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Publication Information

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NIMMER ON COPYRIGHT®by:

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2025

Filed Through:

RELEASE NO. 123,

APRIL 2025

Nimmer on Copyright

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§ 12A.10 Statutory Prohibitions

Once the definition of “copyright management information” is understood,¹ its application becomes straightforward. The core of Section 1202 sets forth two separate prohibitions on altering or deleting copyright management information. Those prohibitions, it should be noted, do not contain affirmative obligations—parties who own the copyright to works may continue to purvey them without the incorporation of any type of copyright management information.² But if they choose to avail themselves of CMI, Section 1202 commands third parties to respect that choice.³

[A] Disseminating False Copyright Management Information

Section 1202 is built on two prohibitions.⁴ One is geared at removing or altering CMI; that aspect is discussed below.⁵ The one currently under discussion applies to intentionally providing false copyright management information.⁶ It applies both to providing⁷ that false copyright management information⁸ and also to distributing the same or importing it for distribution.⁹ It is noteworthy that this language is not limited to “public distribution,” as is the coordinate right under copyright law.¹⁰

[1] Mental Element.

¹ See [§ 12A.09](#) *supra*.

² “It is important to note that the DMCA does not *require* CMI, but if CMI is provided, the bill protects it from falsification, removal or alteration.” S. Rep. (DMCA), p.16 (emphasis original).

³ “Section 1202 does not mandate the use of any type of CMI. It merely protects the integrity of CMI if a party chooses to use it in connection with a copyrighted work, prohibiting its deliberate deletion or alteration.” H. Rep. (DMCA), p.22.

⁴ See [17 U.S.C. §§ 1202\(a\), 1202\(b\)](#).

⁵ See [§ 12A.10\[B\]](#) *infra*.

⁶ H. Rep. (DMCA), p.20.

⁷ What additional connotation does “providing” have that is not conveyed by the coordinate term “distributing”? Surely, the distinction could not have been inadvertent, as it separates two distinct subsections. Compare [17 U.S.C. § 1202\(a\)\(1\)](#) and [§ 1202\(a\)\(2\)](#). Perhaps the volatile nature of the Internet moved Congress to include terminology that is not susceptible of an arguable limitation to material means. See [§ 12A.04\[C\]\[2\]\[c\]](#) *supra*. Cf. [§ 8.11\[B\]\[4\]\[a\]](#) *supra*.

⁸ [17 U.S.C. § 1202\(a\)\(1\)](#).

⁹ [17 U.S.C. § 1202\(a\)\(2\)](#).

¹⁰ [17 U.S.C. § 106\(3\)](#). Again, it is hard to imagine that the distinction was inadvertent. Given the ferment in the Internet context over what takes place privately and publicly, perhaps Congress wished to elide one source of confusion. See N. 7 *supra*.

As to both the providing and distributing prohibitions,¹¹ the statute contains twin mental requirements.^{11.1} First, it applies solely to activities that are undertaken “knowingly.”¹² Second, it applies only when the violator acts “with the intent to induce, enable, facilitate, or conceal infringement.”¹³ Failure to plead both dooms plaintiff’s cause of action.^{13.1} A defendant who escaped inducement liability under *Grokster*¹⁴ was held immune for lack of intentionality under the instant offense, as well.¹⁵

[2] Practical Example.¹⁶

The legislative history contains almost no guidance on how this prohibition plays out in practice. But it does state the following:

The prohibition in this subsection does not include ordinary and customary practices of broadcasters or inadvertent omission of credits from broadcasts of audiovisual works since, *inter alia*, such omissions [are not made with knowledge that they will] induce, enable, facilitate or conceal a copyright infringement.¹⁷

That statement furnishes a vehicle to explore the practical ramifications of the statute’s operation. Let us posit that WXYZ-TV broadcasts *Gone with the Wind*, omitting mention of Clark Gable, and further broadcasts D.W. Griffith’s *Birth of a Nation*, which it relabels *Autochthony*.¹⁸ Let us assume further that WXYZ’s staff is usually punctilious as to credits, but that these two peccadilloes slipped onto the air.¹⁹ How do the subject exploitations fare under Section 1202?

Before confronting the interpretation of the legislative history that inadvertent omissions do not knowingly facilitate infringement, let us inquire, at the threshold, whether the subject conduct is actionable under Section 1202. As to the substitution of one title for another, we are dealing paradigmatically in the realm of

¹¹ For additional mental elements in the context of the other prohibition, see [§ 12A.10\[B\]\[1\]\[b\] infra](#).

^{11.1} The statute includes “a ‘double scienter’ requirement.” [Mango v. Buzzfeed, Inc., 970 F.3d 167, 172 \(2d Cir. 2020\)](#); [GC2 Inc. v. International Game Tech., IGT, Doubledown Interactive LLC, 391 F. Supp. 3d 828, 839, 840 \(N.D. Ill. 2019\)](#).

¹² [17 U.S.C. § 1202\(a\)](#). See [Ward v. National Geographic Soc’y, 208 F. Supp. 2d 429, 449–50 \(S.D.N.Y. 2002\)](#) (dismissing claim).

¹³ [17 U.S.C. § 1202\(a\)](#). As summarized in the legislative history, “(1) the person providing, distributing or importing the false CMI must know the CMI is false, and (2) the person providing, distributing, or importing the false CMI must do so with the intent to induce, enable, facilitate or conceal an infringement of any right under Title 17.” H. Rep. (DMCA), p.20.

^{13.1} See [Logan v. Meta Platforms, Inc., 636 F. Supp. 3d 1052, 1064 \(N.D. Cal. 2022\)](#).

¹⁴ See [§ 12.04\[A\]\[4\]\[a\] supra](#).

¹⁵ See [Monotype Imaging, Inc. v. Bitstream, Inc., 376 F. Supp. 2d 877, 893 \(N.D. Ill. 2005\)](#).

¹⁶ This section derives from David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. Copr. Soc’y 401, 418–21 (1999).

¹⁷ H. Rep. (DMCA), pp.20–21. The report repeats almost the exact same language with respect to Section 1202’s other prohibition, as well. H. Rep. (DMCA), p.21. See [§ 12A.10\[B\] infra](#).

¹⁸ Note that we are *not* dealing with Nate Parker’s 2016 film of the same name. For purposes of the hypothetical, the assumption should be that the prints furnished to the station were appropriately credited, and that WXYZ-TV itself deleted or altered the subject information.

¹⁹ If we entertain the contrary assumption that WXYZ-TV customarily truncates the credits to provide less “dead time” to its viewers, but that it is alone in the industry in that stance, then the station cannot claim that it is following “ordinary and customary practices of broadcasters,” inasmuch as most television stations would have included the subject credits.

copyright management information.²⁰ It also occurs in the context of the work's "performance," thereby satisfying the other criterion for CMI.²¹ Thus far, it would seem that the switch incurs liability as the dissemination of false CMI. But what of the additional ingredients noted above? An element of the offense here is that the defendant act with the "intent to induce, enable, facilitate, or conceal infringement." Given its publication in 1915, *Birth of a Nation*, by its own name or by any other, has entered the public domain through expiration of its term.²² Accordingly, from an objective standpoint, its dissemination cannot lead to liability.

But now consider two possible counter-arguments. (1) The requirement as to infringement is not objective. (2) In any event, it is not limited to the United States. As to the first, it must be admitted that the reference to infringement occurs only in the context of the defendant's mental element, not as an objective feature of the statute.²³ Thus, one construction of the statute would be that a party who subjectively intends to facilitate infringement of a work, even though objectively it reposes in the public domain and therefore cannot be infringed, incurs liability under Section 1202. The problem with such a construction is that it is bizarre and pointless. Congress should have no motivation to pass legislation under Title 17 of the United States Code²⁴ to punish people who think they are committing infringement when, in fact, they are not.²⁵

Considering now the second argument, it is true that the statute here refers starkly to "infringement,"²⁶ rather than to "an infringement of any right under this title,"^{26.1} which is the language used in the coordinate prohibition.²⁷ The distinction in language could arguably give rise to a difference in interpretation.^{27.1}

But there are several problems with that interpretation. From a practical standpoint, it is highly doubtful that *Birth of a Nation* is protected under any national copyright scheme, so the argument would probably be bootless in this particular instance.²⁸ Even apart from that circumstance, for there to be liability under the statute, the defendant must act with intent. Thus, even if the plaintiff could show that Côte d'Ivoire,²⁹ for instance, still protects that movie, the proof would have to show, in addition, that defendant acted intentionally to facilitate such Ivorian infringement. For all practical purposes, that proof would seem to reflect a near impossibility.

²⁰ See [§ 12A.09\[A\]\[1\]](#) *supra* (work's title is first category of CMI listed in statute).

²¹ See [§ 12A.09\[B\]\[2\]](#) *supra*.

²² See [Chap. 9](#) *supra*.

²³ [17 U.S.C. § 1202\(a\)](#) ("No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement" undertake specified conduct).

²⁴ Although the instant realm can be labeled "paracopyright" as opposed to copyright proper, it cannot be wholly divorced from the orbit of copyright protection. See [§ 12A.18\[B\]](#) *infra*.

²⁵ A constitutional question would also arise as to whether Congress would be empowered to act in this fashion under the Copyright Act. See [§ 1.05](#) *supra*.

²⁶ [17 U.S.C. § 1202\(a\)](#).

^{26.1} But note that the legislative history interpolates here the requirement that the infringement be "of any right under Title 17." See N. 13 *supra*.

²⁷ [17 U.S.C. § 1202\(b\)](#) *in fine*. See [§ 12A.10\[B\]\[1\]\[b\]](#) *infra*.

^{27.1} See N. 30 *infra*.

²⁸ On the rule of shorter term in international copyright jurisprudence, see [§ 17.10\[A\]](#) *infra*.

²⁹ Among all the countries on earth, the nation formerly called in English "the Ivory Coast" apparently has the longest potential copyright term—life of the author plus 99 years. S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* 358 (1987).

In addition, from a more categorical stance, it is difficult to believe that Congress intended its bare reference to “infringement” to be interpreted to bring into the Section 1202 calculus the copyright laws of 150 nations on earth—albeit its failure to qualify the term in the statute, as it did in the coordinate provision treated below, opens the door to making the argument.³⁰ But there is not a trace of support in the legislative history for adopting the interpretation that Congress thereby intended to refer to infringement other than under the U.S. Copyright Act. Indeed, the contrary argument proves too much. For the bare reference to “infringement” could equally be taken to refer to state common law copyright infringement, or indeed to encroachment on rights outside the copyright sphere altogether. Therefore, although Congress used the naked term “infringement” in this context, given the structure of Section 1202 as a whole, it seems best to limit the subject infringement to rights under U.S. federal copyright law.³¹

What if the hypothetical is changed so that WXYZ supplied a false title not for *Birth of a Nation*, but for a current movie subject to copyright protection? If done inadvertently, then it is reasonable to assume that the station lacked the intent of facilitating copyright infringement. In this particular, therefore, the language of the legislative history quoted above becomes operative. Consonant with the quoted portion from the report, it is difficult to imagine any circumstance in which a TV station’s retitling of a movie could be intended to induce copyright infringement.³²

Let us turn now to WXYZ’s failure to reveal during a broadcast of *Gone with the Wind* who played the role of Rhett Butler. That conduct does not constitute dissemination of false information; but inasmuch as the coordinate prohibition of Section 1202 applies to altered information, and further given that the legislative history currently under examination is repeated word-for-word as to that latter prohibition as well, this aspect of the matter is best treated here as well.

In the first place, the station’s conduct falls within the legislative history’s excuse for “inadvertent omission of credits from broadcasts of audiovisual works”; but is that the basis on which it should be excused? The threshold question arises whether what we are dealing with here qualifies initially as copyright management information. Clark Gable was not the author, title, or copyright owner of the film. But, nonetheless, he does fall within the definition of the fifth category of copyright management information, being “a … performer … who is credited in the audiovisual work.”³³ Yet, notwithstanding that a performance of the film that fails to mention Gable falls within this category, the statutory definition itself excepts one situation from qualifying as CMI: public performances of works by television broadcast stations.³⁴ Inasmuch as WXYZ’s conduct falls unambiguously within that exception, the usage, omission, or substitution of Clark Gable’s name here simply does not qualify as copyright management information.

Accordingly, Section 1202 is inapplicable to this situation. As a consequence, it is erroneous for the legislative history to focus its attention on the “inadvertent omission of credits from broadcasts of audiovisual works” based on lack of a mental element, when even the presence of that mental element

³⁰ Indeed, the argument has been accepted in another context, arising out of a coordinate amendment enacted as part of the Digital Millennium Copyright Act. See *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016). For a critique of that ruling, see [§ 12B.07\[E\]\[3\]\[c\] infra](#).

³¹ See [§ 17.02 infra](#).

³² That legislative history refers to “inadvertent omission of credits from broadcasts.” But even in the realm of deliberate activity, and relabeling rather than omission, it is still hard to conceptualize how it could be intended to induce subsequent acts of copyright infringement.

³³ See [§ 12A.09\[A\]\[1\] supra](#).

³⁴ This category reads in full as follows: “With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.” [17 U.S.C. § 1202\(c\)\(5\)](#).

would not alter the calculus.³⁵ It may be that the House Judiciary Committee framed the legislative history³⁶ for Section 1202 towards a version of the bill that was no longer current when its report issued.³⁷

[B] Removing or Altering Copyright Management Information

[1] Three Substantive Prohibitions.

The other statutory prohibition comes in three parts.³⁸ As to each, the bar applies only to unauthorized conduct, and only to appropriately willful conduct, as discussed below.

[a] Actionable Conduct.

The three components of actionable conduct are as follows:

(1) The first prohibition applies to removing or altering any copyright management information.³⁹ That much is straightforward. It takes little imagination to realize that the information which Congress has laboriously prescribed as an aid to sound information policy cannot be defaced or deformed with impunity. Not only does this provision prohibit defacing or altering the title page of a book,^{39.1} but it also forbids deletion of the electronic information that may accompany a computer file containing a copyrightable composition.

(2) The second extends to distributing copies or phonorecords⁴⁰ from which the pertinent copyright management information has been deleted or changed.⁴¹ Selling a book with an altered title qualifies here. The same bar applies to importing copies or phonorecords for distribution.⁴² An example would

³⁵ In other words, even if WXYZ maliciously wished to facilitate infringement and thought that the mislabeling of Rhett Butler would achieve its aim, it is not liable under Section 1202. For its status as a television broadcaster makes its invocation of the performer's name ineligible to qualify as CMI.

³⁶ A different part of the bill was amended to show solicitude to both broadcasters and cable entities, particularly insofar as they adopted new standards in the future. See [§ 12A.11\[B\]\[2\]\[c\] infra](#). But the legislative history quoted above does not, of course, purport to address that addition geared at subsequent conduct. *Id.*

³⁷ See [§ 12A.15\[B\] supra](#).

³⁸ See [17 U.S.C. § 1202\(b\)](#).

³⁹ [17 U.S.C. § 1202\(b\)\(1\)](#).

^{39.1} [Falkner v. General Motors LLC, 393 F. Supp. 3d 927, 939 \(C.D. Cal. 2018\) \(Treatise quoted\)](#).

⁴⁰ The statute actually refers to "works, copies of works, or phonorecords." [17 U.S.C. § 1202\(b\)\(3\)](#). The need to predicate "of works" for "copies" but not for "phonorecords" bespeaks a lack of awareness that both those terms refer to physical items in which copyrightable compositions may be embodied. See [§ 2.03\[C\] supra](#). Thus, "copies or phonorecords" would have been sufficient. If there were a need, however, to belabor what was contained in the physical items, then the reference should have been to "copies of works, or phonorecords of works." For a parallel solecism in a Supreme Court opinion, see [§ 8.13\[B\]\[3\]\[c\]\[ii\]\[II\] N. 220 supra](#).

⁴¹ [17 U.S.C. § 1202\(b\)\(3\)](#). The statutory language is dense here: "No person shall ... distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law." *Id.* As written, the prohibition on unauthorized alterations is enmeshed into the mental element, which will be discussed below. See [§ 12A.10\[B\]\[1\]\[b\] infra](#). What happens if the copyright owner actually has authorized removal of CMI, but unbeknownst to the defendant in court—can his subjective mental state render him culpable nonetheless? Under the statute, a defendant is liable when he has *knowledge* that required information has been removed without authorization. Can it truly be said that he *knows* that the copyright owner withheld permission for her name to be removed when, in fact, she never did? It would seem that, although he could honestly *believe* in good faith that she did so, he cannot *know* something that is untrue. Accordingly, a sensible conclusion is that, regardless of the mental state, there is liability here only when, in fact, the copyright management information is removed or altered without the copyright owner's permission.

be importing compact discs from which the composer's name has been removed. It also applies to public performance of those copies or phonorecords.⁴³ That prohibition would reach the conduct of a movie theater that screened a print of a film misidentifying the director.⁴⁴

The first case to construe this provision addressed the conduct of an Internet "visual search engine" that created thumbnail sketches of images, without the CMI that appeared ancillary to the image on the original site.⁴⁵ The court ruled that plaintiff failed to demonstrate that defendant knew or should have known that this conduct would lead to infringement.⁴⁶ "Defendant's users could obtain a full-sized version of a thumbnail image by clicking on the thumbnail. A user who did this was given the name of the Web site from which Defendant obtained the image, where any associated copyright management information would be available, and an opportunity to link there. Users were also informed on Defendant's Web site that use restrictions and copyright limitations may apply to images retrieved by Defendant's search engine."⁴⁷ On that basis, the court ruled that no violation had occurred.⁴⁸

(3) Finally, a separate subparagraph of the statute prohibits distribution⁴⁹ of copyright management information itself, to the extent that it has been removed or altered.⁵⁰ What does this mean, and how does it differ from the foregoing prong? Although copyright doctrine is well familiar with distribution of the tangible media in which copyrightable works may be embodied (*viz.*, copies and phonorecords),⁵¹ there is no antecedent body of copyright law on the distribution of intangibles, such as information.⁵² It would seem, therefore, that a sea change in orientation is invited, and that a body of jurisprudence

⁴² [17 U.S.C. § 1202\(b\)\(3\)](#).

⁴³ [17 U.S.C. § 1202\(b\)\(3\)](#).

⁴⁴ That hypothetical deals with a copy. How could affected conduct unfold as to a phonorecord? A radio station publicly performs compact discs; but the term "copyright management information" definitionally excludes those broadcasts. [17 U.S.C. § 1202\(c\)\(4\)](#). See [§ 12A.09\[A\]\[1\]](#) *supra*. A disc jockey who plays discs also publicly performs phonorecords. Nonetheless, in the normal course of affairs, that type of performance does not implicate the work's title, composer, singer, instrumentalist, or copyright owner, so it is hard to imagine how there could be wrongful alteration or deletion of affected CMI in this context. How, then, is Section 1202 likely to apply to phonorecords? If a non-broadcast radio station's signal—for instance over the Internet—were deemed to constitute a public performance, and if that transmission included such details as the composer's name and copyright owner, then alterations or deletion in that context could attract liability under the statute, given satisfaction of the requisite mental elements described below. See [§ 12A.10\[B\]\[1\]\[b\]](#) *infra*.

⁴⁵ [Kelly v. Arriba Soft Corp.](#), 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999). A later appeal affirmed in part and reversed in part, but did not address the instant DMCA provisions. [336 F.3d 811](#) (9th Cir. 2003).

⁴⁶ [77 F. Supp. 2d at 1122](#).

⁴⁷ [Id. at 1122](#) (footnote omitted).

⁴⁸ [Id. at 1122](#) ("Plaintiff's images are vulnerable to copyright infringement because they are displayed on Web sites. Plaintiff has not shown users of Defendant's site were any more likely to infringe his copyrights, any of these users did infringe, or Defendant should reasonably have expected infringement.").

⁴⁹ As in the previous instance, the bar extends as well to importation for distribution. [17 U.S.C. § 1202\(b\)\(2\)](#).

⁵⁰ [17 U.S.C. § 1202\(b\)\(2\)](#).

⁵¹ See [§§ 8.11–8.13](#) *supra*.

⁵² Some courts applying previous law have displayed insensitivity to the operative distinction here, thereby producing erroneous results. Nimmer, Brown & Frischling, *The Metamorphosis of Contract Into Expand*, [87 Cal. L. Rev. 17, 36–38 \(1999\)](#). See [§ 8.12\[B\]\[1\]\[d\]\[i\]](#) *supra*.

must now develop to determine the parameters of this distribution. A number of puzzles arise in that regard, to be considered after explication of the balance of these bars.⁵³

[b] Mental Element.

Complex knowledge elements apply in this context. Certain common elements apply to all three aspects of the prohibition, and additional elements apply differentially to each.

As to all three prongs, the defendant must know that his conduct “will induce, enable, facilitate, or conceal an infringement of any right under” United States copyright law.⁵⁴ Given how many sources have reproduced the statute erroneously, it bears emphasis that that abetting language applies separately from each of the three prongs.

To elaborate, the proper format for the statute is that the section in question sets forth three separate indented paragraphs and then, back at the margin, it adds the mental element that governs each of them.⁵⁵ Nonetheless, one can run across both judicial decisions at the circuit⁵⁶ and district court levels,⁵⁷ along with official government publications,⁵⁸ that reproduce the section in question erroneously, by embedding the mental element⁵⁹ into the final indented subparagraph—as if it had no application to the first two indented subparagraphs.⁶⁰ That mistake has led commentators and courts

⁵³ See [§ 12A.10\[B\]\[3\] infra](#).

⁵⁴ [17 U.S.C. § 1202\(b\)](#) *in fine*. The language in that section “under this title” eliminates foreign copyright laws, or domestic state laws, from consideration. See [§ 12A.10\[A\]\[2\] supra](#).

⁵⁵ Here is the proper format for the section in question:

(b) REMOVAL OR ALTERATION OF COPYRIGHT MANAGEMENT INFORMATION.—No person shall, without the authority of the copyright owner or the law—

(1) intentionally remove or alter any copyright management information,

(2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or

(3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law,

knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

⁵⁶ See [2 United States Code, 1994 Edition, Supplement V, 17 U.S.C. 1202\(b\)](#), at 1159 (U.S. Government Printing Office 2000).

⁵⁷ See [Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295, 301 \(3d Cir. 2011\)](#). Nonetheless, that decision properly understood the statute’s mental element, *id. at 302 n.8*, an issue that the panel did not consider, as it was belatedly raised on appeal, *id. at 301 n.6*.

⁵⁸ See [Powers v. Caroline’s Treasures Inc., 382 F. Supp. 3d 898, 903 \(D. Ariz. 2019\)](#); [BanxCorp v. Costco Wholesale Corp., 723 F. Supp. 2d 596, 609 \(S.D.N.Y. 2010\)](#).

⁵⁹ See S. Rep. (DMCA), p. 89, reproduced *infra* on page App. 54-102. Even the Copyright Office once got it wrong! See *Copyright Office Circular 92* at 188 (April 2000).

⁶⁰ To segregate that last segment of the statute from the language that precedes it, the usage herein cites to “[17 U.S.C. § 1202\(b\)](#) *in fine*.”

⁶¹ The foregoing sources erroneously present [17 U.S.C. § 1202\(b\)](#) as follows:

(b) REMOVAL OR ALTERATION OF COPYRIGHT MANAGEMENT INFORMATION.—No person shall, without the authority of the copyright owner or the law—

into error.⁶¹ By contrast, some cases properly appreciate that intent to facilitate copyright infringement remains a pre-requisite here.⁶² Nonetheless, one court held that merely placing a copyright notice at the bottom of a web page, on which a third party's proprietary photograph had been included,^{62.1} evidenced the requisite intent^{62.2} to infringe^{62.3}—a result that would appear contrary to the statutory scheme.^{62.4}

The requirement of abetting infringement is absolute in the criminal context.⁶³ Thus, to obtain a conviction, the government must bear the high burden of proving beyond a reasonable doubt the state of the defendant's mind.⁶⁴ In the civil context, by contrast, a far lower standard prevails.⁶⁵ Beyond the evidentiary standard of proof by a preponderance of the evidence (rather than beyond a reasonable doubt), Section 1202 itself supplies an alternative to actual knowledge: "having reasonable grounds to know."⁶⁶ Thus, a civil defendant who lacks actual knowledge that his conduct will enable copyright

- (1) intentionally remove or alter any copyright management information,
- (2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or
- (3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law, knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

⁶¹ One case states the elements as:

Courts have applied this statute in a straightforward manner such that Plaintiffs here need only allege (1) the existence of CMI ... ; (2) removal and/or alteration of that information; and (3) that the removal and/or alteration was done intentionally.

BanxCorp v. Costco Wholesale Corp., 723 F. Supp. 2d 596, 609 (S.D.N.Y. 2010). That enumeration camouflages the requisite mental element of "having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement."

⁶² See *Steele v. Bongiovi*, 784 F. Supp. 2d 94, 98 (D. Mass. 2011). One case upholds the correct standard, even though it quotes the statute in the erroneous format. See GC2 *Inc. v. Int'l Game Tech. PLC*, 255 F. Supp. 3d 812, 821 (N.D. Ill. 2017).

^{62.1} After defendant booked a band to play its venue, it advertised information about that band on its website, including a photo of the band that plaintiff snapped. *Pierson v. Infinity Music & Entm't, Inc.*, 300 F. Supp. 3d 390, 391 (D. Conn. 2018).

^{62.2} The activity evidently reflected inadvertence, and defendant removed the photo days after receiving plaintiff's email claiming ownership. *Id. at 392*.

^{62.3} "A reasonable jury could infer from this evidence that Defendant chose to place the copyright notices at the bottom of the pages which featured Plaintiff's photographs with the intent to induce, enable, facilitate, or conceal an infringement of those photographs." *Id. at 396-97*.

^{62.4} A standard copyright notice appeared at the bottom of each page of the website at the recommendation of a design firm; defendant had no knowledge of plaintiff's copyright. *Id. at 396*. Those facts indicate that, as a matter of law, defendant lacked any intent to *induce* copyright infringement of those photographs—and the same applies to *enable*, *facilitate*, or *conceal* that infringement.

⁶³ *17 U.S.C. § 1202(b)* *in fine*. See *§ 12A.14 infra*.

⁶⁴ The statute does not address a "reckless disregard" standard. For these purposes, presumably there should be recourse to general standards of criminal jurisprudence with respect to specific intent crimes. See *Chap. 15 infra*. An additional aspect of "willful blindness" recurs in another aspect of the Digital Millennium Copyright Act. See *§ 12B.04[A][1][b][vi] infra*.

⁶⁵ *17 U.S.C. § 1202(b)* *in fine* ("with respect to civil remedies under section 1203"). See *§ 12A.13 infra*.

⁶⁶ *17 U.S.C. § 1202(b)* *in fine*.

infringement, but who has reasonable grounds to believe that it will, cannot defeat liability under Section 1202 on the basis that he lacked actual knowledge.

As to the first prong of prohibited conduct (removing or altering CMI),⁶⁷ the statute additionally requires that the defendant act “intentionally.”⁶⁸ Thus, one who removes copyright management information without the copyright owner’s consent, and who does so intentionally, falls afoul of Section 1202. But what does “intentionally” mean here?^{68.1} Does it mean the intent to remove the information, as opposed to deleting it inadvertently?⁶⁹ Or does it connote a higher standard, of knowing that the subject information being removed includes, for example, a work’s title and its author’s name? Or does it go even further still, meaning acting with the intent to violate Section 1202 through affirmative knowledge that the material being removed includes the work’s title, for example, and that titles are enumerated by the statute as protected CMI?⁷⁰ Although it can be safely stated that a person who removes CMI by accident lacks the necessary mental ingredient, how much further along the spectrum actionable intent lies remains unanswered.⁷¹

As to the second prong (distributing goods),⁷² a defendant who distributes (as well as imports or publicly performs) copies or phonorecords is not liable unless he acts “knowing that copyright management information has been removed or altered without authority of the copyright owner or the law.”⁷³ Thus, in addition to the general requirement noted above that the defendant must know that his conduct will facilitate copyright infringement,⁷⁴ the separate requirement pertains that he must know of

⁶⁷ See [§ 12A.10\[B\]\[1\]\[a\]](#) *supra*.

⁶⁸ [17 U.S.C. § 1202\(b\)\(1\)](#).

^{68.1} Without trying to answer that question, one case holds deficient a complaint lacking any factual allegations on that score. See [Chevrestt v. Am. Media, Inc., 204 F. Supp. 3d 629, 632 \(S.D.N.Y. 2016\)](#).

⁶⁹ One case inclines towards this standard. See [Gordon v. Nextel Communs., 345 F.3d 922 \(6th Cir. 2003\)](#) (“McCarthy admits that he used the rental poster, scanned and enlarged a portion of it, and made the framed pictures that were used as the set decorations. McCarthy admits that he removed the information, and there is no suggestion that the removal was unintentional.”). The court nevertheless granted summary judgment to defendants based on lack of knowledge that their conduct would induce infringement. *Id. at 927*. See [§ 12A.10\[C\]\[1\]](#) N 150 *infra*.

⁷⁰ When Congress passed the NET Act, its most recent foray into digital copyrights prior to enactment of the Digital Millennium Copyright Act, it clarified to some extent the meaning of willfulness in the criminal context. See [§ 15.01\[B\]\[2\]](#) *infra*. In the instant context of the WIPO Treaties Act, by contrast, there is no such elucidation.

⁷¹ Congress did not act on the Copyright Office’s recommendation that the legislative history specify “that the reference to infringement does not mean that the actor must have intended to further any particular act of infringement—just to make infringement generally possible or easier to accomplish.” 1997 Hearings, Serial No. 33, at 51 (statement of Register Peters).

⁷² See [§ 12A.10\[B\]\[1\]\[a\]](#) *supra*.

⁷³ [17 U.S.C. § 1202\(b\)\(3\)](#). In one case, failure to provide specificity about the falseness led to dismissal of that count in a complaint (with leave to amend). See [Doe v. Github, Inc., 672 F. Supp. 3d 837, 859 \(N.D. Cal. 2023\)](#).

⁷⁴ See [§ 12A.10\[A\]\[1\]](#) *supra*. What if the concealment is not of copyright infringement, but rather of a CMI violation under Section 1202 itself? Although it is possible to interpret “an infringement of any right under this title” to refer to the very Section 1202 under consideration, that manner of interpreting the statute would appear impermissibly circular. One court nonetheless tacitly followed that approach initially by formulating the element for liability here as having “reasonable grounds to know that such removal and distribution constituted a DMCA infringement.” [Mango v. BuzzFeed, Inc., 356 F. Supp. 3d 368, 377 \(S.D.N.Y. 2019\)](#) (emphasis added). But its later reference is more ambiguous:

[Defendant] should have reasonably known that altering the gutter credit to include a false attribution to Fisher’s law firm would have wrongfully implied that BuzzFeed had permission to use the Photograph, thus concealing its infringement.

the unauthorized status of the removal or alteration. Whereas the previous requirement is subject, in the civil context, to the alternative noted above that the defendant has “reasonable grounds to know,” there is no comparable dispensation here. It follows that an element of proof under Section 1202 is that the defendant possess actual knowledge of the unauthorized change to the CMI, rather than simply having a reasonable basis to so conclude.⁷⁵ The Sixth Circuit follows this approach.⁷⁶

As to the third prong as well (distributing CMI),⁷⁷ Section 1202 contains the same knowledge requirement, *i.e.*, knowledge that “the copyright management information has been removed or altered without authority of the copyright owner or the law.”⁷⁸ Again, the contrast with the general requirement applicable to all three prongs, which can be satisfied in the civil context by “reasonable grounds to know,” implies that the specific requirement at issue here can be satisfied only through proof of actual knowledge.

One case addresses the burden of proof applicable here.^{78.1} Live Nation distributed t-shirts bearing photos of the hip hop group Run-DMC; in acting without the photographer’s permission, it infringed his copyright.^{78.2} Some of the images in question appeared in plaintiff’s book, others on a website that he authorized.^{78.3} The district court granted summary judgment in favor of Live Nation based on plaintiff’s failure to make any factual showing that defendant “either removed the CMI in question or did so knowingly.”^{78.4} Characterizing that focus as being on the wrong question, the Court of Appeals reformulated it to whether the evidence created a triable issue of fact whether defendant distributed the photos with the requisite knowledge.^{78.5} On the facts presented, the Ninth Circuit concluded that at least a weak inference was warranted, and therefore reversed.^{78.6} It cited circumstantial evidence^{78.7} showing that Live Nation knew photos were often copyrighted;^{78.8} it knew that plaintiff himself often held the

⁷⁵ *Id. at 378.* The concealed infringement could be a violation of the copyright owner’s general distribution right, see [§ 8.11](#) *supra*, rather than a CMI violation. The Second Circuit affirmed on the latter basis, thereby avoiding this conundrum. [970 F.3d 167, 173 \(2d Cir. 2020\)](#).

⁷⁶ *Gordon v. Nextel Communs.*, [345 F.3d 922, 926–927 \(6th Cir. 2003\) \(Treatise cited\)](#) (granting summary judgment to defendants who believed that poster from which CMI was deleted had been cleared for use in television commercials).

⁷⁷ See [§ 12A.10\[B\]\[1\]\[a\]](#) *supra*.

⁷⁸ [17 U.S.C. § 1202\(b\)\(2\)](#). See [§ 12A.10\[B\]\[2\]](#) *infra*.

^{78.1} See [Friedman v. Live Nation Merch., Inc.](#), [833 F.3d 1180 \(9th Cir. 2016\)](#).

^{78.2} *Id. at 1182*.

^{78.3} *Id. at 1183*.

^{78.4} *Id. at 1187* (parentheticals omitted).

^{78.5} *Id. at 1187*.

^{78.6} *Id. at 1189* (“not particularly strong, inference that Live Nation knew of the removal of the CMI when it distributed Friedman’s photographs”).

^{78.7} *Id. at 1189* (“circumstantial evidence can be used to prove any fact”).

^{78.8} The evidence showed a “striking similarity” (which “may give rise to a permissible inference of copying”) between the tint effects, captions, and layouts of photos in plaintiff’s book and licensed website, on the one hand, and those same photos used by defendant, on the other. *Id. at 1188*. See [§ 13.02\[B\]](#) *infra*.

copyright to images of Run-DMC;^{78.9} and it “never offered any explanation for how it came to possess the images.”^{78.10}

One case conceded that defendant’s inclusion of a credit tag hyperlinked to plaintiff “undermines” plaintiff’s allegations regarding defendant’s bad intent.^{78.11} Nonetheless, the opinion allowed the case to proceed beyond the pleading stage, as the tagging did not “conclusively mean[] the Defendant lacks the required scienter . . .”^{78.12} By contrast, another case granted summary judgment against plaintiff’s claim that use of his photo, as contained in an old newspaper advertisement, was actionable.^{78.13}

[2] Lack of Authorization

[a] By the Copyright Owner.

The foregoing alterations are barred only to the extent that they occur “without the authority of the copyright owner or the law.”⁷⁹ Thus, a defendant charged with removing copyright management information, or with distributing a copy containing altered information, escapes liability to the extent that plaintiff cannot prove that defendant acted outside the copyright owner’s authority.⁸⁰

One can readily appreciate why the copyright owner of a work should be allowed to consent to deletion of her name from copies, phonorecords, or even volatile distributions. After all, she owns the work, and if she is content to witness its dissemination without being identified, no one else’s interests are harmed. But, as written, Section 1202 gives her far broader authority. For it applies to all species of copyright management information. In the not-infrequent case in which the current owner was not the original author, the upshot is that she can authorize the deletion of the work’s author and of its title, regardless of the concomitant anguish that those omissions might occasion to the work’s creator. Indeed, to the extent that she consents to the substitution of a third party’s name as author, all liability under Section 1202 is avoided.⁸¹ Her permission as to the deletion or alteration of the name of the performer or director similarly immunizes subsequent distribution of copies of those works under the WIPO Treaties Act.⁸²

^{78.9} [833 F.3d at 1186–87](#).

^{78.10} [Id. at 1188](#) (emphases original). Rather, it denied knowledge with “artfully worded language” from which a jury could draw an adverse inference. *Id.*

^{78.11} [Gattoni v. Tibi, LLC, 254 F. Supp. 3d 659, 664 \(S.D.N.Y. 2017\)](#).

^{78.12} [Id. at 664](#). Another case likewise held adequate a pleading alleging that defendant removed copyright headers with the intention of using material “for his own personal financial gain,” even though the complaint lacked the word “knowing.” [Splunk Inc. v. Cribi, Inc., 662 F. Supp. 3d 1029, 1054 \(N.D. Cal. 2023\)](#).

^{78.13} See [Fey v. Panacea Mgmt. Grp. LLC, 261 F. Supp. 3d 1297, 1313 \(N.D. Ga. 2017\)](#).

⁷⁹ [17 U.S.C. § 1202\(b\)](#).

⁸⁰ We revert here to the doctrine of indivisibility—does the subject authorization need to come only from the owner of the copyright as a whole? Or is permission from an exclusive licensee adequate? See [§§ 10.01–10.02 supra](#). If the latter, must the pertinent distribution relate to the realm to which the subject license pertains? There is no ready answer to these matters.

⁸¹ Thus, the publisher who *ex hypothesi* owns the copyright to Thomas Pynchon’s novels could consent to their distribution over the Net under the name Danielle Steele. One who acts with the publisher’s permission thereby avoids all liability under Section 1202. See N. 88 *infra*.

⁸² See [§ 12A.09\[A\]\[1\] supra](#).

The interests protected by those categories of copyright management information are redolent of moral rights.⁸³ Yet, the fact that the statute allows the copyright proprietor (and not the author or any other interested individual) complete freedom to waive those categories of management information along with her own identity leads to the conclusion that Section 1202 is not designed to protect moral rights,⁸⁴ albeit some of the interests that it serves run parallel to that domain.⁸⁵ Nonetheless, because Section 1202 does not, by its own terms, immunize conduct that is otherwise actionable,⁸⁶ to the extent that the Lanham Act (or other doctrines of U.S. law whereby moral rights find vindication)⁸⁷ creates a cause of action, say, for deleting a director's name or for substituting an author's name, then those complaints may proceed on their own merits.⁸⁸

[b] By Law.

Even if the copyright owner has not consented to deletion or alteration of CMI, Section 1202 also immunizes from liability conduct that is authorized by "the law."⁸⁹ But which law is implicated here? Presumably,⁹⁰ the reference must be to something other than Section 1202,⁹¹ as otherwise the reference leads to an infinite regress.⁹² When is removal of copyright management information authorized by law? The future could reveal infinite arguments here, of which the legislative history anticipates not a one.⁹³

⁸³ See [Chap. 8D](#) *supra*.

⁸⁴ A marked difference separates the two domains. Under Continental theory, moral rights serve the author's personal interest and are non-economic in orientation. See [§ 8D.01\[A\]](#) *supra*. The instant requirement of copyright management information, by contrast, serves precisely the economic interest of ensuring that royalty payments accrue to the proper source. See S. Rep. (DMCA), p. 7 ("Such information will assist in tracking and monitoring uses of copyrighted works").

⁸⁵ The legislative history claims that Section 1202 "will operate to protect ... copyright owners from interference with the private licensing process." H. Rep. (DMCA), p.11. But that claim falls far short of being an inalienable and personal right.

⁸⁶ There is a feeble contrary argument, which points out that Congress included in the WIPO Treaties Act an explicit safeguard against weakening protection, by virtue of the enactment of Sections 1201 and 1202, for federal or state statutes protecting "privacy of an individual in connection with the individual's use of the Internet." [17 U.S.C. § 1205](#). The negative pregnant, so the argument goes, is that Section 1202 might indeed derogate from a cause of action under, say, the Lanham Act.

⁸⁷ See [§ 8D.03](#) *supra*.

⁸⁸ Thus, Thomas Pynchon may be able to obtain relief, notwithstanding passage of the WIPO Treaties Act. See N. 81 *supra*. But see [§ 8D.03\[A\]\[2\]\[b\]](#) *supra* (limitations on extent of cognizable tort of reverse passing off). He simply cannot make any headway under Section 1202 against the publisher to whom he assigned his copyright, or those who act under its authority.

⁸⁹ [17 U.S.C. § 1202\(b\)](#).

⁹⁰ Very little of the massive history for the WIPO Treaties Act bothers to explicate Section 1202. Virtually all attention seems to have been devoted to Section 1201. See [§ 12A.15\[B\]](#) *infra*.

⁹¹ Should one interpret this aspect of the WIPO Treaties Act to refer to "law" other than what is contained in that entire enactment? Or, indeed, other than the entire Digital Millennium Copyright Act of which it forms a part? The matter is unclear. Unless application of other provisions of the same enactment would engender logical problems of the type sought to be avoided in the text, then presumably "the law" should include those coordinate provisions as well as antecedent law (and also future enactments).

⁹² One is put in mind here of the legal puzzle of *renvoi*. See Rogers & Molzon, *Some Lessons About the Law from Self-Referential Problems in Mathematics*, [90 Mich. L. Rev. 992 \(1992\)](#).

⁹³ See [§ 12A.17\[B\]](#) *infra*. Section 1202 does nothing to clarify the referent for "the law" of which it speaks.

For instance, imagine that a television news report displays a painting incident to its artist's obituary.⁹⁴ We may assume that the author's name will typically be listed in that context, and probably the title as well. But the television station⁹⁵ running the report may fail to include the name of the copyright owner. Does "the law" as set forth in copyright's fair use doctrine vindicate that omission? We may assume for the sake of argument that the display of the copyrighted work itself finds ready shelter under the fair use umbrella.⁹⁶ Does that conclusion end the inquiry?^{96.1} Or should there be a further examination focused on whether the decision to leave out the owner's name itself qualifies as fair? Does it make a difference if the print shown on-air itself listed the owner's name in the undisplayed portion? Or should the news organization be obligated to make inquiries even absent that reference? Does a different standard apply if the allegation is not deletion of the CMI constituting the owner's name, but its alteration to list the name of another? Do different standards apply to deletion or alteration not of the owner's name, but of the work's title or author's name, or of the name of a performer? Should Section 1202's reference to "the law" be limited to statutes or other features of the law that themselves affirmatively command materials to be conveyed in a certain format that does not include CMI? If so, what laws fit that paradigm?⁹⁷

All these questions—and the hundreds more that may arise in real-world application of the statute—are left unanswered. An even greater deficit is that Congress has failed to offer any guidance even as to how to conceptualize the inquiry here, as the wealth of dangling questions attests. Courts just have to muddle through in attempting to vindicate the statute's Protean terminology.

[3] Puzzles in Application.⁹⁸

Under the typology offered above of the instant ban on removing or altering copyright management information, the statute's first prohibition is on altering or removing CMI itself, and its second on altering or removing CMI contained in material objects.⁹⁹ But onto those, Section 1202 grafts a third prohibition: distribution of CMI itself from which the CMI has been deleted or altered. As noted above, logical puzzles thereby arise.¹⁰⁰

☞ The reach of this provision to deleted copyright management information poses a paradox. Consider the contrast with the second prong discussed above. In that context of tangible goods, the bar extends to distribution of copies and phonorecords from which the requisite copyright management information has

⁹⁴ Note that the statute includes "displays" as one of the enumerated means of conveying CMI. [17 U.S.C. § 1202\(c\)](#). Cf. [§ 12A.04\[C\]\[2\]\[c\]](#) *supra*.

⁹⁵ Although broadcast television stations are excluded from certain definitions of CMI, they never avoid liability with respect to the copyright owner's name. Compare [17 U.S.C. § 1202\(c\)\(3\)](#) and [17 U.S.C. § 1202\(c\)\(4\)–\(5\)](#). See [§ 12A.09\[A\]\[1\]](#) *supra*.

⁹⁶ See [§ 13F.02](#) *infra*.

^{96.1} One case ruled that its initial conclusion of fair use as to copyright infringement defeated any subsequent complaint regarding copyright management information. See [Kennedy v. Gish, Sherwood & Friends, Inc.](#), [143 F. Supp. 3d 898, 914 \(E.D. Mo. 2015\)](#). It reached that conclusion based on [17 U.S.C. § 1201\(c\)\(1\)](#), notwithstanding that this statutory provision (a) only applies to anti-circumvention, rather than the instant domain of copyright management information; and (b) even where it does apply, commands that an antecedent determination of fair use is irrelevant to the Digital Millennium Copyright Act, not that it is dispositive. See [§ 12A.05\[D\]](#) *supra*. The court's conclusion would therefore appear to be in error.

⁹⁷ Certainly, fair use does not; nothing in the doctrine affirmatively forbids one who makes use of a copyrighted image from appending the owner's name to it.

⁹⁸ This section derives from David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, [46 J. Copr. Soc'y 401, 428–33 \(1999\)](#).

⁹⁹ See [§ 12A.10\[B\]\[1\]\[a\]](#) *supra*.

¹⁰⁰ See [§ 12A.10\[B\]\[1\]\[a\]](#) *supra*.

been deleted. That feature is eminently sensible—one can easily imagine a videocassette from which the director's name has been omitted, or a book in which the author's name has been defaced. But turning now to the bar on distribution directly of CMI, how can it apply when the CMI itself has been removed? The statute provides in pertinent part: "No person shall ... distribute ... copyright management information [from which]¹⁰¹ the copyright management information has been removed."¹⁰² From the illogic of that formulation, it seems that the digital revolution has clouded clear thinking itself.¹⁰³

Perhaps sense can be made of that language by interpreting the statute to refer to a large file containing copyright management information. To the extent that someone who disseminates the copyrighted work also¹⁰⁴ offers that file—but has removed from it without the proprietor's authorization¹⁰⁵ one feature of the CMI, retaining the rest—then liability could arise under the statute. For instance, one could imagine terms and conditions¹⁰⁶ in a file appended to a copyrighted report on environmental safety detailing that usage may be made of the copyrighted work without royalties, but that all such usages must be reported to the copyright proprietor's accounting department. One who propagates the file absent that last feature has sensibly diminished the copyright proprietor's legitimate expectations.¹⁰⁷

☞ That orientation may also help to unlock the difference between Section 1202's two separate prohibitions, one on disseminating false CMI,¹⁰⁸ the other on removing or altering CMI.¹⁰⁹ Given that the first already bans purveyance of false copyright management information, what further need is there to separately bar removal of that information? Does that bastardized form not in and of itself constitute a falsehood? The answer is that telling a partial truth may not constitute a lie in and of itself, yet nonetheless deserve its own statutory proscription. In other words, a file containing two types of CMI, each of them true, but from which three other types have been wrongfully deleted, does not necessarily violate the prohibition on false copyright management information, but does come within the instant ban.

☞ At this point, another question immediately arises—what if some CMI is indeed deleted, but it is only of a duplicative nature? Imagine, for instance, that the copyright owner's name is listed five times, of which three are removed. Based on the interpretation just reached, that conduct should be actionable. After all, the target individual is purveying matter containing CMI from which some CMI has been removed without authorization.

But that interpretation soon leads to absurd results. After all, second-hand book stores have sold books from time immemorial without the publisher's initial dust jacket.¹¹⁰ That conduct finds complete protection

¹⁰¹ The words in the statute here are actually "knowing that." As has been explicated earlier, although the provisions of [17 U.S.C. § 1202\(b\)](#) couch their scope in terms of mental elements, in fact they should be interpreted to import substantive requirements. See [§ 12A.10\[B\]\[1\]\[a\]](#) *supra*.

¹⁰² [17 U.S.C. § 1202\(b\)\(2\)](#).

¹⁰³ It would be helpful to glean guidance here from the legislative history. Unfortunately, however, the paragraph in the report discussing this provision is entirely conclusory and unhelpful. See H. Rep. (DMCA), p.21. See also [§ 12A.15\[B\]](#) *infra*.

¹⁰⁴ Actually, there is no need to limit consideration to the case in which the same individual offers both the work itself and the file containing its copyright management information. In the future, specialization may separate those two functions.

¹⁰⁵ Or authorization of "the law," however that might arise. See [§ 12A.10\[B\]\[2\]\[b\]](#) *supra*.

¹⁰⁶ Note that these qualify as category (6) of CMI. See [§ 12A.09\[A\]\[1\]](#) *supra*.

¹⁰⁷ That department could track usages, help the company advertise the magnitude of its altruism, bring altruism to an end once exploitation crosses a certain threshold, or put the reports to a dozen other uses.

¹⁰⁸ See [§ 12A.10\[A\]](#) *supra*.

¹⁰⁹ See [§ 12A.10\[B\]\[1\]\[a\]](#) *supra*.

¹¹⁰ Problems arise only when the owner attempts to rebind the copies in its possession. See [§ 8.12\[E\]](#) *supra*.

under the first sale doctrine.¹¹¹ But, of course, the jacket bears the work's title, its author's name, and that of the publisher-copyright owner, typically in three or more places.¹¹² Is sale of a used book absent its original dust jacket now to fall afoul of Section 1202? It is impossible to believe that Congress intended such a radical departure from established norms.

Yet rejection of this last construct casts doubt on what came before. If, indeed, deletion of three references each to the title, author, and owner via discarding the dust jacket does not offend Section 1202 (whereby a total of nine items qualifying for the CMI label are lost), then why should there be liability for the conduct posited above of removing some CMI from a file without the proprietor's authorization, but retaining the rest? Is a distinction to be drawn here when the deleted items are only duplicative? Although that reading would simultaneously validate the second-hand book store and hold liable a party who disseminates a file containing incomplete CMI, there is nothing in the statute or its legislative history that directly hints at such an interpretation.¹¹³

☞ The dust jacket raises a detour involving the first prohibition: "No person shall, without the authority of the copyright owner or the law, intentionally remove or alter any copyright management information."¹¹⁴ Moving away from the second-hand book store to the reader who has purchased a new authorized text, if she subsequently discards the jacket, has she fallen afoul of the statute? Without doubt, she falls within the above language, even to the extent of acting "intentionally." But ordinary readers, harboring no reasonable grounds to know that discarding the jacket will induce, enable, facilitate, or conceal copyright infringement, escape liability under the statute on that basis.¹¹⁵

Accordingly, perhaps it is time to reconsider the foregoing point. The second-hand book store that sells a work without its dust jacket could indeed be conceptualized as having performed the physical activity necessary for liability under the third prong.¹¹⁶ But, because the book's title, author's name, and copyright owner is still contained on the book's spine and title page, the requisite knowledge element of facilitating infringement is lacking.¹¹⁷

☞ A dust jacket constitutes part of a "copy" of a copyrighted work containing CMI and therefore is governed by the anti-deletion feature.¹¹⁸ But the definition of CMI, in addition, includes not only the requisite information embodied into copies and phonorecords, but also those conveyed in "performances or displays of a work."¹¹⁹ In many instances, the two categories overlap, and the latter references are accordingly otiose. For instance, when a cable television station transmits a movie, the end credits constitute CMI.¹²⁰

¹¹¹ See [§ 8.12\[B\]](#) *supra*. It is for that reason that publishers who wish to avoid sale of their excess inventory decline to part with ownership over the physical property. See [Little, Brown & Co. v. American Paper Recycling Corp.](#), 824 F. Supp. 11 (D. Mass. 1993).

¹¹² One usually finds that information on the front cover, the spine, and back cover or flyleaf of the dust jacket.

¹¹³ The statute's mental element, however, offers an escape-hatch here, as the next hypothetical illustrates. See [§ 12A.10\[B\]\[1\]\[b\]](#) *supra*.

¹¹⁴ [17 U.S.C. § 1202\(b\)\(1\)](#).

¹¹⁵ See [§§ 12A.10\[A\]\[1\], 12A.10\[B\]\[1\]\[b\]](#) *supra*.

¹¹⁶ See [§ 12A.10\[B\]\[1\]\[a\]](#) *supra*.

¹¹⁷ See [§ 12A.10\[B\]\[1\]\[b\]](#) *supra*.

¹¹⁸ See [§ 12A.10\[B\]\[1\]\[a\]](#) *supra*.

¹¹⁹ See [§ 12A.09\[B\]\[2\]](#) *supra*.

¹²⁰ [17 U.S.C. § 1202\(c\)\(5\)](#) ("writer, performer, director"). That provision is inapplicable to a broadcast television station, as opposed to a cable TV station. *Id.* Nonetheless, even the broadcaster's transmission over the air includes CMI, insofar as the work's title, author, and copyright owner are concerned. [17 U.S.C. § 1202\(c\)\(1\)–\(3\)](#). See [§ 12A.09\[A\]\[1\]](#) *supra*.

Those credits appear ancillary to a “performance.”¹²¹ But they are present only because the film studio initially embedded them onto the print that has come into the station’s possession. That piece of celluloid or videotape qualifies as a “copy.” In this particular, the reference to “performance,” albeit applicable, is duplicative and therefore unnecessary.

But one can imagine other instances in which there is no overlap. A band playing live at a nightclub is one such instance. More in line with the intended thrust of the WIPO Treaties Act is a website on the Internet. There, the same movie that was shown on the television station may be viewed, the same songs that were heard at the nightclub may be heard. By the same token, the website might show displays of works of art, again not necessarily reflective of a prior copy.

The question now arises whether, in the Net context, the same type of copy or phonorecord underlies the film, music, or painting that one would expect to find outside of cyberspace. In many instances, the work fixed will be in some tangible medium of expression from which it could be later produced, thereby rendering it into a “copy” or “phonorecord.”¹²² But perhaps in the case of volatile performances and displays, the improvisational aspect is as evanescent as what one would hear at a New Orleans nightclub. Users could contribute interactively to creating the online “painting” that is displayed, with no backup up copy being made. Conceivably, these instances are the ones at which the expansive language of the statute is aimed.¹²³

But, a new problem now arises. An element of the offense for deletion of CMI is that it must occur “without the authority of the copyright owner or the law.”¹²⁴ How does one ascertain the copyright owner of a performance that is not previously or simultaneously tangibly fixed? Under federal statutory copyright law, there is no owner, as there is no protection for the subject work!¹²⁵ Accordingly, giving content to the “performance or display” language for conveying CMI opens new doors to intractable problems, even as it attempts to close old ones.¹²⁶

☞ We now need to run through the same exercise again, only this time attuned to these new avenues of exploitation. Consider first the live musical performance. If the bandleader nightly names all of her collaborators, but on one evening deliberately neglects to mention the saxophonist, is that an instance of conveying copyright management information knowing that copyright management information has been removed? Once again, the statute reaches bizarre realms if it punishes people for their choice of speech on a given day.¹²⁷ But equally, once again, the interpretation that Section 1202 does not reach this conduct

¹²¹ See [§ 8.18\[E\]](#) *supra*.

¹²² See [§ 2.03\[C\]](#) *supra*.

¹²³ Why was the decision made not to include also “reproductions,” “adaptations,” and “distributions” of copyrighted works? Though Congress did not explain why it felt the need to divide the means of conveyance of CMI as it did, one can posit structural reasons for dividing the universe as Section 1202 does. (It is not contended that these perspectives are certain; the attempt here is to posit a plausible rationale for the scheme that Congress in fact adopted.) It is not necessary to include “distributions,” as those inherently relate to physical items and are thus caught up in the definition of CMI to include “copies and phonorecords.” By the same token, “reproductions” must occur in a tangible medium of expression, thereby leading to the same conclusion. Finally, “adaptations” are actionable only if they simultaneously constitute “reproductions.” See [§ 8.09\[A\]\[1\]](#) *supra*.

¹²⁴ See [§ 12A.10\[B\]\[2\]](#) *infra*.

¹²⁵ See [1.08\[C\]\[2\]](#) *supra*. There might be state law protection in such cases. See [§ 8C.02](#) *supra*. In addition, there is an anti-bootlegging right under federal law, which is adjacent to copyright protection. See [§ 8E.03](#) *supra*.

¹²⁶ See also [§ 12A.04\[C\]\[2\]\[c\]](#) *supra*.

¹²⁷ For the deletion of the sax player’s name to be actionable, it must occur “without the authority of the copyright owner or the law.” [17 U.S.C. § 1202\(b\)](#). See [§ 12A.10\[B\]\[2\]](#) *infra*. So, who is the copyright owner of the live improvisation? If a sound recording were taking place, copyright law would furnish an answer. See [§ 2.10](#) *supra*. But the live improvisation at issue here is not even subject to copyright protection, as discussed above. More puzzles in the statute’s application thereby arise.

calls into question the interpretation posited above that removing some CMI from a file without the proprietor's authorization but retaining the rest falls afoul of the statute.

☞ What if a website is hosting the improvisation live? Let us alter the facts such that the bandleader does properly credit each of her instrumentalists, but the webmeister deliberately eliminates credit for the sax player from the version accessible over the Internet. In this instance, the webmeister's actions have conveyed the bandleader's CMI, but some has been removed without her authority.¹²⁸ There is nothing counterintuitive in concluding that Section 1202 should be sensibly interpreted to come into play as to this instance.¹²⁹

☞ What if someone does not directly violate the statutory provisions regarding copyright management information, but assists another to do so—does vicarious liability attach here? On principle, it would seem that the statute forecloses that result. Unlike traditional copyright infringement,¹³⁰ an essential element of plaintiff's case for disturbing copyright management information is that defendant acted without authority.¹³¹ In that light, it is questionable to reason here by analogy to copyright doctrines such as vicarious liability, which includes no authorization prong.¹³² Nonetheless, *dicta* in certain cases indicate that a claim might be cognizable for vicarious liability in this context.¹³³ If vicarious liability were actually found against a given individual for disturbing copyright management information,¹³⁴ it is hoped that the subject theory would be subjected to greater scrutiny.

The foregoing voyage to a few ports in the ocean of possibilities reveals that most questions of Section 1202's application remain unanswered. Given the spare and difficult statutory language, with no meaningful assistance from the legislative history,¹³⁵ the courts are bound to drift unaided as they chart their way through very treacherous waters.¹³⁶

[C] Practical Experience

With the passage of some decades since enactment of the WIPO Treaties Act, a body of case law has arisen interpreting the features canvassed above.¹³⁷ Although far more decisions have construed the concurrently added anti-circumvention right,¹³⁸ the instant domain has not lain entirely fallow.

¹²⁸ Note the need to finesse reference to authorization of the copyright owner, as there is none under federal law for a jazz improvisation. See N. 125 *supra*.

¹²⁹ See [§ 12A.10\[C\]\[2\]](#) *infra*.

¹³⁰ See [§ 13D.02](#) *infra* (elements of infringement case consist of only ownership plus copying).

¹³¹ See [§ 12A.10\[B\]\[2\]](#) *supra*.

¹³² See [§ 12.04\[A\]\[2\]](#) *supra*.

¹³³ *Gordon v. Nextel Communs.*, 345 F.3d 922, 925–926 (6th Cir. 2003) (*Treatise cited*) (“it is inappropriate to permit summary judgment to be granted based on the defendants' lack of actual knowledge of the removal of the copyright management information when they may be vicariously liable for its removal”). See *Rosenthal v. MPC Computers, LLC*, 493 F. Supp. 2d 182, 190 (D. Mass. 2007) (“both parties assume that vicarious infringement liability is also available” under [17 U.S.C. § 1202](#)).

¹³⁴ In *Gordon v. Nextel*, defendant escaped liability altogether; in *Rosenthal v. MPC*, the magistrate recommended that the liability case be set for later trial.

¹³⁵ See [§ 12A.15\[B\]](#) *infra*.

¹³⁶ A number of cases have arisen since the law's passage. See [§ 12A.10\[C\]](#) *infra*.

¹³⁷ See [§ 12A.10\[B\]](#) *supra*.

¹³⁸ See [§ 12A.06](#) *supra*.

[1] Concrete Adjudications.

In one case, plaintiff published textbooks, to which defendant sold class notes.¹³⁹ By adding its own name to those class notes, the case held that defendant did not convey false copyright management information.¹⁴⁰ That decision also ruled, as a matter of law, that defendant's conduct lacked any mental element of participating in copyright infringement¹⁴¹ that would render it liable under the statute.¹⁴² By contrast, a different case allowed a photographer to maintain his case, after he uploaded to Twitter shots of earthquake devastation from Haiti, without a copyright notice but with his name appended.¹⁴³ The complaint arose against an online photo database, which included its own name as the authorized source.¹⁴⁴ The court allowed the claims to proceed¹⁴⁵ both for falsification of copyright management information¹⁴⁶ and for its removal.¹⁴⁷

One decision construing Section 1202¹⁴⁸ granted summary judgment to defendants who used a copy of plaintiff's poster of dental illustrations in the background of a television commercial for a phone company's two-way message service.¹⁴⁹ Although the copyright management information had been removed from the poster, the essential ingredient of intent to induce infringement was lacking.¹⁵⁰

¹³⁹ See *Faulkner Press, L.L.C. v. Class Notes, L.L.C.*, 756 F. Supp. 2d 1352, 1355 (N.D. Fla. 2010).

¹⁴⁰ *Id. at 1359–60*. The key point is that defendant did not alter any product originating from plaintiff; it produced its own product, which it duly marked.

¹⁴¹ See § 12A.10[B][1][b] *supra*.

¹⁴² *756 F. Supp. 2d at 1360*.

¹⁴³ See *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 298 (S.D.N.Y. 2011). The images at issue in the counterclaim included attributions “Morel” and “by photomorel,” but no copyright notice. *Id. at 299*.

¹⁴⁴ The attribution was “AFP/Getty.” *Id. at 300*.

¹⁴⁵ *Id. at 304–305*.

¹⁴⁶ See § 12A.10[A] *supra*. A later opinion in this case clarified that including “AFP” and “Getty” in the caption created a triable issue of fact. *Agence France Presse v. Morel*, 934 F. Supp. 2d 547, 577 (S.D.N.Y. 2013). “Moreover, the evidence also suggests that AFP and Getty added their watermarks to at least some of the Photos-in-Issue, which is facially suggestive of ownership.” *Id.* (citations omitted). See § 12A.09[C][3] *supra*.

¹⁴⁷ See § 12A.10[B] *supra*.

¹⁴⁸ Another opinion denied summary judgment to plaintiff, given its absence of showing defendant's intent. See *Thomas M. Gilbert Architects, P.C. v. Accent Builders & Developers, LLC*, 629 F. Supp. 2d 526, 537 (E.D. Va. 2008), aff'd unpub., 377 Fed. Appx. 303 (4th Cir. 2010).

¹⁴⁹ See *Gordon v. Nextel Communs.*, 345 F.3d 922 (6th Cir. 2003).

¹⁵⁰ The court's reasoning was as follows:

[W]hen Crossroads obtained the poster from the prop company, its personnel believed that the poster had been cleared for use in television commercials. As a result, the defendants assert, there is no evidence that Crossroads had any reason to know that the removal would facilitate or conceal an infringement. Furthermore, McCarthy asserts that it was his practice to obtain permission from an artist if the artwork was not obtained from a prop house, and that he would have sought Gordon's approval if he thought there was a clearance issue in this case. The record contains no evidence to counter McCarthy's testimony. As a result, Gordon may not claim that the copyright information was removed with reasonable grounds to know that it would “induce, enable, facilitate, or conceal an infringement.”

345 F.3d at 927.

In addition, to be actionable, the removal must be from a work that is at least substantially similar to the copyrighted work in question.^{150.1} That standard derives from the fact that liability arises from exploiting “copies of works … knowing that copyright management information has been removed or altered without authority of the copyright owner or the law.”^{150.2} If defendant removes information from something that is *dissimilar* to the copyrighted material in question, then it fails to qualify as a *copy* of the work in question.^{150.3} That language therefore serves as the statutory hook to prevent nonsensical claims that plaintiff has a right to complain about elimination of its copyright management information when defendant propounds an entirely dissimilar work.

But it goes too far to conclude, as did *dictum* in one case, that “no DMCA violation exists where the works are not identical.”^{150.4} If plaintiff owns the copyright to a 300-page book and defendant propounds a work in which a single sentence is missing from that work, the two are not *identical*—but are still beyond doubt *substantially similar*.^{150.5} The authority supposedly requiring *identity*^{150.6} fails to withstand scrutiny.^{150.7} Nonetheless, when the work in question has only thin creativity, the applicable standard may approach *identity*,^{150.8} depending on the circumstances.^{150.9}

Does any room exist to vindicate the proposition that greater than substantial similarity is required here? Congress enacted Section 1202 as part of the Digital Millennium Copyright Act as an adjunct to fighting digital piracy.^{150.10} Divergent standards already exist ranging from *substantial similarity* to *virtual identity*—and even more confusion would follow to the extent that courts sketched levels yet another standard in

^{150.1} The copyright infringement count in the previous case failed, inasmuch as the blurred images in the background failed to amount to substantial similarity. *Id. at 924–925*. See [13.03 infra](#).

^{150.2} [17 U.S.C. § 1202\(b\)\(3\)](#) (emphasis added).

^{150.3} See [§ 2.03](#) *supra*.

^{150.4} [O’Neal v. Sideshow, Inc.](#), 583 F. Supp. 3d 1282, 1287 (C.D. Cal. 2022).

^{150.5} See [§ 13.03](#) *infra*.

^{150.6} As support, the opinion adduced an unpublished case. *Id. at 1287*, citing [Kirk Kara Corp. v. W. Stone & Metal Corp.](#), 2020 U.S. Dist. LEXIS 189425 (C.D. Cal. 2020). Unremarked is that the latter case proceeded on default, with defendant unrepresented. *Id. at *1*.

^{150.7} Turning to *Kirk Kara*, that unpublished decision cited two reported cases. *Id. at *18–19*. Neither relied on the *identity* standard. To the contrary, one encapsulated the governing standard as follows: “In those cases where claims of removal of CMI have been held viable, the underlying work has been *substantially* or entirely reproduced.” [Fischer v. Forrest](#), 286 F. Supp. 3d 590, 609 (S.D.N.Y. 2018) (emphasis added). The other dismissed the complaint inasmuch as “Plaintiff has not shown users of Defendant’s site were any more likely to infringe his copyrights, any of these users did infringe, or Defendant should reasonably have expected infringement.” [Kelly v. Arriba Soft Corp.](#), 77 F.Supp.2d 1116, 1122 (C.D. Cal. 1999), aff’d and rev’d in part on other grounds, 336 F.3d 811 (9th Cir. 2003).

^{150.8} That feature, however, follows from traditional copyright doctrine, not as a function of the removal of copyright management information here under scrutiny. See [§ 13.03\[A\]\[4\]](#) *supra*.

^{150.9} For instance, departing from a 300-page book, consider a list of ten favorite restaurants. To be substantially similar might require copying, in order, at least nine, and possibly all ten. See [§ 13.03\[A\]\[4\]](#) *supra*. In one case, defendant’s comparisons of automobiles was “virtually identical” to plaintiff’s, yet the court dismissed the Section 1202 count. [Advanta-STAR Auto. Research Corp. of Am. v. Search Optics, LLC](#), 672 F. Supp. 3d 1035, 1053, 1057 (S.D. Cal. 2023).

^{150.10} See [§ 12A.02](#) *supra*. Reference in the legislative history to digital technology’s enabling of “perfect” copies lends at least weak support to the notion that Congress aimed its sights at identical materials. [ADR Int’l Ltd. v. Inst. for Supply Mgmt. Inc.](#), 667 F. Supp. 3d 411, 430 (S.D. Tex. 2023).

between.^{150.11} Therefore, it seems best not to import new inquiries but to rely on existing copyright doctrine in this regard.^{150.12}

In similar measure, some cases hold that “a defendant cannot violate the DMCA by associating its name with a derivative work that is unquestionably a distinct work, even if the derivative work infringes a copyright.”^{150.13} Admittedly, an unauthorized film may infringe the copyright in the novel on which it is based,^{150.14} but crediting the film to someone other than the novelist does not seem to rise to the level of false copyright management information.^{150.15}

Another opinion ruled that the credit line “Photography: Don Levey” qualified as CMI, notwithstanding its failure to advert to copyright ownership.¹⁵¹ It also determined that the notation on the back cover of the album jacket was not fatally disconnected from the photo on the front.¹⁵² In another case involving the copying of drawings for a manufacturing plant,¹⁵³ contested factual issues prevented summary judgment regarding defendant’s intent to facilitate copyright infringement.¹⁵⁴

In one case, plaintiff alleged that defendants removed the copyright management information associated with plaintiff’s poetry, and correspondingly added false copyright management information by purveying the product in its own website.¹⁵⁵ In terms of the former claim, the information at issue consisted of (a) the title of the work, (b) the copyright notice appearing on each page of plaintiff’s website, and (c) the URL www.poetry.com.¹⁵⁶ The court rejected (a) as qualifying copyright management information, given that the title in question was not listed on the registration for the poetry collection in question.¹⁵⁷ It likewise rejected (b), as protection applies only to information “from the ‘body’ or the ‘area around’ the work,” not to anything “simply printed on the website.”¹⁵⁸ It also rejected (c), as the registration for the work in question showed its

^{150.11} *Id.* at 430.

^{150.12} Upon considering the legislative scheme in detail, a magistrate’s report recommended that “there is no justification, based on congressional intent, before the Court for adding the extra term of ‘identical’ to the DMCA’s plain language.” **ADR Int’l Ltd. v. Inst. for Supply Mgmt. Inc.**, 667 F. Supp. 3d 411, 430 (S.D. Tex. 2023). The district court judge agreed. *Id.* at 417.

^{150.13} [Crowley v. Jones, 608 F. Supp. 3d 78, 90 \(S.D.N.Y. 2022\)](#) (quote marks omitted).

^{150.14} See [§ 3.04](#) *supra*.

^{150.15} In *Crowley*, plaintiff took a photograph of a rapper, which was used as the art on the rapper’s album, altered to look like the feed of a closed-circuit camera. [608 F. Supp. 3d at 91](#). Given that plaintiffs’ complaint alleged “that defendant associated their names with a distinct work,” the court dismissed their claim under [17 U.S.C. § 1202\(a\)](#). *Id.*

¹⁵¹ [Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC, 999 F. Supp. 2d 1098, 1102 \(N.D. Ill. 2014\)](#).

¹⁵² [Id. at 1102](#). The court distinguished past cases in which the attribution was contained in an entirely different website, or in which there were multiple photographs that could have been identified. [Id. at 1102-03](#) (finding it “implausible” that viewer of record album would fail to link credit line on back with photo on cover).

¹⁵³ See [Jedson Eng’g, Inc. v. Spirit Constr. Servs., Inc., 720 F. Supp. 2d 904, 911 \(S.D. Ohio 2010\)](#).

¹⁵⁴ [Id. at 931](#).

¹⁵⁵ See [Personal Keepsakes, Inc. v. Personalizationmall.com, Inc., 975 F. Supp. 2d 920, 922, 928 \(N.D. Ill. 2013\)](#).

¹⁵⁶ [Id. at 928](#).

¹⁵⁷ [Id. at 926, 928](#). “Allowing a plaintiff to make out a DMCA claim based on alleged CMI that does not link up in any way to the copyright registration is an invitation to unfair litigation against parties who have tried to tread carefully to avoid copyright infringement.” [Id. at 928-29](#).

¹⁵⁸ [Id. at 929](#).

copyright owner to be another entity than the one listed.¹⁵⁹ Turning to the latter claim, it is true that defendant listed www.giftsforyounow.com as the name of its own website. But the court rejected a claim of false copyright management information, as that URL simply appeared at the bottom of every page as a generic website footer.¹⁶⁰ It was not listed close to the poems in question and therefore not “conveyed”¹⁶¹ with them in the sense required to violate the statute.^{161.1} In sum, plaintiff failed to make any headway on its copyright management information claims in this case.^{161.2} Subsequent authority follows that case with respect to proposition (b) above.^{161.3}

When plaintiff could not prove that “her signature and a copyright symbol were on the images” when defendant received them,” the court held against her for failure to show that the information in question was originally “conveyed in connection with” the protected work.^{161.4}

Professional photographers snapped images of houses for sale and licensed them to real estate agents for uploading to a multiple listing service (MLS); some photos contained metadata embedded into the images.^{161.5} The photographers filed suit against the provider of software to the MLS services for elimination of that metadata, notwithstanding that (1) there are “many points throughout the file handling process when metadata can be altered or completely deleted unintentionally from a photograph”^{161.6} and (2) the absence of “any evidence that the absence of metadata led to actual copyright infringement.”^{161.7} The district court denied all theories of liability: (a) the fact that defendant added its own copyright notice on the same page failed to constitute false CMI;^{161.8} (b) defendant was not responsible for removal of CMI, given that there were “any number of ways the CMI could have been excised before upload”;^{161.9} (c) there was no proof that

¹⁵⁹ “That makes poetrygift.com, at best, an indicator of the seller of the product, which says nothing about the copyright status of the product; in the same way, Amazon.com does not suggest that Amazon owns copyrights with respect to every product it sells.” *Id. at 928.*

¹⁶⁰ *Id. at 929.*

¹⁶¹ The definition for CMI “means any of the [specified] information *conveyed* in connection with copies or phonorecords of a work or performances or displays of a work” [17 U.S.C. § 1202\(c\)](https://www.law.cornell.edu/uscode/text/17/1202) (emphasis added).

^{161.1} [975 F. Supp. 2d at 929](https://www.giftsforyounow.com). “[T]he only conclusion the Court can reach about the copyright notice at the bottom of Techny’s www.giftsforyounow.com website is that it has some intellectual property rights in its own website, not that it is claiming ownership of a copyright to all of its products.” *Id.*

^{161.2} Following that ruling is [GC2 Inc. v. Int’l Game Tech. PLC](https://www.giftsforyounow.com), 255 F. Supp. 3d 812, 821 (N.D. Ill. 2017). Ruling to the contrary is [Pierson v. Infinity Music & Entm’t, Inc.](https://www.giftsforyounow.com), 300 F. Supp. 3d 390 (D. Conn. 2018), criticized in [§ 12A.10\[B\]\[1\]\[b\] supra](https://www.giftsforyounow.com). It should be added that a later ruling in the former case vindicated plaintiff’s claim for removal of CMI, based on all the circumstances. See [GC2 Inc. v. International Game Tech., IGT, Doubledown Interactive LLC](https://www.giftsforyounow.com), 391 F. Supp. 3d 828 (N.D. Ill. 2019).

^{161.3} See [SellPoolSuppliesOnline.com LLC v. Ugly Pools Ariz., Inc.](https://www.giftsforyounow.com), 344 F. Supp. 3d 1075, 1082–83 (D. Ariz. 2018).

^{161.4} [Powers v. Caroline’s Treasures Inc.](https://www.giftsforyounow.com), 382 F. Supp. 3d 898, 903 (D. Ariz. 2019), quoting [17 U.S.C. § 1202\(c\)](https://www.giftsforyounow.com). The same result inured in [Craig v. UMG Recordings, Inc.](https://www.giftsforyounow.com), 380 F. Supp. 3d 324, 338 (S.D.N.Y. 2019) (“There is not even any evidence suggesting whether there was CMI on the Photographs when Defendants obtained them.”). Mention should also be made of an additional case involving photographs, which held fatal plaintiff’s failure to identify what information was purportedly removed from which photographs. See [Free Speech Syst., LLC v. Menzel](https://www.giftsforyounow.com), 390 F. Supp. 3d 1162, 1175 (N.D. Cal. 2019).

^{161.5} See [Stevens v. Corelogic, Inc.](https://www.giftsforyounow.com), 194 F. Supp. 3d 1046, 1047–48 (S.D. Cal. 2016).

^{161.6} *Id. at 1048.*

^{161.7} *Id. at 1049* (“nor have the named Plaintiffs ever used metadata to track down copyright infringement”).

^{161.8} *Id. at 1051–52*, citing [Ward v. Nat’l Geographic Soc.](https://www.giftsforyounow.com), 208 F. Supp. 2d 429, 450 (S.D.N.Y. 2002).

defendant acted intentionally;^{161.10} and (d) proof was equally lacking that defendant had reasonable grounds to know that any removal of metadata would lead to copyright infringement.^{161.11}

The Ninth Circuit affirmed.^{161.12} Focusing on the mental element, it noted that the formulation looks to the future—"having reasonable grounds to know that [the defendant's conduct] *will* induce, enable, facilitate, or conceal an infringement."¹⁶² It interpreted that language to require specificity;^{162.1} a plaintiff "must make an affirmative showing, such as by demonstrating a past 'pattern of conduct' or 'modus operandi', that the defendant was aware or had reasonable grounds to be aware of the probable future impact of its actions."^{162.2} The cause of action failed based on plaintiffs' failure to "put forward *any* evidence that CoreLogic knew its software carried even a substantial risk of inducing, enabling, facilitating, or concealing an infringement, let alone a pattern or probability of such a connection to infringement."^{162.3}

It should be added that the Copyright Office disapproved of that result.^{162.4} To redress the deficiency,^{162.5} it recommended to Congress adding a new provision to the statute.^{162.6} By contrast, the Second Circuit

^{161.9} [Id. at 1052.](#)

^{161.10} [Id. at 1052-53.](#)

^{161.11} [Id. at 1053.](#) In addition, plaintiff's claims failed based on an implied license defense.

Plaintiffs licensed their photographs to real estate agents for the express purpose of uploading the photographs onto an MLS. *** Nowhere in the agreements with the agents do Plaintiffs warn the agents not to remove embedded metadata not viewable with the naked eye.

[Id. at 1054.](#)

^{161.12} [899 F.3d 666 \(9th Cir. 2018\), cert. denied, 139 S. Ct. 1222 \(2019\).](#)

¹⁶² [17 U.S.C. § 1202\(b\)](#) *in fine* (emphasis added).

^{162.1} [899 F.3d at 674](#) ("a more specific application than the universal possibility of encouraging infringement; specific allegations as to how identifiable infringements 'will' be affected are necessary").

^{162.2} *Id.* It later elaborated that "the plaintiff must provide evidence from which one can infer that future infringement is likely, albeit not certain, to occur as a result of the removal or alteration of CMI." [Id. at 675.](#)

^{162.3} [Id. at 676](#) (emphasis original).

^{162.4}

The Office finds the Ninth Circuit's *CoreLogic* result troubling. It essentially requires that not only must a section 1202 plaintiff prove intentional removal and distribution and prove that this action was done with the knowledge that it will encourage infringement, but also that this knowledge must be based on a "pattern of conduct" or "modus operandi," a requirement not present in the statute. Admittedly, proving that a defendant knows or has reasonable grounds to know that an action "will" cause or facilitate infringement is a relatively high bar. However, the *CoreLogic* opinion raises this bar impermissibly high in the Office's view.

Register of Copyrights, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States* 96 (April 2019).

^{162.5} The Office conceded that "section 1202's dual intent standard is necessary, at least in the criminal context, to ensure that innocent actors are not swept up by the provisions of section 1202." *Id.* at 97. But it felt differently about the civil context, proposing a new provision "that would address the difficulty creators face when trying to use section 1202 to protect their attribution rights—namely the requirement of intent to encourage infringement or knowledge that one's actions will induce infringement." *Id.* at 97-98.

^{162.6}

distinguished that ruling, which focused on the possibility of downstream infringement by third party users.^{162.7} Under its own facts, the Second Circuit held that “a defendant’s awareness that distributing copyrighted material without proper attribution of CMI will conceal *his own* infringing conduct satisfies the DMCA’s second scienter requirement.”^{162.8}

Later, the Eleventh Circuit expressed its agreement with both sister circuit rulings.^{162.9} Plaintiff owned commercial photographs of hotels; although it embedded CMI within the photos’ metadata, its license to hotels included no restrictions on manipulating or removing that metadata.^{162.10} Defendant acted as an intermediary between the hotels that licensed those photos and online travel agents (such as Expedia), at times purveying the photos without their CMI.^{162.11} Plaintiff’s case foundered on the second scienter requirement^{162.12}—rejecting the standard that defendant had reasonable grounds to know that its actions would “make infringement generally possible or easier to accomplish,”^{162.13} the opinion agreed with the Ninth Circuit in placing on plaintiffs the burden “to provide evidence from which one can infer that future infringement is likely, albeit not certain, to occur as a result of the removal or alteration of CMI.”^{162.14} Although not required to show “a specific and identifiable infringement,” plaintiff’s case failed to show any identifiable connection between defendant’s actions and such infringement as may have occurred—given that the images in question, in light of plaintiffs’ liberal licensing, could have emanated “from any number of sources.”^{162.15}

One case denied liability when an automotive photographer snapped a shot of an outdoor mural on a parking garage.^{162.16} Given the chosen angle, only one wall of the mural appeared in the photo—not the other wall, on which plaintiff had placed his pseudonym “Smash 137.”^{162.17} The resulting suit against use of

The Office recommends that Congress consider an addition to section 1202 that, while retaining a dual standard, would loosen it slightly to focus on intent to conceal rather than to infringe. Our proposed new section 1202A states that the knowing removal or alteration of any copyright management information would be actionable only if it was done with the intent to conceal the author’s attribution information. This would alleviate the burden on creators’ ability to effectively use section 1202 when their identifying information has been altered or removed, while still providing safeguards for those who remove or alter CMI for innocent or good faith purposes.

Id. at 98. The new proposed section would “protect against liability for innocent or good faith removal of CMI, while giving creators a new tool to prevent deliberate efforts to conceal their authorship of a work. This would address the difficulty in proving intent to commit infringement, while narrowly focusing on issues of authors’ attribution rights.” *Id.* at 5.

^{162.7} [Mango v. Buzzfeed, Inc., 970 F.3d 167, 173–74 \(2d Cir. 2020\)](#).

^{162.8} [Id. at 172](#) (emphasis original).

^{162.9} See [Victor Elias Photography, LLC v. Ice Portal, Inc., 43 F.4th 1313, 1320 \(11th Cir. 2022\)](#), cert. denied, **143 S. Ct. 736 (2023)**.

^{162.10} [Id. at 1316–17](#).

^{162.11} [Id. at 1315](#).

^{162.12} [Id. at 1319](#). The opinion did not reach defendant’s defense under the first scienter requirement of not intentionally removing the CMI, given its holding under the second. [Id. at 1320 n.8](#).

^{162.13} [Id. at 1321](#).

^{162.14} [Id. at 1321](#), quoting [Stevens v. Corelogic, 899 F.3d at 675](#). The opinion later reiterated that the statute “does not require knowledge in the sense of *certainty* as to a future act.” [Id. at 1324](#), quoting [899 F.3d at 674](#) (emphasis added by Eleventh Circuit).

^{162.15} [Id. at 1324–25](#).

^{162.16} See [Falkner v. General Motors LLC, 393 F. Supp. 3d 927, 929 \(C.D. Cal. 2018\)](#).

the photo on defendant's social media failed—merely framing the scene, rather than editing or cropping material, failed to amount to the requisite removal or alteration of copyright management information.^{162.18} On that authority, another denied liability for framing part of plaintiff's mural during a Super Bowl commercial.^{162.18a}

A valuable example of a practical situation, as described by one court, is as follows:

Imagine that the back cover of the Ian Fleming novel *Dr. No* contained the following encomium: “In Ian Fleming’s *Dr. No*, Fleming shows his mastery of Cold War spycraft.” Imagine then that a person lifted language from that review to promote a different thriller, writing: “In John Le Carré’s *Tinker, Tailor, Soldier, Spy*, Le Carré shows his mastery of Cold War spycraft.” Whatever the other legal implications of such conduct might be, it is inconceivable that a DMCA claim would lie from the elimination of Fleming’s name. The expression at issue does not connote Fleming’s copyright ownership of anything, much less the language common to the two book-promoting blurbs.^{162.19}

Based on those considerations, the court denied a claim brought by plaintiff apriarist that defendant committed an actionable violation by lifting phrases from his brochure to promote their own rival knock-off versions of his honey harvesting aid.^{162.20} A later case distinguished that authority to hold culpable a company that removed the copyright management information from plaintiff’s artwork used on slot machines.^{162.21} It was no defense that the information was not “pre-existing” in plaintiff’s product, given defendant’s contractual obligation to affix that information before disseminating the artwork in question.^{162.22}

[2] Applicable to Low-Tech Settings?

The major flashpoint to emerge about Section 1202 concerns its reach—in particular, whether Congress intended to limit the regulation of copyright management information to the electronic context that gave birth to the Digital Millennium Copyright Act. In *Textile Secrets Int'l, Inc. v. Ya-Ya Brand Inc.*,¹⁶³ plaintiff manufactured a fabric design composed of peacock feathers, marked with its name and copyright notice on

^{162.17} *Id. at 929*. Defendant claimed he did not see any name on the mural. *Id.*

^{162.18} *Id. at 938–39* (Treatise quoted as to [§ 12A.10\[B\]\[1\]\[a\] supra](#)).

^{162.18a} See [Williams v. Hy-Vee, Inc., 661 F. Supp. 3d 871, 877, 884–85 \(S.D. Iowa 2023\)](#).

^{162.19} [Fischer v. Forrest, 286 F. Supp. 3d 590, 611 \(S.D.N.Y. 2018\)](#). The Second Circuit’s affirmation quotes that same language. [968 F.3d 216, 223 \(2d Cir. 2020\) \(Treatise cited\)](#).

^{162.20} “[W]hat was removed was not Fischer’s name as the copyright holder of the advertising text, but ‘Fischer’s’ insofar as it was a part of the actual product name.” *Id. at 223*. “No reader would find that the ‘Fischer’s’ as used in the phrase ‘Fischer’s Bee-Quick is a safe, gentle, and pleasant way to harvest your honey’ speaks to copyright ownership.” [286 F. Supp. 3d at 611](#).

^{162.21} See [GC2 Inc. v. International Game Tech., IGT, Doubledown Interactive LLC, 391 F. Supp. 3d 828, 836–37 \(N.D. Ill. 2019\)](#). In contrast to the use of snippets in *Fischer*, plaintiff in this case provided defendant with artwork “which was then used, in its entirety, in the online versions of the games later developed by the defendants.” *Id. at 844*.

^{162.22} *Id. at 844*.

Nowhere does the text of section 1202 suggest that removal of copyright management information is only a violation if that information was placed on the copyrighted materials by the plaintiff itself. Such a reading would lead to the absurd result where a copyright owner who contracts with another entity to manufacture their products—and in the process to affix copyright management information—could not avail itself of the DMCA’s removal provisions. The Court declines to adopt the defendants’ requested approach.

Id. at 845. Approving this language is [Mango v. Buzzfeed, Inc., 970 F.3d 167, 171 n.1 \(2d Cir. 2020\)](#).

¹⁶³ [524 F. Supp. 2d 1184 \(C.D. Cal. 2007\)](#).

its tag and selvage.¹⁶⁴ It complained that defendant infringed the copyright in its fabric design,¹⁶⁵ and added another count for violation of the Digital Millennium Copyright Act. The court acknowledged that a literal interpretation of the statute would characterize the tag and selvage as CMI.¹⁶⁶ But it rejected the “impractical results” that such an approach would yield.¹⁶⁷ Instead, its search into the structure and history of Section 1202 caused it to conclude that that section was not “intended to apply to circumstances that have no relation to the Internet, electronic commerce, automated copyright protections or management systems, public registers, or other technological measures or processes as contemplated in the DMCA as a whole.”¹⁶⁸ Given the absence of facts “showing that any technological process as contemplated in the DMCA was utilized by plaintiff in placing the copyright information onto the FEATHERS fabric, or that defendants employed any technological process in either their removal of the copyright information from the design or in their alleged distribution of the design,” it concluded that “the facts of this case do not trigger § 1202.”¹⁶⁹ The court stopped short of limiting CMI in all instances to digital exploitation, without attempting to define the relevant borders.¹⁷⁰

That district court ruling amplifies the holding of another district court case, *IQ Group, Ltd. v. Wiesner Publishing, LLC*.¹⁷¹ IQ was an advertising service that prepared copy for an insurance company. Its logo, “a capital ‘Q’ with the outline of a lower-case ‘I’ in the center,”¹⁷² was removed when the insurance company hired a rival to modify an ad prepared by IQ and to distribute the reformulated ad via email to solicit insurance business.¹⁷³ IQ contended that its logo qualified as copyright management information; taken literally, the statute could apply “wherever any author has affixed anything that might refer to his or her name.”¹⁷⁴ Against that boundless application, the court adopted a “narrowing interpretation.”¹⁷⁵ It thereby brought its ruling within the Supreme Court’s mandate to avoid effacing the boundaries between trademark and copyright protection by creating “a species of mutant copyright law.”¹⁷⁶

The above holding of *IQ Group* harmonizes with the later holding of *Textile Secrets*. In another respect, however, the earlier case went further. Plaintiff IQ contended that its “Legal Notice” hyperlink, which its rival likewise removed when preparing the new ad, also qualified under the statute.¹⁷⁷ The court constructed a

¹⁶⁴ Selvage refers to “the edge or border of the fabric that is intended to be cut off and discarded.” *Id. at 1192 n.7*. See [§ 7.13\[C\]](#) N. 101 *supra*.

¹⁶⁵ See [§ 2A.08\[H\]\[2\]](#) *supra*.

¹⁶⁶ [524 F. Supp. 2d at 1195](#).

¹⁶⁷ [Id. at 1195](#).

¹⁶⁸ [Id. at 1201](#).

¹⁶⁹ [Id. at 1201–1202](#).

¹⁷⁰ [Id. at 1202 n.17](#).

¹⁷¹ [409 F. Supp. 2d 587, 593 \(D.N.J. 2006\)](#).

¹⁷² [Id. at 589](#).

¹⁷³ [Id. at 589](#).

¹⁷⁴ [Id. at 593](#).

¹⁷⁵ [Id. at 593](#).

¹⁷⁶ [Id. at 592](#), quoting *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003). See [§ 1.19\[B\]](#) *supra*.

relationship between the two portions of the Digital Millennium Copyright Act¹⁷⁸ to conclude that Section 1202 only protects “a component of an automated copyright protection or management system.”¹⁷⁹ That interpretation seems difficult to square with the facts of this case, given that the advertisements about which plaintiff complained were indeed “sent via email, and thus likely copied and distributed as part of an automated process within a computer network environment . . .”¹⁸⁰ The same considerations applied to a later Third Circuit case, in which defendant scanned plaintiff’s photograph to its website and encouraged visitors to engage in further manipulation of the hapless image.¹⁸¹ But unlike *IQ Group*, the court rejected defendant’s posited connection between the two portions of the Digital Millennium Copyright Act. It refused to limit the definition of “copyright management information” from the words set forth in the statute to automated¹⁸² copyright protection or management systems.¹⁸³

The question remains whether, absent an automated system, someone who removes a notification that says “© 2002 by Gudmundur Jones” with the intent to induce copyright infringement may ever be held culpable under Section 1202. *IQ Group* seems to answer that question in the negative, whereas *Textile Secrets* holds open the possibility that, under given circumstances, liability may attach even in the non-digital context. Some courts have ruled to the contrary of *IQ Group*, usually without much analysis,¹⁸⁴ others have allowed the complaint to stand as a pleading matter,^{184.1} reserving for later the question as to its

¹⁷⁷ [409 F. Supp. 2d at 591](#).

¹⁷⁸ Section 1201 sets forth the anti-circumvention provisions; Section 1202 sets forth the current provisions regarding copyright management information. See [§ 12A.03 supra](#). The court fits those parts together as follows:

Chapter 12, as a whole, appears to protect automated systems which protect and manage copyrights. The systems themselves are protected by § 1201 and the copyright information used in the functioning of the systems is protected in § 1202. [¶] This interpretation fits well with statements in the legislative history about the historical context of the DMCA. Congress intended the DMCA to modernize copyright protection as a response to the development of new technologies which both enabled new forms of copyright protection as well as new forms of copyright infringement.

[409 F. Supp. 2d at 597](#).

¹⁷⁹ [Id. at 597](#).

¹⁸⁰ [Id. at 597](#). The court reasoned that the hyperlink and logo themselves were not intended to serve that function. “Rather, to the extent that they functioned to protect copyright at all, they functioned to inform people who would make copyright management decisions. There is no evidence that IQ intended that an automated system would use the logo or hyperlink to manage copyrights, nor that the logo or hyperlink performed such a function, nor that Wiesner’s actions otherwise impeded or circumvented the effective functioning of an automated copyright protection system.” *Id.*

¹⁸¹ See [Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295, 299 \(3d Cir. 2011\)](#). An unknown employee at defendant radio station had taken plaintiff’s photograph, cut off the “gutter credit” listing his name, and posted it to the website. *Id.*

¹⁸² Judge Fuentes invoked an interesting textual argument that Congress deliberately defined “copyright management information” more broadly than defendants’ proposed construction of “electronic rights management information.” The WIPO Copyright Treaty, which furnished the template for Section 1202, imposes the requirement that regulated information appear “in connection with the communication of a work, and then further delineates standards in an electronic context.” [Id. at 305 n.13](#). See [§ 12A.02\[B\] supra](#). The posited implication is that Congress intended to dispense with that treaty requirement by failing to incorporate its limitations into the drafting of the Digital Millennium Copyright Act.

¹⁸³ [650 F.3d at 302, 305](#).

¹⁸⁴ See [Carter v. Pallante, 256 F. Supp. 3d 791, 801 \(N.D. Ill. 2017\)](#); [Agence France Presse v. Morel, 769 F. Supp. 2d 295, 306 \(S.D.N.Y. 2011\)](#); [Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 461–462 \(S.D.N.Y. 2009\)](#); [Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC, 999 F. Supp. 2d 1098, 1102 \(N.D. Ill. 2014\)](#).

^{184.1} See [Strobel v. Rusch, 431 F. Supp. 3d 1315, 1329 \(D.N.M. 2020\)](#).

sufficiency.¹⁸⁵ The Copyright Office, although calling the body of case law¹⁸⁶ interpreting section 1202 “relatively contained,” concluded that “the applicability of the provision to analog as well as digital works ... is now well-settled.”¹⁸⁷

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¹⁸⁵ See *Cable v. Agence France Presse*, 728 F. Supp. 2d 977, 980–981 (N.D. Ill. 2010); *Jacobsen v. Katzer*, 609 F. Supp. 2d 925, 934 (N.D. Cal. 2009).

¹⁸⁶ One case cited above opposes the limiting construction. See *Murphy v. Millennium Radio Grp.*, 650 F.3d 295, 299 (3d Cir. 2011). It rejects the proposition that plaintiff must have utilized the subject work electronically, but does not conclusively resolve cases in which both plaintiff’s and defendant’s conduct is non-digital.

¹⁸⁷ Register of Copyrights, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States* 87 (April 2019).