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.

Section 1202 of the DMCA, which implements Article 12, tracks the WCT's language:

§1202. Integrity of copyright management information

(a) False copyright management information. — No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement —

(1) provide copyright management information that is false, or

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

(b) Removal or alteration of copyright management information. — No person shall, without the authority of the copyright owner or the law —

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

(2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or

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

Both §1202(c) and WCT art. 12 define CMI broadly to include identifying information about the author, the work, the copyright owner, the terms and conditions of use of the work, and in some cases the performer, writer, or director of the work.

Section 1202 differs from §1201 in two important ways. First, §1202 applies only in cases that involve CMI. Second, unlike §1201, §1202 contains a *mens rea* requirement. What is the significance of these limitations? Consider the following cases.

IQ Group, Ltd. v. Wiesner Publishing, LLC

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

[IQ, an online advertising firm, distributed ads for two insurance companies, National Senior Associate Company ("NSAC") and Capital Care, Inc. IQ included in the ads its own logo and a hyperlink to copyright information on its own web site. Both NSAC and Capital Care subsequently hired Wiesner to distribute ads for them. Wiesner distributed the same ads that IQ had formerly distributed, but it removed the IQ logo and the hyperlink to IQ's web site. IQ registered copyright in the ads and then sued Wiesner, NSAC, and Capital

Care, alleging copyright infringement and violation of §1202. Wiesner moved for summary judgment on IQ's §1202 claim.]

GREENAWAY, J.: . . . Wiesner argues that the logo and hyperlink cannot fall within the scope of the statute, as set out in 17 U.S.C. §1202(c), and asks the Court to rule on this as a matter of law.

The DMCA provision at issue, 17 U.S.C. §1202(c), defines "copyright management information" in eight categories. IQ contends that the logo falls within category 2 ("[t]he name of, and other identifying information about, the author of a work"), category 3 ("[t]he name of, and other identifying information about, the copyright owner of the work"), and category 7 ("[i]dentifying numbers or symbols referring to such information or links to such information"). IQ contends as well that the hyperlink falls within categories 3 and 7, and that the hyperlink points to a website containing information falling within category 6 ("[t]erms and conditions for use of the work"). . . .

1. The DMCA in the Framework of Trademark and Copyright Law

In effect, IQ asks this Court to construe the DMCA so as to allow a logo, functioning as a service mark, to come within the definition of copyright management information which, by operation of the DMCA, would act to protect the copyright of its owner. . . .

Looking only at the literal language of the statute, IQ's construction is not implausible: a logo in an email, to the extent that it operates as a trademark or service mark, could communicate information that indicates the source of the email. It is a symbol that refers to identifying information, so a very broad interpretation of §1202(c) might conceivably include a logo. The problem is that this construction allows a trademark to invoke DMCA protection of copyrights. . . .

The Supreme Court cautioned against blurring the boundaries between trademark law and copyright law in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). . . . The Court warned that disregarding the trademark/copyright law distinction "would create a species of mutant copyright law." *Id.* at 34. . . .

. . . [R]ather than an interpretation of the Lanham Act, as in *Dastar*, IQ here seeks an interpretation of the DMCA that would blur the boundaries between copyright and trademark. Following *Dastar*, this Court rejects this argument. . . .

2. The DMCA: Statutory Interpretation Of §1202 . . .

The text of §1202 appears to define "copyright management information" quite broadly, to the point that the section, read literally, applies wherever any author has affixed anything that might refer to his or her name. Examination of the legislative history, as well as extrinsic sources, however, shows that the statute should be subject to a narrowing interpretation.

Law professor Julie E. Cohen has written widely on the DMCA and on copyright management information. See generally Julie E. Cohen, *Copyright and The Jurisprudence of Self-Help*, 13 Berkeley Tech. L.J. 1089 (1998). Cohen explains that, traditionally, authors have relied on copyright law to define and protect their legal rights. Now, however, new technologies can control access to works, such that technology attached to the work itself defines and protects the legal rights of the copyright owner. The DMCA directly protects not the copyrights, but the technological measures that protect the copyrights. In Cohen's view, copyright

management information ("CMI") is limited to components of such technological measures.[1] This central insight is confirmed by examination of the history of §1202.

It is frequently stated that Congress enacted the DMCA in order to implement the World Intellectual Property Organization ("WIPO") Copyright Treaty and the WIPO Performances and Phonograms Treaty. H.R. Rep. No. 105-551 (1998). It is true that enactment of the DMCA brought United States copyright law into compliance with these treaties. *Id.* Thus, the WIPO treaties are useful in understanding §1202.

The WIPO treaties mandated protection of copyright management information. According to Severine Dusollier, WIPO protected CMI as part of "a double protection for technical measures." S. Dusollier, *Some Reflections on Copyright Management Information and Moral Rights*, 25 Colum. J.L. & Arts 377, 382 (2003). In the framework of the WIPO treaties, technical measures such as CMI are components of automated copyright protection systems: "As digital identification systems and other technologies that enable the marking and protection of works have started to develop, rightholders have feared that these technological tools might themselves be cracked by other technologies or machines, or that they might be easily modified or removed." *Id.* The WIPO treaties, and hence the DMCA, protect CMI so as to protect the technological measures of copyright protection themselves. This echoes the understanding of the DMCA expressed by Cohen, *supra*.

Although many view the DMCA as implementing the WIPO treaties, in fact, §§1201 and 1202 were drafted prior to the treaties. President Clinton established the Information Infrastructure Task Force ["IITF"] in 1993 with the mandate to develop comprehensive information technology policies and programs that would promote the development of the national information infrastructure ("NII"). . . .

Released in September, 1995, and known as the "White Paper," the Report [of the IITF's Working Group on Intellectual Property Rights] presented a draft of §§1201and 1202, and discussed the rationale for these sections:

> Systems for managing rights in works are being contemplated in the development of the NII. 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[2] are, and will continue to be, 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 work (e.g., attribution information) as well as to indicate authorized uses of the work (e.g., permitted use information). For instance, information may be included in an "electronic envelope" containing a work that provides information regarding authorship, copyright ownership, date of creation or last modification, and terms and conditions of authorized uses. As measures for this purpose become incorporated at lower levels (e.g., at the operating system level), such information may become a fundamental component of a file or information object.
>
> Once information such as this is affiliated with a particular information object (e.g., data constituting the work) and readily accessible, users will be able to easily address questions over

1. *See also* Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at Copyright Management in Cyberspace*, 28 Conn. L. Rev. 981, 984 (1996) ("new digital monitoring and metering technologies define the burgeoning field of 'copyright management'").

2. As explained in the Report, steganography is digital watermarking. (*Id.* 188.)

> licensing and use of the work. For example, systems for electronic licensing may be developed based on the attribution or permitted use information associated with an information object.

(*Id.* 191-192.)

The White Paper understood "copyright management information" to be information about authorship, ownership, and permitted uses of a work that is included in digital versions of the work so as to implement "rights management functions" of "rights management systems." Such systems are conceived of as electronic and automated within the environment of a computer network. . . .

The White Paper demonstrates that the Working Group on Intellectual Property Rights, in drafting §1202, understood this section to protect the integrity of automated copyright management systems functioning within a computer network environment. . . .

The draft legislation presented in the White Paper was introduced in both houses of Congress immediately upon its release as the "The National Information Infrastructure Copyright Protection Act" ("NIICPA"). . . . As Congress developed the DMCA, the NIICPA was incorporated into it. Section[] . . . 1202 underwent no significant revision between drafting in 1995 and enactment in 1998 under section 103 of the DMCA, Public Law 105-304.

The Congressional committees which considered the DMCA published a number of reports on the Act relevant to §§1201 and 1202. There is little discussion, however, of §1202. The Senate Committee Report provides this commentary:

> Rights management information is "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 . . . which is attached to a copy of a work or appears in connection with communication of the work to the public." Art. 12. Rights management information is more commonly referred to in the U.S. as copyright management information (CMI). The purpose of CMI is to facilitate licensing of copyright for use on the Internet and to discourage piracy.
>
> [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.
>
> Under the bill, CMI includes such items as the title of the work, the author, the copyright owner, and in some instances, the writer, performer, and director. CMI need not be in digital form, but CMI in digital form is expressly included.

S. Rep. No. 105-190 (1998). Viewed alone, this gives only a vague idea as to what copyright management information is and how it functions. It is, however, consistent with the understanding established supra, as it emphasizes the role of such information in facilitating licensing on the Internet, discouraging piracy, and establishing an efficient Internet marketplace. There is nothing to suggest that the Senate Committee understood §1202 differently from the Working Group, as protecting the integrity of automated copyright management systems functioning within a computer network environment.

Similarly, the House Committee stated: "A new 'Section 1202' to the Copyright Act is required by both WIPO Treaties to ensure the integrity of the electronic marketplace by preventing fraud and misinformation." H.R. Rep. No. 105-551 (1998). This committee report, in addressing a different DMCA section, states: "It may, in appropriate circumstances include the absence of customary indicia of ownership or authorization, such as a standard and accepted digital watermark or other copyright management information." *Id.* This shows that Congress viewed a digital watermark as an example of copyright management information. . . .

This interpretation of §1202 makes sense additionally because it fits §1201 with §1202, and with chapter 12 as a whole. . . .

. . . [T]raditionally, the rights of authors have been managed by people, who have controlled access and reproduction. Through scientific advances, we now have technological measures that can control access and reproduction of works, and thereby manage the rights of copyright owners and users. Section 1202 operates to protect copyright by protecting a key component of some of these technological measures. It should not be construed to cover copyright management performed by people, which is covered by the Copyright Act, as it preceded the DMCA; it should be construed to protect copyright management performed by the technological measures of automated systems.

Under this interpretation of §1202, this Court must determine whether the information removed by Wiesner from the NSAC and Capital Care ads functioned as a component of an automated copyright protection or management system. IQ has presented no evidence on this matter that creates a genuine issue as to a material fact for trial. This Court finds no genuine issue as to a material fact and therefore Wiesner is entitled to judgment as a matter of law. . . .

[The court also denied IQ's motion for summary judgment on its copyright infringement claim against Wiesner because copyright ownership of the ads was disputed.]

Kelly v. Arriba Soft Corp.

77 F. Supp. 2d 1116 (C.D. Cal. 1999)*, aff'd in part and rev'd in part on other grounds, *336 F.3d 811 (9th Cir. 2003)

[Arriba Soft, an image search engine, linked to a web site containing Kelly's copyrighted photographs and created "thumbnail" images of the photographs to display as search results. Users who clicked on a thumbnail would see the full-size image via a direct link to Kelly's site, but Arriba framed the full-size images with its own content. Applying a test later identified as the "display" test (see Note 1, page 427 *supra*), the Ninth Circuit initially held that Arriba Soft had infringed Kelly's exclusive right of public display. *Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 947 (9th Cir. 2002). On a motion for rehearing, however, the court withdrew that portion of its opinion, stating that it should "not be cited as precedent." The court subsequently ruled that Arriba Soft's creation of the thumbnail images was fair use. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815 (9th Cir. 2003). Kelly also asserted a claim for violation of §1202. That portion of the district court's opinion, which was not appealed, follows.]

TAYLOR, J.: . . . During the period when most of the relevant events in this case occurred, Defendant's visual search engine was known as the Arriba Vista Image Searcher. By "clicking" on the desired thumbnail, an Arriba Vista user could view the "image attributes" window displaying the full-size version of the image, a description of its dimensions, and an address for the Web site where it originated.[1] By clicking on the address, the user could link to the originating Web site for the image.[2]

1. This full-size image was not technically located on Defendant's Web site. It was displayed by opening a link to its originating Web page. But only the image itself, and not any other part of the originating Web page, was displayed on the image attributes page. From the user's perspective, the source of the image matters less than the context in which it is displayed.

2. Defendant's current search engine, ditto.com, operates in a slightly different manner. When a ditto.com user clicks on a thumbnail, two windows open simultaneously. One window contains the full-size image; the other contains the originating Web page in full.