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Court Ruling Reinforces Copyright Owners' Anti-Circumvention Rights

by

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A federal court decision issued on September 30 provided a solid interpretation of a federal law protecting against unauthorized access to valuable copyrighted movies, TV shows, music, and ebooks. In *Yout v. Recording Industry Association of America*, the court held that federal law prohibits the circumvention of technical measures used by an online platform that restrain access to copyrighted content by ordinary consumers using that platform in the ordinary course of operation.

The court's careful reasoning in *Yout v. RIAA* about the capacious meaning of key terms contained in Section 1201(a) of the Digital Millennium Copyright Act (DMCA) should be viewed as persuasive authority by courts in future court cases involving the anti-circumvention rights of copyright owners. Indeed, the court ruling hopefully will dissuade other online edge service companies from designing and marketing technologies intended to circumvent restrictions on access to copyrighted content.

In today's digital economy, American consumers increasingly enjoy movies, TV shows, music sound recordings, and ebooks through subscription to Internet-based streaming services like

Netflix, Spotify, and OverDrive. But the success of the subscription access model depends on copyright owners being able to protect the value of their creative content by maintaining control over who gains access to it. Online subscription services that license copyrighted content for viewing or listening typically use "technological protection measures" (TPMs) to ensure that only paying subscribers receive access to such content.

Importantly, Section 1201(a) of the DMCA bolsters copyright owners' right to control access to their content by prohibiting the use of, or trafficking in, technologies that are intended to defeat or bypass TPMs. Section 1201(a)(1) contains what is known as the "access control" or "effective access provision." It provides that "[n]o person shall circumvent a technological measure that effectively controls access" to a copyrighted work.¹ And Section 1201(a)(2) contains what is known as the anti-trafficking provision. It states that "[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof" that is designed as well as marketed for circumventing TPMs and that lacks another commercially significant purpose.² Free State Foundation President Randolph May and I describe the property rights' basis and continuing importance of this law 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."³

Yout is an online provider of a software service that allows users to download audio, video, and combined audio/video files from major streaming sites, including YouTube. It has described the service as a "stream recording tool" and has generated revenues through online ads and sales of subscriptions.⁴ Its service enables users to enter a URL linked to Internet content to create personal copies that are downloadable to the user's device. The content accessed by Yout's service is publicly accessible and not guarded by a paywall, encryption, or a cipher.

Yout's service enables its users to download files directly from YouTube through a simple automated process. By comparison, YouTube allows its users to download posted video or audio files only through a discrete and complex multi-step process. Those steps – summarized simplistically – involve using Chrome browser's Developer Tools menu to identify the file, copying and pasting a "Request URL" into a new browser window, and then modifying a number sequence in order to obtain a downloadable file copy.⁵

In October 2019, RIAA sent a notice to Google to delist Yout's software service from its search results because Yout circumvents YouTube's access control mechanisms for posted

¹ 17 U.S.C. § 1201(a)(1).

² 17 U.S.C. § 1201(a)(2).

³ Randolph J. May and Seth L. Cooper, "Congress Should Preserve Anti-Circumvention Rights: The Online Market for Movies and Music Depends on DMCA Section 1201," *Perspectives from FSF Scholars*, Vol. 15, No. 52 (October 6, 2020), at: <https://freestatefoundation.org/wp-content/uploads/2020/10/Congress-Should-Preserve-Anti-Circumvention-Rights-100620.pdf>.

⁴ See *Yout, LLC v. Recording Industry Association of America*, U.S. Dist. Ct. of Conn., Case No. 20-1602, Ruling on Defendant's Motion to Dismiss (September 30, 2022) at 38.

⁵ See *id.* at 2-3.

content. In response to RIAA's notice, allegedly Google delisted Yout, and some Yout customers apparently cancelled their subscriptions as a result. Yout filed a lawsuit against RIAA that, among other things, sought a declaratory judgment that Yout's service does not violate Section 1201(a).

On September 30, the U.S. District Court for the District of Connecticut issued its decision in *Yout, LLC v. Recording Industry Association of America*, dismissing all of Yout's claims against RIAA, including a Yout's request for a declaratory judgment. The Court found that Yout failed adequately to plead that it did not violate the Section 1201(a)(1)'s "control access" provision by causing unauthorized access to copyrighted works. And the court found that Yout similarly failed to show that it did not violate Section 1201(a)(2)'s anti-trafficking provisions, since its service was designed as well as marketed to circumvent YouTube's TPMs, and it lacked any significant commercial purpose other than circumventing YouTube's TPMs.

The District Court's decision in *Yout v. RIAA* helpfully clarified the meaning and scope of Section 1201(a) in at least five respects:

First, a TPM need not be put in place by the copyright owner but instead may be put in place by a third-party service provider. As the District Court recognized, Section 1201(a)(3) "defines circumvention and effectiveness in reference to the 'authority of the copyright owner,' but it does not require that the copyright owner establish an access control."⁶ The court rightly declined to read such a requirement into the law. A service provider such as YouTube that makes use of TPMs in offering licensed copyrighted content to consumers is thus acting consistent with the copyright owner's authority.

Second, a TPM includes emergent technologies that prevent access to copyrighted works. Although the DMCA does not define the meaning of a "technological measure" or TPM, the District Court explained, "construing 'technological measure' capaciously is consistent with the purposes of the Copyright Act" because "Congress used broad enough language to ensure that the DMCA would accommodate new and evolving technologies."⁷ Although Section 1201(a)(3)(A) states that "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,"⁸ the court held that "scrambling and encryption do not constitute an exhaustive list of technological measures," and that "an access control need not necessarily 'prevent access' like a lock or safe in order to constitute a 'technological measure.'"⁹ Thus, the court found it was not necessary that YouTube use a password, encryption, or similar mechanism to prevent access to content on its website in order for its TPM to meet the statute's definition.

⁶ *Id.* at 18.

⁷ *Id.* at 17.

⁸ 17 U.S.C. § 1201(a)(3)(A).

⁹ *Id.* at 17.

Third, the term "controls access" includes measures that "restrain" user access to copyrighted content. The District Court consulted the relevant dictionary definition of "control" as "to exercise restraining or directing influence over" as well as the definition of "access" as "freedom or ability to obtain or make use of something."¹⁰ And it determined that the plain meaning of the statutory term "controls access" appears broader than "prevents access."¹¹ Accordingly, the court determined that Section 1201(a) encompassed TPMs that "restrain a YouTube user's freedom or ability to access the location where downloadable files are stored and download them."¹²

Fourth, an "effective" TPM need not be "strong" or prevent access to copyrighted content in all instances. In interpreting Section 1201(a)(3)(A)'s provision that a TPM "effectively control access" to a copyright owner's work, the District Court found that "prevailing precedent construes the term 'effective' capaciously,"¹³ and that a TPM need not constitute "an impenetrable barrier" or provide "airtight protection."¹⁴ Moreover, "[e]ven the existence of ubiquitous tools to circumvent the TPM will not necessarily render the measure ineffective as a matter of law,"¹⁵ as "the relative strength or weakness of a technological measure is not dispositive regarding its efficacy."¹⁶ And in applying this interpretation of the law, the court found that Yout's service "bypasses" YouTube's TPM because it affirmatively modifies the Request URL, causing a user to access content that is not otherwise available.¹⁷

Fifth, the statute requires evaluation of a TPM's efficacy from the standpoint of an "ordinary consumer" using a platform in the "ordinary course of its operation." The District Court determined that if an ordinary user in the ordinary course of using an online service with a technical measure in place does *not* access the copyrighted content – even if such access is available – then the TPM effectively controls access to that content. But the court found that Yout never alleged that an ordinary user downloads content in the ordinary course of using YouTube. As the court observed, "the ordinary YouTube player page provides no download button and appears to direct users to stream content."¹⁸ Rather, accessing downloadable content via YouTube requires taking steps that amount to "an extraordinary use of the YouTube Platform, which is self-evident from the fact that the steps access downloadable files through a side door, the Developer Tools menu, and that users must obtain instructions hosted on non-YouTube platforms to explain how to access the file storage location and their files."¹⁹

In sum, *Yout v. RIAA*, the District Court rightly avoided unduly narrow interpretations of the Section 1201(a) regarding effective TPMs that restrain access to copyrighted content, and it

¹⁰ *Id.* at 15.

¹¹ *Id.* at 14.

¹² *Id.* at 14.

¹³ *Id.* at 16.

¹⁴ *Id.* at 25.

¹⁵ *Id.* at 29.

¹⁶ *Id.* at 30.

¹⁷ *Id.* at 31.

¹⁸ *Id.* at 26-27.

¹⁹ *Id.* at 26.

reasonably interpreted the law consistent with the DMCA's underlying purpose to "strengthen copyright protection in the digital age."²⁰ Following the court's decision, other online edge service companies should think twice before designing and marketing technologies to circumvent restrictions on access to copyrighted content. Although district court decisions do not constitute binding precedent, the court's careful reading of statutory terms presented in *Yout* should be persuasive in guiding other federal courts in future cases involving TPMs and the anti-circumvention rights of copyright owners.

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Further Readings

Seth L. Cooper, "[In Debate Over Radio Royalties, Congress Should Favor Property Rights](#)," *FSF Blog* (September 6, 2022).

Seth L. Cooper, "[State Restrictions on Ebook Licensing Prices Are Preempted by Federal Law](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 26 (May 20, 2022).

Seth L. Cooper, "[World IP Day 2022: Strengthen Copyright Protections for Creative Works](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 22 (April 26, 2022).

Randolph J. May and Seth L. Cooper, "[State Laws Forcing Publishers to License Ebooks to Libraries Are Unlawful](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 14 (March 21, 2022).

Seth L. Cooper, "[American Music Fairness Act Would Secure Copyrights in Sound Recordings](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 11 (February 24, 2022).

Seth L. Cooper, "[D.C. Circuit Should Affirm the Constitutionality of Anti-Circumvention Rights](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 8 (February 2, 2022).

Randolph J. May and Seth L. Cooper, "[Congress Should Preserve Anti-Circumvention Rights: The Online Market for Movies and Music Depends on DMCA Section 1201](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 52 (October 6, 2020).

²⁰ *Id.* at 8 (quoting *Universal City Studios v. Corley*, 273 F.3d 429, 435 (2d Cir. 2001)).