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**D.C. Circuit Should Affirm the Constitutionality of
Anti-Circumvention Rights**

by

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At issue in a case now before the D.C. Circuit is the constitutionality of the law protecting copyright owners' right to exercise reasonable control over access to their works. Opponents of the law claim that it infringes their First Amendment free speech rights. But Section 1201 of the Digital Millennium Copyright Act (DMCA) is a speech-neutral law intended to aid copyright owners in preventing bad actors from misappropriating the value of their property. The D.C. Circuit ought to affirm Section 1201's constitutionality with flying colors.

For copyright owners in 2022, sales of subscriptions for viewing or listening to their creative works are often more important than sales of copies. And "technological protection measures" (TPMs) are integral to subscription-based models for accessing copyrighted content via Internet connections. TPMs such as encryption and password systems ensure that video and music services like Netflix and Spotify can be enjoyed by subscribers, but not exploited by pirates or freeloaders.

Similar to how the law of trespass protects property owners against unauthorized access to their land, Section 1201 protects copyright owners against those who intentionally subvert TPMs in order to access their copyrighted content. Sections 1201(a) and 1201(b) prohibit the

circumvention as well as the trafficking of services and devices that circumvent TPMs for controlling access to copyrighted content. Both provisions are directed toward technologies that are designed primarily to circumvent TPMs, have only limited commercially significant purposes other than circumventing TPMs, or are marketed or used in concert with a person with knowledge of intended use for circumventing TPMs. Free State Foundation President Randolph May and I wrote more about the importance of the law securing TPMs in our October 2020 *Perspectives from FSF Scholars*, "[Congress Should Preserve Anti-Circumvention Rights: The Online Market for Movies and Music Depends on DMCA Section 1201.](#)"

In *Green v. U.S. Department of Justice*, now pending at the D.C. Circuit, the plaintiffs claim that Section 1201 is facially overbroad and thereby burdens "a substantial range of protected speech that is disproportionate to its legitimate sweep." But Section 1201's anti-circumvention and anti-trafficking provisions don't directly regulate speech. The law doesn't restrict any particular message or group of messengers. After all, the law is directed at the prevention of unauthorized access to copyrighted property belonging to third parties. To the extent that Section 1201 conceivably could pose some sort of indirect and incidental burden on speech having to do with TPMs, such instances would be decidedly rare and pale in comparison with the myriad instances in which the law does not impose any speech burden.

Other courts rightly have rejected claims that Section 1201 amounts to an overbroad speech restriction. For example, in *Universal City Studios, Inc. v. Corley* (2001), the Second Circuit held that Section 1201(a)'s anti-circumvention prohibition implicates functional, non-speech aspects of computer codes, thus rendering it content neutral and subject to intermediate-level scrutiny. Under intermediate-level scrutiny, a restriction must further a substantial government interest, the interest must be unrelated to speech suppression, and the restriction must not burden substantially more speech than necessary to accomplish that substantial interest. The Second Circuit correctly determined that those prohibitions pass intermediate scrutiny because they further substantial government interests in stopping mass-scale digital piracy.

The plaintiffs in *Green* also claim that Section 1201's prohibitions – in combination with the triennial rulemaking process conducted by the Copyright Office for establishing temporary exemptions from the law for specific categories of conduct – amount to an unconstitutional speech licensing regime and a prior restraint on speech. But this over-hyped claim lacks support in First Amendment jurisprudence.

As the Supreme Court explained in *City of Lakewood v. Plain Dealer Publishing Company* (1998), "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on content or viewpoint of speech by suppressing disfavored speech or disliked speakers." And in *Thomas v. Chicago Park District* (2002), the Supreme Court stated that the existence of a prior restraint on speech depends on whether the government has "unconfined authority to pass judgment on the content of speech." But Section 1201 lacks these hallmarks of a speech license or prior restraints. This content-neutral law's narrow focus on protecting control over access to the copyrighted property of third parties belies any discriminatory power to disfavor particular speech or speakers.

Furthermore, it is to Congress's credit that Section 1201 contains a triennial rulemaking process for granting temporary – and renewable – exemptions for non-infringing uses of particular classes of works. Those temporary exemptions supplement permanent exemptions contained in the statute for beneficial non-infringing uses of anti-circumvention technologies. For instance, Section 1201(f)'s exemption for reverse engineered interoperable computer programs protects fair use.

Not surprisingly, plaintiffs in *Green* failed to persuade the trial court on their First Amendment claims. Those claims should fare no better on appeal. Section 1201 is not a speech suppression law – and it doesn't even come close. The D.C. Circuit should recognize that Section 1201 is a content-neutral provision that serves the government's interest in preserving copyrighted property from unauthorized access and misappropriation of its value. The court should uphold the anti-circumvention rights of copyright owners.

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Further Readings

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