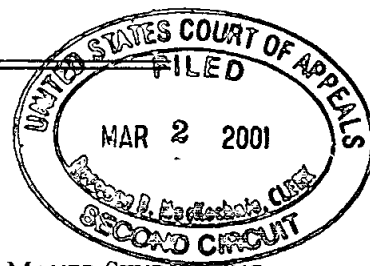


00-9185

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



UNIVERSAL CITY STUDIOS, INC., PARAMOUNT PICTURES CORP., 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 CORP., Plaintiffs/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.

RECORD COPY
PLEASE RETURN TO ROOM
1802

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

BRIEF OF *AMICI CURIAE* RECORDING INDUSTRY ASSOCIATION OF AMERICA (RIAA); AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA (AFM); AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (AFTRA); AMERICAN FILM MARKETING ASSOCIATION (AFMA); AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (ASCAP); BROADCAST MUSIC, INC. (BMI); AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS (ASMP); ASSOCIATION OF AMERICAN PUBLISHERS (AAP); BUSINESS SOFTWARE ALLIANCE (BSA); DIRECTORS GUILD OF AMERICA, INC. (DGA); GRAPHIC ARTISTS GUILD; INTERACTIVE DIGITAL SOFTWARE ASSOCIATION (IDSA); NATIONAL ASSOCIATION OF THEATER OWNERS (NATO); NATIONAL CABLE TELEVISION ASSOCIATION, INC. (NCTA); NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (NCAA); NATIONAL FOOTBALL LEAGUE AND NATIONAL FOOTBALL LEAGUE PROPERTIES, INC. (NFL); NATIONAL HOCKEY LEAGUE (NHL); NATIONAL MUSIC PUBLISHERS' ASSOCIATION (NMPA); OFFICE OF THE COMMISSIONER OF BASEBALL; PRODUCERS GUILD OF AMERICA (PGA); PROFESSIONAL PHOTOGRAPHERS OF AMERICA (PPA); REED ELSEVIER, INC.; SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION (SBCA); SCREEN ACTORS GUILD, INC. (SAG); SOFTWARE & INFORMATION INDUSTRY ASSOCIATION (SIAA); AND WRITERS GUILD OF AMERICA, WEST, INC. (WGA) IN SUPPORT OF APPELLEES AND AFFIRMANCE OF THE JUDGMENT BELOW.

David E. Kendall
Paul B. Gaffney
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

David M. Proper
National Football League and
NFL Properties
280 Park Avenue
New York, NY 10017
(212) 450-2545

OFFICE OF THE COMMISSIONER
OF BASEBALL
Thomas J. Ostertag
245 Park Avenue
New York, NY 10167
(212) 931-7855

Attorneys for *Amici Curiae*

1971-1972
1973-1974
1975-1976

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

OF AMICI CURIAE RECORDING INDUSTRY ASSOCIATION OF AMERICA (RIAA); AMERICAN
ASSOCIATION OF MUSICIANS OF THE UNITED STATES AND CANADA (AFM); AMERICAN
ASSOCIATION OF TELEVISION AND RADIO ARTISTS (AFTRA); AMERICAN FILM MARKETING
ASSOCIATION (AFMA); AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
(ASCAP); BROADCAST MUSIC, INC. (BMI); AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
(ASMP); ASSOCIATION OF AMERICAN PUBLISHERS (AAP); BUSINESS SOFTWARE ALLIANCE
(BSA); DIRECTORS GUILD OF AMERICA, INC. (DGA); GRAPHIC ARTISTS GUILD; INTERACTIVE
DIGITAL SOFTWARE ASSOCIATION (IDSA); NATIONAL ASSOCIATION OF THEATER OWNERS
(NATO); NATIONAL CABLE TELEVISION ASSOCIATION, INC. (NCTA); NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION (NCAA); NATIONAL FOOTBALL LEAGUE AND NATIONAL FOOTBALL
LEAGUE PROPERTIES, INC. (NFL); NATIONAL HOCKEY LEAGUE (NHL); NATIONAL MUSIC
PUBLISHERS' ASSOCIATION (NMPA); OFFICE OF THE COMMISSIONER OF BASEBALL;
AMERICAN GOLF ASSOCIATION (PGA); PROFESSIONAL PHOTOGRAPHERS OF AMERICA (PPA);
ELSEVIER, INC.; SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION
(SBCA); SCREEN ACTORS GUILD, INC. (SAG); SOFTWARE & INFORMATION INDUSTRY
ASSOCIATION (SIIA); AND WRITERS GUILD OF AMERICA, WEST, INC. (WGA) IN SUPPORT OF
THEIR INTERESTS AND AFFIRMANCE OF THE JUDGMENT BELOW.

David E. Kendall
David B. Gaffney
KENDALL & CONNOLLY LLP
1200 New York
Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

David M. Proper
National Football League and
NFL Properties
280 Park Avenue
New York, NY 10017
(212) 450-2545

OFFICE OF THE COMMISSIONER
OF BASEBALL
Thomas J. Ostertag
245 Park Avenue
New York, NY 10167
(212) 931-7855

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
CORPORATE DISCLOSURE STATEMENT	vi
INTEREST OF THE <i>AMICI</i>	1
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. THE DMCA ADDRESSES THE UNIQUE THREAT THAT DIGITAL COPYING AND THE INTERNET POSE TO THE PROTECTION OF COPYRIGHTED WORKS.....	11
II. THE TOOLS FOR UNLAWFUL CONDUCT, SUCH AS DeCSS, ARE SUBJECT TO REGULATION AND PROSCRIPTION.....	15
III. THE DMCA DOES NOT RESTRICT FREE SPEECH AND EXPRESSION.....	18
A. Functional Speech Is Routinely Regulated.....	18
B. The Presence of an Expressive Element in Unlawful Functional Speech Does Not Exempt It from Regulation.	20
IV. THE DMCA DOES NOT CONFLICT WITH THE FAIR USE DOCTRINE.....	24
CONCLUSION	28

TABLE OF AUTHORITIES

FEDERAL CASES

<i>A&M Records, Inc. v. Abdallah</i> , 948 F. Supp. 1449 (C.D. Cal. 1996).....	17, 20
<i>A&M Records, Inc. v. Napster, Inc.</i> , ___ F.3d ___, Nos. 00-16401, 00-16403, 2001 WL 115033 (9th Cir. Feb. 12, 2001)	20, 27
<i>Bernstein v. U.S. Department of Justice</i> , 176 F.3d 1132 (9th Cir.), <i>op. withdrawn</i> , 192 F.3d 1308 (9th Cir. 1999).....	18
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969).....	24
<i>Brown v. Hartlage</i> , 456 U.S. 45 (1982)	21
<i>CFTC v. Vartuli</i> , 228 F.3d 94 (2d Cir. 2000)	23
<i>Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.</i> , 600 F.2d 1184 (5th Cir. 1979).....	12
<i>Fonovisa, Inc. v. Cherry Auction, Inc.</i> , 76 F.3d 259 (9th Cir. 1996)	20
<i>Giboney v. Empire Storage & Ice Co.</i> , 336 U.S. 490 (1949).....	21
<i>Harper & Row, Publishers, Inc. v. Nation Enterprises</i> , 471 U.S. 539 (1985).....	11, 12, 24, 25, 26
<i>Junger v. Daley</i> , 209 F.3d 481 (6th Cir. 2000).....	18
<i>Maynard v. Wooley</i> , 430 U.S. 705 (1977)	23
<i>Mazer v. Stein</i> , 347 U.S. 201 (1954).....	12
<i>Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.</i> , 166 F.3d 65 (2d Cir. 1999)	24, 25
<i>Sega Enterprises Ltd. v. Sabella</i> , No. C93-04260 CW, 1996 WL 780560 (N.D. Cal. Dec. 18, 1996)	20
<i>Shackelford v. Shirley</i> , 948 F.2d 935 (5th Cir. 1991)	21

<i>Sony Corp. of America v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	15
<i>Stewart v. Abend</i> , 495 U.S. 207 (1990)	25
<i>Telerate Systems, Inc. v. Caro</i> , 689 F. Supp. 221 (S.D.N.Y. 1988).....	20
<i>United States v. Fernandez</i> , No. 92 CR. 563 (RO), 1993 WL 88197 (S.D.N.Y. Mar. 25, 1993).....	22, 23
<i>United States v. Freeman</i> , 761 F.2d 549 (9th Cir. 1985).....	21
<i>United States v. Kelley</i> , 254 F. Supp. 9 (S.D.N.Y. 1966), <i>aff'd</i> <i>in part & rev'd in part on other grounds</i> , 395 F.2d 727 (2d Cir. 1968).....	21
<i>United States v. Mendelsohn</i> , 896 F.2d 1183 (9th Cir. 1990)	22
<i>United States v. Morris</i> , 928 F.2d 504 (2d Cir. 1991).....	22
<i>United States v. Rowlee</i> , 899 F.2d 1275 (2d Cir. 1990)	21
<i>Universal City Studios v. Reimerdes</i> , 111 F. Supp. 2d 294 (S.D.N.Y. 2000).....	27

STATE CASES

<i>Duchac v. State</i> , 505 S.W.2d 237 (Tenn. 1973).....	18
<i>Miller v. State</i> , 503 So. 2d 929 (Fla. Dist. Ct. App. 1987)	21
<i>State v. Warner</i> , 696 P.2d 1052 (Or. 1985)	18

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES

17 U.S.C. § 107	25
17 U.S.C. § 1002.....	16
17 U.S.C. § 1201.....	14, 26
18 U.S.C. § 201	18, 19
18 U.S.C. § 287	18, 19

18 U.S.C. § 373	18
18 U.S.C. § 875	18, 19
18 U.S.C. § 876	18, 19
18 U.S.C. § 1001.....	18, 19
18 U.S.C. § 1030.....	19
18 U.S.C. § 1953.....	16, 19
18 U.S.C. § 2425.....	18
18 U.S.C. § 2512.....	16
47 U.S.C. § 605	17
U.S. Const., art. I, § 8, cl. 8	12, 16

LEGISLATIVE HISTORY

H.R. Rep. No. 105-551, pt. 1 (1998)	15, 17
S. Rep. No. 105-190 (1998)	14, 15

STATE STATUTES

Ala. Code § 13A-7-8	16
Ala. Code § 13A-8-151	19
Ala. Code § 13A-9-9	16
Ala. Code § 13A-11-34	16
Alaska Stat. § 11.66.260	16
Ariz. Rev. Stat. Ann. § 13-1505.....	16
Ariz. Rev. Stat. Ann. § 13-2003.....	16
Ark. Code Ann. § 5-66-104	16

Cal. Penal Code § 466.....	16
Conn. Gen. Stat. Ann. § 53a-106.....	16
Del. Code Ann. tit. 11, § 828.....	16
Ga. Code Ann. § 16-11-63.....	16
5 Ill. Comp. Stat. Ann. § 175/5-105.....	19
5 Ill. Comp. Stat. Ann. § 175/10-140.....	19
720 Ill. Comp. Stat. Ann. § 5/19-2.....	16
Ky. Rev. Stat. & R. Serv. § 526.040	16
La. Rev. Stat. Ann. § 14:70.4.....	16
Neb. Rev. Stat. Ann. § 28-605	16
N.M. Stat. Ann. § 30-16-5.....	16
N.Y. Penal Law § 225.30	16
N.Y. Penal Law § 250.10	16
N.Y. Veh. & Traf. Law § 397-a.....	16
18 Pa. Cons. Stat. Ann. § 4106.1.....	16
S.C. Code Ann. § 16-11-20	16
S.D. Codified Laws § 22-39-37	16
Va. Code Ann. §18.2-196	16
Va. Code Ann. § 46.2-1079	16
Wash. Rev. Code Ann. § 9.26A.090.....	19

CORPORATE DISCLOSURE STATEMENT

In accordance with FRAP 26.1, *amici* state that none of the organizations participating as *amici*, except for Reed Elsevier, Inc., has any parent companies nor do any publicly held companies own ten percent or more of their stock. Reed Elsevier, Inc., is a private company, the shares of which are controlled by Reed International, PLC, which is traded on the London stock exchange, and Elsevier NV, which is traded on the Amsterdam exchange.

INTEREST OF THE AMICI

Amici are a broad coalition of organizations that represent the authors, composers, creators, producers, and distributors of music, film, television, literature, photographic art, computer software, and interactive video games. Although diverse in their creative pursuits, *amici* are united by a single interest: their industries' survival depends on both the promotion of free expression and the protection of intellectual property rights in the artistic works created, produced, and distributed by their members.

Amicus the Recording Industry Association of America ("RIAA") is a trade association representing more than 300 recording companies, including BMG Entertainment, EMI Recorded Music North America, Sony Music Entertainment Inc., Warner Music Group, and Universal Music Group. Members of the RIAA create, produce, and/or distribute approximately 90 percent of all legitimate sound recordings in the United States and own the copyrights in those works. One of the RIAA's principal objectives is to support and promote the creative, artistic, free speech, and financial interests of recording artists and the RIAA's member companies.

Amicus the American Federation of Musicians of the United States and Canada ("AFM") is an international labor organization representing over 110,000 professional musicians in the United States and Canada. Musicians represented by the AFM record albums, movie soundtracks, television and radio programming and commercials.

Amicus the American Federation of Television and Radio Artists (“AFTRA”) is a national labor union representing over 80,000 performers and newsmen who are employed in the news, entertainment, advertising, and sound recording industries.

Amicus the American Film Marketing Association (“AFMA”) is a trade association representing over 150 independent producers and distributors of motion pictures and television programming as well as twenty-seven affiliated financial institutions that provide funding for independent production. AFMA members include: Chase Manhattan Bank, The Lewis Horwitz Organization, a Division of Southern Pacific Bank, Miramax International, NBC Enterprises, New Concorde Pictures, New Line Cinema, RKO Pictures, Saban Pictures International, The Kushner-Loke Company, Union Bank of California, Viacom Pictures/Showtime Networks, and Worldwide Entertainment.

Amicus the American Society of Composers, Authors and Publishers (“ASCAP”) is an unincorporated voluntary membership association of 100,000 composers, lyricists, and music publishers. *Amicus* Broadcast Music, Inc. (“BMI”) represents approximately 200,000 songwriters, composers, and music publishers. On behalf of ASCAP members and BMI affiliated composers and publishers, as well as hundreds of thousands of writers and publishers of foreign performing rights societies, ASCAP and BMI license the right of non-dramatic public performance of the millions of copyrighted musical compositions in their repertoires.

Amicus the American Society of Media Photographers (“ASMP”) is the largest organization in the world representing professional photographers who make photographs for publication in the various media. ASMP has approximately 6,000 members, most of whom are freelance photographers, who have been producing some of this country’s best photography for publishers, advertising agencies and corporate clients for more than half a century. ASMP estimates that there are over 100,000 freelance photographers with interests similar to those of its members in the United States. Under the Copyright Act of 1976, freelance photographers are the presumptive owners of the copyrights to the images they create, and most earn their livings by licensing the use and reuse of their photographs.

Amicus the Association of American Publishers (“AAP”) is the national trade association of the U.S. book publishing industry. Representing an industry that depends on the exercise of First Amendment rights, AAP has been a leader in the battle to protect free speech. AAP’s members also vigorously support strong intellectual property rights protection. As digital media, including ebooks, become increasingly important ways to distribute published content, the publishing industry views effective encryption as an absolutely essential tool for protecting creative rights.

Amicus the Business Software Alliance (“BSA”) serves as the voice of the world’s leading software developers before governments and with consumers in the international marketplace. Its members represent the fastest-growing industry

in the world. BSA educates computer users on software copyrights, advocates public policy that fosters innovation and expands trade opportunities, and fights software piracy. BSA members create approximately 90% of the world office-productivity software.

Amicus the Directors Guild of America, Inc. ("DGA") is a non-profit corporation that serves as the duly recognized labor organization and exclusive representative for the purposes of collective bargaining of, *inter alia*, directors, assistant directors, and unit production managers of theatrical and television motion pictures.

Amicus the Graphic Artists Guild, UAW Local 3030, is a New York not-for-profit corporation that represents graphic designers, illustrators, and other creative professionals in the graphic arts. The Guild's mission is to protect and promote the economic interests of its members. It works to improve conditions for all creators of graphic art and to raise ethical and financial standards throughout the graphics industry.

Amicus the Interactive Digital Software Association ("IDSA") is the trade association dedicated to serving the business and public affairs needs of companies that publish video games for game consoles, personal computers, handheld devices, and the Internet. IDSA members collectively accounted for more than ninety percent of the \$6.02 billion in entertainment software sales in the United States in 2000, and billions more in export sales of American-made entertainment software.

Amicus National Association of Theatre Owners (“NATO”) is the trade association for the motion picture theatre industry. It represents more than 600 members in the United States in addition to international members. NATO’s membership includes the largest cinema chains in the world and hundreds of smaller, independent theatre owners as well.

Amicus National Cable Television Association, Inc., (“NCTA”) is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving over 90 percent of the nation’s cable television households, over 200 cable television program networks, as well as cable equipment suppliers, and others interested in or affiliated with the cable television industry.

Amicus National Collegiate Athletic Association (“NCAA”) is a voluntary, unincorporated association of approximately 1,200 colleges, universities, athletics conferences, and related organizations devoted to the regulation and promotion of intercollegiate athletics for 300,000 male and female student-athletes. As hundreds of NCAA athletics events are broadcast annually on network television, cable and satellite systems, the NCAA and its members are committed to ensuring that appropriate copyright protection is maintained in the new digital age.

Amicus National Football League and National Football League Properties, Inc. (“NFL”) is an unincorporated association of thirty-two (32) Member Clubs, each of which owns and operates a professional football team. The NFL, as the producer and coordinator of the collective product of the NFL championship

football, exclusively owns the copyrights in the broadcasts of, *inter alia*, all NFL games.

Amicus National Hockey League (“NHL”) is an unincorporated association of thirty (30) Member Teams in the United States and Canada, each of which owns and operates a professional hockey team. The NHL engages in a wide array of commercial endeavors, including the local, national, and international licensing of its copyrighted game telecasts and other programming.

Amicus National Music Publishers’ Association (“NMPA”) is the principal trade association representing the interests of music publishers in the United States. The more than 800 music publisher members of NMPA, along with their subsidiaries and affiliates, own or administer the majority of U.S. copyrighted musical works. For over eight decades, NMPA has served as the leading voice of the American music publishing industry in Congress and in the courts.

Amicus the Office of the Commissioner of Baseball represents the thirty clubs engaged in the professional sport of Major League Baseball. The clubs own copyrights in the broadcasts of more than 2000 Major League Baseball games played each year, and they are responsible for licensing a variety of traditional and new media rights to present those telecasts.

Amicus the Producers Guild of America (“PGA”) is a non-profit organization that has been in existence since 1950. It represents the interests of a substantial number of individual producers in the motion picture and television industries. Members of the PGA initiate, coordinate, supervise, and control, either

on their own behalf (entrepreneur producers) or on behalf of an employer (employee producers), all aspects of the motion picture and/or television production process—creative, financial, technological, and administrative—throughout all phases from inception to completion, including coordination, supervision, and control of all other talents and crafts, subject to the provisions of their collective bargaining agreements and personal services contracts.

Amicus Professional Photographers of America (“PPA”), the world’s largest photographic trade association, represents photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, advertising, and art. The professional photographers represented by the PPA have been the primary caretakers of world events and family histories for the last 150 years, and have shared their creative works with the public secure in the knowledge that their rights in those works would be protected.

Amicus Reed Elsevier, Inc. is a leading publisher of various types of copyrighted works for the business and academic communities, including scientific journals, law-related materials, reference books and textbooks, and magazines. Reed Elsevier has made substantial investments in equipment and materials to ensure safe, secure, and efficient delivery of copyrighted works over the Internet and other electronic networks.

Amicus Satellite Broadcasting and Communications Association (“SBCA”) is the national trade association that represents all the segments of the satellite industry that deliver video programming and broadband services to

consumers. It is made up of DBS providers and satellite broadband companies; the major video programmers; and satellite equipment manufacturers and dealers.

Amicus Screen Actors Guild, Inc. ("SAG") is the collective bargaining representative for over 96,000 professional actors and performing artists, including dancers, singers, and stunt performers, in the theatrical and television motion picture industry. The ability of SAG-represented performers to realize the compensation to which they are entitled by virtue of their performances is inextricably tied to the protection of intellectual property rights and the prevention of unauthorized copying of the motion pictures in which these performers render services.

Amicus Software & Information Industry Association ("SIIA") is the leading trade association committed to promoting and protecting the interests of the software and information industries. SIIA represents over 1,000 member companies, including well-known market leaders to hundreds of smaller companies involved in developing and marketing software and electronic content for business, education, consumers, the Internet, and entertainment uses. SIIA's Content Division is comprised of more than 100 large and small companies that publish and distribute information or provide technology and services that enable the marketing and delivery of information products and services. This division includes the Digital Rights Management Working Group, which focuses upon the legal, social, and technical solutions that facilitate online publishing and distribution.

Amicus Writers Guild of America, west, Inc. (“WGA”) is a labor organization representing approximately 8,500 professional authors of stories and screenplays for theatrical films and television programs, radio, the Internet, and other new media technologies. The WGA also represents news writers for radio and television. WGA writers create intellectual property throughout the United States, and in several foreign countries under the terms of contracts negotiated by the WGA.

Amici work to support and protect the important First Amendment and copyright interests of their members in a variety of ways. With regard to the issues raised in this appeal, *amici* are committed to protecting the copyrights, trademarks, and trade secrets of their members and work to combat piracy of their legally protected works, which deprives members of the creative industry of the income that the Constitution has deemed to be the just reward for their efforts. *Amici* operate comprehensive anti-piracy programs, work to strengthen copyright protection through legislative activity, assist in the investigation and prosecution of piracy, pursue enforcement actions against illegal copying and distribution, and work to develop and strengthen anti-piracy security measures.

All parties have consented to *amici* filing this brief.

SUMMARY OF ARGUMENT

The protections offered by the Digital Millennium Copyright Act (“DMCA”) are critical to safeguarding *amici*’s creative works from state-of-the-art digital piracy. *Amici* share the view of appellees, the district court, and Congress

that the ease and ubiquity of digital copying warrants the sort of *ex ante* protection enacted in the DMCA, and specifically the provisions in section 1201(a)(2), which, as applied in this case, preclude the dissemination of DeCSS. The authors, artists, individuals and companies represented by *amici* rely upon technological security measures to guard against piracy of their legally protected works in digital format. Specifically, the Content Scramble System (“CSS”) protects motion pictures and other works recorded in the DVD format. The DMCA represents a carefully calibrated effort by Congress, after significant study and analysis, to balance a variety of interests in the brave new world of cyberspace, in a way that would best facilitate the creation and distribution of speech and expression in the digital age.

Appellants and their supporting *amici* embrace an opposite and wholly untenable view of the law. They do not dispute that the DeCSS computer code functions as a master key to unlock encrypted DVDs and allow unauthorized persons to copy their content. Rather, they assert that the First Amendment provides a safe harbor for those who want to pass that key around, because the DeCSS software itself, in addition to serving as a tool, also conveys protected “expression” to those who know how to read it. Appellants and their supporting *amici* also assert that the DMCA precludes “fair use” of DVDs by imposing legal barriers against those who wish to make perfect digital copies of DVD-formatted films.

Appellants turn the notion of First Amendment protection on its head. The DMCA was enacted to protect First Amendment rights – specifically those of

amici in their creative works. The Act poses no impediment at all for those who wish to express their opposition to the encryption of copyrighted works, the enactment of prophylactic copyright protection rules, or even the idea of copyright protection generally. What the DMCA does do is forbid trafficking in a cybernetic burglary tool whose primary purpose is to destroy digital protection of copyrighted material and to facilitate piracy of that material. Appellants and their *amici* also misapprehend the fair use doctrine of copyright, construing it as a right of unfettered digital access to copyrighted works, rather than a privilege to make limited reasonable use of such works for legitimate purposes. These arguments were properly rejected below, and *amici* respectfully submit they should be rejected here.

ARGUMENT

I. THE DMCA ADDRESSES THE UNIQUE THREAT THAT DIGITAL COPYING AND THE INTERNET POSE TO THE PROTECTION OF COPYRIGHTED WORKS.

Free expression cannot thrive without effective protection for copyrighted works. Copyright law motivates authors, composers, and artists to invest their time and efforts in the development of new works, secure in the knowledge that they will maintain control over and reap the rewards of their creative labors for a reasonable period. These rewards, in turn, benefit the public by encouraging the continued creation and dissemination of original expression. “[I]t should not be forgotten that the Framers intended copyright itself to be the

engine of free expression.” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas. . . . “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.’”

Id. (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

The Framers’ acknowledgement of the importance of copyright appears in the grant to Congress of the authority 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. Congress in turn has repeatedly exercised that authority to foster the free speech and expression that the First Amendment was intended to protect. Since the first federal Copyright Act in 1790, the public interest in protecting intellectual property has been manifested in federal statutes and sustained by diligent enforcement of restrictions against unlawful duplication and distribution of protected works. As the Framers envisioned, “free expression is enriched by protecting the creations of authors from exploitation by others, and the Copyright Act is the congressional implementation of that judgment.” *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979).

The DMCA represents Congress’s latest attempt to enforce the promise of copyright against threats of piracy that continue to mutate with the development

of new communication technologies. When the DMCA was enacted in 1998, it was clear that rapidly emerging digital technologies for copyright piracy had radically changed the landscape of copyright enforcement and threatened to destroy the marketplace for legitimate works distributed in digital form. With the advent of digital media and the Internet, those seeking to profit illegally from the creative works of others by disseminating such works without authorization can and do so immediately and expertly, producing perfect pirated copies on a massive global scale. It is often as easy as a few mouse clicks to send flawless digital duplicates to hundreds of thousands of Internet users.

This new digital environment has rendered traditional tools of copyright enforcement significantly less effective. Traditional *ex post* infringement actions simply lack the speed and dexterity to deal effectively with the rapid, widespread, and decentralized nature of digital piracy. By the time a content owner learns of an infringement, brings an enforcement action, and obtains relief, the pirated work has already been disseminated to others, each capable of making and disseminating perfect copies of that work and hence of further piracy. And even that scenario presumes that the content owner could identify and find the pirate – a dubious assumption in light of the anonymity available to and widely utilized by Internet users. Unchecked, such piracy threatens to destroy the legitimate marketplace for works of art, music, film, software, literature, and other video programming (including sports programming), and will deter the development and distribution of new works in state-of-the-art digital media.

Realizing that traditional tools of copyright enforcement needed to be supplemented by technological safeguards, the CSS encryption key system was developed. But as this case demonstrates, works of intellectual property that can be encrypted can also be decrypted through the ingenuity of hackers. Technological safeguards alone can never adequately protect creative works against a diffuse global network of Internet-linked individuals who seek to traffic in and profit illegally from the works of others.

To complement the creative industries' own efforts to thwart illegal digital copying, Congress in 1998 enacted § 1201(a)(2) of the DMCA, which forbids trafficking in the implements of piracy – specifically, technology designed to defeat private copyright protections. *See* 17 U.S.C. § 1201(a)(2). Congress accurately assessed that the spread of digital piracy threatens the rights of copyright holders as well as the fundamental promise of both the First Amendment and the Internet – that works of music, cinema, video, and literature will become more abundant and more readily accessible, and distributed in state-of-the-art form. In the words of the Senate Judiciary Committee:

Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy. [The DMCA] provides this protection and creates the legal platform for launching the global digital on-line marketplace for copyrighted works. It will facilitate making available quickly and conveniently via the Internet the movies, music, software, and literary works that are the fruit of American creative genius.

S. Rep. No. 105-190, at 8 (1998). *See also* Report of the House Judiciary Committee, H.R. Rep. No. 105-551, pt. 1, at 10 (1998). In the DMCA, Congress thus not only endorsed industry encryption efforts but further recognized that content owners ought not to be obligated to secure their works (and repeatedly re-secure them) with Fort Knox protections in response to hacker assaults. This conclusion, embodied in the DMCA after extensive hearings, study, and deliberation, is entitled to substantial deference. As the Supreme Court noted in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984):

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

II. THE TOOLS FOR UNLAWFUL CONDUCT, SUCH AS DeCSS, ARE SUBJECT TO REGULATION AND PROSCRIPTION.

In recommending the DMCA for enactment, the Senate Judiciary Committee observed that the anti-trafficking provision was “roughly analogous to making it illegal to break into a house using a tool, the primary purpose of which is to break into houses.” S. Rep. No. 105-190, at 11.

There is abundant justification and precedent for the legislative regulation of tools used to engage in unlawful conduct. One could exhaust the word limit of this *amicus* brief with citations to statutes and case law directed against

such things as burglary tools,¹ forgery devices,² radar detectors,³ ATM access devices,⁴ wiretapping equipment,⁵ gambling devices,⁶ and the like.

With regard to intellectual property generally and copyright in particular, Congress has authority under the Constitution to enact all measures “which shall be necessary and proper” to protect the interests of those owners of intangible property. U.S. Const., art. I, § 8, cls. 8, 18. Prior to the DMCA, Congress exercised that authority by enacting prophylactic measures similar to those cited above. For example, the Audio Home Recording Act protects the copyrights of songwriters and recording artists by forbidding the possession or sale of digital audio recorders that lack mechanisms to prevent serial copying, as well as the distribution or manufacture of devices designed to circumvent those safeguards. 17 U.S.C. § 1002(a), (c). Likewise, the Communications Act of 1934, as amended, protects the copyrights of the producers of cable television programs by forbidding the possession, manufacture, and trafficking of any device or equipment that is

¹ See, e.g., Ala. Code § 13A-7-8; Cal. Penal Code § 466; S.C. Code Ann. § 16-11-20; Ariz. Rev. Stat. Ann. § 13-1505; Conn. Gen. Stat. Ann. § 53a-106; Del. Code Ann. tit. 11 § 828; 720 Ill. Comp. Stat. Ann. § 5/19-2; N.M. Stat. Ann. § 30-16-5.

² See, e.g., Ala. Code § 13A-9-9; Ariz. Rev. Stat. § 13-2003; Neb. Rev. Stat. Ann. § 28-605; S.D. Codified Laws § 22-39-37; Va. Code Ann. § 18.2-196 (devices for credit card fraud).

³ See, e.g., N.Y. Veh. & Traf. Law § 397-a; Va. Code Ann. § 46.2-1079.

⁴ See, e.g., La. Rev. Stat. Ann. § 14:70.4; 18 Pa. Cons. Stat. Ann. § 4106.1.

⁵ See, e.g., 18 U.S.C. § 2512(1)(b); Ala. Code § 13A-11-34; Ga. Code Ann. § 16-11-63; Ky. Rev. Stat. & R. Serv. § 526.040; N.Y. Penal Law § 250.10.

⁶ See, e.g., 18 U.S.C. § 1953(a); Alaska Stat. § 11.66.260; Ark. Code Ann. § 5-66-104; N.Y. Penal Law § 225.30.

“primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services.” *See* 47 U.S.C. § 605(a), (e)(4). The doctrine of contributory copyright infringement imposes similar liability on those who traffic in the instruments of infringement. *See, e.g., A&M Records, Inc. v. Abdallah*, 948 F. Supp. 1449, 1456 (C.D. Cal. 1996) (holding that contributory copyright infringement doctrine imposes liability on the sellers of “products specifically manufactured for counterfeiting activity, even if such products have substantial noninfringing uses”).

When it considered the DMCA, Congress found that the special threat posed by digital copying merited similar prophylactic protections for copyright owners – protections that would prohibit both the act of digital piracy and trafficking in the tools for circumventing technological access controls. As the House Committee on the Judiciary noted:

The changes contained in the new Section 1201 are meant to parallel similar types of protection afforded by Federal telecommunications law and state laws. Just as Congress acted in the areas of cable television and satellite transmissions to prevent unauthorized interception and descrambling of signals, it is now necessary to address the on-line environment.

H.R. Rep. No. 105-551, pt. 1, at 10.

The Senate Committee’s analogy of devices like DeCSS to burglary tools is particularly trenchant. Even appellants and their *amici* acknowledge that the plain and undeniable purpose of this software was to decrypt DVDs so they can be perfectly copied in a digital form and disseminated worldwide almost instantaneously via the Internet. Of course, not every act of copying necessarily

violates the copyright laws. But not every conceivable use of a burglary tool is illegal, either – these devices would no doubt be happily useful to those who routinely lock themselves out of their own homes. That does not change the fact that the law routinely proscribes the possession of or trafficking in tools of unlawful conduct as an effective *ex ante* method of regulating and limiting the unlawful conduct itself.⁷

III. THE DMCA DOES NOT RESTRICT FREE SPEECH AND EXPRESSION.

Appellants and many of their supporting *amici* contend that the First Amendment bars an injunction against computer code, such as DeCSS, because code, to those able to read it, often contains an expressive element. This challenge fundamentally misapprehends the scope of First Amendment protections.

A. Functional Speech Is Routinely Regulated.

This appeal does not turn on whether computer code is properly considered “speech.” Compare *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000), and *Bernstein v. U.S. Dep’t of Justice*, 176 F.3d 1132 (9th Cir.), *op. withdrawn*, 192 F.3d 1308 (9th Cir. 1999). Many laws prohibit acts of pure speech when they function as instruments of illegality, without violating the First Amendment. Federal law, for example, criminalizes solicitation,⁸ fraud,⁹ extortion,¹⁰ and bribery.¹¹ It is against

⁷ “[A]n alternative legitimate use does not eliminate an object from the category of potential burglar’s tools.” *State v. Warner*, 696 P.2d 1052, 1056 (Or. 1985); see also *Duchac v. State*, 505 S.W.2d 237, 241 (Tenn. 1973) (“[I]t has generally been held that if the instruments are capable of being used in committing burglary, it is immaterial that they were originally designed and intended for a lawful purpose.”).

⁸ See, e.g., 18 U.S.C. § 373 (solicitation to commit a violent crime); 18 U.S.C. § 2425 (transmission of information or solicitation to entice a minor).

the law in some states to publish telephone credit card information. *See, e.g.*, Wash. Rev. Code Ann. § 9.26A.090. Civil causes of action also exist for “pure speech” torts such as harassment, slander, libel, simple assault, and false light invasion of privacy.

Moreover, a number of state and federal statutes prohibit or otherwise regulate the use of certain kinds of computer code. Presumably even hackers are grateful for the federal statutes that prohibit both the transmission of computer code written to infect the recipients’ computers with destructive viruses, and that prohibit the trafficking in computer passwords. *See* 18 U.S.C. §§ 1030(a)(5)(A), (a)(6). Laws have also been enacted and enforced that prohibit the transmission of gambling software, *see* 18 U.S.C. § 1953(a), the publication of the “algorithms” or “codes” that make up another’s digital signature device, *see, e.g.*, 5 Ill. Comp. Stat. Ann. 175/5-105, 175/10-140, and the trafficking in code that enables the theft of telecommunications services, *see, e.g.*, Ala. Code § 13A-8-151. Whatever the “communicative” nature of such transmissions, they are permissibly forbidden because they also constitute illegal conduct.

With regard to copyright, the law against contributory infringement applies specifically to those who, while not themselves copying, aid, facilitate, or assist others to copy illegally, whether by using a photocopy machine, computer

⁹ *See, e.g.*, 18 U.S.C. § 1001 (false statements); 18 U.S.C. § 287 (false claims).

¹⁰ *See, e.g.*, 18 U.S.C. § 875 (transmitting extortion attempts or requests for ransom); 18 U.S.C. § 876 (mailing threats or extortion attempts).

¹¹ *See, e.g.*, 18 U.S.C. § 201 (bribery of federal officials).

software, or some other device. *See A&M Records, Inc. v. Napster, Inc.*, ___ F.3d ___, Nos. 00-16401, 00-16403, 2001 WL 115033 (9th Cir. Feb. 12, 2001) (defendant engaged in contributory infringement by providing software and an online forum for duplicating and distributing copyrighted music); *Sega Enters. Ltd. v. Sabella*, No. C 93-04260 CW, 1996 WL 780560 (N.D. Cal. Dec. 18, 1996) (defendant engaged in contributory infringement by posting copyrighted video games on computer bulletin board and by offering devices designed solely to copy video games); *Telerate Sys., Inc. v. Caro*, 689 F. Supp. 221 (S.D.N.Y. 1988) (defendant engaged in contributory infringement by providing software that permitted users to obtain unauthorized access to an on-line service); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996) (defendant engaged in contributory infringement by holding swap meet that facilitated the exchange of copyrighted music); *A&M Records v. Abdallah*, 948 F. Supp. 1449 (C.D. Cal. 1996) (defendant engaged in contributory infringement by providing analog audio tapes customized for the purpose of duplicating copyrighted music).

The fact that the DMCA protects intellectual rather than real or personal property, and that it proscribes certain kinds of computer code, does not distinguish this Act from a vast body of plainly constitutional federal and state statutes and precedents proscribing the tools of unlawful conduct.

B. The Presence of an Expressive Element in Unlawful Functional Speech Does Not Exempt It from Regulation.

It is undisputed that the principal function of DeCSS, if not the only function (for virtually all users), is to facilitate the decryption and copying of

copyright-protected works on DVDs. The Court therefore should not give significant weight to appellants' contention that DeCSS also has an expressive component to it that privileges it against prohibition. As Justice Black, staunch defender of the First Amendment, once wrote for the Court:

[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (citation omitted).

Constitutional challenges of the sort asserted here are routinely asserted – and just as routinely denied – in cases involving “functional” speech under the laws cited above. There is no First Amendment defense to acts of “pure speech” such as solicitation of crime, *Brown v. Hartlage*, 456 U.S. 45, 55 (1982); fraud, *United States v. Rowlee*, 899 F.2d 1275, 1280-81 (2d Cir. 1990); harassment, *Shackelford v. Shirley*, 948 F.2d 935, 938 (5th Cir. 1991); gambling, *United States v. Kelley*, 254 F. Supp. 9, 14-15 (S.D.N.Y. 1966), *aff'd in part & rev'd in part on other grounds*, 395 F.2d 727 (2d Cir. 1968); or counseling income tax evasion, *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985). An individual would be equally liable for aiding and abetting burglary if he e-mails his fellow burglar the combination to the vault as if he hands his associate the requisite crowbar and explosives. *See, e.g., Miller v. State*, 503 So. 2d 929, 930 (Fla. Dist. Ct. App. 1987).

Similarly, an individual is liable for transmitting a computer virus regardless of whether that virus will express “the inadequacies of current security measures on computer networks by exploiting the security defects that [the defendant] had discovered.” *See United States v. Morris*, 928 F.2d 504, 505 (2d Cir. 1991).

Those who have explicitly raised a First Amendment defense to prosecutions or suits alleging unlawful conduct on the basis of the expressive content of computer data have been equally unsuccessful. For example, in *United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990), the Ninth Circuit held that the First Amendment did not bar the illegal bookmaking conviction of two defendants who mailed a computer disk encoded with a software program that “provided a computerized method for recording and analyzing bets on sporting events.” *Id.* at 1184.

The question is not whether the . . . program is speech, but whether it is protected speech. “Where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone.”

Although a computer program under other circumstances might warrant first amendment protection, [this program] does not. [It] is too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection. No first amendment defense need be permitted when words are more than mere advocacy, “so close in time and purpose to a substantive evil as to become part of the crime itself.”

Id. at 1185-86 (citations omitted). In *United States v. Fernandez*, No. 92 CR. 563 (RO), 1993 WL 88197 (S.D.N.Y. Mar. 25, 1993), the court rejected a First Amendment challenge to the federal prosecution of an individual under the

Computer Fraud and Abuse Act for posting material, apparently including computer access passwords, on government computers. “Whatever else, theft, including accessing computers without authorization and using information therein to cause damage or loss to others . . . is not activity protected by the First Amendment.” *Id.* at *4. And just recently this Court affirmed, over First Amendment objections, a finding that a purveyor of a commodities-trading computer program could be required to register with the Commodity Futures Trading Commission. *CFTC v. Vartuli*, 228 F.3d 94 (2d Cir. 2000). “We do not think that [the software] in the form it was sold and marketed by the defendants was ‘speech’ of the sort thus protected.” *Id.* at 111.

The distinction between functional and communicative speech is firmly grounded in First Amendment jurisprudence. Courts recognize that in some instances words and code serve an immediate illicit purpose, and function as instruments of illegality, much like burglars’ tools or an unauthorized cable television descrambler. The fact that words, codes, actions, or objects may also contain some expressive content does not immunize them from the law. It would be quite odd indeed if a ring of burglars could avoid prosecution for sharing their tools if they simply etched “Live Free or Die” into the handles of each. *But cf. Maynard v. Wooley*, 430 U.S. 705 (1977).

This rationale applies with equal force when the instrument of illegality is computer code. Whatever minimal expressive elements DeCSS may contain, these elements do not immunize the use of DeCSS for its intended

purpose – a tool of piracy to facilitate the duplication and dissemination of copyright-protected works distributed on DVD.¹²

IV. THE DMCA DOES NOT CONFLICT WITH THE FAIR USE DOCTRINE.

In their other challenge to the injunction, appellants contend that the district court's application of the DMCA "unconstitutionally eliminates fair use" by preventing the copying of works distributed on DVDs. Among other things, appellants and their *amici* assume that the privilege of fair use encompasses a "right" of unfettered access, and also a "right" not just to copy, but to make perfect and complete digital copies. Like their "expressive speech" challenge to the injunction, appellants' fair use argument seriously misapprehends the controlling law and virtually ignores the First Amendment interests the DMCA protects and promotes.

The doctrine of fair use provides individuals other than the copyright-holder with "a privilege . . . to use the copyrighted material in a reasonable manner without [the copyright-holder's] consent." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985) (quotation omitted). The doctrine thus "tempers the protection of copyright by allowing an author to use a limited amount of copyrighted material under some circumstances." *Nihon Keizai Shimbun, Inc. v.*

¹² This case does not present any First Amendment question of causation: for example, whether expression produces some consequence which may result in liability. Such cases are governed by the exacting incitement standards of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Here, it is instead the direct functional use of the computer code which is at issue, for it is undisputed that DeCSS itself (and not some alleged impact of its "expressive" qualities) operates to unlock the CSS protection appellees have placed on their DVDs.

Comline Bus. Data, Inc., 166 F.3d 65, 72 (2d Cir. 1999) (quotation omitted).

Although codified in the Copyright Act, *see* 17 U.S.C. § 107, the fair use doctrine finds its roots in principles of free speech. *See Harper & Row*, 471 U.S. at 560. The fair use doctrine strikes a balance between the free speech rights of authors, artists, and content owners – by preserving their incentive to produce creative works – and the free speech rights of those who want to use copyrighted works, but in a manner that avoids harm to the economic value of those works. *See id.* at 562, 568 (fair use “presupposes good faith and fair dealing” and does not apply where a use, although otherwise fair, “would adversely affect the potential market for the copyrighted work” (quotations omitted)).

Central to the concept of fair use is the notion that the law will imply a limited right to use a copyrighted work only where a “reasonable copyright owner . . . [would] have consented to the use.” *Harper & Row*, 471 U.S. at 550 (quotation omitted). Courts have consistently interpreted the fair use doctrine as permitting individuals who had obtained access to protected works to make limited use of those works. Courts have never interpreted the doctrine, however, as providing would-be fair-users with a right of access to protected works. As the Supreme Court has noted, “nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright. In fact, the Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work.” *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990). Similarly, in *Harper & Row*, the Supreme Court recognized that traditionally the fact that an

author had not published her work greatly diminished someone else's opportunity to make fair use of it. 471 U.S. at 550-52.

Content owners have long exercised this prerogative to choose when and how they provide access to their works, and intellectual property laws have consistently enforced and protected their choices. The law will enforce a movie theatre's right to charge for admission, regardless of whether an individual wishes to see the movie for the purposes of scholarship, news reporting, or artistic criticism. The doctrine of fair use does not require the theatre to provide her with free admission or to provide her with a copy of the film in a format suited to her tastes. Similarly, the doctrine neither requires studios to provide would-be critics with free access to the films that it releases in the DVD format, nor to provide critics with DVDs that may be duplicated and manipulated in perfect digital form.

It is hyperbolic in the extreme to assert that reasonable, Congressionally-authorized access controls over works in digital form "eliminate fair use." Fair use of motion pictures, for example, has been occurring long before the advent of digital distribution and will continue long after. Students, professors, and critics remain free to quote or describe portions of a DVD-formatted work, and parodists remain free to lampoon it. Further, the Act exempts individuals engaged in reverse engineering or encryption research from liability for circumventing access devices under certain circumstances. 17 U.S.C. § 1201(f), (g).

By contrast, it is plain that dissemination of DeCSS would devastate the market for motion pictures. Purveyors of the DeCSS code cannot distinguish

between the student who seeks to splice a portion of Steven Spielberg's *Amistad* into a multi-media report on slavery and copyright pirates who seek to distribute perfect digital copies of the film around the globe. As the district court concluded, "dissemination [of DeCSS] itself carries very substantial risk[s] of imminent harm because the . . . means of circumventing access controls to copyrighted works threatens to produce virtually unstoppable infringement of copyright." *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 332 (S.D.N.Y. 2000). See also *A&M Records v. Napster*, *supra*, 2001 WL 115033 *10 (owners of copyrighted recordings "necessarily [suffer] harm[]" by "[h]aving digital downloads available for free on the Napster system"). Any further dissemination of DeCSS, even to facilitate fair use, risks its widespread use for illicit purposes and unabated piracy of copyrighted works. This in turn threatens to destroy the legitimate global marketplace for these creative works. Rampant piracy would be a powerful disincentive to releasing works on DVDs and in any other state-of-the-art digital format to the detriment of the entire creative community, including writers, actors, and other talent who share in the revenue generated by new technologies.

The DMCA provides a measured response to a pernicious problem, giving force of law to artists' efforts to limit, through encryption technology, the unauthorized access to their works. This distinction comports both with the courts' traditional understanding of the fair use privilege and with Congress' findings regarding the unique threat posed by digital piracy. As such, this Court should refuse appellants' invitation to recast fair use as a right of access.

CONCLUSION

Rather than undermining First Amendment interests, the DMCA in fact promotes free speech with *ex ante* protections for those who create and disseminate expression in the most advanced technological form. The DMCA imposes no restrictions on criticism or other expressive speech directed at the scope of copyright protection, CSS encryption, Congress, the courts, or the plaintiffs. Nor is there any legitimate complaint that protected encrypted DVDs will "eliminate" fair use of works distributed in that format. The decision of the district court and the injunction entered below should be affirmed.

CERTIFICATION

The undersigned attorney of record for the *amici* hereby certifies that the foregoing brief complies with FRAP 29(d). The total number of words in the foregoing brief is 6,932.

Dated: Washington, D.C.
February 27, 2001

Respectfully submitted,

WILLIAMS & CONNOLLY LLP
David E. Kendall
Paul B. Gaffney
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202)434-5000

By: Daniel Kendall

Attorneys for *Amici Curiae* except for
the National Football League,

National Football League Properties,
Inc., and Major League Baseball

David M. Proper
National Football League and
National Football League Properties
280 Park Avenue
New York, NY 10167
(212) 450-2545

Attorney for the National Football
League and National Football League
Properties, Inc.

OFFICE OF THE COMMISSIONER
Thomas J. Ostertag
245 Park Avenue
New York, NY 10167
(212) 931-7855

Attorneys for Major League Baseball

CERTIFICATE OF SERVICE

I hereby certify that on this the 26th day of February, 2001, I caused two copies of the Brief of *Amici Curiae* to be deposited in the United States mail, first-class postage prepaid, addressed to the following:

Martin Garbus, Esq.
Frankfurt, Garbus, Klein & Selz, P.C.
488 Madison Avenue
New York, NY 10022
Attorneys for Defendants-Appellants

Cindy A. Cohn, Esq.
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
Attorneys for Defendants-Appellants

Leon P. Gould, Esq.
Proskauer Rose LLP
1585 Broadway
New York, NY 10036-8299
Attorneys for Plaintiffs-Appellees

And one copy addressed to the following:

Edward A. Cavazos, Esq.
Cavazos, Morin, Langenkamp & Ferraro L.L.P.
9020-I Capital of Texas Highway, Suite 250
Austin, TX 78759
Attorneys for Amici Ernest Miller; Dr. Siva Vaidhyanathan; Mary Wallace Davidson; and Christina Olson Spiesel

Christopher A. Hansen, Esq.
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Attorneys for Amici 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*

David A. Greene, Esq.
First Amendment Project
1736 Franklin Street, 9th Floor
Oakland, CA 94612

*Attorneys for Amici Online News Association; Reporter's Committee for
Freedom of the Press; Newspaper Association of America; Student Press
Law Center; Wired News; Pew Center on the States; Silha Center for the
Study of Media Ethics and Law; and the College of Communications,
California State University, Fullerton*

James S. Tyre, Esq.
Law Offices of James S. Tyre
10736 Jefferson Boulevard, #512
Culver City, CA 90230-4969

*Attorneys for Amici Dr. Harold Abelson; Dr. Andrew W. Appel; Dr. Dan
Boneh; Dr. Edward W. Felten; Dr. Robert Harper; Andy Hertzfeld; Dr.
Brian Kernighan; Dr. Marvin Minsky; Dr. James Morris; Dr. P.J.
Plauger; Dr. James C. Reynolds; Dr. Ronald Rivest; Dr. Avi Ruben; Dr.
Barbara Simons; Dr. Eugene H. Spafford; Richard Stallman; and Dr.
David S. Touretzky*

Julie E. Cohen, Esq.
Associate Professor of Law
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Attorneys for Amici Intellectual Property Law Professors

Jennifer Stisa Granick, Esq.
559 Nathan Abbott Way
Stanford, CA 94305


*Attorneys for Amici Dr. Steven Bellovin; Dr. Matt Blaze; Dr. Dan
Boneh; Dave Del Torto; Dr. Ian Goldberg; Dr. Bruce Schneier; Frank
Andrew Stevenson; and Dr. David Wagner*

Yochai Benkler, Esq.
New York University School of Law
Vanderbilt Hall
40 Washington Square South, 322-A
New York, NY 10012

Attorneys for Amici Professor Yochai Benkler and Professor Lawrence Lessig

Mr. Arnold G. Reinhold
14 Fresh Pond Place
Cambridge, MA 02138
Pro Se

On said date, the original plus ten (10) copies of said Brief will be deposited in the United States mail, first-class postage prepaid, to the Clerk of the Court for filing.


Stephen D. Andrews