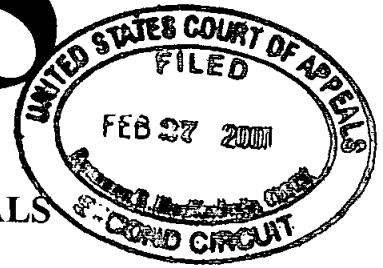
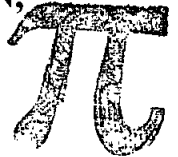


00-9185



IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNIVERSAL CITY STUDIOS, INC., PARAMOUNT PICTURES CORPORATION,
METRO-GOLDWYN-MAYER STUDIOS INC., TRISTAR PICTURES, INC.,
COLUMBIA PICTURES INDUSTRIES, INC., TIME WARNER
ENTERTAINMENT COMPANY, L.P., DISNEY ENTERPRISES INC.,
TWENTIETH CENTURY FOX FILM CORPORATION,



Plaintiff-Appellees, RECORD COPY
PLEASE RETURN TO ROOM
1802

v.

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

Defendants-Appellants,

SHAWN C. REIMERDES, ROMAN KAZAN

Defendants,

UNITED STATES OF AMERICA,

Intervenor.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFF-APPELLEES AND AFFIRMANCE
OF LAW PROFESSORS RODNEY A. SMOLLA, ERWIN
CHEMERINSKY, KENNETH L. KARST, AND MARCY STRAUSS

Rodney A. Smolla
George E. Allen Professor of Law
University of Richmond School of Law
Richmond, Virginia 23173
(804) 289-8197
Counsel for Amici

00-9185

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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

Plaintiff-Appellees,

v.

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

Defendants-Appellants,

SHAWN C. REIMERDES, ROMAN KAZAN

Defendants,

UNITED STATES OF AMERICA,

Intervenor.

**On Appeal from the United States District Court
For the Southern District of New York**

BRIEF *AMICUS CURIAE*
**IN SUPPORT OF PLAINTIFF-APPELLEES AND AFFIRMANCE
OF LAW PROFESSORS RODNEY A. SMOLLA, ERWIN
CHEMERINSKY, KENNETH L. KARST, AND MARCY STRAUSS**

Rodney A. Smolla
George E. Allen Professor of Law
University of Richmond School of Law
Richmond, Virginia 23173
(804) 289-8197
Counsel for Amici

Erwin Chemerinsky
Sydney M. Irmas Professor of Public
Interest Law, Legal Ethics, and
Political Science
University of Southern California Law School
Los Angeles, California (213) 740-2539

Kenneth L. Karst
David G. Price and Dallas P. Price
Professor of Law
University of California, Los Angeles
Box 951476
Los Angeles, California 90095
(310) 825-1847

Marcy Strauss
Professor of Law
Loyola Law School
1331 W. Olympic Blvd.
Los Angeles, California 90015

TABLE OF CONTENTS

Table of Authorities	ii
Interests of Amici	1
Argument	1
I. CONGRESS HAD THE AFFIRMATIVE POWER UNDER ARTICLE I OF THE CONSTITUTION TO ENACT THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998	1
II. THE “STRICT SCRUTINY” STANDARD SHOULD NOT APPLY	5
A. No Special “Standard of Review” Is Required	5
B. DMCA is Not A Content-Based Law Requiring Use of Strict Scrutiny	11
III. THE DMCA IS CONSTITUTIONAL UNDER THE “INTERMEDIATE SCRUTINY” STANDARD, OR ITS EQUIVALENT	14
IV. THE INJUNCTIVE RELIEF WAS NOT AN UNCONSTITUTIONAL PRIOR RESTRAINT	23
A. Prior Restraints and Intellectual Property	23
B. Linking and “Electronic Civil Disobedience”	26
Conclusion	27
Certificate of Compliance	30
	31

TABLE OF AUTHORITIES

CASES

<i>A & M Records, Inc. v. Napster, Inc.</i> , 2001 WL 115033 (9 th Cir. Feb. 12, 2001)	26
<i>Abkco Music, Inc. v. Stellar Records</i> , 96 F.3d 60 (2 nd Cir. 1996)	25
<i>Authors League of America v. Oman</i> , 790 F.2d 220 (2 nd Cir. 1986)	7
<i>Board of Trustees of State of New York v. Fox</i> , 492 U.S. 469 (1989)	6
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969)	8
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	8
<i>Butterworth v. Smith</i> , 494 U.S. 624 (1990)	16
<i>Cable/Home Communication Corp. v. Network Productions, Inc.</i> , 902 F.2d 829 (11 th Cir. 1990)	19
<i>California Satellite Sys. v. Seimon</i> , 767 F.2d 1364 (9 th Cir. 1985)	19
<i>Cambell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994)	14
<i>Central Hudson Gas & Electric Corp. v. Public Service Commission</i> , 447 U.S. 557 (1980)	9
<i>Cohen v. Cowles Media Co.</i> , 501 U.S. 663 (1991)	17
<i>Connick v. Meyers</i> , 461 U.S. 138 (1983)	9
<i>Cox Broadcasting Corp. v. Cohn</i> , 420 U.S. 469 (1975)	16
<i>Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.</i> , 604 F.2d 200 (2 ^d Cir. 1979)	24, 25

<i>Eldred v. Reno</i> , – F.3d –, 2001 WL 127725 (D.C. Cir., Feb. 16, 2001)	6, 8
<i>Gershwin Publishing Corporation v. Columbia Artists Management, Inc.</i> , 443 F.2d 1159 (2d Cir.1971)	20, 21
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	13
<i>Goldstein v. California</i> , 412 U.S. 546 (1973)	2, 19, 20
<i>Harper & Row, Publishers, Inc. v. Nation Enterprises</i> , 471 U.S. 539 (1985)	7, 12, 13, 14
<i>Hazelwood v. Kuhlmeier</i> , 484 U.S. 260 (1988)	8
<i>Iowa State University Research Foundation, Inc. v. American Broadcasting Cos., Inc.</i> , 621 F.2d 57 (2 nd Cir. 1980)	15, 16
<i>Junger v. Daley</i> , 209 F.3d 481 (6th Cir. 2000)	10
<i>Landmark Communications, Inc. v. Virginia</i> , 435 U.S. 829 (1978)	16
<i>Matthew Bender & Co. v. West Publishing Co.</i> , 158 F.3d 693 (2nd Cir.1998)	21
<i>Mazer v. Stein</i> , 347 U.S. 201(1954)	15
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat) 316 (1819)	2, 3, 5
<i>Milkovich v. Lorain Journal</i> , 497 U.S. 1 (1990)	13
<i>Miller v. California</i> , 413 U.S. 15 (1973)	9
<i>New Era Publications, International, APS v. Henry Holt and Company, Inc.</i> , 695 F.Supp. 1493, 1525 (S.D.N.Y. 1988), <i>aff'd</i> , 873 F.2d 576, 584 (2nd Cir. 1989)	24
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	8, 13

<i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971)	25, 26
<i>Nihon Keizai Shimbun v. Comline Business Data, Inc.</i> , 166 F.3d 65 (2nd Cir.1999)	24
<i>Perez v. United States</i> , 402, U.S. 146 (1971)	5
<i>Philadelphia Newspapers, Inc. v. Hepps</i> , 475 U.S. 767 (1986)	13
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992)	9
<i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367 (1969)	8, 9
<i>Rushton v. Vitale</i> , 218 F.2d 434 (2nd Cir. 1955)	25
<i>Sable Communications of California, Inc., v. FCC</i> , 492 U.S. 115 (1989)	6
<i>Simon & Schuster, Inc. v. New York State Crime Victims Board</i> , 502 U.S. 105 (1991)	6
<i>Smith v. Daily Mail Publishing Co.</i> , 443 U.S. 97 (1979)	16
<i>Sony Corporation of America v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984)	13, 14
<i>The Florida Star v. B.J.F.</i> , 491 U.S. 524 (1989)	16
<i>Turner Broadcasting System v. FCC</i> , 512 U.S., 622 (1994)	9
<i>Twentieth Century Music Corp. v. Aiken</i> , 422 U.S. 151 (1975)	15
<i>Twin Peaks Productions, Inc. v. Publications International, Ltd.</i> , 996 F.2d 1366 (2 nd Cir. 1993)	8
<i>United States v. Bodin</i> , 375 F.Supp. 1265(W.D. Okla. 1974)	22
<i>United States v. Darby</i> , 312 U.S. 100 (1941)	5

<i>United States v. Lopez</i> , 514 U.S. 549 (1995)	4
<i>United States v. Morrison</i> , 120 S.Ct. 1740 (2000)	4
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	6, 9
<i>United States v. Thomas</i> , 116 F.3d 606 (2 nd Cir. 1997)	27
<i>Ward v. Rock Against Racism</i> 491 U.S. 781 (1984)	6
<i>Wainright Securities, Inc., v. Wall Street Transcript Corp.</i> , 558 F.2d 91 (2 nd Cir. 1969)	25
<i>Zacchini v. Scripps-Howard Broadcasting Co.</i> , 433 U.S. 562 (1977)	17

STATUTES

Copyright Act of 1976, 17 U.S.C. § 102	11
Copyright Term Extension Act of 1998 (“CTEA”), Pub.L. No. 105-298, 112 Stat. 2827	6
Digital Millennium Copyright Act of 1998, (“DMCA”), 17 U.S.C. § 1201 <i>et seq.</i>	<i>passim</i>

OTHER AUTHORITIES

Robert Gorman, <i>Comments on a Manifesto Concerning the Legal Protection of Computer Programs</i> , 5 Alb. L. J. Sci. & Tech. 377, 281 (1996)	10
--	----

INTERESTS OF AMICI

Amici curiae are law professors who specialize in the fields of constitutional law and intellectual property who respectfully submit this brief addressing the significant questions posed by the intersection of freedom of speech and intellectual property principles. This brief is filed with the consent of the parties.

ARGUMENT

I. CONGRESS HAD THE AFFIRMATIVE POWER UNDER ARTICLE I OF THE CONSTITUTION TO ENACT THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

At the outset, *amici* here wish to address the submission advanced by others in support of the Appellants that Congress lacked the affirmative power under Article I of the Constitution to even pass the Digital Millennium Copyright Act of 1998, (“DMCA”), codified at 17 U.S.C. § 1201 *et seq.* This is a bold argument, for it claims that wholly aside from any possible First Amendment limitations, Congress did not possess sufficient affirmative power under either the Copyright Clause, the Commerce Clause, or the Necessary and Proper Clause to pass this legislation at all. If the *amici* advancing this theory are correct, the case is over, and the First Amendment questions need not be reached, for Congress would have been powerless

even to create the DMCA.¹

The argument is simply wrong. As Chief Justice Marshall admonished in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 407 (1819), “we must never forget, that it is a *constitution* we are expounding.” (Emphasis in original). Article I grants to Congress the power: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const., Art. I, § 8, cl.8. In *Goldstein v. California*, 412 U.S. 546 (1973) the Supreme Court acknowledged the commodious sweep of this constitutional grant, observing that the terms of the Copyright Clause “have not been construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles.” *Id.* at 561. The Necessary and Proper Clause in turn empowers Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” For two centuries the Necessary and Proper Clause has been read as a munificent expansion of Congress’ power under Article I, not as a narrow confinement of it. As Chief Justice John Marshall admonished: “It must have been the intention of those

¹ See Brief *Amicus Curiae* of Intellectual Law Professors in Support of Defendants-Appellants, Supporting Reversal, §§ I-III. This argument was not raised by the parties below, and thus it is doubtful that it is even properly before the Court.

who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end.” *McCulloch*, 17 U.S. at 415.

Congress undoubtedly has the power under the Copyright Clause to punish outright copyright piracy. Having identified a specific threat to the integrity of copyright posed by digital piracy, having determined that the self-help afforded by encryption technology is admirable and appropriate, Congress acted to bolster that self-help with legal reinforcement and remedy. This is outside the scope of the Constitution only if punishing the aiding and abetting of federal law violations, and deterring violation of federally-created rights, are outside the scope of the Constitution. Manifestly, they are not. The Copyright Clause empowers Congress to act by “securing” the “exclusive Right” authors possess to their creations. To “secure” a right means more than to merely declare and define it. It includes the powers to deter violations, to create remedies, and to punish ancillary wrongs that threaten the core.

The Constitution does not explicitly grant Congress the power to charter a federal bank, but *McCulloch* held that such power exists under the Necessary and

Proper Clause. And under that same clause, Congress can prohibit banking fraud, and punish the aiding and abetting of banking fraud, including trafficking in computer technologies intended to facilitate electronic embezzlement. The Constitution permits Congress to punish counterfeiting. But it also permits Congress to punish those who would aid and abet counterfeiting, including trafficking in devices (electronic or otherwise) for the purpose of facilitating the production of counterfeit money. The same analysis applies to copyright.

The argument that Congress also lacks power under the Commerce Clause to enact the DMCA is even more specious. While it is correct that in recent years the Supreme Court has more clearly marked the outer perimeters of the commerce power, those holdings have involved regulation that was not targeted at commercial or economic activity. *See United States v. Lopez*, 514 U.S. 549 (1995) (striking down Gun-Free School Zones Act of 1990); *United States v. Morrison*, 120 S.Ct. 1740 (2000) (striking down portions of the Violence Against Women Act of 1994). In cases that do not involve commercial or economic regulation, the Court has now made it clear that the non-commercial conduct Congress seeks to regulate must in some sense “substantially affect” interstate commerce. To punish marketing of devices intended to facilitate digital piracy of copyrighted works, however, is quintessentially commercial in nature, and a textbook example of a regulation of

commerce “among the several States.” Nothing in the recent retrenchment of Commerce Clause jurisprudence has cast doubt on Congress’ plenary power to punish economic transactions in interstate commerce that Congress has determined to make illegal, or to ban trafficking in articles of commerce that Congress has declared contraband. *See, e.g., Perez v. United States*, 402, U.S. 146 (1971) (sustaining congressional power to prohibit extortionate credit transactions); *United States v. Darby*, 312 U.S. 100 (1941) (sustaining congressional power to exclude from interstate commerce goods produced by workers not paid the federal minimum wage). The great empowering clauses of Article I were intended “to enlarge, not to diminish the powers vested in the government.” *McCulloch*, 17 U.S. at 420. “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *Id.* at 421.

II. THE “STRICT SCRUTINY” STANDARD SHOULD NOT APPLY

A. No Special “Standard of Review” Is Required

The Appellants and their supporting *amici* focus intently on the appropriate standard of First Amendment review that ought to be employed by this Court in examining the DMCA. The Appellants, and some *amici*, urge adoption of “strict

scrutiny.” Other *amici* appear to concede that the less demanding “intermediate scrutiny” standard is appropriate, but claim that even under that standard, the DMCA is unconstitutional.² These arguments, however, move much too fast.

In a significant recent decision bearing directly on the constitutional issues pending before this Court, the United States Court of Appeals for the District of Columbia Circuit in *Eldred v. Reno*, – F.3d –, 2001 WL 127725 (D.C. Cir., Feb. 16, 2001), upheld the Copyright Term Extension Act of 1998 (“CTEA”), Pub.L. No. 105-298, 112 Stat. 2827. The case presented a constitutional challenge under the First Amendment and the Copyright Clause to the power of Congress to extend for

² “Strict scrutiny” is usually articulated as requiring a “compelling” governmental interest, and a means that is “narrowly” or “precisely” tailored to effectuate that interest, a concept that often is re-phrased as requiring that government chose the “least restrictive means” to vindicate its compelling goals. *See, e.g., Sable Communications of California, Inc., v. FCC*, 492 U.S. 115 (1989); *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105 (1991). “Intermediate scrutiny,” a standard that varies slightly in its formulation depending on its context, is usually articulated as requiring only a “substantial” or “important” governmental interest, and the requirement of “narrow tailoring” is understood as less demanding than the “least restrictive means” test of strict scrutiny, but more demanding than “minimum rational basis” review. *See, e.g., United States v. O’Brien*, 391 U.S. 367, 377 (1968) (applying an intermediate level of scrutiny in draft-card burning case); *Ward v. Rock Against Racism* 491 U.S. 781, 799 (1984) (intermediate scrutiny applied to content-neutral “time, place, or manner” regulation of speech); *Board of Trustees of State of New York v. Fox*, 492 U.S. 469, 480 (1989) (interpreting the intermediate scrutiny test used in commercial speech cases to require only a “reasonable” connection between means and ends, a level that the Court described as less demanding than the “least restrictive means” but more demanding than mere “rational basis.”).

a period of years the duration of copyrights, both those already extant and those yet to come. The court rejected both constitutional claims, pointedly cutting off at the threshold any First Amendment challenge to the copyright extension:

The decisions of the Supreme Court . . . and of this court . . . stand as insuperable bars to plaintiffs' first amendment theory. In *Harper & Row* the Court . . . explained how the regime of copyright itself respects and adequately safeguards the freedom of speech protected by the First Amendment. . . . In keeping with this approach, we held . . . that copyrights are categorically immune from challenges under the First Amendment. . . . We think the plaintiffs' purported distinction is wholly illusory. The relevant question under the First Amendment -- regardless whether it arises as a defense in a suit for copyright infringement or in an anticipatory challenge to a statute or regulation -- is whether the party has a first amendment interest in a copyrighted work. The works to which the CTEA applies, and in which plaintiffs claim a first amendment interest, are by definition under copyright; that puts the works on the latter half of the "idea/expression dichotomy" and makes them subject to fair use. This obviates further inquiry under the First Amendment. . . . Suffice it to say we reject their first amendment objection to the CTEA because the plaintiffs lack any cognizable first amendment right to exploit the copyrighted works of others.

Id. at *4 (internal citations omitted).

It is not at all clear that *any* distinct and free-standing First Amendment "level of review" such as "strict scrutiny" or "intermediate scrutiny" is required under existing constitutional doctrines applicable to the intersection of intellectual property

and First Amendment concerns.³ While strict scrutiny might be thought of as a sort of default test when dealing with content-based regulation of speech, even within the universe of content-based regulation, the strict scrutiny test is often displaced by other more specific First Amendment standards created to reflect the balance of interests at hand. Because free speech issues arise in an extraordinarily wide range of circumstances and settings, the Supreme Court has not attempted to jam all free speech analysis into one unified constitutional standard. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (establishing knowing or reckless disregard for truth or falsity standard for public official libels); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (establishing test of intent, imminence, and likelihood test for incitement to violence prosecutions); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (establishing balancing test for reporter's privilege); *Red Lion Broadcasting Co. v. FCC*, 395 U.S.

³ This Court in *Authors League of America v. Oman*, 790 F.2d 220 (2nd Cir. 1986) sustained the “manufacturing clause” of the Copyright Act, holding that abstractions such as the right to circulate and receive ideas did not trump Congress’ concrete power to foster and protect the nation’s intellectual property. *Id.* at 223 (“Put simply, the cases plaintiffs rely upon establish that there is a constitutional right to freely circulate one’s ideas. They also establish the public’s right to receive those ideas. They do not, however, create any right to distribute and receive material that bears protection of the Copyright Act.”). *See also Eldred v. Reno*, – F.3d –, 2001 WL 127725, *3 (D.C. Cir., Feb. 16, 2001) (“copyrights are categorically immune from challenges under the First Amendment”); *Twin Peaks Productions, Inc. v. Publications International, Ltd.*, 996 F.2d 1366, 1378 (2nd Cir. 1993) (“the fair use doctrine encompasses all claims of first amendment in the copyright field”).

367 (1969) (establishing “intermediate scrutiny” standard for broadcast regulation); *Connick v. Meyers*, 461 U.S. 138 (1983) (establishing “issues of public concern” standard and balancing test for government employee speech claims); *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988) (establishing balancing test deferential to school officials for evaluating speech rights of students in public schools); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) (creating four-part test for commercial speech); *Miller v. California*, 413 U.S. 15 (1973) (creating three-prong test for obscenity).

Even if some general “level of review” were to be applied to the DMCA, it should at *most* be the intermediate scrutiny test traditionally applied to content-neutral regulation of speech, and the DMCA is well within the permissible compass of that standard. The DMCA on its face does not appear to single out expression at all, but rather is directed to devices marketed for the purpose of pirating. At most this should trigger the intermediate scrutiny standard customarily applied to content-neutral laws that incidentally burden expression. *See, e.g., United States v. O’Brien*, 391 U.S. 367, 377 (1968); *Turner Broadcasting System v. FCC*, 512 U.S., 622, 641-652, 662 (1994). The DMCA is clearly not an exercise in viewpoint-discrimination. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). More importantly, the DMCA is not content-based in the sense in which that term of art is properly applied in First

Amendment jurisprudence.

The Appellant and its supporting *amici* have expended substantial rhetorical energy advancing the proposition DeCSS computer code is expression protected by the First Amendment, as if this observation alone warrants application of strict scrutiny. Yet this is but a truism, an obvious proposition insufficient to decide the case. For *of course* computer code is expression, and *of course* as expression it is protected by the First Amendment.⁴ The question is not whether DeCSS computer code is protected by the First Amendment, or whether one applies such labels to it as “functional” or “expressive.” The question is whether the First Amendment’s protection extends so far as to immunize the Appellants from deliberately marketing such code to facilitate the theft of intellectual property.⁵

⁴ Conversely, it is now well-settled that computer code may be protected by Copyright Act. See Robert Gorman, *Comments on a Manifesto Concerning the Legal Protection of Computer Programs*, 5 Alb. L. J. Sci. & Tech. 377, 281 (1996). (“It has, for example, been established by any number of U.S. court decisions that the copyright owner may stop not only the literal, and near-literal, copying of program code but also the replication of a program at a broader level of abstraction, typically referred to as its ‘structure, sequence and organization.’”)

⁵ In *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000), the United States Court of Appeals for the Sixth Circuit reversed a district court holding that encryption export regulations presented no First Amendment issue, while nonetheless dismissing the case for lack of standing. In the course of the Sixth Circuit’s discussion, however, the court intimated that in a case in which the standing issues were resolved and a justiciable challenge to the regulations were presented, the intermediate scrutiny standard would apply.

B. DMCA is Not A Content-Based Law Requiring Use of Strict Scrutiny

The DMCA is content-based only in the incidental sense that *all* intellectual property protection is *necessarily* content-based. Indeed, protection of intellectual property without reference to content would be incoherent. If the appellants' argument were sound, Congress in defining intellectual property law would be walking on constitutional eggshells. In the scores of intellectual property cases decided by the United States Supreme Court, however, the Court has never once announced that it would subject any provision of federal intellectual property law to the First Amendment's strict scrutiny test. To go down such a road would be both impertinent and impractical. A casual browse through modern copyright law reveals how constantly and inevitably copyright law is crafted with reference to content, with special variations and caveats applicable to all sorts of expression, including literary works, architectural works, pictorial, graphic and sculptural works, factual compilations, musical works, dramatic works, pantomimes and choreographic works, motion pictures and audiovisual works, sound recordings, derivative works, and countless other categories and subcategories, each reflecting the considered view of Congress (and the interpretative gloss of the courts) on the appropriate balance of societal interests posed by each form and subject of expression. *See* 17 U.S.C. § 102 (defining general subject matter of copyright). The Supreme Court has never

held, or even *intimated*, that Congress is subject to the searching superintendence of strict judicial scrutiny for every difficult policy choice it makes in defining the laws of patents, trademarks, or copyright. To the contrary, all of our intellectual property jurisprudence suggests that the accommodation between freedom of expression and protection of intellectual property is effectuated *in gross*, through the large structural elements of intellectual property that serve the function of mediating between ownership in expression and free trade in expression.

While many aspects of intellectual property law reflect this accommodation, it is most famously captured in copyright jurisprudence in two concepts, the “idea / expression” dichotomy, and the “fair use” doctrine. *See Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985) (copyright’s idea/expression dichotomy strikes “a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.”). Tellingly, these fundamental principles of copyright are *themselves* content-based regulations of expression. Yet it has never been understood that the “strict scrutiny” test is superimposed on top of those doctrines. Instead, Congress and the courts have engaged in exactly the opposite assumption, that doctrines such as fair use and the idea/expression dichotomy *are* the accommodation copyright law makes to free expression. In short, every detail of fair use doctrine does

not pose a free-standing question of First Amendment law.⁶ See *Harper & Row*,

⁶ In this regard it is worth comparing copyright law to defamation law. Unlike copyright law, which has largely developed in its own universe, without any overt importation of First Amendment jurisprudence, modern defamation law has been heavily constitutionalized, with many common-law defamation doctrines now modified to reflect a greater accommodation of free speech values. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (first imposing First Amendment “actual malice” standard in public official defamation cases); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (adopting First Amendment distinction between public and private figure defamation standards and establishing various limitations on damages). There are, however, some useful parallels. The “fact / opinion” dichotomy in defamation law, which immunizes a defendant from liability for statements that are not factual (such as opinions, characterizations, or rhetorical hyperbole), serves much the same “engineering function” as the fair use doctrine serves in copyright law. The law of defamation vindicates an individual’s interest in reputation by providing limited protection against false statements of fact, but the law does not protect reputation to the extent of immunizing the individual from non-factual comment, critique, and criticism. In parallel, the law of copyright protects an author’s intellectual property from unauthorized exploitation, but does not protect that property from copying incident to comment, critique, and criticism. While the First Amendment does require that state defamation law be limited to false assertions of “fact,” see *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), American courts have never held that the actual doctrinal content of the “fact / opinion” distinction as it exists in defamation law is subject to the overriding “macro-doctrine” of First Amendment “strict scrutiny.” Indeed, any such attempt would result in utter doctrinal chaos. Thus it has always been understood that the substance of the fact / opinion doctrine itself supplies the First Amendment standard. From a First Amendment perspective, the Supreme Court requires that states impose defamation liability only for false statements of *fact*; beyond that minimum, states are left to themselves to craft the precise contours of the “opinion” defense. See *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990). The methodology of “strict scrutiny” (or even “intermediate scrutiny,” for that matter) is simply irrelevant. A similar mechanism operates in copyright law. While the Supreme Court has that the idea/expression dichotomy and the fair use doctrine eliminate any tension between copyright law and the First Amendment, the Supreme Court and the uniform jurisprudence of

Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985) (“In view of the First Amendment protections already embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use.”).⁷

III. THE DMCA IS CONSTITUTIONAL UNDER THE “INTERMEDIATE SCRUTINY” STANDARD, OR ITS EQUIVALENT

The Copyright Clause and the First Amendment have peacefully coexisted for over 200 years. Fundamental to that co-existence is the presupposition that copyright protection does not impoverish the marketplace of ideas, but enriches it. *See, e.g., Harper & Row*, 471 U.S. at 559. (“In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression,

lower courts have never treated the First Amendment as an independent font of detailed copyright doctrine (or even intimated such a principle), but instead have assumed that sufficient protection for freedom of speech inures in the structure of copyright law itself.

⁷ Similarly, in the Supreme Court’s other modern “fair use” decisions, *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) and *Cambell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the First Amendment “strict scrutiny” test is never mentioned, and the decisions focus on the self-contained contours of copyright doctrine.

copyright supplies the economic incentive to create and disseminate ideas.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is; by this incentive, to stimulate [the creation of useful works] for the general public good.”)

When a wrongdoer violates the copyright laws, the violation will virtually *always* involve some act of “expression.” Indeed, the very *paradigm* of copyright violation, the wrongdoing infringer who copies a protected work without permission and sells the pirated copy in the market, is engaged in expressive activity. So too, the infringer who produces a “derivative work,” such as a movie based on a novel, without obtaining the permission and license from the copyright owner of the underlying work, is engaged in “expression,” perhaps highly creative and innovative expression, but that alone will not immunize the infringer from the reach of copyright law, including injunctive relief to enforce the limited monopoly of intellectual property ownership created by the Copyright Act. See *Iowa State University*

Research Foundation, Inc. v. American Broadcasting Cos., Inc., 621 F.2d 57, 61 (2nd Cir. 1980) (“The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.”).

To be sure, there are numerous holdings and First Amendment principles that do provide robust (but by no means absolute) protection for the publication of truthful information.⁸ None of the decisions in this estimable line of cases, however, involved theft of intellectual property, or the unlawful provision of the burglar tools designed

⁸ See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding unconstitutional a civil damages award entered against a television station for broadcasting the name of a rape-murder victim obtained from courthouse records); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding unconstitutional the imposition of liability against a newspaper for publishing the name of a rape victim in contravention of a Florida statute prohibiting such publication in circumstances in which a police department inadvertently released the victim’s name); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979) (finding unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender, where the newspapers obtained the name of the alleged juvenile assailant from witnesses, the police, and a local prosecutor, stating that the “magnitude of the State’s interest in this statute is not sufficient to justify application of a criminal penalty”); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (overturning criminal sanctions against newspaper for publishing information from confidential judicial disciplinary proceedings leaked to the paper); *Butterworth v. Smith*, 494 U.S. 624 (1990) (refusing to enforce the traditional veil of secrecy surrounding grand jury proceedings against a reporter who wished to disclose the substance of his own testimony after the grand jury had terminated, holding the restriction inconsistent with the First Amendment principle protecting disclosure of truthful information).

to facilitate that theft. Indeed, if there were a general First Amendment principle preventing punishment for publication of any information that was “true,” intellectual property would not be possible. More broadly, if the First Amendment were understood to create a presumptive right to publish anything that might be deemed “true,” legal recourse for a vast array of injuries effectuated through the revelation of truthful material would be eviscerated, from the revelation of trade secrets to disclosure of information that one is contractually bound to keep confidential. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). (“Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”).⁹

The wholesale copying of a movie in contravention of the rights of the copyright holders is by no stretch a “fair use,” and no one in this litigation makes that

⁹ The “right of publicity” (or tort of “appropriation of name or likeness”) provides a useful analogue. As the tort is commonly understood and applied in most jurisdictions, the intentional exploitation of another’s name or likeness for commercial purposes is actionable. The tort includes a newsworthiness exception that vindicates First Amendment interests by immunizing a defendant from use of another’s name or likeness as an incident to news coverage or other commentary regarding that person. The newsworthiness defense is to the tort of appropriation what fair use is to copyright. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Supreme Court rejected a First Amendment challenge to a damages award against a broadcasting company that violated plaintiff’s rights of publicity by displaying a performer’s act without his permission, even though the presentation was literally “truthful,” and presented as “news.”

claim. The claim that is made, rather, is an extremely exotic one, so exotic as to stretch credulity. Some people, it is argued, might make use of DeCSS technology to assist them in making “fair use” of a copyrighted movie. The examples offered are professors or students who wish to copy small snippets from movies and compile them on one disk for the purposes of illustrating a film lecture, a movie reviewer who wants to quote or copy a portion of a film as part of a review, a television station or news program seeking to show some portion of a review during a broadcast discussing or critiquing a movie. These are good examples, because they all fall within the classic paradigms of “fair users,” academics, students, reviewers, or journalists who seek to reproduce limited portions of a copyrighted work in order to critique or comment upon it.

Now realistically, to what extent does the DMCA interfere with the rights of such fair users? Nothing in copyright law requires a copyright holder to make it easy to copy works. While the law permits fair use, it imposes no affirmative obligation on the author to facilitate it. So too, nothing in the law prohibits copyright owners from making it difficult to copy works, so as to discourage pirating. The owners of copyrighted movies, for example, frequently distribute their films on a pay-for-view basis, via cable television or satellite networks, in which the movies are electronically scrambled to prevent unauthorized viewing. Ingenious bandits nevertheless at times

traffic in devices marketed solely to permit users to steal the movies from the cable or satellite distribution systems. Courts have properly treated such “expression” as nothing more than an incident to larceny, and not immunized by the First Amendment. *See Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 849 (11th Cir. 1990); (promotion of statutorily-prohibited “descrambling devices” for subscription cable television programming, and sale of pirated computer chips to compromise the encryption of plaintiffs’ transmissions, were not protected by the First Amendment); *California Satellite Sys. v. Seimon*, 767 F.2d 1364, 1367-68 (9th Cir. 1985) (no First Amendment right to pirate scrambled satellite broadcast signals).

When dealing with intellectual property in digital form, measures providing protection *ex ante* are not merely peripheral supplements to property protection, they may in practical terms supply the core of that protection. Without the kind of anti-device and anti-trafficking provisions created by the DMCA, protection of digitalized intellectual property may become a legal fiction. Congress is not so helpless; the Commerce and Copyright Clauses not so frail. When Congress is confronted with evidence of new technological developments that threaten the integrity of traditional copyright protection, Congress may provide additional kinds of legal protection to respond to the threat. *See Goldstein v. California*, 412 U.S. at 562 (“As our

technology has expanded the means available for creative activity and has provided economical means for reproducing manifestations of such activity, new areas of federal protection have been initiated.”).

While the tension between the system of copyright protection and the system of free expression may not have the mathematical rigidity of a zero-sum game, it nevertheless largely remains that society cannot have it both ways. We cannot maintain a meaningful regime of intellectual property protection if the property right may be nullified by anyone who may plausibly assert a free speech right to disseminate “truthful information.”

There is nothing violative of the First Amendment, or copyright law, in the fact that Congress chose to enact specific protections for technological measures to supplement the existing rules governing direct, vicarious, and contributory infringement liability. These doctrines were devised by courts. *See Gershwin Publishing Corporation v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1161-62 (2d Cir.1971) (“Although the Act does not specifically delineate what kind or degree of participation in an infringement is actionable, it has long been held that one may be liable for copyright infringement even though he has not himself performed the protected composition. . . . Similarly, one who with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another,

may be held liable as a ‘contributory’ infringer.”).¹⁰ They may surely be augmented by Congress, acting within its legislative competence.

Appellants and their amici seem to complain that appellant's conduct might not be actionable under those long-existing doctrines. But the question here is not whether the conduct of the Appellants would satisfy judicially-created standards for liability for contributory or vicarious infringement, but whether Congress may, consistent with the First Amendment, add to those doctrines another one, based on the analogy to laws outlawing the distribution of burglars tools, tools for cable service theft, and the like. If the Constitution does bar not the courts from recognizing, on their own initiative, the utility of contributory infringement as a tool to advance the purposes of copyright protection, it is beyond peradventure that the Constitution does not bar Congress itself from making use of comparable tools.

There may, of course, be some value in de-encryption technology *in and of itself*, value that can be separated from its use as a tool to invade copyright interests. But Congress was aware of this, and took pains to carve out exceptions from the

¹⁰ See also *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693, 706 (2nd Cir.1998). (“Notwithstanding the absence of substantial similarity, a database manufacturer may be liable as a contributory infringer (in certain circumstances) for creating a product that assists a user to infringe a copyright directly. . . . Two types of activities that lead to contributory liability are: (I) personal conduct that encourages or assists the infringement; and (ii) provision of machinery or goods that facilitate the infringement.”).

DMCA that would cover virtually all plausible examples of such value. Indeed, the DMCA is well-calculated to protect the benign use of de-encryption technology, for the law is narrowed both by negation and affirmation. The law only purports to reach devices marketed for infringing purposes. As an extra measure of protection, however, Congress carefully catalogued the principal legitimate uses that it could envision, and *on top* of the law's negative limitation, explicitly immunized such uses through various affirmative defenses listed in the statute, to the extent that it was possible to do that without unduly endangering digital copyrighted, technologically protected works generally.¹¹

The constitutional equities here are overwhelmingly one-sided. On one side is a technology that exists almost exclusively to subvert copyright protection. *See United States v. Bodin*, 375 F.Supp. 1265, 1267 (W.D. Okla. 1974) (“We do not find any denial of freedom of expression to the ‘tape pirate.’ What he seeks is not the freedom to express himself artistically or otherwise, but the right to make exact and identical copies of sound recordings produced by others.”). On the other side are highly speculative hypothetical uses in which the unavailability of the technology might make the copying of a copyrighted work for fair use purposes marginally more

¹¹ See 17 U.S.C. § 1201(f)(2), (f)(3), (g)(4), (j)(4) (creating exceptions for such purposes as reverse engineering, encryption research, and security testing).

inconvenient.¹² Laws designed to deter law-breakers often impose minor inconvenience to law-abiders. To deter skyjackings and terrorism innocent passengers must walk through metal detectors and have their luggage subjected to random inspection. But such peripheral inconvenience alone is not ground for voiding an otherwise valid law. It would turn the constitutional balance on its head to say that the First Amendment *requires* Congress to adopt a solicitude for fair use so sweeping that Congress is powerless to impose an embargo on the tools of piracy for fear that an occasional fair user might be inconvenienced. In the small range of cases where a legitimate fair user is slightly inconvenienced, that inconvenience is a social cost well worth the benefit it achieves in deterrence of piracy, and certainly well within the balance that Congress was entitled to strike.

IV. THE INJUNCTIVE RELIEF WAS NOT AN UNCONSTITUTIONAL PRIOR RESTRAINT

A. Prior Restraints and Intellectual Property

Appellants and their supporting *amici* attack the injunction using a simple syllogism: (1) an injunction is a prior restraint; (2) prior restraints are presumptively

¹² The fair user can make a compilation from tapes. Or the fair user can show an excerpt from a film on a DVD, then pop out the disk (or rotate disks in a typical multi-disk DVD player) to show an excerpt from the next film. Film lectures and movie critiques have managed to survive the first century of film criticism without DVD machines.

unconstitutional; thus (3) this injunction was presumptively unconstitutional. The flaw in the syllogism is in the second step. Prior restraints to protect intellectual property are *not* presumptively unconstitutional, but are instead *routine*. As Judge Leval has noted: “Injunctions are generally issued to prevent infringement of copyright. . .” *New Era Publications, International, APS v. Henry Holt and Company, Inc.*, 695 F.Supp. 1493, 1525 (S.D.N.Y. 1988) (internal citations omitted), *aff’d*, 873 F.2d 576, 584 (2nd Cir. 1989). Injunctions to prevent theft of intellectual property exist as an incident to the character of the interest protected as property. The First Amendment is not a license to trespass or to steal, and once violations of intellectual property rights have been established through the due process of adjudication, courts may use their equitable powers to prevent such incursions. *See Nihon Keizai Shimbun v. Comline Business Data, Inc.*, 166 F.3d 65, 74 (2nd Cir.1999)(“Defendants argue that this injunction is overly broad and represents an unconstitutional prior restraint on freedom of the press. We have repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine.”); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979) (“For similar reasons, the preliminary injunction did not constitute an unconstitutional ‘prior restraint.’ This is not a case of government

copyright, but a private plaintiff's attempt to protect its property rights. The propriety of a preliminary injunction where such relief is sought is so clear that courts have often issued an injunction without even mentioning the first amendment. . . . The prohibition of the Lanham Act is content neutral, . . . and therefore does not arouse the fears that trigger the application of constitutional 'prior restraint' principles."); *Abkco Music, Inc. v. Stellar Records*, 96 F.3d 60 (2nd Cir. 1996) ("harm, generally when a copyright plaintiff makes out a prima facie showing of infringement, irreparable harm may be presumed"); *Wainright Securities, Inc., v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2nd Cir. 1969). (preliminary injunctions granted as a matter of course in copyright cases if prima facie case of copyright infringement can be shown because irreparable injury can be presumed when a copyright is infringed.); *Rushton v. Vitale*, 218 F.2d 434, 436 (2nd Cir. 1955) (Clark, J.) (same); *See also New York Times Co. v. United States*, 403 U.S. 713, 726 n. (1971) (Brennan, J., concurring) (distinguishing the prior restraint at issue in the famous "Pentagon Papers" case from protection of copyright, stating: "Similarly, copyright cases have no pertinence here: the Government is not asserting an interest in the particular form of words chosen in the documents, but is seeking to suppress the ideas expressed therein. And the copyright laws, of course, protect only the form of expression and not the ideas expressed."); *id.* at 731-32 n.1 (1971) (White, J., concurring) ("No one

denies that a newspaper can properly be enjoined from publishing the copyrighted works of another.”).

The United States Court of Appeals for the Ninth Circuit, in the closely watched Napster litigation, recently sustained the granting of a preliminary injunction (with some modifications) against Napster, an on-line service that facilitated the unauthorized transfer of copyrighted musical recordings. *A & M Records, Inc. v. Napster, Inc.*, 2001 WL 115033 (9th Cir. Feb. 12 2001). The court in *Napster* rejected a First Amendment “prior restraint” challenge to the injunction, targeted at Napster’s contributory infringement activity. *Id.* at *22 (“We, however, briefly address Napster’s First Amendment argument so that it is not reasserted on remand. . . . The company asserts two distinct free speech rights: (1) its right to publish a ‘directory’ (here, the search index) and (2) its users’ right to exchange information. We note that First Amendment concerns in copyright are allayed by the presence of the fair use doctrine. . . . There was a preliminary determination here that Napster users are not fair users. Uses of copyrighted material that are not fair uses are rightfully enjoined.”) (internal citations omitted).

B. Linking and “Electronic Civil Disobedience”

The district court’s injunction against linking should be understood against the backdrop of the contumacious behavior with which the court was forced to contend.

The district court did not issue an injunction *in rem*, purporting to enjoin the world from posting Internet links to DeCSS sites. The district court merely directed the principal party to this litigation not to post such links, in direct response to that party's deliberate and self-celebrated defiance of the court's equitable powers, a defiance brazenly calculated to frustrate the remedy imposed by the court.

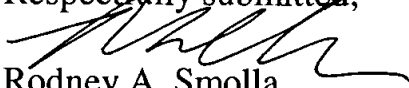
The Appellant's self-proclaimed status as an electronic civil disobedient fails to infuse his actions with any deep moral resonance. Digital hacking is hardly the stuff of Martin Luther King, Mahatma Ghandi, or Henry David Thoreau. More pointedly, civil disobedience of any variety, electronic or otherwise, is still disobedience. Whatever moral sensibilities may compel a person to break the law as a gesture of protest, the breaking of the law is not thereby excused. Civil disobedience in its classic form is undertaken with an expectation that punishment will follow. *See United States v. Thomas*, 116 F.3d 606, 614-15 (2nd Cir. 1997) (while jury nullification "may at times manifest itself as a form of civil disobedience that some may regard as tolerable," in a nation committed to the rule of law such civil disobedience is not a "right.>").

CONCLUSION

This case is not about censorship in the marketplace of ideas. It is about theft in the marketplace of ideas. This case is not about an uninhibited constitutional right

to publish truthful information. It is about the right of our society to deter and punish piracy.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Rodney A. Smolla', written over the printed name.

Rodney A. Smolla

George E. Allen Professor of Law
University of Richmond School of Law
Richmond, Virginia 23173
(804) 289-8197
Counsel for Amici

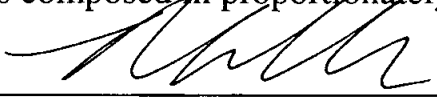
Erwin Chemerinsky
Sydney M. Irmas Professor of Public
Interest Law, Legal Ethics, and
Political Science
University of Southern California Law School
Los Angeles, California (213) 740-2539

Kenneth L. Karst
David G. Price and Dallas P. Price
Professor of Law
University of California, Los Angeles
Box 951476
Los Angeles, California 90095
(310) 825-1847

Marcy Strauss
Professor of Law
Loyola Law School
1331 W. Olympic Blvd.
Los Angeles, California 90015

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)B), the undersigned certifies that this Brief is composed in proportionately spaced 14-point typeface and is 6,986 words.

A handwritten signature in black ink, appearing to read 'R. Smolla', written over a horizontal line.

Rodney A. Smolla
Counsel for Amici

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNIVERSAL CITY STUDIOS, INC. et al.,
Plaintiff-Appellees,

-vs-

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

SHAWN C. REIMERDES, ROMAN KAZAN,
Defendants,

UNITED STATES OF AMERICA,
Intervenor.

00-9185

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Jeffrey Widen, being duly sworn, deposes and states:

1. I am not a party to this action, am over 18 years of age, and reside in Nassau Country, New York.

2. On February 27, 2001 I served two copies of the *Brief Amicus Curiae in Support of Plaintiff-Appellees and Affirmance of Law Professors Rodney A. Smolla, Erwin Chemerinsky, Kenneth L. Karst, and Marcy Strauss* upon Martin Garbus, Esq. of Frankfurt, Garbus, Lein & Selz located at 488 Madison Avenue, New York, New York 10022.

3. Said service was made by delivering 2 true copies of the aforementioned document and leaving it at said office.

Sworn to before me this 27th
day of February, 2001.

ANTHONY LOPEZ
Notary Public, State of New York
No. 31-6015568
Qualified in New York County
Commission Expires Nov. 2, 2002

Jeffrey Widen