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.

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

CORRECTED APPELLANTS' REPLY BRIEF

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STATUTES AND REGULATIONS

Except for those included in the addendum, all pertinent statutes and regulations cited in this Brief are contained in the Brief for Appellants.

INTRODUCTION

Section 1201(a) interferes with publishing books, making films, understanding and teaching about code, engaging in valuable security research, archiving works that might otherwise be lost, and even reading e-books for those who need software assistance to do so. A law that interferes with such a broad range of expression—and directly bans acts of communication and reading—cannot evade First Amendment review.

The Government relies heavily on the false premise that the law burdens only conduct rather than speech, and in doing so fails to meaningfully engage with the standards required by the Constitution for a law that imposes content-based burdens and a prior restraint licensing requirement on speech. Under that established law, Section 1201(a) cannot stand.

The Government half-heartedly argues that any burdens on speech are merely incidental and justified by legitimate aims, but it fails to explain—much less prove—how Section 1201(a) advances those aims or why they couldn't be adequately addressed by less-restrictive means (such as traditional copyright law). Instead, it offers conclusory statements by interested parties that establish only that certain business interests and regulators supported the law and continue to support it.

By contrast, Appellants have offered specific evidence of extensive harms to speech. Opening Brief for Appellants ("Opening Br."), at 8-14. Indeed, the Library

of Congress, the Copyright Office, and their principal officers involved in administering the law have agreed that Section 1201(a)(1) causes such harms. But the licensing regime they administer doesn't remedy them. As implemented, it is a grueling and expensive regulatory process that places every burden on the would-be speaker and yields, at best, only partial and temporary exemptions for some, at the discretion of the Government. Besides, those exemptions can only relieve liability under Section 1201(a)(1)—anyone providing a service or technology can still be prosecuted under Section 1201(a)(2), whether or not their conduct has obvious social benefit and would support an unmistakably fair use.

Just as the Government takes it upon itself to opine that certain speech is unnecessary or not valuable (Opening Br. 42), so too does the Government minimize Appellants' freedom to publish verifiable results in the form of code snippets and circumvention instructions and to create high-quality video overlays, analysis of audiovisual works, and learning tools. *See, e.g.*, Answering Brief for Appellees ("Answering Br.") at 37, 40. These arguments demonstrate exactly the censorious attitude the Supreme Court has warned against when it has explained why blanket restraints on speech subject to piecemeal exceptions are presumptively unconstitutional.

This Court should reverse the district court's dismissal of Appellants' facial challenges to Section 1201(a) and direct the district court to enter a preliminary

injunction against the unconstitutional enforcement of the law.

ARGUMENT

I. APPELLANTS' FACIAL CHALLENGES TO SECTION 1201(a) ARE PROPERLY BEFORE THE COURT

The Government argues that this appeal is limited to Appellants' "as-applied challenge." Answering Br. 29, 46, 48. Not so. Appellants sought a preliminary injunction based on both facial and as-applied challenges to Section 1201(a). *See* JA866, 900-01. That the district court addressed the merits of Appellants' facial challenge in a prior order does not prevent this Court from considering that challenge in this appeal. Where, as here, the district court's underlying merits decision is "inextricably bound up" with its reasons for ruling on the injunction, this Court routinely reviews the underlying decision as a part of the appeal of the preliminary injunction ruling. *See, e.g.*, *Ark. Dairy Coop. Ass'n v. U.S. Dep't of Agric.*, 573 F.3d 815, 832-33 (D.C. Cir. 2009); *accord Munaf v. Geren*, 553 U.S. 674, 691 (2008) ("[W]hether an action should be dismissed for failure to state a claim is one of the most common issues that may be reviewed on appeal from an interlocutory injunction order." (cleaned up)). Appellants' notice of appeal specifically sought review of the district court's dismissal order, and the Opening Brief set out Appellants' arguments against that order's rejection of the facial challenge, which was inextricably bound to the subsequent preliminary injunction ruling. *See* JA1763; Opening Br. III. The question is squarely before this Court.

II. SECTION 1201(a) BURDENS SPEECH, NOT MERELY CONDUCT

In enacting Section 1201(a), Congress targeted acts of reading and communication with the express goal of inhibiting the dissemination of digital information. It assumed this legal barrier would lead to greater profits for certain copyright holders, and thereby encourage the creation and dissemination of certain kinds of expressive works. Answering Br. 21-23. Since both the means and objective are closely connected to accessing and communicating information, it is no surprise that the law directly burdens speech.

A. Section 1201(a) Burdens Speech

In defending Section 1201(a), the Government's core premise is the mistaken idea that the statute only regulates conduct. Answering Br. 25, 27-29. This is demonstrably incorrect.

Appellants and their amici have documented a host of speech activities burdened by Section 1201(a). Even the district court agreed that "code is speech" and that Section 1201(a) "appears to burden the accessing, sharing, publishing, and receiving of information," including "both the code that does the circumventing and the [technological protection measures]-protected material to which the circumventing code enables access." JA829-30. Likewise, the Government, when exercising its power to grant limited temporary exemptions, has repeatedly

acknowledged that the law's ban on circumvention has harmed legitimate speech activities. JA22-23, 30.

For instance, Section 1201(a)'s circumvention ban inhibits people's ability to read e-books (if they have visual disabilities), to make movies and other audiovisual adaptations, to read the code in their electronics, to author new software apps, and to learn about and teach others about technology. Opening Br. 17. These activities involve making information intelligible to read and transform into new expression—acts at the core of the First Amendment's protection. Opening Br. 21-22, 25-26 (citing authorities).

The Government attempts to distinguish the long line of cases affirming these protections by claiming they don't apply because they "merely discuss the importance of access to information in the context of First Amendment challenges to restrictions on the dissemination of information." Answering Br. 25-26. This claim is perplexing. Appellants and others, like the parties in those cases, ***do*** seek to access information in order to learn, teach, and create new expressive works. This so-called "conduct" falls squarely within the speech recognized and protected in this long line of cases. *See, e.g.*, *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (the First Amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw"). And Section 1201(a) ***does*** restrict the dissemination of information: it bars individuals from using the data

encoding of a copyrighted work to take excerpts for their own expression, run computerized analysis on it, and otherwise make fair and non-infringing uses that generate new expressive works and new knowledge. It also bans communications that constitute all or part of a circumvention service or technology, such as Dr. Green's academic publications and Dr. Huang's software instructions.

The Government's argument that the First Amendment affords less protection to the right to receive information than the right to create it is equally specious. The Government relies entirely on cases involving access to public or government-held information. Answering Br. 26-27 (citing cases). But Appellants and others seek access to information ***already within their control***, in order to create new expressive works. The Government does not cite any relevant cases discussing the right to access and use information one lawfully possesses.

Lacking authority for its claim, the Government turns to analogies that only underscore its misunderstanding of Section 1201(a) and its burden on speech. Answering Br. 25, 27-28, 42. No one in the record is picking the lock on a proverbial bookstore; Section 1201(a) targets efforts to understand and work around, for otherwise lawful purposes, barriers that have been erected on ***one's own property***. Appellants seek to read and use copies of works they lawfully own: just as blind people wish to enjoy e-books they have purchased; filmmakers wish to use clips from Blu-ray discs they have purchased; potential purchasers of Huang's NeTVCR

seek to work with audiovisual media they own; and computer scientists wish to study information encoded in software embedded in consumer devices. JA105, 136-37, 908, 928, 930, 1503-04.

Traditionally, when a person buys an object with a copy of a work, they own that copy. 17 U.S.C. § 101 ("'Copies' are material objects . . . in which a work is fixed"). That means they are free to do anything not specifically forbidden under Section 106, such as read it, lend it, resell it, or dismantle it altogether. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538-39 (2013). Traditionally, a person also has the right to dismantle and understand a lock they have bought. *Cf. Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160 (1989) (reverse engineering spurs knowledge and innovation). Section 1201(a) upends that tradition and makes it a crime both to look past barriers obscuring parts of one's own property, and to communicate the instructions to do so.

Moreover, unlike a lock-pick, circumvention code itself embodies creative expression. Accordingly, a better analogy would be to a book providing instructions on how to pick locks or a translation of a document written in code or encrypted using a cipher, which plainly are speech.

And, just as a printing press plays an essential role in generating new speech, *see, e.g.*, *Minneapolis Star & Tribune Co. v. Commissioner*, 460 U.S. 575, 583-85 (1983), so too do circumvention tools such as software programs that allow creators

to extract clips from DVDs. And just as a tax on ink may impermissibly burden newspapers' First Amendment rights (*id.*), a prohibition on circumvention tools does the same for creators.

Comparing Appellants to thieves and cat burglars is a transparent attempt to distract this Court from what is actually at issue here: a ban on activities that have long been recognized as speech. This case is not about breaking locks, but reading, writing, publishing, and communicating ideas, new creative expression, and information. All of these speech activities are directly burdened by Section 1201(a) when they concern digital access controls.

B. Section 1201(a) Burdens Dr. Green's Speech

Equally misguided is the Government's claim that the statute doesn't affect Green because "[w]riting and disseminating an academic work does not violate the statute."[1] Answering Br. 37. It is undisputed that Green's work requires circumventing access controls and publishing code that includes circumvention instructions. Both are necessary to educate others and allow peers to validate his findings, which will in turn advance the state of knowledge in security research. Opening Br. 8-9. This is a core fair use, *see* 17 U.S.C. § 107. Yet publishing code in

[1] The Government separately argues that Green waived his request for a preliminary injunction because he received an exemption in the most recent triennial rulemaking. Answering Br. 37. But Green seeks a preliminary injunction against enforcement of Section 1201(a)(2), which is not subject to rulemaking exemptions. Opening Br. 8, 32-33, 52-53.

academic work falls squarely within the scope of publication considered unlawful under Section 1201(a)(2).

Rather than acknowledge Green's reasons for including code, the Government asserts without support that it is "unclear why an academic work . . . would need to contain examples of circumvention code." Answering Br. 37. The Government does not get to decide whether Green's publishing code is "necessary" to advance that academic research. As even the court in *Corley* recognized, "programmers communicating ideas to one another almost inevitably communicate in code, much as musicians use notes. Limiting First Amendment protection of programmers to descriptions of computer code (but not the code itself) would impede discourse among computer scholars." *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 448 (2d Cir. 2001). The Government cannot sidestep the First Amendment by minimizing Green's need to speak.

C. Section 1201(a) Burdens Dr. Huang's Speech

The Government concedes that the law burdens Huang's work, but argues that his work is not protected speech. Answering Br. 39-40. This, too, is incorrect. Huang wishes to create expressive audiovisual works, analyze audiovisual works with the aid of a computer, and write code that conveys knowledge and instructions in the precise languages used by computer programmers. Opening Br. 10-11. Huang's NeTVCR will allow users to make fair use of existing videos, altering colors for

accessibility or expressive purposes, and creating all kinds of fair and valuable new expressions: side-by-side comparisons to teach media literacy, professional-quality overlays using transparency and blurring rather than ugly and distracting jagged edges, captioning to assist those with hearing disabilities, and computer-enabled analysis to overlay commentary and labels based on processing the data contained in the audiovisual stream. Opening Br. 10; JA925, 927, 930-31, 1491-1512. The First Amendment protects these expressive activities. *See Spence v. Washington*, 418 U.S. 405 (1974).

The Government compounds its error by declaring that Huang's expression is not restrained because he could engage in some other form of expression on a different topic. Answering Br. 40. But Huang wishes to study and communicate code designed to circumvent certain access controls in order to foster audiovisual expression and learning. Opening Br. 10-12. The Government cannot cast aside the First Amendment's protections because it does not understand or value those pursuits. *See Texas v. Johnson*, 491 U.S. 397, 416 (1989) (the principle "that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea").

Equally unpersuasive is the Government's suggestion that a regulation does not burden speech if would-be speakers like Huang can find other, possibly less

efficient or more expensive ways to express their message. *See* Answering Br. 40. While the availability of alternative avenues of expression can be part of the intermediate scrutiny analysis, it does not affect the threshold question of whether a statute burdens speech. *See Pursuing Am.'s Greatness v. FEC,* 831 F.3d 500, 510 (D.C. Cir. 2016) ("[W]hether a burden on speech leaves open alternative means of expression does not factor into whether a speech ban is content based"). Nor could the suggestion to use "smart TVs," Answering Br. 40, satisfy intermediate scrutiny in any event, as the Government does not (and cannot) argue that these alleged alternative means are as adequate, effective, or economical as Huang's proposed approach. *See United Bhd. of Carpenters v. NLRB*, 540 F.3d 957, 969 (9th Cir. 2008) ("Where 'there is no other *effective and economical* way for an individual to communicate his or her message,' alternative methods of communication are insufficient." (emphasis added)). Huang has explained that his proposed expression (and the expression facilitated by publishing his code) goes beyond what existing technology permits. *See* JA925, 927, 930-31; *Weinberg v. City of Chi.*, 310 F.3d 1029, 1041-42 (7th Cir. 2002) ("Whether an alternative is ample should be considered from the speaker's point of view.").

D. Section 1201(a) Burdens the Speech of Third Parties

Beyond the burdens on Appellants' own speech, Section 1201(a)'s burden on the speech of third parties underscores its impermissible overbreadth.

The Government starts by attempting to brush the governing overbreadth standard aside, claiming that Section 1201(a) has "permissible applications to restrict unlawful access and copying." Answering Br. 49. As even the Government concedes, that is not enough: courts must evaluate not whether permissible applications exist, but whether the unconstitutional applications are substantial in relation to the permissible ones. *Id.* There is ample evidence in the record showing that a considerable swath of Section 1201(a)'s impact falls on non-infringing, legitimate speech, and the organizations echoing Appellants' concerns further support that position. *See* Opening Br. 32, 37; *infra* Section VI.B; *see also* Accessibility, Security, and Repair Fair Users Br.; Kartemquin Br.

Advocates for filmmakers, researchers, people with disabilities, libraries, archivists, educators, and others have documented harms resulting from Section 1201(a)'s ban on circumvention. Opening Br. 14 (citing JA1361-67, 1373, 1507, 1534-36). Indeed, every exemption the Librarian has granted for such activities through the rulemaking process is a concession that Section 1201(a) has burdened legitimate speech.[2] That is even more obvious for the many speakers that have been less successful, whose speech may have been equally proper but who weren't able to meet the other factors under the Librarian's discretionary standard. *See, e.g.*,

[2] Of course, to the extent these speech acts depend on access to circumvention "tools," every exemption is also a concession of the burden of the total ban on disseminating such tools.

JA946-47. Either way, the triennial rulemaking process—a burdensome speech-licensing regime that, at most, gives speakers ***temporary*** permission to speak that expires every three years—does not materially reduce the statute's burdens on third-party speech or save the law from overbreadth. Opening Br. 7-8, 43; *see Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965) (even speech ultimately permitted under a licensing regime is impermissibly burdened).

III. SECTION 1201(a) DOES NOT ESCAPE FIRST AMENDMENT SCRUTINY BY VIRTUE OF ITS RELATIONSHIP TO COPYRIGHT

The Government repeatedly suggests that Section 1201(a) can evade First Amendment scrutiny because it is adjacent to copyright law, which in turn is "an engine of free expression." Answering Br. 19, 24, 45. As the Government and its amici concede, however, Section 1201(a) is fundamentally different from the ordinary provisions of copyright law. Indeed, it thwarts several of those provisions.

Copyright acts as an "engine of free expression" only when it respects the traditional contours that keep it within its appropriate bounds. *See, e.g.*, *Golan v. Holder*, 565 U.S. 302, 327-29 (2012) (cleaned up); *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1195-96 (2021). These traditional contours, such as fair use and the idea/expression dichotomy, serve as "built-in First Amendment accommodations" that, when they are respected, help alleviate the obvious tension between the First Amendment and the Copyright Clause. *Golan*, 565 U.S. at 327-29. Speech-

restricting laws that upend those traditional contours, however, demand First Amendment scrutiny. *Id.*

The Government admits that Section 1201(a) constitutes "a new form of protection" that is "not derived from any provision of copyright law." Answering Br. 49-50. Indeed, there is no evidence, beyond self-serving assertions, that Section 1201(a) serves copyright's purpose of fostering the creation of new, expressive works. *See, e.g.*, Association of American Publishers Br. 15-16; JA1612-13. By contrast, there is ample evidence that Section 1201(a) inhibits the creation of new expressive works by impeding fair uses. *See* Opening Br. 14; *supra* Section II.C.

As for the Government's claim that Section 1201(a) protects fair use through the rulemaking process (Answering Br. 43-45), that too is belied by the statute and the record. First, a key element of fair use is that it does not require permission—let alone waiting up to three years to request it. Fair use is a *right* that has been integral to copyright since its inception: "If the use is otherwise fair, then no permission need be sought or granted." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994); *id.* at 575 (explaining that from "the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill

copyright's very purpose"). Section 1201(a) turns that right into a highly contingent privilege, bestowed, if at all, by a government official.[3]

Second, the rulemaking process makes seeking that permission costly, time-consuming, and subject to multiple additional requirements. The Librarian may consider not only whether a given use is fair, but also a host of other factors, and exercises the discretion to deny exemptions based on "such other factors as the Librarian considers appropriate." 17 U.S.C. § 1201(a)(1)(C)(v). In the past three rulemaking proceedings, those factors reached far beyond the ambit of copyright to include, for example, effects on the environment and energy policy. *See* Opening Br. 41 n.9. Further, Appellants and amici have offered substantial evidence that many fair uses are not exempted. *See supra* Section II.D; JA946-47; Accessibility, Security, and Repair Fair Users Br.; Kartemquin Br.

Third, the exemption process does not even apply to the dissemination of circumvention information, services, and technologies, which frequently are expressive in their own right as well as essential to the exercise of fair use rights.

Finally, fair use is not the only rule that limits the traditional contours of copyright; the Supreme Court has explicitly recognized the idea/expression

[3] Even obtaining an exemption does not provide much certainty, as the exemptions frequently include caveats and limitations, and opponents have in at least one instance sought to invalidate an exemption through litigation. *See, e.g.*, *Med. Imaging & Tech. All. v. Library of Congress*, No. 1:22-cv-00499 (D.D.C. docketed Feb. 25, 2022).

dichotomy as an equally important boundary. *Golan*, 565 U.S. at 328-29. Section 1201(a) intrudes here as well, by blocking the owner of a copyrighted work from seeing or making use of the non-copyrightable ideas contained therein and creating potential liability for sharing code snippets and technical data related to circumvention that, in themselves, fail to meet the standard for copyrightability. *Id.*; *see also* JA545-46.

A statutory relationship to copyright law is no shield from First Amendment scrutiny where, as the Government acknowledges, Section 1201(a) falls outside its traditional contours.

IV. THE GOVERNMENT OFFERS NO DEFENSE OF SECTION 1201(a)'S SPEECH-LICENSING REGIME

The government apparently concedes that the only way citizens can overcome Section 1201(a)(1)'s speech restrictions is to obtain the Government's permission in advance. Opening Br. 39-40. It also apparently concedes that the law lacks the constitutionally required safeguards such speech licensing regimes require. *See* Opening Br. 41-43.

Instead of contesting either point, the Government offers the novel, and incorrect, theory that a speech-licensing regime can evade review when its permissions apply to a class of users rather than particular individuals. Answering Br. 46-47. The Government does not identify any case that draws that distinction, and Appellants are unaware of any.

That absence is unsurprising. The dangers of prior restraints and speech-licensing regimes are not alleviated just because permitting determinations might apply classwide or are characterized as "notice-and-comment rulemaking." *Id.* A regime for licensing movies or books would be no more constitutionally permissible if it operated to approve or disapprove genres rather than individual works.

To the contrary, "*any system* of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963) (cleaned up) (emphasis added). A regime that includes and applies vague and amorphous catch-all standards like "such other factors as the Librarian considers appropriate," 17 U.S.C. § 1201(a)(1)(C)(v), cannot overcome that presumption.[4]

V. SECTION 1201(a) IS SUBJECT TO, AND FAILS, STRICT SCRUTINY

The Government offers scant support for its claim that strict scrutiny should not apply, and even less to explain how the statute could survive that scrutiny.

[4] The Government argued before the district court that Section 1201(a) is not a speech licensing regime because it is content-neutral, and the district court accepted this argument. JA84-85, 836-39. Tellingly, the Government does not renew this argument on appeal, and the district court's rationale for exempting Section 1201(a) from constitutional scrutiny was plainly wrong. Section 1201(a) is not content-neutral, *see infra* Section V.A, but even if it were, that would not affect its status as an impermissible prior restraint. *See* Opening Br. 40 (collecting cases). The Government also does not propose that the rulemaking can be severed from the prohibition; it cannot. Opening Br. 43.

A. Section 1201(a) is a Content-Based Restriction

The Government does little to defend the district court's conclusion that Section 1201(a) is content-neutral, beyond a misplaced analogy to fair use (*see supra* Section III), unadorned citations to *Reed* and *O'Brien* (Answering Br. 28-29), and resort to the (incorrect) premise that Section 1201 regulates only conduct (Answering Br. 41). The Government cannot explain why a law that bans speech based on "particular subject matter" or "function or purpose"—circumvention—while allowing other speech, is not content-based. *See* Opening Br. 24-29; *City of Austin v. Reagan Nat'l Advert. of Austin*, No. 20-1029, 2022 WL 1177494, at *7 (U.S. Apr. 21, 2022) ("[A] regulation of speech cannot escape classification as facially content-based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result."). Indeed, the Government's own assertion (Answering Br. 40) that Huang may share code "for purposes other than circumvention" illustrates an impermissible preference for certain types of content over others.

Section 1201's various exemptions further demonstrate that the statute is content-based. *See, e.g.*, *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2346-47 (2020) (law that barred all robocalls but contained a government-debt exception is "about as content-based as it gets"). As the Government concedes, the statutory exemptions allow the same expressive activity "for one purpose but not for

other purposes." Answering Br. 42. Section 1201(f) exempts circumvention for the purpose of writing interoperable code, but not other forms of code that depend on fair use or use of non-copyrightable ideas gleaned from the copyrighted work. Other exemptions permit certain speakers, but not others, to engage in expressive conduct, such as Section 1201(g)'s exemption for encryption research, which depends on whether a person is formally trained or employed in conducting encryption research—codifying a suspicion that those not formally trained are less legitimate. *See Nat'l Inst. Of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2367 (2018) ("[S]peaker-based laws run the risk that 'the State has left unburdened those speakers whose messages are in accord with its own views.'" (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011))).

Even worse, the statute's triennial rulemaking provisions empower the Librarian to further discriminate among speakers and subject matter. If the Government were correct that "the statute merely charges the Librarian with distinguishing 'non-infringing uses' from other uses," Answering Br. 42-43, then the Librarian would have exempted all acts without a nexus to copyright infringement from Section 1201(a)(1) liability. It has steadfastly refused to do so. Moreover, the Librarian discriminates among speakers. For example, one exemption allows "teaching[] or scholarship" by university professors, but not other educators running large online courses. 37 C.F.R. § 201.40(b)(1)(ii)(A)-(B). The Librarian also denies

and narrows exemptions based on matters that have nothing to do with copyright, such as its views on environmental policy and automobile safety, or whether non-infringing speech "requires" high-resolution imagery. JA969-70, 946-47.

Nevertheless, the Government appears to believe that Section 1201's triennial rulemaking process evades content-based scrutiny because it directs the Librarian to consider nonbinding factors that partially overlap with fair use considerations. *See* Answering Br. 42-44. But as discussed above, *supra* Section III, the rulemaking process bears no resemblance to a normal fair use analysis. Moreover, the Government explicitly opposes the idea that Section 1201(a) should be read to accommodate fair use. Answering Br. 49-51. If the Government is right that the statute casts aside fair use, it cannot then bypass normal First Amendment scrutiny simply by pointing out a partial overlap in the types of content favored both by Section 1201(a) and by fair use. The Government cannot at once take that position but argue that fair use principles somehow save the statute from First Amendment scrutiny.

In short, while the exemptions included in Section 1201(a) and created through the triennial rulemaking may partially limit the law's adverse impact on speech (albeit through a procedurally improper bureaucratic speech-licensing regime), *see* Answering Br. 42, they simultaneously reinforce the content-based nature of the law. *See Barr*, 140 S. Ct. at 2356 (an exception from a speech restriction

that favors some topics over others is content-based and requires strict scrutiny). Were it otherwise, the Government could save every content-based restriction on speech from constitutional infirmity by banning all speech, then adopting exemptions for certain favored categories. That is not the law, and the Supreme Court has repeatedly made clear that clumsy speech regulations are just as unconstitutional as malicious ones. *See, e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 486 (2014); *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 638 (1980).

B. Section 1201(a) Fails Strict Scrutiny

To withstand scrutiny as a content-based speech restriction, the Government must "prove that [Section 1201(a)] furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171 (cleaned up). The Government makes no effort to defend the statute under this standard. And it could not, as Section 1201(a) is hardly "the least restrictive means of achieving" the Government's asserted interest in promoting the dissemination of digital works. *See McCullen*, 573 U.S. at 478; Answering Br. 21-24. As Appellants have explained, pre-existing copyright laws are adequate without overwhelming harm to legitimate speech. *See* Opening Br. 29-30. Section 1201(a), on the other hand, primarily impedes lawful speech. *Id.*; *see also supra* Section II.D. Because the Government

cannot meet its burden of showing that the statute is narrowly tailored to the Government's asserted interest, it fails strict scrutiny.

VI. SECTION 1201(a) FAILS INTERMEDIATE SCRUTINY

The Government cannot satisfy intermediate scrutiny either. Contrary to the Government's claim (Answering Br. 14, 21), Appellants have not conceded that Section 1201(a) furthers a substantial interest, nor that its purported interest is unrelated to the suppression of free expression. While Appellants do not dispute that promoting the creation and dissemination of creative works is a substantial interest, Appellants strongly dispute that Section 1201(a) furthers that interest. To the contrary, Section 1201(a) targets and restricts protected expression and activities closely connected with such expression, and the Government has not introduced sufficient evidence to justify those restrictions. *See* Opening Br. 34-36; JA1685-88.

A. The Government Has Not Met Its Burden to Show Section 1201(a) Furthers a Legitimate Interest

To establish a substantial interest under intermediate scrutiny, the Government must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 664 (1994) (cleaned up). That "the Government's asserted interests are important in the abstract does not mean . . . that the [statute] will in fact advance those interests." *Id.*; *see Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 50 (D.C. Cir. 1977) (rules violated the First Amendment because

the Commission "has not put itself in a position to know whether the alleged . . . phenomenon is a real or merely a fanciful threat.").

The Government's attempts to satisfy this burden are either conclusory, illogical, or both. The Government asserts that Section 1201(a) is a "natural" or "reasonabl[e]" way to address the purported harm of "mass unlawful copying" (Answering Br. 32, 34) but does nothing to demonstrate how it in fact "direct[ly] and material[ly]" alleviates that harm. *See Turner*, 512 U.S. at 664. If it did, by now surely a rightsholder would have produced evidence that an exemption from the circumvention ban had resulted in any infringing activity or other harm. Likewise, arguing without factual support that Section 1201(a) has *some* "deterrent effect" beyond copyright infringement liability (Answering Br. 35) does not come close to satisfying intermediate scrutiny. Nor does the Government's speculation that mass unlawful copying "*could* stifle the market for digital works" (Answering Br. 32) suffice to "demonstrate that the recited harms are real, not merely conjectural." *Turner*, 512 U.S. at 664 (plurality); *see also Pagan v. Fruchey*, 492 F.3d 766, 773-74 (6th Cir. 2007) (declining to adopt a "standard of 'obviousness' or 'common sense,' under which [a court] uphold[s] a speech regulation in the absence of evidence of concrete harm").

The Government also fails to offer evidence showing that any "gap" in other laws amounted to an actual harm or that Section 1201(a) was the "required" solution.

Answering Br. 32. Instead, the Government offers self-serving statements from a vendor of access controls insisting that the motion picture industry would forgo the digital marketplace absent this particular restriction on others' speech. Answering Br. 21; JA1584, 1610-16. The unsubstantiated fear of an interested party is not enough to satisfy the government's burden. *Turner*, 512 US at 664-68. Nor is parroting rightsholders in crediting the law for the size of the digital media market, again without support. Answering Br. 23-24. The fact that some industries choose to use technological protection measures does not establish that they are necessary to stimulate creation. And the size of the current market says nothing about what that market would look like without the challenged provisions of the statute.

Notably, the Government's discussion has little to say about the proliferation of technological protection measures outside the motion picture and music industries—in consumer electronics, devices, and vehicles. *Id.* Prohibiting a farmer from circumventing access to the software in their tractor fosters no expressive activity other than the salty speech that likely occurs when the farmer finds out they are not allowed to fix their own tractor in the middle of harvest season. *See* JA105-06. Further, as the Copyright Office has recognized, this software is only useful for its intended purpose when used in concert with the hardware that is sold along with it—there is no online market for this software and, in turn, no legitimate concern about its infringement. JA337, 1211.

Intermediate scrutiny requires a "record that convincingly shows a problem to exist and that relates the proffered solution to the statutory mandate." *HBO*, 567 F.2d at 50. Vague and conclusory assertions do not make that record.

B. Section 1201(a) Burdens Far More Speech Than Necessary

The Government also bears the burden to show that Section 1201(a) does "not 'burden substantially more speech than is necessary to further the government's legitimate interests,'" *Turner*, 512 U.S. at 662, yet it struggles to identify any legitimate application of Section 1201(a) not already covered by the less restrictive, pre-existing doctrines of copyright infringement.

The Government speculates that people could circumvent technological protections in order to disseminate infringing copies or download a video rental to view after the rental period ends. Answering Br. 22-23. But copyright law already addresses these purported harms, as these activities implicate reproduction and distribution rights and the technology to enable them is governed by existing doctrines of secondary liability, as well as Section 1201(b). The same is true of the hypothetical hacker who breaches a paywall and downloads music to listen to at their convenience. The Government imagines that this hacker might simply listen to the music without downloading it. *Id.* Even assuming this scenario did not involve an already infringing reproduction, the hacker might still face potential civil and criminal liability under (among other things) the Computer Fraud and Abuse Act, 18

U.S.C. § 1030, which makes it unlawful to access and obtain information from a protected computer "without authorization." Apart from fanciful hypotheticals, the Government has not identified any actual case in which pre-existing law left the Government without a meaningful ability to prosecute malicious circumvention.

But even if the Government believes that preexisting copyright law is not enough, the obvious less restrictive means at Congress's disposal would be targeted regulation tailored to particular harms. Regulating the circumvention of technological access controls, without any connection to an infringement of the rights of copyright owners, is redundant and burdens substantially more speech than can be justified by the speculative harms the Government alleges. *See Women Strike for Peace v. Morton*, 472 F.2d 1273, 1284-85 (D.C. Cir. 1972) ("the state should not be permitted to regulate speech when it can achieve all its legitimate goals by some other regulation" at little cost); *United States v. Popa*, 187 F.3d 672, 677 (D.C. Cir. 1999) (law did not satisfy intermediate scrutiny where a narrower prohibition would achieve its legitimate aims).

Nor can the Government explain why the challenged provisions of Section 1201(a) are necessary on top of Section 1201(b)'s prohibitions against services or technologies that involve circumvention of a measure that "protects a right of a copyright owner." 17 U.S.C. § 1201(b). That provision has a connection to actual copyright infringement (which would apply in hypothetical scenarios involving

piracy) and leaves a path open for non-infringing uses and the technologies and knowledge that support them.

The Government applauds Section 1201(a) for eliminating uncertainty in "murky" fair use cases by simply removing fair use as a defense to circumvention, but the supposed clarity of an overbroad ban on speech cannot relieve the Government of its burden to prove the law is tailored to its legitimate purposes. Answering Br. 35-36. The First Amendment "demand[s] a close fit between ends and means" that "prevents the government from too readily sacrificing speech for efficiency." *McCullen*, 573 U.S. at 486 (cleaned up). The Court should not accept the Government's brazen attempt to evade its burden: restricting fair uses makes the statute much *more* burdensome on speech than it otherwise would be. *See Turner*, 512 U.S. at 662; *cf. Golan*, 565 U.S. at 328-29 (preservation of fair use necessary to avoid First Amendment scrutiny).

Finally, the evidence is clear that Section 1201(a) has a drastic deterrent effect on people who need to circumvent to engage in beneficial, non-infringing uses, and wish to stay on the right side of the law. Logically, it will have less deterrent effect on people who are violating preexisting copyright law by circumventing in order to infringe—instead, the burden falls disproportionately on the most law-abiding speakers.

In short, even if the Court applies intermediate scrutiny, the statute still fails.

VII. SECTION 1201(a) SHOULD BE CONSTRUED TO AVOID CONFLICT WITH THE FIRST AMENDMENT

There remains an alternative way to resolve this case: rather than adopting the Government's expansive interpretation of Section 1201(a), which brings it into direct conflict with the First Amendment, the Court could construe Section 1201(a) to require a nexus to copyright infringement, as the Federal Circuit has done. *See Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1202-03 (Fed. Cir. 2004). In statutory terms, circumventing to achieve non-infringing uses of copyrighted works—uses authorized by copyright law—should have the requisite "authority of the copyright owner" and therefore not violate Section 1201(a). *See* 17 U.S.C. § 1201(a)(3)(A).

The Government brushes that alternative aside, asserting that Section 1201's "exemption scheme would make no sense if all non-infringing uses were already exempt." Answering Br. 20. Not so: under this alternative construction, the rulemaking would be used to create clear and bright-line safe harbors for non-infringing circumventions, but other activity not expressly carved out in exemptions would still be lawful if it did not have a nexus with actual infringement. That result makes perfect sense, is a plausible reading of ambiguous text, and would be supported by Congress's intent to preserve non-infringing uses, the canon of constitutional doubt, and the rule of lenity. *See* Opening Br. 46-50. There is no reason to read Section 1201(a) to make it unlawful for people like Green and Huang to

circumvent access controls in order to facilitate beneficial and non-infringing use of copyrighted works.

CONCLUSION

For these reasons, and those detailed in Appellants' Opening Brief, Appellants are entitled to a preliminary injunction against the unconstitutional enforcement of Section 1201(a) based on both facial and as-applied claims.

Dated: May 23, 2022

Respectfully submitted,

By: */s/ Corynne McSherry*

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CERTIFICATE OF COMPLIANCE

I, Corynne McSherry, 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 6483 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.

Dated: May 23, 2022 */s/ Corynne McSherry*

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: May 23, 2022 */s/ Corynne McSherry*

ADDENDUM

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17 U.S.C. § 101

§101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

An "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "Berne Convention" is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person's "children" are that person's immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A "Copyright Royalty Judge" is a Copyright Royalty Judge appointed under section 802 of this title, and includes any individual serving as an interim Copyright Royalty Judge under such section.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

A "device", "machine", or "process" is one now known or later developed.

A "digital transmission" is a transmission in whole or in part in a digital or other non-analog format.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

An "establishment" is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

The term "financial gain" includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

A "food service or drinking establishment" is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

The "Geneva Phonograms Convention" is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.

The "gross square feet of space" of an establishment means the entire interior space of that establishment, and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.

The terms "including" and "such as" are illustrative and not limitative.

An "international agreement" is—

(1) the Universal Copyright Convention;

(2) the Geneva Phonograms Convention;

(3) the Berne Convention;

(4) the WTO Agreement;

(5) the WIPO Copyright Treaty;

(6) the WIPO Performances and Phonograms Treaty; and

(7) any other copyright treaty to which the United States is a party.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

The term "motion picture exhibition facility" means a movie theater, screening room, or other venue that is being used primarily for the exhibition of a copyrighted motion picture, if such exhibition is open to the public or is made to an assembled group of viewers outside of a normal circle of a family and its social acquaintances.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

A "performing rights society" is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be

perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

For purposes of section 513, a "proprietor" is an individual, corporation, partnership, or other entity, as the case may be, that owns an establishment or a food service or drinking establishment, except that no owner or operator of a radio or television station licensed by the Federal Communications Commission, cable system or satellite carrier, cable or satellite carrier service or programmer, provider of online services or network access or the operator of facilities therefor, telecommunications company, or any other such audio or audiovisual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission service, shall under any circumstances be deemed to be a proprietor.

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work "publicly" means—

> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Registration", for purposes of sections 205(c)(2), 405, 406, 410(d), 411, 412, and 506(e), means a registration of a claim in the original or the renewed and extended term of copyright.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

A "treaty party" is a country or intergovernmental organization other than the United States that is a party to an international agreement.

The "United States", when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

For purposes of section 411, a work is a "United States work" only if—

(1) in the case of a published work, the work is first published—

(A) in the United States;

(B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;

(C) simultaneously in the United States and a foreign nation that is not a treaty party; or

(D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or

(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article".

The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

The "WIPO Copyright Treaty" is the WIPO Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.

The "WIPO Performances and Phonograms Treaty" is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland, on December 20, 1996.

A "work of visual art" is—

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
>
> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

> (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;
>
> > (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
> >
> > (iii) any portion or part of any item described in clause (i) or (ii);
>
> (B) any work made for hire; or
>
> (C) any work not subject to copyright protection under this title.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

A "work made for hire" is—

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106–113, nor the deletion of the words added by that amendment—

> (A) shall be considered or otherwise given any legal significance, or
>
> (B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination,

by the courts or the Copyright Office. Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made For Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106–113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.

The terms "WTO Agreement" and "WTO member country" have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act.

17 U.S.C. § 107

§107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

18 U.S.C. § 1030

§1030. Fraud and related activity in connection with computers

(a) Whoever-

(1) having knowingly accessed a computer without authorization or exceeding authorized access, and by means of such conduct having obtained information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph y. of section 11 of the Atomic Energy Act of 1954, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation willfully communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains-

(A) information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);

(B) information from any department or agency of the United States; or

(C) information from any protected computer;

(3) intentionally, without authorization to access any nonpublic computer of a department or agency of the United States, accesses such a computer of that department or agency that is exclusively for the use of the Government of the United States or, in the case of a computer not exclusively for such use, is used by or for the Government of the United States and such conduct affects that use by or for the Government of the United States;

(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period;

(5)(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss.

(6) knowingly and with intent to defraud traffics (as defined in section 1029) in any password or similar information through which a computer may be accessed without authorization, if-

(A) such trafficking affects interstate or foreign commerce; or

(B) such computer is used by or for the Government of the United States;

(7) with intent to extort from any person any money or other thing of value, transmits in interstate or foreign commerce any communication containing any-

(A) threat to cause damage to a protected computer;

(B) threat to obtain information from a protected computer without authorization or in excess of authorization or to impair the confidentiality of information obtained from a protected computer without authorization or by exceeding authorized access; or

(C) demand or request for money or other thing of value in relation to damage to a protected computer, where such damage was caused to facilitate the extortion;

shall be punished as provided in subsection (c) of this section.

(b) Whoever conspires to commit or attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.

(c) The punishment for an offense under subsection (a) or (b) of this section is-

(1)(A) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(1) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than twenty years, or both, in the case of an offense under subsection (a)(1) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(2)(A) except as provided in subparagraph (B), a fine under this title or imprisonment for not more than one year, or both, in the case of an offense under subsection (a)(2), (a)(3), or (a)(6) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(B) a fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(2), or an attempt to commit an offense punishable under this subparagraph, if-

(i) the offense was committed for purposes of commercial advantage or private financial gain;

(ii) the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State; or

(iii) the value of the information obtained exceeds $5,000; and

(C) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(2), (a)(3) or (a)(6) of this section which occurs after a conviction for another

offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(3)(A) a fine under this title or imprisonment for not more than five years, or both, in the case of an offense under subsection (a)(4) or (a)(7) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(4), or (a)(7) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(4)(A) except as provided in subparagraphs (E) and (F), a fine under this title, imprisonment for not more than 5 years, or both, in the case of-

(i) an offense under subsection (a)(5)(B), which does not occur after a conviction for another offense under this section, if the offense caused (or, in the case of an attempted offense, would, if completed, have caused)-

(I) loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least $5,000 in value;

(II) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;

(III) physical injury to any person;

(IV) a threat to public health or safety;

(V) damage affecting a computer used by or for an entity of the United States Government in furtherance of the

administration of justice, national defense, or national security; or

(VI) damage affecting 10 or more protected computers during any 1-year period; or

(ii) an attempt to commit an offense punishable under this subparagraph;

(B) except as provided in subparagraphs (E) and (F), a fine under this title, imprisonment for not more than 10 years, or both, in the case of-

(i) an offense under subsection (a)(5)(A), which does not occur after a conviction for another offense under this section, if the offense caused (or, in the case of an attempted offense, would, if completed, have caused) a harm provided in subclauses (I) through (VI) of subparagraph (A)(i); or

(ii) an attempt to commit an offense punishable under this subparagraph;

(C) except as provided in subparagraphs (E) and (F), a fine under this title, imprisonment for not more than 20 years, or both, in the case of-

(i) an offense or an attempt to commit an offense under subparagraphs (A) or (B) of subsection (a)(5) that occurs after a conviction for another offense under this section; or

(ii) an attempt to commit an offense punishable under this subparagraph;

(D) a fine under this title, imprisonment for not more than 10 years, or both, in the case of-

(i) an offense or an attempt to commit an offense under subsection (a)(5)(C) that occurs after a conviction for another offense under this section; or

(ii) an attempt to commit an offense punishable under this subparagraph;

(E) if the offender attempts to cause or knowingly or recklessly causes serious bodily injury from conduct in violation of subsection (a)(5)(A), a fine under this title, imprisonment for not more than 20 years, or both;

(F) if the offender attempts to cause or knowingly or recklessly causes death from conduct in violation of subsection (a)(5)(A), a fine under this title, imprisonment for any term of years or for life, or both; or

(G) a fine under this title, imprisonment for not more than 1 year, or both, for-

(i) any other offense under subsection (a)(5); or

(ii) an attempt to commit an offense punishable under this subparagraph.

(d)(1) The United States Secret Service shall, in addition to any other agency having such authority, have the authority to investigate offenses under this section.

(2) The Federal Bureau of Investigation shall have primary authority to investigate offenses under subsection (a)(1) for any cases involving espionage, foreign counterintelligence, information protected against unauthorized disclosure for reasons of national defense or foreign relations, or Restricted Data (as that term is defined in section 11y of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)), except for offenses affecting the duties of the United States Secret Service pursuant to section 3056(a) of this title.

(3) Such authority shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.

(e) As used in this section-

(1) the term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated

typewriter or typesetter, a portable hand held calculator, or other similar device;

(2) the term "protected computer" means a computer-

(A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government;

(B) which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States; or

(C) that-

(i) is part of a voting system; and

(ii)(I) is used for the management, support, or administration of a Federal election; or

(II) has moved in or otherwise affects interstate or foreign commerce;

(3) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession or territory of the United States;

(4) the term "financial institution" means-

(A) an institution, with deposits insured by the Federal Deposit Insurance Corporation;

(B) the Federal Reserve or a member of the Federal Reserve including any Federal Reserve Bank;

(C) a credit union with accounts insured by the National Credit Union Administration;

(D) a member of the Federal home loan bank system and any home loan bank;

(E) any institution of the Farm Credit System under the Farm Credit Act of 1971;

(F) a broker-dealer registered with the Securities and Exchange Commission pursuant to section 15 of the Securities Exchange Act of 1934;

(G) the Securities Investor Protection Corporation;

(H) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978); and

(I) an organization operating under section 25 or section 25(a) of the Federal Reserve Act;

(5) the term "financial record" means information derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution;

(6) the term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter;

(7) the term "department of the United States" means the legislative or judicial branch of the Government or one of the executive departments enumerated in section 101 of title 5;

(8) the term "damage" means any impairment to the integrity or availability of data, a program, a system, or information;

(9) the term "government entity" includes the Government of the United States, any State or political subdivision of the United States, any foreign country, and any state, province, municipality, or other political subdivision of a foreign country;

(10) the term "conviction" shall include a conviction under the law of any State for a crime punishable by imprisonment for more than 1 year, an

element of which is unauthorized access, or exceeding authorized access, to a computer;

(11) the term "loss" means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service;

(12) the term "person" means any individual, firm, corporation, educational institution, financial institution, governmental entity, or legal or other entity;

(13) the term "Federal election" means any election (as defined in section 301(1) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30101(1))) for Federal office (as defined in section 301(3) of the Federal Election Campaign Act of 1971 (52 U.S.C. 30101(3))); and

(14) the term "voting system" has the meaning given the term in section 301(b) of the Help America Vote Act of 2002 (52 U.S.C. 21081(b)).

(f) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(g) Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i). Damages for a violation involving only conduct described in subsection (c)(4)(A)(i)(I) are limited to economic damages. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage. No action may be brought under this subsection for the negligent design or manufacture of computer hardware, computer software, or firmware.

(h) The Attorney General and the Secretary of the Treasury shall report to the Congress annually, during the first 3 years following the date of the enactment of this subsection, concerning investigations and prosecutions under subsection (a)(5).

(i)(1) The court, in imposing sentence on any person convicted of a violation of this section, or convicted of conspiracy to violate this section, shall order, in addition to any other sentence imposed and irrespective of any provision of State law, that such person forfeit to the United States-

(A) such person's interest in any personal property that was used or intended to be used to commit or to facilitate the commission of such violation; and

(B) any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation.

(2) The criminal forfeiture of property under this subsection, any seizure and disposition thereof, and any judicial proceeding in relation thereto, shall be governed by the provisions of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853), except subsection (d) of that section.

(j) For purposes of subsection (i), the following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) Any personal property used or intended to be used to commit or to facilitate the commission of any violation of this section, or a conspiracy to violate this section.

(2) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this section, or a conspiracy to violate this section

37 C.F.R. § 201.40

§ 201.40 Exemptions to prohibition against circumvention.

(a) General. This section prescribes the classes of copyrighted works for which the Librarian of Congress has determined, pursuant to 17 U.S.C. 1201(a)(1)(C) and (D), that noninfringing uses by persons who are users of such works are, or are likely to be, adversely affected. The prohibition against circumvention of technological measures that control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) shall not apply to such users of the prescribed classes of copyrighted works.

(b) Classes of copyrighted works. Pursuant to the authority set forth in 17 U.S.C. 1201(a)(1)(C) and (D), and upon the recommendation of the Register of Copyrights, the Librarian has determined that the prohibition against circumvention of technological measures that effectively control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) shall not apply to persons who engage in noninfringing uses of the following classes of copyrighted works:

> (1) Motion pictures (including television shows and videos), as defined in 17 U.S.C. 101, where the motion picture is lawfully made and acquired on a DVD protected by the Content Scramble System, on a Blu-ray disc protected by the Advanced Access Content System, or via a digital transmission protected by a technological measure, and the person engaging in circumvention under paragraphs (b)(1)(i) and (b)(1)(ii)(A) and (B) of this section 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, where circumvention is undertaken solely in order to make use of short portions of the motion pictures in the following instances:
>
> > (i) For the purpose of criticism or comment:
> >
> > > (A) For use in documentary filmmaking, or other films where the motion picture clip is used in parody or for its biographical or historically significant nature;

(B) For use in noncommercial videos (including videos produced for a paid commission if the commissioning entity's use is noncommercial); or

(C) For use in nonfiction multimedia e-books.

(ii) For educational purposes:

(A) By college and university faculty and students or kindergarten through twelfth-grade (K-12) educators and students (where the K-12 student is circumventing under the direct supervision of an educator), or employees acting at the direction of faculty of such educational institutions for the purpose of teaching a course, including of accredited general educational development (GED) programs, for the purpose of criticism, comment, teaching, or scholarship;

(B) By faculty of accredited nonprofit educational institutions and employees acting at the direction of faculty members of those institutions, for purposes of offering massive open online courses (MOOCs) to officially enrolled students through online platforms (which plat forms themselves may be operated for profit), in film studies or other courses requiring close analysis of film and media excerpts, for the purpose of criticism or comment, where the MOOC provider through the online platform limits transmissions to the extent technologically feasible to such officially enrolled students, institutes copyright policies and provides copyright informational materials to faculty, students, and relevant staff members, and applies technological measures that reasonably prevent unauthorized further dissemination of a work in accessible form to others or retention of the work for longer than the course session by recipients of a transmission through the platform, as contemplated by 17 U.S.C. 110(2); or

(C) By educators and participants in nonprofit digital and media literacy programs offered by libraries, museums, and other nonprofit entities with an educational mission, in the course of face-to-face instructional activities, for the purpose of criticism or comment, except that such users may only circumvent 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.

(2)

(i) Motion pictures (including television shows and videos), as defined in 17 U.S.C. 101, where the motion picture is lawfully acquired on a DVD protected by the Content Scramble System, on a Blu-ray disc protected by the Advanced Access Content System, or via a digital transmission protected by a technological measure, where:

(A) Circumvention is undertaken by a disability services office or other unit of a kindergarten through twelfth-grade educational institution, college, or university engaged in and/or responsible for the provision of accessibility services for the purpose of adding captions and/or audio description to a motion picture to create an accessible version for students, faculty, or staff with disabilities;

(B) The educational institution unit in paragraph (b)(2)(i)(A) of this section has a reasonable belief that the motion picture will be used for a specific future activity of the institution and, after a reasonable effort, has determined that an accessible version of sufficient quality cannot be obtained at a fair market price or in a timely manner, including where a copyright holder has not provided an accessible version of a motion picture that was included with a textbook; and

(C) The accessible versions are provided to students or educators and stored by the educational institution in a manner intended to reasonably prevent unauthorized further dissemination of a work.

(ii) For purposes of paragraph (b)(2) of this section,

(A) “Audio description” means an oral narration that provides an accurate rendering of the motion picture;

(B) “Accessible version of sufficient quality” means a version that in the reasonable judgment of the educational institution

unit has captions and/or audio description that are sufficient to meet the accessibility needs of students, faculty, or staff with disabilities and are substantially free of errors that would materially interfere with those needs; and

(C) Accessible materials created pursuant to this exemption and stored pursuant to paragraph (b)(2)(i)(C) of this section may be reused by the educational institution unit to meet the accessibility needs of students, faculty, or staff with disabilities pursuant to paragraphs (b)(2)(i)(A) and (B) of this section.

(3)

(i) Motion pictures (including television shows and videos), as defined in 17 U.S.C. 101, where the motion picture is lawfully acquired on a DVD protected by the Content Scramble System, or on a Blu-ray disc protected by the Advanced Access Content System, solely for the purpose of lawful preservation or the creation of a replacement copy of the motion picture, by an eligible library, archives, or museum, where:

(A) Such activity is carried out without any purpose of direct or indirect commercial advantage;

(B) The DVD or Blu-ray disc is damaged or deteriorating;

(C) The eligible institution, after a reasonable effort, has determined that an unused and undamaged replacement copy cannot be obtained at a fair price and that no streaming service, download service, or on-demand cable and satellite service makes the motion picture available to libraries, archives, and museums at a fair price; and

(D) The preservation or replacement copies are not distributed or made available outside of the physical premises of the eligible library, archives, or museum.

(ii) For purposes of paragraph (b)(3)(i) of this section, a library, archives, or museum is considered “eligible” if -

(A) The collections of the library, archives, or museum are open to the public and/or are routinely made available to researchers who are not affiliated with the library, archives, or museum;

(B) The library, archives, or museum has a public service mission;

(C) The library, archives, or museum's trained staff or volunteers provide professional services normally associated with libraries, archives, or museums;

(D) The collections of the library, archives, or museum are composed of lawfully acquired and/or licensed materials; and

(E) The library, archives, or museum implements reasonable digital security measures as appropriate for the activities permitted by paragraph (b)(3)(i) of this section.

(4)

(i) Motion pictures, as defined in 17 U.S.C. 101, where the motion picture is on a DVD protected by the Content Scramble System, on a Blu-ray disc protected by the Advanced Access Content System, or made available for digital download where:

(A) The circumvention is undertaken by a researcher affiliated with a nonprofit institution of higher education, or by a student or information technology staff member of the institution at the direction of such researcher, solely to deploy text and data mining techniques on a corpus of motion pictures for the purpose of scholarly research and teaching;

(B) The copy of each motion picture is lawfully acquired and owned by the institution, or licensed to the institution without a time limitation on access;

(C) The person undertaking the circumvention views or listens to the contents of the motion pictures in the corpus solely for the purpose of verification of the research findings; and

(D) The institution uses effective security measures to prevent further dissemination or downloading of motion pictures in the corpus, and to limit access to only the persons identified in paragraph (b)(4)(i)(A) of this section or to researchers affiliated with other institutions of higher education solely for purposes of collaboration or replication of the research.

(ii) For purposes of paragraph (b)(4)(i) of this section:

(A) An institution of higher education is defined as one that:

(1) Admits regular students who have a certificate of graduation from a secondary school or the equivalent of such a certificate;

(2) Is legally authorized to provide a postsecondary education program;

(3) Awards a bachelor's degree or provides not less than a two-year program acceptable towards such a degree;

(4) Is a public or other nonprofit institution; and

(5) Is accredited by a nationally recognized accrediting agency or association.

(B) The term "effective security measures" means security measures that have been agreed to by interested copyright owners of motion pictures and institutions of higher education; or, in the absence of such measures, those measures that the institution uses to keep its own highly confidential information secure. If the institution uses the security measures it uses to protect its own highly confidential information, it must, upon a reasonable request from a copyright owner whose work is contained in the corpus, provide information to that copyright owner regarding the nature of such measures.

(5)

(i) Literary works, excluding computer programs and compilations that were compiled specifically for text and data mining purposes, distributed electronically where:

(A) The circumvention is undertaken by a researcher affiliated with a nonprofit institution of higher education, or by a student or information technology staff member of the institution at the direction of such researcher, solely to deploy text and data mining techniques on a corpus of literary works for the purpose of scholarly research and teaching;

(B) The copy of each literary work is lawfully acquired and owned by the institution, or licensed to the institution without a time limitation on access;

(C) The person undertaking the circumvention views the contents of the literary works in the corpus solely for the purpose of verification of the research findings; and

(D) The institution uses effective security measures to prevent further dissemination or downloading of literary works in the corpus, and to limit access to only the persons identified in paragraph (b)(5)(i)(A) of this section or to researchers or to researchers affiliated with other institutions of higher education solely for purposes of collaboration or replication of the research.

(ii) For purposes of paragraph (b)(5)(i) of this section:

(A) An institution of higher education is defined as one that:

(1) Admits regular students who have a certificate of graduation from a secondary school or the equivalent of such a certificate;

(2) Is legally authorized to provide a postsecondary education program;

(3) Awards a bachelor's degree or provides not less than a two-year program acceptable towards such a degree;

(4) Is a public or other nonprofit institution; and

(5) Is accredited by a nationally recognized accrediting agency or association.

(B) The term "effective security measures" means security measures that have been agreed to by interested copyright owners of literary works and institutions of higher education; or, in the absence of such measures, those measures that the institution uses to keep its own highly confidential information secure. If the institution uses the security measures it uses to protect its own highly confidential information, it must, upon a reasonable request from a copyright owner whose work is contained in the corpus, provide information to that copyright owner regarding the nature of such measures.

(6)

(i) Literary works or previously published musical works that have been fixed in the form of text or notation, distributed electronically, that are protected by technological measures that either prevent the enabling of read-aloud functionality or interfere with screen readers or other applications or assistive technologies:

(A) When a copy or phonorecord of such a work is lawfully obtained by an eligible person, as such a person is defined in 17 U.S.C. 121; provided, however, that the rights owner is remunerated, as appropriate, for the market price of an inaccessible copy of the work as made available to the general public through customary channels; or

(B) When such a work is lawfully obtained and used by an authorized entity pursuant to 17 U.S.C. 121.

(ii) For the purposes of paragraph (b)(6)(i) of this section, a "phonorecord of such a work" does not include a sound recording of a performance of a musical work unless and only to the extent the recording is included as part of an audiobook or e-book.

(7) Literary works consisting of compilations of data generated by medical devices or by their personal corresponding monitoring systems, where such

circumvention is undertaken by or on behalf of a patient for the sole purpose of lawfully accessing data generated by a patient's own medical device or monitoring system. Eligibility for this exemption is not a safe harbor from, or defense to, liability under other applicable laws, including without limitation the Health Insurance Portability and Accountability Act of 1996, the Computer Fraud and Abuse Act of 1986, or regulations of the Food and Drug Administration.

(8) Computer programs that enable wireless devices to connect to a wireless telecommunications network, when circumvention is undertaken solely in order to connect to a wireless telecommunications network and such connection is authorized by the operator of such network.

(9) Computer programs that enable smartphones and portable all-purpose mobile computing devices to execute lawfully obtained software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications with computer programs on the smartphone or device, or to permit removal of software from the smartphone or device. For purposes of this paragraph (b)(9), a "portable all-purpose mobile computing device" is a device that is primarily designed to run a wide variety of programs rather than for consumption of a particular type of media content, is equipped with an operating system primarily designed for mobile use, and is intended to be carried or worn by an individual.

(10) Computer programs that enable smart televisions to execute lawfully obtained software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications with computer programs on the smart television, and is not accomplished for the purpose of gaining unauthorized access to other copyrighted works. For purposes of this paragraph (b)(10), "smart televisions" includes both internet-enabled televisions, as well as devices that are physically separate from a television and whose primary purpose is to run software applications that stream authorized video from the internet for display on a screen.

(11) Computer programs that enable voice assistant devices to execute lawfully obtained software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications with computer programs on the device, or to permit removal of software from the device, and is not accomplished for the purpose of gaining

unauthorized access to other copyrighted works. For purposes of this paragraph (b)(11), a "voice assistant device" is a device that is primarily designed to run a wide variety of programs rather than for consumption of a particular type of media content, is designed to take user input primarily by voice, and is designed to be installed in a home or office.

(12) Computer programs that enable routers and dedicated network devices to execute lawfully obtained software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications with computer programs on the router or dedicated network device, and is not accomplished for the purpose of gaining unauthorized access to other copyrighted works. For the purposes of this paragraph (b)(12), "dedicated network device" includes switches, hubs, bridges, gateways, modems, repeaters, and access points, and excludes devices that are not lawfully owned.

(13) Computer programs that are contained in and control the functioning of a lawfully acquired motorized land vehicle or marine vessel such as a personal automobile or boat, commercial vehicle or vessel, or mechanized agricultural vehicle or vessel, except for programs accessed through a separate subscription service, when circumvention is a necessary step to allow the diagnosis, repair, or lawful modification of a vehicle or vessel function, where such circumvention is not accomplished for the purpose of gaining unauthorized access to other copyrighted works. Eligibility for this exemption is not a safe harbor from, or defense to, liability under other applicable laws, including without limitation regulations promulgated by the Department of Transportation or the Environmental Protection Agency.

(14) Computer programs that are contained in and control the functioning of a lawfully acquired device that is primarily designed for use by consumers, when circumvention is a necessary step to allow the diagnosis, maintenance, or repair of such a device, and is not accomplished for the purpose of gaining access to other copyrighted works. For purposes of this paragraph (b)(14):

> (i) The "maintenance" of a device is the servicing of the device in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that device; and
>
> (ii) The "repair" of a device is the restoring of the device to the state of working in accordance with its original specifications and any

changes to those specifications authorized for that device. For video game consoles, "repair" is limited to repair or replacement of a console's optical drive and requires restoring any technological protection measures that were circumvented or disabled.

(15) Computer programs that are contained in and control the functioning of a lawfully acquired medical device or system, and related data files, when circumvention is a necessary step to allow the diagnosis, maintenance, or repair of such a device or system. For purposes of this paragraph (b)(15):

(i) The "maintenance" of a device or system is the servicing of the device or system in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that device or system; and

(ii) The "repair" of a device or system is the restoring of the device or system to the state of working in accordance with its original specifications and any changes to those specifications authorized for that device or system.

(16)

(i) Computer programs, where the circumvention is undertaken on a lawfully acquired device or machine on which the computer program operates, or is undertaken on a computer, computer system, or computer network on which the computer program operates with the authorization of the owner or operator of such computer, computer system, or computer network, solely for the purpose of good-faith security research.

(ii) For purposes of paragraph (b)(16)(i) of this section, "good-faith security research" means accessing a computer program solely for purposes of good-faith testing, investigation, and/or correction of a security flaw or vulnerability, where such activity is carried out in an environment designed to avoid any harm to individuals or the public, and where the information derived from the activity is used primarily to promote the security or safety of the class of devices or machines on which the computer program operates, or those who use such devices or machines, and is not used or maintained in a manner that facilitates copyright infringement.

(iii) Good-faith security research that qualifies for the exemption under paragraph (b)(16)(i) of this section may nevertheless incur liability under other applicable laws, including without limitation the Computer Fraud and Abuse Act of 1986, as amended and codified in title 18, United States Code, and eligibility for that exemption is not a safe harbor from, or defense to, liability under other applicable laws.

(17)

(i) Video games in the form of computer programs embodied in physical or downloaded formats that have been lawfully acquired as complete games, when the copyright owner or its authorized representative has ceased to provide access to an external computer server necessary to facilitate an authentication process to enable gameplay, solely for the purpose of:

(A) Permitting access to the video game to allow copying and modification of the computer program to restore access to the game for personal, local gameplay on a personal computer or video game console; or

(B) Permitting access to the video game to allow copying and modification of the computer program to restore access to the game on a personal computer or video game console when necessary to allow preservation of the game in a playable form by an eligible library, archives, or museum, where such activities are carried out without any purpose of direct or indirect commercial advantage and the video game is not distributed or made available outside of the physical premises of the eligible library, archives, or museum.

(ii) Video games in the form of computer programs embodied in physical or downloaded formats that have been lawfully acquired as complete games, that do not require access to an external computer server for gameplay, and that are no longer reasonably available in the commercial marketplace, solely for the purpose of preservation of the game in a playable form by an eligible library, archives, or museum, where such activities are carried out without any purpose of direct or indirect commercial advantage and the video game is not distributed

or made available outside of the physical premises of the eligible library, archives, or museum.

(iii) Computer programs used to operate video game consoles solely to the extent necessary for an eligible library, archives, or museum to engage in the preservation activities described in paragraph (b)(17)(i)(B) or (b)(17)(ii) of this section.

(iv) For purposes of this paragraph (b)(17), the following definitions shall apply:

(A) For purposes of paragraphs (b)(17)(i)(A) and (b)(17)(ii) of this section, "complete games" means video games that can be played by users without accessing or reproducing copyrightable content stored or previously stored on an external computer server.

(B) For purposes of paragraph (b)(17)(i)(B) of this section, "complete games" means video games that meet the definition in paragraph (b)(17)(iv)(A) of this section, or that consist of both a copy of a game intended for a personal computer or video game console and a copy of the game's code that was stored or previously stored on an external computer server.

(C) "Ceased to provide access" means that the copyright owner or its authorized representative has either issued an affirmative statement indicating that external server support for the video game has ended and such support is in fact no longer available or, alternatively, server support has been discontinued for a period of at least six months; provided, however, that server support has not since been restored.

(D) "Local gameplay" means gameplay conducted on a personal computer or video game console, or locally connected personal computers or consoles, and not through an online service or facility.

(E) A library, archives, or museum is considered "eligible" if -

(1) The collections of the library, archives, or museum are open to the public and/or are routinely made available to

researchers who are not affiliated with the library, archives, or museum;

(2) The library, archives, or museum has a public service mission;

(3) The library, archives, or museum's trained staff or volunteers provide professional services normally associated with libraries, archives, or museums;

(4) The collections of the library, archives, or museum are composed of lawfully acquired and/or licensed materials; and

(5) The library, archives, or museum implements reasonable digital security measures as appropriate for the activities permitted by this paragraph (b)(17).

(18)

(i) Computer programs, except video games, that have been lawfully acquired and that are no longer reasonably available in the commercial marketplace, solely for the purpose of lawful preservation of a computer program, or of digital materials dependent upon a computer program as a condition of access, by an eligible library, archives, or museum, where such activities are carried out without any purpose of direct or indirect commercial advantage. Any electronic distribution, display, or performance made outside of the physical premises of an eligible library, archives, or museum of works preserved under this paragraph may be made to only one user at a time, for a limited time, and only where the library, archives, or museum has no notice that the copy would be used for any purpose other than private study, scholarship, or research.

(ii) For purposes of the exemption in paragraph (b)(18)(i) of this section, a library, archives, or museum is considered "eligible" if -

(A) The collections of the library, archives, or museum are open to the public and/or are routinely made available to researchers who are not affiliated with the library, archives, or museum;

(B) The library, archives, or museum has a public service mission;

(C) The library, archives, or museum's trained staff or volunteers provide professional services normally associated with libraries, archives, or museums;

(D) The collections of the library, archives, or museum are composed of lawfully acquired and/or licensed materials; and

(E) The library, archives, or museum implements reasonable digital security measures as appropriate for the activities permitted by this paragraph (b)(18).

(19) Computer programs that operate 3D printers that employ technological measures to limit the use of material, when circumvention is accomplished solely for the purpose of using alternative material and not for the purpose of accessing design software, design files, or proprietary data.

(20) Computer programs, solely for the purpose of investigating a potential infringement of free and open source computer programs where:

(i) The circumvention is undertaken on a lawfully acquired device or machine other than a video game console, on which the computer program operates;

(ii) The circumvention is performed by, or at the direction of, a party that has a good-faith, reasonable belief in the need for the investigation and has standing to bring a breach of license or copyright infringement claim;

(iii) Such circumvention does not constitute a violation of applicable law; and

(iv) The copy of the computer program, or the device or machine on which it operates, is not used or maintained in a manner that facilitates copyright infringement.

(21) Video games in the form of computer programs, embodied in lawfully acquired physical or downloaded formats, and operated on a general-purpose computer, where circumvention is undertaken solely for the purpose of

allowing an individual with a physical disability to use software or hardware input methods other than a standard keyboard or mouse.

(c) Persons who may initiate circumvention. To the extent authorized under paragraph (b) of this section, the circumvention of a technological measure that restricts wireless telephone handsets or other wireless devices from connecting to a wireless telecommunications network may be initiated by the owner of any such handset or other device, by another person at the direction of the owner, or by a provider of a commercial mobile radio service or a commercial mobile data service at the direction of such owner or other person, solely in order to enable such owner or a family member of such owner to connect to a wireless telecommunications network, when such connection is authorized by the operator of such network.