

ORAL ARGUMENT NOT YET SCHEDULED

No. 21-5195

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

MATTHEW D. GREEN, ET AL.,

Plaintiff-Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,

*Defendant-Appellees.**(Full caption on inside cover)*

On Appeal from the United States District Court for the District of Columbia,
No. 1:16-cv-01492-EGS, Hon. Emmet G. Sullivan

**BRIEF *AMICUS CURIAE* OF KARTEMQUIN EDUCATIONAL FILMS
AND INTERNATIONAL DOCUMENTARY ASSOCIATION
IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

Jack I. Lerner (CA SBN 220661)
UCI INTELLECTUAL PROPERTY, ARTS, AND
TECHNOLOGY CLINIC
401 E. Peltason Dr.
Irvine, CA 96297
(949) 824-7684
jlerner@law.uci.edu

Counsel for Amici Curiae

January 19, 2022

MATTHEW D. GREEN, ANDREW BUNNIE HUANG, ALPHAMAX, LLC,

Plaintiff-Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, LIBRARY OF CONGRESS,
U.S. COPYRIGHT OFFICE, CARLA HAYDEN, MARIA A. PALLANTE,
SHIRA PERLMÜTTER, MERRICK B. GARLAND,

Defendant-Appellees

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amici curiae* certify as follows.

(A) Parties and Amici. Except for *amici* listed herein and any other *amici* who have not yet entered an appearance in this Court, all parties, intervenors, and *amici* appearing before the district court are listed in the Brief for Plaintiff-Appellants filed January 12, 2022.

(B) Rulings Under Review. References to the rulings at issue appear in the Joint Appendix filed January 12, 2022 (Docket No. BL-19). The rulings under review were made by the United States District Court for the District of Columbia, Hon. Emmet G. Sullivan, in Case No. 1:16-cv-01492-EGS:

- a) Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (District Court Dkt. Nos. 24, 25) (June 27, 2019) (JA 801-802); and
- b) Memorandum Opinion Order Denying Plaintiffs' Motion for Preliminary Injunction (District Court Dkt. Nos. 51, 52) (July 15, 2021) (JA 1730).

(C) Related Cases. To the knowledge of counsel, the case on review was not previously before this Court or any other court, and there are no other related cases currently pending in this Court or in any other court.

**STATEMENT OF IDENTITY, INTEREST IN CASE,
AND SOURCE OF AUTHORITY TO FILE**

Amici curiae are nonprofit organizations that produce and fund independent films, support the independent filmmaking community, and advocate for independent filmmakers. *Amici*—together with a group of organizations representing thousands of independent filmmakers across the nation—have since 2008 participated in every rulemaking conducted pursuant to the statute at issue in this appeal. *Amici* seek to share with this Court their unique experience with this statute. This brief uniquely represents the interests of independent filmmakers whose First Amendment-protected expressive conduct has been harmed by the statute at issue in this case. No other *amici* are known to intend to file a brief on behalf of this particular position or are in a position to articulate the particular experiences of *amici*.

Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1(a), *amici* represent that they have no parent corporations and that no publicly held company has a 10% or greater ownership interest in them.

Amici are nonprofit organizations.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES	iii
STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE	iv
CORPORATE DISCLOSURE STATEMENT	iv
TABLE OF AUTHORITIES	vi
GLOSSARY OF ABBREVIATIONS	x
STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS	1
INTEREST OF <i>AMICI CURIAE</i>	2
INTRODUCTION AND SUMMARY OF THE ARGUMENT	4
ARGUMENT	10
I. SECTION 1201 IMPERMISSIBLY RESTRICTS INDEPENDENT FILMMAKERS' ABILITY TO MAKE FAIR USE.	10
II. SECTION 1201'S TRIENNIAL RULEMAKING DOES NOT ADEQUATELY REMEDY THE HARMS OF SECTION 1201	13
III. THIS COURT SHOULD NARROWLY CONSTRUE SECTION 1201 AND PRESERVE EXISTING EXEMPTIONS	19
CONCLUSION	20
CERTIFICATE OF COMPLIANCE.....	22
CERTIFICATE OF SERVICE	23

TABLE OF AUTHORITIES

CASES

<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	8, 19
<i>Chamberlain Group, Inc. v. Skylink Technologies, Inc.</i> , 381 F.3d 1178 (Fed. Cir. 2004).....	20
<i>Eldred v. Ashcroft</i> , 537 U.S. 186	10, 19
<i>FW/PBS, Inc. v. Dallas</i> , 493 U.S. 215, 226 (1990) (plurality opinion) (quoting <i>Shuttlesworth v. Birmingham</i> , 394 U.S. 147, 151 (1969))	18
<i>Golan v. Holder</i> , 565 U.S. 302 (2012).....	10
<i>Hofheinz v. Discovery Communications, Inc.</i> , 2001 WL 1111970, *4 (S.D.N.Y. 2001).....	10
<i>Lennon v. Premise Media Corp.</i> , 556 F. Supp. 2d 310, 322 (S.D.N.Y. 2008).....	10
<i>MDY Industries, LLC v. Blizzard Entertainment, Inc.</i> , 629 F.3d 928 (9th Cir. 2010)	20
<i>Monster Commc 'ns, Inc. v. Turner Broad. Sys. Inc.</i> , 935 F. Supp. 490 (S.D.N.Y. 1996).....	10
<i>Red Label Music Publ'g v. Chila Prods.-</i> , 18 C 7252, 2019 U.S. Dist. LEXIS 90159 (N.D. Ill. May 30, 2019)	11
<i>Sofa Entm't, Inc. v. Dodger Prod., Inc.</i> , 782 F. Supp. 2d 898, (C.D. Cal. 2010)....	11

STATUTES

17 U.S.C. §1201	5, 6
17 U.S.C. §1201(a)	14
17 U.S.C. §1201(a)(1)(C)	6
17 U.S.C. §1201(a)(1)(C)(ii)	7, 13
17 U.S.C. §1201(a)(1)(C)(iii)	8, 13
17 U.S.C. §1201(a)(1)(C)(iv).....	6, 13
17 U.S.C. § 1201(a)(1)(C)(v).....	7, 14
17 U.S.C. §1201(b).....	14

REGULATIONS

37 C.F.R. § 201.40	17, 18
--------------------------	--------

MISCELLANEOUS

<i>Documentary Filmmakers' Statement of Best Practices in Fair Use</i> , Ctr. for Media and Soc. Impact (Nov. 18, 2005), http://www.cmsimpact.org/sites/default/files/fair_use_final.pdf	3
Film Independent, et al., Comment on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 3 (Dec. 18, 2017), https://cdn.loc.gov/copyright/1201/2018/comments-121817/class1/class- 01-initialcomments-joint-filmmakers.pdf	10, 13
H. R. Rep. No. 105-501, pt. 2 (1998)	6

H.R. Rep. No. 105-551, pt. 1 (1998)	14
International Documentary Association et al., Comment on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Feb. 6, 2015), https://cdn.loc.gov/copyright/1201/2015/ comments-020615/InitialComments_LongForm_IDA_Class06.pdf	10, 13, 17
International Documentary Association, et al., Comment on Section 1201 Study, (Mar. 2, 2016), https://www.regulations.gov/comment/COLC-2015-0012-0063	16
Lawrence E. Strickling, Re: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, RM2011-7, NAT'L TELECOMM. AND INFO. AGENCY 23 (Sept. 21, 2012), http://copyright.gov/1201/2012/2012_NTIA_Letter.pdf	5
Library of Congress Section 1201 Rulemaking Hearing (May 7, 2009), https://www.copyright.gov/1201/hearings/2009/transcripts/1201-5-7-09.txt	17, 20
R. Anthony Reese, <i>Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?</i> , 18 BERKELEY TECH. L.J. 619, 647–50 (2003)	15

Register of Copyrights 2010 Recommendation, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies	12, 15
Register of Copyrights 2012 Recommendation, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies	12
Register of Copyrights 2015 Recommendation, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies	11, 12
Register of Copyrights 2018 Recommendation, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies	12
<i>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 Intell. Prop. of the House Comm. on the Judiciary, 105th Cong. 47 (1997)</i>	14

STATUTES AND REGULATIONS

Except for the following, all applicable statutes and regulations are contained in the Brief for Plaintiffs-Appellents Matthew D. Green, et al. This brief contains references to the recommendations of the Register of Copyrights in each

of the triennial rulemakings considering exemptions pursuant to 17 U.S.C. § 1201(a)(1)(C); the recommendations are not available in the Federal Register or fully codified in the Code of Federal Regulations but can each be referenced in full at the Copyright Office’s website dedicated to the rulemakings, <https://www.copyright.gov/1201/>, via the links labeled “[year] Recommendation.”

GLOSSARY OF ABBREVIATIONS

<u>Term</u>	<u>Abbreviation</u>
Digital Millennium Copyright Act	DMCA
Technological Protection Measure	TPM

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* Kartemquin Educational Films and the International Documentary Association state that their counsel authored this brief in whole. No party or their counsel contributed money to fund the preparation or submission of this brief. No other individual(s) or organization(s) other than *amici curiae* contributed financial support intended to fund the preparation or submission of this brief.

INTEREST OF *AMICI CURIAE*

Independent film reaches millions of viewers across the United States every year. Filmmakers increasingly fulfill the role of traditional news organizations, informing the public about a range of important issues. Filmmakers depend on the doctrine of fair use to explore culture, history, and current events. To do so, they must utilize portions of digitized movies and other digitized content.

Amici are nonprofit organizations that produce and fund independent films, support the independent filmmaking community, and advocate for independent filmmakers in various fora. *Amici* led a group of organizations representing thousands of independent filmmakers nationwide that has participated in every rulemaking since 2008 conducted pursuant to the statute at issue in this case. They seek to share with this Court their unique experience with this statute.

As creators and rightsholders themselves, *amici* understand the importance of copyright protections and have been victims of copyright infringement. *Amici* have long exercised fair use rights with the acute understanding that their own content can also be used under the doctrine—and because filmmakers are also

rightsholders, the norms they have set for themselves are carefully balanced to foster responsible use.¹

Amicus curiae Kartemquin Films is a not-for-profit media arts organization and collaborative center for documentary media makers who seek to foster a more engaged and empowered society. In 2016 Kartemquin celebrated 50 years of sparking democracy through documentary. A revered resource on issues of fair use, ethics, storytelling and civic discourse, Kartemquin is internationally recognized for crafting quality documentaries backed by innovative community engagement, and for its filmmaker development programs and media advocacy. The organization has won almost every major critical and journalistic prize for documentary filmmaking.

Amicus curiae International Documentary Association is an organization that seeks to assist the growth and development of documentary films and the overall documentary culture. IDA provides educational programs and resources to documentary makers of various skill levels. IDA's grant programs help filmmakers attain the financing necessary to create documentary films. IDA also advocates for

¹ See, e.g., *Documentary Filmmakers' Statement of Best Practices in Fair Use*, Ctr. for Media and Soc. Impact (Nov. 18, 2005), http://www.cmsimpact.org/sites/default/files/fair_use_final.pdf.

major issues that affect documentary filmmakers, including free speech and fair use.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Digital Millennium Copyright Act prevents filmmakers from exercising their First Amendment right to make fair use by making it illegal to access content on DVDs and other digital content protected by encryption. Congress intended to create a “fail-safe” mechanism to preserve the public’s right to make fair use. But the open-ended rulemaking process it devised is unduly burdensome and has led to exemptions that leave filmmakers uncertain as to how they can make fair use safely. *Amici* urge this Court to issue a limiting construction that preserves their First Amendment right to make fair use. In addition, if this Court is inclined to order equitable relief in this appeal, this Court should preserve existing exemptions until a more constitutionally appropriate procedure is in place and more workable exemptions have gone into effect.

Filmmakers depend on the doctrine of fair use to make commentary, criticism, instruction, and report on current events by utilizing portions of digitized movies and other digitized content. Fair use in filmmaking has been called a

paradigmatic fair use,² and without it a massive range of expressive conduct would be impossible. But fair use is of little consequence if filmmakers cannot access the high-quality digital material they seek to use in the first place. Suppose a filmmaker wants to analyze how special effects in the *Star Wars* film franchise have evolved from 1977 to the present day, examining various clips from the past 45 years. The law is quite clear that fair use permits the use of film clips without permission or payment to the *Star Wars* rightsholders. To do this, however, the filmmaker will need to obtain high-quality footage, which is likely to be locked behind encryption and other technological protection measures (“TPMs”). That is a problem for filmmakers because Congress made it a crime to circumvent technologies that control access to copyrighted content when it enacted the Digital Millennium Copyright Act (“DMCA”) in 1998, now codified at Section 1201 of the copyright statute.³ The result is that, barring an exemption from the Librarian of Congress, filmmakers cannot access the digital content they need for fair use without a credible fear of civil and criminal liability.

This result was entirely foreseeable, as Congress recognized at the time of passage, so it developed what legislators called a “fail-safe” mechanism intended

² Lawrence E. Strickling, Re: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Sept. 21, 2012), http://copyright.gov/1201/2012/2012_NTIA_Letter.pdf.

³ 17 U.S.C. §1201.

to protect lawful uses from Section 1201's, suppressive effects.⁴ Congress drew up a unique procedure in which the Register of Copyrights conducts a rulemaking every three years and then makes recommendations to the Librarian of Congress, who may lift Section 1201's prohibition on circumvention of TPMs for select classes of works.⁵ While *amici* appreciate the hard work of Copyright Office staff who labor to conduct the rulemaking, this process has created serious burdens for independent filmmakers and caused uncertainty as to when filmmakers can utilize the exemption they were granted. The rulemaking process is flawed in several ways.

First, in determining whether an exemption is warranted, the Librarian must not simply assess whether the law has restricted a party's fair use rights; instead, the Librarian also conducts an open-ended inquiry into policy considerations that touch on questions like the general efficacy of Section 1201⁶ and the overall ability

⁴ H. R. Rep. No. 105-501, pt. 2, at 36 (1998).

⁵ 17 U.S.C. §1201(a)(1)(C).

⁶ *Id.* §1201(a)(1)(C)(iv) (“...the Librarian shall examine...the effect of circumvention of technological measures on the market for or value of copyrighted works”).

to make fair use.⁷ In addition, the law allows the Librarian unbridled discretion to base her decision on “such other factors as the Librarian considers appropriate.”⁸

Second, the process places a severe burden on *amici* and others for whom Section 1201 has suppressed or restricted their ability to make fair use. The rulemaking takes over a year and requires filmmakers to undertake hundreds of hours of complex legal work and fact-gathering, which would be impossible without pro bono counsel.

Third, though the Librarian has issued helpful exemptions for filmmakers, the exemptions require that the filmmaker rule out all non-circumventing alternatives, or research and investigate all available screen capture software and make a determination as to how that software works. In every triennial rulemaking since 2008, *amici* have presented copious evidence that no viable alternatives to circumvention exist, yet this burdensome obstacle remains. The Librarian has granted documentary and independent filmmakers exemptions that do provide some relief—but they are unnecessarily difficult to use or understand, and come only after lengthy advocacy.

⁷ *Id.* §1201(a)(1)(C)(ii)-(iii) (“...the Librarian shall examine...the availability for use of copyrighted works [and] the availability for use of works for nonprofit archival, preservation, and educational purposes”).

⁸ *Id.* § 1201(a)(1)(C)(v).

As the Supreme Court has repeatedly held, fair use is a constitutional doctrine, “necessary to fulfill copyright’s very purpose, ‘to promote the Progress of Science and useful Arts.’”⁹ It is fair use that allows copyright law to coexist with the First Amendment’s guarantee of freedom of speech. Congress is free to shape copyright law as it sees fit, but not in a way that suppresses and restricts an essential “First Amendment accommodation” that is “built-in” to copyright law.¹⁰ When Congress enacted Section 1201, it made a wide swath of expressive conduct effectively impossible—and then granted a Congressional official the power to selectively lift that suppression of speech based on a vague and open-ended set of policy factors. *Amici* should not have to ask for the Librarian of Congress’s blessing every three years to continue to practice their fair use rights.

Amici respectfully request that this Court recognize the ways this law impermissibly inhibits protected expression; clarify that Section 1201(a) is subject to fair use; and direct that liability under Section 1201 can only attach where there is a connection between infringing conduct and the act of circumventing a technological protection measure.

⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (citing U.S. Const., Art. I, sec. 8).

¹⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *see also Golan v. Holder*, 565 U.S. 302 (2012).

In addition, *amici* respectfully request that, to the extent equitable relief is available in this appeal, the Court make existing exemptions permanent until a more constitutionally appropriate procedure is in place and more workable exemptions have gone into effect.

ARGUMENT

I. Section 1201 impermissibly restricts independent filmmakers' ability to make fair use.

Filmmaking plays an important social and political role in American society. Filmmakers coming from a wide range of perspectives and backgrounds use the language of film to explore culture, history, politics, and society; encourage debate and the exchange of ideas and opinions; and raise awareness about issues facing underrepresented individuals who struggle to be heard.

Fair use is critically important to filmmaking. The independent filmmaking community has developed a robust practice of responsible, appropriate fair use, and films that make fair use are regularly insured, distributed, and broadcast.¹¹ Courts regularly reaffirm that the use of copyrighted material in films for the purposes of criticism, commentary, historical analysis, and similar purposes is a quintessential fair use.¹²

¹¹ Film Independent et al., Comment on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 3 (Dec. 18, 2017) (hereinafter “Film Independent et al. 2017 Comment”), ; International Documentary Association et al., Comment on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 2-4, app. B (Feb. 6, 2015) (hereinafter “Independent Documentary Association et al. 2015 Comment”).

¹² See, e.g., *Monster Commc'ns, Inc. v. Turner Broad. Sys. Inc.*, 935 F. Supp. 490 (S.D.N.Y. 1996); *Hofheinz v. Discovery Communications, Inc.*, 2001 WL 1111970, *4 (S.D.N.Y. 2001); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 322

In today's digital environment, filmmakers cannot make fair use without accessing digital materials. As *amici* have proven in numerous triennial rulemakings, filmmakers must be able to access high quality digital material in order to conduct criticism, commentary, or make fair use in other ways with the detail necessary to make their point.¹³ In addition, *amici* have repeatedly demonstrated that to make fair use filmmakers must use high quality content or their films will not be seen: they will be rejected by broadcasters, streaming services, and theatrical distributors.¹⁴

Section 1201 prevents filmmaking filmmakers' ability to make fair use because it prevents them from obtaining the material they need. The vast majority of digital motion picture material can only be accessed from encrypted media,¹⁵

(S.D.N.Y. 2008); *Sofa Entm't, Inc. v. Dodger Prod., Inc.*, 782 F. Supp. 2d 898, 910-11 (C.D. Cal. 2010); *Red Label Music Publ'g v. Chila Prods.*, 18 C 7252, 2019 U.S. Dist. LEXIS 90159 (N.D. Ill. May 30, 2019).

¹³ See Film Independent, et al. 2017 Comment, 3; International Documentary Association et al., 2015 Comment, 1-2, 10-11, app. E, app. B. at 16.

¹⁴ See Film Independent, et al. 2017 Comment, 3; International Documentary Association et al. 2015 Comment, 1-2; Register of Copyrights 2015 Recommendation, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 90 ("Joint filmmakers presented a detailed record to argue that standard-definition resolution is insufficient for film distribution purposes. . . . Based on this record, the Register finds that Joint Filmmakers have demonstrated they are likely to suffer adverse effects if they are unable to make use of material on Blu-ray in these cases.").

¹⁵ Register of Copyrights 2015 Recommendation, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control

and filmmakers reasonably fear that decrypting such media could lead to civil and criminal liability. This is why the Register of Copyrights has on numerous occasions concluded that Section 1201 is adversely affecting fair use for independent filmmakers.¹⁶

Technologies, 83 (“[G]enerally speaking, copyrighted motion pictures are not widely available in formats not subject to technological protections.”).

¹⁶ Register of Copyrights 2010 Recommendation, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 52, 65, 72 (“Documentary filmmakers . . . have also provided persuasive evidence that non-circumventing alternative means of obtaining portions of DVDs cannot substitute for the decrypted content obtained through circumvention”); Register of Copyrights 2012 Recommendation, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 138 (documentary filmmakers had their fair uses “are, or likely will be, adversely affected by the prohibition against circumvention when there is a need to use high-quality motion picture material to convey intended criticism or commentary”); Register of Copyrights 2015 Recommendation, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 99 (documentary filmmakers had “sufficiently established that various technological measures interfere with their ability to make desired uses of motion pictures and that a significant number of those uses are likely fair and noninfringing” and that documentary filmmakers are adversely affected by Section 1201 “including when it is necessary to use high-quality motion picture material to convey intended criticism or commentary.”); Register of Copyrights 2018 Recommendation, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 22, 30, 73-75 (filmmakers “had met their burden of showing that the statutory prohibition on circumvention of access controls limits their ability to engage in the proposed uses”).

II. Section 1201's triennial rulemaking does not adequately remedy the harms of Section 1201

Amici, as part of a large group of filmmaker organizations representing thousands of independent filmmakers nationwide, have participated in five rounds of triennial rulemaking processes, dating to 2008. *Amici* deeply appreciate the immense time and effort the Copyright Office staff has put into the exemption process. Unfortunately, while the exemption process has been important to independent filmmakers, in several respects it has failed in its goal of serving as a “fail-safe” mechanism that protects fair use and other lawful uses.

First, *amici* have been dismayed that in determining whether an exemption is warranted, the Librarian cannot simply assess whether the law has restricted a party's fair use rights; instead, the statute instructs that the Librarian, through the Register of Copyrights, must also conduct an open-ended inquiry into a range of policy considerations. The statute requires that the Librarian consider “the effect of circumvention of technological measures on the market for or value of copyrighted works,”¹⁷ “the availability for use of copyrighted works,”¹⁸ and “the availability for use of works for nonprofit archival, preservation, and educational purposes.”¹⁹ The law also allows the Librarian to base her decision on “such other factors as the

¹⁷ 17 U.S.C. §1201(a)(1)(C)(iv) .

¹⁸ *Id.* §1201(a)(1)(C)(ii).

¹⁹ *Id.* §1201(a)(1)(C)(iii).

Librarian considers appropriate.”²⁰ These “other factors” are undefined, providing the Librarian unbridled discretion to dispense or withhold permission to access encrypted content for fair use purposes.

Indeed, one problem with the process is that the Librarian (through the Register of Copyrights) has imposed inconsistent reasoning from one rulemaking to another. A key example can be found by comparing the Register’s 2012 recommendation with recommendations made in subsequent rulemakings. In 2012, the Register invoked the open-ended “such other factors as the Librarian considers appropriate” inquiry to account for the difference between “access controls” such as password protection, and controls that “effectively protect[] a right of a copyright owner,” such as anti-copying mechanisms. With Section 1201, Congress prohibited the circumvention of access controls, but it deliberately chose *not* to prohibit the circumvention of other types of controls (often called “rights controls” or “copy controls”).²¹ Congress drew this distinction in significant part because it thought that doing so would preserve fair use.²² Encryption systems such as those

²⁰ *Id.* § 1201(a)(1)(C)(v).

²¹ Compare 17 U.S.C. §1201(a) with 17 U.S.C. §1201(b).

²² H.R. Rep. No. 105-551, pt. 1, at 18 (1998) (“[A]n individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully.”); *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on*

found on Blu-ray, DVDs, and streaming media, however, have been considered combined access controls *and* copy controls. This undermines Section 1201's statutory scheme because even though filmmakers lawfully acquire and view the content,²³ they cannot make a copy for fair use purposes without the concern that they are also breaking an "access control." Discussing this conundrum, the Register noted:

The fact that a technological measure that controls access is being used predominantly for the purpose of preventing reproduction and other rights of the copyright owner is a relevant consideration in this case. The fact that Congress clearly distinguished between measures that control access and measures that protect the rights of the copyright owner is undisputed. . . . In addition to the other four factors weighing in favor of designating a class of works, the fact that in this case the effect of the access control is not to prevent unauthorized access, but rather to restrict uses of motion pictures, is an additional factor weighing in favor of designating a class. . . . The fact that a technological measure that qualifies as an access control is affecting use, not access, is another relevant consideration for the Librarian.²⁴

Courts and Intell. Prop. of the House Comm. on the Judiciary, 105th Cong. 47 (1997 (statement of Marybeth Peters); R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619, 647–50 (2003) (showing that the decision not to prohibit circumvention of "rights" controls was a central component of Congress's efforts to ensure that Section 1201 did not undermine important rights such as fair use

²³ Register of Copyrights 2010 Recommendation, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 44

²⁴ *Id* at 71-72.

Amici view this as a critically important consideration, because to prohibit the circumvention of technologies that “merge” access and copy controls is fundamentally counter to Congressional intent and the structure of the statute. In subsequent rulemakings, however, neither the Register nor the Librarian addressed this issue again.²⁵

Second, the triennial rulemaking process has also placed undue burdens on *amici*. The rulemaking has been styled not as an administrative rulemaking, but as an adjudication: proponents of exemptions bear the burden of proof with substantial evidence to support their case, and a round of comments is reserved for parties who oppose the proposed exemptions. The entire process takes over a year and is enormously costly. In the 2015-2016 rulemaking proceeding, for example, pro bono counsel spent nearly 2000 hours advocating for an exemption for filmmakers. The effort required three attorneys, seven law students, and two interns. *Amici* filed over 130 pages of legal argument and evidentiary submissions, participated in in-person hearings, and responded to post-hearing correspondence from the Copyright Office. At market rates, such services would cost hundreds of thousands of dollars, and that figure does not include the time spent by hundreds of

²⁵ *Amici* discussed the issue of merged access and rights controls extensively in comments they filed in the Copyright Office’s 2016 study on Section 1201. *See* International Documentary Association, et al., Comment on Section 1201 Study, 15-17 (Mar. 2, 2016).

filmmakers, organizational staff, and administrative support who also contributed to the effort, including travel from Chicago to Los Angeles to participate in a hearing. If *amici* had not had pro bono counsel, they never would have been able to take part in the process.

Third, where the Librarian has issued exemptions for filmmakers, those exemptions come with burdensome and confusing conditions that impose uncertainty for filmmakers. Every exemption applying to filmmakers thus far has required them to investigate or try out ostensibly non-circumventing alternatives such as screen capture software, under the theory that such software might not circumvent technological protection measures. For example, the current exemption requires that, before obtaining encrypted content,

the person engaging in circumvention . . . reasonably believes that non-circumventing alternatives are unable to produce the required level of high-quality content, or the circumvention is undertaken using screen-capture technology that appears to be offered to the public as enabling the reproduction of motion pictures after content has been lawfully acquired and decrypted. . . .²⁶

In every triennial rulemaking since 2008, *amici* have presented voluminous evidence that no viable alternatives to circumvention exist,²⁷ and no credible

²⁶ 37 C.F.R. § 201.40 (2021).

²⁷ See, e.g., Library of Congress Section 1201 Rulemaking Hearing 27-40 (May 7, 2009) (statement of Jim Morrisette, Technical Director, Kartemquin Educational Films); International Documentary Association et al. 2015 Comment, 2-4, app. B (Feb. 6, 2015).

evidence has ever been introduced that would rebut this assertion.²⁸ Yet this burdensome obstacle remains. Film editors, directors, and producers face uncertainty as to how to arrive at a “reasonable belief” as to non-circumventing alternatives, and it is remarkably difficult to determine whether a screen capture technology enables reproduction “after content has been lawfully acquired and decrypted.”²⁹ Thus, even while the independent filmmaking community takes some comfort in the fact that an exemption exists, today filmmakers still labor in uncertainty and with fear of liability.

The problems with the triennial rulemaking process raise constitutional concerns. As the Supreme Court has instructed, “a scheme making the ‘freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.’”³⁰

²⁸ Nor, for that matter, has it ever even been alleged that filmmaker exemptions have harmed the market for motion pictures in any way.

²⁹ 37 C.F.R. §201.40 (2021). In 2013, counsel on this brief presented a workshop to over 100 documentary filmmakers to explain how filmmakers could comply with the Section 1201 exemption then in effect. As an indicator of how complicated the filmmakers’ exemptions have been, even the simplified process we presented to them was seven steps long.

³⁰ *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 226 (1990) (plurality opinion) (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969)).

III. This Court should narrowly construe Section 1201 and preserve existing exemptions

The problems with Section 1201 are of constitutional significance because they implicate fair use, a “built-in First Amendment accommodation.”³¹ The Supreme Court has held that fair use is “necessary to fulfill copyright’s very purpose, ‘to promote the Progress of Science and useful Arts,’ because it is essential “simultaneously to protect copyrighted material and to allow others to build upon it.”³² Without fair use, copyright law cannot coexist with the First Amendment’s guarantee of freedom of speech. For this reason, Congress cannot establish new rights of actions or amend copyright law in a way that suppresses and restricts fair use.

Amici therefore respectfully request that this Court clarify that Section 1201(a) is bounded by the traditional contours of copyright doctrine, which allow for fair use and other exceptions and limitations, and to hold that liability under Section 1201 can only attach where there is a connection between infringing conduct and the act of circumventing a technological protection measure, as the

³¹ *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

³² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 569, 575 (citing U.S. Const., Art. I, sec. 8).

United States Court of Appeals for the Federal Circuit did in *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*³³

Amici also respectfully request that, to the extent equitable relief is available in this appeal, the Court make existing exemptions permanent until a more constitutionally appropriate procedure is in place and more workable exemptions have gone into effect. The existing exemptions, while flawed, do provide limited relief for filmmakers seeking to access digital materials for fair use purposes.

CONCLUSION

In 2009, Gordon Quinn, who is the Founder and Artistic Director of *amicus* Kartemquin Educational Films, testified in a Section 1201 hearing at the Library of Congress. Fair use, he explained, is “something that we need as documentary filmmakers, as storytellers, to be able to participate in the culture of the community, to critique things in our society. It’s something that I shouldn't have to ask permission for.”³⁴ The same holds true today. We live in a digital age, and a law that restricts filmmakers’ ability to make fair use of digital materials restricts

³³ 381 F.3d 1178, 1202-03 (Fed. Cir. 2004). In *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928 (9th Cir. 2010), the Ninth Circuit declined to adopt the Federal Circuit’s rule. However, in neither that case nor *Chamberlain* did the court consider Section 1201’s impact on the First Amendment, and neither case involved core expressive conduct such as filmmaking.

³⁴ Library of Congress Section 1201 Rulemaking Hearing 20 (May 7, 2009) (statement of Gordon Quinn, Founder and Artistic Director, Kartemquin Educational Films).

their ability to make arguments in the digital space. Filmmakers need to be able to conduct analysis, explore, and make arguments about the present world and about our history, and that project is at the heart of democracy. Section 1201 harms filmmaker *amici*'s ability to pursue that project.

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

UCI INTELLECTUAL PROPERTY,
ARTS, AND TECHNOLOGY CLINIC

Dated: January 19, 2022

/s/ Jack I. Lerner
Jack I. Lerner

University of California, Irvine School of
Law
401 E. Peltason
Irvine, CA 92697
(949) 824-7684
jlerner@law.uci.edu

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I, Jack I. Lerner, in reliance on the word count of the word processing system used to prepare this brief, certify that the foregoing brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B).

The brief contains 4,287 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

The brief has been prepared in Times New Roman 14-point font, a proportionately spaced typeface, using Microsoft Word 2016. This document complies with the type-volume limitation of the Federal Rules of Appellate Procedure and the Circuit Rules.

Dated: January 19, 2022

/s/ Jack I. Lerner
Jack I. Lerner

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 19, 2022

/s/ Czarina Ellingson
Czarina Ellingson

UCI INTELLECTUAL PROPERTY,
ARTS, AND TECHNOLOGY CLINIC