BRIEF OF PROFESSORS
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AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

The undersigned respectfully submit this brief *amicus curiae* in support of Appellant.

Preliminary Statement

CSS is a technical scheme designed to prevent copying of DVD movies. DeCSS is a software tool intended to disable CSS under certain circumstances. The lower court held that while CSS robs users of "the First Amendment protections . . . embodied in the . . . latitude for scholarship and comment traditionally afforded by fair use," *Harper & Row Publishers, Inc., v. Nation Enterprises*, 471 U.S. 539, 560 (1985) ("*Harper & Row*"), Section 1201(a)(2) of the Copyright Act, introduced by the Digital Millennium Copyright Act ("DMCA") (the "antidevice provision") could properly be applied to prohibit defendant Corley's distribution of DeCSS.

As applied by the lower court, the antidevice provision is unconstitutional. Based on the lower court's factual findings of the extent to which CSS burdens traditional rights of fair use, we respectfully submit that the antidevice provision cannot be applied to a tool—DeCSS—that permits users to reclaim these First Amendment protections embodied in traditional copyright law. As the court below

found, "[b]y prohibiting the provision of circumvention technology, the DMCA fundamentally altered the landscape." *Universal City Studios, Inc. v. Reimerdes,* 111 F. Supp. 2d 294, 323 (S.D.N.Y. 2000). This legislative "re-landscaping" effectively eliminates precisely those contours of traditional copyright law that allow it to dwell in harmony with the First Amendment. This Congress may not do.

The court below found that "the CSS encryption of DVD movies, coupled with the characteristics of licensed DVD players, limits [fair] uses absent circumvention of CSS." *Id.,* at 111 F. Supp. 2d at 338. Indeed, "certain uses that might qualify as 'fair' for purposes of copyright infringement—for example, the preparation by a film studies professor of a single CD-ROM or a tape containing two scenes from different movies in order to illustrate a point in a lecture on cinematography…—would be *difficult or impossible absent circumvention* of the CSS encryption." *Id.*, at 322 (emphasis added). Surprisingly, although the court properly acknowledged that the fair use doctrine "has been viewed by courts as a safety valve that accommodates the exclusive rights conferred by copyright with the freedom of expression guaranteed by the First Amendment," *id.*, and found that "Congress elected to leave technologically unsophisticated persons who wish to make fair use of encrypted copyrighted works without the technical means of doing so," *id.*, at 324, it set aside these conclusions to hold that the antidevice provision did not violate the First Amendment.

Thus, even though the antidevice provision effectively eliminates fair use for most users of digitized works, the court concluded that the DMCA is congruent with the First Amendment. It reached this surprising result because it erroneously treated the Appellant's challenge as an overbreadth challenge, 111 F. Supp. 2d at 336-37. The court reasoned that since Corley himself has not been frustrated by CSS in, for example, quoting from a video in instructional materials, his argument must raise the rights of others. Under its overbreadth analysis, this led the court to adopt an unduly restrictive view of the implications of its findings about the effects of CSS on fair use for the constitutionality of the antidevice provision.

This case, however, does not raise an overbreadth challenge. Corley raises his own right to distribute materials that the DMCA cannot constitutionally prohibit. He claims that the speech-restrictive implications of banning DeCSS—given the particular characteristics of DeCSS and of the particular protection scheme it decrypts—render the prohibition of DeCSS unconstitutional. If DeCSS cannot constitutionally be prohibited by the DMCA, then Corley cannot constitutionally be prohibited from distributing it.

By contrast, an "overbreadth" challenge is one in which "an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not

before the court—those who desire to engage in legally protected expression." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). But again, Corley complains that his own freedom has been restricted, not the speech of some third party. His objection no more raises the rights of others than would the objection of a distributor of a constitutionally-protected radical pamphlet prosecuted for distributing a pamphlet that he did not himself write or read.

Given the lower court's finding that prohibiting DeCSS made it "difficult or impossible" for technically unsophisticated users to quote directly from as central a cultural medium as film, the antidevice provision cannot be applied to bar the dissemination of DeCSS unless doing so would further an important government interest by means no more restrictive than necessary. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) ("*Turner I*").[1] The existence of a statutory scheme that relies on less restrictive copy-protection mechanisms to solve a similar problem in the context of digital audio recording devices, 17 U.S.C. §1001 *et. seq.*, a scheme that Congress failed to consider, is strong indication that a less restrictive means that Congress could have used does exist. See *Denver Area*

[1] Amici express no opinion here as to the position taken by the appellant and other amici that the proper standard of review is strict scrutiny, because the antidevice provision is a content-based regulation of speech—software. Our analysis assumes that the antidevice provision will be judged by the more lenient standard that the court below used—that which is applicable to content-neutral speech regulations—and explains why even under that standard the anti-device provision of the DMCA is unconstitutional as applied to prohibit DeCSS. Our argument applies *a fortiori* if the Court accepts the proposition that the proper standard is strict scrutiny.

Educational Telecommunications Consortium v. FCC, 518 U.S. 727, 757 (1996) ("*Denver*"). Ignoring this less restrictive means, Congress instead chose to extend absolute legal protection even to the most extreme copy-protection mechanisms—like CSS. Such mechanisms absolutely eliminate fair uses of works embodied in digital media, and can even prevent access to public domain materials embodied in such media. This Congress cannot do consistent with its obligation under the First Amendment to refrain from burdening speech unnecessarily.

Interests of Amici

Amici submit this brief as professors who specialize in the relationship of information policy and intellectual property to constitutional law. We write because we believe our expertise may aid the court in considering a particular perspective on this case. We focus primarily on the effects of this ruling not on computer engineers or on web-based publishers, but on the millions of regular users who are not computer professionals, and whose ability to express themselves in creative and meaningful ways is severely and unnecessarily undermined by the antidevice provision as applied by the court below. We have no personal interest in the outcome of this case. The parties have consented to our filing this brief.

Argument

I. The Constitutional Standard of Review

As the court below properly found, the antidevice provision of the DMCA burdens speech. From the perspective of users, however, this burden is not censorial—the feminist film critic and the fundamentalist preacher are equally disabled by the provision from illustrating their criticisms of Hollywood.[2] Because it burdens speech without discrimination, *amici* maintain, and the court below agreed, that the provision must be tested against the standard for content neutral regulation of speech set by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367 (1968), and more recently restated in *Turner I*.

The most significant Supreme Court case to articulate the borders between copyright law and the First Amendment is *Harper & Row*. In *Harper & Row*, the Supreme Court was asked to create a special "first amendment" exception to copyright law for news reporting that used copyrighted materials. The Court refused. There was no need, the Court held, to create any *special* First Amendment exception to the scope of copyright law "[i]n view of the First Amendment

[2] From the perspective of computer professionals and web-publishers, the antidevice provision as applied here to prohibit linking and source code distribution, among other things, could be characterized as content-based regulation of their professional language. From this perspective, the antidevice provision prohibits speaking in this language about how one might decrypt copyrighted materials, but not, for example, about how to decrypt employee files stored on employers' systems. Such a differentiation based on Congress' decision that the former is a more dangerous use of professional language than the latter should be subject to strict scrutiny.

protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use. . . .” 471 U.S. at 560. First Amendment interests limiting the scope of copyright are, in effect, built into copyright law already. And thus, the Court saw no need to provide a second line of First Amendment defense.

Harper & Row simply underscored the Supreme Court’s express reliance upon these core privileges that copyright law retains for users—in particular fair use and access to materials in the public domain like facts and ideas—to allow it to dwell in peace with the First Amendment. *Cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582-83 (1994) (“*Campbell*”) (evaluating eligibility of a potentially infringing work to be treated as a parody and a fair use by quoting with approval the statement that “First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed,” quoting *Yankee Publishing Inc. v. News America Publishing, Inc.*, 809 F. Supp. 267, 280 (SDNY 1992) (Leval, J.)). This understanding of the relationship between First Amendment interests and “fair use” was acknowledged by the district court below. 111 F. Supp. 2d at 322.

The issue in this case is whether Congress, through the enactment of the antidevice provision as applied to the facts in this case, has so limited the practical

possibility of making privileged use of digitized materials that it undermines "the First Amendment protections . . . embodied in the Copyright Act. . . ." to the point of rendering it unconstitutional.

Content-neutral laws that burden speech must (1) serve an important government interest (2) in a manner no more restrictive than necessary. *Turner I*, 512 U.S. at 662. To fulfill the first prong of the test, it must be shown "that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.*, at 664. The second prong requires that "the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.*, at 662.
The lower court's findings suggest that the interest involved in this case is to secure for the Hollywood studios the revenue stream they derive from the home distribution market, while moving from an analog distribution medium — videotape — to a digital distribution medium — DVD. 111 F. Supp. 2d at 309-11. The state interest in furthering this private interest is to implement one half of the copyright bargain, in which the government grants private parties a limited monopoly over expression to "promote Progress," in this case by making "digital networks safe places to disseminate and exploit copyrighted works." See S. Rep. No. 105-190, 105th Cong. 2d Sess. 2 (1998). Assuming that the interest served by

the antidevice provision is at least important, even if not compelling,[3] the question for this Court is whether Congress's means were well measured to this end. Or, alternatively, whether the means were too drastic for the end, "sacrific[ing] important First Amendment interests for too speculative a gain." *Denver*, 518 U.S. at 760.

II. The Antidevice Provision, As Applied to DeCSS, Dramatically Departs from Copyright's Traditional Balance Between Owners' Limited Rights and Users' Privileges

In the court below, appellees took the position "that the anti-circumvention laws are intended to create a legal barrier to unauthorized access, as a separate and distinct right from copyright infringement." Plaintiff's Memorandum of Law in Opposition to Cross-Motion to Vacate the Preliminary Injunction, at 1. "Congress," they argued, "intended to provide copyright holders with an entirely

[3] It is important to remember, as the Court considers the expansive nature of the restrictions created by the antidevice provision, that the lower court found that DVD revenues account for about 14% of the studios' revenue stream, 111 F. Supp. at 310 n.69, and that home video distribution more generally accounts for 40%. *id.*, at 311 n.70. Even if there were absolutely no technological protection for DVDs, this would not diminish revenues from theatre and broadcast distribution, from merchandising, and from home distribution to the millions of users who would rather own or rent a legal copy than spend hours making a bootleg. Nowhere in the legislative history is there an evaluation—as opposed to an assertion—of the actual need for added protection. Nowhere, for example, is there an evaluation of why it is that the software industry has dealt with the availability of perfect digital copying from its inception, but has in its brief period of existence become a substantially larger industry than the movie industry. See 1997 Economic Census, *Information*, Subject Series, Establishment and Firm Size, Table 1 (software industry gross receipts over $61 billion; movie and video industries $44 billion).

new level of protection for their copyrighted works in the digital age—independent of long established protection against copyright infringement." *Id.* at 7.

The DMCA as interpreted below indeed sweeps aside the nuanced structure of the Copyright Act, with its limited grant of rights, 17 U.S.C. § 106, and its grant of varied use privileges, 17 U.S.C. §§ 107-112, 117. Under this interpretation, encryption of copyrighted works embodied solely in digital media, as most works in a few short years will certainly be, will render the complex balance of the Copyright Act obsolete. Owners will be able to encrypt works they distribute, and the antidevice provision of the DMCA will make it impossible for users legally to make any use of those works—privileged or otherwise—without the express authority of the owner.

"From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, 'to promote the Progress of Science and useful Arts . . . .'" *Campbell*, 510 U.S. at 575. So too does securing access to other components of the public domain, like facts and ideas, *id.*, at note 5. "Fair use is not a grudgingly tolerated exception to the copyright owner's rights of private property, but a fundamental policy of the copyright law." Pierre N. Leval, *Toward a Fair Use Standard,* 103 Harv. L. Rev. 1105, 1135 (1990). Making it almost impossible, as the antidevice provision does,

for most users to exercise their fair use privileges cannot serve the purpose of aiding copyright in the digital age, much less be considered a properly tailored or no more restrictive than necessary manner of doing so.

Traditional copyright law has focused on giving the owner—say, the movie studio—enough incentives to make a movie in the first place, while leaving the product sufficiently free for reutilization to allow millions of creative acts, small and large, to multiply the social value of that initial creation many times over.

"It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not 'some unforeseen byproduct of a statutory scheme.' *Harper & Row*, 471 U.S., at 589 (dissenting opinion). It is, rather, 'the essence of copyright,' *ibid.*, and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.' To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. *Harper & Row*, 471 U.S., at 556-57 . . . . This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science

and art." *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 349-50 (1991).[4]

"For as Justice Story explained, 'in truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.' *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845). Similarly, Lord Ellenborough expressed the inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it when he wrote, 'while I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science.' *Carey v. Kearsley*, 4 Esp. 168, 170, 170 Eng. Rep. 679, 681 (K. B. 1803)." *Campbell*, 510 U.S. at 575.

Yet, as the court below held, the DMCA fundamentally limits the ability of users to make fair uses of digitized video materials. CSS encryption is designed to work with licensed DVD players such that fair uses, the equivalent of quotation from movies, "would be difficult or impossible absent circumvention of the CSS

[4] Accord White v. Samsung Electronics America, 989 F.2d 1512, 1517 (9th Cir 1993) (Kozinski, J., dissenting) ("[I]t may seem unfair that much of the fruit of a creator's labor may be used by others without compensation. But this is not some unforeseen byproduct of our intellectual property system; it is the system's very essence. … We give authors certain exclusive rights, but in exchange we get a richer public domain.").

encryption." 111 F. Supp. 2d at 322. Based on this finding, the court below surmised that in enacting the antidevice provision of the DMCA, Congress had decided to make it technically impracticable for technologically unsophisticated users to make fair use of encrypted copyrighted works. See *id.*, at 324.

There is no authority for the notion that First Amendment limitations on the reach of copyright are satisfied if "sophisticated" users have a fair use privilege while "unsophisticated" users do not. The First Amendment restriction is general, not elitist. The privilege *Harper & Row* presumes reaches every citizen, not just those trained to hack. And thus the decision by Congress to deny fair use rights to one class of users is inconsistent with the presupposition of *Harper & Row*.

III. The Radical Departure of the DMCA from Copyright Law's Balance Unnecessarily Restricts the Speech of Users

This radical departure from the traditional framework of copyright law was neither necessary nor narrowly tailored to attain the goal of allowing movie studios to reap sufficient returns to justify investing in making movies. It therefore fails the intermediate scrutiny of *O'Brien*.

Congress's thinking in embracing the most extreme protection for technology is incomplete and contradictory. The closest effort we see in the legislative history to consider the justification for this level of protection was the Report of the Senate Committee on the Judiciary, S. Rep. 105-190. There, the

committee stated that the antidevice provision was added "[i]n order to provide meaningful protection and enforcement of the copyright owner's right to control access to his or her copyrighted work." *Id* at 28. The Committee analogized the provision to prohibitions on sale of equipment intended for the unauthorized reception of cable television service, 47 U.S.C. § 553(a)(2), equipment used for unauthorized decryption of satellite cable programming, 47 U.S.C. § 605(e)(4), and, most pertinently, to 17 U.S.C. § 1002(a), which regulates digital audio recording equipment and prohibits equipment that removes the serial copy management system required by that section to be included in digital audio recorders. *See* S. Rep. No. 105-190 at 28.

The problem with these analogies is that the first two are inapposite, and the third represents precisely the lesser restrictive means that was readily available to Congress, and which Congress failed to consider.

The first two provisions protect the integrity of telecommunications systems, not of copyright. Unlike copyright holders, however, neither Congress nor the Constitution circumscribe the property rights of cable and satellite providers to exclude nonpaying customers. They have full property rights in their systems, not a set of limited statutory rights. The devices these provisions prohibit thus cannot serve to allow users to exercise privileged access to the protected telecommunications systems, because users have no access privileges. They are

therefore a poor analogy to devices that enable users to make use of copyrighted materials in ways that the users are privileged to make under copyright law, the First Amendment, and the Copyright Clause, U.S. Const. Art. I, § 8, cl. 8.

The sole apposite analogy, then, is to the provision of the Audio Home Recording Act of 1992, codified at 17 U.S.C. § 1002(a), but that provision undermines Congress's claim that prohibiting all circumvention devices absolutely is necessary.

The Audio Home Recording Act requires that digital audio tape recorders include a technology that prevents serial copying, where serial copying is defined as the ability to make a digital reproduction from a digital reproduction, as opposed to from an original. See 17 U.S.C. § 1001(11). In other words, where digital audio tapes, as opposed to DVDs, are concerned, Congress found it sufficient to assure that second generation copying could not occur. Users who own digital audio tapes can—as a practical, technical matter—make copies of the whole or any portion of these tapes when they are privileged to do so, as well as when they are not. This allows the users to make fair uses, or otherwise privileged uses, but also to make illegal copies. Serial copy management systems simply prevent someone who possesses a *copy* of a digital audio tape from making further copies. While this solution does not completely prevent one person from making hundreds of copies for distribution, it resolves the problem of perfect multi-generation copying that the

court below described as an "outbreak epidemic." 111 F. Supp. 2d at 331-32. As to digital audio tapes, then, Congress has prevented an epidemic without eliminating fair use.[5]

But Congress does not address why the same solution would not have sufficed for DVDs. Nowhere in the legislative history is there a consideration of the efficacy or inefficacy of the approach taken vis-à-vis digital audio tapes in 17 U.S.C. § 1001 *et. seq*. Nowhere is there consideration of whether there was something special about the music industry that made that solution adequate to deal with unauthorized copying of digital audio tapes, but inadequate to deal with copying of other digital media, like DVDs. Nowhere is there any argument about why the threat of illegal copying of DVD film is any different from the threat of illegal copying of digital audio tape.[6]

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[5] Congress supplemented the technical measure with a two percent tax on all digital audio recording devices, earmarked as a subsidy for copyright owners to make up for the revenue they could expect to lose from unauthorized copying that would occur thanks to the perfect first-generation copying that these devices permitted. See 17 U.S.C. § 1004.

[6] The legislative history is also self-contradictory. The Report of the House Committee on Commerce observed that the DMCA "would represent an unprecedented departure into the zone of what might be called paracopyright—an uncharted new domain of legislative provisions designed to strengthen copyright protection by regulating conduct which traditionally has fallen outside the regulatory sphere of intellectual property law." H.R. Rep. 105-551, Part 2, at 24-25. Its sole response was that "the digital environment poses a unique threat to the rights of copyright owners, and as such, necessitates protection against devices that undermine copyright interests. In contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of works—at virtually no cost at all to the pirate." *Id.* at 25. But the committee did not describe what made the threat unique, and the final version of the DMCA plainly contradicts the claim that digital media is unique. In the very same chapter that includes the antidevice provision, Congress also enacted a provision requiring that all new *analog* videotape recorders to include copy protection capabilities. This section also includes an

This inconsistent treatment is relevant to the question whether Congress satisfies the requirements of *O'Brien*. As in *Denver*, this Court "can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as some indication that more restrictive means are not 'essential' (or will not prove very helpful)." *Denver*, 518 U.S. at 757. In *Denver*, the Supreme Court was faced with one statute—the Cable Act of 1992—that resolved the problem of protecting children from offensive television programming using a very restrictive combination of legal and technical means, and another statute—the Telecommunications Act of 1996—that attempted to deal with the same problem in slightly different media or channels, by a less restrictive combination of law and technology.

Without passing on the constitutionality of those means, the Court noted that they were plainly less restrictive. "Where, as here, the record before Congress or before an agency provides no convincing explanation [for using the more restrictive means in this context], this Court has not been willing to stretch the limits of the plausible, to create hypothetical non-obvious explanations in order to justify laws that impose significant restrictions upon speech." *Id.* at 760. See also

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antidevice provision to protect those analog copy-prevention mechanisms. See section 1201(k) of the Copyright Act, codified 17 U.S.C. § 1201(k). The existence of this parallel to the antidevice provision in the analog context, in which the home video industry has thrived for almost two decades, suggests that the antidevice provision has little to do with the uniqueness of digital media. More likely, it is the product of successful manipulation by movie industry lobbyists of the digital duplication bogeyman to obtain a new right perfectly to control their products.

Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 130 (1989) (considering less restrictive FCC regulations aimed at serving the same purpose as the challenged legislation as a backdrop to finding that "[t]he congressional record presented to us contains no evidence as to how effective or ineffective the FCC's most recent regulations were or might prove to be").

A regime that enables end users to make copies and quotations of digitized materials they legally possess, and responds to the serial copying problem with a limited prohibition on circumventing serial copying management devices coupled with, say, a tax on DVD players transferred as subsidies to Hollywood studios, would plainly be less restrictive than the antidevice provision as interpreted by the court below, and as applied to prohibit DeCSS.

Stepping into the breach left by Congress, the district court offered three reasons to support its conclusion that the effects on the fair use privileges of technologically unsophisticated users did not render the antidevice provision unconstitutional. First, the court suggested that "anyone wishing to make lawful use of a particular movie may buy or rent a videotape, play it, and even copy all or part of it with readily available equipment." 111 F. Supp. 2d at 337. This argument fails for two reasons. First, the DMCA enacted 17 U.S.C. §1201(k), which requires all new analog video recorders to include technological means that prevent copying from analog videotapes or pay transmissions. As physical

attrition leads to replacement of analog recorders, it will become as impossible to quote from videotapes as it is today from DVDs. Second, even in the absence of §1201(k), digital media are, in the blink of an historical eye, becoming our primary means of embodying information and cultural goods. Referring users to yesteryear's leftovers undervalues the constitutionally protected expressive interests at stake.

The district court further reasoned that its decision, properly limited to Corley or to active distributors of circumvention software, would not deter fair users. See 111 F. Supp. 2d at 338. This response misses the point of the burden that the antidevice provision places on technologically unsophisticated users. The problem is not *deterrence* but *incapacitation*. The trouble with the antidevice provision is not that it deters fair users, but that, as the district court found, it disables them from making fair uses. By prohibiting the manufacture of devices that would enable users to make fair uses, the antidevice provision does not simply chill fair use; it makes it impossible for the majority of users.

Finally, the district court stated, "we do not deal here with 'pure speech.' Rather, the issue concerns dissemination of technology that is principally functional in nature." 111. F. Supp. 338-39. Whether *DeCSS* is "pure speech" or not, however, is irrelevant to the claim that its prohibition substantially and unjustifiably burdens quotation from film. Without doubt, the quotation of

copyrighted speech is speech, and it is the restriction on that that raises the constitutional question.

Imagine a ten-year-old girl doing her homework on the history of the Holocaust. She includes in her multimedia paper a clip from Steven Spielberg's film, *Schindler's List*, in which a little girl in red, the only color image on an otherwise black-and-white screen, walks through the pandemonium of a deportation. In her paper, the child superimposes her own face over that of the girl in the film. The paper is entitled "My Grandmother." Or imagine a professor of critical film theory putting together a series of illustrations of sexist or racist stereotyping in Hollywood movies. Or imagine a law professor who teaches media law, who offers a short snippet of *The Insider* to motivate discussion of the costs and benefits of commercial media. These and millions of other unsung acts of individual creativity that rely on common cultural materials are central to expressive freedom. They are what allow us all to speak to each other using not only plain text, but also a rich tapestry of the cultural materials within which we live as members of a community and a culture. And they are precisely the uses that First Amendment values have traditionally protected through the guarantee of fair use. The antidevice provision removes that constitutional protection. It is for this reason unconstitutional.

Conclusion

As applied to prohibit DeCSS, the antidevice provision of the DMCA violates the First Amendment. CSS is a device that makes fair and otherwise privileged uses of digitized materials practically impossible. Prohibiting its circumvention in the absolute way that the antidevice provision, as interpreted below, does, would render these materials practically unavailable to the vast majority of users who are not computer geeks.

An elimination of fair use, or otherwise privileged uses, for digitized works is a radical departure from traditional copyright law. The purported justification for this departure relies on the unique attributes of digital copying. While these attributes may justify some technological regulation, the legislative record is devoid of consideration of why less restrictive means, like those already adopted for digital audio tapes, would not suffice.

As applied by the court below to DeCSS, the antidevice provision imposes too great a burden on speech for too speculative a gain to withstand First Amendment scrutiny.

Dated: January 25, 2001

Respectfully submitted,

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