00-9185

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNIVERSAL CITY STUDIOS, INC., *et al.*

Plaintiffs-Appellees

v.

ERIC CORLEY, A/K/A EMMANUEL GOLDSTEIN AND 2600 ENTERPRISES, INC.

Defendants-Appellants

SHAWN C. REIMERDES, ROMAN KAZAN

Defendants

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF OF *AMICI CURIAE*

ERNEST MILLER; DR. SIVA VAIDHYANATHAN; MARY WALLACE DAVIDSON; CHRISTINA OLSON SPIESEL

IN SUPPORT OF APPELLANTS AND REVERSAL OF THE JUDGMENT BELOW

EDWARD A. CAVAZOS, ESQ.
GAVINO MORIN, ESQ.
Cavazos, Morin, Langenkamp & Ferraro L.L.P.
9020-I Capital of Texas Highway, Suite 250, Austin, Texas 78759
(512) 340-1330
Counsel for *Amici Curiae*

January 26th, 2001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Constitutional Provisions:

Other Authorities, Internet Sites:

PRELIMINARY STATEMENT

The undersigned *amici curiae* respectfully submit this brief *amicus curiae* in support of appellants Eric Corley, a/k/a "Emmanuel Goldstein" and 2600 Enterprises with the consent of all parties, pursuant to F.R.A.P. 29(a).

IDENTITY AND INTERESTS OF THE AMICI[1]

Amici curiae, as educators, researchers and librarians, write to address the threat to free speech and fair use that upholding Judge Kaplan's interpretation of the Digital Millennium Copyright Act (DMCA) would pose.

Dr. Siva Vaidhyanathan is a media studies scholar and cultural historian who holds a Ph.D. in American Studies from the University of Texas at Austin. Dr. Vaidhyanathan currently serves as a Faculty Fellow in the Department of Culture and Communication at New York University, where he teaches classes entitled "Language of Communication: Film, Radio, Television," "Global Media," and "Impacts of Technology: The Digital Moment."

Ernest Miller is Resident Fellow for the Information Society Project at Yale Law School, which is committed to the preservation and promotion of democratic

---

[1] Affiliations are listed only to identify the *amici*, whose views expressed herein do not necessarily coincide with those of their respective universities or employers.

values in the Information Society. Mr. Miller also lectures on technology and ethics for the Bergen County Academies, which are technology magnet schools in Northern New Jersey.

Mary Wallace Davidson currently heads the William & Gayle Cook Music Library at Indiana University, where she also coordinates the program in music librarianship at the School of Library and Information Science, and teaches music bibliography and librarianship. She has long been active in the Music Library Association, serving as its president (1983 to 1985), and as a member or chair of its Legislation Committee since 1990.

Christina Olson Spiesel is a visual artist who teaches students at the post-graduate level. She is currently co-teaching a course at Quinnipiac University Law School entitled "Visual Persuasion in the Law" that prepares lawyers to both use visual displays effectively as part of their professional work and to understand visual texts sufficiently to critique them and object to them as necessary.

Each *amicus* makes frequent fair use of copyrighted material, copied whole or in part, while teaching, conducting research, or compiling bibliographic or monographic works for scholarly dissemination. *Amici curiae* have learned from years of experience to place great value on the ability and right to quote, copy, and comment on elements of protected works without having to ask permission or

negotiate a formal licensing relationship with the owner of the copyrighted works. Such uses are at the heart of the on-going creation of our common culture. As information is increasingly distributed solely in digital formats that are protected by rights management and access control software, *amici curiae* are acutely aware of the threat Judge Kaplan's interpretation of the DMCA presents to educational, research, and artistic endeavors.

SUMMARY OF ARGUMENT

The DMCA, as interpreted by the District Court, precludes valuable and traditionally protected fair use activities in the arts, sciences, and educational arenas. Accordingly, the District Court's interpretation of the DMCA is unconstitutional in that it is contrary to the mandates of article 1 section 8 and the First Amendment to the United States Constitution.

ARGUMENT

I. The District Court's Application of the DMCA Deprives the Public of the Right to Engage in Traditionally Protected Activities

The decision of the District Court severely limits the ability of the public to engage in activities that would otherwise qualify as protected fair use. In his opinion, Judge Kaplan concluded 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…" Universal City Studios, Inc. v. Reimerdes, 111 F.Supp.2d 294, 324 (S.D.N.Y. 2000). That this interpretation of the statute would have far reaching effects was not lost on Judge Kaplan, who nonetheless maintained that, with regard to the fair use doctrine, "the DMCA fundamentally altered the landscape." Id. at 323.

The ominous consequences of Judge Kaplan's ruling become apparent in light of the wide variety of valuable fair uses that can be made with content stored in digital formats. Even if one were to only look at DVD technology, as Judge Kaplan himself noted, the range of possible fair uses one might make is "remarkably varied," Reimerdes, 111 F.Supp.2d at 338. Such DVD-related fair uses include (1) taking quotations from the script by a movie reviewer, (2) broadcasting an excerpt of a scene to illustrate a review, (3) performing portions of the sound track by a musicologist, and (4) making clips of scenes by a film scholar to make a comparative point. Id. at 337 (acknowledging "that numerous other examples doubtless could be imagined").

But DVDs are only part of the story. Audio Compact Discs (CDs), first introduced almost twenty years ago, have all but replaced their analog predecessors, the phonorecords. The MP3 file format for storing digital music is

rapidly becoming the *de facto* standard, supplanting CDs as they did phonorecords. Electronic books (e-books) are rapidly gaining popularity, with sales expected to reach $2.3 billion by 2005, which means they will account for ten percent of all book sales. Chet Dembeck, Internet Boosts Overall Book Sales, THE E-COMMERCE TIMES (2000) at http://www.ecommercetimes.com/news/articles2000/000602-6.shtml. Moreover, in schools, plans are already in place for the replacement of traditional textbooks with their electronic equivalents.[2] Formats for the representation of digital photographs and computer-animated imagery are likewise quickly becoming ubiquitous. When combined into multimedia works, any or all of these technologies can meld to form unique, new representations of information. It should come as no surprise, then, that educators, researchers, and artists who rely on the fair use doctrine as they work with, manipulate and build upon the content stored in these digital formats would have serious concerns about any new doctrines that limit their legitimate ability to do so.

The representative examples that follow are intended to demonstrate that a wide array of activities extending well beyond the types recognized by Judge

---

[2] As one example, the Commissioner of the Texas Education Agency has proposed a plan to replace all written textbooks with e-books. A Phillips Brooks, Proposal: Replace Textbooks with Computers, THE AUSTIN AMERICAN-STATESMAN, September 12, 1997, at B1.

Kaplan, are threatened by the DMCA as the District Court interprets it. As seen below, these activities arise in diverse educational, scientific, and artistic endeavors.

A. Text and Video Content Analysis

Stylometry is a social science created by coupling, in an unlikely manner, statistics and literature. It applies statistical methods to literary works to quantify and analyze language style. See, Warren Buckland, Forensic Semiotics, 10(3) THE SEMIOTIC REVIEW OF BOOKS (1999) *available at* http://www.chass.utoronto.ca. Some of the stylistic data that is analyzed includes sentence length and the use of "habit" words. Id. One practical application of this relatively new science is to attribute authorship to anonymous or pseudonymous text. Thus, for example, Vassar English Professor Donald Foster recently became the first scholar since the nineteenth century to uncover a genuine new work by William Shakespeare. Caleb Crain, The Bard's Fingerprints, LINGUA FRANCA – THE REVIEW OF ACADEMIC LIFE (July/August 1998) *available at* http://www.linguafranca.com/9807/crain.html. This discovery came after long and careful analysis of the new work vis-à-vis the known works of Shakespeare. After this discovery, Professor Foster was asked to analyze the anonymously written book Primary Colors and attribute authorship to

that work. His test results correctly identified Joe Klein as the author. Id. Stylometry has also been used by others to attribute authorship to such works as the Federalists Papers and passages in the New Testament. Warren Buckland, Forensic Semiotics, 10(3) THE SEMIOTIC REVIEW OF BOOKS (1999) available at http://www.chass.utoronto.ca.

Like stylometry, video content analysis, while still very much in its infancy, looks to create new techniques to allow fast and easy searching of video images. Andrew W. Appel & Edward W. Felten, Technological Access Control Interferes with Noninfringing Scholarship, COMMUNICATIONS OF THE ACM, Sept. 2000 at 21. So, as an example, if the surgeon general wanted to search a collection of videos to look for depictions of cigarettes, he could simply type in a query and have the matching video clips cued up for his viewing. Id. This field has tremendous potential in scholarly and industrial applications.

The emergence and future of disciplines like stylometry and video content analysis depend on the availability of large volumes of data that can be easily accessed and manipulated. In order to analyze this data, a stylometrist often needs access to the copyrighted text of a work. Accordingly, the survival of these promising fields depends on the ability to make fair use of that content, which is increasingly only available in digital formats. Put another way, practitioners of

these new disciplines must be able to access the work in the first place if they are going to analyze it. Unfortunately, researchers who chose to work on digital works are already hampered by access control technologies. Professor Peter Ramadge of Princeton University has noted that his research work in the field of video content analysis is being stymied by his lack of access to high quality video. Id. Thus far, Professor Ramadge has only been able to acquire licenses to two full-length copyrighted digital video works for his research. Id. Ideally, he would use DVD movies, but the CSS encryption routines prevent him from accessing the content on the discs. Id.

Without a fair use exemption to the DMCA, those researchers and scientists who could otherwise make fair use of copyrighted material will be denied access to that material. Such a result may very well kill these fledgling sciences, to the benefit of none and the detriment of the public as a whole.

B. Reverse Engineering

The District Court's application of the DMCA also impedes the important ability of technologists and engineers to engage in fair use-protected reverse engineering of computer programs.[3]

Reverse engineering is the common practice of disassembling a product to discover how it works. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1974).

In computer science, reverse engineering is especially important because of the way that software is developed. Computer software is written in programming languages ("source code") which is translated into a computer-readable form ("object code"). Whereas source code can be easily deciphered by humans, object code cannot. When consumers purchase software, they are almost always receiving the object code without the source code. Consequently, even an incredibly talented programmer would likely find it impossible to decipher the

---

[3] Although the DMCA offers some exceptions for reverse engineering, these exceptions are severely limited and offer protection only to those seeking to achieve or enable interoperability of an independently created program with other programs.

internal workings of commercial software without the ability to reverse engineer the object code. This is significant because, unlike other authors such as novelists and musicians, software authors, through the object code, hide uncopyrightable elements such as ideas and concepts of their works. See generally 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.05[D][4] (1999) (hereinafter "NIMMER").

To determine precisely what object code is doing, computer programmers employ special tools (disassembles or decompilers) that allow them to reverse engineer the code. These tools work by translating the object code back into source code, which can be readily studied.

The process of reverse engineering object code will always involve at least one act of copying (that of the reconstructed source code). NIMMER §13.05[D][4]. In determining whether the copying involved in reverse-engineering constitutes infringement, courts have been quick to point out the resulting public policy benefits of this technique. See, Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992). Indeed, courts have recognized that software that cannot easily be analyzed by the programming community precludes public access :

> …to the ideas and functional concepts contained in those programs, and thus confers on the copyright owner a de facto monopoly over those ideas and functional concepts. That result defeats the fundamental purpose of the Copyright Act to

> encourage the production of original works by protecting the expressive elements of those works while leaving the ideas, facts, and functional concepts in the public domain for others to build on.

Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1527 (9th Cir. 1992).

"Ideally," as Professor Nimmer has pointed out, "a competitor – although bound to respect the original code elements added by the programmer – should be free to use the unprotected elements of the software…" NIMMER § 13.05[D][4]. Under the District Court's interpretation of the DMCA, however, the computer scientist who wishes to study unprotected elements of software to improve her programming skills is prevented from doing so if the software is protected by a technological measure that effectively controls access.

More importantly, the DMCA proscription of reverse engineering extends into the classroom. A computer science instructor who reverse engineers a program protected with an access control to demonstrate to her students the "real world" use of an efficient sorting algorithm would risk liability under the District Court's interpretation of the DMCA. One could easily imagine the consequences if instructors in other fields were faced with similar restrictions. There would be very little progress in science and the useful arts if biology teachers could no longer dissect frogs, if English teachers could no longer diagram sentences, and if auto shop teachers could no longer tear down engines. Yet, this is exactly the

state of affairs we are left with by the District Court, whose interpretation of the DMCA turns educators wishing to reverse engineer digital works for teaching into lawbreakers.

C. Digital Sampling for the Purpose of Musical Parody

A well-recognized form of fair use involves copying elements of a musical work in order to parody it. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994). This court, in particular, has a long history of recognizing the value of parody with regard to musical composition. In Elmsere Music, Inc. v. National Broad. Co., this court reviewed a district court opinion which held that NBC's copying of certain elements of the plaintiff's musical composition in a Saturday Night Live parody did not constitute an infringement. 482 F. Supp. 741, 743 (S.D.N.Y.), aff'd, 623 F.2d 252 (2d Cir. 1980). Despite finding that the melody which was appropriated for the parody was the "heart" of the plaintiff's composition, the district court granted a motion for summary judgment for NBC on the grounds that using the plaintiff's work in its parody was a fair use. Id. at 744. This court, in affirming the district court's decision, declared that "a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point." Elsmere Music, 623 F.2d 252, 253 (2d Cir. 1980)

(citing Columbia Pictures Corp., v. National Broad. Co., 137 F. Supp 348, 354 (S.D. Cal. 1955). As one commentator has noted, "while each fair use analysis requires an examination of the amount and substantiality of material copied, the principle remains that musical parody, in order to be effective, requires at least some copying." Margaret E. Watson, Unauthorized Digital Sampling In Musical Parody: A Haven In The Fair Use Doctrine? 21 W. NEW ENG. L. REV. 469 (1999).

In an increasingly digital world, digital copying or "sampling" is inevitably employed to effectively parody a musical work. Id. Sampling involves taking parts of a sound recording and incorporating them in a subsequent work. If copying the most memorable features of a song constitutes a fair use in parody, as the Supreme Court held in Campbell, it seems clear that digital sampling of a sound recording for the purpose of parody would equally qualify for protection. Id. As the Supreme Court held, "parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation." Campbell, 510 U.S. at 588.

Of course, if Judge Kaplan's interpretation of the DMCA is correct, this protected right would prove meaningless where a music publisher simply releases its recordings under protection of an access control technology. Circumventing such a technology to engage in protected copying for the sake of parody would be

illegal, thus making what would otherwise be an acceptable fair use a wrongful act. Moreover, it is not difficult to imagine that publishers would exploit Judge Kaplan's view of the DMCA in an effort to prevent parody of their work. As has been successfully argued before this court, "parody deserves protection precisely because makers of an original work will be unwilling to license derivative uses that damage the public reputation of originals through negative criticism." Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 115 n.3 (2d Cir. 1998). Copyright owners have been unwilling to license their work if parody is the licensee's goal. In Campbell, the defendants showed that they were willing to afford all credit of authorship in the original work to Acuff-Rose, and were even willing to pay a licensing fee for use of the sample 510 U.S. at 572. Nonetheless, Acuff-Rose refused to license the sample in an attempt to prevent negative criticism of their work. Id. Had Acuff-Rose been able to rely on Judge Kaplan's version of the DMCA, they would have ultimately been successful in thwarting what the Supreme Court later recognized to be a protected contribution to the arts.

D. Creating Valuable Indices and Search Tools

Scientists and artists are not the only ones adversely affected by limitations placed on access to copyrighted material. A DMCA that does not take fair uses

into account precludes researchers from using those materials in ways that are completely consistent with copyright law. Take, for example, the case of a university professor who purchases a digitized multi-volume index to a scholarly work, which contains copyrighted abstracts of those works. Now further imagine that the discs come bundled with search software that allows the professor to access the copyrighted content of the disc, which is otherwise not accessible because it is encrypted, but the search software is limited in function. The professor wants to make to extract a list of sources for a bibliography, which list would contain fair use quotations from the copyrighted abstracts, but needs to employ her own search methodology. Traditionally, she may do so without fear of violating copyright law because such actions constitute fair use. New York Times Co. v. Roxbury Data Interface, Inc., 434 F.Supp. 217 (NJ 1977). If however, the data is made inaccessible through technological measures such as encryption, then the professor is prohibited from accessing the underlying material without running afoul of the DMCA. The fact that the researcher wants to engage in a perfectly legal activity does not help her because she is prevented by the DMCA from accessing the information to use it.

One can easily postulate other examples where the DMCA prevents the creation of valuable indices. For example, suppose a library purchases a database

containing detailed information about books in it collection. The database is encrypted, but the bundled software allows librarians to search for items by author's name, book title, and subject matter. The library makes the database available to the librarians so that they can assist patrons in searching the collection. The library quickly recognizes that many patrons look for books by authors without knowing the correct spelling of the author's name; this causes many searches to come up empty and is frustrating to patrons. The library could easily solve this problem by employing a phonetic search algorithm such as the Soundex algorithm. The Soundex algorithm, first employed by the U.S. Census Bureau at the turn of the last century, is a well-known method for performing phonetic searches of names. The library could create a second index; one that was organized phonetically. With this new index, the library patron could successfully find books authored by "Umberto Eco" even if the person entering the search query misspelled the name as "Humberto Echo." The Soundex algorithm is robust enough to find matches so long as the query is a reasonably good phonetic representation of the actual name. Under copyright law, new indices that have a "potential to save researchers a considerable amount of time and, thus, facilitate the public interest in the dissemination of information," are favored and can be said to be a fair use of copyrighted material. Id. at 221. Under the District Court's

interpretation of the DMCA, however, the library cannot implement the Soundex solution because, in our example, access the data is protected by technological measures.

Of course volumes could be written identifying many more examples of existing or readily identified fair uses stifled under the District Court's interpretation of the DMCA. It is also important, however, to note that digital technology is still relatively young, and an overly broad interpretation of the DCMA threatens not only existing examples, but also fair uses that are as yet unimaginable. In other words, the District Court's decision not only cripples existing uses, but innovation in fair use.

II. Because it Deprives the Public of Valuable Fair Uses, Judge Kaplan's Interpretation of the DMCA is Unconstitutional

A. The Constitution, Through the Fair Use Doctrine, Places Limits on Monopolies Granted to Authors and Inventors.

1. The First Amendment

It is clear that the fair use doctrine operates as a limitation on the rights of copyright holders. One source of this limitation is the First Amendment to the U.S. Constitution. Indeed, courts have used the fair use doctrine to resolve

"[c]onflicts between interests protected by the First Amendment and the copyright laws." Keep Thomson Governor Committee v Citizens for Gallen Committee 457 F. Supp. 957, 960, 199 USPQ 788 (1978, DC NH). As the District Court itself observed, fair use "has been viewed by the courts as a safety valve that accommodates the exclusive rights conferred by copyright with the freedom of expression guaranteed by the First Amendment." Universal City Studios, Inc. v. Reimerdes, 111 F.Supp.2d 294, 321 (S.D.N.Y. 2000). The Supreme Court has stated that: "First Amendment protections… [are] embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and in the latitude for scholarship and comment traditionally afforded by fair use." Harper & Row v. Nation Enterprises, 471 U.S. 539, 560 (1985).

2. Article I, Section 8

A second and oft-cited justification for the fair use doctrine comes from the limitations found in Article I, Section 8 of the United States Constitution. See, e.g., Rosemont Enterprises v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966) While this clause allows Congress to grant monopolies to authors and inventors, it does so under two enumerated conditions. First, the monopoly must be for a limited time. U.S. CONST. Art. I, § 8. Second, the monopoly must be in

furtherance of the promotion of "the Progress of Science and useful Arts." Id. Indeed, this Court has conscientiously balanced the need for copyright protection with these constitutional limitations, holding that, "courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry." Berlin v. E.C. Publications Inc., 329 F.2d 541, 544 (2d Cir. 1964).

B. Constitutional Principles Require that Fair Use be Available as a Defense to DMCA Violations.

The District Court rejected the Appellant's fair use defense on the grounds that Congress had provided no statutory fair use defense for violations of section 1201 of the DMCA. Universal City Studios, Inc. v. Reimerdes, 111 F.Supp.2d 294, 322 (S.D.N.Y. 2000). Even if the District Court was correct in its assertion that no such statutory authority existed, it was nevertheless obligated to apply the fair use doctrine pursuant to constitutional principles. More specifically, while Congress had authority to enact the DMCA pursuant to an enumerated power (Article I, Section 8), it could only do so pursuant to the limitations established in that enumerated power. Thus, for example, Congress could not grant to the authors (or inventors) of CSS perpetual exclusive rights to their

discovery because such a grant would violate the enumerated power's strict requirement that the exclusive rights be granted for only a limited time. Likewise, Congress could provide such exclusive protection to the Plaintiffs only to the extent that such protection acts to promote the progress of science and useful arts.

Because the Appellant raised a Fair Use Defense, the Court was obligated to inquire whether, under the facts of this case, the Appellee's rights were subordinate to the public's interest in the development of art, science and industry.

CONCLUSION

In the diverse arenas of science, scholarship, and the arts, to be governed by the District Court's version of the DMCA is to be stripped of the right to make the valuable fair uses of copyrighted materials upon which new contributions to the field are so often based. Had it recognized this and correctly applied the fair use doctrine, the District Court would have had no alternative but to hold that in this case the Plaintiffs' rights in the CSS technology are subordinate to the public's interests in the development of art, science, and scholarship. By failing to do so, the District Court not only ran afoul of basic constitutional

principles, it seriously threatened scientific, academic and artistic advancement. For these reasons, the District Court's Judgment must be reversed.

Dated: Austin, Texas
January 26, 2001

Respectfully submitted,

_____

Edward A. Cavazos
Texas Bar Number:00787223
Gavino Morin
Texas Bar Number: 00788077
CAVAZOS, MORIN, LANGENKAMP & FERRARO L.L.P
9020-I Capital of Texas Highway, Suite 250
Austin, Texas 78759
(512) 340-1330

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Pro. 29(d) and 32(a)(7)(B), the undersigned certifies that this brief, exclusive of the exempted portions, contains 4,428 words. The brief has been prepared in proportionally spaced typeface using: Times New Roman, 14 point.

Dated: January 26, 2001

_____

Edward A. Cavazos

CERTIFICATE OF SERVICE

I, Edward A. Cavazos, hereby certify that on this the 26th day of January, 2001, two correct copies of the Brief of *Amici Curiae* were served via Federal Express, overnight delivery, upon each of the following parties:

Martin Garbus, Esq.
FRANKFURT, GARBUS, KLEIN & SELZ, P.C.
488 Madison Avenue
New York, New York 10022
Attorneys for Defendants-Appellants

Cindy A. Cohn, Esq.
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Attorneys for Defendants-Appellants

Leon P. Gold, Esq.
PROSKAUER ROSE LLP
1585 Broadway
New York, New York 10036-8299
Attorneys for Plaintiffs-Appellees

On said date and by said manner, the original plus nine (9) copies of said Brief will be delivered to the Clerk of the Court for filing.

_____

Edward A. Cavazos