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INTRODUCTION

The core question presented by this appeal is whether the District Court's interpretation of 17 U.S.C. §1201 reaches too far, violating the First Amendment rights of *2600 Magazine* and its readers, along with fair users, ordinary users of purchased DVDs, computer scientists and other members of the media. *2600 Magazine* argues that it does, in three unprecedented ways, and that properly construed, it need not.

The First Amendment is violated by enjoining publication of and linking to a computer program by a magazine as part of news coverage; preventing the public study, discussion and review of protection and circumvention methods; and eliminating fair and noninfringing use of copyrighted content.

Thus, whether viewed in terms of enjoining the press, distorting scientific discourse or frustrating fair use, First Amendment rights are violated here. *2600 Magazine* argues that each of these violations requires strict scrutiny and that, for each of them, the District Court's statutory interpretation fails that test.

Alternately, *2600 Magazine* argues that the District Court's interpretation fails even intermediate scrutiny, since absolutely banning the publication of circumvention technologies ignores the public side of the copyright bargain, is overly broad and fails to leave ample alternative publication channels.

What is equally important in evaluating this case, however, is recognizing how the First Amendment is *not* implicated. Many of the claims advanced by the opposing parties and amici respond to arguments that *2600 Magazine* has *not* made. First, *2600 Magazine* claims no First Amendment right to use copyrighted material, except in the context of fair use or noninfringing use. Second, *2600 Magazine* does not argue that the First Amendment limits the Studios' use of access control technologies (Opening Brief at 64-67). Instead, the issue is whether the statute should be interpreted to allow the force of law to prevent access by "unauthorized equipment," even by lawful purchasers of DVDs or legitimate fair users.

Third, *2600 Magazine* claims no First Amendment right to engage in proscribed "conduct." What it did here is undisputed: it published a news item about the DeCSS controversy and attendant to that published the program itself. It later linked to the program, as did the *New York Times*, Time Warner subsidiary CNN, the *San Jose Mercury News* and many others. In both instances, its only "conduct" was publishing on the Internet.

As the Studios' brief makes clear, the First Amendment problems at issue here arise from an underlying question: whether §1201 is to be limited to its goal of shielding copyright holders from infringement or whether, as the Studios claim,

it is a sword that empowers them to wield unprecedented control over the private viewing of copyrighted works. The Studios claim that §1201 grants them control over the *players* for their works.¹ This admission demonstrates that, despite their protestations, the Studios’ concerns here transcend copyright infringement. For them, §1201 is the key to gain over digital content what they have unsuccessfully attempted to gain over past formats—control over the means of viewing their works.

FACTS

Although the parties obviously disagree on several factual points, two of the Studios’ key factual claims require immediate correction.

First, the Studios’ interpretation of §1201 relies heavily on the claim that the “trafficking proscriptions” were “enacted to comply with the nation’s obligation, under the WIPO Copyright Treaties.” Studios at 26. Yet both the Senate Report and the hearing testimony confirm that banning of circumvention devices was *not* required by the WIPO treaty. To the contrary, the treaty drafters *rejected* such a requirement:

¹ The basis for this new control lies in §1201(a)(3). *See infra* at 38. The Studios claim that those who lawfully acquire DVDs obtain only the “author[ity]” to “access[] DVD content via authorized equipment.” Studios at 63, n. 43.

The treaty also originally contained language that banned circumvention devices. Again, controversy resulted in a milder declaration that member countries “shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty.” The end result is that the treaty shifted the debate over technological circumvention measures . . . back to the national level, where each nation will determine how to best conform with the treaty.

Add-12 (*citation omitted*). Indeed, Administration representative Bruce Lehman told Congress that the WIPO Treaty would be satisfied by implementing a use-based, rather than a device-based, approach.² The District Court’s expansive device ban was plainly *not* required by the treaty.³

Correspondingly, those access DVD content *without* using authorized equipment or who provide equipment that can be so used are liable under §1201.

² See *WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act*: Hearing on H.R. 2281 and H.R. 2280 Before the House SubComm. On Courts and Intellectual Prop., 105th Cong. 62 (1997) (congressional testimony of Asst. Sec of Commerce and Commissioner of Patents and Trademarks Bruce A. Lehman).

Mr. Boucher: . . . Within the confines of the treaty and its legal requirements, assuming that we ratify it, could we meet those requirements by adopting a conduct oriented approach as opposed to a device oriented approach?

Mr. Lehman: . . . In my personal view, the answer is yes. . . .

Mr. Boucher: All right. So the answer is yes, we could adopt a conduct oriented approach and be in compliance with the treaty.

³ One commentator has noted that no new laws were required to satisfy anticircumvention obligations in the treaty. Pamela Samuelson, *SYMPOSIUM*:

Second, the Studios and the District Court claim that the license for CSS is offered on a “nondiscriminatory basis” to all potential developers of players. Studios at 5. In reality, however, the restrictive licensing structure for CSS in conjunction with the District Court’s reading of §1201 not only prevents the development of an “authorized” open-source player, is also gives the Studios extraordinary control over players and fair and noninfringing uses of DVDs.

The licensing system is circular. First, the Studios license CSS to encrypt movies on DVDs⁴; developers who wish to make a DVD player must then either license CSS or reverse engineer it in order for the Studios’ DVDs to play on their players. However, the CSS license binds developers to strict and all-encompassing confidentiality and trade secret provisions, imposes regional encoding and other restrictions, and is enforced by a million-dollar liquidated-damages provision. *See, e.g.,* A2091-2. The exclusion of open-source developers comes not from any overt discrimination, therefore, but from the fact that these restrictive licenses are inconsistent with the requirements of open-source systems.

Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised, 14 Berkeley Tech. L.J. 519 (Spring, 1999).

⁴ CSS does not perform any authentication of users and plays both infringing and noninfringing DVDs alike. Opening Brief at 3.

Section 1201, as interpreted by the District Court, then closes the circle by preventing reverse engineering required to develop competing players without agreeing to the restrictive CSS license. In short, this system of licenses and technology, enforced by §1201, allows the Studios to dictate the features of DVD players, which in turn gives the Studios control of how and on what terms consumers can view and use DVDs. Because those terms are not compatible with open source development, no open-source player has yet been released.⁵

ARGUMENT

I. STRICT SCRUTINY IS REQUIRED HERE BUT IS NOT MET

A. Under The Rule Of *Florida Star*, The District Court's Decision Must Be Reversed

The relevant facts of this case can be stated simply: the court below enjoined *2600 Magazine*, a traditional publisher engaged in news reporting, from providing to its readers the text of a controversial computer program, or even information about where on the Internet the reader could find that program. This

⁵ Mark Lewis, U.S. Attorney's Alliance with Studios in DeCSS Case Neglects Others, *Webnoize*, (March 1, 2001) ("The first interim license for the CSS technology was available in October 1997, and nearly two-and-half years later, there are still no commercial Linux DVD players on the market") at <http://news.webnoize.com:80/item.rs?ID=11755>. (visited March 1, 2001).

contravenes well-settled First Amendment law: “[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.’” *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989).

The Studios and amici offer a farrago of arguments aimed at evading this straightforward rule. Each boils down to one of two related claims: First, that the *Florida Star* rule is inapplicable because the District Court’s order constitutes mere content-neutral conduct regulation, with only incidental effects on speech; or second, that *2600 Magazine* was not really “speaking” at all. Neither has merit.⁶

1. DeCSS Is Truthful Information About A Matter Of Public Significance

2600 Magazine’s publication concerned the issues raised by DMCA’s anti-trafficking provisions – plainly “a matter of public significance.” The *Florida Star* synthesis of prior cases makes clear that the “matter” is the general subject of the publication, not the specific, complained-of item in the publication. *Id.* at 536-7

⁶ The Studios also made a claim under §1201(b) that was only summarily noted by the District Court. Opening Brief at 10. Contrary to the Government’s assertion (Intervenor’s Brief at 34), *2600 Magazine* has not waived this issue.

(characterizing article as concerning “the commission, and investigation, of a violent crime” without asking whether identity of rape victim was needed).⁷

2. DeCSS Was Lawfully Obtained By 2600 Magazine

2600 Magazine “lawfully obtained” the text of DeCSS. *2600 Magazine* did not “break and enter an office or dwelling” to gather this information. *See Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). Nor is there any claim that the creation of DeCSS, or DeCSS itself, or *2600 Magazine* infringed anyone’s copyright. A37-49.

Rather, people unaffiliated with *2600 Magazine* created DeCSS through legitimate reverse engineering. A296-99, 1401-1882 *passim*.⁸ Reverse engineering is a traditional, well-accepted technique, neither unethical nor illegal, that plays a key role in the intellectual property bargain. *See, e.g., Sony Entertainment Corp v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000). DeCSS’s

⁷ The Studios argue that DeCSS is not “truthful information” because it is a computer program, and is neither true nor false. Studios at 32. This is absurd. *2600 Magazine’s* publication of the text of the DeCSS program was “truthful” because it accurately conveyed to the reader the text of the program (as opposed to a publication that purported to reprint the text of the DeCSS program, but in fact substituted the text of some other document).

⁸ The DVDCCA has elsewhere claimed a trade secret violation arising out of the development of DeCSS. *See DVDCCA Amicus Brief*, at 1. If so, then the California Court where that claim is pending has sufficient power to address that

creators then published the information — and *2600 Magazine* simply republished what hundreds of others had also published. Accordingly, *2600 Magazine's* publication of the offending information cannot be restrained absent an interest “of the highest order.”

3. The Government's Interest In Banning *2600 Magazine's* Publication Of DeCSS Is Not “Of the Highest Order”

Florida Star establishes another crucial point: once truthful information has entered the public domain, no interest can justify an order barring its further release. *See Florida Star*, 491 U.S. at 535 (court could not constitutionally restrain dissemination of truthful information once “publicly revealed” or “in the public domain”)(*quotation omitted*).

Moreover, the interests supporting the District Court's injunction are weak at best. The Studios have demonstrated little, if any actual harm from the publication of DeCSS, much less from its publication by *2600 Magazine*. *See infra* at 29. And if the District Court's decision is permitted to stand, only *2600 Magazine's* publication of DeCSS will be enjoined, while DeCSS will remain available worldwide. *See, e.g.,* <http://www.zpok.demon.co.uk/deCSS/CSS.html> (listing sites posting DeCSS)(visited March 16, 2001). Thus, this dispute falls within a long

issue and to remedy it. No trade secret violation was alleged here and the District Court's decision did not rely on this allegation.

line of cases in which courts have found asserted interests simply insufficient to justify orders enjoining speech. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (“private litigant’s interest in protecting vanity of their commercial self interest simply *does not qualify* as grounds for imposing a prior restraint.”); *Ford Motor Comp. V. Robert Lane*, 67 F.Supp.2d 745, 753 (E.D. Mich. 1999) (web publication of trade secrets).

Indeed, state interests “of the highest order” exist on *defendant’s* side of the case. The interest in protecting copyright holders is at least matched by the state’s interest in preserving the public side of the copyright bargain, including fair use. *See infra* at 25.

The *Florida Star* Court was concerned in part that if speakers could be “punished for publishing certain truthful information,” the result would be “timidity and self-censorship.” *Ibid.* That concern is especially appropriate here. Speakers cannot easily ascertain whether a given technology falls within the prohibition; §1201(a)(2) does not require that the publisher know anything about what a technology does (liability can be imposed based purely on its “design” and the prohibition applies if the technology protects only a single copyrighted work. The chilling effect of the District Court’s interpretation will thus be broad – media

and others will simply avoid publishing any technology that might possibly fall within the prohibition. This is impermissible.

B. Section 1201(a)(2) Is Not Content Neutral

Plaintiffs urge that the *Florida Star* rule is inapplicable because the District Court's order constitutes mere content-neutral conduct regulation, with only incidental effects on speech. "[G]enerally applicable laws," they urge, "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." *Cohen*, 501 U.S. at 669. That argument is misplaced. The obligation that the District Court's interpretation of §1201 imposes on speakers like *2600 Magazine* is not content-neutral. More fundamentally, it is not the sort of "law of general applicability" primarily regulating conduct and only "incidentally" touching speech that is contemplated by *Cohen* and other cases. It directly regulates speech.

The crux of *Cohen* is that generally applicable statutes pose relatively little risk of harm to speech or the press because they only impose indirect and diffuse burdens on speakers. Most of the cases involve "generally applicable economic regulations" such as sales taxes, fire and health codes, and traffic tickets for news reporters. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986).

The essence of these cases is that government has leeway to enact laws regulating non-expressive conduct even though those laws may make it more expensive to speak. Because such laws do not regulate speech at all, they are facially content-neutral. In *Cohen*, thus, the Court upheld a promissory estoppel statute imposing on citizens generally the obligation to keep their promises.⁹

Yet §1201 does not fall within this category. As interpreted by the District Court, it forbids publishers to publish certain information. This is direct, not incidental, restriction of speech. The publication of an important news item *is* the claimed violation; the violation is based upon the publication itself, not some related collateral action.

Suppose a technical protection measure used by copyright owners could be circumvented by using widely available software, and that *2600 Magazine* published a clear, step-by-step explanation of how to use the software. Under the

⁹ *Cohen*, 501 U.S. at 669 (1991), cites two cases in which the Supreme Court struck down facially neutral taxes where no discriminatory intent existed. In *Murdock v. Pennsylvania*, 319 U.S. 105, 106-07, 114-17 (1943), the Supreme Court barred the application to Jehovah's Witnesses of an ordinance imposing a flat tax on solicitors: "[T]hat the ordinance is 'nondiscriminatory' is immaterial. . . . A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike." *Id.* at 115. See also *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460

District Court's theory, such an explanation would be illegal. Yet it is incontrovertible that the essence of the statutory prohibition in that case would be to restrict speech, specifically because of its communicative impact.

The better analogy, thus, is not to *Cohen*, but to *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46(1988). There, the plaintiff brought a claim under the "generally applicable" tort of intentional infliction of emotional distress, usually requiring outrageous "conduct." The Court nevertheless held that where the conduct was speech, there also by a magazine, no liability could attach without a showing that the publication contained a false statement of fact made with "actual malice." *See also Hurley v. GLIB*, 515 U.S. 557 (1995)(general anti-discrimination laws require strict scrutiny when applied to a parade).

Section 1201(a)(2), as interpreted by the District Court, is not neutral as to content. *Cohen* distinguished cases like *Florida Star* primarily because "[©]n those cases, the State itself defined the content of publications that would trigger liability," while the law in *Cohen* "simply require[d] those making promises to keep them." 501 U.S. at 670-71. But §1201(a)(2), as interpreted, "define[s] the

U.S. 575, 578-79 (1983)(use tax imposed on paper and ink struck down despite no "illicit legislative intent").

content of publications that . . . trigger liability.”¹⁰ On its face and through its exceptions, §1201(a)(2) makes distinctions as to both subject-matter and viewpoint.¹¹ It only applies to publishing on the subject of circumvention technology. It is also viewpoint-based, the prohibition is biased in one direction: no prohibition applies to the publication of protection technologies.

The Studios argue that §1201 is content-neutral because its *goal* – that of preventing copyright infringement – is content-neutral. This misses the point. A statute barring the advocacy of Communism may have the content-neutral goal of preventing the overthrow of the government, but that does not render the statute content-neutral. Section 1201 not only distinguishes between publications based on their informational content but, as applied here, its entire point is to prevent certain information from being conveyed to the public. That is the essence of a content-based restriction.

Even the oft-cited *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), does not support the Studios. While the Supreme Court found that the First Amendment did not bar a performer’s suit against a news organization for

¹⁰ The argument that the *Florida Star* standard depends on content-based discrimination is undercut by *Butterworth v. Smith*, 494 U.S. 624 (1990), which invalidated a flat, content-neutral ban on post-term testimony disclosures by grand jury witness.

appropriation of the “right to the publicity value of his performance” after his entire act was broadcast on local television, *id.* at 562, it also noted that its holding did not extend to reporting on information about an event of public interest.

There is one final respect in which §1201(a)(2), as interpreted by the District Court, has much more than an “incidental” effect on speech, and that is its sweeping effect. It prevents anyone from publishing the prohibited information anywhere. *Compare Arcara*, 478 U.S. at 705 (burden on bookstore “mitigated” because “free to sell the same materials at another location”) (footnote omitted). It does not matter how widely the information has already been disseminated or who the source was.

In contrast to the rare cases that uphold speech injunctions, §1201(a)(2) takes certain subjects completely “off the table.” In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30-34 (1984), a newspaper was placed under a protective order in a civil action that prohibited it from disclosing discovery information obtained from the plaintiffs. The Supreme Court refused to apply strict scrutiny largely because the prohibition turned purely on the source of the information; the newspaper was free to “disseminate the identical information covered by the protective order as long as the information is gained through means independent of

¹¹ See Opening Brief at 20-21.

the court's processes." *Id.* at 34. Here, by contrast, technology subject to §1201(a)(2) simply cannot be published.

C. The Injunction Bars *2600 Magazine's* Expression

The Studios insist that strict scrutiny does not apply because §1201 is applied to *2600 Magazine's* "conduct," not its speech. Studios at 17. This contention must be rejected for a variety of reasons.

Most obviously, the Studios' characterization of this as conduct is simply wrong. *2600 Magazine* was enjoined from publishing information. The act of publication was the *only* "conduct" banned.

Secondly, if §1201 can be characterized as being aimed the communicative impact of the expressive acts, it must nevertheless satisfy strict scrutiny. In *Hurley*, for example, the Supreme Court cleanly distinguished walking from parading and applied strict scrutiny. *Hurley*, 515 U.S. at 569.

Similarly, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court squarely rejected the contention that *O'Brien* analysis applied to the federal campaign finance law's limits on contributions and expenditures:

[t]he expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of

the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.

Id. at 16. *Buckley* demonstrates that the Supreme Court’s approach to the speech-conduct distinction is far more sophisticated than the Studios suggest. Just as money is critical to effective expression in the political campaign context, so too is the ability to publish computer programs to those who speak on issues relating to computer technology. *See, e.g.*, Amicus Briefs of Dr. Harold Abelson, *et al.*; ACM Committee; Dr. Steven Bellovin, *et al.*; Arnold G. Reinhold.

1. Both “Verbal Acts” and Burglars Tools Doctrines Require First Amendment Scrutiny and Intent

The Studios, their amici and the government next argue that *2600 Magazine*’s publication is outside First Amendment protection extended to other journalists because it constitutes a “verbal act” or is the mere provision of “burglary tools.” Reliance on these doctrines is misplaced. While crimes can be committed with “pure speech,” such statutes must be narrowly construed with the First Amendment in mind and almost always require illicit intent. *See e.g. Watts v. United States*, 394 U.S. 705 (1968)(overturning a conviction for threatening the President).

This Court has provided the soundest analysis of how to obey “the commands of the First Amendment” under the general federal threat statute, 18 U.S.C. §875(c) (criminalizing conduct of threatening in interstate commerce). In *United States v. Kelner*, 534 F.2d 1020 (2d Cir.), *cert. Denied*, 429 U.S. 1022 (1976), the defendant had been convicted of threatening to assassinate a foreign leader. *Id.* at 1021. The Court upheld the conviction by narrowly reading the statute. First, it required proof of the defendant’s “specific intent to communicate a threat to injure.” *Id.* at 1023 (citation and quotation marks omitted). Second, it held that the threat itself must be true, that is, “on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.” *Id.* at 1027.

Similarly, §1201 cannot be saved by the analogy to burglary tools.¹² First, characterizing speech as something else simply substitutes characterization for

¹² The Studios and amici also make much of an analogy to cable and satellite descrambler boxes, often referred to as “black boxes.” In the context of cable and satellite systems, black boxes are used to access copyrighted works that a user has *not* purchased but that are transmitted into her home. Thus, although she technically “possesses” the copyrighted works, a black box user has no legitimate basis on which to “access” or view them. In contrast, the DVD purchaser has paid for the right to view the work. Legitimate purchasers of works who seek to circumvent for noninfringing purposes are not comparable to cable pirates.

scrutiny. Second, burglary tools cases generally hold that illicit intent is an element of the crime.¹³ See *State v Hart*, 200 Kan. 153, 156 (1967). As that court noted, “[O]therwise, the innocent possession of ordinary tools which are suitable for and commonly used in unlawfully breaking and entering another’s property, might very well subject an honest workman to the statute’s penalty. Certainly the legislature intended no such outlandish result when it enacted this legislation.” *Hart*, 200 Kan. At 157.¹⁴ The lack of an unlawful intent requirement renders §1201 similarly defective.

D. Restraints on The Publication of Computer Programs Require Standard First Amendment Scrutiny

1. Computer Programs are Speech

Relying on an argument that has failed at least three other times, the Government here intervened claiming that *no* constitutional concerns are raised by §1201 because *2600 Magazine’s* publication “did not involve protected

¹³ Also, because §1201(a)(2) creates civil, not criminal, liability, the risk to speech is greater because the burden of proof is lower. See *New York Times v. Sullivan*, 376 U.S. 254, 277-78 (1964). .

¹⁴ See also in *Chicago v. Mulkey*, 44 Ill. 2d 558 (1970)(statute invalidated for failure to specify criminal intent); *State v. Emery*, 610 S.W.2d 698 (Mo. App. 1980) (finding implicit intent requirement); *State v. Lawson*, 59 N.M. 482 (1955); *State v. Hefflin*, 338 Mo. 236 (1935); *State v. Shedoudy*, 45 N.M. 516 (1941) (same holdings with respect to similar statutes).

expression.” Intervenor’s Brief at 23. The Government’s argument, however, ignores the District Court’s contrary analysis, which was based on extensive factual trial testimony about the expressive nature of software. *See* Opinion at 345, n. 275 ; Intervenor’s Brief at 19, footnote*.¹⁵ In the three other decisions, *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000), *Bernstein v. U.S. Dept. of Justice*, 176 F.3d 1132 (reh’g en banc granted, op. withdrawn)(9th Cir. 1999), *reh’g en banc granted, op. withdrawn*¹⁶, *Karn v. U.S. Dep’t of State*, 920 F.Supp. 1 (D.DC 1996), the Government’s argument there was rejected for the same reason it was rejected here. As the District Court correctly observed: “the path from idea to human language to source code to object code is a continuum But each form expresses the same idea, albeit in different ways.” Opinion at 326.¹⁷ For this reason, articles and papers containing and discussing computer programs and

¹⁵ Even where review is *de novo*, it is a matter of concern when an Intervenor on appeal attempts to seek reversal of a portion of a District Court’s decision that was based on extensive trial testimony.

¹⁶ In *Bernstein*, the government admitted that regulations prohibiting electronic publication of encryption programs directly regulated the expressive activities of computer programmers, scientists, academics and others. *See e.g. Bernstein* at 1235. Despite this prior admission, the Government here argues that §1201, which completely bans such publications, has no such effect.

¹⁷ *See also* Amicus Briefs of Dr. Harold Abelson, *et al.*; ACM Committee; and Dr. Steven Bellovin, *et al.*

related theories have been published in scientific journals for over 25 years as part of peer review. *See* Opening Brief at 26 n.17.

2. *Vartuli* and *Name.Space* Support *2600 Magazine* Here

The Government’s claim that *no* speech is impacted by the District Court’s decision here relies chiefly on a recent decision of this Court, *Commodity Futures Trading v. Vartuli*, 228 F.3d 94 (2nd Cir. 2000)(“*Vartuli*”). In that case, however, this Court carefully *narrowed* an injunction barring the dissemination of a computer program that performed commodity futures trading. Holding that the First Amendment would be violated if the ban were to apply “even if [the program was] were being used solely as speech, if, for example it [was] being advertised sold and used as an academic commentary on commodities markets,” *id.* at 112, this Court limited the injunction to the dissemination of the program for the purpose of automatic trading of futures contracts.

The situation here is strikingly similar. The District Court here did what the lower court in *Vartuli* erroneously did – it enjoined all publication of DeCSS by *2600 Magazine* regardless of the purpose of the publication, ignoring the possible uses of the program “as speech.” *Vartuli* supports *2600 Magazine*’s request that

this Court interpret §1201 to require a similar inquiry and that any injunction allow for continued “speech” uses for the program.¹⁸

The Government also relies on *Name.Space, Inc. v. Network Solutions*, 202 F.3d 573 (2nd Cir. 2000) for the proposition that a Court should move cautiously in making broad pronouncements about how the First Amendment should be applied in areas of rapid technological change. While this approach is admirable, and parallels *2600 Magazine’s* argument under *Denver Area*, it is misused by the government here. Rather than have this Court exercise “caution” in *applying* the First Amendment to speech, the Government would have the Court entirely abdicate its constitutional duty to apply the First Amendment.

Not only is this suggestion inappropriate, it is plainly contradicts this Court’s approach in *Name.Space*, which counseled “particularistic, context sensitive analysis,” that assessed the existence of ample alternate channels for the speech in question. *Id.* at 586:

Domain names and gTLDs *per se* are neither automatically entitled to nor excluded from the protections of the First Amendment, and appropriate inquiry is one that fully addresses particular

¹⁸ *2600 Magazine* further maintains that the record contains sufficient evidence to demonstrate that its publication, made as part of news coverage of the role of DeCSS should be allowed.

circumstances presented with respect to each domain name.

Id. at 586 (*citations omitted*). Thus, *Name.Space* like *Vartuli*, requires any injunction, if necessary, be more carefully tailored than a complete ban on publication.

3. The Government's Remaining Arguments Are Unfounded

The Government next deploys a series of purely semantical arguments in support of its claim that no constitutional analysis is required. First, they claim that Internet publication is not “publication” because readers can download the published item, “much like a delivery truck.” This is inconsistent with *Reno v. ACLU* 521 U.S. 844 (1997) (“*Reno*”) and other Internet speech cases. In fact, Appellants are aware of *no* case holding that Internet publication loses First Amendment protection because the information published is a computer program, rather than a photograph, text or graphic, all of which are also easily “downloaded.”

Second, they claim that since computer programs were developed “to perform complex tasks,” no First Amendment analysis is required. Obviously were that the rule, any explicative speech on complex subjects, from textbooks to cookbooks to How-To CD-ROMs, would be outside the scope of the First Amendment.

Third, they argue that publication “for all the world to see” somehow negates the First Amendment protection the program might otherwise receive. As amply demonstrated by *Florida Star*, the scope of publication is no basis for denying or limiting First Amendment protection. *Florida Star*, 491 U.S. 540 (mass scope of disclosure cannot serve as a surrogate for injury). This is a shocking position for the Government to take.

II. EVEN INTERMEDIATE SCRUTINY IS NOT MET BY THE APPLICATION OF §1201 TO 2600 MAGAZINE¹⁹

¹⁹ The Government's attempts to refute the argument of Amici Benkler and Lessig are also well wide of their mark, *See* Intervenor’s Brief at 31-33 n.9. The Government argues that Congress's awareness of the Audio Home Recording Act ("AHRA"), coupled with its failure to adopt the AHRA serial copying prevention approach, is evidence that "Congress actually did consider and reject" the AHRA model. *Id.* The Senate Report cited by the Government, however, mentions the AHRA as an “analogous” scheme, not as an ineffective alternative. ("Legislation prohibiting circumvention devices is not unprecedented. The Copyright Act in Section 1002(c) already protects sound recordings [describing AHRA details without distinction or criticism]. . .) S.Rep. No.190, 105th Cong., 2d Sess., at 11-12 (1998). Under the Government's rationale, the fact that Congress passed a prohibition on indecent telephone conversations, cognizant of the FCC's less restrictive regulations, should have been evidence that Congress had considered and rejected these less restrictive measures as inadequate. Plainly, the Supreme Court reached the opposite conclusion in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 130-131 (1989). Congress's awareness of a less restrictive alternative and its failure to explain its adoption of a substantially more restrictive regime are reasons to find the DMCA constitutionally infirm. The Government correctly states that Congress decided not to define-and thereby limit-the technical measures protected by the antidevice provision. But that is precisely the Act's constitutional failing, not its defense. This failure is not saved by the

A. The District Court Ignored the Governmental Interest in the Public Side of the Copyright Bargain

The Studios claim that “the first part of the test” for intermediate scrutiny is met because *2600 Magazine* agrees that §1201 furthers the government’s interest in preventing copyright infringement. Any evaluation of the District Court’s interpretation of §1201, however, must consider both sides of the copyright bargain. *See* Opening Brief at 22. Thus, as explained by Justice Breyer in his concurrence in *Nixon v. Shrink Missouri Govt*, 528 U.S. 377 (2000):

. . . where a law significantly implicates competing constitutionally protected interests in complex ways . . . the court has . . . balanced interests, [which has meant] asking whether the statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects upon the others (perhaps, but not necessarily,

Government’s advancing a theory that Congress did not adopt: that the AHRA is ill-suited to protecting copyright given the distribution capacity of the Internet, as shown by the recent Napster litigation. Intervenor’s at pp. 31-33, footnote *.

Yelling “Napster” in a crowded courtroom, however, does not an argument make. Whether or not conditions have changed so dramatically as to render the AHRA approach no longer viable, the Government would have this Court reach that complex decision where Congress did not. The Supreme Court cautions against such an approach. Faced with a similar incongruity between more and less restrictive regulatory/technical approaches to treat similar ills, and given an absence of express congressional explanation of the difference, the “Court has not been willing to stretch the limits of the plausible, to create hypothetical non-obvious explanations in order to justify laws that impose significant restrictions upon speech.” *Denver Area Educ. v. FCC*, 518 U.S. 727, 760 (1996).

because of the existence of a clearly superior, less restrictive alternative).

Nixon at 402. *Nixon* balanced the First Amendment against the integrity of the electoral process. Here, this court must balance the First Amendment and the public side of the copyright bargain with the interests of copyright holders in preventing infringement. Even under intermediate scrutiny, *both* of these interests must be taken into account.

B. The Absolute Ban on Publication of DeCSS is Overbroad

Second, the District Court’s interpretation plainly “burdens substantially more speech than necessary.” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S., 180, 213-14 (1997). First, as shown above, a complete ban on trafficking of circumvention devices found in §1201(a)(2) was *not* required by the WIPO treaty. In fact, such a requirement was expressly rejected. *See supra* at 3-4. Second, the self-serving claim that §1201 is required to *induce* Studios to release their works on DVDs is belied by the fact that they did so in March, 1997, well before §1201 was enacted on October 28, 1998. A197-98. More importantly, however, the ban on DeCSS is not properly tailored because it leaves no alternative channels for publication of the program and is not based upon proven harm.

1. The Complete Ban on Publication and Linking to DeCSS Leaves No Alternative Channels

Intermediate scrutiny, whether based upon *O'Brien* or the *Clark* articulation,²⁰ requires consideration of alternative channels for the speech restrained, even as a byproduct of a content-neutral regulation. For example, in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (plurality op), the Supreme Court held:

The fourth and final O'Brien factor – that the restriction is no greater than is essential to the furtherance of the government interest – is satisfied as well. . . . the restriction leaves *ample capacity to convey the dancer's erotic message.*" (Citation omitted)

Here, in contrast to both *City of Erie* and *United States v. Weslin*, 156 F.3d 292 (2d Cir. 1998), cited by the Studios, §1201 does not allow any alternative channels for publishing the banned message. DeCSS is completely banned and, as demonstrated both at trial and urged by amici, DeCSS conveys a unique message that cannot be conveyed by generalized criticisms of the DMCA or Hollywood or discussions and teaching of cryptography. See A453-61, Amicus Briefs of Dr.

²⁰ See *Clark v. Community for Creative New Violence*, 468 U.S. 288 (1984) ("in the last analysis [the O'Brien test] is little, if any different from the standard applied to time, place or manner restrictions. (footnote omitted).

Harold Abelson, *et al.*; Dr. Steven Bellovin, *et al.*; and ACM Committee. Studios at 42.²¹

The District Court heard no evidence and made no factual findings about alternative channels for the publication of DeCSS. The Government attempts to characterize §1201 as an “interim solution,” invoking *Wayte v. United States*, 470 U.S. 598, 613 (1985) Intervenor’s Brief at 30, 35. But, contrary to the administrative selective service policy in *Wayte*, §1201 is not an *interim* solution, it is law; the development of technological or any other means of distinguishing prospective fair users from infringers will not affect §1201 without further legislation.

In fact, however, alternative channels for distribution of DeCSS could exist without undermining the goal of the statute. As in *Vartuli* and consistent with §1201(a)(2)(A)-(c), relief could be tailored to prevent the “providing of” DeCSS by *2600 Magazine* for the purpose of facilitating infringement.

²¹ *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), does not help the Studios’ Argument. There, the publication at issue was “help-wanted” ads presented in a gender discriminatory manner. At that time, such “purely commercial advertising” was unprotected speech. *Id.* at 384. *Pittsburgh Press* is even weaker today in light of *Hurley*, which applied strict scrutiny to the application of an antidiscrimination law.

2. The Injunction is Overbroad in that It Allows Injunctions Where There is No Harm

The injunction is also overbroad because it stifles speech in absence of any established harm. Despite their claims on appeal, the Studios have never proven any actual, particular harm related to DeCSS. Indeed, they admitted at trial that, notwithstanding months of international enforcement efforts, they had not found a *single* incident of a DVD having been decrypted with DeCSS and distributed on the Internet in violation of their copyrights. *See, e.g.*, A178-79.

In their complaint, the Studios discussed the fear of instantaneous, world-wide dissemination of decrypted DVD movies. A42 at ¶19, A72. Apparently aware that they could not support this claim, at trial the Studios attempted to prove much less. Using a single expert, Dr. Michael Shamos, the Studios attempted to show only that one could use DeCSS with a compression technology called DivX and a fast Internet connection to transmit a movie in six hours. *See generally* A76-119.

What the Studios undisputedly failed to do was present any evidence that: (i) DeCSS was actually being used by anyone other than the Studios themselves in this way; or (ii) any actual harm resulted. Whether such uses even exist is an open question. CSS was “cracked” as early as 1996, years before the advent of DeCSS

in October 1999 and several other “rippers” predate DeCSS. *See, e.g.*, A1994, 2541-43, 2555.

Instead of proving harm, the Studios rely on unsupported prophecies that the entertainment industry will be destroyed if *2600 Magazine* is not silenced. Such prophecies may be good public relations, but they are no substitute for legal proof of harm, especially in a First Amendment case.

III. THE DISTRICT COURT’S BROAD New LINKING TEST MUST BE REVERSED

Perhaps recognizing how much of their own speech would be chilled by the District Court’s broad new linking test, the Studios attempt to limit it to the specific facts of this case. *See Studios’ Brief* at 45-52. After all, Time Warner subsidiary CNN, as well as MSNBC, *The New York Times*, *the San Jose Mercury News*, *Wired*, and many other media outlets have linked to both DeCSS and to other alleged circumvention tools as part of their news coverage of the ongoing debate surrounding §1201.²²

²² See Opening Brief at 14. Recent media coverage containing or linking to alleged circumvention devices include:
<<http://www.theregister.co.uk/content/4/17568.html>>;
<<http://www.wired.com/news/culture/0,1284,42259,00.html>>;
<<http://news.cnet.com/news/0-1005-200-5058111.html>> (all visited on March 15, 2001).

But District Court plainly did not limit its test to these facts. It announced that it was setting a new “standard” applicable to any “linking to a site containing circumvention technology.” Opinion at 341. If, as the Studios and Government suggest, the test should be limited to the specific facts of this case and rejected as a new Constitutional rule, this Court should expressly do so.²³

Even limited to the facts of this case, however, the linking injunction overreaches. Both the Government and the Studios make much of the fact that *2600 Magazine* linked and even encouraged linking after the preliminary injunction was issued and before trial. But the District Court expressly *declined* to enjoin linking in issuing the preliminary injunction. See Opinion at 312. In both *United States v. Scott*, 187 F.3d 282 (2d Cir. 1999) and *Oral-B Labs., Inc. v. Mi-Lor Corp*, 810 F.2d 20 (2d Cir. 1987), cited by the Studios, the restrained party repeatedly violated prior injunctions. That history justified issuing a broader restraint to create a “safe harbor” around the prevented activity.²⁴ Here, the

²³ The Studios have been sending broad cease and desist letters based upon the District Court’s decision. A2534-40. Confusion concerning the scope of the linking test without clarification by this Court, could unnecessarily chill speakers.

²⁴ In *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368 (5th Cir. 1977) the Defendant had a long pre-litigation history of imitating Kentucky Fried Chicken’s trademarks in an attempt to improperly pass itself off as a licensed supplier of Kentucky Fried Chicken goods. Nothing comparable is alleged here.

Studios and Intervenor seek to have this Court punish *2600 Magazine* for doing things that the District Court expressly did not enjoin.

IV. THE FAILURE TO PRESERVE FAIR USE AND OTHER LIMITS OF COPYRIGHT PROTECTION RENDERS THE DISTRICT COURT'S INTERPRETATION OF §1201 UNCONSTITUTIONAL

The Studios point out that the traditional right of copyright holders to decide when and how to release their works impacts fair use but is not in violation of the First Amendment. Studios at 64. This is quite true and quite beside the point. The question here is *not* whether the Studios should be prevented from distributing their works with technical protection measures that, on their face, make fair use or ordinary personal use more difficult. The question is whether §1201 can, without colliding with the First Amendment or the limits of the Copyright Clause, permit enjoining or punishing those who attempt to enjoy or regain these rights.

A. *2600 Magazine* May Raise The Interest Of Its Readers

Well-settled third-party standing principles make it clear that *2600 Magazine* may object to the application of §1201(a)(2) to DeCSS on behalf of its readers when they would face substantial obstacles to doing so themselves. Such claims are allowed if *2600 Magazine* is directly affected by the outcome and its

relationship to these third parties is such that its advocacy of their interests is likely to be effective. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 411 (1991); *Singleton v. Wulff*, 428 U.S. 106, 113-18 (1976) (plurality); *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965). Alternatively, such arguments are allowed under First Amendment principles.

The three criteria for third-party standing are met here. First, *2600 Magazine* will suffer an injury in fact if the District Court’s application of the anti-trafficking provisions to DeCSS is sustained. *See Powers*, 499 U.S. at 411.

Second, potential fair users of works encrypted with CSS face a very concrete obstacle to assertion of their own constitutional challenges to the anti-trafficking provisions: These individuals need DeCSS to make fair uses of encrypted works. If DeCSS cannot be “provided” or “manufactured,” however, ordinary fair users of copyrighted works will only rarely be in a position to challenge the law that effectively forecloses exercise of their rights. *Cf. Baird*, 405 U.S. at 446 (distributor of contraceptives is in best position to challenge law banning distribution).

Third, the relationship between *2600 Magazine* and these individuals is sufficiently close to guarantee effective advocacy of their interests. Neither a confidential nor even a preexisting relationship between the parties is required.

See, e.g., Powers, 499 U.S. at 413-14 (criminal defendant may assert equal protection rights of prospective jurors excluded from jury because of their race). The parties' interests need only be sufficiently interdependent. *See id.* In particular, when confronted with laws banning distribution of goods whose use is needed to effectuate constitutional rights, distributors have been permitted to assert their customers' rights. *See Craig v. Boren*, 429 U.S. 190, 195 (1976) (vendor may challenge statute forbidding sale of 3.2% beer to men (but not women) between the ages of 18 and 21); *Baird*, 405 U.S. at 446 (non-physician distributor of contraceptives may challenge statute banning distribution to unmarried individuals).

Here, the relationship is closer, and the case for third-party standing correspondingly stronger, than in *Powers*, *Craig*, or *Baird*. *2600 Magazine* is not simply a vendor of DeCSS, but a magazine that seeks to provide timely and accurate information to its readers about developments in the areas of computer software and information security, and whose interest in securing its readers' right to receive this information is strong. *2600 Magazine* is more like the defendant physicians in *Singleton* and *Griswold*, who sought to enable their clients to enjoy their constitutional rights to procreative choice in reality, not just in theory. Similarly, individuals who want information about software for enabling fair and

noninfringing uses are more likely to seek this information from journalistic sources and the magazine has a correspondingly strong interest in disseminating information that its readers seek. This congruence of interests supports third-party standing here.

The First Amendment overbreadth doctrine, an analog to the third-party standing rule of *Craig and Baird*, also entitles *2600 Magazine* to raise the rights of others. Litigants may “challenge a statute, not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.” *Secretary of State of Maryland v. J. H. Munson Co.*, 467 U.S. 947, 956 –957 (1984)(*quotation omitted*). Just as booksellers may assert the rights of its customers, *2600 Magazine* may assert the rights of its readers. *See Virginia v. American Booksellers Ass’n*, 484 U.S. 383, 393 (1988).

B. Congress Did Not Intend to Eliminate Fair Use of Digital Content

The Studios make much of the fact that Congress did not expressly write a fair use defense into §1201. This is correct. But again, that is not the question. The question is whether the absence of a general fair use defense means that Congress intended to eliminate fair use of digital works protected by technical protection measures and, if so, whether this elimination would be constitutional.

There is ample evidence that Congress did not intend §1201 to eliminate fair use. First, and most importantly, the statute itself is clear:²⁵ “Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.” §1201(c)(1).²⁶ As the Registrar of Copyrights said:

²⁵ The Studios’ curiously assert without elaboration that *2600 Magazine* has “waived” its statutory arguments. Studios at 3 n. 4. This is puzzling. *2600 Magazine* has plainly made several statutory arguments here, chiefly that proper statutory construction of 1201(c)(1), 1201(a)(3), 1201(c)(3) and 1201(c)(4) can avoid the Constitutional difficulties that otherwise arise.

²⁶ The Studios correctly point out that such clauses are often placed in statutes to clarify that no Constitutional violation was intended. *See* Studios’ brief at 38. Yet this does not render the clause meaningless, as they suggest. To the contrary, it supports *2600 Magazine’s* argument here. The statute states that “nothing” in 1201 “shall affect . . . fair use.” Proper application of this clause prevents the Constitutional problems that result from eliminating fair use.

[T]his legislation clarifies existing law and expands specific exemptions for laudable purposes. These specific exemptions are supplemented by the broad doctrine of fair use. Although not addressed in this bill, fair use is both a fundamental principle of the U.S. copyright law and an important part of the necessary balance on the digital highway. Therefore the application of fair use in the digital environment should be strongly reaffirmed.”²⁷

Despite the statutory language and legislative history indicating that Congress meant to retain fair use, the Studios claim that Congress intended to abolish fair use and substitute in its place “three narrow exceptions” for “the limited purposes of reverse engineering, encryption research and security testing.” Studios at 57. Nothing in these three statutory exemptions, however, suggests that they exhaust the scope of the fair use defense. Similarly, the claim that the inclusion of fair use would render the exceptions “superfluous” is unpersuasive, as the specific §1201 exemptions contain eligibility criteria that differ from the traditional four fair use factors. For example, whether an individual is eligible for the “reverse engineering” exception under §1201(f) does not determine whether she qualifies as a fair user. *Compare* §1201(f) with 17 U.S.C. §107.

²⁷ Testimony of Marybeth Peters, Registrar of Copyrights and Associate Librarian for Copyright Services p. 40. (H.R. 2441 and S. 1284). Joint Hearing before the Subcommittee of Courts and Intellectual Property of the House Committee on the Judiciary and the Senate Committee on the Judiciary - -- NII Copyright Protection Act of 1995.

C. Congress Did Not Intend To Eliminate Other Noninfringing Uses

2600 Magazine has shown that lawful purchasers of DVDs have legitimate, noninfringing uses for their own DVDs that require use of circumvention tools. Some of those include playing those DVDs on a machine running an open-source operating system such as Linux, playing DVDs purchased in Europe on players purchased in the US, fastforwarding past commercials on some DVDs and making personal backup, none of which constitute copyright infringement. *See also* Amicus Brief of Ernest Miller, *et al.*

So is circumvention of DVDs that one has purchased for noninfringing purposes prevented by §1201? The District Court held that it was, since §1201 only required that DeCSS be designed “primarily” to circumvent CSS.²⁸ Opinion at 318-319. But the statute carefully defines illegal “circumvention” more narrowly, as an act done “without the authority of a copyright holder.” Logically, therefore, acts done *with* the authority of the copyright holder are not “circumvention.” The question then, is what constitutes the “authority” of the copyright holder.

²⁸ In so finding, the District Court erroneously rejected the uncontroverted testimony of the creator of DeCSS that it was created “primarily” to be used in developing a Linux and/or other open-source DVD player. *See* A298-99.

The Studios argue that a purchaser of a DVD containing their movies does not receive legal “authority” to decrypt the work. Studios at 63 n. 43. Instead, they claim that “authorization by the Studios [upon purchase of a DVD] has been limited to accessing DVD content *via authorized equipment.*” *Id.* But where and how has this authority “limited”? Nowhere during or after the purchase transaction are consumers informed, much less contractually bound, to view the work only on “authorized equipment.” To the contrary, DVDs are sold with no contractual restrictions whatsoever.²⁹

Both law and common sense provide that, in absence of some sort of contractual limitation, one obtains the necessary legal “authority” to access and view the film contained therein by purchasing or otherwise legally acquiring a DVD.³⁰ Nothing in the legislative history of §1201 or the plain language of the

²⁹ Of course the normal bounds of copyright law will restrict how they may use the DVD. But here the Studios claim a right to restrict the terms of private viewing, something that has always resided on the public side of the copyright bargain.

³⁰ Support for this is also found in the long-recognized “separation principle” that distinguishes a copy and from the copyrighted work. Purchase of a copy of a work, while not including the right to infringe, has always been different from purchasing the work itself and has included the remaining rights of ownership applicable to “goods, wares [or] merchandise.” *Dowling v. U.S.*, 473 U.S. 207, 216, 217 (1985).

statute provides that Congress intended the access provision to allow copyright holders to require that consumers play DVDs on a studio-approved player. The statute expressly provides that §1201 not be used to require manufacturers to comply with Studio requirements. §1201©(3).

Copyright holders have long sought to control the devices that play their works. In *Sony Entertainment Corp. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000) *cert denied*, the Ninth Circuit recently ruled, “Sony understandably seeks control over the market for devices that play games Sony produces or licenses. The copyright law, however, does not confer such a monopoly;” *See also Sony v. Universal City Studios*, 464 U.S. 417, 442, n. 32 (1984) (“*Betamax*”); *Motion Pictures Patents Company v. Universal Film Manufacturing Company et al.*, 243 U.S. 502, 518 (1917)(invalidating a license term for part of motion picture projectors that would “create a monopoly in the manufacture and use of moving picture films”).

The Studios claim that §1201 gives them this long-denied control. But the statute is more reasonably read as allowing those who have purchased or lawfully

acquired a DVD to decrypt the work. Correspondingly, those who provide tools for those purposes are not in violation of §1201(a)(2).³¹

D. If Congress Did Eliminate Fair Use, Then §1201 Is Unconstitutional

The Studios do not argue that the elimination of fair use would be Constitutional by refuting either the First Amendment or the Copyright Clause analyses presented in the Opening Brief and by amici.³² Instead, the Studios list “fair uses” that may still exist even with the imposition of technological protection measures—uses such as “imitating or spoofing characters, quoting language, showing on a DVD player in a classroom.” Studios at 66.³³ This view, of course,

³¹ Section 1201(a)(2)(A)-(c) appear to describe how such a determination is made. The District Court incorrectly held that these three tests were “immaterial.” Opinion at 319.

³² In contrast, the Government suggests that the First Amendment does not require fair use *at all*. Intervenor’s brief at 53. While Courts have rarely needed to rely on the constitutional footing for fair use, they and the commentators are unanimous that the doctrine is essential to the coexistence of the First Amendment and the Copyright clause. *See* Opening Brief at 42-46; ACLU amicus brief at 8-14. Perhaps sensing the difficulty of this position, the Government quickly asserts that the relationship is “unsettled” and suggests that the Court should not address this “important constitutional issue.” Intervenor’s Brief at 53. *2600 Magazine* agrees that this issue need not be addressed by this Court, not because it is “unsettled,” but because it is well settled that fair use provides a key part of the balance between the First Amendment and copyright.

³³ The Studios also suggest “taking a brief snapshot from a TV or video display.” Studios’ Brief, page 66. This suggestion is disingenuous; simply pointing a video camera at a television or computer monitor will result in an image

conflicts with the District Court’s holding, which freely acknowledged that it would eliminate fair use. Opinion at 322, 324. And of course, in addition to the District Court’s recitation of fair uses that would be lost, the record is replete with other examples. *See, e.g.*, A324-33, A386-98.

The fair use doctrine has always been interpreted to change as technology changes. The “time shifting” allowed under *Betamax* as fair use did not exist until VCRs were introduced. Similarly, in *RIAA v. Diamond Multimedia Sys., Inc.* 180 F.3d 1072, 1079 (9th Cir. 1999), the 9th Circuit found that “space shifting” was fair use, noting “[S]uch copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act.” *See also Sony v. Connectix* (fair use doctrine includes reverse engineering).³⁴

containing bands of horizontal distortion (as seen when live news coverage includes televisions or computer monitors in the background). Additionally, many DVDs include significant material unavailable in any other format, including director’s cuts, interviews and outtakes. The Registrar of Copyrights acknowledged “there are works that exist only in a digital form.” 65 Fed.Reg. 64567 (Add-121). Obviously, as the use of the medium continues, such “DVD only” releases will grow.

³⁴ Judicially-crafted limits have long played a key role in keeping copyright within the bounds of the constitution. Fair use was originally created by the courts in 1841, *Betamax*, 464 U.S. at 475 n.12, and only codified by Congress in 1976. The first sale doctrine was a judicial creation as well. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908). This is especially the case when technological change has rendered copyright’s literal terms ambiguous. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

Yet as interpreted by the District Court, §1201 would require professors seeking to analyze the film techniques of Martin Scorsese to forego using actual movie clips and instead have actors perform the relevant scenes or describe them in text. Rather than changing with new technologies, the Studios suggest that §1201 relegates scholarship, criticism, news reporting and education to the analog past while they (and their profits) move into the digital future.

This type of argument is commonly made in First Amendment cases, and is routinely rejected: “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Reno*, 521 U.S. 844 (1997) (*citation omitted*). In *Reno*, the Supreme Court wisely held that the availability of “indecent” speech on paper did not justify banning it on the Internet. Similarly, both the Studios and the fair users should enjoy the benefits of digital technologies.

E. Case-By-Case Nature Of Fair And Noninfringing Use Should Not Preclude Review Here

The Studios next claim that fair and noninfringing use should not be applied here because it requires a case-by-case analysis of the particular use. That is true in the context of direct infringement, but a more structural inquiry is required when fair use is raised in the indirect infringement context. *See Betamax* (time shifting by VCR users is fair use); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th

Cir. 1988) (court examines “archiving” uses for software copying program). Here, given the obvious standing of *2600 Magazine* to raise the interests of its readers, the substantiality of the record and the District Court’s admission of the danger to fair use, consideration of the fair use impacts of the District Court’s interpretation of §1201 here is both appropriate and necessary.

CONCLUSION

The Studios claim that *2600 Magazine*’s proposed construction of §1201 and the imposition of fair use would “eviscerate the trafficking proscriptions and eliminate the protection for which Congress enacted them.” Studios’ Brief at 63, n.43. This is untrue. Reasonably interpreted to avoid constitutional conflict, §1201 will remain a strong tool to prevent commercial and noncommercial distribution of tools designed for copyright infringement. Persons who, like the defendants in *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829 (11th Cir. 1990) or *California Satellite v. Seimon*, 767 F.2d 1364 (9th Cir. 1985), advertise their tools as ways to infringe copyrights, distribute them with instructions about infringement or whose tools are actually proven to be primarily used to infringe, will all still be subject to the trafficking provisions. The sky will not fall.

What will be allowed is breathing room for the traditional limits of copyright law that maintain its delicate balance with the First Amendment and that preserve the public side of the copyright “bargain.”

Based upon the foregoing, we respectfully request that the District Court decision be reversed and, if necessary, the case be remanded for further consideration in light of the Constitutional issues raised.

CERTIFICATION

The undersigned attorney of record for the Appellants do hereby certify that the foregoing brief complies with the type-volume limitation as set forth in FRAP 32(a)(7). The total number of words in the foregoing brief is 9,996.

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