

IN THE SHADOW OF MT. OLYMPUS: COULD A REVISION OF 17 U.S.C. §§ 1202-1204 BRING THEM INTO DAYLIGHT?

Eric F. Harbert*

I. INTRODUCTION

In the seven years since passage of the Digital Millennium Copyright Act (DMCA),¹ voluminous material relating to section 1201 of the Act² has been written as part of a war of culture and litigation.³ That war has yielded numerous lawsuits brought under section 1201, and the section continues to be used for enforcement measures on behalf of intellectual property owners. Yet the neighboring sections of the Act⁴ have received less attention. Although section 1202 has rarely been invoked in a court proceeding,⁵ it could grow in importance in the realm of digital content distribution, where intellectual property rights are being split into smaller and smaller slivers of ownership distributed on an increasing number of incompatible platforms.⁶

This Comment looks at section 1202 of the DMCA and the remedies sections, 17 U.S.C. §§ 1203-1204,⁷ their possible interpretations,

* J.D., 2005, UCLA School of Law.

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

² 17 U.S.C.A. § 1201 (West Supp. 2004)(amended by Pub. L. No. 105-304, §103(a) (1998)).

³ See generally LAWRENCE LESSIG, *FREE CULTURE* (2004).

⁴ 17 U.S.C.A. §§ 1202-1205 (West Supp. 2004)(amended by Pub. L. No. 105-304, §103(a) (1998)).

⁵ As one court stated, “[t]here is a dearth of case law on the application of § 1202.” *Schiffer Pub., Ltd. v. Chronicle Books, LLC*, No. Civ. A. 03-4962, 2004 WL 2583817, at *13 (E.D. Pa. Nov. 12, 2004).

⁶ The author is heavily indebted to the analysis of §1202 found in DAVID NIMMER, *Puzzles, in COPYRIGHT: SACRED TEXT, TECHNOLOGY, AND THE DMCA* 329 (2003) [hereafter *Puzzles*].

⁷ This revision began as a class presentation for Professor Nimmer’s Advanced Copyright Seminar at UCLA School of Law in the spring of 2004. The original presentation was conducted in partnership with Daniel C. Hurwitz and included a revision of 17 U.S.C. § 1201. That portion of the revision is contained in a separate paper by Mr. Hurwitz, entitled “A Proposal in Hindsight: The “DMCA Amendments Needed Related to Unforeseen Legal and

their origins in World Intellectual Property Organization treaties, and prior U.S. law in this area to suggest revisions that will make them more effective, more robust, and less partial in their protection. Particular emphasis is accorded to section 1202 in an attempt to ameliorate the extraordinary complexity of liabilities the present version could create, and to clarify its intended purpose. A draft of the proposed statute is included as an appendix.

II. THE WIPO COPYRIGHT AND PHONOGRAMS TREATIES

The Digital Millennium Copyright Act was passed in order to bring U.S. Copyright Law into compliance with the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty.⁸ It is with the pertinent sections of those treaties that we must begin our analysis, as they form the blueprint for the structures we can build, modify, or demolish in our analysis.

The pertinent sections are Article 12 of the Copyright Treaty (“Article 12”)⁹ and Article 19 of the performances and phonograms Treaty (“Article 19”)¹⁰. Both sections protect against the unauthorized removal or alteration of electronic rights management information. Both also protect against unauthorized distribution, importation for distribution, and broadcast or communication to the public¹¹ with knowledge that “electronic rights management information” (“RMI”)¹² has been altered or removed without authority. Whose authority? Neither article gives an answer. What is protected? Article 12 protects works or copies of works¹³ while Article 19 protects “performances, copies of fixed performances or phonograms”¹⁴ Both treaties require that

Economic Situations” Act of 2004” (unpublished manuscript of Daniel C. Hurwitz on file with author).

⁸ WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998, Pub. L. No. 105-304, 112 Stat. 296, §§101-105 (1998).

⁹ WIPO Copyright Treaty, Dec. 20, 1996, art. 12, available at <http://www.wipo.int/documents/en/diplconf/distrib/94dc.htm> (last visited April 28, 2004) [hereafter “Article 12”].

¹⁰ WIPO Performances and Phonograms Treaty, Dec. 20, 1996, art. 19, available at <http://www.wipo.int/documents/en/diplconf/distrib/95dc.htm> (last visited April 28, 2004) [hereafter “Article 19”].

¹¹ The WIPO Performances and Phonograms Treaty, art. 19(1)(ii), also adds a “catch-all” provision: “or make available to the public.”

¹² Article 12, *supra* note 10; Article 19, *supra* note 11.

¹³ Article 12, *supra* note 10.

¹⁴ Article 19, *supra* note 11. Interestingly, each of these provisions is located in a separate subsection than the prohibition against removal or alteration of rights management information. One could interpret this to mean that the removal/alteration prohibition is universal, whereas the prohibition on distribution, importation for distribution, broadcast or communication is limited to the specific types of copyright works or performances mentioned. This

the infringer knowingly perform the act in question, and that they know the act will induce, enable, facilitate, or conceal an infringement of any right covered by the respective treaty.¹⁵ For civil remedies, an infringer of either treaty provision need only have reasonable grounds to know that the act will have those effects, which appears to be equivalent to a standard of recklessness. In both treaties, “knowingly performing” modifies the term “following acts;” therefore, the specific knowledge standard applies to “without authority” in each Article. Thus, to violate the terms of the treaty articles, a person must have specific knowledge that his action is taken without authority¹⁶ and that he has actually taken the action, and must at least have reasonable grounds to know it will enable, facilitate, induce, or conceal an infringement.

Note that both treaties limit protection to electronic rights management information. This is a significantly broader area than pre-DMCA RMI protections under United States law. The Audio Home Recording Act of 1992¹⁷ introduced the concept of “copyright and generation status information,” but this was limited to the realm of digital audio tape, a format then expected to revolutionize the distribution of music.¹⁸ Then the Digital Performance Rights in Sound Recordings Act of 1995¹⁹ provided for rights management information regarding the title of sound recordings and the name of the featured performer.²⁰ However, it did not provide for rights management information pertaining to copyright status.²¹ In contrast to these amendments to the U.S. Copyright Act²², taken collectively, the WIPO treaties are much more expansive in what kinds of rights management information they protect: all electronic RMI that identifies the work, the author of the work, the owner of any right in the work, the performer, the perform-

distinction is less important for our purposes than it might have been had these protections not been combined into one statutory section in the DMCA.

¹⁵ Article 12, *supra* note 10, extends this to infringement of any right under the Berne Convention for the Protection of Literary and Artistic Works as well.

¹⁶ As mentioned above, there is no discussion of whose authority is needed. It would seem that in order to enforce this type of provision, an “authorizer” would need to have standing under the law of the country in which he brings suit. This would suggest that authority is needed from the copyright holder for the work, or for the authorized licensee of whichever right is being exploited. Furthermore, the original author of the work might also have standing for a moral rights claim.

¹⁷ 17 U.S.C. §1001-10 (1992).

¹⁸ See 2 NIMMER ON COPYRIGHT § 8B.03[C] (discussing copyright and generations status information).

¹⁹ Pub. L. No. 104-39, 109 Stat. 336 (1995).

²⁰ See 2 NIMMER ON COPYRIGHT § 8.22[C][1][b].

²¹ DAVID NIMMER, *A Tale of Two Treaties*, in COPYRIGHT: SACRED TEXT, TECHNOLOGY, AND THE DMCA 141, 159-60 (2003).

²² 17 U.S.C. §§ 101-1332 (2005).

ance of the performer, the producer of the phonogram, the phonogram, information about the terms and conditions of use of the performance or phonogram, any numbers or codes that represent such information,²³ and the types of works to which they must be attached in order to get that protection.²⁴

The narrow scope of previous United States law may suggest a reason why little litigation has yet occurred under section 1202 — perhaps the major intellectual property fields, such as the music industry, see it as a protection for digital music in the Internet era, where a yet-to-be developed copyright management information (“CMI”) system will track all online distribution of music. There has been much discussion of a system called Secure Digital Music Initiative (“SDMI”), a form of digital CMI that would track all online distribution of music in order to compute royalties.²⁵ At the time section 1202 was passed, the arrival of such a system seemed imminent; however, no consensus has been reached for SDMI standards. Furthermore, the SDMI initiative seems to have ground to a complete halt.²⁶ Nevertheless, such a system is likely to be developed in the future, and should be kept in mind as we reconstruct section 1202.²⁷

III. ANALYSIS OF THE EXTANT SECTION 1202: SHOULD IT STAY OR SHOULD IT GO?

The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 brings the United States Copyright Act into compliance with the titular treaties. 17 U.S.C. § 1202 is the perti-

²³ See Article 12, *supra* note 10, and Article 19, *supra* note 11.

²⁴ Essentially all works.

²⁵ See SDMI Homepage, <http://www.sdmi.org>.

²⁶ The SDMI initiative was put on “hiatus” as of May 18, 2001 due to a lack of consensus for standards. All discussions for standards have been put off to “some later date.” *Id.* (last visited November 16, 2005). It would seem that four years have passed with little or no activity in this area. Perhaps newly prominent players in online distribution will provide new momentum once the competition between new delivery platforms has thinned out.

²⁷ A separate system known as International Standard Recording Code (“ISRC”), developed prior to enactment of the DMCA and still in use, incorporates information into sound recordings on CD that allows programs like iTunes to recognize the title of a track, the album title, the recording artist, and the owner of the master recording, when the CD is inserted into a computer. See E-mail from Thomas Cavanaugh, Senior Vice President, Business & Legal Affairs, Fox Music Inc., to Eric F. Harbert (March 9, 2004, 14:00:11 PST) (on file with author). ISRC can be used by the retailer to track payment for online music downloads, but it does not contain CMI for the publisher of the underlying composition. “[T]he code is sufficient for a RETAILER (e.g. iTunes) to track the licensor, but not sufficient for the licensor (i.e. the record company) to calculate all royalties from there.” E-mail from Thomas Cavanaugh to Eric F. Harbert (November 16, 2005, 14:39:34 PST) (on file with author) (emphasis in original).

ment application of Articles 12 and 19, but is remarkably longer than the treaty provisions and far more complex. In the interest of brevity, I will presume that the reader has a working knowledge of the statute.²⁸ There are several provisions that may need modification; we examine each with the WIPO treaties in mind.

A. *Overinclusive CMI Definitions*

Unlike WIPO, section 1202 does not limit its coverage to electronic CMI.²⁹ Arguably, this one change is responsible for an exponential increase in complexity. Now that the non-electronic realm is open to CMI enforcement, all kinds of activities that we have taken for granted are potentially subject to civil or criminal remedies.³⁰ Consider two examples. First, if an individual makes a backup copy of her favorite album, but on her copy writes “Fave CD Backup,” rather than its original title, she is not liable for the copy she has made.³¹ However, she has entered the territory of section 1202 (a)(1) by knowingly creating false CMI, and the only question is one of intent to induce, enable, facilitate, or conceal infringement. It is lucky for the average consumer that the drafters of section 1202 added this intent requirement, because it provides a buffer zone of safety for the casual CMI manipulator. Second, what if I decide to sell back my Business Associations casebook, and I tear out the title page, where I had written my home phone number (in the hopes that if I misplaced the book and someone else found it, they could return it to me), so that I will not get late-night phone calls from a desperate student next year? Here I have intentionally removed CMI, so my actions fall under section 1202(b), and this section does not have the same buffer zone — it only requires that I know or have reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement. It would be hard to argue that I know I am inducing an infringement. It would be somewhat easier to argue that I have reasonable grounds to know that I am facilitating infringement.³²

²⁸ A thorough analysis can be found in *Puzzles*, *supra* note 7.

²⁹ See 17 U.S.C.A. § 1202(c) (West Supp. 2004).

³⁰ See 17 U.S.C.A. §§ 1203-1204 (West Supp. 2004).

³¹ Although this action might qualify as an infringement of multiple copyrights, the Audio Home Recording Act allows consumers to make a copy of the CD, so long as it is to be used for noncommercial purposes, by prohibiting infringement actions “based on the noncommercial use by a consumer of such a [digital or analog recording] device or medium for making digital musical recordings or analog musical recordings.” 17 U.S.C.A. § 1008 (West Supp. 2004).

³² Most of the removed CMI in this example would be duplicated on the cover of the book, and thus it hardly seems possible that I knew the removal might facilitate any kind of infringement because the information is still present on the book. However, the copyright notice in a book traditionally appears only on the back of the title page, which I tore out.

Non-electronic CMI are ubiquitous: Photo captions; the name of a newspaper; a phonogram producer's credit; a director's credit on a film print. If one gives a poetry reading and identifies the author of the poem, but not the title, could one be liable? Given the potential to create liability for activities we have permitted, if not encouraged, in the past, one might wonder why Congress chose to expand protection beyond electronic CMI when the WIPO treaties did not demand it. The legislative history of the DMCA is silent with respect to the inclusion of non-electronic CMI in section 1202, but there is one point of interest to note here. The Final "Conference" Report from the House of Representatives, in describing the WIPO treaties, refers to their definitions of copyright management information, but does not mention that each treaty limits its application to electronic CMI.³³ At the same time, there are examples in the record indicating that legislators were implicitly thinking in terms of electronic CMI, with concern as to how new technologies would interact with existing forms of copyright management information, and to what extent new forms of CMI might create playability problems.³⁴ Finally, the legislative history notes the importance of CMI "in establishing an efficient *Internet* marketplace in copyrighted works . . . [s]uch information will assist in tracking and monitoring uses of copyright works, as well as licensing of rights and indicating attribution, creation and ownership."³⁵ Thus, it would seem that the limitations to electronic CMI may have slipped under the radar. If, on the other hand, the word "electronic" was intentionally dropped, no reason for the change has been articulated.

We are left at a crossroads with regard to the expansion. If we choose not to limit section 1202 to electronic CMI, we are extending the scope of protection beyond treaty compliance. This seems questionable without some kind of reason for the expansion. The reasons for protecting electronic CMI are obvious — in distribution systems monitored by computers, for example, the alteration of CMI can have profound effects, particularly with respect to the facilitation of infringement. For example, when Napster was forced to implement a filtering system to prevent the trading of copyrighted files, users began to inten-

Therefore this alteration might remove the only copyright notice in the work, and copyright notices are explicitly included in §1202's definition of CMI. See 17 U.S.C. § 1202(c)(3). In this situation a lack-of-knowledge argument might be less tenuous.

³³ H.R. CONF. REP. NO. 105-796, at 64 (1998).

³⁴ See, e.g., remarks by Rep. Bliley in the House Floor Debate, Oct. 13, 1998 (voicing concern over compatibility issues between analog CMI measures and new digital technologies).

³⁵ 3-12 NIMMER ON COPYRIGHT §12A.08(quoting S. Rep. No. 105-190, at 16 (1998))(emphasis added.)

tionally misspell the names of artists (e.g. “Matallica” or “Metallika”, rather than “Metallica”) so that the file names would not be blocked out, and millions of other users who were aware of the common misspellings or could guess them would know how to find and copy the files. This deceit, which could just as readily be performed with films, television shows, software or books in the electronic world would fall squarely under section 1202(a)(1) — indeed, it would seem to be exactly the type of behavior the statute intends to prohibit, whereas in the non-electronic world this type of CMI manipulation would not be as effective.³⁶ In addition, there is little need for concern that limiting protection to electronic CMI would be underinclusive with respect to the goals of the DMCA. The term “electronic” is sufficiently broad to cover all CMI related to the distribution of any creative works via computers, the Internet, and any other delivery system using data or electricity for transmission.³⁷

Given the general DMCA focus on making the Copyright Act effective with regard to new technologies, it hardly seems appropriate to give it new paracopyright powers over technologies extending backward to the dawn of civilization. A revised version of section 1202 that reinstates the term “electronic” would limit the section’s application to electronic forms of CMI and allow non-electronic forms of CMI to be governed under existing statutes.³⁸

B. *The Intent Element*

Unlike the WIPO treaties, section 1202 adds elements of intent into the CMI liability schema. Section 1202(a) requires one to act with an “intent to induce, enable, facilitate, or conceal infringement.” This is in contrast to the WIPO “knowing or having reasonable grounds to know” standard. As discussed above,³⁹ the intent standard creates a buffer zone of protection, wherein those with an “innocent” mens rea will not be subject to liability. According to the legislative history, the knowledge requirement acts in combination with the intent require-

³⁶ I must concede that this ineffectiveness is mostly due to the greater difficulty of making copies in the non-electronic world, rather than to a major difference in the CMI themselves. But this highlights the greater value of electronic CMI, and hence, the greater impetus for protecting them.

³⁷ “Electronic” is defined by dictionary.com as “based on, operated by, or otherwise involving the controlled conduction of electrons, or other charge carriers . . . of, relating to, or produced by means of electronics . . . of or relating to music produced or altered by electronic means, as by a tape recorder or synthesizer . . . of, implemented on, or controlled by a computer or computer network.” [http://dictionary.reference.com/\(search for “electronic”\)](http://dictionary.reference.com/(search+for+“electronic”))(last visited May 5, 2004).

³⁸ See *infra* Appendix A.

³⁹ See *infra* p. 7.

ment to limit liability to persons who know the CMI is false and act with an intent to induce, enable, facilitate, or conceal an infringement.⁴⁰ This standard for liability seems fairly clear because the intent element is focused on how infringement is made more likely — thus, merely having knowledge that writing false CMI on one's backup CD might somehow facilitate infringement will not expose one to liability, because one has not exhibited an intent to facilitate infringement.

With respect to section 1202(b), the story is different. Here, the intent element is applied to the removal or alteration of copyright information,⁴¹ and mere knowledge or reasonable grounds for knowledge is the standard with respect to inducing, enabling, facilitating, or concealing infringement.⁴² This use of intent is more ambiguous. It could refer to intentional removal or alteration in order to distinguish accidental removal or alteration. However, it could also suggest that one must be aware that the information being removed qualifies as CMI under the statute. Alternately, the meaning could fall somewhere in the middle, requiring one to know that the information contains material such as the author's name, the title of the work, etc.⁴³ Until more courts interpret the statute, the true meaning of this intent standard remains in a state of flux.⁴⁴

The other prongs of section 1202(b) do not have any intent standard, relying instead upon the knowledge of removal or alteration of CMI, and knowledge or having reasonable grounds to know of infringement facilitation, enablement, inducement or concealment. This standard is more in line with the treaties' language, which is devoid of anything resembling intent. Subsections 1202(b)(2) and (3) apply this

⁴⁰ H.R. REP. NO. 105-551, pt. 1, at 20 (1998).

⁴¹ 17 U.S.C. §1202(b)(1)(2004).

⁴² *Id.*

⁴³ See *Puzzles*, *supra* note 8, at 348-49.

⁴⁴ Thus far, very few courts have discussed this intent standard, but the preferred interpretation may be that the intent is purely with respect to the action of removal. In *Gordon v. Nextel Communications*, 345 F.3d 922 (6th Cir. 2003), the defendant admitted that, in blowing up plaintiff's photos into posters for use as set decorations, he intentionally cut off CMI. The defendant "admits that he removed the information, and there is no suggestion that the removal was unintentional." *Id.* at 927. However, the court found that the defendant lacked any knowledge that his actions induced, enabled, facilitated, or concealed infringement because he believed that the copyrighted work had been cleared for use. The court granted defendant's motion for summary judgment. A more ambiguous interpretation can be found in *Monotype Imaging, Inc. v. Bitstream, Inc.*, 376 F. Supp. 2d 877 (N.D. Ill. Jul. 12, 2005), where the court quoted the statutory language and stated that there was no evidence that the defendant "knowingly or intentionally contributed to such use." *Id.* at 893. Even less helpful is *Thron v. Harpercollins Publishers, Inc.*, 2002 WL 1733640 (S.D.N.Y. Jul. 26, 2002) the court stated that the plaintiff "has offered no competent, admissible evidence to support any finding that defendants removed or altered [any CMI] 'intentionally,' as required by the statute." *Id.*

standard to the distribution or importation for distribution of CMI itself,⁴⁵ or of any works, and the public performance of works. One wonders why a distinction in mens rea levels has been made for these activities, as opposed to removal or alteration. It seems fair to assume that the drafters intended a lesser standard to reflect a moral distinction between one who acts as a conduit and one who has dirty hands from actual alteration or removal of CMI. This is faulty reasoning, however, as the statute is actually imposing a lower “knowledge-only” standard for the “cleaner” hands of distributors, who are responsible for the mass dissemination of the altered works, than for the person who altered the CMI in the first place, who is held to a “knowledge plus intent” standard, even though he/she may do nothing to put the altered work into circulation. The question is whether we can legitimately restrict the wide net of the WIPO language with intent standards for the provision of false CMI. Given that intent requirements narrow the effective scope of the treaties, it may be questionable to do so lest we run the risk of non-compliance. On the other hand, the intent restrictions seem to be a very smart modification of the WIPO language because they further restrict the myriad of liability situations that would seem to fall outside the scope of statutory intent. As noted above,⁴⁶ the DMCA is intended to promote efficient markets for copyrighted works. Without the intent restrictions, the acts of creating false CMI on a CD and ripping out the title page of book would be more likely to lead to liability.⁴⁷ If acts that fall within socially accepted norms of behavior and do not involve an attempt to further infringement begin to yield liability, then arguably we are not promoting an efficient marketplace for copyrighted works. Thus, if the intent to promote efficient markets for copyright works also underlies the WIPO provisions, perhaps these intent requirements are not a matter of non-compliance. In the interest of making section 1202 an effective and efficient tool for protection of efficient markets, existing intent provisions should be maintained. In addition, the intent requirement of section 1202(b)(1) should be extended to the other two prongs of section 1202(b) in order to extend

⁴⁵ The §1202(b)(2) provision is not reflected in the WIPO language; however, it is not treated herein because I feel it is in line with the treaties. Although it may be somewhat vague, this is due to the underlying vagaries of what constitutes CMI. Furthermore, this provision will be more manageable under a revised version of §1202 where protection is limited to electronic CMI.

⁴⁶ See *supra* p. 8.

⁴⁷ Note that in the latter example this would call for the § 1202(b)(1) intent standard to be interpreted as at least requiring me to know that the information I removed could be considered CMI.

additional protections to distributors in order to prevent a chilling factor on their marketplace activities.

C. *Inappropriate Exceptions for Broadcasters: Part One*

Section 1202 is mysteriously rife with exceptions for broadcasters. Subsections 1202(c)(4) and (5), in defining CMI under the statute, exclude the name and other identifying information about a performer fixed in a work other than an audiovisual work for a public performance of the work by a radio or television broadcast station.⁴⁸ If the work is an audiovisual work, then the statute excludes from the definition of CMI the name and other identifying information of a writer, performer or director credited in the work for a public performance by a radio or television broadcast station.⁴⁹ Here, the sparse legislative history presents an interesting quandary. In its discussion of the mental elements required for violation of subsections 1202(a) or (b), it states “[t]he prohibition in this subsection does not include ordinary and customary practices of broadcasters or inadvertent omission of credits from broadcasts of audiovisual works since, inter alia, such omissions [are not made with knowledge that they will] induce, enable, facilitate or conceal a copyright infringement.”⁵⁰ If such practices do not meet the minimum mental requirement for liability under section 1202, then there is no need for the exceptions discussed here because such ordinary practices would not trigger liability in the first place.

In addition, both of these exceptions conflict with the WIPO treaties, which specifically enumerate broadcasting as a method of distribution that must be treated in the same manner as the other enumerated methods.⁵¹ Treaty compliance is a compelling factor in DMCA statutory formulation — so we must ask whether there is a strong argument that creating these exceptions furthers the spirit, if not the letter, of the WIPO treaties.

Consider for a moment the extraordinary position broadcasters have in the distribution of copyrighted works. Making private use of the finite resource of the public airwaves, they arguably provide more access to film, television, radio, and other dramatic works than any other source. For example, a successful motion picture may be seen by about fifteen million moviegoers in its domestic theatrical run. On tele-

⁴⁸ 17 U.S.C. § 1202(c)(4).

⁴⁹ *Id.*

⁵⁰ 3-12A NIMMER ON COPYRIGHT § 12A.10[A][2] (quoting H.R. REP. NO. 105-551, pt. 1, at 20-21 (1998)).

⁵¹ WIPO Copyright Treaty, art. 12(1)(ii), *supra* note 10; WIPO Performances and Phonograms Treaty, art. 19(1)(ii), *supra* note 11.

vision, however, it may likely be seen by this many, or more, people in the very first broadcast showing. If the network runs it three times over a period of two or three years, the total viewing audience may be over twenty million viewers.⁵² For an opera or play broadcast on public television, the effect may be even more profound — whereas ticket sales for a single performance would rarely exceed a few thousand, the television audience can easily surpass this by a factor of one hundred, if not one thousand. The distribution power of broadcasting is quite clear, and it highlights the importance of CMI in at least two ways: the desire to have works properly identified when an audience is first exposed to them (both for moral rights reasons and commercial reasons — e.g. they may want to buy the DVD, or the producer may want to generate brand recognition for a sequel) and the ability to create a monitoring system that can help to detect infringing activities occurring in or around this pipeline. An access circumvention technology along these lines probably would not qualify as CMI; however, parts that pertain purely to identification of the section 1202 enumerated forms of CMI probably would.⁵³ The two arguments above suggest that broadcasting should be included within the domain of section 1202. To do otherwise stands the effectiveness of the statute on its head.

D. *Inappropriate Exceptions for Broadcasters: Part Two*

Despite the above exclusions from the definition of CMI, Section 1202(e) provides another level of protection for broadcasters. It excepts some, but not all, broadcaster activity that would otherwise fall within WIPO's standards for liability. The conjunctive structure of sections 1202(e)(1)(A) and (B), and of sections 1202(e)(2)(A)(i) and (ii) limits liability under section 1202(b) to acts made with an intent to facilitate, enable, induce or conceal infringement. Section 1202(e)(2)(B) also uses this intent standard. Without describing each section in lengthy detail, the exemptions are limited to entities acting in capacities such as "broadcast station" or "cable system," terms that section 1202(e)(3) refers us to the Communications Act of 1934⁵⁴ to draw definitions.⁵⁵ It is

⁵² The obvious counter-argument is that there may be many repeat viewers — that is, the total viewership of the multiple airings includes a significant number of people who watched more than one broadcast, and thus were counted multiple times. However, the same may be true in theaters.

⁵³ See *Puzzles*, *supra* note 7, at 381-82.

⁵⁴ 47 U.S.C. §153 (2004).

⁵⁵ *Id.* Interestingly, that Act appears to define "broadcast stations" as limited to broadcasters of radio communications, but then defines radio communications to include all signals and pictures that can be transmitted in this manner.

difficult to ascertain whether all distributors who could be affected by these issues have been immunized.⁵⁶

Query whether we even need section 1202(e). The protections it affords via the intent requirement can be included in section 1201(b). Thus, it would seem to be appropriate to repeal this subsection altogether.

E. *Whose Authority Controls?*

Recall our discussion of the ambiguous WIPO term “without authority.”⁵⁷ While the term itself yields no clues as to whose authority is needed, the definitions of RMI include the author of the work and the owner of any right in the work or performance.⁵⁸ This suggests, but is not concrete proof, that one might need the authority of the author/and or the holder of whichever right(s) led to the particular distribution, display, or performance of the work. Section 1202(b) specifies that authority must come from the copyright holder. This is a questionable limitation because the copyright holder may not be the author. Indeed, in our mass-commerce society, the author is often not the copyright holder — the work-for-hire doctrine allows a copyright to be held by someone other than the author from the very moment a work is created. In situations where the copyright holder is not the author, what provision in section 1202 prevents the copyright holder from refusing to credit the author, or from removing the author’s name or changing the title of the work at a later point in time? Surprisingly, no such protection exists. Section 1202 affords no power to authors to enforce CMI that they may have created in the first place. Thus, nothing therein precludes Simon & Schuster from releasing Stephen King’s next novel with Arianna Huffington credited as the author. An author does have protections outside of section 1202 — he potentially has contractual rights that can be enforced, and in some circumstances may be able to bring a claim under the Lanham Act.⁵⁹ Nevertheless, to give authors no protection, at a minimum for their own names (or a desire to remove their names) on their works, seems to contravene the spirit of CMI protection. While authors who sign work for hire contracts are generally aware that they are signing over economic control of the property, they are probably unaware that they are signing over the right to enforce CMI provisions under section 1202. These provisions are important because authors and other creators may be relying upon

⁵⁶ For example, do analog satellite systems qualify as radio transmissions?

⁵⁷ See *supra* p. 3.

⁵⁸ Article 12, *supra* note 10; Article 19, *supra* note 11

⁵⁹ 15 U.S.C. §1125.

continuing identification in order to build their careers. Thus, my revised version of section 1202(e) invests an original right to convey CMI with the author, which provides for the ability to separate such rights from economic rights, and to transfer them in whole or in part via a written instrument. The provision also makes clear that any CMI rights not explicitly granted in writing are retained by the author.

F. *Authorization by “the Law”*

Section 1202(b) also allows removal or alteration of CMI by authority of “the law.” This phrase is entirely ambiguous, and the legislative history yields no clues as to its intended meaning.⁶⁰ Failure to clarify this section of the statute could have a profound chilling effect upon the fair use of copyrighted works.⁶¹ Without such clarification, it may be possible that persons who make fair use of copyrighted works, without ensuring that their use does not remove or alter CMI, could face liability under section 1202. The intent requirements discussed in section C are not sufficient to avoid such liability — for example, an artist might create a new audiovisual work using pre-existing footage taken from a website, but intentionally strip off CMI that would interfere with the communicative impact of the new work, then make the new work available on his website under a Creative Commons license allowing others to use it as they please. The uses that other people make of the excerpts from the original copyrighted material could result in 3rd party liability for copyright infringement, so the artist may be found to have had the requisite intent to facilitate infringement.

An improvement upon the statutory language would be welcome. However, one cannot simply insert a reference to section 107 of the United States Copyright Act because such protections would only be triggered if there were an infringement in the first place. Nor would it be wise to integrate an independent “fair use” type structure into section 1202. Given that section 107 is a statutory description of the case law that developed in response to the unauthorized exploitation of copyrighted works, it would seem foolhardy to shortcut judicial determination in an area that Congress has clearly left to the courts.

An appropriate place to insert language remedying the problem might be in the legislative history to section 1202(b). This would give judges an indication of how to deal with this quagmire. However, such an insertion is beyond the scope of this work.

⁶⁰ *Puzzles, supra* note 7, at 351.

⁶¹ See 17 U.S.C. §107 (2005).

G. Remedies

In addition to an examination of section 1202, a brief discussion of sections 1203-1204 is also in order. With respect to civil and criminal remedies, the WIPO treaties require the United States Copyright Act to “provide adequate and effective legal remedies.”⁶² Section 1204 provides stiff criminal penalties for violations of either section 1201 or section 1202. The prosecution must show that the offense was willfully committed and for purposes of commercial advantage or private financial gain. This is a tough standard to meet, but the penalties are accordingly severe. With a first offense bringing up to \$500,000 in fines and up to five years in prison (or both), the statute provides compelling deterrence to violation of section 1202.⁶³ The penalties double for second offenses and beyond. One might argue that these penalties are too severe for seemingly innocuous offenses that might occur with regard to CMI. But this is not the case — serious financial fraud or theft could be committed in association with removing CMI in a digital content delivery system. The WIPO treaties were likely drafted with that in mind, as was the DMCA. The section 1204 penalties give teeth to CMI enforcement.

Section 1203, which establishes statutory damages for violations of sections 1201-1202, may not have such bite. Statutory damages are an attractive option for CMI enforcement in electronic market activities because they provide a more efficient method of imposing economic sanctions upon violators — plaintiffs do not have to undergo the more difficult and time consuming attempt to prove actual damages. Section 1203(c)(3)(B) provides a range from \$2,500 to \$25,000 per violation, subject to the court’s discretion. I would increase the upper limit to \$100,000 per violation to provide deterrence in situations where one violation might have a major impact as compared to “average” violations. For example, a violation by a major broadcaster during prime-time might qualify for maximum damages (keeping in mind that such a violation would have to be intentional). Even this level of statutory damages might not be adequate; after all, such a cost might be a small expense for a major network. Nevertheless, since we have yet to see any litigation under section 1202, it may be prudent not to elevate statutory damages too far.⁶⁴

⁶² Article 12, *supra* note 10; Article 19, *supra* note 11.

⁶³ Since §1201 is not within the scope of this comment, I state no opinions with regard to appropriate deterrence thereto.

⁶⁴ For example, what if a plaintiff, claiming an unlawful removal of CMI in a network broadcast of film, successfully argued that the network’s violation was actually one violation

Section 1203(c)(4) provides for the trebling of damages for repeated violations occurring within three years after a final judgment for another such violation. This clause is slightly ambiguous — it would seem that one could violate section 1201, then get snared under this provision by a section 1202 violation. It might be appropriate to clarify this point. One might also consider limiting such trebling to situations where the violations were willful. However, the intent requirements in my revised section 1202 arguably limit the possibility of treble damages to situations where a defendant is exhibiting a pattern of intentional violations.

IV. CONCLUSION

An analysis of section 1202–1204 of the DMCA provides insight into a paracopyright protection whose day has not yet arrived. The usefulness of section 1202 in particular is quite evident. Napster users who intentionally misspelled artists' names and/or song titles were lucky that section 1202 was not invoked. As new identification systems are developed to protect distribution of copyrighted works, these provisions of the Digital Millennium Copyright Act are likely to gain more notice. The revisions of section 1202–1204 suggested in this Comment would effectively protect electronic CMI attached to copyrighted works, and would be open to less criticism for the nearly incomprehensible and unpredictable consequences that can result under the current statute, and that seem to be giving our courts an aversion to section 1202. Perhaps similar revisions may one day be implemented by Congress, transforming section 1202 into a potent weapon for rights holders to use in their fight against copyright violators.

at the network level, plus another violation on each local station's re-broadcast of the network feed?

APPENDIX A.

Revised versions of 17 U.S.C. §§ 1202-1204. Additions are in **bold**.

Sec. 1202. Integrity of ELECTRONIC 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 **electronic** copyright management information that is false, or

(2) distribute or import for distribution **electronic** copyright management information that is false.

(b) Removal or Alteration of **Electronic** Copyright Management Information.—No person shall, without the authority of: **1) the author; 2) a subsequent copyright owner to whom the author has transferred authority under subsection (e); or 3) the law—**

(1) intentionally remove or alter any **electronic** copyright management information,

(2) intentionally distribute or import for distribution **electronic** 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) intentionally distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that **electronic** 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.

(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, **displays, reproductions, distributions or adaptations** 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) The name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.

(5) 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.

(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.

(e) Transfer of CMI Rights by Author –

The rights to convey copyright management information with a work are invested at the inception of the work in that work’s author. Those rights may be transferred in whole or in part in connection with a transfer of copyright ownership to a new owner. Any such transfer is entirely separate from the transfer of economic rights protected by the Copyright Act, and must be evidenced in writing. Any CMI rights not explicitly granted to the new owner in writing are retained by the author.

Sec. 1203. Civil remedies

(a) Civil Actions.—Any person injured by a violation of section 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, 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 1201 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 \$ **100,000** 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 \$ **100,000**.

(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 3 years after a final judgment was entered against the person for another such violation **of the same sec-**

tion of Chapter 12 of this Act, 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.—

(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 [**2876] 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, or educational institutions.—In the case of a nonprofit library, archives, or educational institution, the court shall remit damages in any case in which the library, archives, or educational institution sustains the burden of proving, and the court finds, that the library, archives, or educational institution was not aware and had no reason to believe that its acts constituted a violation.

Sec. 1204. Criminal offenses and penalties

(a) In General.—Any person who violates section 1201 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, or Educational Institution.—Subsection (a) shall not apply to a nonprofit library, archives, or educational institution.

(c) Statute of Limitations.—No criminal proceeding shall be brought under this section unless such proceeding is commenced within 5 years after the cause of action arose.

