

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

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

Online News Association; Reporter's Committee for Freedom of the Press; Newspaper Association of America; Student Press Law Center; Wired News; Pew Center on the States; Silha Center for the Study of Media Ethics and Law; and the College of Communications, California State University, Fullerton

**IN SUPPORT OF APPELLANTS AND
REVERSAL OF THE JUDGMENT BELOW**

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Online News Association and Student Press Law Center are 501(c)(3) nonprofit organizations, and Newspaper Association of America is a 501(c)(6) nonprofit organization, each with no parent corporations or stockholders.

Reporters Committee for Freedom of the Press is an unincorporated association with no parent corporations or stockholders.

College of Communications, California State University, Fullerton and the Silha Center for the Study of Media Ethics and Law, based at the School of Journalism and Mass Communication at the University of Minnesota, are academic institutions at public universities.

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INTERESTS OF THE *AMICI CURIAE*

The *amici curiae* are journalism membership and trade associations, online publications, and academic institutions which are concerned that the District Court's opinion, should it be affirmed, will significantly chill freedom of the online press by stifling one of its important features, linking. *Amici curiae* believe that if online journalism is to thrive, courts must allow it the unqualified First Amendment protection afforded its print counterparts, a result already mandated by the Supreme Court.⁽¹⁾ The District Court's subjective test to determine "linking liability," which departs from previously unquestioned freedom of the press principles, is a dangerous precedent; it allows Congress to authorize prior restraints on whole classes of information published on the World Wide Web, the publication of which is constitutionally protected in all other media.

The *amici curiae* represent the broad range of journalistic interests and are eminently qualified to speak to the Court on these issues:

- The **Online News Association** is an association composed largely of professional online journalists. Though not yet two years old, the Association has more than 450 professional members, that is, members whose principal livelihood involves gathering or producing news for online presentation. The membership includes news writers, producers, designers, editors, photographers and others who produce news for the Internet or other digital delivery systems. By permitting liability to be predicated on the establishment of hypertext links, the decision of the District Court threatens to chill the constitutionally protected speech of online journalists by exposing them to legal risks not borne by other journalists, solely on the basis of the medium in which they practice their craft.
- The **Reporters Committee for Freedom of the Press** is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.
- The **Newspaper Association of America** (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Most NAA members are daily newspapers, accounting for 87% of the U.S. daily newspaper circulation. Over 1,400 member newspapers publish on the Internet through the World Wide Web. One of the NAA's missions is to advance newspapers' interests in First Amendment matters, including the right to publish free from prior restraints.
- The **Student Press Law Center** is a national, non-profit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and preserving the rights of student journalists. The Center provides legal help and information to more than 2,000 student journalists and journalism educators each year. As the only national organization in the country devoted exclusively to defending the legal rights of the student press, the Student Press Law Center has collected information on student press cases nationwide and has produced a number of publications on student press law, including its book, *Law of the Student Press*, and its thrice-yearly magazine, the *SPLC Report*.
- **Wired News** is a daily technology news site published at www.wired.com. Wired News was founded in 1996.
- The **Pew Center on the States** is a research initiative founded in order to assist journalists, policy makers and concerned citizens to become better informed about innovations in public policy at the state level. Its principal activity is the publication of news about public policy on its website, *Stateline.org*, a free daily service that follows the development of major issues as they appear on the public agenda in the states. *Stateline.org* contains original reporting on critical issues by a Washington, DC-based reporting staff and links to daily newspaper reports from the 50 state capitals.
- The **Silha Center for the Study of Media Ethics and Law** was established in 1984 within the School of Journalism and Mass Communication at the University of Minnesota. The Center's efforts focus on the examination of the legal rights and ethical responsibilities of the mass media in a democratic society. The Center is particularly

concerned about the development of legal principles that will apply to the new media, and the impact such principles will have on the First Amendment rights of all journalists.

- The **College of Communications, California State University, Fullerton**, established in 1989, is committed to advancing a democratic society by preparing students to understand the history and interpretation of the First Amendment. The College is especially interested in the development of legal principles emanating from the First Amendment as they apply to the new media and the effect that such principles have on the rights of media practitioners.

Amici curiae are keenly aware that this case presents the issue of linking liability for the first time and that this holding may be the model for how future courts consider freedom of the online press hereafter. The importance of this case to *amici curiae* and the entire online journalism community cannot be overstated. *Amici curiae* urge that this court honor the Supreme Court's endorsement of the World Wide Web as a "dynamic, multifaceted, category of communication"⁽²⁾ and exercise extreme caution so that the still-evolving field of online journalism is not substantially hindered at this critical stage in its development.⁽³⁾

ARGUMENT

I. ONLINE JOURNALISM IS AN IMPORTANT PART OF THE AMERICAN PRESS, AND LINKING IS AN IMPORTANT COMPONENT OF ONLINE JOURNALISM

A. The World Wide Web Has Become a Core News Medium

The World Wide Web has revolutionized journalism. Not since the emergence of television a half-century ago has a technological innovation so dramatically enhanced the ability of journalists to disseminate information to the public. The Web provides an extraordinary 24-hour framework for the distribution of news: text can be fused with sound, pictures and video; supplemental sources of information can be instantly cross-referenced; readers can participate through polls and discussion groups. The Web liberates journalists from the space and time barriers that confine the traditional print and broadcast media.

It is no surprise then that the Web is the most rapidly growing medium for the delivery of news. Results from one of the largest regular surveys of Web users show that 55 percent of all users access news websites at least once a day.⁽⁴⁾ A 1999 study by the Pew Research Center for the People and the Press found that 41 percent of U.S. adults were online news consumers, nearly double the percentage from two years earlier.⁽⁵⁾ And the number of news websites continues to grow. *Editor & Publisher's* comprehensive Media Info Web page, which tracks all news organizations with a Web presence, shows there are now 8,844 news websites in the United States alone.⁽⁶⁾

Online journalism, although once considered a peripheral component of traditional news media, is now part of the news media mainstream. It is an independently viable industry, with its own trade associations, unions, style guidelines and industry awards. Online journalists have established their credibility within their profession and with the public as well. In the Pew study

cited above, 49 percent of Web users said online news was more accurate than news from traditional news sources, and a similar survey by Jupiter Communications found that more than 80 percent of Web users trust online news as much as traditional news sources.⁽⁷⁾

Yet, the potential of online journalism is still largely untapped. As the Internet continues to grow, as bandwidth expands, as computer and modem processing speeds increase, and as more creative uses are made of the Web's capabilities, the Web will continue to evolve as an important channel through which the public gets its news.

B. Linking, One of the Defining Characteristics of the Web, Is a Defining Characteristic of Online Journalism

Hyperlinks are the engine of the Web, allowing rapid connections to be made between people and information. Without hyperlinks, the Web's extraordinary ability to facilitate the rapid, global dissemination of information would be severely impaired. Hyperlinks are the threads that tie together disconnected bits of information on the Web, permitting Web publishers to take advantage of all available knowledge when crafting messages. As the District Court noted in ACLU v. Reno, 929 F.Supp. 824, 837 (E.D. Pa. 1996), aff'd, 521 U.S. 844 (1997), "The power of the Web stems from the ability of a link to point to any document regardless of its status or physical location."

Hyperlinks enhance online news reporting. The rapid access to layers of supplementary information allows journalists to add depth and context to their stories, making them more meaningful and useful to readers. Links allow the journalist to direct readers to the journalist's primary source material, lending credibility to the report and empowering the reader to investigate independently. Instead of merely summarizing the results of a complex scientific study, reporters often include a link to the research report or journal, allowing readers to make their own assessments and to scrutinize the reporter's account. Links can take readers to research archives, past articles, government records, audio and video clips of newsworthy events, discussion groups, and more. Many of these sources are stored on servers in other states or countries or are not prominently featured on the Web and would be difficult to find without hyperlinks.

Online journalists use links like these routinely. When Judge Starr issued his report on allegations against President Clinton, and when the Florida Supreme Court issued its recent election rulings, online accounts were accompanied by links to the actual documents. And if the Web had been available in 1971, journalists for the *Washington Post* and *New York Times* may have linked to the Pentagon Papers in addition to publishing their own interpretations of those controversial documents. See New York Times v. United States, 403 U.S. 713 (1971).

Links enable the online journalist to fully include each of the elements of reporting -- strong storytelling devices, presentation of a variety of viewpoints, and attribution of primary and secondary sources -- in a story. According to the Society of Professional Journalists, one of the ultimate goals of journalism is to provide readers with comprehensive accounts of the news, and one of the journalist's ethical mandates, in order to "Seek Truth and Report It," is to identify sources and provide the public with as much source information as possible.⁽⁸⁾

Links are critical features in each of the three major models for online journalism. News websites that are associated with major print and broadcast news organizations, such as *CNN.com*, *USAToday.com* and *ABCNews.com*, publish original articles alongside some that may have appeared in their other-media counterparts. These sites supplement each type of article with hyperlinks to related content on the Web and with content that would not fit in their associated print or broadcast versions. In contrast, sites such as *Salon.com*, *CNet.com* and *TheStreet.com*, produce their own content exclusively for the Web. These sites also make extensive use of hyperlinks to augment their stories and to connect readers with other Web content. Sites in a third category, "meta" or "portal" sites, rely almost entirely on hyperlinks: these sites contain menus of hyperlinks, organized by topic, which readers can select. Many portal sites also use search engines or robots to create continuously updated pages of links that are customized to the interests of individual visitors or subscribers.

C. Restrictions on Linking Hinder the Basic Functioning of the Web

Forcing journalists to withhold information that they believe is important for readers not only contradicts long-standing journalistic and First Amendment principles, as explained below, it also undermines the Web's essential purpose. The Web was designed to work as a completely open system, empowering all people to access all posted information. Journalists can help advance that objective by investigating information on the Web and providing readers with useful links. As the Web's principal architect has said:

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 can't link.⁽⁹⁾

II. THE DISTRICT COURT'S TEST FOR LINKING LIABILITY VIOLATES THE FIRST AMENDMENT PROTECTIONS OF FREEDOM OF THE PRESS

A. The Unqualified Free Press Protections Applied to the Print Medium Should be Applied to Online Journalism

Publishers on the World Wide Web, under the District Court's ruling, are subject to injunctions and liability that are unthinkable in other media. The District Court's conclusion stands in stark contrast to the U.S. Supreme Court's commands that debate on public issues be "uninhibited, robust and wide-open," New York Times v. Sullivan, 376 U.S. 254, 270 (1964), and that publication on the World Wide Web is due unqualified First Amendment protection, Reno v. ACLU, 521 U.S. 844, 870 (1997).

As different as the Web may be from other journalistic media, its essential purpose is the same: to inform the broadest audience possible as fully as possible. This common and fundamental purpose is what underlies the press's hallowed constitutional status.

The right to publish necessarily encompasses the right to publish a link. But the District Court, giving talismanic effect to the phrase "functionality," subjects Web publications to restrictions not permitted in the print media. Yet, the only "function" with which the District Court takes issue is the more rapid provision of additional information. The expression by the publisher -- publishing the address of a website -- is identical in each case, although the reader may use the furnished information in slightly different ways. Instead of typing a Web address identified in a print article into a browser or using a search engine to find referenced material, the reader can click on the link.

The "function" that the District Court found justified a new constitutional rule is no different from the pre-Web practice of identifying reference material that a reader could then retrieve from a library. Web journalism should not lose a degree of constitutional protection because it works so efficiently.⁽¹⁰⁾

B. The District Court's Linking Liability Test Will Chill Significantly More Speech Than the Defamation Standard

The District Court's creation of a special constitutional test whereby an online publisher may be subject to suit under a federal statute merely because it has included a link in an article will have a serious chilling effect on journalistic practice. A journalist may sooner omit links, even those for which liability would be unlikely to attach, than subject herself to a trial regarding what she did or did not know or intend. The court's framework thus rewards timidity. It ensures that a great deal of important, newsworthy information will not reach the public.

The District Court acknowledged that the chilling effect engendered by its "rule permitting liability for or injunctions against Internet hyperlinks is a genuine concern." Universal City Studios v. Reimerdes, 111 F. Supp.2d 294, 340 (S.D.N.Y. 2000). But the court believed that it had set out a standard that was "highly analogous" to the test for defamation, a standard that "gives the press great comfort in publishing all sorts of material that would have been actionable at common law." Id. at 341. The District Court held that an online publisher could be enjoined or held liable if it were proven 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 the technology." Id.

The journalists represented by amici curiae do not find "great comfort" in the District Court's subjective test. The District Court's analogy is inapt; the test for linking liability will flatly prohibit the publication of information that is permitted in other media. The test will chill significantly more speech than the defamation standard announced by the Supreme Court in New York Times v. Sullivan, 376 U.S. 254 (1964), and subsequent cases.

Despite the District Court's efforts, its test for linking liability and the constitutional tests for defamation differ in several significant ways. Most basically, the New York Times test, requiring a clear and convincing showing of actual malice, allows for defamation actions in only the most exceptional cases. The test is set up so as to err decidedly on the side of allowing undesirable publication, rather than risk infringing unnecessarily on the freedom of the press:

Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.

St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

The significant barrier to liability set out in the defamation standard is consistent with the fundamental principle of the First Amendment that in order to place as few limits on publication as possible, our democracy must tolerate some abuses of a free press. Thus even a strong potential for speech to be used for illegal purposes does not justify a blanket restriction. As this Court has said, "it is unfortunate that the exercise of liberties so precious as freedom of speech and of the press may sometimes do harm that the state is powerless to recompense: but this is the price that must be paid for the blessings of a democratic way of life." Edwards v. National Audubon Society, 556 F.2d 113, 122 (2d Cir. 1977).⁽¹¹⁾

The District Court takes the opposite position; it admits that its standard will encompass fair uses as well as infringing ones within its prohibition.⁽¹²⁾ Instead of requiring culpability akin to "actual malice," the court's test is met by the simple intent to disseminate certain information.

Thus even the publication of circumvention technology in the context of an educational story pertaining solely to non-infringing uses is prohibited in order to guard against the possibility that an infringing use of that information may occur. As a result, banned from publication are links to a website containing DeCSS in a report on permissible efforts to reverse engineer CSS, or in a report on the way a film professor compiles film clips for exhibition in class, or in a report on the District Court's decision. Banned are links that inform the reader exactly what DeCSS is, even if the reader is advised not to "use" DeCSS.

Moreover, unlike the defamation standard in which relief is confined to damages, the District Court's test authorizes injunctions, that is, a judicial order barring publication, as well as liability. See Near v. Minnesota, 283 U.S. 697, 718-19 (1931) (stating that the defamed "find their remedies . . . in actions" for damages, "not in proceedings to restrain . . . publication"); Kramer v. Thompson, 947 F.2d 666, 671-680 (3rd Cir. 1990) (reviewing the rule against injunctions and characterizing exceptions to it as merely a "trickle"); Community for Creative Non-Violence v. Pierce, 814 F.2d 663, 672 (D.C. Cir. 1987) (stating the settled rule that "equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages"); Alberti v. Cruise, 383 F.2d 268, 272 (4th Cir. 1967). The rule against injunctions has varied historical origins. But perhaps the most important reason for its continued vitality is the concern that prohibiting publication is plainly censorship. See Northwestern Pac. Railroad Co. v. Lumber & Sawmill Workers' Union, 31 Cal.2d 441, 448 (1948) (holding that equity "will not restrain the commission of a libel or slander, for that is prior censorship--a basic evil denounced by the Constitution[] of the United States . . . in protecting freedom of speech and press"); see generally Annotation, Injunction as a Remedy Against Defamation of Person, 47 ALR2d 715, 726-27 (1956) ("The most formidable obstacle to the grant of injunctive relief against personal defamation in this country has been the feeling of the courts that to allow such relief would infringe the constitutionally guaranteed freedoms of speech and of the press by setting up what

would be, at least potentially, a system of judicial censorship.""). This principle is not unique to defamation jurisprudence. "Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." New York Times v. United States, 403 U.S. 713, 717 (1971) (Black, J. concurring).

Further absent in the District Court's formulation is any analogue to the requirement that the publication be defamatory, that is, actually harmful to the subject's reputation, not merely untrue. See Levin v. McPhee, 119 F.3d 189, 195 (2d Cir. 1997); cf. Wood v. Georgia, 370 U.S. 375, 384-88 (1962) (explaining that one who makes false statements damaging to the reputation of a judge may be held in contempt of court only upon a showing of a clear and present danger of obstruction of justice).⁽¹³⁾ This requirement is consistent with the broader rule that restrictions on First Amendment rights are not tolerated unless "the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Turner Broadcasting System v. FCC, 512 U.S. 622, 664 (1994).

The District Court's standard, in contrast, allows one to halt publication without any showing that the link was used improperly by any reader or caused anybody any harm at all. Although a *per se* standard of liability does exist for defamation actions, in which the false statements are inherently damaging, a *per se* standard must not be applied where, as here, publication supports "remarkably varied" legal and non-damaging uses. See The Florida Star v. B.J.F., 491 U.S. 524, 539-40 (1989) (rejecting an ordinance in which "liability follows automatically from publication"); see also Celle v. Filipino Reporter Enterprises, 209 F.3d 163, 179 (2d Cir. 2000) (noting the "fuzziness" of the defamation *per se* rule).

Within the defamation analogy, publication by hyperlinking more closely resembles the practice of accurately reporting that allegedly false and defamatory statements were made by a reliable person. By hyperlinking, a publication is merely referring its reader to a reliable source of information about a newsworthy event or issue without espousing or concurring with the linked-to site's purposes.

In the defamation context, this Court, recognizing that "the First Amendment protects accurate and disinterested reporting of [newsworthy] charges," has applied a "neutral reportage privilege." Edwards, 556 F.2d at 120. Under the neutral reportage privilege, the press may report neutrally on the fact that asserted defamatory statements were made. The rule is derived from the very basic concept that the press must be free to report on newsworthy controversies. "The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them." Id.

Indeed, linking comes with even fewer risks than neutral reportage and is thus worthy of even greater constitutional protection. The online journalist is at least one step removed; she does not "republish" the allegedly harmful statement but merely indicates to the reader where it may be found.

On a practical level, the District Court's standard adds a significant burden to present day news reporting practice as dictated by journalistic ethics. Sound journalistic practice mandates that journalists seek to report the truth fully and fairly. See supra Society of Professional Journalists Code of Ethics. The defamation test requires nothing more. Merely having adhered to this standard is usually adequate to defend oneself against a charge of defamation; a journalist may refer to notes of interviews and investigations, research materials, and other documentary evidence to mount a defense. However, a journalist who includes links in a story may have to retain an extensive record of the content of all linked-to sites at the time the link was created solely for the purpose of defending herself in an action based on linking liability.

In addition, the examination into the publisher's intent in providing the link, required in the third part of the District Court's test, presents risks not present when the issue is merely the reporter's knowledge. Indeed, the core purpose of journalism is to disseminate information; one could scarcely imagine a situation in which the third prong of the District Court's test offered a legitimate journalist any safe haven. The District Court's test opens up to examination the subjective intent of numerous individuals responsible for including a link in a story.⁽¹⁴⁾

These unparalleled burdens, and the threat of having to testify about every single link included in an article will result in a grave chilling effect on linking.

C. The District Court Interprets the DMCA to Authorize a Prior Restraint Against Publication of DeCSS by all Subsequent Publishers

The result of the District Court's ruling is that any court is now empowered to issue an order barring any publisher from purposefully publishing a link to a site that contains DeCSS. This result is not only an unprecedented intrusion on the well-established First Amendment right to editorial freedom,⁽¹⁵⁾ it is a classic prior restraint.⁽¹⁶⁾ No matter what the situation or the news story, linking to a site containing DeCSS subjects the publisher to liability unless the link was accidental. The only defenses available are the ignorance that DeCSS is on the linked-to site, the ignorance that DeCSS is unlawful circumvention technology, and the lack of intent to maintain the link as a source of the DeCSS information. It is not a defense that the article was, despite the fact that it also contained DeCSS, an important source of information. It is not a defense that DeCSS is uniquely illustrative of a newsworthy issue. It is not a defense that no copyright holder would likely be imminently harmed by the publication of the link, or that an adequate post-publication remedy is available.

The fact that DeCSS is deemed contraband by the Digital Millennium Copyright Act does not change the constitutional calculation. Indeed, the DMCA itself forbids the use of the Act to grant a prior restraint. 17 U.S.C. 1201(b)(1).

The prior restraint so authorized is one that could not issue in the print medium; it is hard to imagine that a newspaper could be restrained from directing its readers to the web address of a site that contains DeCSS, or for that matter, the title and edition of a magazine in which DeCSS was published, or the address to which to send orders for the T-shirt that has DeCSS printed on it, or the name of an encryption expert who may have a copy. The Supreme Court has long protected the First Amendment right of the press to publish not only mere "links" to confidential

information, but the information itself. See Landmark Communications v. Virginia, 435 U.S. 829, 840 (1978) (rejecting argument that First Amendment protection does not extend to "the publication of information 'which by Constitutional mandate is to be confidential'"). See, e.g., The Florida Star v. B.J.F., 491 U.S. 524, 526 (1989) (identity of rape victim); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 98 (1979) (identity of juvenile offender). The press's rights are not necessarily diminished because the information was initially obtained improperly by someone else. See New York Times v. United States, 403 U.S. 713, 714, 740 (1971) (White, J. concurring) (holding that the New York Times could publish the confidential Pentagon Papers, even though the reporter obtained them without authorization and possibly as a result of criminal conduct).⁽¹⁷⁾ Even if one were to accept the assertion that the harm caused by the disclosure of DeCSS is not capable of being completely undone by post-publication relief, an injunction against publication is still not justified. See Oklahoma Publishing Co. v. District Court, 430 U.S. 308, 310-11 (1977) (refusing to enjoin the publication of photographs and the name of an 11 year old who had appeared at a detention hearing, even though a state statute authorized such an order).

III. ANY TEST FOR LINKING LIABILITY MUST BE BASED ON ACTIVE PARTICIPATION IN A TRAFFICKING ENTERPRISE

The tension in the District Court's opinion, evident by the court's authorization of prior restraints despite the DMCA's express prohibition on them, is a result of the District Court's wrongly perceiving the publication of a link to another website, without anything more, to be "offering to the public, providing, or otherwise trafficking." The First Amendment requires that "trafficking" be more than merely directing a reader to another source of information.⁽¹⁸⁾ Although a hyperlink may be evidence of actionable conduct, it cannot be the basis for liability in and of itself.

Courts should not formulate new constitutional tests specific to a medium unless such tests are absolutely necessary. In this case, existing First Amendment tests for vicarious liability adequately address Congress's concern in adopting the DMCA. For this reason, amici curiae endorse the hyperlinking liability analysis put forth by *amici curiae* American Civil Liberties Union *et al.*

CONCLUSION

For the foregoing reasons, *amici curiae* believe the judgment below should be reversed.

Respectfully submitted,

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Notes

1. Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997)
2. Id.
3. All parties have consented to the filing of this brief and their letters of consent have been filed with the court.
4. Survey of 3291 Web users by the Graphic, Visualization, Usability Center at Georgia Tech University, October 1998 (www.gvu.gatech.edu/user_surveys).
5. David Novack, "From Novelty to Mainstream," Editor & Publisher, Feb. 1, 1999, p. 36, citing the Pew survey of 3,184 adults.
6. www.mediainfo.com (accessed Dec. 4, 2000). Of all the links, 3139 were to newspaper Websites, 2602 to magazines, 1928 to radio, 1003 to television, and 172 to syndicates.
7. Novack, supra, n. 5.
8. See Society of Professional Journalists' Code of Ethics, available at www.spj.org/ethics/code.htm. The mandate persists even, at times, when that information is legally confidential or was obtained by others through improper means. See infra note 17 and accompanying text.

9. Mark Sableman, "Link Law: The Emerging Law of Internet Hyperlinks," 4 Comm. L. & Pol'y 557, 560 (1999), quoting Tim Berners-Lee, "Realizing The Full Potential of the Web" <www.w3.org/1998/02/Potential.html>

10. Indeed, were this brief submitted online, the judges of this Court could click on the links found in footnotes 4, 6, 8 or 9 and be quickly taken to those websites. Yet the "function" of the online version of the brief is no different than this paper one that requires that the web addresses be typed into a computer instead.

To the extent "functionality" refers to the hyperlink instructing the reader how to accomplish a task, there are common analogues in other news media. Newspapers commonly print intentionally instructive materials, such as gardening tips, that could be used for improper purposes, such as growing marijuana. And television news broadcasts details of how robberies are committed even though an aspiring thief may learn essential information from the report. Several courts have refused to attach liability in such situations. See, e.g., Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988) (reversing jury's award of damages in wrongful death action against a magazine publisher following adolescent's death allegedly caused by article describing practice of autoerotic asphyxia); DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982) (dismissing wrongful death action by deceased minor's parents against NBC after their son hanged himself while imitating a stunt observed on the Johnny Carson Show); Olivia N. v. NBC, Inc., 126 Cal. App.3d 488 (1981), cert. denied, 458 U.S. 1108 (1982) (finding that a victim sexually abused by teenagers imitating a similar incident depicted in television drama had no valid cause of action against television network).

11. "As [James] Madison said, 'Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.'" New York Times v. Sullivan, 376 U.S. 254, 271 (1964) (quoting 4 Elliot's Debates on the Federal Constitution 571 (1876)). See also Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988) ("But even though falsehoods have little value in and of themselves, they are nevertheless inevitable in free debate.").

12. The District Court identified, under its interpretation of the Digital Millennium Copyright Act, "a notable potential impact on uses that copy portions of a DVD movie" and characterized the interests of those affected as "remarkably varied." Reimerdes, 111 F. Supp.2d at 338.

13. The presumption of irreparable harm that in other contexts accompanies a legislative authorization of an injunction is not available when First Amendment rights are at issue. Pennkamp v. Florida, 328 U.S. 331, 335 (1946); Whitney v. California, 274 U.S. 357, 378-79 (1927) (Brandeis, J., concurring).

Were it otherwise, the scope of freedom of speech and of press would be subject to legislative definition and the function of the First Amendment as a check of legislative power would be nullified.

Landmark Communications v. Virginia, 435 U.S. 829, 843-44 (1978).

14. The Supreme Court has cautioned against applying intent based standards when First Amendment rights are at stake. See Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) (striking down a test that hinged legality on the publisher's purpose in including an illustration).

15. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974); CBS v. Democratic National Committee, 412 U.S. 94, 120-21 (1973); see also Regan v. Time, Inc., 468 U.S. 641, 678 (1984) ("the Government simply has no business second-guessing editorial judgments as to the communicative value of illustrations").

16. An order that *prevents* one from exercising his or her free speech rights, rather than addressing the harm caused by an utterance after the fact, is a "prior restraint." Prior restraints strike at the very heart of the First Amendment:

In determining the extent of the [First Amendment's] constitutional protection, it has generally, if not universally, been considered that the chief purpose of the guaranty is to prevent previous restraints on publication.

Near v. Minnesota 283 U.S. 697, 713 (1930). See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) ("[P]rior restraints upon speech and publication are the most serious and least tolerable infringement on First Amendment rights."); New York Times v. United States, 403 U.S. 713, 726-27, 730 (1969) (stating that prior restraints are permissible only "at time of war" (Brennan, J. concurring), or when a "direct, immediate and irreparable damage to our nation or its people" is certain to result) (Stewart J. concurring)). Prior restraints bear "a heavy presumption against its constitutional validity." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

As discussed above, the First Amendment dictates that the proper relief is not an injunction against publication, but an action for post-publication liability. "Subsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for . . . misdeeds in the First Amendment context." CBS, Inc. v. Davis, 510 U.S. 1315, 1318 (1994). See also Nebraska Press Association, 427 U.S. at 558 (explaining the preference for post-publication sanctions rather than prior restraints).

17. See also Religious Technology Center v. Lerma, 908 F.Supp. 1353 (E.D.Va. 1995), in which the court made clear that a reporter could not be liable for publishing excerpts of newsworthy documents, even where those documents were protected by copyright; Bartnicki v. Vopper, 200 F.3d 109 (3d Cir. 1999), cert. granted, 120 S.Ct. 2716 (2000), in which the Third Circuit held that a radio broadcaster could not be punished under state and federal wiretap statutes for broadcasting an illegally intercepted phone conversation, because the broadcaster did not participate in its interception. But see Boehner v. McDermott, 191 F.3d 463 (D.C. Cir. 1999); Peavy v. WFAA-TV, 221 F.3d 158 (5th Cir. 2000) (holding the law could be constitutionally applied in other, limited situations).

18. The District Court used the "expressive conduct" test set out in United States v. O'Brien, 391 U.S. 367, 376-77 (1968), to evaluate whether its linking liability standard comported with the First Amendment. [Op. at 76-77] Several courts have cautioned against applying O'Brien when

the "conduct" sought to be addressed is the disclosing and publishing of information. See Bartnicki v. Vopper, 200 F.3d 109, 120 (3d Cir.1999), cert. granted, 120 S.Ct. 2716 (2000), ("If the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct."); IDK v. County of Clark, 836 F.2d 1185, 1194 (9th Cir. 1988) ("[B]ooks and newspapers are, without doubt, expression; dating is conduct that is protected to the extent that it involves expressive activities."); Century Communications Corp. v. FCC, 835 F.2d 292, 295 (D.C. Cir. 1987).