ORAL ARGUMENT NOT YET SCHEDULED

Case No. 21-5195

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MATTHEW D. GREEN, ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
Defendants-Appellees.

BRIEF OF *AMICI CURIAE* ASSOCIATION OF AMERICAN PUBLISHERS, INC., ENTERTAINMENT SOFTWARE ASSOCIATION, MOTION PICTURE ASSOCIATION, INC. RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., AND NEWS MEDIA ALLIANCE IN SUPPORT OF APPELLEES AND AFFIRMANCE

On Appeal from the U.S. District Court for the District of Columbia
Case No. 1:16-cv-01492-EGS
Hon. Emmet G. Sullivan

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Corporate Disclosure Statement

Pursuant to Circuit Rule 26.1, *Amici Curiae* state that they have no parent corporations and that no publicly held corporation or other publicly held entity owns ten percent (10%) or more of any *amicus* organization.

Certificate as to Parties, Rulings Under Review, and Related Cases

Except for the entities listed herein and any *amici curiae* who have not yet entered an appearance in this Court, all parties, intervenors, and *amici* appearing before the district court are listed in the Briefs for Appellants and Appellees.

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GLOSSARY

Digital Millennium Copyright Act	DMCA
Digital Rights Management	DRM
Technological Protection Measure	TPM
Visual Artists Rights Act	VARA

STATUTES AND REGULATIONS

Relevant statutes and regulations are included in the Briefs for Appellants and Appellees.

INTEREST OF *AMICI CURIAE*[1]

The Association of American Publishers, Inc. ("AAP"), the Entertainment Software Association ("ESA"), the Motion Picture Association, Inc. ("MPA"), the Recording Industry Association of America, Inc. ("RIAA"), and the News Media Alliance ("NMA"), are trade associations whose members create and distribute some of the highest-value, most significant copyrighted works in the marketplace. *Amici* were founded to protect their members' copyright interests ***and*** First Amendment rights. *Amici* submit this brief because reversing either of the district court's orders would eviscerate critical safeguards created by Section 1201 (17 U.S.C. § 1201) of the Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, 112 Stat. 2860 (1998), and thus undermine copyright's role as our "engine of free expression." *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 330 (S.D.N.Y. 2000), *quoting Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

AAP represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No party, counsel to any party, or any person other than *Amici* contributed money to fund preparation or submission of this brief.

learning solutions. As publishers, AAP members identify, nurture and promote authors working in a wide range of disciplines, and representing a broad array of perspectives. In the process, they help ensure that our democracy benefits from a vibrant marketplace of ideas.

ESA is the U.S. trade association serving companies that manufacture video game equipment and create software for game consoles, handheld devices, personal computers, and the internet.[2] The association has an unmatched track record in protecting the industry's First Amendment rights and helping its members to reimagine entertainment for billions of players around the world.

MPA is the voice of the global film and television industry—a community of storytellers at the nexus of innovation, imagination, and creativity. In the United States and around the world, the film and television industry drives the creative economy. MPA's members are Walt Disney Studios Motion Pictures; Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Universal City Studios LLC; and Warner Bros. Entertainment Inc.

RIAA is the trade organization that advocates for recorded music and the people and companies that create it in the United States. RIAA's several hundred

[2] Note that video games, like books, movies, and music, enjoy full First Amendment protections. *See Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011).

members – ranging from major American music groups with global reach to artist-owned labels and small businesses – make up the world's most vibrant and innovative music community, working to help artists reach their potential and connect with fans while supporting hundreds of thousands of American jobs. In support of this mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels.

NMA is a nonprofit organization that represents the interests of more than 2,000 news media organizations in the United States and internationally. The Alliance diligently advocates for news organizations on issues that affect them today, including protecting news organizations' intellectual property and free speech rights. The proper implementation of copyright's fair use doctrine and the protections of the DMCA are matters of urgent importance to NMA and its members.

As the Supreme Court has repeatedly recognized, "the Framers intended copyright itself to be the engine of free expression." *Harper & Row*, 471 U.S. at 558. Since the advent of the digital age and the DMCA's enactment, Section 1201's prohibitions against circumvention of access controls and trafficking in circumvention tools have played—and continue to play—a vital role in furthering copyright's crucial objectives. Section 1201 helps prevent devastating piracy and unauthorized access to copyrighted works, in that way preserving the incentive for

content creators and distributors like *Amici*'s members to continue to create and disseminate expressive works.[3] Technological protection measures also enable copyright owners to design innovative business models that benefit consumers by enabling lower-cost access to a more diverse variety of offerings, including subscription-based access to high-quality, digital entertainment content, on-demand viewing, cloud-based storage and sharing, and secure, authenticated videogame play.

Over time, each of the industries represented by *Amici* have relied on Section 1201 to expand their options for disseminating their content. In the motion picture industry, studios or their licensees used software on DVDs and Blu-ray discs that disabled the ability to access the content on unauthorized players or to copy and distribute it onto computers or over the internet. Today, the studios' streaming services, whether transactional or subscription-based, deploy content protection measures on internet and cable/satellite streams. Recorded music was distributed through services like iTunes that encrypted streams and downloads. Now, services like Spotify and Apple Music offer subscription access models that

[3] For a recent example that highlights the importance of Section 1201 anti-circumvention provisions, *see* U.S. Dep't of Justice, *Public voice and principal salesperson for notorious videogame piracy group sentenced to 3+ years in prison for conspiracy*, Feb. 10, 2022, https://www.justice.gov/usao-wdwa/pr/public-voice-and-principal-salesperson-notorious-videogame-piracy-group-sentenced-3 (strong anti-piracy victory by DOJ against notorious hackers of video games).

protect both time-limited downloads and all-you-can-eat streaming access. Videogame consoles and content have and continue to be protected by DRM. Consoles, like the Xbox, PlayStation and Nintendo Switch, use various forms of technical protection measures to prevent piracy and to ensure a secure delivery platform to provide not only access to video games, but access to movies and music through various third party services (including services such as YouTube and Hulu). Literary works, such as those published by AAP and NMA members have been offered with content protection measures through e-book readers and also now through website access subscriptions that require authentication and password protection.

Indeed, the continued vitality of *Amici*'s members' businesses directly depend upon the types of technological protection measures for which Section 1201 provides protection.[4] As both copyright owners and parties who sometimes rely on the fair use defense, *Amici*'s members have a unique perspective regarding

[4] A recent study concluded that the copyright industries contributed over $2.5 trillion to the U.S. economy in 2019. ROBERT STONER AND JÉSSICA DUTRA OF ECONOMISTS INCORPORATED, PREPARED FOR THE INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA), COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2020 REPORT 3 (2020), https://www.iipa.org/files/uploads/2020/12/2020IIPA-Report-FINAL-web.pdf. Another study concluded that global online piracy of motion pictures alone costs the U.S. economy at least $29.2 billion in lost revenue each year. U.S. CHAMBER OF COMMERCE, IMPACTS OF DIGITAL PIRACY ON THE U.S. ECONOMY ii (June 2019), https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf.

how Section 1201—consistently with the traditional contours of copyright—fosters and encourages, rather than hinders, free expression.

SUMMARY OF ARGUMENT

The Copyright Clause, Art. I, § 8, cl. 8, exists to foster the creation and dissemination of original works for the general public welfare. Copyright serves as an engine of free expression, working in tandem with the First Amendment. This salutary purpose depends on ensuring that copyright holders receive a fair return for exploiting their copyrighted works. In our digital age, a single pirated copy of a copyrighted work can find its way onto the internet, where billions of people can access the infringing work without cost. Massive infringement impedes free expression in several ways. Deprived of a fair return, copyright owners have less incentive to create and distribute expressive works. Moreover, the specter of rampant piracy inhibits copyright holders from creating new platforms and services that can offer the consuming public broader access to creative works. And, widespread infringement increases the copyright owner's cost of disseminating expressive works, making access to those works more difficult for many cost-conscious consumers. By deterring digital piracy, Section 1201 serves as an engine of free expression. In the nearly twenty-five years since the statute's enactment, the free speech benefits resulting from Section 1201's protections have been legion. In challenging the constitutionality of Section 1201, Appellants and

their supporting amici ignore copyright's unique role in fostering the dissemination of creative content for the public's benefit.

Section 1201 does not trigger heightened scrutiny: the section falls squarely within the traditional contours of copyright. Because of copyright's free speech underpinnings, courts confronted with First Amendment challenges to copyright statutes give greater deference to Congress's enactments. Indeed, the Supreme Court has recognized, as discussed below, that Congress may sometimes limit or modify uses previously held to have been a fair use. Moreover, Section 1201's prohibitions are consistent with the long-established principles that a copyright owner has the right to limit publication or not to publish at all; and that one who improperly gains access to a copyrighted work may not automatically invoke fair use as a defense. And, even assuming that Section 1201 granted copyright owners a "new right," the copyright law's history shows that such increased protection is not unique. Rather, Congress has historically expanded copyright owners' exclusive rights. Finally, Section 1201's rulemaking procedure in no way alters copyright's traditional contours but rather embodies an approach that reflects the current provisions of the Copyright Act and the judicial determinations of fair use.

Even assuming that Section 1201 triggered some type of heightened scrutiny, intermediate scrutiny – or something lower – would apply: no court has concluded that Section 1201 is content-based, and all courts considering the issue

have concluded that the statute is constitutional. The statute serves a substantial government interest: preventing piracy and encouraging dissemination of expressive works. The statute encourages, rather than suppresses, speech by allowing copyright owners to exploit new technologies without fear of rampant piracy and unauthorized access. And the statute has a minimal or no burden on speech by virtue of the rule-making procedure and legitimate alternative avenues of access to copyrighted works. *Amici* urge that the Court affirm both the district court's order of dismissal and its order denying injunctive relief.

ARGUMENT

I. SECTION 1201 IS CONSISTENT WITH COPYRIGHT'S TRADITIONAL CONTOURS AND TRIGGERS NO SPECIAL SCRUTINY

The Supreme Court has repeatedly explained that "[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Harper & Row*, 471 U.S. at 558, *citing Mazer v. Stein*, 347 U.S. 201, 209 (1954) (Copyright posits that "encouragement of individual effort by personal gain is the best way to advance public welfare"); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (The ultimate aim of copyright is "to stimulate [the creation of useful works] for the general public good.") (internal quotations omitted). "Evidence from the founding, moreover, suggests that inducing *dissemination*—as opposed to creation—was

viewed as an appropriate means to promote science." *Golan v. Holder*, 565 U.S. 302, 326 (2012) (emphasis in original).

"As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). *Accord*, *Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003) ("The Copyright Clause … empowers Congress to *define* the scope of the substantive right.") (emphasis in original). "Judicial deference to such congressional definition is 'but a corollary to the grant to Congress of any Article I power.'" *Eldred*, 537 U.S. at 218, *quoting Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 6 (1966). In light of these core principles, Section 1201 falls squarely within the traditional contours of copyright and triggers no searching scrutiny.

A. Section 1201 Encourages the Creation and Dissemination of Expressive Works

The advent of the internet and the ability to make unauthorized perfect, digital reproductions of a copyrighted works on a mass scale posed a threat to copyright holders who otherwise desired to innovate and explore new media and new distribution models. After a lengthy legislative process, Congress concluded that "copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive

piracy." *See* S. REP. NO. 105-190, at 8 (1998).[5] Congress enacted section 1201 for very good reasons. The United States had just joined the World Intellectual Property Organization ("WIPO") Copyright Treaty and the WIPO Performances and Phonograms Treaty, Apr. 12, 1997, S. Treaty Doc. No. 105-17 (1997),which required parties to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors [or "performers or producers of phonograms"] in connection with the exercise of their rights … ." When Congress held hearings regarding implementation of the treaties, copyright owners strongly supported legislation creating a right against unauthorized access and protecting against trafficking in circumvention devices. They also emphasized the role such legislation would play in helping to launch new business models for disseminating creative expression. *See, e.g.*, *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong., 1st Sess., at 79 (Sept. 16 and 17, 1997) (statement of Jack Valenti,

[5] With the advent of file-sharing software, Congress's concern about the effects of massive infringement proved prescient. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd*., 545 U.S. 913, 923 (2005) ("[B]ecause well over 100 million copies of the software in question are known to have been downloaded, and billions of files are shared across the FastTrack and Gnutella networks each month, ***the probable scope of copyright infringement is staggering***.") (emphasis added).

MPAA) ("The same technology that will smooth the way for legitimate delivery of video on demand over digital networks will also prime the pump for copyright pirates."); *id.* at 204 (statement of Allan Adler, AAP) ("Without adequate safeguards for copyright, the promise of the Internet simply won't be fulfilled."). So, in passing Section 1201, Congress had substantial evidence that statutory prohibitions against unauthorized access and circumvention tools were an essential supplement to existing law to protect copyright owners and thus incentivize online speech and prevent piracy. *See* STAFF OF THE H. COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE U.S. H. OF REP. ON AUGUST 4, 1998, at 6 (Comm. Print 1998) ("These technological measures … that this bill protects can be deployed, not only to prevent piracy and other harmful unauthorized uses of copyrighted materials, but also to support new ways of disseminating copyrighted materials to users … These technological measures may make more works more widely available … .").

After Congress enacted the DMCA, the Copyright Office and the Librarian of Congress, through the triennial rulemaking process codified in Section 1201(a)(1)(C), have continued to hear from copyright owners regarding (i) ongoing risks presented by digital piracy and (ii) the ways in which Section 1201(a) has facilitated the launch of successful business models that have increased the

availability of means of access to creative content.[6] The following are a few selected from many examples:

> "[A]n underlying assumption of many of the remarks made in the course of this inquiry is that technological protection measures will be used to 'take' works away from users or to deny access. I strongly believe that this assumption is fundamentally flawed. Technological protection measures actually facilitate the making of works available to consumers. DVD is a concrete example. My company [Warner Bros.] would not have released its motion pictures on the DVD format if DVD did not incorporate technical protection measures." May 19, 2000 statement of Dean Marks, Warner Bros.[7]

> "Video game consoles are platforms for the creation, distribution, and consumption of copyrighted works, and they rely on the TPMs at issue … to prevent infringement of those works. … [S]trong copyright protections are critical to the investment and creation of copyrighted works …." May 17, 2012 statement of Christian Genetski, ESA.[8]

> "Access control technologies are an integral part of our efforts to offer consumers the widest possible choice of platforms and terms at a corresponding range of price points to enjoy our movies and TV

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[6] During every triennial proceeding, *Amici* have submitted evidence to the Copyright Office concerning the innovative business models for distribution of their creative works that have been facilitated by Section 1201, and about the ongoing threat posed by digital piracy.

[7] *Library of Congress U.S. Copyright Office DMCA Section 1201(a)(1) Hearing*, written statement of Dean Marks, at 2 (May 18-19, 2000), https://www.copyright.gov/1201/hearings/2000/dean_marks.pdf.

[8] *Library of Congress U.S. Copyright Office Section 1201 Rulemaking Hearing before the Copyright Office Panel*, at 18 (May 17, 2012), https://www.copyright.gov/1201/2012/hearings/transcripts/hearing-05-17-2012.pdf.

> programs." May 17, 2012 statement of Dan Mackechnie, 20th Century Fox Home Entertainment.[9]
>
> "So the deals historically that I was involved with when I was previously with Sony Music, for example, we did a lot of due diligence and we specified very precisely what kind of security measures we intended to have in place for sometimes called end-to-end or link, or whatever term you want to use, to protect the music." April 12, 2018 statement of David Hughes, RIAA.[10]

Over the years, Congress has gathered additional evidence of the continued need for, and the success of, Section 1201. *See, e.g., Chapter 12 of Title 17, Hearing before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. On the Judiciary*, 113th Cong., 2d Sess., at 2 (Sept. 17, 2014) (statement of Rep. Jerrold Nadler) (Section 1201 "has worked to encourage the creation of new digital works and has allowed authors a way to protect against copyright infringement while also helping to promote the development of new and innovative business models."); *id.* (statement of Rep. Thomas Marino) ("The digital economy has enabled wide distribution of movies, music, eBooks and other

[9] *Id.* at 72.

[10] *Library of Congress U.S. Copyright Office Section 1201 Roundtable*, at 102 (Apr. 12, 2018), https://www.copyright.gov/1201/2018/hearing-transcripts/1201-Rulemaking-Public-Roundtable-04-12-2018.pdf.

digital content. Chapter 12 seems to have a lot to do with the economic growth ... .").[11]

In 2017, Congress requested a report from the Register of Copyrights concerning how section 1201 functioned in the marketplace. The report confirmed that section 1201 has successfully spurred the dissemination of creative works. *See U.S. Copyright Office, Library of Congress, Section 1201 of Title 17: A Report of the Register of Copyrights*, at i (June 2017) ("1201 Study") ("Since the enactment of section 1201, the use of technological measures has been useful in expanding consumer choice and the avenues for dissemination of creative works …"). The report also concluded that the circulation of circumvention tools would cause increased harm to copyright owners and the public. *Id.* at 56 ("[T]he Office agrees with the commenters who argued that it would be impossible to control the downstream uses of any circumvention tools once distributed, even if they were produced with the intent that they be used only to assist authorized circumvention.").[12]

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[11] The hearing transcript is available at: https://docs.house.gov/meetings/JU/JU03/20140917/102670/HHRG-113-JU03-Transcript-20140917.pdf.

[12] *Amici,* and their members, submitted comments and testimony during the Section 1201 Study process. *See, e.g., Library of Congress U.S. Copyright Office Public Roundtable on Section 1201*, at 22-23 (May 19, 2016), https://www.copyright.gov/policy/1201/public-roundtable/transcript_05-19-2016.pdf (statement of Troy Dow, Walt Disney Co.) ("I can tell you that the

Section 1201 has allowed *Amici*'s members to transform their businesses in ways that have expanded the output of creative expression and have made that expression more widely accessible to consumers. *Amici*'s members constantly innovate to meet the demands of their customers and to provide choices to keep audiences growing and diversifying.[13] For example, subscription-based, digital access to movies, television content, newspapers, books, magazines, music, and

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availability of these legal tools has been directly relevant to the decisions to get into these markets … [T]he DMCA has been a factor in the willingness to engage in all of those things. And so, I think it, from our perspective, has been both necessary and successful."); *Library of Congress U.S. Copyright Office Public Roundtable on Section 1201*, at 35 (May 25, 2016), https://www.copyright.gov/policy/1201/public-roundtable/transcript_05-25-2016.pdf (statement of Ben Golant, ESA) ("I think that the statute has allowed members to be creative in ways to protect its content through DRM measures and then having 1201 on top of that gives them a modicum of assurance that they can go forward to create more and new things. In fact the entire system … leads not only to the creation of innovative products but also goodwill among our consumers."); *id.* at 15 (statement of Susan Chertkof, RIAA) ("It's been well publicized in the music industry that the industry is shifting from an ownership model to an access model and that access is really kind of where all the growth is.").

[13] *See generally* Entertainment Software Association, 2021 ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY, https://www.theesa.com/2021-essential-facts-about-the-video-game-industry; Motion Picture Association, THEME REPORT (2021), https://www.motionpictures.org/wp-content/uploads/2022/03/MPA-2021-THEME-Report-FINAL.pdf; Association of American Publishers, *Advancing Digital Platforms to Support Student Success*, https://publishers.org/our-markets/higher-education; Recording Industry Association of America, 2021 YEAR-END MUSIC INDUSTRY REVENUE REPORT | RIAA, https://www.riaa.com/ reports/2021-year-end-music-industry-revenue-report-riaa/.

videogames, along with inexpensive, time-limited access to downloads of such works, would not be a viable business model without legal protection for access controls. In designing their diverse offerings, authors and creative businesses need marketplace protection against widespread availability of hacking tools that render useless the limitations on digital access that make these offerings possible. Section 1201 provides that protection and serves copyright law's objective of fostering free expression.[14]

B. In Certain Cases Involving Technological Innovation, Congress Has the Power to Define the Contours of the Fair Use Defense

A false premise underlies the arguments of Appellants and some of their supporting *amici*: namely, that Congress may never, consistently with the First Amendment, alter the scope of fair use. In the context of technological innovation, the Supreme Court has indicated otherwise. In *Sony Corp. of Am. v. Universal City*

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[14] Section 1201(a)(2) "is aimed fundamentally at outlawing so-called 'black boxes' that are expressly intended to facilitate circumvention of technological protection measures for purposes of gaining access to a work[.]" H.R. REP. NO. 105-551, pt. 2, at 29 (1998). "Congress was particularly concerned with encouraging copyright owners to make their works available in digital formats such as 'on-demand' or 'pay-per-view,' which allow consumers effectively to 'borrow' a copy of the work for a limited time or a limited number of uses." *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 947 (9th Cir. 2010). Dr. Huang's Alphamax's NeTVCR would enable the equivalent of such unlawful activities. After the device strips the HDCP encryption used to protect content transmitted through an HDMI cable, anything viewable on a television screen can be copied in perfect digital form quality and added to a permanent collection of movies, television shows, and music videos, regardless of the terms and conditions of access.

Studios, Inc. ("*Sony-Betamax*"), the Court held that recording of free, over-the-air television programming for later viewing, and then deleting the content ("time-shifting") constituted fair use. 464 U.S. at 454. The Court also emphasized, however:

> ***It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past.*** But it is not our job to apply laws that have not yet been written.

Id. at 456 (emphasis added). Thus, in the seminal case involving new technology and the scope of fair use, the Court clearly indicated that Congress, to promote copyright's purpose, may address technological innovation by updating the boundaries of fair use.

Notably, Appellants' proposed uses of technology fall squarely within the type of activity that, according to the *Sony-Betamax* Court, Congress has every right to regulate. For example, Appellant Huang conceded below that he wanted to enable what is frequently referred to as "back-up copying," "space shifting," and "format shifting," ECF 30-3 ¶¶15, 21-22. The Court in *Sony-Betamax* recognized that Congress had the power to enact a law that made *time* shifting, even of free broadcasts, illegal. *See* 464 U.S. at 456. In passing section 1201, Congress concluded—as it had the constitutional right to do—that access controls are necessary to prevent rampant piracy and to preserve copyright's status as an engine of free expression. Moreover, courts and the Copyright Office have repeatedly

concluded that space shifting and format shifting are not fair uses. *See, e.g.*, *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 862 (9th Cir. 2017) ("The reported decisions unanimously reject the view that space-shifting is fair use under § 107.") (citations omitted); U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION: RECOMMENDATION OF THE REGISTER OF COPYRIGHTS 107-126 (Oct. 2015).

C. Copyright Owners May Limit Access to Their Works

Copyright owners have the right to refrain from disseminating their works. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The owner of the copyright, if [it] pleases, may refrain from vending or licensing and content [itself] with simply exercising the right to exclude others from using [its] property."). A "copyright owner has right to protect 'the expressive content of his unpublished writings for the term of his copyright.'" *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1116 (9th Cir. 2000), *quoting Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir.1987). Indeed, "nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright." *Stewart v. Abend*, 495 U.S. 207, 228–29 (1990).

In *Harper & Row*, the defendant obtained a purloined copy of President Gerald Ford's memoirs and published a key excerpt. In rejecting the defendant's

claim of fair use, the Court noted: "The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance." 471 U.S. 558 (citation omitted). So, copyright holders have traditionally had a right to control the dissemination of their works, and restrictions on access have influenced courts' willingness to find fair use. Section 1201's access provisions fall within the traditional contours of copyright.

D. Congress Has Historically Created New Rights in Furtherance of Copyright's Objectives

Appellants and their supporting *amici* characterize section 1201's anti-circumvention and anti-trafficking provisions as an aberration in copyright law. *See, e.g.*, *Brief of Amici Copyright Scholars* at 2 (characterizing the statute as a "new class of right'). However, since the enactment of the first copyright statute, the Copyright Act of 1790, Congress has adopted new classes of rights to advance copyright's free speech objectives. The 1790 Act originally granted authors of maps, charts, and books "the sole right and liberty of printing, reprinting, publishing and vending" their original work. Act of May 31, 1790, ch. 15, 1 Stat. 124. Over the decades, Congress amended the statute or enacted new laws to protect new categories of works, including musical works (Act of Feb. 3, 1831, ch. 16, 4 Stat. 436); photographic works (Act of July 8, 1870, ch. 230, 16 Stat. 198); motion pictures (Act of Aug. 24, 1912, Pub. L. No. 62-303, ch. 356, sec. 5, § 5(l)–

(m), 37 Stat. 488, 488 (1912)); sound recordings (Pub. L. No. 92-140, 85 Stat. 391 (1971)); computer software (Pub. L. No. 96-517 (1980)); and architectural works (Pub. L. No. 101-650, 701,703, 104 Stat 5128, 5133 (1990)). Moreover, in 1870, copyright law for the first time granted protection against the creation of unauthorized derivative works—even though an unauthorized derivative work can add socially valuable content. *See, e.g.*, *Abend*, 495 U.S. at 237 (classic movie *Rear Window* infringed plaintiff's short story even though the story made up only twenty percent of film's storyline; and even though the film received four Academy Award nominations and ranks number 42 on the American Film Institute's 100 Years…100 Movies list). Congress has nonetheless determined that the benefit society would reap from providing copyright owners with an exclusive right to prepare derivative works (*see* 17 U.S.C. §106(2)) outweighs any societal benefits that might accrue from an unfettered right to adapt copyrighted works without authorization. Consistent with the traditional contours of copyright, Section 1201 is merely one in a long line of enactments affording broader copyright protection in the interest of promoting free expression.

Amici Copyright Scholars also assert that Section 1201 substantially alters the traditional contours of copyright, which "had always before required infringement by someone to predicate liability." *Copyright Scholars' Brief* at 4. This contention suffers from at least two flaws. First, it begs the question: the right

to make derivative works had no nexus with infringement until Congress passed a new law in 1870 making unauthorized adaptation infringing. Second, the contention is factually incorrect. In 1990, Congress passed the Visual Artists Rights Act, 17 U.S.C. §106A ("VARA"), Pub.L. No. 101–650 (tit. VI), 104 Stat. 5089, 5128–33 (1990). VARA amended the Copyright Act to give visual artists certain rights in connection with their works of art, including the right of attribution, the right of integrity, and in some cases, the right to prevent a work's destruction. *See Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995). These rights differ from the economic rights that copyright law previously protected. *See Massachusetts Museum of Contemp. Art Found., Inc. v. Buchel*, 593 F.3d 38, 48 (1st Cir. 2010). Thus, VARA, like section 1201, added rights to the Copyright Act that did not require traditional "infringement" as a trigger to liability.

E. Section 1201's Rulemaking Procedure Ensures that the Statute Conforms to Copyright's Traditional Contours

Since Congress enacted the DMCA, the Copyright Office and the Librarian of Congress, through the triennial rule-making process codified in Section 1201(a)(1)(C), have balanced ongoing risks of piracy against the need for exemptions for certain noninfringing uses of certain classes of works. *See Section 1201 Rulemaking: Eighth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention* (October 2021), available at

https://cdn.loc.gov/copyright/1201/2021/2021_Section_1201_Registers_Recommendation.pdf. Congress created the rulemaking proceeding to address lawful uses of copyrighted works not covered by the permanent exemptions. *Id.* at 3. Section 1201(a)(1) requires the Librarian of Congress, following a rulemaking proceeding conducted by the Copyright Office, to publish any class of copyrighted works as to which the Librarian has determined that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected by the prohibition against circumvention in the succeeding three-year period, thereby exempting that class from the prohibition for that period. *Id.*

Appellants and their supporting *amici* suggest that the rulemaking procedure is an unconstitutional speech-licensing regime because the Librarian must consider, for example, how an exemption might affect nonprofit archival, preservation, and educational purposes; and also must consider the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research.[15]

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[15] The Librarian must consider: "(i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Librarian considers appropriate." 17 U.S.C. §1201(a)(1)(C).

Copyright Scholars' Brief at 21. Yet, section 107 makes precisely those types of distinctions. The preamble to section 107 identifies "purposes such as criticism, comment, news reporting, teaching… scholarship, or research…" Likewise, the first fair use factor distinguishes between uses of a "commercial nature" and "uses for nonprofit educational uses." 17 U.S.C. §107(1).

Moreover, in considering the first fair use factor—*i.e.*, the purpose and character of the defendants' use—a court will consider whether a defendant's use is *transformative*. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-81 (1994) (suggesting that parody is more transformative than satire). While more recent cases have broadened the concept of "transformation," the inquiry nevertheless involves examining the nature of the works at issue. *See, e.g., Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith,* 11 F.4th 26, 32 (2d Cir. 2021), *cert. granted*, No. 21-869 (Mar. 28, 2022) ("[T]he judge must examine whether the secondary work's use of its source material is in service of a 'fundamentally different and new' artistic purpose and character, such that the secondary work stands apart from the "raw material" used to create it.") (internal quotations omitted). Likewise, the second fair use factor, the nature of the copyrighted work, distinguishes between fictional and factual uses; and between published and unpublished works. *Campbell*, 510 U.S. at 586. Section 1201's rulemaking process falls within these traditional contours of fair use jurisprudence.

Neither does the Section 1201 rulemaking procedure – which is *not* an adjudication, as argued by some of Appellants' *amici* – flout the traditional contours of copyright because it privileges one speaker over the other, as Appellants and some *amici* allege. *See Copyright Scholars' Brief* at 23-24. Copyright law has long made such distinctions. For example, Section 108 of the Copyright Act, 17 U.S.C. §108, gives preference to certain types of uses of certain types of works by certain types of users, *i.e.*, libraries and archives. Section 110 of the Act, 17 U.S.C. §110, exempts certain performances and displays by instructors or pupils under certain circumstances (Section 110(1)); certain performances at a place of worship or other religious assembly (Section 110(3)); and certain performances for educational, religious, or charitable purposes (Section 110(4)).

Finally, the Copyright Office does not, as Appellants and some of their supporters claim, conduct the rulemaking process in a "highly burdensome fashion." Nor does the Copyright Office unduly narrow or reject exemptions. The Office even proactively changed its procedures, with support from *Amici* and other copyright owners, to allow for streamlined renewals of exemptions. The Office gives proponents every opportunity to build their cases. The Office does not deny petitions with poor support at the outset, instead opting to move forward and consider later submitted evidence. Despite rules that would allow otherwise, the Office even accepts evidence from proponents of exemptions submitted for the

first time at hearings that take place late in the process and even by letter after those hearings.[16]

In addition, as the court in *Universal City Studios v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001), noted, there is "no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original." In many cases, there are readily available alternative—and legal—means to access the content at issue. For example, a review of the 2018 triennial rulemaking record demonstrates that almost all of the conduct Dr. Huang identifies, other than copying full-length movies and shows in an unencrypted, digital format, is already possible using lawful devices currently available in the marketplace. Split-screen televisions, digital-video-recorders, and videogame consoles that allow for recording game play are all commonplace.

Finally, the triennial rulemaking procedures likely provide more certainty and cost-effectiveness than an unfettered regime where users could circumvent and

[16] Neither do copyright owners reflexively oppose every proposed exemption, as the "Accessibility, Security and Repair Fair Users" claim. Indeed, *Amici* have not opposed renewals of any exemptions for multiple cycles; have supported changing the procedure to allow for streamlined renewals with very little evidence submitted by proponents; and frequently offer compromises (especially on important accessibility issues) or do not even file in response to new petitions that do not present significant threats to creative industries.

make digital copies based on fair use. Such circumvention would undoubtedly result in expensive litigation and little legal certainty and would have more of a chilling effect on those wishing to engage in circumvention. Courts make fair use determinations on a case-by-case basis. *See Campbell*, 510 U.S. at 577. Moreover, some factors may prove more important in some contexts than in others. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1198 (2021). So, a decision in one case would not create certainty for the next dispute. For example, Appellant Huang claims that he wants to circumvent to "space shift" and "format shift." However, as noted, the courts have held that these uses are not fair uses. *VidAngel*, 869 F.3d at 862. But for the DMCA, proponents of space shifting or format shifting might mistakenly rely on fair use as a justification for circumventing and (perhaps inadvertently) cause devastating digital piracy. Section 1201 provides something closer to certainty.[17]

[17] Neither is there merit to the contention that the rulemaking process is prohibitively expensive and results in delays. Lawsuits involving allegations of copyright infringement and issues of fair use can be extremely expensive and can take years to resolve. For an extreme case, *see Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021) (litigation decided on fair use grounds lasted approximately eleven years). The rulemaking also provides a fresh bite of the apple every 3 years, unlike civil litigation.

II. SHOULD THE COURT DETERMINE THAT SECTION 1201 TRIGGERS HEIGHTENED SCRUTINY, IT SHOULD APPLY INTERMEDIATE SCRUTINY

Even if the Court were to decide that section 1201 triggers heightened scrutiny, the statute is, at most, subject to intermediate scrutiny. As the district court held, the section is not content-based. *Green v. U.S. Dep't of Justice*, 392 F. Supp. 3d 68, 92-93 (D.D.C. 2019. Other courts that have considered the issue and decided that section 1201 triggers scrutiny have applied intermediate scrutiny and found the provision constitutional. *See Reimerdes*, 111 F. Supp. 2d at 330, *aff'd Corley*, 273 F.3d at 454-55; *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1089 (N.D. Cal. 2004); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1131 (N.D. Cal. 2002). *Amici* refer to the Government's responding brief for why Appellants' arguments lack merit. However, *Amici* will address one argument contained in the Copyright Scholars' brief. As noted above, the Copyright Scholars contend that strict scrutiny applies because Section 1201 and the rule-making process exempt certain categories of uses but not others (*i.e.*, that the statute's exceptions and limitations render it content based). *Copyright Scholars' Brief* at 19-26. But as discussed above, the fair use inquiry under section 107 of the Copyright Act, and other defenses and limitations, make similar distinctions. If the Copyright Scholars were correct about section 1201's constitutionality—and they are not—they would also *a fortiori* have to attack the

constitutionality of Sections 107, 108, and 110 and judicial interpretations of the fair use defense as content-based. Of course, they do just the opposite. There is no basis for applying strict scrutiny in this case.

CONCLUSION

Section 1201 reflects judgments of a kind Congress typically makes; judgments entirely within the Legislature's domain. *See Eldred*, 537 U.S. at 205. The district court's dismissal order and order denying the motion for a preliminary injunction should be affirmed.

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