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A Survey of the DMCA's Copyright Management Information Protections: The DMCA's CMI Landscape after *All Headline News* and *McClatchey*

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A SURVEY OF THE DMCA'S COPYRIGHT MANAGEMENT
INFORMATION PROTECTIONS: THE DMCA'S CMI
LANDSCAPE AFTER *ALL HEADLINE NEWS* AND *MCCLATCHEY*

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ABSTRACT

Copyright management information (CMI), defined by the Digital Millennium Copyright Act (DMCA), is information conveyed with a copyrighted work that identifies the owner and nature of that copyright. Although the DMCA prohibits the knowing removal of CMI under 17 U.S.C. § 1202(b), district court decisions relating to CMI are split on whether its provisions apply only to digital forms or also extend to non-digital CMI conveyance. This Article describes the current state of CMI jurisprudence and the expected effects of possible interpretive outcomes.

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INTRODUCTION

The Digital Millennium Copyright Act (the Act) protects copyright management information (CMI) placed by a copyright's owner. The Act generally defines CMI as "information conveyed in connection with [copyrighted works] . . . *including in digital form,*" that identifies the owner and nature of the copyright itself.¹ However, the statutory wording leaves open questions about whether the protections are specific to digital CMI in digital media, digitally created CMI in either digital or analog media, or all CMI in media.

Earlier CMI-related decisions split between two interpretive camps. The narrower interpretation construed CMI protection strictly within the context of the Act's overarching legislative purpose. It therefore limited CMI protection to digital measures, such as copyright information embedded in software as a part of a larger digital rights management (DRM) system.² Other courts favored a broader approach and were willing to expand the CMI protection beyond digitally stored CMI to digitally *placed* CMI, such as digitally embedded watermarks in printed photos. Courts following the latter approach avoided foreclosing the Act's applicability to entirely analog CMI.

Two recent district court decisions, *McClatchey v. Associated Press*³ and *Associated Press v. All Headline News*,⁴ endorse an even broader interpretation of the Act's CMI provisions. Both decisions explicitly extend the reach of the Act's CMI provisions beyond digital forms of transmission or conveyance to fully analog CMI manifestations. This interpretation has potentially significant effects

¹ 17 U.S.C. § 1202(c) (2006) (emphasis added).

² See, e.g., *IQ Group v. Wiesner*, 409 F. Supp. 2d 587 (D.N.J. 2006).

³ *McClatchey v. Associated Press*, No. 3:05-cv-145 (Johnstown), 2007 WL 776103 (W.D. Pa. March 9, 2007).

⁴ *Associated Press v. All Headline News*, 608 F. Supp 454 (S.D.N.Y. 2009).

on copyright enforcement, some of which are detailed below.

Absent an authoritative Supreme Court opinion, the split remains. This Article surveys these cases, formulates a unified picture of the Act's CMI protections, and concludes with practical suggestions on how to best assess the validity of a CMI claim under the Act.

I. THE DMCA AND CMI

The Act is a statutory implementation of two treaties with the World Intellectual Property Organization (WIPO): the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, both signed in 1996.⁵ The Act broadly addresses the protection of digital production and dissemination of copyrighted technological and technologically created works.⁶ Two of the Act's many mandates are protection against circumvention of technological copyright measures⁷ and preservation of CMI.⁸ The former, codified in § 1201, targets a specific *class* of devices and services, but § 1202, dealing with CMI, only imposes liability for certain *acts*.

Sections 1201 and 1202, known as the "anti-circumvention" provisions, are the codification of Articles 11 and 12 of the 1996 WIPO Copyright Treaty, which requires parties to "provide adequate legal protection . . . against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights"⁹ and to provide "effective legal remedies against any person knowingly . . . remov[ing] or alter[ing] any electronic rights management information without authority."¹⁰ The treaty itself is notable because it specifically mentions the protection of *electronic* rights management.

⁵ See 17 U.S.C. § 101 (2006) (defining "international agreement" as including the WTO Agreement, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty).

⁶ S. Rep. No. 105-190, at 2 (1998); see also MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12A.02(B)(1) (Rev. Ed. 2010).

⁷ 17 U.S.C. § 1201 (2006).

⁸ *Id.* § 1202.

⁹ World Intellectual Property Organization Copyright Treaty art. 11, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 [hereinafter WIPO Copyright Treaty].

¹⁰ *Id.* art. 12 para. 1.

The language in §§ 1201 and 1202 differs subtly from that of the treaty. Subject to several incidental exceptions, § 1201 bans the “circumvent[ion of] technological measure[s] that effectively control access” to protected works.¹¹ Like the remainder of the Act, the section specifically addresses “technological measures,” not other measures more broadly covered by general copyright doctrine. This language reflects Article 11. However, § 1202, which covers CMI and implements Article 12, contains no such wording. Courts disagree whether CMI, as protected by § 1202, must be by definition a “technological measure” within the meaning of § 1201 or whether the textual exclusion of technological requirements implies a broader definition. This Article analyzes whether these two provisions should be read in isolation or together as a broader statutory scheme.

II. CMI’S POSSIBLE MEANINGS UNDER THE DMCA

Section 1202 protects eight distinct categories of information as CMI, if used “in connection with copies . . . performances or displays of a work.” The categories include: (1) the work’s title; (2) its author; (3) its copyright owner; (4) names of performers in non-audiovisual; non-broadcast work; (5) names of writers, performers, and directors in audiovisual, non-broadcast work; (6) terms and conditions for the work’s use; (7) links, numbers, or codes referring to CMI; and (8) any additional data properly added to the definition by administratively promulgated regulation.¹²

Data belonging to any of these categories may not be removed, altered, or falsified if they are conveyed in conjunction with a copied work.¹³ Data not falling into one of § 1202’s eight CMI categories is not protected under the Act’s provisions but may be subject to other laws, such as unfair trade.¹⁴ Section 1202 claims require both intent to remove or alter the CMI and a showing of actual infringement resulting from the removal or alteration.¹⁵ Violations of § 1202 are

¹¹ 17 U.S.C. § 1201 (2006).

¹² *Id.* § 1202(c).

¹³ *Id.* § 1202(a) and (b).

¹⁴ S. Rep. No. 105-190, at 16 (1998); *see also* NIMMER, *supra* note 6, at § 12A.09[A].

¹⁵ JAY DRATLER, JR., CYBERLAW: INTELLECTUAL PROPERTY IN THE DIGITAL

punishable by actual and fixed statutory damages under § 1203.¹⁶ Criminal penalties apply to willful and commercially exploitative violators.¹⁷

The debate about whether CMI protected by § 1202 must be a “technological measure” centers on § 1202’s inapt wording and poorly documented legislative history. Section 1202 contains no mention of other Act-created provisions and includes the phrase “including in digital form” when defining CMI for the purpose of § 1202. This implies that § 1202’s definitions have a broader reach than merely that of the technological realm.

Because it is part of the Act, it is also possible to read § 1202 to target only technological copyright protection methods and digital methods of conveying CMI. This would rule out a broader interpretation including traditional copyright management, such as copyright notices in textbooks. The Act was enacted with the stated goal of creating “the legal platform for launching the global digital on-line marketplace for copyrighted works” and to “make digital networks safe places to disseminate and exploit copyright materials.”¹⁸ It would follow that the Act’s provisions should be interpreted in the context of its legislative purpose. The first courts to consider the issue espoused this context-sensitive view.

III. DMCA CONTEXT-SENSITIVE INTERPRETATIONS OF CMI

In 2006, a New Jersey district court provided the first detailed interpretation of § 1202 in *IQ Group v. Wiesner*.¹⁹ In *IQ Group*, the defendant, Wiesner Publications, redistributed an online advertisement for a client shared with the plaintiff, IQ Group. In so doing, it removed an embedded logo belonging to the plaintiff and replaced it with its own. The court considered the breadth of § 1202’s coverage in light of its statutory construction, the state of jurisprudence within the copyright field, and the statute’s legislative

MILLENNIUM § 4.03 (2000).

¹⁶ 17 U.S.C. § 1203(c) (2006) (note that both § 1201 and § 1202 are mentioned directly).

¹⁷ *Id.* § 1204(a).

¹⁸ S. Rep. No. 105-190, at 2 (1998).

¹⁹ *IQ Group v. Wiesner*, 409 F. Supp. 2d 587 (D.N.J. 2006).

history.

Though it conceded that a literal reading of the statute implied a broad application, the court determined that the statute should be subject to a “narrowing interpretation”²⁰ that only protects CMI functioning “as a component of an automated copyright protection or management system.”²¹ The court held that § 1202 should not be “construed to cover copyright management performed by people, which is covered by the Copyright Act.”²² Under this standard, the court found insufficient evidence that the logo served as a component of automated copyright protection or management and granted summary judgment to the defendants.

The court reasoned that while authors traditionally used copyright law to protect their legal rights, modern technological measures have increasingly displaced law in controlling access to works. It noted that the purpose of the Act was to protect those technological measures rather than the copyrights themselves.²³ It found support for this view in the working papers of the executively mandated Working Group on Intellectual Property Rights, which drafted the largely unchanged language of legislation now known as §§ 1201 and 1202.²⁴ The report giving rise to §§ 1201 and 1202, colloquially called the “White Paper,” noted that the drafters intended the CMI provisions to protect information vital to the implementation of automated, digital-copyright management systems.²⁵ The language presented in the White Paper passed through Congress with little comment and no significant revision prior to enactment, suggesting that legislators shared this interpretation.²⁶ Finally, the court noted that this narrow interpretation made § 1202 consistent with § 1201, as

²⁰ *Id.* at 593.

²¹ *Id.* at 597.

²² *Id.*

²³ *Id.* at 593. *See also* Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at Copyright Management in Cyberspace*, 28 CONN. L. REV. 981, 984 (1996).

²⁴ *See id.* at 594-97.

²⁵ WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE, executive summary (1995), available at <http://www.uspto.gov/web/offices/com/doc/ipnii/execsum.html>.

²⁶ *IQ Group*, 409 F. Supp. 2d. at 596.

well as Chapter 12 as a whole.

About one year later, a California district court largely followed *IQ Group*'s reasoning in *Textile Secrets v. Ya-Ya*, though it reached a somewhat less definitive conclusion.²⁷ The case involved an allegedly copied textile design.²⁸ The plaintiff, Textile Secrets, registered a copyright for a textile of its own design. The defendant, a high-end clothing designer named Ya-Ya Brand Inc., had allegedly taken sample yardage of the fabric provided by the plaintiff and incorporated it into its own clothing after removing tags indicating the design's registered ownership. Textile Secrets argued that Ya-Ya's removal of the tag constituted a violation of § 1202.²⁹

Applying basic principles of statutory construction, the court reached a similar initial result to *IQ Group* and determined that § 1202 must be construed in light of Chapter 12 as a whole and as a part of the Act's Title I.³⁰ A literal reading, as also noted by *IQ Group*, would result in § 1202's applicability "wherever any author has affixed anything that might refer to his or her name."³¹ It found this interpretation impracticable within the context of the Act's structure, thus justifying an inquiry into § 1202's legislative history.

The *Textile Secrets* court also assessed the White Paper and subsequent legislative history and concurred with *IQ Group*'s narrowed interpretation of § 1202. However, the court noted in dictum that it did "not find it necessary to define the scope . . . [as] only [applying] to copyright management information that functions 'as a component of an automated copyright protection or management system.'"³² Thus, unlike in *IQ Group*, the *Textile Secrets* court construed § 1202 as possibly applying to technological measures that directly or effectively control access to work, not solely to components of automated copyright management systems.³³

Both cases interpreted § 1202 narrowly; neither court imputed tangible or non-digital forms of copyright information into § 1202's

²⁷ *Textile Secrets v. Ya-Ya*, 524 F. Supp. 2d 1184 (C.D. Cal. 2007).

²⁸ *Id.* at 1188.

²⁹ *Id.* at 1192-93.

³⁰ *Id.* at 1195.

³¹ *Id.* (quoting *IQ Group*, 409 F. Supp. 2d at 593).

³² *Id.* at 1203, n. 18.

³³ *Id.* at 1202-03.

scope. But the dictum in *Textile Secrets* was a harbinger for a wholesale interpretive change.

IV. BROADER INTERPRETATIONS OF CMI: GENERAL APPLICABILITY?

Some recent district court decisions have broadened § 1202's applicability. Shortly after *Textile Secrets*, the district court of the Western District of Pennsylvania held in *McClatchey v. Associated Press* that § 1202 also applies to non-digital information.³⁴ Plaintiff McClatchey took and subsequently registered a copyright for a photo of Flight 93's crash during the events of September 11, 2001. The defendant, Associated Press (AP), allegedly redistributed the photo, replacing McClatchey's copyright information with its own.

In denying summary judgment for the AP, the court chose to interpret § 1202 broadly based on the face of the statute; specifically, it pointed to § 1202(c)'s assertion that "copyright management information" includes "any" information falling within § 1202's categories, "including in digital form."³⁵ The court reasoned that to "avoid rendering those terms superfluous, the statute must also protect non-digital information."³⁶ It noted that the usage of a computer to add copyright management information already constitutes the use of a digital or technological device to add CMI.³⁷ Unlike the *IQ Group* or *Textile Secrets* courts, however, the *McClatchey* court took a strictly textual approach to § 1202 interpretation and declined to participate in a detailed analysis of the legislative history.

The *McClatchey* court used language in *IQ Group* to justify its position. Part of *IQ Group*'s test for CMI protection is a determination of whether the CMI "functioned as a component of an automated copyright protection system."³⁸ Whereas in *IQ Group* this determination was meant to cabin § 1202 strictly to CMI used as part of an automated management system, the *McClatchey* court

³⁴ *McClatchey*, 2007 WL 776103.

³⁵ *Id.* at *5.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *IQ Group v. Wiesner*, 409 F. Supp. 2d 587, 597 (D.N.J. 2006).

understood this language to encompass the process of using software to place copyright information on *analog* works, such as pictures.³⁹ This construction broadened the reach of § 1202 significantly.

Another recent case involving CMI also endorsed a broad interpretation of § 1202, but rejected *IQ Group's* and *Textile Secrets'* approaches altogether. In 2009, a New York district court in *Associated Press v. All Headline News* found § 1202's language clear enough on its face to bar any inquiry into its legislative history.⁴⁰ The plaintiff, AP sued defendant All Headline News for misappropriating news from the AP's ticker and replacing the AP's copyright notice with its own. The *Associated Press* court declined to follow the rationales of the decisions in *IQ Group* and *Textile Secret*, stating that Second Circuit rules of statutory construction barred them from inquiring into legislative history "to cloud statutory text that is clear" even if there are "contrary indications in [that] history."⁴¹ The court then used similar logic as the *McClatchey* court in determining that no inquiry into the methods or nature of the CMI removal was necessary because the statute plainly contemplated even non-digital alteration of analog data to be within its scope.⁴² Unlike *McClatchey*, however, it found no reason to use language from *IQ Group* to justify its decision, instead reading the statute itself as being applicable to all kinds of copyright information, whether analog or digital. It notably found no mention of "technological measures of automated systems" within the statute itself and thus saw no reason to limit the section's applicability.⁴³

V. PRACTICAL IMPLICATIONS OF § 1202 CONSTRUCTION

It is unclear how this interpretive split will be resolved, though no recent trial or appellate court has rejected the textualist approach endorsed by *McClatchey* and *Associated Press*. A narrow § 1202 interpretation implies that CMI protection provisions are treated separately from general copyright law. A broad § 1202 interpretation,

³⁹ *McClatchey*, 2007 WL 776103, at *5.

⁴⁰ *Associated Press v. All Headline News*, 608 F. Supp 454 (S.D.N.Y. 2009).

⁴¹ *Id.* at 461-62 (quoting *Ratzlaf v. U.S.*, 510 U.S. 135, 147-48 (1994)).

⁴² *Id.* at 462.

⁴³ *Id.*

however, has several important implications not only for the availability of § 1203 damages, but also for trademark law, copyright law, and for CMI process licensees and licensors.

A. Availability of § 1203 Damages

A broad interpretation of § 1202 would potentially increase the availability of § 1203's statutory damages. The earlier, narrower § 1202 interpretation made it difficult to prove violation and deterred plaintiffs without cases clearly involving purely digital CMI from attempting to claim § 1203 damages. However, recent courts' willingness to extend § 1202 applicability may significantly increase the number of statutory damage claims.⁴⁴ Such claims, if successful, are lucrative. Section 1203 entitles the prevailing party to \$2,500 to \$25,000 per violation, and the few courts that have interpreted § 1203's meaning of "violation" have generally counted each individual impression.⁴⁵ For works distributed online, the total penalty could be astronomical. The threat of such large penalties may cause artists and others creating works under fair use to be more circumspect about the copyrighted works from which they draw inspiration, possibly tilting the litigation balance in favor of copyright holders.⁴⁶

B. Relationship Between DMCA CMI Requirements and Trademark Law

A § 1202 interpretation broad enough to protect instances of copyright protection and not simply automated protection methods would pose overlapping trademark concerns. In many instances, CMI bears the trademark of the copyright's owner. A simple example

⁴⁴ See, e.g., Fred von Lohmann, *AP Invokes DMCA Against Obama "Hope" Poster Artist*, ELECTRONIC FRONTIER FOUNDATION (Mar. 23, 2009), <http://www.eff.org/deeplinks/2009/03/ap-uses-dmca-intimidate-hope-artist>.

⁴⁵ 17 U.S.C. § 1203(c)(3) (2006); see also Fred von Lohmann, *supra* note 45.

⁴⁶ See, e.g., *Sony BMG Music Entertainment v. Tenenbaum*, No. 07 Civ. 11446-NG (D. Mass. July 9, 2010) (district court nullified a large jury award of statutory damages on due process grounds, even though the award was statutorily valid).

would be the placement of a trademarked business name on a printed photograph. This poses a dilemma; removal of CMI would violate the Act, but retention of CMI in subsequent distribution may violate trademark law.⁴⁷ No court has commented directly on this impasse, though *Associated Press* implied in passing that source citations could not be construed as trademark infringement.

C. Effects on Copyright Law

If § 1202 is applied to all types of CMI, whether analog, digital, manual, or automated, requirements for fair use of copyright information could be significantly altered. At the most textual end of the spectrum, § 1202 makes no exception for fair use; removal or alteration of copyright information is categorically prohibited “without the authority of the copyright owner or law.”⁴⁸ Thus, in its broadest reading, § 1202 practically requires retention of all previous CMI, even for artistic transformations or renditions of existing works, whether digital or analog in content or creation. Such an interpretation would directly oppose the fair use concept that certain types of use do not require the copyright holder’s permission. Any failure to retain this CMI is subject to statutory penalties. A possible defense, however, is to aver that because fair use is fundamentally not infringement, the removal of CMI, whether or not intentional, cannot lead to actual infringement. Thus, one required element of a § 1202 claim would be unfulfilled.

A context-sensitive but still broad reading of § 1202 would protect digital or digitally placed CMI in both digital and analog works, but not purely analog CMI. Under this approach, a determi-

⁴⁷ See Eric Goldman, *AP Enforcement Action Against Syndicator Survives Dismissal Motion--AP v. All Headline News*, TECHNOLOGY AND MARKETING LAW BLOG (Feb. 19, 2009), http://blog.ericgoldman.org/archives/2009/02/ap_enforcement.htm. But see *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (holding that Lanham Act claims for false designation of origin are barred if the copyrighted work in question becomes part of the public domain).

⁴⁸ See, e.g., David Johnson, *Court Split Widens over Whether DMCA Rules against Removal of Copyright Management Information Apply Only to Automatic, Computerized Copyright Management Systems*, DAVID JOHNSON'S DIGITAL MEDIA LAWYER BLOG (Mar. 25, 2009), http://www.digitalmedialawyerblog.com/2009/03/court_spilt_widens_over_whethe.html.

nation of whether the Act protects the CMI in question would require an inquiry into the exact process used to create the CMI as well as the process used to alter it. For example, CMI such as copyright information digitally embedded into an image's metadata may be protected if a wholly digital process was used in its subsequent transformation under fair use, but not if the work was altered by a manual or analog process (e.g., a physical transformation of a physical print without visible CMI).⁴⁹ This approach would emphasize the method by which the CMI was altered or removed, rather than by inquiry into whether CMI was removed at all.

D. Effects on CMI Process Owners

The courts also have not clarified whether CMI conveyance dependent on external process is also protected, and whether those processes must be preserved in subsequent redistribution of the protected work. Only one case, *Jacobsen v. Katzer*, has commented on the matter.⁵⁰ *Jacobsen* involved two model train hobbyists, both of whom created software frameworks for controlling model train behavior. The plaintiff, who sold the software commercially, filed a multifaceted suit against the defendant, who, under an open-source license, created software that functionally overlapped with the plaintiff's software. In ruling on the plaintiff's copyright claims, the *Jacobsen* court noted in dicta that under §1202, if an automated process is used to imprint CMI in software source code, that process or another like it must retain the original CMI for subsequent impressions.⁵¹ The court also noted that accidental CMI omission might be a violation of § 1202 if the omission takes place via intentional secondary means that unintentionally remove the CMI. For example, if a protected piece of software relies on third-party software both to embed CMI and provide a critical function to the parent software, § 1202 may be violated if that third-party application is replaced with another to enhance the non-CMI function it provides but no longer conveys the attached CMI.

Such an interpretation of the CMI provisions may have significant

⁴⁹ See, e.g., Fred von Lohmann, *supra* note 45.

⁵⁰ *Jacobsen v. Katzer*, 93 U.S.P.Q. 2d 1236 (N.D. Cal. 2009).

⁵¹ *Id.* at 1242-43.

implications for CMI-generating process owners, such as software manufacturers. Creators of CMI-generating processes may be forced to give their process, or details about that process, away if a non-original party adapts the work it protects. Both *Jacobsen* and the statute itself are silent as to whether the owner or licensor of the CMI imprinting mechanism is entitled to compensation if § 1202 mandates its inclusion.

CONCLUSION

Though § 1202 and CMI have historically been a minor component in litigation involving the sweeping Act, some recent court cases have tended to broaden the reach of CMI protection. A broad interpretation of § 1202 will increase the availability of statutory damages, alter copyright balance toward the right's owners, and affect related trademark law. If courts continue to trend toward broader § 1202 interpretation, they must be prepared to handle a much larger volume of cases posing Act and derivative claims. In addition, litigants must consider several novel effects of CMI doctrine when formulating their copyright complaints or defenses.

PRACTICE POINTERS

- Advise clients to document current CMI conveyance and propagation processes. The clearer the connection between the CMI and the underlying work's protection scheme is made, the more likely the CMI itself is to be protected.
- Copyright owners should ensure that any copyright information placed on a protected work clearly falls into one of § 1202's eight defined CMI categories.
- Fully develop copyright-infringement claims before attempting to assert a CMI claim, because the latter is dependent on the former.
- To mitigate legal exposure, advise clients intending to manipulate or integrate copyrighted works under fair use to only remove as much embedded CMI as is necessary. Remind clients that fair use is only a defense and not necessarily a deterrent to litigation.