

The Article III Standing Problem for AI-Scraping Anti-Circumvention Claims

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Attorneys at Gibson Dunn share why plaintiffs' growing reliance on DMCA anti-circumvention claims in AI scraping cases exposes a critical vulnerability

As artificial intelligence use increases, it has also become a growing target of IP litigation. Early AI-training lawsuits have largely focussed on conventional copyright claims, litigating issues addressing fair use, derivative works, and ownership. In the face of challenges posed by those cases, plaintiffs have turned to a different statutory lever—the Digital Millennium Copyright Act.

The DMCA includes an anti-circumvention provision that makes it unlawful to bypass technological measures that control access to copyrighted works. 17 U.S.C. § 1201(a)(1)(A) “No person shall circumvent a technological measure that effectively controls access to a work protected under this title”. The statute’s focus on access makes it attractive in scraping cases. Even where traditional copyright infringement or harm is difficult to allege, plaintiffs increasingly rely on the alleged act of evasion itself.

Courts are split on whether a plaintiff can allege a standalone anti-circumvention claim under Section 1201(a)(1)—the Ninth Circuit permits such claims, while the Federal Circuit does not. In the jurisdictions where standalone claims are permitted, such claims have begun to appear in AI-training and content scraping disputes, where plaintiffs allege that technology companies used bots to access online content at scale, ingest it, and train generative AI systems. Plaintiffs sometimes contend that this scraping was accomplished by bypassing logins, paywalls, CAPTCHAs, or rate limits, and then claim that such actions constitute circumventing technological measures in violation of the anti-circumvention provision.

Paradoxically, even in courts that recognise these claims, the very feature that makes Section 1201(a)(1) attractive to plaintiffs—liability untethered from infringement—may render many such claims constitutionally defective under modern Article III standing doctrine. Thus, as explored below, standing is a powerful and underused early-stage defence worth raising in these cases before costly technical discovery begins.

Modern Article III standing doctrine after *TransUnion*

The Supreme Court’s 2021 decision in *TransUnion v Ramirez* reinforced the requirement that a plaintiff demonstrate a concrete injury for Article III standing, holding that a statutory violation alone does not suffice. 594 U.S. 413, 425 (2021). Rather, plaintiffs must allege a concrete injury that is “real, and not abstract.” *Id.* at 424 (citation omitted). Since standing is jurisdictional, courts may dismiss deficient claims at the pleading stage. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

After *TransUnion*, the critical inquiry is often concreteness. Tangible harms, such as economic loss, are generally considered concrete. Intangible harms, such as reputational harms, qualify only where they bear “a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” *Id.* at 341; *TransUnion*, 594 U.S. at 424. In the years since *Spokeo* and *TransUnion*, courts have increasingly dismissed statutory claims premised on intangible injuries untethered from real-world consequences.

MDY and the Ninth Circuit’s independent access-control right

The Ninth Circuit approved standalone Section 1201(a)(1)(A) anti-circumvention claims in *MDY Industries LLC v Blizzard Entertainment* 629 F.3d 928, 950 (9th Cir. 2010), explaining that “Congress intended to prohibit even non-infringing circumvention.” In so doing, however, the court recognised that Section 1201 creates “a new anticircumvention right distinct from the traditional exclusive rights of a copyright owner.” The *MDY* court acknowledged a conceptual break from traditional copyright injury: “[h]istorically speaking, preventing ‘access’ to a protected work in itself has not been a right of a copyright owner arising from the Copyright Act.” *Id.* at 944.

That separation helps explain Section 1201(a)(1)’s appeal in AI-training cases, where plaintiffs often cannot plausibly allege dissemination, copying, or economic harm. But the same separation also creates a vulnerability. If the only purported harm is unauthorised access, the injury is purely intangible and may lack a close relationship to a traditionally recognised common-law injury, as required by *TransUnion*.

Concreteness and the DMCA

Recent AI-scraping complaints typically allege only unauthorised access, not downstream economic or dissemination harms. This is precisely the type of abstract intangible injury *TransUnion* instructs courts to scrutinise with particular care.

Although courts have not squarely addressed standing in Section 1201 AI cases, recent decisions involving DMCA Section 1202 claims provide useful guidance. In *Raw Story Media v OpenAI*, a federal court dismissed a DMCA claim under Section 1202(b) for lack of Article III standing where plaintiffs failed to plausibly allege any “actual adverse effects” flowing from the asserted statutory violation. 756 F. Supp. 3d 1, 6 (S.D.N.Y. 2024). Applying *TransUnion*, the court held that the pleaded injury was too abstract to support standing, emphasising that the asserted harm—untethered to economic injury, dissemination, or other downstream consequences—lacked a close “historical or common-law analogue.” *Id.*

That reasoning translates naturally to Section 1201(a)(1)(A) claims predicated on unauthorised access alone, and the standing problem may be even more acute in the anti-circumvention context.

In that light, *Raw Story* is an early signal of how courts are likely to evaluate anti-circumvention claims untethered from real-world consequences. If the interest Section 1201 protects is conceptually distinct from the bundle of historical copyright interests, as the Ninth Circuit previewed in *MDY*, then the path to a “close relationship” analogue becomes difficult. Simply put, a pure access-based claim, pleaded without plausible downstream effects, may not map onto a traditionally recognised harm and therefore may fail to satisfy the concreteness requirement.

Standing as a practical threshold defence

As AI-scraping litigation matures, Article III standing challenges may become the first and most consequential battlefield. For defendants, the strategic appeal is clear: a successful standing challenge can end a case before costly and intrusive technical discovery begins. That is especially significant in the Section 1201 context, where plaintiffs may allege circumvention “upon information and belief,” and where merits discovery can be both technically complex and commercially sensitive. A standing-focused motion also reframes the dispute at the outset. Instead of litigating whether a particular tool constitutes “circumvention,” whether an access control is “effective,” or whether a given technology qualifies as an access control, the inquiry becomes more fundamental: what real-world injury did this plaintiff actually suffer, and is it the kind of injury federal courts have traditionally recognised?

Plaintiffs turned to Section 1201 to avoid the limits of traditional copyright infringement claims. But by divorcing liability from apparent harm, they invited constitutional scrutiny that may end the cases before they begin.

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