ORAL ARGUMENT NOT YET SCHEDULED

No. 21-05195

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

Matthew D. Green, et al.,

Appellants,

v.

United States Department of Justice, et al.,

Appellees.

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

FINAL CORRECTED AMICUS BRIEF OF ACCESSIBILITY, SECURITY, AND REPAIR FAIR USERS IN SUPPORT OF PLAINTIFF-APPELLANTS

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Corporate Disclosure Statement

Pursuant to Circuit Rule 26.1, amici curiae state that they have no parent corporations and that no publicly held corporation or other publicly held entity owns ten percent (10%) or more of any amicus organization.

Certificate as to Parties, Rulings Under Review, and Related Cases

Parties and Amici. The following were parties in the district court proceeding from which this appeal was taken and are the parties before this Court:

a. Matthew D. Green

b. Andrew Bunnie Huang

c. Alphamax, LLC

d. United States Department of Justice

e. Library of Congress

f. United States Copyright Office

g. Carla Hayden

h. Maria A. Pallante

i. Loretta E. Lynch

j. Digital Content Protection, LLC (amicus)

k. Intel Corporation (amicus)

l. Advanced Access Content System Licensing Administrator, LLC (amicus)

m. DVD Copy Control Association (amicus)

n. Association of American Publishers, Inc. (amicus)

o. Entertainment Software Association (amicus)

p. Motion Picture Association, Inc. (amicus)

q. Recording Industry Association of America, Inc. (amicus)

Ruling Under Review. The rulings under review are the district court's:

a. Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (Dkt. Nos. 24, 25); and

b. Memorandum Opinion Order Denying Plaintiffs' Motion for Preliminary Injunction (Dkt. Nos. 51, 52).

Both rulings were entered by Emmet G. Sullivan, United States District Judge for the District of Columbia, on June 27, 2019 and July 15, 2021 in Case No. 1:16-cv-01492-EGS.

Related Cases. There are no related cases before this court, or any other court.

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Glossary of Abbreviations

Term	*Abbreviation*
Digital Millennium Copyright Act	DMCA
Technological Protection Measure	TPM

Statutes and Regulations

Except for the following, all applicable statutes and regulations are contained in the addendum to the Brief for Plaintiffs-Appellants Matthew D. Green, et al. This brief contains references to the recommendations of the U.S. Copyright Office in each of the triennial rulemakings promulgating exemptions from 17 U.S.C. § 1201; the recommendations are not available in the Federal Register or fully codified in the Code of Federal Regulations but can be referenced in full at the Copyright Office's website dedicated to the rulemakings, https://www.copyright.gov/1201/, via the links labeled "[year] Recommendation."

Statement of Identity, Interest in Case, and Source of Authority to File

Amici are organizations and individuals who promote functional fair uses of copyrighted works for socially beneficial accessibility, security, and repair purposes.[1] While amici range widely in their missions, they share membership in communities whose First-Amendment-protected activities do not infringe copyright but have nevertheless been chilled by the anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA) and harmed by the failure of the Copyright Office to protect their rights through the triennial rulemaking promulgating exemptions from Section 1201.[2]

Amici include organizations who advocate for equitable access to copyrighted works—including books, movies, television programming, software, educational materials, video games, and web content—for the tens of millions of Americans with disabilities. Equitable access requires ensuring that third parties can take the actions necessary—including circumvention of technological protection measures (TPMs)—to remediate inaccessible copyrighted works into accessible formats,

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[1] A full list of amici appears as in the appendix to this brief.
[2] *See* 17 U.S.C. § 1201.

such as creating audio versions of e-books or adding closed captions to video programming.

Amici also include organizations and individuals who engage in and advocate for the ability for good-faith security researchers to identify, diagnose, and fix security flaws and vulnerabilities in copyrighted software. Enabling good-faith security research requires ensuring that researchers can circumvent TPMs without fear of legal risk.

Finally, amici include organizations and individuals that advocate for consumers' and independent organizations' right to repair lawfully obtained devices that use software. Amici advocate for the right to repair—which often includes circumvention—to reduce costs, reduce environmental impacts, and help marginalized communities access technology.

Statement of Authorship and Financial Contributions

All parties have consented to timely-filed amicus briefs. No counsel for a party authored this brief in whole or in part.[3] No party, counsel to

[3] The Samuelson-Glushko Technology Law and Policy Clinic at Colorado Law, part of the Colorado Law Clinical Programs, counsel to amici, represented plaintiff-appellant Matthew Green before the Copyright Office during the 2015 triennial rulemaking evaluating petitions for exemption from the anti-circumvention measures of

any party, or any person other than amici curiae contributed money to fund preparation or submission of this brief.

Argument

Amici urge this Court to reverse the district court's order granting the motions for dismissal by defendant-appellees Department of Justice, et al. and conclude that plaintiff-appellants Matthew D. Green, et al. are likely to succeed in their facial First Amendment challenge to Section 1201.[4] Section 1201 violates the First Amendment by effectively chilling a wide range of socially beneficial and uncontroversial fair uses, including accessibility, security, and repair. Section 1201's triennial exemption rulemaking has failed to remedy Section 1201's fatal

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Section 1201, but the Clinic's representation of Dr. Green was limited to the rulemaking itself and ended after the completion of the rulemaking. The representation specifically did not extend to the litigation that is the subject of this appeal.

[4] *See* 17 U.S.C. § 1201. As plaintiff-appellants explain, one way the Court can reach this result is to apply the canon of constitutional avoidance by construing Section 1201 "to be bounded by the traditional contours of copyright doctrine . . . [and] requiring a nexus to copyright infringement for 1201 liability to attach." Pl.-Appellants' Br. At 46–47 (internal citations omitted). We likewise concur with plaintiff-appellants that Section 1201's triennial rulemaking is not severable from the statute. *Id.* at 43–44.

constitutional problems—particularly with respect to accessibility, security, and repair fair uses.[5]

The right to engage in fair use is protected by the First Amendment. The Supreme Court has concluded that fair use is one of copyright law's essential "built-in First Amendment accommodations" and serves as a "traditional First Amendment safeguard."[6] The Supreme Court has conceptualized fair use as a safety valve that prevents copyright law from suppressing the exercise of First Amendment rights.[7]

Section 1201 eliminates fair use's capacity to serve as a First Amendment safeguard when copyrighted works are encumbered with TPMs. It does so by effectively prohibiting fair uses that require the circumvention of TPMs.[8]

The triennial rulemaking has failed to rectify Section 1201's substantive First Amendment problems. For two decades, the Copyright

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[5] *See* 17 U.S.C. § 1201(a)(1)(C)–(D).
[6] Eldred v. Ashcroft, 537 U.S. 186, 219–20 (2003); Golan v. Holder, 565 U.S. 302, 328 (2012) (citing *Eldred*, 537 U.S. at 219; Harper & Row v. Nation, 471 U.S. 539, 558 (1985)).
[7] *See id.*
[8] *See* 17 U.S.C. § 1201(a)(1)(A).

Office has conducted the triennial rulemaking[9] with a predictable pattern of denying or narrowing proposed exemptions[10] intended to enable accessibility, security, and repair fair uses, among others. The Office's conduct of the rulemaking has effectively codified Section 1201's chill on accessibility, security, and repair fair uses that even the Office has consistently recognized are fair uses.

Moreover, the Office's conduct of the triennial rulemaking as a trial-like speech licensing inquiry has imposed significant procedural harms atop Section 1201's chilling effects on accessibility, security, and repair

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[9] As a formal matter, Section 1201 obliges the Librarian of Congress to make the determination of exemptions following the triennial rulemaking in consultation with the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce. *See* 17 U.S.C. § 1201(a)(1)(C). As a practical matter, the Copyright Office exercises primary responsibility over conducting the proceeding and the Register's recommendations are typically approved without modification by the Librarian, though the Librarian overruled the Register in one notable instance involving e-book accessibility discussed *infra*, Part I.B & n.26. For convenience, this brief refers primarily to the Copyright Office as the effective superintendent of the triennial rulemaking even though each recommendation by the Register of Copyrights corresponds to a formal rulemaking action by the Librarian to grant and codify the recommendation in the Code of Federal Regulations.

[10] *See generally* Jonathan Band, *The Complexity Dialectic: A 2021 Update*, PolicyBandwidth (Nov. 19, 2021), http://infojustice.org/archives/43776 (analyzing the complexity of the regulations released during the triennial rulemaking).

fair uses. The Office routinely and unfairly has interrogated and dismissed the legitimacy of the constitutional rights of people with disabilities, disability services organizations and libraries, security researchers, and ordinary consumers and repair professionals to engage in uncontroversial fair uses protected by the First Amendment.

I. The Copyright Office has sought to deny or effectively deny Section 1201 exemptions for accessibility fair uses.

Accessibility advocates representing various disability communities, including several amici, have participated in every triennial rulemaking evaluating Section 1201 exemption proposals since 2003. Disability communities have advocated for three key categories of accessibility-focused exemptions:

- **Right to Read:** Organizations representing people who are blind, visually impaired, or print-disabled[11] have appeared before the Office seven times to secure, renew, and expand an exemption that permits people with disabilities and accessibility-focused organizations to circumvent TPMs on

[11] A print disability is any disability that prevents a person from effectively reading print material in any format.

inaccessible e-books to transform them into Braille, large-print, audio, and other accessible formats.[12]

- **Disability Services:** Organizations representing educational disability services professionals have appeared before the Office twice to secure, renew, and expand an exemption that permits circumvention of TPMs on copyrighted videos used in K-12 and higher education contexts to add closed captions and audio descriptions and ensure equitable access for students, faculty, and staff who are deaf, hard of hearing, blind, visually impaired, or DeafBlind.[13]

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[12] *See* Second Triennial Rulemaking, Recommendation of the Register of Copyrights at 64 (2003) ("2003 Recommendation"); Third Triennial Rulemaking, Recommendation of the Register of Copyrights at 37 (2006) ("2006 Recommendation"); Fourth Triennial Rulemaking, Recommendation of the Register of Copyrights at 246 (2010) ("2010 Recommendation") ; Fifth Triennial Rulemaking, Recommendation of the Register of Copyrights at 17 (2012) ("2012 Recommendation") ; Sixth Triennial Rulemaking, Recommendation of the Register of Copyrights at 127 (2015) ("2015 Recommendation") ; Seventh Triennial Rulemaking, Recommendation of the Acting Register of Copyrights at 22–23 (2018) ("2018 Recommendation"); Eighth Triennial Rulemaking, Recommendation of the Register of Copyrights at 128-30 (Oct. 19, 2021) ("2021 Recommendation").

[13] 2018 Recommendation at 89; 2021 Recommendation at 64.

- **General Accessibility Purposes:** In 2021, a broad coalition of disability rights organizations proposed a general accessibility exemption that would have broadly permitted circumvention for efforts intended to remediate inaccessible copyrighted works into accessible formats.[14]

In each triennial rulemaking, the Office has acknowledged that each of these exemption categories entails fair use, but has variously denied or narrowed them and, as a result, reinforced substantial barriers to the civil rights of people with disabilities. The Office has effectively ensured that people who have disabilities cannot participate equitably in society simply because a work they seek to access is encumbered with a TPM.

A. The Office has consistently recognized that accessibility-focused exemptions entail fair use.

In evaluating accessibility-focused exemption proposals, the Office consistently has concluded that they entail fair use. The Office has relied on explicit statements from Congress in the legislative history of

[14] 2021 Recommendation at 311. In 2012, the Office also considered and largely rejected a proposed exemption to permit circumvention of TPMs applied to video for the purpose of creating, improving, and displaying captions and descriptive audio tracks to enable people with disabilities to perceive such works, and for the purpose of conducting accessibility research and development. *See* 2012 Recommendation at 143-56.

the Copyright Act and well-established precedent from the Supreme Court and the Second Circuit to recognize the uncontroversial proposition that making books, movies, and other copyrighted works accessible to people with disabilities is an unequivocal, archetypical fair use.[15]

E-book accessibility efforts consistently have been recognized as fair uses across two decades of the triennial rulemaking. From the successful initial petition for an exemption, to its subsequent evolution and renewal, to its later expansion to harmonize Section 1201's exemption structure with the United States' entry into the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, the Office has consistently recognized that people who are blind, visually impaired, or print disabled circumventing TPMs to engage in self-help remediation of an inaccessible e-book entails fair use.[16]

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[15] *See* 2021 Recommendation at 318 (citing Sony v. Universal City Studios, 464 U.S. 417, 455 n.40 (1984) (discussing the legislative history of the Copyright Act); Authors Guild v. HathiTrust, 755 F.3d 87, 101–02 (2d Cir. 2014)) (additional internal citations omitted).

[16] 2003 Recommendation at 70; 2006 Recommendation at 38; 2010 Recommendation at 248; 2012 Recommendation at 17, 22 (implicitly

Similarly, the Office has consistently recognized that the efforts of educational disability services professionals to remediate inaccessible video through the addition of captions and audio description are fair use. From the initial proposal granted in 2018 through the hard-fought refinement of the exemption to address a wide range of pandemic-related changes in the educational use of video in 2021, the Office consistently concluded the accessibility uses enabled by the exemption were likely to be uncontroversial fair uses.[17]

Finally, the Office even conceded in the most recent triennial rulemaking that a broad, categorical accessibility exemption, which would have exempted circumvention for any activity undertaken for the purpose of creating an accessible version of any kind of copyrighted work, was directed toward at least some likely fair uses.[18] In particular,

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recognizing fair use); 2015 Recommendation at 134–35; 2018 Recommendation at 22–23 (renewing the 2015 exemption and adopting its analysis); 2021 Recommendation at 128–30.

[17] 2018 Recommendation at 95-101; 2021 Recommendation at 318–21. Another exemption focused on captioning and description research was largely rejected in 2012. *See* 2012 Recommendation at 143-56. See discussion *supra*, note 14.

[18] 2021 Recommendation at 318–21.

the Office emphasized that "creating accessible versions of inaccessible copyrighted works . . . is a favored purpose for fair use."[19]

B. The Office has sought to deny or effectively denied Section 1201 exemptions for accessibility fair uses.

Notwithstanding the fair uses entailed by the numerous accessibility-focused exemption proposals to the Office, the Office has routinely limited or denied proposed exemptions on grounds that ignore the First Amendment and the civil rights of people with disabilities. In 2010, despite concluding that the proposed e-book accessibility exemption entailed fair use,[20] having granted essentially the same exemption in 2003 and 2006,[21] and "agree[ing] that as a matter of policy, access to e-books for the visually impaired should be encouraged,"[22] the Office recommended denying an exemption allowing people who are blind, visually impaired, or print disabled to engage in self-help to remediate inaccessible e-books.[23]

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[19] *Id.*
[20] *See* 2010 Recommendation at 248.
[21] 2003 Recommendation at 70; 2006 Recommendation at 38. *See generally* 2010 Recommendation at 252–53 (describing the Office's 2010 perspective on the 2003 and 2006 rulemakings).
[22] 2010 Recommendation at 261.
[23] *Id.* at 260.

Rejecting the blind community's own assertions about its members' needs, the Office complained that exemption proponents, including some amici, had not sufficiently demonstrated that renewing the exemption to ensure the right to read was warranted.[24] Expressing skepticism that blind people really lacked access to TPM-encumbered e-books, the Office concluded that the contentions of leading blind organizations, the sound policy arguments in favor of the exemption (with which the Office agreed), and the indisputably fair uses at issue were all simply not enough to meet the bar for an exemption under Section 1201.[25]

Even after the Librarian of Congress ultimately rejected the Register's recommendation,[26] the Office continued over the next four triennial rulemakings to demand burdensome justification of the proposed disability services exemption and modest, incremental

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[24] *Id.* at 256-266.
[25] *See id.* at 259-262.
[26] The Librarian noted that the Office had ignored statements from the blind community, failed to develop the record, and recommended rejecting the exemption despite literally "no one oppos[ing]" it. Librarian of Congress, *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 75 Fed. Reg. 43,825, 43,838–39 (July 27, 2010).

updates to both accessibility exemptions.[27] These demands required extensive briefing and negotiation over changes including issues as uncontroversial as the removal of ableist language from the Office's regulations codifying the exemptions and bringing the e-book exemption into compliance with the Marrakesh Treaty, into which the United States had already entered.[28]

The Office caused the most significant substantive harm to accessibility uses in 2021 when it effectively denied the general accessibility exemption that disability organizations proposed to mitigate the burden of repeatedly appearing before the Office.[29] The Office concluded that Section 1201 precluded it from exempting

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[27] *See* 2012 Recommendation at 16–25 (lengthy analysis of expansions to e-book exemption); 2015 Recommendation 127–37 (lengthy analysis of renewal of e-book exemption); 2018 Recommendation at 89-111 (lengthy analysis of the disability services exemption); 2021 Recommendation at 64-79 (lengthy analysis of expansions to the disability services exemption), 125-34 (lengthy analysis of expansions to the e-book exemption); *see also* 2012 Recommendation at 143–56 (lengthy analysis of the largely rejected accessibility research exemption discussed *supra*, note 14).

[28] 2021 Recommendation at 126; *see also* 2015 Recommendation at 132-34 (acknowledging the Marrakesh Treaty).

[29] 2021 Recommendation at 315-34 (rejecting the proposed exemption for all accessibility uses except for a token carveout for circumvention related to video game controllers).

circumvention for accessibility purposes on a categorical basis even though the uses were uncontroversially fair uses.[30] The Office suggested that removing Section 1201's chill on constitutionally protected efforts to make copyrighted works accessible would instead require disability organizations to individually brief and justify separate exemptions for each of the numerous categories of works under 17 U.S.C. § 102[31]—an exercise in regulatory pointillism that would have required hundreds of thousands of words of filings, extensive hearings and negotiations, and securing hundreds of hours of pro bono services from numerous legal clinics.[32]

The Office's inability or unwillingness to broadly permit accessibility fair uses has posed substantial consequences for the rights of people with disabilities to access information, education, and culture on equitable terms. Doing so has contradicted the spirit, if not the letter, of a wide range of state and federal civil rights laws guaranteeing people with disabilities "the right to live in the world,"[33] including the

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[30] *See id.* at 316–18.
[31] *See id.* at 318, 322–26.
[32] See discussion *infra*, Section IV.
[33] *See generally* Jacobus tenBroek, *The Right to Live in the World*, 54 Cal. L. Rev. 841 (1966).

First Amendment rights of people with disabilities to access information on equal terms.

Without the chilling effect of Section 1201, people with disabilities would be able to more effectively realize their civil rights to access copyrighted works on equitable terms. Recognizing Section 1201's unconstitutionality would serve the ends of the First Amendment and disability law alike.

II. The Office has routinely narrowed Section 1201 exemptions for security fair uses.

Like disability communities, a wide range of respected independent security researchers and cybersecurity organizations, including several amici and plaintiff Dr. Matthew Green, have participated in five triennial rulemakings dating back to 2006.[34] The security research community has repeatedly appeared before the Office to secure, renew, and expand an exemption permitting circumvention of TPMs on copyrighted works in service of performing good-faith security research. As with accessibility-focused exemptions, the Office has consistently

[34] *See* 2006 Recommendation at 54; 2010 Recommendation at 174–75; 2015 Recommendation at 250–51; 2018 Recommendation at 283–85; 2021 Recommendation at 234-35. The Office did not consider a security research exemption *sua sponte* in 2012.

acknowledged that exemptions directed toward security research entail fair use but has nevertheless continued to impose significant limitations on the security research exemption that have hindered the work of researchers to ensure the cybersecurity of products and services ranging from consumer and industrial devices to vehicles to election systems.

A. The Office has consistently recognized that security-focused exemptions entail fair use.

As with accessibility-focused exemptions, the Office has consistently reached the uncontroversial conclusion that security-focused exemptions entail fair use. Deploying the familiar four-factor analysis, the Office has reached essentially the same conclusion throughout the evolution of the security research exemption from narrowly enabling circumvention for research on vulnerabilities caused by computer-accessible audio recordings[35] and video games[36] to a more general-purpose exemption allowing good-faith research of contemporary vulnerabilities in a wide range of computer software.[37]

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[35] *See* 2006 Recommendation at 63 (implying that security research is noninfringing).
[36] 2010 Recommendation at 186.
[37] 2015 Recommendation at 300.

In an archetypical analysis during the 2015 rulemaking—the subject of the present litigation—the Office concluded that the first factor weighed in favor of fair use because many of the activities involved in security research are transformative.[38] Moreover, the Office has routinely concluded that good-faith security research promotes several of the activities and purposes of fair use such as criticism, comment, teaching, scholarship, and research.[39]

Likewise, the Office routinely has concluded that security research satisfies the fourth (market) factor. The Office has determined that there is no indication that good-faith security research will usurp the market.[40] The Office has recognized that in fact, research into and correction of security flaws is likely to have a positive impact on the market for copyrighted works because it may spur the development and marketing of copyrighted computer software that does not impose security risks for consumers.[41]

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[38] 2015 Recommendation at 300–01.
[39] *See id.*; 2018 Recommendation at 294-95.
[40] *See* 2015 Recommendation at 301–02; 2018 Recommendation at 297-98.
[41] *See* 2015 Recommendation at 302. Though the analysis focuses primarily on the first and fourth factor, the Office has also concluded

B. The Copyright Office has routinely narrowed Section 1201 exemptions for security fair uses.

Despite its recognition that security research is typically fair use, the Office has consistently narrowed security research exemption proposals on grounds largely unrelated to fair use. In 2006, the Office narrowed a proposed exemption to allow security research on all literary and audiovisual works to permit research only on sound recordings encumbered with TPMs that themselves caused security vulnerabilities.[42]

Like its skepticism of disability communities, the Office in 2010 rejected security researchers' plea for latitude to investigate a wide array of similar vulnerabilities by concluding that there was insufficient evidence of actual vulnerabilities to justify a broader class—despite Section 1201 rendering the discovery of such vulnerabilities illegal. In 2010, despite again acknowledging that a broad proposed exemption for

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that the second factor weighs in favor of fair use because the activities involved in security research are typically functional rather than creative. *See, e.g.*, 2015 Recommendation at 301. The third factor has proven to be of little significance because courts have been willing to allow copying of original works when necessary for transformative purposes. *See, e.g.*, 2015 Recommendation at 301.

[42] 2006 Recommendation at 62-64.

security research entailed fair use, the Office again rejected the exemption in favor of one narrowly focused on security vulnerabilities caused by video game TPMs.[43]

In 2015, the Office again offered an unduly narrow exemption in response to proposals from security researchers seeking an exception to conduct good-faith security research. Despite the uncontroversial fair uses at issue, the Office encumbered the final security exemption with a variety of problematic limitations, including restrictions on the classes of devices that bore no relationship to fair use but significantly hindered the proposed research.[44]

In 2018, the Office again maintained a number of problematic limitations, including one that tied eligibility for the security research exemption to compliance with "any applicable law."[45] In doing so, the Office raised the specter of software companies using Section 1201 to chill the publication of information about security vulnerabilities in their products by haling security researchers into federal court under

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[43] *See* 2010 Recommendation at 177–78.
[44] *See* 2015 Recommendation at 316–20.
[45] 2018 Recommendation at 302–306, 308–311.

the pretext of tenuous legal violations ranging from local electrical codes to contract disputes to the speech and media regulations of authoritarian regimes.[46] In 2021, the Office finally severed the "any applicable law" tether after receiving the blessing of the Department of Justice, but again retained a wide range of other limitations that lacked any obvious connection to the fairness of good-faith security research.[47]

As with accessibility, the Office's inability or unwillingness to broadly permit fair security uses via the triennial rulemaking has posed substantial consequences for the rights of security researchers individually and cybersecurity policy more generally. Independent researchers help make technological devices and software safer by identifying and reporting flaws and vulnerabilities that software vendors are unable or unwilling to discover and fix.[48] This reporting function is not only critical to cybersecurity but is a core exercise of

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[46] *See id.* at 310-311.

[47] *See* 2021 Recommendation at 255 ("The Register does not find any actual or likely adverse effect from the Access, Use, or Lawfully Acquired limitations challenged by proponents.")

[48] *See, e.g.*, Reply Comments of GitHub at 1-2, Eighth Triennial Rulemaking (March 10, 2021), http://www.copyright.gov/1201/2021/comments/reply/Class%2013_Reply_GitHub.pdf.

First Amendment rights, bringing criticism and commentary to bear in service of facilitating solutions to critical social problems.

When Section 1201 chills the First Amendment rights of security researchers, technological vulnerabilities are less likely to be identified. These chilling effects also have downstream effects on the rights and safety of consumers, who become limited in their ability to make informed choices about the products and services they purchase. Without the chilling effects of Section 1201, security researchers would more effectively exercise their First Amendment rights to ensure the safety and security of software used in a wide range of essential social, economic, and democratic activity.

III. The Office has routinely denied or narrowed Section 1201 exemptions for repair-focused fair uses.

Like the disability and security communities, a wide range of consumer and independent repair advocates have participated in triennial rulemakings dating back to 2015. [49] The repair community has repeatedly appeared before the Office to secure, renew, and expand exemptions allowing circumvention of copyrighted computer software

[49] *See* 2015 Recommendation at 218–19; 2018 Recommendation at 184–85; 2021 Recommendation at 190–91.

necessary to diagnose, maintain, and repair a wide range of vehicles, consumer devices, and medical equipment. The Office has consistently acknowledged that exemptions directed toward repair entail fair use, but again has repeatedly rejected and narrowed repair exemptions, exacerbating a range of competition, consumer protection, and environmental problems.

A. The Copyright Office has routinely recognized that repair-focused exemptions entail fair use.

As with accessibility- and security-focused exemptions, the Office has often concluded that repair-focused exemptions entail uncontroversial fair use. From the initial petition for an exemption focused on vehicle repair[50] to the repair exemption's later expansions to encompass consumer devices[51] and medical equipment,[52] and rejection of proposals to encompass video game consoles[53] and commercial and

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[50] 2015 Recommendation at 218-19.
[51] 2018 Recommendation at 229.
[52] 2021 Recommendation at 231–32.
[53] 2018 Recommendation at 205–06. *But see* 2021 Recommendation at 232 (recommending a limited exemption for the repair of optical drives).

industrial equipment,[54] the Office has recognized that the functional nature of repair often entails fair use.[55]

In its archetypical four-factor fair use analysis in 2015, the Office found that the first factor tended to support a finding of fair use because the proposed uses of computer programs are likely to be transformative.[56] Importantly, the Office noted that the first factor may favor noncommercial and personal fair uses such as maintaining the intended functionality of smartphones by their owners.[57]

Likewise, the Office has often concluded that repair satisfies the fourth (market) factor. The Office has noted that there is no separate market for computer programs within vehicles outside of the vehicles they are embedded in, suggesting that circumvention of TPMs for copyrighted software needed for the operation of a vehicle were not likely to cause market harm.[58]

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[54] 2021 Recommendation at 197–98.
[55] 2015 Recommendation at 234; 2018 Recommendation at 202-05; 2021 Recommendation at 201-04.
[56] 2015 Recommendation at 234.
[57] *Id*. at 235.
[58] *Id*. at 236.

When proponents sought to expand the exemption in 2018 to include diagnosis, repair, and modification of entertainment systems within vehicles, home appliances, smartphones, video game consoles, computers, and consumables, the Office reached similar conclusions with respect to the first and fourth factors.[59] Specifically, the Office noted that repair supports the purpose of the embedded programs, and the personal, noncommercial activities enhance the intended purpose of each program, concluding that there is "an 'emerging general understanding that bona fide repair and maintenance activities are typically noninfringing.'"[60]

Finally, in its 2021 recommendation, the Office reiterated its view that diagnosis, maintenance, and repair of software-embedded devices for the purpose of restoring functionality is likely fair use.[61] Relying on its own separate, extensive study of software, the Office concluded that, "properly applied, the fair use factors—together with the existing case

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[59] *Id.* at 202-205.
[60] *Id.* at 203 (quoting U.S. Copyright Office, *Section 1201 of Title 17* at 90 (2017) ("*Section 1201 Report*"), https://www.copyright.gov/policy/1201/section-1201-full-report.pdf).
[61] 2021 Recommendation at 202.

law—should ensure that consumers, repair technicians, and other interested parties will be able to engage in most traditional repair . . . activities without fear of copyright infringement liability."[62]

B. The Copyright Office has denied or limited Section 1201 exemptions for repair fair uses.

Despite consistently recognizing repair as fair use, the Office has repeatedly denied or narrowed requested exemptions for repair. In 2015, the Office narrowed the proposed exemption for vehicle repair by excluding circumvention of in-vehicle entertainment and telematics systems necessary for vehicle repair.[63] This was despite the fact that accessing these systems is necessary for repair because they often are inextricably linked with other vehicle systems used in remote repair diagnostics.

Similarly, the Office also narrowed the exemption to exclude circumvention by independent mechanics undertaking repair on behalf of a vehicle's owner, again for reasons unrelated to fair use.[64] In both

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[62] *Id.* (quoting U.S. Copyright Office, *Software-Enabled Consumer Products* at 39-41 (2016), https://www.copyright.gov/policy/software/software-full-report.pdf) (omissions in original).
[63] 2015 Recommendation at 246.
[64] *Id.* at 246–47.

2018 and 2021, despite finding that the expanded proposals were likely to entail fair use, the Office declined to expand the exemption to explicitly allow for third-party assistance.[65] Even though the Office reversed course on some of its previous repair restrictions in 2021, it substantially limited proposals for commercial and industrial equipment.[66]

The Office's ongoing inability or unwillingness to broadly permit fair repair uses via the triennial rulemaking has positioned Section 1201 to pose substantial consequences for the rights of people to repair their devices independently or through a competitive market for independent repair, with significant consequences to marginalized

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[65] *See* 2018 Recommendation at 222-25 (removing a limitation that circumvention be "undertaken by the authorized owner" but demurring on proponents' request to "expressly include language permitting third-party assistance" and noting that entities "electing to proceed with circumvention activity pursuant to the exemption do so at their peril"); 2021 Recommendation at 230 (again declining to recommend express language).

[66] 2021 Recommendation at 197–98 (declining to evaluate the extension of the exemption to commercial and industrial devices), 231–33 (excluding repair of all components but the optical drives of video game consoles).

communities as a result.[67] Limiting the repairability of devices has led many people to simply replace their broken devices, resulting in environmentally harmful e-waste and depriving communities who cannot afford new devices from accessing used devices, in turn exacerbating long-standing gaps in digital inclusion.[68]

IV. The Office conducts the triennial rulemaking in a highly burdensome fashion that causes additional procedural harms to the First Amendment rights of fair users.

As counsel on this brief has explained in testimony to the U.S. Senate, Section 1201's specific harms to accessibility, security, repair, and other fair uses have been amplified by the Office's conduct of the triennial rulemaking reviewing exemptions to Section 1201 in a burdensome fashion.[69] The Office's burdensome conduct of the triennial

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[67] *See generally* Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (2021) (citing concerns about "the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony . . . in . . . repair markets").

[68] *E.g.*, U.S. PIRG, *The costs of the digital divide are higher than ever. Repair can help*, (Apr. 15, 2021), https://uspirg.org/blogs/blog/usp/costs-digital-divide-are-higher-ever-repair-can-help .

[69] *See generally* Testimony of Prof. Blake E. Reid, *Are Reforms to Section 1201 Needed and Warranted?*, U.S. Senate Committee on the Judiciary, Subcommittee on Intellectual Property at (Sept. 16, 2020), https://www.judiciary.senate.gov/download/reid-testimony ("Reid Senate Testimony") (discussing the history of the triennial rulemaking).

rulemaking—much of which is not required by Section 1201's delegation of authority[70]—adds a significant procedural First Amendment insult to Section 1201's substantive injury of fair users' rights. Exemption proponents have consistently appeared before of the Copyright Office in good faith,[71] advocating for the ability to engage in socially beneficial activities without fear of civil or criminal liability.[72] But the triennial rulemaking has forced them to repeatedly, unnecessarily, and unfairly undergo a process that resembles the worst aspects of speech licensing regimes.

Disability, security, and repair communities chilled by Section 1201 cannot simply consult with an attorney to receive assurance that they can go about their activities lawfully under the protection of fair use.[73] Exemption proponents must first slog through a degrading, grinding,

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[70] *See* 17 U.S.C. § 1201(a)(1)(C)–(D) (not mentioning, for example, the Office's adversarial division of the rulemaking between exemption opponents and proponents).
[71] *See generally* Reid Senate Testimony, *supra* note 69.
[72] *See id.* at 6–7 & nn.38–39 (explaining the civil liability provisions of 17 U.S.C. § 1203(b)–(c) (providing for injunctive and statutory damages of up to $2500 per act of circumvention) and 17 U.S.C. § 1204(a)(1) (making initial willful offenses for purposes of commercial advantage or private financial gain a five-year felony)).
[73] Reid Senate Testimony, *supra* note 69 at 7.

and difficult process over the course of many months, spending hundreds of hours to prepare extensive paperwork and plead with government officials for permission to engage in a constitutionally protected activity.[74]

More specifically, exemption proponents must wait for a brief window that opens just once every three years.[75] They must engage specialized legal assistance, typically provided only by a small number of pro bono law clinics with expertise in the triennial rulemaking.[76] Developing the case for a single exemption can take more than 500 hours of legal work across a single instance of the triennial rulemaking.[77] At the prevailing market rate, advocacy for a single exemption under the triennial rulemaking might cost an individual proponent or advocate more than $100,000 even if performed entirely by law clerks, or potentially more than $380,000 if performed by a senior attorney[78]—a prohibitive cost for many non-profit organizations and

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[74] *See id.*
[75] *See* 17 U.S.C. § 1201(a)(1)(C).
[76] Reid Senate Testimony, *supra* note 69 at 7.
[77] *See Section 1201 Report*, *supra* note 60 at 128 & n.697.
[78] *See Laffey Matrix*, http://www.laffeymatrix.com/see.html (last visited Jan. 17, 2022) (specifying a $208 hourly rate for paralegals and law

individuals whose activities are chilled by Section 1201 absent an applicable exemption.[79]

The limited capacity of clinics to provide pro bono services for the triennial rulemaking means that some would-be exemption proponents likely never have the opportunity to present the case for an exemption to the Copyright Office.[80] While Section 1201 permits the Office to investigate exemptions *sua sponte* as an agency might typically do in the context of a notice-and-comment rulemaking, the Office has chosen not to do so.[81]

When an exemption proponent can obtain legal help, a lengthy task awaits.[82] A proponent must work with counsel to compile dozens of pages of detailed justifications across numerous filings over the course of a full year or more.[83] In many cases, proponents must travel to Washington to undergo intensive questioning about the legitimacy of

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clerks and a $764 hourly rate for an attorney with eleven to nineteen years of experience).

[79] *See* Reid Senate Testimony, *supra* note 69 at 7.

[80] *Id.*

[81] *Id.*; *see* 17 U.S.C. § 1201(a)(1)(C).

[82] Reid Senate Testimony, *supra* note 69 at 7.

[83] *Id.*

their work and personal activities from government officials in hours-long hearings.[84] Specifically, exemption proponents in the 2021 rulemaking were required to prepare:

- A petition to renew an existing exemption;[85]
- A separate petition to request expansion of an existing exemption;[86]
- Detailed long-form comments;[87]
- Detailed long-form reply comments;[88]
- Hearing testimony across several weeks of hearings; [89]
- In some cases, additional responses to post-hearing questions posted by the Copyright Office, some of which requested proponents to engage in protracted negotiations with

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[84] *Id.*
[85] Petitions to Renew Prior Exemptions (July 22, 2020), https://www.copyright.gov/1201/2021/petitions/renewal/.
[86] Petitions for Newly Proposed Exemptions (Sept. 8, 2020), https://www.copyright.gov/1201/2021/petitions/proposed/.
[87] Round 1 Comments (Dec. 14, 2020), https://www.copyright.gov/1201/2021/comments/.
[88] Reply Comments (March 10, 2021), https://www.copyright.gov/1201/2021/comments/reply/.
[89] Transcripts of Public Hearings (Apr. 5–21, 2021), https://www.copyright.gov/1201/2021/hearing-transcripts/.

rightsholders to develop specific regulatory language or settle substantive disputes;[90] and

- In some cases, even further responses to post-hearing ex parte communications by exemption opponents.[91]

Under the auspices of the proceeding, exemption proponents also must undergo opposition and questioning from professional lobbyists and corporate attorneys representing opponents of their First-Amendment-protected activities who in some cases impugn their character and reflexively criticize their proposals,[92] often without seriously reviewing or even attempting to understand them.[93] As a result, the Office routinely recommends exemptions riddled with vague

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[90] Post-Hearing Questions, (May 14, 2021), https://www.copyright.gov/1201/2021/post-hearing/.
[91] Ex Parte Communications (2021), https://www.copyright.gov/1201/2021/ex-parte-communications.html.
[92] Various organizations filed comments opposing or contesting aspects of nearly every request for new and expanded exemptions filed in the 2021 triennial rulemaking. *See* Opposition Comments (Feb. 9, 2021), https://www.copyright.gov/1201/2021/comments/opposition/.
[93] *See* Reid Senate Testimony, *supra* note 69 at 8 & n.57.

and ambiguous language and caveats that preclude the certainty proponents seek.[94]

The Office has attempted to streamline the process for renewing existing exemptions over the past two rulemakings.[95] However, the regular need to make updates to narrowly-drawn exemptions replete with limitations means that existing exemptions must be rehashed anew through the Office's full, non-"streamlined" process for new exemptions.[96] And the exemptions expire after three years,[97] requiring proponents to repeat the process in a regulatory version of Groundhog Day.

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Far from vindicating the constitutional right to engage in fair use demanded by the First Amendment, Section 1201's triennial rulemaking has required people with disabilities, security researchers, consumers, and repair professionals to plead for their ability to make

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[94] The current exemptions occupy more than 4500 words in the Code of Federal Regulations. *See* 37 C.F.R. § 201.40.
[95] *See generally* 2021 Recommendation at 12–15 (describing the "streamlined" renewal process).
[96] *See Reid Senate Testimony*, *supra* note 69, at 7.
[97] *See* 17 U.S.C. § 1201(a)(1)(C)–(D).

socially beneficial, non-infringing, functional fair uses in what amounts to a trial before a government tribunal, complete with open-ended cross-examination from opponents who object. The Office routinely conducts the triennial rulemaking in a manner that leaves in place Section 1201's barriers to uses that even the Office concedes are fair uses, with dire substantive and procedural consequences for the constitutional rights of people with disabilities, disability services organizations and libraries, security researchers, and ordinary consumers and repair professionals. The triennial rulemaking fails to provide relief from Section 1201's unconstitutional burdens on the right to engage in fair use, and this Court should conclude that plaintiff-appellants are likely to succeed in their facial First Amendment challenge to Section 1201 accordingly.

Respectfully submitted,

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Appendix: List of Amici

American Council of the Blind (ACB)

American Foundation for the Blind (AFB)

American Library Association (ALA)

Association on Higher Education and Disability (AHEAD)

Association of College and Research Libraries (ACRL)

Association of Late-Deafened Adults (ALDA)

Association of Research Libraries (ARL)

Association of Transcribers & Speech-To-Text Providers (ATSP)

Steven M. Bellovin, Percy K. and Vida L.W. Professor of Computer Science, Columbia University; affiliate faculty, Columbia Law School*

J. Alex Halderman, Professor of Computer Science and Engineering and Director, Center for Computer Security and Society, University of Michigan*

iFixit

National Association of the Deaf (NAD)

National Federation of the Blind (NFB)

Perkins School for the Blind

Public Knowledge

SecuRepairs.org

Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)

The Repair Association

* Affiliation listed for identification purposes only

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