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Goldstein on Copyright
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§ 7.18 COPYRIGHT MANAGEMENT INFORMATION

The digital environment presents increased opportunities not only for piracy, but also for electronic licensing of copyrighted works. Articles 12 and 19, respectively, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty aim to enhance licensing transactions by obligating countries adhering to the treaties to ensure the integrity of copyright management information. Article 12 of the WIPO Copyright Treaty, for example, requires """"adequate and effective" remedies against unauthorized removal or alteration of electronic rights management information or dissemination of copies with missing or altered management information, knowing that "it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention."

Section 1202 of Title 17, added by the Digital Millennium Copyright Act,[1] implements the copyright management requirements of the WIPO treaties through two provisions, one prohibiting the dissemination of false copyright management information for the purpose of promoting copyright infringement,[2] the other prohibiting the unauthorized removal or alteration of copyright management information.[3] Both provisions pivot on a definition of "copyright management information" that includes among the elements connected to copies, phono-records, performances or displays, the work's title,[4] the name of the author[5] and copyright owner,[6] and the performer in cases other than audiovisual works,[7] the writer, performer and director in the case of audiovisual works,[8] and the terms and conditions for use of the work.[9]

Copyright Management Information. To qualify as copyright management information, the elements in question must inform the public that a work is copyrighted and by whom;[9.0.1] "most courts that have considered the issue have found that the meaning of CMI is broad."[9.0.2] As one court put it, "the point of CMI is to inform the public that something is copyrighted and to prevent infringement."[9.0.3] So, for example, a copyright notice placed by a website owner in its own name on a page containing a reproduction of another copyright owner's work will constitute "copyright management information."[9.0.4]

A digital watermark is one form in which copyright management information may be embedded.[9.1] Copyright headers - "relatively human-readable text" at the top of a source code file -- may also contain copyright management information.[9.2] This information must also be sufficiently proximate to the copyrighted work to communicate that it relates to that work and not to some other work, such as a the website on which the work appears.[9.3]

Although courts have divided on whether section 1202's protection extends to the described information regardless of the medium in which it is embodied, or only to information embedded in the technological measures of automated systems, the weight of authority holds that the information need not be part of an automated system.[9.4] Section 1202(b) does not require the copyright management information to have been placed on the disputed material by the copyright owner; indeed, in one case the court applied the provision against a defendant that had, with the copyright owner's consent, originally annexed the management information to the content.[9.5]

Section 1202 prohibits the unauthorized removal or alteration of any specified elements, but does not require the author or copyright owner to include any or all of these elements on copies of the work. Although the provision nowhere expressly requires that the subject matter in issue be under copyright, the requirement in section 1202(a) of an intention "to induce, enable, facilitate, or conceal infringement," like the introductory reference in 1202(b) to "the authority of the copyright owner," and in the concluding clause to "an infringement of any right under this title," implies that copyright exists in the subject matter.

Intentionality. Section 1202(a) prohibits any person from providing false copyright management information, or distributing false copyright management information "knowingly and with the intent to induce, enable, facilitate, or conceal infringement."[10] The fact that the distributor of a copyrighted photograph includes its own copyright notice on the same page as the photograph, and even proximate to it, will not subject the distributor to liability for providing false copyright information;[10.1] nor will it be actionable for a software supplier to display its own copyright notice on the same web page as the copyright owner's photograph.[10.2] A defendant's use of a watermark to identify its platform as the source of a downloaded image has been held not to constitute false CMI.[10.3] As a rule, the works must be identical for there to be a violation.[10.4]

Section 1202(b), which more explicitly incorporates the WIPO Treaties' obligations, prohibits the intentional removal or alteration of copyright management information,[11] the distribution of copyright management information knowing that it has been removed or altered without authority,[12] and the distribution or public performance of a work, knowing that copyright management information has been removed or altered without authority.[13] To meet the intentionality requirement imposed by section 1202(b), courts have required concrete pleading and proof of affirmative intent. Thus, while one court held that it sufficed for a plaintiff pleading a section 1202(b) claim to allege the removal of its watermark from the film,[13.1] another court in the same circuit ruled that "automatically omitting CMI by embedding a photo out of the full context of the webpage where the CMI is found cannot itself plead intentionality as required by the DMCA."[13.1.1]

It is a condition to liability in any of these cases that the offender knew -- or, in the case of civil remedies, had reason to know -- that its conduct would facilitate copyright infringement. What constitutes knowledge or """"reasonable grounds to know"? Plaintiffs in *Stevens v. CoreLogic, Inc*.[13.2] complained that defendant, which marketed Multiple Listing Service software platforms to the real estate industry, had stripped metadata containing plaintiffs' copyright information from plaintiff real estate photographs in violation of section 1202(b). Affirming the district court's grant of summary judgment to the defendant, the court observed that the photographers' "primary argument is that, because one method of identifying an infringing photograph has been impaired, someone *might* be able to use their photographs undetected . That assertion rests on no affirmative evidence at all; it simply identifies a general possibility that exists whenever CMI is removed."[13.3] "In short," Judge Marsha Berzon wrote for the court, "to satisfy the knowledge requirement, a plaintiff bringing a section 1202(b)(1) claim must offer more than a bare assertion that 'when CMI metadata is removed, copyright infringement plaintiffs... lose an important method of identifying a photo as infringing.' Instead, 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."[13.4]

Can the second element of section 1202(b)'s double scienter requirement -- that the defendant had at least reasonable grounds to know that the removal or alteration of CMI "will induce, enable, facilitate, or conceal an infringement of any right under this title" -- encompass the defendant's own infringement as well as a third party's? In *Mango v. Buzzfeed, Inc.*, [13.5] where defendant had published the plaintiff photographer's picture both without permission and without correct attribution, the court rejected defendant's argument that it could not be liable under section 1202(b) because there was no evidence that it knew its conduct would lead to future, third party infringement of Mango's copyright, and held that the plain language of the statute did not require such evidence; "[o]n its face, 'an infringement' is not limited by actor (*i.e.*, to third parties) or by time (*i.e.*, to future conduct). So while future copyright infringement by a third party may constitute 'an infringement, under Section 1202(b), nothing in the statutory language limits its applicability to such downstream infringement." [13.6]

Although the logic and much of the language of the second element in section 1202's double scienter requirement appear to contemplate third-party infringement, the provision's plain language, cited by the court, and particularly the final word, "conceal," suggest an intention to include infringer misconduct as well. The harder question is whether the second scienter element encompasses technical infringements that ultimately qualify as fair use or are excused under a statutory exception. Although the required foresight might be implied in cases like *Mango,* where the defendant itself made the use, it would be a greater stretch to excuse a defendant on the ground that, though it knew infringement was likely, it also knew the infringement would qualify for one or another excuse under the statute.

Identity. As a rule, a section 1202(b) claim will lie only when the CMI is removed from, or altered in connection with, an identical copy of the copyrighted work. [13.6.1] So, in a case where the complaint alleged that """"[t]hough Output from [defendant's] Copilot is often a verbatim copy, even more often it is a modification: for instance, a near-identical copy that contains only semantically insignificant variations of the original Licensed Materials, or a modified copy that recreates the same algorithm," and "that the Copilot output is a 'modified format,' 'variation,' or the 'functional equivalent' of the licensed code, the court ruled that this was "not sufficient for a Section 1202(b) claim," and was "a fundamental defect" in the complaint. [13.6.2]

Section 1202 is silent on the question of secondary -- contributory, vicarious or inducement -- liability for the proscribed falsification, removal or alteration of copyright management information. Although the primary activity contemplated by section 1202 is not copyright infringement, the provision is nonetheless sufficiently akin to other torts -- most notably misrepresentation -- to support secondary liability. Although it is not self-evident that *copyright* secondary liability rules should apply, and not the rules designed for misrepresentation or trademark infringement, the Sixth Circuit Court of Appeals held in *Gordon v. Nextel Communications* [13.7] that copyright's vicarious liability rules should apply to section 1202 cases as well, ruling that a defendant will be vicariously liable for a section 1202 violation if it had the right and ability to supervise the offending conduct and had an obvious and direct financial interest in the conduct. [13.8]

Section 1202(d) exempts lawfully authorized government investigative or protective activities, comparable to those covered by the exemption respecting circumvention of access controls, from the copyright management information requirements, and section 1202(e) accommodates the need for accurate copyright management information to the realities of the broadcast and cablecast marketplace by limiting the liability of broadcasters, cable systems and program providers. In the case of analog transmissions, section 1202(e)(1) exempts a broadcasting station, cable system or programming provider if compliance is "not technically feasible or would create an undue financial hardship," and the station, system or provider had no intention to facilitate or conceal infringement. In the case of digital transmissions, section 1202(e)(2) contemplates that the industry will adopt voluntary standards for placement of copyright management information, and that once a standard is established, a broadcaster, cable system or program supplier will be relieved of liability so long as it was not itself responsible for any nonstandard placement of copyright management information, and did not intend by its conduct to facilitate copyright infringement. [14] Section 1202(e)(2) also prescribes limitations on liability respecting digital transmissions before the adoption of voluntary standards. [15]

Footnotes

1 Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

2 17 U.S.C. §1202(a).

3 17 U.S.C. §1202(b).

4 17 U.S.C. §1202(c)(1).

5 17 U.S.C. §1202(c)(2).

6 17 U.S.C. §1202(c)(3).

7 17 U.S.C. §1202(c)(4). Excepted from this provision are public performances of works by radio and television broadcast stations.

8 17 U.S.C. §1202(c)(5). Excepted from this provision are public performances of works by radio and television broadcast stations.

9 17 U.S.C. §1202(c)(6).

9.0.1 Fischer v. Forrest, 968 F.3d 216, 223 (2d Cir. 2020) ("While an author's name can constitute CMI, not every mention of the name does. Here, "'Fisher's' is part of a product name; it is not a reference to 'James H. Fischer' as the owner of a copyrighted text. Nor is the name '[t]he title and other information identifying the work' or the '[t]he name of, and other identifying information about, the author of the work' as required by the statute.").

9.0.2 Michael Grecco Productions, Inc. v. Alamy, Inc., 372 F.Supp.3d 131, 137 (E.D.N.Y. 2019).

9.0.3 Personal Keepsakes, Inc. v. Personalizationmall.com, Inc., 975 F.Supp.2d 920, 928 (N.D. Ill. 2013). The court in this case possibly missed the point in giving too much force to the *punctilio* of copyright registration, and holding that poem titles were not CMI because they failed to match the titles of the works on the copyright registrations.

9.0.4 *See, e.g.*, Post University v. Course Hero, Inc., 2023 WL5507845 (D.Conn.2023) ("The broad meaning of 'conveyed in connection with' is consistent with its place within the statutory structure -- not as part of the section's outlining the various violations, but as part of the definition that determines whether information falls under the category of CMI at all. Thus, at the motion to dismiss stage, unless it is 'implausible' that a viewer could understand the information to be referring to the defendant as the work's copyright holder, dismissal is inappropriate.").

9.1 *See* Costar Group, Inc. v. Commercial Real Estate Exchange, Inc., 2023 WL 3979445 (C.D.Cal. 2023) ("While the Court previously found that a bare logo without more is not sufficient identifying information to constitute CMI, there are additional allegations in the SAC that make clear that CoStar's watermark is recognized in the industry and identifies CoStar as the owner of images on CoStar's webpage. The watermark is present on six separate registered CoStar trademarks and appears as the 'favicon' next to the title of CoStar webpages. Moreover, CREXi specifically instructed its agents to crop out the watermark from CoStar's images before posting them, and in some instances, replaced it with its own watermark."); IQ Group, Ltd. v. Wiesner Publishing, LLC, 409 F. Supp. 2d 587, 596, 78 U.S.P.Q.2d 1755 (D.N.J. 2006) (Evaluating legislative history to conclude that "Congress viewed a digital watermark as an example of

copyright management information."); Gregerson v. Vilana Financial, Inc., 2008 U.S. Dist. Lexis 11727 (D. Minn. 2008) (Digitally embedded watermark containing copyright notice and name of copyright owner constitutes copyright management information under section 1201(c)(3)).

See also Jacobson v. Katzer, 93 U.S.P.Q.2d 1236 (N.D. Cal. 2009) ("[T]he Court finds that there has been some technological process employed to protect the author's name, a title, a reference to the license and where to find the licensee, a copyright notice, and the copyright owner of Plaintiff's work.").

9.2 *See* Iconics, Inc. v. Massaro, 192 F.Supp.3d 254, 272 (D.Mass.2016) ("The headers used by ICONICS convey at least information about the copyright owner, author, and certain terms of use for the file (i.e., confidentiality), and are conveyed along with the source code files precisely to keep this identifying information together with the code."). *See also* Energy Intel. Group, Inc. v. Kayne Anderson Capital Advisors, L.P., 948 F.3d 261, 277 (5th Cir. 2020) ("Nothing in §1202 indicates that a digital file name cannot be CMI. Rather, a PDF's file name may be CMI if it is 'conveyed in connection with copies' of the underlying work and contains a 'title and other information identifying the work."DD'); Millennium Funding, Inc. v. Private Internet Acess, Inc., 2022 WL 7560395 (D.Colo. 2022).

9.3 *See, e.g.*, Alan Ross Machinery Corp. v. Machinio Corp., 129 U.S.P.Q.2d 1729, 1731 (E.D.Ill.2019) ("[W]here the only CMI displayed by Alan Ross appears on the website's footer, not on the works or images themselves, the only conclusion the Court can reach about the general copyright notice at the bottom of Alan Ross's 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 the photographs or information contained in the listing."). *See also*, Fashion Nova, LLC v. Blush Mark, Inc., 2023 WL2540418 (C.D.Cal. 2023) ("Plaintiff's company name and logo appear to be located at the top of Plaintiff's website. Accordingly... the company name and logo are not conveyed in connection with the relevant images and therefore are not CMI. And product names alone are not CMI, as they do not reveal to the viewer that the images are copyrighted."); GC2 Inc. v. Int'l Game Technology PLC 255 F.Supp. 3d 812, 821 (N.D. Ill. 2017) (Link to the defendant's terms of use at the bottom of webpage was not connected to plaintiff's artwork displayed there; courts "have generally required more than a boilerplate terms of use notice near a copyrighted work" in order to find a party liable for distributing false CMI"); Stevens v. CoreLogic Inc. 194 F.Supp.3d 1045, 1051, (S.D. Cal. 2016) (granting summary judgment against plaintiff who claimed that defendant distributed false CMI when it displayed its own copyright notice on the same webpage as plaintiff's photographs.").

9.4 *Compare* Murphy v. Millennium Radio Group LLC, 650 F.3d 295, 303, 99 U.S.P.Q.2d 1022 (3rd Cir. 2011) (Removal of printed credit from magazine photograph violated section 1202 even though the credit was not part of an automated copyright protection or management system; "[i]t may strike some as more intellectually harmonious to interpret the prohibition of removal of CMI in §1202 as restricted to the context of §1201, but nothing in the text of §1201 actually dictates that it should be taken to limit the meaning of "'copyright management information."DD'); Williams v. Cavalli, 113 U.S.P.Q.2d 1944, 1947 (C.D.Cal.2015); Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC, 999 F.Supp.2d 1098, 1101, (N.D. Ill. 2014); Associated Press. v. All Headline News Corp., 608 F.Supp.2d 454, 462, 89 U.S.P.Q.2d 2020 (S.D.N.Y. 2009) (protection extended to copyright management information appearing in AP news reports) *with* Textile Secrets Int'l, Inc. v. Ya-Ya Brand, Inc., 524 F.Supp.2d 1184, 1201-02 (C.D.Cal. 2007);IQ Group, Ltd. v. Wiesner Pub. LLC, 409 F.Supp.27, 597 (D.N.J.2006) ("To come within §1202, the information removed must function as a component of an automated copyright protection or management system.").

9.5 GC2 Inc. v. Int'l Game Technology, 391 F.Supp.3d 828, 845 (N.D. Ill. 2019) (Nowhere does the text of section 1202 suggest that the 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.").

10 "The prohibition in this subsection does not include ordinary and customary practices of broadcasters of inadvertent omission of credits from broadcasts of audiovisual works since, inter alia, such omissions do not entail knowing provision of false CMI with intent to induce, enable, facilitate or conceal a copyright infringement." H.R. Rep. No. 105-551(I), at 20-21.

10.1 Ward v. Nat'l Geographic Soc'y, 208 F.Supp.2d 429, 450, 63 U.S.P.Q.2d 803 (S.D.N.Y. 2002).

10.2 Stevens v. Corelogic, Inc., 194 F.Supp.3d 1046, 1051 (S.D. Cal. 2016). *See also* SellPoolSuppliesOnline.com, LLC v. Ugly Pools Arizona, Inc., 804 F. App'x 668, 670-71 (9th Cir. 2020); Logan v. Meta Platforms, Inc., 2022 WL 14813836 (N.D. Cal. 2022).

10.3 Steinmetz v. Shutterstock, Inc., 2022 WL 4342174 (S.D.N.Y. 2022).

10.4 *See, e.g.*, Doe 1 v. Github, Inc., 2024 WL 235217 (N.D.Cal.2024) (""""Although the Court finds it unlikely that this deficiency could be cured by the allegation of additional facts, it grants leave to amend out of abundance of caution."); Advanta-STAR Auto. Rsch. Corp. of Am. v. Search Optics, LLC, 2023 WL 3366524 (S.D.Cal.May 2023) ("Courts have held that no DMCA violation exists where the works are not identical."); Kirk Cara Corp. v. W.Stone & Metal Corp., 2020 WL 5991503 (C.D. Cal.Aug.14, 2020); ("[E]ven where the underlying works are similar, courts have found that no DMCA violation exists" unless the works are identical."); Frost-Tsuji Architects v. Highway Inn, Inc., 2015 WL 263556 (D. Haw. Jan. 21, 2015), *aff'd*, 700 F.App'x 674 (9th Cir. 2017)(No Section 1202(b) violation where the allegedly infringing drawing was "not identical.").

11 17 U.S.C. §1202(b)(1).

12 17 U.S.C. §1202(b)(2). *See* Friedman v. Live Nation Merchandise, Inc., 833 F.3d 1180, 1189, 119 U.S.P.Q.2d 1852 (9th Cir. 2016) (Where evidence was consistent with an inference that defendant knew of removal of CMI when it distributed plaintiff's photographs, the burden on summary judgment shifted to defendant to persuade court that there was a genuine issue of material fact.).

13 17 U.S.C. §1202(b)(3). *See* Gordon v. Nextel Communications & Mullen Adver., Inc., 345 F.3d 922, 926-927, 68 U.S.P.Q.2d 1369 (6th Cir. 2003) (Defendants' agent believed that allegedly infringing artwork had been cleared for use in television commercials; "[a]s a result, there is no proof that the defendant utilized the version of the illustrations 'knowing that copyright management information [had] been removed or altered without authority of the copyright owner."DD').

See also Zuma Press v. Getty Images (US) Inc., 845 Fed. Appx. 54 2021 U.S.P.Q.2d 245 (2d Cir. 2021) ("A reasonable juror could find only that the purported changes to Plaintiffs' CMI resulted not from some intentional act of which Getty was aware but from aberrations and mistakes in the automatic migration process itself, during which Getty processed approximately 7,000,000 images."); Stevens v. Corelogic, Inc., 194 F.Supp.3d 1046, 1051 (S.D. Cal. 2016); Iconics, Inc. v. Massaro, 192 F.Supp.3d 254, 273 (D.Mass.2016) (""""Contrary to defendant's protestations, however, courts have not held that distribution under §1202(a) requires wide public distribution.").

13.1 Bain v. Film Independent, Inc. 2018 WL 6930766 (C.D.Cal.2018).

13.1.1 Logan v. Meta Platforms, Inc., 2022 WL 14813836 (N.D. Cal. 2022). *See also* Splunk Inc. v. Cribl, Inc., 2023 WL 2562875 (N.D.Cal.2023) ("As for the argument that Splunk has failed to plead the required scienter for a violation of Section 1202, that is foreclosed by the language in Splunk's complaint. According to the complaint, '[i]n or around December 2018, Mr. Sharp added an open-source MIT license to the go-S2S source code on his personal [G]it[H]ub webpage, falsely identifying himself as the author and/or owner of the copyright in the go-S2S code, and falsely providing open-source terms for use of the

go-S2S code, despite its derivation from Splunk's proprietary source code.' CEO Sharp allegedly 'added this false license to the go-S2S code to obscure his own unlawful copying of Splunk's copyrighted source code.' Alone, this is sufficient to plead a violation of Section 1202(a) (involving false CMI).").

13.2 899 F.3d 66 (9th Cir. 2018).

13.3 899 F.3d at 674.

13.4 899 F.3d at 675. *See also* Victor Elias Photography, LLC v. Ice Portal, Inc., 43 F.4th 1313, 1320 (11th Cir. 2022); Mango v. Buzzfeed, Inc., 970 F.3d 167, 171 (2d Cir. 2020); Tremblay v. OpenAI, Inc., 2024 WL 557720 (N.D.Cal. 2024)(Rejecting copyright owner's argument that defendant's "failure to state which internet books it uses to train ChatGPT shows that it knowingly enabled infringement, because ChatGPT users will not know if any output is infringing"; "Plaintiffs do not point to any caselaw to suggest that failure to reveal such information has any bearing on whether the alleged removal of CMI in an internal database will knowingly enable infringement.").

13.5 970 F.3d 167, 2020 U.S.P.Q.2d 10926 (2d Cir. 2020).

13.6 970 F.3d at 172.

13.6.1 *See* Loeb-Defever v. Mako, L.L.C., 2023 U.S.P.Q.2d 1033 (5th Cir. 2023) ("Defendants could not have intended or even known that their conduct would 'induce, enable, facilitate, or conceal an infringement' when they were not infringing Plaintiffs' copyright in the first place because they held a license. As such, Defendants -- including those alleged to be directly and vicariously liable -- were entitled to summary judgment on Plaintiffs' DMCA claims as well.".

13.6.2 Doe 1 v. Github, Inc. 2024 WL 235217 (N.D. Cal. Jan 3, 2024).

13.7 345 F.3d 922 (6th Cir. 2003).

13.8 345 F.3d at 925-26. (Vicarious liability exists when "(1) a defendant has the right and ability to supervise the infringing conduct and (2) the defendant has an obvious and direct financial interest in the infringement," and if the persons for whom the defendant is vicariously liable committed a direct violation of §1202)). *See also* Rosenthal v. MPC Computers, LLC 493 F.Supp.2d 182, 190 (D.Mass. 2007). *But see* Millennium Funding, Inc. v. Private Internet Access, Inc., 2022 WL 7560395 (D.Colo. 2022) ("The Court is cautioned, however, by the unsettled nature of the applicable law. The Court finds that this issue -- the specific requirements of a vicarious liability claim under §1202 -- is more appropriately definitively determined at a later stage in the proceedings.").

14 17 U.S.C. §1202(e)(2)(A).

15 17 U.S.C. §1202(e)(2)(B).

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