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**Congress Should Preserve Anti-Circumvention Rights:
The Online Market for Movies and Music Depends on DMCA Section 1201**

by

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Introduction and Summary

The Senate Subcommittee on Intellectual Property is in the midst of a review to consider modernizing copyright law. While there are several legislative measures that ought to be considered as part of this modernization effort, it is no understatement to say that the burgeoning online market for movies and music depends on the preservation of Section 1201 of the Digital Millennium Copyright Act (DMCA).

Online streaming subscription services like Netflix, Hulu, Spotify, and Apple Music are now hallmarks of the Digital Age economy. The widespread popularity and economic success of these and other Internet-based models for accessing copyrighted content depend on the maintenance of the strong "anti-circumvention" rights that are contained in Section 1201 of the DMCA. Congress must preserve these rights so that copyright owners and service providers can continue to rely on encryption and password protection to give access to paying consumers while preventing unauthorized users from accessing content to which they are not legally entitled.

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Section 1201 is working and it is best left alone. By prohibiting the use and trafficking of technologies to circumvent legitimate "technological protection measures" (TPMs) that control access to copyrighted content, Section 1201 protects the value of copyrighted content. Those theft protection measures remain vitally necessary to support the commercial viability of access-based models for video and music.

Copyright law secures exclusives rights over the reproduction, distribution, public performance or display of creative works, as well as the creation of derivatives. But when persons circumvent TPMs to access copyrighted video or music content they are not necessarily liable for infringement. Section 1201 of the DMCA fills the void by recognizing anti-circumvention rights for owners of creative works. Section 1201(a)(1) prohibits anyone from circumventing TPMs that effectively control access to a creative work protected by law. And Section 1201(a)(2) prohibits anyone from trafficking in products, services, or devices that are primarily designed to circumvent a TPM that effectively controls access to a work protected by law.

Traditional copyright protections do not protect rights to control *access* to creative works. However, Section 1201(b) bolsters copyrights by prohibiting persons from "trafficking in devices that facilitate circumvention of measures that protect against copyright infringement." Persons are liable under Section 1201(b), for instance, for selling devices that disable anti-copying TPMs and thereby enable production of unauthorized copies.

From a private property rights standpoint, Section 1201's anti-circumvention prohibitions are well-founded. The law typically protects access to other forms of property through trespass to chattels, conversion, and trespass to land torts. Section 1201 provides similar protections to copyright in a manner that is suited to Digital Age realities and to the use of the Internet and other network technologies.

By passing Section 1201, Congress helped to preserve economic incentives to make copyrighted movie, TV, and music content available to paying consumers. Section 1201 has succeeded. Back in 1998, VHS tapes and music CDs were prevalent. Today, many consumers prefer Internet streams through subscriptions or on-demand rentals over purchases of copies. For example, online video service provider Netflix has grown to nearly 73 million paid subscribers in the U.S. and Canada as of the second quarter of 2020, generating over \$5.5 billion in revenue during the first half of the year. In the third quarter of 2020, Hulu had 35.5 million paid subscribers. Paid streaming music subscribers in the U.S. increased to almost 100 million in 2019, and streaming services generated 85% of U.S. music industry revenues during the first half of 2020.

Section 1201's prohibitions on circumvention and trafficking have effectively prevented the development of a capitalized market for circumvention technologies. Wide commercial availability of devices and services that allow circumvention of protection measures would undermine the economic viability of access models for viewing and listening to copyrighted content. Elimination of Section 1201(a) would, at best, compel copyright owners and associated service providers to continuously dedicate massive financial resources to combatting the latest commercial circumvention offerings for misappropriating the value of their intellectual property.

Critics of Section 1201 have called for the law to be changed so that violations would depend on a showing that circumventions of TPMs are connected with infringing uses of copyrighted works. Such a "nexus" requirement would effectively eliminate Section 1201(a)'s protections. In its report on Section 1201, the Copyright Office sensibly recommended against a "nexus" amendment, "as it could severely weaken the right of copyright owners to exercise meaningful control over the terms of access to their works online." Congress also ought to reject a nexus requirement.

Indeed, a nexus requirement would blend anti-circumvention and anti-trafficking prohibitions into infringement claims and thereby conflict with international obligations. The U.S. has signed several free trade agreements (FTAs) that recognize separate causes of action for circumvention and infringement. Most recently, Article 20.66 of the United States-Mexico-Canada (USMCA) FTA requires each member country to provide legal protections and remedies against circumvention of TPMs for protected sound recordings separate from infringement claims.

Although critics contend that Section 1201 restricts fair use and legitimate research uses for anti-circumvention technologies, such criticisms appear overstated and give too little credit to the terms of the statute. The law's exemption provisions make sufficient allowance for beneficial non-infringing uses of anti-circumvention technologies. For example, permanent exemptions extend to activities such as reverse engineering for purposes of developing interoperable computer programs, encryption research, and security testing. Additionally, Congress had the foresight to include in Section 1201 a triennial rulemaking process for granting temporary – and renewable – exemptions for non-infringing uses of particular classes of works.

Also, as the Copyright Office acknowledged in its 2017 report, Section 1201(f)'s exemption for reverse engineered interoperable computer programs protects fair use. And federal courts have rejected broad-based First Amendment challenges to Section 1201 involving alleged fair use. As the Second Circuit held in *Universal City Studios, Inc. v. Corley* (2001), Section 1201(a)'s prohibitions implicate functional, non-speech aspects of computer codes used to circumvent TPMs, thus rendering those provisions content neutral. *Corley* held that those prohibitions advance substantial government interests in preventing mass digital piracy.

In our new book, *Modernizing Copyright Law for the Digital Age – Constitutional Foundations for Reform*, available from Carolina Academic Press, Amazon, and elsewhere, we have called on Congress to update statutory provisions that do not sufficiently protect copyrights. But Section 1201 is working and changing the law could put at risk vital protections for copyrighted works.

If Congress seeks to amend the statute, it should do so only narrowly. Clarifying permanent exemptions for security testing and encryption research might not be unreasonable – but only if they are limited to parameters set out in the Copyright Office's Section 1201 study. The same goes for amendments to further streamline the Copyright Office's processes for renewing temporary exemptions. But in all cases, Congress should proceed with the understanding and acknowledgement that strong anti-circumvention rights are essential to the vitality of the Digital Age economy.

Section 1201 and Anti-Circumvention Rights

Federal copyright law secures exclusive rights over the reproduction, distribution, public performance or display of creative works, as well as the creation of derivative works. But rights of control over access are not historically secured to copyright owners. In other words, when copyright owners assert control over access to their creative works, persons who access those works without authorization are not necessarily liable for infringement. Section 1201 of the Digital Millennium Copyright Act of 1998 (DMCA) fills the void by recognizing "anti-circumvention" rights for owners of creative works.

The DMCA was passed to implement the World Intellectual Property Organization Copyright Treaty (WIPO Treaty). Article 11 of the WIPO Treaty requires member nations to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

Section 1201 of the DMCA applies when the owners of creative work seek to control access to their works using "technological measures" – also known as "technological protection measures" or "TPMs." According to the statute, to "circumvent" a TPM 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." Section 1201(a)(1) prohibits anyone from circumventing TPMs that effectively control access to a creative work protected by law. And Section 1201(a)(2) prohibits anyone from trafficking in products, services, or devices that are primarily designed to circumvent a TPM that effectively controls access to a work protected by law.

Although Section 1201(a) recognized new protections against unauthorized access to creative works that are distinct from copyright protections, Congress also bolstered pre-existing copyrights protections by including another anti-trafficking provision in Section 1201(b). Under Section 1201(b), persons are prohibited from "trafficking in devices that facilitate circumvention of measures that protect against copyright infringement." Persons are liable under Section 1201(b), for instance, for selling devices that disable anti-copying TPMs and thereby enable the unauthorized use of copyrighted works. (When the DMCA was passed, it was unnecessary for Congress to prohibit persons from directly circumventing TPMs in order to reproduce or publicly perform or display the work because such conduct constitutes infringement and is barred by Section 106 of the Copyright Act.)

Thus, there is an important distinction between Section 1201's two anti-trafficking provisions. On the one hand, Section 1201(a)(2) prohibits trafficking in devices, services, or other technologies designed to circumvent TPMs and enable *access* to protected content. And on the other hand, Section 1201(a) prohibits trafficking in devices designed to circumvent TPMs and enable *infringement* of exclusive rights of reproduction, distribution, public performance or display, and creation of derivative works. However, both anti-trafficking provisions are directed at technologies that are designed primarily to circumvent TPMs, have only limited commercially

significant purposes other than circumventing TMPs, or are marketed or used in concert with a person with knowledge of intended use for circumventing TPMs.

Congress provided for both civil remedies and criminal penalties of action for violations of Section 1201. As will be discussed below, Section 1201 contains several "permanent" exemptions from liability. The statute also contains a triennial rulemaking process conducted by the Copyright Office for establishing temporary exemptions from liability for specific categories of conduct, with the potential for renewal of those temporary exemptions through successive triennial rulemakings.

Section 1201 is Consonant with Property Rights Principles

From a private property rights standpoint, Section 1201's anti-circumvention prohibitions are well-founded. The value of copyrighted video and music content, like other forms of private property, depends upon a legal basis for protection and enforcement against trespass.

As we explain in our book, *Modernizing Copyright Law for the Digital Age: Constitutional Foundations for Reform*, the American Founders understood that it is the responsibility of government not only to secure property rights but to promote their use and value. The American Founders recognized that creative works are a form of property and they sought to secure and promote them by establishing copyright protections. Owners have the legitimate expectation that real and personal property are protected from trespass and that they should be able to enforce their rights in the event of misappropriation or unauthorized use. And the law typically provides enforcement for property rights against harms from unauthorized access through trespass to chattels, conversion, and trespass to land tort claims.

Similarly, owners of copyrights who hold creative works in their possession and seek to control access to those works should be able to rely on the law's protections and pursue remedies when persons, without authorization, evade measures intended to control access and thereby appropriate the value of those works. Section 1201 provides those protections and remedies to copyright owners in a manner suited to the context of the Digital Age economy. This enables copyright owners and service providers offering copyrighted content the ability to make protected work accessible through the Internet or other network technologies in exchange for payment and according to particular terms of service.

Section 1201's Anti-Circumvention Rights are Critically Important to the Digital Age Economy

According to the Copyright Office's 2017 report on Section 1201: "In enacting section 1201, Congress aimed to create a legal foundation to launch the global digital online marketplace for copyrighted works." Section 1201 has succeeded in this aim. Anti-circumvention rights have been essential to the emergence of subscription or on-demand service models for accessing creative video and music content, and those rights remain key to the vitality of such services.

In 1998, consumers purchased movies in VHS tape format, DVDs were nascent, video rental stores were common, and music CD purchases constitute the dominant generator of revenues for

sound recordings. Today, however, subscription volumes and revenue data indicate that many consumers prefer to enjoy Internet streams of movies, TV, and music through subscription or on-demand models rather than outright purchase of copies. For example, online video subscription service provider Netflix grew to nearly 73 million paid subscribers in the U.S. and Canada as of the second quarter of 2020, generating over \$5.5 billion in revenue during the first half of the year. In the third quarter of 2020, the Walt Disney Company reported that Hulu had 35.5 million paid subscribers, up from 27.9 million in the corresponding quarter of the previous fiscal year. That same quarter, subscriptions to Disney+ soared to 60.5 million globally. Other online video subscriptions choices include Amazon Prime Video, HBO Max, and new entrants Apple TV+ and Peacock.

According to the Digital Media Association's 2020 "Streaming Forward Report," paid streaming music subscribers in the U.S. increased by 20% in 2019 to almost 100 million. Popular streaming music services include Spotify, Pandora, Tidal, Apple Music, and Amazon Music Unlimited. The Recording Industry Association of America's Joshua P. Friedlander reported that during the first half of 2020, streaming services generated 85% of U.S. music industry revenues, and the \$3.8 billion generated by subscription services during the first half of the year constituted 67% of total revenues during that period.

Software subscriptions – or software as a service (SaaS) – is also a lucrative emergent model for business enterprise and individual computer users. For instance, Synergy Research Group found that enterprise SaaS generated more than \$23 billion in revenue for software vendors during the first quarter of 2019, with major software vendors experiencing double-digit growth over the prior year.

Section 1201 Prevents Commercialization of a Market for Mass Digital Piracy

Section 1201's prohibitions on circumvention and trafficking have effectively prevented the development of any capitalized market for circumvention technologies. Absent anti-circumvention rights, a predatory industry for enabling unauthorized access to copyrighted content likely would emerge. Wide commercial availability of circumvention devices and services undoubtedly would undermine the economic incentive for online access models for viewing or listening to creative content. Legislative repeal of Section 1201 or amendments intended to reduce the law's protections would, at best, require copyright owners and online media access providers to continuously dedicate far more financial resources to combatting the latest commercial technologies designed for the purpose of enabling misappropriation of the value of their intellectual property.

Amending Section 1201 to Require a Nexus with Infringement Would Undermine Anti-Circumvention Rights and Harm Copyright Owners

Congress should resist calls to weaken Section 1201's protections by amending the law to require that anti-circumvention violations have a connection with infringing uses or activities. Such calls have been made by critics of Section 1201 that seek to have the law amended by adding a nexus requirement that would effectively codify the misguided reading of the statute made by the Federal Circuit in *Chamberlain Group, Inc. v. Skylink Technologies, Inc.* (2004).

In *Chamberlain*, the Federal Circuit concluded that Section 1201(a) "prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners." A bill introduced in the 113th and 114th Congresses called the Unlocking Technology Act embodies this approach. Critics of Section 1201 contend that requiring a connection between circumvention of TPMs and infringement under the Copyright Act is needed to prevent the law's overreach and to protect fair use, market competition, as well as scientific research and technological innovation. However, the Federal Circuit's reading of Section 1201 has been rejected by the Ninth Circuit, the Copyright Office, and the Department of Justice.

In *MDY Industries, LLC v. Blizzard Entertainment, Inc.* (2010), the Ninth Circuit concluded that a nexus requirement was at odds with the text of Section 1201 as well as its legislative history. The Ninth Circuit determined that the terms of Section 1201 established "two distinct types of claims": new rights against circumvention of TPMs intended to control access to protected works under Section 1201(a), and reinforcement of existing copyrights from circumvention of TPMs under Section 1201(b). According to the Ninth Circuit, such a construction avoids rendering any of Section 1201's provisions superfluous.

The Ninth Circuit rooted the distinctiveness of new anti-circumvention rights and protections that bolster existing copyright protections in textual differences between Sections 1201(a) and (b). For instance, the distinction is reflected in Section 1201(a)'s reference to a "protected work" and Section 1201(b) refers to a copyrighted work. Also, the two specific examples of actions that "circumvent a technological measure" identified in Section 1201(a) – namely, descrambling a scrambled work and decrypting an encrypted work – do not necessarily infringe copyrights or facilitate infringement. Furthermore, the triennial rulemaking process contained in Section 1201(a)(1)(B)-(D) provides temporary exemptions from Section 1201(a)(1)(A)'s anti-circumvention prohibition – but not from violations of Section 1201(b). The court concluded that this differential treatment reflects Congress's intent to balance "copyright owners' new anti-circumvention right with the public's right to access the work."

Importantly, the Copyright Office opposes adding a nexus requirement to Section 1201(a)(1)'s prohibition on persons circumventing TPMs to access protected works. This opposition was reiterated in testimony by Copyright Office General Counsel and Associate Register Regan A. Smith before the Senate Intellectual Property Subcommittee on September 16, 2020. The Copyright Office's position is based on its carefully reasoned 2017 study of Section 1201, which stated:

The Office does not [] believe enacting an infringement nexus requirement to be advisable, as it could severely weaken the right of copyright owners to exercise meaningful control over the terms of access to their works online—a right that both Congress and the Executive Branch have properly recognized as essential to the development of the digital marketplace for creative content.

In litigation before the Fifth Circuit in 2010, the U.S. Department of Justice opposed a nexus requirement for Section 1201(a)(1), positing that "[t]he entire point of that provision was to

provide a federal prohibition against bypassing passwords, encryption, and other technologies that regulate access to a copyrighted work in circumstances in which the act of obtaining access would not by itself violate the copyright laws."

Notably, adopting a nexus requirement would apparently run contrary to U.S. international obligations. The Copyright Office Study cited eight free trade agreements (FTAs) with foreign nations that Congress ratified between 2003 and 2011 that require violations of TPMs to be treated as separate causes of action from copyright infringement. Additionally, Article 20.66 of the United States-Mexico-Canada (USMCA) FTA requires each member country to provide legal protections and remedies against circumvention of TPMs for protected sound recordings. And the USMCA expressly states: "Each Party shall provide that a violation of a measure implementing this Article is a separate cause of action, independent of any infringement that might occur under the Party's law on copyright and related rights." Inserting a nexus requirement into Section 1201 would blend those causes of action into one rather than keep them separate.

Section 1201's Exemption Provisions Negate the Need for Amendments

Although critics contend that Section 1201 restricts fair use and legitimate research uses for anti-circumvention technologies, such criticisms appear to be overstated and to give too little credit to the terms of the statute.

The law's exemption provisions make sufficient allowance for beneficial uses of anti-circumvention technologies. Section 1201(d)-(i) contains several "permanent" exemptions from liability for circumvention, trafficking, or both. Those exemptions involve activities by nonprofit libraries, archives, educational institutions, as well as law enforcement, intelligence, and other government activities. Permanent exemptions also include reverse engineering for purposes of developing interoperable computer programs, encryption research, protection of minors, protection of personally identifying information, and security testing.

Moreover, Congress had the foresight to include in Section 1201(a)(1)(B)-(E), a triennial rulemaking process by which the Register of Copyrights evaluates and recommends to the Librarian of Congress adoption of temporary exemptions for users of particular classes of copyrighted works who are or who are likely to be "adversely affected by virtue of such prohibition in their ability to make non-infringing uses of that particular class of works" in the succeeding 3-year period. In conducting its rulemaking, the Librarian the must examine a set of factors that includes "the availability for use of works for nonprofit archival, preservation, and educational purposes" as well as "the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research." Based on that examination, the Librarian publishes a triennial list of temporary exemptions from liability under Section 1201(a)(1).

The triennial rulemaking process contained in Section 1201(a)(1)(B)-(E) constitutes an additional safety valve for beneficial uses of circumvention technologies. This process effectively future-proofs the statute by permitting temporary exemptions to address particularities of emerging technologies and uses.

Taken together, the availability of permanent and temporary exemptions makes it unnecessary for Congress to amend Section 1201. In its Section 1201 study, the Copyright Office did recommend Congress consider amending the statute to expand and clarify its exemptions for security testing under Section 1201(j) and for encryption research under Section 1201(g). And it also recommended Congress consider establishing new permanent exemptions for subjects of routinely granted temporary exemptions, such as enabling disabled persons to utilize assistive technologies, unlocking used mobile devices, and allowing diagnosis, repair, or maintenance of a computer program. However, the existing triennial rulemaking process is available to accommodate all of those beneficial or potentially beneficial uses of anti-circumvention technologies.

Moreover, the Copyright Office's Section 1201 report concluded that the permanent exemption contained in Section 1201(f) for reverse engineering to develop and distribute interoperable programs was intended by Congress to preserve the Ninth Circuit's decision in *Sega Enterprises, Lt. v. Accolade, Inc.* (1992), which held that uses of software to achieve interoperability may constitute fair use. In the study, the Copyright Office offered further interpretative guidance regarding Section 1201(f), concluding that the exemption includes "user acts of creating, distributing, and using circumvention tools for interoperability purposes" provided that such acts do not involve infringement or other violations of law.

Furthermore, federal courts have rejected broad-based First Amendment challenges to Section 1201, including challenges tied to alleged fair uses of copyrighted works. For example, in *Green v. U.S. Department of Justice* (2019) the U.S. District Court for the District of Columbia rejected pre-enforcement claims that Section 1201(a)'s anti-circumvention and anti-trafficking provisions are unconstitutionally overbroad and burden a substantial number of possible fair uses of copyrighted materials by third parties. The District Court in *Green* also rejected claims that the triennial rulemaking process constitutes a prior restraint on speech, as the process does not call for censorship based on content, viewpoint, or speaker identity. Like other District Court decisions, *Green* followed the Second Circuit's holding in *Universal City Studios, Inc. v. Corley* (2001) that Section 1201's anti-circumvention and anti-trafficking provisions implicate functional, non-speech aspects of computer codes used to circumvent TPMs, thus rendering those provisions content neutral. *Corley* held that Section 1201's prohibitions advance a substantial government interest in preventing mass digital piracy and it also held that interest is unrelated to the suppression of free expression. *Green* and other District Court decisions have followed *Corley* in this regard.

Beginning with its seventh triennial proceeding (2017-2018) to determine exemptions to the prohibition on circumvention in Section 1201, the Copyright Office has implemented process reforms. Those reforms enable more streamlined and less burdensome means for parties to seek renewal of previously granted temporary exemptions that do not face any significant opposition. The Office's process streamlining also weighs against the need for legislative amendment to Section 1201.

If Congress Considers Amending Section 1201, It Should Only Do So Narrowly

In our new book, *Modernizing Copyright Law for the Digital Age – Constitutional Foundations for Reform* as well as in *Perspectives from FSF Scholars* papers, we have forthrightly called for Congress to update statutory provisions that do not sufficiently protect copyrights. For instance, Section 512 and its "notice-and-takedown" provision is outdated and ineffective at curbing mass-scale online piracy by users of online platforms such as YouTube. But we do not consider amending Section 1201 to be necessary.

Section 1201 is working successfully. By securing access-based services for copyrighted content, the statute serves an immensely valuable role in the Digital Age economy. And the exemption provisions are functioning and remain adaptable to future innovation and uses. For these reasons, the safer course is for Congress to leave Section 1201 as it is rather than change the statute.

However, in the event Congress seeks to amend Section 1201, it should do so only for purposes of clarifying or establishing narrow permanent exemptions or for further streamlining temporary exemption renewals. As observed earlier, the Copyright Office did recommend Congress consider expanding and clarifying the permanent exemptions for security testing under Section 1201(j) and for encryption research under Section 1201(g). The Copyright Office also recommended Congress consider establishing new permanent exemptions for subjects of routinely granted temporary exemptions. Although the temporary exemption process renders congressional amendments unnecessary regarding those subjects, such amendments might not be unreasonable if confined to the basic parameters set out in the Copyright Office's Section 1201 study.

Additionally, the Copyright Office's 2017 study on Section 1201 recommended that Congress consider adopting the use of presumptions and burden-shifting procedures. Such procedural mechanisms could reduce hurdles to making future renewals for exemptions that lack significant opposition. The Copyright Office's revisions to its triennial rulemaking process for uncontroversial renewals appear to make further process reforms unnecessary. However, if kept within the narrow confines set forth by the Copyright Office, such an amendment to the rulemaking process could further streamline such renewals and might not jeopardize anti-circumvention rights. Housekeeping amendments to eliminate initial implementing provisions for Section 1201 that no longer serve any purpose might also be adopted without jeopardizing anti-circumvention rights.

Rightly, the Copyright Office's Section 1201 study recommended against Congress amending the basic framework for Section 1201. The Office also recommended against a number of amendments suggested by critics of Section 1201. Congress should take those recommendations seriously and resist calls by Section 1201 critics to re-write the law.

Conclusion

The widespread popularity and economic success of subscription and on-demand models for accessing copyrighted content depend on strong anti-circumvention rights contained in Section 1201 of the Digital Millennium Copyright Act (DMCA). By prohibiting the use and trafficking

of technologies to circumvent legitimate "technological protection measures" that control access to copyrighted content, Section 1201 protects the value of copyrighted content and supports the commercial viability of access-based models for video and music.

The Senate Subcommittee on Intellectual Property is undertaking a review of the DMCA, with an eye toward modernizing copyright law. But Section 1201 is working and it is best left alone. Yet if Congress seeks to amend the statute, such as by clarifying permanent exemptions for security testing, encryption research, or by streamlining temporary exemption renewals, it should do so only within the narrow parameters set out in the Copyright Office's Section 1201 study. In all cases, Congress must preserve strong anti-circumvention rights so that copyright owners and streaming service providers can continue relying on encryption and password protection to give access to paying consumers and to prevent access by unauthorized users.

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Further Reading

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