

COPYRIGHT MANAGEMENT MURK: *MURPHY V. MILLENNIUM RADIO GROUP* AND THE ENCROACHMENT OF THE DIGITAL MILLENNIUM COPYRIGHT ACT INTO THE ANALOG REALM

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I. INTRODUCTION

Congress enacted the Digital Millennium Copyright Act (“DMCA”)¹ in 1998 to provide effective legal protection for technological safeguards against digital piracy.² Section 1201 of the Act prohibits the circumvention of “technological measure[s] that effectively control access to a work,”³ while the lesser-known § 1202 protects the “integrity of copyright management information.”⁴ Recently, in *Murphy v. Millennium Radio Group*, the Third Circuit held that a credit in a print magazine qualified as protected copyright management information (“CMI”) under § 1202.⁵ In the wake of this holding, there was a perceived dissonance that the DMCA could apply to analog works and safeguards.⁶

CMI is usually understood as any piece of information that either helps identify the work or the right holder, or manages rights.⁷ Nonetheless, courts have expressed differing opinions as to the scope of CMI protected by § 1202.⁸ The plain language of § 1202 appears to protect all CMI regardless of form, and most courts have, at least in dicta, interpreted the § 1202 definition of CMI broadly to incorporate analog forms of copyright within its scope.⁹ However,

1. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 102, 112 Stat. 2860 (2006) (codified as amended in scattered sections of 17 and 28 U.S.C.).

2. *See* *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 300 (3d Cir. 2011).

3. 17 U.S.C. § 1201(a)(1)(A) (2006).

4. 17 U.S.C. § 1202.

5. *Murphy*, 650 F.3d at 305.

6. *See, e.g.*, Tom Casagrande, *3d Circuit: Removal of Non-Digital Author Info Violates DIGITAL Millennium Copyright Act*, LIKELY TO BE CONFUSED -- THE SOFTER SIDE OF IP LAW (June 15, 2011, 2:41 PM), <http://secondarymeaning.blogspot.com/2011/06/3d-circuit-removal-of-non-digital.html>.

7. Séverine Dusollier, *Some Reflections on Copyright Management Information and Moral Rights*, 25 COLUM. J.L. & ARTS 377, 379 (2003).

8. Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 71 (2007).

9. *Id.* at 71-72.

several district courts have narrowly interpreted the statute to hinge protection on CMI's function and the circumstances of its removal. For example, in *IQ Group, Ltd. v. Wiesner Publishing, LLC* the New Jersey District Court emphasized the digital focus of the DMCA's legislative history and statutory structure in concluding that § 1202 only protects CMI that functions as part of "technological measures of automated systems," which are afforded protection under § 1201.¹⁰ The Central District of California also looked to legislative intent in *Textile Secrets International, Inc. v. Ya-Ya Brand Inc.*, concluding that § 1202 does not "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."¹¹ *Murphy* marks the first time an appellate court has grappled with whether § 1202(c)'s definition of CMI is restricted to the digital contexts described in *IQ Group* and *Textile Secrets*.¹²

Part II of this case note provides a brief overview of the legislative background and content of § 1202. Part III summarizes the Third Circuit's decision in *Murphy v. Millennium Radio Group*. Part IV considers the Third Circuit's broad interpretation of § 1202 within the context of legislative history, and posits that a narrower interpretation akin to *Textile Secrets* is more proper. Finally, Part V considers the practical impact of *Murphy* on litigation and suggests that the Third Circuit's decision opens the door for legal intimidation and heightened settlements in cases of completely analog acts of infringement.

II. LEGISLATIVE BACKGROUND AND CONTENT OF 17 U.S.C. § 1202

A. The Information Infrastructure Task Force White Paper

10. *IQ Grp., Ltd. v. Wiesner Publ'g, LLC*, 409 F. Supp. 2d 587, 597 (D.N.J. 2006).

11. *Textile Secrets Int'l, Inc. v. Ya-Ya Brand Inc.*, 524 F. Supp. 2d 1184, 1201 (C.D. Cal. 2007).

12. *See Murphy*, 650 F.3d at 302.

The statutory language of § 1202 has its origins in a 1995 white paper prepared by the Working Group on Intellectual Property Rights.¹³ This working group formed as a subcommittee of the Information Infrastructure Task Force (“IITF”), which the Clinton Administration commissioned in 1993 “to develop comprehensive telecommunications and information policies and programs that will promote the development of the [National Information Infrastructure] and best meet the country’s needs.”¹⁴ The stated aim of the white paper was “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.”¹⁵

Section 1202, both as enacted and as proposed in the white paper, prohibits the falsification, alteration, or removal of any CMI.¹⁶ The white paper’s proposed statutory text defines CMI, in part, as “the name and other identifying information of the author of a work.”¹⁷ The white paper itself explicitly notes that the above definition is not limited to such information that is included in or digitally linked to a copyrighted work; all such information, regardless of form, would be protected.¹⁸

The white paper’s proposed statutory definition of “copyright management information” focuses on the objective forms and types of information that qualify as CMI, but is silent on CMI’s function; in other words, it defines what CMI is, but not what it does.¹⁹ Fortunately, the white paper itself provides some guidance on this question.

13. *See IQ Group*, 409 F. Supp. 2d at 594.

14. INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 1 (1995) [hereinafter WHITE PAPER], available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>.

15. *Id.* at 2.

16. Compare WHITE PAPER, *supra* note 14, at 236, with 17 U.S.C. § 1202.

17. WHITE PAPER, *supra* note 14, app. 1 at 7.

18. *Id.* at 236.

19. *See id.* app. 1 at 7.

The white paper conceptualizes CMI as information that facilitates licensing or regulated use of protected works.²⁰ The white paper first discusses CMI as an evolved form of notice.²¹ Prior to the United States' 1989 accession to the Berne convention, notice of copyright was required on all distributed copies of a work; failure to affix notice could result in a loss of copyright protection for the work.²² Following the Berne Convention, however, notice became permissive rather than required.²³ The white paper notes that the Copyright Act's lack of notice and registration requirements may make it hard to differentiate between protected and unprotected works, and may also make it more difficult for potential licensees to identify the copyright owner, especially on the Internet.²⁴ Rather than reinstate a notice requirement to allay these difficulties, the white paper argued that "the benefits of utilizing [CMI] should encourage copyright owners to include or affix information historically included in copyright notices."²⁵

Rights owners would primarily yield these benefits by the implementation of CMI in so-called "rights management systems,"²⁶ wherein CMI would serve to "inform the user about the authorship and ownership of a work . . . [and] indicate authorized uses of the work."²⁷ The white paper goes on to describe CMI playing both active and passive roles in such systems. In

20. *See id.* at 235 ("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 [National Information Infrastructure]. Reliable information will also facilitate efficient licensing and reduce transaction costs for licensable uses of copyrighted works . . ."); *see also id.* at 53 ("The inclusion of copyright management information in copies of works will also facilitate licensing.")

21. *See id.* at 63.

22. *Id.* at 60.

23. WHITE PAPER, *supra* note 14, at 60.

24. *Id.* at 62.

25. *Id.* at 63.

26. *See id.* at 191 ("Systems for managing rights in works are being contemplated in the development of the [National Information Infrastructure]. These systems will serve the functions of tracking and monitoring uses of copyrighted works as well as licensing of rights and indicating attribution, creation and ownership interests. A combination of file- and system-based access controls using encryption technologies, digital signatures and steganography are, and will continue to be, employed by owners of works to address copyright management concerns.")

27. *Id.* at 191.

the active role, a computer processes the CMI to license or control access to the associated work.²⁸ In the passive role, the rights management system merely conveys the electronically packaged CMI to the user.²⁹ Regardless, the user does not need to seek out the usage and licensing information, and at some point the information is processed by a system. For this reason, courts have classified the passage's described rights management systems as automated.³⁰

B. The World Intellectual Property Organization Treaties

While the IITF white paper circulated amongst legislators, the United States signed on to two World Intellectual Property Organization (“WIPO”) treaties in December 1996 pertaining, respectively, to Copyright³¹ and Performances and Phonograms.³² The two WIPO treaties do not refer to “copyright management information,” but instead offer substantively identical provisions for the protection of the similarly defined “rights management information” (“RMI”).³³ The differences between the definitions are slight; the more significant break between the treaties and the proposed white paper legislation comes not in their respective definitions of CMI and RMI, but in the scope of protection afforded such information. The WIPO treaties only require contracting parties to provide adequate and effective legal remedies

28. The white paper anticipates the development of electronic licensing systems. *Id.* For a contemporary overview of these electronic licensing systems, see Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L.J. 161, 162-63 (1997). CMI may also play an active role in digital watermarking and encryption systems. See Dusollier, *supra* note 7, at 380-82.

29. For instance, the white paper describes the packaging of CMI in an “electronic envelope,” which the user may open to read about the work and its rights information. WHITE PAPER, *supra* note 14, at 191.

30. See *IQ Grp.*, 409 F. Supp. 2d at 595 (interpreting the white paper passages referenced *supra* notes 27-29).

31. WIPO Copyright Treaty art. 12, Dec. 20, 1996, S. TREATY DOC. No. 105-17, at 1, 11 (1997) [hereinafter WIPO Copyright].

32. WIPO Performances and Phonograms Treaty art. 19, Dec. 20, 1996, S. TREATY DOC. No. 105-17, at 18, 36 (1997) [hereinafter WIPO PPT].

33. WIPO Copyright, *supra* note 31, at 11; WIPO PPT, *supra* note 32, at 37. The complete treaty definition of “rights management information” reads, “[a]s used in this Article, ‘rights management information’ means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.” *Id.*

against the removal or alteration of *electronic* rights management information.³⁴ Thus, presuming that CMI and RMI referred to essentially the same things,³⁵ the statutory text recommended by the IITF offered far broader protection than that required by the WIPO treaties because the IITF proposal protected *all forms* of CMI—electronic and not.

C. THE DIGITAL MILLENNIUM COPYRIGHT ACT

Driven, in part, by the need to comply with the WIPO treaties,³⁶ Congress passed the Digital Millennium Copyright Act (“DMCA”) in October 1998 with the stated aim to “facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.”³⁷

Section 1202 of the DMCA is essentially a hybrid text that draws substantially from the IITF white paper proposal and the WIPO treaties. For the purposes of this note, it is imperative to observe that subsections 1202(a)³⁸ and 1202(b),³⁹ which together prohibit the falsification,

34. WIPO Copyright, *supra* note 31, at 11 (“Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention: (i) to remove or alter any *electronic* rights management information without authority; (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.”)

35. Congress certainly believed the terms synonymous. *See* SEN. ORRIN HATCH, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, S. REP. NO. 105-190, at 11 n.18 (2008) (“Rights management information is more commonly referred to in the U.S. as copyright management information.”).

36. David Nimmer, *Appreciating Legislative History The Sweet and Sour Spots of the DMCA’s Commentary*, 23 CARDOZO L. REV. 909, 915-16 (2002).

37. HATCH, *supra* note 35, at 1-2.

38. The subsection provides, in full: “(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.” 17 U.S.C. § 1202(a).

39. The subsection provides, in part:

(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,

...

alteration and removal of CMI, do not expressly limit protection to electronic CMI. Furthermore, § 1202(c)⁴⁰ expressly includes digitally formatted CMI in its statutory definition of the term, but does not limit the definition to CMI in digital form.⁴¹ Thus, like the white paper’s proposed statute, the enacted § 1202’s plain language protects a far broader scope of CMI than that required by the WIPO treaties because CMI is not expressly limited to electronically formatted information. However, it should be noted that the scope of protection afforded to CMI is nevertheless limited by the mental elements incorporated in subsections (a) and (b), which generally require intentional falsification or removal, and knowledge that such act will induce, enable, facilitate, or conceal infringement.⁴² Thus, the statute does seemingly limit the application of its broad definition.

Also of note, subsection (d) exempts law enforcement and other governmental agents from liability under the subsection.⁴³ Finally, subsection (e) creates separate liability

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 . . . , having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

Id. § 1202(b).

40. The subsection provides, in part:

(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.

. . .

(7) Identifying numbers or symbols referring to such information or links to such information.

. . .

Id. § 1202(c).

41. The Senate report makes this clear: “CMI need not be in digital form, but CMI in digital form is expressly included.” HATCH, *supra* note 35, at 16.

42. See 17 U.S.C § 1202(a)-(b).

43. *Id.* § 1202(d).

exemptions for analog and digital broadcasters.⁴⁴ This note will focus on the analog exemption. Paragraph (1) of subsection (e) provides that an analog broadcaster will not be held liable for violating provisions of subsection (b) if it is not “technically feasible” for that person to avoid the violation, or if avoiding the violation would “create an undue financial hardship.”⁴⁵ For example, a broadcaster who interrupts a broadcast of a motion picture for a news bulletin, thereby deleting part of the motion picture’s credits, would not fall within the prohibition.⁴⁶ Broadcasters may also remove or alter credits that are of an “excessive duration in relation to standard practice in the relevant industries” if broadcasting the credits in full would create undue financial hardship.⁴⁷ However, these limitations on liability only apply if the broadcaster did not intend, by engaging in such activity, to induce, enable, facilitate or conceal infringement.⁴⁸

III. SUBJECT CASE: *MURPHY V. MILLENNIUM RADIO GROUP*

Murphy marks the first time an appellate court has grappled with whether § 1202(c)’s definition of CMI applies outside the context of automated copyright protection systems,⁴⁹ and is significant because the Third Circuit rejected the narrower interpretations adopted by the lower courts in *IQ Group* and *Textile Secrets*. Under *Murphy*,

CMI . . . is *not* restricted to the context of ‘automated copyright protection or management systems.’ Rather, a cause of action under § 1202 of the DMCA potentially lies whenever the types of information listed in §§ 1202(c)(1)–(8) . . . is falsified or removed, regardless of the form in which that information is conveyed.⁵⁰

44. *Id.* § 1202(e).

45. *Id.*

46. *Hearing on H.R. 2180 and H.R. 2281 Before the H. Subcomm. on Courts and Intellectual Prop.*, 105th Cong. (1997) [hereinafter *Peters Statement*] (statement of Marybeth Peters, Register of Copyrights), available at <http://judiciary.house.gov/legacy/4012.htm>.

47. HATCH, *supra* note 35, at 37.

48. 17 U.S.C. § 1202(e)(1)(b).

49. *See Murphy*, 650 F.3d 295 at 302.

50. *Id.* at 305.

A. Facts and Procedural History

Plaintiff Peter Murphy (“Murphy”), a professional photographer, was hired by the print magazine *New Jersey Monthly* (“*NJM*”) to photograph shock jocks Craig Carton and Ray Rossi for an article.⁵¹ Murphy retained the copyright to the photograph (“the Image”), and received a gutter credit⁵² in the magazine identifying him as the Image’s author.⁵³

At the time, Carton and Rossi were the hosts of a show on the New Jersey radio station WKXW, which is owned by the defendant Millennium Radio Group (“MRG”).⁵⁴ Following publication of the photograph in *NJM*, an unknown employee of WKXW scanned and, without Murphy’s consent, posted an electronic copy of the Image to the station’s website and to myspace.com.⁵⁵ The posted copies cropped off the gutter credit that identified Murphy as the photographer.⁵⁶

Spurred by these unauthorized postings and some negative on-air remarks about him by Carton and Rossi, Murphy brought causes of action against MRG, Carton, and Rossi (“the Station Defendants”) for violations of § 1202 of the DMCA, copyright infringement, and defamation.⁵⁷ This note will focus on Murphy’s § 1202 claim.

The District Court granted MRG’s motion for summary judgment on all claims,⁵⁸ holding that application of DMCA to a print magazine credit would disregard the digitally-focused statutory intent of the Act.⁵⁹ Murphy appealed.⁶⁰

51. *Id.* at 298.

52. A gutter credit is a credit placed in the inner margin, or “gutter,” of a magazine page, that runs perpendicular to the relevant image. *Id.* at 299.

53. *Id.*

54. *Id.* at 298.

55. *Murphy*, 650 F.3d at 299.

56. *Id.*

57. *Id.* at 299.

58. *Id.* at 299-300.

59. *Murphy v. Millennium Radio Grp. LLC*, No. 08-1743, 2010 WL 1372408, at *4 (D.N.J. Mar. 31, 2010).

60. *Murphy*, 650 F.3d at 300.

B. Third Circuit's Discussion

DMCA subsection 1202(c)(2) lists “[t]he name of, and other identifying information about, the author of a work” in the definition of CMI so long as such information is “conveyed in connection with copies . . . of a work.”⁶¹ Murphy argued that, by the plain language of this provision, the *NJM* gutter credit qualified as CMI because it identified Murphy as the photographer—i.e. author—of the Image, and the credit was conveyed in connection with copies of the Image.⁶² The Station Defendants countered that § 1202 cannot be read in isolation, but must be interpreted in the context of the DMCA as a whole, with particular emphasis on § 1201, and in light of the statute’s legislative history.⁶³ Interpreted in this light, the Station Defendants argued that the DMCA only protects CMI that functions as part of an automated system for protecting and managing copyrights.⁶⁴ The court ran through the following exercises in statutory interpretation, and addressed certain policy concerns in dicta.

1. The Plain Language of § 1202(c) is Unambiguous.

The Third Circuit found the language of § 1202(c) unambiguous when read in isolation: the text imposes no requirement that the enumerated information must function as part of an automated system to qualify as CMI.⁶⁵ Indeed, the Third Circuit found the language to be extremely broad, with no restrictions on the context in which information must be used in order to qualify as CMI.⁶⁶

2. The Plain Meaning of § 1202(c) is Still Unambiguous When Viewed in the Context of the DMCA as a Whole.

61. 17 U.S.C § 1202.

62. *Murphy*, 650 F.3d at 301.

63. *Id.*

64. *Id.*

65. *Id.* at 302.

66. *Id.*

Unlike the courts in *IQ Group* and *Textile Secrets*, the Third Circuit did not find the § 1202(c) definition of CMI ambiguous when considered in the context of the DMCA as a whole.⁶⁷ Defendants argued that because § 1202 falls under a chapter titled “Copyright Protection and Management Systems,” CMI must necessarily refer to information that operates within such a system.⁶⁸ Defendants further argued that § 1202 was drafted to work in tandem with § 1201, which guards “technological measure[s] that effectively control access to a work . . . [or] protect[] a right of copyright owner,”⁶⁹ and that when interpreted in this context, it is obvious that § 1202(c)’s definition of CMI is limited to information that functions as part of an automated copyright management system.⁷⁰ Defendants relied upon the District Court’s opinion in *IQ Group* to articulate this argument:

[Sections 1201 and 1201] are sections within a common chapter (*chapter 12, “Copyright Protection and Management Systems”*) and the two provisions covered by the remedies and penalty provisions of §§ 1203 and 1204. 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 systems is protected in § 1202.*⁷¹

Defendants, thus, argued that the DMCA’s structure shows that § 1202 must apply only to *technological* systems for the protection and management of copyrights; in other words,

67. *See id.* at 303.

68. Defendants’ Brief in Opposition to Plaintiff’s Appeal at 10, *Murphy*, 650 F.3d 295 (No. 10-2163), 2010 WL 4160869 [hereinafter Def. Brief]. Defendants argued,

[t]he words ‘Management Systems have to be taken seriously – *both* of them. The title, and the word ‘systems,’ apply to both §1201 (sic) and 1202, *not* just to 1201 as Plaintiff would have it. Section 1201 focuses on *systems* that offer *protection* to copyrighted material (e.g. encoding and encryption systems), while § 1202 focuses on *systems* used in the *management* of this copyrighted material – systems that employ Copyright Management Information to protect and facilitate electronic transactions in copyrighted material.

69. 17 U.S.C. § 1201(a)-(b).

70. *Murphy*, 650 F.3d at 303.

71. Def. Brief, *supra* note 68, at 11 (quoting *IQ Grp., Ltd. v. Wiesner Publ’g, LLC*, 409 F. Supp. 2d 587, 597 (D.N.J. 2006)) (emphasis in original).

contrary to the apparent plain language of the section, CMI is not meant to apply to every piece of “information” related to every possible work in any circumstance.⁷²

The court rejected this argument, as it found nothing in the language of §§ 1201 or 1202 showing that the two sections were designed to have interrelated interpretations.⁷³ The court explained, “[s]ection 1201 does not mention ‘copyright management information’; in fact, it does not refer to § 1202 at all. . . . Similarly, § 1202 does not refer to § 1201, and the definition of CMI is located squarely in § 1202.”⁷⁴ The court found that §§ 1201 and 1202 establish independent causes of action that arise from different conduct on the part of the defendants, albeit with similar remedies.⁷⁵

3. The Legislative History of the DMCA Provides No Extraordinary Showing of Intentions Contrary to the Plain Language Reading of § 1202.

Finding the language of § 1202(c) unambiguous both in isolation and in statutory context, the Third Circuit next looked to the legislative history of the DMCA in search of an “extraordinary showing of contrary intentions” that would justify a rejection of its plain reading of the statutory language.⁷⁶ The court found no such showing.⁷⁷

The Station Defendants primarily relied on the legislative review performed by the district courts in *IQ Group* and *Textile Secrets*.⁷⁸ In *IQ Group*, the district court placed emphasis on the IITF white paper, which it found to be a clear indication of legislative intent contrary to the statute’s plain language. Here, the Third Circuit quoted the following excerpt from the white paper:

72. *Id.* at 12.

73. *Murphy*, 650 F.3d at 303.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 305.

78. *Id.* at 303.

[a] combination of file- and system-based access controls using encryption technologies, digital signatures and steganography are . . . employed by owners of works to address copyright management concerns. . . . To implement these rights management functions, information will likely be included in digital versions of a work (i.e., *copyright management information*) to inform the user about the authorship and ownership of a work⁷⁹

The *IQ* court concluded that the use of “copyright management information” in the quoted context indicated a congressional intent to limit the scope of CMI to such that functions as part of “rights management systems.”⁸⁰ Finally, the *IQ* court deduced that, “[s]uch systems are conceived of as electronic and automated within the environment of a computer network.”⁸¹ This final deduction, also advanced here by the Station Defendants, fell short in the Third Circuit’s view: “[the white paper] description leaves the question of just how [CMI] will be included—that is whether it *must* be used in some form of an ‘automated copyright protection or management system’ or whether it can be conveyed by other means—entirely open.”⁸²

The court then reviewed the WIPO treaties. Recall that these treaties only required signatories to provide remedies against the removal or alteration of any *electronic* rights management information (“ERMI”).⁸³ Defendants asserted that because the DMCA was passed to implement the WIPO treaties, and nothing in the legislative record explicitly indicated intent to assign broader meaning to CMI than ERMI, the two terms must be synonymous.⁸⁴

The Third Circuit conceded “some force” to this argument, but nonetheless concluded that the submitted legislative history did not provide the “extraordinary showing of contrary intentions” necessary to disregard the plain language of § 1202(c).⁸⁵ At best, the court found the legislative history *consistent* with the Defendants’ interpretation of § 1202, but found

79. *Murphy*, 650 F.3d at 304 (emphasis in original) (citations omitted).

80. *IQ Grp.*, 409 F. Supp. 2d at 595.

81. *Id.*

82. *Murphy*, 650 F.3d at 304 (emphasis in original).

83. See WIPO Copyright, *supra* note 31, at 11.

84. *Murphy*, 650 F.3d 295 at 304.

85. *Id.* at 304-05.

nothing that explicitly contradicted the plain meaning interpretation advocated by Murphy.⁸⁶ Furthermore, the court stated that Congress was certainly free, in implementing the WIPO treaties, to define CMI more broadly than ERMI.⁸⁷

4. Policy Concerns

The court addressed certain policy concerns in dicta and footnotes. The court acknowledged that its plain language reading of § 1202 is extremely broad, and places no restriction on the context in which information must be used in order to qualify as CMI.⁸⁸ The court conceded that “such an interpretation might well provide an additional cause of action under the DMCA in many circumstances in which only an action for copyright infringement could have been brought previously.”⁸⁹ Nevertheless, the court did not find this “absurd.”⁹⁰ Indeed, the court wrote, “it is undisputed that the DMCA was intended to expand . . . the rights of copyright owners.”⁹¹ Thus, in the court’s view, the creation of an additional cause of action was entirely consistent with the purpose of the statute.⁹² “If there is a difficulty here,” the court wrote, “it is a problem of policy, not of logic.”⁹³

As illustrative of this “problem of policy,” the Station Defendants argued that the plain language reading of § 1202 allows the DMCA to “swallow up” the Copyright Act, effectively rendering the latter redundant.⁹⁴ The court countered that an infringer who “merely copies” an entire work, without removing CMI, will face liability under the Copyright Act, but escape

86. The court noted that although the WIPO treaties’ definition of “electronic rights management information” is situated in the context of a broader discussion of rights management systems, the definition does not explicitly require that such information be used in connection with such systems to qualify as ERMI. *Id.* at 304-05.

87. *Id.* at 305.

88. *Id.* at 302.

89. *Id.*

90. *Murphy*, 650 F.3d at 302.

91. *Id.* at 303.

92. *See id.*

93. *Id.* at 302.

94. *Id.* n.8.

prosecution under § 1202.⁹⁵ The court used the example of a pirated DVD.⁹⁶ So long as the infringer does not edit out the credits, he will not have violated § 1202 because he presumably will not have removed any CMI.⁹⁷

The Station Defendants further asserted that the broad interpretation would effectively curtail fair use, since most fair uses will involve the removal of CMI.⁹⁸ Here, the Court invoked § 1202's mental elements.⁹⁹ Because § 1202(b) only applies when a defendant knows or has reasonable grounds to know that removal will “induce, enable, facilitate or conceal” an infringement, and those intending to make a legitimate fair use lack this mindset, the court concluded that fair use was not threatened by its holding.¹⁰⁰

5. The Third Circuit Held that Print Credits May Qualify as CMI.

The Third Circuit vacated the district court's grant of summary judgment in favor of the Defendants on all counts.¹⁰¹ The court found that CMI, as defined in § 1202(c), is not restricted to the context of “automated copyright protection or management systems.”¹⁰² Rather, a cause of action under § 1202 of the DMCA potentially lies whenever the types of information listed in § 1202(c)(1)-(8) and “conveyed in connection with copies . . . of a work . . . including in digital form” is falsified or removed, regardless of the form in which that information is conveyed.¹⁰³ Thus, the court held that the fact that Murphy's name appeared in a printed gutter credit near the

95. *Id.*

96. *Murphy*, 650 F.3d at 302 n.8.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* n.8.

101. *Id.* at 310.

102. *Murphy*, 650 F.3d at 305.

103. *Id.* at 301.

Image rather than as data in an “automated copyright protection or management system” did not prevent it from qualifying as CMI or remove it from the protection of § 1202.¹⁰⁴

IV. ANALYSIS

At first glance, the *Murphy* decision appears disharmonious with intuitive understanding of the DMCA, namely that the *Digital Millennium Copyright Act* could not possibly extend to protect an *analog* print credit. Nonetheless, the plain language of § 1202 is indisputably broad, and the statute’s murky legislative history sheds far less guidance on the issue than the Station Defendants would lead one to believe.¹⁰⁵ While it is likely that Congress did intend to extend § 1202 protection to print credits in certain hypothetical circumstances where a credit serves a given function, the record only offers vague and often contradictory guidance as to what those protected functions would be. It is therefore difficult to demonstrate an “extraordinary showing” of congressional intent necessary to limit § 1202’s applicability to the context of § 1201 functionality. Given this burden, the Third Circuit was justified to reject the narrow interpretation of § 1202 advanced by the Station Defendants. However, the Third Circuit’s holding that a § 1202 cause of action arises upon *any* falsification, alteration or removal of enumerated CMI is demonstrably at odds with the policy aims of the DMCA as a whole. Instead, an objective standard requiring some factual nexus between the defendant’s act and an unauthorized digital distribution is appropriate for a claim to survive summary judgment. This nexus was present in *Murphy*, and because a trier of fact must determine whether the Station Defendants’ possessed the requisite mental states, *Murphy*’s claim cannot be decided as a matter of law. Thus, in spite of its overbroad holding, the Third Circuit was nevertheless correct to vacate the district court’s grant of summary judgment.

104. *Id.*

105. Other legal scholars have noted as much. *See, e.g.,* Lastowka, *supra* note 8, at 71 (“Looking at the legislative history simply clouds the issue.”).

A. Mere Analog Formatting of a Print Credit Does not Preclude a § 1202 Claim.

The plain language of § 1202(c) does not make the form of CMI determinative. Rather, the statute uses the non-exclusive phrase “including in digital form” as the only formatting requisite in its definition of CMI.¹⁰⁶ In spite of this non-exclusive language, the Third Circuit conceded some weight to the Station Defendants’ argument that “*electronic* rights management information,” as used by the WIPO treaties, and “copyright management information,” as used by Congress, were intended to be coterminous in scope.¹⁰⁷ In their brief, the Station Defendants argued,

If Plaintiff wants to speculate that Congress might have intended CMI to be broader than ERMI, he can do so, but then he must acknowledge the need for this Court to consult *legislative history* of the DMCA. There is no evidence in the legislative history of any such intent.¹⁰⁸

Unfortunately for the Defendants, such evidence *does* exist in the record. In testimony before the House Judiciary Committee, the Register of Copyrights specifically addressed and applauded the expanded scope of CMI compared to ERMI:

We believe that the proposed section 1202 in this bill adequately and appropriately implements the treaty obligation *It goes beyond the bare minimum obligation 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.*¹⁰⁹

Congress was thus made aware that its statutory language exceeded the treaty obligation, and was advised by the Copyright Office that the expanded scope was “useful and appropriate.” Therefore, the Defendants’ argument that Congress intended to limit the scope of CMI to *electronic* rights management information is not sustainable.

106. 17 U.S.C. § 1202(c).

107. See *supra* note 84 and accompanying text.

108. Def. Brief, *supra* note 68, at 16 (emphasis in original).

109. *Peters Statement*, *supra* note 46 (emphasis added).

Moreover, the exemptions granted by § 1202(e) indicate that Congress appreciated the scope of its broad definition in § 1202(c). Recall that § 1202(e) creates an exemption for analog broadcasters who remove CMI in instances where avoiding the removal is “not technically feasible or would create an undue financial hardship.”¹¹⁰ For example, a broadcaster that interrupts film credits with an emergency news bulletin would not be liable.¹¹¹ The scenario implies, however, that analog film credits could function as CMI under, at minimum, some circumstances, and it follows that if analog film credits may function as CMI, analog print credits likely qualify as CMI under the same circumstances.

In sum, Congress did not establish a formatting threshold for CMI.

B. The Legislative Record Offers Only Vague and Contradictory Guidance on the Functional Threshold of CMI.

The issue becomes far murkier when attempting to determine the circumstances under which an analog credit may qualify as CMI. Since the statute does not limit CMI’s form, such a determination must be made based on a functional or other circumstantial threshold. Realizing this, the Station Defendants advanced an argument that CMI is only protected when it functions as part of an automated copyright protection system or “technological measure” afforded protection in § 1201.¹¹² As the Third Circuit correctly noted, however, the plain language of the statute imposes no such functional requirement.¹¹³ In fact the only verb appearing in the statutory definition of CMI that describes the information’s function is “[to] identif[y].”¹¹⁴

110. 17 U.S.C. § 1202(e)(1)(A).

111. *Peters Statement*, *supra* note 46.

112. *Murphy*, 650 F.3d at 302.

113. *Id.*

114. *See* 17 U.S.C. § 1202(c).

Moreover, the statute itself offers no guidance as to who or what is on the receiving end of the identifying information, or what the receiver is to do with that information.¹¹⁵

Looking to the legislative record offers little further definitive assistance. For one, the record is sparse.¹¹⁶ Moreover, the little discussion that does exist is vague. The Senate Report introduces the CMI provisions with an ambiguous assertion of CMI's function: "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."¹¹⁷ Based on this statement, one might interpret "assist[ing] in tracking and monitoring uses of copyrighted works" as the threshold function qualifying CMI. Under this interpretation, the more expansive licensing and identifying functions following the initial clause are exemplary secondary features which are diminished in importance by the use of "as well as." Since it is hard to imagine CMI "tracking and monitoring uses" outside the context of an automated or digital system, this interpretation lends credence to the Station Defendants' position. An alternate interpretation, however, might posit that none of the listed functions are a threshold, but rather that all are potential functions of CMI. Under this interpretation, any information enumerated in § 1202(c) would qualify as CMI if it assisted in the "licensing of rights and indicated attribution, creation and ownership." This more expansive interpretation is bolstered elsewhere in the Report, where the Senate broadly notes, "[t]he purpose of CMI is to facilitate licensing of copyright for use on the Internet and to

115. *See id.*

116. The Senate Judiciary Report recommending passage of the DMCA offers five pages of policy discussion of § 1201's anticircumvention measures, but only four paragraphs, amounting to less than a page, on § 1202's CMI provisions. *See HATCH, supra* note 35, at 11-17. Specific policy discussing in the House Reports is no more becoming, offering only a few scattered sentences.

117. *Id.* at 16.

discourage piracy.”¹¹⁸ Here, “tracking and monitoring” is not even listed as a purpose,¹¹⁹ and so it is difficult to conclude that the Senate definitively considered “tracking and monitoring” a threshold function. More importantly, all of the information enumerated in § 1202 arguably facilitates Internet licensing and discourages piracy regardless of whether it functions in an automated system.¹²⁰

The House Report is, if anything, more opaque. It states, “[s]ection 1202’ . . . is required . . . to ensure the integrity of the electronic marketplace by preventing fraud and misinformation. . . . This section will operate to protect consumers from misinformation as well as authors and copyright owners from interference with the private licensing process.”¹²¹ Again, the record leaves open just how CMI accomplishes “preventing fraud and misinformation.” Since a false print credit is just as deceptive as false data, “protection from fraud and misinformation” could be equally necessary outside of automated rights management systems as in. The latter clause, in which CMI protects “authors and copyright owners from interference with the private licensing process,”¹²² presumably refers to CMI’s ability to function within a technological system that “effectively controls access to a work” or “effectively protects a right of a copyright owner,” but, again, the House’s description does not expressly limit CMI’s function to those abilities.

118. HATCH, *supra* note 35, at 11 n.18.

119. *See id.*

120. The print credit in *Murphy*, for example, could have pointed potential licensees to contact *Murphy* to discuss an internet licensing agreement. Though not automated, human-to-human licensing negotiations are a method of copyright management. The credit may also have served as an admittedly weak deterrent to digital piracy. Had Internet users seen the credit, they would have been put on notice that further copying and distribution would require permission of the copyright owner. With this notice, some users, who may otherwise act differently, would not copy or redistribute the Image, or may have to seek permission before doing so.

121. HOWARD COBLE, WIPO COPYRIGHT TREATIES IMPLEMENTATION AND ONLINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION, H. REP. NO. 105-551, pt. 1, at 10-11 (1998).

122. *Id.*

The most luminous source of legislative intent remains the IITF white paper, but it offers inconsistent guidance as well. *IQ Group* primarily relied on a white paper passage that explicitly refers to CMI’s role in rights management systems to conclude that CMI is limited to components of technological measures that protect copyright, and that § 1202 does not cover copyright management performed by people.¹²³ This conclusion, however, ignores later passages in the white paper that describe CMI functioning in human-performed copyright management systems.¹²⁴ Unlike later versions of § 1202—including the version enacted by Congress—the white paper’s proposed statutory definition of CMI imposed no requirement that the information be conveyed in connection with copies or phonograms of a work.¹²⁵ The white paper explains its proposal’s lack of such a requirement, reasoning “[m]any users will obtain such information from public registers, where the integrity of such information will be no less important.”¹²⁶

The white paper makes clear that its proposed legislation protected such information regardless of whether it is included in or digitally linked to a copyrighted work, and that the integrity of information filed in such registers will be “no less important” than information that is included or digitally linked.¹²⁷ If users would have to seek out the information stored in these registers because it wasn’t linked to the work, however, the protected method of copyright management could not be considered “automated.” Rather, it would be a type of “copyright management performed by people” that the *IQ* court mistakenly asserted the white paper did not intend to protect. While Congress later nullified the described passage of the white paper by

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

124. See WHITE PAPER, *supra* note 14, at 236.

125. *Id.* at 236 (“[t]he 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.”); compare *id.* app. 1 at 7, with 17 U.S.C § 1202(c).

126. WHITE PAPER, *supra* note 14, at 236.

127. *Id.*

requiring that CMI be conveyed in connection with a copy of a work, the passage nonetheless shows that the earliest conceptions of CMI were broader in scope than the *IQ* court believed, and cannot be used to conclusively clarify the vagaries of the later congressional record.

It is quite plausible, and perhaps even likely, that some legislators believed that CMI's role was limited to § 1201 technological measures. First, as the *IQ* court succinctly put it, this interpretation just “makes sense”¹²⁸ and imbues an internal coherence to the DMCA that the Act otherwise lacks. Looking at the DMCA as a whole, §§ 1201 and 1202 are situated in a common chapter titled “Copyright Protection and Management Systems.” If a congressman were only to glance at the chapter and section titles without carefully reading the sections’ texts—which contain no references to one another—it would be natural to deduce that § 1201 (titled “Circumvention of Copyright Protection Systems”) protects the systems themselves while § 1202 protects the information used in the functioning of the systems.¹²⁹

Second, the record most often plants its policy arguments for the DMCA within a technological framework. For example, the Copyright Office has repeatedly described §§ 1201 and 1202 as “technological adjuncts” to the Copyright Act.¹³⁰ Moreover, part II of the House Judiciary Report, under a section titled “Background and Need for Legislation,” enumerates six specific aims of the DMCA: Promoting Electronic Commerce, Understanding the Nexus Between Electronic Commerce and Intellectual Property, Prohibiting Certain Devices, Protecting Fair use in the Digital Environment, Promoting Encryption Research, and Protecting

128. *IQ Grp.*, 409 F. Supp. 2d at 597.

129. David Nimmer has written extensively about the legislature’s apparent misunderstanding of the DMCA, going so far as to write, “[i]f one draws at random any particular floor commentary concerning the copyright amendments passed in October 1998, the odds are high that it completely misstates the law as it actually appears on the books today.” Nimmer, *supra* note 36, at 933.

130. See *Peters Statement*, *supra* note 46; see also THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 3 (1998), available at www.copyright.gov/legislation/dmca.pdf.

Personal Privacy in the Digital Environment.¹³¹ These aims, all technological, are, at best, only indirectly served by the protection of information that is not, at some point, processed by an automated system.

Finally, § 1202's nonexclusive language pertaining to form can be explained by the legislature's desire to avoid placing inadvertent restrictions on the development of CMI.¹³² Furthermore, imposing a requirement that CMI function as part of an automated system would likely have created compliance issues with the WIPO treaties, which contain no such functional requirement.¹³³

Nonetheless, the Station Defendants had the burden of demonstrating an “*extraordinary showing* of contrary legislative intent,”¹³⁴ and given the vagaries and inconsistencies of the record, as well as the number of inferences necessary to support an argument that Congress so intended to limit § 1202 to the § 1201 context of automated systems, it is difficult to fault the Third Circuit for concluding that this high burden had not been met. If Congress did, in fact, intend to narrow § 1202 with a functional threshold as argued, the Third Circuit's over-inclusive interpretation of the statute serves as a cautionary tale of the perils of preemptively regulating little-understood emerging technologies whose development is ongoing and rapid.

C. The Third Circuit Adopted a Standard That is Too Broad.

131. THOMAS BLILEY, DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, H. REP. NO. 105-551, pt. 2, at 21-28 (1998).

132. This explanation is supported by the record. See *Hearing on H.R. 2180 and H.R. 2281 Before the H. Subcomm. on Courts and Intellectual Prop.*, 105th Cong. (1997) (statement of Robert Holleyman, President, Business Software Alliance) (“Finally, with respect to both copyright protection systems and copyright management systems, we support the bill's approach in that it does not establish standard technologies and formats which these measures must take. Technology in these areas is developing rapidly. To establish a specific standard or format at this time would fossilize existing systems, and cause us to lose the benefit of future innovation. Thus we fully support the approach which would leave the marketplace to develop the particular systems used.”), available at <http://judiciary.house.gov/legacy/464.htm>. Although the author is not aware of a copyright management system that reads and processes analog credits, it is not difficult to imagine the development of such a system. For instance, a smartphone application might use the phone's camera to take a picture of a credit, process the image to extract the text, and run that text as a search query in a licensing database.

133. See WIPO Copyright, *supra* note 31, at 11; see also WIPO PPT, *supra* note 32, at 18-42.

134. *Murphy*, 650 F.3d at 302 (emphasis added).

Whatever CMI's form or function, the Third Circuit's holding that "a cause of action under § 1202 of the DMCA potentially lies *whenever* the types of information listed in § 1202(c)(1)-(8) and 'conveyed in connection with copies . . . of a work . . . including in digital form' is falsified or removed, regardless of the form in which that information is conveyed" goes too far.¹³⁵ The IITF white paper, the WIPO treaties, and the DMCA were all undoubtedly prompted by the problems digital networks posed to copyright owners. Namely 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."¹³⁶ The Third Circuit's interpretation would make the statute applicable in cases that do not involve the Internet or digital networks, and, thus, fall outside even the broadest asserted legislative purpose of the statute.

Furthermore, the Third Circuit even conceded that its broad interpretation might create a "problem of policy" because it "might well provide an additional cause of action under the DMCA in many circumstances in which only an action for copyright infringement could have been brought previously."¹³⁷ Despite the white paper's purport to recommend "only those changes that are essential to adapt the law to the needs of the global information society,"¹³⁸ the Third Circuit did not find its "problem of policy" "absurd,"¹³⁹ and without further inquiry found it "undisputed that the DMCA was intended to expand . . . the rights of copyright owners."¹⁴⁰ The Third Circuit's major failing in *Murphy*, thus, was its willingness to conceptualize the

135. *Id.* at 305 (emphasis added).

136. HATCH, *supra* note 35, at 8.

137. *Murphy*, 650 F.3d at 302.

138. WHITE PAPER, *supra* note 14, at 2.

139. *Murphy*, 650 F.3d at 302.

140. *Id.* at 303.

DMCA as an arbitrary grant of expanded rights to copyright owners without properly considering the purpose of that grant.¹⁴¹

Because the DMCA was a response to the proliferation of digital infrastructure, a narrower interpretation of § 1202 based on a circumstantial threshold, akin to the court's interpretation in *Textile Secrets International, Inc. v. Ya-Ya Brand Inc.*, is more proper. This standard merely requires factual circumstances that involve some "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,"¹⁴² before § 1202 will apply.

The facts of *Textile Secrets* demonstrate the wisdom of this interpretation. The asserted CMI at issue was a notice of copyright printed on the selvage¹⁴³ of a copyrighted fabric design, and also on a removable tag affixed to the work.¹⁴⁴ This notice included the plaintiff's name.¹⁴⁵ As part of an infringement suit, the plaintiff copyright owner claimed that the defendant's removal of the selvage and tag constituted a removal of CMI in violation of § 1202.¹⁴⁶ The printed information did not include a bar code or other marker that could be electronically scanned, nor did the defendants scan or otherwise digitize the design so that it could be

141. The Third Circuit explained its neglect thusly:

As for the purpose of the statute as a whole, it is undisputed that the DMCA was intended to expand . . . the rights of copyright owners. The parties here differ only as to their conclusions regarding the *extent* to which the DMCA expanded those rights. Murphy's definition of CMI provides for a significantly broader cause of action than the Station Defendants' does. However, the Station Defendants can point to nothing in the statute as a whole which compels the adoption of their reading instead of Murphy's. In short, considering the purpose of the statute does not provide us with meaningful guidance in this case.

Id.

142. *Textile Secrets Int'l, Inc. v. Ya-ya Brand, Inc.*, 524 F. Supp. 2d 1184, 1201 (C.D. Cal. 2007).

143. The edge or border of the fabric that is intended to be cut off and discarded.

144. *Textile Secrets*, 524 F. Supp. 2d at 1192-93.

145. *Id.* at 1192.

146. *Id.* at 1193.

disseminated electronically.¹⁴⁷ In other words, the factual circumstances of the case fell completely outside the digital realm. Nonetheless, under the Third Circuit’s plain language interpretation in *Murphy*, these facts would fall within the scope of the DMCA because they involved removal of enumerated CMI.¹⁴⁸ The *Textile Secrets* court, however, rightly concluded that Congress did not intend § 1202 to apply in such circumstances.¹⁴⁹

Murphy is distinguishable from *Textile Secrets* because, unlike the defendants there, the Station Defendants digitized the work and made it available for electronic dissemination on the Internet. Applying *Textile Secrets* interpretation would, thus, have led to the same result reached by the Third Circuit, but would not have exceeded the broadest discernable policy goals of Congress.

V. IMPACT

Pending other circuits’ chance to evaluate § 1202, it is too early to appreciate the extent of *Murphy*’s adoption. With that said, even before the Third Circuit reached its decision, a growing number of district courts were adopting broad constructions of CMI.¹⁵⁰ Following *Murphy*, however, at least one district court appreciated that unrestricted plain language application of § 1202 runs contrary to legislative intent. On a motion to dismiss in *Brown v.*

147. *Id.* at n.16.

148. Section 1202(c)(3) includes “[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,” in the statutory definition of CMI. 17 U.S.C. § 1202(c)(3).

149. *Textile Secrets*, 524 F. Supp. 2d at 1201.

150. *Brown v. Stroud*, No. C 08–02348 JSW, 2011 WL 2600661, at *5 (N.D. Cal. June 30, 2011) (citing *Agence France Press v. Morel*, 769 F. Supp. 2d 295 (S.D.N.Y. 2011); *Faulkner Press, L.L.C. v. Class Notes, L.L.C.*, 756 F. Supp. 2d 1352, 1359 (N.D. Fla. 2010) (plain language did not limit definition of CMI to “notices that are placed on works through technological processes,” but finding no violation of DMCA); *Cable v. Agence France Presse*, 728 F. Supp. 2d 977, 980–81 (N.D. Ill. 2010); *Interplan Architect, Inc. v. C.L. Thomas, Inc.*, No. 4:08–cv–03181, 2009 WL 6443117, at *3–5 (S.D. Tex. Nov.13, 2009); *Fox v. Hildebrand*, No. CV 09-2085 DSF (VBKx), 2009 WL 1977996, at *3 (C.D. Cal. July 1, 2009) (declining to look to legislative history where “[t]he plain language of the DMCA provision at issue is not limited to copyright notices that are digitally placed on a work”); *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 461–62 (S.D.N.Y. 2009) (denying motion to dismiss and finding that there is “no textual support for limiting the DMCA’s application to ‘the technological processes of automated systems’ ”)).

Stroud, the court rejected the defendant’s contention that CMI need be electronic or function in an automated system, but nonetheless could not “turn a blind eye to the purposes for which the DMCA was enacted.”¹⁵¹ Accordingly, the court adopted the *Textile Secrets* standard, and gave the plaintiff leave to amend his complaint to comport.¹⁵² Other circuits would be wise to follow this course.

Several commentators, primarily evaluating the efficacy of § 1202 as a moral rights provision, have noted that the plain language reach of § 1202 is already effectively mitigated by the mental states.¹⁵³ To bring a successful claim, a plaintiff must prove that a defendant had reasonable grounds to know that his act would induce, enable, facilitate, or conceal an infringement, and that he intentionally removed or altered CMI, or distributed a work knowing that information had been removed or altered.¹⁵⁴ While this sets a high burden for the plaintiff *at trial*, these mental elements cannot effectively curb the statute’s reach at the summary judgment phase because determination of mental state is an issue of fact that each party is likely to dispute, and no case law currently exists that outlines circumstances under which a defendant would have reasonable grounds to know that his act will induce, enable, facilitate or conceal an infringement.¹⁵⁵ Assuming the plaintiff has admissible evidence of the requisite mental states,

151. *Id.*

152. *Id.* at *6.

153. *See, e.g.*, Lastowka, *supra* note 8, at 73 (“With regard to the removal of CMI, plaintiffs often fail because their claims do not involve an assertion of their economic rights. In order to prove liability under the CMI provisions in § 1202(b), a plaintiff must essentially prove that a defendant was expressly contemplating copyright infringement when removing or distributing the information without the required CMI.”); Jane Ginsburg, *Art and the Law: Suppression and Liberty – Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9, 13 (2001) (“[S]ection 1202 falls short of the WIPO treaty requirement, because section 1202 concerns only copyright management information whose removal or alteration facilitates or conceals copyright infringement.”).

154. 17 U.S.C. § 1202. In *Murphy*, for example, the plaintiff will have to prove that the station employee who scanned the Image intentionally cropped off the gutter credit, that the station knew the credit originally accompanied the Image and had been removed when it posted the Image to the Internet, and that all actors had reasonable grounds to know that their acts would induce, enable, facilitate or conceal an infringement.

155. Section 1202 claims that *have* been decided on summary judgment typically involve works that were not protected by copyright in the first place (*see, e.g.*, *Thron v. HarperCollins Publishers, Inc.*, No. 01 Civ. 5437, 2002

his claim must go forward.¹⁵⁶ While these threshold inquiries into a defendant's mental state may indeed limit the application of the DMCA, the mental elements alone are insufficient to mitigate the statute's reach in the practical context of litigation.

In effect, the Third Circuit's broad interpretation of § 1202, together with Congress' misguided reliance on mental states to curb the statute's application, creates the opportunity for legal intimidation and heightened infringement settlements. Whereas statutory infringement damages for copyright infringement may be as little as \$750,¹⁵⁷ a successful § 1202 claimant is entitled to \$2,500 and may receive as much as \$25,000 in statutory damages.¹⁵⁸ Simply tacking a § 1202 claim to an infringement complaint therefore raises a defendant's minimum damages payout by over 300%, and leverages the plaintiff's ability to negotiate higher settlements. Given today's high costs of litigation and the unlikelihood under *Murphy* that a § 1202 claim can be defeated on a motion to dismiss or at summary judgment, such exaggerated settlements are likely even in cases that fall completely outside the digital realm. This problem of policy exceeds all discernible aims of Congress, and cannot be dismissed.

VI. CONCLUSION

The Third Circuit justifiably held that *Murphy*'s § 1202 claim could not be decided as a matter of law. In doing so, however, it adopted an overbroad standard that allows for DMCA claims against purely analog forms of infringement, exceeding the bounds of legislative intent. The record does not support a formal threshold that qualifies CMI, and is far too murky to

U.S. Dist. LEXIS 13670, at *5 (S.D.N.Y. July 26, 2002)), or where plaintiffs could not show that defendants distributed works with actual knowledge that CMI had been removed (*see, e.g.,* *Gordon v. Nextel Commc'ns*, 345 F.3d 922, 923, 927 (6th Cir. 2003)).

156. While courts have been reluctant to infer mere knowledge of removal (*see supra* note 154), at least one court has held that intentional removal could reasonably be inferred from the nature of the defendant's business. *McClatchey v. Associated Press*, 3:05-cv-145, 2007 U.S. Dist. LEXIS 17768, at *16-17 (W.D. Pa. Mar. 19, 2007). When intent can be inferred, the plaintiff's evidentiary burden at summary judgment is low.

157. 17 U.S.C. § 504(c)(1).

158. 17 U.S.C. § 1203(c)(3)(B).

establish a functional threshold. Accordingly, a circumstantial threshold requiring some factual nexus between the defendant's act and a subsequent unauthorized distribution on a digital network is both consistent with the legislative intent and an appropriate threshold for a claim to survive summary judgment.

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