UNITED STATES COURT OF APPEALS
FEB 20 2001
SECOND CIRCUIT

00-9185

To Be Argued By:
DANIEL S. ALTER

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 00-9185

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

-- v. --

ERIC CORELY *[sic]*, also known as Emmanuel Goldstein, and 2600 ENTERPRISES INC.,

Defendants-Appellants,

-and-

SHAWN C. REIMERDES and ROMAN KAZAN,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR INTERVENOR UNITED STATES OF AMERICA

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United States Court of Appeals

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Defendants-Appellants,

-and-

SHAWN C. REIMERDES and ROMAN KAZAN,

Defendants.

BRIEF FOR INTERVENOR
UNITED STATES OF AMERICA

Preliminary Statement

Defendants-appellants Eric Corely a/k/a/ Emmanuel Goldstein and 2600 Enterprises Inc. (collectively "defendants") appeal from the amended final judgment of the United States District Court for the Southern District of New York (Hon. Lewis A. Kaplan, J.), entered on August 23, 2000, permanently enjoining defendants from violating the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201 *et seq.* (Joint Appendix ("A") 2690). The judgment was entered in accordance with an Opinion of the district court, dated August 17, 2000 (A2597), which is officially reported as *Universal City Studios, Inc. v. Reimerdes,* 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

The Internet and its supporting technologies have wrought a paradigm shift in the means of conducting trade. With its valuable potential for global product distribution at far lower transaction costs, electronic commerce has also created new business challenges, particularly for vendors of intellectual property. Until fairly recently, artists and authors had only to contend with the bootleg distribution of their works in hard-copy form; they now face the reality of uncontrollable, on-line infringement. Embracing the digital medium as their own, infringers threaten to usurp much if not all of the Internet market for copyrighted works.

In response to this threat, the consumer electronics and computer industries have developed technologies that protect from infringement copyrighted works in digital format by denying individuals access to such materials absent some special key or descrambling code, and by disabling users with access from making copies of a work without authorization. As might be expected, other interests have developed counter-technologies that circumvent these measures. Joining an international effort to make the Internet a more secure business forum, Congress enacted the DMCA to uphold the integrity of copyright protection in cyberspace, and thereby to foster the efficient exchange of educational, cultural, scientific, and other informational products

and services. Among, other things, the DMCA prohibits anyone from disseminating access-control circumvention technologies, except for certain specified purposes.

In this case, defendants posted a form of circumvention technology on their Internet web site, making it readily available to the public. Defendants also linked their web site to other web sites on the Internet that likewise offered this technology to the public. Defendants had a specific purpose for doing this, though it was not one sanctioned by the DMCA. To the contrary, defendants posted this circumvention technology on the Internet specifically to enable others to crack the encryption code that plaintiffs, Universal City Studios, Inc., et al. ("plaintiffs ") -- eight major film studios -- use to combat theft of motion pictures distributed in digital format. Hence, despite defendants' efforts to pitch this case as a classic story of the gadfly press, and to cast themselves in the role of the protagonist reporter who seeks only to convey truthful information to the public, this lawsuit is really about computer hackers and the tools of digital piracy.

The district court accurately assessed the matter, rejected defendants' First Amendment defense, and enjoined their violation of the DMCA. Accordingly, the district court's judgment should be affirmed.

Issues Presented For Review

1. Whether, as applied to defendants' dissemination of circumvention technology, the DMCA is consistent with the First Amendment as an appropriate conduct regulation.

2. Whether the district court's order enjoining defendants from committing specific violations of the DMCA is both content neutral and sufficiently tailored to satisfy constitutional requirements.

3. Whether the district court correctly rejected defendants' overbreadth challenge to the DMCA, where defendants did not violate the statutory provision at the core of their challenge, did not establish an adequate factual record, and where the alleged overbreadth was not substantial in any event.

Statement of the Case

A. The Statutory Framework

The DMCA arose out of the World Intellectual Property Organization's ("WIPO") effort to harmonize and strengthen intellectual property laws worldwide. Two treaties of the WIPO, the Copyright Treaty and the Performances and Phonograms Treaty, both provide that contracting states

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 or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

See WIPO Copyright Treaty, S. Treaty Doc. No. 105-17, 105th Cong., 1st Sess. (1997), 1997 WL 447232, at *8, *17. The United States signed these treaties on April 12, 1997, and the Senate ratified them on October 21, 1998. *See* 144 Cong. Rec. S12985-01 (daily ed. Nov. 12, 1998) (Resolution of Ratification of Treaties), 1998 WL 785674 (Cong. Rec.).

To implement these treaties, Congress enacted the DMCA. The DMCA contains three prohibitions related to circumvention. First, it prohibits the act of "circumvent[ing] a technological measure that effectively controls access to a work protected [by the Copyright Act]." 17 U.S.C. § 1201(a)(1)(A). A second provision, which is the focus of this case, forbids trafficking in technology or products designed to circumvent a technological measure that controls access to a copyrighted work ("circumvention technology"). Id. at § 1201(a)(2) 1201(a)(2)"). In full, § 1201(a)(2) provides that:

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that --
(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under [the Copyright Act];

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under [the Copyright Act]; or

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

Id.

The DMCA:s third anti-circumvention provision prohibits trafficking in technology designed to circumvent measures that protect a copyright owner's rights under the Copyright Act in expressive works. *See 17* U.S.C. § 1201(b).[1] Whereas § 1201(a)(2) applies to technology that blocks access to the copyrighted work-such as a device that permits access to an article on an Internet web site only by those who pay a fee or have a password-§ 1201(b) applies to technology that protects the copyright itself-such as a device on the same web site that prevents the viewer from copying the article once it is accessed. *See* S. Rep. No. 190, 105th Cong., 2d Sess. 11-12 (1998) ("Senate Report").

[Note pp. 6-7. Footnotes marked by asterisks in original; replaced by numbers here.]

1 Section 1201(b)(1) provides that:
No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that:
(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

The DMCA provides several exceptions to these prohibitions. The statute permits an individual to circumvent an access control on a copyrighted work, or, in limited circumstances, to share circumvention technology: (1) in order for a school or library to determine whether to purchase a copyrighted product; (2) for law enforcement purposes; (3) to achieve interoperability of computer programs; (4) to engage in encryption research; (5) as necessary to limit the internet access of minors; (6) as necessary to protect personally identifying information; or (7) to engage in security testing of a computer system. *See* 17 U.S.C. § 1201(d)-(j).

In addition, the DMCA provides that its prohibition on access circumvention itself, § 1201(a)(1)(A), would not apply to users of certain types of works if, upon the recommendation of the Register of Copyrights, the Librarian of Congress concludes that the ability of those users "to make noninfringing uses of that particular class of work" is "likely to be adversely affected" by the prohibition. 17 U.S.C. § 1201(a)(1)(B). The statute makes clear, however, that any exceptions to § 1201(a)(1)(A) adopted by the Librarian of Congress are not defenses to violations of the anti-traffic king provisions contained in §§ 1201(a)(2) and 1201(b). *See* 17 U.S.C. § 1201(a)(1)(E).

To permit the Librarian of Congress to conduct an administrative rule-making proceeding regarding possible exceptions to § 1201(a)(1)(A), the DMCA delayed the effective date of that provision for two years. *See* 17 U.S.C. § 1201(a)(1)(C). The Register of Copyrights, in consultation with the Department of Commerce, completed this rule-making proceeding on October 27, 2000, and the Librarian of Congress adopted two exceptions to § 12 01 (a) (1) (A)-n either of which is relevant here. *See 65* Fed. Reg. 64556, 64564-66 (Oct. 27, 2000) (adopting exceptions to § 1201(a)(1)(A) for compilations consisting of lists of web sites blocked by filtering software applications and for literary works protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence).

B. Factual Background

In 1997, plaintiffs began distributing films for home viewing on digital versatile disks or DVDs. Uni*versal City Studios*, 111 F. Supp. 2d at 310. DVDs "are the latest technology for home viewing of recorded motion pictures and result in drastically improved audio and visual clarity and quality of motion pictures shown on televisions or computer screens." *Id.* at 307 (footnote omitted). Use of the DVD format, however, brought an "increased risk of piracy by virtue of the fact that digital files, unlike the material on video cassettes, can be copied without degradation from generation to generation." *Id.* at 309 (footnote omitted). To minimize this increased risk plaintiffs adopted a technological measure known as the Content Scramble System or CSS. *See id.* at 308. "CSS involves encrypting [or scrambling] the digital sound and graphics files on a

DVD that together constitute a motion picture." Id. at 309-10 (footnote omitted). A CSS-protected DVD is then unscrambled by technological components contained in licensed DVD players or computer drives. *See id.* at 310.

Defendants publish a magazine for computer hackers, which "has included articles on such topics as how to steal an Internet domain name, access to other peoples e-mail, intercept cellular phone calls, and break into computer systems at Costco stores and Federal Express." *Universal City* Studios, 111 F. Supp. 2d at 308-09 (footnotes omitted). In November 1999, defendants posted DeCSS on their magazine's Internet web site for downloading by the public. *See id.* at 312.[2] Defendants' web site also established links to several other web sites that also claimed to offer DeCSS for download. *See id.* DeCSS is a computer program capable of decrypting or 'ripping' encrypted DVDs, thereby allowing playback on noncompliant computers as well as copying of decrypted files to computer hard drives." *Id.* at 311. Once decrypted and stored on a computer drive, films distributed on CSS-protected DVDs "can be copied like any other" digital file, *id.* at 313, and can be transferred over the Internet, *see id.* at 314-15. Defendants described DeCSS on their web site as " 'a free DVD decoder' that allows 'people to copy DVDs'" (A44).

[Note p. 9.]

2 "Downloading" is the process of retrieving data or program files over the Internet from a source on the Internet. *See Universal City Studios*, 111 I F. Supp. 2d at 312 & n. 88.

C. The District Court Proceeding

On January 14, 2000, plaintiffs commenced this action in the district court. (A5). The second amended complaint, dated April 26, 2000, alleged that defendants' dissemination of DeCSS on the Internet violated §§ 1201(a)(2) and 1201(b) of the DMCA. (A44-45). Plaintiffs sought both preliminary and permanent injunctive relief. (A45-47).

Defendants answered the complaint by asserting, *inter alia,* that plaintiffs failed to state a claim under the DMCA, and that § 1201 of the DMCA was unconstitutional both on its face and as applied to because it violates the First Amendment. (A63-64). Specifically, defendants maintained that DeCSS is protected expression, and that § 1201 unlawfully discriminates against DeCSS on the basis of content. *See Universal City Studios,* 111 F. Supp. 2d at 325. Defendants also argued that § 1201 is unconstitutionally overbroad because it effectively prevents individuals from making fair use of plaintiffs' copyrighted films, *se*e id. at 325-26, and is void for vagueness, see id. at 339. Finally, defendants claimed that an injunction barring their dissemination of DeCSS would violate the prior-restraint doctrine. *See id.* at 333.

D. The District Courts Decision

At the outset of the litigation, the district court preliminarily enjoined defendants from posting DeCSS software on their Internet web site. *See Universal City Studios, Inc. v. Reimerdes*, 82 R Supp. 2d 211 (S.D.N.Y. 2000). Following a trial on the merits, the district court held that CSS effectively controls access to copyrighted works within the meaning of § 1201(a)(2). *See*

Universal City Studios, 111 F. Supp. 2d at 317-18. Because viewers cannot access CSS encrypted DVDs without the necessary technological "keys," and because those keys are lawfully available only "by purchasing a [licensed] DVD player," the district court concluded that CSS is an effective access control measure. *Id.*[3]

[Note p. 11.]

3 The district court apparently found that CSS also protects DVDs from unauthorized copying. *See Universal City Studios*, 111 F. Supp. 2d at 303, 30910 (plaintiffs "Protect [their DVD] motion pictures from copying by using an encryption system called CSS" (emphasis added)). Thus, technology designed to circumvent CSS would arguably implicate both § 1201(a)(2) and § 1201(b). The district court's ruling principally relied, however, on § 1201(a)(2). *See id.* at 316 & n. 133.

Having determined that defendants violated § 1201(a)(2), the district court rejected defendants' several First Amendment challenges to the DMCA. Although the district court accepted defendants' argument that "computer code -- whether source or object -- is a means of expressing ideas," and is thus protected' by the First Amendment," *Universal City Studios*, 111 F. Supp. 2d at 327, it disagreed with defendants' assertion that the DMCA was subject to strict scrutiny, *see id.* at 328. Instead, the district court held that the statute was subject only to intermediate scrutiny because it is not intended to suppress ideas, but to regulate the purely functional aspects of circumvention technology. *Id.* at 328-29. Concluding that the protection of copyrighted works from digital piracy advances a substantial governmental interest, and that any incidental limitation on defendants' expression was no broader than necessary to satisfy that goal, the district court upheld the constitutionality of the DMCA. *Id.* at 330.

The district court also rejected defendants' overbreadth challenge to § 1201(a)(2) on prudential grounds. It reasoned that "whether Section 1201(a)(2) as applied here substantially affects rights, much less constitutionally protected rights, of members of the 'fair use community' cannot be decided in bloc, without consideration of the circumstances of each member or similarly situated groups of members." *Universal City Studios*, 111 F. Supp. 2d at 338. Concluding that it lacked an adequate factual record to make such determinations, the district court refused to entertain defendants' overbreadth claim. *See id.*[4]

[Note p. 12.]

4 The district court also summarily rejected defendants' vagueness challenge to § 1201(a)(2), holding that "[t]here can be no serious doubt that posting a computer program the sole purpose of which is to defeat an encryption system" fell squarely within the statute's prohibitions. *Universal City Studios,* 111 F. Supp. 2d at 339. Given defendants' clear statutory violation, the district court refused to entertain their claim that the DMCA was vague "as applied to others." *Id.*

Finally, the district court held that injunctive relief barring defendants from trafficking in circumvention technology comports with the First Amendment. The district court rejected

defendants' prior-restraint argument because its injunction did not target any expressive characteristics of DeCSS, but instead reached only the program's purely functional capacity to decrypt CSS-protected DVDs. *Universal City Studios,* 111 F. Supp. 2d at 334-35. In addition, the district court concluded that an order enjoining defendants from linking their web site to other web sites offering DeCSS was constitutionally sound because clear and convincing evidence showed that defendants had specifically established such links in order to violate the DMCA. *See* id. at 341.

Summary of Argument

As applied to defendants' conduct, § 1201(a)(2) and the district court's injunction are entirely consistent with the First Amendment. Defendants distributed DeCSS on the Internet as a purely utilitarian device for decrypting CSS-protected DVDs. In that context, DeCSS is not sufficiently expressive in character to warrant First Amendment protection. *See* Point I.A., *infra.*

Regardless of any expressive characteristics that DeCSS might arguably exhibit, however, the district court's ruling is still correct. Because § 1201(a)(2) does not discriminate against speech on the basis of Content, serves an important governmental interest by protecting copyrighted works in digital format from massive infringement, and is no broader in Sweep than necessary to accomplish that goal, its application to defendants' conduct does not offend the First Amendment. *See* Point I.B., infra. 14

The district court's order barring defendants from directly disseminating circumvention technology, and from linking their Internet web site to other web sites that offer DeCSS to the public, is also constitutionally sound. The injunction does not burden expression on the basis of subject matter, is sufficiently tailored to its purpose, and is supported by overwhelming evidence that defendants purposefully violated § 1201(a)(2). *See* Point II, *infra.*

Finally, the district court properly rejected defendants' overbreadth challenge to § 1201(a)(2). Defendants' overbreadth theory rests on an asserted constitutional right of third parties to make fair use of plaintiffs' films. However, defendants neither circumvented plaintiffs' protective measures nor used plaintiffs' films for any purpose, and are therefore not appropriate parties to press a fair-use claim. Furthermore, the evidentiary record in this case is inadequate to assess the validity of defendants' overbreadth theory. And even assuming defendants' theory were colorable, as a matter of law, any existing overbreadth would not be substantial enough to warrant facial invalidation of § 1201(a)(2). *See* Point III, *infra.*

STANDARD OF REVIEW

This Court reviews a "district court's order entering a permanent injunction for abuse of discretion, which can be found if the district court relied upon a clearly erroneous finding of fact or incorrectly applied the law." *General Media Communications, Inc. v. Cohen,* 131 F.3d 273, 278 (2d Cir. 1997) (citation omitted), *cert. denied*, 524 U.S. 951 (1998).

ARGUMENT

POINT I

SECTION 1201 (a)(2) AS APPLIED IN THIS CASE DOES NOT VIOLATE THE FIRST AMENDMENT

A. Defendants' Dissemination of DeCSS Software Does Not Constitute Protected Expression

Computer programs are "essentially utilitarian" works. *Computer Assocs. Int'l, Inc. v. Altai, Inc.,* 982 F.2d 693, 704 (2d Cir. 1992). Simply put, they are articles that accomplish tasks." *Sega Enterprises, Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524 (9th Cir. 1992). DeCSS -- the computer program "[a]t the bottom of this case" -- is no different. Brief for Defendants-Appellants ("Appellants' Br.") at 2. As the district court found, "DeCSS, like any other computer program, is a series of instructions that causes a computer to perform a particular sequence of tasks which, in the aggregate, decrypt CSS-protected files." *Universal City Studios*, 111 F. Supp. 2d at 328-29; *see also* Appellants' Br. at 2 ("DeCSS decrypts the data on a DVD and stores it."). This function is entirely nonexpressive, and thus does not warrant First Amendment protection.

To be sure, "[f]unctionality and expression are not mutually exclusive." *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 586 (2d Cir. 2000) (hold ing that existing Internet generic Top Level Domain names, such as ".com," ".net," and ".org," do not "constitute protected speech under the First Amendment"). Obviously, a technological device, such as a computer program, "could be used for an expressive purpose such as commentary, parody, news reporting or criticism, comprising communicative messages." *Id.* (citation omitted). But "[m]indful of the often unforeseeable impact in rapid technological changes," this Court has been "wary of making legal pronouncements" regarding the application of the First Amendment "based on highly fluid circumstances which will almost certainly give way to tomorrow's realities." *Id.* at 584.

This Circuit has therefore rejected a rigid, categorical approach to free-speech claims involving new telecommunications technologies in favor of a more nuanced inquiry. And as the Court recently instructed, the proper question in such cases is " 'whether the mix of functionality and expression is sufficiently imbued with the elements of communication' " to bring a technology within "the reach of the First Amendment." *Name.Space,* 202 F.3d at 585 (quoting *Spence v. Washington,* 418 U.S. 405, 409 (1974)). This careful assessment entails a "particularistic, context-sensitive analysis." *Id.* at 586.

Indeed, this Court has already applied a functional and closely contextual analysis to determine whether a computer program manifests expression protected by the First Amendment. In *CFTC v. Vartuli,* 228 FM 94 (2d Cir. 2000), the court rejected a free-speech challenge to 7 U.S.C. § 6m(1), which is a statutory provision requiring commodity trading advisors ("CTAs") to register with the Commodity Futures Trading Commission. The defendants in *Vartuli* qualified under the statute as CTAs because they manufactured and marketed a computer program that analyzed futures transactions and provided customers with "buy" and "sell" signals, *"i.e.,* it told customers whether to buy or sell yen or Swiss franc futures." *Id.* at 103. The defendants maintained that their computer program conveyed "constitutionally protected speech and that any registration

requirement applicable to it therefore must be analyzed as a prior restraint." *Id.* at 109. This Court disagreed.

Observing that the buy/sell signal generated by the software "was to be used in an entirely mechanical way, as though it was an audible command to a machine to start or to stop," the court concluded that the computer program "induce[d] action without the intercession of the mind or the will of the recipient." *Vartuli*, 228 F.3d at 111. The court further considered that

[n]one of the reasons for which speech is thought to require protection above and beyond that accorded non-speech behavior -- the pursuit of truth, the accommodation among interests, the achievement of social stability, the exposure and deterrence of abuses of authority, personal autonomy and personality development, or the functioning of democracy -- is implicated by the communications here in issue, and none counsels in favor of treating the [software's] communications at issue as protected "speech."

Id. (citation omitted).

Consequently, "[f]rom a First Amendment perspective," the court concluded that the program "did not materially differ from a system in which [the buy/sell] signals electronically triggered trades." *Vartuli*, 228 RM at 111. The "fact that the system used words as triggers and a human being as a conduit, rather than programming commands as triggers and semiconductors as a conduit" was "irrelevant." *Id.* The court therefore held that, "[i]n selling [the program] in the manner in which it was sold, as an automatic trading system," the defendants had "acted . . . without engaging in constitutionally protected speech."

Vartuli is instructive here. Like the sale of computer software that merely generates buy/sell signals, defendants' dissemination of DeCSS software was not intended "to convey information or to assert values." 228 F.3d at 111 (citation omitted). As the district court found, "DeCSS was created solely for the purpose of decrypting CSS -- that is all that it does." *Universal City Studios*, 111 F. Supp. 2d at 319. Thus, by posting DeCSS software on the Internet for all takers to download, defendants "enable[d] anyone who receive(d] it and who ha[d] a modicum of computer skills to circumvent plaintiffs' access control system." *Id.* at 329. In other words, defendants merely equipped others with a tool to decrypt CSS-protected DVDs; they engaged in no protected communication.

Nor does DeCSS software "speak" to its users in any expressive sense when used for its intended purpose; DeCSS mechanically instructs a computer to perform a specific task. *See Universal City Studios,* 111 F. Supp. 2d at 303 (describing DeCSS as computer program "that circumvents the CSS protection system and allows CSS-protected motion pictures to be copied and played on devices that lack the licensed decryption technology"); *see also id.* at 320 (finding designer of DeCSS "viewed 'cracking' CSS as an end in itself"). Indeed, the operation of DeCSS software does not even rely on the type of human "automaton" involved in *Vartuli*, who responded reflexively to computer-generated signals "without the intercession of the mind or the will." 228 F.3d at 111. DeCSS instead relies entirely upon "programming commands as triggers and semiconductors as a conduit" in decrypting CSS-protected DVDs. *Id.* In short, DeCSS is a digital

crowbar, and "[n]one of the reasons for which speech is thought to require protection above and beyond that accorded to non-speech behavior . . . is implicated" by its distribution. *Id.*

Defendants nevertheless try to characterize this case as involving quintessential First Amendment freedoms. Defendants contend that they "published DeCSS as part of [their] normal practice as a news magazine, implicating freedom of the press." Appellants' Br. at 16. They also maintain that "DeCSS *code* is itself protected expression," and therefore dissemination of DeCSS implicates freedom of speech. *Id.* (emphasis added).[5] Besides ignoring "the potential costs of categorical decisions" barring regulation in this area, *Name.Space,* 202 F.3d at 584 n.11, defendants' arguments are independently without merit.

[Note p. 19]

5 In *dictum,* the district court broadly stated that "[i]t cannot seriously be argued that *any form* of computer code may be regulated without reference to First Amendment doctrine." *Universal City Studios,* 111 F. Supp. 2d at 326 (emphasis added). This rather expansive statement is inconsistent, however, with this Court's more narrow and contextual application of the First Amendment to potentially expressive material. *See Vartuli,* 228 F.3d at 110-11; *Name-Space,* 202 F.3d at 585-86.

Section 1201(a)(2) outlaws trafficking in circumvention technology. *See 17* U.S.C. § 1201(a)(2). The Supreme Court has repeatedly instructed, however, "that it 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." *Cox v. Louisiana,* 379 U.S. 559, 563 (1965) (quoting *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502 (1949)). This rule negates both formulations of defendants' as-applied challenge to the DCMA.

For example, this is not a free-press case simply because defendants posted DeCSS software on their magazine's web site. Defendants did not "publish" DeCSS on the Internet in the sense of conveying a message to readers through an electronic medium. Defendants instead exploited the Internet's technical capacity to supply *operable software* to users through the process of downloading. In other words, defendants used the Internet as their vehicle for distributing prohibited technology, much like a delivery truck.

Similarly, this is not a free-speech case simply because computer programs consist of code. As the district court found, computer scientists developed " code" or "programming languages" to instruct computers "to *perform complex tasks." Universal City Studios*, 111 F. Supp. 2d at 306 (emphasis added). That "[t]hese languages, like other written languages, employ symbols and syntax to convey meaning," *id.,* however, is ultimately irrelevant in assessing the constitutionality of § 1201(a)(2)s prohibition. At best, the role played by DeCSS code establishes only that defendants' illegal "conduct was in part initiated, evidenced, or carried out by means of language." *Cox*, 379 U.S. at 563 (citation omitted). "Put another way," because "[s]peech is not protected by the First Amendment when it is the very vehicle of the crime itself," *United States v. Rowlee,* 899 F.2d 1275, 1278 (2d Cir.) (citation omitted), *cert. denied,* 498 U.S. 828 (1990),

any expressive element in DeCSS software does not immunize defendants' unlawful trafficking in circumvention technology. *Accord Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.,* 968 F.2d 286, 295 (2d Cir. 1992) ("simply because speech or other expressive conduct can in some circumstances be the vehicle for violating a statute directed at regulating conduct does not render the statute unconstitutional").[6]

[Note p. 21.]

6 Again, *Vartuli* provides helpful insight. Although *Vartuli* readily acknowledges that the "uses of language are subtle, complex, and infinitely variable," 228 F.3d at 112, it specifically recognizes that "only some" of those functions "are covered by the Special reasons for freedom of speech," *id.* at 111 (citation omitted). *Vartuli* therefore strongly suggests that where language is "used in'an entirely mechanical way," *id.,* such as in "the dissemination of systems for the automatic" decryption of CSS-protected DVDs, *id.* at 112, government regulation of that usage will not trigger constitutional scrutiny.

Nor is defendants' argument that DeCSS code is "read, reviewed and used by cryptographers and computer scientists as part of the normal scientific method for developing and testing cryptographic methodologies and teaching programming and cryptography" particularly compelling. Appellants' Br. at 16. Although defendants' observation may be true, it does not change the constitutional analysis. Both the text of the DMCA and the district court's findings make clear that § 1201(a)(2) does not reach any expressive content in DeCSS software.

Indeed, the DMCA specifically accounts for, and insulates, any expressive role computer code plays in scientific discourse. In relevant part, the statute permits an individual to provide circumvention technology "to another person with whom he or she is working collaboratively for the purpose of conducting acts of good faith encryption research . . . or for the purpose of having that other person verify his or her acts of good faith encryption research." 17 U.S.C. § 1201(g)(4)(B). After considering the statutory criteria for applying this exemption, the district court correctly concluded that defendants were not "involved in good faith encryption research." *Universal City Studios*, 111 F. Supp. 2d at 321 (applying criteria set forth in 17 U.S.C. § 1201(g)(3)).[7]

[Note p. 22.]

7 In adopting an "encryption research" defense to § 1201 liability, Congress recognized that "courts may be unfamiliar with encryption research and technology, and may have difficulty distinguishing between . . . legitimate encryption research and a so-called 'hacker' who seeks to cloak his activities in this defense." H.R. Rep. No. 105-551, 105th Cong., 2d Sess., pt. 2, at 44 (1998) ("House Report"). Thus, § 1201(g)(3) "contains a non-exhaustive list of factors a court shall consider in determining whether a person properly qualifies for the encryption research defense." *Id.*

In reaching this conclusion, the district court noted that defendants posted DeCSS on the Internet "for all the world to see." *Universal City Studios*, 111 F. Supp. 2d at 321. This behavior was powerful evidence that defendants "disseminated [DeCSS] in a manner that facilitates [copyright] infringement," rather than "in a manner reasonably calculated to advance the state of knowledge or development of encryption technology." 17 U.S.C. § 1201(g)(3)(A). By prohibiting only the former conduct, however, § 1201(a)(2) permissibly regulates defendants' " non-speech activities," *i.e.,* their distribution of DeCSS over the Internet "as the automatic system" for decrypting CSS-protected DVDs that "it was intended to be." *Vartuli,* 228 F.3d at 112. This application of § 1201(a)(2) is not "any the less constitutionally permissible" simply because the dissemination of DeCSS under different circumstances, and for different purposes, might foster communication regarding computer science. *Id.* "Actual speech which may arise as incident to conduct is not at issue here," and, consequently, neither is the First Amendment. *Young v. New York City Transit Auth.,* 903 F.2d 146, 154 (2d Cir.) (subway begging not protected speech despite that it "sometimes occasions questions from, and conversations with, passengers"), *cert. denied,* 498 U.S. 984 (1990).

Because defendants' dissemination of circumvention technology did not involve protected expression, the district court's application of § 1201(a)(2) in this case raises no constitutional concerns.

B. Defendants' As Applied Challenge To Section 1201 (a)(2) Fails Under Applicable First Amendment Principles

Even assuming that some aspect of defendants' conduct was expressive enough to warrant protection by the First Amendment, the district court's application of § 1201(a)(2) should nevertheless survive review. The law clearly recognizes that "when 'speech'and 'nonspeech' elements are combined in a single course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *Junger v. Daley,* 209 F.3d 481, 485 (6th Cir. 2000) (regulations governing export of encryption software held subject to *O'Brien* test). So long as a regulation affecting speech is content neutral, it will satisfy the First Amendment

"if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than essential to the furtherance of that interest."

Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) (quoting *O'Brien,* 391 U.S. at 377); *see also Able v. United States,* 88 F.3d 1280, 1295 (2d Cir. 1996); *Jews for Jesus,* 968 F.2d at 295. As applied in this case, § 1201(a)(2) meets all of these criteria.

1. Section 1201(a)(2) Is Content Neutral

The Supreme Court has "said that the 'Principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation because of [agreement or] disagreement with the message it conveys.'" Turner *Broadcasting*, 512 U.S. at 642 (quoting *Ward v. Rock Against*

Racism, 491 U.S. 781, 791 (1989)). "The government's purpose is the controlling consideration." *Ward,* 491 U.S. at 791. By this measure, the district court's application of § 1201(a)(2) was unquestionably content neutral.

The purpose of § 1201(a)(2) is to limit the serious threat of copyright infringement created by circumvention technology, not to "stifle [ ] speech on account of its message *Turner Broadcasting,* 512 U.S. at 641 (statute's "must carry" provisions governing television programming held content neutral because overriding congressional objective was to preserve national access to free television); *see also Ward,* 491 U.S. at 792 (sound-amplification guidelines held content neutral because "principal justification" was, *inter alia,* "city's desire to control noise levels . . . in order to retain the character of the [park] and its more sedate activities"). As the district court correctly observed, the "reason that Congress enacted the anti-trafficking provision of the DMCA had nothing to do with particular ideas of computer programmers and everything to do with functionality -- with preventing people from circumventing technological access control measures." *Universal City Studios*, 111 F. Supp. 2d at 329. The statute's legislative history fully supports this conclusion by analogizing the effect of the DMCA's anti-circumvention provisions "to making it illegal to break into a house using a tool, the primary purpose of which is to break into houses." Senate Report at 11. Indeed, Congress plainly viewed the prohibition against both circumvention and trafficking in circumvention technology as "a prohibition on conduct." *Id.* at 12.

Defendants nevertheless argue that "Congress clearly designed § 1201(a)(2) to disfavor speech of a particular content: speech that discusses or explains how to circumvent 'technical measures.' " Appellants' Br. at 21. This argument fails on at least two fronts. To start, DeCSS is hardly just speech that *"discusses or explains*" the circumvention of access controls. *Id.* DeCSS actually circumvents access controls. Consequently, defendants wrongly argue that "DeCSS runs afoul of § 1202(a)(2) because of what it says." Appellants' Br. at 19.

Furthermore, several parts of the DMCA plainly show that Congress did not "ban[ ] 'technologies,' including computer programs, based upon their subject matter and ideas." Appellants' Br. at 19 (footnote omitted). Among other things, the DMCA permits reverse engineering, *see* 17 U.S.C. § 1201(f), encryption research, *see id.* § 1201(g), and the testing of computer security systems, *see id.* § 1201(j). These provisions deeply undermine any notion that Congress was hostile to the subject matter of cryptography. To the contrary, Congress fully appreciated that "the goals of [the DMCA] would be poorly served if [its] provisions had the undesirable and unintended consequence of chilling legitimate research activities in the area of encryption." House Report at 27; *see also* Senate Report at 15 (same).

In short, both the "design and operation" of the DMCA "confirm that the purposes underlying [its] enactment . . . are unrelated to the content of speech." *Turner Broadcasting*, 512 U.S. at 647. Congress did not forbid circumvention technology; Congress sought to deter the *misuse* of such technology by those who would exploit it for illicit purposes. Cf. House Report at 27 ("Electronic commerce will flourish only if legitimate encryption researchers discover, and correct the flaws in encryption systems before illegitimate hackers discover and exploit these flaws."). Thus, defendants' "ability to hypothesize a content-based purpose for [the statute] rests

on little more than speculation and does not cast doubt upon the content-neutral character" of § 1201(a)(2). *Turner Broadcasting,* 512 U.S. at 652.

2. Section 1201(a)(2) Furthers An Important Governmental Interest

The DMCA easily satisfies the second prong of the constitutional analysis. "Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously," Congress was acutely aware that "copyright owners [would] hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy." Senate Report at 8. Congress therefore enacted the DMCA to "provide[ ] this protection and [to] create[ ] the legal platform for launching the global digital on-line marketplace for copyrighted works." Id. Indeed, Congress was firmly convinced that the importance of the treaties implemented by the DMCA "to the protection of American copyrighted works abroad cannot be overestimated." *Id.* at 10.

In particular, those who drafted the DMCA believed that it would "facilitate making available quickly and conveniently via the Internet the movies, music, software, and literary works that are the fruit of American genius," and would also "encourage the continued growth of the existing off-line global marketplace for copyrighted works in digital for mat by setting strong international copyright standards." Senate Report at 8. They consequently believed that the DMCA's anti-circumvention provisions would "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education." *Id.* at 1.[8]

[Note p. 28.]

8 Congress was also well aware that the "growth of electronic commerce is having a profound impact on the nation's economy." House Report at 22 (noting that "the information technology sector now constitutes 8.2 percent of the Nation's gross domestic product," that, by the end of 1997, "approximately 7.4 million Americans were employed in the field," and that the "total value of economic activity conducted electronically in 2002 will range from $200 billion to more than $500 billion."). Accordingly, Congress was convinced that, in "defin[ing] whether consumers and businesses may engage in certain conduct, or use certain devices, in the course of transacting electronic commerce," the DMCA could "determine the extent to which electronic commerce realizes its potential." *Id.*

Thus, by enacting the DMCA, Congress indisputably sought "to further the important public purposes framed in the Copyright Clause, U.S. Const., Art. I, § 8, cl. 8, of rewarding the creators of copyrighted works and of 'promoting broad public availability of literature, music, and the other arts.' " *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 710 (1984) (describing purpose of Copyright Act's compulsory licensing scheme for retransmission of broadcast signals on cable television networks (quoting *Twentieth Century Music Corp. v. Aiken,* 422 U.S. 151, 156 (1975)). The magnitude of these interests should not be underestimated, since "the Framers intended copyright itself to be the engine of free expression." *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 558 (1985). Nor should courts take lightly the way in which

Congress chose to advance these goals through the DMCA. The Supreme Court has shown "consistent deference to Congress when major technological innovations alter the market for copyrighted materials" because "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." *Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417, 431 (1984).

In sum, given the vast scientific, cultural, and economic capital threatened by the illicit use of circumvention technology, both § 1201(a)(2) and its specific application to defendants' conduct undeniably serve a substantial governmental concern.

3. Section 1201 (a)(2) Is Sufficiently Tailored To Satisfy Constitutional Requirements

Finally, the DMCA is sufficiently tailored for First Amendment purposes. The Supreme Court has emphasized that a content-neutral regulation "need not be the least speech-restrictive means of advancing the Government's interests." *Turner Broadcasting,* 512 U.S. at 662. Rather, a statute is sufficiently tailored "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." Id. (citations omitted). Applying this standard, the district court held that § 1201(a)(2)'s incidental affect on speech is no "broader than is necessary to accomPlish Congress' goals of preventing infringement and promoting the availability of content in digital form." *Universal City Studios*, 111 F. Supp. 2d at 330. The district court was correct.

As an initial matter, the numerous exceptions to § 1201(a)(2) demonstrate that the DMCA is closely tailored. In drafting the statute's anti-circumvention provisions, Congress carefully balanced, among other things, the needs of law enforcement and other government agencies, computer programmers, encryption researchers, and computer security specialists, against the serious problems created by circumvention technology. *See* 17 U.S.C. §§ 1201(e)-1201(g); *id.* § 1201(j). That *defendants'* conduct did not fall within any of these statutory exceptions does not prove that the DMCA sweeps too broadly. *See, e.g., FEC v. Nat'l Right to Work Committee,* 459 U.S. 197, 208 (1982) ("statutory prohibitions and exceptions" regarding political contributions by corporations and unions held "sufficiently tailored . . . to avoid undue restriction on the associational interests asserted" by political organization).

Furthermore, the district court found that current technology cannot "provide means of limiting access only to copyrighted materials and only for uses that would infringe the rights of the copyright holder' " *Universal City Studios,* 111 F. Supp. 2d at 330 n.206. This finding is dispositive. Absent such sophisticated access control measures, § 1201(a)(2) is "the only effective interim solution to carry out" the government's interest. *Wayte v. United States,* 470 U.S. 598, 613 (1985) ("passive enforcement policy" governing prosecutions for failure to register for military service held sufficiently tailored under *O'Brien* where government had found no other "practicable way of obtaining the names and current addresses of likely non-registrants").

This fact obviously negates defendants' argument that the district court "failed to consider" whether § 1201(a)(2) "does not 'burden substantially more speech than is necessary to further the government's legitimate interests.' " Appellants' Br. at 26 (quoting *Turner Broadcasting,* 512

U.S. at 662). By necessity, when a challenged "statutory prohibition is not a means to some greater end, but an end in itself," it is not substantially broader than required. *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 572 (1990) (plurality) (prohibition against nude dancing held sufficiently tailored under *O'Brien* where provision requiring "pasties and G-strings" was "the bare minimum to achieve the State's purpose"). Stated differently, when the "evil" targeted by a content-neutral speech regulation (such as unauthorized decryption of CSS-protected works) "is created by the medium of expression itself" (here, DeCSS software), even a complete ban of that particular medium of expression is *narrowly tailored." Frisby v. Schultz,* 487 U.S. 474, 487-88 (1988) (complete ban on residential picketing held sufficiently tailored under *O'Brien* (emphasis added; citations omitted)).[9]

[Note p. 31-33.]

9 Amici Benkler and Lessig argue that § 1201 is insufficiently tailored because Congress failed adequately to consider adopting less restrictive protective measures, such as provisions akin to the statutory scheme for protecting digital audio tapes from illicit copying. *See Amicus* Brief of Professors Benkler and Lessig ("Benkler-Lessig Br.") at 14-17 (discussing 17 U.S.C. § 1002(a)). Their argument fails for three reasons. First, as Benkler and Lessig concede, Congress actually did consider and reject the Audio Home Recording Act of 1992 as a model for the DMCA. *See id.* at 13-14; *see also* Senate Report at 28. This is clear from the fact that, unlike 17 U.S.C. § 1002(a), which requires manufacturers of digital audio recording devices and digital audio interface devices to conform their products to certain technological specifications, the DMCA expressly does not 'require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product, provide for a response to any particular technological measure," *id.* § 1201(c)(3); *see also* Senate Report at 12 (explaining that § 1201 "does not impose any affirmative design mandates on manufacturers of consumer electronics, telecommunications, and computing products").

Furthermore, the reliance that Benkler and Lessig rest on § 1002(a) is wholly misplaced given that § 1002(a) does not respond to the synergistic threat of massive piracy that arises from combining digital technology with the Internet's global distribution capacity. The recent copyright litigation spawned by the wholesale copying and distribution of musical works in digital form over the Internet vividly illustrates this point. *See A&M Records, Inc. v. Napster, Inc.,* _ F.3d _, 2001 WL 115033 (9th Cir. Feb. 12, 2001); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y 2000).

Finally -- despite their argument to the contrary -- by staking their challenge to the DMCA on the allegedly curtailed rights of individuals to make fair use of plaintiffs' copyrighted films, Benkler and Lessig attack the statute on overbreadth grounds. *See* Benkler-Lessig Br. at 3-4. For the reasons set forth in Point III *infra,* the district court properly rejected this overbreadth claim.

Because § 1201(a)(2)'s prohibition against disseminating circumvention technology is an important end in itself," *Barnes*, 501 U.S. at 572, it is sufficiently tailored to meet constitutional standards.

POINT II

THE DISTRICT COURT'S INJUNCTION IS APPROPRIATE

Congress empowered federal courts to grant temporary and permanent injunctions to remedy violations of § 1201. *See* 17 U.S.C. § 1203(b)(1). Pursuant to that authority, the district court permanently enjoined defendants from: (1) in any way, manufacturing, importing, or otherwise offering or providing to the public, DeCSS, or any other product, service, device or component that is primarily designed, produced, or marketed to circumvent CSS, or any other technological measure adopted by plaintiffs that effectively controls access to plaintiffs' copyrighted works, or that effectively protects plaintiffs' copyrighted works from infringement, and has only limited commercially significant purposes other than circumventing plaintiffs' protective measures; and (2) knowingly linking any Internet web site operated by defendants to any other web site containing DeCSS, or knowingly maintaining any such links for the purpose of disseminating DeCSS. *See Universal City Studios*, 111 F. Supp. 2d at 346-47.

Defendants attack the district court's injunction as unconstitutional, arguing that it is impermissibly content-based and far too broad. *See* Appellants' Br. at 17-30. Neither challenge has merit. The district court's order barring defendants from trafficking in circumvention technology directly, and from linking to Internet web sites that supply DeCSS, is legally supportable and appropriate in scope.[10]

[Note. p. 34.]

10 The district court's injunction restrains defendants from violating both § 1201(a)(2) (prohibiting dissemination of technology that circumvents controls placed on *access) and* § 1201(b) (prohibiting dissemination of technology that circumvents controls placed on *copying). See Universal City Studios,* 111 F Supp. 2d at 346-47. Although the district court analyzed § 1201(a)(2) at length, it did not discuss defendants' conduct in terms of a § 1201(b) violation. This omission is ultimately immaterial, however, for two reasons. First, defendants' brief on appeal does not challenge the § 1201(b) component of the injunction; consequently, defendants have waived any appellate challenge in that regard. *See Tischmann v. ITT/Sheraton Corp.,* 145 F.3d 561, 568 n.4 (2d Cir.) (argument waived when raised for first time on appeal in reply brief), *cert. denied,* 525 U.S. 963 (1998); *see also Graham v. Long Island Rail Road,* 230 F.3d 34, 41 (2d Cir. 2000); *United States v. Greer,* 223 F.3d 41, 51-52 & n.2 (2d Cir. 2000); *Thomas v. Roach,* 165 F.3d 137, 146 (2d Cir. 1999). Second, the district court expressly found that plaintiffs protect their "motion pictures from *copying* by using an encryption system called CSS," *id.* at 303 (emphasis added), and that a CSS-protected DVD decrypted by DeCSS "can be copied like any other [digital] file," *id.* at 313. For the limited purpose of this case, and especially given defendants' waiver, these findings should be sufficient to sustain the district court's injunction under § 1201(b).

A. The District Court"s Order Enjoining Defendants From Directly Disseminating DeCSS and Other Circumvention Technology Is Constitutionally Sound

As a threshold matter, defendants' suggestion that the district court's order does not constitute a permissible content-neutral injunction is wrong. *See* Appellants' Br. at 25 n. 16. For reasons already explained, *see* Point I.B.1 *supra,* "none of the restrictions imposed by the court were directed at the contents of [any] *message"* conveyed by defendants. *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 763 (1994) (emphasis added). Rather, the order targets only the functional application of circumvention technology.

Similarly, the district court's order plainly "burden[s] no more speech than necessary to serve a significant government interest." *Madsen,* 512 U.S. at 765. Again, as the district court's findings establish, *see Universal City Studios*, 111 F. Supp. 2d at 330 n.206, the current state of technology makes a comprehensive injunction against the unlawful dissemination of DeCSS "the only effective interim solution to carry out" the government's interest. *Wayte,* 470 U.S. at 613. *See* Point I.B.3. *supra.*

Furthermore, an injunction prohibiting a party from violating statutory provisions is generally " appropriate where there is a likelihood that, unless enjoined, the violations will continue." *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1477 (2d Cir. 1996) (citation omitted), *cert. denied,* 522 U.S. 812 (1997). The district court found that defendants would "quite likely" continue to traffic in circumvention technology "unless enjoined." *Universal City Studios*, 111 F. Supp. 2d at 343. The district court also concluded that such conduct would cause plaintiffs significant -- "probably . . . incalculable injury. *Id.* at 335, 342.

Importantly, the district court only barred defendants from disseminating technology that is primarily designed, knowingly marketed, and having only limited commercial use except for circumventing plaintiffs' access-control measures. *Universal City Studios*, 111 F Supp. 2d at 347. Closely cropped injunctive provisions such as these, which forbid specific statutory violations, are sufficiently tailored to survive even First Amendment scrutiny. *See Cable/Home Communication Corp. v. Network Productions, Inc.,* 902 F.2d 829, 849 (11th Cir. 1990) (injunction against sale of decryption technology that violated statute governing satellite television transmissions was consistent with First Amendment where order was "limited in scope including only defendants-appellants' action which violate[d]" statute); *California Satellite Systems v. Seimon,* 767 F.2d 1364, 1368 (9th Cir. 1985) (same for injunction against use of equipment that intercepted satellite television transmissions in violation of statute); cf. *CFTC v. American Board of Trade,* 803 F.2d 1242, 1251 (2d Cir. 1986) (approving injunction prohibiting statutory violation that was "carefully tailored to avoid any interference with legitimate activities").

Defendants also maintain that the district court lacked an evidentiary basis for its injunction, and therefore made certain causal assumptions that contradict First Amendment precepts. According to defendants, because plaintiffs failed to show that they were directly harmed by defendants conduct, the district court impermissibly relied on defendants' broad dissemination of DeCSS via the Internet as "'an acceptable surrogate for injury.'" Appellants' Br. at 23 (quoting *Florida Star v. B.J.F,* 491 U.S. 524, 540 (1989)). The district court aptly described this argument as a "farrago of distortions." Universal City Studios, 111 F. Supp. 2d at 342.

To start, defendants conveniently ignore that their conduct is precisely what Congress sought to eliminate by enacting § 1201(a)(2). Congress understood "that the digital environment poses a *unique* threat to the rights of copyright owners, and as such, necessitates protection against devices that undermine copyright interests." House Report at 25 (emphasis added). Congress also recognized that, "[i]n contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of works-at virtually no cost at all to the pirate." *Id.*; *see also* Senate Report at 8. The DMCA directly responds to "the ease with which digital works can be copied and distributed worldwide virtually instantaneously," Senate Report at 8, and accepts that the injury allegedly unproven in this case is an inherent feature of digital technology itself. Consequently, by basing its injunction on the very real threat to plaintiffs' intellectual property rights posed by defendants' conduct, the district court was faithful to congressional intent. *See Universal City Studios*, 111 F Supp. 2d at 342 & n.261 (construing § 1203(b)(1)'s authorization for injunctive relief "to prevent or restrain violations" as "demonstrating that the requisite injury need only be threatened" (emphasis added)).[11]

[Note. pp. 37-39.]

11 Noting the epidemic-like propagation of circumvention technology on the Internet, and its staggering potential for copyright infringement, the district court held that the functional capacity of digital technology both provided an acceptable proxy for harm and determined the appropriate level of constitutional scrutiny to apply to § 1201(a)(2). *See Universal City Studios, 111* F. Supp. 2d at 332-33. This conclusion is fully consistent with controlling law. The Supreme Court has "long recognized that each medium of expression presents special First Amendment problems," *FCC v. Pacifica Foundation,* 438 U.S. 726, 748 (1978) (plurality), and that "differences in characteristics of new media justify differences in the First Amendment standards applied to them," Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969) (footnote omitted). As a corollary to these principles, "the fact that a law singles out a certain medium . . . is insufficient by itself to raise First Amendment concerns." *Turner Broadcasting,* 512 U.S. at 660 (citations omitted). Heightened scrutiny of such regulations is therefore "unwarranted when the differential treatment is justified by some special characteristic of the particular medium being regulated." *Id.* at 660-61 (citations omitted)

After considering extensive evidence regarding computer code, the Internet, digital storage media, encryption and circumvention technologies, and the effects of such technologies on the market for plaintiffs' DVD films, *see Universal City Studios*, 111 F. Supp. 2d at 305-15, the district court determined that "the digital world is very different" from the world of other media, *id.* at 331. In short, this "special characteristic" of the digital world-i.e., the overwhelming threat to copyright protection presented by digital technology-"justifies" the causal assumptions implicit in the DMCA regarding the harms unleashed by circumvention technology, such as DeCSS. Turner *Broadcasting,* 512 U.S. at 660-61.

In any event, the district court did consider evidence that pirated copies of plaintiffs' encrypted DVD films were available from Internet sources, and that copies of such films had been downloaded and exchanged online. *Universal City Studios*, 111 F. Supp. 2d at 314-15, 342. Based on the record, the district court also found that DeCSS was the "superior product" as

compared to other decryption programs, and that the "apparent availability of pirated motion pictures shot up . . . dramatically upon introduction of DeCSS." *Id.* at 342. Finally, the district court found that "broad dissemination of DeCSS threatens ultimately to injure or destroy plaintiffs' ability to distribute their copyrighted products on DVDs," *id.* at 335, and that plaintiffs "have no adequate remedy at law" because proof of actual damages "would be difficult if not virtually impossible" to establish, *id.* at 343-44, and that "defendants would be in no position to compensate plaintiffs" in any event, *id.* at 335. These findings adequately support the district court's permanent injunction. *See Ticor Title Ins. Co. v. Cohen,* 173 F.3d 63, 68 (2d Cir. 1999); *New York State Nat'l Organization for Women v. Terry,* 886 F.2d 1339, 1362 (2d Cir. 1989), *cert. denied,* 495 U.S. 947 (1990).

Nor -- as defendants maintain -- does the the Supreme Court's decision in *Florida Star v. B.J.F,* 491 U.S. 524 (1990), undermine this conclusion. *See* Appellants' Br. at 23. *Florida Star* held that a statutory ban on the publication of personal information by "instrument[s] of mass communication" was impermissibly underinclusive because the state justified the restriction on privacy grounds, yet permitted public dissemination of the same information by other means. 491 U.S. at 540 ("When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant."). In that context, the Supreme Court instructed that "the mass scope of disclosure is not an acceptable surrogate for injury." *Id. Florida Star* did not consider the need to a regulate a medium of communication that actually *performs* illegal tasks, and therefore its admonition regarding the straightforward transmission of information has no relevance here.[12]

[Note. p. 40.]

12 Defendants also contend that *"Florida Star* strongly suggests that enjoining further publication of DeCSS at this point does not sufficiently further" any governmental interest, "since DeCSS was published by so many [other] persons." Appellants' Br. at 24 (citing *Florida Star,* 491 U.S. at 535). Again, insofar as *Florida Star's* holding solely addressed the publication of truthful information -- not the distribution of operable software -- this argument is likewise flawed. Moreover, *Florida Star* expressly recognized that, in "a limited set of cases," a meaningful public interest might be served by further restricting release of information that was already available to the public. 491 U.S. at 535. For the reasons stated by the district court, *see Universal City Studios*, 111 F. Supp. 2d at 344-45 (discussing continued harm to plaintiffs absent injunction), further dissemination of DeCSS would certainly fall within that "limited set of cases." *Florida Star,* 491 U.S. at 535.

In all, the district court's injunction against defendants' direct dissemination of DeCSS neither targets the content of any expression nor prohibits defendants from engaging in any activities beyond those proscribed by § 1201(a)(2). It is therefore valid and should be affirmed.[13]

[Note. p. 41.]

13 On appeal, defendants do not raise a prior-restraint argument and have therefore waived it. *See Greer,* 223 F.3d at 51-52. In any event, since the district court's injunction targets only the functional aspects of DeCSS, under *Vartuli,* the order does not violate the prior-restraint doctrine. *See* 228 F.3d at 111-12.

B. The District Court"s Anti-Linking Injunction Comports With The First Amendment

"Linking," as the district court explained, results from "[p]rogramming a particular point on a [computer] screen to transfer the user to another web page." *Universal City Studios*, 111 F Supp. 2d at 324. The sole function of a link is to "take one almost instantaneously to the desired destination [on the Internet] with the mere click of an electronic mouse." *Id.* at 339. Defendants linked their Internet web site to other web sites that posted DeCSS for downloading, and then advertised that people could obtain DeCSS by using those links. *See id.* at 325. The district court concluded that defendants' linking " offered, provided or otherwise trafficked in DeCSS" in violation of § 1201(a)(2). *Id.* at 325.

The district court closely analyzed the possible First Amendment ramifications of enjoining defendants' linking. *See Universal City Studios*, 111 F. Supp. 2d at 339. Focusing on the hybrid nature of computer code that effectuates a link, the district court analyzed § 1201(a)(2)'s application to linking under the *O'Brien* standard. *See id.* (observing that computer code has both expressive and functional characteristics). The district court concluded that any such application would be content-neutral and sufficiently tailored, and would "materially advance a substantial governmental purpose" by curtailing dissemination of DeCSS posted on foreign web sites that are not subject to the DMCA. *Id.* at 340.

To minimize its potential chill on the free exchange of information over the Internet, the district court held that link-based liability under the DMCA would be inappropriate

absent clear and convincing evidence that those responsible for the link (a) know that the relevant material is on the linked-to site, (b) know that it is circumvention technology that may not lawfully be offered, and (c) create or maintain the link for the purpose of disseminating that technology.

Universal City Studios, 111 F Supp. 2d at 341. Given that defendants "initially touted [DeCSS] as a way to get free movies," and "later maintained the links to promote the dissemination of the program in an effort to defeat effective judicial relief," the district court concluded that clear and convincing evidence justified an anti-linking injunction in this case. *Id.*

Defendants make several arguments against the district court's anti-linking injunction, all of which are unpersuasive. Defendants first assert that the district court's ruling "permits anyone to be enjoined from linking to sites presenting anti-circumvention technology if the linker intended to disseminate the technology." Appellants' Br. at 27-28. This characterization of the district court's order is simply wrong. The district court's injunction applies only to "those responsible for the link," and does not apply to those who would simply use the link to visit a web site. *Universal City Studios, 111* F. Supp. 2d at 34 1. In halting *defendants'* conduct, the district court properly employed a supply-side theory of liability, which § 1201(a)(2) expressly imposes.

Defendants next complain that the district court "found links to be 'functional' and thus unworthy of full First Amendment protection because they provide information efficiently and quickly." Appellants' Br. at 28. This description also mischaracterizes the district court's decision. The district court did not enjoin defendants' linking because links foster the efficient exchange of information; the district court enjoined defendants' linking because links permit defendants to "engage[ ] in the functional equivalent of transferring DeCSS code to the user themselves." *Universal City Studios*, 111 F. Supp. 2d at 325. Again, the order correctly targets defendants' unlawful conduct.

Finally, defendants contend that the district court applied too lax a test in assessing whether an anti-linking injunction comports with the First Amendment. They maintain that a court may enjoin linking Only "upon a determination that the link was 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' " Appellants' Br. at 29 (quoting *Brandenberg v. Ohio,* 395 U.S. 444, 447 (1969)). This argument is meritless, especially since the district court arguably applied a more stringent standard than the Constitution commands.

Defendants portray their web-site links in terms of pure speech, and thus argue that the strictest First Amendment standards should apply to § 1201(a)(2). Links are not speech, however; they are the technological bridges that connect different Internet web sites for myriad purposes. For those who use Internet links to join with others who share their beliefs, the act of linking might be said to constitute association in cyberspace. Accordingly, First Amendment principles governing the regulation of associational conduct would provide the appropriate guidance here.[14]

[Note. p. 44.]

14 The Government does not concede, however, that the act of linking necessarily constitutes association for the purposes of First Amendment analysis. As this Court has already noted in applying First Amendment principles to the regulation of Internet technology, it is "'unwise and unnecessary definitively to pick one analogy or one specific set of words now.'" *Name. Space,* 202 F.3d at 585 (quoting *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 742 (1996) (plurality)).

The First Amendment protects association only insofar as it is not an alliance to break the law. Thus, the government may not "restrict speech or association because it finds the views expressed by any group to be abhorrent." *Healy v. James,* 408 U.S. 169, 187-88 (1972). Before the government may regulate associational conduct, it "has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." Id. at 186. In determining whether the regulation of such conduct is legitimate, "the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not." *Id.* at 192; *see also X-Men Security, Inc. v. Pataki,* 196 F.3d 56, 71 (2d Cir. 1999).

Under the First Amendment, defendants had every right to use their web site to advocate against the DMCA. They also had the right to associate on the Internet with others who support the use

of circumvention technology by linking to web sites that decry § 1201(a)(2). But by purposefully linking to web sites that post DeCSS for downloading, defendants' actions exceeded advocacy and crossed the line into unlawful action. *See Healy,* 408 U.S. at 186. Through their links, defendants intentionally furthered the unlawful dissemination of circumvention technology, and thereby jeopardized plaintiffs' intellectual property. "The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights." *Madsen,* 512 U.S. at 776. Consequently, the district court's anti-linking injunction was entirely proper.

Moreover, by requiring clear and convincing evidence that defendants' linking willfully violated § 1201(a)(2), the district court was exceedingly conscientious about any potential chill on expression that might ensue from an anti-linking injunction. This Court need not decide now whether the heightened evidentiary burden imposed by the district court, or the preponderance standard generally applied in civil cases, is the appropriate gauge for link-based liability. There is simply no question that defendants' self-proclaimed act of "electronic civil disobedience," *Universal City Studios*, 111 F Supp. 2d at 303, 324 (discussing defendants' attempt to circumvent the district court's preliminary injunction by urging others to post DeCSS on the Internet and then linking their web site to these new postings), provides clear and convincing evidence of defendants' willfulness.

Nevertheless, the Government does not concede that the district court correctly imposed a heightened evidentiary burden. Both the DMCA and its legislative history are silent as to the applicable evidentiary standard for injunctive relief. This "silence is inconsistent with the view that Congress intended to require a special, heightened standard of proof," and contrary to the general presumption that the preponderance standard is "applicable in civil actions between private litigants unless particularly important individual interests or rights are stake." *Grogan v. Garner,* 498 U.S. 279, 286 (1991) (citation omitted); *see also Herman & MacLean v. Huddleston,* 459 U.S. 375, 389-90 (1983).[15] Given that the district court's ruling did not address this authority, the Government urges this Court not to adopt a heightened evidentiary standard at this time. A more ambiguous case of willful violation, which better crystallizes the issue for consideration, would provide a more suitable vehicle for deciding the appropriate standard of proof.

[Note pp. 46-47.]

15 An alleged incidental burden on First Amendment rights is not necessarily the type of interest that requires a heightened evidentiary standard. Cf. *Ellis v. Bh'd of Ry., Airline & Steamship Clerks, Freight Handlers, Express & Station Employees,* 466 U.S. 435, 457 n.15 (1984) (rejecting requirement that defendant in accounting proceeding prove by clear and convincing evidence that First Amendment violation had been corrected). Nor does *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), support a heightened evidentiary standard in this context, as the district court believed. *See Universal City Studios*, 111 F. Supp. 2d at 340-41. *Sullivan* involved an action for defamation. Defamation involves pure speech, and defamation law exists to regulate pure speech. Thus, to ensure that "debate on public issues" remained " uninhibited, robust, and wide-open," *Sullivan,* 376 U.S. at 270, and was not unduly chilled by the threat of

liability, the Supreme Court in *Sullivan* engrafted a heightened evidentiary threshold onto certain libel and slander claims, *see id.* at 279-80. Computer code is not pure speech, however, and it is the *functional* capacity of computer code that § 1201(a)(2) seeks to control. In using the *Sullivan* test as a model for link-based liability under the DMCA, the district court lost Sight of this important distinction.

POINT III

THE DISTRICT COURT PROPERLY REJECTED DEFENDANTS' OVERBREADTH CHALLENGE

Defendants argue that, "[i]n addition to being unconstitutional as applied to [their own dissemination of DeCSS], the District Court's interpretation of § 1201 as a blanket prohibition of the manufacture or dissemination of DeCSS is independently unconstitutional because it eliminates fair use of DVD movies." Appellants' Br. at 41. Specifically, they contend that the DMCA's prohibition against disseminating circumvention technology violates the First Amendment because it effectively denies many the wherewithal to make fair use of copyrighted works that are protected by encryption and other technologies. *See id.* at 46-51. The district court correctly rejected this claim as an ill-conceived overbreadth challenge to § 1201(a)(2). *See Universal City Studios*, 111 F. Supp. 2d at 338-39.

The First Amendment overbreadth doctrine is an exception to the "traditional rule . . . that "'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.'" *Los Angeles Police Dep't v. United Reporting Pub. Co.,* 528 U.S. 32, 38 (1999) (quoting *New York v. Ferber,* 458 U.S. 747, 767 (1982). It is "predicated on the sensitive nature of protected expression," and allows "persons to attack an overly broad statute even though [their] conduct is clearly unprotected and could be proscribed by a law drawn with the requisite specificity." *Ferber,* 458 U.S. at 768-69. Such challenges are "deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their right for fear of . . . sanctions provided by a statute susceptible of application to protected expression." *Los Angeles Police Dep't,* 528 U.S. at 38 (citation omitted).

Nevertheless, given the "wide-ranging effects of striking down a statute on its face at the request of one whose conduct may be punished despite the First Amendment," the Supreme Court has repeatedly emphasized that "the overbreadth doctrine is strong medicine and [has] employed it with hesitation, and then only as a last resort." *Ferber, 458 U.S.* 769 (citation omitted). This reluctance exists because "there comes a point" where the desire to avoid chilling expression "cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." *Broderick v. Oklahoma,* 413 U.S. 601, 615 (1973). Accordingly, "before the statute involved will be invalidated on its face," *Ferber,* 458 U.S. at 769, its alleged overbreadth 44must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep," *Broderick,* 413 U.S. at 615.

Under these principles, defendants' overbreadth challenge fails on several levels. To start, defendants' claim of constitutional violation is far too attenuated even for overbreadth analysis. The DMCA makes circumvention of access controls and dissemination of circumvention technology two separate violations. *Compare* 17 U.S.C. § 1201(a)(1)(A) (prohibiting the act of circumvention itself) with 17 U.S.C. § 1201(a)(2) (prohibiting dissemination of circumvention technology). Defendants' claim that § 1201(a)(2)'s prohibition burdens an alleged constitutional right of fair use, however, necessarily presupposes a right to circumvent access controls placed on copyrighted materials-the very conduct prohibited by § 1210(a)(1)(A). Here lies defendants' problem.

Had defendants actually circumvented plaintiffs' access control measures for an illicit purpose, the overbreadth doctrine could theoretically permit them to challenge § 1201(a)(1)(A) by asserting the alleged rights of fair users. But the district court did not hold defendants liable for circumvention, and therefore defendants lack standing to challenge § 1201(a)(1)(A). Without invalidating § 1201(a)(1)(A) -- and thereby establishing the predicate right to circumvent CSS -- defendants cannot establish the basis for challenging § 1201(a)(2). And even though the Supreme Court "has allowed a party to assert the rights of another without regard to the ability of the other to assert his own claims," *Secy of State of Maryland v. J.H. Munson Co.,* 467 U.S. 947, 957 (1984), it has never extended the overbreadth doctrine to include attacks upon a statutory provision that is not even alleged to have been violated. Accordingly, defendants' overbreadth claim unravels at its inception.

Furthermore, as the district court correctly held, defendants' overbreadth claim also fails because the evidentiary record in this case does not provide

a complete view of whether the interests of the absent third parties upon whom defendants rely really are substantial and, in consequence, whether the DMCA as applied here would materially affect their ability to make fair use of plaintiffs' copyrighted works.

Universal City Studios, 111 F. Supp. 2d at 337. In this regard, the Supreme Court has repeatedly instructed that, to "succeed in [an overbreadthl challenge," a party "must demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally." *New York State Club Assn, Inc. v. City of New York,* 487 U.S. 1, 14 (1988); *see also Regan v. Time, Inc.,* 468 U.S. 641, 651-52 (1984) (plurality); *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 801-02 (1984). Defendants have not done so.

The record plainly undercuts any claim that § 1201(a)(2) significantly interferes with the ability to make fair use of films distributed on CSS-protected DVDs. *See* Appellants' Br. at 41. The district court found that "all or substantially all motion pictures available on DVD are also available on video tape," and are thus are "readily available" for fair use purposes. *Universal City Studios*, 111 F Supp. 2d at 337. In addition, the sound tracks of CSS-protected movies can be easily recorded, and consequently the dialogue, music, and sound effects contained on DVD films remain fully accessible for fair use. *See id.* at 338. Defendants summarily respond to these points by insisting that "[f]air users should not be required to choose between paying for two

copies of the same movie or making do with an inferior copy," but they offer no persuasive reason why. Appellants' Br. at 54.[16]

[Note p. 51.]

16 As authority for their claimed right to make fair use of plaintiffs' *digitalized* motion pictures, defendants cite *Landmark Assocs., Inc. v. Willingboro, 431* U.S. 85, 92 (1977) and *Martin v. City of Struthers,* 319 U.S. 141, 145-49 (1943). *Landmark* Assocs. invalidated an ordinance that prohibited individuals from posting "for sale" signs on their property to deter "white flight" from residential neighborhoods. *See* 431 U.S. at 86. *Martin* invalidated an ordinance that prohibited door-to-door distribution of handbills. *See* 319 U.S. at 142. Neither case purports to address the scope of an individual's entitlement to make fair use of another's copyrighted expression, nor the constitutionality of any limitations or burdens to which an individual may be subject in making fair use of another's work.

In sum, the "mere fact" that defendants "can conceive of some impermissible applications" of § 1201(a)(2) is not sufficient to render it susceptible to an overbreadth challenge." *Taxpayers for Vincent,* 466 U.S. at 800; *see also United States v. Johnson,* 952 F.2d 565, 577 (1st Cir. 1991), *cert. denied,* 506 U.S. 816 (1992). Admittedly, the DMCA's prohibitions against circumvention technology may burden an individual's ability to make fair use of certain copyrighted films -- and perhaps even some films that may fall into the public domain. *See Universal City Studios,* 111 F. Supp. 2d at 338 & n.245. But under the current circumstances, § 1201(a)(2) "is 'not *substantially* overbroad,'" and therefore "'whatever overbreadth may exist should be cured through case-by-ease analysis of the fact situations to which its sanctions, assertedly, may not be applied.'" *Ferber,* 458 U.S. 773-74 (emphasis added; quoting *Broderick,* 413 U.S. at 615-16).[17]

[Note p. 52.]

17 Accord David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act,* 148 U. Pa. L. Rev. 673, 741 (2000) (concluding that, should the DMCA ultimately afford too great a monopoly over expression, "courts at that juncture would be called upon to apply section 1201 to that world of the future -- whether by upholding it exactly as written, by interpolating into it additional exceptions to give substance to the user exemption that it already contains, or by making the determination that protection for user rights (traditionally protected in the analog world through such devices as fair use and the first sale doctrine) rises to constitutional levels" (footnotes omitted)).

Finally, there is a third reason why defendants' overbreadth claim fails: A party may not invoke the overbreadth doctrine unless there is "a realistic danger" that a statute "will significantly compromise *recognized* First Amendment protections of parties not before the Court." *Taxpayers for Vincent,* 466 U.S. at 801 (emphasis added). Defendants cannot satisfy this condition.

In contrast to defendants' sweeping assertions, *see* Appellants' Br. at 43-46, the courts have never held that the First Amendment requires a fair-use doctrine. *Accord Harper & Row,* 471 U.S. at

556, 560 (observing that "copyright's idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression" (citation omitted)). Indeed, the precise relationship between the First Amendment and copyright law remains unsettled, and any further definition would likely have far-reaching implications. Because defendants do not present a "flesh and blood legal problem[ ] with data relevant and adequate to an informed judgment," their overbreadth challenge is wholly inadequate to address this important constitutional issue. *Ferber,* 458 U.S. at 768 (citation omitted).

Moreover, even if the First Amendment did command such an exception to copyright protection, that exception would surely be far more limited than the statutory right of fair-use currently afforded by 17 U-S-C. § 107. *See Roy Export Co. Estab. of Vaduz, Lichtenstein v. Columbia Broadcasting Sys., Inc.,* 672 F.2d 1095, 1100 (2d Cir.) (positing possible First Amendment right of fair use on "the conceivable Occurrence of some 'rare,' almost unique' circumstance . in which 'it is at least arguable that the informational value of [the work] cannot be separated from the [author's] expression.'" (quoting *Iowa State Univ. Research Found., Inc. v. American Broadcasting Co.,* 621 F.2d 57, 61 n.6 (2d Cir. 1980)), *cert. denied*, 459 U.S. 826 (1982); *see also Los Angeles News Serv. v. Tullo,* 973 F.2d 791, 795-96 & n.5 (9th Cir. 1992).[18] As a result, there is no "realistic danger" that § 1201(a)(2) "will significantly compromise" anyone's "recognized" First Amendment rights, much less the rights of a substantial population of would-be fair users. *Taxpayers for Vincent, 466 U.S.* at 801. Absent that threat, an overbreadth challenge is inappropriate.

[Note p. 54.]

18 In an analogous context, the Eleventh Circuit has observed that simply because the Constitution empowers

Congress to create copyright laws only if they benefit society as a whole rather than authors alone . . . does not mean that every copyright holder must offer benefits to society, for the copyright is an incentive rather than a command. And, *a fortiori,* a copyright holder need not provide the most complete public access possible.

Pacific and Southern Co. v. Duncan, 744 F2d 1490, 1498-99 (11th Cir. 1984) (rejecting First Amendment/fair use claim that "public interest" in availability of broadcast recordings "protects every activity that exposes more viewers to a broadcast"), *cert. denied*, 471 U.S. 1004 (1985). This reasoning is plainly inconsistent with defendants' overbreadth claim, which rests on the alleged constitutional right of fair users to access films that plaintiffs choose to distribute on CSS-protected DVDs.

CONCLUSION

The judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word-processing system used to prepare this brief, there are 12,642 words in the brief.

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