AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech

**Universal Cities Studios, Inc. v. Corley, 273 F.3d 429** (2nd Cir. 2001)

*In 1998, Congress passed the Digital Millennium Copyright Act in pursuance to the World Intellectual Property Organization Copyright Treaty. Among its provisions was a prohibition on circumventing technological measures that controlled access to copyrighted work or trafficking in technology the primary purpose of which was to defeat technological measures protecting copyrighted work. Eric Corley published a magazine and website for hackers, and in 1999 he posted a copy of a decryption computer program (DeCSS) that allowed users to unlock the protective technology movie studios placed on DVD’s of their films. He posted an executable object code of DeCSS on his own website. Eric Corley published a magazine and website for hackers, and wrote an article describing the technological and legal battle over DeCSS. He included on the web version of the article copies of both the object and source code of DeCSS. Corley was not alone in distributing the code, and the movie studios tried without much success to squash the distribution of the code by sending cease-and-desist letters to websites hosting it.*

*Several movie studies filed suit in federal district court seeking an injunction barring Corley from posting the decryption program. The studies won their suit after a jury trial and were granted an injunction barring Corley from posting the program on his own site or linking to other sites that did post the program. Corley appealed, arguing that his publication of a computer code was constitutionally protected speech. A panel of judges on the circuit court affirmed the district court’s ruling. The circuit court found that computer code was constitutionally protected, but should be analyzed as a combining conduct and expression. The injunction against posting the code was constitutionally permitted as a content-neutral approach to advancing an important governmental interest that burdened expressive speech as little as possible while regulating the conduct in question.*

JUDGE NEWMAN.

. . . .

Communication does not lose constitutional protection as "speech" simply because it is expressed in the language of computer code. Mathematical formulae and musical scores are written in "code," i.e., symbolic notations not comprehensible to the uninitiated, and yet both are covered by the First Amendment. If someone chose to write a novel entirely in computer object code by using strings of 1's and 0's for each letter of each word, the resulting work would be no different for constitutional purposes than if it had been written in English. The "object code" version would be incomprehensible to readers outside the programming community (and tedious to read even for most within the community), but it would be no more incomprehensible than a work written in Sanskrit for those unversed in that language. The undisputed evidence reveals that even pure object code can be, and often is, read and understood by experienced programmers. And source code (in any of its various levels of complexity) can be read by many more. . . .

. . . .

. . . . Even dry information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection.

Thus, for example, courts have subjected to First Amendment scrutiny restrictions on the dissemination of technical scientific information, and scientific research, and attempts to regulate the publication of instructions.

Computer programs are not exempted from the category of First Amendment speech simply because their instructions require use of a computer. A recipe is no less "speech" because it calls for the use of an oven, and a musical score is no less "speech" because it specifies performance on an electric guitar. Arguably distinguishing computer programs from conventional language instructions is the fact that programs are executable on a computer. But the fact that a program has the capacity to direct the functioning of a computer does not mean that it lacks the additional capacity to convey information, and it is the conveying of information that renders instructions "speech" for purposes of the First Amendment. The information conveyed by most "instructions" is how to perform a task.

. . . .

. . . . Unlike a blueprint or a recipe, which cannot yield any functional result without human comprehension of its content, human decision-making, and human action, computer code can instantly cause a computer to accomplish tasks and instantly render the results of those tasks available throughout the world via the Internet. The only human action required to achieve these results can be as limited and instantaneous as a single click of a mouse. These realities of what code is and what its normal functions are require a First Amendment analysis that treats code as combining nonspeech and speech elements, i.e., functional and expressive elements.

. . . .

. . . . Causation in the law ultimately involves practical policy judgments. Here, dissemination itself carries very substantial risk of imminent harm because the mechanism is so unusual by which dissemination of means of circumventing access controls to copyrighted works threatens to produce virtually unstoppable infringement of copyright. In consequence, the causal link between the dissemination of circumvention computer programs and their improper use is more than sufficiently close to warrant selection of a level of constitutional scrutiny based on the programs' functionality.

In considering the scope of First Amendment protection for a decryption program like DeCSS, we must recognize that the essential purpose of encryption code is to prevent unauthorized access. Owners of all property rights are entitled to prohibit access to their property by unauthorized persons. Homeowners can install locks on the doors of their houses. Custodians of valuables can place them in safes. Stores can attach to products security devices that will activate alarms if the products are taken away without purchase. These and similar security devices can be circumvented. Burglars can use skeleton keys to open door locks. Thieves can obtain the combinations to safes. Product security devices can be neutralized.

. . . .

. . . . The DMCA and the posting prohibition are applied to DeCSS solely because of its capacity to instruct a computer to decrypt CSS. That functional capability is not speech within the meaning of the First Amendment. . . . This type of regulation is therefore content-neutral, just as would be a restriction on trafficking in skeleton keys identified because of their capacity to unlock jail cells, even though some of the keys happened to bear a slogan or other legend that qualified as a speech component.

As a content-neutral regulation with an incidental effect on a speech component, the regulation must serve a substantial governmental interest, the interest must be unrelated to the suppression of free expression, and the incidental restriction on speech must not burden substantially more speech than is necessary to further that interest. The Government's interest in preventing unauthorized access to encrypted copyrighted material is unquestionably substantial, and the regulation of DeCSS by the posting prohibition plainly serves that interest. Moreover, that interest is unrelated to the suppression of free expression. . . . Whether the incidental regulation on speech burdens substantially more speech than is necessary to further the interest in preventing unauthorized access to copyrighted materials requires some elaboration.

. . . .

Posting DeCSS on the Appellants' web site makes it instantly available at the click of a mouse to any person in the world with access to the Internet, and such person can then instantly transmit DeCSS to anyone else with Internet access. Although the prohibition on posting prevents the Appellants from conveying to others the speech component of DeCSS, the Appellants have not suggested, much less shown, any technique for barring them from making this instantaneous worldwide distribution of a decryption code that makes a lesser restriction on the code's speech component. . . .

. . . .

This reality obliges courts considering First Amendment claims in the context of the pending case to choose between two unattractive alternatives: either tolerate some impairment of communication in order to permit Congress to prohibit decryption that may lawfully be prevented, or tolerate some decryption in order to avoid some impairment of communication. Although the parties dispute the extent of impairment of communication if the injunction is upheld and the extent of decryption if it is vacated, and differ on the availability and effectiveness of techniques for minimizing both consequences, the fundamental choice between impairing some communication and tolerating decryption cannot be entirely avoided.

In facing this choice, we are mindful that it is not for us to resolve the issues of public policy implicated by the choice we have identified. Those issues are for Congress. . . .

. . . .

*Affirmed*.