

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

|                                       |   |                       |
|---------------------------------------|---|-----------------------|
| Benjamin Edelman,                     | ) |                       |
|                                       | ) |                       |
| Plaintiff,                            | ) | C.A. No. 02-11503-RGS |
|                                       | ) |                       |
| v.                                    | ) |                       |
|                                       | ) |                       |
| N2H2, INC., a Washington corporation, | ) |                       |
|                                       | ) |                       |
| Defendant.                            | ) |                       |

**DEFENDANT N2H2, INC.’S MEMORANDUM OF LAW IN SUPPORT OF  
ITS MOTION TO DISMISS THE COMPLAINT**

**I. INTRODUCTION**

Plaintiff Benjamin Edelman (“Edelman”), without provocation or justification, filed the instant action against Defendant N2H2, Inc. (“N2H2”). That action, styled as a declaratory relief action, must be dismissed because no case or controversy exists. N2H2 has never threatened Edelman with legal action, nor given him any reason to believe such action was imminent. Rather, Edelman is abusing the legal system by merely using this action to attempt to obtain access to N2H2’s proprietary, confidential and trade secret information, which he has no legal right to obtain.

N2H2 is a software company which provides a public service by distributing software products that can be used to shield children from Internet sites that spew forth harmful material such as child pornography and other sexually explicit and often violent material; hate group or racist propaganda; promotional material about tobacco, alcohol, or drugs; graphic depictions of violence; information on satanic or cult groups; gambling casinos; and even recipes for making bombs or other explosives. N2H2’s products, which it developed and continues to improve at considerable expense, transform what would otherwise be a dangerous online environment into a safe forum in which children can enjoy a wealth of educational and

entertaining material while freeing their parents or other adults from having to constantly and continuously monitor their Internet use.<sup>1</sup>

N2H2 protects its innovative software products, and the proprietary, confidential and trade secret information contained in and used by those products, through license restrictions which prohibit the use or disclosure of such information as well as the reverse engineering of N2H2's software. Edelman, a first year law student who has never entered into a license agreement with N2H2, nonetheless seeks an order from this Court prohibiting N2H2 from ever bringing legal action against him pursuant to such a license agreement. Also, although claiming not to have yet done so, Edelman requests that this Court declare that he has a right to misappropriate N2H2's valuable trade secrets, to repeatedly copy and distribute N2H2's copyrighted software and database, and to circumvent the encryption measures N2H2 uses to protect its copyrighted works. Finally, not satisfied with simply seeking such overbroad rulings on unripe and speculative claims, Edelman further seeks on behalf of the American Civil Liberties Union ("ACLU") – which is funding his adventure – an unconstitutional advisory opinion on the merits of the Digital Millennium Copyright Act ("DMCA").

Edelman's claims present a non-justiciable dispute – Edelman has no standing to assert claims based on hypothetical actions not yet undertaken to which no one, including N2H2, has objected. An imminent threat of harm is required for this Court to assert jurisdiction. Edelman instead requests an abstract review of the constitutionality of a statute he has not violated, as well as the merits of a contract he has not signed and legality of other actions he has not yet undertaken – all of which are beyond the powers of this Court. It is impossible to know whether Edelman's ill-defined future activities will, or will not, violate N2H2's standard license, the DMCA, or any other law, or if N2H2 ever will choose to enforce any of those rights against him. This Court should decline to engage in the futile speculation Edelman seeks. Indeed, Edelman's actual agenda is not to adjudicate a dispute between two parties – because none exists

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<sup>1</sup> The Internet increased the danger of pornographic exploitation of children to such an extent that Congress passed legislation requiring internet service providers to report child pornography of which they are aware. *See* 42 U.S.C. § 13032. Such a duty to report criminal activity is non-existent in virtually every other segment of criminal law.

– but rather is an unprovoked attack on the wisdom of legislation, a matter which is best addressed by Congress, not the judiciary. Edelman’s Complaint presents no justiciable case or controversy within the meaning of Article III, Section 2 of the Constitution, and accordingly, it should be dismissed for want of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

## **II. STATEMENT OF FACTS**

### **A. N2H2 And Its Products.**

N2H2 is an Internet access management company based in Seattle, Washington, that provides Internet filtering systems, which can be used to control access to specific Internet websites. N2H2’s software is used by schools, public libraries and families throughout the United States and the world to ensure that children who access the Internet in homes, schools, and libraries are protected from material deemed unsuitable for them. Indeed, the Children’s Internet Protection Act (“CIPA”) requires public libraries that participate in certain federal programs to use such filtering systems as a means of protecting children from the harmful content that is easily accessible over the Internet.<sup>2</sup>

N2H2 has expended enormous efforts and funds developing its innovative and highly effective filtering systems. In contrast to many existing systems, N2H2’s products do not rely on “word blocking” (the blocking of individual sites based on words in the text) or image recognition to filter websites, but rather utilize N2H2’s proprietary, confidential and trade secret database of websites it has determined to contain objectionable materials. N2H2 employs a full-time staff that painstakingly compiles and updates daily this extensive database, which consists of over 4,000,000 individual website addresses (known as URLs) that have been categorized according to the type of offensive matter contained on the website. Each URL in N2H2’s database is placed into one or more of 42 categories of objectionable content, and the end user may block access to any combination of those categories.<sup>3</sup> To further ensure the accuracy of its list, N2H2 also provides a service known as “URL Checker” that allows anyone with Internet

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<sup>2</sup> Edelman’s counsel, the ACLU, sponsored a recent constitutional challenge to CIPA.

<sup>3</sup> The details, descriptions, and criteria of N2H2’s 42 content categories are publicly available on its website at <http://www.n2h2.com/products/categories.php>.

access to view how any URL in N2H2's database has been categorized. Anyone who disagrees with N2H2's categorization of a website can request that N2H2 review that classification and N2H2 reviews every such request within two days of its submission.

N2H2's proprietary database, and the extensive human review effort involved in creating that database, enable a highly-accurate method of filtering Internet content. N2H2's system relies on user-based blocking,<sup>4</sup> a highly effective manner that avoids burdening web site operators with ensuring that people visiting web sites are of the proper age, which would be virtually impossible for them to accomplish.<sup>5</sup> A study of several web filtering systems conducted for the United States Department of Justice by eTesting Labs, a highly respected independent testing lab, found that N2H2's software produced the highest "Correct Blocking Ratio,"<sup>6</sup> and that it had the lowest number of incorrectly blocked sites of all filtering software that was tested. [The full text of the study is available at <http://www.etestinglabs.com/main/reports/usdoj.pdf>.]

#### **B. N2H2 Has Not Threatened Litigation Against Edelman.**

Edelman, who has in the past been paid to examine N2H2's system by parties opposed to Internet filtering, requested that N2H2 disclose to him its full proprietary and confidential database of objectionable websites, which is entitled to both trade secret and

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<sup>4</sup> Filtering of this nature, also known as "server-side filtering," is regarded as the most accurate type of filtering. See Commission on Child Online Protection (COPA) Report to Congress, October 20, 2000, at 19, available at <http://www.copacommission.org/report/COPAreport.pdf> ("Relative to other [non-server-side] technologies, the best of these [server-side] technologies can be highly effective in directly blocking access to global harmful to minors content on the Web and also on newsgroups, email and chat rooms. Server-side filters may be more easily implemented on a wide scale than client-side filters and may be more difficult for children to defeat.").

<sup>5</sup> The Supreme Court foresaw the advantages of using server-side filters instead of requiring web-site operators to restrict access to adults. See *Reno v. ACLU*, 521 U.S. 844, 876-77 (1997) ("[I]t would be prohibitively expensive for noncommercial--as well as some commercial--speakers who have Web sites to verify that their users are adults. These limitations must inevitably curtail a significant amount of adult communication on the Internet. By contrast...currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children will soon be widely available.") (emphasis in original) (internal citations and quotations omitted).

<sup>6</sup> A filtering software's Correct Blocking Ratio ("CBR") provides a measurement of content filtering software's effectiveness at correctly blocking content as currently defined in each product's filter definitions. The CBR is computed as the total number of correctly blocked pages divided by the total number of pages tested. The higher the value of the CBR, the more effective the specific content filtering software is at correctly blocking content.

copyright protection. This request and its subsequent denial is the only direct contact N2H2 has had with Edelman. Although N2H2 would not provide Edelman with its copyrighted and trade secret materials, Edelman does not allege that N2H2 threatened him with legal action, or that he believed any such threat was imminent.

N2H2 declined Edelman's request for three reasons. First, the potential harm to children caused by public release of N2H2's database runs counter to N2H2's goal of helping to make the Internet family-friendly and child-friendly. With N2H2's products, children can enjoy unlimited access to suitable content instead of being subject to a dangerous and sordid virtual world full of pornographic, racist, and drug-promoting websites. Releasing N2H2's database would allow the operators of these sites and their customers to stay one step ahead of efforts to limit their access to adult web-surfers by changing URLs or devising efforts to defeat filtering software.<sup>7</sup> Moreover, N2H2's database is undoubtedly the most comprehensive listing of pornographic and other offensive and illicit material available on the Internet, and if publicly released, has the potential to become a virtual yellow pages for pornographers, hate groups and the like.

Further, N2H2 has obvious business concerns – not to mention potential liability to its shareholders – that prohibit it from engaging in reckless behavior such as the disclosure of proprietary and confidential trade secrets and copyrighted material to Edelman, who has expressed his desire to make this information freely available to anyone throughout the world who has Internet access. Indeed, one expressed purpose of Edelman's action is to make N2H2's proprietary and confidential database available to its competitors. [Compl. at ¶ 45.] N2H2 operates in a highly competitive market in which knowledge of its methods and systems of internal operation would provide its rivals substantial competitive advantages. If N2H2's comprehensive database is released as Edelman plans, N2H2's competitors would achieve an unfair advantage to N2H2's great detriment.

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<sup>7</sup> The link between sexual abuse of children and online pornography, which is present in websites, chat rooms, user groups, electronic bulletin board systems, and newsgroups, is well documented. *See* <http://www.fbi.gov/hq/cid/cac/innocent.htm>.; <http://www.netsmartz.org/PARENTS/home/rskinfo.html>.

N2H2 has spent seven years and millions of dollars developing the database to which Edelman seeks access. That database provides N2H2 with a competitive advantage over other companies that make filtering software because it guarantees a lower percentage of incorrectly blocked websites and a higher percentage of correctly blocked websites. If Edelman is permitted to make that database available to N2H2's competitors, those competitors could use that database to drastically improve the effectiveness of their own filtering systems, destroying N2H2's competitive edge. N2H2's business concerns are well-founded, as the experiences of two makers of filtering software show. First, Net Nanny publicized its similar list, which included only a fraction of the URLs contained in N2H2's database does and was therefore less valuable, and soon went bankrupt. Cyber Patrol's list of URLs was hacked and made public, which led it to seek an acquisition by another filtering company three months later. Continued publication of these types of lists could not only wipe out the companies that compile and maintain them, such as N2H2, but could destroy the entire filtering software industry.

### **III. ARGUMENT**

#### **A. Imminent Harm Is An Absolute Prerequisite To Any Declaratory Relief Action.**

##### **1. A party seeking to invoke federal jurisdiction must have standing.**

The Constitution of the United States limits “[t]he Judicial power” of the federal courts to “Cases” and “Controversies.” U.S. CONST. art. III, § 2. That limitation is based, in part, on the notion that, as Justice Frankfurter observed, “the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity.” *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (plurality opinion). These considerations are of particular importance in cases, such as this one, challenging the constitutionality of an act of Congress. Accordingly, the Supreme Court has fashioned various doctrines to protect against the premature exercise of the federal courts’ counter-majoritarian judicial-review power. *See id.* at 503-04.

Of those constitutional doctrines, one has particular relevance to the present

proceeding: the requirement of standing. Standing is a prerequisite to the existence of federal subject-matter jurisdiction. *E.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III.”); *United States v. AVX Corp.*, 962 F.2d 108, 115 (1st Cir. 1992) (standing requirement embodied in Article III is “fundamental to the ability to maintain a suit”). A party invoking federal jurisdiction must thus allege facts sufficient to establish standing. *Lujan*, 504 U.S. at 560 (The party invoking federal jurisdiction bears the burden of establishing these elements [of standing].”); *Benjamin v. Aroostook Med. Center, Inc.*, 57 F.3d 101, 104 (1st Cir. 1995) (“The burden of alleging facts necessary to establish standing falls upon the party seeking to invoke the jurisdiction of the federal court.”).<sup>8</sup>

“The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.” *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (emphasis added). The “gist of the question of standing” is whether the party seeking relief has “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Baker v. Carr*, 369 U.S. 186, 204 (1962) (emphasis added). In *Lujan*, the Supreme Court established the current framework for evaluating a plaintiff’s standing to bring suit in the federal courts:

[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and

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<sup>8</sup> Edelman’s action for declaratory relief must meet the same demanding “case or controversy” standard as a traditional litigation action. *E.g.*, 28 U.S.C. § 2201(a) (declaratory judgment act grants jurisdiction only “In a case of actual controversy...”); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (declaratory judgment act did not expand limited power of federal courts to entertain litigation outside narrow area to which Constitution and Acts of Congress confine right to litigate in federal courts); *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 534 (1st Cir. 1995) (declaratory judgment act empowers federal courts to grant declaratory relief only “in a case of actual controversy.”). Indeed, alleging facts that meet Article III’s case-or-controversy requirement “is particularly important...where the granting of declaratory relief is discretionary, and, in the First Circuit, should be decided on the side of caution.” *Ernst & Young v. Depositors Econ. Prot. Corp.*, 862 F. Supp. 709, 713 (D.R.I. 1994) (emphasis added) (citing *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488 (1st Cir. 1992) (declaratory judgments should not be granted unless the need is clear, not remote or speculative)).

particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly...trace[able] to the challenged action of the defendant, and not...th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Lujan*, 504 U.S. at 560-61 (internal citations and quotations omitted); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000) (applying *Lujan* formulation); *Libertad v. Welch*, 53 F.3d 428, 436 (1st Cir. 1998) (same). Edelman cannot meet the threshold requirement of demonstrating an imminent injury in fact.<sup>9</sup>

**2. Edelman must demonstrate actual or imminent harm to meet the “injury-in-fact” requirement of standing.**

The injury-in-fact requirement for standing means that “the injury must affect the plaintiff in a personal and individual way.” *Lujan*, 504 U.S. at 560 n.1. With respect to claims in which the harm has not yet occurred but allegedly will occur in the future, like Edelman’s, the Supreme Court emphasized the requirement of imminence. *Id.* at 560-61. The plaintiffs in *Lujan* attempted to support standing by submitting affidavits regarding their intent to engage in activity that would allegedly harm them. The Court rejected the plaintiffs’ arguments because their “profession of an intent...is simply not enough. Such ‘some day’ intentions – without any description of concrete plans, or indeed any specification of *when* the some day will be – do not support a finding of the actual or imminent injury that our cases require.” *Id.* at 564 (emphasis in original) (internal quotations omitted); *see also id.* at 564 n.2 (“It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff’s own

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<sup>9</sup> Edelman also cannot meet the causation requirement of standing. *See Friends of the Earth*, 528 U.S. at 180 (“to satisfy Article III’s standing requirements, a plaintiff must show...the injury is fairly traceable to the challenged action of the defendant...”). Any injury Edelman alleges he will suffer in the future cannot possibly be traced to the actions of N2H2, as it has never suggested it would try to sue Edelman. While Edelman apparently would like an advisory opinion with respect to N2H2 to serve as a *de facto* insurance policy against future disagreements, a private party in a litigation is not an insurance (or assurance) company.

control. In such circumstances, we have insisted that the injury proceed with a high degree of immediacy....”). In a footnote, the Court clarified that by “imminent” it means “‘*certainly* impending.’”<sup>10</sup> *Id.* at 564 n.2 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added in original)); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (“[t]he plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury....”) (emphasis added) (internal quotation omitted).

**B. Edelman Has No Standing To Assert A Declaratory Relief Action Because He Faces No Imminent Harm.**

In his Complaint, Edelman fails to even assert the proper standard for declaratory relief, claiming that he faces a “[r]ealistic” threat of suit, not an “imminent” threat, as required for this Court’s assertion of jurisdiction. [Compl. at 24.] Edelman has further failed to cite any facts that would support a finding that he faces imminent harm. *See e.g., Lujan*, 504 U.S. at 560-61 (harm based on future injury must be imminent to support standing). Rather, Edelman merely cites N2H2’s justifiable use of a license agreement to protect its copyrights, trademarks, and trade secrets, which is standard practice in the software industry, and N2H2’s intervention in a previous case, also for the purpose of protecting its intellectual property. [Compl. at ¶¶ 70-72.] Not only is Edelman not a party to that license agreement, he also was not a party in the previous action.

Edelman does not assert that N2H2 ever threatened to sue him, nor does he assert that N2H2 ever threatened to sue any other individual, group, or corporation for engaging in the acts he purportedly plans to undertake. [*See generally*, Compl.]<sup>11</sup> Accordingly, Edelman has

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<sup>10</sup> Although technically a component of the standing doctrine, the imminence requirement also relates to the ripeness requirement of Article III, which prevents courts from interfering with legislative enactments until it is necessary to do so. “The basic rationale [of the ripeness requirement] is ‘to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements.’” *Stern v. United States District Court*, 214 F.3d 4, 10 (1st Cir. 2000) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). Irrespective of whether they are analyzed under the rubric of standing or ripeness, however, Edelman’s claims relating to his future actions are non-justiciable.

<sup>11</sup> Even if N2H2 had threatened others with litigation for conduct identical to that in which Edelman purportedly plans to engage, such threats would not grant Edelman standing. *See McColleston v. Keene*, 668 F.2d 617, 620 (1st Cir. 1982) (“Even where a plaintiff alleges both that a statute or ordinance covers a plaintiff’s intended conduct and that the prosecuting officials have enforced that law against others and threaten to continue to enforce the law, it does not automatically follow that the plaintiff has stated a case or controversy.”).

failed to allege facts sufficient to demonstrate that he has standing to bring this action and it should be dismissed.

**1. Edelman Does Not Have Standing To Pursue His Breach Of License Claim (First Cause of Action) Because He Has Never Entered Into Any License Agreement With N2H2.**

Edelman’s request for a declaration that he has not breached a nonexistent license agreement is absurd and unnecessary— obviously N2H2 could not possibly seek to have Edelman held liable for breaching an agreement that he has not entered into. *See El Dia, Inc.*, 963 F.2d at 499 (declaratory judgments should not be granted unless the need is clear). Edelman can readily avoid any alleged “risk” of harm (which is by no means imminent) by simply not entering into a license with N2H2. *See Lujan*, 504 U.S. at 564 (refusing to find standing based on alleged future injury, where “acts necessary to make the injury happen are at least partly within the plaintiff’s own control”).

Edelman, however, wants to have his cake and eat it as well. He desires to enter a license agreement with N2H2 in order to gain access to N2H2’s proprietary, confidential and trade secret software and database. Yet he is not willing to abide by the terms of N2H2’s license, which is designed to protect N2H2’s intellectual property disclosed pursuant to that license. He thus requests that this Court grant him permission to enter into that agreement in bad faith (i.e., fully intending to breach it) and to subsequently breach that agreement by copying, misappropriating and distributing N2H2’s protected information, and at the same time to prohibit N2H2 from ever taking any legal action against him. This Court simply does not have the power to issue such an order, and Edelman does not have standing to seek such a request.

Edelman likewise lacks standing to seek review of the provisions of N2H2’s

standard license agreement.<sup>12</sup> Edelman is not a party to that license and thus has “no personal stake” in such review. *See Baker v. Carr*, 369 U.S. at 204 (to have standing, plaintiff must have “a personal stake in the outcome of the controversy”); *Flast v. Cohen*, 392 U.S. at 99 (standing “focuses on the party seeking to get his complaint before a federal court”). Moreover, it would be impossible for the Court to determine whether Edelman’s ill-defined future activities will violate that license or whether N2H2 would sue him for any such breach, let alone whether those activities are some how nonetheless permissible, as Edelman suggests.

**2. Edelman Has No Standing To Pursue His Copyright Infringement (Second, Third and Fourth Causes of Action), Trade Secret (Fifth Cause of Action) Or DMCA (Sixth and Seventh Causes of Action) Claims Because He Has Not Yet Violated Those Laws Nor Has N2H2 Threatened Him With Legal Action Pursuant To Those Laws.**

Edelman has allegedly not yet violated any of the statutes that he requests this Court to declare he is not liable for violating. He has allegedly not yet copied nor distributed N2H2’s copyrighted software and database, misappropriated N2H2’s trade secrets or circumvented the technological measures N2H2 uses to protect its copyrighted works. Nonetheless, Edelman wants to engage in each of those illegal activities, and wants this Court’s blessing to do so.

This Court should not be in the business of issuing advisory opinions on the proposed business or research activities of every litigant that pounds on its door. Futile guesswork of this nature is an unconstitutional exercise that is outside the powers of this Court. Were it not, the federal courts would be flooded with litigants seeking pre-approval of their actions. Whether or not Edelman’s ill-defined future activities violate N2H2’s rights will require

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<sup>12</sup> Edelman’s contention that he is entitled to declaratory relief on his contract claim because federal copyright law preempts portions of N2H2’s license that prohibit reverse engineering is ill-advised, especially in light of the most recent application of First Circuit law to this issue. The Federal Circuit, applying First Circuit law, held that “the Copyright Act does not preempt...contract claims [prohibiting reverse engineering].” *Bowers v. Baystate Tech., Inc.*, 2002 U.S. App. Lexis 17184, \*14 (Fed. Cir. Aug. 20, 2002) (reversing district court holding that Copyright Act preempts reverse engineering provisions in shrink-wrap license agreements and noting that most courts have found that Copyright Act does not preempt contractual constraints on copyrighted articles because copyright affects rights against world while contract affects rights against specific party that freely and deliberately agrees not to engage in specific conduct, such as reverse engineering).

a detailed analysis of the actions actually taken, an analysis that cannot be performed in the abstract as Edelman requests.<sup>13</sup> Any present ruling regarding whether Edelman will or will not violate any of the laws from which he requests declaratory relief would be purely speculative and thus beyond this Court's authority.

Likewise, it is futile to speculate whether N2H2 would sue Edelman until he has actually violated N2H2's intellectual property rights. Despite Edelman's rumblings, N2H2 has not threatened him with legal action. Indeed, Edelman does not allege that he has ever been threatened with enforcement of copyright or trade secret laws, or that enforcement of any of them is imminent. The Supreme Court has repeatedly held that "[a]llegations of possible future injury do not satisfy the requirements of Art. III." *E.g., Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added). Any injury Edelman will allegedly suffer in the future must be "certainly impending" to satisfy the Constitution's injury in fact requirement. *Id.* (emphasis added); *see also Babbitt*, 442 U.S. at 298 (same).

**C. Edelman Does Not Have Standing To Challenge The Constitutionality Of The DMCA "As Applied" Because He Has Not Yet Undertaken Any Actions To Which The DMCA May Be Applied.**

An "as-applied" challenge to the constitutionality of a statute requires that the putative plaintiff face either an application of the statute in question or immediate threats of an application of the statute. The Supreme Court has admonished that "federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Poe v. Ullman*, 367 U.S. at 504. Edelman's efforts to challenge the DMCA in the absence of any threat of enforcement should be unequivocally rejected as an attempt to marginalize Congress's exclusive legislative authority. *See Younger v. Harris*, 401 U.S. 37, 52 (1971) ("The power and

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<sup>13</sup> This point deserves substantial weight because of the nature of the claims Edelman asserts. For example, his copyright claims, especially the defense of fair use, require particularly close factual examination of the nature and quantity of the copying as well as the impact of the copying on the copyrighted work, facts which would be difficult to assess in the abstract. Additionally, the DMCA, which recently went into effect, has not been interpreted by many courts, and therefore is not susceptible to proper rulings absent well-developed facts.

duty of the judiciary to declare laws unconstitutional...broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them.”); *Int’l Longshoremen’s & Warehousemen’s Union, Local 37 v. Boyd*, 347 U.S. 222, 223-24 (1954) (“Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.”); *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89-90 (1947) (“The power of courts, and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of the litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough.”) (emphasis added)

**1. Edelman cannot bring a pre-enforcement, “as-applied” constitutional challenge through a declaratory relief action.**

Permitting Edelman’s action for a declaration that the DMCA is unconstitutional “as-applied” would turn the doctrine of standing on its head because the statute in question has never been applied to him. Indeed, Edelman has allegedly not yet undertaken any activity to which the statute could be applied. There simply is no way that this Court can fairly address whether it would be unconstitutional to apply the statute to Edelman’s ill-defined future actions. *See e.g., Norton v. Ashcroft*, 298 F.3d 547, 555-56 (6th Cir. 2002) (affirming denial of plaintiffs’ claim for declaratory relief because “without a concrete set of facts, [a Court] would be forced to speculate regarding the specific components of a [violation of the statute in question] and the likelihood that [the statute in question] might be applied to them. Under these circumstances, it would be impossible to evaluate plaintiffs’ claim that [the statute in question], as applied to them, violates the First Amendment.”) (emphasis added); *United States v. Gaudreau*, 860 F.2d 357, 360-61 (10th Cir. 1988) (“In a declaratory judgment action no one has been charged so the court cannot evaluate the statute as applied.”) (emphasis added); *cf. Gilbert v. Cambridge*, 932 F.2d 51, 57-63 (1st Cir. 1991) (no case or controversy existed where plaintiff sought relief from ordinance prohibiting conversion of rental housing to condominium but failed to submit permit that would allow such conversion because failure to seek available administrative relief rendered plaintiff’s

claim premature).

**2. N2H2 has not threatened Edelman, therefore his claims request an unconstitutional advisory opinion.**

Edelman alleges that he “fears” liability under the DMCA. [Compl. at ¶¶ 64-67, 69.] But that is all that he alleges – a general “fear” about hypothetical threats that have never been made with respect to alleged research that has not yet been performed and may never be performed.<sup>14</sup> Edelman does not identify any immediate threat of enforcement, and none can reasonably be inferred from the facts he has alleged. By requesting relief before he is even remotely threatened with injury, and without any reference to a concrete conflict between the parties, Edelman is asking this Court to render an impermissible advisory opinion regarding the constitutionality of the DMCA. *See e.g., Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (“a federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them. Its judgments must resolve a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”) (citations and quotations omitted); *United States Nat’l Bank v. Independent Ins. Agents of Am.*, 508 U.S. 439, 446 (1993) (“a federal court [lacks] the power to render advisory opinions.”) (quoting *Preiser v. Newkirk*, 422 U.S. at 401).

**3. This Court should give significant deference to Congress’s assessment of the need for and legality of the DMCA.**

Despite the fact that Edelman has faced no credible threat of enforcement, he asks the Court to eviscerate the DMCA, which Congress enacted in 1998 to combat the rise of digital piracy via the Internet. The ease of distributing pirated copies of copyrighted works over the Internet (such as that Edelman expects this Court to preemptively condone) has rendered traditional tools of copyright enforcement less effective. In enacting the DMCA, Congress determined that the spread of digital piracy threatens not only the rights of copyright holders but

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<sup>14</sup> Of course, if the fear of liability derived from anything other than a specific and immediate threat to sue were sufficient to satisfy the injury-in-fact requirement, then every litigant to come before the Court would have standing.

also the fundamental promise of both the First Amendment and the Internet – that works of music, video, and literature should become more abundant, more readily accessible, and more widely distributed in state-of-the-art digital form. S. Rep. No. 105-190, at 8 (1998). *See also* Report of the House Judiciary Committee, H.R. Rep. No. 105-551, pt. 1, at 10 (1998).

Congress’ efforts to deal with the impact of the Internet on the protection of copyrighted works deserve special deference. As the Supreme Court pronounced:

Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted material. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

*See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984)

Notwithstanding Congress’s reasoned judgment, Edelman would like this Court to declare the DMCA unconstitutional as it applies to his “proposed research.” [Compl. at ¶¶ 82, H.] Edelman and the ACLU may wish to strike down the DMCA, but their concern is political, rather than a legal concern, and consequently can only be pursued in the halls of Congress until they have a real case or controversy to bring before this Court.

**4. The constitutional requirement of standing is not diminished because Edelman’s Complaint asserts a violation of the First Amendment.**

The fact that Edelman is alleging a hypothetical infringement of the First Amendment does not affect this Court’s standing analysis. *See Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) (holding that plaintiff must satisfy the injury-in-fact requirement in order to bring an overbreadth challenge); *Bischoff v. Osceola County*, 222 F.3d 874, 884 (11th Cir. 2000) (“even under the more lenient requirements for standing applicable to First Amendment overbreadth challenges, it still remains the law that plaintiffs must establish that they have suffered some *injury in fact* as a result of the defendant’s actions”) (emphasis in original); *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1112 (9th Cir. 1999) (holding that plaintiff in an overbreadth case must nevertheless satisfy the injury-in-fact requirement); *Nat’l Council for Improved Health v. Shalala*, 122 F.3d 878, 882 (10th Cir. 1997) (“Although the overbreadth doctrine permits a party to challenge a statute or regulation that has not been

unconstitutionally applied to that party, it does not dispense with the requirement that the party itself suffer a justiciable injury”); *Bordell v. General Electric Co.*, 922 F.2d 1057, 1060-61 (2d Cir. 1991) (the “slender [overbreadth] exception to the prudential limits on standing...does not affect the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court’s jurisdiction”).

It is thus clear that, even in a First Amendment-overbreadth case, an injury in fact sufficient for standing “must be concrete and particularized, and actual or imminent, as opposed to conjectural or hypothetical.” *The Pitt News v. Fisher*, 215 F.3d 354, 360 (3d Cir. 2000) (internal footnote omitted). In the instant case, the alleged harm is neither actual nor imminent, and consequently Edelman has no standing to pursue the instant action. *See New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996) (“if no credible threat of prosecution looms, the chill [on plaintiff’s right to free expression] is insufficient to sustain the burden that Article III imposes. A party’s subjective fear that she may be prosecuted for engaging in expressive activity will not be held to constitute an injury for standing purposes unless that fear is objectively reasonable.”) (emphasis added). Indeed, Edelman cannot point to even a remote threat of injury, let alone an imminent one. Having failed to allege any threat of enforcement by N2H2, or any harmful conduct fairly traceable to N2H2, this Court should hold Edelman’s allegations insufficient to confer standing upon him to seek generalized redress for future research he has not commenced and may never commence.

**D. Even If Edelman Has Standing, This Court Should Exercise The Discretion That The Declaratory Judgment Act Grants It And Refuse To Hear The Instant Case.**

Even if the Court were to conclude that it had subject-matter jurisdiction over this case, it still need not exercise that jurisdiction. The Declaratory Judgment Act is discretionary and “has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants. On its face, the statute provides that a court ‘*may* declare the rights and other legal relations of any interested party seeking such declaration.’” *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286-87 (1995) (holding that discretion pursuant to a

request for declaratory relief is greater than discretion otherwise vested in courts) (first emphasis added, second emphasis added in original) (citation omitted); *see also DeNovellis v. Shalala*, 124 F.3d 298, 313-14 (1st Cir. 1997) (affirming dismissal of declaratory judgment action by relying extensively on *Wilton*). The instant case involves a recent act of Congress in the increasingly important and highly technical field of copyright protection in the digital era. Internet filtering, a nascent sector of the software industry, is progressing and improving constantly, and meddling judicial intrusions will undoubtedly delay – or even prohibit – it from reaching its full promise. It is further unnecessary for this Court to declare rights under an unsigned contract. Accordingly, N2H2 respectfully submits that, even if this Court determines that it has jurisdiction, it should exercise its accompanying broad discretion and decline to exercise that jurisdiction in this case.

#### **IV. CONCLUSION**

For the reasons stated herein, Defendant N2H2 respectfully submits that its motion to dismiss the Complaint should be granted.

N2H2, Inc., Defendant

By its attorneys

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