

The Freedom to Link?: The Digital Millennium Copyright Act Implicates the First Amendment in *Universal City Studios, Inc. v. Reimerdes*

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I. INTRODUCTION

Imagine the following hypothetical:

There are two Web sites. The first one, an online news report, publishes an article about copyright infringement featuring a hyperlink at its end which leads readers to a site [that] the article's publisher knows contains unlawful material—an illegal software code, perhaps, or a pirated music file or an unauthorized copy of a secret religious text. Meanwhile, the publisher of the second Web site, a lone crusader who believes that all information should be freely available to everyone, publishes an article with the exact same link. Question: May a court place the two publishers on the scales and reasonably conclude that one is engaging in lawful linking activity while the other has perpetrated a legal no-no?¹

An issue analogous to this hypothetical was addressed by United States District Court Judge Kaplan in *Universal City Studios, Inc. v. Reimerdes*.² In short, the court resolved the issue by enjoining the defendants from maintaining hyperlinks³ from their site to third-party sites offering a computer utility called Decode Content Scrambling System (DeCSS).⁴ The primary attribute of DeCSS is its ability to decrypt or “rip” encrypted Digital Versatile Discs (DVDs).⁵ During the manufacturing process, the contents of a DVD are encrypted with a process called Content Scramble System (CSS) that prevents the DVD

1. Carl S. Kaplan, *Cyber Law Journal: Assessing Linking Liability*, N.Y. TIMES (Sept. 8, 2000), available at <http://www.nytimes.com/2000/09/08/technology/08CYBERLAW.html>. Mr. Kaplan's article, viewed in online format, was the genesis of this Note.

2. 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

3. A hyperlink is text or graphics that, when clicked, takes the user from the current page being viewed to the page referenced in the hyperlink. Technically speaking, the link does not “take” the user anywhere. Rather, the link is a set of instructions that when executed, causes the user's web browser (e.g., Microsoft's Internet Explorer or Netscape's Navigator) to locate the Internet address or URL for the referenced site, from which it requests a copy of the file containing the data that the new web page consists of. See Nicos L. Tsilas, *Minimizing Potential Liability Associated with Linking and Framing on The World Wide Web*, 8 COMM. LAW CONSPPECTUS 85 (Winter 2000).

4. *Reimerdes*, 111 F. Supp. 2d at 340.

5. *Id.* at 311.

from being played on anything other than a licensed DVD player capable of decoding the encrypted disc.⁶ Once decrypted, the content of the DVD is unscrambled and may be copied.⁷ The Digital Millennium Copyright Act (DMCA)⁸ makes it unlawful to provide, offer or otherwise traffic in any technology that allows for the decryption or circumvention of technological measures intended to protect the access or use of copyrighted digital materials, such as encryption.⁹ Beyond merely holding that the defendants violated the Act by posting copies of the program on their web site,¹⁰ the court held that establishing and maintaining links to third-party web sites was equivalent to posting.¹¹ As a result, the court concluded that linking was equivalent to “providing, offering, or otherwise trafficking” in DeCSS.¹²

A summary of the competing principles involved is perhaps best stated by Judge Kaplan himself:

[T]he dispute between these parties is simply put if not necessarily simply resolved. Plaintiffs have invested huge sums. . . in reliance upon . . . [assurances] that they will have the exclusive right to copy and distribute those motion pictures for economic gain. Defendants, on the other hand, are adherents of a movement that believes that information should be available without charge to anyone clever enough to break into the computer systems Less radically, they have raised a legitimate concern about the possible impact on traditional fair use of access control measures in the digital era. Each side is entitled to its views. In our society, however, clashes of competing interests like this are resolved by Congress. For now, at least, Congress has resolved this clash in the DMCA and in plaintiffs' favor.¹³

Universal City Studios, Inc. v. Reimerdes is about much more than decrypting DVDs. It raises questions regarding the extent to which fundamental values will be recognized in cyberspace and how regulation of the Internet will impact those values. This Note focuses

6. *Id.* The licensing agreements between the DVD distributors and the DVD player manufacturers mandate that the manufacturer engineer its players so as not to produce an output capable of being recorded. Thus, CSS prevents copying by forcing manufacture of playback only DVD players. See *infra* note 39.

7. *Reimerdes*, 111 F. Supp. 2d at 311.

8. Pub. L. No. 105-304, 112 Stat. 2860–2918 (1998) (codified as amended in scattered sections of 17 U.S.C.).

9. 17 U.S.C. § 1201(a), (b) (1998).

10. A web site typically refers to one or more web pages maintained by the same person or entity and consisting of a home and secondary pages containing a variety of content.

11. *Reimerdes*, 111 F. Supp. 2d at 339.

12. *Id.*

13. *Id.* at 345–46.

on the application of the DMCA to prohibit the posting and linking of "circumvention technology"¹⁴ on the Internet, while also addressing the larger issue of the unintended consequences that regulating cyberspace can have on free expression. Because hypertext links play such a fundamental role in the utility of the Internet, this Note argues that the application of the DMCA's anti-trafficking provisions to enjoin linking places a significant and unwarranted burden on the Internet as a forum for free expression.

Section II is intended to provide a brief background of the technological and legal environment in which the *Reimerdes* controversy arose. Section III focuses on the factual background and rationale for the *Reimerdes* decision. Section IV then analyzes the rule of law produced by the decision and the impact that this decision has on free speech in cyberspace. Finally, this Note concludes that any prohibition banning hyperlinks should be granted only under extraordinary circumstances because of the potential for creating a substantial chilling effect on the Internet as an engine for free expression.

II. THE WEB, FREE EXPRESSION, COPYRIGHT, AND THE DMCA

The World Wide Web has revolutionized the way people and businesses communicate ideas and obtain and disseminate information. Cyberspace provides an optimal platform for publishers to disseminate their ideas to millions of people around the world simultaneously. Moreover, virtually anyone with access to the Internet can become a publisher because the transaction costs and barriers to entry in cyberspace are nominal compared to the costs of publishing in real space. With an Internet connection, any computer user can become a virtual worldwide "town crier" or "pamphleteer."¹⁵ The potential uses of the Internet are limited only by the scope of the human imagination. In the words of the "inventor" of the Internet, Tim Berners-Lee:

The dream behind the Web is of a common information space in which we communicate by sharing information. Its universality is essential: the fact that a hypertext link can point to anything, be it personal, local or global, be it draft or highly polished. There was a second part of the dream, too, dependent on the Web being so generally used that it became a realistic mirror (or in fact the primary embodiment) of the ways in which we

14. Circumvention technology refers to any technology, including computer software, that enables one to circumvent a technological measure that controls access to, or restricts the use of, copyrighted digital media. See 17 U.S.C. § 1201(a), (b).

15. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

work and play and socialize. That was that once the state of our interactions was on line, we could then use computers to help us analyze it, make sense of what we are doing, where we individually fit in, and how we can better work together.¹⁶

Like any technology, however, there are side effects and unintended consequences. Noxious computer programs such as viruses and Trojan horse programs invade computers, e-mail inboxes are bombarded with “junk” e-mails, and “cybersquatters” attempt to capitalize on the names of others. Just as the positive potential of the Internet is limitless, so is the potential for abuse. The challenge posed to Congress and to the courts is to create rules that minimize the negative externalities created by the technology without stifling the creative and commercial potential of the medium.

Digital technology probably impacts the copyright industry to a greater extent than any other industry. Simultaneously, the Internet presents both an incredible opportunity and a disastrous nightmare for the copyright industry. On one hand, the Internet provides a new frontier as a potential delivery medium for movies, music, games and other entertainment. On the other, it represents a giant, global copying machine, where pirated versions of copyrighted works can be disseminated around the world instantaneously.¹⁷

Traditional copyright law has focused on attacking the infringing activity, rather than the means of infringement.¹⁸ When copyright law was originally conceived, the primary concern was the reproduction of books, maps and charts.¹⁹ A copyright infringement suit was prosecuted simply by locating the producer of copies and obtaining an injunction to prevent further copying or by seizing his printing press. Not only was the infringer relatively static, but the cost of equipment presented a significant barrier of entry to the illicit trade of book pirating.

Technology has radically altered the paradigm. The means of copying, a computer, is readily obtainable and allows the digital pirate to make near-perfect copies of digital audio and video works at very

16. Tim Berners-Lee, *The World Wide Web: A Very Short Personal History*, available at <http://www.w3.org/People/Berners-Lee/ShortHistory.html> (last visited Nov. 19, 2000).

17. See WORLD TRADE ORGANIZATION, ELECTRONIC COMMERCE AND THE ROLE OF THE WTO, SPECIAL STUDIES 2, TABLE OF COMMITMENTS 53-54 (1998). This is true at least with respect to digital works, to the extent that a digital copy of a text, song or movie can be duplicated without any degradation of quality and the incremental cost of each additional copy is theoretically zero.

18. See generally, 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 12A.01 (2001) [hereinafter 3 NIMMER].

19. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 294 (1996).

little cost. Unlike the bulky printing press, which had to be acquired at a considerable cost and required a fixed location, the Internet pirate's device, the computer, is inexpensive and portable. Thus, the barriers to entry facing a traditional copyright infringer are absent with respect to a digital infringer, who only needs a computer and access to the Internet. Moreover, the Internet allows a copyright infringer to distribute perfect copies around the world instantaneously and anonymously. Traditional copyright enforcement is ineffective in such an environment due to its reactive nature—once a copy has been made, it can be distributed instantly to a large number of individuals. The copyright industry, aware of this threat, has begun using technological measures such as content scrambling and encryption as a barrier to infringement. These efforts were aided by Congress's enactment of the DMCA in 1998.

This massive piece of legislation shifted the focus from the infringer to the infringing technology. Codified into the Copyright Act, Title 17, the DMCA enhances traditional copyright protections and the private efforts of the copyright industry by making it unlawful, with certain limitations, to circumvent a technological measure used by a copyright holder to prevent unauthorized access to a copyrighted work.²⁰ Additionally, the DMCA makes it illegal to manufacture or traffic in a technology that facilitates the circumvention of a technological measure intended to protect against such unauthorized access to a digital work.²¹ Moreover, the DMCA prohibits the dissemination of a technology that circumvents measures intended to prevent subsequent use of a digital work, such as copying.²²

Although both circumvention of access controls and the dissemination of technology facilitating such circumvention are proscribed under the Act, circumvention of use controls is not. Only trafficking in technology facilitating such circumvention is unlawful under the Act.²³ This means that an individual, who has obtained authorized access to a digital work, may legally circumvent a measure placed on the work that prevents copying without the copyright holder's permission, but that individual may not circumvent a technology preventing unauthorized access in the first instance. One commentator explains the difference between circumventing access as opposed to use con-

20. 17 U.S.C. § 1201(a)(1).

21. 17 U.S.C. § 1201(a)(2).

22. 17 U.S.C. § 1201(b)(2).

23. The distinction between "access" and "use" is subtle yet critical and will be explored below. In a nutshell, access controls prevent unauthorized access to a work, whereas use controls prevent unauthorized use of the work, such as copying, even after authorized access has been obtained.

trols by analogizing the former to breaking and entering a castle and the latter to committing disorderly conduct after obtaining authorized access.²⁴

The DMCA imposes substantial penalties for violations of its provisions. The remedies under the Act provide for injunctive relief as well as actual and statutory damages.²⁵ In addition to civil damages, criminal penalties may be imposed if the offender is engaged in willful conduct for the purpose of “commercial advantage or private financial gain.”²⁶

The trafficking provisions represent what Professor Lawrence Lessig refers to as “indirect” regulation in cyberspace.²⁷ Rather than directly regulating copyright infringement, the government instead regulates the “code”—circumvention technology—in order to control copyright infringement by making it more difficult.²⁸ This “indirect” regulation of the dissemination of a technology, DeCSS, is what was at issue in *Reimerdes*.

III. THE CASE: *UNIVERSAL CITY STUDIOS, INC. v. REIMERDES*

Universal City Studios, Inc. v. Reimerdes marks the first application of the anti-trafficking provisions of the DMCA. Part A of this section provides the factual context of the case. Part B details the court’s factual findings. Finally, Part C examines the statutory and constitutional analysis that the court employed in order to enjoin the defendants from posting and linking to DeCSS under the DMCA.

Judge Kaplan’s opinion provides a detailed statutory and constitutional analysis²⁹ as well as extensive background on the technology of the digital media and the Internet.³⁰ It must be noted at the outset

24. See 3 NIMMER, *supra* note 18, § 12A.03[D][1]–[3], at 12A-29–12A-32.

25. 17 U.S.C. § 1203(a)–(c).

26. 17 U.S.C. § 1204. The maximum penalties for a criminal offense under the Act are five years in prison and/or a monetary penalty of \$500,000 or both. *Id.*

27. Lawrence Lessig, *The Constitution of Code: Limitations on Choice-Based Critiques of Cyberspace Regulation*, 5 COMM. L. CONCEPTUS 181, 184–86 (1997); see also LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE* (1999). Professor Lessig theorizes that in the “real space,” non-Internet world, behavior is regulated by law, norms and nature. In cyberspace, the regulatory influence of nature is substituted by code. However, in real space nature is static; in cyberspace, code is plastic. Nature is stable and not susceptible to manipulation by law; code is unstable but susceptible to manipulation by law. Because the stabilizing influence of nature (real space code) is erased in cyberspace, it is necessary to supplement it with regulation of code. Because of the difficulty in controlling behavior by force of law and the relative ease in controlling behavior by code, government uses law to regulate code, which in turn regulates behavior in cyberspace.

28. See *supra* note 27.

29. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 315 (S.D.N.Y. 2000).

30. *Id.* at 303–10.

that this is *not* a copyright infringement case but one addressing a hybrid doctrine that has been referred to as “para-copyright.”³¹ Although the DMCA is contained within the Copyright Act, it does not directly concern copyright infringement and does not require proof of actual infringement by the defendants or by anyone else for that matter.³² Thus, the focus of the case is on violation of the DMCA, rather than infringement. In fact, as explained below, a violation of the Act can occur absent any evidence of infringement.

A. Factual Background

Eight motion picture studios³³ brought an action in the Federal District Court for the Southern District of New York under the DMCA to enjoin the defendants from posting DeCSS.³⁴ According to the complaint, DeCSS violated the DMCA due to its ability to decrypt the copy control mechanism used to protect movies distributed in DVD format.³⁵ The defendants maintained a web site called *2600.com*³⁶ in connection with a print magazine called *2600: The Hacker Quarterly*.³⁷

In order to prevent unauthorized copying and piracy of the content on DVDs,³⁸ the movie studios employed a scrambling technology

31. See 3 NIMMER, *supra* note 18, § 12A.05[D], at 12A-72. Para-copyright refers to the fact that the DMCA protects copyright management systems rather than copyrighted works. *Id.* § 12A.18[B], at 12A-174. A person may violate the DMCA in the absence of any infringing conduct by that person or another.

32. *Id.*

33. The eight motion picture studio plaintiffs were: Universal City Studios, Inc.; Paramount Pictures Corporation; Metro-Goldwyn-Mayer Studios Inc.; TriStar Pictures, Inc.; Columbia Pictures Industries, Inc.; Time Warner Entertainment Co., L.P.; Disney Enterprises, Inc.; and Twentieth Century Fox Film Corporation.

34. *Reimerdes*, 111 F. Supp. 2d at 303

35. *Id.*

36. 2600 News, *The Hacker CSC Quarterly*, available at <http://www.2600.com> (last visited Mar. 4, 2001).

37. *Reimerdes*, 111 F. Supp. 2d at 308–09. The original defendants were Shawn Reimerdes, Roman Kazan and Eric Corley. Defendants Reimerdes and Kazan both entered into consent decrees with plaintiff. *Id.* at 312 n. 91. Plaintiffs subsequently amended their complaint to add 2600 Enterprises, Inc. as a defendant. *Id.* Identifying the defendant Eric Corley (who also goes by the *nom de plum* “Emmanuel Goldstein” after a character in George Orwell’s novel 1984) as someone “viewed as a leader of the hacker community,” the court described the defendants’ publication as “something of a bible to the hacker community.” *Id.* at 308 (footnote omitted) (citing trial transcript testimony of defendant Eric Corley, publisher of *2600: The Hacker Quarterly*). The court proceeded by describing some of the content of the magazine: “such topics as how to steal an Internet domain name, intercept cellular calls, and break into the computer system at Costco Stores and Federal Express.” *Id.* at 308–09 (footnotes omitted).

38. A DVD is capable of holding over 4.7 gigabytes on a five inch plastic disc similar to a compact disc (CD), which only holds approximately 650 megabytes. *Id.* at 307. DVDs are ideal for movies, because they have enough storage space to contain feature length film in digital format. Digital content has the unique characteristic of allowing virtually infinite copies to be made

called Content Scrambling System (CSS), which encrypts or scrambles the digital content contained on a DVD.³⁹ To view the content, a user must use a DVD player or DVD drive with special software containing the decryption or descrambling key, which are encryption algorithms that allow the player to unscramble the content, making it viewable.⁴⁰ CSS inhibits the duplication of DVDs to the extent that those licensed to manufacture DVD players and drives are prohibited from manufacturing equipment that produces a signal that could be used to copy DVDs.⁴¹

In September of 1999, a Norwegian teenager named Jon Johansen, along with two other unknown individuals, acquired the CSS decryption keys by reverse-engineering a licensed DVD player.⁴² Using these keys, he developed a program called "DeCSS," which effectively decrypts a DVD, allowing a user to playback the DVD on an unlicensed player or to copy it without any encryption or scrambling.⁴³ DeCSS is a "Windows executable file," meaning it can be used only on a computer operating in the Windows operating system environment.⁴⁴ Once Johansen posted a copy of DeCSS on his personal web site, it was quickly distributed and was made available on hundreds of web sites on the Internet.⁴⁵

without any significant degradation in the quality of the audio and video content; a characteristic that makes DVDs particularly attractive to copy. *Id.* at 309.

39. *Id.* CSS was developed cooperatively by Matsushita Electric Company and Toshiba Corp. These companies granted a royalty-free license to the DVD Copy Control Association, which in turn licenses the technology to both equipment manufacturers and the motion picture studios. *Id.* at 310 n.60. For more detailed information on DVD copy protections systems, see Jeffrey A. Bloom et al., *Copy Protection for DVD Video*, 87 PROCEEDINGS OF THE IEEE, NO. 7, 1267 (July 1999), in which the authors state:

CSS is a low-cost method of scrambling MPEG-2 video, developed by Matsushita.

Descrambling requires a pair of keys. One of the keys is unique to the disk, while the other is unique to the MPEG file [graphical and audio content] being descrambled. . . . The purpose of CSS is twofold. First and foremost, it prevents byte-for-byte copies of an MPEG stream from being playable since such copies will not include the keys. Second, it provides a reason for manufacturers to make compliant devices, since CSS scrambled disks will not play on noncompliant devices. Anyone wishing to build compliant devices must obtain a license, which contains the requirement that the rest of the copy-protection system be implemented.

Id. at 1268.

40. *Reimerdes*, 111 F. Supp. 2d at 309.

41. *Id.* at 310.

42. *Id.* at 311. The term "keys" refers to a cryptographic algorithm that allows encrypted media to be decrypted. In order to unlock the content of a DVD, the keys contained in the DVD player must be applied to corresponding keys contained on the DVD, which would result in the descrambling of the content.

43. *Id.*

44. *Id.*

45. *Id.*

In November of the same year, the defendants began posting on their web site a downloadable copy of DeCSS that they acquired on the Internet.⁴⁶ They also established a list of hyperlinks to other sites that posted DeCSS.⁴⁷ As a result, computer users could obtain a copy of DeCSS, either by downloading it from the defendants' web site or by clicking on a hyperlink on the site, which then transported them to an unrelated web site, which might contain the program.⁴⁸

Once the plaintiffs became aware of the proliferation of DeCSS on the Internet, they sent numerous letters to web site operators who had posted DeCSS, demanding that they remove the program.⁴⁹ When the letters failed to prompt the defendants' removal of DeCSS from their site, the plaintiffs followed up on their threat and filed suit in Federal District Court.⁵⁰

As a result, the plaintiffs were granted a preliminary injunction to bar the defendants from posting DeCSS on their web site.⁵¹ Following the injunction, the defendants ceased posting DeCSS on their web

46. *Id.* at 312.

47. *Id.*

48. *Id.*

49. *Id.*

50. While this Note focuses on the *Reimerdes* case, the plaintiffs also brought suits against several other individuals. The same plaintiffs brought suit against a defendant under the DMCA in the Federal District Court for the District of Connecticut. *Universal City Studios, Inc. v. Hughes*, No. 300CV72RNC (filed Jan. 14, 2000). As of this writing, the *Hughes* case does not appear to have gone beyond the pleading stage. The DVD Copy Control Association, the licensing entity for CSS, also brought suit against an individual in California under state trade secret law. *DVD Copy Control Ass'n v. McLaughlin*, No. CV 786804, 2000 WL 48512 (Cal. Super. Ct. Jan. 21, 2000) (unpublished opinion granting preliminary injunction). The proceedings in *McLaughlin* are, as of this writing, stayed pending the decision by the California Court of Appeals on the defendant's appeal of the preliminary injunction. For additional information on these cases, see the Berkman Center's Open Law Project, *Open DVD*, available at <http://eon.law.harvard.edu/openlaw/DVD/> (last visited Mar. 4, 2001).

51. *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 222 (memorandum order granting preliminary injunction). The court concluded that the plaintiffs had met the requisite requirements for a preliminary injunction and rejected the defendants' First Amendment challenges to the DMCA as applied:

The computer code at issue in this case does little to serve [First Amendment] goals. Although this Court has assumed that DeCSS has at least some expressive content, the expressive aspect appears to be minimal when compared to its functional component. Computer code primarily is a set of instructions which, when read by the computer, cause it to function in a particular way, in this case, to render intelligible a data file on a DVD. It arguably "is best treated as a virtual machine"

Id. at 222 (quoting *Junger v. Daley*, 8 F. Supp. 2d 708, 715-18 (N.D. Ohio 1998) (footnotes omitted)).

Against this minimal interest, the court juxtaposed the DMCA's value in complimenting the instrumental benefits of copyright law. *Id.* Because of the unquestionable societal benefit served by the DMCA and copyright law, and given that the posting of DeCSS appeared to be "part of a course of action in clear violation of the law," the court found that whatever expressive element DeCSS contained was outweighed by the governmental interest in suppressing it. *Id.* at 211.

site, but continued to post the hyperlinks to other sites that purportedly posted copies of the program.⁵² Additionally, they urged Internet users to download DeCSS at these other sites,⁵³ indicating that their actions were an act of “electronic civil disobedience.”⁵⁴

B. Findings of Fact

The court examined the actual process necessary to employ DeCSS to decrypt a DVD.⁵⁵ The decryption process takes 20 to 45 minutes, after which a user is left with between four to six gigabytes of data.⁵⁶ In order for that data to be transferable, the user must compress it using a compression utility.⁵⁷ Once compressed, the graphic and sound files must be synchronized, a process that takes 10 to 20 hours.⁵⁸ Despite the fact that the process is “computationally intensive” and time consuming, the court found it to be “entirely feasible.”⁵⁹ The compression results in approximately 650 megabytes of data, allowing the data to be transferred to a writeable CD-ROM.⁶⁰

More important in terms of dissemination, however, was the risk that the decrypted movies, once compressed, could be easily transferred across the Internet.⁶¹ The court found that, while a transmission of a complete movie may take as long as six hours because of the immense amount of data, the transmission time could be cut, with high speed access, to as little as three to twenty minutes.⁶²

The plaintiffs stipulated that they had no direct evidence of any DeCSS-decrypted movie being transmitted across the Internet.⁶³ Nevertheless, the court concluded that the plaintiffs had been damaged.⁶⁴ Because DeCSS is “a free, effective and fast means of decrypt-

52. *Reimerdes*, 111 F. Supp. 2d at 312.

53. *Id.* at 313. On a banner on defendants’ web site, they declared, “Stop the MPAA” (Motion Picture Association of America), and stated, “We might have to face the possibility that we could be forced into submission. For that reason it’s especially important that as many of you as possible, all throughout the world, take a stand and mirror these files.” *Id.*

54. *Id.* at 303, 312.

55. *Id.* at 313.

56. *Id.*

57. *Id.* The court noted that “one solution” was to employ a compression utility called “DivX.” Movies compressed using the utility are commonly referred to as “DivXed Movies.” *Id.*

58. *Id.*

59. *Id.* at 314.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 314–15. The court noted that the plaintiffs’ expert found a person on the Internet willing to trade a copy of the movie *The Matrix* for a copy of *Sleepless in Seattle*. This fact, however, begs the question as to whether the movies were even decrypted using DeCSS. As the

ing plaintiffs' DVDs and copying them to computer hard drives," they could then be copied on to writeable CD-ROM's or transmitted across the Internet.⁶⁵ Whether any actual infringement was attributable to the defendants was irrelevant because, as the court noted, the violation of the anti-trafficking provisions is not dependent on a showing of actual infringement.⁶⁶

According to the court, this potential for copying and piracy had two implications. First, the court found the defendants' posting of DeCSS to be equivalent to "publishing a bank vault combination in a national newspaper" because it compromised the plaintiffs' copy protection system.⁶⁷ As long as DeCSS was available, the plaintiffs were potentially faced with developing a new method of protecting their movies in order to prevent greater levels of copying, obviously an expensive proposition.⁶⁸ Second, the availability of DeCSS and its capacity for making copies of plaintiffs' movies, which could then be freely distributed, "threatened to reduce the studios' revenues" from DVDs.⁶⁹ Consequently, the court concluded that the plaintiffs had already been "gravely injured."⁷⁰

C. *The Court's Statutory and Constitutional Analysis*

The *Reimerdes* court was faced with a number of statutory and constitutional issues. From the standpoint of statutory interpretation, the first question is whether the defendants' posting of DeCSS constituted a violation of Section 1201 of the DMCA. If the posting constituted a violation, then the second question is whether the linking of DeCSS to other sites was the equivalent of posting and thus constituted a violation as well. The court answered both questions in the affirmative.⁷¹ Further, as discussed below, the court also answered in the affirmative the question as to whether the statute, both on its face

court noted previously, there were several other "ripper" programs available at the time that were capable of decrypting DVDs, although apparently not as effective as DeCSS. *Id.* at 311.

65. *Id.* at 315.

66. *Id.*

67. *Id.* This finding raises an interesting question with respect to injunctive relief in this instance. At the time, DeCSS was available at numerous other sites. Thus, barring the defendants from posting it would have little effect in terminating its availability, except that it would not be available via the defendants' web site. This is illustrated by the fact that the defendants posted web site addresses in plain or non-hyperlink text following the final injunction, which likely diluted significantly the efficacy of the injunction.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 325.

and as applied, was valid under the Free Expression Clause of the First Amendment.⁷²

1. Statutory Analysis

a. Section 1201(a)(2)

Section 1201(a)(2) prohibits manufacturing, providing, offering or otherwise trafficking in any technology that facilitates the circumvention of a technological measure that effectively controls access to a copyrighted work or protects the rights of a copyright holder against unauthorized use of the work, such as copying.⁷³ This so-called “anti-trafficking” provision compliments the basic anti-circumvention provision by denying the means necessary to circumvent technological measures employed to control the access to or use of a copyrighted work.⁷⁴

The defendants conceded to providing and offering DeCSS by posting it on their web site and “absent a court order would continue to offer and provide DeCSS to the public by making it available for download on the 2600.com web site.”⁷⁵ The defendants argued, however, that because CSS was easily decrypted, it was not a technology that “effectively” controlled access.⁷⁶ The court rejected this argument because the term “effectively,” as used in this context, merely required the input of some information or a process in order to gain access to the work.⁷⁷ The court then found that CSS was in fact a technology that effectively controlled access to a copyrighted work,

72. *Id.* at 326, 341.

73. *Id.* at 316–17; 17 U.S.C. § 1201(a)(2) (1998). This Section provides that [n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology . . . that - (A) is primarily designed or produced for the purpose of . . . ; (B) has only limited commercially significant purpose or use other than . . . ; 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].

This “anti-trafficking” provision in effect supplements the anti-circumvention provision by prohibiting the dissemination of technology that may be used to gain unauthorized access to a copyrighted work. See 3 NIMMER, *supra* note 18, § 12A.03[D][1]–[3]. The circumvention provision is analogous to a statute prohibiting breaking and entering; the anti-trafficking provisions are the equivalent to a law prohibiting burglar tools. See *id.*

74. *Id.*

75. *Reimerdes*, 111 F. Supp. 2d at 317.

76. *Id.* As a computer program, DeCSS is clearly “technology within the meaning of the statute.” *Id.* Because DeCSS “clearly is a means of circumventing a technological access control measure,” the court concluded that if DeCSS is within the meaning of either Sub-paragraphs (A), (B), or (C) of Section 1201(a)(2), and none of the statutory exemptions applies, the defendants are in violation of the DMCA by posting DeCSS. *Id.*

77. *Reimerdes*, 111 F. Supp. 2d at 318.

even though it might have been only marginally effective in doing so.⁷⁸ Since the only function of DeCSS was to defeat DVD encryption, it was designed primarily to circumvent CSS.⁷⁹ Thus, the plaintiffs established a *prima facie* violation of Section 1201(a)(1)(A), unless one or more of the statutory exceptions were applicable.⁸⁰

The defendants asserted two related defenses against the application of the DMCA that would prohibit their dissemination of DeCSS. First, they asserted that their distribution of DeCSS fell within the reverse-engineering statutory exception. The contention is that the purpose of DeCSS was to allow persons with computers running the Linux operating system⁸¹ to view DVDs on their computers.⁸² DeCSS was necessary for this purpose, the defendants claimed, because there were no Linux-compatible DVD players available at that time. In light of this, they argued, the reverse-engineering exception⁸³ to the DMCA applied to the extent that DeCSS was intended to achieve interoperability between DVDs and the Linux system.⁸⁴ The court re-

78. *Id.* at 317–18. A contrary finding would possibly have led to the conclusion that CSS was not protected by Sections 1201(a)(1)(A)–(C). *Id.* In order to gain access to a DVD protected by CSS, the user must apply the keys contained within a compliant player or drive. The court found that rather than requiring the access control that provided a strong measure of protection, the statute merely required the “application of information or a process or a treatment,” which CSS did. *Id.*

79. *Id.* at 318–19.

80. *Id.* at 319. The DMCA has several narrow statutory exceptions that exempt certain conduct from the anti-circumvention provisions. Reverse-engineering to achieve interoperability, good-faith encryption research, and security testing, *see* 17 U.S.C. § 1201(f), (g), were all considered and rejected by the court. *Reimerdes*, 111 F. Supp. 2d at 319–21.

The court also concluded that because “the only purpose or use of DeCSS is to circumvent CSS, the foregoing is sufficient to establish a *prima facie* violation of Section 1201(a)(2)(B) as well. *Id.* at 319. That subsection prohibits trafficking in any technology that “(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]; . . .” 17 U.S.C. § 1201(a)(2)(B).

81. The Linux operating system is an open source alternative to the ubiquitous Microsoft Windows operating system. The term “open source” refers to the fact that the source code for the operating system, unlike Windows, is transparent and may be manipulated and altered by individual users. For more information on the Linux system, *see generally*, Jason Kroll, *What is Linux?* LINUX J. (June 24, 1999), available at http://www.linuxjournal.com/about_linux/ (last updated July 28, 1999) (last visited Mar. 6, 2001).

82. *Reimerdes*, 111 F. Supp. 2d at 319.

83. At trial, the defendants claimed several statutory exemptions to the DMCA but, in their post-trial brief, confined their claim to the reverse-engineering exemption. *Id.*

84. The defendants also claimed that the fair use exemption protected their activity on the theory that DeCSS was developed to further the development of a DVD player that would run under the Linux operating system, rather than to pirate DVDs. Because no Linux-compatible DVD drive existed at the time DeCSS was developed, the defendants contended that the statutory exemption under the DMCA for reverse-engineering and interoperability exempted them from liability. The court, however, made short work of this argument. Even accepting the initial premise of the defendants’ argument as true (about which the court expressed some doubt), the

jected this claim, noting that the defendants did not do any reverse-engineering themselves, but rather simply posted a program created by a third party.⁸⁵ Moreover, even if they had actually created the program, the exception would not have applied because the reverse-engineering exception applies only to dissemination of technology “solely for the purpose’ of achieving interoperability”⁸⁶ Since DeCSS was designed to run on the Windows operating system and was capable of being used to decrypt DVDs, the defendants could not claim that its “sole” purpose was to achieve interoperability.⁸⁷

Related to the statutory defense was the defendants’ claim that the doctrine of fair use⁸⁸ entitled them to disseminate DeCSS. The defendants argued that because DeCSS might be capable of allowing others to obtain access to copyrighted works for fair use purposes, the *Sony* doctrine exempted the dissemination of DeCSS from the DMCA.⁸⁹ In *Sony Corp. v. Universal City Studios, Inc.*,⁹⁰ the Supreme

defendants did not do any reverse-engineering by themselves. Moreover, because the sole purpose of DeCSS was to circumvent access and use controls, the defendants would be liable for trafficking in a prohibited technology, regardless of the ostensible reason why the software was originally developed. Finally, even if the defendants had done the reverse-engineering, the court suggested that the exemption would not apply because DeCSS was a Windows-executable file not capable of running under Linux. The court raised and dismissed the defendants’ earlier contentions that their activity may have been exempted by virtue of the encryption or security testing exemptions, finding them either abandoned by the defendants or clearly inapplicable. *Id.* at 319–21.

85. *Id.* at 319

86. *Id.*

87. *Id.*

88. The fair use doctrine is codified in 17 U.S.C. § 107 (1995).

89. Access and use controls can have the effect of inhibiting fair use to the extent that they must be circumvented in order for one to gain access to engage in the fair use activity. Because fair use is by definition not infringement, circumvention of access or use controls in order to make fair use would not be an infringing activity.

The defendants argued that the DMCA could not reasonably be construed to prohibit the dissemination of DeCSS and other circumvention technology because to do so would be to deny in large part the ability of the public to engage in legitimate fair use activities. Moreover, the defendants also argued, DeCSS was capable of significant use other than the infringement of copyrighted materials. This argument was based on the “substantial non-infringing use” rule of *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). In *Sony*, the Supreme Court held that the manufacturer of the Betamax video tape recorder was not contributorily liable for copyright infringement, even though the recorders could be used to make illegal copies of copyrighted television programming. *Id.* at 456–57. The case stands for the proposition that manufacturers of an article of commerce are exempt from claims of contributory infringement if the article is capable of substantial non-infringing use.

While the *Reimerdes* court acknowledged that encryption technology may affect the ability to make fair use of DVDs and other digital content in some instances, it found that Congress struck a balance among competing interests by providing sufficient safe harbors for certain activities that would otherwise be considered infringing. 111 F. Supp. 2d at 323–24. The court reasoned that the fair use doctrine was applicable only as a defense to infringement, and because the defendants were being sued for offering circumvention technology, the doctrine was inapplicable. *Id.* at 324. In fact, the court stated that lack of an express inclusion of a fair use defense in Sec-

Court held that the manufacturer of a product allegedly used by consumers to engage in copyright infringement was exempt from claims of contributory copyright infringement if the product was capable of substantial non-infringing use, such as making limited personal copies.⁹¹ Although the *Reimerdes* court acknowledged that copyright management systems such as CSS had the potential to restrict an individual's ability to engage in fair use, the court rejected the defendants' argument. First, the court noted that *Sony* was inapplicable to violations of the DMCA because the conduct at issue was trafficking in circumvention technology, not contributory copyright infringement.⁹² Second, noting that Congress had explicitly excluded the *Sony* doctrine from Section 1201, the court stated that *Sony* was overruled to the extent it was inconsistent with the DMCA.⁹³ Thus, a device or technology capable of having a substantial non-infringing use, while exempt from a contributory infringement claim under *Sony*, can nevertheless violate the anti-trafficking provisions for its circumvention capability.

b. Linking to Other Sites With DeCSS

The court, after finding that posting DeCSS constituted a violation of the DMCA, addressed the issue of whether linking to another site constituted offering, providing or otherwise trafficking in DeCSS within the meaning of Chapter 12 of the DMCA.⁹⁴ The plaintiffs' request for an injunction to prohibit the defendants from linking to DeCSS stemmed "in no small part from what the defendants themselves have termed their act of 'electronic civil disobedience'—their attempt to defeat the purpose of the preliminary injunction"⁹⁵

tion 1201 was evidence that Congress decided not to include such a defense under the statute. *Id.*

The court went as far to say that a device could be exempt from contributory infringement under the *Sony* test but could still be in violation, declaring that *Sony* "has been overruled by the later enactment of the DMCA to the extent that any inconsistency between *Sony* and the new statute." *Id.* at 323. The court rejected the defendants' assertion that *Sony* immunized them from liability because DeCSS might possibly be used for non-infringing purposes. The court stated that while a device or technology with a substantial non-infringing use may be exempted under *Sony* from contributory infringement, it could still be subject to suppression under Section 1201 because the DMCA had "fundamentally altered the [copyright] landscape." *Id.* at 319.

90. 464 U.S. 417 (1984).

91. *Id.* at 442.

92. *Reimerdes*, 111 F. Supp. 2d at 323–24.

93. *Id.*

94. *Id.* at 324.

95. *Id.* In fact, at the close of the preliminary injunction hearing, the plaintiffs requested that the injunction be extended to prevent the defendants from linking. The court denied their request because they had not raised the issue in their pleadings. *Id.* at 312.

Interpreting the plain language of the statute with the aid of a dictionary,⁹⁶ the court determined that “the anti-trafficking provision of the DMCA is implicated where one presents, holds out or makes a circumvention technology or device available, knowing its nature, for the purpose of allowing others to acquire it.”⁹⁷

The court identified three basic categories of hyperlinks that the defendants used to link to other sites with DeCSS.⁹⁸ Links in the first category, when clicked, resulted in the automatic download of the program.⁹⁹ Those in the second category sent the user to a third party’s web page containing nothing other than DeCSS.¹⁰⁰ The third category links took the user to a web page or site containing substantial content in addition to DeCSS.¹⁰¹

The court held that the first category links were “the functional equivalent of transferring the DeCSS code to the user themselves.”¹⁰² Similarly, the court found no substantial difference between a hyperlink that takes a person from the defendants’ web site to a page containing nothing more than the DeCSS code and that offering no other option than to download the software. To the extent that the defendants linked to sites with knowledge and intent to make DeCSS available, they effectively provided or otherwise trafficked in DeCSS.¹⁰³

Links to sites with content other than DeCSS, however, presented a somewhat closer question for the court. With respect to this type of link, the court stated that linking to a web site that incidentally made DeCSS available, without more, would not necessarily subject the linking party to liability.¹⁰⁴ The court illustrated the problem with the following hypothetical:

If one assumed, for the purposes of argument, that the Los Angeles Times web site somewhere contained the DeCSS code, it would be wrong to say that anyone who linked to the Los Angeles Times web site, regardless of purpose or the manner in which the link was described, thereby offered, provided or otherwise trafficked in DeCSS merely because

96. *Id.* at 325 (“To ‘traffic’ in something is to engage in dealings with it . . . [and] to ‘provide’ something, in the sense of the statute, is to make it available or furnish it To ‘offer’ is to present or hold it out for consideration.”).

97. *Id.*

98. *Id.* at 324–25.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 325.

103. *Id.*

104. *Id.*

DeCSS happened to be available on a site to which one linked.¹⁰⁵

In the court's view, the defendants did much more than linking to a site that incidentally contained DeCSS. The defendants encouraged other sites to post DeCSS for the purpose of distributing it and took steps to verify that the sites they linked to were in fact posting it.¹⁰⁶ These actions, according to the court, elevated the defendants' linking to the level of providing or trafficking in DeCSS.¹⁰⁷

2. First Amendment Challenges

Having concluded that the defendants' conduct fell within the activities proscribed by the DMCA, the court turned to address the defendants' constitutional claims. The defendants raised two principal arguments against the DMCA's application to the dissemination of DeCSS. First, they argued that the DeCSS source and object code was "protected speech" and as a result, the application of the Act's anti-trafficking provisions constituted a violation of their First Amendment right to free expression.¹⁰⁸ Second, they contended that the imposition of an injunction preventing their linking to other web sites posting DeCSS constituted a further violation of the Amendment to the extent that hypertext links constitute speech.¹⁰⁹

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." ¹¹⁰ This language has been interpreted as providing "that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹¹¹ Thus, as a general matter, restrictions on speech are separated into two categories: content-based and content-neutral restrictions. Content-based regulations seek either to limit expression based on the message or because of the effect of the message, while content-neutral regulations limit speech incidentally in pursuance of other goals unrelated to the content of the speech.¹¹²

105. *Id.* In support of this proposition, the court cites to DVD Copy Control Ass'n v. McLaughlin, No. CV 786804, 2000 WL 48512, at *4 (Cal. Super. Ct. Jan. 21, 2000), a state trade secret misappropriation case brought against another defendant who posted DeCSS. The court's use of this case is somewhat ironic, however, because the *McLaughlin* court refused to grant an injunction barring linking. *Id.* at *4.

106. *Reimerdes*, 111 F. Supp. 2d at 324-25.

107. *Id.*

108. *Id.* at 325.

109. *Id.* at 339.

110. U.S. CONST. amend. I.

111. *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (citations omitted).

112. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 789-90 (2d ed. 1988).

With certain well-defined exceptions, content-based restrictions are invalid under the First Amendment unless upon a showing that they serve a compelling governmental interest and are narrowly tailored to achieve that interest in the “least restrictive means possible,” a standard commonly referred to as “strict scrutiny.”¹¹³ In contrast, a content-neutral limitation on speech is generally upheld if it “furthers an important or substantial governmental interest” that is not related to the “suppression of free expression” and does so in a manner that is not unduly restrictive upon speech.¹¹⁴

a. The DMCA’s Prohibition of the Dissemination of DeCSS

There was no dispute that the injunction in the *Reimerdes* case required some level of First Amendment scrutiny. As stated by the court, “It cannot seriously be argued that any form of computer code may be regulated without reference to First Amendment doctrine.”¹¹⁵ Computer code, in addition to being a series of binary instructions to a computer, is a means of expressing ideas. Because the First Amendment has been expanded to cover virtually all modes of expression, any regulation of computer code must be evaluated in the context of the First Amendment.¹¹⁶

However, the court did not agree that the First Amendment automatically erected a barrier against the Section 1201(a)(2) anti-trafficking provisions.¹¹⁷ As an initial matter, the court had to decide the level of constitutional scrutiny applicable to the statute.¹¹⁸ As discussed, content-based regulations are reviewed under “strict scrutiny,” whereas their content-neutral counterparts are reviewed on a lesser standard called “intermediate scrutiny.”¹¹⁹

In order to survive strict scrutiny, content-based restrictions on speech must “serve compelling state interests in the least restrictive means available.”¹²⁰ In contrast, under the intermediate scrutiny test, as pronounced by the Supreme Court in *United States v. O’Brien*,¹²¹

113. See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664–65 (1994).

114. *Id.*

115. *Reimerdes*, 111 F. Supp. 2d at 326.

116. *Id.* at 327 (citing *Junger v. Daley*, 209 F.3d 481, 485 (6th Cir. 2000) (other citations omitted)).

117. *Id.* at 332.

118. See *id.* at 327 (quoting *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972), for the proposition that “[i]n general, ‘government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . .’”).

119. *Id.* at 328.

120. *Id.* at 327 (footnote omitted) (citing *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115 (1989); *Turner Broad. Sys. Inc., v. F.C.C.*, 512 U.S. 622 (1994)).

121. 391 U.S. 367, 377 (1968).

content-neutral restrictions “will be upheld if they serve a substantial governmental interest and restrict First Amendment freedoms no more than necessary.”¹²² In general, “[r]estrictions on the nonspeech elements of expressive conduct fall into the conduct-neutral category.”¹²³ Because DeCSS contains both expressive and functional, nonspeech elements, the question was whether Section 1201(a)(2) targeted the expressive content of DeCSS or was principally aimed at proscribing the functional, nonspeech elements while incidentally restricting expression.¹²⁴

The court found that the DMCA “had nothing to do with the suppression of speech and everything to do with . . . preventing people from circumventing technological access control measures . . .”¹²⁵ DeCSS, like any computer code, has both expressive and non-expressive, functional elements. The court reasoned that the DMCA, as applied to the posting of DeCSS, was a content-neutral restriction on speech because it primarily restricted the nonspeech, functional elements of the program and only incidentally restricted any of its expressive elements.¹²⁶ The court went on to state, however, that the “particular functional characteristics” of DeCSS were “such that the Court would apply the same level of scrutiny even if it were viewed as content based.”¹²⁷

Content-neutral restrictions on speech are upheld if they serve a substantial or important governmental interest without any unnecessary restriction on free speech.¹²⁸ The court held that the DMCA’s goal of protecting copyrighted works was a substantial governmental interest in light of the constitutional mandate for copyright protection¹²⁹ and the importance of the copyright industry to the national

122. *Reimerdes*, 111 F. Supp. 2d at 327.

123. *Id.* at 328.

124. *See id.* at 327–28. Because of the constitutional distinction “between pure speech, which ordinarily receives the highest level of protection, and expressive conduct,” incidental restrictions upon expression may be justified by a substantial governmental interest in regulating the nonexpressive activity. *Id.* “The critical point is that nonspeech elements may create hazards for society above and beyond speech elements,” making them “subject to regulation in appropriate circumstances because the government has an interest in dealing with the potential hazards of the nonspeech elements despite the fact that they are joined with expressive elements.” *Id.*

125. *Id.* at 329.

126. *Id.*

127. *Id.* at 332–33. The court cites *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992), in support of this proposition, noting that some categories of speech may be regulated on the basis of their content, e.g., obscenity and fighting words.

128. *Reimerdes*, 111 F. Supp. 2d at 328.

129. U.S. CONST. art. I, § 8, cl. 8 reads, “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”

economy.¹³⁰ Moreover, the prohibition of disseminating circumvention software as a means of providing copyright protection was viewed by the court as accomplishing its objective without infringing on the right of expression any more than necessary.¹³¹ The court thus concluded that the DMCA as applied to prohibit the posting of DeCSS was a content-neutral regulation serving a substantial governmental interest without restricting speech any more than necessary.¹³² The court qualified this holding, however, by stating that the holding was “limited (1) to programs that circumvent access controls to copyrighted works in digital form in circumstances in which (2) there is no other practical means of preventing infringement through use of the programs, and (3) the regulation is motivated by a desire to prevent performance of the function for which the programs exist rather than any message they might convey.”¹³³

b. Prior Restraint

The court next turned to the defendants’ argument that the injunction prohibiting the dissemination of DeCSS constituted a prior restraint of speech. “Few phrases are as firmly rooted in our constitutional jurisprudence as the maxim that ‘[a]ny system of prior restraints of expression comes to [a] court bearing a heavy presumption against its constitutional validity.’”¹³⁴ A prior restraint occurs when limitations are placed on speech prior to its publication, as opposed to subsequent punishment imposed upon the speaker through fines or imprisonment.¹³⁵ In spite of this proclamation, the court found that enjoining the defendants from disseminating DeCSS was not barred by the prior restraint doctrine.¹³⁶ The court distinguished the case at bar from “classic prior restraint cases” on the grounds that in the latter cases, “the government sought to suppress speech at the very heart of the First Amendment concern—expression about public issues of the sort that is indispensable to self government.”¹³⁷ The court stated that

130. *Reimerdes*, 111 F. Supp. 2d at 329.

131. *Id.* at 329.

132. *Id.* at 332.

133. *Id.* at 333.

134. *Id.* (quoting *United States v. Washington Post Co.*, 403 U.S. 713, 714 (1971)).

135. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW*, § 1616, at 1019–1020 (5th ed. 1995).

136. *Reimerdes*, 111 F. Supp. 2d at 333–34.

137. *Id.* at 334–35 (citing *Near v. Minnesota*, 283 U.S. 697 (1931) (an injunction abating scandalous and defamatory newspapers); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (injunction barring the publication of internal government history of Vietnam War); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (court order against publication of details of pending murder case)).

it would be a mistake to equate the expressive elements of DeCSS with the New York Times' publication of the Pentagon Papers¹³⁸ "without a more nuanced consideration of the competing concerns."¹³⁹

The court held that "the considerations supporting an injunction" against the dissemination of DeCSS were "very substantial indeed."¹⁴⁰ Because the "broad dissemination of DeCSS threatens ultimately to injure or destroy [the] plaintiffs' ability to" distribute and sell their products, "the potential damages are incalculable."¹⁴¹ On the other side of the equation, the court found very little constitutional value in the dissemination of DeCSS. "The presence of some expressive content . . . should not obscure the fact" that DeCSS is primarily functional, with only minimal expressive characteristics.¹⁴² Because the "enjoined expressive element" of DeCSS was minimal, the court held that the prior restraint doctrine did not prevent an injunction against its dissemination.¹⁴³

The court also rejected the defendants' argument that the statutory prohibition on disseminating circumvention technology was unconstitutionally overbroad. The defendants' overbreadth claim rested on the assertion that the injunction deprived others of the ability to make lawful fair use of encrypted works.¹⁴⁴ While the court acknowledged that the fair use with respect to DVDs was affected by the DMCA, it found those effects to be trivial in degree. To the extent that those concerns existed, however, the court held that the affected parties, not the defendants, may bring the overbreadth challenge.¹⁴⁵

138. *Reimerdes*, 111 F. Supp. 2d at 334–35. The *New York Times* obtained certain Department of Defense documents regarding the Vietnam War entitled "History of U.S. Decision Making Process on Vietnam Policy," documents that portrayed the government's involvement in the war in a very unfavorable light. The government requested that the *Times* not publish the papers and demanded their return. The Supreme Court ultimately held that the government could not constitutionally suppress the publication of the papers. *N.Y. Times*, 403 U.S. at 713–14.

139. *Reimerdes*, 111 F. Supp. 2d at 336 (referring to *N.Y. Times*, 403 U.S. at 713).

140. *Id.* at 335.

141. *Id.*

142. *Id.*

143. *Id.* at 336.

144. *Id.*

145. Interestingly, a California Superior Court, in granting a preliminary injunction in a similar DeCSS case brought under state trade secret law, refused to extend injunctive relief to prohibit linking, citing concerns of overbreadth. See *DVD Copy Control Ass'n, Inc. v. McLaughlin*, No. CV 786804, 2000 WL 48512, at *4 (Cal. Super. Ct. Jan. 21, 2000) (unpublished order granting preliminary injunction). The DVD Copy Control Association, the licensor of CSS, brought a trade secret misappropriation action against defendants for posting and linking to sites containing DeCSS in a manner similar to the defendants in *Reimerdes*. *Id.* In refusing to extend injunctive relief to bar linking to sites with DeCSS, the court stated, "the Court refuses to issue an injunction against linking to other websites which contain the protected materials as such an order is overbroad and extremely burdensome. Links to other websites are the mainstay

The court also quickly dismissed the defendants' assertion that Section 1201(a)(2) was unconstitutionally vague. Finding that there can be "no serious doubt" that the defendants' posting of DeCSS constituted "an offer to the public of technology primarily designed for the purpose of circumventing [the plaintiffs'] access control system," which clearly violated the DMCA, the court held that the defendants would "not be heard to complain of any vagueness as applied to others."¹⁴⁶

c. The Prohibition of Linking to Sites With DeCSS

As with computer code generally, hyperlinks "have both expressive and functional elements."¹⁴⁷ In light of this, the court reasoned that the constitutional propriety of enjoining the defendants from linking to other sites with DeCSS was governed by the intermediate scrutiny standard.¹⁴⁸ The court found that each prong of the intermediate scrutiny test was met with respect to the prohibition against linking.¹⁴⁹ First, the prohibition against linking to sites with DeCSS satisfied the content-neutrality prong because, in the court's view, the "regulation of the linking" was unrelated to the suppression of speech in the same way that the prohibition on posting DeCSS was.¹⁵⁰ Second, the prohibition against linking served the important governmental interest of protecting digital works from circumvention, since the "[d]efendants' posting and their linking amount to very much the same thing."¹⁵¹ However, the third prong, "whether the 'regulation promotes a substantial government interest that would be achieved less effectively absent the regulation,'" was "a somewhat closer call."¹⁵²

Rather than enjoining the defendants from linking to other sites with DeCSS, the plaintiffs could alternatively proceed directly against those other sites to force them to take down the copies of DeCSS. This option was arguably more effective than the injunction against linking. However, the "real significance" of the anti-linking injunc-

of the Internet and indispensable to its convenient access to the vast world of information. A website owner cannot be held responsible for all of the content of the sites to which it provides links. Further, an order prohibiting linking to websites with prohibited information is not necessary since the Court has enjoined the posting of the information in the first instance. Nothing in this Order shall prohibit discussion, comment or criticism, so long as the proprietary information identified above is not disclosed or distributed." *Id.*

146. *Reimerdes*, 111 F. Supp. 2d at 339.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

tion was not with domestic, but with overseas sites, which were possibly beyond the jurisdictional reach of the DMCA.¹⁵³ Apparently finding that an anti-linking injunction would frustrate attempts to access these overseas web sites, the court held that the imposition of the injunction met the third prong of the intermediate scrutiny test as well.¹⁵⁴

Finally, the court addressed the concerns about the potential chilling effect that an injunction against linking might create. The court recognized the importance that hyperlinks play in the fundamental function and utility of the Internet:

[Hyperlinks] often are used in ways that do a great deal to promote the free exchange of ideas and information that is a central value of our nation. Anything that would impose strict liability on a web site operator for the entire contents of any web site to which the operator linked therefore would raise grave constitutional concerns, as web site operators would be inhibited from linking for fear of exposure to liability. And it is equally clear that exposing those who use links to liability under the DMCA might chill their use, as some web site operators confronted with claims that they have posted circumvention technology falling within the statute may be more inclined to remove the allegedly offending link rather than test the issue in court. Moreover, web sites often contain a great variety of things, and a ban on linking to a site that contains DeCSS amidst other content threatens to restrict communication of this information to an excessive degree.¹⁵⁵

Although the court recognized the potential chilling effect that an injunction barring linking would have, it found that this concern was not "unique to the issue of linking."¹⁵⁶ The court analogized to the potential chilling effect that defamation suits have on the press.¹⁵⁷ "Just as the potential chilling effect of defamation suits has not utterly immunized the press" from liability for defamation, the potential chilling effect cannot prevent application of the anti-circumvention provisions to linking.¹⁵⁸ The solution was to establish a standard sufficiently high to exempt all instances except those "in which the con-

153. *Id.* at 340.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

duct in question has little or no redeeming constitutional value.”¹⁵⁹ Again, borrowing from the defamation jurisprudence, the court held:

[T]here may be no injunction against, nor liability for, linking to a site containing circumvention technology, the offering of which is unlawful under the DMCA, absent clear and convincing evidence that those responsible for the link (a) know at the relevant time that the offending 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. Such a standard will limit the fear of liability on the part of web site operators just as the *New York Times* standard gives the press great comfort in publishing all sorts of material that would have been actionable at common law, even in the face of flat denials by the subjects of their stories. And it will not subject web site operators to liability for linking to a site containing proscribed technology where the link exists for purposes other than dissemination of that technology.¹⁶⁰

The court found that the plaintiffs demonstrated such clear and convincing evidence. First, the court found that the defendants linked to the third party sites with the knowledge that those sites contained DeCSS.¹⁶¹ Additionally, the defendants did so with the full knowledge that DeCSS was a circumvention device, which in light of their experience at trial caused them to know that their linking to such sites violated the DMCA.¹⁶² Finally, the court found that they maintained such links to thwart the effectiveness of the original injunction.¹⁶³ Thus, because the defendants knew that that DeCSS was a circumvention device proscribed by the DMCA and because the defendants posted and linked to DeCSS with the intent to disseminate DeCSS to enable others to circumvent technological access control measures, the court concluded that “[a]n anti-linking injunction does no violence to the First Amendment.”¹⁶⁴

159. *Id.* The court referred to the “public official” standard set forth in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), where the Supreme Court established the rule under which a public official defamation plaintiff must prove, by clear and convincing evidence, that the defendant published a statement “with knowledge of falsity or serious doubt as to its truth.” *Id.*

160. *Reimerdes*, 111 F. Supp. 2d. at 341.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

3. The Remedy

Section 1203 of the DMCA provides, inter alia, that “[a]ny person injured by a violation of section 1201 . . . may bring a civil action in an appropriate United States court for such violation.”¹⁶⁵ The defendants argued that the plaintiffs failed to meet the injury requirement for three reasons. First, the defendants argued that the plaintiffs failed to introduce evidence proving that any decrypted movies were actually available, a fact that the plaintiffs actually stipulated to.¹⁶⁶ The court rejected this contention by holding that the plaintiffs were required to show merely the threat of injury caused by a violation of the statute, rather than actual injury.¹⁶⁷ The court concluded that the threat of piracy posed by the existence of DeCSS represented “a clear threat of injury.”¹⁶⁸

Second, the defendants asserted that the real threat posed by DeCSS was exaggerated by the plaintiffs, who actually believed that DeCSS presented a minimal threat to their interests. However, because this contention was based merely on a couple of statements made by the plaintiffs in an effort to “‘spin’ public opinion,” the court found that such statements were not an accurate representation of the plaintiffs’ actual belief on the matter.¹⁶⁹

Finally, the defendants claimed that to the extent that decrypted movies may exist, no evidence was adduced at trial that they were actually decrypted using DeCSS. The defendants claimed that there were other software utilities available that were equally or more effective at decrypting DVDs than DeCSS. While the court acknowledged that other DVD “ripping” programs were available, it concluded that DeCSS, as “the superior product,” was more capable of decrypting DVDs than the competing software.¹⁷⁰ In a footnote, the court noted that the defendants’ argument would fail even if there was credible evidence supporting their contention that DeCSS was an inferior alternative because the defendants were nevertheless liable under the doctrine of joint liability as set forth in *Summers v. Tice*.¹⁷¹

165. 17 U.S.C. § 1203(a).

166. *Reimerdes*, 111 F. Supp. 2d at 342.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* The doctrine of alternative liability set forth in *Summers v. Tice*, 199 P.2d 1 (Cal. 1948), holds that where two or more defendants are negligent, and one, and only one, caused injury to the plaintiff but it is unclear which one was the actual cause, the burden of proof shifts to the plaintiffs to individually disprove their liability. See also 1 CAL. CIV. PRAC. TORTS § 1:32 (1992) (explaining application of the *Summers* doctrine).

Where, as here, two or more persons take substantially identical wrongful actions, one and only one of which had to be the source of the plaintiffs' injury, and it is equally likely that one inflicted the injury as the other, the burden of proof on causation shifts to the defendants, each of which is liable absent proof that its action did not cause the injury.¹⁷²

Having found that the injury element of the statute was met, the court turned to fashioning an appropriate remedy. The DMCA provides that the court may, in addition to actual and statutory damages, impose injunctive relief if doing so is reasonably necessary to prevent or restrain violations of the Act's provisions.¹⁷³ Generally, injunctive relief is appropriate when there is a substantial likelihood of future violations and "the plaintiff lacks an adequate remedy at law."¹⁷⁴ The court found that both elements were met. First, the defendants demonstrated their propensity for continuing to disseminate DeCSS, in spite of the preliminary injunction imposed prior to trial to prevent them from posting DeCSS.¹⁷⁵ Moreover, the court found that the plaintiffs had no adequate remedy at law because the actual damages to the plaintiff were incalculable. The court also found that statutory damages did not provide adequate relief because such damages were

172. *Id.* n.267. It is doubtful, however, if the facts of the case really apply to the rule set forth by the court. To the extent decrypted movies are available, it follows that some device or program must have been used to decrypt the movie, assuming the source of the movie was a DVD. However, it by no means follows that "one and only one [of the available utilities] had to be the source of the plaintiffs' injury" because, in fact, it is just as likely that some or all of the decrypting utilities contributed to the creation of decrypted movies. Moreover, the *Summers* doctrine merely shifts the burden of persuasion and still requires joinder of each defendant responsible for the plaintiff's injury. See CALIFORNIA JURY INSTRUCTIONS – CIVIL, BOOK OF APPROVED JURY INSTRUCTIONS, CA BAJI 3.80 (8th ed. 1994).

173. 17 U.S.C. § 1203.

174. *Reimerdes*, 111 F. Supp. 2d at 343.

175. *Id.* The court found that:

In this case, it is quite likely that defendants, unless enjoined, will continue to violate the Act. Defendants are in the business of disseminating information to assist hackers in "cracking" various types of technological security systems. And while defendants argue that they promptly stopped posting DeCSS when enjoined preliminarily from doing so, thus allegedly demonstrating their willingness to comply with the law, their reaction to the preliminary injunction in fact cuts the other way. Upon being enjoined from posting DeCSS themselves, defendants encouraged others to "mirror" the information—that is, to post DeCSS—and linked their own web site to mirror sites in order to assist users of defendants' web site in obtaining DeCSS despite the injunction barring defendants from providing it directly. While there is no claim that this activity violated the letter of the preliminary injunction, and it therefore presumably was not contumacious, and while its status under the DMCA was somewhat uncertain, it was a studied effort to defeat the purpose of the preliminary injunction. In consequence, the Court finds that there is a substantial likelihood of future violations absent injunctive relief.

assessed at \$2,500 per each offer of the offending technology and it would be next to impossible to determine what constituted an individual "offer."¹⁷⁶

On the above basis, the court broadly enjoined and restrained the defendants from disseminating any technology that violated § 1201 and granted declaratory relief, stating that the defendants' "posting of DeCSS on an Internet web site and knowing linking to other Internet web sites containing DeCSS for the purpose of disseminating DeCSS violated the Digital Millennium Copyright Act, 17 U.S.C. §§ 1201 *et seq.*"¹⁷⁷

IV. ANALYSIS

The purpose of this section is to analyze the application of the DMCA to prohibit the posting of, and linking to, computer programs such as DeCSS. Part A examines the First Amendment implications of applying the DMCA to prohibit the posting of DeCSS. Part B then addresses the free speech implications of an injunction barring linking to other DeCSS-containing sites. This section concludes that the injunction requiring the removal of DeCSS from the defendants' site is probably correct in light of the First Amendment jurisprudence but that the DMCA, as applied to prohibit linking to other DeCSS-containing sites, impermissibly infringes upon the right to free expression.

A. *The Prohibition Against Posting DeCSS*

This part first looks at the impact of the *Reimerdes* decision on traditional notions of fair use. It then examines the First Amendment concerns attending the suppression of DeCSS. Finally, this part concludes that the DMCA, as applied in the *Reimerdes* case, places unwarranted restrictions on fair use and free expression, arguing for a fair use "exception" to the trafficking provisions.

1. Fair Use

Although the court noted that the defendants raised "a significant point" with respect to the impact of copy control technology and the DMCA on fair use, with a more complete statutory analysis, it might have reached a different conclusion as to the constitutionality of the DMCA as applied. First, the court found that CSS was an "access control" under Section 1201(a)(2) rather than a "use control" under

176. *Id.* at 343-44.

177. *Id.* at 346-47.

Section 1201(b)(1).¹⁷⁸ This is questionable, however, because CSS is primarily designed to prevent copying, i.e., use, not unauthorized access. Second, the court neglected to consider the impact of Section 1201(c)(1), which states, "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under [the Copyright Act]."¹⁷⁹

Fair use, along with the idea-expression dichotomy, is viewed as essential to balance the tension between copyright and free expression. This tension arises from the limited monopoly granted to copyright holders. Copyright protection, rather than a mere means for authors to acquire wealth, is intended to benefit the public by operating as "the engine of free expression."¹⁸⁰ Copyright accomplishes this goal; by "establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."¹⁸¹ At the same time, however, copyright restricts free expression to the extent that one is barred from copying or otherwise using the mode of expression copyrighted by another.¹⁸²

The idea-expression dichotomy dictates that only modes of expression, not the underlying ideas contained within that expression, receive copyright protection so that facts and ideas remain in the public domain.¹⁸³ Fair use complements this idea-expression dichotomy by exempting from copyright infringement certain limited uses of copyrighted works that would otherwise constitute infringement.¹⁸⁴ Once a common law doctrine, fair use is now codified within Section 107 of the Copyright Act.¹⁸⁵ Traditional fair use activities include copying for "criticism, comment, news reporting, [and] teaching,"¹⁸⁶ as well as limited copying for personal use.¹⁸⁷ Another example of fair use is making back-up copies of computer software.¹⁸⁸ Because the potential applications constituting fair use are limited only by human imagination, the doctrine employs a facts-and-circumstances test

178. 17 U.S.C. § 1201(a)(2), (b)(2).

179. 17 U.S.C. § 1201(c)(1).

180. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

181. *Id.*

182. See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 14 DUKE L.J. 147, 165-66 (1998).

183. *Id.* at 556; see also 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 1.10[B][2] (2001).

184. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.05, at 13-151-13-152 (2001).

185. *Id.*

186. 17 U.S.C. § 107.

187. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984) (holding that using a VCR to make non-commercial copies for personal use was fair use).

188. See *Vault Corp. v. Quaid Software*, 847 F.2d 255 (5th Cir. 1988).

rather than a bright-line rule.¹⁸⁹ In addition to the exemptions afforded to certain uses, traditional copyright law also provides a safe harbor for the manufacturers of devices that can be used for infringing purposes but have substantial non-infringing uses.¹⁹⁰

The DMCA has altered this traditional paradigm by limiting the technology that facilitates fair use. As noted earlier, there are three key provisions in Section 1201 relating to circumvention. First, Section 1201(a)(1) prohibits the circumvention of technological measures that control access to copyrighted works. This Section only applies to the circumvention of access control technology and "is inapplicable to 'the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected by [the Copyright Act], even if such actions involve circumvention . . .'"¹⁹¹ Second, Section 1201(a)(2) supplements the anti-circumvention provision by making it unlawful to traffic in any technology that facilitates the circumvention of access controls. The legislative history indicates that Congress intended these provisions to apply "when a person *has not obtained authorized access* to a copy or a phonorecord of a work for which the copyright owner has put in place a technological measure that . . . controls access to [the] work."¹⁹²

Third, Section 1201(b)(1), in contrast, proscribes trafficking in any technology that circumvents a technological measure that "protects a right of a copyright owner under [the Copyright Act] in a work or a portion thereof . . ." ¹⁹³ The difference between the first two provisions and the third one is that "an individual would not be able to circumvent in order to gain unauthorized access to a work" but could circumvent encryption "in order to make fair use of a work which he or she has acquired lawfully."¹⁹⁴ Thus, it is not unlawful to circumvent a use control technological measure to engage in fair use, but it is

189. 17 U.S.C. § 107. This Section provides, "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." *Id.*

190. See *Sony*, 464 U.S. at 455.

191. 3 NIMMER, *supra* note 18, § 12A.03[D][2], at 12A-34–12A-35.

192. Congress characterized the circumvention of an access control as being "the electronic equivalent of breaking into a locked room in order to obtain a copy of a book." *Id.* § 12A.03[D][1], at 12A-29 (quoting H.R. REP. NO. 105-551, at 17 (1998)).

193. 17 U.S.C. § 1201(b)(1).

194. 3 NIMMER, *supra* note 18, § 12A.06[C], at 12A-89 (quoting H.R. REP. NO. 105-551, at 18 (1998)).

unlawful for anyone to traffic in technology that facilitates such circumvention.¹⁹⁵

The court concluded that DeCSS fell within the prohibitions under Section 1201(a)(2). However, CSS does not fit neatly into the category of an access control measure, because although it nominally restricts access by requiring playback on a compliant player, the primary purpose of CSS is to prevent copying.¹⁹⁶ An access control prevents a user from gaining unauthorized access to a work in the first instance.¹⁹⁷ For example, one cannot access the copyrighted materials in the Westlaw or Lexis databases without first obtaining a password from the data providers.

In contrast, CSS prevents copying by encrypting the content of DVDs so that they can be played only on "compliant devices" that do not produce a signal capable of being copied. Although "access" to a DVD is restricted to the extent that it cannot be viewed on a noncompliant DVD player, authorized access to the DVD itself can be obtained by purchasing or renting a DVD in general. The only reason for limiting playback of DVDs to compliant DVD players is to inhibit copying. Therefore, in substance, if not in form, CSS is very similar to a use control mechanism and Section 1201(b)(1), not Section 1201(a)(2), is applicable.

Had the court applied Section 1201(b)(1) instead of Section 1201(a)(2), the outcome might have been different because the nega-

195. See *id.* § 12A.03[D][3], at 12A-36–12A-37.

196. However, even if CSS is an access control measure in form, it is a use control mechanism in substance. This is consistent with Nimmer's commentary, where he states, "Given the stark contrast in how the two paragraphs are drafted, it would be improper for a court to construe § 1201 to bar the unenumerated behavior of one who engages solely in prohibited usage of a work to which he has lawful access. That is the function, instead, of traditional copyright law. To the extent that that individual capitalizes on his success, however, by offering comparable services to the public, at that point he incurs liability under [Section 1201(b)(2)]." *Id.*, § 12A.03[D][3], at 12A-38 n.187.

197. See H.R. REP. NO. 105-551, pt. 1, at 17 (1998). The committee report indicates the ban on circumvention of access controls and technology that facilitates such circumvention applies "when a person has not obtained authorized access to a copy or a phonorecord of a work for which the copyright owner has put in place a technological measure that . . . controls access to [the] work." *Id.* (emphasis added). In another section, the report states, "to protect the owner, copyrighted works will most likely be encrypted and made available to consumers once payment is made for access to a copy of the work. *Id.* at 10 (emphasis added). Moreover, recognizing the potential fair use implications, the committee stated "that Paragraph (a)(1) does not apply to the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under Title 17, even if such actions involve circumvention of additional forms of technological protection measures. In a fact situation where the access is authorized, the traditional defenses to copyright infringement, including fair use, would be fully applicable. So, an individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully." *Id.* at 18 (emphasis added).

tive fair use impact of suppressing DeCSS would have been more apparent. Because the underlying use of a work obtained by circumventing an access control device would generally constitute theft or direct infringement, there is little fair use concern in prohibiting the dissemination of a technology that enables such circumvention. However, to the extent that DeCSS enables users who have already obtained authorized access to a DVD to make fair use of their own property, the justification for suppressing the device is diminished. Instead of a technology that solely enables illegal behavior, DeCSS might have been viewed as one enabling lawful fair use. This is especially true when one considers the statutory proclamation that Section 1201 is not to be interpreted, and *a fortiori* not applied, to affect the right of fair use.¹⁹⁸

It is legitimate to question whether the overall impact that the anti-circumvention provisions may have on fair use is significant in the context of DeCSS, given that the device is but one of several formats on which movies are available. However, because digital media is envisioned to eventually include everything from plain text to movies, the application of such provisions would have far-reaching fair use implications. For example, if books and periodicals become available only in digital form, one's ability to make limited copies could disappear. Moreover, because the only option to DVDs is the inferior analog videocassette, it is no answer to suggest that a ready alternative to DVDs is available for fair use.

The potential impact on fair use should be readily apparent: although circumvention to engage in fair use is not prohibited, the dissemination of technology allowing others to engage in fair use is. Thus, only those with the technical acumen to circumvent encryption measures like CSS are able to engage in lawful fair use of digital works that are locked up with encryption. As a result, the effect of the Act does not square with its legislative history and express statutory declaration that "[n]othing in [§ 1201] shall affect rights, remedies, limitations, or defenses to copyright infringement, *including fair use*, under [the Copyright Act]."¹⁹⁹

The negative impact on fair use is further illustrated by the *Reimerdes* decision, which held the *Sony* doctrine to have been over-

198. 17 U.S.C. § 1201(c)(1); see also *Recent Cases: Copyright Law-District Court Holds That Website's Posting of and Linking to Code That Decrypts DVD Copyright Protection Technology Violate Digital Millennium Copyright Act—Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), Appeal docketed, No. 00-9185 (2nd Cir. Sept. 19, 2000), 114 HARV. L. REV. 1390, 1395-97 (2001) (noting a conflict between § 1201(a), (b) and § 1201(c)(1) and arguing that courts should interpret the latter as favoring fair use).

199. 17 U.S.C. § 1201(c)(1) (emphasis added).

ruled to the extent inconsistent with the DMCA. As noted above, under the *Sony* doctrine, devices capable of substantial non-infringing use are exempt from contributory copyright infringement claims. In *Sony*, studios filed a contributory infringement suit against Sony. The studios claimed that consumers of Sony's Betamax video recorders were using the recorders to make infringing copies of television programs. The Supreme Court concluded that such so-called "time shifting" by consumers was a fair use activity.²⁰⁰ Even if the consumer copying constituted copyright infringement, however, the Court held that Sony was not liable as a contributory infringer because the Betamax was an instrumentality of commerce capable of a substantial non-infringing use.²⁰¹

Under the DMCA as applied in *Reimerdes*, however, the *Sony* doctrine is inapplicable because the violation of the anti-trafficking and other provisions of the Act can be shown without regard to whether the circumvention technology may be used in a manner constituting fair use, a result apparently contemplated by Congress.²⁰² DeCSS was *capable* of at least one non-infringing use because it allowed users to decrypt DVDs and play the contents on a computer powered by the Linux operating system, for which no compliant players existed at the time. Additionally, DeCSS can be used to decrypt DVDs to make limited, noncommercial copies, a practice that generally is exempt from copyright infringement as fair use. Moreover, realizing the potential adverse impact of his holding, Judge Kaplan correctly noted that "the interests of persons wishing to circumvent CSS in order to make lawful use of the copyrighted movies it protects are remarkably varied."²⁰³ Whether such uses rise to the level of being "substantial" is another question, but one that the court did not reach because Congress specifically excluded the *Sony* doctrine as a defense under the DMCA.

Fair use is essential to balance the copyright holders' proprietary interests against the larger public interest. Rather than an absolute

200. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 (1984).

201. *Id.* at 456.

202. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 324 (S.D.N.Y. 2000). The court quoted the Judiciary Committee Report on the DMCA: "The *Sony* test of 'capab[ility] of substantial non-infringing uses,' while still operative in cases claiming contributory infringement of copyright, is not part of this legislation, however." HOUSE COMM. ON JUDICIARY, SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE U.S. HOUSE OF REPRESENTATIVES ON AUG. 4, 1998, at 9 (Comm. Print 1998). Instead, "[t]he relevant test, spelled out in the plain and unchanged language of the bill, is whether or not a product or service 'has only limited commercially significant purpose or use other than to circumvent.'" *Id.* The House and Senate Reports, however, do not refer to this issue.

203. *Reimerdes*, 111 F. Supp. 2d at 338.

property right created for the intellectual property owners, copyright is intended to serve the public as “the engine of free expression.”²⁰⁴ The only way to prevent Section 1201 from adversely impacting fair use is to conclude that the Section is applicable only to the extent that it does not diminish the fair use right. Essentially, this means that a Sony defense should be read into the DMCA because to hold otherwise would have the effect of substantially denying users of digital media the ability to enjoy their statutorily-prescribed right to make fair use of copyrighted works.

2. First Amendment Concerns

The failure of the court to fully analyze the impact on fair use has First Amendment implications as well. First, as applied by the *Reimerdes* court, the anti-trafficking provisions burden free speech by upsetting the balance between copyright and the First Amendment, thus ceasing to be a valid exercise of Congress’s legislative powers. Second, to the extent that the provisions exceed the scope of Congressional power, they cease to serve an “important or substantial governmental interest” under the intermediate scrutiny test.

In analyzing the constitutionality of the prohibition on posting DeCSS, the court applied the *O’Brien* intermediate scrutiny standard of review, which requires a showing that the injunction serve an important or substantial governmental interest in a manner narrowly tailored to achieve that interest without unduly interfering with the defendants’ expression.²⁰⁵ In holding that the anti-trafficking provision was a legitimate use of Congressional authority, the court focused primarily on the fact that the DMCA’s goal was to prevent copyright infringement.²⁰⁶

Given that Section 1201(a)(2) or 1201(b)(1) as applied in *Reimerdes* has the potential for limiting fair use and imposing liability for disseminating a technology facilitating fair use, the issue as to whether an important or substantial governmental interest is served by its application deserves a more careful analysis than was given by the *Reimerdes* court. In order for the anti-trafficking provisions to constitute an “important or substantial” governmental interest, the interest itself must be a valid exercise of Congress’s power. Because the regu-

204. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985). The court went on to note that although “[t]he immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor . . . , the ultimate aim is, by this incentive, to stimulate [the creation of useful works] for the general public good.” *Id.* (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1974)).

205. *Reimerdes*, 111 F. Supp. 2d at 329–330.

206. *Id.*

lation of circumvention technology is not directly authorized under the Copyright Clause, the trafficking provisions are a valid exercise of Congress's power only to the extent that they are "necessary and proper" to effectuate such powers under the Clause.²⁰⁷ In order for the trafficking provisions to constitute a valid exercise of power under the Necessary and Proper Clause, the provisions must be "appropriate" and "plainly adapted" to the achievement of an enumerated power.²⁰⁸

Assuming, *arguendo*, that the trafficking provisions in general are a valid means to effectuate Congress's ends under the Copyright Clause,²⁰⁹ the question remains as to whether the provisions, as applied against the defendants, actually serve those ends. The Necessary and Proper Clause is a limitation as well as a grant of power. To the extent that the continued existence of a robust fair use doctrine is essential to maintain the balance between copyright and free expression,

207. This assumes that Congress implemented the DMCA as a means to effectuate its Copyright Clause powers; the legislative history is indefinite on this. According to Nimmer, the House Judiciary Committee originally grounded the authority for the DMCA in the Copyright Clause, but, in contrast, the House Commerce Committee found the constitutional authority in the Commerce Clause and the Senate Judiciary Committee report set forth no constitutional basis. See 3 NIMMER, *supra* note 18, § 12A.18[A], at 12A-177 (citing respective committee reports). The probable basis for constitutional authority likely rests in the Necessary and Proper Clause, as a means to effectuate Congress's ends under either the Copyright or Commerce Clauses. See *infra* note 208.

208. *M'Culloch v. State (McCulloch v. Maryland)*, 17 U.S. (4 Wheat) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."). In order to be a valid exercise of power under the Necessary and Proper Clause, legislation must not only be "necessary" in the sense that it is helpful to achieve an enumerated end but it must also be proper in the sense that the legislation is a legitimate use of power. See, e.g., *Printz v. United States*, 521 U.S. 898, 924 (1997) (holding that the requirement that local law enforcement conduct background checks under the Brady Act was not a legitimate exercise of power under the Necessary and Proper and Commerce Clauses because it violated the principle of state sovereignty).

209. Before even reaching the question of whether Section 1201(b)(1) meets the substantial interest test, the initial question should have been whether the interest is even within the scope of Congress's power. Certainly Congress has the power under the Necessary and Proper Clause to pass legislation to effectuate its authority under the Copyright Clause.

Thus, the anti-trafficking provision, Section 1201(a)(1), is a legitimate exercise of power because it seeks to inhibit infringement by preventing unauthorized access to copyrighted works. Had the court been correct in finding that CSS was an access control device and that DeCSS was a technology circumventing an access control device, application of Section 1201(a)(1) to prohibit the posting of DeCSS would serve a substantial governmental interest. This is true because no plausible argument exists in favor of allowing either circumvention of access controls or trafficking in technology that facilitates such circumvention, because generally there is no justification for gaining unauthorized access to a copyrighted work. In contrast to the anti-trafficking provision, however, Section 1201(b)(1) seeks to prohibit the dissemination of technology that may be used not only to engage in copyright infringement but also to engage in legally permissible fair use. Although prohibiting technology that enables copyright infringement is a legitimate exercise of power under the Copyright Clause through the Necessary and Proper Clause, it is illegitimate to the extent that Section 1201 outlaws technology enabling fair use.

application of the trafficking provisions to suppress technology that enables fair use is contrary to the grant of power under the Copyright Clause. Thus, to the extent that the trafficking provisions, as applied to suppress the dissemination of DeCSS, work to undermine the ability of the public to make fair use of digital works, the provisions fail to advance an important or substantial interest.

Even if the DMCA is intended to serve a substantial governmental interest, the *Reimerdes* court's analysis of whether the Act as applied to the facts of the case satisfied the third prong of the intermediate scrutiny test is suspect, at least logically. As applied by the court, the narrow-tailoring requirement becomes a self-fulfilling prophecy, diminishing the intermediate scrutiny test. The *O'Brien* test has two separate requirements besides content neutrality: (1) the regulation must serve an important or substantial interest and (2) it must do so in a manner that interferes with speech no more than necessary.²¹⁰ The former ensures that the interest is significant enough to warrant incidental restrictions on speech, and the latter limits the restrictions to what is necessary to the furtherance of the interest. In contrast, the test applied by the *Reimerdes* court neglects to evaluate whether the DMCA is overly restrictive on speech, but instead merely asks whether the regulation is effective. Under *Reimerdes*, the anti-trafficking provisions would be constitutional unless they fail an ad hoc analysis of whether the existence of the provisions is more effective than doing nothing, regardless of the extent to which they restrict speech.²¹¹

As the court correctly noted, the intermediate scrutiny test does not demand that the regulation be the *least* restrictive means available. Rather, according to the court, the *O'Brien* narrow-tailoring requirement, as interpreted by the Court in *Ward v. Rock Against Racism*,²¹² demands only that the regulation serve a substantial interest that would be achieved less effectively without the regulation.²¹³ True, the *Ward* Court did state that the narrow-tailoring requirement was satisfied where a "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."²¹⁴ However, the Court also qualified this holding by explaining that a

210. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

211. *See Reimerdes*, 111 F. Supp. 2d at 329–33. The reference to restrictions on the defendants' expression is scant. *See id.* at 335 ("the First Amendment interests served by the dissemination of DeCSS . . . are minimal.").

212. 491 U.S. 781 (1989).

213. *Id.* at 782–83.

214. *Id.* at 799.

regulation may not "burden substantially more speech than is necessary to further the government's legitimate interests."²¹⁵ Moreover, *Ward* and the precedents relied upon therein involved time, place and manner regulations such as noise or protest ordinances,²¹⁶ making the holding somewhat inapposite for a regulation applied to suppress the dissemination of a computer program. The *Reimerdes* court erred by reducing the intermediate scrutiny test to a question of whether the DMCA is necessary and effective and failing to consider whether the regulation "burdens substantially more speech than is necessary to further the government's legitimate interests."²¹⁷

Even if the mere effectiveness of a regulation were the test of its constitutionality, it is questionable if the anti-trafficking provisions measure up. First, although proponents of the DMCA argue that the anti-trafficking provisions are necessary to bring the United States into compliance with the WIPO treaties,²¹⁸ this argument begs the question as to whether the protections are really necessary to effectuate the interest of preserving copyright protections. True, digital works are extremely susceptible to piracy because the physical limitations associated with analog copying are almost nonexistent with digital works. However, copyright management systems are intended to artificially recreate those physical limitations. The plaintiffs' works are somewhat vulnerable in that perfect copies of their digital works can be made at little or no cost. However, such vulnerability is somewhat mitigated by their ability to employ technology like CSS to thwart copying.

CSS still presents a significant barrier to duplication in spite of the existence of DeCSS. As the court noted, the process of decrypting, converting and compressing the files on a DVD is quite laborious and may take on average a total of twelve hours and a considerable amount of manipulation. Although DeCSS does not cost anything to make copies in real dollars, making such copies and using the program require a significant time investment.

Moreover, although a significant risk may arise when movies, once decrypted, may be distributed on the Internet for free, the plaintiffs failed to produce any evidence that they had suffered any injury

215. *Id.*

216. *Id.*

217. *Id.*

218. One justification for the DMCA was to bring U.S. copyright law into line with the World Intellectual Property Organization (WIPO) Copyright Treaty and Performances and Phonograms Treaty. See 3 NIMMER, *supra* note 18, §§ 12A.01[B]; 12A.02[A]. These treaties require, *inter alia*, the adoption of "adequate legal protections" and "effective legal remedies" against circumvention of technological measures that protect copyrighted works from unauthorized access or use. *Id.* § 12A.01[B], at 12A-7.

resulting from this speculative risk. In fact, even a compressed movie file of 650 megabytes would take an inordinate amount of time to transmit over normal Internet bandwidths. The greatest threat to piracy is not from DeCSS, but rather from overseas factory operations that press unauthorized duplicate copies of DVDs.²¹⁹

Additionally, the actual harm to the plaintiffs' intellectual property interests by programs like DeCSS is speculative, at most. Although the *Reimerdes* court concluded that the continued existence of DeCSS represented a constant threat to the plaintiffs' intellectual property interests, the court was forced to admit that there was no direct evidence that the program had actually been used to make illegal copies of the plaintiffs' movies.²²⁰ The court justified the imposition of injunctive relief with the rather naked declaration that the potential for harm was virtually incalculable. However, no attempt was made to calculate the actual or potential damages, and it is equally possible that DeCSS presents only a *de minimus* risk of harm to the plaintiffs' interests.

The experience of the computer software industry illustrates how speculative the plaintiffs' alleged injury is. The software industry has managed to develop into one of the largest industries in the world in the absence not only of anticircumvention laws but also of the substantial technological copy protections that the plaintiffs enjoy. This is true despite the fact that computer software is subject to the same risk of zero-cost perfect copying. Although the software industry faces significant challenges in reducing losses to copyright infringement, it has managed to do so without additional governmental regulation.

The *Reimerdes* case is also illustrative of the impracticality of enforcing the DMCA. Once the author of DeCSS posted it on the Internet, it was available to anyone with an Internet connection. As a

219. See Anthony Kuhn, *Widespread DVD Piracy in China a Blow to Hollywood Movies: Trend Suggests That No Format Is Safe, And That There's A Limit To What The Film Industry Can Do To Protect Its Product*, L.A. TIMES, Aug. 31, 2000, at C1; see also, Jack Valenti, *Record Number of DVDs Seized in Single Raid in China*, Motion Picture Association of America Press Release (Apr. 27, 2000), available at <http://www.mpa.org/anti-piracy/press/index.htm> (last visited Mar. 6, 2001). Although there was no evidence adduced at trial as to the economic impact that DeCSS supposedly had on the plaintiffs' market for DVD sales and rentals, DVD sales are expanding rapidly. Owners of DVD players spent approximately \$4 billion on DVD movies in 2000, triple the sales in 1999, and their rental market share increased from 4% to 12% of total movie rentals. See Mike Snyder, *DVD popularity rivaling VHS*, CHI. SUN-TIMES 38, Feb. 27, 2001, § 2, available at 2001 WL 7220038. According to the Motion Picture Association of America, more than \$250 million in annual revenue is attributable to videotape piracy, but no comparative statistics are available for DVDs. See Motion Picture Association of America, *Anti-piracy*, available at <http://www.mpa.org/anti-piracy/index.htm> (last visited Mar. 6, 2001).

220. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 314 (S.D.N.Y. 2000).

result, taking down individual sites with the program was essentially pointless, except as a means of possibly intimidating and discouraging others from making the program available. By the time the plaintiffs filed suit, the genie was out of the bottle and no reasonable amount of litigation could put it back. Additionally, to the extent that the program is actually used to engage in piracy, the plaintiffs' best remedy is probably the one that existed prior to the advent of the DMCA: copyright infringement actions for direct and contributory infringement. This raises the important question of whether the anti-trafficking provisions are even capable of advancing the substantial interests that they putatively serve.

In order to avoid restrictions on speech and fair use, future courts should apply Section 1201(b)(1) only when there is direct evidence of copyright infringement attributable to the technology or when there is no evidence of any substantial non-infringing use of the technology. By reading the *Sony* doctrine into the DMCA, the inherent conflict between the trafficking provisions and Section 1201(c)(1) is resolved. Whether DeCSS is capable of *substantial* non-infringing use is unclear because the record is not adequately developed on these issues as they were not central to the resolution of the case.²²¹ Ultimately, Congress should amend Section 1201 to add a provision incorporating the *Sony* doctrine of substantial non-infringing use as an affirmative defense to anti-trafficking claims.

B. *The Ban On Linking To Sites With DeCSS*

The First Amendment concerns attending the ban against the posting of DeCSS are amplified with respect to the ban against linking. This section argues (1) that the *Reimerdes* court erred in holding that the defendants' linking to other DeCSS-containing web sites was the "functional equivalent" of disseminating DeCSS by posting it on their own web site; (2) that the court further erred by focusing solely on the expressive content of DeCSS, when the focus should have been on the injunction's effect of suppressing the content of the defendants' web site; and (3) that the errors were compounded by the court's application of the intermediate scrutiny standard of review to the suppression of the defendants' hyperlinks because the imposition of the injunction is unconstitutional even under intermediate scrutiny.

221. As noted above, because proof of copyright infringement is not an element of the anti-circumvention provisions, there was no effort by the plaintiffs to introduce evidence of actual copyright infringement by DeCSS users. Although there was some evidence that DeCSS could be used to decrypt DVD content to facilitate playback on Linux systems, the record is not sufficiently developed on that point to determine whether such use was substantial because the court rejected the defendants' *Sony* defense.

1. The Mechanics of Applying Section 1201 to Linking

Hyperlinks serve as essential elements of expression on the World Wide Web and are to a great extent what make the Web unique as a communication forum by providing seamless navigation between various web sites in order to obtain information. Tim Berners-Lee explains:

The Web was designed to be a universal space of information, so when you make a bookmark or a hypertext link, you should be able to make that link to absolutely any piece of information that can be accessed using networks. The universality is essential to the Web: it loses its power if there are certain types of things to which you cannot link.²²²

A hyperlink is a bit of code written in a language called Hypertext Markup Language. Hyperlink text is generally distinguishable from non-linked text by underlining and contrasting colors, or it is in the form of a graphic image. Imbedded in the link is a set of instructions that cause the user's computer to load the web page referenced in the link. Rather than having to type the address of the referenced site into the web browser, linking automates the process. Technically speaking, when a user clicks on a hyperlink, the user's browser reads the code, locates the referenced Universal Resource Locator (URL), and requests a copy of the page located at the referenced URL.²²³

In many ways, a hyperlink is analogous to a legal citation.²²⁴ Much like the function of a legal citation, which serves to alert the reader for the authority of a proposition and provides a source for additional information, imbedding a hyperlink within the content of text

222. Mark Sableman, *Link Law: The Emerging Law of Internet Hyperlinks*, 4 COMM. L. & POL'Y 557, 560 (1999) (quoting Tim Berners-Lee, *Realising the Full Potential of the Web* (based on a talk presented at the W3C meeting, London, Dec. 3, 1997)), available at <http://www.w3.org/1998/02/Potential.html>.

223. See Tsilas, *supra* note 3, at 85–86. The author states:

Hypertext links (often referred to simply as "links") are the highlighted text, pictures or logos (including banner advertisements) on the linking website that, when selected, access the linked-to web page. Technically, after a user selects a site by clicking on the text, picture or logo, the user's web browser reads the software code, finds the location on the Internet that matches the address and requests a copy of the web page. The computer hosting the linked web page sends the copy back to the user's browser. The browser on the user's computer reads the code of the copied web page and constructs the page according to the transmitted code so that the page appears on the user's computer screen. Access to the content of the linked-to website is confirmed by the display of its Universal Resource Locator ("URL"), which replaces the URL of the previous website on the top portion of the user's browser.

Id. (footnotes omitted).

224. See Amicus Brief of Openlaw Participants at 5, available at <http://eon.law.harvard.edu/openlaw/DVD/amicus.html> (last visited Mar. 12, 2001).

serves the function of alerting the reader that additional information on the subject matter is available at another virtual location. Beyond providing a reference, hyperlinks increase the efficiency of communication by “taking” the reader directly to the source of the information without the necessity of an additional input. In this way, links differ from a legal citation, in that the reader is automatically transferred to the location of the reference source. However, the same is true for some legal citations as well, as evidenced by services such as Westlaw and Lexis, which use hyperlinks to integrate legal citations.

The issue before the *Reimerdes* court was not whether the defendants’ activity was, as the court termed it, the “functional equivalent” to positing DeCSS, but whether the defendants’ linking constituted “offering, providing, or otherwise trafficking” in DeCSS.²²⁵ The activity of creating and maintaining a hyperlink defies the categorical description of offering, providing or trafficking in a technology in that the defendants lacked any direct control over the content of the web pages to which they linked. The extent to which a hyperlink to another site facilitated the dissemination of DeCSS depended on at least two additional factors: (1) whether the owner of the other site made DeCSS available for download and (2) with the exception of links automatically starting a download, whether the individual user made the decision to actually download. As a result, it stretches credulity to suggest that the defendants were providing, offering, or trafficking in anything other than pure information.

The providing of mere information, however, does not fall within the proscription against trafficking in circumvention technology. At most, the defendants were providing references to other sites that provided, offered, or trafficked in DeCSS. However, the hyperlink does not itself “provide” the particular content referred to; it instead creates a cross-reference. This concept is amply demonstrated by the fact that the *New York Times* and *CNN* linked to the *2600.com* website and others posting DeCSS.²²⁶ To argue that *2600.com* was providing or offering DeCSS by virtue of linking would be to contend that the *New York Times* and *CNN* were as well.

The extension of the injunction to prohibit linking might find some justification if the linking is viewed as a sort of “contributory

225. See 17 U.S.C. § 1201(a)(2), (b)(1).

226. See, e.g., Carl S. Kaplan, *Assessing Linking Liability*, N.Y. TIMES (Sept. 8, 2000), available at <http://www.nytimes.com/2000/09/08/technology/08CYBERLAW.html>. The article provides a link to the defendants’ web site, as did other articles written by Mr. Kaplan prior to the injunction forcing the defendants to take down their links. Thus, *New York Times* was, in effect, aiding in the dissemination of DeCSS while attempting to report on the case, because DeCSS was available for download at the *2600.com* site.

trafficking” activity. The defendants, after having been forced to remove DeCSS from their own web site following the preliminary injunction, encouraged others to create “mirror sites” that made DeCSS available for download. It can be argued then that the defendants materially contributed to the dissemination of DeCSS to the extent that they had knowledge of the existence of DeCSS on the other sites, actively encouraged other sites to post DeCSS, and encouraged visitors of their web site to utilize the hyperlinks on the *2600.com* web site to obtain copies of DeCSS. On this view, the defendants can be said to have materially contributed to the trafficking of a circumvention device, similar to contributory copyright infringement.

Contributory copyright infringement occurs when a person, “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.”²²⁷ The doctrine of contributory infringement is based on the common law tort theory of joint enterprise liability.²²⁸ Joint enterprise liability “rests upon an analogy to the law of partnership,” requiring a relationship involving a “common purpose” and “mutual right of control” over the activity causing the harm.²²⁹ Although there might have been a common purpose between the defendants and the other web site owners to facilitate the distribution of DeCSS, there is no indication that the defendants had any control, direct or indirect, over those other sites. Thus, the court’s decision lacks support by analogy from either contributory infringement or enterprise liability principles.

The strongest argument lies with respect to links that resulted in the “automatic” download of DeCSS, and the court’s characterization of these links as being the functional equivalent to posting DeCSS is fairly persuasive. However, the fact remains that once the defendants took down their own DeCSS posting, the program was no longer available at a site within their control. Even with links resulting in an automatic download of the program, the program itself is resident on the third-party web site, and not on the defendants’. If the third-party web site hosting the program were to remove it, as many apparently did subsequent to the injunction against the defendants, the hyperlink would result in nothing more than an error message. At best, the plaintiffs were aiding other parties in the dissemination of DeCSS by providing information, which does not appear to be a violation of Section 1201.

227. 3 NIMMER, *supra* note 18, § 12.04[A][2], at 12-72 (citing *Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (internal quotation marks omitted)).

228. *See id.* § 12.04[A][2].

229. *See* WILLIAM L. PROSSER, *LAW OF TORTS*, 475-79 (4th ed. 1971).

With regard to links referring to a page with an additional hyperlink that resulted in the download of the program or links to pages with content other than DeCSS, the causal connection between the link and the dissemination of DeCSS is even more attenuated. In those instances, there is at least one intermediate step between a web surfer's reading of the link and his or her actual downloading of the program. In any case, distinguishing between different types of links, as the court did, merely obscures the issue because under no circumstances can the act of linking reasonably be held to be the same as that of posting a computer program.

By distinguishing between permissible and impermissible links, the court is imputing responsibility based on the intent of the linking party. This begs the question, however, of whether it is proper to attribute motive and intent to establish derivative liability for linking. While derivative liability for linking is not by any means a settled legal question, the *Reimerdes* court's rule seems to be a departure from the view taken by another court in a case involving similar circumstances, as discussed below.

2. First Amendment Issues

The issues pertaining to "linking liability" and First Amendment freedom are a relatively unsettled area of law.²³⁰ However, two recent cases shed some light on the divergent paths that courts have taken. In another DVD case, *DVD Copy Control Ass'n v. McLaughlin*,²³¹ a California Superior Court refused to extend a preliminary injunction to bar linking to sites containing DeCSS code.²³² *McLaughlin* was a case brought against a defendant shortly before *Reimerdes* on very similar facts, but under the trade secret misappropriation theory, rather than under the DMCA.²³³ Although the *McLaughlin* court granted the plaintiffs' request for a preliminary injunction barring the posting of DeCSS, it refused to extend the injunctive relief to include linking, citing concerns that "[l]inks to other websites are the mainstay of the Internet and indispensable to its convenient access to the vast world of information. A website owner cannot be held responsible for all of the content of the sites to which it provides links."²³⁴ The court

230. See Richard Raysman & Peter Brown, *Recent Linking Issues*, N.Y.L.J. 3, Feb. 8, 2000, at 1.

231. No. CV 786804, 2000 WL 48512 (Cal. Super. Ct. Jan. 21, 2000) (unpublished order granting preliminary injunction).

232. *Id.* at *4.

233. *Id.* at *1-2.

234. *Id.* at *4; see also *ACLU v. Reno*, 929 F. Supp. 824, 836-37 (E.D. Pa. 1996), *aff'd*, *Reno v. ACLU*, 521 U.S. 844 (1997), ("[L]inks from one computer to another, from one docu-

went on to explain that such an injunction to cover linking was unnecessary because "the Court has enjoined the posting of the information in the first instance."²³⁵

In contrast, the Federal District Court for the District of Utah held in *Intellectual Reserve Inc. v. Utah Lighthouse Ministries, Inc.*²³⁶ that the First Amendment did not pose a substantial bar against an anti-linking injunction in a copyright infringement case.²³⁷ The court found that the act of linking to another site with the knowledge that it contained infringing materials was sufficient to establish a prima facie case of contributory infringement.²³⁸ The court dismissed the defendants' First Amendment challenge with minimal discussion, stating "the First Amendment does not give defendants the right to infringe on legally recognized rights under the copyright law."²³⁹ *Reimerdes* is distinguishable from *Intellectual Reserve*, however, to the extent that in the latter case, there was evidence of both actual and contributory copyright infringement, activities that have historically been accorded no First Amendment protection anyway.²⁴⁰

The suppression of the defendants' hyperlinks has a more profound effect on First Amendment rights than does suppression of posting because of the core importance of links to the structure of the Internet. The etiology of the court's error lies to a large extent in its excessive focus on functionality. Although the functional component of DeCSS is relevant with respect to its evaluation under the *O'Brien* standard, the functionality of links should have little to do with justifying their suppression. DeCSS's functionality is directly related to the alleged harm it causes. However, the functionality of the defendants' links to sites with DeCSS relates only indirectly to the alleged harm. The defendants' links did not increase the risk of dissemination any more than plain-text references would. Instead, they simply made the expression of information more efficient by obviating the need for users to manually enter a URL address. The fact that these links

ment to another across the Internet, are what unify the Web into a single body of knowledge, and what makes the Web unique.").

235. *McLaughlin*, 2000 WL 48512, at *4. The *Reimerdes* court, however, came to the opposite conclusion, finding that while the plaintiffs could enjoin domestic defendants, the plaintiffs would lack jurisdiction to go after overseas defendants. It was felt that a ban against linking would help prevent domestic computer users from obtaining DeCSS from those overseas sources, and this was the primary rationale in support of the anti-linking injunction. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 340 (S.D.N.Y. 2000).

236. 75 F. Supp. 2d 1290 (D. Utah 1999).

237. *Id.* at 1295.

238. *Id.*

239. *Id.*

240. *Id.* at 1293.

made the defendants' expression more efficient should not provide a basis for the suppression of the links. If anything, the efficiency-enhancing attributes of hyperlinks should be a factor weighing against the suppression.

a. *Level of Scrutiny*

Although the DMCA is a facially content-neutral regulation,²⁴¹ Congress was at least cognizant of the potential for unwarranted restrictions on speech. Congress's awareness is evidenced by the language that it included in Section 1203(c) warning that any impositions of the provisions contained therein are subject to the First Amendment prohibition against prior restraints.²⁴² Conceptually, if not legally, the imposition of an injunction in *Reimerdes* prohibiting the defendants from linking to other DeCSS-containing sites was quintessentially content-based even though the DMCA itself is content and viewpoint-neutral. The plaintiffs desired the injunction precisely because of the content of the message expressed: that DeCSS was available for download at the linked sites. The court noted that the plaintiffs' request "obviously stems in no small part from what the defendants themselves have termed their act of 'electronic civil disobedience.'"²⁴³ The court went on to state that the defendants' linking was "an attempt to defeat the purpose of the preliminary injunction by (a) offering the practical equivalent of making DeCSS available on their own web site by electronically linking users to other sites still offering DeCSS, and (b) encouraging other sites that had not been enjoined to offer the program."²⁴⁴ Because the purpose of the injunction was to prohibit the defendants from engaging in a course of expressive conduct, the injunction should be evaluated carefully in order to ensure that the defendants' right to free expression was not unduly interfered with in order to achieve the intended purpose of the DMCA.²⁴⁵

241. Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 413 (1999). Interestingly, while the *Reimerdes* court cited this source in support of the proposition that the DMCA is content-neutral, 111 F. Supp. at 329, Professor Benkler actually filed an amicus brief against the imposition of an injunction in this case. See Brief of Amicus Curiae Professor Yochai Benkler, Universal Studies, Inc. v. Corley (No. CV 0277) (filed 2000) (in Support of Defendant's Cross-Motion to Vacate the Preliminary Injunction), available at <http://eon.law.harvard.edu/openlaw/DVD/filings/NY/0612-benkler-amicus.html> (last visited Nov. 21, 2000). Professor Benkler's article provides an excellent critical discussion of the history and possible First Amendment implications of the DMCA.

242. 17 U.S.C. § 1203(c).

243. *Reimerdes*, 111 F. Supp. 2d at 324.

244. *Id.* at 324-25.

245. See Brief of Amicus Curiae Openlaw Participants, *Corley*, (No. Civ 0277) (in support of defendants arguing that injunction against linking constitute a content-based restriction of

However, under current free speech jurisprudence, “[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”²⁴⁶ In making this determination, “[t]he government’s purpose is the controlling consideration,” and if the regulation fulfills “purposes unrelated to the content of expression it is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”²⁴⁷

Under these standards, the DMCA is a content-neutral regulation because its restriction on expression can be “justified without reference to content of the regulated speech.”²⁴⁸ The principal purpose of the DMCA generally, and the anti-trafficking provisions specifically, is to protect copyright holders from infringement by providing them with legal protection supplementing their use of encryption technology, and the Act does so without reference to the content of any expression.²⁴⁹ The *Reimerdes* court was correct in applying the intermediate scrutiny standard of review as the DMCA restricts the defendants’ expressive activities substantially, but only as an unintended consequence of its regulatory purpose. The rationale is that the DMCA does not intentionally discriminate against particular types of speech, but instead imposes a blanket prohibition on certain conduct that may incidentally restrict expression. However, the court erroneously concluded that an injunction barring hyperlinks satisfied this intermediate level of scrutiny.

b. The Injunction and Intermediate Scrutiny

A content-neutral regulation that incidentally affects expression will be upheld 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 is essential to the furtherance of that interest.”²⁵⁰ A content-neutral regulation generally meets the requirement of narrow tailoring if it achieves an important interest “that would be achieved less effectively absent the regulation.”²⁵¹

speech), available at <http://eon.law.harvard.edu/openlaw/DVD/amicus.html> (last visited Nov. 20, 2000).

246. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

247. *Id.*

248. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984).

249. See Benkler, *supra* note 241.

250. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

251. *Id.* (quoting *Ward*, 491 U.S. at 799).

There are a number of factors weighing in favor of finding a substantial governmental interest served by the anti-trafficking ban as applied.

First, as discussed above, copyright law furthers the important interest of creating a lucrative “marketplace of ideas” for authors to exploit the economic value of their work, and the anti-circumvention and trafficking provisions are a necessary and appropriate means to further this end, by making the digital and online environment a safe place to conduct business.²⁵² Second, the benefits that accrue from the multi-billion-dollar copyright and information technology industry are an essential component of the national economy.²⁵³ Finally, the government has an interest in maintaining the rule of law, and allowing electronic piracy to go unchecked would substantially undermine this interest.

On the other hand, the First Amendment concerns pertaining to the prohibition against the posting of DeCSS, as discussed above in Section III(A)(2), are equally relevant to the linking issue. As explained in that section, there is a genuine question as to whether the anti-trafficking provisions, as applied to DeCSS, exceed Congress’s authority under the Copyright and Necessary and Proper Clauses due to the provisions’ incompatibility with traditional notions of fair use. There is also an issue as to whether the application of Section 1201 to linking serves an important or substantial interest, given that there is no evidence of any actual injury to the plaintiffs and the risk of injury is speculative at best. Even if the application of the anti-trafficking provisions to linking serves a substantial governmental interest, the third prong of the *O’Brien* standard is even more difficult to be sustained with respect to linking.

There are three fundamental errors with respect to the *Reimerdes* court’s suppression of the hyperlinks to DeCSS-containing sites. First, the court’s use of functionality to justify treating linking as a proxy for posting unduly interfered with the defendants’ right to free expression because the fact that hyperlinks are a more efficient mode of communication does not provide a basis for their suppression. Second, the ban on linking fails to meet the alternative formulation of the intermediate scrutiny test in that it is not tailored to achieve the governmental interest more effectively than the absence of an injunction.

The court’s focus on the functionality of links fails to provide an adequate basis for their suppression. In the court’s view, the hyper-

252. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 330 (S.D.N.Y. 2000); see also discussion *supra* Section III(A)(2).

253. *Reimerdes*, 111 F. Supp. 2d at 330.

links to other DeCSS-containing sites was merely a proxy for posting DeCSS directly on the *2600.com* web site. The court erred by attributing far too much weight to the functionality of the link and by neglecting the link's expressive content. True, hyperlinks enhance speech by making navigation between web sites more efficient. Beyond this speech-enhancing difference, however, there is little difference between a hyperlink and a plain-text reference. As the Supreme Court noted, the functionality of computer code does not provide a basis for qualifying First Amendment protection.²⁵⁴

First, the fact that the defendants chose to publish the addresses for DeCSS-containing web sites using hyperlinks rather than plain text is irrelevant because the putative harm that the court was seeking to prevent was the dissemination of DeCSS, not linking itself. To the extent that referring users to other DeCSS-containing sites represented a substantial risk to the plaintiffs' interests, such risk exists whether the URL addresses for those sites are communicated via a hyperlink, plain text, or even via word of mouth. Certainly, the court would not prevent the defendants from orally communicating alternative sources for DeCSS. The court was also apparently unwilling to prohibit the defendants from posting the URL addresses for other DeCSS sites in plain, non-hyperlink text, as evidenced by the fact that such a list still exists on the defendants' web site.

Second, this illusory distinction between plain-text and hyperlink-enhanced speech departs from settled First Amendment law in that the Supreme Court has made clear that the functionality of code or the Internet provides no basis for qualifying First Amendment protection.²⁵⁵ Furthermore, the existence of inferior, alternative modes of expression, such as plain-text references, does not provide a basis for suppression.²⁵⁶ If the court is justified in suppressing the defendants' expression, that justification must rest on its power to suppress the content of the expression, regardless of its form.

The injunction against linking actually restricts the defendants' speech more than is necessary to achieve the interest of protecting the plaintiffs' intellectual property rights. This is because the injunction deprives the defendants of their preferred method of expression. In analyzing the extent to which the injunction imposes on the defendants' First Amendment rights, the links must be considered in terms of the overall message that they were attempting to express. The links

254. See *Reno v. ACLU*, 521 U.S. 844, 845 (1997).

255. See *id.*

256. See, e.g., *United States v. Playboy Entm't Group*, 529 U.S. 803, 803-05 (2000) (holding that the fact that the transmission of adult programming was burdened rather than prohibited provided no basis for qualifying First Amendment scrutiny).

at issue in the *Reimerdes* case were contained in a page of the defendants' web site entitled "News Archive."²⁵⁷ This archive can accurately be characterized as symbolic speech advocating defiance of the injunction barring the defendants and others from posting DeCSS. Under a banner declaring, "Stop the MPAA," the defendants stated, "We have to face the possibility that we could be forced into submission. For that reason, it's especially important for as many of you as possible, all throughout the world, take a stand and mirror these files."²⁵⁸ This page remains in existence today and includes a lengthy list of the URL addresses for sites that purport to offer DeCSS for download in plain, non-hyperlink text.²⁵⁹ It seems clear that the defendants' use of the hyperlinks, while facilitating the dissemination of DeCSS, was an integral aspect of the defendants' expressive message. In essence, the defendants were expressing the view that DeCSS should not be subject to regulation, and the hyperlinks provided a reference amounting to the effect of "see this web site for additional information, including a copy of DeCSS." Moreover, the injunction entirely prohibits the defendants from linking to several hundred web sites solely on the basis that DeCSS may exist on these sites. This forecloses the defendants from communicating by linking with those sites, regardless of whether the purpose in doing so is to disseminate DeCSS.

Finally, the injunction fails to "promote a substantial governmental interest that would be achieved less effectively absent the regulation."²⁶⁰ The governmental interest of protecting against copyright infringement is not served any better by an injunction banning linking than it would be without such an injunction. By the time the *Reimerdes* case was decided, DeCSS was available anywhere in the world via the Internet. The court even conceded that an injunction against linking would be a less effective alternative than obtaining injunctions directly prohibiting the other sites from posting DeCSS.²⁶¹ The court's sole rationale for the linking injunction was that it would prevent domestic Internet users from accessing DeCSS on foreign web sites, over which the plaintiffs would not otherwise be able to obtain

257. *Reimerdes*, 111 F. Supp. 2d at 340; see also 2600 News, The Hacker CSC Quarterly, *News Archives*, available at <http://www.2600.com/dvd/docs/>.

258. *Reimerdes*, 111 F. Supp. 2d at 313.

259. See 2600 News, The Hacker CSC Quarterly, *News Archives*, available at <http://www.2600.com/news/1999/1227-help.html> (last visited Mar. 14, 2001). Obviously, a reader of this web page can merely "cut" the text of the URL and "paste" it onto the address toolbar of their browser in order to achieve the same effect as a hyperlink. This fact makes the efficacy of the injunction against linking questionable.

260. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

261. See *Reimerdes*, 111 F. Supp. 2d at 340; cf. *McLaughlin*, 2000 WL 48512, at *4.

jurisdiction.²⁶² This ignores the facts that the 2600.com web site was merely a conduit to those overseas sites and that they could and can still be easily located by entering the search string “DeCSS” into any search engine. Whatever effect the injunction might possibly have had on minimizing the spread of DeCSS would have been so minimal as to be of almost no constitutional significance and certainly did not justify the substantial burden placed on the defendants’ expression.

c. The Chilling Effect on Linking

The *Reimerdes* court recognized the potential chilling effect resulting from a ban on linking, noting that the imposition of “strict liability on a web site operator for the entire contents of any web site to which the operator linked therefore would raise grave constitutional concerns”²⁶³ Although the court acknowledged these First Amendment concerns, the legal standard it created is inadequate to prevent a chilling effect on linking. The court’s adoption of a legal standard similar to that used in defamation cases is a novel approach, but this approach ultimately causes more problems than it solves and is insufficient to cure the defects noted above.

The court’s rule does raise the evidentiary bar to minimize the chilling effect on linking because the ruling applies only to persons who knowingly and intentionally facilitate in the trafficking of a circumvention technology. Any person engaged in such an activity should be sufficiently on notice, or should know, that they are engaged in unlawful conduct. Thus, like the “actual malice” requirement for public figure defamation liability, this element of scienter places a strong limitation on the scope of the rule. Furthermore, a requirement of proof by clear and convincing evidence provides an additional safeguard against improper issuance of injunctions.

However, the analogy between defamation and linking is somewhat inapposite because linking to circumvention technology does not involve the same sort of speech at issue in defamation cases. Liability for defamation requires proof of the publication of a falsehood. As a general matter, false and defamatory statements are not accorded full First Amendment protection.

By comparison, the linking to a site containing DeCSS involves no falsity; instead, under the *Reimerdes* rule, the critical issue is whether the defendant engaged in linking in order to disseminate illegal circumvention technology. Unlike defamation, where the actual publication of the falsehood is direct and central to the injury, it is the

262. See *Reimerdes*, 111 F. Supp. 2d at 340.

263. *Id.*

potential effect produced by the link, rather than the link itself, that is the cause of the injury. Not only does the link itself produce no direct injury to the plaintiffs' interests, the dissemination of DeCSS produces no direct harm because the program is harmful to the plaintiffs' copyright interests only when it is actually used to engage in infringement. Therefore, the threat of harm attending the linking to DeCSS-containing sites is much more attenuated than that attending the publication of libelous statements. In this way, linking is treated much like the utterance of "fighting words" or other speech that is accorded minimal scrutiny not because of its content per se, but because its relative expressive value is substantially outweighed by the "clear and present danger" presented by its utterance. On this rationale, the *Reimerdes* rule might be justified if the interests sought to be protected are sufficiently proximate and serious, but as explained above, they are not.

The *Reimerdes* court concluded that the defendants linked to other sites in an effort to encourage broad dissemination of DeCSS, thereby bringing their activity within the parameters of its newly created rule. The problem with this rule is that it seems to provide much more protection against chilling speech than it actually does. Even though the rule adequately raises the evidentiary bar, the threat of lawsuits and injunctions still exists. Faced with the expense and uncertainty associated with litigating the issues of knowledge and intent to disseminate, web site operators may simply choose to remove links rather than risking litigation. Moreover, a rule such as this, if applied broadly to linking liability, will increase the transaction costs associated with linking by necessitating investigation of the linked-to sites to ferret out any possible illegal content because merely disclaiming responsibility for off-site content may not be sufficient to avoid litigation and eventual liability. In sum, while the court's rule may make it more difficult for plaintiffs to obtain anti-linking injunctions, it is not likely to reduce the chilling effect that the threat of such suits imposes.

V. CONCLUSION

At the time of writing, the judgment in *Universal City Studios, Inc. v. Reimerdes* is being appealed to the Second Circuit Court of Appeals. The defendants-appellants are asserting that the DMCA, as applied, violates the First Amendment.²⁶⁴ An impressive array of amici have emerged in support of overturning the trial court judg-

264. See Appellant's Brief, *Universal City Studios, Inc. v. Reimerdes* (No. 00-9185) (2nd Cir. filed Sep. 18, 2000).

ment, including the ACLU, numerous prominent legal scholars, computer scientists, and so-called "fair use interests."²⁶⁵

Professors Lawrence Lessig and Yochai Benkler joined on a brief arguing, inter alia, that the DMCA, as applied, unconstitutionally restricts free speech and fair use.²⁶⁶ Although Lessig and Benkler assume that the appropriate standard for review is intermediate scrutiny, the ACLU maintains that the appropriate standard for review is strict scrutiny.²⁶⁷ In addition to the fair use and free speech arguments made at trial and on appeal by the defendants, a group of law professor *amici* suggest that the DMCA is not a valid exercise of Congress's power under the Copyright or Commerce Clauses to the extent that the Act exceeds the grants of power under those clauses and conflicts with the First Amendment.²⁶⁸

The plaintiffs-appellees are to some extent looking a gift horse in the mouth because they are suggesting that the DeCSS code does not deserve any First Amendment scrutiny.²⁶⁹ They too have substantial allies in support of the lower court decision. Not only has a group of copyright industry allies filed an *amicus* brief in support of the plaintiffs,²⁷⁰ but the Attorney General has also intervened on behalf of the United States in support of the application of the DMCA.²⁷¹

To some extent, the trial court ruling may have been an expected consequence of the defendants' so-called "electronic civil disobedience." Rather than being viewed as a media outlet disseminating information, Mr. Corley and his web site were viewed as part of a criminal hacker culture. The question is whether the viewpoint of a particular defendant is at all relevant to the application of a statute that even the court agreed has some impact on speech and a significant impact on traditional notions of fair use. At least as a matter of principle,

265. A complete list of links to the *amicus* briefs is available at <http://eon.law.harvard.edu/openlaw/DVD/> (last visited Mar. 13, 2001).

266. See Brief of Amici Curiae Professors Yochai Benkler and Lawrence Lessig, *Reimerdes* (No. 00-9185), available at <http://cyberlaw.stanford.edu/lessig/content/testimony/dvd/dvd.pdf> (last visited Mar. 2001) (in Support of Appellant).

267. See Brief of Amici Curiae ACLU et al. at 7, *Reimerdes* (No. 00-9185), available at <http://www.aclu.org/court/corley.pdf> (last visited Mar. 14, 2001).

268. See generally Amicus Curiae Intellectual Property Law Professors, *Reimerdes* (No. 00-9185) (Supporting Reversal in Support of Defendants-Appellants), available at http://www.eff.org/IP/Video/MPAA_DVD_cases/20010126_ny_lawprofs_amicus.html (last visited Mar. 14, 2001).

269. See Plaintiffs-Appellees' Brief, *Reimerdes* (No. 00-9185), available at <http://cryptome.org/mpaa-v-2600-bpa.htm>, (last visited Mar. 14, 2001).

270. See Brief of Amici Curiae Recording Indus. Ass'n of America (RIAA) et al., *Reimerdes* (No. 00-9185), available at <http://www.mpa.org/Press/DeCSSFinalAmicubrief.htm> (last visited Mar. 14, 2001).

271. See Brief of Intervenor United States of America, *Reimerdes* (No. 00-9185), available at <http://cryptome.org/mpaa-v-2600-usa.htm> (last visited Mar. 14, 2001).

the Constitution has never permitted disparate treatment on the basis of viewpoint.

Two fundamental premises emanate from the *Reimerdes* decision. First, computer code constitutes speech that deserves some level of First Amendment protection. Second, even though computer code constitutes “protected speech,” making computer code available on the Internet for dissemination may, under certain circumstances, be illegal. It is difficult to disagree with these high-level generalities. To say that computer code is not speech for First Amendment purposes would be akin to saying that English is protected speech, but Latin is not. Likewise, to suggest that the government is powerless to regulate code because code by definition constitutes speech, regardless of the consequences, is an invitation to anarchy. The question is how far code can be regulated without violating traditional First Amendment freedoms.

If the *Reimerdes* judgment is upheld, the clear message is that traditional fair use principles will be undermined because the users of digital works will be subject to the copyright holders’ control as to what uses may be made of their work, regardless of whether such control is granted to the holder under copyright law. Although the impact with respect to DVDs may not appear extensive, it will become much more prevalent as traditional media such as books, newspapers, and entertainment are increasingly converted into digital and online formats. Presently, one wishing to make limited copies from a book or periodical may do so under traditional fair use rules. If the particular work is in digital form and protected by a copyright management system, however, a fair use copy could only be made to the extent that the copyright holder permitted it. This sort of control distorts the balance between copyright and free expression. If copyright is truly the “engine of free expression” and fair use is essential to balance the interests of the copyright holders against the public interests that copyright law is intended to serve, then any attempt to restrict fair use beyond its traditional parameters should be viewed as an unconstitutional exercise of power under the Copyright Clause.

The imposition of the injunction against linking raises grave constitutional concerns. The Internet is becoming a substantial medium for free expression, in addition to its commercial applications. Any restriction on hyperlinking should be reviewed very carefully and should be applied only when truly necessary to achieve an interest of a high order. In the *Reimerdes* case, the trial court erred by focusing too much on the functionality of hyperlinks and not enough on the nature and extent of the restrictions placed on the defendants’ free expres-

sion. With respect to links, the attribute of functionality is what makes the Internet unique as an expressive medium because linking makes communication more efficient. The efficiency of a mode of communication should never be the test for its proscription.

