Define Your Terms: What Do the Phrases "Copyright Management Information" and "In Connection With" from Section 1202 of the Digital Millennium Copyright Act Mean?"

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The Digital Millennium Copyright Act ("DMCA")[1] relies on the phrases "copyright management information" and "in connection with" to delineate what can and cannot be done with copyrighted materials. Section 1202 prohibits intentional removal or alteration of "copyright management information" that is conveyed "in connection with" copyrighted works.[2] These key phrases from Section 1202 have, however, created confusion among copyright owners and users regarding the owner's responsibilities and the user's rights. Courts have attempted to define these phrases to address this ambiguity. This article summarizes the current case law regarding these two important phrases in the DMCA.

DMCA Section 1202 - Competing Interpretations

Section 1202(b) prohibits the intentional removal or alteration of any "copyright management information," the knowing distribution of altered copyright management information, and the knowing distribution of works where the copyright management information has been removed or altered.[3] Section 1202(b) provides:

> 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.[4]

Section 1202(c) defines the term "copyright management information" to include any of the following information conveyed "in connection with" copies, displays, phonorecords, or performances 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 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.[5]

Currently, district courts remain split on the appropriate interpretation of these terms and no circuit court has yet addressed the issue. However, courts appear to be moving toward a broad definition of copyright management information.

Cases That Define "Copyright Management Information" Narrowly

Read literally, Section 1202(c) defines "copyright management information," or "CMI," broadly, to the point that it may apply "wherever any author has affixed anything that might refer to his or her name."[6] However, despite the apparently broad definition of CMI provided by Section 1202(c), some cases—especially early ones—interpreting this section take a narrow approach to the definition of CMI, limiting it to circumvention of a "technological measure."[7] Courts articulating this more narrow interpretation indicate that it is based on the legislative history and Section 1201 of the DMCA.[8]

The first published decision to interpret Section 1202's "copyright management information" language was *IQ Group, Ltd. v. Wiesner Publishing, LLC*.[9] This case involved the defendant's unauthorized distribution of copyrighted advertisements from which the defendant removed the plaintiff's logo and hyperlink. The court in *IQ Group* looked closely at the legislative history of the statute.[10] In concluding that the definition of CMI is limited to "technological measure[s]," the court stated:

> This interpretation of § 1202 makes sense . . . because it fits § 1201 with § 1202, and with chapter 12 as a whole. The language of § 1201 expressly states that it concerns the circumvention of a "technological measure" which either "effectively controls accesses to a work" or "effectively protects a right of a copyright owner." . . . Chapter 12, as a whole, appears to protect automated systems which protect and manage copyrights. The systems themselves are protected by § 1201 and the copyright information used in the functioning of the system is protected in § 1202.[11]

The court noted that Section 1202 "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."[12] Applying this narrow definition of CMI, the court found that the plaintiff's logo and hyperlink in the subject email advertisements failed to function as CMI because they did not function as components of an "automated copyright protection or management system."[13]

Citing favorably to *IQ Group*, the Central District of California similarly read Section 1202 narrowly in *Textile Secrets International, Inc. v. Ya-Ya Brand, Inc*.[14] The court reasoned that applying "a literal interpretation of 'copyright management information' as defined in Section § 1202(c) would in effect give § 1202 limitless scope in that it would be applicable to all works bearing copyright information. . . . In other words, § 1202 would apply . . . 'whenever any author affixed anything that might refer to his or her name.'"[15]

The court concluded that Section 1202 was not "intended to apply to circumstances that have no relation to the Internet, electronic commerce, automated copyright protections or management systems, public registers, or other technological measures or processes as contemplated in the DMCA as a whole."[16] Applying this narrow interpretation of CMI, the court found that the plaintiff's allegations of removal of copyright information from a printed fabric design could not be the basis of a claim under Section 1202 as a matter of law.[17]

According to the *IQ Group* and *Textile Secrets* decisions, Section 1202 requires that CMI employ some technological measure or process, but what exactly was required was still left an open question. For example, in *Textile Secrets*, the court suggested that the inclusion of a "bar code or other marker that could be electronically scanned" would be sufficient to satisfy the court's "technological process" requirement.[18] What is clear, however, is that the written name (or other identifier) of a copyright owner is insufficient to qualify for protection as CMI based on these decisions.

Cases That Define "Copyright Management Information" Broadly

Other courts have rejected this narrow interpretation of CMI, relying on the literal language of Section 1202(c) that appears to define CMI broadly.[19] Since the *IQ Group* decision, several courts have taken the opposite approach, applying the language of Section 1202 literally and expressly rejecting the court's reliance on legislative history.[20]

The most recent decision to reject *IQ Group* and similar decisions is *Agence France Presse v. Morel*.[21] In particular, the *Agence France* court rejected the *IQ Group* decision's reliance on legislative history, noting that when a statute is unambiguous on its face, it is inappropriate to look to legislative history to define the terms of the statute.[22] The *Agence France* court found that a broad interpretation of Section 1202 was appropriate given the plain language of the statute.[23] Thus, that court found that typewritten notations identifying the name of the copyright owner qualified as CMI under Section 1202, notwithstanding the lack of "technological" measures involved in these notations.[24]

The *Agence France* court further held that it should "not resort to legislative history to cloud a statutory text, but instead [it should] enforce the statutory language according to its terms."[25] The court also noted that "the narrow interpretation on which [*IQ Group* and similar decisions] rely is directly at odds with the broad definition set forth in the statutory text itself."[26] The court concluded that the written notations at issue identifying plaintiff Daniel Morel as the copyright owner and source of the subject imagery fell "squarely within the statutory definition of CMI."[27]

Agence France Presse v. Morel is one of many cases decided since *IQ Group* to apply a broad definition of "copyright management information." The *Agence France* court relied on several similar decisions, including *Cable v. Agence France Presse*;[28] *BanxCorp v. Costco Wholesale Corp*.;[29] and *Associated Press v. All Headline News Corp*.[30] Each of these cases rejected the *IQ Group* court's reliance on legislative history, instead applying the "ordinary meaning" of the statute.[31] For example, in *Cable* the court found, unlike the court in *IQ Group*, that the "plaintiff's name and hotlink fell within the scope of 'copyright management information.'"[32]

***Agence France Presse v. Morel*'s Interpretation of "In Connection With"**

In addition to its holdings regarding the "copyright management information" language, the *Agence France* decision also discussed the "in connection with" language of the DMCA. The court took a broad approach to the interpretation of the "in connection with" language of Section 1202, specifically rejecting the "argument that CMI must be removed from the photograph itself to state a claim for removal or alteration of CMI."[33] The court held that CMI information must be conveyed "*in connection* with copies" of a work, but not necessarily *on* the work itself.[34] The court found, therefore, that the attributions "Morel" and "photomorel" appearing on Morel's Twitpic page qualified as CMI conveyed "in connection with" his photographs appearing on the Twitpic page.[35] The court noted,

however, that the location of Morel's CMI may go to the issue AFP's intent in removing or altering the CMI, another element of a claim under Section 1202.[36] Together with the court's broad reading of "copyright management information," the court's understanding of the "in connection with" language represents a potential opportunity for Section 1202.

Conclusion

Currently, there is no consensus on the definition of "copyright management information" from Section 1202(b) of the DMCA. However, it appears that courts are more often adopting a broad interpretation of the phrase. As seen in the recent *Agence France Presse v. Morel* decision, a broad definition of CMI also opens the "in connection with" language from the statute to multiple interpretations. At least one court is willing to define this phrase broadly to include CMI distributed with, but not on, a copyrighted work. Time will tell if and how the placement of CMI may affect courts' decisions regarding a defendant's intent in removing or altering CMI.

Endnotes

[1] 17 U.S.C. § 1201, et seq.

[2] 17 U.S.C. § 1202(b)(1) - (3).

[3] *Id*.

[4] *Id*.

[5] 17 U.S.C. § 1202(c).

[6] *IQ Group, Ltd. v. Wiesner Publishing, LLC*, 409 F. Supp. 2d 587, 593 (D.N.J. 2006).

[7] *See*, *e.g*., *Murphy v. Millennium Radio Group, LLC*, No. 08-CV-01743, 2010 BL 70565 (D.N.J. Mar. 31, 2010); *Textile Secrets Int'l, Inc. v. Ya-Ya Brand, Inc*., 524 F. Supp. 2d 1184 (C.D. Cal. 2007); *IQ Group*, 409 F. Supp. 2d at 596-97. Section 1201 states, in relevant part: "No person shall circumvent a *technological measure* that effectively controls access to a work protected under this title." 17 U.S.C. § 1201(a)(1)(A) (emphasis added).

[8] *IQ Group*, 409 F. Supp. 2d at 596-97.

[9] 409 F. Supp. 2d 587 (D.N.J. 2006).

[10] *Id*. at 595-97.

[11] *Id*. at 597.

[12] *Id*.

[13] *Id*. at 598.

[14] 524 F. Supp. 2d 1184, 1195.

[15] *Id*. (quoting *IQ Group*, 409 F. Supp. 2d at 593).

[16] *Id*. at 1201.

[17] *Id*. at 1201-02.

[18] *Id*. at 1202 n.16.

[19] *See*, *e.g.*, *Agence France Presse v. Morel*, No. 10-CV-02730 at *16 (S.D.N.Y. Jan. 14, 2011) (rejecting the narrow interpretation of Section 1202 adopted by *IQ Group*); *Associated Press v. All Headline News Corp*., 608 F. Supp. 2d 454, 461-62 (S.D.N.Y. 2009) (rejecting the argument that the court should look to the legislative history of Section 1202).

[20] *See*, *e.g.*, *Agence France Presse v. Morel*, No. 10-CV-02730 (S.D.N.Y. Jan. 14, 2011); *Cable v. Agence France Presse*, 728 F. Supp. 2d 977 (N.D. Ill. 2010); *BanxCorp v. Costco Wholesale Corp*., 723 F. Supp. 2d 596, 597 (S.D.N.Y. 2010); *Associated Press v. All Headline News Corp*., 608 F. Supp. 2d 454 (S.D.N.Y. 2009).

[21] No. 10-CV-02730 (S.D.N.Y. Jan. 14, 2011)

[22] *Id*. at *16-17.

[23] *Id*. at *16.

[24] *Id*. at *17.

[25] *Id*. at *17 (internal quotations omitted).

[26] *Id*. at *16.

[27] *Id*.

[28] 728 F. Supp. 2d 977.

[29] 723 F. Supp. 2d. 596.

[30] 608 F. Supp. 2d 454.

[31] *See*, *e.g.*, Cable, 728 F. Supp. 2d at 980-81.

[32] *Id*.

[33] *Agence France Presse v. Morel*, No. 10-CV-02730 at *15 (S.D.N.Y. Jan. 14, 2011). *Accord Banxcorp*, 723 F. Supp. 2d at 597 (holding that the placement of CMI on a website and not directly on the copyrighted work may factor into the defendant's intent or may indicate that the CMI did not actually relate to the copyrighted work, but declining to hold that CMI must appear directly on the copyrighted work).

[34] *Agence France Presse v. Morel*, No. 10-CV-02730 at *15 (S.D.N.Y. Jan. 14, 2011).

[35] *Id*. at *15, 17.

[36] *Id*. at *17. A claim under Section 1202 requires a showing of intentional or knowing alteration or removal of CMI. 17 U.S.C. § 1202 (b).