00-9185

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNIVERSAL CITY STUDIOS, INC., *et al.*

Plaintiffs-Appellees

v.

ERIC CORLEY, A/K/A EMMANUEL GOLDSTEIN AND 2600 ENTERPRISES, INC.

Defendants-Appellants

SHAWN C. REIMERDES, ROMAN KAZAN

Defendants

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION FOR RESEARCH LIBRARIES, MUSIC LIBRARY ASSOCIATION, NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, ELECTRONIC PRIVACY INFORMATION CENTER, AND COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION
IN SUPPORT OF APPELLANTS AND REVERSAL OF THE JUDGMENT BELOW

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INTERESTS OF AMICI

Amici submit this brief urging that this Court reverse the decision of the district court and remand the case for additional fact-finding. Amici have obtained the consent of all of the parties.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the U.S. Constitution. The protection of principles of freedom of expression as guaranteed by the First Amendment is an area of special concern to the ACLU. The ACLU has been at the forefront in numerous state and federal cases involving freedom of expression on the Internet.

The American Library Association ("ALA") is a nonprofit educational organization of more than 61,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries. ALA is dedicated to the improvement of library and information services, to the public's right to a free and open information society--intellectual participation--and to the idea of intellectual freedom.

The Association for Research Libraries ("ARL") is a not-for-profit membership organization comprising the leading research libraries in North America. Its mission is to shape and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to and effective use of recorded knowledge in support of teaching, research, scholarship, and community service.

The Music Library Association ("MLA") is the professional organization in the United States devoted to music librarianship and to all aspects of music materials in libraries. Founded in 1931, MLA and its members make significant contributions to librarianship, publishing, standards and scholarship, and the development of new information technologies.

The National Association of Independent Schools ("NAIS") is a voluntary membership organization serving independent day and boarding schools nationwide. Representing over 1,100 independent schools in the United States and 38 other countries, the NAIS have a keen interest in access to information through fair use exceptions, particularly online.

The Electronic Privacy Information Center ("EPIC") is a non-profit, public interest research organization focusing on civil liberties issues in the field of electronic information. EPIC works to protect privacy, the First Amendment, and constitutional values in new communications media through policy research, public education and litigation.

The Computer & Communications Industry Association ("CCIA") is an international, nonprofit association of computer and communications firms. CCIA's members include equipment manufacturers, software developers, and telecommunications and online service providers. CCIA's mission is to promote open, barrier-free competition in the offering of computer and communications products and services worldwide.

INTRODUCTION

If copyright law is to continue to be true to the First Amendment and its constitutional roots,[1] the grant of additional rights to copyright holders should foster rather than stifle creative expression.[2] The Digital Millennium Copyright Act (DMCA) represents an unprecedented expansion of copyright law. To comprehend its scope, and the First Amendment problems it presents, it is helpful to conceptualize copyright protections as consisting of concentric rings of liability to copyright holders.[3] The charts below illustrate this metaphor. At the core is direct liability for copyright infringement.[4] In the next ring are the indirect liability doctrines of contributory infringement and vicarious liability that courts have read into copyright law through case by case adjudications. These first two rings of liability accommodate free speech concerns by recognizing fair use rights. The DMCA adds a third ring of indirect liability for circumventing technical measures used to protect access to copyrighted works ("the anti-circumvention provision"),[5] and a fourth ring for making or trafficking in circumvention technology ("the anti-

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[1] *See generally* Melville B. Nimmer, "Does Copyright Abridge the First Amendment Guaranties of Free Speech and the Press?", 17 U.C.L.A. L. Rev. 1180 (1970); Paul Goldstein, "Copyright and the First Amendment," 70 Colum. L. Rev. 983 (1970).

[2] Yochai Benkler, "Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain," 74 N.Y.U. L. Rev. 354, 386-89 (1999); James Boyle, "A Politics of Intellectual Property: Environmentalism for the Net?," 47 Duke L.J. 87, 89 (1997).

[3] *See* Benkler, *supra* note 2, at 358.

[4] 17 U.S.C. § 106, § 501.

[5] 17 U.S.C. §1201(a)(1)(A) "No person shall circumvent a technological measure that effectively controls access to a work protected under this title."

trafficking provision").[6] In addition to holding that the third and fourth rings of liability do not allow fair use rights, the district court in this case added yet a fifth ring of indirect liability based on mere links to sites containing circumvention technology. As the circles of indirect liability expand outward, the quantum of free speech shrinks – unless the law incorporates limiting principles to preserve a robust domain for free speech interests.[7]

Courts have imposed indirect liability for copyright infringement in situations in which third parties have knowingly and materially participated in illegal behavior. If indirect liability is expanded without regard to (1) whether there were any underlying acts of infringement; (2) whether any relationship exists between the actual infringers and the person the plaintiff seeks to hold indirectly liable; and, most importantly, (3) whether a fair use or other free speech right applies, that expansion presents grave constitutional problems. Yet, in this case, a

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[6] 17 U.S.C. §1201(a)(2). "No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that –

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

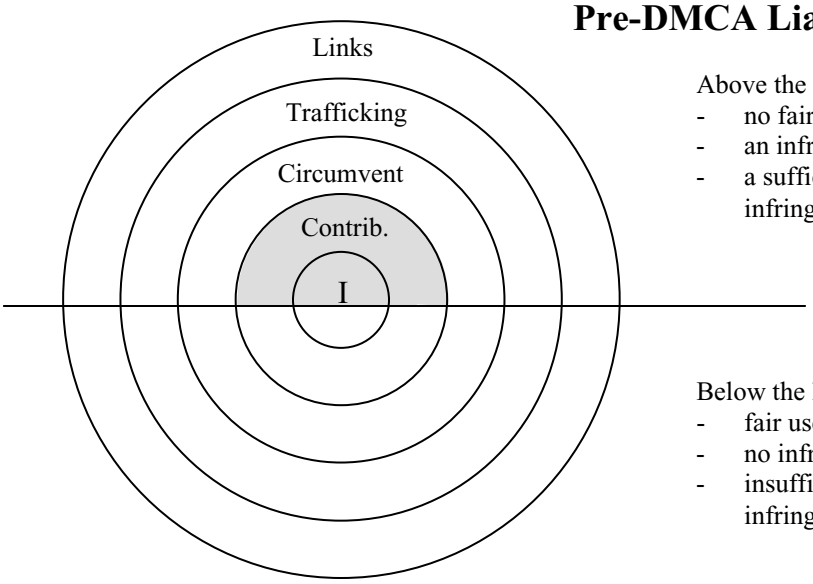
(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

17 U.S.C. § 1201(b)(1) similarly prohibits trafficking in technology "for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title."

journalist was held liable under the DMCA as a trafficker in circumvention technology for posting and linking to a computer program known as DeCSS even though there is no proof that the posting of DeCSS has caused any underlying acts of infringement of DVD movies in which the plaintiffs own copyrights. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000). Nor is there proof that this defendant either substantially contributed to copyright infringement or had any ability to control the acts of any users of DeCSS, as previous indirect liability standards would require. Even more fundamentally, the district court in this case erred by holding that fair use and the First Amendment are irrelevant to a charge under the anti-trafficking provision. *Id*. at 324. As the charts and discussion below illustrate, the district court's expansive interpretation of liability under the DMCA violates the First Amendment.

Pre-DMCA Liability



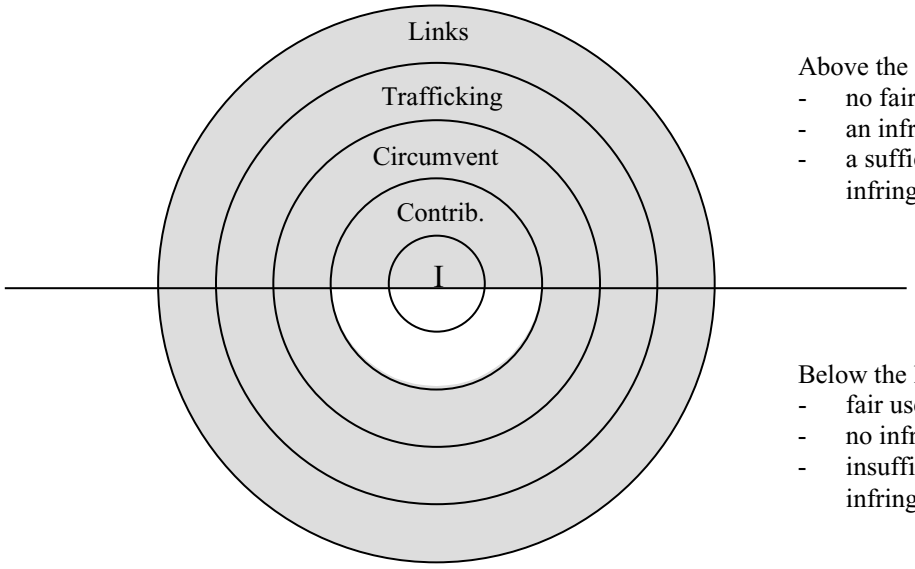
Above the line:
- no fair use;
- an infringing act; and
- a sufficient relationship between infringer and defendant

Below the line: either
- fair use;
- no infringing act; or
- insufficient relationship between infringer and defendant

I = direct infringer
Shading = liability

[7] *See* Benkler, *supra* note 2, at 393 ("An increase in the amount of material one owns decreases the communicative components freely available to all others.").

District Court Interpretation of Liability Under DMCA

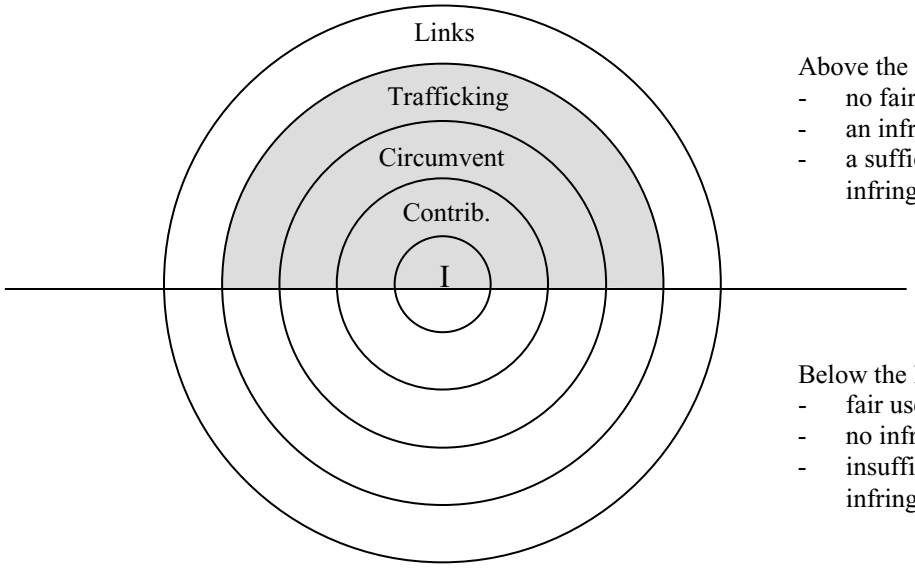


Above the line:
- no fair use;
- an infringing act; and
- a sufficient relationship between infringer and defendant

Below the line: either
- fair use;
- no infringing act; or
- insufficient relationship between infringer and defendant

I = direct infringer
Shading = liability

Constitutional Interpretation of Liability Under DMCA



Above the line:
- no fair use;
- an infringing act; and
- a sufficient relationship between infringer and defendant

Below the line: either
- fair use;
- no infringing act; or
- insufficient relationship between infringer and defendant

ARGUMENT

I. Copyright Law Has Historically Recognized the Need for Careful First Amendment Balancing.

A. The First Amendment Requires That Any Expansion of Liability to Copyright Holders Survive Careful Scrutiny.

The DMCA's anti-circumvention and anti-trafficking provisions punish entirely new categories of noninfringing, protected speech, and create the third and fourth rings of liability outlined above. Congress believed that this expansion of liability was necessary to prevent "massive piracy" that might be facilitated by "the ease with which digital works can be copied and distributed worldwide virtually instantaneously." The Digital Millenium Copyright Act of 1998, Sen. Rep. 105-190, Comm. on the Judiciary, 105th Cong., 2d. Sess., May 11, 1998 (Sen. Judiciary Rep.) at 8. The anti-circumvention provision was intended to "encourage[] technological solutions … by enforcing private parties' use of technological measures with legal sanctions for circumvention …." *Id.* at 11. The provision would "supplement" the copyright law by promoting the use and effectiveness of technological measures. *See id.* at 9. The anti-trafficking provisions would, in turn, "supplement[] the prohibition against the act of circumvention ... with prohibitions on creating and making available certain technologies … developed or advertised to defeat technological protections against unauthorized access to a work." Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, 105th Cong., 2d. Sess., Comm. on the Judiciary, Sept. 1998 (House Manager's Rep.) at 8.

This expansion clearly implicates the First Amendment. The anti-circumvention provision of the DMCA prohibits unauthorized access to all speech protected by access control technology regardless of whether the user has a free speech right to use the speech. The anti-trafficking provision further inhibits access to noninfringing speech by outlawing the technology needed to obtain that speech. And to the extent that the challenged circumvention technology is software, that work is itself speech. *See Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d at 326-27; *see also Junger v. Daley*, 209 F.3d 481, 485 (6th Cir. 2000); *Bernstein v. Dep't of Justice*, 176 F.3d 1132, 1141, *rehearing granted and opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999). A recent incident illustrates the DMCA's very real impact on speech. When the music industry issued a challenge to test the security of a new digital music copyright protection system, Princeton computer science Professor Edward Felten accepted the challenge. *See* Amy Harmon, "Group Says It Beat Music Security But Can't Reveal How," The New York Times, Jan.15, 2001. He succeeded in writing a program that disabled the copyright protection, but was then deterred from publishing his results for fear of liability under the DMCA's anti-trafficking and anti-circumvention rules. *Id*.

Given their direct application to protected speech, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied" to the DMCA provisions. *Reno v. ACLU ("ACLU I")*, 521 U.S. 844, 870 (1997). Even if Congress's asserted interest is compelling, the First Amendment inquiry does not end. To survive constitutional scrutiny, the anti-circumvention and anti-trafficking

provisions of the Constitution must be narrowly tailored to achieve a compelling government interest.[8] *Id.*, at 879; *Sable Comm. v. FCC*, 492 U.S. 115, 126 (1989).

B. The Fair Use Doctrine Has Traditionally Served to Ensure that Copyright Laws Are Narrowly Tailored in Accordance with the First Amendment.

Traditionally, the fair use doctrine has ensured that copyright laws are consistent with the First Amendment. *See Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) (suggesting the constitutional dimension of the fair use doctrine). Making fair use of another author's work is often necessary to engage in critical commentary, news reporting, and other free speech-related activities that serve First Amendment goals. *See, e.g., Campbell v. Acuff-Rose Music, Inc.,* 114 S.Ct. 1164 (1994) (fair use parody as a form of critical commentary); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966) (fair use to reproduce portions of article in critical biography of Howard Hughes); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F. 2d 1148 (9th Cir. 1986) (fair use to reproduce parody of Jerry Falwell in protest mailing about the parody); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) (fair use to parody popular song in humor magazine).

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[8] The district court applied intermediate scrutiny based on the "functional" component of the speech covered by the anti-trafficking provision. Amici agree with appellants that the level of scrutiny applied to protected speech should not, and has never previously been, determined by the functionality of the speech. Amici believe, however, that even under intermediate scrutiny the anti-trafficking provision, as interpreted by the district court, would violate the First Amendment, because of the complete lack of fit between any actual harm and the breadth of the speech restriction.

In addition to its roots in the First Amendment, the Supreme Court has noted that the fair use doctrine is required by the Constitution's copyright clause itself. "[S]ome opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, 'to promote the Progress of Science and useful Arts….'" *Campbell*, 510 U.S. at 575 (citing U.S. Const., Art. I, sec. 8); *see also id*. at 577, quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (fair use "permits [*and requires*] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is intended to foster") (emphasis added).

As the District Court below observed, fair use "has been viewed by the courts as a safety valve that accommodates the exclusive rights conferred by copyright with the freedom of expression guaranteed by the First Amendment." *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 321 (S.D.N.Y. 2000). Various Supreme Court and Court of Appeals' decisions confirm this. *See, e.g., Harper & Row v. Nation Enterprises, Inc.* 471 U.S. 539 (1985); *Nihon Keizai Shimbun v. Comline Business Data*, 166 F.3d 65, 74 (2d Cir. 1999). Without fair use or a similar limiting principle in copyright law, this law would frequently clash with the First Amendment. *See generally* Goldstein, *supra* note 1; Benkler, *supra* note 2.

It has generally been unnecessary for courts to rely explicitly on the constitutional basis for fair use because of its longstanding doctrinal home in American copyright law. *See, e.g.*, *Time, Inc. v. Bernard Geis Assocs*., 293 F.

Supp. 130 (S.D.N.Y. 1968) (fair use to reproduce frames of Zapruder film in order to explain author's theory of Kennedy assassination). When Congress finally codified fair use in the Copyright Act of 1976, it identified several categories of favored uses, i.e., for "criticism, comment, news reporting, teaching…, scholarship, [and] research," all of which are free speech-related uses of copyrighted works. When codifying fair use, Congress made clear that the newly adopted fair use provision was meant "to restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way." *See* H.R. Rep. No. 94-1476, p. 66 (1976); S. Rep. No. 94-473, p. 62 (1975). The legislative history also evidences that Congress did not intend to "freeze" the concept of fair use and expected that courts would continue to evolve fair use principles in the course of common law adjudications, "especially during a period of rapid technological change," as they had done for many decades. *Id*.

As anticipated, courts have frequently invoked fair use to mediate tensions between interests of copyright owners and those of subsequent users of protected works in cases involving new technologies that posed challenging questions for copyright law. *See, e.g., Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (time-shift copying of television programs held fair use); *Sega Enterprises, Ltd. v. Accolade, Inc*., 977 F.2d 1510 (9th Cir. 1992) (fair use to reverse engineer computer program code for legitimate purpose of getting access to information necessary to make a compatible program, furthering constitutional

purposes of copyright); *RIAA v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999) (space-shift copying of music also fair use).

The most prominent role of fair use lies in the central core of the concentric circles of copyright liability set forth above, that is, as a limitation on the exclusive rights of copyright owners when they have claimed direct infringement by a defendant. But fair use also has a crucial role in indirect liability cases. One proper defense in a case involving claims of contributory infringement or vicarious liability is that the underlying acts which the defendant facilitated or could have controlled are, in fact, fair uses. *See, e.g., Lewis Galoob Toys, Inc. v. Nintendo of Am.*, Inc., 964 F.2d 965 (9th Cir. 1992), *cert. denied*, 507 U.S. 985 (1993) (ruling, in part, that Galoob was not contributorily liable for copyright infringement because users of Galoob's game genie were fair users). Fair uses are, moreover, among the noninfringing uses of a technology that may be deemed "substantial" so as to limit the power of copyright owners to impose indirect liability on the manufacture and sale of an infringement-enabling technology. *See, e.g., Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417 (1984) (no contributory infringement because of substantial noninfringing uses of Betamax machines). Indeed, free speech concerns are perhaps greater in the indirect liability context because third parties are even more likely to be chilled by the possibility of liability than direct users of copyrighted material.[9]

[9] *See, e.g.*, Alfred C. Yen, "Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment," 88 Geo. L.J. 1833, 1888 (June 2000).

II. As Interpreted by the District Court, the Anti-Circumvention and Anti-Trafficking Provisions of the DMCA Fail the Careful Scrutiny Required of Statutes That Infringe Protected Speech.

A. To Survive Constitutional Scrutiny, the Anti-Circumvention and Anti-Trafficking Provisions Must Accommodate Fair Use and Free Speech Rights.

As explained above, the anti-circumvention and anti-trafficking provisions of the DMCA expand indirect liability to create a new third and fourth ring of persons liable to copyright holders. The provisions give the force of law to encryption technology that prevents unauthorized access to copyrighted works -- regardless of whether a user has a fair use right to access the work. The constitutional interests embodied in fair use, however, do not evaporate merely because a copyright owner uses technological wrappers to protect copies of its works. And just as Congress could not repeal the fair use provision of U.S. copyright law without creating serious conflicts with the First Amendment, it cannot accomplish the same result indirectly by banning all technologies through which fair uses can be made. Thus, as the case law discussed above makes clear, in order to pass constitutional muster, the third and fourth rings of liability created by the DMCA must be narrowly tailored through recognition of a fair use right or similar limiting principle. The district court clearly erred by holding that fair use was irrelevant to liability under the DMCA.

Properly interpreted, Congress left some latitude for fair uses in the third ring of liability it created – the anti-circumvention provision. Section 1201(a)(1)(A) is limited in scope by seven specific limitations that privilege

circumvention of access controls for, among other things, reverse engineering, encryption research, and computer security testing. 17 U.S.C. §§ 1201(f), (g), and (j). The National Academy of Sciences recently concluded that there may be additional legitimate reasons for circumventing technical measures used by copyright owners to protect their works, and that Congress may have intended to allow these fair use circumventions. *See* Committee on Intellectual Property Rights, Computer Science & Telecommunications Board, "The Digital Dilemma: Intellectual Property in the Information Age (2000)," at 174-75; *see also* Pamela Samuelson, "Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised," 14 Berkeley Tech. L.J. 519, 536-57 (1999).

Sections 1201(c)(1) and (c)(4) also provide support for fair use rights to circumvent. Section 1201(c)(1) provides that nothing "shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title." In addition, Section 1201(c)(4) provides that "[n]othing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products." Although the intended scope of these provisions is not entirely clear, amici believe that courts can and should employ these subsections to excuse some acts of circumvention seemingly covered by 1201(a)(1)(A) where necessary to enable fair uses or other free speech-related uses of copyrighted works. *See* Jane C. Ginsburg, "From Having Copies to Experiencing Works, U.S. Intellectual Property: Law and

Policy," Hugh Hansen, ed., (Sweet & Maxwell, forthcoming 2001, available at http://www.ssrn.org), at 15 (suggesting that 1201(c)(1) should be interpreted to allow a fair use right to circumvent). For example, a purchaser of a mass-marketed copy of a DVD movie may need to bypass CSS in order to make fair use of that copy in the course of preparing a critical commentary about it. Even the district court acknowledged that the range of potential fair uses of DVD movies was "remarkably varied," 111 F. Supp. 2d at 338, and opined that technically sophisticated persons would be able to make fair uses of DVD movies, *id*. at 322.

Amici agree that the fourth ring of liability – the anti-trafficking provision – is more difficult to reconcile with constitutionally protected fair use and free speech interests. Only three of the seven specific exceptions to 1201(a)(1)(A) explicitly authorize the making of a tool to accomplish privileged circumventions. If interpreted literally, that means that while users may have a right to circumvent for specific purposes, they will be unable to exercise that right. There will be no tools available to assist them in circumvention because the anti-trafficking provisions make those tools illegal. Congress could not have intended to create four meaningless privileges. In addition, unlike the anti-circumvention provisions, Congress failed to include a rulemaking procedure to ensure that the anti-trafficking provisions do not interfere with fair uses or other noninfringing uses of copyrighted works. *See* § 1201(a)(1)(C). Contrary to the district court's holding, however, amici believe that this Court can read Sections 1201(c)(1) and (c)(4) as

limitations to ensure that the anti-trafficking provisions also comply with the First Amendment.[10]

In this case, reading a fair use principle into the anti-trafficking provision would protect the many legitimate expressive free-speech-related uses of DeCSS. Carnegie Mellon Professor Touretsky posted different modes of expression of DeCSS for educational purposes. Columbia Law School Professor Jane Ginsburg linked to sites where DeCSS was posted in the course of teaching her copyright course. Protesters wore T-shirts bearing portions of the DeCSS source code, and appellant Corley is a journalist who reproduced and linked to DeCSS in his online news coverage.

To apply a fair use or free speech principle to the anti-trafficking provision does not leave copyright holders without a remedy for the manufacture and distribution of technologies that lack legitimate uses. *See*, *e.g.*, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). It merely requires that copyright holders prove that circumvention technology is incapable of substantial noninfringing uses before a court may impose liability for trafficking in it. Courts in past cases have been able to distinguish between genuine and

[10] It may be less clear how a fair use principle works in the context of an anti-trafficking case, where liability is imposed not for "use" but for manufacturing or offering circumvention technology. In the context of liability for trafficking, amici assert that the necessary free speech right must be tied to the potential use of the technology rather than to the behavior of the trafficker. If the technology is capable of substantial noninfringing uses, then the defendant – whether or not she is also a fair user – has a fair use right to manufacture or offer the technology.

pretextual claims of substantial noninfringing uses. *See, e.g.*, *Sega v. MAPHIA*, 948 F. Supp. 923 (C.D. Cal. 1996).

B. To Survive Constitutional Scrutiny, the Anti-Trafficking Provision Must Also Require Proof of Harm and a Direct Relationship Between the Infringer and the Defendant.

To be narrowly tailored, the third and fourth rings of liability imposed by the DMCA -- for circumvention of access controls and trafficking in circumvention technology -- must also include the traditional safeguards recognized by courts before imposing any indirect liability for copyright infringement: 1) proof of infringement, and 2) some direct relationship between the infringer and the defendant. To explain why, we begin with a review of the doctrine of indirect liability for copyright infringement. The federal copyright statute includes no provision providing for liability based on the acts of another. Rather, indirect liability for copyright infringement is a judge-made doctrine. Courts have traditionally recognized two forms, vicarious liability and contributory liability.

Vicarious liability for copyright infringement has its roots in the tort doctrine of *respondeat superior*.[11] If infringement occurred, and a third-party defendant had the right and ability to supervise the infringer and a direct financial interest in the infringement, liability may be imposed. Nimmer on Copyright, Sec. 12.04[A][1] (Matthew Bender 9/97); *see Shapiro, Bernstein & Co. v. H.L. Green Co.,* 316 F.2d 304, 307 (2d Cir. 1964); *Gershwin Publ'g Corp. v. Columbia Artists Management, Inc.,* 443 F.2d 1159, 1162-63 (2d Cir. 1971).

[11] *See* Yen, *supra* note 9, at 1843-44.

The separate but related doctrine of contributory infringement is an outgrowth of enterprise liability. Nimmer on Copyright, Sec. 12.04[A][2]. Under contributory infringement rules, a third party is liable only if 1) an infringement actually occurred; 2) the third party had knowledge of the infringement; 3) the third party "induced, caused or materially contributed" to it; and 4) the defendant "substantially participated in the users' infringement" (which has been interpreted as requiring that the defendant was "acting in concert" with the direct infringers). Nimmer on Copyright, at 12-73; *see Gershwin Publ'g Corp.,* 443 F.2d at 1162; *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.,* 907 F. Supp. 1361, 1371 (N.D. Cal. 1995).

Though the specific tests vary somewhat, both forms of indirect liability require proof of two essential elements (in addition to allowing a fair use defense) before liability may be imposed on a defendant who did not directly infringe a copyright: 1) actual infringement; and 2) a direct relationship between the infringer and the third party. *See DSC Communications v. Pulse Communications*, 170 F.3d 1354, 1359 (Fed. Cir. 1999) ("direct infringement is a necessary predicate for any derivative liability ...; absent direct infringement, there can be no contributory infringement"). Any indirect liability for copyright infringement has the potential to chill protected speech, because third parties are likely to avoid any connection with even potentially infringing material in order to avoid liability.[12] But requiring proof of harm and a direct relationship between the infringer and the third party

[12] *See* Yen, *supra* note 9, at 1843-44.

helps to minimize the unnecessary chilling of speech, and thus ensures that liability is narrowly tailored.

The anti-circumvention and anti-trafficking provisions of the DMCA lack these necessary safeguards for imposing indirect liability. It is a telling fact that appellees were unable to identify a single instance of infringement brought about by DeCSS notwithstanding the presence of hundreds, if not thousands, of copies of this program on publicly accessible websites, even after it was taken down from defendant-appellant Corley's site. Nor did they show that Corley was either supervising actual infringers or acting in concert with them. Especially since trafficking in circumvention technology represents an entirely new category of indirect liability, these additional elements of proof ensure that the provision is narrowly tailored as required by the First Amendment. To impose liability for trafficking on defendant-appellant Corley consistent with the Constitution, then, the Court should remand to the district court for additional fact-finding to determine first whether Corley had a fair use or free speech right to offer DeCSS (as discussed in Section II.A. above). Even if he did not, plaintiffs-appellees must prove that DeCSS was actually used to infringe their copyrights and that defendant-appellant Corley had a direct relationship with the infringers before liability may be imposed.

C. If Section 1201(a)(2) Lacks the Constitutional Safeguards Outlined Above, It Must Be Voided On Its Face.

If this Court finds that the anti-trafficking provision is incapable of the narrowing construction outlined above, it must be voided on its face.[13] *See Virginia v. American Booksellers Assoc.*, 484 U.S. 383, 397 (1988); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). Without free speech safeguards the expansion of indirect liability into a fourth ring of liability for trafficking in circumvention technology unconstitutionally restricts speech that was clearly in the public domain and protected by the First Amendment prior to the DMCA. *See* Benkler, *supra* note 2, at 385-429; *see, e.g.*, David Nimmer, "A Riff on Fair Use,"148 U. Penn. L. Rev. 673, 739 (noting the "conscious contraction of user rights" by Congress). As interpreted by the district court, the anti-trafficking provision operates as an effective ban on a variety of expressive technologies capable of substantial noninfringing uses. Unless narrowly construed, such an effective ban on protected speech violates the First Amendment. *See ACLU I,* 521 U.S. 844 (1997) (striking down the Communications Decency Act because it operated as an effective ban on speech protected for adults). DeCSS is, of course, only one of countless technologies covered by the statute. In addition, the district court's interpretation has had and will continue to have a substantial chilling effect on the development of new technologies capable of important noninfringing uses.[14]

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[13] The district court's rationale for concluding that fair use was irrelevant to liability under the anti-trafficking provision would also preclude a fair use right to circumvent. Since defendant-appellant Corley was sued under the anti-trafficking provision, however, this Court need only consider the constitutionality of that provision.

[14] *See, e.g.*, Julie Cohen, "Unfair Use," The New Republic online, at http://www.tnr.com/online/cohen052300.html; Oscar S. Cisneros, "Fear of a Pay

III. The District Court's Injunction Prohibiting the Use of Links to Web Sites with Circumvention Technology Violates the First Amendment.

A. Linking is Expressive, Communicative Activity Protected By the First Amendment.

The web is analogous to "a vast library including millions of readily available and indexed publications." *ACLU I,* 521 U.S. at 853. The unique quality of this "library" comes from the boundless volumes of information available on the Internet. Never before have individuals so easily been able to "publish" information. *Id*. ("Any person or organization with a computer connected to the Internet can 'publish' information."). Never before has it been so simple to reach "a world-wide audience of millions of readers, viewers, researchers, and buyers." *Id.* The Supreme Court recognized and praised this "vast democratic fora of the Internet." *Id.,* at 868-69.

If the web is a vast library, links serve as both its card catalog and its digital footnotes. Web publishers use links to refer users to related documents. A "link" in a web page allows the user to move from one web site to another that contains the related document by "clicking" on specified text or graphics on the web page using a computer mouse. Rather than requiring a reader to go to a library or bookstore to locate the referenced document, a link allows a web user to click on

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Per Use World," Wired, 10/9/00; Matt Richtel, "Web Music Battle Heats Up," The New York Times, Aug. 22, 2000, at C-6 (reporting declaratory relief action filed to determine lawfulness of Gnutella file-sharing software); Damien Cave, "A Hacker Crackdown?," Salon Magazine, at http://salon.com/tech/feature/2000/08/07/yoink_napster/print.html (Aug 7, 2000) ("There is evidence that the mere threat of legal hassles is convincing some programmers to lay off their grand plans.").

the link to access the related document wherever in the world it is located. Linking effectively ties the entire web together into a single interconnected body of knowledge made up of all the individually published web pages of millions of different users around the world. "The ability to link from one computer to another, from one document to another across the Internet regardless of its status or physical location, is what makes the Web unique." *ACLU v. Reno* ("*ACLU II*"), 31 F. Supp. 2d 473, 483 (E.D.Pa. 1999), *aff'd* 217 F.3d 162 (3d Cir. 2000).

Journalists routinely use links to refer users to information posted on other websites in the course of covering stories on controversial subjects of public importance. Educators also provide links to information posted on other websites for purely pedagogical reasons. Columbia Law Professor Jane Ginsburg and Professor Jessica Litman of Wayne State University Law School have hosted links to many sites, including cites with DeCSS code, in the teaching of their classes.

The uniqueness of links arises not, as the district court suggests, from their "functionality." Links are no more "functional" than footnotes. The reader decides whether to follow the link. The creator of the link has no control over the content on the linked site, or over whether the reader decides to follow the link. Rather, the uniqueness of links arises from the efficiency with which users, *if they choose*, can locate and retrieve related documents. To illustrate the error in the district court's analysis, if an annotated Bible contained footnotes referencing Thomas Aquinas's commentaries and the two books were shelved next to each other at the library, then the ease of following the footnote to the source would lessen the First

Amendment protection of the footnote. The "functionality" of links is irrelevant to the level of First Amendment protection. Thus, links are clearly expression entitled to the highest degree of First Amendment protection.

B. The District Court Erred By Interpreting the Anti-Trafficking Provision To Prohibit Mere Links to Circumvention Technology.

As discussed above, the anti-trafficking provision of the DMCA already reflects a dramatic extension of liability beyond the behavior sought to be prevented: copyright infringement. The court below created an additional fifth ring of indirect liability by imposing liability for linking to circumvention technologies. Section 1201(a)(2) provides that "[n]o person shall … offer to the public, provide, or otherwise traffic in any" circumvention technology. The district court found that this provision "is implicated where one presents, holds out, or makes a circumvention technology or device available, knowing its nature, for the purpose of allowing others to acquire it." 111 F. Supp. 2d at 325. The court further found that maintaining a link to a web page containing the DeCSS code "is the functional equivalent of transferring the DeCSS code to the user…." *Id*. The court then enjoined the defendants not just from directly distributing DeCSS to the public, but also from linking to other sites that did. Because linking to a site containing DeCSS is the "functional equivalent" of directly presenting or making DeCSS available to the user, the court reasoned, linking to a DeCSS site violates the DMCA anti-trafficking provision.

But the "functional equivalent" of something is not the thing itself. The text of the anti-trafficking provision should be interpreted cautiously, with attention to both the words of the text and the evidence of congressional intent, to avoid further encroachment on protected speech. Certainly, the language of the statute does not require the expansive reading that the district court gave to it. Significantly, moreover, the legislative history of Section 1201(a)(2) and (b)(1) contains no hint that Congress intended the provision to extend to links. And Congress had ample opportunity to demonstrate this intent: the Senate Judiciary, House Judiciary, and House Commerce Committees all issued lengthy reports on the DMCA, as did the Conference Committee and Congressman Howard Coble, the Chairman of the House Judiciary Subcommittee on Courts and Intellectual Property and the manager of the DMCA.[15] In none of these detailed documents is there even a suggestion that Section 1201(a)(2)'s trafficking provision should apply to links to circumvention technology.

In sum, there is no evidence that Congress intended to construct a fifth ring of liability for links, nor is there any evidence that a breach of the other four rings is so imminent as to require a further expansion of liability. In the absence of such evidence, there is no compelling justification for the lower court's expansive

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[15] *See* Sen. Judiciary Rep.; House Manager's Rep.; House Judiciary Comm. Rep.: WIPO Copyright Treaties Implementation and On Line Copyright Infringement Liability Limitation, House Rep. 105-551, Pt. 1, Comm. on the Judiciary, 105th Cong., 2d Sess., May 22, 1998; House Commerce Comm. Rep.: Digital Millennium Copyright Act of 1998, House Rep. 105-552, Pt. 2, Comm. on Commerce, 105th Cong., 2d. Sess., July 22, 1998; Digital Millennium Copyright

interpretation of trafficking to include linking to a DeCSS site. Indeed, this expansive interpretation steers the decision onto thin ice constitutionally.

C. Imposing Liability for Mere Links to Circumvention Technology Violates the First Amendment.

The district court's extension of the anti-trafficking statute to impose liability for merely providing links to sites containing circumvention technology violates the First Amendment. Mere links between sites do not establish a relationship sufficient for imposing either vicarious or contributory liability when a link references a site with circumvention technology. *See* discussion *supra* at Section II.B. In the vast majority of instances, there is no relationship whatsoever between sites connected through links. There is no ability for a linker to supervise or control content on the linked site. Neither do websites connected through links "act in concert" any more than the authors of this brief "act in concert" with Nimmer by including a reference to his work. It is this lack of control over the linked site that makes the district court's conclusion that "defendants' posting and their linking amount to very much the same thing," 111 F. Supp. 2d at 339, fundamentally wrong. Even if the third and fourth rings of expanded liability for circumvention and trafficking are constitutional, which is far from clear, to weaken the causal link between infringement and liability even further would clearly impose liability beyond constitutional limits.

Act (Conference Report to Accompany H.R. 2281), House Rep. 105-796, 105th Cong., 2d Sess., Oct. 8, 1998.

Although the district court recognized that liability for links was constitutionally suspect, the court's analysis ignored both established indirect liability doctrine and the need to accommodate free speech concerns. Rather than requiring proof of harm and a direct relationship between the defendant and an infringer, the district court imposed liability on anyone who links to circumvention technology with knowledge and for the purpose of disseminating the technology. The knowledge and intent requirements in this "heightened standard" fail to resolve the constitutional problems inherent in imposing liability for links. For example, any journalist or academic who links to a site where DeCSS is posted as part of news coverage about the controversy is likely to a) know that DeCSS is located at that site, b) know that certain motion picture studios consider it illegal and that the district court has ruled that it is illegal, and c) create the link with the intent of enabling readers to understand the controversy which will inevitably result in the dissemination of the program to some degree.

The chilling effect of the district court's ruling has already begun, and has extended beyond simply linking to DeCSS. Prior to the ruling, The New York Times, CNN, the Village Voice, CNET and many other news publications all linked to sites containing DeCSS as part of their coverage of this case. Many of those organizations have now removed their links. Few news organizations will find the distinction between linking "for the purpose of disseminating a technology" and linking for other purposes to be sufficiently clear to be sure the organization would be safe if it published a link to a program such as DeCSS.

Copyright professors Pamela Samuelson of Berkeley and Lydia Pallas Loren at Lewis and Clark School of Law were deterred from posting links to DeCSS in their teaching materials for fear of liability. A library science professor at the University of North Carolina was told to remove a link to DeCSS because the university feared liability.

Assuming that the Court overcomes other constitutional problems with the anti-trafficking provision, amici believe that in some narrow circumstances links may be relevant evidence in an anti-trafficking case. For example, a manufacturer or offerer of circumvention technology that has been used to infringe a copyright could link to sites containing the infringing material. While such links would never create a per se violation, links might be relevant evidence in establishing vicarious liability – i.e., that the manufacturer had the "the right and ability to supervise" and a "direct financial interest" in the infringement. But amici emphasize that the existence of a link alone would never be sufficient proof for establishing indirect liability. Unlike the district court's test, imposing liability for trafficking only where the technology is incapable of substantial noninfringing uses and plaintiffs have met the traditional test for indirect liability provides the balance necessary under the First Amendment to prevent unnecessary chilling of protected speech.

Conclusion

In summary, to remedy the constitutional defects in the district court's opinion and order, amici urge this Court to:

1) interpret Section 1201(a)(2) to require plaintiffs-appellees to prove that there is no fair use or free speech right to offer DeCSS, that DeCSS was used to infringe their copyrights, and that there is a sufficient relationship between defendant-appellant Corley and any infringers;

2) reverse the district court's ruling and remand with instructions to consider whether Corley may be held liable under the interpretation of Section 1201(a)(2) outlined in #1 above;

3) in the alternative, should the court hold that the statute does not permit the interpretation outlined in #1 above, the court should rule that Section 1201(a)(2) is unconstitutional on its face; and

4) reverse the district court's ruling that Section 1201(a)(2) may be applied to prohibit mere links to sites containing circumvention technology.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Pro. 29(d) and 32(a)(7)(B), the undersigned certifies that this brief, exclusive of the exempted portions, contains 6,879 words. The brief has been prepared in proportionally spaced typeface using: Word 97; Times New Roman, 14 point.

Dated: January 26, 2001

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CHRISTOPHER A. HANSEN

CERTIFICATE OF SERVICE

I, Christopher A. Hansen, hereby certify that on this the 26th day of January, 2001, two correct copies of the Brief of *Amici Curiae* were served via Federal Express, overnight delivery, upon each of the following parties:

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