Beyond Infringement: Rethinking DMCA § 1202 for Generative AI
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NOTE

Beyond Infringement: Rethinking DMCA § 1202 for Generative AI

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Abstract. With the emergence of large language models (LLMs) like ChatGPT, scholars and courts have fervently debated whether LLMs' training on and reproduction of copyrighted materials amounts to fair use. But in a recent series of cases, a lesser-known challenge to LLMs has reared its head: § 1202 of the Digital Millenium Copyright Act. This provision requires that when a work is copied, its associated copyright management information (CMI)—such as its license or terms of use agreement—is copied with it. The requirement was originally intended to modernize copyright for the Internet by ensuring all users would be aware of the terms of their use. Now, § 1202's unintended overbreadth threatens to block LLM development and use as it swallows questions of infringement and fair use entirely.

This Note argues that § 1202 is broader than traditional copyright infringement in three critical respects: It allows liability without any showing of copyrightability, provides no fair use defense, and permits disproportionate statutory damages. While § 1202 includes an intent requirement, that requirement is so minimal that it fails to meaningfully limit the statute's reach—especially in the LLM context, where the act of violating § 1202 may itself satisfy the mental requirement.

In response to these concerns, this Note proposes that courts adopt an identicality requirement for § 1202 claims against LLMs. This requirement would cabin liability to outputs that exactly match training data—cases where the removal or alteration of CMI is both clear and technically avoidable. The approach mirrors Congress's existing accommodation of technological limitations for broadcasters in cases of technical infeasibility or financial hardship. A similar understanding for LLMs would preserve § 1202's core purpose, resolve a growing district court split, and ensure the most consequential copyright question raised by generative artificial intelligence is answered on its merits—not sidestepped by a statute never designed to decide it.

[†] [Acknowledgment Text]

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On the other side of the split, courts and commentators have held that something less than identicality is sufficient to show that CMI was removed from a "copy."[131] In one case, a district court held that "superficial alterations" to a work—alterations that in at least some courts on the other side of the split would lead to a dismissal for lack of identicality—justified a denial of defendants' motion to dismiss.[132] The court held 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."[133]

Though some courts do not specify a standard beyond a rejection of identicality,[134] others have specifically stated that the correct standard is "substantial similarity" between the allegedly infringing and original works.[135] One Ninth Circuit case abided by a slightly different standard: "striking similarity."[136] This standard is imported directly from copyright infringement doctrine,[137] emphasizing courts' confusion between copyright infringement and

[131] Oracle Int'l Corp. v. Rimini St., Inc., No. 2:14-CV-01699-MMD-DJA, 2023 WL 4706127, at *82 (D. Nev. July 24, 2023) (rejecting defendant's argument "that a work that removes copyright management information must be an exact copy of the original work."); ADR Int'l Ltd. v. Inst. for Supply Mgmt. Inc., 667 F. Supp. 3d 411, 428 (S.D. Tex. 2023) ("Specifically, the Court is persuaded by the reasoning of courts that have found that the DMCA may properly apply even when the allegedly infringing work is not identical to the original."); Nimmer On Copyright, *supra* note 25 § 12A.10(C)(1) ("[T]o be actionable, the removal must be from a work that is at least substantially similar to the copyrighted work in question . . . But there is no warrant to conclude, as did *dictum* in one case, that 'no DMCA violation exists where the works are not identical.'"); *New Parent World, LLC v. True To Life Prods., Inc.*, No. CV-23-08089-PCT-DGC, 2024 WL 4277865, at *2 (D. Ariz. Sept. 24, 2024) (Other courts have held that an infringing work need not be an identical copy to violate the DMCA . . . The Court finds these cases persuasive.").

[132] ADR Int'l Ltd. v. Inst. for Supply Mgmt. Inc., 667 F. Supp. 3d 411, 428 (S.D. Tex. 2023).

[133] *Id.*

[134] Real World Media LLC v. Daily Caller, Inc., 744 F. Supp. 3d 24, 40–41 (D.D.C. 2024) ("Ultimately, the Court agrees with a leading treatise that the arguments requiring perfect identity under these circumstances "fail[ ] to withstand scrutiny." Nimmer on Copyright, *supra* note 25 § 12A.10. Hence, the Court rejects Daily Caller's categorical argument that exact copies of portions of a video can never support a DMCA claim."); ADR Int'l Ltd. v. Inst. for Supply Mgmt. Inc., 667 F. Supp. 3d 411, 425 (S.D. Tex. 2023) ("The DMCA is not limited to CMI conveyed in connection with identical copies of a work.").

[135] Enter. Tech. Holdings, Inc. v. Noveon Sys., Inc., No. 05-CV-2236 W (CAB), 2008 WL 11338356, at *7 (S.D. Cal. July 29, 2008) (finding the defendant violated the DMCA by altering CMI from "transportation management software" he programmed "that was 'substantially similar'" to the allegedly infringed software.); Nimmer On Copyright, *supra* note 25 § 12A.10(C)(1) ("[T]o be actionable, the removal must be from a work that is at least substantially similar to the copyrighted work in question . . . But there is no warrant to conclude, as did *dictum* in one case, that 'no DMCA violation exists where the works are not identical.'").

[136] Friedman v. Live Nation Merch., Inc., 833 F.3d 1180, 1188 (9th Cir. 2016).

[137] *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1188 (9th Cir. 2016) cites *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987) for its standard on striking similarity. *Baxter*

DMCA § 1202 claims, and it has rarely been followed.[138] In that case, striking similarity was found where allegedly infringing photographs contained "alterations, such as tint effects and added logos" that only appeared in the original source.[139] Other courts have defined their standard by reference to a work's derivative nature rather than its similarity or identicality; some courts explicitly state that derivative works are not exempt from § 1202 liability.[140] But no general rule exists: Just like the courts on the other side of the split, most courts advocating a similarity standard have not specified the application of the standard.[141]

Copyrightability. Notably, neither standard for determining whether a work is a "copy" under § 1202 considers the copyrightability of the underlying subject matter. Unlike the infringement standard, where the copying in fact inquiry determines whether a work was actually copied and the copying in law inquiry determines if that copying led to substantial similarity sufficient for legal action, § 1202 uses either the identicality or the similarity standard as a proxy for both of those inquiries. But in effect, this collapses the inquiries: the similarity and identicality standards require some measure of similarity between the works in question, and once that similarity is established, it is seemingly assumed to be

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does not include any DMCA claims. Rather, it explicitly uses its "striking similarity" standard to establish copying in the context of a copyright infringement claim.

[138] At least two district courts within the Ninth Circuit have acknowledged the Ninth Circuit's striking similarity standard. *See Aardwolf Indus., LLC v. Abaco Machines USA, Inc.*, WL 10350547, at *11 (C.D. Cal. Nov. 13, 2017); *see Oracle Int'l Corp. v. Rimini St., Inc.*, WL 4706127, at *82 (D. Nev. July 24, 2023). But many more district courts within the Ninth Circuit have declined to do so. *See supra* notes 112-114 (listing district court cases within the Ninth Circuit that have followed the identicality standard instead).

[139] *Id.*

[140] *Huffman v. Activision Publ'g, Inc.*, No. 219CV00050RWSRSP, 2020 WL 8678493, at *12 (E.D. Tex. Dec. 14, 2020) ("Nothing in the statute exempts derivative works or a defendant's own work."); *GC2 Inc. v. Int'l Game Tech., IGT, Doubledown Interactive LLC*, 391 F. Supp. 3d 828 (N.D. Ill. 2019)(rejecting the "broad proposition that derivative or collaborative works are categorically excluded from protection under the DMCA's provision for removal of copyright management information," though never explicitly endorsing one side of the court split on identicality.). *But see* Nimmer On Copyright, *supra* note 25 § 12A.10(C)(1) (conceding that "an unauthorized film may infringe the copyright in the novel on which it is based, but crediting the film to someone other than the novelist does not seem to rise to the level of false copyright management information" while claiming that the proper standard is substantial similarity).

[141] *Real World Media LLC v. Daily Caller, Inc.*, 744 F. Supp. 3d 24, 40–41 (D.D.C. 2024) (rejecting identicality without providing a substitute standard); *Oracle Int'l Corp. v. Rimini St., Inc.*, WL 4706127, at *82 (D. Nev. July 24, 2023) (suggesting substantial similarity as the proper standard without describing its application); *ADR Int'l Ltd. v. Inst. for Supply Mgmt. Inc.*, 667 F. Supp. 3d 411, 428 (S.D. Tex. 2023) (rejecting identicality without providing a substitute standard); *New Parent World, LLC v. True To Life Prods., Inc.*, No. CV-23-08089-PCT-DGC, 2024 WL 4277865, at *2 (D. Ariz. Sept. 24, 2024) (rejecting identicality without providing a substitute standard).