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Keeping Princess Peach Locked in Her Castle: Criminal Liability for Trafficking Circumvention Technology—United States v. Reichert

Jacob M. Abdo

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KEEPING PRINCESS PEACH LOCKED IN HER CASTLE: CRIMINAL LIABILITY FOR TRAFFICKING CIRCUMVENTION TECHNOLOGY—UNITED STATES V. REICHERT

Jacob M. Abdo†

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1. Princess Peach is a character from the highly popular video game franchise, Mario Bros. See Rus McLaughlin, IGN Presents: The History of Super Mario Bros., IGN (Sept. 13, 2010), http://www.ign.com/articles/2010/09/14/ign-presents-the-history-of-super-mario-bros?. At the game’s inception, Princess Peach served as an object for the hero, Mario, to rescue from the villain, Bowser. Id.
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UNITED STATES V. REICHERT

I. INTRODUCTION

Laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.2

—Thomas Jefferson

In United States v. Reichert, the Sixth Circuit upheld Jeffrey Reichert’s criminal conviction for willfully trafficking in video game modification chips in violation of §§ 1201 and 1204 of the Digital Millennium Copyright Act (DMCA).3 On appeal, the court found that the contested, deliberate ignorance jury instruction did not constitute a reversible error.4 Although correctly decided based on existing law, Reichert highlights new concerns and issues regarding criminal prosecution under the DMCA.

Part II of this case note presents a concise history of the DMCA5 followed by an examination of §§ 12016 and 12047 of the DMCA. Part III discusses Reichert’s facts and procedure,8 holding,9 and dissent.10 Part IV analyzes Reichert11 and discusses its effects on consumer rights.12 Part V concludes that courts should reject Reichert’s relaxed treatment of § 1204’s mens rea element.13

II. COPYRIGHT LAW

United States copyright law is rooted in the Constitution’s mandate “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive...
right to their respective writings and discoveries." Under the federal copyright regime, authors are granted, for a limited time, a collection of exclusive rights in their "original works of authorship fixed in a tangible medium of expression." The owner of a copyrighted work has the exclusive right to reproduce; prepare derivative works; distribute; display; and in the case of sound recordings, the right to perform the copyrighted work via digital audio transmission. Copyright does not exist to merely reward the author for her labors. The true underlying goal of copyright is to provide the quantum of protection necessary to encourage authors to create and disseminate new, original works.

A. History of the Digital Millennium Copyright Act

Traditionally, the United States federal copyright regime has taken a "technology neutral" approach—regulating the use of works rather than devices or means used to access them. However, the digital revolution of the late twentieth century and its disruptive impact on the production and consumption of copyrighted material prompted content industries to urge Congress to amend the copyright statute. Accordingly, Congress enacted the DMCA

20. See, e.g., WHITE PAPER, supra note 19, at 12 ("The emergence of integrated information technology is dramatically changing, and will continue to change, how people and businesses deal in and with information and information products . . .").
21. See Digital Millennium Copyright Act Section 104 Report: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the Comm. on the Judiciary, 107th Cong. 11–14 (2001) [hereinafter Section 104 Report], available at http://commdocs.house.gov/committees/judiciary/hju76669.000/hju76669_0.htm (statement of Howard L. Berman, Ranking Member, Subcomm. on Courts, the
to combat piracy of digital works, to advance electronic commerce, and to implement the World Intellectual Property Organization (WIPO) Copyright Treaty. Among other things, the DMCA proscribes the sale of devices that circumvent technologies that effectively protect copyrighted works. In enacting the DMCA, Congress reasoned that the prohibition on circumvention was an important extension of the longstanding protection against copyright infringement. Congress sought to maintain the balance between the interests of copyright owners and consumers by carving out “breathing space” for the fair use of copyrighted material. Commentators, however, were quick to note that the DMCA expanded the scope of copyright protection and provided copyright holders a substantial new control over the means of distribution.

B. Circumvention Liability Under § 1201 of the Digital Millennium Copyright Act

Section 1201 of the DMCA proscribes the circumvention of technologies that effectively protect copyrighted content. Circumvention is defined as the “descrambling, decrypting,
avoiding, bypassing, removing, deactivating or impairing" of technological protection measures (TPMs) through technological means.\(^{29}\) Circumvention is often likened to "digital trespass,"\(^{30}\) and circumvention technology is likened to a "skeleton key."\(^{31}\)

Congress justified the prohibition against circumvention on the grounds that it brought copyright infringement into the digital era.\(^{32}\) Commentators have roundly rejected this assertion, finding that circumvention liability represents "an unprecedented departure" into the regulation of devices under the guise of copyright law.\(^{33}\)

There are two categories of circumvention liability under the DMCA: "access control" and "copy control."\(^{34}\) Access control liability prohibits circumventing an access control TPM\(^{35}\) as well as trafficking in access control circumvention technology.\(^{36}\) Whereas copy control liability only prohibits trafficking technology that circumvents a copy control TPM,\(^{37}\) the act of circumventing a copy


\(^{30}\) See, e.g., Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1196 (Fed. Cir. 2004).

\(^{31}\) See, e.g., Corley, 273 F.3d at 453-54 (likening circumvention software to a skeleton key that can open a locked door, a combination that can open a safe, or a device that can neutralize the security device attached to a store's products).

\(^{32}\) Accord Chamberlain, 381 F.3d at 1195; see S. REP. NO. 105-190, at 12 (1998).

\(^{33}\) H.R. REP. NO. 105-551, pt. 2, at 24 (1998) (discussing a letter sent to Congress signed by sixty-two copyright law professors expressing concern regarding the regulation of devices in the name of copyright law); see also Robert P. Merges, One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000, 88 CALIF. L. REV. 2187, 2202 (2000) ("The protection of expression . . . is for the first time achieved through the regulation of devices.").

\(^{34}\) 17 U.S.C. § 1201(a)-(b) (2012).

\(^{35}\) Id. § 1201(a)(1) ("No person shall circumvent a technological measure that effectively controls access to a work protected under this title.").

\(^{36}\) Id. § 1201(a)(2) ("No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title . . . .").

\(^{37}\) Id. § 1201(b)(1) ("No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that
control TPM is not itself prohibited under the DMCA. This is because circumventing a copy control TPM is essentially copyright infringement under § 106(1). Because a single device may function as both an access control and a copy control TPM, a single act of circumvention can violate both § 1201(a) and § 1201(b).

For liability to attach in a § 1201(a)(2) trafficking action, a plaintiff must prove: (1) ownership of a valid copyright on a work, (2) effectively controlled by a technological measure, which has been circumvented, (3) that third parties can now access without authorization, in a manner that (5) infringes or facilitates infringing a right protected by the Copyright Act, because of a product that (6) the defendant either (i) designed or produced primarily for circumvention; (ii) made available despite only limited commercial significance other than circumvention; or (iii) marketed for use in circumvention of the controlling technological measure.

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38. See Ticketmaster L.L.C. v. RMG Techs., Inc., 507 F. Supp. 2d 1096, 1112 (C.D. Cal. 2007) ("Sections 1201(a)(2) and 1201(b)(1) differ only in that 1201(a)(2), by its terms, makes it wrongful to traffic in devices that circumvent technological measures that control access to protected works, while 1201(b)(1) makes it wrongful to traffic in devices that circumvent technological measures that protect rights of a copyright owner in a work.").


40. See, e.g., Apple, Inc. v. Psystar Corp., 673 F. Supp. 2d 931, 941-42 (N.D. Cal. 2009) (finding a likely violation of both § 1201(b)(1) and § 1201(a)(2) when a computer software’s "access control" was circumvented and the program was subsequently copied to the computer’s RAM when the program was loaded), aff’d in relevant part, 658 F.3d 1150, 1152 (9th Cir. 2011). See generally MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 519 (9th Cir. 1993) ("[I]t is generally accepted that the loading of software into a computer constitutes the creation of a copy under the Copyright Act.").


Under § 1201, a technology's primary purpose is determined by its function and not the creator's subjective intent.\textsuperscript{43} Further, a TPM that is easily circumvented may still effectively control access to a work.\textsuperscript{44} The circuits are split regarding whether a plaintiff must establish a relationship between the alleged circumventing technology and copyright infringement.\textsuperscript{45} The Federal Circuit holds that a § 1201 plaintiff must establish a "nexus to infringement" between the circumvention technology at issue and the copyrighted material.\textsuperscript{46} The Ninth Circuit, however, requires no such nexus.\textsuperscript{47} The circuits also disagree about whether a plaintiff must show that the defendant lacked the copyright owner's permission to circumvent.\textsuperscript{48} The Federal Circuit holds that a § 1201 plaintiff must show that the third party engaged in unauthorized access of copyrighted content using the technology in question,\textsuperscript{49} whereas the Second Circuit holds that liability attaches whenever circumvention occurs.\textsuperscript{50}

\textsuperscript{43} See Universal City Studios, Inc. v. Corley, 273 F.3d 429, 457 (2d Cir. 2001) (rejecting that intent to cause harm is required); Realnetworks, Inc. v. DVD Copy Control Ass'n, 641 F. Supp. 2d 913, 939 (N.D. Cal. 2009) ("[T]here is no intent element to the element of circumventing protection afforded by a technological measure . . . ." (internal quotation marks omitted)); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 318 (S.D.N.Y. 2000) (holding that motivation is immaterial).

\textsuperscript{44} See Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 549 (6th Cir. 2004) (commenting that a TPM does not need to be "an impervious shield" to effectively control access to a copyright-protected work); see also 321 Studios, 307 F. Supp. 2d at 1095 (stating that a TPM may still effectively protect copyrighted work despite the availability of circumvention technology).

\textsuperscript{45} See United States v. Reichert, 747 F.3d 445, 458 (6th Cir. 2014) (Donald, J., dissenting) ("[T]he circuit split is representative of an ongoing debate over the . . . scope of the DMCA's anti-circumvention provision [regarding] whether certain applications of § 1201 have undermined the delicate balance that Congress sought to achieve between strengthening copyright law and preserving consumer rights . . . in our increasingly digitized culture.").

\textsuperscript{46} MDY Indus., LLC v. Blizzard Entm't, Inc. 629 F.3d 928, 949 (9th Cir. 2010) (discussing the "nexus to infringement" requirement in the Federal Circuit as found in Chamberlain, 381 F.3d at 1192–1203).

\textsuperscript{47} Id. at 953 n.16.

\textsuperscript{48} See id. (declining to adopt "nexus to infringement").

\textsuperscript{49} Id. at 1193.

The DMCA established several exceptions to circumvention liability. First, the Act incorporated traditional defenses against copyright infringement—such as fair use—into its statutory framework.\textsuperscript{51} Second, the Act enumerated eight permissible types of circumvention.\textsuperscript{52} Third, the Act charged the Library of Congress\textsuperscript{53} to evaluate and create further statutory exemptions to circumvention liability.\textsuperscript{54} Factors relevant to the Library of Congress’s inquiry include:

(1) the availability for use of copyrighted works; (2) the availability for use of works for nonprofits archival, preservation, and educational purposes; (3) 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; (4) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (5) such other factors as the Librarian considers appropriate.\textsuperscript{55}

The Library of Congress has shielded eight classes of technology from circumvention liability\textsuperscript{56} including read-aloud software that assists disabled persons to read electronic works,\textsuperscript{57}

\textsuperscript{51} 17 U.S.C. § 1201(c) (2012) ("Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use . . . .").

\textsuperscript{52} See id. § 1201(d)–(j). The following entities are immunized from circumvention liability: nonprofit libraries, archives, educational institutions, law enforcement, intelligence, and other government security agencies. Id. Further, circumvention liability does not attach when circumvention is undertaken for the following purposes: reverse engineering, encryption research, protecting minors, and protection of personally identifying information. Id.

\textsuperscript{53} See id. § 1201(a)(1)(C) ("[The Library of Congress acts] upon the recommendation of the Register of Copyrights, who . . . consult[s] with the Assistant Secretary for Communications and Information of the Department of Commerce.").

\textsuperscript{54} Id. § 1201(a)(1)(B)–(C).

\textsuperscript{55} Id. § 1201(a)(1)(C)(i)–(v). The constitutionality of this process has been questioned on the grounds that the Librarian of Congress is not a member of the executive branch and thus lacks requisite authority to make these recommendations. See Pamela Samuelson, Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised, 14 BERKELEY TECH. L.J. 519, 559 n.209 (1999).

\textsuperscript{56} See 37 C.F.R. § 201.40 (2014).

\textsuperscript{57} Id. § 201.40(b)(1).
computer programs that permit cellular telephones to be used on a different wireless network, and technologies that circumvent DVD Content Scrambling Systems when circumvention is necessary to produce high-quality content required for educational purposes.

The DMCA affords few defenses for a defendant charged with trafficking circumvention technology. For example, fair use is not a recognized defense against trafficking liability because circumvention—not copyright infringement—is the punishable offense. Of the enumerated exceptions, only the law enforcement, reverse engineering, encryption research, and security testing apply to the anti-trafficking provision. Further, the exceptions adopted by the Library of Congress are not applicable to a § 1204 defendant.

58. Id. § 201.40(b)(3).
59. Id. § 201.40(b)(4).
60. "[T]he fair use of a copyrighted work . . . is not an infringement of copyright." 17 U.S.C. § 107. Factors relevant to the determination of whether a work was fairly used include:

   (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
   (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.


63. 17 U.S.C. § 1201(a)(1)(E) ("Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph.").
C. Criminal Prosecution for Circumvention Under § 1204 of the Digital Millenium Copyright Act

Section 1204 of the DMCA established criminal liability for "[a]ny person who violates section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain." Penalites are severe. A first time offense carries a maximum fine of $500,000, five years imprisonment, or both. Subsequent offenses carry a maximum fine of $1,000,000, ten years imprisonment, or both. In criminal copyright prosecution, civil copyright case law has precedential value. This applies to jury instructions as well.

For criminal liability to attach under § 1201(a)(2) and § 1204 of the DMCA, the government must prove that the defendant:

1. willfully
2. manufactured or trafficked in
3. a technology, product, service, or part thereof
4. that either:
   a. is primarily designed or produced for the purpose of
   b. "has only limited commercially significant purpose or use other than" or
   c. 'is marketed by that person or another acting in concert with that person with that person's knowledge for use in'
5. circumventing an access control without authorization from the copyright owner
6. for commercial advantage or private financial gain.

Some commentators suggest that in its effort to deter digital piracy of copyrighted works, the government will increasingly rely on criminal prosecution for copyright infringement. There is merit to this argument, especially when the infringer is civilly...

64. Id. § 1204(a).
65. Id. § 1204(a)(1).
66. Id. § 1204(a)(2).
67. See United States v. Wise, 550 F.2d 1180, 1188 n.14 (9th Cir. 1977).
68. See United States v. Cross, 816 F.2d 297, 303 (7th Cir. 1987).
70. See Jonathan Bick, Internet Copyright Infringement: An Emerging White-Collar Crime Internet, BICKLAW.COM, www.bicklaw.com/Publications/InternetCopyrightInfringement.htm (last visited Apr. 26, 2015) (hypothesizing that public policy will spur governments to seek criminal prosecution for Internet copyright infringement).
judgment-proof.\textsuperscript{71} To date, the United States has pursued relatively few criminal prosecutions under § 1204.\textsuperscript{72} As of January 2015, a Westlaw search produced eight § 1204 criminal proceedings.\textsuperscript{73} Of these cases, only one is designated as a published appellate opinion: \textit{United States v. Reichert}.\textsuperscript{74}

The lack of appellate case law and the relative complexity of §§ 1201 and 1204 has produced confusion among the courts. For example, in \textit{Reichert}, the trial court all but ignored § 1204’s mens rea element when it issued a jury instruction that effectively made the sale of circumvention technology a strict liability offense.\textsuperscript{75} On appeal, the Sixth Circuit declined to construe the scope and reach of the crime’s mens rea.\textsuperscript{76} This sets dangerous precedent for future § 1204 prosecutions.


\textsuperscript{72} For a complete list of § 1204 prosecutions, see infra note 73.


\textsuperscript{74} 747 F.3d 445. The methodology used to conduct this study was as follows: first, Author entered “17 U.S.C. 1204” into the Westlaw database; second, Author selected the “Citing References” tab on Westlaw page that corresponded to the statute; third, Author read each case contained within the “Citing References” page to confirm that § 1204 was the dispositive issue.

\textsuperscript{75} Id. at 449–50; see also Proposed Jury Instruction at 2–3, \textit{United States v. Reichert}, No. 1:12 CR 177 (N.D. Ohio Jan. 18, 2013) (documenting the defendant’s proposed jury instructions).

\textsuperscript{76} \textit{Reichert}, 747 F.3d at 451.
III. THE REICHERT DECISION

A. Facts and Procedure

Jeffrey J. Reichert operated a video game console modification business. For a fee, Reichert modified game consoles to bypass the device's TPM. When properly attached to the printed circuit board, a modification chip circumvents the game console's TPMs. Manufacturers install TPMs to prevent the console from running pirated or otherwise unauthorized games.

Prior to his arrest, Reichert was an active contributor to an online discussion forum dedicated to the topic of video game console modification. The online discussion forum served as a virtual clubhouse where enthusiasts discussed various ways to modify video game consoles. Although only possessing a high school diploma, Reichert was regarded among the forum members as a capable video game console modifier. Reichert routinely advised members about the different types of modification chips, where to obtain pirated video games, and how to conceal modifications from console manufacturers. Although some members may have been unaware of the illegal nature of their

77. See id. at 448 (noting that federal agents seized, among other things, "business cards advertising Reichert's services" when they raided his residence where he also conducted business).
78. Id.
79. Id. at 449, 456.
80. See generally Phillip A. Harris Jr., Mod Chips and Homebrew: A Recipe for Their Continued Use in the Wake of Sony v. Divineo, 9 N.C. J.L. & TECH. 113, 117 (2007) (discussing how modification chips are used to enhance video game console functionality and circumvent technological protection measures).
81. Reichert, 747 F.3d at 448.
83. Reichert, 747 F.3d at 449.
84. Id. at 449, 454. Among members, Reichert was known as "the only person . . . that knew there was another way . . . to modify a certain type of console." Id. at 449.
85. Id. at 449. In one such post, Reichert told a member of the forum that a certain modification chip was "the best chip for sure," but warned the novice gamer that he risked "screw[ing] stuff up" if he installed the chip improperly. Id.
86. Id.
activities, Reichert posted a comment stating, "[w]e aren't technically supposed to do [installs]," but "no one cares." 87

Unbeknownst to Reichert, the forum had become the focus of a joint Department of Homeland Security and Immigration and Customs Enforcement (ICE) anti-piracy investigation, code named Operation Tangled Web. 88 In 2007, an undercover ICE agent contacted Reichert seeking to buy a modified Nintendo Wii. 89 Reichert agreed. 90 Reichert purchased a Nintendo Wii, modified the console, and sold the illicit device to the agent for a $50 profit. 91 Thereafter, employees of Nintendo, Inc., serving as experts for the United States, verified that the Wii had been successfully "hard-modded with a Wii Key mod chip" and was capable of playing pirated video games. 92

Agents searched Reichert's residence and the garage of his friend, Kevin Belcik, 93 where they discovered modification chips, a soldering iron, computers, and business cards advertising Reichert's services. 94 Reichert admitted to agents that he "knew the mod chips were in a gray area," but he did not believe that it was illegal to sell and install the chips. 95

Reichert was subsequently charged under §§ 1201 (a) (2) (A) and 1204 (a) of the DMCA. 96 At trial, Jason Allen, an Internet piracy

87. Id.
88. Id. at 456.
89. Id. at 448. Nintendo Wii is a popular video game console that was introduced by Nintendo Co., Ltd. in 2006. See Company History, NINTENDO, http://www.nintendo.com/corp/history.jsp (last visited Apr. 24, 2015).
90. Reichert, 747 F.3d at 448.
91. Id.
92. See Exhibit A at 5, United States v. Reichert, No. 1:12 CR 177 (N.D. Ohio Jan. 18, 2013). The modified Nintendo Wii successfully loaded and ran a pirated version (i.e., an unauthorized copy) of Super Paper Mario (DVD-R format). See id. Had the console's technological protection measures been functioning correctly, the Wii would have produced an error message and prohibited game play when the pirated game was placed in the device. See id.
93. Reichert, 747 F.3d at 448.
94. Id.
95. Id. at 449.
96. 17 U.S.C. § 1201(a)(2)(A) (2012) ("No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title."); Reichert, 747 F.3d at 448 (noting Reichert's charge and when "[c]ircumventing or trafficking in
specialist with Nintendo testified that the "primary purpose" of modification chips [was] to enable a user to play pirated video games." The witness then explained how the Wii video game console would be disassembled and the modification chip soldered to the device’s circuit board. In the witness's opinion, the modification process was a "pretty complicated process," given that the modifier need[ed] to identify the proper locations to attach the wires and because holding a soldering iron for too long could damage the [circuit] board. Although evidence tended to show "that Reichert did not knowingly order his modified chips from an international source," Allen testified, "it is pretty well known among the community that in the United States mod chips without licenses are illegal.

In his defense, Reichert argued that he believed that modifying video game consoles was legally permissible. Reichert's sole witness, Kevin Belcik, testified that Reichert had received instruction on building personal computers from a high school vocational program. Belcik then attempted to testify that modifying a video game console required the same basic knowledge that Reichert had learned in the vocational program. The court sustained the government's objection to this testimony and further disallowed Belcik from stating whether Reichert believed that modifying video game consoles was against the law.

Over Reichert's objection, the district court adopted the government's proposed deliberate ignorance jury instruction. The instruction stated that the jury "may find that [Reichert] knew he was violating the Digital Millennium Copyright Act . . . [if he] deliberately ignored a high probability that he was trafficking in technology primarily designed to circumvent technological
circumvention tools in violation of § 1201 is a criminal offense" under § 1204(a)).
measures designed to effectively control access to a work copyrighted under federal law.\(^\text{106}\)

In his proposed jury instructions, Reichert unpersuasively argued that the deliberate ignorance instruction proposed by the government was incorrect and instead should be replaced by a willful standard, "meaning he knew he was violating the law."\(^\text{107}\) Reichert also failed to persuade the district court that the jury should have been instructed about the non-infringing ways modifications chips are used.\(^\text{108}\)

Before delivering its deliberate ignorance instruction, the district court instructed the jury on willfulness, stating:

As used in these instructions, an act is done willfully if it is done voluntarily and intentionally with the intent to do something unlawfully, that is, with the intent either to disobey or disregard the law. While a person must have acted with the intent to do something the law forbids, the person need not be aware of the specific law or the rule his conduct is violating. Willfulness requires the Government to prove that the law imposed a duty on the Defendant, that the Defendant knew of this duty, and that he voluntarily and intentionally violated that duty.\(^\text{109}\)

The district court then delivered its deliberate ignorance instruction, which stated, in relevant part:

If you are convinced that the Defendant deliberately ignored a high probability that he was trafficking in technology primarily designed to circumvent technological measures designed to effectively control access to a work copyrighted under federal law, then you

\(^{106}\) Id.

\(^{107}\) Proposed Jury Instruction, \textit{supra} note 75, at 2–3.

\(^{108}\) Id. at 3–5. Reichert correctly noted that the owner of a computer program may legally copy that program for archival purposes provided that the copy is destroyed should the holder lose the right to possess the original version. See Brief of Appellant at 5–7, \textit{Reichert}, 747 F.3d 445 (No. 13-3479), 2013 WL 2470411, at *5–7. Additionally, Reichert correctly stated that a rightful owner of software purchased legally from another region might be using a lawfully installed modification chip to circumvent that software's technological protective measures. See id.

\(^{109}\) \textit{Reichert}, 747 F.3d at 450.
may find that he knew he was violating the Digital Millennium Copyright Act.\footnote{110}{Id.}

Reichert was convicted for violating §§ 1201(a)(2)(A) and 1204(a) of the DMCA.\footnote{111}{Id.; see also United States v. Reichert, No. 1:12 CR 177 (N.D. Ohio Jan. 18, 2013), aff'd, 747 F.3d 445.} Over objection, Reichert's sentence was increased on the grounds that his "crime was facilitated by his possession of technical computer skills 'not . . . possessed by members of the general public.'"\footnote{112}{Reichert, 747 F.3d at 450.} Although the district court noted that Reichert was "getting a tough deal," it denied his motion for a reduced sentence.\footnote{113}{Id.; see also United States v. Reichert, No. 1:12 CR 177 (N.D. Ohio Apr. 10, 2013) (memorandum opinion and order denying defendant's motion to impose alternative sentence) (describing sentencing in detail).} Reichert was sentenced to twelve months and one day of imprisonment.\footnote{114}{Reichert, 747 F.3d at 450.} An appeal followed.\footnote{115}{See id.}

B. The Holding

The Sixth Circuit addressed three fundamental issues in Reichert.\footnote{116}{Id.} The first issue was whether the deliberate ignorance jury instruction negated § 1204(a)'s willful mens rea element.\footnote{117}{Id. at 451.} The second issue was whether the exclusion of Belcik's testimony violated Reichert's constitutional right to present a defense.\footnote{118}{Id. at 453.} The third issue was whether the district court erred in applying the special skills enhancement to Reichert's sentence.\footnote{119}{Id. at 454.}

For criminal liability to attach under § 1204(a), the government must show that the accused acted "willfully and for purposes of commercial advantage or private financial gain."\footnote{120}{17 U.S.C. § 1204(a) (2012).} Reichert conceded that a showing of willful blindness would satisfy the crime's mens rea.\footnote{121}{Id. at 451–52.} However, Reichert argued that the deliberate ignorance instruction "eviscerated" § 1204(a)'s mens rea element "by allowing the jury to convict him upon finding only that he [deliberately ignored a high probability] that he was trafficking
in circumvention technology, rather than [a finding that] he knew that he was violating the law by trafficking in [circumvention] technology."\textsuperscript{122} Reichert did not challenge the jury’s findings.\textsuperscript{123}

The court acknowledged that § 1204(a)’s mens rea element was a matter of first impression, but it declined to interpret its scope.\textsuperscript{124} Instead, the court held “that a defendant need not be aware of the specific provision of law that his conduct violates, as long as he is aware that his act is illegal.”\textsuperscript{125} The court reasoned that because the instruction was “sandwiched”\textsuperscript{126} in between clarifying language, the deliberate ignorance principles were “substantially covered” and the crime’s mens rea requirement remained intact.\textsuperscript{127}

The court dispensed with Reichert’s argument that “the instruction failed to properly reflect that a defendant is willfully blind only if he took ‘deliberate action’ to avoid actual knowledge” on the grounds that the language was taken from a pattern jury instruction that has “repeatedly” been upheld.\textsuperscript{128} The court held that although “mildly imprecise,” “when viewed ‘as a whole,’ the jury instructions . . . properly instructed the jury on the issue of willfulness.”\textsuperscript{129} The court speculated that the jury had found Reichert acted willfully because he stated that he was operating in a “‘gray’ area of the law.”\textsuperscript{130}

The court also rejected that the exclusion of Belcik’s testimony violated Reichert’s constitutional right to present a defense.\textsuperscript{131} The exclusion of evidence offends the Constitution when done arbitrarily or disproportionately.\textsuperscript{132} The court found that the proffered testimony “had only marginal relevance to whether

\textsuperscript{122} Id. at 451 (emphasis added).
\textsuperscript{123} Id. at 453.
\textsuperscript{124} Id. at 451.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 452.
\textsuperscript{127} Id. at 453 n.2.
\textsuperscript{128} Id. at 451. See generally KEVIN F. O’MALLEY, JAY E. GRENIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 17:09 (6th ed. 2006) (discussing the Sixth Circuit’s “repeated[] approv[al]” of the Sixth Circuit Pattern Criminal Jury Instruction on “deliberate ignorance”).
\textsuperscript{129} Reichert, 747 F.3d at 452 (quoting United States v. Ross, 502 F.3d 521, 527 (6th Cir. 2007)).
\textsuperscript{130} Id. at 452–53.
\textsuperscript{131} Id. at 454.
\textsuperscript{132} Id. at 453 (citing Holmes v. South Carolina, 547 U.S. 319, 324–26 (2006)).
Reichert believed . . . that his conduct was legal" because Belcik had been away during the time in question.\footnote{133} Finally, the court was unmoved by Reichert’s argument that special skills sentencing enhancement was improper.\footnote{134} Citing Reichert’s half-decade of experience modifying consoles, his adeptness with a soldering iron, and his reputation in the game modification community, the court found that Reichert possessed requisite “special skills” to warrant the sentencing enhancement.\footnote{135} Accordingly, the Sixth Circuit upheld Reichert’s conviction and sentence.

C. The Dissent

Judge Bernice Donald issued the court’s dissenting opinion.\footnote{137} Citing the numerous statutory exceptions to circumvention liability, § 1201’s legislative history,\footnote{136} and subsequent congressional action,\footnote{138} Judge Donald found that Reichert’s appeal must be analyzed through the lens of the modification chip’s uncertain legal standing.\footnote{139} Judge Donald determined that for criminal

\begin{itemize}
  \item \footnote{133} Id. at 454.
  \item \footnote{134} Id. at 454-55.
  \item \footnote{135} Id. at 448-49, 455. In its determination, the court relied heavily on testimony provided by the prosecution’s expert witness—an employee of Nintendo Ltd.—who stated, among other things, that the “modification of a game system can be a pretty complicated process.” Id. at 455 (internal quotation marks omitted); \textit{see also} Exhibit A, supra note 92, at 7.
  \item \footnote{136} Reichert, 747 F.3d at 455.
  \item \footnote{137} Id. (Donald, J., dissenting).
  \item \footnote{138} Id. at 460 (citing Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,570 (Oct. 27, 2000) (codified at 37 C.F.R. § 201)) ("[T]he Librarian of Congress considered, but ultimately declined to create an exemption for mod[ification] chips . . . based on its reasoning that § 1201(f) was sufficient to safeguard against legitimate users of mod[ification] chips . . . from adverse action.").
  \item \footnote{139} See id. at 460 n.3. At the time the Sixth Circuit heard Reichert’s case, there were two bills presented to Congress that would alter the Act’s “framework” by, among other things, requiring a nexus to infringement. \textit{Id.} (citing Unlocking Consumer Choice and Wireless Competition Act, H.R. 1123, 113th Cong. (2014); Unlocking Technology Act of 2013, H.R. 1892, 113th Cong. (2013)). However, these bills have not been passed into law.
  \item \footnote{137} Reichert, 747 F.3d at 460 (Donald, J., dissenting).
\end{itemize}
liability to attach under § 1204, the defendant must know that selling modified video game consoles is illegal.\textsuperscript{141} Under this standard, the instruction should have stated that Reichert willingly violated § 1201 if he "deliberately ignored a high probability that he was breaking [a] law designed to effectively control access to a work copyrighted under federal law" as opposed to "deliberately ignored a high probability that he was trafficking in technology primarily designed to circumvent technological measures designed to effectively control access to a work copyrighted under federal law."\textsuperscript{142}

Judge Donald found that the instruction given by the trial court "directly undermined Reichert's only defense" and "permitted the jury to deliver a guilty verdict upon a lesser finding than the statute's willfulness requirement."\textsuperscript{143} The judge rejected the majority's position that the deficient portion of the instruction was cured because it was "sandwiched between two proper statements of the law."\textsuperscript{144} Because the court could "do no more than guess at what the jury might have done . . . [if] properly instructed," the instruction constituted a reversible error.\textsuperscript{145}

Finding that § 1204's mens rea requirement was "arguably open to various interpretations," Judge Donald argued that the rule of lenity should apply.\textsuperscript{146} This doctrine, which requires criminal statutes to "provide fair warning," mandated that the Government conclusively establish that Reichert acted with the requisite mens rea.\textsuperscript{147} Judge Donald found that the deliberate ignorance jury instruction improperly "convoluted the scienter element of the charge and aggravated the already heightened risk of error stemming from a statute that was itself" ambiguous and impermissible.\textsuperscript{148}

Citing the "overwhelming evidence" that established Reichert's defense, "the ongoing debate over the scope of the DMCA's anti-
circumvention provision," and contemporary legal scholarship, Judge Donald found that had the jury received the correct deliberate ignorance instruction, it would have been "highly improbable" that Reichert would have been convicted.149

IV. ANALYSIS

A. Establishing Liability for Trafficking Circumvention Technology

The majority held that the jury instruction, "viewed 'as a whole,'" sufficiently conveyed § 1204's willfulness requirement because the contested portion of the instruction was "sandwiched between" passages that properly stated the crime's mens rea.150 Accordingly, the court upheld Reichert's conviction.151 Although Reichert purported to have avoided interpreting the scope of § 1204(a)'s mens rea element,152 it is useful to analyze the case and evaluate its likely impact on future §§ 1201(a)(2)(a) and 1204 prosecutions.

1. Jury Instruction

The district court instructed the jury to deliver a guilty verdict if Reichert "deliberately ignored a high probability that he was trafficking in technology primarily designed to circumvent technological measures designed to effectively control access to a work copyrighted under federal law."153

This instruction was flawed because it unnecessarily conflated the issue of trafficking circumvention technology with the technology's primary purpose. In one sentence, the instruction asked the jury to determine whether Reichert was "trafficking in [a] technology" and if that technology was "primarily designed to circumvent" TPMs that effectively protect copyrighted work.154 The instruction was defective because an affirmative response to trafficking may have dictated an affirmative finding that the modification chip was primarily designed for circumvention purposes. Said another way, if Reichert sold a modification chip,
then it must have been the case that the modification chip was primarily designed for circumvention. This is undesirable because it fails to adequately address the crime’s mens rea element.

A more prudent course would be to divide the instruction into a three-prong test. This test would proceed as follows: (1) Did the defendant traffic in a technology? (2) Is the trafficking technology primarily designed to circumvent technological measures that effectively control access to a work? (3) Did the defendant know or deliberately ignore a high probability that the trafficked technology was primarily designed for circumvention purposes? This instruction properly conveys the crime’s mens rea and more clearly states its constituent elements.

2. Civil Liability Under § 1201(a)(2)(A)

Liability attaches under § 1201(a)(2)(A) if and only if the technology at issue “is primarily designed or produced for the purpose of circumventing a [TPM] that effectively controls access to a [copyrighted] work.” Liability does not attach if the technology is merely capable of circumventing a TPM. The determination of a technology’s primary purpose is a matter of fact to be submitted to the jury. Expert witness testimony likely will be required.

In Reichert, the government presented evidence that the modification chip at issue was capable of bypassing a “game console’s security measures.” Further, “the government’s expert

157. 321 Studios, 307 F. Supp. 2d at 1098 (“With regard to the second prong of both § 1201(a)(2) and § 1201(b)(1), it is impossible for this Court to determine on summary judgment whether [the technology] has only limited commercially significant purposes other than circumvention, as this is a question of fact for a jury to decide, and neither party has produced significant evidence on this issue.”).
159. Reichert, 747 F.3d at 449; see also United States’ Response to Defendant’s Motion in Limine at 4–5, United States v. Reichert, No. 1:12 CR 177 (N.D. Ohio Jan. 18, 2013).
witness testified that the primary purpose of modification chips is to enable a user to play pirated video games. 160 Reichert did not present contrary expert witness testimony. 161 Accordingly, it is reasonable to conclude that the jury found that the modification chip that Reichert sold had the primary purpose of circumventing a TPM that controls access to the video game console. 162

Future defendants should not repeat this mistake. A § 1201(a) defendant should go to great lengths to introduce evidence that shows non-circumventing uses for the technology at issue. Additionally, § 1204 defendants should urge that the “beyond a reasonable doubt” standard be used when determining a technology’s primary purpose. Success at this stage should immunize the defendant from criminal and civil liability. 163

3. Criminal Liability Under § 1204(a)

Section 1204(a) provides criminal liability for willfully trafficking circumvention technology. 164 Under § 1204(a), criminal liability attaches if and only if the government proves that the defendant “willfully and for purposes of commercial advantage or private financial gain” violated § 1201 (e.g., sold a technology that is primarily used for circumvention). 165

Because the legal status of the technology is a matter of fact, 166 the government needs to prove that a § 1204 defendant knew that he was trafficking in a technology and that the technology’s primary purpose is to circumvent TPMs. 167 Courts should not

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160. Reichert, 747 F.3d at 449 (internal quotation marks omitted).
161. United States’ Motion in Limine to Exclude Evidence of “Fair Use” and Reference to “Legal” Uses for Mod Chips Under Federal Rules of Evidence 401, 402, 403, and 702, at 3-4, Reichert, No. 1:12 CR 177.
162. See Reichert, 747 F.3d at 449-50.
163. See generally id. at 459 n.2. (“[I]nstalling a mod chip into a console like the Wii for the purpose of enhancing its functionality, so that it can play ordinary and lawfully purchased DVDs, would also seem to fall under the reverse engineering exception at § 1201(f), so long as such a modification was not designed primarily . . . for the purpose of playing illegal, pirated video games.” (internal quotation marks omitted)).
165. Id.
166. 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085, 1098 (N.D. Cal. 2004) (finding that a technology’s commercially significant purpose is a “question of fact for the jury to decide”).
interpret § 1204 to merely require that a defendant willingly sold a circumvention technology. This would undermine Congress’s intent and make the distinction between civil and criminal liability practically nonexistent. For criminal liability to attach, it must be shown beyond a reasonable doubt that a § 1204 defendant: (1) trafficked in a technology, whose primary purpose is to circumvent a technological measure that effectively protects access to a copyrighted work, and (3) the defendant knew or was willfully blind to the technology’s primary purpose.

The way in which a subsequent purchaser uses the technology is not relevant to a § 1204 inquiry. Once the government has demonstrated that the defendant sold a technology whose primary purpose is to circumvent a TPM, evidence of subsequent non-infringing use is not a defense. Nonetheless, subsequent non-infringing use may be relevant to demonstrate that a defendant was not aware of the technology’s primary purpose. This would negate the crime’s willful act requirement. However, civil liability may still attach under § 1201(a)(2)(A).

The effectiveness of this approach has yet to be determined.

The government produced two pieces of evidence that addressed Reichert’s knowledge of the modification chip’s primary purpose. The first was an Internet post in which Reichert stated, “[w]e aren’t technically supposed to do [installs],” but “no one

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168. See Universal City Studios, Inc. v. Corley, 273 F.3d 429, 441 (2d Cir. 2001) (“The DMCA creates civil remedies and criminal sanctions.”) (citations omitted)); see also H.R. REP. No. 105-551, pt. 2, at 26 (1998) (“The Committee has endeavored to specify, with as much clarity as possible, how the right against anti-circumvention would be qualified to maintain balance between the interests of content creators and information users.”).


170. Id. § 1201(a)(2)(A).

171. Id. § 1204.


173. See MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc., 622 F.3d 361, 366 (5th Cir. 2010) (citing Corley with approval); see also Corley, 273 F.3d at 443 (“[T]he DMCA . . . does not concern itself with the use of those materials after circumvention has occurred.”) (citations omitted)). But see Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1194 (Fed. Cir. 2004) (“[T]he DMCA emphatically did not ‘fundamentally alter’ the legal landscape governing the reasonable expectations of consumers or competitors . . . .”).

The second was Reichert's admission to the arresting agents that he "knew the mod chips were in a gray area." Reichert's only witness, Kevin Belcik, was prevented from testifying about whether Reichert believed that his conduct was illegal. From the evidence presented, it is reasonable to conclude that the jury believed that Reichert knew that the modification chip was primarily used to circumvent copyright protection.

The dissent argued that the deliberate ignorance instruction constituted a reversible error because it "directly undermined Reichert's only defense at trial" and negated the statute's mens rea element. The dissent contended that the jury instruction should have asked whether Reichert "deliberately ignored a high probability that he was breaking the law designed to effectively control access to a work copyrighted under federal law." The dissent's conclusion is flawed. Notwithstanding the bar on Kevin Belcik's testimony, Reichert conceded that "the record [was] replete with evidence that . . . Reichert was operating under the belief that his conduct was lawful." Further, the dissent's proposed instruction ignores the primary purpose standard mandated by the DMCA. As discussed above, subsequent non-infringement is irrelevant once the government has established that the primary purpose of the technology is to circumvent a technological measure that effectively protects a copyrighted work and the defendant is aware of this.

176. Id.
177. Id.; see also Brief of Appellant, supra note 108, at 13 ("The defense attempted to introduce Mr. Reichert's statements that he believed that modifying game console hardware was permissible under federal copyright law, but that copying and selling copied game was not.").
178. Reichert, 747 F.3d at 462 (Donald, J., dissenting).
179. Id. at 461 (emphasis omitted).
181. 17 U.S.C. § 1201(a)(2)(A) (2012) ("No person shall . . . traffic in any technology . . . that . . . is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a [copyrighted] work . . . .").
182. For a discussion of circumvention as its own cause of action separate and apart from copyright infringement, see Universal City Studios, Inc. v. Corley, 273 F.3d 429, 443 (2d Cir. 2001) (holding that circumvention is a standalone offense); 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085, 1097 (N.D. Cal. 2004); Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 303 (S.D.N.Y. 2000).
B. Consumer Rights

The DMCA has been a lightning rod in copyright law. Prior to its enactment, politicians, academicians, and members of the content industries debated the merits of circumvention liability. To be sure, scholars have spilled much ink criticizing the DMCA and its circumvention provisions. Since its enactment, the U.S. Copyright Office, pursuant to statutory mandate, has solicited public comments from interested parties regarding the effects and effectiveness of circumvention liability. Consumers have been largely excluded from this discussion despite the DMCA’s mandate to “promote electronic commerce.” This is ironic, of course, because commerce cannot exist without consumers. Consumers are not without recourse, however. Section 1201(c) of the DMCA states that “[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement . . . .” Therefore, consumers may seek to attack the DMCA’s anti-circumvention provisions using the first sale doctrine.

183. See, e.g., WHITE PAPER, supra note 19, at 231–33 (discussing fair use and circumvention liability).


185. See, e.g., Section 104 Report, supra note 21, at 27–32 (summarizing the broad range of views solicited from the public on the anti-circumvention provisions included in the DMCA); Memorandum from Marybeth Peters, Register of Copyrights, to James H. Billington, Library of Congress 20–21 (Oct. 27, 2003), http://www.copyright.gov/1201/docsregisters-recommendation.pdf (discussing the process whereby the opinions of interested parties are solicited pursuant to 17 U.S.C. § 1201(a)(1)(C)’s Notice of Inquiry).

186. REPORT OF THE REGISTER, supra note 22, at vi.


188. See id. § 109.
Video game developers use "regional encoding"—also referred to as Digital Rights Management—to prohibit users from playing games in regions that differ from where the game console was sold.\(^{189}\) For example, a PlayStation video game console purchased in the United States may not run a PlayStation video game purchased in Japan even though the game and game console would otherwise be compatible.\(^{190}\) This practice is antagonistic to a consumer's right to alienate her property as protected by the first sale doctrine.

The first sale doctrine establishes that once a copy of a work is lawfully sold, the copyright owner cannot control subsequent transfers of that particular work.\(^{191}\) The rationale behind the first sale doctrine is "that ownership of the material object . . . is distinct from ownership of the intellectual property."\(^{192}\)

Conceived at common law,\(^{193}\) the first sale doctrine has deep roots in American jurisprudence.\(^{194}\) The United States Supreme
Court first approved the doctrine at the turn of the twentieth century. The Court affirmed the international scope of the first sale doctrine by holding that the doctrine applies to work manufactured and purchased both domestically and abroad. Iterations of the doctrine have been codified in the various Copyright Acts. The doctrine’s international analog, the doctrine of exhaustion, is widely recognized—although not without controversy—by foreign jurisdictions. Proponents of international exhaustion argue that the doctrine advances notions of free trade and benefits consumers. Opponents argue that the doctrine limits a copyright holder’s ability to maximize her profits by inhibiting “territorial licenses.”

Although not raised in Reichert, the first sale doctrine presents a potentially powerful shield against circumvention which exhibits to the eyes of another the ideas intended to be conveyed.

Id.

195. See Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 349–51 (1908) (holding that an author’s exclusive statutory right to “vend” was extinguished after the first sale of the work).

196. See Kirtsaeng, 133 S. Ct. at 1358 (holding that the first sale doctrine applies to works manufactured abroad, purchased abroad, and subsequently imported into the United States); Quality King Distribs., Inc. v. L’anza Research Int'l, Inc., 523 U.S. 135, 152 (1998) (holding that the first sale doctrine applies to works manufactured in the United States, purchased abroad, and subsequently imported into the United States). But see Damien Riehl & Jumi Kassim, Is “Buying” Digital Content Just “Renting” for Life? Contemplating a Digital First-Sale Doctrine, 40 WM. MITCHELL L. REV. 783, 787 (2014) (discussing how content industries use contracts to limit the first sale doctrine).


201. Judge Donald did cite several relevant articles that address the first sale doctrine; however, neither Reichert nor Judge Donald squarely addressed the doctrine. See United States v. Reichert, 747 F.3d 445, 455–64 (6th Cir. 2014) (Donald, J., dissenting).
liability.° 202 Under a geographically neutral interpretation of the first sale doctrine, circumventing regional encoding to play a video game lawfully made and legally obtained abroad may not constitute copyright infringement. 203 A prosecutor will likely argue that the first sale doctrine is irrelevant because the act of circumvention is itself proscribed. 204 A § 1201(a)(2) defendant should rebut this claim by asserting that first sale can defeat the primary purpose element of the offense. 205 Accordingly, a § 1201(a)(2) defendant may introduce evidence that the circumvention technology at issue is used to defeat regional encoding in a manner that is consistent with a geographically neutral first sale doctrine. 206 If the defendant is in a jurisdiction that does not require a nexus to infringement, such as the Ninth Circuit, this argument becomes less persuasive.

Additionally, a § 1201(a)(2) defendant can aver that the circumvention technology at issue merely allows the user to retain the degree of control that she would otherwise have under the Copyright Act—namely, the right of ownership afforded under the first sale doctrine. 207 The geographically neutral interpretation of the first sale doctrine lends further credence to this argument. 208 Opponents may attempt to refute this argument on the grounds

202. See 17 U.S.C. § 1201(c)(1) ("Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title."). See generally Besek, supra note 184, at 473 ("The first sale doctrine is . . . potentially implicated when a work is distributed in a physical medium but its use is limited to certain specific machines."); Lydia Pallas Loren, Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement, 77 WASH. U. L.Q. 895, 865 (1999) (stating that when a defendant asserts a first sale defense to a criminal charge, the government must prove beyond a reasonable doubt that the first sale doctrine is a viable defense). But see Vernor v. Autodesk, Inc., 621 F.3d 1102, 1116 (9th Cir. 2010) (holding that a licensee who never obtained ownership may not invoke the first sale defense because ownership was never conveyed).

203. See Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1371 (2013). Kirtsaeng’s holding extends to all copyrightable works, including video games. See id. at 1360.

204. See PROSECUTING IP CRIMES, supra note 69, at 66–67.


206. This scenario is not that dissimilar from the facts of Kirtsaeng in which textbooks were purchased in Thailand, imported into the United States, and resold to American customers. See Kirtsaeng, 133 S. Ct. at 1356.


208. Kirtsaeng, 133 S. Ct. at 1364–68 (listing the “parade of horribles” that would result from a geographical interpretation of the first sale doctrine).
that the DMCA’s prohibition on circumvention is separate and apart from copyright infringement. This attempt should fail if the defendant can show that (1) the copy was lawfully made and (2) was legally purchased and not merely rented. This argument is less applicable to negate trafficking liability because it does little to negate the crime’s mens rea.

A §§ 1201(a)(2) and 1204(a) defendant may also argue that the first sale doctrine limits a copyright holder’s right. Courts hold that affirmative defenses to copyright infringement do not immunize circumvention liability on the grounds that the act of circumvention, not infringement, is the proscribed offense. If first sale is not an affirmative defense, but rather a limitation on the exclusive rights enjoyed by the copyright owner, then the scope of the DMCA’s anti-circumvention provisions should retrench. As such, American and international copyright law suggest that uses otherwise permissible under the first sale doctrine do not offend anti-circumvention laws.

V. CONCLUSION

It is often said that hard cases make bad law. In Reichert, the converse of this maxim appears to be true. In an effort to combat piracy of digital works, Congress enacted legislation that made the otherwise benign act of enhancing a video game console’s

209. See PROSECUTING IP CRIMES, supra note 69, at 67–68.
210. See United States v. Moore, 604 F.2d 1228, 1232 (9th Cir. 1976) (holding that the copy in question must be “unauthorized” to avoid the first sale question).
211. See United States v. Drebin, 557 F.2d 1316, 1326–27 (9th Cir. 1977) (stating that a sale must have occurred to trigger first sale doctrine).
213. See Universal City Studios, Inc. v. Corley, 273 F.3d 429, 440 (2d Cir. 2001) (“The DMCA was enacted in 1998 to implement the World Intellectual Property Organization Copyright Treaty, which requires contracting parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures . . . which are not authorized by the authors concerned or permitted by law.”) (emphasis added) (quoting World Intellectual Property Organization (WIPO) Copyright Treaty, supra note 23, art. II.).
functionality a criminal offense. Yet, before criminal liability may attach, the government must meet the heavy burden of showing that the accused acted willfully. No doubt, this high degree of culpability is desirable given the statute’s ambiguous language and the severity of its sanctions.

Unfortunately, Reichert’s uncritical interpretation of the crime’s mens rea requirement produced a criminal statute that far exceeds the Act’s purpose and intent. Reichert has taken the DMCA’s prohibition on trafficking circumvention technology one-step closer to strict liability crime. This will likely diminish consumer rights and obstruct the Act’s intent to promote commerce. To avoid this undesirable outcome, courts should look critically upon Reichert and take due care to maintain the crime’s willful mens rea.