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Student Note:

### SECTION 1202(B) AND AI: IMPLICATIONS FOR COPYRIGHT INFRINGEMENT LAWSUITS AND CONSIDERATIONS FOR DIGITAL CREATORS

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*Section 1202(b) of the DMCA imposes liability—including potentially sizeable statutory damages awards—on users who remove or alter copyright management information (CMI) or knowingly distribute works with removed CMI. Until now, Section 1202 had been seldom used by plaintiffs, but there is a recent uptick driven by suits filed against developers of generative artificial intelligence (AI) technology alleging violation of Section 1202(b) of the Digital Millennium Copyright Act (DMCA). This Student Note provides a summary of Section 1202(b)'s history and caselaw and explains how recent AI cases have started to develop a clearer sense of Section 1202's limits. Earlier courts that considered Section 1202(b) issues adopted a wide range of views of the statutory scope based on the plain language of the statute and its legislative history, while later courts fashioned discrete requirements for viable Section 1202(b) claims, such as the "double scienter" and "identity" requirements. But there is very little precedent caselaw and the scope of Section 1202(b) and potential defenses, such as Article III standing, fair use, and First Amendment rights, which remain unsettled. The Note concludes with observations about how users may insulate themselves from liability in the face of an evolving Section 1202(b) litigation landscape.*

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## INTRODUCTION

Section 1202(b) of the Digital Millennium Copyright Act (DMCA) imposes liability on users who remove or alter copyright management information (CMI) or knowingly distribute works with removed CMI.<sup>1</sup> The Journal has published many articles about Sections 1201 and 1202 of the DMCA over the years.<sup>2</sup> This Student Note adds to the conversation by providing a comprehensive retrospect of Section 1202(b) to inform discussion of how courts may assess contemporary claims under Section 1202(b). Today, we see Section 1202(b) claims being filed as part of the wave of copyright litigation related to artificial intelligence (AI).<sup>3</sup>

<sup>1</sup> 17 U.S.C. § 1202(b).

<sup>2</sup> See Jie Hua, *Toward a More Balanced Model: The Revision of Anti-Circumvention Rules*, 60 J. COPYRIGHT SOC'Y USA 327 (Spring 2013); Elizabeth F. Jackson, *The Copyright Office's Protection of Fair Uses Under the DMCA: Why the Rulemaking Proceedings Might be Unsustainable and Solutions for Their Survival*, 58 J. COPYRIGHT SOC'Y USA U.S.A. 521 (2010-2011); Karen A. Chesley, *Calculating Damages Under the Digital Millennium Copyright Act: How Far Should Courts Go When Multiplying Statutory Awards*, 57 J. COPYRIGHT SOC'Y USA SOC'Y U.S.A. 1 (Fall 2009-Winter 2010); Chris Kruger, *Passing the Global Test: DMCA Sec. 1201 as an International Model for Transitioning Copyright Law into the Digital Age*, 53 J. COPYRIGHT SOC'Y USA U.S.A. 447 (Spring-Summer 2006); Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. COPYRIGHT SOC'Y USA U.S.A. 113 (2002-2003); Michael Landau, *Has the Digital Millennium Copyright Act Really Created a New Exclusive Right of Access?: Attempting to Reach a Balance Between Users' and Content Providers' Rights*, 49 J. COPYRIGHT SOC'Y USA U.S.A. 277 (Fall 2001); David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. J. COPYRIGHT SOC'Y USA. 401 (Spring 1999).

<sup>3</sup> See, e.g., Second Am. Compl., *Doe 1 v. Github, Inc.*, No. 4:22-cv-06823, at 49–50 (N.D. Cal. filed Jan. 25, 2024) (alleging violations of Sections 1202(b)(1) and (b)(3) through removal of CMI in violation of open-source software license agreements); Am. Compl., *N.Y. Times Co. v. OpenAI*, No. 1:23-cv-11195, at 64–65 (S.D.N.Y. filed Aug. 12, 2024)

Section 1202(b) claims in these suits primarily allege violation of Section 1202(b) through AI developers' removal of author-identifying information from copyrighted works and subsequent use of the works to train large language models.<sup>4</sup> Moreover, these suits have been brought against some of the biggest names in technology, including Microsoft, Meta, and OpenAI.<sup>5</sup> But to look only at these high-profile cases is to miss the prevalence of Section 1202(b) claims brought in the past four years, and not just in AI cases.

Between 2020 and 2024, federal courts across the United States rendered at least 330 legal opinions that cite to Section 1202(b) of the DMCA.<sup>6</sup> This quantity is more than 1.5 times greater than the number of opinions citing to Section 1202(b) rendered between 2015 and 2020 and is nearly as many opinions citing to Section 1202(b) rendered between 2020 and the adoption of the provision in 1998.<sup>7</sup> The most recent group of Section 1202(b) claims are alleged in copyright infringement lawsuits brought against AI companies in which many plaintiffs allege violation of Section 1202(b) through the companies' alleged use of

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(alleging violations of Sections 1202(b)(1) and (b)(3) through removal or alteration of CMI from news and media content); Third Consolidated Am. Compl., *Kadrey v. Meta Platforms, Inc.*, No. 3:23-cv-03417, at 18–19 (N.D. Cal. filed Jan. 21, 2025) (alleging violations of Section 1202(b)(1) for removal of CMI from books).

<sup>4</sup> See, e.g., Second Am. Compl., *Doe 1 v. Github, Inc.*, No. 4:22-cv-06823, at 49–50 (N.D. Cal. filed Jan. 25, 2024) (alleging violations of Sections 1202(b)(1) and (b)(3) through removal of CMI in violation of open-source software license agreements); Am. Compl., *N.Y. Times Co. v. OpenAI*, No. 1:23-cv-11195, at 64–65 (S.D.N.Y. filed Aug. 12, 2024) (alleging violations of Sections 1202(b)(1) and (b)(3) through removal or alteration of CMI from news and media content); Third Consolidated Am. Compl., *Kadrey v. Meta Platforms, Inc.*, No. 3:23-cv-03417, at 18–19 (N.D. Cal. filed Jan. 21, 2025) (alleging violations of Section 1202(b)(1) for removal of CMI from books).

<sup>5</sup> See, e.g., Second Am. Compl., *Doe 1 v. Github, Inc.*, No. 4:22-cv-06823, at 49–50 (N.D. Cal. filed Jan. 25, 2024) (alleging violations of Sections 1202(b)(1) and (b)(3) through removal of CMI in violation of open-source software license agreements); Am. Compl., *N.Y. Times Co. v. OpenAI*, No. 1:23-cv-11195, at 64–65 (S.D.N.Y. filed Aug. 12, 2024) (alleging violations of Sections 1202(b)(1) and (b)(3) through removal or alteration of CMI from news and media content); Third Consolidated Am. Compl., *Kadrey v. Meta Platforms, Inc.*, No. 3:23-cv-03417, at 18–19 (N.D. Cal. filed Jan. 21, 2025) (alleging violations of Section 1202(b)(1) for removal of CMI from books).

<sup>6</sup> Westlaw, Citing References: § 1202. Integrity of copyright management information, [\(https://1.next.westlaw.com/RelatedInformation/N63D21E60A06711D8B8FABFF7D35FC9C0/kcCitingReferences.html?docSource=ddda16fcfc744b938be0efdffcd0bba&pageNumber=1&facetGuid=h78957f8183b9cdc61ccc53dce66730ea&ppcid=2a050266253c4d74b76b74e0e5f482a5&transitionType=ListViewType&contextData=\(sc.UserEnteredCitation\)\)](https://1.next.westlaw.com/RelatedInformation/N63D21E60A06711D8B8FABFF7D35FC9C0/kcCitingReferences.html?docSource=ddda16fcfc744b938be0efdffcd0bba&pageNumber=1&facetGuid=h78957f8183b9cdc61ccc53dce66730ea&ppcid=2a050266253c4d74b76b74e0e5f482a5&transitionType=ListViewType&contextData=(sc.UserEnteredCitation)) (last visited Mar. 28, 2025). The numbers provided are estimations based on Westlaw analytics and only refer to Section 1202(b) cases in which a court rendered a legal opinion. As such, the numbers may not capture all Section 1202(b) suits filed to date that did not progress.

<sup>7</sup> See *id.* Following its enactment in 1998, Section 1202(b) was relatively unlitigated, and courts rendered legal opinions in only 196 Section 1202(b) suits prior to 2015. See *id.*

copyrighted works to develop and train generative AI systems.<sup>8</sup> Removal of CMI and other forms of identifying information is necessary for the effective creation and development of generative AI systems. As a result, both individual users and organizational developers of AI are susceptible to suit under Section 1202(b), an idea explored in Part IV of this Note.

Although Section 1202(b) appears straightforward on its face, recent Section 1202(b) claims raise challenging questions about how to interpret the statute.<sup>9</sup> The answers to these questions are particularly important given the substantial statutory damages that come from Section 1202(b) violations – between \$2,500 and \$25,000 per violation.<sup>10</sup> While this amount may not seem like much for a single violation, damages have the potential to accumulate to massive amounts in cases involving removal of CMI en masse, which results in many consecutive individual violations of Section 1202(b).<sup>11</sup> In many of the recent AI copyright lawsuits, CMI is alleged to have been removed from millions of works, leading to potential Section 1202 damage awards in the billions of dollars.<sup>12</sup> Moreover, resolution of how to interpret Section 1202(b) has important implications for many re-uses of copyrighted works, ranging from text data mining research to

<sup>8</sup> See, e.g., Second Am. Compl., Doe 1 v. Github, Inc., No. 4:22-cv-06823, at 49–50 (N.D. Cal. filed Jan. 25, 2024) (alleging violations of Sections 1202(b)(1) and (b)(3) through removal of CMI in violation of open-source software license agreements); Compl., Raw Story Media, Inc. v. OpenAI Inc., No. 1:24-cv-01514, at 9–11 (S.D.N.Y. filed Feb. 28, 2024) (alleging violations of Sections 1202(b)(1) and (b)(3) through removal of CMI from copyrighted works of journalism).

<sup>9</sup> See, e.g., Second Am. Compl., Doe 1 v. Github, Inc., No. 4:22-cv-06823, at 49–50 (N.D. Cal. filed Jan. 25, 2024) (alleging violations of Sections 1202(b)(1) and (b)(3) through); Compl., Raw Story Media, Inc. v. OpenAI Inc., No. 1:24-cv-01514, at 9–11 (S.D.N.Y. filed Feb. 28, 2024) (alleging violations of Section 1202(b)(1) and (b)(3) through removal of CMI from copyrighted works of journalism).

<sup>10</sup> 17 U.S.C. § 1203(c)(3)(B) (“At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1202 in the sum of not less than \$2,500 or more than \$25,000.”). Damages from Section 1202(b) violations have the potential to be particularly hefty in cases of CMI removal and alteration that is conducted en masse from hundreds of individual copyrighted works or as part of automated data formatting process. In these instances, damages claims have the potential to amount to millions of dollars. Cf. Chesley, *supra* note 3, at 29 (“The DMCA has [] been subject to a great deal of criticism for its lack of clarity with regard to fair use and scope of violations. Read expansively, there could be enormous liability for very minor infractions.”).

<sup>11</sup> See generally Bobby Allyn, ‘The New York Times’ takes OpenAI to Court. ChatGPT’s Future Could Be on the Line, NPR (Jan. 14, 2025 4:27 PM), <https://www.npr.org/2025/01/14/nx-s1-5258952/new-york-times-openai-microsoft>; Leyland Cacco, Canadian Media Companies Sue OpenAI in Case Potentially Worth Billions, THE GUARDIAN (Nov. 29, 2024 2:02 PM), <https://www.theguardian.com/world/2024/nov/29/canada-media-companies-sue-openai-chatgpt>.

<sup>12</sup> *Id.*

routine re-distribution, given the broad range of issues that may implicate the statute.<sup>13</sup>

This Note provides a retrospect of past interpretations of Section 1202(b), with the aim of informing legal scholars, practitioners, and other interested parties about how courts may interpret the statute today when resolving Section 1202(b) claims raised in current lawsuits implicating AI. Part I reviews the legislative history and purpose of Section 1202(b) and takes stock of courts' interpretations of the statutory provision prior to the technological advent of AI. Part I also provides background on courts' treatment of Section 1202(c), which historically has informed judicial assessments of Section 1202(b). Part I concludes with a discussion of the Ninth Circuit's pending review of the interlocutory appeal in *Doe 1 v. Github*, the first lawsuit squarely alleging violation of Section 1202(b) to be heard by a court of appeals, and the potential of the appeal to redefine the elements of Section 1202(b) claims. Then, Part II reviews interpretations of Section 1202(b) proffered in contemporary copyright infringement lawsuits implicating AI and discusses future implications of the suits and best practices for individuals and organizations amidst the uncertainty of how Section 1202(b) may be interpreted. Part III details a number of side issues in current Section 1202(b) proceedings implicating AI that could be determinative of whether future Section 1202(b) suits may proceed. Finally, Part IV concludes with practical observations about how users and organizational developers of AI may insulate themselves from liability in the face of an evolving Section 1202(b) litigation landscape.

### *I: SECTION 1202(B) PRIOR TO THE ADVENT OF AI*

This Part reviews the purpose and legislative history of Section 1202(b), identifies particular considerations in courts' past interpretations of Section 1202(b) that may resurface in analyses of Section 1202(b) in the current lawsuits, and provides an overview of Section 1202(c).

#### *A. A Quick Primer on Section 1202*

Section 1202 was enacted in 1998 as part of the Digital Millennium Copyright Act (DMCA). The DMCA is well-known for its safe harbor,<sup>14</sup> notice-and-takedown,<sup>15</sup> and anticircumvention<sup>16</sup> provisions that have increased access to digital copyrighted works through limiting online service providers' liability for users' infringement and granting authors legal protections against unauthorized

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<sup>13</sup> Cf. Pamela Samuelson, *Text and Data Mining of In-Copyright Works: Is it Legal?*, 64 COMMS. OF THE ACM, No. 11, Oct. 2021, at 20–22.

<sup>14</sup> 17 U.S.C. § 512.

<sup>15</sup> *Id.*

<sup>16</sup> 17 U.S.C. § 1201.

access of their digital works.<sup>17</sup> While these provisions of the DMCA regulate access to copyrighted works, Section 1202 stands apart through its regulation of the content of copyrighted works, namely “copyright management information” (CMI) included within works.<sup>18</sup>

Section 1202(a) prohibits the falsification of CMI with the intent to aid copyright infringement, and Section 1202(b), discussed in greater detail below, forbids the intentional alteration or removal of CMI.<sup>19</sup> Both Section 1202(a) and Section 1202(b) are rooted in the premise that removal of CMI can further copyright infringement by enabling greater access to works that are not clearly protected under copyright or associated with an author.<sup>20</sup> Section 1202(c), also discussed below, defines the types of information that constitute “CMI” as referenced within Sections 1202(a) and (b).<sup>21</sup> Akin to the limited liability for copyright infringement provided in Section 512 of the DMCA, Sections 1202(d) and (e) respectively exclude government actors from liability under Section 1202 and limit liability under Section 1202 for particular kinds of analog and digital transmissions of copyrighted works that are incapable of including CMI.<sup>22</sup>

Of the multiple provisions encompassed in Section 1202, Section 1202(b) arguably provides the greatest number of analytical hurdles given the necessary consideration of its statutory purpose, legislative history, and relationship to Section 1202(c) to assess the provision’s statutory and judge-made requirements.<sup>23</sup> The following Sections describe these aspects of Section 1202(b).

### *B. Purpose and Legislative History of Section 1202(b)*

Section 1202(b) of the DMCA protects the integrity of copyright management information (CMI).<sup>24</sup> Per Section 1202(c), CMI comprises certain information identifying a copyrighted work, often including the title, the name of

<sup>17</sup> *The Digital Millennium Copyright Act*, S. U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/dmca/#:~:text=In%201998%2C%20Congress%20passed%20he,Section%20512> (last visited May 18, 2025).

<sup>18</sup> See 17 U.S.C. § 1202.

<sup>19</sup> 17 U.S.C. § 1202(a), (b).

<sup>20</sup> See generally H.R. Rep. No. 105-551.

<sup>21</sup> 17 U.S.C. § 1202(c).

<sup>22</sup> 17 U.S.C. § 1202(d), (e). Section 1202(b) “does not prohibit any lawfully authorized investigative, protective, information security, or intelligence activity of an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting pursuant to a contract with the United States, a state, or a political subdivision of a state.” 17 U.S.C. § 1202(d).

<sup>23</sup> See, e.g., *Textile Secrets Int’l, Inc. v. Ya-Ya Brand Inc.*, 524 F. Supp. 2d 1184 (C.D. Cal. 2007) (considering Section 1202(b)’s complete legislative history to determine if the alleged removal of CMI fell within the scope of Section 1202(b)); cf. *IQ Grp., Ltd. v. Wiesner Publishing, LLC*, 409 F. Supp. 2d 587, 593–97 (D.N.J. 2006) (considering Section 1202(b)’s complete legislative history to determine if CMI fell within the scope of Section 1202(c) and could thus be alleged to be removed under Section 1202(b)).

<sup>24</sup> 17 U.S.C. § 1202(b).

the author, and terms and conditions for the use of a work.<sup>25</sup> Section 1202(b) forbids the alteration or removal of CMI. The section provides in relevant part that:

[n]o person shall, without the authority of the copyright owner or the law

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- (1) intentionally remove or alter any CMI,
- (2) distribute or import for distribution CMI knowing that the CMI 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.<sup>26</sup>

Past courts to weigh in on Section 1202(b) interpreted the statutory language in light of its legislative history.<sup>27</sup> The legislative history of Section 1202(b) is largely rooted in a white paper published by the Information Infrastructure Task Force (IITF) and two treaties reached by the World Intellectual Property Organization (WIPO).<sup>28</sup> All three writings influenced the specific language of the provision and the motivation to codify Section 1202(b).

### 1. The NII Report

The earliest traceable origin of Section 1202(b) is a white paper published in September 1995 by the National Information Infrastructure Task Force (IITF), commonly known as the NII white paper.<sup>29</sup> The IITF was established by the Clinton Administration in 1993 to formulate policies to promote the development of the National Information Infrastructure (NII).<sup>30</sup> The Working Group on

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<sup>25</sup> 17 U.S.C. § 1202(c); *See infra* Part I.B.

<sup>26</sup> Nimmer, *supra* note 2.

<sup>27</sup> *See, e.g.*, *Textile Secrets Int'l, Inc.*, 524 F. Supp. 2d 1184 (C.D. Cal. 2007); *ADR Int'l Ltd. v. Inst. for Supply Mgmt., Inc.*, 667 F. Supp. 3d 411 (S.D. Tex. 2023).

<sup>28</sup> Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: Report of the Working Group of Intellectual Property Rights* (Sept. 1995); *WIPO Copyright Treaty*, WIPO (Dec. 20, 1996), <https://www.wipo.int/wipolex/en/text/295157>; *WIPO Performances and Phonograms Treaty*, WIPO (Dec. 20, 1996), <https://www.wipo.int/wipolex/en/text/295477>.

<sup>29</sup> Information Infrastructure Task Force, *supra* note 28.

<sup>30</sup> *Id.*

Intellectual Property Rights (Working Group) housed within the IITF released the NII white paper in 1995 (NII Report) to “discuss the application of [then-]existing copyright law and to recommend changes that [were] essential to adapt the law to the needs of the global information society.”<sup>31</sup> Among other discussions, the NII Report included drafted language of Section 1202(b), which outlined protections against the knowing alteration or removal of “copyright management information” (CMI) and distribution of works with altered or removed CMI.<sup>32</sup>

The NII Report also described the rationale behind the drafted provisions.<sup>33</sup> The Working Group identified that systems for managing rights were critical to the management of the NII and that such systems would function to track and monitor uses and licensing of copyrighted works as well as to indicate attribution and ownership interests.<sup>34</sup> In implementing the rights management systems, the Working Group noted that information would likely be included in digital versions of works as CMI to inform others about authorship and ownership of the work and to indicate authorized uses.<sup>35</sup> The Working Group predicted that, after CMI is associated with a particular work and accessible, others would be able to easily address questions over the licensing and use of the work.<sup>36</sup> Following publication of the Report, the National Information Infrastructure Copyright Protection Act (NIICPA), containing many ideas posited in the NII Report, was introduced in the House of Representatives and the Senate but stalled and never progressed.<sup>37</sup>

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<sup>31</sup> *Textile Secrets Int'l, Inc.*, 524 F. Supp. 2d at 1196–97.

<sup>32</sup> *Id.* at 1196 n.12; Information Infrastructure Task Force, *supra* note 29, at 235. The Report’s draft of Section 1202(b) provides: “No person shall, without authority of the copyright owner or the law, (i) knowingly remove or alter any copyright management information, (ii) knowingly distribute or import for distribution copyright management information that has been altered without authority of the copyright owner or the law, or (iii) knowingly distribute or import for distribution copies or phonorecords from which copyright management information has been removed without authority of the copyright owner or the law.” [Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: Report of the Working Group of Intellectual Property Rights, app. 1, at 7 \(Sept. 1995\)](#).

<sup>33</sup> Information Infrastructure Task Force, *supra* note 29, at 191.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 191–92.

<sup>37</sup> *Id.* The NIICPA contained drafted language of Sections 1201 and 1202 that was copied verbatim from the Report. *Id.* (citing Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 CONN. L. REV. 981, 989 (1996)).



## 2. The WIPO Treaties

Adoption of Section 1202(b) was also motivated by developments in digital copyright protection in the international sphere.<sup>38</sup> The World Intellectual Property Association hosted a conference in December 1996 that resulted in the adoption of two treaties by 160 countries: the “WIPO Copyright Treaty” and the “WIPO Performances and Phonograms Treaty” (collectively, the WIPO Treaties).<sup>39</sup> Both treaties discuss “obligations concerning rights management information” and aim to address concerns of the modification or removal of CMI.<sup>40</sup> Specifically, the WIPO Copyright Treaty provides in relevant part:

Contracting parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights information without authority; [or]

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management has been removed or altered without authority.<sup>41</sup>

## 3. Enactment of Section 1202(b) in the DMCA

Committees in the House of Representatives and Senate published reports commenting on the WIPO treaties prior to the enactment of the Digital Millennium Copyright Act (DMCA) in 1998.<sup>42</sup> The House’s report’s commentary

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<sup>38</sup> Julie S. Sheinblatt, *The WIPO Copyright Treaty*, 13 BERKELEY TECH. L.J. 535, 535 (1998) (“The [WIPO Copyright and WIPO Performances and Phonograms Treaties] were created in response to the arrival of the digital age, which has made information a key business asset, expanded international commerce, and enabled faster and easier copying of copyrighted work. . . . The Copyright Treaty was formed both to harmonize global copyright law and to extend that law into the digital domain.”).

<sup>39</sup> *Id.* at 1197–98; WIPO Copyright Treaty, *supra* note 29; WIPO Performances and Phonograms Treaty, *supra* note 28.

<sup>40</sup> *Textile Secrets Int’l, Inc.*, 524 F. Supp. 2d at 1198; WIPO Copyright Treaty, *supra* note 29, art. 12(1); WIPO Performances and Phonograms Treaty, *supra* note 29, art. 19(1).

<sup>41</sup> WIPO Copyright Treaty, *supra* note 29, art. 12(1). This language closely tracks the drafted language of Section 1202(b) in the NII Report. *Supra* note 28.

<sup>42</sup> *Textile Secrets Int’l, Inc.*, 524 F. Supp. 2d at 1198–99; H.R. Rep. No. 105-551 (1998), <https://www.congress.gov/congressional-report/105th-congress/house-report/551/1>; S. Rep. No. 105-190 (1998), <https://www.congress.gov/congressional-report/105th->

on Section 1202(b) is significant here.<sup>43</sup> The House Committee cautioned that “borderless digital means of dissemination are becoming increasingly more popular,” and while this spread will benefit U.S. consumers, “it will unfortunately also facilitate pirates who aim to destroy the value of American intellectual property.”<sup>44</sup> As such, domestic legislation implementing the WIPO treaties was necessary.<sup>45</sup> The House Committee noted that compliance with the treaties required a two-prong statutory provision.<sup>46</sup> First, an anti-circumvention measure was needed to complement Article 11 of the WIPO Copyright Treaty, which is now provided in Section 1201 of the DMCA.<sup>47</sup> Second, an anti-fraud and misinformation measure was needed to complement Article 12 of the WIPO Copyright Treaty, which is now provided in Section 1202 of the DMCA.<sup>48</sup>

### B. *A Quick Primer on Section 1202(c)*

Courts’ prior interpretations of Section 1202(b) have hinged upon their concurrent interpretations of Section 1202(c), which details “copyright management information” (CMI) in the context of Section 1202(b).<sup>49</sup> Section 1202(c) defines CMI as certain information that identifies a copyrighted work, including the title, the name of the author, and terms and conditions for the use of a work.<sup>50</sup>

Like Section 1202(b), Section 1202(c) was adopted in the wake of the NII Report and WIPO Treaties discussed above as part of the DMCA.<sup>51</sup> The NII

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congress/senate-report/190/1. The House identified that implementation of the DMCA was motivated to serve as domestic legislation implementing the WIPO treaties. H.R. Rep. No. 105-551.

<sup>43</sup> The Senate Report is discussed in greater detail in the discussion of the legislative history and purpose of Section 1202(c). *See infra* Part I.D.

<sup>44</sup> H.R. Rep. No. 105-551.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Textile Secrets Int’l, Inc.*, 524 F. Supp. 2d at 1198–99; H.R. Rep. No. 105-551, at 9–12; WIPO Copyright Treaty, *supra* note 29, art. 11 (providing that “[c]ontracting [p]arties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights”); 17 U.S.C. § 1201 (detailing provisions to protect against “violations regarding the circumvention of technological protection measures”).

<sup>48</sup> *Textile Secrets Int’l, Inc.*, 524 F. Supp. 2d at 1198–99; H.R. Rep. No. 105-551, at 9–12; WIPO Copyright Treaty, *supra* note 28, art. 12 (providing that “[c]ontracting [p]arties shall provide adequate legal protection and effective legal remedies against any person knowingly performing any of the [listed] acts knowing . . . that it will induce, enable, facilitate, or conceal an infringement of any right covered by this Treaty or the Berne Convention”); 17 U.S.C. § 1202(b) (detailing provisions to protect the “integrity of copyright management information”).

<sup>49</sup> *See, e.g., Textile Secrets Int’l, Inc.*, 524 F. Supp. 2d at 1198–99.

<sup>50</sup> 17 U.S.C. § 1202(c).

<sup>51</sup> WIPO Copyright Treaty, *supra* note 29; WIPO Performances and Phonograms Treaty, *supra* note 28.

Report described copyright management information (CMI) as “a kind of license plate for a work on the information superhighway, from which a user may obtain important information about the work.”<sup>52</sup> The Report defined CMI as “the name and other identifying information of the author of a work, the name and other identifying information of the copyright owner, terms and conditions for uses of the work, and such other information as the Register of Copyrights may prescribe by regulation.”<sup>53</sup> The WIPO Copyright Treaty offered a similar definition, defining CMI as:

Information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.<sup>54</sup>

CMI protection was also discussed in House and Senate Committee hearings commenting on the WIPO treaties and formulating the language of Section 1202(c) in the DMCA.<sup>55</sup> The Senate Committee report provided insight to the definition of CMI as embodied in Section 1202(c).<sup>56</sup> The Senate report identified CMI as “an important element in establishing an efficient Internet marketplace in copyrighted works free from governmental regulation” and noted CMI will aid in monitoring the usage and licensing of copyrighted works.<sup>57</sup> The report noted that “under the bill, CMI need not be in digital form, but CMI in digital form is expressly included.”<sup>58</sup> Moreover, CMI does not have to be provided for a copyrighted work, but it is protected from removal, falsification, or alteration if an author elects to include it.<sup>59</sup>

As enacted in the DMCA, Section 1202(c) defines eight types of information as constituting CMI:

Definition. — As used in this chapter, the term ‘copyright management information’ means the following information conveyed in

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<sup>52</sup> *Textile Secrets Int’l, Inc.*, 524 F. Supp. 2d at 1196–97; Information Infrastructure Task Force, *supra* note 28, at 235.

<sup>53</sup> Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: Report of the Working Group of Intellectual Property Rights, app. 1, at 7 (Sept. 1995).

<sup>54</sup> WIPO Copyright Treaty, *supra* note 29, art. 12(2). This language closely tracks the drafted language of Section 1202(c) in the NII Report. Information Infrastructure Task Force, *supra* note 28.

<sup>55</sup> H.R. Rep. No. 105-551; S. Rep. No. 105-190.

<sup>56</sup> S. Rep. No. 105-190.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

connection with copies or phonorecords of a work or performances or displays of a work, including in digital form:

- (1) The title and other information identifying the work, including the information set forth on a notice of copyright.
- (2) The name of, and other identifying information about, the author of the work.
- (3) The name of, and other identifying information about, the copyright owner of the work, including information set forth in a notice of copyright.
- (4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a writer, a performer, or director whose performance is fixed in work other than an audiovisual work.
- (5) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a writer, a performer, or director who is credited in the audiovisual work.
- (6) Terms and conditions for use of the work.
- (7) Identifying numbers or symbols referring to such information or links to such information.
- (8) Such other information as the Register of Copyrights may prescribe by regulation but not including any information concerning the user of a copyrighted work.<sup>60</sup>

While Section 1202(c) does not impose any affirmative or negative obligations on copyright owners, it nevertheless is fundamental to assessments of Section 1202(b) claims. Since Section 1202(b) references “CMI” but does not itself define the term, Section 1202(b) is always interpreted in tandem with the definition of CMI provided in Section 1202(c).<sup>61</sup> Section 1202(c) thus functions as the animating provision of Section 1202, as alleged CMI must first fall within the definition of CMI posited in Section 1202(c) before it can be “removed or altered” in violation of Section 1202(b).<sup>62</sup> The following Section outlines prior interpretations of Sections 1202(b) and (c) and describes how the provisions necessarily influence one another.

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<sup>60</sup> 17 U.S.C. § 1202(c); *see* Nimmer, *supra* note 2, at 413–15 (describing the enumeration of forms of CMI encompassed under Section 1202(c)).

<sup>61</sup> *See, e.g.,* IQ Grp., Ltd. v. Wiesner Publishing, LLC, 409 F. Supp. 2d 587, 591 (assessing whether a logo could constitute CMI under Section 1202(c) prior to determining whether Section 1202(b) was violated by removal of a logo).

<sup>62</sup> *Id.*

C. *Prior Interpretations of Section 1202(b) and (c)*

The Central District of California was the first federal district to assess a Section 1202(b) claim in *Kelly v. Arriba Soft Corporation*.<sup>63</sup> In *Kelly*, the plaintiff alleged violation of the copyrights in their thumbnail photographs by the defendant's the inclusion of the thumbnails in their "visual search engine" image database.<sup>64</sup> The plaintiff also alleged the defendant violated Section 1202(b) by removing or altering the CMI associated with their images.<sup>65</sup> The court found the defendant did not intentionally remove or alter CMI from the images under Section 1202(b)(1) because the contested CMI did not appear in the original images captured by the defendant.<sup>66</sup> Even if CMI was present in the original images, the defendants did not apparently intend to remove or alter the CMI.<sup>67</sup> Moreover, the defendants did not distribute works with altered or removed CMI under Section 1202(b)(3) because the thumbnail images compiled by the defendant were linked to full-size images with the name of the website where the defendant obtained the image.<sup>68</sup> As such, the court concluded that the defendant would not have had "reasonable grounds to know" it would cause users to infringe the plaintiff's copyrights and thus did not violate Section 1202(b).

Following *Kelly*, courts assessing Section 1202(b) claims declined to uphold claims where plaintiffs failed to provide a defendant's knowledge or intent in violating the statute and cabined their analyses to whether CMI was included in an original work as necessary for a violation of Section 1202(b).<sup>69</sup> But a major shift in courts' interpretations of Section 1202(b) was spurred by reasoning in *IQ Group, Ltd. v. Weisner Publications, LLC*.<sup>70</sup> In *IQ Group*, the plaintiff alleged violation of Section 1202(b) through the defendant's failure to include a company logo and hyperlink to copyright notices in copyrighted advertisements that the defendant distributed via email.<sup>71</sup> On these facts, the court held the defendant did not violate Section 1202(b) in its distribution of the ads because the logo and

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<sup>63</sup> 77 F. Supp. 1116, 1117 (C.D. Cal. 1999).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1122.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See *Schiffer Pub., Ltd. v. Chronicle Books*, No. 03-4962, 2004 WL 2583817, at \*14 (E.D. Pa. Nov. 12, 2004) (finding no violation of Section 1202(b) where a plaintiff failed to demonstrate that the defendant removed CMI from the "body" of, or area around, the original work itself); *Monotype Imaging, Inc. v. Bitstream, Inc.*, 376 F. Supp. 2d 877, 893 (N.D. Ill. 2005) (finding the defendant did not violate Section 1202(b) for its failure to include a copyright notice in reproduction of copyrighted fonts and, even if licensees used the plaintiff's fonts, the defendant did not knowingly or intentionally contribute to those uses).

<sup>70</sup> 409 F. Supp. 2d 587 (D.N.J. 2006).

<sup>71</sup> *Id.* at 589.

hyperlink to copyright notices did not constitute CMI as defined by Section 1202(c).<sup>72</sup> First, the court identified that claiming the IQ Group logo as CMI “impermissibly blurs” the distinction between trademark law and copyright law, and thus the logo cannot be construed as CMI.<sup>73</sup> Second, the logo and hyperlink fall outside the definition of CMI in Section 1202(c) as interpreted by the court.

The *IQ Group* court noted that the text of Section 1202 appeared to broadly define CMI and concluded that the interpreted definition of CMI should be narrowed in light of scholarly insights and the provision’s legislative history.<sup>74</sup> The court reviewed the history of the DMCA and writings that motivated adoption of Section 1202, namely aforementioned the NII Report and WIPO treaties.<sup>75</sup> From these, the court deduced that CMI only describes information that “function[s] as a component of an automated copyright protection or management system.”<sup>76</sup> The court identified that both the NII Report and the WIPO Treaties suggested that technical measures like CMI are components of automated copyright protection systems and that such interpretation of the statute’s legislative history is affirmed by legal scholarship.<sup>77</sup> The court also noted that the aforementioned congressional reports on the DMCA understood the proposed language of Section 1202 as “protecting the integrity of automated copyright management systems functioning within a computer network environment.”<sup>78</sup> In solidifying its technology-oriented interpretation of Section 1202, the court identified that its interpretation was consonant with Section 1201, which mentions circumvention of “technological measure[s]” that function to control and protect the rights of copyright owners.<sup>79</sup>

Applying its fashioned interpretation to the alleged Section 1202(b) violation at issue, the *IQ Group* court concluded that the logo and hyperlink did not constitute CMI.<sup>80</sup> Neither the logo nor the hyperlink were alleged to function as part of an automated copyright protection or management system, and there was no evidence that the defendant’s actions circumvented a function of an automated

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<sup>72</sup> *Id.* at 591–593.

<sup>73</sup> *Id.* at 592.

<sup>74</sup> *Id.* at 593. The court first referred to legal scholarship to conclude that CMI should be limited to the technological measures that protect copyrights in works. *Id.* at 593 (citing to Julie E. Cohen, *Copyright and The Jurisprudence of Self-Help*, 12 Berkeley Tech L.J. 1089 (1998) [hereinafter “Jurisprudence of Self-Help”]).

<sup>75</sup> *Id.* at 594–596.

<sup>76</sup> *Id.* at 597.

<sup>77</sup> *Id.* at 595–596 (citing S. Dusollier, *Some Reflections on Copyright Management Information and Moral Rights*, 25 Colum. J.L. & Arts 377, 382 (2003); Cohen, *Jurisprudence of Self-Help*, *supra* note 75; Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 Conn. L. Rev. 981, 989 (1996); Jessica R. Friedman, *A Lawyer’s Rambling Down the Information Superhighway: Copyright*, 65 Fordham L. Rev. 705 (1995)).

<sup>78</sup> *Id.* at 596.

<sup>79</sup> *Id.* at 596–597.

<sup>80</sup> *Id.* at 597.

protection or management system.<sup>81</sup> As the logo and hyperlink excluded by the defendant did not fall within the interpreted definition of CMI in Section 1202(c), the defendant did not violate the statute.

*IQ Group* was the first decision to offer a statutory interpretation of Section 1202(b) and (c), albeit an exceptionally narrow one. Notably, the courts' decision on the Section 1202(b) violation hinged upon the character of the CMI at issue rather than any act of removal or alteration by the defendant. In *Textile Secrets International, Inc. v. Ya-Ya Brand Inc.*, a court in the Central District of California adopted this narrow construction of Section 1202(c).<sup>82</sup> The *Textile Secrets* plaintiff alleged violation of Section 1202(b) through the defendant's removal of selvege<sup>83</sup> and a tag listing the plaintiff's name and a copyright symbol from fabric printed with the plaintiff's copyrighted design that the defendant allegedly reproduced without permission.<sup>84</sup> The plaintiff argued that the information on the selvege and the corresponding tag constituted CMI within the scope of Section 1202(c).<sup>85</sup>

The *Textile Secrets* court concluded that the selvege and tag did not constitute CMI as defined in Section 1202(c).<sup>86</sup> The court adopted the *IQ Group* court's narrow construction of Section 1202(c) and noted that the provision cannot apply in circumstances that "have no relation to the Internet, electronic commerce, automated copyright protections or management systems . . . or other technological measures or processes as contemplated in the DMCA as a whole."<sup>87</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> 524 F. Supp. 2d 1184, 1201 (C.D. Cal. 2007). *But cf.* *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 305–06 (S.D.N.Y. 2011) ("[T]his [c]ourt declines to adopt a narrow construction of the term 'CMI'-- adopted by the District of New Jersey . . . as limited to 'a component of an automated copyright protection or management system.'"); *Faulkner Press, L.L.C. v. Class Notes, L.L.C.*, 756 F. Supp. 2d 1352, 1359 (N.D.Fla. 2010) (finding plain language did not limit CMI to "notices that are placed on works through technological processes"); *Fox v. Hildebrand*, 2009 WL 1977996, at \*3 (C.D. Cal. July 1, 2009) (declining to consider the legislative history of Section 1202 where the plain language of the provision "is not limited to copyright notices that are digitally placed on a work"); *Assoc. Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 461–62 (S.D.N.Y. 2009) (denying motion to dismiss and finding a lack of textual support to limit the DMCA's application only to technological processes of automated systems).

<sup>83</sup> "Selvege" is the border of fabric that is intended to be cut off. *Id.* at 1192 n.7.

<sup>84</sup> *Id.* at 1192–93.

<sup>85</sup> *Id.* at 1193.

<sup>86</sup> *Id.* at 1202.

<sup>87</sup> *Id.* at 1201. The court considered the interpretation of Section 1202(c) offered by a court in the Western District of Pennsylvania in *McClatchey v. The Associated Press*, No. 3:05-cv-145, 2007 WL 776103 (W.D. Pa. Mar. 9, 2007). *See id.* at 1201–02. In *McClatchey*, the plaintiff had a copyright in a printed photograph of the United 93 plane crash on September 11, 2001 and included her title and copyright information on the photograph. *McClatchey*,

As the addition of the selva and tag did not comprise a “technological process” within the scope of Section 1202(c), they were not CMI and thus the defendant did not infringe Section 1202(b) in removing them.<sup>88</sup>

The narrow interpretation of Section 1202(c) furthered in *IQ Group* and *Textile Secrets* was countered by subsequent decisions adopting broader interpretations of CMI.<sup>89</sup> In *Murphy v. Millennium Radio Group LLC*, the court declined to follow the interpretive approach of *IQ Group* and found that CMI as defined under Section 1202(c) is not limited to the context of “automatic copyright protection or management systems.”<sup>90</sup> In *Murphy*, the plaintiff alleged violation of Section 1202(b) in the defendant’s alleged removal of the plaintiff’s gutter credit in their copyrighted photograph.<sup>91</sup> The plaintiff’s photograph, including the gutter credit, was printed in a physical magazine.<sup>92</sup> The defendant then scanned the image from the magazine, cropped the original photo caption and gutter credit, and posted the electronic copy on a website without permission from the plaintiff.<sup>93</sup> The website allowed its visitors to alter the image using photo editing software and share copies of their edited images with the defendant by submitting them through the website.<sup>94</sup>

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2007 WL 776103, at \*1–2. An Associated Press reporter took a photograph of the plaintiff’s printed photograph and distributed a copy of the photograph with the title and copyright notice removed without the plaintiff’s permission. *Id.* In finding the defendant’s cropping violated Section 1202(b), the court offered a more expansive interpretation of Section 1202(c). *Id.* Because the plaintiff used a computer software program to add identifying information on her copies of the photograph, the information was added via a “technological process” that fell within the ambit of CMI as defined by Section 1202(c). *Id.* at \*5.

The *Textile Secrets* court distinguished *McClatchey* from the present case because the District Court failed to consider the legislative history of Section 1202(c) before finding the statutory provision applied. *Textile Secrets Int’l, Inc.*, 524 F. Supp. 2d at 1202. The *Textile Secrets* court also bolstered the *IQ Group* court’s interpretation of Section 1202(c) by citing opinions issued shortly after *Kelly* that indicated a basis of Section 1202 in establishing technological safeguards. *Id.* (citing *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (discussing the DMCA’s purpose to provide immunity to online service providers from copyright infringement for passive actions engaged in by technological processes); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1125 (N.D. Cal. 2002) (finding that Congress aimed to protect against piracy and promote electronic commerce in enacting Section 1202)).

<sup>88</sup> *Id.* at 1202–03.

<sup>89</sup> See, e.g., *Murphy v. Millennium Radio Grp., LLC*, 650 F.3d 295 (3d Cir. 2011).

<sup>90</sup> *Id.* at 305.

<sup>91</sup> *Id.* at 298–99. A gutter credit is “a credit placed on an inner margin, or ‘gutter,’ of a magazine page, ordinarily printed in smaller type and running perpendicular to the relevant image on the page.” *Id.* at 299.

<sup>92</sup> *Id.* at 298–99.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*



The *Murphy* court found that the gutter credit constituted CMI within the scope of Section 1202(c) and that the defendant violated Section 1202(b).<sup>95</sup> In establishing a broader standard for CMI encompassed within Section 1202(c), the court assessed the plain meaning of the statutory text before resorting to interpretation in light of the provision's legislative history.<sup>96</sup> The court identified that "[t]here is nothing particularly difficult about the text of Section 1202" and noted that the text of the statute imposes no requirement that CMI be a part of an automatic copyright protection or management system as concluded by the *IQ Group* court.<sup>97</sup> Moreover, the court remarked that the provision was extremely broad and that any difficulty in construing the statute would derive from concerns of policy.<sup>98</sup> The court identified that the DMCA was intended to expand the rights of copyright owners and that the *IQ Group* court's reading of the statute's legislative history did not contradict a broader reading of CMI encompassed in Section 1202(c). Specifically, the *Murphy* court identified that although the NII Report identified CMI as information likely to be included in digital works to inform the user about the authorship of the work, the method of communicating this information was an open question.<sup>99</sup> Based on these insights, the *Murphy* court found the legislative history was not sufficiently compelling to disregard the plain language of Section 1202(c) and concluded that a cause of action under Section 1202 "potentially lies whenever the types of information listed in Section 1202(c)(1)–(8) and 'conveyed in connection with copies . . . of a work . . . including in digital form' is falsified or removed, regardless of the form in which that information is conveyed."<sup>100</sup> As the gutter credit fell within the court's modified scope of Section 1202(c), it was CMI within the meaning of the statute.<sup>101</sup>

Subsequent district courts followed the *Murphy* court's lead and adopted broader interpretations of Section 1202(c),<sup>102</sup> while others formulated narrow

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<sup>95</sup> *Id.* at 305.

<sup>96</sup> *Id.* at 302.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 303–04.

<sup>100</sup> *Id.* at 305.

<sup>101</sup> *Id.*

<sup>102</sup> See *Brown v. Stroud*, No. C 08-02348, 2011 WL 2600661, at \*5 (N.D. Cal. June 30, 2011) (finding a claim for violation of Section 1202(a) or (b) must "allege facts showing that the alleged falsification or removal of CMI has some relation to the Internet, electronic commerce, or the purposes for which the DMCA was enacted."); *Pac. Studios Inc. v. W. Coast Backing, Inc.*, No. 2:12-cv-00692, 2012 WL 12887637 (C.D. Cal. April 18, 2012) (denying a partial motion to dismiss and finding adequate pleading of violation of Section 1202(b) under the *Murphy* standard).

interpretations along the lines of *IQ Group* and *Textile Secrets*<sup>103</sup>. Subsequent courts have also flushed out a standard for viable Section 1202(b)(1) and (b)(3) claims beyond consideration of the quality of CMI at issue, although it remains relevant.<sup>104</sup> The basic elements of this standard are detailed in the following Subpart.

#### D. Elements of a Section 1202(b) claim

To have a claim under Section 1202(b), a plaintiff must allege particularized facts about the existence of CMI in the copyrighted work and the removal or alteration of that CMI.<sup>105</sup> Additionally, courts require a plaintiff to demonstrate that the defendant had knowledge that the CMI was being altered or removed and that the alteration or removal would enable copyright infringement.<sup>106</sup> Finally, some courts have required plaintiffs to show that the work with the altered or removed CMI is an exact copy of the original work—what has become known as the “identicality” requirement.<sup>107</sup> These three requirements are further detailed below.

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<sup>103</sup> See *Kirk Kara Corp. v. W. Stone and Metal Corp.*, No. CV 20-5991503, 2020 WL 5591503 (C.D. Cal. Aug. 14, 2020) (granting a motion to dismiss Section 1202 claims on the grounds that “no DMCA violation exist[ed] where the works [at issue] are not identical”).

<sup>104</sup> See, e.g., *id.* at \*6 (“To establish a claim under section 1202(b)(1), a plaintiff must plausibly allege: (1) the existence of CMI on the infringed work, (2) removal and/or alteration of that information, and (3) that the removal and/or alteration was done intentionally.”); *Craig v. Univ. Music Grp. Recordings, Inc.*, 380 F. Supp. 3d 324, 338 (S.D.N.Y. 2019) (“[A] defendant may be liable under Section 1202(b)[(3)] for “distribu[ing] [a] copyrighted work] . . . knowing that copyright management information has been removed or altered without the authority of the copyright owner or the law.”).

<sup>105</sup> *Mango v. Buzzfeed, Inc.*, 970 F.3d 167, 173 (2d Cir. 2020) (finding liability for violation of 1202(b) for knowing removal of a gutter credit included in a separate line of text below a copyrighted photograph).

<sup>106</sup> *Stevens v. Corelogic*, 899 F.3d 666, 676 (9th Cir. 2018) (finding no liability for violation of Section 1202(b) because a plaintiff did not put forward evidence of the defendant’s knowledge that its software could induce, enable, facilitate, or conceal infringement); *Mango*, 970 F.3d at 171 (holding that, as a matter of first impression, Section 1202(b) includes a “double-scienter requirement”).

<sup>107</sup> *Doe 1 v. GitHub, Inc.*, No. 22-cv-06823, 2024 WL 23217, at \*8 (N.D. Cal. Jan. 22, 2024) (finding that allegedly infringing material must be identical to an original work to have a viable Section 1202(b) claim); *Andersen v. Stability AI Ltd.*, No. 23-cv-00201, 2024 WL 3823234, at \*8 (N.D. Cal. Aug. 12, 2024) (dismissing a Section 1202(b) claim on the basis that the allegedly infringing AI output was not identical to the original work); cf. *Frost-Tsuji Architects v. Highway Inn, Inc.*, No. 12-00496, 2024 WL 3405871, at \*1 (D. Haw. July 10, 2014), *aff’d* 700 F. App’x. 674 (9th Cir. 2017) (considering the “near identical” and “virtually identical” nature of copies of a copyrighted work in finding sufficient factual allegations for a Section 1202(b)(1) claim). But cf. *ADR Int’l Ltd. v. Ins.*

## 1. Particularized Allegations of Existence of CMI and Removal of CMI by Defendants

A plaintiff must identify the particular types of CMI in their works that they believe were altered or removed and allege plausible facts about which defendants committed an alteration or removal in violation of Section 1202(b) and when the violation occurred.<sup>108</sup> To meet this requirement, allegations of altered or removed CMI cannot be conclusory, like the allegations of alteration or removal of a “creator’s name” or “the form of [an] artist’s signature” in *Andersen*.<sup>109</sup> Rather, plaintiffs must identify the exact type of CMI that was allegedly altered or removed.<sup>110</sup>

## 2. Knowledge Requirement

Courts also require a plaintiff to allege facts that support that a defendant both knew CMI was being altered or removed from the plaintiff’s works and knew that the conduct would “induce, enable, facilitate, or conceal an infringement.”<sup>111</sup> This knowledge requirement was coined as the “double-scienter requirement” in *Stevens v. CoreLogic*.<sup>112</sup> The *Stevens* court concluded that a defendant must both intend to remove CMI and be aware that removal of the CMI would further copyright infringement to be liable for violation of Section 1202(b).<sup>113</sup>

Courts have noted that the double-scienter requirement is intended to limit liability by providing a heightened requisite state of mind.<sup>114</sup> As demonstrated in *Beijing Meishe Network Technology*, factual allegations of multiple previously-filed lawsuits against a defendant for removal of CMI and copying of copyrighted works fulfill this requirement.<sup>115</sup> Moreover, the CMI that is altered or removed

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for Supply Mgmt. Inc., 667 F. Supp. 3d 411, 427 (S.D. Tex. 2023) (finding that Section 1202(b) does not include an “identity” requirement and noting that copying must only be “substantially similar”).

<sup>108</sup> *Mango*, 970 F.3d at 173; *Andersen*, 2024 WL 3823234, at \*8; cf. *Nimmer*, *supra* note 2, at 422–23.

<sup>109</sup> *Andersen*, 2024 WL 3823234, at \*8.

<sup>110</sup> *Id.*; cf. *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 1116, 1122 (C.D. Cal. 1999) (requiring CMI exist on the original work for potential liability for violation of Section 1202(b)).

<sup>111</sup> 17 U.S.C. § 1202(b)(3); *Stevens v. Corelogic*, 899 F.3d 666, 676 (9th Cir. 2018); cf. *Nimmer*, *supra* note 2, at 423–25 (describing the “mental element” of Section 1202(b) claims).

<sup>112</sup> *Stevens*, 899 F.3d at 676.

<sup>113</sup> *Id.*

<sup>114</sup> See, e.g., *Beijing Meishe Network Tech. Co, Ltd. v. TikTok, Inc.*, No. 23-cv-06012, 2024 WL 1772833, at \*3 (N.D. Cal. Apr. 23, 2024); *Tremblay v. OpenAI Inc.*, 716 F. Supp. 3d 772, 778–80 (N.D. Cal. 2024).

<sup>115</sup> *Beijing Meishe Network Tech. Co, Ltd.*, 2024 WL 1772833, at \*3.

does not have to be noticeable by the public for its removal to induce, enable, facilitate, or conceal copyright infringement.<sup>116</sup>

### 3. “Identity” Requirement

Some courts impose an “identity” requirement and require that plaintiffs demonstrate that the work with the removed CMI is an exact copy of the original work and thus is “identical,” except for the missing or altered CMI.<sup>117</sup> While the term “identity” was adopted by the district court in *Doe 1 v. Github, Inc.*,<sup>118</sup> earlier courts considered the identicalness of an alleged copy with removed CMI to an original work.<sup>119</sup> In *Frost-Tsuji Architects v. Highway Inn, Inc.*, the plaintiff brought suit under Section 1202(b), alleging the defendants copied the plaintiff’s copyrighted computer-aided design (CAD) drawings of a restaurant kitchen floor plan and intentionally removed CMI from the drawings.<sup>120</sup> The District of Hawaii granted summary judgement to defendants on the plaintiff’s Section 1202(b) claim on the basis that the plaintiff did not provide any evidence demonstrating that any of the defendants removed CMI from its work.<sup>121</sup> The plaintiff alleged that some of the defendants possessed floor plans that were “virtually identical” to the plaintiff’s original drawings.<sup>122</sup> The court indicated that the fact that the defendants possessed allegedly “virtually identical” floor plans did not mean that CMI had been removed from the floor plans.<sup>123</sup> Rather, virtually identical plans could have been produced by redrawing the original plans by hand and not including the plaintiff’s CMI.<sup>124</sup> The court determined that such exclusion of CMI

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<sup>116</sup> *Id.*

<sup>117</sup> *GitHub, Inc.*, 2024 WL 23217, at \*8; (finding that allegedly infringing material must be identical to an original work to have a viable Section 1202(b) claim); *Andersen*, 2024 WL 3823234, at \*8 (dismissing a Section 1202(b) claim on the basis that the allegedly infringing AI output was not identical to the original work); 42 North, LLC v. Brad Douglas, LLC, No. 1:20-cv-188, 2024 WL 4661396, at \*3 (W.D. Mich. Nov. 4, 2024) (finding Section 1202(b) did not apply to an original work that was not identically copied); *Frost-Tsuji Architects v. Highway Inn*, No. 13-00496, 2014 WL 5798282, at \*6 (D. Haw. Nov. 7, 2014), *aff’d* 700 F. App’x. 674 (9th Cir. 2017) (finding that “[t]he physical act of removal is not the same as basing a drawing on someone else’s work.”); *Kirk Kara Corp. v. W. Stone and Metal Corp.*, No. CV 20-5991503, 2020 WL 5991503, at \*6 (C.D. Cal. Aug. 14, 2020) (finding that “even where the underlying works are similar, courts have found that no DMCA violation exists where the works are not identical.”).

<sup>118</sup> Trial Tr. 34:7, 18, *Doe 1 v. Github, Inc.*, No. 22-cv-235217 (N.D. Cal. filed May 7, 2023); *GitHUB*, 2024 WL 235217, at \*9 (“In short, neither case cited by [p]laintiffs concerns Section 1202(b)’s *identity* requirement.”) (emphasis added).

<sup>119</sup> *Frost-Tsuji Architects*, 2014 WL 5798282 (D. Haw. Nov. 7, 2014), *aff’d* 700 F. App’x. 674 (9th Cir. 2017); *Kirk Kara Corp.*, 2020 WL 5991503 (C.D. Cal. Aug. 14, 2020).

<sup>120</sup> *Frost-Tsuji Architects*, 2014 WL 5798282, at \*1–2.

<sup>121</sup> *Id.* at \*4–5.

<sup>122</sup> *Id.* at \*5.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

would not amount to a violation of Section 1202(b) because it “would not involve any removal or alteration of [CMI] from [the plaintiff’s] original work.”<sup>125</sup>

Following *Frost-Tsuji Architects*, the Southern District of New York in *Fischer v. Forrest* considered the level of identicalness between the plaintiff’s original work and the defendants’ work when assessing a Section 1202(b) claim.<sup>126</sup> In *Fischer*, the plaintiff alleged the defendants copied the plaintiff’s product brochure and website in the defendants’ advertisement.<sup>127</sup> In granting summary judgment to the defendants on all Section 1202(b) claims, the court indicated that “[a]side from four discrete phrases among the many used on [the plaintiff’s] brochure and website, there is no similarity between [the plaintiff’s] original works and [the defendants’] advertisement.”<sup>128</sup> The court further recognized that prior cases holding Section 1202(b) claims were viable had involved underlying works alleged to be “substantially or entirely reproduced,” which aligned with the text of Section 1202(c) requiring that CMI be “conveyed in connection with copies . . . of a work . . . or displays of a work.”<sup>129</sup> Since the copying of the four phrases did not constitute substantial or entire reproduction of the plaintiff’s brochure and website, the defendants did not violate Section 1202(b).<sup>130</sup>

*Frost-Tsuji Architects* and *Fischer Forrest* provide insights to district courts’ early consideration of identity as a requirement for a Section 1202(b) claim. While the *Frost-Tsuji Architects* court considered the plaintiff’s allegation that the defendants’ works were “virtually identical” to the plaintiff’s, the court did not explicitly suggest that the works had to be identical for the plaintiff to have a viable Section 1202(b) claim.<sup>131</sup> Similarly, the *Fischer* court considered the degree of identicalness through the four copied phrases and indicated that “substantial[] or entire[],” not identical, reproduction was required to maintain a Section 1202(b) claim.<sup>132</sup> However, neither court clearly articulated an “identity requirement” and seemed to indicate it was only a potential consideration when assessing Section 1202(b) claims.

The Central District of California was the first court to affirmatively impose an “identity” requirement when assessing the plaintiff’s Section 1202(b) claims in *Kirk Kara Corporation v. Western Stone and Metal Corporation*.<sup>133</sup> In *Kirk Kara*, the plaintiff alleged the defendant copied the plaintiff’s copyrighted engagement ring designs and intentionally removed CMI, in the form of “KIRK

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<sup>125</sup> *Id.*

<sup>126</sup> *Fischer v. Forrest*, 286 F. Supp. 3d 590, 609 (S.D.N.Y. 2018), *aff’d* 968 F.3d 216 (2d Cir. 2020).

<sup>127</sup> *Id.* at 596–600.

<sup>128</sup> *Id.* at 609.

<sup>129</sup> *Id.* (quoting 17 U.S.C. § 1202(c)).

<sup>130</sup> *See id.*

<sup>131</sup> *Frost-Tsuji Architects*, 2014 WL 5798282, at \*5.

<sup>132</sup> *Fischer*, 286 F. Supp. 3d at 609.

<sup>133</sup> *Kirk Kara Corp.*, 2020 WL 5991503.

KARA” engraved on the rings, from the copies.<sup>134</sup> The court dismissed the plaintiff’s Section 1202(b) claim on the grounds that the original designs and allegedly copied designs were not exact copies.<sup>135</sup> The court identified that a side-by-side review of images of the plaintiff’s rings and the defendant’s rings suggested the ring designs may be substantially similar but the defendant “did not make *identical* copies of the plaintiff’s rings and then remove the engraved CMI.”<sup>136</sup>

Contemporary federal courts are divided in imposing an identity requirement for Section 1202(b) claims. Notably, district courts of the Ninth Circuit Court of Appeals have varied in their treatments of the identity requirement.<sup>137</sup> As discussed above, the Central District of California applied the identity requirement in *Kirk Kara Corporation*, although it provided little explanation for doing so.<sup>138</sup> Conversely, the District of Nevada declined to impose the identity requirement in *Oracle, Inc. v. Rimini Street* because, it reasoned, the requirement may weaken the intended protections for copyright holders under Section 1202(b).<sup>139</sup> Application of the identity requirement is also unsettled in district courts beyond the Ninth Circuit.<sup>140</sup>

The Ninth Circuit is poised to be the first circuit court to weigh in on the identity requirement in the pending interlocutory appeal of *Doe 1 v. Github, Inc.*<sup>141</sup> In *Github*, owners of copyrights in software code brought a suit against GitHub, a platform on which software developers store and share code.<sup>142</sup> The plaintiffs alleged that Microsoft Copilot, an AI product developed in part by Github, illegally removed CMI from their works that were stored on Github.<sup>143</sup> Notably, the plaintiffs did not allege copyright infringement in the suit, and only argued breach of contract, negligence, unjust enrichment, and unfair competition claims in addition to violation of Section 1202(b).<sup>144</sup> The plaintiffs stored their software in GitHub’s publicly accessible software repositories under open-source

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<sup>134</sup> *Id.* at \*1.

<sup>135</sup> *Id.* at \*6.

<sup>136</sup> *Id.* (emphasis in original).

<sup>137</sup> See, e.g., *Oracle Int’l Corp. v. Rimini Street*, No. 2:14-cv-01699, 2023 WL 4701627, at \*81–83 (D. Nev. July 24, 2023); *Kirk Kara Corp.*, 2020 WL 599153, at \*6.

<sup>138</sup> *Kirk Kara Corp.*, 2020 WL 5991503, at \*6 (C.D. Cal. Aug. 14, 2020).

<sup>139</sup> *Oracle Int’l Corp.*, 2023 WL 4701627, at \*81–83.

<sup>140</sup> See, e.g., *ADR Int’l Ltd. v. Ins. for Supply Mgmt. Inc.*, 667 F. Supp. 3d 411, 427 (S.D. Tex. 2023) (finding that Section 1202(b) does not include an “identity” requirement and noting that copying must only be “substantially similar”).

<sup>141</sup> *Doe 1 v. Github, Inc.*, No. 4:22-cv-06823, 2024 WL 4336532 (N.D. Cal. Sept. 27, 2024).

<sup>142</sup> *Doe 1 v. Github, Inc.*, 672 F. Supp. 3d 837, 845–47 (N.D. Cal. 2023).

<sup>143</sup> *Id.* at 847.

<sup>144</sup> First Am. Compl., *Doe 1 v. Github, Inc.*, No. 4:22-cv-06823, at 52–68 (N.D. Cal. filed June 8, 2023). Other AI copyright infringement suits that allege violation of Section 1202(b) sometimes allege other claims, like invasion of privacy, but consistently allege direct or vicarious copyright infringement. See, e.g., *Compl., J.L. v. Alphabet, Inc.*, No. 23-cv-03440, at 59–82 (N.D. Cal. filed July 11, 2023).

license agreements.<sup>145</sup> The plaintiffs claimed that GitHub removed CMI from their code and trained the Copilot AI model on the code in violation of the license agreements.<sup>146</sup> Moreover, the plaintiffs claimed that, when prompted to generate software code, Copilot includes unique aspects of the plaintiffs' code in its outputs.<sup>147</sup> In their complaint the plaintiffs alleged that all requirements for a valid Section 1202(b) claim were met in the present suit.<sup>148</sup> The plaintiffs stressed that, in removing CMI, the defendants failed to prevent users of Copilot from making illegal use of the product.<sup>149</sup> Consequently, they claimed, the defendants removed the CMI, knowing that it would "induce, enable, facilitate, and/or conceal infringement" of copyrights in violation of Section 1202(b).<sup>150</sup>

As to the identity requirement, the plaintiffs argue that Section 1202 contains no such requirement given the plain language of the statute makes it a violation to remove or alter CMI from a copy of a copyrighted work, regardless of whether the work is identical.<sup>151</sup> The defendants counter that Section 1202, which defines CMI as relating to a "copy of a work," requires a complete and identical copy, not just parts of a copy.<sup>152</sup> The plaintiffs concede that Copilot reproduces snippets of code rather than complete versions.<sup>153</sup> Therefore, per the defendants, Copilot does not create "identical copies" of the plaintiffs' complete copyrighted works.<sup>154</sup>

The Ninth Circuit's hearing of the interlocutory appeal on "whether Sections 1202(b)(1) and (b)(3) of the DMCA impose an identity requirement"<sup>155</sup> is notable for a number of reasons. First, Section 1202(b) is largely unaddressed by the circuit courts, and explicit appellate guidance has only been provided for the

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<sup>145</sup> *Id.* at 845–47.

<sup>146</sup> *Id.* at 847.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Second Am. Compl., Doe 1 v. Github, Inc., No. 22-cv-06823, at 3, 24–42 (N.D. Cal. filed Jan. 25, 2024).

<sup>150</sup> *Id.* at 48–53.

<sup>151</sup> Pl.'s Opp. to Def.'s Mot. to Dismiss the Second Am. Compl., Doe 1 v. Github, Inc., No. 22-cv-06823, at 6–9 (N.D. Cal. filed Mar. 27, 2024).

<sup>152</sup> Def.'s Reply in Support of their Mot. to Dismiss the Second Am. Complaint in Consolidated Action, Doe 1 v. Github, Inc., No. 22-cv-7074, at 4–6 (N.D. Cal. filed Apr. 10, 2024).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* The defendants' argument is based on both the text of Section 1202 as well as policy concerns. *Id.* The defendants point to the protection of "copies," rather than excerpts, derivatives, or other adaptations, in the wording of the statute. *Id.* at 4. Moreover, protection of excerpts under Section 1202 would create chaos for ordinary uses of copyrighted works. *Id.*

<sup>155</sup> *Github*, 2024 WL 4336532, at \*1.

knowledge requirement referenced above.<sup>156</sup> Consequently, determinations of Section 1202(b) claims are largely informed by varying district court decisions that are binding only on the parties to the suits and provide inconsistent interpretations of the requirements for a claim under the provision.<sup>157</sup> An appellate ruling that accepts or rejects the identity requirement would create additional binding authority to further clarify courts' interpretations of Section 1202(b).

Second, a ruling on the identity requirement from the Ninth Circuit *specifically* would be notable because it would be binding upon the large number of Section 1202(b) claims presently being litigated in the Ninth Circuit's lower courts.<sup>158</sup> Given the centrality of AI developers operating in California and elsewhere in the Ninth Circuit, the outcome of the appeal would significantly impact future lawsuits that involve Section 1202(b) claims.

It is difficult to anticipate how the Ninth Circuit might rule in the appeal, but one can tease out some of the implications of three choices the court has the option to adopt: first, interpretation of the identity requirement as requiring a complete and exact copy; second, interpretation that incomplete and inexact copying is sufficient to satisfy the identity requirement; and third, finding an identity requirement does not apply to Section 1202(b) claims.

If the Ninth Circuit interprets the identity requirement as requiring a complete and exact copy, it would impose a high standard for the requirement and plaintiffs would likely be constrained in their ability to bring Section 1202(b) claims. If the court did this, the *Github* plaintiffs' claims would likely fail as the alleged copied snippets of code generated by Copilot are not exact copies and do not comprise the complete copyrighted works. This hypothetical standard would be advantageous for individuals who remove CMI from copyrighted works in the course of processing them using AI as well as those who deploy AI systems that produce small portions of content similar (but not exactly so) to inputs. So long as the works being processed or distributed are not *complete* exact copies, individuals would be free to alter the CMI of the works for ease in analyzing the copyrighted information.

Alternatively, the Ninth Circuit could adopt a loose interpretation of identity in which incomplete and inexact copying would be sufficient. One

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<sup>156</sup> See *Stevens v. Corelogic*, 899 F.3d 666, 676 (9th Cir. 2018) (finding no liability for violation of Section 1202(b) because a plaintiff did not put forward evidence of the defendant's knowledge that its software could induce, enable, facilitate, or conceal infringement); See *supra* Part II.D.1.

<sup>157</sup> See Part II.D.

<sup>158</sup> See, e.g., Compl., In re Google Generative AI Litigation, No. 3:23-cv-03440, at 87–89 (N.D. Cal. filed Jul. 11, 2023) (alleging violations of Sections 1202(b)(1) and (b)(3) for removal of CMI from social media posts and visual artworks); Compl., Concord Music Grp., Inc. v. Anthropic PBC, No. 5:24-cv-03811, at 56–57 (N.D. Cal. filed Oct. 18, 2023) (alleging violations of Sections 1202(b)(1) and (b)(3) for removal of CMI from musical works); Third Consolidated Am. Compl., Kadrey v. Meta Platforms, Inc., No. 3:23-cv-03417, at 18–19 (N.D. Cal. filed Jan. 21, 2025) (alleging violations of Section 1202(b)(1) for removal of CMI from books).



approach would be to require identity but not copying of the entire work (something the plaintiffs in the *Github* suit advocate for). How the parties or the Ninth Circuit would formulate what standard would apply to this “less than entire” but still “near identical” standard is hard to say, but presumably, plaintiffs would have an easier time alleging facts sufficient for a Section 1202(b) claim. Applied to *Github*, it still seems unclear that the copied snippets of the plaintiffs’ code in the Copilot outputs could pass muster (this is likely a factual question to be determined at later stages of the litigation). But it could allow claims to at least survive an early motion to dismiss. As such, the adoption of this standard could limit how AI developers engage with works but also potentially affect others, such as researchers using similar techniques to process, clean, and distribute small portions of copyrighted works as part of a dataset.

Finally, the Ninth Circuit may decide to do away with the identity requirement altogether. While this may seem like a potential boon to plaintiffs, who could allege that removal of CMI and distribution of some copied material, no matter how small, plaintiffs would still face substantial challenges. Elimination of the identity requirement would likely lead to greater weight being placed on the knowledge requirement in courts’ assessments of Section 1202(b) claims, which requires that defendants know or have reasonable grounds to know that their actions will “induce, enable, facilitate, or conceal an infringement.” In the context of the *Github* case, even without an identity requirement, plaintiffs’ Section 1202(b) claims contain scant factual allegations about the defendants’ CMI removal and knowledge in the court filings to date. For other developers and users of AI, the effects of not having an identity requirement would likely vary on a case-by-case basis.

## *II: CURRENT INTERPRETATIONS AND FUTURE IMPLICATIONS OF SECTION 1202(B) AND (C)*

This Part details how Section 1202(b) and (c) present in lawsuits implicating AI as well as non-AI suits that still implicate the statute. The infrequent litigation of Section 1202(b) claims prior to the 2010s may make protections against the removal of CMI appear to be a relatively insignificant component of the DMCA.<sup>159</sup> However, the technological advent of AI has drastically elevated the importance and value of Section 1202(b). Prior to the widespread use of generative AI technology, removal of CMI from copyrighted works was largely possible only by individuals taking discrete actions to remove CMI “by hand” from copyrighted works, like cropping out the attribution line of a copyrighted

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<sup>159</sup> See *supra* note 6 and accompanying text.

photograph using photo editing software.<sup>160</sup> Modern AI technology not only allows users to remove more discrete kinds of information, like metadata encompassed in digital works, but also allows for removal of information en masse without necessitating discrete action for each removal. The increased capacity of individuals to manipulate information using AI technology has increased the attractiveness of bringing claims for removal of CMI under Section 1202(b), and the statute has become an important prospective outlet for relief.

However, there are many unanswered questions about how to interpret the language of Section 1202(b) and what is required to have a viable claim under the statute. Moreover, how the statute is interpreted impacts the ease of satisfying Section 1202(b) and has the potential to enable misuse of the provision. The following paragraphs elaborate upon these ideas and others in the context of current suits under Section 1202.

The Section 1202(b) issues in present copyright infringement lawsuits implicating AI seem to arise from the plaintiffs’ “throw it against a wall and see what sticks” approach in alleging DMCA claims.<sup>161</sup> In *Andersen v. Stability AI, Ltd.*, the plaintiffs’ initial complaint alleged sweeping violations of the DMCA under sections 1201 through 1205,<sup>162</sup> and the plaintiff’s second amended complaint alleges only “DMCA violations” without reference to particular statutory provisions.<sup>163</sup> The complaints filed in *Doe 1 v. GitHub, Inc.* contain similarly broad and vague allegations.<sup>164</sup> Despite this, courts generally find the Section 1202(b) allegations to be viable and have allowed them to proceed in the early stages of these suits.<sup>165</sup> The Section 1202(b) claims in *Doe 1 v. GitHub, Inc.* are representative of Section 1202(b) claims in the many present suits against AI developers alleging violations of Section 1202(b).<sup>166</sup> The primary issue in *GitHub*

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<sup>160</sup> See, e.g., *Murphy v. Millennium Radio Grp., LLC*, 650 F.3d 295, 299 (3d Cir. 2011) (assessing the cropping of a gutter credit of and subsequent unauthorized use of a photograph as a violation of Section 1202(b)); *McClatchey v. The Associated Press*, No. 3:05-cv-145, 2007 WL 776103, at \*2 (W.D. Pa. Mar. 9, 2007) (assessing the cropping of a title and copyright notice from a photo taken of a physical copy of a copyrighted photograph that included a title and copyright notice as a violation of Section 1202(b)).

<sup>161</sup> See, e.g., *Compl., Andersen v. Stability AI Ltd.*, No. 23-cv-00201, 2024 WL 3823234, at 12–14 (N.D. Cal. filed Jan. 13, 2023).

<sup>162</sup> *Id.*

<sup>163</sup> *Second Am. Compl., Andersen v. Stability AI Ltd.*, No. 23-cv-00201, 2024 WL 3823234, at 58, 78 (N.D. Cal. filed Oct. 31, 2024).

<sup>164</sup> See *Compl., Doe 1 v. GitHub, Inc.*, No. 22-cv-06823, 2024 WL 23217, at 10 (N.D. Cal. filed Nov. 3, 2022); *Second Am. Compl., Doe 1 v. GitHub, Inc.*, No. 22-cv-06823, 2024 WL 23217, at 11 (N.D. Cal. filed Jan. 25, 2024).

<sup>165</sup> See, e.g., *Doe 1 v. GitHub, Inc.*, No. 22-cv-06823, 2024 WL 23217, at \*8 (N.D. Cal. Jan. 22, 2024). But see *Raw Story Media, Inc. v. OpenAI Inc.*, No. 1:24-cv-01514, 2024 WL 4711729, at \*3–5 (S.D.N.Y. Nov. 7, 2024) (dismissing claims under Section 1202(b)(1) for lack of Article III standing); *infra* Part III.A.

<sup>166</sup> See generally *Compl., Concord Music Grp., Inc. v. Anthropic PBC*, No. 5:24-cv-03811, at 56–57 (N.D. Cal. filed Oct. 18, 2023) (alleging violations of Sections 1202(b)(1) and

on appeal is whether Section 1202(b) contains the aforementioned identity requirement, which is also an issue in other AI suits.<sup>167</sup>

Of the lawsuits filed against AI developers in district courts that allege Section 1202(b) claims, the claims in one suit have been allowed to proceed past the motion to dismiss stage,<sup>168</sup> the claims in three suits have been dismissed without leave to amend,<sup>169</sup> and the claims in three suits have been dismissed with

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(b)(3) for removal of CMI from copyrighted musical works); Third Consolidated Am. Compl., *Kadrey v. Meta Platforms, Inc.*, No. 3:23-cv-03417, at 18–19 (N.D. Cal. filed Jan. 21, 2025) (alleging violations of Section 1202(b)(1) for removal of CMI from copyrighted books); Second Am. Compl., *Doe 1 v. Github, Inc.*, No. 4:22-cv-06823, at 49–50 (N.D. Cal. filed Jan. 25, 2024) (alleging violations of Sections 1202(b)(1) and (b)(3) through removal of CMI in violation of open-source software license agreements); Compl., *Raw Story Media, Inc. v. OpenAI Inc.*, No. 1:24-cv-01514, at 9–11 (S.D.N.Y. filed Feb. 28, 2024) (alleging violations of Section 1202(b)(1) and (b)(3) through removal of CMI from copyrighted works of journalism); Compl., *Daily News, L.P. v. Microsoft Corp.*, No. 1:24-cv-03285, at 90–91 (S.D.N.Y. filed Apr. 30, 2024) (alleging violations of Sections 1202(b)(1) and (b)(3) through removal of CMI from copyrighted news and media content); Am. Compl., *Intercept Media, Inc. v. OpenAI Inc.*, No. 1:24-cv-01515, at 18–22 (S.D.N.Y. filed June 21, 2024) (alleging violations of Sections 1202(b)(1) and (b)(3) through removal of CMI from copyrighted works of journalism); Am. Compl., *N.Y. Times Co. v. OpenAI*, No. 1:23-cv-11195, at 64–65 (S.D.N.Y. filed Aug. 12, 2024) (alleging violations of Sections 1202(b)(1) and (b)(3) through removal of CMI from copyrighted news and media content); Compl., *Vacker v. Eleven Labs, Inc.*, 1:24-cv-00987, at 49–52 (D. Del. filed Aug. 29, 2024) (alleging violation of Sections 1202(b)(1) and (b)(3) through removal of CMI from copyrighted audiobook narrations); Am. Compl., *Center for Investigative Reporting, Inc. v. OpenAI Inc.*, No. 1:24-cv-04872, at 28–32 (S.D.N.Y. filed Sept. 24, 2024) (alleging violations of Sections 1202(b)(1) and (b)(3) through removal of CMI from copyrighted news and media content); Second Am. Compl., *Andersen v. Stability AI Ltd.*, No. 23-cv-00201, at 61, 62, 69, 79 (N.D. Cal. filed Oct. 31, 2024) (alleging violations of Section 1202(b)(1) through removal of CMI from copyrighted books); *Pierce v. Photobucket, Inc.*, No. 1:24-cv-03432, at 43–46 (D. Colo. filed Dec. 11, 2024) (alleging violations of Sections 1202(b)(1) and (b)(3) through removal of CMI from copyrighted photographs).

<sup>167</sup> *Id.*; *Andersen v. Stability AI Ltd.*, No. 23-cv-00201, 2024 WL 3823234, at \*8 (N.D. Cal. Aug. 12, 2024).

<sup>168</sup> *Kadrey v. Meta, Inc.*, No. 3:23-cv-03417 (N.D. Cal. filed Mar. 7, 2025) ECF 471 (declining to dismiss Section 1202(b)(3) claims from the plaintiff's third consolidated amended complaint).

<sup>169</sup> See *Raw Story Media, Inc. v. OpenAI Inc.*, No. 1:24-cv-01514 at 6–7 (S.D.N.Y. Nov. 7, 2024) ECF 117 (dismissing Section 1202(b) claims for lack of a concrete injury as required for Article III Standing), ECF 137; *Raw Story Media, Inc. v. OpenAI Inc.*, No. 1:24-cv-01514 at 2 (S.D.N.Y. Apr. 3, 2025) ECF 137 (denying plaintiffs' motion for leave to amend Section 1202(b) claims in complaint); *Andersen v. Stability AI Ltd.*, No. 3:23-cv-00201 at 11–13 (N.D. Cal. Aug. 12, 2024) ECF 223 (dismissing Section 1202(b)(1) and (b)(3) claims without leave to amend); *The New York Times Co. v. Microsoft Corp.*, No. 1:23-cv-11195 at 1–2 (S.D.N.Y. Mar. 26, 2025) ECF 485 (dismissing Section 1202(b)(1) and (b)(3) claims without leave to amend against all defendants in the *New York Times*, *Daily News*, and *Center for Investigative Reporting* related suits).

leave to amend.<sup>170</sup> In two suits, the Section 1202(b)(3) claims have been dismissed against a particular defendant, while the Section 1202(b)(1) claims have been allowed to proceed against that defendant.<sup>171</sup> Finally, in two suits, Section 1202(b) claims have been alleged but the defendant has yet to oppose them.<sup>172</sup> Claims have been dismissed without leave to amend for lack of Article III standing<sup>173</sup> and insufficient factual allegations of alteration or removal of CMI.<sup>174</sup> The fact-specific nature of Section 1202(b) claims makes it difficult (and perhaps unwise) to infer from these suits how other Section 1202(b) claims will progress.<sup>175</sup> However, it is certain that progression of the pending suits hinges upon answering significant interpretive questions about both the statute and threshold procedural requirements to bring suit.

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<sup>170</sup> Tremblay v. OpenAI Inc., No. 3:23-cv-03223 at 6–8 (N.D. Cal. Feb. 12, 2024) ECF 104 (dismissing Section 1202(b)(1) and (b)(3) claims with leave to amend for failure to allege knowing removal or alteration of CMI and failure to allege distribution of works without CMI rather than mere reproduction of works without CMI); Concord Music Grp., Inc. v. Anthropic PBC, No. 5:24-cv-03811 at 9–12 (N.D. Cal. Mar. 25, 2025) ECF 322 (dismissing Section 1202(b)(1) and (b)(3) claims with leave to amend); Doe 1 v. GitHub, Inc., No. 4:22-cv-06823 at 14–16 (N.D. Cal. Jan 22, 2024) ECF 195 (dismissing Section 1202(b)(1) and (b)(3) claims with leave to amend); In re Google Generative AI Copyright Litigation, No. 5:23-cv-03440 at 1–2 (N.D. Cal. Jun 06, 2024) ECF 46 (dismissing Section 1202(b)(1) and (b)(3) claims with leave to amend).

<sup>171</sup> See The New York Times Co. v. Microsoft Corp., No. 1:23-cv-11195 at 1–2 (S.D.N.Y. Mar 26, 2025) ECF 485 (dismissing Section 1202(b)(3) claims without leave to amend against OpenAI Inc. in the *New York Times*, *Daily News*, and *Center for Investigative Reporting* related suits and denying dismissal of Section 1202(b)(1) claims against OpenAI Inc. in the *Daily News* and *Center for Investigative Reporting* related suits).

<sup>172</sup> See Compl., Pierce v. Photobucket, Inc., 1:24-cv-03432 at 43–47 (D. Colo. filed Dec. 11, 2024) (alleging violations of Sections 1202(b)(1) and (b)(3)); Mot. to Dismiss, Vacker v. ElevenLabs, Inc., No. 1:24-cv-00987 at 7–13 (D. Del. Dec. 6, 2024) (arguing dismissal of Section 1202(b)(1) and (b)(3) claims should be dismissed for lack of Article III standing and insufficient factual allegations to state a claim under Section 1202(b)).

<sup>173</sup> See, e.g., Raw Story Media, Inc. v. OpenAI Inc., No. 1:24-cv-01514 at 2 (S.D.N.Y. Nov. 7, 2024) ECF 117 (dismissing Section 1202(b) claims for lack of Article III Standing), ECF 137; *infra* Part III.A.

<sup>174</sup> See, e.g., Andersen v. Stability AI Ltd., No. 3:23-cv-00201 at 11–13 (N.D. Cal. Aug 12, 2024) ECF 223 (dismissing Section 1202(b)(1) and (b)(3) claims without leave to amend for failure to allege sufficient facts of alteration or removal of CMI for claims under Section 1202(b)(1) and (b)(3)).

<sup>175</sup> Additionally, the inconsistency between district court rulings on Article III standing to bring suit under Section 1202(b) suggests this uncertainty extends to threshold procedural inquiries. Compare *Raw Story Media, Inc.*, 2024 WL 4711729 (finding new organizations alleging violation of Section 1202(b) by an AI developer’s removal of CMI and identifying information from their works lacked Article III standing to bring suit), with *The Intercept Media, Inc. v. OpenAI Inc.*, No. 24-cv-1515, 2025 WL 556019 (S.D.N.Y. Feb. 20, 2025) (finding a media company pleaded a “concrete injury [sufficient for standing] that was of the kind long protected by American courts” through an AI developer’s alleged removal of CMI from the media company’s articles).

Current Section 1202(b) suits that do not implicate AI also raise a variety of interpretive questions about the provision's requirements. In *Oppenheimer v. Highland Falls Country Club*, a court in the Western District of North Carolina determined that Section 1202(b)(3) protection applies to physical copies of copyrighted works.<sup>176</sup> In *Oppenheimer*, the plaintiff photographer alleged violation of Section 1202(b) through the defendants' removal of the plaintiff's name, date, and copyright symbol included on his copyrighted photograph and use of the photograph on the defendant's website and in printed brochures the defendant distributed to the public.<sup>177</sup> The *Oppenheimer* court relied upon interpretation of the plain language of Section 1202(b)(3) in finding the printed works were protected.<sup>178</sup> The court identified that "digital" is not mentioned in the plain language of Section 1202(b)(3) and thus the non-digital, printed works were protected.<sup>179</sup> The *Oppenheimer* court also rejected the defendants' argument that CMI as defined in Section 1202(c) excludes physical or printed CMI.<sup>180</sup> The court noted that Section 1202(c)'s "inclusion clause" merely provides a digital copy as an example of a form of a copy.<sup>181</sup> As such, physical and printed copies of CMI fall within the scope of CMI as defined by Section 1202(c).<sup>182</sup>

One day prior to the decision in *Oppenheimer*, the court in *42 North LLC v. Brad Douglas, LLC* also found that protection under Section 1202(c) does not extend to CMI in non-digital form based on interpreting the language of Section 1202(c) in light of its legislative history.<sup>183</sup> In *42 North*, the plaintiff alleged violation of Section 1202(b) through the defendant's handmade permit drawings of the plaintiff's copyrighted architectural design drawings.<sup>184</sup> The *42 North* court followed a similar path as the *IQ Group* and *Textile Secrets* courts in investigating the policy motivators behind the adoption of Section 1202 and reached a similar conclusion.<sup>185</sup> Because the information included on the architectural design drawings did not operate "'to protect [an] automated system[] which protect and manage copyrights' in order to 'facilitate electronic and Internet commerce,'" it did not constitute CMI within the court's interpreted scope of Section 1202(c) and thus could not be CMI that was altered or removed in violation of the DMCA.<sup>186</sup> On Section 1202(b) issue, the court found that, even if the CMI fell within the scope of Section 1202(c), the defendant would not have violated Section 1202(b)

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<sup>176</sup> See *Oppenheimer v. Highland Falls Country Club*, No. 1:24-cv-00133, 2024 WL 4683301, at \*4 (W.D.N.C. Nov. 5, 2024).

<sup>177</sup> *Id.* at \*2.

<sup>178</sup> *Id.* at \*3.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *42 Brand, LLC*, 2024 WL 4661396, at \*2–4.

<sup>184</sup> *Id.* at \*1.

<sup>185</sup> *Id.* at \*2–4.

<sup>186</sup> *Id.* at \*4.

because the hand-drawn permit drawings were not identical to the original architectural design drawings.<sup>187</sup>

### III: OTHER LEGAL DOCTRINES THAT MAY IMPACT SECTION 1202(B) AND (C)

This Part details three legal doctrines that may impact contemporary courts' assessments of Section 1202(b) and (c) in the context of AI. First, the standing requirement of Article III appears poised to present challenges to bringing suits under Section 1202(b)(3). Second, broad references to "the law" in the statutory text of Section 1202(b) and (c) may provide an outlet for a viable fair use defense to Section 1202(b) claims. Third, if fair use is not a viable defense, forced inclusion of CMI to comply with Section 1202(b) may raise issues grounded in the First Amendment, such as compelled speech.

#### A. Article III Standing Under Section 1202(b)(3)

In *Raw Story Media, Inc. v. OpenAI Inc.*, Judge McMahon recently dismissed the plaintiff's complaint for lack of Article III standing to assert a violation of Section 1202(b)(1) without an allegation that the defendant disseminated copies of the plaintiff's copyrighted work with altered or removed CMI.<sup>188</sup> In *Raw Story Media*, the plaintiff alleged violation of Section 1202(b)(1) through the defendant's alleged use of the plaintiff's "breaking news features, investigative news articles and opinion columns published online" to train ChatGPT, the defendant's AI-powered large language model.<sup>189</sup> The plaintiffs alleged that "'thousands' of their copyrighted works were . . . stripped of their author, title, and copyright information, and input into . . . Open AI's training sets" and used

<sup>187</sup> *Id.* But cf. *New Parent World, LLC v. True to Life Prods., Inc.*, No. cv-23-08089, 2024 WL 4277865, at \*2–3 (finding Section 1202(b) does not require an allegedly infringing copy to be identical to the original work for a viable claim).

<sup>188</sup> *Raw Story Media, Inc. v. OpenAI Inc.*, No. 1:24-cv-01514, 2024 WL 4711729, at \*3–5 (S.D.N.Y. Nov. 7, 2024) (granting a motion to dismiss for lack of Article III standing and denying without prejudice a motion for leave to replead to renewal on a proper record); see generally *Big RulingL Judge McMahon dismisses Raw Story's complaint v. OpenAI on lack of standing for DMCA claim*, ChatGPT is Eating the World (Nov. 8, 2024), <https://chatgptiseatingtheworld.com/2024/11/08/big-ruling-judge-mcmahon-dismisses-raw-storys-complaint-v-openai-on-lack-of-standing-for-dmca-claim/>; Aaron Moss, *Will AI Copyright Claims Keep Standing After New Ruling?*, Copyright Lately (Nov. 10, 2024), <https://copyrightlately.com/raw-story-copyright-lawsuit-standing/>; cf. Jonathan Band, *TransUnion, Nicklin, and Preserving the Right to Embed*, Disruptive Competition Project (Aug. 11, 2021), <https://project-disco.org/intellectual-property/081121-transunion-nicklin-and-preserving-the-right-to-embed/>.

<sup>189</sup> *Id.* at \*1.

to train ChatGPT, and that this violated Section 1202(b)(1).<sup>190</sup> The plaintiffs sought both actual or statutory damages and injunctive relief.<sup>191</sup>

The court found that plaintiff's Section 1202(b)(1) arguments failed due to a lack of Article III standing to pursue their claims for damages and an injunction.<sup>192</sup> Article III standing to bring a lawsuit for a statutory violation requires a plaintiff establish that they suffered a "concrete injury."<sup>193</sup> Specifically, "'to establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant, and (iii) that the injury would likely be redressed by judicial relief.'"<sup>194</sup> When assessing whether a harm is concrete, courts must assess whether "the alleged injury to the plaintiff has a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts" and requires plaintiffs to identify "a close historical or common-law analogue for their asserted injury."<sup>195</sup>

The court assessed the deficiencies in the plaintiffs' standing damages and injunctive relief piecemeal. First, the court identified that the plaintiffs lacked standing to pursue damages because "interference with property" did not function as a sufficient historical analogue.<sup>196</sup> Judge McMahon identified that she "[is] not convinced that the mere removal of identifying information from a copyrighted work—absent dissemination—has *any* historical or common-law analogue" of concrete harm.<sup>197</sup> Second, the court identified that the plaintiffs lacked standing to pursue injunctive relief because they "failed to allege facts tending to show that the risk of ChatGPT reproducing their work without the requisite inclusion of CMI was "substantial."<sup>198</sup> The plaintiffs failed to allege that the information in their publications is copyrighted as required to protect against future copyright infringement.<sup>199</sup> Moreover, the court found there was no substantial risk that the current operating version of ChatGPT would generate plagiarized information.<sup>200</sup>

In light of *Raw Story Media*, it's likely that Article III standing will likely play a role in future Section 1202(b) suits, particularly those that involve non-

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at \*3.

<sup>193</sup> *Id.* at \*2 (citing *Spokeo, Inc v. Robins*, 578 U.S. 330, 341 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

<sup>194</sup> *Id.* (citing *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021)).

<sup>195</sup> *Id.* (citing *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424–25 (2021)).

<sup>196</sup> *Id.* at \*3.

<sup>197</sup> *Id.* at \*4.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at \*5.

<sup>200</sup> *Id.* The court distinguished the current operating version of ChatGPT from older versions of ChatGPT that generated responses with significant amounts of plagiarized content. *Id.*

copyrightable works and plead only the removal or alteration of CMI in violation of Section 1202(b) without a claim of copyright infringement.

*B. “The Law” as it Relates to Section 1202(b)*

Second, fair use may operate as a defense to allegations of Section 1202(b) violations. Per the statute’s language, Section 1202(b) safeguards against removal or alteration of CMI unless such removal or alteration as permitted by the copyright owner or “the law.”<sup>201</sup> This undefined reference to “the law” could encompass permission to remove or alter CMI so long as such uses fall within the ambit of fair use outlined under 17 U.S.C. § 107.

The interplay between the DMCA and fair use has previously been explored with regard to provisions of the Act outside of Section 1202(b). On July 28, 2020, the U.S. Senate Committee on the Judiciary Subcommittee on Intellectual Property held a hearing titled, “How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?”<sup>202</sup> The hearing commentary primarily focused on the safe harbor provisions included in Section 512 of the Act and the “anti-circumvention” provision of Section 1201, but did not discuss the provisions of Section 1202.<sup>203</sup> The lack of consideration of fair use as a defense to Section 1202 claims makes the prospect ripe for discussion in light of the pending Section 1202(b) suits.

The fair use defense protects an author’s use of another’s original work provided the use is for purposes including criticism, comment, news reporting, teaching, scholarship, or research. The fair use defense is codified in Section 107 of the Copyright Act of 1976. When a court is tasked with gauging whether a particular use is fair, the statute provides four factors to guide the court’s determination:

- (1) The purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes;

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<sup>201</sup> 17 U.S.C. § 1202(b).

<sup>202</sup> *How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use? Before the S. Comm. on Intell. Prop.*, 116th Cong. (2020), <https://www.judiciary.senate.gov/committee-activity/hearings/how-does-the-dmca-contemplate-limitations-and-exceptions-like-fair-use>; see generally Katharine Trendacost & Corynne McSherry, *What Really Does and Doesn’t Work for Fair Use in the DMCA*, Elec. Frontier Found. (July 31, 2020), <https://www.eff.org/deeplinks/2020/07/what-really-does-and-doesnt-work-fair-use-dmca>; Eileen McDermott, *What’s Fair? Senate IP Subcommittee Contemplates Problems with Copyright Fair Use Regime*, IP Watchdog (July 30, 2020 7:15 AM), <https://ipwatchdog.com/2020/07/30/whats-fair-senate-ip-subcommittee-contemplates-problems-with-copyright-fair-use-regime/id=123614/>.

<sup>203</sup> See, e.g., *How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use? Before the S. Comm. on Intell. Prop.*, 116th Cong. (2020) (statements of Sherwin Siy, Lead Public Policy Manager at Wikimedia Foundation; Christopher Mohr, Vice President of Intellectual Property and General Counsel, Software and Information Industry Association).



- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.

If a court found “the law” as described in the language of Section 1202(b) encompasses the statutory fair use defense, activities that entail the alteration or removal of CMI and that fall within the kinds of uses protected by fair use may constitute fair uses and thus not be violations of Section 1202(b).

Particular activities that entail the removal or alteration of CMI are well-positioned to excuse violations of Section 1202(b) under the fair use defense. Instances of CMI removal or alteration to create copyrighted works that parody original works may have particularly compelling arguments for excusal as fair uses. This is largely because required retention of CMI identifying original authors in the works of others that comment on or criticize original works would risk associating original authors with criticism of their own works, an activity that is likely improbable.<sup>204</sup> Additionally, AI technologies that employ CMI removal and alteration for research purposes are suited for excusal as fair use. Academics and researchers commonly use such tools to conduct text data mining research and format and restructure data for subsequent analysis. Hypothetical fair use assessments of these removals of CMI would benefit from the fact that the removal and alteration of CMI is for research and potentially nonprofit educational purposes.

### *C. First Amendment Issues Implicated in Section 1202(b)*

Finally, First Amendment issues implicated in Section 1202(b) may impact the constitutionality of the statute and thus limit its operation. Courts have long recognized that fair use operates as a “safety valve” to prevent copyright law from restricting the First Amendment freedoms of speech, expression, and the press.<sup>205</sup> This function of fair use is best explained through an example. Suppose an individual wants to write and publish a review of an author’s book and include quotations of language from the book. In a world without the fair use defense, the individual cannot include the quotations in their review without violating the author’s copyright in the book. As a result, the individual’s First Amendment

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<sup>204</sup> *Cf.* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 593 (1994) (finding that there is no derivative market for critical works because of the “unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions.”).

<sup>205</sup> *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558–59; *see generally* Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. REV. 1180 (1970).

freedom of expression through inclusion of the quotations in the review would be unconstitutionally restrained. In a world with fair use, the individual can include the quotations without violating the author's copyright in the book because the use of the quotations in the review easily qualifies as commentary or criticism expressly protected by the fair use defense and the author's First Amendment rights remain unviolated.

If a court found "the law" as described in the language of Section 1202(b) encompasses the statutory fair use defense, the fair use safety valve would operate to prevent restriction of First Amendment rights by Section 1202(b), and the provision would remain constitutionally sound. Conversely, if a court found "the law" did not encompass the statutory fair use defense, First Amendment freedoms of speech, expression, and the press could be restricted by limitations imposed by Section 1202(b).

The anticircumvention and antitrafficking provisions in Section 1201 of the DMCA have previously been challenged as overbroad, unconstitutionally vague, and facial violations of the First Amendment.<sup>206</sup> In every challenge, federal district and appellate courts found the provisions were content neutral, constitutional when assessed under an intermediate scrutiny standard of review, and did not violate the plaintiffs' First Amendment rights.<sup>207</sup> Section 1202(b) has never been challenged on First Amendment grounds, and it is uncertain whether the same First Amendment challenges made to Section 1201 would fare any better if made against Section 1202(b). However, unlike Section 1201, Section 1202(b) may be susceptible to challenge under the compelled speech doctrine of the First Amendment.

The compelled speech doctrine provides that the government cannot force an individual to express a particular belief or "punish an individual for refusing to articulate, advocate, or adhere to the government's approved messages."<sup>208</sup> For example, the government cannot require children in public schools to salute the American flag since it is unconstitutional to require students to espouse particular symbolic messages put forward by the government.<sup>209</sup> Similarly, the government cannot require individuals to publicly display government speech, such as a state

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<sup>206</sup> See *Universal City Studios, Inc. v. Corley*, 273 F.3d 329 (2d Cir. 2001) (holding antitrafficking provisions of the DMCA was not an unconstitutional restriction of speech under the First Amendment); *United States v. Elcom, Ltd.*, 203 F. Supp. 2d 111 (N.D. Cal. 2002) (holding the anticircumvention provision of the DMCA was not unconstitutionally vague, not an unconstitutional restriction of speech under the First Amendment, and not unconstitutionally overbroad); *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004) (holding the anticircumvention provisions of the DMCA were constitutional); *Green v. United States Dept. of Justice*, 111 F.4th 81 (D.C. Cir. 2024) (holding the anticircumvention and antitrafficking provisions of the DMCA were not overbroad in violation of the First Amendment and were not susceptible to a facial First Amendment challenge).

<sup>207</sup> *Id.*

<sup>208</sup> David L. Hudson, *Compelled Speech*, Free Speech Ctr. at Middle State Tenn. Univ. (last updated July 2, 2024), <https://firstamendment.mtsu.edu/article/compelled-speech/>.

<sup>209</sup> *West Virginia Bd. of Edu. v. Barnette*, 319 U.S. 624, 640–42 (1943).

motto on a license plate, since it is unconstitutional for the government to “require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.”<sup>210</sup>

Compelled speech caselaw to date suggests the compelled speech doctrine primarily protects against compulsion of political or ideological messages,<sup>211</sup> and the potential of the compelled speech doctrine to protect against compelled factual disclosures by individuals is comparatively less explored.<sup>212</sup> However, existing practices of government-enforced factual disclosures by individuals that are afforded no First Amendment protection suggest it may be difficult to allege that required inclusion of factual information like CMI constitutes compelled speech. For example, individuals are required to make factual disclosures providing the amount and sources of their income on their tax returns and disclosing their current home address information for inclusion in sex offender registries, yet neither of these disclosures have been found to constitute compelled speech.<sup>213</sup> As a result, a successful argument that required retention of CMI in creators’ works constitutes compelled speech would likely have to hinge upon the effect of the inclusion of CMI on a creator’s ideological message or beliefs as relayed in their copyrighted work.

#### *IV: PRACTICAL CONCERNS WHEN DEALING WITH CMI*

Section 1202 has risen in prominence across the many AI copyright lawsuits filed over the last two years, but the courts have yet to answer many critical

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<sup>210</sup> *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).

<sup>211</sup> See *Barnette*, 319 U.S. 624 (1943); *Wooley*, 430 U.S. 705 (1977); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (holding application of a public accommodation law which would require parade organizers to include the plaintiffs-appellees in a parade would alter the expressive content of the parade and thus violate the First Amendment); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) (holding a Department of Defense policy that the Department to deny federal funding to educational institutions that prohibited military representatives access and assistance at the institutions for recruiting purposes was unconstitutional under the unconstitutional conditions doctrine because it required the institutions to choose between surrendering its First Amendment rights and losing federal funding for its university).

<sup>212</sup> See Alan K. Chen, *Compelled Speech and the Regulatory State*, 97 IND. L.J. 881, 892–96.

<sup>213</sup> See *id.* at 895; *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995) (finding a requirement that the defendant disclose client information did not constitute compelled speech of an ideological belief in violation of the First Amendment); *United States v. Arnold*, 740 F.3d 1032, 1035 (5th Cir. 2014) (holding the registration requirement of the Sex Offender Registration and Notification Act did not constitute compelled speech in violation of the First Amendment).

questions about viable defenses or limitations on Section 1202(b) claims.<sup>214</sup> Creators and other users should therefore exercise caution. This is especially true if, as these cases are decided, courts should begin to lower existing barriers to Section 1202(b), such as the identity requirement. This could have the effect of allowing these claims to survive past early stages of litigation, making resolution more costly and riskier, and Section 1202(b) claims more attractive to opportunistic plaintiffs or outright “copyright trolls.”<sup>215</sup> Unlike a copyright infringement claim under Section 501, a Section 1202 claim requires no prerequisite copyright registration (and in fact may not require copyright ownership at all), but does provide plaintiffs with significant statutory damages if Section 1202 is found to be violated.<sup>216</sup> These features make the statute well-suited for abuse, especially where plaintiffs may be able to drag out litigation past the initial stages.<sup>217</sup> While some Section 1202(b) claims are undoubtedly legitimate, users should be wary of the potential for plaintiffs with less compelling or nonexistent Section 1202(b) claims to bring suit with nefarious intent.

So, what can users do? First, if at all possible, users should refrain from separating any information that could be construed as CMI from copyrighted works when re-using them to avoid possible liability under Section 1202(b)(1).<sup>218</sup> As discussed above, courts continue to be unclear about the scope of information encompassed in Section 1202(c).<sup>219</sup> In the context of creating and sharing copyrighted works, content such as titles, author names, organizational affiliations, and numerical citation information could be construed as CMI per the enumerated categories provided in Section 1202(c). Users should avoid separating

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<sup>214</sup> See, e.g., *Github*, 2024 WL 4336532 (granting the plaintiff’s motion to certify an order for interlocutory appeal to determine if Section 1202(b) imposes an identity requirement). Similarly, courts have come down on different sides of whether Article III standing serves as a limitation to bringing a Section 1202(b) claim. Compare *Raw Story Media, Inc. v. OpenAI Inc.*, No. 24-cv-01514, 2024 WL 4711729 (Nov. 7, 2024) (finding new organizations alleging violation of Section 1202(b) by an AI developer’s removal of CMI and identifying information from their works lacked Article III standing to bring suit), with *The Intercept Media, Inc. v. OpenAI Inc.*, No. 24-cv-1515, 2025 WL 556019 (S.D.N.Y. Feb. 20, 2025) (finding a media company pleaded a “concrete injury [sufficient for Article III standing] that was of the kind long protected by American courts” through an AI developer’s alleged removal of CMI from the media company’s articles).

<sup>215</sup> For general background on the evolution and practices of copyright trolls, see generally Matthew Sag, *Copyright Trolling: An Empirical Study*, 100 IOWA L. REV. 1105 (2014).

<sup>216</sup> See 17 U.S.C. § 1203(c)(3)(B) (“At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1202 in the sum of not less than \$2,500 or more than \$25,000.”).

<sup>217</sup> Cf. Sag, *supra* note 216, at 1119 (“The problem with [copyright] statutory damages, as a matter of both design and application, is that the amounts awarded bear no relationship to the harm of infringement. . . . Statutory damages play a significant role in the profitability of copyright trolling. Without statutory damages, defendants might decide that their infringements are so trivial that the plaintiff will not bother to pursue them.”).

<sup>218</sup> 17 U.S.C. § 1202(b), (c).

<sup>219</sup> See *supra* Part I.C.

these kinds of information from copyrighted works whenever possible, regardless of whether the works are being processed in a physical or digital format. Additionally, other information like organizational logos or hyperlinks to copyright notices could be construed as CMI. Although both of these were not found to constitute CMI in *IQ Group, Ltd. v. Weisner Publishing, LLC*,<sup>220</sup> the court in *Murphy v. Millennium Radio Group* expressly overruled the *IQ Group* interpretation of Section 1202.<sup>221</sup> As such, both logos and hyperlinks could constitute CMI as defined in Section 1202(c) and thus should receive the same careful treatment as the other information discussed above.

Second, users should know that distributing works that have removed or altered CMI raises potential liability under Section 1202(b)(2).<sup>222</sup> This is true regardless of whether the distributed copy is in a print or digital format. Practically speaking, doing so raises the visibility of such actions so naturally heightens risk. But additionally, distribution may make it more difficult to mount at least one successful defense: lack of standing based on failure to allege concrete harm, as was successfully argued in *Raw Story Media v. OpenAI Inc.*, relying on the Supreme Court's *TransUnion* decision.<sup>223</sup> While the *Raw Story* court found lack of harm for mere removal of CMI, under Section 1202(b)(1), distribution that puts copyrighted works in the hands of third-parties without CMI attached seems a much more tenuous case. This is because potential downstream distribution of copyrighted works without adequate tracking information to monitor authorized uses could more naturally be construed as a "concrete harm" that Section 1202 was enacted to specifically address.<sup>224</sup>

Organizations that develop AI technologies face somewhat higher stakes in their prospective liability under Section 1202(b).<sup>225</sup> Users that engage in occasional removal of CMI are better positioned to implement the suggestions provided above to avoid liability under Section 1202(b). However, organizations that remove CMI en masse, like AI developers, would likely have difficulty implementing the above suggestions since removal of CMI and other forms of identifying information is necessary for the effective creation and development of AI technologies. As a result, AI developers may feel at a loss as to how to protect against liability under Section 1202(b).

Ideally, AI developer defendants in Section 1202(b) suits would want to establish that they did not remove or alter CMI and thus did not violate Section 1202(b). While this is not feasible given the necessity of CMI removal and alteration for certain AI applications, especially during training stages, AI developer defendants can benefit from limitations imposed on Section 1202(b)

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<sup>220</sup> 409 F. Supp. 2d 587 (D.N.J. 2006).

<sup>221</sup> *Murphy v. Millennium Radio Grp., LLC*, 650 F.3d 295, 304–06 (3d Cir. 2011).

<sup>222</sup> See 17 U.S.C. § 1202(b)(2).

<sup>223</sup> See *Raw Story Media, Inc.*, 2024 WL 4711729, at \*3–5.

<sup>224</sup> See Information Infrastructure Task Force, *supra* note 28, at 191–92;

<sup>225</sup> See generally Allyn, *supra* note 12; Cacco, *supra* note 11.

claims under current caselaw. First, current and prior lawsuits assessing Section 1202(b) claims reveal that Section 1202(b) determinations are incredibly fact specific. As courts continue to come down on either side of Section 1202(b) issues in cases that look factually similar, there is little certainty as to how individual Section 1202(b) claims will be assessed.<sup>226</sup>

Third, AI developer defendants can leverage a number of defenses built into the requirements for a valid Section 1202(b) claim.<sup>227</sup> The double-scienter requirement necessitating plaintiffs prove a defendant intended to remove CMI and had knowledge that removal would further copyright infringement creates two hurdles to establish knowledge.<sup>228</sup> Defendants in jurisdictions that apply the double-scienter requirement can use this heightened standard to argue against having the knowledge required under Section 1202(b). Moreover, the identity requirement provides another opportunity for defendants to argue against liability under Section 1202(b).<sup>229</sup> If a defendant's reproduction involves less-than-complete copies of copyrighted works, they can argue that failure to meet the identity requirement renders the plaintiff's Section 1202(b) claim unviable.

### CONCLUSION

Until recently, Section 1202 was a relatively quiet and seldom-used part of the Digital Millennium Copyright Act. No more. The surge of interest in Section 1202(b) claims brought by plaintiffs against developers of generative artificial intelligence technologies have put this provision in the spotlight. As recounted above, making a successful Section 1202 claim still faces many barriers, and no court has imposed Section 1202 liability in any of the AI copyright infringement lawsuits to date. But, given the potential for high statutory damages and the relatively routine ways in which many users remove and alter CMI, it is important that the courts carefully consider the limits of such claims.

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<sup>226</sup> Compare *Textile Secrets Int'l, Inc. v. Ya-Ya Brand Inc.*, 524 F. Supp. 2d 1184 (C.D. Cal. 2007), with *McClatchey v. The Associated Press*, No. 3:05-cv-145, 2007 WL 776103 (W.D. Pa. Mar. 9, 2007).

<sup>227</sup> See *supra* Part I.E.2; Part I.E.3.

<sup>228</sup> See *supra* Part I.E.2.

<sup>229</sup> See *supra* Part I.E.3.