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7 CANAL+ TECHNOLOGIES, INC.

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

12 GROUPE CANAL+ S.A., CANAL+
13 TECHNOLOGIES, S.A., CANAL+
TECHNOLOGIES, INC.,

14 Plaintiffs,

15 v.

16 NDS GROUP PLC, NDS AMERICAS, INC.,

17 Defendants.
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CASE NO.: C02-01178 VRW

**CANAL+'S OPPOSITION TO NDS
GROUP PLC'S and NDS
AMERICAS, INC.'S MOTION TO
DISMISS**

Date: Thursday, May 30, 2002
Time: 2:00 p.m.
Courtroom 6

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1 **I. Introduction**

2 Canal+ has filed a complaint in this action which describes in unusual detail NDS's
3 illegal and anti-competitive conduct as well as the considerable damage it has caused. NDS has
4 responded with a motion to dismiss each cause of action based on technical arguments, rather
5 than meeting the substantive allegations made against it. However, even these arguments lack
6 merit.

7 Canal+'s state law claims are not preempted by the Copyright Act. Controlling case law
8 rejects preemption where the claims contain "extra elements" beyond allegations of unlawful
9 copying. Here, NDS's subsequent efforts to disrupt Canal+'s business relationships and its
10 concealment of the sabotage it engineered provide the requisite extra elements. These same
11 allegations amply support the state law claims Canal+ has pled. Canal+ has likewise properly
12 pled its claims of copyright infringement and violations of the Digital Millennium Copyright
13 Act. With respect to these claims, NDS ignores the allegations of the complaint in an attempt to
14 evade liability. Finally, Canal+'s RICO claim is well pled. NDS's conspiracy to undermine
15 Canal+'s security measures falls squarely within the ambit of the RICO statute under Ninth
16 Circuit authority.

17 For these reasons, NDS's motion to dismiss should be denied in its entirety.

18 **II. Argument**

19 **A. Canal+'s State Law Claims are not Preempted by the Copyright Laws.**

20 NDS asserts that the copyright laws preempt Canal+'s state law claims for tortious
21 interference, unfair competition, and civil conspiracy. It claims that Canal+ has merely restated
22 its copyright claim in the guise of these causes of action. *See* MTD at 5-8. NDS is wrong.

23 Copyright law only preempts a state law claim when it amounts to a repackaging of a
24 copyright claim. *See* 17 U.S.C. § 301; *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003
25 (9th Cir. 2001) (stating rule); *Symantec v. McAfee Assoc.*, 1998 WL 740798, *4 (N.D. Cal. 1998)
26 (plaintiff repackaged a claim regarding copying and distribution of copyrightable material as
27 "unfair competition"). Because the copyright law "governs only copying," however, there is no
28 preemption when a state law claim includes allegations beyond "mere reproduction or the like."

1 See *Rasmussen & Assoc., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 904 (9th Cir. 1992)
2 (quoting *Oddo v. Ries*, 743 F.2d 630, 635 (9th Cir. 1984)). Specifically, state law claims are not
3 preempted where they include a so-called “extra element” – allegations of wrongful conduct
4 above and beyond a copyright violation. See e.g., *Sturdza v. United Arab Emirates*, 281 F.3d
5 1287, 1305 (D.C. Cir. 2002) (no preemption of tortious inference claim where defendant not only
6 copied the plaintiff’s design but also usurped her contract with a third party); *Rasmussen*, 958
7 F.2d at 904 (no preemption of claim for wrongful use of agency certificate where defendant not
8 only copied plaintiff’s certificate but used it to obtain governmental privileges; use of document
9 for wrongful purposes was not the same as copying it).

10 Where a state law claim includes the requisite “extra elements,” it does not matter that
11 there may be a related infringement. See, e.g., *Educational Testing Serv. v. Simon*, 95 F. Supp.
12 2d 1081, 1091-92 (C.D. Cal. 1999) (no preemption of unfair competition claim where defendant
13 violated copyright by copying and disseminating test questions because plaintiff alleged “extra
14 elements” of unlawfully subverting a licensing exam and unfairly disrupting the licensing and
15 text-taking process); *Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115, 1127 (N.D. Cal.
16 2001) (no preemption of breach of contract claim where defendant promised to pay for copied
17 software, but failed to do so; promise to pay for a copied work satisfies the “extra element” test);
18 *Sturdza*, 281 F.3d at 1305 (no preemption of tortious interference related to copying of design);
19 *Rasmussen*, 958 F.2d at 904 (no preemption of wrongful use of copied certificate).¹

20 Canal+’s state law tortious interference and unfair competition claims include allegations
21 going well beyond NDS’s infringement. Canal+ has alleged that NDS built upon the
22 infringement by highlighting the existence of counterfeit cards in an effort to disrupt Canal+’s
23

24 ¹ See also *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058, 1072 (N.D. Cal. 2000)
25 (no preemption of state law trespass to chattels claim where defendant not only copied website
26 but gained unauthorized access to website to do so); *Lattie v. Murdach*, 1997 WL 33803, *5
27 (N.D. Cal. 1997) (no preemption of fraud claims involving copying because plaintiff alleged
28 extra elements of lies about payment and not making copies); *Interactive Network, Inc. v. NTN
Comm., Inc.*, 875 F. Supp. 1398, 1410 (N.D. Cal. 1995) (no preemption of unfair competition
claim where plaintiff alleged consumer confusion through defendants’ misleading press
releases).

1 relationships with existing and potential customers. *See* Complaint ¶¶ 29-30, 66-70. Copyright
2 law does not cover these additional acts of wrongdoing.

3 Specifically, with regard to tortious interference, Canal+ alleged that it had contracts with
4 third parties, that NDS knew of those contracts, that it intentionally acted to disrupt those
5 contracts, and that Canal+ was injured as a result. *See* Complaint ¶¶ 29-30, 66-70. These
6 additional elements state a tortious interference cause of action that its not preempted. *See U-*
7 *Neek, Inc. v. Wal-Mart Stores, Inc.*, 147 F. Supp. 2d 158, 174 n.10 (S.D.N.Y. 2001) (tortious
8 interference claims “involve the extra element of Defendants’ alleged bad faith ‘intent’ in
9 entering into contractual and business relations with a third party.”); *Sturdza*, 281 F.3d at 1305
10 (tortious interference claim not preempted).

11 With regard to statutory and common law unfair competition, Canal+ has again alleged
12 the anticompetitive diversion of Canal+’s existing customers, along with NDS’s implicit deceit
13 in highlighting the breach of Canal+’s security without revealing that it had engineered the
14 breach. *See* Complaint ¶¶ 29-30. These additional allegations of misconduct safeguard the
15 unfair competition claims against a preemption challenge. *See Titan Sports, Inc. v. Turner*
16 *Broad. Sys., Inc.*, 981 F. Supp. 65, 72 (D. Conn. 1997) (no preemption of unfair competition
17 claim that had extra elements of misrepresentations to third party consumers); *Gemel Precision*
18 *Tool Co., Inc. v. Pharma Tool Corp.*, 35 U.S.P.Q. 2d 1019, 1025 (E.D. Pa. 1995) (no
19 preemption of common law unfair competition claim that had extra elements including “alleged
20 conspiracy to divert and actual diversion of clients”).

21 Canal+’s civil conspiracy claim is based upon its other state law claims. Because the
22 underlying state law claims include the requisite “extra elements,” the conspiracy charge does
23 likewise. Accordingly, it too survives.

24 **B. Canal+ Has Stated a Claim for Statutory Unfair Competition.**

25 NDS’s does not (and cannot) challenge Canal+’s claim for injunctive relief under
26 California Business & Professions Code section 17203. Instead, it argues that Canal+’s request
27 for restitution under section 17203 should be dismissed because Canal+ has not alleged facts to
28 support such a remedy. *See* MTD at 8-9.

1 To obtain restitution under section 17203, Canal+ need only allege that NDS has
2 obtained property that should be returned. *See Cortez v. Purolator Air Filtration Prod. Co.*, 23
3 Cal. 4th 163, 178 (2000) (restitution under section 17203 provides for the return of any property
4 to the person from whom it was unfairly acquired). Here, Canal+ has alleged that NDS
5 wrongfully obtained its smart cards – Canal+’s property – as part of its wrongful scheme. *See*
6 *Complaint ¶ 35*. Canal+ is entitled to the return of that property. Its claim for restitution is thus
7 supported by the allegations of the Complaint.²

8 **C. Canal+ Has Stated a Common Law Unfair Competition Claim.**

9 NDS next offers a half-hearted challenge to Canal+’s common law unfair competition
10 claim. It asserts that the cause of action should be dismissed because it does not involve the
11 most common variety of unfair competition known as “passing off.” *See MTD* at 9-10. But
12 even NDS does not suggest that common law unfair competition is limited to allegations of
13 passing off. *See Cell-Tech Comm., Inc. v. Los Angeles Cell. Tech. Co.*, 20 Cal.4th 163, 193
14 (1999) (“the tort has been extended to situations other than classic passing off”). According to
15 California’s Supreme Court, unfair competition covers “all cases where fraud is practiced by one
16 in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity
17 of the dishonest schemer can invent.” (citation omitted). *See id.* Deceptive conduct is the heart
18 of the claim. *See id.* Thus, for example, an unfair competition claim was stated against a party
19 who delivered altered stamps to dealers to facilitate their resale as genuine. *See American*
20 *Philatelic Soc’y v. Claibourne*, 3 Cal. 2d 689, 697-99 (1935). Further, the tort can include
21 disruption of customer relationships and trade secrets theft, without allegations of “passing off.”
22 *See Gemel*, 35 U.S.P.Q. 2d at 1025 (common law unfair competition claim alleged a “conspiracy
23 to divert and actual diversion of clients”); *United States Golf Ass’n v. Arroyo Software Corp.*, 69

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25
26 ² NDS also asks the Court to dismiss Canal+’s request for an accounting, but makes no
27 argument and cites no authority regarding that remedy. Section 17203 provides a remedy under
28 which a defendant must provide the plaintiff an accounting. Canal+ is entitled to that remedy
here, requiring NDS to identify each Canal+ card it obtained, how the card was obtained, and the
use to which it was put.

1 Cal. App. 4th 607, 618 (1999) (noting that common law misappropriation is “one of a number of
2 doctrines subsumed under the umbrella of unfair competition”).

3 Here, Canal+ has alleged that NDS participated in a deceptive scheme. It claims that
4 NDS first conspired to promote counterfeiting as in *Claibourne*. It then profited from the
5 success of the conspiracy by making misleading claims to potential customers about the
6 supposed insecurity of Canal+’s technology (without revealing that NDS was directly
7 responsible for that insecurity). Such deceptive means of “securing the trade of a rival dealer”
8 constitute common law unfair competition. *See Cell-Tech*, 20 Cal.4th at 193. Accordingly,
9 NDS’s challenge to the claim must be rejected.

10 **D. Canal+ Has Stated Claims for Tortious Interference with Existing Contracts**
11 **and Prospective Economic Advantage.**

12 NDS also challenges Canal+’s claims for tortious interference with existing contracts and
13 tortious interference with prospective economic advantage. Its motion blurs the distinction
14 between the two claims, and then focuses exclusively on the claim for prospective economic
15 advantage. Both claims are properly pled.

16 A cause of action for interference with existing contracts requires that a plaintiff allege
17 (1) the existence of a contract with a third party; (2) the defendant’s awareness of that contract;
18 and (3) the defendant’s intentional disruption of that contract. *E.g., LiMandri v. Judkins*, 52 Cal.
19 App. 4th 326, 343-44 (1997) (elements of claim). Canal+ has specifically alleged each of these
20 elements. *See* Complaint ¶¶ 66-70, 29-31 (alleging contracts with third parties in six countries,
21 NDS’s knowledge, and NDS’s intentional disruption). Accordingly, its claim for tortious
22 interference with existing contracts states a cause of action.

23 Canal+’s allegations regarding interference with prospective economic relations are also
24 sufficient to state a claim. The required elements are (1) existence of a prospective business
25 relationship with a probability of future economic rewards for the plaintiff; (2) the defendant’s
26 knowledge of the relationship; (3) the defendant’s intentional acts to disrupt the relationship (acts
27 wrongful by a measure beyond the act of interference itself); (4) causation and damages. *See*
28 *Crosstalk Prod., Inc. v. Jacobson*, 65 Cal. App. 4th 631, 646 (1998) (listing elements).

1 Here, Canal+ alleged that it had potentially advantageous relationships with both content
2 providers and system operators for the sale of its state of the art digital television security
3 systems. See Complaint ¶¶ 7, 29, 68. Canal+ further alleged that NDS not only knew about
4 these potential relationships, but also was competing for them. See *id.* ¶¶ 27, 29, 68-70. And
5 Canal+ alleged that NDS acted intentionally and wrongfully to deny Canal+ this prospective
6 economic advantage. See *id.* ¶¶ 25, 27, 29-30, 69. Finally, Canal+ alleged that as a result of
7 NDS's conduct, Canal+ has lost sales opportunities and customers to its competitors and suffered
8 economic harm. See *id.* ¶¶ 30, 32-33, 70-71. These allegations fully satisfy the notice pleading
9 requirements of F.R.C.P. 8. See *Leatherman v. Tarrant County Narcotics Intelligence and*
10 *Coordination Unit*, 507 U.S. 163, 168 (1993) (“The liberal system of ‘notice pleading’ set up by
11 the Federal Rules[,] Rule 8(a)(2) ... does not require a claimant to set out in detail the facts upon
12 which he bases his claim. To the contrary, all the Rules require is “a short and plain statement of
13 the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds
14 upon which it rests”); see also *Crosstalk*, 65 Cal. App. 4th at 646 (elements of interference with
15 prospective advantage claim).³

16 **E. Canal+ Has Stated a Civil Conspiracy Claim.**

17 NDS next suggests that Canal+'s civil conspiracy claim should be dismissed because it is
18 not an independent tort. But NDS tells only half the story. Civil conspiracy is a dependent claim
19 that functions to hold joint wrongdoers liable for all the damages that flow from the wrongs
20 committed in furtherance of a conspiracy. So long as the plaintiff states a claim for underlying
21 wrongs, it can state a civil conspiracy claim. See *Applied Equip. Corp. v. Litton Saudi Arabia*
22 *Ltd.*, 7 Cal. 4th 503, 511 (1994) (stating rule); *Sprewell v. Golden State Warriors*, 266 F.3d 979,
23 992 (9th Cir. 2001) (same); *Sebastian Int'l, Inc. v. Russolillo*, 162 F. Supp. 2d 1198, 1207-08

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25
26 ³ Canal+ possesses substantial additional detail regarding the potential relationships with
27 which NDS interfered and the manner in which NDS accomplished that interference. Thus, if
28 the Court believes additional detail is necessary, Canal+ respectfully requests leave to amend to
supply that detail.

1 (C.D. Cal. 2001); (same); *Migliori v. Boeing North Am., Inc.*, 97 F. Supp. 2d 1001, 1012-13
2 (C.D. Cal. 2000) (same).

3 Here, the underlying wrongs are the unfair competition and tortious interference claims
4 that Canal+ has properly pled. Such claims fully support the civil conspiracy cause of action.

5 **F. Canal+'s Copyright Infringement Claims are Properly Pled.**

6 NDS raises three objections to Canal+'s direct and contributory copyright claims. First,
7 NDS attacks the standing of two of the plaintiffs to bring a copyright claim. Second, NDS
8 argues that the direct infringement claim is time barred. Third, with respect to the contributory
9 infringement count, NDS contends that there was no direct infringement in the United States
10 upon which a derivative contributory infringement claim could be based. Each of these
11 arguments lacks merit.

12 **1. The complaint properly alleges ownership of the copyrighted work.**

13 NDS asserts that both copyright claims fail to state a claim for copyright infringement
14 because two of the plaintiffs in the litigation are not alleged to own the copyrighted work. It is
15 true that ownership of an exclusive interest in copyright is a prerequisite to a claim for
16 infringement of that copyright. *See* 17 U.S.C. § 501(b). Here, the Complaint properly alleges
17 that at least one of the plaintiffs, Canal+ Technologies, is the owner of the copyright to the
18 Mediaguard UserROM software code improperly copied and distributed by NDS. *See*
19 Complaint ¶ 45. NDS does not take issue with Canal+ Technologies' ownership.

20 As there is no dispute that at least one plaintiff has standing to sue for infringement, the
21 presence of Groupe Canal+ and Canal+ Technologies, Inc. in the lawsuit is irrelevant. *See CBS*
22 *Inc. v. Primetime 24 Joint Venture*, 76 F. Supp. 2d 1333, 1337 (S.D. Fla. 1998) (“[A]s the Court
23 has found that CBS has standing to obtain the same injunctive and declaratory relief sought by
24 Affiliates, there is no need to analyze Affiliates’ standing.”); *Watt v. Energy Action Educ.*
25 *Found.*, 454 U.S. 151, 160 (1981) (applying general rule that standing of one plaintiff suffices;
26 “Because we find California has standing, we do not consider the standing of the other
27 plaintiffs.”). There is no basis to dismiss the copyright claims because at least one of the
28 plaintiffs undisputedly has standing to them.

1 **2. The statute of limitations does not impact Canal+'s copyright claims.**

2 NDS next argues that the direct infringement claim should be dismissed in its entirety as
3 time barred under the Copyright Act's three year statute of limitations. *See* MTD at 10-11. That
4 argument fails for several reasons.

5 Section 507(b) of the Copyright Act bars infringement claims that "accrue" more than
6 three years before a complaint is filed. *See* 17 U.S.C. § 507(b). Here, the Complaint was filed
7 on March 12, 2002. Accordingly, to withstand a motion to dismiss, Canal+ must merely allege a
8 claim for infringement that accrued after March 12, 1999.

9 An infringement claim accrues when a plaintiff has knowledge of an infringement, or is
10 chargeable with such knowledge. *See Roley v. New World Pictures*, 19 F.3d 479, 481 (9th Cir.
11 1994). Canal+'s infringement claim did not accrue until, at the very earliest, March 26, 1999,
12 the date on which the copying of Canal+'s code was publicly revealed. *See* Complaint, ¶¶ 4, 21,
13 25 (alleging Canal+ began investigating after discovery of copying with first publication on
14 March 26, 1999). Given NDS's cloak and dagger secrecy, *see* Complaint ¶ 5, Canal+ could not
15 possibly have known about the copying of its code before the publication on March 26, 1999.
16 Because this date of accrual is less than three years prior to the filing of the Complaint, Canal+
17 has satisfied the applicable statute of limitations. *See Roley*, 19 F.3d at 481.

18 In addition, to prevail on a motion to dismiss based on the statute of limitations, a party
19 must show that the running of the statute is apparent from the face of the complaint. *See Jablon*
20 *v. Dean Witter & Co*, 614 F.2d 677, 682 (9th Cir. 1980). Here, NDS has alleged multiple
21 instances of infringement by NDS in the United States. *See* Complaint ¶¶ 25, 48. The complaint
22 does not specify the date of each act of infringement. More importantly, the complaint does not
23 identify any specific act of infringement as having taken place prior to March 12, 1999. Because
24 no statute of limitations defense is apparent from the complaint, the infringement allegations
25 cannot be dismissed. *See id.*; *see also Aalmuhammed v. Lee*, 202 F.3d 1227, 1238 (9th Cir.
26 2000) (reversing dismissal of copyright claim where "allegations leave room for proof" that
27 conduct is actionable).

1 Finally, the complaint specifies at least one instance of illicit copying – on March 26,
2 1999 – that undisputedly occurred within the three-year time frame. *See* Complaint ¶ 25 (“On
3 March 26, 1999, DR7 published C+ Technologies’ code on its website.”) NDS contends that
4 this particular infringement is not actionable because it is not alleged to have occurred within the
5 United States. *See* MTD at 11. But Canal+ need not plead specific facts to overcome a claim of
6 extraterritoriality that NDS has not yet asserted. Where the facts pled allow for the possibility
7 that the act of infringement occurred within the United States, the allegations are sufficient to
8 withstand a motion to dismiss. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Lee*, 202 F.3d
9 at 1238.

10 The decision in *Aalmuhammed v. Lee*, in which the Ninth Circuit reversed the dismissal
11 of a copyright claim, involved nearly identical facts:

12 The complaint does not say whether the Largo defendants’ conduct occurred
13 outside the United States. . . . These allegations leave room for proof that the
14 conduct that the Largo defendants engaged in took place within California, even
15 though it had consequences abroad. We cannot tell from the complaint whether
foreign distributors do their work in foreign countries or do it by fax, phone, and
email from California. We therefore reverse the dismissal based on
extraterritoriality of the claims against the Largo defendants.

16 *Lee*, 202 F.3d at 1238. The same result must obtain here. While NDS states that the alleged
17 infringement on March 26, 1999 took place outside of the United States, the complaint does not.
18 For this reason as well, Canal+’s infringement allegations are not time barred.

19 **3. Canal+’s contributory copyright infringement claim is properly pled.**

20 Canal+ has asserted copyright claims against NDS not only for NDS’s own acts of
21 infringement, but also for NDS’s contribution to infringement by others. According to NDS, this
22 contributory infringement claim should be dismissed because it lacks allegations that the
23 underlying infringement by third parties is actionable. *See* MTD at 11-12. NDS asserts that the
24 underlying direct infringement occurred outside of the United States, and is therefore not
25 actionable under United States copyright laws. But again, NDS is improperly looking beyond
26 the complaint in making that assertion. *See Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

27 The allegations in Canal+’s contributory copyright infringement claim do not specify the
28 location of the third party acts of direct infringement to which NDS contributed. *See* Complaint

1 ¶¶ 54-57. While certain acts may well have taken place outside the United States, this hardly
2 precludes proof of actionable direct infringements inside the United States. *See Conley*, 355 U.S.
3 at 45-46 (motion to dismiss must be denied “unless it appears beyond doubt that the plaintiff[s]
4 can prove no set of facts in support of [their] claims which would entitle [them] to relief.”). The
5 allegations in Canal+’s complaint in no way foreclose the possibility that NDS contributed to
6 acts of direct copyright infringement occurring the United States. Indeed, in asserting its claim
7 for contributory copyright infringement, Canal+ has implicitly alleged that the underlying
8 infringements were actionable.

9 As with the direct infringement claim, the Ninth Circuit’s *Lee* decision is dispositive:
10 “[Plaintiffs’] allegations leave room for proof that the conduct that the [defendants] engaged in
11 took place within [the United States], even though it had consequences abroad.” *See Lee*, 202
12 F.3d at 1238. Since Canal+’s allegations leave room for precisely the same proof, NDS’s motion
13 to dismiss the contributory infringement count must be denied. *See also Conley*, 355 U.S. at 45-
14 46.

15 **G. Canal+’s DMCA Claim is Properly Pled.**

16 NDS next challenges Canal+’s allegation that it violated the anti-circumvention
17 provisions of the Digital Millennium Copyright Act (“DMCA”). The DMCA prohibits the
18 production or trafficking in circumvention technology, which is “any technology, product,
19 service, device, component, or part thereof,” (A) whose primary purpose is circumvention; (B)
20 that has only limited other commercially significant purposes; or, (C) that is marketed for
21 circumvention. *See* 17 U.S.C. § 1201(a)(2)(A)-(C). Canal+’s DMCA claim is properly pled
22 because Canal+ alleged that NDS produced, distributed and trafficked in the file
23 “SECAROM.ZIP” and Canal+ alleged that SECAROM.ZIP is a circumvention technology.

24 Specifically, Canal+ alleged that NDS “created a digital archive file called
25 ‘SECAROM.ZIP’” and “transmitted the SECAROM.ZIP file to NDS Americas, Inc. in
26 California with instructions that it be published on the Internet.” Complaint ¶¶ 23-25; *see also*
27 *id.* ¶ 61. Canal+ alleged that SECAROM.ZIP is “a technology, or part thereof” that “was
28 designed and produced for the primary purpose of defeating the MediaGuard smart card’s access

1 control of copyrighted works, including digital television content.” *See id.* ¶¶ 61-62; *see also id.*
2 ¶¶ 24-25. These allegations establish the sufficiency of Canal+’s DMCA Claim.

3 NDS responds by claiming that the code it distributed is “a technological protection
4 measure, not a circumvention technology.” *See* MTD at 14. As a preliminary matter, this is a
5 factual allegation beyond the Complaint and is, in fact, contradicted by the Complaint. As such,
6 it must be disregarded for the purposes of this motion. *See Pareto*, 139 F.3d at 699. However,
7 should the Court wish to reach the substance of NDS’s argument, it will find it without merit.

8 There is no dispute that some code found in SECAROM.ZIP is also found on Canal+’s
9 smart cards. *See* MTD at 14; Complaint ¶¶ 24-25, 48. It is also undisputed that Canal+ created
10 its smart cards with that code to protect digital television signals from unauthorized access. *See*
11 MTD at 14; Complaint ¶¶ 17-18, 60. Undoubtedly, the smart cards Canal+ created were a
12 technological protection measure. With equal certainty, because SECAROM.ZIP was created by
13 NDS with circumvention as its purpose, it is a circumvention technology, not a protection
14 measure. *See* 17 U.S.C. § 1201(a)(2)(A) (prohibition applies to “*any technology ... primarily*
15 *designed or produced for the purpose of circumventing a technological measure that effectively*
16 *controls access to a work protected under [copyright].” (emphasis added).*

17 SECAROM.ZIP is a digital archive file for personal computers that exists independent of
18 any Canal+ smart card. It is not found in any Canal+ technological protection measure or used
19 as part of any technological protection measure. According to Canal+’s complaint, it is a file
20 that NDS created and produced for the circumvention purposes expressly prohibited by the
21 DMCA. *See* Complaint ¶¶ 23-25, 61.

22 In essence, NDS produced a new and unauthorized blueprint of Canal+’s safe and
23 distributed that blueprint (along with other materials) to a website catering to safe crackers. NDS
24 argues that because its illicit blueprint is a facsimile of the one used to make the safe, it was
25 made for the same purpose: protecting property. But there, as here, the unauthorized copy was
26 not made to protect property. It was made to facilitate the theft of property. It is this illicit
27 purpose that renders SECAROM.ZIP an impermissible circumvention technology. *See* 17
28 U.S.C. § 1201(a)(2)(A); *see also Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 444 n. 15

1 (2d Cir. 2001) (highlighting the question of what DeCSS was “primarily designed ... for the
2 purpose of” and affirming the injunction in *Universal City Studios, Inc. v. Reimerdes*, 111 F.
3 Supp. 2d 294, 318 (S.D.N.Y. 2000) (“the only remaining question under Section 1201(a)(2)(A)
4 is whether the DeCSS was designed primarily to circumvent”); *Sony Computer Entm’t. Am., Inc.*
5 *v. Gamemasters*, 87 F.Supp. 2d 976, 987 (N.D. Cal. 1999) (technology’s “primary function” is
6 circumvention); *Realnetworks, Inc. v. Streambox, Inc.*, 2000 WL 127311, *8 (W.D. Wash. 2000)
7 (at least part of technology “is primarily, if not exclusively, designed to circumvent”).

8 The DMCA does not exempt circumvention technologies that contain code also found in
9 technological protection measures. Nor is an exception to be found in the nascent DMCA
10 jurisprudence. Indeed, in *Reimerdes*, the court suggested that publishing details of a
11 technological protection measure is exactly the kind of circumvention-purposed activity the
12 DMCA was enacted to prohibit. *See Reimerdes*, 111 F. Supp. 2d at 315. That court stated:

13 [Publication of the circumvention device] is analogous to the publication of a bank
14 vault combination in a national newspaper. Even if no-one uses the combination to
15 open the vault, its mere publication has the effect of defeating the bank’s security
16 system, forcing the bank to reprogram the lock.

16 *See Id.*⁴

17 NDS created and produced SECAROM.ZIP for the prohibited purpose of defeating
18 Canal+’s security system. NDS’s distribution of SECAROM.ZIP has had its intended effect as
19 Canal+ has been forced to abandon its conditional access system and “reprogram the lock.” *See*
20 *Complaint* ¶ 28. Accordingly, nothing in the pleadings, the DMCA, or the case law supports
21 NDS’s request to dismiss Canal+’s DMCA claim.

22 23 **H. Canal+ Has Properly Stated its RICO Claims.**

24 NDS raises five challenges to Canal+’s RICO allegations. Each is incorrect:

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26 ⁴ In both *Universal City Studios, Inc. v. Corley* and *RealNetworks, Inc. v. Streambox, Inc.*,
27 the technology found to be a circumvention device contained part of the circumvented
28 technological protection measure. The DeCSS program at issue in *Corley* and *Reimerdes*
contained a licensed DVD decryption key reverse engineered from the Xing DVD Player. The
StreamBox VCR program of *RealNetworks* performed the RealPlayer secret handshake.

1 **1. Canal+ has alleged a concrete injury to business and property.**

2 NDS first argues that Canal+ has not alleged a concrete injury to business or property as a
3 result of NDS's racketeering activities, as the case law requires. MTD at 18 (citing *Sedima*,
4 *S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) and *Steele v. Hospital Corp.*, 36 F.3d 69, 70 (9th
5 Cir. 1994)). But Canal+'s damages allegations meet the pleading requirements. In its complaint,
6 Canal+ detailed the out of pocket loss it suffered from NDS's acts:

7 C+ Technologies has spent substantial time and money developing
8 countermeasures to combat each type of pirate smart card that resulted from the
9 publication caused by NDS. [...] At enormous expense, C+ Technologies is
10 currently developing a new smart card design and will soon transition its existing
11 network to the new design. This transition will be time consuming and expensive
12 because each and every legitimate smart card will have to be exchanged.

13 *See* Complaint ¶ 28. This detailed allegation of loss from NDS's sabotage contradicts NDS's
14 claim that "Canal+ has not alleged either payment or loss of money by reason of NDS's alleged
15 conduct." *See* MTD at 18. NDS's argument should be rejected for this reason alone.

16 In addition, NDS is wrong when it argues that ordinary compensatory damages are not
17 cognizable as RICO damages. As the cases NDS cites make clear, damages limitations imposed
18 by RICO are designed to cut off vaguely pleaded allegations, attenuated and speculative harms,
19 and non-business personal injuries. *See, e.g., Steele*, 36 F.3d at 70-71 (plaintiffs alleged only a
20 "speculative" injury). By contrast, plaintiffs state RICO claims by alleging damages to business
21 or property that arise directly from specific racketeering activities, including damages from acts
22 similar to those alleged in this case. *See, e.g., Sebastian Int'l, Inc. v. Russolillo*, 186 F. Supp. 2d
23 1055, 1068 (C.D. Cal. 2000) (where defendants distributed counterfeit products, plaintiff stated
24 RICO claim for resulting lost sales and increased costs); *Perfect 10, Inc. v. Cybernet Ventures,*
25 *Inc.*, 167 F. Supp. 2d 1114, 1127 (C.D. Cal. 2001) (first and third party copyright violations
26 sufficient to state RICO injury claim); *Planned Parenthood, Inc. v. American Coalition of Life*
27 *Activists*, 945 F. Supp. 1355, 1381 (D. Or. 1996) (allegation that defendants disrupted relations
28 with actual and future customers through several specific acts stated a RICO claim); *General*
Motors Corp. v. Lopez de Arriortua, 948 F. Supp. 670, 680-81 (E.D. Mich. 1996) (lost profits
flowing from intellectual property violation – here, trade secrets theft – stated RICO claim; "lost

1 profits are recoverable under RICO.”); *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256,
2 262, 265 (2nd Cir. 1995) (affirming RICO damages for lost profits and damage to goodwill
3 where enterprise made knowingly false statements about quality of competitor’s product to third
4 party purchasers).

5 Canal+ has alleged that NDS’s racketeering activities directly harmed its business by
6 destroying the value of its smart card and costing Canal+ pay per view subscriptions, sales
7 opportunities, and customers. *See* Complaint ¶¶ 28-33. These are cognizable RICO damages.

8 **2. Canal+ has alleged an investment injury under Section 1962(a).**

9 NDS’s second argument is that Canal+ has failed to state a claim under section 1962(a), a
10 RICO subsection that allows a plaintiff to recover for a distinct injury flowing from the
11 defendant’s investment of racketeering income.

12 NDS relies upon the general rule that such claims cannot rest on the mere allegation that
13 a defendant has invested its ill-gotten gains and continued committing RICO predicate acts under
14 section 1962(c) against the plaintiff. *See* MTD at 19-20 (citing *Nugget Hydroelectric, L.P. v.*
15 *PG&E*, 981 F.2d 429, 437 (9th Cir. 1992) and *Blue Cross & Blue Shield v. Philip Morris, Inc.*,
16 113 F. Supp. 2d 345, 383-84 (E.D.N.Y. 2000)). But NDS overlooks Canal+’s allegation of
17 distinct injury above and beyond the harm from NDS’s initial predicate acts – the dissemination
18 of the SECAROM.ZIP file. As Canal+ alleged in its section 1962(a) claim, NDS took advantage
19 of the economic benefit it gained from its initial RICO offenses to disrupt Canal+’s business with
20 third parties. *See* Complaint ¶ 87 (“Defendants have received income derived, directly or
21 indirectly, from the pattern of racketeering activity herein alleged, by creating for NDS an unfair
22 competitive advantage, leading to purchases from NDS that would not otherwise have been
23 made.”).

24 The courts are divided on the question whether a generalized assertion that a defendant’s
25 investment of racketeering income allowed it to better compete for sales opportunities – thus
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1 causing the plaintiff lost sales – states a section 1962(a) claim.⁵ But the Court need resolve this
2 conflict. Canal+'s allegation of distinct injury focuses on NDS's deliberate acts after it
3 committed the section 1962(c) predicate acts. It is not merely directed to a general competitive
4 advantage NDS gained from its initial offenses.

5 The one case that has closely analyzed the interplay between claims under sections
6 1962(a) and 1962(c) supports Canal+. In *In re American Honda Motor Co., Inc. Dealerships*
7 *Relations Litigation*, 941 F. Supp. 528, 549 (D. Maryland 1996), the plaintiffs alleged that
8 defendant auto dealers had engaged in racketeering acts of bribery to obtain additional
9 dealerships under section 1962(c). On top of that, they alleged that the defendants used income
10 from these new dealerships to better compete against the plaintiffs in a specific manner: through
11 the new dealerships, the defendants were able to divert more cars and thus compete unfairly
12 against the plaintiffs. *See id.* The court noted that the plaintiffs had done more than simply
13 allege that “but for” the use of racketeering income, more harm had occurred – they had alleged
14 a new and distinct wrong. In a detailed analysis of the two statutes, the court held that RICO
15 plaintiffs are not forced to choose between section 1962(a) and section 1962(c). Rather, they
16 need only allege that the investment of illicit income “played a causative role” in the distinct
17 injury. *See id.* at 549-50.

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20 ⁵ Compare *Perfect 10*, 167 F. Supp. 2d at 1127-28 (giving plaintiff chance to amend to claim
21 that investment from underlying copyright violations allowed defendant to “finance expansion or
22 competition against Perfect 10, expand its customer base” or other competitive injuries);
23 *Schwartz v. Upper Deck Co.*, 956 F. Supp. 1552, 1559 (S.D. Cal. 1997) *vacated on other ground*,
24 104 F. Supp. 2d 1228 (S.D. Cal. 2000) (noting that an investment injury could be “competitive
25 injury”); *System Mgmt, Inc. v. Loiselle*, 91 F. Supp. 2d 401, 415 (D. Mass. 2000) (permitting
26 claim that extra profits from racketeering income put defendant in a “more competitive bidding
27 situation” against competitor on bids); *Marlee Elec. Corp. v. Eclectic Tech. Corp.*, 1993 WL
28 30081, *12 (E.D. Pa. 1993) (1962(a) claim was that racketeering acts of stealing proprietary
technology permitted defendant to compete directly against plaintiff) *with Dow Chem. Corp. v.*
Exxon Corp., 30 F. Supp. 2d 673, 697-98 (D. Del. 1998) (general claim that investment of funds
from predicate acts of wrongfully procuring patent rights caused lost sales to plaintiff did not
state a section 1962(a) claim); *Eli Lilly & Co. v. Roussel Corp.*, 23 F. Supp. 2d 460, 487 (D.N.J.
1998) (same for general claim that racketeering income caused lost sales to plaintiff); *Lightning*
Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1188 (3rd Cir. 1993) (same for general claim that income
from stolen trade secrets hurt plaintiff's sales).

1 Canal+ has not merely claimed that NDS's sabotage put it in a better competitive position
2 costing Canal+ sales and profits (although that allegation is a valid section 1962(c) claim, and
3 although many courts would accept it as a section 1962(a) claim). Rather, Canal+ alleges that
4 NDS played upon the benefit it gained from its initial racketeering acts by making misstatements
5 to potential customers in a further attempt to disrupt Canal+'s business. These subsequent acts
6 are distinct from the initial cracking and distribution of Canal+'s code. Canal+ has therefore
7 stated a section 1962(a) claim.

8 **3. Canal+ has alleged a RICO enterprise.**

9 NDS next argues that Canal+ does not allege a RICO enterprise because it does not
10 properly state that the enterprise has existence and structure apart from the racketeering activity.
11 See MTD at 20-21. The enterprise Canal+ has alleged is an association in fact between the two
12 NDS corporate defendants and Al Menard of DR7.com. See Complaint ¶ 88. A RICO enterprise
13 includes "any union or group of individuals associated in fact." See *United States v. Turkette*,
14 452 U.S. 576, 581-82 (1981) (stating rule).

15 A corporation's involvement in the RICO enterprise satisfies the requirement that the
16 enterprise have an existence and structure separate from the pattern of racketeering activity. See
17 *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 786 (9th Cir. 1996) ("The participation of a
18 corporation in a racketeering scheme is sufficient, of itself, to give the enterprise a structure
19 separate from the racketeering activity."); *Chang v. Chen*, 80 F.3d 1293, 1300-01 (9th Cir. 1996)
20 (noting that "the involvement of a corporation . . . can satisfy the enterprise element's
21 requirement of a separate structure" but finding that plaintiffs failed to allege that the corporation
22 participated in the racketeering acts); *Sebastian Int'l v. Russolito*, 186 F. Supp. 2d 1055, 1067
23 (C.D. Cal. 2000) (applying rule); *Pharmacare v. Caremark*, 965 F. Supp. 1411, 1423 (D. Haw.
24 1996) (citing *Chang* and *Webster* for rule that the enterprise must have a separate existence
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1 beyond the racketeering acts and decision-making structure, and holding that “this requirement
2 may be fulfilled by the simple inclusion of a corporation as a participant in the enterprise.”⁶

3 NDS confuses the rule that a corporation can provide the structure of an enterprise with
4 the pleading requirement that a plaintiff actually allege that a corporation in fact provided such
5 structure. It cites two cases where the plaintiff failed to properly allege what the distinct
6 decision-making structure or system of authority was, and instead generally claimed that a
7 hodgepodge of corporations had together been a RICO enterprise. *See Simon v. Value*
8 *Behavioral Health, Inc.*, 208 F.3d 1073, 1080, 1083-84 (9th Cir. 2000) (plaintiff made overbroad
9 claim that hundreds of companies were an enterprise, but failed to allege the “system of authority
10 that guided the operation of the enterprise”); *Rotec Indus., Inc. v. Mitsubishi Corp.*, 163 F. Supp.
11 1268, 1280 (D. Or. 2001) (plaintiff alleged that four corporate entities “and possibly others”
12 were among enterprise members, but failed to specify “the decision-making structure of the
13 enterprise.”)⁷

14 Here, by contrast, Canal+ has specifically alleged that NDS Group PLC provided the
15 structure of the enterprise. *See* Complaint ¶ 88 (“[The] enterprise was organized, supervised, and
16 directed by NDS.”). This is all that is required at the pleading stage. *See Perfect 10*, 167 F.
17 Supp. 2d at 1126 (denying motion to dismiss where corporate defendant’s “supervisory role”
18 over and partnership with website operators met the structure requirement); *Sebastian*, 186 F.
19 Supp. 2d at 1067.

23 ⁶ *Chang* was the first Ninth Circuit case to require that an enterprise have an existence and
24 structure distinct from the pattern of racketeering acts. Both before and after *Chang*, however,
25 courts have consistently held that the participation of a corporation in the enterprise provides a
26 structure distinct from the pattern of acts. *See United States v. Blinder*, 10 F.3d 1468, 1473-75
(9th Cir. 1993); *United States v. Feldman*, 853 F.2d 648, 660 (9th Cir. 1988); *United States v.*
Kirk, 844 F.2d 660, 664 (9th Cir. 1988).

27 ⁷ *Rotec’s* discussion of the enterprise requirement appears out of line with the Ninth Circuit
28 rule that the participation of a corporation can provide the structure of the enterprise. To the
extent it is inconsistent with controlling Ninth Circuit authority, it should be disregarded.

1 **4. Canal+ properly alleged the RICO predicate act of wire fraud.**

2 NDS's fourth RICO argument is that Canal+ has not stated a wire fraud claim. NDS
3 contends that (1) a RICO plaintiff cannot allege wire fraud as a substitute for a copyright claim;
4 (2) that a defendant does not engage in wire fraud by intentionally enabling third parties to
5 commit fraud against the plaintiff; and (3) that a RICO plaintiff must allege detrimental reliance
6 on the wire fraud itself. *See* MTD at 21-23. NDS is wrong on each point.

7 First, NDS argues that Canal+ has improperly restated a copyright claim as wire fraud to
8 create a predicate act supporting its RICO claim. But this argument is based entirely on cases
9 decided before Congress added criminal copyright infringement as a RICO predicate act. *See* 18
10 U.S.C. § 1861(1) (criminal copyright violation is a predicate act). Before the statute was
11 amended, courts routinely prohibited a party from transmuting a copyright infringement claim
12 into a predicate act under RICO. Now that copyright infringement is itself a predicate act, there
13 is no longer any reason why wire fraud related to such infringement cannot be part of a RICO
14 claim.

15 Second, NDS argues that Canal+ cannot state a wire fraud claim without alleging that
16 NDS lied directly to Canal+ so that NDS could obtain money or property directly from Canal+.
17 But that is not what the wire fraud statute requires. The statute requires only (a) a scheme or
18 artifice to deceive; (b) use of the wires or causing of the use of the wires in furtherance of the
19 scheme; and (c) intent to defraud or deceive. *See* 18 U.S.C. § 1343 (wire fraud); *Schreiber Dist.*
20 *Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400 (9th Cir. 1986) (describing claim in RICO
21 context); *see also McNally v. United States*, 483 U.S. 350, 351-54 (1987) (mail fraud intent must
22 be to obtain money or property). Accordingly, wire fraud does not require a direct
23 misrepresentation to the plaintiff, or that such misrepresentations be intended to obtain money or
24 property directly from the plaintiff.

25 A defendant can commit wire fraud by enabling third parties to defraud the plaintiff.
26 Indeed, the wire fraud statute has been applied in cases similar to this one in which the defendant
27 enabled third parties to fraudulently obtain the plaintiff's television transmissions. *See United*
28 *States v. Coyle*, 943 F.2d 424, 427 (4th Cir. 1991) (defendant who used the mail to sell third

1 parties devices and instructions for descrambling cable signals was properly convicted of mail
2 fraud even though he did not lie to the cable companies or mail them anything); *United States v.*
3 *Norris*, 833 F. Supp. 1392, 1395 (N.D. Ind. 1993), *aff'd* 34 F.3d 530 (7th Cir. 1994) (on same
4 facts as *Coyle*, court rejected defendant's argument he could not be charged with wire and mail
5 fraud because he had not lied to anyone or mailed anything to cable companies; wire and mail
6 fraud laws are applied broadly against schemes to defraud).⁸

7 Third and finally, NDS is wrong to argue that a RICO plaintiff must allege detrimental
8 reliance on wire fraud. Indeed, "reliance is not a necessary element of the wire fraud offense."
9 *See United States v. Oren*, 893 F.2d 1057, 1063 (9th Cir. 1990); *United States v. Halbert*, 712
10 F.2d 388, 390 (9th Cir. 1983) (same); *United States v. Goldberg*, 455 F.2d 479, 481 (9th Cir.
11 1972) (same); *see also In re Crazy Eddie Sec. Litig.*, 812 F. Supp. 338, 350 (E.D.N.Y. 1993)
12 (same).

13 In making its argument, NDS confuses the rule regarding reliance on wire fraud and the
14 requirement that a plaintiff allege an injury proximately caused by the racketeering activity. *See,*
15 *e.g., Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1117 (9th Cir. 1999) (stating RICO
16 proximate causation rule). NDS cites two cases in which, under their particular facts, the
17 plaintiffs' ability to allege the required RICO injury turned on whether they had relied on the
18 defendants' predicate acts of wire or mail fraud. *See* MTD at 22 (citing *Forsyth v. Humana, Inc.*,
19 114 F.3d 1467, 1481 (9th Cir. 1997) (plaintiffs only alleged wire and mail fraud and thus had to
20 show that such acts proximately caused their injury) and *Aizuss v. Commonwealth Equity Trust*,
21 847 F. Supp. 1482, 1490-91 (E.D. Cal. 1993) (plaintiffs' other predicate acts were dismissed,
22

23 ⁸ To support its argument, NDS offers two cases that have nothing to do with enabling third
24 parties to defraud the plaintiff. NDS claims that these cases held that "RICO protected
25 customers who suffered direct injury, but not competitors who suffered indirect injury caused by
26 mail fraud." *See* MTD at 21. This proposition cannot be derived from these cases, and it is
27 wrong for NDS to make such a misleading statement. In both, the plaintiff alleging wire fraud
28 failed to show elements required by the statute – something not true here. *See Monterey Plaza
Hotel Ltd. Part. v. Local 483 Hotel Emp. Union*, 215 F.3d 923, 926 (9th Cir. 2000) (plaintiff's
allegation that labor union engaged in wire and mail fraud to harm its business goodwill failed
because allegations did not show that union actually sought to obtain the goodwill through
deception); *United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989) (reversing mail fraud
conviction where defendant had not lied to the persons the government claimed he had lied to).

1 leaving only wire and mail frauds, forcing plaintiffs to allege that such acts proximately caused
2 their injury). But these cases do not stand for a general proposition that a RICO plaintiff must
3 allege detrimental reliance on wire fraud. Rather, they apply the basic rule that a plaintiff must
4 allege that the racketeering pattern proximately caused injury. Here, Canal+ met that
5 requirement; it alleged that the RICO enterprise engaged in a pattern of predicate acts, including
6 wire fraud, that destroyed the value of its smart card and thus caused immense damage to its
7 business. Thus, as with NDS's other wire fraud arguments, this contention is without merit.

8 **5. Canal+ has alleged a RICO conspiracy.**

9 In its final argument, NDS contends that because Canal+ has failed to state a claim under
10 sections 1962(a) and (c), it has also failed to state a RICO conspiracy claim under section
11 1962(d). Because Canal+ has successfully stated each of the underlying claims, it has also stated
12 its RICO conspiracy claim.

13 **III. Conclusion**

14 For the reasons set forth above, Canal+ respectfully requests that the Court deny NDS's
15 motion to dismiss the complaint.

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17 Dated: May 9, 2002

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