkey for Blu-ray from the United States without issue, and without using a VPN or other means of masking a

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<sup>8</sup> Mar. 16 M&O at 24 (citing 5/5/ Tao Decl. ¶ 16; 8/6 Tao Decl. ¶ 2).

<sup>9</sup> Mar. 16 M&O at 35.

<sup>10</sup> Amended PI Order, dated Mar. 17, 2015 [Doc. No. 88], at 2-3, 6-8.

<sup>11</sup> Mar. 16 M&O at 24.

<sup>12</sup> Multiple third party service providers, including domain registries and social media companies, pursuant to the PI Order, ceased providing services to Defendants.

<sup>13</sup> Declaration of Matthew Hewlett, dated April 15 2016 (“April 2016 Hewlett Decl.”) ¶ 7, Ex. A.

United States IP address.<sup>14</sup> Defendants operate a website at TDMore.cn, which purports to distribute and fulfill upgrades of the original TDMore software enjoined by the Amended PI Order.<sup>15</sup> Defendants have also created a new U.S.-oriented Facebook page to promote their DVDFab software, located at <https://www.facebook.com/dvdfabsoftware/>.<sup>16</sup>

Additionally, Defendants market, and sell, the Circumvention Products through the VidOn Products, which are manufactured and sold by Defendants.<sup>17</sup> The VidOn Products, sold from Defendants' website, VidOn.me as well as from large and well-known retailers including Amazon and Best Buy, allow a user to extract or "rip" content from optical discs, including Blu-ray discs to the VidOn Cloud, which can then be streamed through the television or over the Internet.<sup>18</sup> Defendants promote the VidOn Products through Facebook, Twitter and Google+ pages and profiles.<sup>19</sup>

The VidOn products are configured to access and extract the audiovisual content on Blu-ray discs, in circumvention of Plaintiff's AACS Technology, by working in conjunction with add-on software, including DVDFab Passkey. When users, including from the United States, attempt to extract the audiovisual content on a Blu-ray disc protected by AACS Technology using the "NAD" version of a DVDFab software product, they receive an error message:<sup>20</sup>

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<sup>14</sup> See Declaration of Joseph Pok Yan Leong, dated April 13, 2016 ("Leong Decl."), ¶¶ 13, 15.

<sup>15</sup> April 2016 Hewlett Decl. ¶ 10, Ex. C. The website located at TDMore.cn makes available for download and upgrade the same products this Court enjoined that were previously sold at TDMore.com: TDMore Blu-ray Converter and TDMore Blu-ray Copy. Amended PI Order at 2-3, 6; April 2016 Hewlett Decl. ¶ 10, Ex. C. The Court enjoined the sales of these products and ordered the domain TDMore.com be disabled, declining to order the disabling of the domain TDMore.cn because, although it was registered to Feng Tao Defendant, there was no operating website at that time. Amended PI Order at 2-3, 6, 8-9; Mar. 16 M&O at 34.

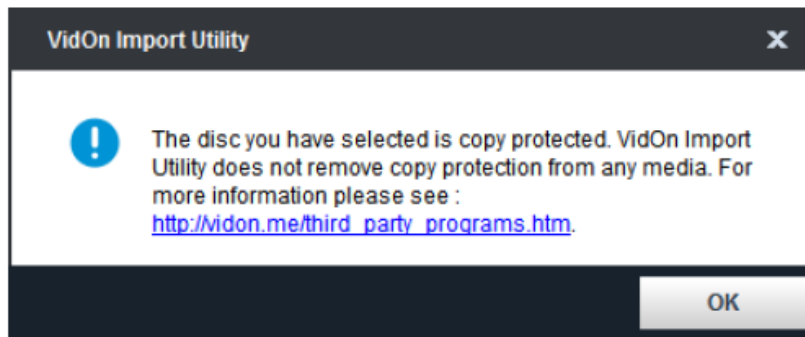
<sup>16</sup> April 2016 Hewlett Decl. ¶ 9, Ex. B.

<sup>17</sup> Despite only "DVD" being included in the name of the new product VidOn DVDWatchBox, it works similarly for Blu-ray discs.

<sup>18</sup> See Leong Decl. ¶ 6, Ex. A.

<sup>19</sup> These pages and profiles are located at least at the URLs: <https://www.facebook.com/VidOn.me/>, <https://twitter.com/VidOnme> and <https://plus.google.com/+VidonMe/posts>. April 2016 Hewlett Decl. ¶ 13, Ex. F. Each web page of Defendants' website located at VidOn.me links to each of these pages and profiles. See Leong Decl. Ex. A.

<sup>20</sup> Leong Decl. ¶ 11.



Clicking on the hyperlink “[http://vidon.me/third\\_party\\_programs.htm](http://vidon.me/third_party_programs.htm)” leads users to the following statement:

#### Third-party Programs

Many commercial DVDs and Blu-rays are copy protected. VidOn Import Utility does not remove copy protection from any media. If it is legal in your area for you to remove copy protection for backup purposes the following third-party programs will help you to work with copy-protected discs.

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#### Passkey (Paid)

This program will work with VidOn Import Utility to make the latter capable of accessing any DVD and Blu-ray titles. You can download the Passkey program at [www.dvdfab.cn](http://www.dvdfab.cn).<sup>21</sup>

Clicking on the hyperlink “[www.dvdfab.cn](http://www.dvdfab.cn)” on this webpage leads users to a product page on Defendants’ website located at DVDFab.cn offering and allowing purchase and download by users in the United States of the DVDFab products “Passkey for DVD” and “Passkey for DVD & Blu-ray (lifetime),” the latter of which is currently subject to promotional discounts.<sup>22</sup>

The website located at DVDFab.cn promotes the ability of Passkey for Blu-ray to circumvent AACS Technology, stating, among other things:

Passkey for Blu-ray, as a Windows-based driver, decrypts any Blu-ray disc just in seconds to allow you to use other compatible software to deal with now unprotected content. It works well with DVDFab Blu-ray Copy, Blu-ray Ripper, and many other apps.

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Passkey for Blu-ray can remove all known BD+ copy protections including . . . all known

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<sup>21</sup> *Id.* ¶ 12, Ex. A.

<sup>22</sup> *Id.* ¶ 13.

AACS copy protections including the newest AACS MKB v26, and AACS bus encryption . . . .<sup>23</sup>

As before, the DVDFab Passkey license agreement states that DVDFab Passkey is owned and copyrighted by Fengtao Software Inc., that DVDFab Passkey “is sold worldwide” and that the license is governed by the laws of the State of South Carolina.<sup>24</sup>

Plaintiff has tested the products and found that the VidOn software works in conjunction with DVDFab Passkey to circumvent AACS access and copy control technology and then extract or “rip” the audiovisual content of Blu-ray discs for playback using the VidOn hardware.<sup>25</sup> Specifically, Plaintiff’s testing shows one can use the DVDFab Passkey and the VidOn Import Utility software to view the audiovisual content on a Blu-ray disc, free and clear of the AACS Technology.<sup>26</sup> Furthermore, the VidOn Import Utility software can import the audiovisual content on a Blu-ray disc, free and clear of the AACS Technology, and then use the VidOn DVDWatchBox hardware and software (including VidOn Server), with DVDFab Passkey no longer running, to play the audiovisual content extracted or “ripped” from that Blu-ray disc on a television display.<sup>27</sup> Such audiovisual content, as noted now free and clear of the AACS Technology, may be posted to the Internet or other peer-to-peer sites for further illegal distribution and copying.

The evidence shows that Defendants’ DVDFab and VidOn brands are commonly owned by Defendants. Specifically:

- i. Defendants market and sell DVDFab and VidOn products together at DVDFab.cn by selling DVDFab software with VidOn Box hardware and offering a

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<sup>23</sup> *Id.* ¶ 14; Declaration of Matthew Hewlett, dated May 27, 2014 [Doc. No. 44], ¶ 6, Ex. A; Oct. 2014 Hewlett Decl. ¶¶ 11, 17, Exs. D, E.

<sup>24</sup> Leong Decl. ¶ 15.

<sup>25</sup> *See id.* ¶¶ 15-23.

<sup>26</sup> *Id.* ¶¶ 18-19.

<sup>27</sup> *Id.* ¶ 20.

“VidOn.me Mini PC,” for use with a television set, for free with purchase of the DVDFab All-In-One software package.<sup>28</sup>

- ii. Defendants’ websites DVDFab.cn and ILikeDVDFab.com (both of which are familiar to the Court) are hosted on the same server as Defendant’s website VidOn.me, and no other websites are hosted on that server.<sup>29</sup>
- iii. As discussed above, an error message mirroring in language and function that contained in the purported “non-AACS-decryption” or “NAD” versions of DVDFab software routes users of the VidOn software to DVDFab Passkey.
- iv. The VidOn software—with no DVDFab software running—communicates with computer servers located at the VidOn- and DVDFab-branded domain names secure.vidon.me and www.dvdfabstore.com, including through encrypted exchanges secured by electronic “certificates” used by that server and registered to each of those domains.<sup>30</sup>
- v. Internet forum posts on DVDFab.cn tie DVDFab to VidOn, including:<sup>31</sup>
  - A forum post by “fengtao,” identified by the DVDFab.cn forum as the “DVDFab Architect,” stating “VidOn Box is what you need for playback” of Blu-ray discs protected by “Cinavia” technology.
  - A forum post by “signals,” identified as a DVDFab.cn forum Administrator, recommending software “From DVDFab partner company VidOn.”

### ARGUMENT

One year ago Defendant Feng Tao assured this Court that he would institute measures to block United States users from accessing his websites, which assurances this Court found “lie ill in the mouth of a party that has consistently and deliberately violated the [PI Order] in the past.” *See Philip Morris USA, Inc. v. Otamedia, Ltd.*, 331 F. Supp. 2d 228, 245 (S.D.N.Y. 2004).<sup>32</sup>

Today, Defendants continue to violate this Court’s orders with impunity. As such, Plaintiff requests that this Court find Defendants in contempt of the Amended PI Order and once again amend the order to take all incentive out of Defendants’ illegal actions, including enjoining

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<sup>28</sup> April 2016 Hewlett Decl. Ex. A.

<sup>29</sup> April 2016 Hewlett Decl. ¶ 11, Ex. D.

<sup>30</sup> Leong Decl. ¶ 22.

<sup>31</sup> April 2016 Hewlett Decl. ¶ 12, Ex. E

<sup>32</sup> Mar. 16 M&O at 34.

additional websites and products, including the VidOn Products, as set out in the Proposed Second Amended Permanent Injunction Order submitted herewith. *See Berger v. Heckler*, 771 F.2d 1556, 1568-69 (2d Cir. 1985) (emphasizing, in the context of contempt proceedings, that “a district court may take such steps as are appropriate given the resistance of the noncompliant party,” and that “[e]nsuring compliance with a prior order is an equitable goal which a court is empowered to pursue even absent a finding of contempt”).

**A. Defendants Are In Contempt Of The Amended PI Order**

It is well-established that “courts have inherent power to enforce compliance with their lawful orders through civil contempt.” *Spallone v. United States*, 493 U.S. 265, 276 (1990) (internal quotation marks and citation omitted). This Court may punish a party for disregarding or violating a court order. 18 U.S.C. § 401.

A court may hold a party in contempt if: “(1) the order the party failed to comply with is clear and unambiguous; (2) the proof of noncompliance is clear and convincing; and (3) the party has not diligently attempted to comply in a reasonable manner.” *CBS Broad. Inc. v. FilmOn.com Inc.*, 814 F.3d 91, 98 (2d Cir. 2016) (citing *Paramedics Electromedicina Comercial, Ltd. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 655 (2d Cir. 2004)).

**1. The Amended PI Order Clearly And Unambiguously Bars Defendants From Manufacturing, Importing, Offering To The Public, Providing, Or Otherwise Trafficking In Circumvention Products**

The Amended PI Order, *inter alia*, clearly and unambiguously (1) bars Defendants from “manufacturing, importing, offering to the public, providing, or otherwise trafficking *in any* technology, product, service, device, component, or part thereof capable of circumventing the AACS Technology – including but not limited to” Defendant’s DVDFab-, Blu-fab-, TDMore-, Wookao- and Booyea-branded software (including DVDFab Passkey for Blu-ray and Passkey Lite) (the “Circumventing Activities”); (2) orders that Defendants “not conduct or participate in

any of the Circumventing Activities through any website, social media or social networking site or service, or other online service *or platform*, or through any offline means;” and (3) orders that they disable those domain names, websites and social media accounts.<sup>33</sup> The scope of conduct barred by the Amended PI Order is “specific and definite” on its face. The Court has twice issued injunctions containing this language: the PI Order and the Amended PI Order.

An order is “clear and unambiguous” if it is “specific and definite enough to apprise those within its scope of the conduct that is being proscribed.” *Mingoia v. Crescent Wall Sys.*, No. 03 Civ. 7143, 2005 WL 991773, at \*1 (S.D.N.Y. Apr. 26, 2005) (internal quotation marks and citation omitted). Noting that injunctions must state their terms specifically and in reasonable detail and not be overbroad, this Court found that the PI Order was the most narrowly-tailored possible order that provided effective relief.<sup>34</sup> At the same time, the Court amended the PI Order to enjoin additional websites and products marketed, sold and distributed by Defendants.<sup>35</sup> Thus, this Court’s issuance of the PI Order and Amended PI Order relied on the specificity and definitiveness of the language in those Orders.

Indeed, this Court found that Defendants’ prior public statements—including for example the timeline on ILikeDVDFab.com, which states, *inter alia*, “March 10, 2014, Judge Broderick from a New York federal court ruled the suspension of DVDFab . . . several of its domains and social media accounts . . .”—confirm that Defendants understood the specific and definite injunctive provisions.<sup>36</sup>

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<sup>33</sup> Amended PI Order at 6-8 (emphasis added).

<sup>34</sup> Mar. 16 M&O at 18, 32.

<sup>35</sup> See Mar. 16 M&O at 32-34.

<sup>36</sup> *Id.* at 25.

**2. The Evidence Showing Defendants' Non-Compliance With The Amended PI Order Is Clear And Convincing**

Plaintiff has presented evidence decisively establishing that Defendants violated the PI Order by continuing their Circumventing Activities. *See Levin v. Tiber Holding Corp.*, 277 F.3d 243, 250 (2d Cir. 2002) (in context of civil contempt, “the clear and convincing standard requires a quantum of proof adequate to demonstrate a ‘reasonable certainty’ that a violation occurred”).

Defendants’ violations of the Amended PI Order are blatant and, in part, are of the same nature as their previous violations of the original PI Order. Defendants have violated the Amended PI Order by: (i) continuing to engage in the very Circumventing Activities proscribed by the Amended PI Order, including through newly activated websites such as TDMore.cn; (ii) failing to disable and cease use of at least DVDFab.cn and DVDFab.de domain names and websites; and (iii) opening up new social media accounts to market DVDFab.cn and the Circumvention Products. Defendants have additionally violated the Amended PI Order by manufacturing, marketing, offering for sale and selling the VidOn Products which, as marketed, can only be used in conjunction with the Circumvention Products.

**3. Defendants Have Not Diligently Attempted To Comply With The Amended PI Order In A Reasonable Manner**

This Court has previously found that Defendants, including Feng Tao Defendant, refused to comply with the PI Order and that, despite Feng Tao Defendant’s awareness of the proscriptions of the PI Order and representations of compliance, Feng Tao Defendant’s “actions outside of court demonstrate that he has no interest in complying with the Preliminary Injunction domestically and has actively sought to circumvent its terms.”<sup>37</sup> Defendants’ actions are no less deliberate now. Defendants have done away with any pretense of ceasing sales to the United

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<sup>37</sup> Mar. 16 M&O at 24; *see also id.* at 32 (“Defendant’s recalcitrant persistence in accessing the United States market makes clear to me that no more narrowly-tailored relief would be effective.”).



States of even the DVDFab Software that circumvents AACCS Technology and have greatly expanded the scope of their operations to include the VidOn Products. They have affirmatively evaded the Order rather than making an effort to comply, much less a diligent effort.

**4. This Court Should Impose Compensatory And Coercive Sanctions On Defendants For Their Contempt**

“Civil sanctions have two purposes: to coerce compliance with a court order and to compensate a plaintiff.” *CBS Broad.*, 814 F.3d at 101 (citing *Local 28, Sheet Metal Workers Int’l Ass’n v. EEOC*, 478 U.S. 421, 443 (1986)). The Court has broad discretion to fashion such sanctions. *Atlantic Recording Corp. v. BCD Music Grp., Inc.*, No 08 Civ. 520, 2009 WL 1390848, at \*9 (S.D.N.Y. May 7, 2009) (citing cases). The Court should award Plaintiff both coercive and compensatory sanctions, specifically to compensate Plaintiff for its attorneys’ fees and costs to make this motion.<sup>38</sup>

a. This Court Should Award Plaintiff Attorneys’ Fees And Costs

“[I]t is appropriate for the court . . . to award the reasonable costs of prosecuting the contempt, including attorney’s fees.” *Flaherty v. Filardi*, No. 03-civ-2167, 2009 WL 3762305, at \*6 (S.D.N.Y. Nov. 10, 2009) (quoting *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130-31 (2d Cir. 1979)). If a court finds that a defendant’s contempt “was willful, it should then award attorneys’ fees and costs” to bring a contempt motion “unless there are persuasive grounds to deny them.” *GMA Accessories, Inc. v. Eminent, Inc.*, No. 07 Civ. 3219, 2008 WL 2355826, at \*10 (S.D.N.Y. May 29, 2008) (internal quotation marks and citation omitted); *see also Fendi Adele S.R.L. v. Burlington Coat Factory Warehouse Corp.*, 642 F. Supp. 2d 276, 299 (S.D.N.Y. 2009) (“[C]ourts typically look . . . to whether the contempt was willful even though willfulness is not a prerequisite to such an award.”). “Contempt is willful when a party had the

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<sup>38</sup> While Plaintiff is not seeking compensatory damages beyond its attorneys’ fees at this time, it reserves its right to do so later in these proceedings.

capacity to comply with a court order but did not make a good faith effort to do so.” *CSX Transp., Inc. v. Emjay Env'tl. Recycling, LTD.*, No. 12-CV-1865(JS)(AKT), 2016 WL 755630, at \*5 (E.D.N.Y. Feb. 25, 2016); *see also Fendi Adele S.R.L. v. Burlington Coat Factory Warehouse Corp.*, No. 06 Civ. 0085, 2007 WL 2982295, at \*4 (S.D.N.Y. Oct. 10, 2007). (“A willful contempt is one where ‘the contemnor had actual notice of the court's order, was able to comply with it, did not seek to have it modified, and did not make a good faith effort to comply.’”) (citation omitted).

Evidence demonstrates that Defendants have willfully violated and continue to willfully violate the Amended PI Order. Defendants had the capacity to comply with the preliminary injunction order by ceasing online sales of the Circumvention Products. Defendants failed to comply and have now violated the two preliminary injunction orders issued in this case, including:

- Defendants offer for sale and sell from their DVDFab.cn website the DVDFab Software, including DVDFab Blu-ray Toolkit, DVDFab All-In-One Lifetime Gift, DVDFab Blu-ray Copy, DVDFab Blu-Ray Ripper, DVDFab Blu-ray Creator, DVDFab Blu-ray to DVD Convertor, DVDFab Video Convertor, DVDFab Passkey for Blu-ray, DVDFab Media Player and DVDFab Passkey Lite.
- Defendants operate a website at TDMore.cn, which offers to fulfill upgrades of the Blu-ray Converter and TDMore Blu-ray Copy.
- As of March 5, 2016, Defendants’ domain name BluFab.cn automatically redirected to Defendants’ website located at DVDFab.cn.
- Defendants have created a new U.S.-oriented Facebook page, located at <https://www.facebook.com/dvdfabsoftware/>, to promote their DVDFab software.<sup>39</sup>
- Defendants use their DVDFab Facebook page to answer users’ questions about using the Circumvention Products on Blu-ray discs to access the motion picture content on those Blu-ray discs.

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<sup>39</sup> April 2016 Hewlett Decl. ¶ 9, Ex. B.

- Defendants market and sell the Circumvention Products through the VidOn Products, sold from Defendants' website, VidOn.me as well as from large and well-known retailers including Amazon and Best Buy.
- Defendants promote the VidOn Products through Facebook, Twitter and Google+ pages and profiles located at <https://www.facebook.com/VidOn.me/> , <https://twitter.com/VidOnme> and <https://plus.google.com/+VidonMe/posts>.<sup>40</sup>

b. This Court Should Impose Coercive Sanctions On Defendants

The district court has "wide discretion" to apply coercive sanctions, *Utica College v. Gordon.*, 389 F. App'x 71, 74 (2d Cir. 2010), "based on the nature of the harm and the probable effect of alternative sanctions." *EEOC v. Local 28, Sheet Metal Workers Int'l Ass'n*, 247 F.3d 333, 336 (2d Cir. 2001) (citation omitted). Here, those considerations favor imposition of a sanction for Defendants' continued violation of the Amended PI Order.

The character and magnitude of the harm inflicted by Defendants' continued stubborn refusal to comply with this Court's orders warrants such a sanction. As this Court has found on multiple occasions, the harm inflicted on Plaintiff by Defendants' activities is irreparable.<sup>41</sup> Defendants' continued trafficking in circumvention technology goes to the heart of the Amended PI Order and merits a coercive measure.

Defendants are likely to respond only to sanctions that are sufficient to make continued refusal to comply with this Court's orders unprofitable. Defendants' continued trafficking in circumvention products in violation of the Amended PI Order demonstrates that those activities are sufficiently lucrative to risk contempt of a court order. Additionally, the available evidence indicates Defendants sell and/or market their products widely, through at least 43 websites and 21 social media accounts.<sup>42</sup>

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<sup>40</sup> See April 2016 Hewlett Decl. ¶ 13, Ex. F.

<sup>41</sup> Mar. 2014 Tr. at 12:19-13:1; Mar. 16 M&O at 33; Amended PI Order at 4-6.

<sup>42</sup> See Amended PI Order at 6-8; Leong Decl. ¶ 6, Ex. A.; April 2016 Hewlett Decl. ¶ 9, Ex. B.

Plaintiff requests the Court impose a coercive sanction of \$10,000 per day on Defendants, continuing until Defendants come into compliance with the Amended PI Order. This figure is reasonable and in line with amounts awarded in previous cases involving similar behavior, namely repeated, brazen violations of court orders and intellectual property protections. *See Gucci Am., Inc. v. Li*, No. 10-CV-4974 (RJS), 2015 WL 7758872, at \*4 (S.D.N.Y. Nov. 30, 2015) (imposing coercive sanction of \$50,000 per day of noncompliance with court order in online trademark counterfeiting case; increase from prior coercive sanction of \$10,000 per day on initial finding of contempt); *CBS Broad. Inc. v. FilmOn.com, Inc.*, No. 10 Civ. 7532, 2014 WL 3702568, at \*7 (S.D.N.Y. July 24, 2014) (imposing coercive sanction of \$10,000 per day of continued broadcasting of plaintiffs' copyrighted programming in violation of injunction, following previous violations of same), *aff'd*, No. 14-3123-CV, 2016 WL 611903 (2d Cir. Feb. 16, 2016); *Chere Amie, Inc. v. Windstar Apparel, Corp.*, 175 F. Supp. 2d 562, 568 (S.D.N.Y. 2001) (\$10,000 fine per day defendant failed to recall copyright- and trademark-infringing product); *Koninklijke Philips Elec. N.V. v. KXD Tech., Inc.*, 539 F.3d 1039, 1041, 1043, 1046 (9th Cir. 2008) (dismissing appeal challenging a \$10,000 per day coercive fine in a trademark counterfeiting action after the defendants failed to take any steps to comply with the court's preliminary injunction order).

**B. This Court Should Enjoin Defendants From Marketing, Selling And Distributing Their New VidOn Products And Operating Related Websites In Violation Of The Amended PI Order**

“Ensuring compliance with a prior order is an equitable goal which a court is empowered to pursue even absent a finding of contempt.” *Berger*, 771 F.2d at 1569. Thus, even without a contempt finding, the circumstances here warrant amendment of the Amended PI to address Defendants' violations of that Order. As this Court previously set out, the decision to modify a preliminary injunction remains in the Court's discretion, a party seeking such modification must

show it is justified by a significant change in facts or law, and “[w]here a defendant continues to violate the terms of a preliminary injunction, modification is appropriate.”<sup>43</sup> As this Court reasoned in issuing the Amended PI Order, Defendants’ violations of the Court’s Amended PI Order justify imposing stringent injunctive terms because no narrower injunction will be effective.<sup>44</sup>

The facts here establish that Defendants continue to violate the Amended PI Order, including through additional products, websites and social media accounts. The Court’s previous findings that Plaintiff is likely to succeed on the merits and that there is an imminent likelihood of irreparable harm to Plaintiff<sup>45</sup> apply equally here. In fact, given Defendants’ increasingly aggressive and flagrant violation of the order and Plaintiff’s rights, including by returning to direct sales and distribution of DVDFab software into the United States, the likelihood of Plaintiff’s success on the merits and the irreparable harm it faces are only greater. The Court should thus modify the Amended PI Order to include Defendants’ VidOn Products and the websites and social media accounts Defendants use to market, sell and/or distribute their VidOn Products and Circumvention Products.

Plaintiff’s request does not alter the character of the relief this Court has already granted in the Amended PI Order. Any objection by Defendants to that relief rings hollow in light of Defendants’ continued contempt of this Court’s orders. “Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for . . . [t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case.” *See Philip Morris*, 331 F. Supp. 2d at 245; *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *see also*

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<sup>43</sup> Mar. 16 M&O at 32 (citing authority).

<sup>44</sup> *Id.* at 32.

<sup>45</sup> *Id.* at 33.

*Handberry v. Thompson*, No. 96 Civ. 6161, 2003 WL 1797850, at \*2 (S.D.N.Y. Apr. 4, 2003) (“[F]ederal courts have the authority to modify an injunction when a defendant has failed to comply with its terms or when the aims of a remedial order have not been realized.”). Thus, “[t]he measure of the court’s power in civil contempt proceedings is determined by the requirements of full remedial relief.” *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949); *Perfect Fit Indus. v. Acme Quilting Co., Inc.*, 673 F.2d 55, 56-57 (2d Cir. 1982) (a court has broad discretion in the context of contempt to fashion an order to coerce compliance with a prior judgment).

**CONCLUSION**

Based upon the foregoing, Plaintiff AACS LA respectfully requests that this Court issue an order requiring Defendants to show cause why they should not be held in contempt of the Amended PI Order and why a Second Amended Permanent Injunction Order providing the relief described above should not be issued.

Dated: New York, New York  
April 15, 2016

Respectfully submitted,

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