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No. 08-10521

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MGE UPS SYSTEMS, INC.,

***Plaintiff-Appellant-Cross-Appellee*,**

v.

POWER PROTECTION SERVICES, LLC;
BILL WILKIE,

***Defendants-Appellees*,**

GE CONSUMER AND INDUSTRIAL, INC.;
GE INDUSTRIAL SYSTEMS, INC.;
GENERAL ELECTRIC COMPANY; POWER MAINTENANCE INTERNATIONAL, INC.,

***Defendants-Appellees-Cross-Appellants*.**

BRIEF OF AMICUS CURIAE MOTION PICTURE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC*

On Appeal From The United States District Court for the Northern District Of Texas, Fort Worth Division, No. 4:04-CV-929Y

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 26.1, 28.2.1 and 29.2, the undersigned counsel of record for Amicus Curiae Motion Picture Association of America, Inc. ("MPAA") certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

A. **Parties:** Amicus Curiae Motion Picture Association of America, Inc. ("MPAA"). The MPAA has no parent corporation, and no publicly held company owns 10% or more of its stock. The MPAA member companies include Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Walt Disney Studios Motion Pictures, Twentieth Century Fox Film Corporation, Universal City Studios LLLP, and Warner Bros. Entertainment Inc.

B. **Attorneys For Amicus Curiae**:

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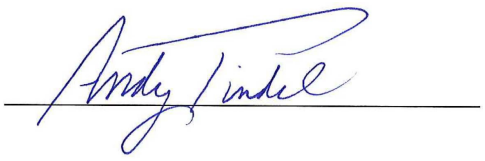

Andy Tindel
Lead Attorney for Amicus Curiae

STATEMENT OF INTEREST OF THE AMICUS CURIAE

MPAA urges correction of a fundamental error of law in the panel's opinion ("the Opinion") that would adversely effect the businesses of the MPAA's members. MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. MPAA's members produce or distribute the vast majority of the filmed entertainment in the domestic theatrical, television, and home entertainment markets, and are among the leading distributors of motion pictures internationally. Increasingly, MPAA members distribute those copyrighted works in digital form, *protected by technological measures*, to consumers and businesses in more formats than ever before, including on DVDs and Blu-Ray discs, and digitally through cable, satellite television, downloads and streaming. MPAA members rely heavily on the robust protections of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. §1201, to benefit not only MPAA members' businesses, but also consumers. MPAA therefore has a strong interest in this case, which involves the scope and application of §1201.

The panel concluded that under §1201(a), "[m]erely bypassing a technological protection that restricts a user from viewing or using a work is insufficient to trigger the DMCA's anti-circumvention provision. The DMCA prohibits only forms of access that would violate or impinge on the protections that

the Copyright Act otherwise affords copyright owners." Slip Op. at 6.[1] MPAA respectfully submits that this interpretation is inconsistent with the DMCA's plain language and legislative history, as well as with the weight of the case law, which make clear that the DMCA *does* prohibit circumvention for the purpose of viewing or using a copyrighted work even where circumvention does not necessarily impinge on the protections of the Copyright Act.[2] Because the Opinion could have a materially adverse effect on content owners, and ultimately, consumers of copyrighted works, MPAA has a strong interest in the outcome of this case. MPAA therefore submits this brief in support of Appellant MGE UPS Systems, Inc.'s Petition for Rehearing *En Banc*.

ARGUMENT

I. COPYRIGHT INFRINGEMENT IS NOT A PREREQUISITE TO A VIOLATION OF SECTION 1201(a).

§1201(a)(1)(A) provides: "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." §1201(a) thus focuses exclusively on *unauthorized access* to copyrighted works,

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[1] The panel also concluded that Appellant MGE UPS Systems, Inc. was unable to prove that cross-appellant GE/PMI "actually circumvented the technology." Slip Op. at 7. MPAA takes no position on the panel's ruling on that issue.

[2] For example, the Netflix service allows consumers to stream movies to their computers or televisions in exchange for a fee. A person who circumvents Netflix's access controls to view movies for free violates the DMCA even if he or she does not (or cannot) copy the movie.

making no mention of infringement or a copyright owners' exclusive rights. *See* Paul Goldstein, II *Goldstein On Copyright* §7.17.1 (2009) ("Access to a work in the sense evidently contemplated by §1201(a) occurs any time a user derives value from a work without necessarily infringing one of the exclusive rights secured by copyright."); June M. Besek, *Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 Colum. J.L. & Arts 385, 450 (2004) ("Besek") ("Access controls are measures that prevent someone from viewing, reading, hearing and/or otherwise perceiving the work without authorization from the rightholder.").[3] Contrary to the Opinion, bypassing a technological measure that restricts viewing or using the work – even absent a copyright violation – is precisely the type of conduct that §1201(a) prohibits.

The Opinion also conflicts with the structure of the DMCA. Whereas §1201(a) focuses on technological measures that control *access* to copyrighted works, §1201(b)(1) focuses on technological measures that protect copyright owners against *unauthorized exploitation* of exclusive rights. The Opinion would make §1201(b) superfluous. And, the paragraphs following §1201(a)(1)(A) charge

[3] Indeed, the two explicit examples of unlawful circumvention of an access control contained in §1201(a) involve "descrambl[ing] a scrambled work [and] decrypt[ing] an encrypted work," 17 U.S.C. §1201(a)(3)(A)—conduct not directly constituting infringement. Descrambling or decrypting a work does not necessarily facilitate infringement; descrambling or decrypting might only enable someone to watch or listen to the work without authorization, with no impact on the exercise of exclusive rights (*e.g.*, the right of reproduction) afforded under the Copyright Act.

the Library of Congress with crafting exceptions for certain non-infringing uses of copyrighted works. *See* 17 U.S.C. §1201(a)(C) & (D). The inclusion of these exemptions makes sense only if §1201(a) prohibits unauthorized circumvention of access controls without regard to whether the circumvention infringes a copyright. Amicus proposes that, given the significant interest that the United States Copyright Office has in the rulemaking authority under §1201(a), the Court request briefing from the Copyright Office on this issue.[4]

The legislative history of §1201 supports the statute's plain meaning. The Senate Report on the DMCA explains that §§1201(a) and 1201(b) "are designed to protect two distinct rights and to target two distinct classes of devices," stating:

> Subsection 1201(a)(2) is designed to protect access to a copyrighted work. Section 1201(b) is designed to protect the traditional copyright rights of the copyright owner. … [I]f an effective technological protection measure limits access to the plain text of a work only to those with authorized access, but provides no additional protection against copying, displaying, performing or distributing the work, then a potential cause of action against the manufacturer of a device designed to circumvent the measure lies under subsection 1201(a)(2), but not under subsection 1201(b).

S. Rep. No. 105-190, at 12 (1998); *id.* at 29 (§1201(a) "covers protections against unauthorized initial access to a copyrighted work"). 1201(a) of the DMCA

[4] Similarly, §§1201(f), (g) & (j) create specific exemptions for certain conduct that is not infringing. These sections, too, would be unnecessary if the panel were correct.

prohibits both circumventing an access control *and* trafficking in devices that enable circumvention of an access control. 1201(b), in contrast, prohibits *trafficking* in devices that enable circumvention of copy protection, but does not prohibit the act of circumventing a copy control. Congress explained this distinction (*i.e.*, not prohibiting circumvention of copy control in §1201(b)) by stating, "copyright law has long forbidden copyright infringements, so no new prohibition [under §1201(b)] was necessary." S. Rep. No. 105-190, at 12. In contrast, the §1201(a)(1) prohibition against circumventing an access control measure, absent infringement, "is necessary because prior to [the DMCA], the conduct of circumvention was never before made unlawful." *Id.*[5]

Prior decisions are to the same effect.[6] Many cases finding violations of §1201(a) concern unlawful receipt of television programming in which the

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[5] *See also* S. Rep. No. 105-190, at 29 (distinguishing measures covered by §1201(b) that "protect … copyright rights" from measures covered by §1201(a) that control access to copyrighted works, and explaining the absence of prohibition on the act of circumvention in §1201(b) on grounds that, unlike the circumvention of an access control measure, "[i]t is anticipated that most acts of circumventing a technological copyright protection measure will occur in the course of conduct which itself implicates the copyright owners rights under title 17").

[6] *E.g.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001) ("[T]he DMCA targets the *circumvention* of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the *use* of those materials after circumvention has occurred.").

defendant circumvents or traffics in circumvention technology for the purpose of *viewing* (not copying) paid programming for free.[7]

Against the foregoing stands *The Chamberlain Group, Inc. v. Skylink Techs, Inc.*, 381 F.3d 1178, 1194 (Fed. Cir. 2004), which held that, where a plaintiff had implicitly authorized its customers to bypass a garage-door opener access control, no §1201 violation had occurred. In *dicta*, the court stated that circumvention of an access control does not violate §1201(a) unless it facilitates copyright infringement. *Id.* This *dicta* ignored the DMCA's plain language and legislative history and should not be credited. And, whatever the reach of §1201(a) as applied to utilitarian products like *Chamberlain*'s garage-door openers, where, as here, use of or access to copyrightable expression is at issue, circumventing an access control is prohibited without regard to whether the act facilitates copyright infringement. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 546-48 (6th Cir. 2004) (distinguishing access controls that prevent watching movies and reading code – access controls that are "conduit[s] to protectable

[7] *E.g.*, *CoxCom, Inc. v. Chaffee*, 536 F.3d 101 (1st Cir. 2008); *DirecTV, Inc. v. Carillo*, No. 05-55931, 2007 U.S. App. LEXIS 8024 (9th Cir. Apr. 3, 2007) (unpublished); *Echostar Satellite, LLC v. Viewtech, Inc.*, 543 F. Supp. 2d 1201 (S.D. Cal. 2008); *DirecTV, Inc. v. Ferguson*, 328 F. Supp. 2d 904 (N.D. Ind. 2004).

expression" – from technologies that merely control *functional* aspects of consumer goods).[8]

II. THE OPINION IGNORED THE PURPOSE OF §1201(a).

Congress enacted the DMCA to encourage "on-demand" or "pay-per-view" access to content, whereby consumers can view or listen to works without obtaining permanent copies of the works. *See* H.R. Rep. No. 105-551 (pt. 2), at 23 (discussing "new technologies for distributing real-time audio and video through the Internet"); Besek at 474 ("Providing copyright owners with the ability to preclude unlimited access was a goal of the DMCA…[p]ay-per-use models often are access-enhancing, since they afford users the opportunity to read, view or experience [] materials [] without imposing the costs of [] unlimited access"). Section 1201(a)'s prohibition against circumvention of an access control solely for the purpose of viewing or enjoying the work is essential to that Congressional purpose. Viewing or listening to a work does not necessarily entail copyright infringement, yet can deprive the content owner of fair compensation, a cognizable

[8] Furthermore, the panel went further than *Chamberlain* did by requiring proof of actual infringement, whereas *Chamberlain* merely concluded that circumvention must make infringement *possible*. 381 F.3d at 1198 (drawing a line between "defendants whose accused products enable copying and those … whose accused products enable *only* legitimate uses of copyrighted [works]"). Thus, even under *Chamberlain*, circumvention of an access control violates section 1201(a) except in the case where "there is *no* nexus between *any possible infringement* and the use of the circumvention devices." *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1319 (Fed. Cir. 2005) (emphasis added).

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harm against which section 1201(a) affords protection. For example, a person might circumvent an access control to watch an on-demand movie without paying the required fee. Such a person might have neither the desire nor the ability to copy the movie.[9] Yet, the act of circumventing the access control clearly harms the content owner without violating an exclusive right. Contrary to the panel's conclusion, §1201(a) was enacted precisely to avoid such a result.[10]

CONCLUSION

MPAA respectfully requests that the Court grant Appellant's Petition for Rehearing *En Banc* to reconsider the portion of the Opinion discussed herein.

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[9] Content companies often use both an access control to prevent consumers from viewing their works without paying *and* a separate copy control to prevent consumers from making an unauthorized copy. *See, e.g.*, *RealNetworks, Inc. v. Streambox, Inc.*, No. C99-2070P, 2000 U.S. Dist. LEXIS 1889, at *6-12, 18-21 (W.D. Wash. Jan. 18, 2000) (describing streaming technology that used separate access and copy control). Someone wanting to enjoy the work for free would need to circumvent only the access control. Under §1201, such person would violate §1201(a) even if he or she does not circumvent the copy control (or there is no copy control). S. Rep. No. 105-190, at 12

[10] *See, e.g.*, S. Rep. No. 358, at 11 (stating that "if unauthorized access to a copyrighted work is effectively prevented through a password, it would be a violation of [§ 1201] to defeat or bypass the password," without consideration of whether the access gained thereby enabled or resulted in an act of infringement).

Dated: August 10, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 10, 2010, I electronically filed the above Brief of Amicus Curiae Motion Picture Association of America, Inc. in Support of Appellant's Petition for Rehearing *En Banc* with the Clerk of the Court using CM/ECF. I also certify that the foregoing Brief of Amicus Curiae Motion Picture Association of America, Inc. in Support of Appellant's Petition for Rehearing *En Banc* is being served this day on all counsel of record, either via transmission of Notices of Electronic Filing generated by the Court's CM/ECF or by U.S. Mail for

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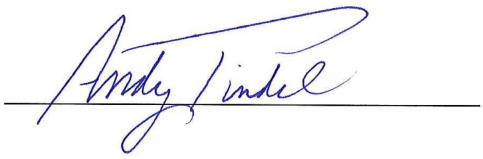

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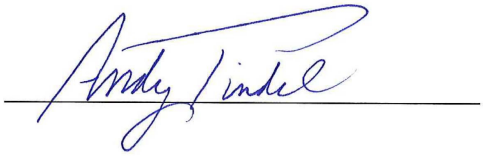

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Pursuant to 5th Cir. R. 32.2 and 32.3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) and the typeface requirements of Fed. R. App. P. 32(a)(6) because:

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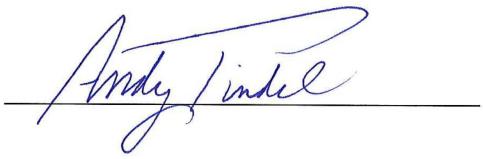

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No. 08-10521, MGE UPS Systems Inc v. Power Protc Svc LLC, et al
USDC No. 4:04-CV-929

The following pertains to your brief electronically as an attachment to your motion to file amicus brief filed on 8/10/2010.

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Sincerely,

LYLE W. CAYCE, Clerk

Gina Randazzo Martin

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