

No. 16-56843

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DISNEY ENTERPRISES, INC., ET AL.,

Plaintiffs-Appellees,

v.

VIDANGEL, INC.

Defendant-Appellant.

On Appeal from the United States District Court

For the Central District of California

Hon. Andre Birotte Jr.

No. 2:16-cv-04109-AB-PLAh

**BRIEF OF DVD COPY CONTROL ASSOCIATION, INC.
AND ADVANCED ACCESS CONTENT SYSTEM
LICENSE ADMINISTRATOR, LLC AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure (“Fed. R. App. P.”), the undersigned counsel for the *Amici* DVD Copy Control Association (“DVD CCA”) and Advanced Access Content System Licensing Administrator, LLC (“AACCS LA”) submit this statement to certify that neither *Amici* has a parent corporation, nor do *Amici* issue stock, including to any publicly held corporations.

Nevertheless, although not required by Fed. R. App. P. 26.1, *Amicus* AACCS LA identifies the following entities who are its members: International Business Machines Corporation, Panasonic Intellectual Property Corporation of America, Microsoft Corporation, SCA IPLA Holdings, Toshiba America Information Systems, Inc., Warner Bros. Entertainment Inc., Disney Worldwide Services, Inc. and DCP, LLC. (See *infra* footnote 1 regarding interested parties.)

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**STATEMENT OF INTEREST OF DVD COPY CONTROL ASSOCIATION
AND ADVANCED ACCESS CONTENT SYSTEM LICENSING
ADMINISTRATOR, LLC AS AMICI CURIAE**

Amici DVD Copy Control Association (“DVD CCA”) and Advanced Access Content System Licensing Administrator, LLC (“AACS LA”) respectfully submit this brief with the consent of all parties. *See* Fed. R. App. P. 29(a).

DVD CCA is a not-for-profit corporation organized under the State of Delaware and recognized by the Internal Revenue Service as a business league under Section 501(c)(6) of the Internal Revenue Code. DVD CCA has over 145 licensees including large and small companies from the consumer electronics, computer, and motion picture industries, each of which is also a member of DVD CCA entitled to participate in the governance of the association. DVD CCA operates through a Board of Directors that is elected by those members that have chosen to exercise the right to participate in the selection of the Board of Directors.

AACS LA is a limited liability company organized under the laws of the State of Delaware and is composed of eight corporate members that are, or are affiliates of, the eight corporations that founded the company and developed the technology that it licenses. AACS LA has over 1000 licensees from countries around the world, including from the motion picture content, motion picture servicing (e.g., disc replicators), consumer electronics, and computer industries.

Amici DVD CCA and AACS LA are each engaged in the business of

licensing their respective technologies that are designed to protect copyrighted works on home video discs against unauthorized access and use. DVD CCA licenses the Content Scramble System (“CSS”) to protect works on DVDs and engages in associated activities to support the licensed technology. AACCS LA developed and licenses its encryption-based technology to protect high-definition motion picture content on Blu-ray Discs (“AACCS Technology”) and also engages in associated activities to support its licensed technology. Neither DVD CCA nor AACCS LA are parties to this case. *Amici* represent that in the preparation and filing of this brief, (i) it was not authored in whole or in part by any party’s counsel, (ii) no direct contribution was made by a party or party’s counsel to fund preparing or submitting the brief, and (iii) no direct contribution was made by any other person, other than the *Amici*, its members, or its counsel, to fund preparing or submitting the brief.¹ Fed. Rules of App. Proc. Rule 29(a)(4)(E)(i)-(iii).

¹ Appellees Disney Enterprises, Inc., Twentieth Century Fox Film Corporation, and Warner Bros. Entertainment, Inc. or their related subsidiaries/parent companies/affiliates are licensees and participating members of DVD CCA and pay annual dues/license fees to the organization. Employees of each of these companies are current board members of DVD CCA. However, neither those companies nor their respective representatives (including those who are current board members) participated in the authorship of this brief or made any monetary contribution that was intended to fund this brief. AACCS LA’s founding companies are Disney Worldwide Services, Inc., IBM Corporation, Intel Corporation, Microsoft Corporation, Panasonic Corporation, Sony Corporation, Toshiba Corporation, and Warner Bros Entertainment, Inc., and the companies that are members of the AACCS LA, LLC are the listed companies or their affiliates.

Amici DVD CCA and AACS LA's interest in this case is substantial given that their core businesses are directly affected by Appellant's circumvention of *Amici's* respective technologies in order to gain access to Appellees' motion picture content and, more importantly, because this Court's ruling and any precedent that may be established thereby could have sweeping implications for both *Amici* and their respective licensing ecosystems.

Each of CSS and AACS Technology is a "technological measure that effectively controls access to a work protected under this title" and, as such, circumvention of each technology is prohibited by Section 1201(a)(1) of the Digital Millennium Copyright Act ("DMCA") (hereinafter referenced as "Section 1201"). Specifically, CSS and AACS Technology are technological protection measures that are the bases for Appellees' allegations that the Appellant violated Section 1201 and on which the District Court based its finding that is on appeal in this case. ER006. The issues on appeal directly affect DVD CCA and AACS LA, and as such they have come together to jointly file this *Amicus Curiae* Brief.

Neither Warner Bros Entertainment Inc. nor Disney Worldwide Service, Inc. nor their affiliates or representatives participated in the authorship of this brief or made any monetary contribution that was intended to fund this brief.

I. BACKGROUND CONCERNING TECHNOLOGICAL PROTECTION MEASURES.

A. CSS and AACS Technologies Are Quintessential Technological Protection Measures That Congress Intended To Protect Against Circumvention

1. The Development of Disc-Based Digital Home Entertainment Market Through Law, Technological Development and Licensing

In late 1996, as the digital revolution was just beginning, the countries of the world came together in the World Intellectual Property Organization (“WIPO”) and agreed that each country would enact legal prohibitions against circumvention of technological protection measures employed to protect copyrighted materials against unauthorized access and use.² In 1998, the United States Congress implemented provisions of the WIPO treaties by enacting the Digital Millennium Copyright Act (“DMCA”). In enacting the new law, Congress noted that technological protection measures can “support new ways of disseminating copyrighted materials to users, and...safeguard the availability of legitimate uses of

² See Article 11, WIPO Copyright Treaty (adopted in Geneva on December 20, 1996), available at http://www.wipo.int/treaties/en/text.jsp?file_id=295166#P87_12240 (last visited February 11, 2017). See also Article 18, WIPO Performances and Phonograms Treaty (adopted in Geneva on December 20, 1996), available at http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=295477 (last visited February 13, 2017).

those materials by individuals.”³ Further, Congress also recognized that the best means of ensuring that such technological protection measures would work to the benefit of consumers as well as the industries involved was through cooperative efforts of interested parties working together.⁴

In the same timeframe, the Content Scramble System (“CSS”) was developed in exactly the manner recognized by Congress. Two leading consumer electronics companies (Panasonic and Toshiba) put forward a proposed encryption/scrambling system to be applied to the movie content that was to be stored on the then-new DVD format discs.⁵ A large team of experts from motion picture, consumer electronics, and information technology companies worked together to recommend a proposed scrambling technology and a set of standardized rules regarding compliance with particular requirements—and importantly, rules regarding resistance against technological attacks (these rules referred to herein generally, as “security requirements”). The result was a set of technical

³ Staff of H. Comm. on the Judiciary, 105th Cong., Section-By-Section Analysis Of H.R. 2281 As Passed By The United States House Of Representatives On August 4, 1998, At 6 (Comm. Print 1998).

⁴ H.R. Rept. 105-796, Conference Report, to accompany H.R. 2281, Digital Millennium Copyright Act (October 8, 1998) at 64-65, available at <https://www.congress.gov/105/crpt/hrpt796/CRPT-105hrpt796.pdf> (last visited February 13, 2016).

⁵ The official name for the format is simply the letters, “DVD,” but the unofficial understanding of the meaning of the letters is “Digital Versatile Disc,” referencing the multiplicity of uses for the discs. See <http://www.dvdforum.org/faq-dvdprimer.htm#1> (last visited February 13, 2016).

specifications and a set of security requirements licensed under a licensing agreement requiring companies building DVD players to comply with those rules in order to build compliant products that would be permitted to decrypt the content recorded on the DVD discs. DVD CCA also licenses the method for studios and other content companies to protect their content using CSS on DVDs. The industry wide adoption of the technical specifications and security requirements promoted a large interoperable ecosystem of devices and discs that allowed consumers to enjoy a reliable playback experience on a range of licensed consumer electronics devices and computer-platform products.⁶

Digital copies of movies, unlike degrading analog copies made from the prior VHS medium, are exact duplicates of the source material, meaning the first copy looks the same as the thousandth copy. Therefore, without the protections afforded by CSS, and the anti-circumvention prohibitions set forth in the DMCA, movie companies were not willing to entrust their highest value digital content to the risks from unauthorized copying and other uses of the new digital format.⁷

DVD CCA came into existence in late 1999 as a multi-industry trade association

⁶ For more information on DVD CCA, visit <http://www.dvdcca.org/css.aspx>.

⁷ See *Real Networks, et. al v. DVD Copy Control Association, et. al*, No. C 08-04548 MHP (U.S. D. Ct., Northern District, CA), Memorandum and Order, August 11, 2009 at 5; *Universal City Studios, Inc. v. Corley*, 273 F. 3d 429 (2^d Cir. 2001) at 436.

with the primary purpose of licensing the CSS technology to protect digital content on DVDs.⁸

In the early 2000's, as technology developed and high definition displays began to come to market, the industries, again working together as Congress had envisioned, realized that a new high definition format disc would allow consumers to enjoy premium motion picture content on new High Definition ("HD") displays. Industry members adopted what became known as Blu-ray Disc™. Eight companies from the three main industry groups involved with bringing the format to market (motion picture, information technology, and consumer electronics) came together to create what became AACS Technology, which is the equivalent approach to Blu-ray Discs as CSS was to DVD (although AACS Technology is much updated technically from CSS).

AACS Technology is licensed by AACS LA and fosters further development and capabilities for the Blu-ray format. The Blu-ray Disc format and AACS Technology were each launched in 2006. Blu-ray Discs rapidly became a

⁸ Prior to 1999 CSS had been licensed by Panasonic (then Matsushita Electric Industrial Co., Ltd.), one of the consumer electronics companies that had developed it in 1996. In December 1999, the two inventing companies licensed the technology on a royalty-free basis to DVD CCA.

highly successful format offering consumers an HD quality video viewing experience, with content from large and small motion picture companies.⁹

In the twenty years since CSS was launched into the market and the over ten years since AACS Technology was launched, both licensing systems are the bedrock for the development of these highly successful formats, enabling hundreds of millions of consumers to enjoy movie and other video content protected using the technologies. Both DVD CCA and AACS LA offer their licenses on fair, reasonable and non-discriminatory (known as “RAND” licensing) terms and conditions, recovering only enough revenue from license fees to cover the costs of administering their licensing programs and maintaining their technologies.

Although DVD sales and usage have declined in recent years, the format, protected by CSS, remains a very important platform for distribution of motion pictures and TV programming to consumers, as well as for consumers to continue to enjoy the DVD discs they purchased over the past twenty years (or that they continue to rent). AACS Technology also remains a viable measure for protection of motion picture content on Blu-ray Discs against unauthorized access and uses worldwide.¹⁰

⁹ See Marcus Yam, *Blu-ray is Penetrating the Market*, Tom’s Hardware (January 12, 2009), available at <http://www.tomshardware.com/news/Blu-ray-disc-sales-dark-knight,6823.html>.

¹⁰ Even today, as video technology evolves, AACS LA has developed a next generation technology that is now protecting the recently launched Ultra HD Blu-

2. Bases for DMCA Section 1201 Protection of CSS and AACS Technology Implementation

The critical feature of both CSS and AACS Technology is that playback of the video content protected by these technologies is enabled only for licensed players made by manufacturers that follow the security requirements that include cryptographic secrets pursuant to the respective licenses from DVD CCA and AACS LA. Individual consumers purchasing a DVD or Blu-ray Disc are not provided the keys or other cryptographic secrets that are necessary for playback. They must use a licensed player, which, in turn, must abide by the technical specifications and security requirements imposed by the licenses from DVD CCA or AACS LA, as applicable. Those specifications and security requirements are designed to ensure that the content is not accessed or used in an unauthorized manner.

Neither license allows distribution of movie or other content from the discs either over the Internet or by copying (whether for individual consumer use or for commercial piracy purposes) onto a hard drive or otherwise. To maintain the integrity of these systems, DVD CCA, AACS LA, and affected rights holders have

ray™ content against unauthorized uses (known as “AACS2 Technology”). AACS2 Technology launched in 2015 and is not an issue in the current case, but AACS LA expects that Appellant/VidAngel would move to circumvent that AACS2 Technology if this court permits its current operations.

taken legal action on several occasions¹¹ when licensees or non-licensee entities have ignored their respective restrictions.¹²

The protections afforded by the technical specifications and security requirements provided by CSS and AACS Technology are themselves protected by Section 1201 against those who would circumvent those technologies. Specifically, Section 1201(a)(1)(A) provides that “[no] person shall circumvent a technological measure that effectively controls access to a work protected under [Title 17].”

Under this Section, to “circumvent a technological measure” means “to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.” 17 U.S.C. § 1201(a)(3)(A). A technological measure that “effectively controls access to a work” is one that “in the ordinary course of its operation, requires the application of information, or a process or a treatment, with

¹¹ See *Real Networks, et. al v. DVD Copy Control Association, et. al*, 641 F.Supp. 2d 913 (N.D. Cal. 2009), Memorandum and Order at 5; *Universal City Studios, Inc. v. Corley*, 273 F. 3d 429 (2^d Cir., 2001) at 436.

¹² The licensing documents, including the security requirements, are available for download from the DVD CCA website (www.dvdcca.org) and the AACS LA website (www.aacsla.com). The technical specifications for CSS are provided only to licensees (subject to confidentiality requirements in the CSS license). Neither website provides the keys or other cryptographic secrets that are essential to decrypting the movie content for viewing from a licensed player. Those keys and cryptographic secrets are available only pursuant to licenses from DVD CCA and AACS LA that imposed confidentiality requirements with regard to the protection of those secrets.

the authority of the copyright owner, to gain access to the work.” 17 U.S.C. § 1201(a)(3)(B).

Both technologies are recognized by courts and the U.S. Copyright Office as “technological protection measures” (also known as TPM’s) effectively protecting against unauthorized access to copyrighted works, *i.e.*, TPM’s protected against circumvention by Section 1201(a)(1) of the DMCA.¹³

DVD CCA and AACS LA continue to license their respective technologies to protect DVDs and Blu-ray Discs, and the newest protection measure (AACS2) for protection of Ultra HD Blu-ray. The success of these technologies is due in large part to the protections afforded by Section 1201 and the interpretive caselaw. *See footnote 15, supra.* This is precisely the result intended by Congress and

¹³ For CSS, *see: 321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1095 (N.D. Cal. 2004); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Sup. 2d 294, 317-18; *Real Networks v. DVD Copy Control Association*, at 24 (paragraph 91); add Copyright Office statements. For AACS Technology, *see Advanced Access Content System Licensing Administrator, LLC v. Lanny Shen*, et al, No. 14 Civ. 1112 (VSB), Document 87: Memorandum and Order (March 16, 2015) at 15 (“There is no doubt that AACS is a technological measure designed to control access to copyright protected materials.”) *Available at: <https://ecf.nysd.uscourts.gov/doc1/127115743735>* (last accessed on February 13, 2017); *See also: U.S. Copyright Office 37 CFR Part 201*, 80 Federal Register 65944, at pp. 18-19 (October 28, 2015) (Addressing, and declining to extend exemption to circumvention of technical protection measure that protects Blu-ray Discs).

repeatedly recognized by the U.S. Copyright Office, as follows (in reference specifically to Section 1201):

“The [DMCA] has played a critical role in the development of the digital marketplace that is a defining feature of modern life. Enacted by Congress in 1998, the DMCA has fostered widespread dissemination and enjoyment of creative works by establishing legal protections for copyrighted content—as well as for the consumers and businesses who wish to access and use it—whether over the internet or through a computer or device.”

Available at

<https://www.copyright.gov/1201/2015/introduction-analysis.pdf>

B. Appellant VidAngel’s System Uses a Known, Notorious Circumvention Tool Not Licensed by DVD CCA or AACIS LA, and Illegal Under Section 1201 of the DMCA, to Gain Access to Encrypted Content on DVDs or Blu-ray Discs and Deliver it to its Customers Over the Internet

There is no dispute in this case that Appellant uses specific software “tools” to gain access to the content on a DVD or Blu-ray Disc. Those tools are illegal, off-shore circumvention tools sold through an online distribution system by an enterprise maintained and operated outside of the United States (AnyDVD for CSS and AnyDVD HD for AACIS). SER 1219-20, paragraphs 36-39. The website distributing these tools has been labeled by the U.S. Government as a “notorious market” engaged in activities that promote copyright piracy,¹⁴ and the U.S. cited

¹⁴ United States Trade Representative, *2013 Out-of-Cycle Review of Notorious Markets*, (February 12, 2014) at 9, available at <https://ustr.gov/sites/default/files/02122014-2013-OCR-Notorious-Markets.pdf> (last visited February 6, 2017). The basis for finding that the website’s activities

the availability of AnyDVD and AnyDVD HD as a specific issue in its dealings with the Government of Antigua and Barbuda.¹⁵ Moreover, that software has been found to be an illegal circumvention tool in its country of origin. In 2014, an Antigua-Barbuda court criminally convicted the owner of Slysoft, Inc. for violation of that country's anti-circumvention laws.¹⁶ The company's primary product was the same circumvention software used by Appellant in its service: AnyDVD HD. In early 2016, Antiguan authorities took regulatory action as a result of this conviction, causing SlySoft to cease operations in Antigua and to describe on its website (www.slysoft.com), that due to regulatory requirements they had to "cease all activities".¹⁷ Subsequently, some of the software designers of Slysoft's AnyDVD and AnyDVD HD products established operations to sell these products from Belize under the rebranded "RedFox" moniker.¹⁸ The products perform the

promote copyright piracy was the fact that the website offered the AnyDVD HD circumvention software. *Id.*

¹⁵ Office of the United States Trade Representative (Acting United States Trade Representative Demetrios Marantis), *2013 Special 301 Report* (May 2013) at 21, available at

<https://ustr.gov/sites/default/files/2013%20Special%20301%20Report%20-%20published.pdf> (last visited February 6, 2017)

¹⁶ See <http://antiguaobserver.com/30k-fine-for-first-conviction-under-copyright-act/> (last visited February 6, 2017); <https://torrentfreak.com/slysoft-dvd-ripper-owner-found-guilty-in-criminal-action-140403/> (last visited February 8, 2017)

¹⁷ See <https://torrentfreak.com/popular-blu-ray-ripper-shuts-down-following-legal-pressure-160224/> (last visited February 6, 2017); See also <https://www.slysoft.com> (last visited February 12, 2017)

¹⁸ See <http://www.myce.com/news/redfox-continues-development-anydvd-hd-version-7-6-9-2-78941/> (last visited February 6, 2017)

same function, however, and AACS LA has pursued both technical and legal challenges to the new distribution system for AnyDVD HD.

Unfortunately, DVD CCA and AACS LA have found pursuing off-shore circumvention tools proprietors to be akin to the ageless arcade game “whack-a-mole,” meaning that, notwithstanding the efforts and successful thwarting by AACS LA of the proprietors’ offerings on various websites, these tools continue to be available from non-U.S. Internet sources (although not from recognized, legitimate U.S. retailers). Although characterized by Appellant as “commercially available,” there is no doubt that the tools used by Appellant are unlawful circumvention tools prohibited under Section 1201 and related anti-circumvention laws of other countries. ER487 at ¶37(ii).

Tools to circumvent CSS as a TPM have been found illegal under Section 1201 in a number of cases.¹⁹ The test as to whether the accused technology involved is subject to any of the Section 1201 anti-circumvention prohibitions is whether there is circumvention of a technological measure that effectively protects access to protected works. *See* Section 1201(a)(1) (prohibiting a user from committing an act of circumvention for the purpose of gaining access to content effectively protected by a technological protection measure); Section 1201(a)(2) (prohibiting a person

¹⁹ *See 321 Studios v. MGM Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004); *Realnetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913 (N.D. Cal. 2009); *Universal Studios v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

from trafficking in tools that circumvent technological protection measure that effectively protects against access to copyrighted content); and Section 1201(b) (prohibiting a person from trafficking in tools that circumvent a technological protection measure that effectively protects against uses prohibited by Title 17). The explanation of what constitutes “circumvention of a technological measure” is provided in paragraph (3) of Section 1201(a) and is applicable to both Section 1201(a)(1) and Section 1201(a)(2). Hence, the courts’ findings against a series of defendants who marketed such products in violation of Section 1201(a)(2) are directly relevant to whether a product that is used to gain access to a work is circumventing a technological measure protected under the DMCA in violation of Section 1201(a)(1).

For example, lawsuits based on the anti-trafficking provision of the DMCA to effectively deter lawful sales of circumvention software in the United States resulted in decisions holding that products incorporating circumvention processes marketed by RealNetworks, 321 Studios, and most recently DVDFab violated Section 1201(a)(2).²⁰

²⁰ See *RealNetworks, Inc. v. DVD Copy Control Association, Inc.*, 641 F. Supp. 2d 913 (2009); *321 Studios v. MGM Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004); *AACS LA, LLC v. Lanny Shen d/b/a DVDFAB*, (S.D.N.Y. No. 14 Civ. 1112 filed March 4, 2014 *Pending Appeal*)—Document 87-Memorandum and Order, at p. 14, available at: <https://ecf.nysd.uscourts.gov/doc1/127115743735> (last visited on 2/13/2017).

In 2015, AACCS LA obtained a broad injunction against Chinese defendant FengTao based on Section 1201(a)(2).²¹ The court prohibited the selling and marketing of FengTao’s AACCS circumvention software called “DVDFab.” DVDFab was sold and marketed to consumers to decrypt DVDs and Blu-ray Discs using unlicensed, noncompliant software that then allowed the user to copy or distribute the content.²²

II. SUMMARY OF ARGUMENT.

The District Court properly held that the DMCA’s unambiguous restriction against circumvention of CSS and AACCS Technology to gain access to Plaintiffs/Appellees’ protected, copyrighted materials belies Appellant’s claim to provide a legitimate filtering service to its customers. No exemption provided in law or regulation permits Appellant’s unauthorized access to the protected materials on DVD and Blu-ray Discs. Appellant has alternative means to provide filtering to consumers, through methods that do not require circumvention of CSS or AACCS Technology as is currently accomplished by at least one competitor to Appellant’s service. DVD CCA and AACCS LA respectfully request that the Court, in considering Appellant’s legal attempt “legitimize” its system, also consider the

²¹ Preliminary Injunction Order, *AACCS LA, LLC v. Lanny Shen d/b/a DVDFAB*, Case No. 14 Civ. 1112(VSB)(S.D.N.Y. filed March 4, 2014 *Pending Appeal*)—Document 21 (Filed March 4, 2014), available at: <https://ecf.nysd.uscourts.gov/doc1/127113784816> (Last visited on 2/13/2017)

likely effect that the same would “legitimize” the illegal circumvention software utilized by Appellant to provide its service. Finally, the legitimate licensing ecosystems of DVD CCA and AACS LA, as well as the competing filtering system offered by Appellant’s filtering competitor(s) in compliance with the law, will be seriously disrupted if Appellant is allowed to utilize unlawful off-shore circumvention software tools to unlawfully decrypt content from DVD and Blu-ray Discs.

III. ARGUMENT.

A. The District Court Properly Found that Appellant’s System Circumvents Effective Technological Measures (CSS and AACS Technology) in Violation of Section 1201(a)(1)

Appellant’s service unlawfully utilizes a known circumvention tool to remove the copyright protections afforded by recognized TPM’s CSS and AACS Technology in violation of Section 1201(a)(1). It is undisputed that Appellant’s service utilizes circumvention software to bypass CSS and AACS in order to gain access to content that is then copied to Appellant’s servers for purposes of streaming the unencrypted content to its customers. SER 1213-1214.

As described above, when a consumer purchases a movie on a DVD or Blu-ray Disc, that consumer obtains the right and ability to watch the DVD or Blu-ray Disc using a licensed player that is built in compliance with the technical specifications and is adherent to the security requirements set by DVD CCA and

AACS LA. Contrary to Appellant’s assertion that it is authorized by the studios to avoid the technical protection measures because keys are provided to them, neither DVD CCA nor AACS LA provide keys directly to consumers. Appellant’s Opening Brief, p. 35 (“VidAngel is *authorized* by the Studios to decrypt CSS, AACS...”.) In each instance for playback, keys are resident on, and protected by, the respective players that adhere to the aforementioned technical specifications and security requirements. Consumers do not obtain the keys or other cryptographic information that would allow them to create a product that could decrypt the movie so that it can be watched (or copied or redistributed). The licensed player that the consumer uses enables the consumer to use an authorized, protected connector to connect his or her player to a display that is capable of receiving and decrypting the content from that connector. Unlicensed products that have somehow obtained the necessary secrets and technology to enable playback in a manner not permitted by the CSS or AACS Technology license are circumvention tools, and the use of such tools is prohibited by Section 1201(a)(1).

B. The District Court Properly Found that No Exemption or Exception to the Circumvention Prohibitions of Section 1201(a)(1) Is Available for Appellant VidAngel’s System

1. The District Court Correctly Rejected Appellant’s “Space-shifting” Argument

In the proceedings below, Appellant maintained that it should be authorized to circumvent CSS and AACS Technology because it is engaged in “classic space-

shifting” that must be authorized as an exception to the prohibition on circumvention of an effective technological measure. Appellant’s opening Brief, at p.16, ¶2. The court below rejected that contention. ER006 at lines 20-21. Although, on appeal, Appellant has now (mostly) moved its space-shifting argument to a separate point apparently not directly connected with whether it is authorized to circumvent CSS and AACS Technology.²³ *Amici* want to make clear that space-shifting is prohibited under Section 1201, having been rejected by the Courts and, as discussed in more detail below, by the Librarian of Congress (twice). This Court should also reject the notion that space-shifting somehow justifies an exemption from circumvention.²⁴

²³ In its Summary of Argument, Appellant states that its “classic space-shifting” argument will defeat both claims of circumvention and copyright infringement. Appellant’s Opening Brief at 16. However, in the main Argument section, it argues only that the “space-shifting” argument is a defense to copyright infringement. The main DMCA-related argument, on pages 32-38 of Appellant’s opening brief, does not discuss space-shifting. Only by combining Appellant’s fair use discussion, pages 27-31, with its later (and incorrect) argument that the DMCA circumvention prohibitions must have an exemption based on fair use (at pages 43-47), does space-shifting re-emerge in Appellant’s DMCA-related argument. Regardless, as demonstrated above, space-shifting is prohibited by the circumvention protections of Section 1201, and exemptions for space-shifting have been rejected by the Librarian of Congress.

²⁴ *321 Studios v. MGM Studios, Inc.*, 307 F. Supp. 2d 1085, 1096 (N.D. Cal. 2004) *citing also Universal City Studios v. Corley*, 273 F. 3d 429, 444 (2d Cir. 2001).

2. Appellant has Not Been Granted an Exemption by the Librarian of Congress under the DMCA's Recognized Process

Appellant has not sought (nor has any other person obtained) an exemption using the process that Congress established for users to obtain exemptions from the Section 1201(a)(1) circumvention prohibitions to accomplish what Appellant desires to do through its internet based movie delivery system. In the language of the DMCA and in the over 18 years since its enactment, Congress has provided a specific mechanism to avoid certain unintended consequences from the anti-circumvention provisions of Section 1201(a)(1) - a triennial rulemaking process to permit "...the Librarian of Congress, following a public proceeding conducted by the Copyright Office, to grant limited exemptions every three years to ensure that the public can still engage in fair and other non-infringing uses of works."

Available at <https://www.copyright.gov/1201/2015/introduction-analysis.pdf>. As described by the Copyright Office:

"The primary responsibility of the Register and the Librarian in the rulemaking proceeding is to assess whether the implementation of access controls impairs the ability of individuals to make non-infringing uses of copyrighted works within the meaning of section 1201(a)(1). To do this, the Register develops a comprehensive administrative record using information submitted by interested members of the public, and makes recommendations to the Librarian concerning whether exemptions are warranted based on that record."

Available at <https://copyright.gov/1201/2015/fedreg-publicinspectionFR.pdf> at page 4/81.

The triennial rulemaking proceedings were initiated in the year 2000. DVD CCA has participated in every one of the triennial proceedings. AACCS LA has participated in every triennial proceeding since the launch of AACCS Technology in 2006. The rulemaking process is the Congressionally authorized regulatory mechanism for a proprietor of new technology or an individual user to seek a lawful exemption to the anti-circumvention provisions of the DMCA. Appellant has not participated in any of these proceedings, let alone requested an exemption that would apply to its system.

None of the exemptions granted to others authorize Appellant's activities circumventing CSS and AACCS Technology. The Librarian of Congress has historically granted various exemptions including with respect to CSS and AACCS Technology for educational, hearing impaired/accessibility requirements and other uses found to be "fair uses" of the protected copyrighted materials.²⁵ However, an exemption for circumvention for "space-shifting," which Appellant claims their service performs, was specifically rejected *twice* by the Librarian of Congress in response to specific requests to permit circumvention for that purpose.²⁶

²⁵ See e.g. U.S. Copyright Office 37 CFR 201, 77 Federal Register 65260 (October 26, 2012) at 65270.

²⁶ Id. at 65276-278; and U.S. Copyright Office 37 CFR Part 201, 80 Federal Register 65944, (October 28, 2015) at 65960.

As this demonstrates, the District Court was correct in finding that Appellant had no justification to circumvent CSS or AACCS Technology based on the notion that space-shifting is somehow exempted from Section 1201(a)(1)'s circumvention prohibitions. ER008, lines 18-19.

3. The Family Movie Act Does Not Provide an Exemption to the DMCA Anti-Circumvention Provision

Appellant also claims that the Family Movie Act, 17 U.S.C. §110(11) (“FMA”), is a later enacted mechanism that Congress provided to authorize circumvention of technological measures otherwise prohibited by Section 1201. Appellant’s Opening Brief at p. 17. The plain language of that Act merely exempts certain, narrowly defined activity from a finding of *copyright infringement*. See 17 USC 110(11). That provision says nothing about exemption from the quite separate claims of circumvention under Section 1201(a)(1). As the District Court correctly found, the legislative history directly addressing this point demonstrates that Congress intended that the FMA does not provide an exemption from Section 1201.

“Neither the plain language nor the legislative history of the FMA support VidAngel’s position. In fact, the legislative history directly contradicts VidAngel’s assertion that the FMA provides an exemption to the anti-circumvention provisions of the DMCA. Senator Orrin Hatch, who introduced the FMA to the U.S. Senate, stated that the FMA ‘does not provide any exemption from the anticircumvention provisions of section 1201 of title 17.’ 150 Cong. Rec. S.11852-01 at S11853 (Statement of Senator Hatch) (RJN Ex. G at 269). Senator Hatch further stated that ‘It would not be a defense to a claim of violation of section 1201 that the circumvention is for the purpose of engaging in the conduct covered by this new

exemption in section 110(11).’ *Id.*” ER008, lines 4-11(footnote omitted).

As Senator Hatch’s quote, above, demonstrates, in enacting the FMA, Congress envisioned that filtering software must be developed without circumventing technological measures effectively preventing access to copyrighted works. In fact, such software – allowing filtering of content without unlawful circumvention – does exist. As the District Court noted, legitimate filtering services exist, including ClearPlay (*See* <https://try.clearplay.com/home/>) whose products work within the defined licensing guidelines of DVD CCA and AACSLA to allow consumers to filter content without unlawful circumvention of CSS or AACSLA Technology. ER020, lines 22-25. Appellant’s filtering service circumvents CSS and AACSLA Technology and ignores licensing altogether deriving an unfair commercial advantage versus legitimate licensed services such as ClearPlay.

If this Court were to agree with Appellant, finding that the FMA exempts Appellant’s system from the prohibitions of Section 1201(a)(1), such a ruling would “legitimize” known (indeed, infamous) circumvention tools and potentially open the flood gates for such tools to become commonplace in the United States. For instance, if the Court were to authorize Appellant’s service and its use of circumvention tools through this proceeding, it is likely that off shore circumvention tool manufacturers would use such a ruling to draw inferences that their tools were authorized to assist filtering services in lawful circumvention.

Further, “filtering services” could be offered for a variety of purposes, enabling makers of such tools to claim that they are offered for such services as authorized uses exempted from Section 1201. This would be a very serious attack on the system that Congress envisioned through the DMCA and that continues to enable markets such as the highly successful markets for DVDs and Blu-ray Discs, as well as the many products that consumers may use to access the content on those discs. Such a ruling would effectively undermine the legitimate ecosystems of DVD CCA and AACS LA by diminishing the effectiveness of TPM’s that the DMCA was designed to protect.

C. Granting Appellant’s Appeal Would Undermine the DVD and Blu-ray Disc Ecosystems that Depend on CSS and AACS Technology

Both DVD CCA and AACS LA’s home entertainment ecosystems rely on the security requirements and restrictions set forth in their respective licensing agreements. Those license requirements are designed to ensure that content remains encrypted unless accessed by a licensed, compliant DVD or Blu-ray Disc player. The systems thereby protect the content of those copyright holders that chose to utilize the respective secure ecosystems to protect their content against unauthorized access. Each ecosystem was also set up to ensure that consumers could readily enjoy their content by setting standard guidelines for decryption and playback to ensure a reliable experience for consumers who purchase legitimate DVD and Blu-ray players.

The effectiveness of the ecosystems relies on the various licensees' commitment to the rules established for the DVD and Blu-ray Disc ecosystems. The availability of an unlicensed, less stringent method of accessing the copyrighted works undermines the legitimate ecosystem in at least three ways:

(1) the copyright holders are less likely to release their content on DVDs and Blu-ray Discs if they are aware of the likelihood that the content may be "ripped" by a now legitimate service from the discs that they entrusted their content to in the market;

(2) the ecosystems' manufacturers have less incentive to support a more stringent licensing ecosystem and copyright protections of DVD CCA and AACLS LA if unencrypted content is made available for playback without any licensing restrictions; and,

(3) as the District Court correctly observed, where an unlicensed service is operated without normal licensing restrictions imposed by the copyright owner, it interferes with the owners' ability to control the use and transmission of its own works (including their choice to use such measures as CSS and AACLS to protect their content). ER017.

D. Allowing Appellant’s System to Continue to Operate as Proposed by Appellant Would Harm Legitimate Filtering Services in the Market

Finally, Appellant suggests circumvention is legal because there might be “development of some system of access-control that could render filtering technically impossible.” Appellant’s Opening brief at p. 42. CSS and AACS, as well as AACS2 for Ultra High Definition, do not encrypt the time codes used by at least one filtering service, ClearPlay, to filter video. Nor are *Amici* aware of any access control technology that would encrypt time codes such that they could not be used by a service like ClearPlay’s.

For these reasons, DVD CCA and AACS LA respectfully urge the Court not to implicitly grant what would amount to an exemption from the unambiguous anti-circumvention provisions of Section 1201, as such an exemption would irreparably harm and disrupt the legitimate and lawful ecosystems that continue to support copyright holders, manufacturers and consumers alike.

IV. CONCLUSION.

The District Court properly concluded that under the DMCA and related caselaw Appellant should be enjoined from using circumvention software to access content protected by CSS and AACS and that no exemptions from liability exist under the FMA or otherwise.

Dated: February 15, 2017

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS
PURSUANT TO FED. R. APP. P. 32(g)(1)**

Pursuant to Fed. R. App. P. 32(g)(1), I certify as follows:

1. This Brief of *Amici* DVD Copy Control Association, Inc. and Advanced Access Content System License Administrator, LLC In Support of Plaintiffs-Appellees complies with the type-volume limitation set forth for Amicus Curiae briefs in Fed. R. App. P. 29(a)(5) (half of limitation of Rule 32(a)(7)(B), because this brief contains 6290 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare this brief, in 14 point font in Times New Roman font.

Dated: February 15, 2017

By: /s/ Dean E. Short
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License Administrator, LLC

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 February 15, 2017.

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: February 15, 2017

By: /s/ Dean E. Short
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