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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

321 STUDIOS,

Plaintiff,

v.
METRO-GOLDWYN-MAYER STUDIOS
INC., et al.,

Defendants,

Case No. C 02-1955 SI

**BRIEF AMICUS CURIAE OF
ELECTRONIC FRONTIER
FOUNDATION, PUBLIC KNOWLEDGE,
AND COMPUTER PROFESSIONALS
FOR SOCIAL RESPONSIBILITY
IN SUPPORT OF PLAINTIFF'S
OPPOSITION TO DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

METRO-GOLDWYN-MAYER STUDIOS
INC., et al.,

Counterclaimants,

v.
321 STUDIOS, also known as 321 Studio,
LLC; ROBERT MOORE, an individual;
ROBERT SEMAAN, an individual; and
VICTOR MATTISON, an individual,

Counterclaim Defendants.

Date: April 25, 2003
Time: 9:00 A.M.
Judge: Hon. Susan Illston

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I. INTEREST OF AMICI

Electronic Frontier Foundation (“EFF”) is a nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990, EFF represents the interests of Internet users both in court cases and in the broader policy debates surrounding the application of law in the digital age. EFF opposes misguided legislation, initiates and defends court cases preserving individuals’ rights, launches global public campaigns, introduces leading edge proposals and papers, hosts frequent educational events, engages the press regularly, and publishes a comprehensive archive of digital civil liberties information at one of the most linked-to websites in the world, www.eff.org.

EFF has a longstanding interest in ensuring that the Constitutional rights Americans enjoy in the non-digital world are transferred intact into cyberspace. As counsel in *Bernstein v. Department of Justice*, EFF established the precedent that computer code is speech protected by the First Amendment. EFF represented Eric Corley, publisher of 2600 Magazine, along with Dean Kathleen Sullivan of Stanford University Law School, in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

Public Knowledge (“PK”) is a nonprofit advocacy and education organization dedicated to ensuring that intellectual property laws and technology policies promote the interests of the public. PK works with a wide spectrum of stakeholders to promote the core conviction that some fundamental democratic principles and cultural values – openness, access, and the capacity to create and compete – must be given new embodiment in the digital age.

Computer Professionals for Social Responsibility (“CPSR”) is a mass membership organization of information professionals, academics, researchers, and the interested public. For over 20 years CPSR has worked to influence decisions regarding the development and use of computers to reflect open and democratic values. As technical experts, CPSR members provide the public and policymakers with realistic assessments of the power and limitations of information and communication technologies. As concerned citizens, CPSR members direct public attention to critical choices in media policy and how those choices affect society.

II. ARGUMENT

Anticircumvention imposes a three-fold burden on the public: It blocks programmers from communicating their work in code; it blocks consumers from making full, fair use of digital media; and it blocks competitors from developing innovative new products around digital entertainment. The Studios' efforts to bar 321 Studios from distributing DVD backup programs illustrate all three of these burdens. But these are burdens this Court can lift with a more careful reading of the law in light of the constitutional interests in free speech and fair use.

The Studios call for an expansive reading of the Digital Millennium Copyright Act's anticircumvention provisions, 17 U.S.C. § 1201 ("DMCA"), relying heavily on *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) and *United States v. Elcom Ltd.*, 203 F.Supp.2d 1111, 1124 (N.D. Cal. 2002) to defend the DMCA's constitutionality. They ignore, however, the different factual circumstances presented in those cases and recent developments that underscore the constitutional import of fair use.

Amici agree with 321 Studios that if the DMCA is properly construed, the constitutional issues need not be reached here because the statute itself accommodates amici's speech and fair use interests. Under the Studios' interpretation, however, the statute is unconstitutional both on its face and as applied to prevent the distribution of a tool to assist the public in exercising its fair use rights and rights to make noninfringing uses of the content available on DVDs.

First, Amici argue that the speech rights of the listening and viewing public are at risk if the Studios are permitted unilaterally to set restrictions on the use and fair use of digital content. As part of copyright's speech-promoting role, consumers must be able to obtain tools for backup and fair use, enabling them to use digital media in new, creative, and critical ways.

Second, we argue that the speech rights of programmers and researchers must be protected, including their rights to discuss encryption and decryption methods, in code. The congressional response to copyright infringement must be narrowly tailored and minimally restrictive on this speech. The DMCA construction the Studios urge fails First Amendment scrutiny.

Finally, public policy demands that the copyright monopoly not be used to block

1 competitive or complementary innovation. The Studios' use and restrictive licensing of
2 technological protection measures, however, goes far beyond any copyright interests. By
3 employing technological measures such as region coding to constrict use of DVDs, the Studios
4 have forfeited their right to enforce their copyrights through technological protection.

5 321 Studios' program is not a digital crowbar nor "the electronic equivalent of breaking
6 into a locked room." It is a reading lamp or notepad enabling the public to make full use of
7 digital media, and it should be protected as such.

8 III. FAIR USE IS A CONSTITUTIONAL VALUE

9 The Studios rely on dicta in the *Corley* and *Elcom* decisions to assert that "[f]air use is
10 not constitutionally based." Motion at 18:28. This assertion, ill-founded even then, has now
11 been squarely rejected by the U.S. Supreme Court in *Eldred v. Ashcroft*, 537 U.S. ___, 2003 WL
12 896627 (2003). The Court held the twenty-year extension of copyright terms did not demand
13 strict independent First Amendment scrutiny because it extended "a copyright scheme that
14 incorporates its own speech-protective purposes and safeguards." *slip op.* at 28. Those internal
15 safeguards, as the Court explained in some detail, are found in the idea/expression distinction
16 and fair use. Because the DMCA's anticircumvention provision effectively eliminates both, it
17 cannot rely on those counterweights to resist First Amendment scrutiny.

18 The *Eldred* Court recognized that copyright monopolies can restrict speech, but upheld
19 the extension not only because copyright's overall scheme promotes creative expression, but also
20 because its limits allow others to re-use that expression. When copyright is stretched beyond its
21 historically limited monopolies, however, to enable copyright holders to lock their works against
22 the access necessary to make fair use, the First Amendment claims must be examined anew. The
23 DMCA fails this heightened First Amendment scrutiny.

24 Intellectual property law has long been understood as a constitutional bargain that
25 "involves a difficult balance between the interests of authors and inventors in the control and
26 exploitation of their writings and discoveries on the one hand, and society's competing interest in
27 the free flow of ideas, information, and commerce on the other hand," *Sony Corp. of America v.*
28 *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

Accordingly, copyright has always been limited by “safety valves” that prevent copyright owners from unduly restricting others’ freedom to speak, thus protecting our cultural commons. See Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 Stan. L. Rev. 1, 4 n. 11 (2001); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354 (1999); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1186-1204 (1970).

Section 1201 dramatically alters “the traditional contours of copyright protection” *Eldred, slip op.* at 31.¹ It forecloses most fair use of technologically protected media and it abrogates the idea/expression distinction for technological protection measures. If read as the Studios advocate, the DMCA would first eliminate the tools necessary to engage in fair use and then forbid discussion of even the ideas behind technological protection measures’ operation, deeming any such discussion a “part thereof” of a circumvention technology. The courts have not yet considered whether these new expansions of copyright are compatible with the First Amendment in light of the Supreme Court’s enunciation of the clear First Amendment interest in fair use. This court should take the opportunity to reset the balance.

IV. THE DMCA UNCONSTITUTIONALLY RESTRICTS FAIR USE

The Studios next claim that fair use is not restricted by the DMCA. This assertion also fails. The Studios’ argument rests on the claim that Congress enacted a “fail-safe” for the DMCA in the form of a triennial rulemaking process by the Copyright Office. Motion 19:23-20:4. What the Studios fail to tell the court is that the rulemaking process does not reach the tools provisions of the DMCA, §§ 1201(a)(2) and 1201(b)(1). The Copyright Office has interpreted its mandate as permitting it to exempt only the *act* of circumvention, and that only as to narrowly constructed “classes of works.” See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64555, (October

¹ Amici leave to others the analysis whether or not Congress had the *power* to enact DMCA-type regulation, under either Copyright Clause or Commerce Clause powers. Our point here is more simply that once that legislation exceeds the “traditional contours of copyright,” it cannot claim that the internal safeguards of traditional copyright provide its own First Amendment harbor.

27, 2000) and Notice of Inquiry, 67 Fed. Reg. 63578, (October 15, 2002). Thus the Copyright Office rulemaking is irrelevant here because it cannot restore the means necessary to effect fair use.

A. Section 1201 impermissibly burdens fair use

The DMCA’s anticircumvention provisions impinge on fair use in two ways. First, the Studios employ the novel right of access control to label fair use accesses as “unauthorized,” even to customers in possession of the necessary tools and legitimately obtained media. Second, the anti-tools provisions of 1201(a)(2) and 1201(b) deny most of the public even the means to exercise their fair use rights in technologically protected media such as DVDs, since they prohibit distribution of the software necessary to excerpt or back-up DVDs. Together, these restrictions on fair use reach constitutional proportion, depriving the public of its benefit from the creativity that copyright law is intended to promote.

Imposition of a technological protection measure allows a copyright holder to control not only reproduction, public performance, and the other exclusive rights recognized in Section 106, but “access” to the work, (§ 1201(a)(1)), an expansion some commentators have termed “paracopyright.”² Section 1201 has been construed to extend this control past the grant or denial of initial access to a work to the continuing manner in which the work is used. Yet the most important fair uses are often those undertaken *without* the authority of the copyright holder: Fair use protects parody and scathing criticism that the copyright holder would not authorize. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (parody could be fair use despite or even because of “the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions”). For this reason, the copyright holder’s denial of permission has not been a decisive factor in traditional fair use analysis.

Copyright holders must not be permitted to circumvent this limit with technology. Their current practice has been to do just that, however. By claiming that only licensed player devices grant “authorized” access, and by strictly limiting the conditions on which they will offer

² See H.R. Rep. No. 105-551, pt. 2 at 24 (1998) (quoting letter to Congress from 62 copyright law professors); Dan L. Burk, *Anti-Circumvention Misuse* (2002),

1 licenses, copyright holders have blocked a wide range of fair and non-infringing uses.³

2 Moreover, when copyright owners have encrypted works such that the ordinary consumer
3 is unable to gain access to or copy them unaided, the public is left to depend on third-party
4 device makers for the ability to make fair use. The anti-device provisions of 1201, unless they
5 permit device-makers to rely on their end-users' fair use rights, take those rights further out of
6 consumers' reach. Both the *Corley* and *Elcom* courts recognized this effect, but both failed to
7 respond to its constitutional implications. See *Universal City Studios, Inc. v. Reimerdes*, 111 F.
8 Supp. 2d 294, 324 (S.D.N.Y. 2000) ("Congress elected to leave technologically unsophisticated
9 persons who wish to make fair use of encrypted copyrighted works without the technical means
10 of doing so."); *Elcom*, 203 F.Supp.2d at 1124 ("Nothing within the express language would
11 permit trafficking in devices designed to bypass use restrictions in order to enable a fair use, as
12 opposed to an infringing use.") Even if the effect of wiping out fair use was precisely what
13 Congress intended, which the full legislative history contradicts, the Constitution does not give
14 Congress that option.

15 **B. The DMCA was not intended to constrict fair use**

16 The full congressional record, however, provides ample evidence that Congress did not
17 intend through Section 1201 to eliminate fair or noninfringing use. First and most importantly,
18 the statute itself states: "Nothing in this section shall affect rights, remedies, limitations, or
19 defenses to copyright infringement, including fair use, under this title." 1201(c)(1). As the
20 Registrar of Copyrights said:

21 [T]his legislation clarifies existing law and expands specific exemptions for
22 laudable purposes. These specific exemptions are supplemented by the broad
23 doctrine of fair use. Although not addressed in this bill, fair use is both a
24 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."⁴

25 <<http://intel.si.umich.edu/tprc/papers/2002/29/misuse.pdf>>.

26 ³ See discussion of misuse, *infra* Part IV.

27 ⁴ Testimony of Marybeth Peters, Registrar of Copyrights and Associate Librarian for Copyright Services
28 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.

1 The legislative history further indicates that Congress thought it was banning “black
2 boxes,” devices designed to remove technological protection measures and which could be used
3 to facilitate unauthorized reproduction and distribution of digital copyrighted works, not
4 eliminating fair use in a sneaky, indirect manner. The key congressional committees reviewing
5 the DMCA expressly stated that the chief harm against which the anti-circumvention provisions
6 were aimed was that of purpose-built tools designed to remove technological protection
7 measures and thereby to facilitate easy reproduction and distribution of economically valuable
8 digital copyrighted works.⁵

9 Prohibiting fair-use-enabling tools along with tools of infringement is a remarkably
10 overbroad response to Congress’s stated purpose of combating piracy. The constitutional import
11 of fair use gives the Court ample reason to read Section 1201 less expansively. Independent
12 speech interests in the code and description of technological measures point in the same
13 direction.

14 **V. SECTION 1201’S PROSCRIPTIONS ON CODE AND ITS DISCUSSION VIOLATE** 15 **THE FIRST AMENDMENT**

16 The Studios grudgingly admit, as they must, that the computer software at issue here is
17 protected expression under the First Amendment. Motion 20:10-11. Indeed, starting from the
18 *Bernstein* case brought by amici EFF, every court that has considered the issue has held that
19 computer programs are entitled to First Amendment protection. *Corley*, 273 F.3d at 445-50;
20 *Elcom*, 203 F.Supp.2d at 1126-27; *Junger v. Daley*, 209 F.3d 481, 484 (6th Cir. 2000); *Bernstein*
21 *v. Dep’t of Justice*, 176 F.3d 1132, 1141-42, *reh’g en banc granted and opinion withdrawn*, 192
22 F.3d 1308 (9th Cir. 1999).⁶ Yet in embracing the reasoning of the *Corley* and the *Elcom*

23 ⁵ See Senate Judiciary Comm., S. Rep. 105-190 (1998) at 29 (“[Section 1201(a)(2)] is carefully drafted to
24 target ‘black boxes’ and to ensure that legitimate multipurpose devices can continue to be made and
25 sold.”); House Judiciary Comm., H. Rep. 105-551 pt.1 (1998) at 18 (same); House Commerce Comm.,
26 H. Rep. 105-551 pt. 2 (1998) at 38 (“The Committee believes it is very important to emphasize that
27 Section 102(a)(2) is aimed fundamentally at outlawing so-called “black boxes” that are expressly
28 intended to facilitate circumvention of technological protection measures for purposes of gaining
access to a work. This provision is not aimed at products that are capable of commercially significant
noninfringing uses....”).

⁶ The *Bernstein* opinion was withdrawn pending *en banc* review. After the Administration changed
significantly the regulations applicable to the code in that case, the review was mooted. Its principle
that code is First Amendment speech stands and has been cited and followed.

1 decisions, the Studios urge this Court to adopt a flawed First Amendment analysis that has been
2 roundly criticized by scholars.⁷

3 The Studios urge this Court to adopt two fundamentally incorrect findings of *Corley* and
4 *Elcom*, neither of which First Amendment jurisprudence supports. First, that although computer
5 code is “speech” within the meaning of the First Amendment, it is subject to greater regulation
6 than other speech because of its “functional” capability to be executed by a computer as well as
7 read by a human eye. Motion 21:14-15 (citing *Elcom*, 203 F.Supp.2d at 1128, *Corley*, 273 F.3d
8 at 454). Second, that although not a single incident of copyright infringement had been
9 demonstrated in those cases (the same is true here), the statutory banning of the code was
10 sufficiently narrowly tailored to satisfy the First Amendment because the speed and scope of the
11 Internet create the *potential* for such harm. *Elcom*, 203 F.Supp.2d at 1129-30; *Corley*, 273 F.3d
12 at 454-55.

13 These two decisions conflict with governing First Amendment precedent. Even assuming
14 that the government advances a content-neutral interest imposing liability (preventing theft of
15 intellectual property), the law fails the heightened scrutiny required of content-neutral speech
16 restrictions under *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994) (“*Turner I*”);
17 and *Turner Broadcasting Sys., Inc. v. F.C.C.*, 520 U.S. 180 (1997) (“*Turner II*”). Here, since the
18 Studios seek an injunction, the request also fails the especially heightened scrutiny required of
19 content-neutral injunctions on speech under *Madsen v. Women’s Health Center, Inc.*, 512 U.S.
20 753 (1994).

21 The Studios’ analysis further conflicts with governing precedent by treating the
22 publication of computer code on the Internet as “functional” speech subject to diminished First
23 Amendment protection. This creation of a new subcategory of less protected speech conflicts
24 with *Reno v. American Civil Liberties Union*, 521 U.S. 844, 970 (1997), which held that the
25 Internet is a fully protected medium of speech and that regulation of speech on the Internet is

26 ⁷ 321 Studios ably points out why these analyses, even if correct, are not appropriate here, either
27 procedurally or based upon the clear differences between the 321 Studios computer program and the
28 programs at issue in *Corley* and *Elcom*. Amici will not repeat those arguments here, but instead will
focus on the flaws in the two prior decisions.

1 subject to ordinary standards of First Amendment scrutiny. It likewise conflicts with *City of*
2 *Ladue v. Gilleo*, 512 U.S. 43, 55 (1994), which held that content-neutral prohibitions foreclosing
3 the use of entire media “can suppress too much speech.” *See also Junger v. Daley*, 209 F.3d at
4 484 (“the fact that a medium of expression has a functional capacity should not preclude
5 constitutional protection.”).

6 The Court should follow the strong precedent *protecting* speech and decline to adopt the
7 contrary positions, which are not binding on this Court. The public policy import of the issue is
8 plain: Computer code is a crucial part of our scientific and political discourse. Scientists,
9 programmers, and hobbyists publish computer code in textbooks, journals, popular magazines,
10 and discussion groups — on the Internet, on CD and DVD, and in print. Before relegating
11 computer code to second-class First Amendment citizenship, this Court should undertake a
12 thorough, more First Amendment-appropriate, analysis.

13 **A. The *Corley* and *Elcom* Decisions’ Incorrect Application of Intermediate Scrutiny**
14 **Conflicts with *Turner* and *Madsen***

15 **1. *Turner***

16 Having correctly held that computer programmers express ideas and information via
17 programming languages, and that publishing computer code is therefore fully a form of “speech”
18 protected by the First Amendment, (*Corley*, 273 F.3d at 445-49, *Elcom*, 203 F.Supp.2d at 1126-
19 27), the *Corley* and *Elcom* courts erred in their application of First Amendment law. As the
20 statute necessarily judges the content of speech, burdening decryption more than encryption,
21 strict scrutiny is most appropriate. Yet even assuming that the courts analyzed the prohibition as
22 aimed not at the content of computer programs such as DeCSS and AEBPR, but rather at their
23 capacity to be used to facilitate copyright infringement, content-neutral regulation of speech
24 requires at a minimum intermediate scrutiny. *See Bery v. City of New York*, 97 F.3d 689, 697
25 (2d Cir. 1996); *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). The *Corley* and
26 *Elcom* courts paid lip service to such a standard, (*Corley*, 273 F.3d at 450-56, *Elcom*, 203
27 F.Supp.2d at 1127-32), but in fact applied a standard of deference wholly inappropriate to even
28 content-neutral regulations of speech.

1 To survive intermediate scrutiny, content-neutral speech regulations must “not burden
2 substantially more speech than necessary” to advance the government’s interests. *Turner I*, 512
3 U.S. at 661-62; *Turner II*, 520 U.S. at 185. The burden of demonstrating this necessity rests
4 upon the government. *Turner I*, 512 U.S. at 664-665. The proper showing requires an empirical
5 record “assur[ing] that, in formulating its judgments, Congress has drawn reasonable inferences
6 based on substantial evidence.” *Id.* at 666.

7 The two earlier decisions conflict with this settled standard in two ways: the courts
8 incorrectly failed to scrutinize the empirical record for “substantial evidence” to support the
9 burden on speech, and likewise failed to scrutinize “the availability and efficacy of
10 ‘constitutionally acceptable less restrictive means’ of achieving the Government’s asserted
11 interests.” *Id.* at 668.

12 First, the *Corley* and *Elcom* courts failed to analyze properly whether Section 1201, as
13 applied by the district court, burdens more speech than necessary. The Second Circuit in *Corley*
14 admitted that under the its injunction, Appellant is flatly “prevent[ed] ... from conveying to
15 others the speech component of DeCSS.” *Corley*, 273 F.3d at 455. It is undisputed that the
16 prohibition of circumvention tools would burden scientific speech, especially in the area of
17 computer security.⁸

18 In addition, the *Corley* court acknowledged that its ruling would reduce the speech that
19 results from fair uses of copyrighted works. The *Corley* district court noted that barring use of
20 DeCSS would prevent, for example, the use of digital quotations from a film by a movie
21 reviewer, digital analysis of portions of the sound track by a musicologist, or clips of scenes by a
22 film scholar to make a comparative point. *Universal v. Remeirdes*, 111 F. Supp 294. at 337
23 (“[n]umerous other examples doubtless could be imagined”); *Elcom*, 203 F.Supp.2d at 1135
24 (“Making a back-up copy of an ebook [something usually prohibited by Adobe’s technological
25 protections], for personal noncommercial use would likely be upheld as a non-infringing fair
26 use.”). Indeed, even in the short time since *Corley*, as DVDs have become a wildly successful

27 ⁸ See Amicus Brief of ACM Committee on Law and Computing Technology, <<http://dvd.openlaw.org>
28 NY/appeals/010126-aclu-amicus.pdf>, and Amicus Brief of Bellocin, *et al.* (computer security experts)

1 medium, further examples of fair uses prohibited by the DMCA abound.⁹

2 Yet rather than carefully considering the legislative record underlying Section 1201 and
3 the evidence and argument from the parties and amici regarding Section 1201's burdens on
4 speech, the *Corley* court merely recited the *Turner* legal standard, improperly attempted to shift
5 the burden of proof to defendant and then summarily concluded that "[t]he prohibition on the
6 Defendants' posting of DeCSS satisfies that standard." *Corley*, 273 F.3d at 455.

7 This conclusory approach contradicts *Turner I*, where findings concerning the actual
8 effects of the regulations on protected speech were labeled "critical to the narrow-tailoring step
9 of the O'Brien analysis, for unless we know the extent to which the ... provisions in fact
10 interfere with protected speech, we cannot say whether they suppress 'substantially more speech
11 than ... necessary.'" *Turner I*, 512 U.S. at 668. The *Corley* court's cursory application of
12 intermediate scrutiny to §1201 contrasts sharply with the exhaustive review of the empirical
13 record to which the Supreme Court subjected the Cable Act must-carry rules in two rounds of
14 litigation in *Turner I* and *Turner II*.

15 The prior courts likewise failed to consider "the availability and efficacy of
16 'constitutionally acceptable less restrictive means' of achieving the Government's asserted
17 interests," as *Turner* requires even under intermediate scrutiny. *Turner I*, 512 U.S. at 668. In
18 doing so, this Court "can take Congress' different, and significantly less restrictive, treatment of
19 a highly similar problem as at least some indication that more restrictive means are not
20 'essential' (or will not prove very helpful)." *Denver Area Educational Telecomm. Consortium v.*
21 *F.C.C.*, 518 U.S. 727, 757 (1996).

22 Numerous less speech-restrictive means have been proposed by which Congress could
23 combat copyright piracy. Those less restrictive means include:

24 (a) Creating explicit and enforceable exceptions from liability for circumvention
25 and circumvention tools for fair and noninfringing uses. David Nimmer, for example, suggests

26 <<http://dvd.openlaw.org/NY/appeals/010126-cryptographers-amicus.pdf>>.

27 ⁹ See Comments in Copyright Office Rulemaking⁹, EFF, *Unintended Consequences: Four Years Under*
28 *the DMCA*, <http://www.eff.org/IP/DMCA/20020503_dmca_consequences.pdf>, as well as
declarations submitted by 321 Studios.

1 requiring companies that encrypt copyrighted works to provide a means of unlocking them for
2 legitimate first-sale or fair-use purposes and immunizing customers who find themselves
3 “stymied by overreaching on the part of content owners” and who resort to self-help
4 circumvention. David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148
5 U. Pa. L. Rev., 673, 707 (2000). *See also* Free Expression Policy Project, “The Progress of
6 Science and Useful Arts: Why Copyright Today Threatens Intellectual Freedom,” 33 (2003),
7 <<http://www.fepproject.org>> (“Free Expression Report”).

8 (b) Restricting circumvention liability to those who intentionally aid and abet
9 copyright infringement or who conspire to infringe copyrights, following the path taken by many
10 “burglars’ tools” statutes. Free Expression Report at 33.¹⁰

11 (c) Limiting liability to circumvention for illegal purposes, as outlined in the
12 Boucher-Doolittle and Lofgren bills, rather than extend liability to tool-makers and tool-
13 disseminators. H.R. 107, 108th Cong. § 5 (2003) (Boucher-Doolittle); H.R. 1066, 108th Cong.
14 § 5 (2003) (Lofgren); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why*
15 *the Anti-Circumvention Regulations Need to be Revised*, 14 Berkeley Tech. L. J. 519, 546
16 (1999); Free Expression Report at 33.

17 (d) Protecting fair and non-infringing uses the same way it protected ephemeral
18 recordings in the DMCA. 17 U.S.C. §112(a)(2). There, Congress expressly required copyright
19 owners to “make available to the transmitting organization the necessary means” for making
20 ephemeral copies and authorized self-help if such means were not made “timely” available. *Id.*
21 Congress could have done the same for fair use: required that copyright owners using

22 ¹⁰ Aiding-and-abetting liability, which reaches speech, has two related requirements, neither of which
23 exists in §1201. First, it requires intentional wrongdoing, not mere recklessness, by the abettor. *Central*
24 *Bank of Denver N.A. v. First Interstate Bank of Denver. N.A.*, 511 U.S. 164, 190 (1994); see 18 U.S.C.
25 § 2. Focusing on intentional wrongdoing creates breathing space for publishers like the New York
26 Times and 2600 Magazine. Second, aiding-and-abetting liability requires that the underlying offense in
27 fact be committed, although the government need not prove by whom it was committed. See e.g.,
28 *United States v. Superior Growers Supply, Inc.*, 982 F.2d 173, 177-78 (6th Cir. 1992); *United States v.*
Campa, 679 F.2d 1006, 1013 (1st Cir. 1982). Similarly, speech that is part of a conspiracy can only be
punished if it is shown the speaker (i) knew of the intended unlawful use of the information and (ii)
agreed with other conspirators that an offense would be committed. See generally *Direct Sales Co. v.*
United States, 319 U.S. 703 (1943); *United States v. Pinckney*, 85 F.3d 4, 8 (2d Cir. 1996). § 1201 does
not require either element.

1 technological protection measures make copies of their works available for fair or non-infringing
2 uses, allowing circumvention and the dissemination of the circumvention means should they fail
3 to do so.

4 (e) Following the model of the Vessel Hull Design Protection Act, 17 U.S.C.
5 §1309, passed as part of the legislative package that contained § 1201. Under that statute, a
6 disseminator of information is liable only if he or she “induced or acted in collusion with” one
7 who actually gains unauthorized access to a work.

8 Inexplicably, the earlier courts have ignored almost all of the available alternative
9 approaches, stating merely that “a content-neutral regulation need not employ the least restrictive
10 means of accomplishing the governmental objective.” But even if a content-neutral regulation
11 need not be the least restrictive alternative, the availability of an array of less restrictive
12 alternatives casts doubt on the narrow tailoring of Congress’s choice. And the existence of other
13 federal statutes taking alternative legislative approaches to similar problems is something that
14 this Court must consider based upon sufficient fact finding. This issue alone precludes summary
15 judgment here.

16 2. *Madsen*

17 Finally, even if the Studios’ request for an injunction could somehow be squared with the
18 requirements of ordinary intermediate scrutiny of content-neutral laws, it falls far short of the
19 heightened scrutiny required of content-neutral injunctions. Under *Madsen* the Court urged that
20 intermediate scrutiny must be applied with special stringency in the case of injunctions, because
21 “[i]njunctions [carry] greater risks of censorship and discriminatory application than do general
22 ordinances.” Content-neutral injunctions must “burden no more speech than necessary to serve a
23 significant government interest,” *Madsen*, 512 U.S. at 766, a standard that is not met by the
24 Studios’ request for an injunction barring all distribution of 321 Studios’ products.¹¹

25 B. The Corley and Elcom decisions erred in creating a new category of lesser protected 26 “functional” speech

27 The second major failing of the two decisions is their assertion that computer programs

28 ¹¹ See also Mark Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property*

1 are somehow a less protected form of speech because of their “functional” capacity. The *Corley*
2 court reasoned that computer programs have “both a nonspeech and a speech component” and
3 that “the posting prohibition of the injunction targets only the nonspeech component.” It
4 therefore concluded that it could enjoin the posting of DeCSS, “regardless of whether DeCSS
5 code contains any information comprehensible by human beings that would qualify as speech.”
6 *Corley*, 273 F.3d at 454. *Elcom* followed that mistaken reasoning: “Congress sought to ban the
7 code not because of what the code says, but rather because of what the code does.” *Elcom*, 203
8 F.Supp.2d at 1128.

9 But what computer programs say cannot be separated from what they do. Banning
10 computer programs for what they enable computer users to do necessarily bans what computer
11 scientists and programmers may say. In other words, the “functional capability” of a computer
12 program to instruct a computer to perform a task is inseparably intertwined with its speech
13 component. Unlike the analogy of skeleton keys used by the Studios and *Corley* court, computer
14 programs are texts written in a programming language. One cannot detach the nonspeech from
15 the speech component. To aim at one is to aim at both.

16 The courts calling Section 1201 a content-neutral restriction “on the nonspeech elements
17 of expressive conduct,” make a subtle but impermissible shift in focus from the speaker to his
18 audience. The bad “conduct” if such there is, is on the part of those who choose to use the
19 programs for circumvention purposes. It is as if O’Brien were prosecuted not for burning his
20 draft card, but for giving an impassioned speech after which listeners burned theirs. *See United*
21 *States v. O’Brien*, 391 U.S. 367 (1968). Such speech would plainly be protected absent the
22 highly unlikely finding of imminent incitement. The Supreme court has made clear that speech
23 does not become “offensive conduct” because listeners may take offense. *Cohen v. California*,
24 403 U.S. 15 (1971). The *Corley* and *Elcom* courts impose a heckler’s veto on code because they
25 assume the public will not see it without being incited to take illegal action.

26 If that is “function,” then every effective piece of persuasive literature is functional -- the
27 revolutionary manifesto, the political advertisement, the lawyer’s closing argument -- as are the

1 instructions to build a nuclear bomb, avoid conscription, or bake a cake. The same rationale
2 would ban a music score or player piano roll for its function in producing music. Government
3 cannot restrict modes of expression “without also running a substantial risk of suppressing ideas
4 in the process.” *Cohen*, 403 U.S. at 26. Such a posture is out of step with the “public interest,
5 secured by the Constitution, in the dissemination of truth.” *Garrison v. Louisiana*, 379 U.S. 64,
6 73 (1964).

7 Even the contention that code may be translated almost instantaneously into action does
8 not strengthen the case for its suppression. “The Supreme Court has rejected the position that
9 speech must be ‘effectively answerable’ to be protected by the Constitution.” *American*
10 *Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d mem.* 475 U.S. 1001 (1986).

11 In other areas where such functional and expressive components are inseparably
12 intertwined, the Supreme Court has not hesitated to apply a more exacting form of intermediate
13 scrutiny than normal. For example, in *City of Ladue*, the Supreme Court invalidated a content-
14 neutral sign ban even though signs posted on houses or front lawns involved the “functional”
15 creation of “visual blight and clutter” inseparable from the expression of ideas. In *Turner*, the
16 Supreme Court applied exacting scrutiny to must-carry rules even though they involved
17 inseparably the “functional” commandeering of a segment of fiber optic cable as well as
18 mandated programming.

19 And in the context of charitable solicitation, involving the “functional” exchange of
20 money as well as support for ideas, the Supreme Court has consistently “refused to separate the
21 component parts of charitable solicitations from the fully protected whole.” *Riley v. National*
22 *Federation of the Blind*, 487 U.S. 781, 796 (1988); *Schaumburg v. Citizens for a Better*
23 *Environment*, 444 U.S. 620, 632 (1980) (solicitation is “characteristically intertwined with
24 informative and perhaps persuasive speech . . . [and] without solicitation the flow of such
25 information and advocacy would likely cease”). And “where . . . the component parts of a single
26 speech are inextricably intertwined,” the Court has held, “we cannot parcel out the speech,
27 applying one test to one phrase and another test to another phrase. Such an endeavor would be
28 both artificial and impractical.” *Riley*, 487 U.S. at 796.

1 The same is true here. The *Corley* and *Elcom* courts’ “artificial and impractical” attempt
2 to sever the speech and nonspeech components of computer programs should be rejected by this
3 Court.

4 **C. Potential future copyright infringement by third parties cannot justify banning**
5 **speech.**

6 The underlying basis for the Studios’ request for an injunction here, as in *Corley* and
7 *Elcom*, is concern that future recipients of the computer programs – none of them parties to these
8 proceedings – could use the programs to break the law. The First Amendment is well acquainted
9 with such claims and has long-established tests to address them. *Brandenburg* addressed the
10 possibility that speech might facilitate future unlawful activity and held that even speech
11 advocating violation of the law may not be proscribed “except where such advocacy is directed
12 to inciting or producing imminent lawless action and is likely to incite or produce such action.”
13 *Brandenburg*, 395 U.S. at 447 (footnote omitted). The Court in *Bartnicki v. Vopper*, addressing
14 the publication of speech facilitated by past unlawful activity, held that the disclosure on a radio
15 show of an illegally intercepted phone conversation could not be prohibited when the publishers
16 did not participate in the illegal interception. *Bartnicki*, 532 U.S. 514 (2001) As the Supreme
17 Court observed, “it would be quite remarkable to hold that speech by a law-abiding possessor of
18 information can be suppressed order to deter conduct by a non-law-abiding third party.” *Id.*
19 These decisions taken together forbid speaker guilt by association. *See also NAACP v. Claiborne*
20 *Hardware Co.*, 458 U.S. 886 (1982).

21 Yet here the Studios wish to stop 321 Studios from distributing its speech, without any
22 showing that it intends to facilitate unlawful copyright infringement, as *Brandenburg* requires,
23 and without any showing that they have participated in illegal activity, as *Bartnicki* requires. This
24 request conflicts with settled First Amendment principles and should be denied.

25 **VI. The DMCA is Susceptible to a Constitutional Interpretation**

26 Fortunately, the DMCA is readily susceptible to a constitutional interpretation. Under a
27 more careful reading, DMCA liability for distribution of a computer program should be limited
28 to fact situations in which a court has found:

- 1 1. That the program enables no noninfringing use, fair use, or exercise of a free
2 speech right;
- 3 2. That a sufficient relationship exist between the publisher of the program and
4 infringers under the aiding and abetting or conspiracy standards¹²; and
- 5 3. That the program was used to infringe copyrights or that an imminent danger
6 of copyright infringement exists under the First Amendment standards.¹³

7 One way to achieve this limitation within the statutory scheme is through the definition of
8 the terms of the statute. Subsection 1201(b) carefully is, by its very terms, limited to
9 technologies that “effectively protect a right of a copyright owner.” If the phrase “right of a
10 copyright owner” is limited to the list of exclusive rights granted an owner under copyright law,
11 then acts done for purposes that are outside the copyright owner’s rights, are simply outside the
12 scope of the statute.

13 Alternately, the court could rely on the statute’s express preservation of free speech and
14 fair use, seen in §1201(c)(1) and (c)(3).¹⁴ Fair use as a defense to infringement likewise
15 developed judicially long before it was codified at Section 107 by the 1976 Copyright Act. *See*
16 *Netanel, Locating Copyright in the First Amendment Skein*, at 119 n. 73. No matter how the
17 construction is accomplished, creation of “safety valves” in the DMCA to match the
18 longstanding ones that exist in copyright law, is necessary for the statute to remain within the
19 bounds of the Constitution.¹⁵

20 **VII. The Studios Have Engaged in Copyright Misuse Via Technological Measures**

21 Finally, the Studios should be barred from pressing their circumvention claims because
22 they have misused their copyrights by means of overreaching technological measures. Not

23 ¹² *See e.g. Central Bank of Denver N.A. v. First Interstate Bank of Denver. N.A.*, 511 U.S. 164, 190
24 (1994)(aiding and abetting requires intentional acts); *United States v. Superior Growers Supply, Inc.*,
982 F.2d 173, 177-78 (6th Cir. 1992); *United States v. Campa*, 679 F.2d 1006, 1013 (1st Cir. 1982)
25 (aiding and abetting requires that underlying offense in fact be committed); *Direct Sales Co. v. United*
26 *States*, 319 U.S. 703 (1943)(conspiracy requirements).

27 ¹³ Under traditional First Amendment standards, speaker liability even for subsequent violent acts is not
28 allowed “unless that speech is capable of producing imminent lawless action.” *Brandenburg v. Ohio*,
395 U.S. 444, 447 (1969).

¹⁴ *See Jane C. Ginsburg, Copyright Use and Excuse on the Internet*, 24 Colum. VLA J.L. & Arts 1, 8-9
(discussion of how §1201(c)(3) can be read to allow fair use under the DMCA).

¹⁵ *See supra*, at 4.

1 content with using technology to deny DVD purchasers the ability to copy or make fair use of
2 their purchases, the Studios have leveraged their copyrights via licenses and technological
3 restrictions to control in which “region” a viewer may watch a DVD and in what manner he or
4 she may watch its content.

5 Most DVDs are region coded so they can only be played on a DVD player coded to the
6 same region as the DVD.¹⁶ Here, as in the *Corley* litigation, the Studios argue that only licensees
7 of the DVD Copy Control Association (“DVD-CCA”) are “authorized” to decrypt CSS and play
8 DVDs: “One cannot gain access to a CSS-protected work on a DVD without application of the
9 three keys that are required by the software. One cannot lawfully gain access to the keys except
10 by entering into a license with the DVD CCA under authority granted by the copyright owners or
11 by purchasing a DVD player or drive containing the keys pursuant to such a license.” Motion
12 13:1-5 (*quoting Reimerdes*, 111 F.Supp.2d at 317-18).

13 In turn, the only players and drives DVD CCA licenses are technologically crippled. As
14 well as blocking copying even of excerpts, the DVD CCA’s licensing arrangements require all
15 CSS licensees to make players read the RPC byte and lock out any DVDs from outside the
16 player’s region.¹⁷ RPC was designed to restrict resale, by enforcing a system of phased releases
17 of copyrighted movies. Under this system, major movie studios generally first release DVDs of
18 domestic films in the United States, followed approximately six months later by release in Japan
19 and Australia, and a year later in England and Europe. RPC was also intended to support
20 geographically-zoned distribution agreements and price discrimination, where consumers pay
21 different prices to purchase a DVD depending on where they reside.

22 Numerous members of the public have entered comments in the Copyright Office’s
23 rulemaking on access-control exemptions protesting the effects of region coding on their access
24 to DVDs they have bought or received as gifts. Foreign language students return home from

25 ¹⁶ RPC, a single byte of data on the DVD, indicates in which geographical “region” a particular DVD may
26 be played. There are six geographical regions, one reserved region (Region 7) and one special purpose
27 region for airlines and cruise ships (region 8); the United States is in Region 1. *See* DVD Frequently
28 Asked Questions, Question 1.10, at <<http://www.dvddemystified.com/dvdfaq.html>>.

¹⁷ *See also* Dean S. Marks & Bruce H. Turnbull, *Technical Protection Measures: The Intersection of
Technology, Law, and Commercial Licenses*, 22 Eur. Intell. Prop. Rep. 198 (2000).

1 abroad to find that the subtitled DVDs they brought with them fail to play on machines at home;
2 travelers find themselves warned or blocked from switching the codes on their laptops or
3 portable players as they move from region to region; many who do not modify their machines
4 find themselves choosing entertainment based on technical incompatibilities rather than
5 preference.¹⁸ Other commenters discussed a further use restriction, encoding of unskippable
6 promotional material on DVDs that forced viewers, often with children, to wait through
7 advertisements on each viewing before the featured movie began.¹⁹ Neither of these restrictions
8 is a part of the copyright scheme, but both use copyright, licensing, and the prohibition on
9 circumvention of technological protection measures for their enforcement.

10 Copyright misuse doctrine “forbids the use of the copyright to secure an exclusive right
11 or limited monopoly not granted by the Copyright Office.” *Practice Management Information*
12 *Corp. v. American Medical Ass’n*, 121 F.3d 516 (9th Cir. 1997) (quoting *Lasercomb America,*
13 *Inc. v. Reynolds*, 911 F.2d 970, 977- 79 (4th Cir.1990)). The Ninth Circuit has adopted a broad
14 public policy version of the test that goes beyond the doctrine’s origins in the patent and antitrust
15 context: “whether plaintiff’s use of his or her copyright violates the public policy embodied in
16 the grant of a copyright, not whether the use is anti-competitive.” *In re Napster, Inc. Copyright*
17 *Litigation*, 191 F.Supp.2d 1087, 1103 (N.D. Cal. 2002) (permitting discovery on misuse defense;
18 citing *Practice Mgmt.*, 121 F.3d. at 521). See generally Brett Frischmann & Dan Moylan, *The*
19 *Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to*
20 *Software*, 15 Berkeley Tech.L.J. 865, 888-893 (Fall 2000); *Alcatel USA, Inc. v. DGI Techs., Inc.*,
21 166 F.3d 772 (5th Cir. 1999). In *Practice Management*, the Ninth Circuit held that AMA’s
22 demands that agency users of its medical codes be excluded from using other, competing codes
23 amounted to copyright misuse. *Practice Mgmt.*, 121 F.3d at 520.

24 The same public policy that forbids use of a copyright monopoly to control purchasers’

25 ¹⁸ See Comments in Copyright Office Rulemaking, Comment no. 35, Electronic Frontier Foundation and
26 Public Knowledge, <<http://www.copyright.gov/1201/2003/comments/035.pdf>>, and Reply Comments
27 nos. 79-203 <<http://www.copyright.gov/1201/2003/reply/reply4.html>> et seq., addressing audiovisual
works stored on Digital Versatile Disks (“DVDs”) that are not available in Region 1 DVD format.

28 ¹⁹ See Comment no. 35, *supra*, and Reply Comments nos. 204-270,
<<http://www.copyright.gov/1201/2003/reply/reply7.html>> et seq.

1 use of third party materials by barring enforcement of the copyright lever should block
2 enforcement of the anticircumvention provision when it is used to support use controls that go
3 beyond the scope of either copyright or access. Even if this Court finds the DMCA's operation
4 to be justified in the abstract, the restrictive leveraging the Studios engage with respect to movies
5 released on DVD should deny them recourse to its provisions.

6 **VIII. CONCLUSION**

7 This Court should reject the Studios' requests. Free speech principles should turn not upon
8 newly minted distinctions between pen-and-ink and point-and-click, but rather upon time-
9 honored distinctions between intentional aiding and abetting of unlawful conduct and speech that
10 at most can be construed as making such conduct easier to commit.

11 Dated: March 14, 2003

12
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15
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