

---

THE COLUMBIA  
SCIENCE & TECHNOLOGY  
LAW REVIEW

---

VOL. XIII

STLR.ORG

FALL 2011

---

## ARTICLE

COPYRIGHT FRAUD IN THE INTERNET AGE:  
COPYRIGHT MANAGEMENT INFORMATION FOR  
NON-DIGITAL WORKS UNDER THE DIGITAL  
MILLENNIUM COPYRIGHT ACT<sup>†</sup>

Russell W. Jacobs<sup>1</sup>

*With the advent of the digital age, authors of creative works enjoy the benefits of quickly and inexpensively distributing their works to global audiences. These developments have unfortunately led to the negative consequence that pirated, unauthorized, or altered copies reach potential users before the creator of the work releases the authentic version according to his or her terms. The Digital Millennium Copyright Act of 1998 sought to address some of these concerns by punishing circumventions of technologies controlling access to copyrighted works (17 U.S.C. § 1201) and by protecting “copyright management information,” i.e. the data identifying the author and the terms of use of a copyrighted work (17 U.S.C. § 1202).*

*While scholars have commented extensively on section 1201, little scholarship exists on section 1202. This Article addresses that gap. The Article discusses a federal court split regarding the scope of application of section 1202 and demonstrates that the legislative history and the plain language of the statute call for broad application to both digital and non-digital works. The Article then looks at section 1202*

---

<sup>†</sup> This Article may be cited as <http://www.stlr.org/cite.cgi?volume=13&article=3>. This work is made available under the Creative Commons Attribution–Non-Commercial–No Derivative Works 3.0 License.

1. Corporate counsel, Starbucks Coffee Company, Seattle, WA; J.D., Columbia University School of Law, 2002; A.B., The University of Michigan, 1999. This Article contains the views of the author. Starbucks Coffee Company does not necessarily share those views. The author extends his gratitude to Professor Jane Ginsburg for her astute insights on an earlier manuscript, to Professor Jennifer Koh for her advice during the writing process, Julie Crowl for her close reading, as well as to colleagues at Starbucks—Paula Boggs, Lucy Helm, Gail Resnik, Anna Kakos, Batur Oktay, Kim Teraberry, and Naser Baseer.

*in the context of Internet fraud, and argues that this section functions as a consumer fraud statute, offering protections for the provision of accurate information and authentic works that can well serve copyright owners and consumers.*

I. Introduction.....	98
II. Section 1202 of the Digital Millennium Copyright Act.....	102
III. Court Split over Non-Digital Applicability of Section 1202	106
A. Decisions Limiting Section 1202 to Digital Works.....	108
B. Courts Applying Section 1202 Broadly.....	112
IV. Statutory Sources.....	115
A. The Working Group's White Paper.....	115
B. The WIPO Treaties.....	118
C. Congressional Hearings.....	121
V. The Digital Birth of Broad Causes of Action for CMI.....	123
A. Lawmaking at the Brink of the Digital Age.....	124
B. Non-Digital Scope of Section 1202.....	130
VI. Copy Fraud in the Digital Age.....	145
VII. Conclusion.....	152

## I. INTRODUCTION

Copyright law protects many types of creative works, which exist in various forms—written, danced, filmed, shaped in clay, among a multitude of others. No matter the form, the owner of the copyright often attaches information about the work, including, almost ubiquitously, the copyright notice, i.e., the familiar line reciting © / Year of Creation / Copyright Owner. Yet, copyright owners do not limit the information that they convey with their works to the copyright notice. For example, movie credits identify the directors, screenwriters, actors, music composers, and performers as well as certain terms of use, namely that viewers may not reproduce the movie.

The late Twentieth Century witnessed an explosion of new types of works protectable by copyright, like software, and new formats for protected works, like digital music and movies. In a related development, the types and amount of information conveyed with copyrighted works have mushroomed. Software familiarly contains a “shrink-wrap” license that identifies its permitted uses as well as restrictions. Likewise, digital music listeners consent to the terms and conditions of use before downloading songs. Some electronic

works bear a “digital watermark,” a security device that creates a unique marker in the work and may prevent copying, distribution, or other unauthorized uses.<sup>2</sup>

This digital age born in the late Twentieth Century has yielded technologies that have held the promise of enabling the reproduction of works in digital format and at low cost, as well as the inexpensive distribution of those works via computer networks.<sup>3</sup> These technologies benefit copyright owners, who can reach larger audiences, as well as the general public, which now has access to a much larger universe of works.<sup>4</sup> A negative consequence of this ease of reproduction and distribution, however, is the potential for high volumes of unauthorized copies.<sup>5</sup> The public therefore faces more

---

2. See Séverine Dusollier, *Some Reflections on Copyright Management Information and Moral Rights*, 25 Colum. J.L. & Arts 377, 381 (2003) (“A single hyperlink can refer to a huge amount of data about the work and the artist. . . . This invisible inscription [in watermarking] is created through steganography, which is the art and science of communicating in a way which conceals the very existence of communication. . . . In a digital environment, watermarking modifies certain so-called ‘useless’ bits of a picture or a sound. The digital code embedded in this way can be extracted and deciphered with an appropriate program. This mark can also consist of an appended serial number. Thus, each image is stamped and dated by the author so that she may trace the source of non-authorized copies of this image through a file containing both these serial numbers and identities of the users with licenses for the stamped pictures.”).

3. See Jessica Litman, *Digital Copyright* 89 (2001) (“In 1992, the ‘Information Superhighway’ suddenly sprang into the news and . . . would usher in a new era of American competitiveness and economic power by enabling us all to harness digital technology to access a new, twenty-first-century technological marvel that would supersede conventional media.”).

4. See Jane Ginsburg, *Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience*, 29 Colum. J.L. & Arts 11, 37 (2005) (“But one might instead focus on the opportunities technological protections extend to individual authors to disseminate their works and to condition further copying or exploitation on remunerating the creators. Digital media, by making the means of production and dissemination available to any computer-equipped author, give authors a realistic opportunity to bring their works to the public without having to put themselves in thrall to traditional intermediaries. The technological measures that reinforce legal control may enable and encourage authorial entrepreneurship, because authors may be able to rely on these measures to secure the distribution of and payment for their works, and new business models may therefore emerge.”); Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 Hous. L. Rev. 1013, 1042–43 (2007) (“Expanding access to the most authoritative sources of information and enabling much more accurate and efficient search capability holds the potential to improve the quality of information available. Better information has the power to sharpen and clarify discourse.”); *id.* at 1045 (“As the Internet has proven with regard to many information goods—from books to music to movies—having a broad searchable catalog produces a long tail of demand that cumulatively can exceed the demand for even the most popular works.”).

5. See Litman, *supra* note 2, at 171 (“Newsstands turn out to be an effective way of marketing newspapers and magazines in part because it is difficult as a

uncertainty regarding the authenticity of a particular work and whether the source has the authority to convey that work. Lawmakers have had to grapple with appropriate legislation to address these concerns about unauthorized uses.

In 1993, as the digital age dawned, U.S. President William Clinton selected experts in intellectual property to propose changes in the law to address the rapid developments in technology. President Clinton charged the Information Infrastructure Task Force Working Group with the broad mission of articulating and implementing policies appropriate for the nation's telecommunications and information systems in the digital age. A subset of this body—the Working Group on Intellectual Property Rights (the “Working Group”)—looked specifically at the changes necessary for intellectual property law. In 1995, the Working Group issued “Intellectual Property and the National Information Infrastructure,” known as the “White Paper,” which recommended changes to copyright law. Proposed legislation based on this report came before Congress in the form of the National Information Infrastructure Copyright Protection Act of 1995 (the “NII CPA”). This legislation did not pass.<sup>6</sup>

---

practical matter to make and distribute additional copies of newspapers and magazines that one buys from the newsstand. If one ‘buys’ a newspaper by downloading it from the World Wide Web, on the other hand, it is pretty easy to make as many copies as one wants. The old rules, customs, and practices, therefore, will not work very well unless we can come up with a way to prevent most of those copies from getting made.”); Steve P. Calandrillo and Ewa M. Davison, *The Dangers of the Digital Millennium Copyright Act: Much Ado About Nothing?*, 50 Wm. & Mary L. Rev. 349, 400–01 (2008) (“The advent of digital technology resoundingly tipped the reward scales against authors. Whether engaged in by organized movie and software piracy rings or individuals using peer-to-peer file-sharing networks, the ability to quickly create and distribute innumerable, near-perfect copies of digitized works has become commonplace. Moreover, it is generally impossible on the Internet to determine whether material is being distributed lawfully. This change in the copyright landscape in fact created the impetus behind enactment of the DMCA.”); *id.* at 355 (“Congress sought to carefully balance the needs of copyright owners threatened by the ease of piracy in a digital era with the needs of the public for access to information and creative content.”); Mark Stefik, *Shifting the Possible: How the Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 Berkeley Tech. L.J. 137, 155–56 (1997) (“From a publishing perspective, uncontrolled digital technology itself shifts the balance in the social contract between those who create and distribute works and those who use them. For many kinds of digital works, it has become very easy to use and duplicate a work without having authorization or providing compensation. Untamed, the digital frontier is so wild that publishers cannot imagine how to make a living. The fundamental challenge is to provide appropriate checks and balances for the interests of the various stakeholders.”).

6. See The Library of Congress, Thomas, <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR02441:@@L&summ2=m&> and <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:SN01284:@@@X> (reporting the legislative status of the NII Copyright Protection Act of 1995).

In the wake of this legislative hurdle and recognizing the ease with which copyrighted works could cross national borders via the Internet and other communications networks, the Clinton administration worked with the international community to formulate common legal frameworks for copyright protections in the digital age. The World Intellectual Property Organization based in Geneva, Switzerland (“WIPO”) sponsored treaty negotiations in 1996. The delegates adopted two treaties on December 20, 1996: the WIPO Copyright Treaty (the “WIPO CT”) and the WIPO Performances and Phonograms Treaty (the “WIPO PPT”); collectively with the WIPO CT, the “WIPO Treaties”), which recommended changes to the copyright law similar to the proposals set forth by the Working Group.<sup>7</sup>

The implementing legislation for the WIPO Treaties came before Congress in 1997. As the WIPO Treaties largely paralleled the White Paper, the respective bills that followed from the treaties and the Working Group contained similar language. In 1998, Congress passed the Digital Millennium Copyright Act and the WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 (the “DMCA”).<sup>8</sup> The DMCA added Chapter 12, entitled “Copyright Protection and Management Systems,” to Title 17, the title relating to copyrights.<sup>9</sup> Chapter 12 created liabilities with respect to two types of infractions. Section 1201 prohibits the circumvention of technologies that control access to a work and the manufacture or use of technologies designed to circumvent those access controls.<sup>10</sup> Section 1202, the subject of this Article, prohibits falsifying, altering, or removing “copyright management information” (“CMI”).<sup>11</sup> The statutory definition of “copyright management information” sets forth eight types of information about a copyrighted work, such as the information in the copyright notice, the title, the author, and the terms of use.<sup>12</sup> Sections 1203 and 1204 enable both civil and criminal actions, respectively, against those who violate sections 1201 and 1202.<sup>13</sup>

Parties litigating section 1202 have disputed the definition of CMI and the federal courts have split on the scope of its applica-

---

7. *See infra* Part IV.B.

8. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2861 (1998).

9. *Id.* at 2863.

10. 17 U.S.C. § 1201 (2006).

11. *Id.* § 1202(b). See Dusollier, *supra* note 1, at 379, for a general definition of “copyright management information” (“CMI is usually understood as any piece of information that either helps identify the work or the rights holder, or manages rights.”).

12. 17 U.S.C. § 1202(c).

13. *Id.* §§ 1203(a), 1204.

tion, namely whether it applies to non-digital works. One set of cases takes the view that CMI refers only to information expressed in digital works, and even more narrowly in one expression to “automated copyright protection or management systems.”<sup>14</sup> These cases find support for this interpretation in the statutory history, particularly the context of the digital age in which the legislation arose.<sup>15</sup> Another set of cases reads the language of section 1202 more broadly and expresses willingness to impose liability no matter the form of the work, i.e., digital or not.<sup>16</sup> This Article examines the split between these sets of cases and reaches the conclusion that both the plain language of the statute and the legislative history support a broad reading of section 1202. Congress intended that section 1202 would apply to non-digital works and drafted the language accordingly.

Part II of this Article summarizes the provisions of section 1202 and the subsequent sections of Chapter 12 relating to CMI that the DMCA added to the Copyright Act. Part III discusses the eleven federal cases that analyze the scope of section 1202. Part IV examines the histories of the Working Group, the WIPO Treaties, and the DMCA, particularly with respect to the scope of protection intended for CMI. Part V analyzes this history and the text of section 1202 and posits that while section 1202 arose in the context of legislative efforts to address issues new to the digital age, Congress did not confine section 1202 to digital works, but rather anticipated a broad application and drafted it to achieve this scope of protection. Part VI assesses how section 1202 functions as a fraud and consumer protection statute in the digital age. Part VII concludes the Article.

## II. SECTION 1202 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

In 1998, Congress added Chapter 12, entitled “Copyright Protection and Management Systems,” to Title 17, the title relating to

---

14. *E.g., Textile Secrets Int'l, Inc. v. Ya-Ya Brand Inc.*, 524 F. Supp. 2d 1184, 1201 (C.D. Cal. 2007) (concluding that Congress intended this section, and the DMCA as a whole, to apply only in the electronic commerce context); *IQ Group, Ltd. v. Wiesner Publ'g, LLC*, 409 F. Supp. 2d 587, 597 (D.N.J. 2006) (concluding that § 1202 applied only to “automated copyright protection or management systems”).

15. *E.g., Textile Secrets*, 524 F. Supp. 2d at 1196–99 (arguing that Congress intended that these provisions would only remedy issues relating to the digital age); *IQ Group*, 409 F. Supp. 2d at 593–97 (same).

16. *E.g., Murphy v. Millennium Radio Group LLC*, 650 F.3d 295, 305 (3d Cir. 2011) (extending protections to photograph); *McClatchey v. Assoc. Press*, 82 U.S.P.Q.2d 1190, 1196, 2007 WL 776103, at \*6 (W.D. Pa. Mar. 9, 2007) (same).

copyrights, as part of the DMCA.<sup>17</sup> Section 1202, included as part of Chapter 12, prohibits (a) the knowing and intentional provision, distribution, or importation for distribution of CMI that is false, and (b) the intentional removal or alteration of CMI.<sup>18</sup> The statute defines “copyright management information” as the information in the copyright notice; the names of the authors, copyright owners, writers, performers, and directors; identifying information and symbols about any of the foregoing or the work (and links to such information); the terms and conditions of use; and any other information required by the Register of Copyrights.<sup>19</sup> Sections 1202(d)

---

17. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2863 (1998).

18. Section 1202 provides, in relevant part:

§ 1202. Integrity of copyright management information

(a) FALSE COPYRIGHT MANAGEMENT INFORMATION.—No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement—

- (1) provide copyright management information that is false, or
- (2) distribute or import for distribution copyright management information that is false.

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

- (1) intentionally remove or alter any copyright management information,
- (2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or
- (3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law, knowing, or, with respect to civil remedies under section 1203 having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title. 17 U.S.C. § 1202(a)–(b) (2006).

19. Section 1202 provides, in relevant part:

§ 1202(c) DEFINITION.—As used in this section, the term “copyright management information” means any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work:

- (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 a work.
- (3) The name of, and other identifying information about, the copyright owner of the work, including the 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 performer whose performance is fixed in a work other than an

and (e) exempt liability in certain situations relating to law enforcement and television transmissions.<sup>20</sup> Section 1203 sets forth the remedies for violations of Sections 1202(a) and (b).<sup>21</sup> Under section 1203, a party succeeding on its claim under section 1202 for the falsification, removal, or alteration of CMI may obtain injunctive relief,<sup>22</sup> an order for the impounding, modification, or destruction of devices involved in the violation,<sup>23</sup> damages,<sup>24</sup> and costs and attorney's fees.<sup>25</sup> The prevailing party may elect to recover actual damages or statutory damages in the amount of \$2,500 to \$25,000

---

audiovisual work.

(5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.

(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, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work. *Id.* § 1202(c).

20. Section 1202 provides, in relevant part:

§1202 (d) LAW ENFORCEMENT, INTELLIGENCE, AND OTHER GOVERNMENT ACTIVITIES.—This section 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. For purposes of this subsection, the term “information security” means activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network.

§ 1202 (e) LIMITATIONS ON LIABILITY.—

(1) ANALOG TRANSMISSIONS.—In the case of an analog transmission, a person who is making transmissions in its capacity as a broadcast station, or as a cable system, or someone who provides programming to such station or system, shall not be liable for a violation of subsection (b) if—

(A) avoiding the activity that constitutes such violation is not technically feasible or would create an undue financial hardship on such person; and (B) such person did not intend, by engaging in such activity, to induce, enable, facilitate, or conceal infringement of a right under this title.

(2) DIGITAL TRANSMISSIONS.—

(A) If a digital transmission standard for the placement of copyright management information for a category of works is set in a voluntary, consensus standard-setting process involving a representative cross-section of broadcast stations or cable systems and copyright owners of a category of works that are intended for public performance by such stations or systems, a person identified in paragraph (1) shall not be liable for a violation of subsection (b) with respect to the particular copyright management information addressed by such standard if—

per violation (or triple that amount in the event of a repeat violation within three years after entry of final judgment).<sup>26</sup>

Section 1204 imposes criminal sanctions in the event of a violation committed “willfully and for purposes of commercial advantage or private financial gain.”<sup>27</sup> For the first offense, penalties may include either or both of fines up to \$500,000 and imprisonment for not more than five years.<sup>28</sup> For the second offense, the

- 
- (i) the placement of such information by someone other than such person is not in accordance with such standard; and
  - (ii) the activity that constitutes such violation is not intended to induce, enable, facilitate, or conceal infringement of a right under this title.

(B) Until a digital transmission standard has been set pursuant to subparagraph (A) with respect to the placement of copyright management information for a category of works, a person identified in paragraph (1) shall not be liable for a violation of subsection (b) with respect to such copyright management information, if the activity that constitutes such violation is not intended to induce, enable, facilitate, or conceal infringement of a right under this title, and if —

- (i) the transmission of such information by such person would result in a perceptible visual or aural degradation of the digital signal; or
- (ii) the transmission of such information by such person would conflict with—

(I) an applicable government regulation relating to transmission of information in a digital signal; (II) an applicable industry-wide standard relating to the transmission of information in a digital signal that was adopted by a voluntary consensus standards body prior to the effective date of this chapter; or (III) an applicable industry-wide standard relating to the transmission of information in a digital signal that was adopted in a voluntary, consensus standards-setting process open to participation by a representative cross-section of broadcast stations or cable systems and copyright owners of a category of works that are intended for public performance by such stations or systems.

(3) DEFINITIONS.—As used in this subsection—

- (A) the term “broadcast station” has the meaning given that term in section 3 of the Communications Act of 1934 (47 U.S.C. 153); and
- (B) the term “cable system” has the meaning given that term in section 602 of the Communications Act of 1934 (47 U.S.C. 522). *Id.* § 1202(d)–(e).

21. Section 1203 provides, in relevant part:

§ 1203 Civil remedies

(a) CIVIL ACTIONS.—Any person injured by a violation of section 1202 or 1202 may bring a civil action in an appropriate United States district court for such violation.

(b) POWERS OF THE COURT.—In an action brought under subsection (a), the court—

maximum fine and prison term increase to \$1,000,000 and ten years, respectively.<sup>29</sup>

### III. COURT SPLIT OVER NON-DIGITAL APPLICABILITY OF SECTION 1202

Only eleven cases have considered the scope of application of section 1202. The sole Court of Appeals to address this question, the Third Circuit Court of Appeals, has joined with federal district courts in six other cases to give the statute a broader scope, while

- (1) may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation, but in no event shall impose a prior restraint on free speech or the press protected under the 1st amendment to the Constitution;
- (2) at any time while an action is pending, may order the impounding, on such terms as it deems reasonable, of any device or product that is in the custody or control of the alleged violator and that the court has reasonable cause to believe was involved in a violation;
- (3) may award damages under subsection (c);
- (4) in its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof;
- (5) in its discretion may award reasonable attorney's fees to the prevailing party; and
- (6) may, as part of a final judgment or decree finding a violation, order the remedial modification or the destruction of any device or product involved in the violation that is in the custody or control of the violator or has been impounded under paragraph (2).

(c) AWARD OF DAMAGES.—

- (1) IN GENERAL.—Except as otherwise provided in this title, a person committing a violation of section 1202 or 1202 is liable for either—
  - (A) the actual damages and any additional profits of the violator, as provided in paragraph (2), or
  - (B) statutory damages, as provided in paragraph (3).
- (2) ACTUAL DAMAGES.—The court shall award to the complaining party the actual damages suffered by the party as a result of the violation, and any profits of the violator that are attributable to the violation and are not taken into account in computing the actual damages, if the complaining party elects such damages at any time before final judgment is entered.
- (3) STATUTORY DAMAGES.—
  - (A) 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 1201 in the sum of not less than \$200 or more than \$2,500 per act of circumvention, device, product, component, offer, or performance of service, as the court considers just.
  - (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.
- (4) REPEATED VIOLATIONS.—In any case in which the injured party sustains the burden of proving, and the court finds, that a person has violated section 1202 or 1202 within three years after a final judgment was entered against the person for another such violation, the court may increase the award of damages up to triple the amount that would otherwise be awarded, as the

four district courts have defined it narrowly.<sup>30</sup> These four decisions have limited section 1202 to the digital sphere, and some of these even have required that the CMI form part of an “automated copyright management system.” As Part III.A *infra* will discuss, these courts found the statutory framework and history compelling—since section 1202 formed part of the Digital Millennium Copyright Act, which contains the term “digital” in its title and sought to update copyright law for the digital age, section 1202 should remain limited to digital works. Part III.B *infra* discusses the other

---

court considers just.

(5) INNOCENT VIOLATIONS.—

(A) IN GENERAL.—The court in its discretion may reduce or remit the total award of damages in any case in which the violator sustains the burden of proving, and the court finds, that the violator was not aware and had no reason to believe that its acts constituted a violation.

(B) NONPROFIT LIBRARY, ARCHIVES, EDUCATIONAL INSTITUTIONS, OR PUBLIC BROADCASTING ENTITIES.—

(i) DEFINITION.—In this subparagraph, the term “public broadcasting entity” has the meaning given such term under section 118(g).

(ii) IN GENERAL.—In the case of a nonprofit library, archives, educational institution, or public broadcasting entity, the court shall remit damages in any case in which the library, archives, educational institution, or public broadcasting entity sustains the burden of proving, and the court finds, that the library, archives, educational institution, or public broadcasting entity was not aware and had no reason to believe that its acts constituted a violation. *Id.* § 1203.

22. *Id.* § 1203(b)(1).

23. *Id.* § 1203(b)(2), (6).

24. *Id.* § 1203(b)(3).

25. *Id.* § 1203(b)(4)–(5).

26. *Id.* § 1203(c)(1)–(4).

27. Section 1204 provides, in relevant part:

§ 1204 Criminal offenses and penalties

(a) IN GENERAL.—Any person who violates section 1202 or 1202 willfully and for purposes of commercial advantage or private financial gain—

(1) shall be fined not more than \$500,000 or imprisoned for not more than 5 years, or both, for the first offense; and

(2) shall be fined not more than \$1,000,000 or imprisoned for not more than 10 years, or both, for any subsequent offense.

(b) LIMITATION FOR NONPROFIT LIBRARY, ARCHIVES, EDUCATIONAL INSTITUTION, OR PUBLIC BROADCASTING ENTITY.—Subsection (a) shall not apply to a nonprofit library, archives, educational institution, or public broadcasting entity (as defined under section 118(g)).

(c) STATUTE OF LIMITATIONS.—No criminal proceeding shall be brought under this section unless such proceeding is commenced within five years after the cause of action arose. *Id.* § 1204.

Guidance from the Computer Crime & Intellectual Property Section of the United States Department of Justice cautions that “[c]riminal enforcement of §

cases, where the courts that applied section 1202 to non-digital works have looked at the plain language of the statute and, seeing no digital limitation on the scope in the wording of section 1202, granted a broad applicability. This Article explores the court split and reviews the origins of the legislation for guidance on the proper interpretation of section 1202. The author ultimately concludes, as discussed *infra* in Part V, that the background of the legislation as well as the text of the statute support the broader reading of section 1202 expressed by those decisions discussed in Part III.B.

#### A. Decisions Limiting Section 1202 to Digital Works

##### *IQ Group*

The first decision to consider whether section 1202 applies to non-digital works, 2006's *IQ Group, Ltd. v. Wiesner Publishing, LLC* elaborated a narrow application of section 1202 and set the stage for the court split that ensued.<sup>31</sup> In *IQ Group*, the plaintiff created an email advertisement that contained plaintiff's logo and a hyperlink to a webpage containing the plaintiff's copyright notices.<sup>32</sup> Defendant Wiesner Publishing, LLC ("Wiesner") copied the advertisement without authorization and made some changes: it removed the plaintiff's logo and hyperlink, and added information that would direct traffic to other defendants' webpages.<sup>33</sup> The plaintiff argued that these acts constituted actionable DMCA claims because Wiesner removed CMI, distributed works knowing that the CMI had been removed, and distributed false CMI, in violation of section 1202(a) and section 1202(b).<sup>34</sup>

On cross motions for summary judgment, the court did not agree with the plaintiff's reading of the statute and dismissed the

---

1202 is rare, and prosecutors are encouraged to contact CCIPS . . . for guidance when considering a charge under this provision." Computer Crime & Intellectual Property Section, United States Department of Justice, Prosecuting Intellectual Property Crimes 209 (3d ed. 2006), available at <http://www.justice.gov/criminal/cybercrime/ipmanual/ipma2006.pdf>.

28. 17 U.S.C. § 1204(a)(1).

29. *Id.* § 1294(a)(2).

30. In *Murphy v. Millennium Radio Group LLC*, 650 F.3d 295, 305 (3d Cir. 2011), the Third Circuit reversed the District of New Jersey's decision according a narrow scope of interpretation to § 1202 in *Murphy v. Millennium Radio Group LLC*, Civ. No. 08-1743, 2010 WL 1372408, at \*1 (D.N.J. Mar. 31, 2010).

31. *IQ Group, Ltd. v. Wiesner Publ'g, LLC*, 409 F. Supp. 2d 587, 597 (D.N.J. 2006) (concluding that the DMCA only extended protection to information that functions as part of "an automated copyright protection or management system").

32. *Id.* at 589.

33. *Id.*

34. *Id.* at 591.

DMCA claims because the logo and hyperlink did not fit within the definition of CMI.<sup>35</sup> Namely, the court held that “[t]o come within § 1202, the information removed must function as a component of an automated copyright protection or management system” and the logo and hyperlink, though clearly digital in nature, did not function as part of such a system.<sup>36</sup>

In considering the meaning of the CMI, the court first looked to the plain language of the statute and noted that the broad definition, “read literally, applies wherever any author has affixed anything that might refer to his or her name.”<sup>37</sup> Notwithstanding this broad language, an examination of the legislative history and “extrinsic sources” convinced the court to subject the statute to “a narrowing interpretation.”<sup>38</sup> The court observed that Congress enacted the DMCA to bring US copyright law into accord with the WIPO Treaties, which conceived of CMI as components of automated copyright protection systems.<sup>39</sup> Further, in the court’s view, the Working Group “understood this section to protect the integrity of automated copyright management systems functioning within a computer network environment.”<sup>40</sup>

The history of the DMCA in Congress also provided support to the court’s views limiting the definition of CMI to the digital context.<sup>41</sup> “Congress intended the DMCA to modernize copyright protection as a response to the development of new technologies which both enabled new forms of copyright protection as well as new forms of copyright infringement.”<sup>42</sup> The court observed that Congress fit section 1202 within Chapter 12, which, as a whole, “appears to protect automated systems which protect and manage copyrights.”<sup>43</sup> The House Committee on the Judiciary (the “House

---

35. *Id.* at 598.

36. *Id.* at 597.

37. *Id.* at 593.

38. *Id.*

39. *Id.* at 593–94. Contrary to the suggestion of this language in *IQ Group*, neither of the WIPO Treaties uses the language “automated copyright protection system.” See WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997), 36 I.L.M. 65 [hereinafter WIPO CT]; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997), 36 I.L.M. 76 [hereinafter WIPO PPT].

40. *IQ Group*, 409 F. Supp. 2d at 595. The Working Group, like the WIPO Treaties, did not require “automated copyright management systems.” Information Infrastructure Task Force, Intellectual Property and the National Infrastructure: The Report of the Working Group on Intellectual Property Rights 174 (1995), available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf> [hereinafter White Paper].

41. *IQ Group*, 409 F. Supp. 2d at 595–97.

42. *Id.* at 597.

43. *Id.*

Committee”) commented that Congress intended the DMCA to apply to “electronic commerce” and the “electronic marketplace.”<sup>44</sup> Further, the House Committee included digital watermarks as an example of CMI, which is consistent with a definition “involving automated copyright management systems functioning within a computer network environment.”<sup>45</sup>

### *Textile Secrets*

A decision from 2007 followed the narrow interpretation expressed in the prior year’s decision in *IQ Group*. In *Textile Secrets Int’l, Inc. v. Ya-Ya Brand Inc.*, the plaintiff created a fabric design inspired by peacock feathers.<sup>46</sup> The material bearing the design contained a copyright notice consisting of the © symbol and the plaintiff’s name, and the plaintiff affixed a tag to the fabric that identified the plaintiff as the registered owner of the design.<sup>47</sup> The plaintiff asserted that the defendant removed the CMI and made copies of the fabric design, and that these acts constituted violations of section 1202(b) of the DMCA.<sup>48</sup>

The court granted the defendant’s motion for summary judgment dismissing the DMCA claim.<sup>49</sup> In giving section 1202 a narrow interpretation, the court declared that Congress did not intend the section “to apply to circumstances that have no relation to the Internet, electronic commerce, automated copyright protections or management systems, public registers, or other technological measures or processes as contemplated in the DMCA as a whole.”<sup>50</sup> Further, the court noted the technological nature of Chapter 12 of the Copyright Act as an indication that Chapter 12 should remain limited to technologically focused measures.<sup>51</sup> If granted a broader scope, “a literal interpretation of ‘copyright management information’ . . . would in effect give § 1202 limitless scope in that it would be applicable to all works bearing copyright information,” which could produce “impracticable results.”<sup>52</sup>

The court examined the origins of the language of section 1202 in the context of the Working Group’s intention to adapt existing

---

44. *Id.* at 596 (citing H.R. Rep. No. 105-551 (1998)).

45. *Id.*

46. *Textile Secrets Int’l, Inc. v. Ya-Ya Brand Inc.*, 524 F. Supp. 2d 1184, 1188 (C.D. Cal. 2007).

47. *Id.* at 1192–93.

48. *Id.* at 1193.

49. *Id.* at 1203.

50. *Id.* at 1201.

51. *Id.* at 1195.

52. *Id.* But see *infra* Part VII regarding why a literal reading of § 1202 does not lead to impracticable results.

copyright law to “the needs of the global information society”<sup>53</sup> and the WIPO Treaties, which sought to protect copyrighted works in digital form by instituting a “double protection for technical measures.”<sup>54</sup> The legislative history confirmed to the court that Congress conceived of section 1202 in the context of technological works.<sup>55</sup> The House Committee identified one of the purposes behind section 1202 as the need to address the potential for fraud and misinformation in the electronic marketplace.<sup>56</sup> Likewise, the Senate Committee on the Judiciary (the “Senate Committee”) placed the DMCA within the context of facilitating electronic development in a digital age.<sup>57</sup>

*Jacobsen and Silver*

The narrow reading established in *IQ Group* established the framework for later decisions.<sup>58</sup> In *Jacobsen v. Katzer*, the court adopted the *IQ Group* approach and concluded that the use of a “technological process” to protect the author’s name, a title, the license, a copyright notice, and the name of the copyright owner in connection with copyrighted software triggered application of section 1202.<sup>59</sup> Following the same approach, the *Silver v. Lavandeira* court declined to extend protections under section 1202 where the “[p]laintiff has not alleged . . . that an automated technological system is responsible for the inclusion of her name in her news reports. Plaintiff’s name inserted into her news reports, without

---

53. *Textile Secrets*, 524 F. Supp. 2d at 1196 (quoting White Paper, *supra* note 39, at 174).

54. *Id.* at 1197–98.

55. *Id.* at 1198.

56. *Id.* at 1198–99.

57. *Id.* at 1199.

58. In *Gregerson v. Vilana Fin., Inc.*, the court concluded that removal of a digital watermark from a digital photograph violated § 1202. Civ. No. 06-1164, 2008 WL 451060, at \*7 (D. Minn. Feb. 15, 2008). The court determined that the digital watermark fit within “the name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright” in § 1202(c)(3), based, in part on the *IQ Group* court’s observations that “Congress viewed a digital watermark as an example of copyright management information.” *Id.* (citing *IQ Group, Ltd. v. Wiesner Publ’g, LLC*, 409 F. Supp. 2d 587, 596 (D.N.J. 2006)). The court considered only the narrow question of whether § 1202 applied to the digital watermark at issue, and the reference to digital watermarks in the statutory history gave the court a clear answer. *Id.* As the court did not opine as to whether § 1202 would extend to contexts other than digital watermarks, this Article contains no further discussion of *Gregerson*.

59. *Jacobsen v. Katzer*, 609 F. Supp. 2d 925, 934 (N.D. Cal. 2009) (denying motion to dismiss); 93 U.S.P.Q.2d 1236, 2009 WL 4823021, at \*7 (N.D. Cal. 2009) (on cross-motions for summary judgment).

more, does not constitute ‘copyright management information’ for purposes of invoking section 1202 of the DMCA.”<sup>60</sup>

*B. Courts Applying Section 1202 Broadly*

*Millennium Radio*

The only Court of Appeals decision to consider the scope of section 1202—and also the most recent decision—reached a different conclusion on the question than *IQ Group* and progeny, and expressed willingness to protect CMI in non-digital works.<sup>61</sup> In *Murphy v. Millennium Radio Group LLC*, the defendant posted on the Internet a version of the plaintiff’s photograph, which cropped out the “gutter” credit—the margin line identifying the plaintiff as author of the photograph.<sup>62</sup> The plaintiff sued under section 1202 because defendants removed or altered the copyright management information.<sup>63</sup>

The Third Circuit reversed the District of New Jersey’s grant of summary judgment for the defendants.<sup>64</sup> In ruling in favor of the photographer, and of a broader reading of section 1202, the Third Circuit looked first to the text of the statute, and found its language directed an inclusive interpretation.<sup>65</sup>

There is nothing particularly difficult about the text of section 1202. Even the [d]efendants, and the courts whose decisions they cite, do not contend that section 1202 is, in itself, ambiguous or unclear. Read in isolation, section 1202 simply establishes a cause of action for the removal of (among other things) the name of the author of a work when it has been “conveyed in connection with copies of” the work. The statute imposes no explicit requirement that such information be part of an “automated copyright protection or management system,” as the [d]efendants claim. In fact, it appears to be extremely broad, with no restrictions on the context in which such information must be used in order to qualify as CMI.<sup>66</sup>

---

60. *Silver v. Lavandeira*, No. 08 Civ. 6522, 2009 WL 513031, at \*2 (S.D.N.Y. Feb. 26, 2009).

61. See *Murphy v. Millennium Radio Group LLC*, 650 F.3d 295, 305 (3d Cir. 2011) (concluding that the fact that the photographer’s name appeared in the printed “gutter” credit, rather than as data in an “automated copyright protection or management system,” did not prevent it from qualifying as CMI).

62. *Id.* at 299.

63. *Id.*

64. *Id.* at 298.

65. *Id.* at 302.

66. *Id.*

The court then looked to the legislative history.<sup>67</sup> With respect to the White Paper, the court noted that the Working Group did not confine the definition of CMI to “an automated copyright protection or management system,” but rather left that question of scope “entirely open.”<sup>68</sup> Similarly, the court observed that while the WIPO Treaties protect only *electronic* rights management information, the DMCA contains no “electronic” qualifier, and this omission does not elucidate the scope of protection for CMI under the DMCA.<sup>69</sup> Accordingly, the court ruled that section 1202 applied “regardless of the form in which that information is conveyed,” and that the photograph gutter credit fell within the scope of section 1202.<sup>70</sup>

#### *District Court Cases*

Multiple district courts have adopted the broader reading later set forth in *Millennium Radio* to include non-digital works within the scope of section 1202<sup>71</sup>—extending protections for CMI in works such as photographs,<sup>72</sup> news articles,<sup>73</sup> and architectural drawings.<sup>74</sup>

67. *Id.* at 303–05.

68. *Id.* at 304.

69. *Id.* at 304–05.

70. *Id.* at 305.

71. In *Faulkner Press, L.L.C. v. Class Notes, L.L.C.*, the court concluded that “the plain language of the DMCA does not limit the definition of copyright management information to notices that are placed on works through technological processes.” 97 U.S.P.Q.2d 1085, 1089 (N.D. Fla. 2010). However, the court dismissed the DMCA claims on summary judgment on other grounds, namely that the defendant did not copy the work in question, so it could not have removed or falsified any CMI from that work. *Id.* at 1090–91. As the court did not reach the question of the scope of protection for non-digital works and the statement about the significance of the plain language of the statute amounts to dictum, this Article contains no further discussion of *Faulkner Press*.

72. *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 304 (S.D.N.Y. 2011) (concluding that using false photo credits constituted a violation of § 1202); *Cable v. Agence France Presse*, 728 F. Supp. 2d 977, 980–81 (N.D. Ill. 2010) (concluding that removal of professional photographer's name and hotlink to his personal website on photographs violated DMCA section 1202); *McClatchey v. The Assoc. Press*, 82 U.S.P.Q.2d 1190, 1195, 2007 WL 776103, at \*5 (W.D. Pa. Mar. 9, 2007) (concluding that the title, plaintiff's name and the copyright notice on printouts of a photograph were protectable items of “copyright management information”).

73. *Assoc. Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 461–62 (S.D.N.Y. 2009) (holding that intentionally altering or removing copyright management information appearing in news reports ran afoul of DMCA section 1202).

74. *Interplan Architect, Inc. v. C.L. Thomas, Inc.*, No. 4:08-cv-03181, 2009 WL 6443117, at \*3 (S.D. Tex. Nov. 13, 2009) (concluding that CMI protections extend to architectural works); *Fox v. Hildebrand*, CV 09-2085, 2009 WL 19779966, at \*2–3 (C.D. Cal. July 1, 2009) (same).

This line of cases has developed and coexisted concurrently with the *IQ Group* line of cases discussed *supra* in Part III.A.

Unlike *IQ Group* and its progeny, these other cases looked to the plain language of the statute and read it as clearly applying to all types of CMI.<sup>75</sup> Three courts focused on the wording “including in digital form” in the section 1202 definition of CMI. In *McClatchey v. The Associated Press* (decided after the *IQ Group* decision, but shortly before the *Textile Secrets* decision), the first decision to adopt the more expansive interpretation, the court noted that section 1202 has a broad definition and applies to eight categories of information, “including in digital form.”<sup>76</sup> “To avoid rendering those terms superfluous, the statute must also protect non-digital information.”<sup>77</sup> Likewise, in its assessment of the statute, the court in *Fox v. Hildebrand* concluded that “[t]he use of ‘including in digital form’ removes any doubt that notices in digital form are covered, but in no way limits the definition to notices made in digital form.”<sup>78</sup> In *Interplan Architect, Inc. v. C.L. Thomas, Inc.*, the court deemed section 1202 applicable to non-digital works under a plain-language approach, emphasizing that the inclusion of the language “including in digital form” in the definition of CMI envisioned “applicability to non-digital works as well” and that the section does not state that its provisions “are limited to specific technological measures.”<sup>79</sup>

Three other decisions noted the broad construction of the statute’s plain language. The court in *The Associated Press v. All Headline News Corporation* found no ambiguity in the language in the DMCA and no reference to “technological measures of automated systems” in the statute.<sup>80</sup> The *Cable v. Agence France Presse* court allowed the DMCA claim to proceed because “the plaintiff’s name and hotlink fall within the scope of ‘copyright management information,’ in the absence of evidence to the contrary.”<sup>81</sup> In *Agence France Presse v. Morel*, the court characterized the narrow interpretation espoused in *IQ Group*, as “directly at odds with the broad definition set forth in the statutory text itself.”<sup>82</sup> A credit line identifying the plaintiff as the copyright owner and photographer “falls squarely within the statutory definition of CMI, which includes ‘the

---

75. *E.g.*, *McClatchey*, 82 U.S.P.Q.2d, at 1195, 2007 WL 776103, at \*5 (extending CMI protection to photographs).

76. *Id.*

77. *Id.*

78. *Fox*, 2009 WL 19779966, at \*3.

79. *Interplan*, 2009 WL 6443117, at \*3.

80. *All Headline News*, 608 F. Supp. 2d at 461–62.

81. *Cable*, 728 F. Supp. 2d at 981.

82. *Morel*, 769 F. Supp. 2d at 306.

name of, and other identifying information about, the author of a work' or 'the copyright owner of the work.'"<sup>83</sup>

Finding the plain language of the statute clear, these courts deemed it unnecessary to consider the legislative history and thus neither engaged in the analysis of the legislative history undertaken by the courts in the *IQ Group* line of cases nor accepted that analysis as informative of the statute's meaning.<sup>84</sup> Only one of the district court cases in this line looked at the legislative history, and that court in its review found support for the broader reading of section 1202. In *Fox v. Hildebrand*, a footnote cautioned that the legislative history did not mandate a contrary interpretation, as the Senate Committee confirmed that CMI "need not be in digital form, but CMI in digital form is expressly included."<sup>85</sup>

#### IV. STATUTORY SOURCES

As the cases discussed in the prior Parts observed, the language of the DMCA, including section 1202 thereof, had its origin in two sources: (1) recommendations of the Working Group tasked by President Clinton in 1993 and (2) the WIPO Treaties. This Part gives background on these sources.

##### A. *The Working Group's White Paper*

President Clinton charged the Information Infrastructure Task Force to articulate and implement comprehensive telecommunications and information policies and programs to address the "National Information Infrastructure" (the "NII")—defined to encompass "digital, interactive services now available, such as the Internet, as well as those contemplated for the future."<sup>86</sup> One subgroup within the Task Force, the Working Group on Intellectual

83. *Id.* (quoting 17 U.S.C. § 1202(c)(2)–(3)).

84. *Id.* (citing *All Headline News*, 608 F. Supp. 2d at 461–62); *Cable*, 728 F. Supp. 2d at 980–81 (declining to consider the legislative history because Seventh Circuit precedent compelled it to look to the "plain language of the statute") (citing *U.S. v. Ye*, 588 F.3d 411, 414–15 (7th Cir. 2009)); *Interplan*, 2009 WL 6443117, at \*4–5 (declining to adopt the "not unconvincing" review of the legislative history set forth in *IQ Group* because the statute had clear language, and the court therefore had an obligation to enforce that language); *All Headline News*, 608 F. Supp. 2d at 461–62 (Second Circuit precedent required the court to look first to the plain language of the statute and only consider legislative history if the statutory language read ambiguously) (citing *Arciniaga v. Gen. Motors Corp.*, 460 F.3d 231, 235 (2d Cir. 2006)); *Fox*, 2009 WL 19779966, at \*3 (observing that clear statutory text renders it unnecessary to consider legislative history, even if the history suggests a contrary intention).

85. *Fox*, 2009 WL 19779966, at \*3 n.3 (quoting S. Rep. No. 105-190, at 16–17 (1998)).

86. White Paper, *supra* note 39, at 2 n.5.

Property Rights, had responsibility for examining and making policy recommendations regarding intellectual property issues implicated by the NII.<sup>87</sup>

In September 1995, after receiving written comments and testimony from hundreds of individuals and groups, the Working Group issued the White Paper, which set forth proposed changes to copyright law that it believed to be necessary “to adapt the law to the needs of the global information society.”<sup>88</sup> The Working Group acknowledged that the White Paper did not address all of the possible intellectual property concerns that the NII might implicate because the Working Group could not predict how the development of technology in the future would impact intellectual property issues.<sup>89</sup> Nonetheless, the Working Group sought to address some anticipated intellectual property, particularly copyright, issues presented by technological development,<sup>90</sup> with specific emphasis on the use of computer networks and communications networks. “The merger of computer and communications technology into an integrated information technology has made possible the development of the National Information Infrastructure which will generate both unprecedented challenges and important opportunities for the copyright marketplace.”<sup>91</sup>

The potential of the NII to expand markets resonated with the Working Group, which noted with concern that authors might hesitate to enter online environments because of the possibility of piracy and unauthorized uses. Further, the Working Group hypothesized that “the full potential of the NII will not be realized if the education, information and entertainment products protected by intellectual property laws are not protected effectively when disseminated via the NII.”<sup>92</sup> While new technologies benefited authors by improving copy quality, making it easier to alter works, and speeding the dissemination of copies, these technological improvements also made it easier for others to make unauthorized uses of works.<sup>93</sup> Accordingly, “[t]he emergence of integrated information technology is dramatically changing, and will continue to change, how people and businesses deal in and with information and entertainment products and services, and how works are created, reproduced, distributed, adapted, displayed, performed, owned, licensed, managed, presented, organized, sold, accessed, used and stored.”<sup>94</sup>

---

87. *Id.* at 2.

88. *Id.*

89. *Id.* at 5.

90. *Id.* at 211–12.

91. *Id.* at 7.

92. *Id.* at 10.

93. *Id.* at 12.

94. *Id.*

The Working Group questioned whether, in this new environment, the current legal framework adequately promoted broad access to a wide array of works while ensuring the rights and commercial interests of those putting the works out in the digital sphere.<sup>95</sup> Ultimately, the Working Group concluded that these new technological developments demanded robust copyright protections because “unless the framework for legitimate commerce is preserved and adequate protection for copyrighted works is ensured, the vast communications network will not reach its full potential as a true, global marketplace.”<sup>96</sup>

The Working Group anticipated that digital works would come attached with information about the rights owner and the terms of use of each work.<sup>97</sup> Over time, rights owners would come to rely on such linked or displayed information as a means of protecting their works. “The accuracy of such information will be crucial to the ability of consumers to find and make authorized uses of copyrighted works on the NII.”<sup>98</sup> The Working Group focused its proposals on rights information for digital works, but did not exclude information in non-digital works from protection. “The proposal prohibits the falsification, alteration or removal of *any* copyright management information—not just that which is included in or digitally linked to the copyrighted work.”<sup>99</sup>

The Working Group opined that only “minor” clarifications and “limited” amendments to the Copyright Act would suffice to implement the needed protections.<sup>100</sup> That draft legislative language included in the White Paper became the NII CPA, which Congress considered in 1995.<sup>101</sup> Congress did not enact the NII CPA, princi-

---

95. *Id.* at 12–13.

96. *Id.* at 16.

97. *Id.* at 191.

98. *Id.* at 235.

99. *Id.* at 236 (emphasis added).

100. *Id.* at 17.

101. NII Copyright Protection Act of 1995, S.1284, H.R. 2441, 104th Cong. § 1202 (1995). The White Paper, *supra* note 39, provides in relevant part:

§ 1202. Integrity of Copyright Management Information

(a) FALSE COPYRIGHT MANAGEMENT INFORMATION.—No person shall knowingly provide copyright management information that is false, or knowingly publicly distribute or import for public distribution copyright management information that is false.

(b) REMOVAL OR ALTERATION OF COPYRIGHT MANAGEMENT INFORMATION.—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

pally as a result of the lawmakers' inability to reach agreement on the scope of liability of service providers for infringements by end users.<sup>102</sup> However, the text formed the basis for the DMCA, which Congress passed in 1998.<sup>103</sup>

### B. *The WIPO Treaties*

In addition to the White Paper, the two treaties adopted in Geneva, Switzerland on December 20, 1996—the WIPO CT and the WIPO PPT—formed the basis for the text of the DMCA (and

without authority of the copyright owner or the law.

(c) DEFINITION.—As used in this chapter, “copyright management information” means 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.

§ 1203. Civil Remedies

(a) CIVIL ACTIONS.—Any person injured by a violation of Sec. 1201 or 1202 may bring a civil action in an appropriate United States district court for such violation.

(b) POWERS OF THE COURT.—In an action brought under subsection (a), the court—

- (1) may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation
- (2) at any time while an action is pending, may order the impounding, on such terms as it deems reasonable, of any device or product that is in the custody or control of the alleged violator and that the court has reasonable cause to believe was involved in a violation;
- (3) may award damages under subsection (c);
- (4) in its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof;
- (5) in its discretion may award reasonable attorney's fees to the prevailing party; and
- (6) may, as part of a final judgment or decree finding a violation, order the remedial modification or the destruction of any device or product involved in the violation that is in the custody or control of the violator or has been impounded under subsection (2).

(c) AWARD OF DAMAGES. —

(1) IN GENERAL.—Except as otherwise provided in this chapter, a violator is liable for either (i) the actual damages and any additional profits of the violator, as provided by subsection (2) or (ii) statutory damages, as provided by subsection (3).

(2) ACTUAL DAMAGES.—The court shall award to the complaining party the actual damages suffered by him or her as a result of the violation, and any profits of the violator that are attributable to the violation and are not taken into account in computing the actual damages, if the complaining party elects such damages at any time before final judgment is entered.

(3) STATUTORY DAMAGES. —

(A) 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 1201 in the sum of not less than \$200 or more than \$2,500 per device, product, offer or performance of service, as the court considers

its section 1202). WIPO convened the treaty talks in response to the emergence of global Internet piracy and adopted the treaties to provide additional enforcement tools particularly tailored to digital and online piracy.<sup>104</sup>

Article 12 of the WIPO CT and Article 19 of the WIPO PPT, in nearly identical language, direct contracting parties to enact legislation prohibiting the knowing removal or alteration of “electronic rights management information,” and the distribution, importation for distribution, broadcasting or communication to the public of works with altered or removed electronic rights management information, without authority.<sup>105</sup> This language largely paral-

---

just.

(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.

(4) REPEATED VIOLATIONS.—In any case in which the injured party sustains the burden of proving, and the court finds, that a person has violated section 1201 or 1202 within three years after a final judgment was entered against that person for another such violation, the court may increase the award of damages up to triple the amount that would otherwise be awarded, as the court considers just.

(5) INNOCENT VIOLATIONS.—The court in its discretion may reduce or remit altogether the total award of damages in any case in which the violator sustains the burden of proving, and the court finds, that the violator was not aware and had no reason to believe that its acts constituted a violation.

#### § 1204. Criminal Offenses and Penalties

Any person who violates section 1202 with intent to defraud shall be fined not more than \$500,000 or imprisoned for not more than 5 years, or both. White Paper, *supra* note 39, app. at 6–11.

102. See *Legislative Hearing on the National Information Infrastructure Copyright Protection Act (H.R. 2441 and S. 1284) Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. q. 10 (1996), available at <http://www.copyright.gov/docs/niistat.html> [hereinafter Feb. 15, 1996 Testimony] (statement of Marybeth Peters, Register of Copyrights). Accord Calandrillo and Davison, *supra* note 4, at 354 (lack of involvement of stakeholders contributed to failure of NII CPA); Litman, *supra* note 2, at 123–28 (failure to involve consumer electronics manufacturers, online service providers, and libraries, among others, led to the evaporation of consensus around the NII CPA).

103. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2861 (1998).

104. Business Software Alliance, *Sixth Annual BSA-IDC Global Software 08 Piracy Study*, at 21 (May 2009), available at <http://images.autodesk.com/adsk/files/globalpiracy2008.pdf>.

105. The WIPO Copyright Treaty provides as follows:

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:

to remove or alter any electronic rights management information without authority;

lels the proposals in the White Paper.<sup>106</sup> The key wording in both treaties is “rights management information,” which both treaties define broadly—including information such as the work, its author, the rights owner, and terms and conditions of use—and without any limitation to electronic format.<sup>107</sup> The substantive provisions in both treaties apply only to electronic rights management information.

---

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority. WIPO CT, *supra* note 38, art. 12(1).

The WIPO Performances and Phonograms Treaty provides as follows:

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:

to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority. WIPO PPT, *supra* note 38, art. 19(1).

106. Though the WIPO delegates adopted the general language proposed by the U.S., they made a few changes, namely relating to (1) privacy and (2) limiting liability to situations involving facilitation of copyright infringement. Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 Va. J. Int'l L. 369, 404–05 (1997). (“Article 14 of the draft treaty was a more limited form of regulation of rights management information (RMI) than the U.S. proposal, principally because of its narrower definition of RMI. This narrower definition responded to criticism that had been leveled at the U.S. proposal which focused on potential uses of CMI to monitor usage of copyrighted works, raising potential privacy concerns which the White Paper had not addressed. . . . The RMI provision of the draft treaty proved to be one of the least controversial parts of the digital agenda at WIPO. . . . Article 14, as originally drafted, would have made it illegal to distribute these duly licensed copies because the licensee could neither distribute copies bearing false RMI nor alter the RMI to make it accurate. To overcome this problem, the final treaty provision, Article 12, reflected an amendment so that alterations of RMI and distributions of copies with false RMI would only be illegal insofar as they facilitated or concealed infringing activities.”).

107. The WIPO Copyright Treaty provides as follows:

As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any rights in the work, or information about 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 the work to the public. WIPO CT, *supra* note 38, art. 12(2).

The WIPO Performances and Phonograms Treaty provides as follows:

*C. Congressional Hearings*

Congress passed the DMCA, including section 1202, as the implementing legislation for the WIPO Treaties.<sup>108</sup> The Senate Committee recognized the place of these treaties:

Title I will implement the new World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty, thereby bringing U.S. copyright law squarely into the digital age and setting a marker for other nations who must also implement these treaties.<sup>109</sup>

Likewise, the House Committee stated that

Title I of this bill contains two substantive additions to U.S. domestic law, in addition to some technical changes, to bring the law into compliance with the [WIPO] treaties so that they may be ratified appropriately.<sup>110</sup>

Congress also acknowledged the role of the White Paper in the birth of the legislation. For example, the Senate Committee noted that

[t]he process to update U.S. copyright law with respect to digital transmissions began in February, 1993, with the formation of the Information Infrastructure Task Force (IITF) to implement the Administration's visions for the National Information Infrastructure (NII). The IITF then established the Working Group on Intellectual Property Rights to investigate the effects of emerging digital technology on intellectual property rights and make recommendations on any appropriate changes to U.S. intellectual property law and policy. This task force issued a report in 1995 known as the White Paper, which discussed the application of existing

---

As used in this Article, "rights management information" means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public." WIPO PPT, *supra* note 38, art. 19(2).

108. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2861 (1998).

109. S. Rep. No. 105-190, at 1 (1998).

110. H.R. Rep. No. 105-551, pt. 1, at 9 (1998).

copyright law to the NII and recommended changes to keep copyright law current with new technology.<sup>111</sup>

The Working Group's proposed section 1202 displays few differences from the final version of the DMCA. Congress made some clarifying changes to the scienter requirements in section 1202(a) and section 1202(b). More significantly for purposes of this Article, Congress made changes to the definition of CMI in section 1202(c). The Working Group had set forth various kinds of information that would fit within the definition of "copyright management information," but did not expressly exclude nor include "digital" works. Congress, then, specified that the definition would incorporate "information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, *including in digital form*," thereby explicitly bringing digital forms of information within the definition.<sup>112</sup> While the WIPO Treaties specifically referred to "*electronic* rights management information" in the substantive provisions,<sup>113</sup> section 1202 of the DMCA does not use the term "electronic" (or "digital" or another equivalent) to modify "copyright management information."<sup>114</sup>

From the proposed language in the White Paper to the DMCA, Congress also added new categories of information to section 1202(c)'s definition. Both the Working Group's and the DMCA's definitions encompass the name and other identifying information of the author; the name and other information of the copyright owner; terms and conditions for use of the work; and any other information prescribed in regulations issued by the Register of Copyrights.<sup>115</sup> Congress augmented that list from the White Paper with certain categories required by the WIPO Treaties: the name and other identifying information of the performer (except for audiovisual works); the name and other identifying information of the writer, performer, and director of an audiovisual work; and identifying numbers or symbols.<sup>116</sup> Beyond those treaty-mandated additions, Congress also added the following two items: the information set forth in a notice of copyright<sup>117</sup> and links to identifying

---

111. S. Rep. No. 105-190, at 2.

112. 17 U.S.C. § 1202(c) (2006) (emphasis added).

113. WIPO CT, *supra* note 38, art. 12(1); WIPO PPT, *supra* note 38, art. 19(1).

114. 17 U.S.C. § 1202(c).

115. White Paper, *supra* note 39, app. at 7; 17 U.S.C. § 1202(c). The Register of Copyrights has not exercised the authority granted by § 1202 to issue regulations expanding the types of information included within the definition of CMI. Nor has the Register issued any other guidance regarding CMI or § 1202.

116. WIPO CT, *supra* note 38, art. 12(1); WIPO PPT, *supra* note 38, art. 19(1); 17 U.S.C. § 1202(c).

numbers or symbols.<sup>118</sup> Additionally, Congress excepted from the definition “public performances of works by radio and television broadcast stations” and “any identifying information about the user of a work.”<sup>119</sup>

Congress made no significant changes to the Working Group’s proposals in either section 1203, regarding civil remedies, or section 1204, regarding criminal penalties.<sup>120</sup> The WIPO Treaties did not set forth any equivalent language for those sections.

## V. THE DIGITAL BIRTH OF BROAD CAUSES OF ACTION FOR CMI

As the history discussed in Part IV *supra* reveals, section 1202, as part of the DMCA, emerged from two sets of texts designed to address new ways of improperly exploiting copyrighted works birthed in the digital age: the Working Group’s White Paper and the WIPO Treaties. The White Paper and the WIPO Treaties sought to encourage copyright holders to use CMI to protect their works against unauthorized exploitation over digital networks (by, e.g., adding digital watermarks), and thereby make Internet commerce safer. Part V.A *infra* discusses this context and the digital origins of section 1202.

In the final version of the DMCA, Congress went beyond the digital context that prompted the White Paper and the WIPO Treaties to give section 1202 a broader application than just the digital realm. The text of section 1202 contains no digital limitation; a plain-language reading therefore mandates a broader reading of the section’s scope. Further, the statutory history does not support a reading that limits the scope to digital works, as both houses of Congress, as well as the Copyright Office, expressed their intention that section 1202 would apply broadly and not only to

---

117. This change has particular significance in light of the testimony before Congress of Register of Copyright Marybeth Peters for the need to harmonize the protections of that information already present in § 506 with the new § 1202, as discussed further in Part V.B.4 *infra*.

118. Compare 17 U.S.C. § 1202(c)(7) with White Paper, *supra* note 39, app. at 7; WIPO CT, *supra* note 38, art. 12(1); and WIPO PPT, *supra* note 38, art. 19(1); see also *National Information Infrastructure Copyright Protection Act (H.R. 2441, and S.1284) Before the Subcomm. On Courts and Intellectual Property of the H. Comm. on the Judiciary* 104th Cong. (1997), available at <http://www.copyright.gov/docs/niitest.html> [hereinafter Nov. 15, 1995 Testimony] (statement of Marybeth Peters, Register of Copyrights) (unpaginated); Feb. 15, 1996 Testimony, *supra* note 101, at q. 16.

119. 17 U.S.C. § 1202(c).

120. White Paper, *supra* note 39, app. at 8–11; 17 U.S.C. §§ 1203, 1204 (2006).

digital works.<sup>121</sup> Part V.B *infra* highlights those cues from the text of the statute, as well as in the legislative history, which support a broader reading of section 1202 not limited to works in digital form.

A. *Lawmaking at the Brink of the Digital Age*

*IQ Group, Ltd. v. Wiesner Publishing, LLC* and its progeny limited the scope of section 1202 to digital information. Namely, the *IQ Group* court held that “[t]o come within section 1202, the information removed must function as a component of an automated copyright protection or management system.”<sup>122</sup> The *IQ Group* court arrived at this conception of section 1202’s scope by looking at the purpose of the WIPO Treaties and the White Paper, which intended to protect “the technological measure of copyright protection themselves.”<sup>123</sup> Given these overarching purposes for the report and the treaties, the individual substantive provisions should serve these ends as well, and apply only in the digital context.<sup>124</sup> As discussed below, these “digital-only” cases accurately observed that the White Paper, the WIPO Treaties, and the DMCA emerged from concerns about intellectual property on the Internet and all sought to address deficiencies in then-existing copyright law by extending protections into the digital realm.

1. The Working Group

The Working Group explicitly noted its purpose as evaluating the current state of the law and making suggestions to adapt the

---

121. See Litman, *supra* note 2, at 36, on the difficulty in imputing any intent on legislators with respect to their drafting of the copyright legislation because the process relies on inter-industry negotiations rather than debate among lawmakers (“To solve that problem, Congress and the Copyright Office settled on a scheme for statutory drafting that featured meetings and negotiations among representatives of industries with interests in copyright.”). *Id.* at 53 (“The nature of this process introduces particular difficulties into the enterprise of statutory interpretation. This type of drafting process makes it exceedingly difficult to speak of legislative intent if by legislative intent one means the substantive intent of members of Congress. Even if one avoids that dilemma by ascribing to Congress an intent to enact the substance of the deals forged in conferences, one nonetheless may encounter difficulty in identifying any overall purpose pervading the text of the statute.”). The author acknowledges those limitations, and sets out in this Article to discern the legislative intent based on the language of the Congressional Committee Reports and the testimony of the Register of Copyrights Marybeth Peters.

122. *IQ Group, Ltd. v. Wiesner Publ’g, LLC*, 409 F. Supp. 2d 587, 597 (D.N.J. 2006).

123. *Id.* at 594–95.

124. *Id.* at 597.

law to the digital age. “Our task is to determine whether the coat still fits in this new information age. An effective intellectual property regime must (1) ensure that users have access to the broadest feasible variety of works by (2) recognizing the legitimate rights and commercial expectations of persons and entities whose works are used in the NII environment.”<sup>125</sup> The Working Group determined that the “coat” no longer fit these new technologies that permit copyright owners to easily create and distribute perfect copies of works, but also permit infringers to distribute said perfect copies without authorization.<sup>126</sup>

The establishment of high-speed, high-capacity electronic information systems makes it possible for one individual, with a few key strokes, to deliver perfect copies of digitized works to scores of other individuals—or to upload a copy to a bulletin board or other service where thousands of individuals can download it or print unlimited ‘hard’ copies. The emergence of integrated information technology is dramatically changing, and will continue to change, how people and businesses deal in and with information and entertainment products and services, and how works are created, reproduced, distributed, adapted, displayed, performed, owned, licensed, managed, presented, organized, sold, accessed, used and stored. *This leads, understandably, to a call for adaptation of—or change in—the law.*<sup>127</sup>

To address these technological changes, the Working Group proposed amendments to the Copyright Act aimed at encouraging copyright owners to include CMI in digital works so that users would be able to trust the authenticity of works accessed digitally.<sup>128</sup>

In the future, the copyright management information associated with a work—such as the name of the copyright owner and the terms and conditions for uses of the work—may be critical to the efficient operation and success of the NII. Copyright management information will serve as a kind of license plate for a work on the information superhighway, from which a user may obtain important information about the work. The accuracy of such information will be crucial to the ability of consumers to find and make authorized uses of copyrighted works on the NII.<sup>129</sup>

---

125. White Paper, *supra* note 39, at 13.

126. *Id.* at 12.

127. *Id.* (emphasis added).

128. *Id.* at 235–36.

129. *Id.* at 235.

In an interview with the author of this Article, Bruce Lehman, Commissioner of the United States Patent and Trademark Office under President Clinton and leader of the Working Group, confirmed that the Working Group viewed its role and its proposals as applying expressly to digital works, based on the direction given by President Clinton.<sup>130</sup> Commissioner Lehman stated that the Working Group intended its proposed section 1202 to cover only works that were being translated into a digital context.<sup>131</sup> This provision would apply to digital works that may also appear in an analog form, but would not apply to the analog versions of works or works existing only in analog form.<sup>132</sup> For example, a broad definition of CMI could incorporate watermarking of an analog work, but such protections of works in non-digital form exceeded the scope of the Working Group's mission.<sup>133</sup> Commissioner Lehman agreed that removing or altering CMI in a non-digital context harmed the copyright owner, but he believed that the then-existing language of the Copyright Act already made such removals or alterations actionable, rendering unnecessary any changes except with respect to digital works.<sup>134</sup>

The testimony before Congress by then-Register of Copyright Marybeth Peters on the NII CPA aligns with Commissioner Lehman's perspective on the scope of the changes proposed in the Working Group's section 1202. Namely, she viewed the NII CPA as seeking to address potential gaps in the law resulting from the emergence of the digital age, which Congress could remedy through the limited changes proposed by the Working Group.<sup>135</sup>

[T]he general concepts of the copyright law as it has evolved over the past two centuries can be applied to the activities taking place today in the NII, and . . . only limited amendment is necessary to adapt the law to current digital technologies. We therefore support the principles behind the proposed amendments as well as most of their language.<sup>136</sup>

As the prior quote evinces, Register Peters understood the proposed legislation to have arisen in response to developing technologies and to apply to digital works. Other portions of her testimony confirm this understanding. "We believe that the bills' limited pro-

---

130. Telephone interview with Bruce Lehman, President, International Intellectual Property Institute (May 14, 2010) [hereinafter Lehman Interview].

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Nov. 15, 1995 Testimony, *supra* note 117.

136. *Id.*

posals adequately address the current state of technology, and that the Working Group did an excellent job in assessing the areas of immediate need.”<sup>137</sup>

## 2. WIPO

Commissioner Lehman viewed the purposes of the WIPO Treaties as convergent with those of the Working Group, namely to protect CMI in the digital realm.<sup>138</sup> The definitions of the phrase “rights management information” in the WIPO Treaties do not limit rights management information to electronic formats; however, the substantive provisions protect only “*electronic* rights management information.”<sup>139</sup> Both the WIPO CT and the WIPO PPT require ratifying nations to enact legislation that would create a cause of action against someone who acted “to remove or alter any *electronic* rights management information without authority” or undertook other actions “knowing that *electronic* rights management information has been removed or altered without authority.”<sup>140</sup> Neither treaty sets forth any substantive provisions that would apply to non-electronic rights management information. Commissioner Lehman did not consider that the variations in wording relating to CMI in the White Paper versus the WIPO Treaties—the White Paper created protections for “copyright management information,” while the WIPO Treaties addressed “electronic rights management information”<sup>141</sup>—amounted to any significant distinction in the scope of protections afforded.<sup>142</sup> Both groups intended to cover the broadest scope of rights possible.<sup>143</sup> Commissioner Lehman attributed the difference to either a translation issue or perhaps to an attempt to capture rights available in some countries but not in others—for example, distribution rights available in some countries but not others.<sup>144</sup>

As she did with the Working Group’s White Paper, Register of Copyright Peters viewed the WIPO Treaties as bringing copyright

---

137. *Id.*

138. Lehman Interview, *supra* note 129.

139. WIPO CT, *supra* note 38, art. 12 (emphasis added); WIPO PPT, *supra* note 38, art. 19 (emphasis added).

140. WIPO CT, *supra* note 38, art. 12 (emphasis added); WIPO PPT, *supra* note 38, art. 19 (emphasis added).

141. White Paper, *supra* note 39, at 235; WIPO CT, *supra* note 38, art.12; WIPO PPT, *supra* note 38, art. 19.

142. Lehman Interview, *supra* note 129.

143. *Id.*

144. *Id.*

laws into the digital age.<sup>145</sup> She noted the international nature of works in the digital realm.

The National Information Infrastructure cannot be contained within U.S. borders; inevitably, it will be part of an extensive global network. Similar issues arising from developing digital technologies are on the agenda in many other countries, as well as in the forum of multilateral treaty negotiations.<sup>146</sup>

In her comments on the WIPO Treaties and the DMCA, Register Peters testified that the Internet offered the potential for both expanded economic activities and communications, but also for fraud.<sup>147</sup> She cautioned that for the marketplace to function effectively consumers would need to trust the reliability of information identifying works, owners, and license terms.<sup>148</sup> “It is therefore critical to protect the integrity of the electronic marketplace.”<sup>149</sup>

### 3. Congress

As the White Paper and the WIPO Treaties displayed an eye to the nascent digital age, both the Senate and House viewed the DMCA as prompted by the rapid changes in technology at that late state of the twentieth century. Language in the DMCA’s legislative history from the Senate echoes the White Paper in seeking to protect the online marketplace. The Senate Committee observed that

[d]ue to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy. Legislation implementing the treaties provides this protection and creates the legal platform for launching the global digital on-line marketplace for copyrighted works. It will facilitate making available quickly and conveniently via the Internet the movies, music, software, and literary works that are the fruit

---

145. *Legislative Hearing on the “WIPO Copyright Treaties Implementation Act” H.R. 2281 and the “Online Copyright Liability Limitation Act” H.R. 2180 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. On the Judiciary*, 105th Cong. (1997), available at [http://www.copyright.gov/docs/2180\\_stat.html](http://www.copyright.gov/docs/2180_stat.html) [hereinafter Sept. 16, 1997 Testimony] (statement of Marybeth Peters, Register of Copyrights) (unpaginated).

146. Nov. 15, 1995 Testimony, *supra* note 117.

147. Sept. 16, 1997 Testimony, *supra* note 144.

148. *Id.*

149. *Id.*

of American creative genius. It will also encourage the continued growth of the existing off-line global marketplace for copyrighted works in digital format by setting strong international copyright standards.<sup>150</sup>

The House Committee followed the Senate Committee in emphasizing the importance of intellectual property rights in the electronic marketplace. “The debate on this legislation highlighted two important priorities: promoting the continued growth and development of electronic commerce; and protecting intellectual property rights.”<sup>151</sup> Further, the House Committee well observed that the DMCA

is one of the most important pieces of legislation affecting electronic commerce that the 105th Congress will consider. . . . The Committee has a long-standing interest in addressing all issues relating to interstate and foreign commerce, including commerce transacted over all electronic mediums, such as the Internet, and regulation of interstate and foreign communications. This legislation implicates each of those interests in numerous ways.<sup>152</sup>

The Senate Committee positioned the CMI provisions specifically, not just the DMCA generally, in the context of the digital age, noting the importance of the integrity of such information to establish a trustworthy online marketplace.<sup>153</sup>

Copyright Management Information (CMI) is an important element in establishing an efficient Internet marketplace in copyrighted works free from governmental regulation. Such information will assist in tracking and monitoring uses of copyrighted works, as well as licensing of rights and indicating attribution, creation and ownership.<sup>154</sup>

The House Committee acknowledged that the DMCA implemented the WIPO Treaties, which maintained as their express purpose the updating of copyright laws for digital works.

With this evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted works.

In Geneva, Switzerland, in December, 1996, a Diplomatic Conference was convened under the auspices of the World

---

150. S. Rep. No. 105-190, at 7 (1998).

151. H.R. Rep. No. 105-551, pt. 2, at 23 (1998).

152. *Id.* at 22.

153. S. Rep. No. 105-190, at 14.

154. *Id.*

Intellectual Property Organization ('WIPO'), to negotiate new multilateral treaties to protect copyrighted material in the digital environment and to provide stronger international protection to performers and producers of phonograms.<sup>155</sup>

The House Committee understood the importance of the additions required by the WIPO Treaties to protect the integrity of the Internet marketplace. "A new [section] to the Copyright Act is required by both WIPO Treaties to ensure the integrity of the electronic marketplace by preventing fraud and misinformation."<sup>156</sup>

The Senate Committee similarly cited the digital context of the WIPO Treaties. "In general, the Copyright Treaty updates the Berne Convention for digital works and the growth of the Internet and other digital communications networks, and the Performances and Phonograms Treaty supplements the Berne Convention with comprehensive copyright protection for performances and sound recordings . . . ."<sup>157</sup>

#### *B. Non-Digital Scope of Section 1202*

Even though the drafters of the DMCA envisioned the legislation as serving to update copyright law for the digital age,<sup>158</sup> both the language of the statute and the legislative history indicate that the drafters did not intend to limit the scope of section 1202 to digital works. Namely, the definition of "copyright management information" contemplates application to non-digital works as do the substantive provisions of the causes of action. Further, the DMCA exempts liability under section 1202 in connection with certain non-digital works, which compels a reading of the statute that imposes liability for violations with respect to other non-digital works. Beyond the plain language of the statute (namely, the definition, the causes of action, and the limitations on liability), the legislative history indicates that both the House Committee and Senate Committee intended a broad scope of application, not limited to digital works. The testimony of Register Peters of the Copyright Office before Congress highlights the intended breadth of application. This Part explores the indications in the plain language of the statute as well as in the legislative history which support a reading of section 1202 applying to works not in digital form.

---

155. H.R. Rep. No. 105-551, pt. 1, at 9; *accord id.*, pt. 2, at 21 (likewise recounting the context and purpose of the WIPO Treaties' negotiations).

156. H.R. Rep. No. 105-551, pt. 1, at 10.

157. S. Rep. No. 105-190, at 8.

158. *See* discussion *supra* Part V.A.

## 1. Definition of CMI

To assess the intended scope of section 1202, the definition provides a necessary starting point. Section 1202(c) defines “copyright management information” as “any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, *including in digital form . . .*”<sup>159</sup> The statute takes care to highlight that the definition covers information for works “in digital form,” which comports with Congress’s expressed purpose for the DMCA: updating the copyright laws to clarify that protections would extend to digital works.<sup>160</sup> Congress drafted the definition of CMI to emphasize that section 1202 sought to bring copyright law into the digital age.

However, one should not misread the phrase “including in digital form” as expressing an intention by Congress to limit the scope to information in digital forms, rather than merely emphasize that the statute extended protection to such information. Attempting to exclude certain unnamed forms from protection by noting that the protections extended to other forms fails as an effective drafting technique since the purported exclusion remains unspecified. If Congress had meant section 1202 to apply only to works in digital form, it would have expressly stated that limitation—using wording like “information conveyed in connection with a work, but only if it is in digital form.” Congress did just that with section 1201 by limiting those protections to “*technological* measures.”<sup>161</sup> Congress did not employ the term “technological” for section 1202, and the “technological” wording in section 1201 does not extend to section 1202. The Third Circuit dismissed such an argument, observing that “[i]f, in fact, section 1201 and section 1202 were meant to have such interrelated interpretations, it is peculiar that there is no explicit indication of this in the text of either provision.”<sup>162</sup> Rather, the wording “including in digital form” emphasizes the digital application, but not does not limit the definition to the digital sphere alone.

Several of the courts that have given section 1202 a broader scope, i.e., not limited to digital works, have adopted this interpretation of the language “including in digital form” as a basis for their decisions. In *Fox v. Hildebrand*, the Central District of California emphasized that “[t]he use of ‘including in digital form’ removes any doubt that notices in digital form are covered, but in

---

159. 17 U.S.C. § 1202(c) (2006) (emphasis added).

160. H.R. Rep. No. 105-551, pt. 2, at 22.

161. *Cf.* 17 U.S.C. § 1201(a)(1)(A) (2006) (“No person shall circumvent a technological measure . . .”).

162. *Murphy v. Millennium Radio Group LLC*, 650 F.3d 295, 303 (3d Cir. 2011).

no way limits the definition to notices made in digital form.”<sup>163</sup> In *Interplan Architect, Inc. v. C.L. Thomas, Inc.*, the Southern District of Texas stated that this language envisioned “applicability to non-digital works as well” and the definition does not state that its provisions “are limited to specific technological measures.”<sup>164</sup> In *McClatchey v. The Associated Press*, the Western District of Pennsylvania likewise noted that the presence of this language indicates that “the statute must also protect non-digital information.”<sup>165</sup>

While the foregoing courts concluded that the language “including in digital form” indicates that section 1202 extends to non-digital works as well, not all courts have agreed. In *Textile Secrets*, the Central District of California judge reached a different conclusion from the later Central District of California decision in *Fox*.<sup>166</sup> The *Textile Secrets* court emphasized that the DMCA intended to bring copyright law into the digital age, and not to replace all of copyright law.

Interpreting the phrase ‘including in digital form’ to mean that copyright management information exists wherever copyright information is located (i.e., on all non-digital works, such as fabric, as welt [sic] as digital works), would in effect result in the DMCA replacing existing copyright law, as the Act would theoretically apply to *all* instances of copyright infringement where copyright information was falsified, altered or removed as set forth in subdivisions (a) and (b) of § 1202. Considering the historical context of the DMCA, the Court finds that the Act’s scope was intended to be more limited, in that its purpose was to give an added layer of protection to certain works that were vulnerable to infringement due to advances in modern technology, namely the Internet and electronic commerce.<sup>167</sup>

As this quote states, the court discarded a reading of the wording “including in digital form” that would give the statute a broader application because it found that reading inconsistent with the “historical context” of the DMCA. This interpretation must fail, though, because the court offers no alternative explanation for the presence of the wording, instead suggesting that ignoring it would better effect the purpose of the statute. The *Fox*, *Interplan*, and

---

163. *Fox v. Hildebrand*, No. CV 09–2085, 2009 WL 19779966, at \*3 (C.D. Cal. July 1, 2009).

164. No. 4:08-cv-03181, 2009 WL 6443117, at \*3 (S.D. Tex. Nov. 13, 2009).

165. 82 U.S.P.Q.2d 1190, 1195 (W.D. Pa. Mar. 9, 2007).

166. *Textile Secrets Int’l, Inc. v. Ya-Ya Brand Inc.*, 524 F. Supp. 2d 1184, 1203 (C.D. Cal. 2007).

167. *Id.* at 1202 n.17.

*McClatchey* approaches give meaning to this wording as emphasizing the digital application, but not confining the definition to digital forms, and therefore present a tighter and more comprehensive reading.

This broader reading also reconciles the statutory language with the legislative history, which reveals that the drafters of section 1202 intended the “including in digital form” language to have an inclusive effect.<sup>168</sup> That wording did not appear in the earliest legislative proposal (the NII CPA), nor in the White Paper or the WIPO Treaties.<sup>169</sup> Congress added the language “including in digital form” to these earlier texts to emphasize the application of section 1202 to works in digital form, but not to the exclusion of CMI in non-digital form. The Senate Committee noted its intention to include non-digital CMI.

Under the bill, CMI includes such items as the title of the work, the author, the copyright owner, and in some instances, the writer, performer, and director. *CMI need not be in digital form*, but CMI in digital form is expressly included.<sup>170</sup>

Even in the prototype for the DMCA, the Working Group expressed an intention, similar to the Senate’s, that the new legislation would apply broadly to CMI in non-digital forms as well, even while framing the technological advances of the digital age as the impetus for the White Paper.<sup>171</sup> “The proposal prohibits the falsification, alteration or removal of *any copyright management information—not just that which is included in or digitally linked to the copyrighted work.*”<sup>172</sup> Commissioner Lehman, who led the Working Group, believed that the new section 1202 would clarify that the Copyright Act extended protections of CMI to digital works, in addition to CMI in non-digital works already protected by the Copyright Act.<sup>173</sup>

Other portions of the legislative history confirm that Congress intended that section 1202 would apply broadly. In identical language, both the House Committee and the Senate Committee

168. *Millennium Radio*, 650 F.3d at 303 (“As for the purpose of the statute as a whole, it is undisputed that the DMCA was intended to expand—in some cases significantly—the rights of copyright owners.”).

169. WIPO CT, *supra* note 38, art. 12; WIPO PPT, *supra* note 38, art.19; NII Copyright Protection Act of 1995, S. 1284, H.R. 2441, 104th Cong. § 1202 (1995); White Paper, *supra* note 39, at app. at 4–7.

170. S. Rep. No. 105–190, at 15 (1998) (emphasis added).

171. White Paper, *supra* note 39, at 2 (“The approach of this Report is to discuss the application of the existing copyright law and to recommend only those changes that are essential to adapt the law to the needs of the global information society.”). *See id.* at 236.

172. *Id.* at 236 (emphasis added).

173. Lehman Interview, *supra* note 129.

expressed their intention that the language would apply in “the broadest sense” and that information merely “be accessible in conjunction with” or “appear with” the work to be protected.

To fall within the definition, there is a threshold requirement that the information be conveyed in connection with copies or phonorecords, performances or displays of the copyrighted work. The term ‘conveyed’ is used in its broadest sense and is not meant to require any type of transfer, physical or otherwise, of the information. It merely requires that the information be accessible in conjunction with, or appear with, the work being accessed.<sup>174</sup>

The view that CMI need only “appear with” the work in order to qualify for protection under section 1202 conflicts with a reading that would confine the section’s application to restricted types of works or only to information in limited forms.

Further, if Congress had intended to limit application of section 1202 to digital works, it could have taken the fundamental step to define the term “digital.” The DMCA defines “broadcast station,” “cable system,” and “copyright management information,” among other terms, but lacks a definition for the core term needed to support a reading of the statute as applying only to works in *digital* form.<sup>175</sup> As the meaning of “digital” remains unclear without a legislative definition, this omission suggests that Congress did not intend to limit the scope of section 1202 to works in digital form.

## 2. Substantive Provisions

Section 1202 crafts not only the definition, but also the causes of action in language indicating broad applicability against the prohibited acts. Namely, the verbs in section 1202 only make sense if they can apply to non-digital works. Section 1202(a) creates causes of action against an individual who “(1) *provide[s]* copyright management information that is false,” or who “(2) *distribute[s]* or *import[s]* for *distribution* copyright management information that is false.”<sup>176</sup> Subsection 1202(b)(1) creates a cause of action against an individual who “intentionally *remove[s]* or *alter[s]* any copyright management information[.]”<sup>177</sup> Subsections 1202(b)(2) and (b)(3) create causes of action against individuals who “*distribute* or *import*

---

174. S. Rep. No. 105–190, at 31; H.R. Rep. No. 105–55, pt. 1, at 21 (1998).

175. See 17 U.S.C. § 1202(c), (e)(3)(A)–(B) (2006).

176. *Id.* § 1202(a) (emphasis added).

177. *Id.* § 1202(b)(1) (emphasis added).

for distribution” works with removed or altered copyright management information.<sup>178</sup>

The verb “provide” in section 1202(a)(1) could well apply only to digital works. Likewise, the verbs “remove” and “alter” in subsection (b)(1) could apply to a definition of CMI defined solely for works in digital form. However, the inclusion of both verbs “distribute” and “import for distribution” in section 1202(a)(2) and section 1202(b)(3) does not make sense if section 1202 applies only to works in digital form. Namely, the verb “distribute” covers a broader set of acts than “import for distribution” with respect to works in digital form and subsumes those acts. In this closed set, the broader term “distribute” renders redundant the narrower term “import for distribution.” For example, posting a work on the Internet or sending it via email would qualify as a “distribution.” When a work originates outside the United States, such “distribution” also constitutes an “importation for distribution.” One cannot import a digital work for distribution without also distributing it. For non-digital works, however, these acts would have different meanings: sending physical goods into the country for sale comprises “importation for distribution,” while actual sales would comprise the act of “distribution.” The Copyright Act does not include definitions of either verb “distribute” or “import for distribution” to help clarify the intended distinction between them.

Moreover, Congress chose not to include the term “electronic” (or a synonym) in the substantive provisions—a difference from the WIPO Treaties. The definition of CMI found in the WIPO Treaties broadly defines the wording “rights management information” to include information for works in non-digital forms,<sup>179</sup> but the substantive provisions of the WIPO Treaties impose liability only for the removal or alteration of “*electronic* rights management information.”<sup>180</sup> Section 1202 of the DMCA does not contain a similar limitation to *electronic* “copyright management information” even though the DMCA language otherwise generally tracks the corresponding language in the WIPO Treaties.<sup>181</sup> While neither the House nor the Senate commented on this change, the omission of this wording is consistent with a broad reading of section 1202. Such a broad reading would not conflict with U.S. obligations

178. *Id.* § 1202(b)(2)–(3) (emphasis added).

179. WIPO CT, *supra* note 38, art. 12(2); WIPO PPT, *supra* note 38, art. 19(2).

180. WIPO CT, *supra* note 38, art. 12(1) (emphasis added); WIPO PPT, *supra* note 38, art. 19(1) (emphasis added).

181. See Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L.R. 41, 71 (2007) (“[T]he CMI provisions enacted in the United States do not use any ‘digital’ or ‘electronic’ modifier, but simply protect ‘copyright management information.’”) (internal citation omitted).

under the WIPO Treaties, as section 1202 fully implements the substantive provisions required in the WIPO Treaties by protecting electronic information. The WIPO Treaties do not prohibit (or even discuss) protections of information in non-digital forms, and therefore the U.S. and other signatories are free to protect such information.

### 3. Limitations of Liability

The limitations on liability in section 1202 of the DMCA also point to a broad scope of applicability. Section 1202(e) exempts from liability acts relating to certain non-digital works, while providing that liability remains for other acts relating to non-digital works, particularly in the realm of television programming.<sup>182</sup> These provisions exempt broadcast television stations, cable systems, and programming providers for broadcast stations and cable systems from liability for violations of subsection 1202(b)(2) involving both analog and digital transmissions if the party in question did not intend “to induce, enable, facilitate, or conceal infringement” of a right under the act and if avoiding the violation would not be “technically feasible” or would create “an undue financial hardship.”<sup>183</sup>

Yet, section 1202(e) maintains liability for both *analog* and digital transmissions that do not meet the exemption.<sup>184</sup> Accordingly, section 1202(e) acknowledges that violations committed with certain types of non-digital works, namely analog transmissions with intentionally removed CMI, remain actionable.<sup>185</sup> The distinction in liability that section 1202(e) draws between different actions relating to analog transmissions has significance only if section 1202 applies to non-digital works. Otherwise section 1202(e) would not need to spell out the circumstances when liability ensues for actions relating to analog, i.e., non-digital works, since section 1202 would never create liability for such works. Accordingly, Congress must have intended that, at least in some instances, improper treatment of CMI in non-digital works could trigger a cause of action.

### 4. Copyright Office Interpretation

The Copyright Office submitted testimony on the bills that emerged from the White Paper process, i.e., the NII CPA, and subsequently for the legislation that followed after the WIPO Treaties,

---

182. *Id.* § 1202(e).

183. *Id.*

184. *Id.*

185. *Id.*

and which became the DMCA. This Part will discuss the testimony of Register of Copyrights Peters, who expressed the view of the Copyright Office that the protections of CMI in the bills should and would, as written, extend to all types of works, whether in digital form or not. The Register's testimony expressed arguably the most concise rationale for extending these rights—to give authors an incentive to include such identifying information in their works so as to promote a safe electronic marketplace.

The Copyright Office believes that the easy availability of information about the authorship, ownership and licensing terms of works will also be critical to the success of the NII. Such information will make it possible for the public to gain access to and enjoy works while respecting the rights of authors and other owners. If obtaining such information is difficult, people are more likely to forego the NII's benefits or resort to unauthorized uses. . . .

We agree with the Working Group that legal protection for such information is necessary in order to ensure its accuracy. It is in everyone's interest, both owners and users of copyrighted material, to be able to rely on the information provided to facilitate identification and licensing. The proposed new section 1202 represents a reasonable approach to this goal: it does not mandate the provision of any particular item of information, but guarantees the integrity of whatever items are in fact provided.<sup>186</sup>

In the prior quote, Register Peters noted the importance of CMI within the NII, and emphasized the digital context of the protections in the NII CPA.

Register Peters viewed the DMCA as an improvement over the WIPO Treaties, which did not extend protections to non-digital works. She applauded section 1202 for going beyond “the bare minimum obligation [of the WIPO Treaties] in several respects, mainly in covering the provision of false information and *information not in electronic form*. In our view, these extensions are useful and appropriate.”<sup>187</sup> Section 1202 would update the Copyright Act to accomplish the aims of the WIPO Treaties by expressly clarifying that existing protections for non-digital works also applied “to distribution by any means, including digital transmission.”<sup>188</sup> While the emergence of the digital age necessitated changes to the law, those changes would not benefit digital works solely, but rather all

---

186. Nov. 15, 1995 Testimony, *supra* note 117.

187. Sept. 16, 1997 Testimony, *supra* note 144 (emphasis added).

188. Feb. 15, 1996 Testimony, *supra* note 101, at q. 10.

types of works, since any work could be exploited over the NII.<sup>189</sup> Register Peters further noted that all copyright owners, no matter the type of work, have an interest in legal tools that allow them to protect their works.<sup>190</sup>

Anyone who creates a work of any type or dimension, or pays for its creation, or purchases a copyright, can be a copyright owner, and therefore has a stake in ensuring that his or her rights can be adequately protected and enforced on the NII. . . . Every copyright owner will benefit from the increased certainty from a clarification of rights in the digital environment, as well as from the provision of legal protection for [the] technological device [he] or she may use to guard against unauthorized copying and for the integrity of the information he or she chooses to provide about terms and conditions of access to the work.<sup>191</sup>

In her comments regarding the NII CPA, Register Peters testified that the Copyright Act as of 1995 and 1996 already protected some forms of CMI (necessarily non-digital information, since Register Peters testified that the pre-NII CPA legislation did not protect digital information).<sup>192</sup> She identified section 506 as the existing section that protected some CMI for non-digital works since it created criminal sanctions for the removal, falsification, or alteration of the copyright notice or of the statements included in an application for registration.<sup>193</sup> She testified that the NII CPA would retain those

---

189. *Id.* at q. 9.

190. *Id.*

191. *Id.*

192. Feb. 15, 1996 Testimony, *supra* note 101, at q. 16 (integrating protections of “statements made in applications for copyright registration and . . . information provided in notices of copyright” from § 506 into the new § 1202 “has the advantages of including in one location in the statute all provisions dealing with the accuracy of copyright-related information.”); Nov. 15, 1995 Testimony, *supra* note 117 (“The Copyright Act already contains a provisions forbidding the alteration or provision of false information about a copyrighted work. This protection, however, is limited in scope, applying only to notices of copyright and to statements made in applications for registration.”); *see supra* notes 186 and 187 and accompanying quotes.

193. Nov 15, 1995 Testimony, *supra* note 117 and discussion *supra* note 187; Feb. 15, 1996 Testimony, *supra* note 101, at q. 16, and discussion *supra* note 191. David Nimmer has observed that statutory provisions other than § 506 protected “copyright management information” before the WIPO. Namely, the Audio Home Recording Act of 1992 required that digital audio tapes contain flags to indicate whether copyright protections extend to the work, and to identify the generation of the work; the act further required that audio players limit copying to first-generation works or works in the public domain. David Nimmer, *Aus Der Neuen Welt*, 93 Nw. U. L. Rev. 195, 197–98 (1998). In 1995, the Digital Performance Right in Sound Recordings Act “provided that sound recordings made

section 506 protections for non-digital works, while section 1202 would address protections for information in digital works.<sup>194</sup>

The Copyright Act already contains a provision forbidding the alteration or provision of false information about a copyright work. This protection, however, is limited in scope, applying only to notices of copyright and to statements made in applications for registration. Accordingly, under current law, other types of information about a copyrighted work could be modified or deleted without liability. The proposed legislation would remedy this state of affairs.<sup>195</sup>

While Register Peters believed that section 506 already protected some CMI in non-digital works, she opined that the NII CPA and the early drafts of the DMCA created ambiguities by setting forth the CMI protections in two different sections. Neither the White Paper nor the WIPO Treaties nor the NII CPA had included the information in the copyright notice or in the copyright applications (i.e., CMI protected by section 506) within the section 1202 definition of CMI.<sup>196</sup> The NII CPA, the legislation proposed by the Working Group in the White Paper, contained a thin definition of CMI that included only “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>197</sup> As a consequence of adding these limited new CMI protections in 1202 while retaining some CMI protections in section 506, the scope of CMI protections in the NII CPA remained unclear. Accordingly, one scholar opined that the NII CPA section 1202 would have applied only to digital

---

available over the Internet must preserve certain relevant information for the purposes of copyright management.” *Id.* at 198. Pamela Samuelson opined that the existing CMI provisions provided insufficient protections under the WIPO Treaties, and viewed the provisions of § 1202 as necessary to bring U.S. copyright law into compliance its treaty obligations. “Only the treaty provision calling for protecting the integrity of rights management information needed legislative implementation in U.S. law.” Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 Berkeley Tech. L.J. 519, 521 n.10 (1999). Register Peters did not comment on these statutes in her testimony, nor does the legislative history for the NII CPA or the DMCA mention them.

194. Nov 15, 1995 Testimony, *supra* note 117.

195. *Id.*

196. WIPO CT, *supra* note 38, art. 12; WIPO PPT, *supra* note 38, art. 19; NII Copyright Protection Act of 1995, S.1284, H.R. 2441, 104th Cong. § 1202 (1995); White Paper, *supra* note 39, app. at 4–7.

197. S.1284 § 1202(c); H.R. 2441 § 1202(c).

works: “[s]ection 1202 [of the NII CPA] would prohibit tampering with ‘copyright management information’ appended to a digital work by the copyright owner.”<sup>198</sup>

To harmonize and clarify those rights, Register Peters suggested amending the scope of CMI in section 1202 of the NII CPA to expressly include the information identified in section 506.<sup>199</sup>

Section 506 goes beyond section 1202 in at least two respects: it deals specifically with copyright notices, which include important publication dates; it also applies to representations made in applications for registration. One possibility would be to broaden the definition of “copyright management information” in section 1202 to cover notices and applications, and to delete section 506.<sup>200</sup>

In follow-up testimony, she strengthened her advocacy for such changes.

As stated in our prior testimony, the Copyright Office agrees that the proposed section 1202, which safeguards the integrity of copyright management information, should be harmonized with provisions in section 506 of the Copyright Act applying to statements made in applications for copyright registrations and to information provided in notices of copyright.

We suggest deleting these provisions in section 506 and adding their coverage to section 1202. Thus, the scope of the provisions in section 1202 would be expanded to include information in copyright notices and representations made in applications for registration. This solution has the advantages of including in one location in the statute all provisions dealing with the accuracy of copyright-related information, and ensuring consistency in definitions and penalties.<sup>201</sup>

Although the NII CPA did not pass, when the DMCA came up for consideration Register Peters renewed her suggestions to amend section 1202 based on the existing protections in section 506. “In its current form, section 1202 still overlaps with and renders redundant at least some of the provisions of section 506(c)–(d). These sec-

---

198. Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at “Copyright Management” in Cyberspace*, 28 Conn. L. Rev. 981, 990 (1996) (internal citation omitted).

199. Feb. 15, 1996 Testimony, *supra* note 101, at q. 16 (“We suggest deleting these provisions in section 506 and adding their coverage to section 1202.”).

200. Nov. 15, 1995 Testimony, *supra* note 117.

201. Feb. 15, 1996 Testimony, *supra* note 101, at q. 16.

tions require careful analysis whether they should be deleted or amended to accommodate the new provisions.”<sup>202</sup>

Congress heeded Register Peters’ suggestion, in part, by amending the DMCA to include the information in the copyright notice as part of section 1202’s definition of CMI.<sup>203</sup> Subsection (c) (1) protects “[t]he title and other information identifying the work, including the information set forth on a notice of copyright.”<sup>204</sup> Subsection (c)(3) protects “[t]he name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.”<sup>205</sup>

These changes to the language of section 1202, when viewed in light of the testimony of Register Peters, support a reading of the DMCA which protects CMI in non-digital works. Before enactment of the DMCA, section 506 created criminal penalties for removal, falsification, or alteration of the information in the copyright notice. In order to implement the provisions of the WIPO Treaties, and in accordance with the suggestions of the Working Group, section 1202 clarified that protections of CMI would extend to works in digital form, but did not remove existing protections. The legislative history also demonstrates that Congress intended and understood that section 1202 would protect both digital works as well as the non-digital works previously covered under section 506, treating both types of works the same. Namely, the Senate Committee explicitly noted that section 1202(c)(1) “makes clear that the information set forth on a notice of copyright [information protected under section 506 before enactment of the DMCA] is included within the definition of copyright management information.”<sup>206</sup> The Senate Committee also explained that section

202. Sept. 16, 1997 Testimony, *supra* note 144.

203. Compare NII Copyright Protection Act of 1995, S. 1284, H.R. 2441, 104th Cong. § 1202 (1995) § 1202 with 17 U.S.C. § 1202(c) (2006).

204. 17 U.S.C. § 1202(c)(1).

205. *Id.* § 1202(c)(3).

206. S. Rep. No. 105-190, at 31 (1998). See Nimmer, *supra* note 192, at 198–99 (characterizing the DMCA as extending protections in CMI beyond those already set forth in the Audio Home Recording Act of 1992 and the Digital Performance Right in Sound Recordings Act of 1995, but not opining on whether § 1202 would extend outside the digital realm) (“The innovation of the new WIPO Copyright Treaty is that it applies right management information across the realm of copyrightable works. . . . This treaty requirement is not limited to digital music or sound recordings, as were previous U.S. enactments” and the innovation “is to universalize the requirement of copyright management information, as well as to add criminal sanctions to its enforcement. No longer does it apply, as under the 1992 and 1995 U.S. copyright amendments, simply to the musical realm. Instead, countries that wish to adhere to this latest instrument of international copyright law must incorporate into their laws provisions for this type of copyright management information as to all types of works exploited over the Internet.”).

1204(a), the section establishing the criminal penalties for violations of the protections of CMI in section 1202, sets forth a standard “identical to the standard used in section 506 of the Copyright Act to establish criminal violations.”<sup>207</sup>

While section 506 protected certain types of CMI, it only set forth criminal penalties, not civil remedies. Prior to passage of the DMCA, the Copyright Act had no civil protections for CMI in any form, digital or not. Section 506, which remained unchanged in the DMCA, reads as follows, in relevant part:

(c) **Fraudulent Copyright Notice.**—Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than \$2,500.

(d) **Fraudulent Removal of Copyright Notice.**—Any person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work shall be fined not more than \$2,500.<sup>208</sup>

The DMCA was novel in creating civil causes of actions for falsification, removal, or alteration of CMI conveyed in any form.

Although Register Peters advocated for the deletion of section 506 and consolidation of all the protections of CMI in section 1202, Congress maintained section 506 in the DMCA. The statutory history does not comment on the reason for maintaining section 506. The presence of the two sections creates a potential inconsistency as each section requires a different standard of mens rea and imposes different penalties. Section 506 applies against those who “with fraudulent intent” affix a copyright notice known to be false, or who “with fraudulent intent” remove or alter the copyright notice, while section 1204 applies against those who “willfully and for purposes of commercial advantage or private financial gain” violate section 1202 (or 1201).<sup>209</sup> Section 506 imposes fines of up to \$2,500, but no imprisonment, while section 1204 imposes fines up to \$500,000 and imprisonment of up to five years.<sup>210</sup>

In addition to the suggestions relating to reconciling sections 506 and 1202, the Copyright Register gave additional testimony

---

207. S. Rep. No. 105-190, at 35 (1998).

208. 17 U.S.C. § 506(c)–(d) (2006).

209. *Id.* §§ 506, 1204.

210. *Id.* §§ 506, 1204.

indicating that she viewed section 1202 as applying equally to works in digital and non-digital forms. Register Peters opined that Congress had improved the definition of CMI in the final version of the DMCA by narrowing the scope of CMI to information “conveyed in connection with” copies, performances, or displays of works.<sup>211</sup> Register Peters welcomed the addition of this limiting wording because it clarified that file copies containing outdated or incorrect information would fall outside section 1202 as they were not conveyed, but rather kept in one place: the language “avoids any application of the provision to such information that may happen to be contained on a piece of paper in a file somewhere.”<sup>212</sup> This testimony indicates that Register Peters found it necessary to specify that section 1202 would not apply to some works on paper, namely archive paper copies. The exclusion of archived paper copies, works in a non-digital form, serves no purpose unless section 1202 protects some works in non-digital forms.

##### 5. “Automated Copyright Management Systems”

While the broader interpretation set forth in the *Millennium Radio* line of cases finds support in the statutory language and history as set forth above, the narrow formulation of section 1202 expressed by the *IQ Group* decision, which limited the scope of section 1202 to information “involving automated copyright management systems functioning within a computer network environment,” finds no support in the language of the DMCA or in the legislative history.<sup>213</sup> The District of New Jersey based its narrow reading on the statutory history, particularly the digital context of the DMCA.<sup>214</sup> In formulating the “automated copyright management system” requirement, the *IQ Group* court referenced the House Committee’s identification of digital watermarks as an example of copyright management information.<sup>215</sup>

The *IQ Group* decision misinterprets the significance of the House Committee Report. The identification of digital watermarks as one type of protected CMI does not mandate that all covered

---

211. *Id.* See *supra* note 18 (section 1202(c) definition in DMCA) and note 100 (section 1202(c) definition in NII CPA).

212. Sept. 16, 1997 Testimony, *supra* note 144.

213. *IQ Group, Ltd. v. Wiesner Publ'g, LLC*, 409 F. Supp. 2d 587, 596 (D.N.J. 2006).

214. *Id.* at 595–97.

215. *Id.* at 596 (“The committee report, in addressing a different DMCA section, states: ‘It may, in appropriate circumstances include the absence of customary indicia of ownership or authorization, such as a standard and accepted digital watermark or other copyright management information.’” (quoting H.R. Rep. No. 105–551, pt. 1, at 25 (1998))).

CMI must come in digital form or function as part of an “automated copyright management system.” The House Committee merely offered an example of one type of CMI that section 1202 would cover. Further, the Committee Reports never use the language “automated copyright management system,” or anything similar. Moreover, as the *Millennium Radio* decision points out, the text of the DMCA does not contain such language.<sup>216</sup> Accordingly, neither the plain language of the statute nor the legislative history supports this limitation.

Besides relying on the House Committee Report, the *IQ Group* court found support for the limiting interpretation in the pre-DMCA language of the Copyright Act. The DMCA

should not be construed to cover copyright management performed by people, which is covered by the Copyright Act, as it preceded the DMCA; it should be construed to protect copyright management performed by the technological measures of automated systems.<sup>217</sup>

However, this decision does not point to the language in the Copyright Act that would impose such a limitation. The plain language of section 506, the only pre-DMCA section that implicated CMI, did not cover only “copyright management performed by people,” but rather imposed liability regardless of whether a human, a computer, or some other being or object conducted the copyright management, and, as discussed *infra* in Part V.B.4, the DMCA did not change section 506.<sup>218</sup> Additionally, assuming *arguendo* that the DMCA did not apply to “copyright management performed by people,” the *IQ Group* decision acknowledged that the pre-DMCA Copyright Act protected such CMI, and those (unspecified) provisions could have formed the basis for liability post-DMCA since the DMCA did not eliminate those provisions.<sup>219</sup>

The similarly restrictive requirement that the CMI application, removal, or distribution involve a “technological process,” favored by some courts over the “automated copyright management system,” likewise lacks support in the legislative history and the statutory text.<sup>220</sup> The *Textile Secrets* court extended the protections of section 1202 only when a “technological process was utilized in con-

---

216. *Murphy v. Millennium Radio Group LLC*, 650 F.3d 295, 303 (3d Cir. 2011) (“The statute imposes no explicit requirement that such information be part of an ‘automated copyright protection or management system, . . .’”).

217. *IQ Group*, 409 F. Supp. 2d at 597.

218. *See* 17 U.S.C. § 506 (2006).

219. Register Peters testified that the DMCA did not eliminate protection of CMI for works in non-digital form. *See* Feb. 15, 1996 Testimony, *supra* note 101, at q.s. 6, 10; Nov. 15, 1995 Testimony, *supra* note 117; discussion *supra* notes 191–194 and associated text.

nection with either applying the copyright information to the fabric or in removing such information or in subsequently distributing the design.”<sup>221</sup> In arriving at this test, the *Textile Secrets* court pointed to the historical context of the DMCA, particularly “that its purpose was to give an added layer of protection to certain works that were vulnerable to infringement due to advances in modern technology, namely the Internet and electronic commerce.”<sup>222</sup> The reference to the DMCA does not point to a particular portion of the legislative history or a section of the act. On the contrary, neither the Senate Committee Report nor the House Committee Report suggests any requirement of a technological process. Nor does the DMCA contain such a restriction.

## VI. COPY FRAUD IN THE DIGITAL AGE

The foregoing exegesis proposes why section 1202 should apply to digital and non-digital works alike. Beyond this question of the scope lies another fundamental question: what purpose does section 1202 serve? In other words, how can copyright owners use section 1202 to protect their interests in the digital age? And how does or can section 1202 protect the broader public interest? The small universe of cases that address section 1202 has not formed a coherent jurisprudence of CMI. In that void, this Part proposes a conception of section 1202 as a fraud statute serving a consumer protection function. It further sees the CMI protections as analogous to a limited right of integrity or attribution.

As a baseline, the DMCA did not establish new forms of copyright infringement. Rather, the DMCA created para-copyright protections to aid copyright owners in the Internet age, addressing (1) technological controls, and (2) the need for adequate and accurate information. Section 1202 captures the need for full information relating to copyrighted works distributed easily, cheaply, rapidly, and in large quantities over the Internet. Meanwhile, section 1201, the other major substantive provision added to the Copyright Act by the DMCA, legislates in the area of technological control, prohibiting the circumvention of access control technologies, or the manufacture or provision of a circumvention device.<sup>223</sup> Section 1201 created new actions not for copyright infringement, but rather for something distinct. “The violation occurs with the prohibited acts; it is not necessary to prove that the dissemination of

---

220. *Textile Secrets*, 524 F. Supp. 2d at 1202 n.17; *Jacobsen v. Katzer*, 609 F. Supp. 2d 925, 934 (N.D. Cal. 2009).

221. *Textile Secrets*, 524 F. Supp. 2d at 1202 n.17.

222. *Id.*

223. 17 U.S.C. § 1201(a)(1)(A)–(b) (2006).

circumvention devices resulted in specific infringements or that the purpose of circumventing an access control was to commit an infringing act.”<sup>224</sup> The section 1201 provisions do not fit within the realm of copyright law, but rather belong among the “many issues about transport and use of digital works [which] lie outside the scope of copyright law. Digital rights rely on a combination of laws and contracts. Digital certificates can be used in a practical way to introduce representations of boundaries and identity into cyberspace, making control practically enforceable.”<sup>225</sup>

Like section 1201, section 1202 establishes para-copyright protections. According to one scholar, the CMI provisions facilitated copyright distribution: “What role does it serve? The answer: the role of the copyright middleman.”<sup>226</sup> Section 1202 does not address technological controls, like section 1201,<sup>227</sup> but rather the need for accurate information in the digital age, particularly markers of genuine copyrighted works. In raising such meta-copyright data as separately protectable alongside the work itself, section 1202 fits in the tradition of the rights of integrity and attribution belonging to the author. Even before the WIPO Treaties, European countries protected the right of integrity, which allows the author to control the authenticity of her works, but in the United States lawmakers have avoided implementing these rights out of concern that authors might be able to interfere with legitimate uses by rightful holders of copies of works.<sup>228</sup> In the digital age, the right of integrity may serve as a weapon to limit the widespread dispersion of inauthentic

---

224. Jane Ginsburg, *The Pros and Cons of Strengthening Intellectual Property Protection: Technological Protection Measures and Section 1201 of the US Copyright Act*, 16 *Info. & Comms. Tech. L.* 191, 192 (2007); *accord id.* at 194 (“Yet, there is considerable evidence from the text and from the legislative history that Congress did intend to create an additional copyright regime based on the control over access to digitally distributed works of authorship. The text indicates that the ‘access’ that § 1201(a) protects goes beyond traditional copyright prerogatives; it distinguishes ‘access’ from a ‘right of the copyright owner under this title.’”).

225. See Stefik, *supra* note 4, at 138.

226. Nimmer, *supra* note 192 at 201.

227. Computer Crime & Intellectual Prop. Section, U.S. Dep’t of Justice, *Prosecuting IP Crimes Manual* 207 (2006) (quoting H.R. Rep. No.105–551, pt. 1, at 22 (1998) (“Thus, while § 1201 primarily targets circumvention devices and technology, ‘section 1202 imposes liability for specified acts. It does not address the question of liability for persons who manufacture devices or provide services.’”).

228. Litman, *supra* note 2, at 184–85 (“Most countries that belong to the Berne Union protect author’s interests in assuring the integrity of the works they create. American lawmakers have always found the notion hard to swallow. . . . Some copyright owners view integrity rights as a dangerous opportunity for individual authors to interfere with the exploitation of works by the copyright owners and licensees. Some copyright experts view integrity rights as yet another way that authors exert unwarranted control over the uses of their works.”).

copies.<sup>229</sup> These rights would protect consumers, who could rely on accurate information identifying sources, as well as the reputation of the author.<sup>230</sup> Section 1202 furthers these purposes by protecting the name of the author and information about the work, and imposing liability on those who distribute versions of works with altered, removed, or falsified CMI.<sup>231</sup>

One may also conceive of the CMI provisions as para-copy-right protections that serve a purpose distinct from protecting rights of integrity: addressing the fraud and misinformation rampant in the digital age that birthed the DMCA. As noted *supra*, the anonymity of the Internet makes it difficult to determine the authenticity and legality of a particular work.<sup>232</sup> Fraudulent distribution of copyrighted works exemplifies a broader trend of fraud in the Internet age.

The Internet makes it effortless for impostors to assume false identities, and therefore, it is a seamless haven for identity theft. The seamy side of the Internet is rapidly becoming a global Petri dish for new torts and crimes perpetrated against consumers. Consumers face a multitude of potential

---

229. *Id.* (“[T]he remarkable plasticity of digital media has introduced a new sort of obstacle to public dissemination: Works can be altered, undetectably, and there is no way for an author to insure that the work being distributed over her name is the version she wrote. . . . We could adopt a narrowly tailored safeguard that framed the integrity right to meet the particular threats posed by digital technology. Authors have a legitimate concern, and that concern is often shared by the public. Finding the authentic version of whatever document you are seeking can in many cases be vitally important.”).

230. Jane Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 *Cardozo Arts & Ent. L. J.* 9, 13 (2001) (“It is increasingly important, especially with digital media, to be able to ensure the authenticity of the work. . . . Unauthorized alterations to a work’s contents threaten the credibility both of the document and of the author’s reputation.”); Dusollier, *supra* note 1, at 391 (“The new techniques increase the practical possibilities for having the author’s identity inextricably bound to her works as they circulate. Due to the multiplication of copies of works in the Information Society, the concern for identifying contents and authors is critical.”).

231. Ginsburg, *supra* note 229, at 14 (“Copyright management information may help ensure that the work, as distributed, is the same as the work was at the time it was first publicly released by the author.”). *But see* Dusollier, *supra* note 1, at 383 (“The Agreed Statement concerning the WIPO Copyright Treaty further states that the provision does not create an obligation to embed such information in the works, nor does it impose formalities that would impede the enjoyment of rights.”) and Lastowka, *supra* note 180, at 70 (“the potential attribution rights found in the CMI provisions of the DMCA have been underused, difficult to employ, and have presented interpretive challenges.”).

232. *See supra* notes 3, 4.

risks as the result of unsavory practices by Internet retailers.<sup>233</sup>

This “multitude of potential risks” comes in many forms.

Consumers are flooded with virus-infected email, spam, and a variety of fraudulent online scams. Online criminals use the technique of ‘phishing’ to trick consumers into giving their credit card numbers by sending fraudulent emails posing as banks, financial service providers, or Internet Service Providers (‘ISP’). The emails often have direct hyperlinks to unaffiliated web sites that mirror the sites of trusted institutions.<sup>234</sup>

The Internet has expanded identity theft, as savvy criminals “are now far more capable of getting confidential personal information, and using it to commit fraud.”<sup>235</sup> Identity theft may also occur through sweetheart scams, in which the fraudster establishes a fake profile on a dating site with the purpose of luring a victim into a personal relationship, and then proceeds to take money from the victim or misuse that person’s personal information.<sup>236</sup> Dating and other social networking sites boast fake profiles created for a different purpose than identity theft, namely impersonation and mocking or harassing of victims.<sup>237</sup> Targets of Internet harassment, through social networking sites or other sites, find themselves besieged by threatening emails, disparaging online posts, and public dissemination of private information.<sup>238</sup> Other forms of Internet

---

233. Michael L. Rustad, *Punitive Damages in Cyberspace: Where in the World Is the Consumer?*, 7 Chap. L. Rev. 39, 40 (2004).

234. *Id.* at 39–40.

235. Harry A. Valetk, *Mastering the Dark Arts of Cyberspace: A Quest for Sound Internet Safety Policies*, 2004 Stan. Tech. L. Rev. 2, at ¶ 11 (2004) (observing, rightly, that “thanks to the Internet’s endless resources, the opportunity to commit identity fraud is everywhere”).

236. See, e.g., Aunshul Rege, *What’s Love Got to Do with It? Exploring Online Dating Scams and Identity Fraud*, 3 Int’l J. of Cyber Criminology 494, 497–98 (2009); Tracy Moore, *Nigerian Romance: Your new online beau is tall, dark, handsome—and a fraud*, Nashville Scene (Nov. 13, 2008), available at <http://www.nashvillescene.com/nashville/nigerian-romance-your-new-online-beau-is-tall-dark-handsome-and-ndash-and-a-fraud/Content?oid=1198860>.

237. See, e.g., *Texas Lawmakers Crack Down on Fake Online Profiles*, Street Knowledge Media (June 24, 2009), available at <http://streetknowledge.wordpress.com/2009/06/24/texas-lawmakers-crack-down-on-fake-online-profiles/>.

238. See, e.g., Rustad, *supra* note 232, at 94–95 (setting forth summaries of decisions involving these disturbing behaviors). See generally Valetk, *supra* note 234, at 54–77 (discussing Internet harassment).

fraud include the sale of massive volumes of counterfeit drugs online.<sup>239</sup>

Within this context of a culture of Internet fraud, section 1202 creates a para-copyright cause of action against fraud in CMI. The Senate acknowledged this purpose: “[a] new ‘section 1202’ to the Copyright Act is required by both WIPO Treaties to ensure the integrity of the electronic marketplace by preventing fraud and misinformation.”<sup>240</sup> Section 1202 codifies common-law fraud for CMI. Fraud traditionally requires the following elements:

- (1) a statement or omission; (2) its falsity; (3) its materiality;
- (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) the speaker’s intent that the hearer rely on the representation in the manner reasonably contemplated; (6) the hearer’s ignorance of the falsity of the representation; (7) the hearer’s reliance on the representation; (8) the hearer’s right to rely on the representation; and (9) damage caused by the representation.<sup>241</sup>

The elements of a claim under section 1202 overlap with the following three of the nine elements of fraud: (1) a statement or omission, i.e., the use of CMI; (2) falsity, i.e., the defendant has falsified, altered, or removed the CMI; and (4) knowledge of the falsity by the speaker, i.e., the defendant knowingly falsified, altered, or removed the CMI.<sup>242</sup>

Considering that a copyright owner need only establish those three elements, Congress has drafted section 1202 to create an irrebuttable presumption that falsifying, altering, or removing of CMI satisfies the remaining elements of fraud. This structuring of the claim aids copyright owners as potential plaintiffs. The presumption of the materiality element, namely that section 1202 sets a standard that CMI conveys material information about a copyrighted work, stands out as perhaps the most significant presumption and demonstrates that Congress valued CMI as essential infor-

239. See Kathy Chu, *Growing Problem of fake drugs hurting patients, companies*, USA Today (Sept. 13, 2010), available at [http://www.usatoday.com/money/industries/health/2010-09-12-asia-counterfeit-drugs\\_N.htm](http://www.usatoday.com/money/industries/health/2010-09-12-asia-counterfeit-drugs_N.htm). See generally Marilyn Larkin, *Combating Counterfeit Drugs Online*, 6 The Lancet Infectious Diseases 552, 552 (2006) (discussing the significance of the problem of counterfeit online drug sales).

240. H.R. Rep. No. 105-551, pt. 1, at 10 (1998).

241. See, e.g., *Webb v. Clark*, 546 P.2d 1078, 1080 (Or. 1976); *Turner v. Enders*, 552 P.2d 694, 696 (Wash. Ct. App. 1976).

242. 17 U.S.C. § 1202 (2006). Section 1202(a) requires that the plaintiff prove the defendant falsified the CMI both “knowingly” and “with the intent to induce, enable, facilitate, or conceal infringement.” *Id.* No case law has addressed how the “with the intent” language alters the required scienter beyond the knowledge requirement.

mation for consumers. The additional presumptions that the hearer will reasonably rely on removals, falsifications, or alterations of CMI and suffer damage as a result further indicate that Congress has accorded considerable importance to CMI, since Congress deemed that damage will invariably result from missing or inaccurate CMI.

While section 1202 functions as a para-copyright fraud statute, it also serves consumer protection functions by dis-incentivizing commercial misrepresentations. The difficulties of assessing the accuracy of information in the Internet age pose particular challenges for defrauded consumers. On the Internet, traditional common-law remedies in tort and contract often prove ineffective because scammers “phishing” for credit card or other personal financial information can act anonymously across borders, evading identification and enforceable judgments.<sup>243</sup> “Deterrence cannot be achieved unless the costs of wrongful conduct are sufficient to induce fraudulent Internet wrongdoers and others tempted by ill-gotten gains not to repeat the conduct again.”<sup>244</sup> Jane Ginsburg has proposed that section 1202 may aid in the protection of consumers against fraudulent uses of copyrighted materials.

Section 1202 was designed to promote the dissemination of copyrighted works by facilitating the grant or license of rights under copyright, particularly through electronic contracting. Because accurate and reliable information about the work is essential to its lawful distribution (particularly online), section 1202 identifies that information and protects it against falsification, removal or alteration.<sup>245</sup>

Section 1202 may serve this purpose even though the negotiations of the DMCA excluded consumer advocacy groups.<sup>246</sup> Perhaps as a result of the lack of participation by consumer groups in

---

243. See Rustad, *supra* note 232, at 40, 54 (arguing that the Internet has made it easy for impostors to assume false identities and difficult for plaintiffs to secure or enforce judgments against plaintiffs who have no physical presence in the United States).

244. *Id.* at 100 (arguing that punitive damages should be awarded to punish and deter intentional and reckless torts in situations where the probability of detection is low and the probability of harm is high).

245. Ginsburg, *supra* note 229, at 12.

246. See Litman, *supra* note 2, at 51–52 (“Although a few organizations showed up at the conferences purporting to represent the ‘public’ with respect to narrow issues, the citizenry’s interest in copyright and copyrighted works was too varied and complex to be amenable to interest-group championship. Moreover, the public’s interests were not somehow approximated by the push and shove among opposing industry representatives. To say that the affected industries represented diverse and opposing interests is not to say that all relevant interests were represented.”).

the drafting of the DMCA, section 1202 does not allow consumers to bring lawsuits as private attorneys general.<sup>247</sup> Nor does section 1202 create any government enforcement options. Only the copyright holder may bring the cause of action for the fraudulent actions with respect to CMI, which significantly limits the power of this codified fraud action. Considering the widespread distribution of unauthorized copies in the digital age, consumers would benefit from enhanced enforcement mechanisms for the substantive provisions set forth in section 1202. Despite these deficiencies in enforcement mechanisms, section 1202 still has the potential to provide a tool for promoting consumer protection in a way similar to section 43(a) of the Lanham Act, which creates causes of action for deceptive trade practices.<sup>248</sup> Although section 43(a) allows claims to be brought only by business owners harmed by such practices, and not consumers in general,<sup>249</sup> this provision has provided powerful protections for consumers against a wide range of deceptive trade practice claims,<sup>250</sup> and section 1202 could serve such a consumer-protection purpose as well.

These consumer protections should extend to non-digital works as well because the Internet age does not confine fraud to digital works. A business now does not need to limit its consumers to the local market, but rather can reach out globally and potentially reach millions worldwide. Accordingly, the Internet opens up markets for distribution of larger quantities of goods in physical form, not just in digital form. Internet fraudsters take information online, but deliver fraudulent materials in physical form, such as pharmaceuticals.<sup>251</sup>

---

247. *Cf.* Rustad, *supra* note 232, at 100 (advocating for increased punitive damages to encourage suits by individual litigants as private attorneys general in Internet consumer fraud cases).

248. *See* Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2006).

249. *See, e.g., Conte Bros. Auto. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 234 (3d Cir. 1998) (declining to extend § 43(a) standing where plaintiffs did not allege a competitive harm and actual competitors existed and were more appropriate litigants); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1108 (9th Cir. 1992) (confining § 43(a) standing to injury to a competitor and commercial injury).

250. Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. Rev. 807, 817 (1999) (noting that courts opened up § 43(a) claims for a wide range of consumer claims beyond what Congress envisioned); Bruce P. Keller, “*It Keeps Going and Going and Going*”: *The Expansion of False Advertising Litigation Under the Lanham Act*, 59 Law & Contemp. Probs. 131, 131 (1996) (“Today, virtually all advertising claims made in interstate commerce—whether on product packages, in newspaper and magazine advertisements, in television or radio commercials, or disseminated through new media such as the Internet—fall within the reach of Section 43(a) of the Lanham Act.”).

251. *See supra* note 236 and accompanying text.

Further, copyright owners distribute the same works in multiple format and media. For example, consumers can stream movies online or purchase a DVD. Similarly, readers can access books on a Kindle® e-reader or in a hard copy. Photographers take digital photos and manipulate them with digital technology, but then make physical prints. In another sign of the digital age, a smart phone can scan a QR code on a print advertisement that will lead to a webpage. In this age marked by interactive and interchangeable formats, it would prove difficult to draw lines between digital and non-digital expressions. If an infringer copied the poster with the print advertisement, but deleted the copyright notice and changed the QR code to direct traffic to a different webpage, would section 1202 not apply because of the non-digital nature of the poster, even though the change had a digital effect by misdirecting web traffic? No policy reason exists to decline protection to the non-digital forms. On the contrary, copyright owners want to protect their hard copies and consumers need accurate information with respect to all kinds of works.

## VII. CONCLUSION

As discussed in Part V.A *supra*, Congress clearly conceived of the protections of CMI in section 1202 of the DMCA within the context of the integrity of copyrighted works distributed and displayed on the Internet. The House Committee proclaimed that “[a] new [section] to the Copyright Act is required by both WIPO Treaties to ensure the integrity of the electronic marketplace by preventing fraud and misinformation.”<sup>252</sup> Similarly, the Senate Committee noted that

[d]ue to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy. Legislation implementing the treaties provides this protection and creates the legal platform for launching the global digital on-line marketplace for copyrighted works.<sup>253</sup>

The Senate Committee’s comments acknowledge the increased potential for fraud in the Internet age and the need for consumer protection laws.

Notwithstanding this context, and contrary to the conclusions expressed in *IQ Group, Textile Secrets*, and their progeny, Congress

---

252. H.R. Rep. No. 105-551, pt. 1, at 10 (1998).

253. S. Rep. No. 105-190, at 7 (1998).

did not intend to restrict the protections of CMI in section 1202 to works in digital form alone. As discussed in Part V.B *supra*, the plain language of the statute includes non-digital works within the protections. The definition of CMI states that section 1202 protects information conveyed in connection with a work, “including in digital form.”<sup>254</sup> This inclusive language highlights the application of the section to digital works, but in no way excludes non-digital works. The verbs in the causes of action make sense only if the protections extend to non-digital works.<sup>255</sup> Section 1202(e) expressly maintains liability with respect to CMI in certain analog, in addition to digital, transmissions.<sup>256</sup>

Additionally, the legislative history supports the broader view. The Working Group intended its proposed legislation to protect all CMI, “not just that which is included in or digitally linked to the copyrighted work.”<sup>257</sup> The Senate Committee clarified that “CMI need not be in digital form.”<sup>258</sup> Both the Senate and House Committees directed that “the term ‘conveyed’ is used in its broadest sense and is not meant to require any type of transfer, physical or otherwise, of the information. It merely requires that the information be accessible in conjunction with, or appear with, the work being accessed.”<sup>259</sup> Register of Copyrights Peters lauded section 1202 of the DMCA for protecting “information not in electronic form”<sup>260</sup> and greeted with approval this update to the law that would extend existing protections “to distribution by any means, including digital transmission.”<sup>261</sup>

In 2007, the Central District of California expressed concern that “a literal interpretation of ‘copyright management information’ . . . would in effect give § 1202 limitless scope in that it would be applicable to all works bearing copyright information,” which could produce “impracticable results.”<sup>262</sup> While the court did not elaborate on its specific fears for these unnamed “impracticable results,” this language presumably serves as a synonym for a floodgate of litigation, i.e., a large number of cases unintended by Congress and presenting an unwelcome burden on the courts. The litigation record since enactment of the DMCA runs contrary to an

---

254. 17 U.S.C. § 1202(c) (2006).

255. *Id.* § 1202(a)–(b).

256. *Id.* § 1202(e).

257. White Paper, *supra* note 39, at 236.

258. S. Rep. No. 105–190, at 15.

259. *Id.* at 31; H.R. Rep. No. 105–551, pt. 1, at 21 (1998).

260. Sept. 16, 1997 Testimony, *supra* note 144.

261. Feb. 15, 1996 Testimony, *supra* note 101, at q. 10; *accord id.*, at q. 6; Nov. 15, 1995 Testimony, *supra* note 117.

262. *Textile Secrets Int’l, Inc. v. Yá-Yá Brand, Inc.*, 524 F. Supp. 2d 1184, 1195 (C.D. Cal. 2007).

argument that a literal reading leads to a floodgate of litigation or “impracticable results.” Namely, in the thirteen years since passage of section 1202, the courts have issued fewer than fifteen written opinions on its scope, a small number and hardly “impracticable.” Some may argue that litigants have not invoked the section because its scope remains unclear and parties wish to avoid the cost of litigating the section’s scope. More likely, the scienter requirement has limited the number of claims, as litigants must allege and prove that the malfeasor *intentionally* remove or altered copyright information or *knowingly* distributed works with altered, falsified, or removed copyright information. This requirement discourages frivolous claims.

Further, a broad interpretation of section 1202 would not likely lead to an increase in the number of cases. Rather, plaintiffs would add a section 1202 claim as an additional count in a copyright action—a DMCA claim would almost always accompany a claim for copyright infringement by, for example unauthorized copying or distribution, since the removal, alteration, or falsification of CMI invariably involves a breach of copyright. The additional damages available under section 1202 for the copyright owner (beyond those available for traditional copyright infringement) encourage the assertion of these CMI claims. The drafters of section 1202 created this carrot to prompt rights holders to take steps to identify and protect their works. A broader reading of the statute would enable more rights holders to take advantage of this protection and incentivize them to include CMI. And, even if this reading of section 1202 were to lead to an increase in copyright actions, the Third Circuit noted that “whether or not [such a] result is desirable, it is not *absurd*.”<sup>263</sup>

The public benefits from the increased use of CMI through the improved ability to verify the authenticity of a work and to learn of its authorized terms and conditions of use. Current legal regimes have had difficulties protecting the public from fraudulent abuses of the Internet age. A broad interpretation of section 1202 proves particularly important for the Internet age because consumers experience difficulties verifying the accuracy of information from anonymous online posters. Consumers need broad protections against cybercriminals; the weapon of a fraud cause of action with significant civil and criminal penalties could deter misrepresentations, at least with respect to copyrighted works. The attachment of accurate and full information to a copyrighted work benefits the users who know they are getting an authentic work and can access any terms and conditions of use.

---

263. *Murphy v. Millennium Radio Group LLC*, 650 F.3d 295, 302 (3d Cir. 2011).

For copyright owners, the consistent inclusion of full and easy-to-access information trains users to look for this information, on digital as well as non-digital works. Educating users about the nature of copyrights and the fact that there may be conditions or restrictions on enjoyment of a work benefits all copyright owners. Thus, this communication of information furthers the goals underlying copyright law to giving time-limited exclusive rights in those works while allowing users to enjoy the works during the monopoly period and perhaps gain inspiration to innovate their own creative works.