NO. 16-56843

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DISNEY ENTERPRISES, INC., ET.AL.,

PLAINTIFF-COUNTER-DEFENDANT-APPELLEE,

V.

VIDANGEL, INC.,

DEFENDANT-COUNTER-CLAIMANT-APPELLANT.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:16-cv-04109-AB-PLA

The Honorable Andre Briotté Jr., District Court Judge

BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF NEITHER PARTY

Mitchell L. Stoltz (CA SBN 291302)
Kit Walsh (CA SBN 303598)
ELECTRONIC FRONTIER
FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Tel. (415) 436-9333

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Legislative Materials

Other Authorities

STATEMENT OF INTEREST[1]

The Electronic Frontier Foundation ("EFF") is a member-supported non-profit organization dedicated to protecting civil liberties in light of new technologies. EFF has participated as counsel and as an *amicus* in dozens of matters relating to copyright law and the Digital Millennium Copyright Act. EFF currently represents security researcher Professor Matthew Green, audiovisual technology innovator Andrew Huang, and Dr. Huang's company Alphamax, LLC, in a pre-enforcement challenge to Section 1201(a) of the Digital Millennium Copyright Act based in part on the First Amendment. *Green v. Dept. of Justice*, 1:16-cv-01492-EGS (D.D.C.). Per Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief.

INTRODUCTION

Appellant VidAngel has urged the Court to construe the anti-circumvention provision of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201(a)(1), to include a fair use defense. As VidAngel mentions, any interpretation of Section 1201 that fails to accommodate fair uses runs afoul of the First Amendment to the Constitution. *Amicus* EFF expresses no opinion on the merits of the Appellees' copyright infringement claims, nor VidAngel's fair use defenses. We

[1] No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

write instead to caution the Court against adopting an interpretation of Section 1201(a)(1) that forecloses the possibility of a fair use defense. Such an interpretation would place impermissible burdens on a wide variety of protected free expression, contrary to the First Amendment.

Section 1201(a)(1)(A) of the DMCA prohibits "circumventing" measures used to control access to copyrighted works. This prohibition is backed by the threat of criminal and civil penalties, and has been interpreted by the Second Circuit and the Department of Justice to apply even where the circumvention serves an entirely lawful purpose. Once every three years, members of the public may ask the Librarian of Congress for an exemption through a rigid and inadequate speech-licensing process.

EFF routinely represents clients who wish to circumvent access controls on media and software in order to foster political and creative expression, and to perform and share computer research. These activities would run afoul of Section 1201 absent a fair use defense and other speech accommodations.

Section 1201, absent such accommodations, violates the First Amendment. The statute directly restricts speech, including the creation of computer programs and the dissemination and publication of information about circumvention. It also prohibits the public from engaging in activities that are fundamental predicates to speech—translating information into a usable form, gathering and creating infor-

mation, sharing the fruits of that knowledge with others, and expressing oneself via fair use. All of this activity is constitutionally protected, and the burdens imposed on it by a version of Section 1201 lacking speech protections violate the First Amendment in at least three ways.

First, Section 1201's content-based bans are subject to strict scrutiny, although they fail both strict and intermediate scrutiny as applied to a defendant who does not infringe copyright because there are ample less restrictive means to advance the purposes supposedly served by Section 1201. Nor does the fact that Section 1201 relates to copyright enable it to avoid that scrutiny: to be compatible with the First Amendment, laws targeting infringement must respect copyright's traditional boundaries, which Section 1201 does not. *Second*, because the statute's sweeping prohibitions are substantially overbroad, and nearly two decades of experience with the law has made clear that it causes extraordinary collateral damage to speech, Section 1201 is facially invalid as well. *Third*, by broadly forbidding all speech that depends upon circumvention—subject to a narrow exemption process administered by the Librarian of Congress—Section 1201 erects a speech-licensing regime that lacks the protections required by the First Amendment.

Because of these serious constitutional issues, in resolving this appeal, the Court should avoid any ruling that would foreclose the possibility of a fair use defense to liability under Section 1201.

BACKGROUND

A. Section 1201's Anti-Circumvention Provision.

Section 1201(a)(1)(A) prohibits "circumvent[ing] a technological measure that effectively controls access to a work protected [by copyright]." 17 U.S.C. § 1201(a)(1). Such measures, often referred to as "technological protection measures" (TPMs), include encryption, username/password combinations, and physical memory restrictions that prevent a user from accessing stored information.[2]

Violation of this provision gives rise to both a private right of action and, if the circumvention or trafficking is done for a commercial purpose, a risk of criminal prosecution punishable by up to $500,000 in fines and imprisonment up to 5 years. 17 U.S.C. § 1204(a). Moreover, even though the ostensible ultimate purpose of the law was to inhibit copyright infringement, prosecutors are taught that they may pursue individuals under Section 1201 even where the circumvention or trafficking has no nexus with actual infringement. U. S. Dept. of Justice, *"Prosecuting Intellectual Property Crimes"* (2013), at 233-79.

[2] Other provisions of Section 1201 prohibit "manufactur[ing], import[ing], offer[ing] to the public, provid[ing], or otherwise traffic[king] in any technology, product, service, device, component, or part thereof, that … is primarily designed or produced for the purpose of" circumventing an access control TPM, or a TPM that "effectively protects the right of a copyright owner under this title," which is to say, a measure that prevents copying or other legally restricted uses. 17 U.S.C. § 1201(a)(2)(A); § 1201(b). This case does not involve claims under §1201(a)(2) or § 1201(b).

B. Section 1201's Triennial Rulemaking Process.

When Congress enacted Section 1201, it recognized that the statute's breadth could lead to adverse impacts on a range of legitimate and socially beneficial activity. H.R. Rep. No. 105-551 pt. 2, at 36 (1998). Congress included an unusual provision directing the U.S. Copyright Office and the Librarian of Congress to conduct a rulemaking process once every three years in order to determine "whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition [on circumvention] in their ability to make noninfringing uses under this title of a particular class of copyrighted works." 17 U.S.C. § 1201(a)(1)(C); 144 Cong. Rec. H10621 (1998), at H10617. If so, the statute instructs the Librarian to grant an exemption for such uses, for a three year period. 17 U.S.C. § 1201(a)(1)(D).

The statute instructs the Librarian to consider several specific factors: (i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact of the anti-circumvention rule on criticism, comment, news reporting, teaching, scholarship, or research; and (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works. 17 U.S.C. § 1201(a)(1)(C). In addition, the Librarian may consider "such other factors as the Librarian considers appropriate." 17 U.S.C. § 1201(a)(1)(C)(v). The Librarian has used this catch-all

provision to deny exemptions for reasons that have nothing to do with the DMCA's ostensible purpose of protecting the market for copyrighted works. For example, exemptions have been rejected based on potential impacts on automobile pollution and energy policy. *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies,* 80 Fed. Reg. 65,944, 65,954 (Oct. 28, 2015) ("2015 Final Rule").

In addition, the Library of Congress has imposed a variety of other requirements on applicants seeking exemptions. Those include: (1) putting the burden of proof on the party seeking an exemption; (2) requiring applicants to demonstrate the rule's widespread impact on non-infringing uses; (3) requiring evidence that people are already engaging in circumvention, even though that invites criminal and civil jeopardy; and (4) requiring applicants to show that there is *no* viable alternative means of engaging in the prohibited use, even if the alternative is far more onerous and expensive. *Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights* ("2015 Recommendation"), https://www.copyright.gov/1201/2015/registers-recommendation.pdf, at 14-16, 85-87. Granted exemptions lapse every three years with no presumption of renewal, and the government has failed to renew several previously granted exemptions. *See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies,* 77 Fed. Reg.

65,944, 65,264-66 (Oct. 26, 2012) ("2012 Final Rule") ("2012 Final Rule") at 65,264-66.

C. The 2015 Triennial Rulemaking.

Despite the substantial burdens of the rulemaking process, thousands of members of the public approached the Copyright Office in the last rulemaking cycle to explain how the ban on circumvention interferes with their noninfringing speech, and to seek or support exemptions from the ban. 2015 Recommendation, at 92. In the most recent rulemaking, the requested exemptions included documentary and narrative filmmaking (*id.* at 85-86, 90); educational uses to teach media criticism and analysis (*id*. at 87,92); security research (*id*. at 188-89); conversion of media to accessible formats for the visually impaired (*id*. at 135); analysis of medical data on medical devices (*id*. at 397, 401); "format shifting" and "space shifting" (converting lawfully-acquired media from one format or device to another) (*id*. at 124). The Library of Congress denied many of the requested exemptions (including for space- and format-shifting) and significantly limited others (including for filmmaking and security research). 2015 Final Rule, at 65,956, 65,960.

ARGUMENT

Should the Court reach the question of whether fair use is a defense to a violation of Section 1201, it should consider the various ways in which an overinclusive Section 1201 – one that lacks traditional limitations such as fair use – would

impermissibly burden the First Amendment rights of the public.

A. Section 1201 Burdens First Amendment Rights.

Section 1201 interferes with those who seek to gather information, to engage in valuable academic research, to create new information and media, to build tools for speech, and to publish transformative words, images, and computer code based upon copyrighted works. All of these steps are protected links in a unified chain of expression that will ultimately reach a public audience that has a corresponding right to hear others' speech and to use their work to engage in new acts of speech and expression. That chain falls squarely within the First Amendment. *See Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach.") (citations omitted); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) ("Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge."). Section 1201 stands in the way of such activities. In doing so, the statute restricts a wide variety of protected speech. Such restrictions, including the following examples, trigger First Amendment scrutiny.

Section 1201 burdens the right to gather information. "[T]he First Amendment goes beyond protection of the press and self-expression of individuals

to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l of Bos. v. Belotti*, 435 U.S. 765, 783 (1978). This principle is implicated in many activities that require circumvention. Members of the public seek to circumvent access controls on their own property in order to gather factual information that they intend to share with others. Some circumvent TPMs to identify and to understand security flaws in computer programs and then share that information to help make computer systems more secure. 2015 Recommendation, at 188-89. Others seek to circumvent TPMs in order to gather information about how to create new tools for self-expression or to make media accessible to those with disabilities. *Id.* at 87, 92, 135.

The Supreme Court has recognized that the ability to gather information is a "necessary predicate" to the subsequent exercise of "rights of speech, press, and political freedom." *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality). "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *see, e.g.*, *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (First Amendment right to record police officers because "[t]he right to publish . . . would be insecure, or largely ineffective" if the necessary antecedent acts of gathering information were "wholly unprotected."); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (First Amendment right to mon-

itor court proceedings).

Section 1201 burdens the right to create and share information. Many who run afoul of TPMs in the course of their activities do not merely want to gather information; they also seek to create new information to share with others. Some seek to circumvent access controls on works in their lawful possession, to shed new light on computer security vulnerabilities and the methods of investigating them, then to share those insights, and the computer code that makes them possible, with others for the benefit of public. 2015 Recommendation, at 188-89. Others seek to create fair use remixes of videos they lawfully possess. *Id.* at 85-86, 90.

This too is protected speech. As the Supreme Court has explained, "the creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell*, 564 U.S. at 570 (citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995) (product labels); and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (plurality opinion) (credit reports)). Using technology like circumvention code to facilitate their information-creation efforts is no barrier to protection. The "process of creating" is as protected as "the product of these processes." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010) ("[W]e have not drawn a hard line between the essays that John Peter Zenger published and the act of setting the type."). Indeed, it is well settled that the First Amendment protection for speech includes protection for the tools that

enable speech. *See, e.g.*, *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592-93 (1983) (striking down a tax on ink used to publish newspapers); *First Nat'l Bank of Boston.*, 435 U.S 765, 795 (striking down a limit on contributing money to a political campaign). Circumvention technology is just such a tool: not only may it constitute speech in and of itself (as discussed above), it is designed to facilitate the gathering and creation of information. It enables the public to engage in protected First Amendment activities and to allow others to do so as well.

One of the most basic problems with Section 1201 is that it applies to works that people have lawfully acquired. Indeed, absent a fair use exception, the provision prevents people from *accessing their own property*. Thus, someone who buys an ebook or DVD would violate the DMCA by using circumvention to access the work's full contents. Section 1201 also prohibits transformation of information into a form that can be used for subsequent speech. For example, the statute identifies "encryption"—the "scrambling" of information—as a technological protection measure that controls access to a work. *See* 17 U.S.C. §§ 1201(g)(1)(B), 1201(a)(3)(A). By prohibiting the use of decryption technology to unscramble information, Section 1201 proscribes efforts to understand and make use of information in the works or items that a person already lawfully possesses. In that respect, Section 1201 is like a ban on unlocking the door to one's own library or us-

ing the tools needed to read a book in that library printed in invisible ink.

For these reasons, Section 1201 squarely implicates protected speech and must face First Amendment review. As set forth below, Section 1201 cannot survive that review if it prohibits fair uses and other uses protected under the traditional contours of copyright law. That is so for three independent reasons.

B. Section 1201 Violates the First Amendment as Applied to Circumvention That Is Not Connected to Copyright Infringement.

As explained above, the public's First Amendment rights are significantly inhibited by Section 1201's bans on circumvention and trafficking. Section 1201 prevents circumvention of media in the furtherance of lawful speech such as remix films. The law likewise prevents researchers from both engaging in critical forms of research using circumvention code and talking about that research, including publishing the relevant code. *See supra*. Absent a fair use defense, these prohibitions violate the First Amendment.

1. Section 1201 Is Subject to Strict Scrutiny.

Content-based speech restrictions are presumptively unconstitutional and subject to strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226-27, 2231 (2015). Both the circumvention and trafficking prohibitions in Section 1201 are content-based: they "defin[e] regulated speech" by "particular subject matter" and by "its function and purpose." *Id*. at 2227.

The anti-trafficking provision bans speech about the particular subject matter (or for the purpose) of circumventing TPMs, while allowing speech on every other subject matter and purpose. The provision's selective ambit "require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (citation omitted). To determine whether a book or set of computer instructions violate the anti-trafficking rule, one would have to examine their contents.

Liability under the circumvention ban likewise hinges on the content of the speech resulting from circumvention. Indeed, the statute on its face draws various content-based distinctions, exempting certain kinds of "reverse engineering" and "encryption research," (17 U.S.C. § 1201(f), (g)), but not others, and overtly regulating speech based on its form and purpose. Section 1201 also requires the Librarian, in determining which activities to exempt by regulation, to "examine" the ban's impact on "the availability for use of works for nonprofit archival, preservation, and educational purposes" and on "criticism, comment, news reporting, teaching, scholarship, or research." 17 U.S.C. § 1201(a)(1)(C)(ii) & (iii). Unsurprisingly, therefore, the line between which instances of circumvention are unlawful and which are lawful is almost entirely content-based. 2015 Final Rule at 65,946 (Rulemaking Defendants will refine an exemption "by reference to the use or us-

er"). Some examples include exemptions for use of video clips in "documentary" film but not "narrative" film; for ebooks offering close media critique but not others; for research on some devices but not others; and for educational uses at universities but not grade schools or adult education programs. 2015 Recommendation, *at* 70-71, 78-82, 85-86, 88, 90-92, 124, 135, 188-189, 937, 401. In short, the statute "require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen*, 134 S. Ct. at 2531 (citation omitted).

Section 1201 cannot escape First Amendment scrutiny by dint of its provenance as a copyright law. As the Supreme Court has made clear, laws that disturb the traditional contours of copyright must face independent First Amendment scrutiny. *See Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); *Golan v. Holder*, 132 S. Ct. 873, 890 (2012); *see also* Neil Netanel, *First Amendment Constraints on Copyright After Golan v. Holder*, 60 UCLA L. Rev. 1082, 1086 (2013) ("Following *Golan* and *Eldred*, neither Congress nor the courts may eviscerate copyright law's idea/expression dichotomy or fair use privilege without running afoul of the First Amendment."). Section 1201 violates those traditional contours if it does not adequately accommodate fair use. An overly restrictive Section 1201 instead prevents the public from engaging in numerous lawful uses of copyrighted works, from altering the playback of movies in the home, to extracting excerpts from DVDs, to

researching security vulnerabilities in everyday devices, to making books more accessible to the disabled, to building new and innovative tools that will be used to comment on affairs of the day. 2015 Recommendation, 70-71, 85-86, 88, 90-92, 135, 188-89, 344-47, 397, 401. Indeed, according to the Department of Justice, enforcement of Section 1201 does not require any nexus to copyright infringement at all. *U.S. Dep't of Justice, Prosecuting Intellectual Property Crimes*, at 4-5.

A Section 1201 that undermines copyright law's speech-protecting accommodations is subject to ordinary First Amendment standards. Here, because the law is content-based, those standards require strict scrutiny.

2. Section 1201 Cannot Survive Strict Scrutiny.

Under strict scrutiny, restrictions on speech can survive only upon a showing that they are "the least restrictive means of achieving a compelling state interest." *McCullen*, 134 S. Ct. at 2530; *see also Reed*, 135 S. Ct. at 2231 (strict scrutiny requires "the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest" (quotations and citations omitted)). That standard cannot be met here. The statute allegedly exists to combat infringement of copyrighted works, but the statute is not narrowly tailored to advance that purpose, and there are far less restrictive means to achieve such goals.

Most obviously, the ordinary enforcement of copyright law (including Apellees' copyright infringement claims in this appeal) protects copyrighted media

without unduly restricting protected speech in the same way that Section 1201 does. Copyright law is a powerful tool: it includes civil liability (with statutory damages) and criminal penalties. 17 U.S.C. §§ 501, 504, 506. But it preserves the robust fair use rights that keep copyright law in balance with the First Amendment. *See Golan*, 132 S. Ct. at 890. And it "leaves breathing room for innovation and a vigorous commerce" by "absolv[ing] the equivocal conduct of selling an item with substantial lawful as well as unlawful uses." *MGM Studios Inc. v. Grokster, Ltd*., 545 U.S. 913, 932-33 (2005); *see also Sony Corp. of Am. v. Universal City Studios, Inc*., 464 U.S. 417, 442, 456 (1984). Copyright law's existing tools are a less restrictive alternative way to advance the purposes supposedly furthered by Section 1201. Without a fair use defense, Section 1201 cannot survive strict scrutiny.

3. Even If The Anti-Trafficking And Anti-Circumvention Rules Were Not Content-Based, They Fail Intermediate Scrutiny.

Section 1201, as applied to a fair user, cannot survive intermediate scrutiny either. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). But a government regulation is only

> sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of

> free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377; *see also*, *e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

Simply put, a burden on speech must be "narrowly tailored to serve a significant governmental interest." *McCullen*, 134 S. Ct. at 2534; *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). This requirement ensures "a close fit between ends and means." *McCullen*, 134 S. Ct. at 2534. The burden on speech must be "no greater than is essential" to advance the government's interest. *Edwards v. District of Columbia*, 755 F.3d 996, 1001-02 (D.C. Cir. 2014) (quoting *O'Brien*, 391 U.S. at 377). The prohibitions must "target[] and eliminate[] no more than the exact source of the 'evil' [they] seek to remedy." *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 522-23 (D.C. Cir. 2010) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

The proponent of speech regulation bears the burden of proving narrow tailoring. *Edwards*, 755 F.3d at 1003. To do so, it 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*, 512 U.S. at 664 (plurality op.). It cannot rest on "mere speculation or conjecture"; instead, substantial evidence" is required. *Edwards*, 755 F.3d at 1003 (quoting *Edenfield v. Fane*, 507 U.S. 761,

770-71 (1993)). Because the anti-trafficking and anti-circumvention rules target far "more than the exact source of the 'evil' [the laws] seek to remedy," *Boardley*, 615 F.3d at 522-23 (quoting *Frisby*, 487 U.S. at 485), Section 1201 cannot survive intermediate scrutiny.

Section 1201 also burdens more speech than necessary to deter copyright infringement. *Boardley*, 615 F.3d at 522-23 (quoting *Frisby*, 487 U.S. at 485). The permanent exemptions to the bans on circumvention and trafficking are these extremely narrow exemptions insufficient to accommodate fair use and protected speech, and in fact they demonstrate that Section 1201 is not narrowly tailored. "[A]n arbitrary exemption from or 'underinclusiveness of the scheme chosen by the government'" can show "the asserted interests either are not pressing or are not the real objects animating the restriction on speech." *Edwards*, 755 F.3d at 1007. For example, a limit on posting signs on lamposts was not narrowly tailored where the government could not justify treating signs for "events" more favorably than signs for "non-events." *Act Now to Stop War & End Racism Coalition v. District of Columbia*, 905 F. Supp. 2d 317, 332 (D.D.C. 2012); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994) (exceptions from speech limits "may diminish the credibility of the government's rationale for restricting speech in the first place"); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 638 (1980) (holding a limit on door-to-door solicitation was not narrowly drawn where it exempted simi-

larly situated solicitors). The existence of these statutory exemptions, which enable a handful of noninfringing uses, undermines the argument that it is proper for the bans on circumvention and trafficking to sweep up all other noninfringing uses.

In short, the application of Section 1201 to noninfringing speech activities violates the First Amendment regardless of what level of scrutiny is applied.

C. Section 1201 Is Unconstitutionally Overbroad.

A burden on fair use and other noninfringing speech is far from tangential to the core of Section 1201's prohibitions. The statute's sweeping prohibitions on circumvention and trafficking burden a wide range of legitimate First Amendment activity. 2015 Recommendation, at 70-71, 78-82, 85-87, 90-92, 135, 188-89, 344-47, 397, 401. This renders Section 1201 unconstitutionally overbroad. *See United States v. Stevens*, 559 U.S. 460, 473 (2010) (striking down animal cruelty statute as overbroad).

Overbreadth is often established by examining *hypothetical* applications of a statute (*see Stevens*, 559 U.S. 460)[3]—but two decades of history with Section 1201 have surfaced numerous specific categories of speech that has actually been subject to impermissible burdens. Those include narrative films (2015 Recommendation, at 88,92); critical commentary on a large portion of a political debate, sporting

[3] By ignoring the traditional contours of direct and secondary copyright infringement, Section 1201 creates a broad hypothetical range of unconstitutional applications in addition to its actual burdens on real instances of protected activity. *See* Section II.C *supra*.

event, or movie (*id.*); educational uses (*id.*); format- and space-shifting (*id.* 124); analysis of medical data from medical devices (*id.* at 397, 401); and remix video expression (*id.* at 91). The thousands of persons who asked the Librarian to issue exemptions in 2015 demonstrate the widespread impact of the ban on circumvention on noninfringing speech. *Id.,* at 70-71, 78-82, 85-87, 90-92, 135, 188-89, 344-47, 397, 401.

Section 1201 is overbroad on its face, if it does not accomodate noninfringing speech such as fair uses.

D. Section 1201 Is An Unconstitutional Speech-Licensing Regime.

Finally, Section 1201's provision for a triennial rulemaking creates additional First Amendment problems in the form of an unlawful speech-licensing regime, rather than acting as a viable substitute for speech protections like fair use. Congress recognized the threat that Section 1201 posed to lawful speech, H.R. Rep. No. 105-551 pt. 2, at 36 (1998), so it created a "fail-safe" to help reduce that risk. *See* 144 Cong. Rec. H10621 (1998), at H10617 (discussing the intent to ensure that "schools of thought in universities can still do research, and all of us can access information in a society that so prides itself on free speech and the free exchange of information.").[4] But the mechanism that Congress created—the triennial exemp-

[4] *See also, e.g.*, 144 Cong. Rec. H7074-03 (1998), at H7092; 144 Cong. Rec. E2136-02 (1998), at E2137; 144 Cong. Rec. H10615-01 (1998), at H10616; 144 Cong. Rec. S4884-01 (1998), at S4889

tions process—does not save the statute. To the contrary, that process is itself an unconstitutional burden on speech.

1. Speech-Licensing Schemes Must Satisfy Strict Standards.

Speech-licensing regimes are presumptively unconstitutional. *See Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965); *see, e.g.*, *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223-24 (1990) (ordinance requiring a permit to operate a business selling sexually explicit books and movies); *Bernstein v. U.S. Dep't of State*, 974 F. Supp. 1288, 1304 (N.D. Cal. 1997) (regulation requiring a license to export encryption technology). As the Supreme Court has explained, a scheme making the "freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *FW/PBS*, 493 U.S. at 226 (plurality opinion) (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969)). Such schemes create an unacceptably high risk that licensors will abuse their excessive discretion. *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988).

Accordingly, a regulation "subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must include "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth*, 394 U.S. at 150-51; *accord Lakewood*, 486 U.S. at 770-72. In addition, any viable speech-licensing re-

gimes must also employ procedural safeguards to limit the inherent dangers of a censorship system. Specifically, (1) the licensing decision must be prompt; (2) there must be prompt judicial review; and (3) when a censor denies a license, it must go to court to obtain a valid judicial order and, once there, must prove the gag is justified. *See Freedman*, 380 U.S. at 58-60.

2. Section 1201 Is An Unconstitutional Speech Licensing Scheme.

Section 1201's exemption process is an unconstitutional speech-licensing regime. The statute begins with a blanket ban on a broad array of activities protected by the First Amendment. 17 U.S.C. § 1201(a)(1). Indeed, the Library of Congress itself has acknowledged that the circumvention ban blocks many kinds of noninfringing speech and that the statute, as written, adversely affects legitimate activity. 2015 Recommendations, at 85-6, 88, 90-92, 135, 188-189, 344-347, 397, 401. The only way that members of the public can overcome that ban is to obtain the government's permission before they are allowed to engage in speech activities. This is a textbook example of a speech-licensing regime.

That regime lacks the safeguards that the First Amendment requires. As an initial matter, the triennial rulemaking procedure lacks definite standards. The statute instructs that a class of copyrighted works is to be exempted from the ban on circumvention if "noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected." 17 U.S.C. § 1201(a)(1)(D). But it

also provides that the Librarian of Congress "shall examine" several factors that speak to whether a use is infringing or is adversely affected by the ban, including "*such other factors as the Librarian considers appropriate*." *Id*. § 1201(a)(1)(C)(i)-(v) (emphasis added). Based on this amorphous clause, the Librarian has denied and narrowed requested exemptions based on a variety of purported concerns that are wholly unrelated to copyright, such as environmental protection, potential risk of personal injury, and energy policy.[5] Likewise, it routinely uses its discretion to favor some lawful speech over others.[6] 2015 Recommendation*, at* 241. A licensing regime creating such excessive discretion and is unconstitutional. *Lakewood*, 486 U.S. at 769-70 (could deny license as against "public interest").

The triennial rulemaking regime also lacks the required procedural protections. *See Freedman*, 380 U.S. at 58-60. The burden impermissibly falls on would-be speakers to vindicate their right to do so, and to carry that same burden every

[5] For example, in the 2015 Rulemaking, the Librarian delayed implementation of exemptions for security research and automobile repair because of their uncertain impact on, among other things, automobile pollution and energy policy. 2015 Final Rule at 65,954; 2015 Recommendation at 241.

[6] For example, in the most recent rulemaking, the Library of Congress opted to prefer "documentary" film to "narrative" film, remixes of film over remixes of video games, multimedia e-books and classroom courses doing "close analysis" of film clips over other fair uses, and research on consumer devices over research on infrastructure. 2015 Recommendation at 70-71, 78-82, 85-86, 88, 90-92, 124, 135, 188-189, 937, 401.

three years. 2015 Recommendation, at 14-15. A would-be speaker must wait up to three years to even ask for permission to speak, and then there are no deadlines requiring the Librarian to act in a timely fashion—in practice it takes between one and two years. *17 U.S.C. §1201 (a)(1)(D)*; *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies* ("2010 Final Rule") 75 Fed. Reg. 43,825, 43,826 (rulemaking commenced October 8, 2008; final rule published July 27, 2010). This is even more egregious than the licensing wait of four months that was unacceptable in *Freedman*. 380 U.S. at 55. Finally, the regime does not provide for a mechanism for swift judicial review; instead, the government has argued that even APA review does not apply to the rulemaking. "Government's Memorandum in Support of Motion to Dismiss," *Green v. Dept. of Justice*, 1:16-cv-01492-EGS (D. D.C. Sept. 29, 2016). Any one of these many failings would render the regime unconstitutional, and even speech that is ultimately exempted through the rulemaking process is impermissibly burdened by being subjected to it. *Freedman*, 380 U.S. at 58-59. The triennial exemption process is not a constitutionally valid substitute for a fair use defense.

E. *Corley* Does Not Immunize Section 1201 From First Amendment Review.

The Second Circuit's 2001 decision in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) is the sole appellate decision to foreclose fair use as a possible defense to a Section 1201 claim. That ruling, of course, is not binding here,

but in any event, the Second Circuit's conclusions regarding Section 1201 and fair use do not resolve the statute's First Amendment problems, for several important reasons.

First, neither the parties nor the court in *Corley* considered whether and how Section 1201's exemption procedure operates as a speech-licensing regime. Indeed, when that case was filed, the triennial rulemaking regime had yet to be implemented, and Section 1201(a)(1)'s ban on acts of circumvention was not at issue. Here, however, the defects of the speech-licensing regime are well-documented. Far from the speech-protective safety valve some assumed it would be, the exemption rulemaking raises its own First Amendment problems and fails to vindicate fair use.

Second, *Corley* emphasized that the question whether the DMCA impairs fair uses was "far beyond the scope" of its ruling because "Appellants do not claim to be making fair use of any copyrighted materials and nothing in the injunction [at issue] prohibits them from making such a fair use." 273 F.3d at 458-59. If this Court reaches VidAngel's fair use defense, the *Corley* opinion will be inapposite by its own terms.

Third, *Corley* was decided without adequate guidance from the Supreme Court regarding the constitutional underpinnings of fair use. The *Corley* defendants argued that Section 1201's trafficking ban impermissibly burdens fair use. In rejecting that claim, the Second Circuit began by observing that the Supreme Court

had not clearly stated that fair use is constitutionally required. Two years after *Corley* was decided, however, the Supreme Court did just that. *See Eldred,* 537 U.S. at 221; *Golan* 132 S. Ct. at 890. Thus, the Supreme Court has superseded a core premise of *Corley's* understanding of the relationship between fair use and the First Amendment

Fourth, *Corley* was simply incorrect in its conclusion that fair use does not encompass a right to copy "by an optimum method or in [an] identical format of the original." 273 F.3d at 459. Fair use encompasses a right to copy as necessary to accomplish a transformative purpose; if an optimum method is necessary to accomplish that purpose, then it is protected by fair use. *See Sony Comput. Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 602-03 (9th Cir. 2000); *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1520-28 (9th Cir. 1992). Even the Library of Congress and the Copyright Office acknowledge that there are numerous categories of fair use video creations for which no alternative means of speech exist because they depend upon access to high-quality source material that is typically distributed subject to access controls. 2015 Recommendation, at 70-71, 78-82, 85-87, 90-92, 135, 188-89, 344-47, 397, 401.

Finally, *Corley* rested in part on its conclusion that evidence of the impact of Section 1201 on fair use was "scanty." 273 F.3d at 459. Nearly two decades later, however, there is ample evidence of that impact. The record in the triennial rule-

makings has identified numerous forms of expression burdened by the challenged provisions that are incontrovertibly protected speech, from documentary and narrative films, to student education, to translation of e-books into an accessible format, to addition of commentary to videos. 2015 Final Rule, 65,949, 65,947-49, 65,960. The speech at issue does not infringe copyright—either because it is a fair use or because it relies only upon factual information in the copyrighted work—yet Section 1201 prevents it. 2015 Recommendation, at 70-71, 78-82, 85-87, 90-92, 135, 188-189, 344-347, 397, 401. The Second Circuit did not have the benefit of these facts.

Subsequent circuit court decisions demonstrate that the relationship between Section 1201 and fair use is far from settled. Courts have split as to how Section 1201 interacts with copyright's traditional contours. The Federal Circuit requires a reasonable relationship between circumvention and copyright infringement. *The Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004). This Circuit has left the door open to a fair use defense. *MDY Indus., LLC, v. Blizzard Entm't, Inc.*, 629 F.3d 928, 950 n. 12 (9th Cir. 2010). Meanwhile, the Sixth Circuit has narrowly construed access controls to avoid penalizing circumvention that had no connection to infringement, and one judge would have held that only circumvention for the purpose of infringement is actionable. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 547 (6th Cir. 2004); *id.* at 552

(Merritt, J., concurring). Thus, *Corley*'s extreme approach does not represent a consensus among the courts.

CONCLUSION

This Court should avoid assigning Section 1201 an interpretation that conflicts with the First Amendment. Whether or not the Court finds in favor of Appellant VidAngel on its fair use defense, the First Amendment requires that VidAngel be allowed to raise that defense to a Section 1201 claim.

Dated: January 18, 2017

Respectfully submitted,

/s/ Mitchell L. Stoltz

Mitchell L. Stoltz

Kit Walsh
ELECTRONIC FRONTIER
FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Tel. (415) 436-9333

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Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of Amicus Curiae Electronic Frontier Foundation In Support of Neither Party complies with the type-volume limitation, because this brief contains 6,468 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

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Dated: January 18, 2017

By: */s/ Mitchell L. Stoltz*
Mitchell L. Stoltz

Counsel for Amicus Curiae
Electronic Frontier Foundation

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 Ninth Circuit by using the appellate CM/ECF system on January 18, 2017.

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By: */s/ Mitchell L. Stoltz*__
Mitchell L. Stoltz

Counsel for Amicus Curiae
Electronic Frontier Foundation