

WHAT'S IN A NAME:
UNDERSTANDING COPYRIGHT
MANAGEMENT INFORMATION

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INTRODUCTION

Gregory Mango is a professional photographer who makes a living licensing his work to media companies.¹ In 2017, he often received freelance assignments from the New York Post that would lead to further licensing opportunities from other media outlets seeking to use his work after seeing it published online.² His name, “Gregory P. Mango,” would appear below his photographs in a separate line, also known as a standard “gutter credit” in the news industry.³ Months after one of his photographs appeared in a story about the lead figure in a discrimination lawsuit for the New York Post, Mango saw his photograph included in a BuzzFeed article.⁴ The image had been copied off the New York Post site, Mango’s name had been replaced with the name of a law firm, and Mango had received no word from BuzzFeed regarding licensing his work.⁵ Thus, Mango was left without any financial compensation from BuzzFeed’s use or any indication he was the photograph’s author.⁶

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1. *Mango v. BuzzFeed, Inc.*, 356 F. Supp. 3d 368, 371 (S.D.N.Y. 2019).
2. *Id.* at 371-72.
3. *Id.* at 372.
4. *Id.*
5. *Id.*
6. *Id.*

William Shakespeare famously penned, “What’s in a name? That which we call a rose by any other word would smell as sweet.”⁷ Yet, artists of both relative anonymity and Shakespearean levels of acclaim would surely disagree with this sentiment. In most creative circles, one’s name is one’s livelihood. When it comes to protecting one’s work within the realm of copyright law, what *is* in a name has become an increasingly important, but increasingly obfuscated, question. 17 U.S.C. § 1202, titled “Integrity of copyright management information,” prohibits both providing false copyright management information and intentionally removing or altering copyright management information to conceal, induce, enable, or facilitate an infringement.⁸ Section 1202(c) broadly defines “copyright management information” as including a wide array of identifying information, like a work’s title and an author’s name.⁹ If found to be in violation of § 1202, a civil defendant may be found liable for either actual damages or statutory damages ranging between \$2,500 and \$25,000 per violation.¹⁰ Despite the provided definition of copyright management information (CMI), courts have grappled with understanding the exact scope of § 1202.¹¹

Whether narrowly reading § 1202 to create extra-statutory limits to prevent an apparent onslaught of CMI litigation, or simply pointing to the statute’s text, circuit (and accordingly, district) courts are struggling to draw cohesive boundaries on where CMI protection begins and ends. Main questions concern whether CMI can be contained in non-digital works and when someone’s name is a “name” as defined within § 1202(c).¹²

This CMI conversation is especially timely. Just as the Internet has democratized the dissemination of information, a recent cultural trend has turned towards the democratization of content creation. The fuel for social media titans like Facebook, Instagram, Twitter, and more recently, Tik Tok, is digital content and lots of it. Professionally produced content and videos made in the bedrooms of teenagers garner millions of interactions daily; the barrier to entry for making a creative work has never been lower. However, within this progressively overcrowded market, copyright challenges arise. Overwhelmed by the superfluous options at their literal fingertips, consumers struggle to

7. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2, l. 46-47.

8. 17 U.S.C. § 1202(a)-(b).

9. *Id.* § 1202(c).

10. *Id.* § 1203(a), (c).

11. *See infra* Part III.

12. *See infra* Parts III and IV for a discussion of the differing lines of reasoning when interpreting 17 U.S.C. § 1202.

identify and choose between authorized copies or infringing substitutes, despite consumers' own preferences for one type of work over another.¹³ Work is misattributed often and the threat of CMI stripping is constant.¹⁴

The United States has generally not protected authors' names as robustly as other countries. U.S. copyright law has largely adhered to the economic incentive theory, which suggests that copyright protection is rooted in providing vital monetary compensation for creators' works.¹⁵ Standing seemingly opposite to this argument is the personality theory/moral rights-driven rationale for copyright, which argues that copyright protection is rooted in respect for creators' autonomy and individuality evident in their creations.¹⁶ Central to the moral rights rationale is the European idea of attribution. Attribution is described via the Berne Convention (Berne), an international copyright treaty, as existing "[i]ndependent[] of the author's economic rights" and granting the author "the right to claim authorship of the work."¹⁷ This general right of attribution has yet to be formally adopted wholesale in U.S. copyright law (despite the United States acceding to Berne in 1988) and is a continued source of debate.¹⁸ CMI, while

13. Jake Linford, *Copyright and Attention Scarcity*, 42 CARDOZO L. REV. 143, 173 (2020).

14. U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 19 (2019) [hereinafter U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY]; see also *id.* at 97 n.550 (quoting Copyright Alliance, Comments Submitted in Response to U.S. Copyright Office's Apr. 24, 2015, Notice of Inquiry (Visual Works Letter) at 2) ("Visual works are more easily infringed online than any other type of work, due to the ease in which images may be uploaded or downloaded, the ubiquity of services that automatically strip out metadata, and the availability of right-click copy and save functionality.").

15. As Justice O'Connor best summarized: "[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

16. See U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 14, at 6.

17. The Berne Convention for the Protection of Literary and Artistic Works, art. 6, Sept. 9, 1886, revised July 24, 1971, 1161 U.N.T.S. 3.

18. See U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 14, at 37-38 ("There remains a qualitative issue of whether U.S. moral rights protections are currently sufficient to the needs of individual authors."). Note the phrasing of a "general right of attribution" above; Congress did provide visual artists with limited moral rights of attribution and integrity for qualifying works under The Visual Artists Rights Act (VARA). *Id.* at 59. However, VARA has narrow applicability, and ultimately cannot provide moral rights relief for digital media. 17 U.S.C. § 101 explains that a "work of visual art" is a painting, drawing, print, sculpture, or photographic image used for exhibition purposes only. These works must either exist in a single copy or in a limited edition of 200 copies or fewer that have been signed and consecutively numbered by the author. 17 U.S.C. § 101 (2010). It is evident that this provides no protection for digital artists and creators on the Internet, where works can exist both intangibly and infinitely.

obviously rooted in U.S.-adopted economic justifications, provides a unique avenue for acknowledging attribution by virtue of its protection of authors' names and claims to their work.¹⁹

This Note argues for a simple, but wholly conscious, viewpoint shift: a robust reading of § 1202(c)'s existing language will help move the United States towards a more effective moral rights framework without severing ties to economic justifications. Furthermore, within the text and legislative history of § 1202, a rare convergence of statutory interpretive modes and an acknowledgement of the right of attribution can be found. With this robust scope of applicability, courts will be able to apply § 1202's provisions in a more consistent, principled way that accounts for a broad array of circumstances. Recovery will be necessarily tied to an underlying infringement claim; nevertheless, both digital and non-digital CMI will be robustly protected whenever they appear alongside an exercise of a copyright owner's exclusive rights. Lest the floodgates burst open as critics of a broad definition often fear, upper and lower limitations on § 1202 exist that will forestall wasteful litigation. Supreme Court direction urges against mutating copyright with trademark law, providing an upper limit of what § 1202(c) can be, while internal safeguards already built into the statutory text of § 1202(b) and the Copyright Act prevent CMI from being wielded against innocent CMI removers.

Part I of this Note will address the history of the Digital Millennium Copyright Act (DMCA), including how legislative actions frame its context. Part II will discuss how CMI can provide an American avenue for adopting the moral right of attribution that complements economic copyright rationales. Part III will provide further justification of this reading through a textualist, purposivist, and intentionalist lens. Part IV will explain the tension between copyright and trademark law that is raised by CMI questions and will provide a framework for working through such questions. Part V will examine the internal limits of § 1202(b) specifically, demonstrating how an onslaught of CMI litigation following this construction would be unlikely.

I. PUBLIC CHOICE THEORY AND THE DMCA

This Note emphasizes a need for adhering to the text of § 1202; this Part will detail the process that created the text. The Supreme Court of the United States has generally granted Congress a wide degree of

19. Absent the assignment of one or more rights in a copyright to another party, the copyright owner and author are one and the same by default and, as such, this Note will use these terms interchangeably for ease of discussion. See *Definitions*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq-definitions.html> [<https://perma.cc/M56G-P8CL>] (last visited July 31, 2022).

deference in matters concerning copyright.²⁰ However, many are critical of legislative efficacy. For instance, public choice theory argues that legislators act in their own best interest; they desire to be reelected, election campaigns cost money, and interest groups have both money to burn and problems they need to solve.²¹ This translates into legislative output, where costs and benefits to certain groups tip the scales in those groups' favor.²² "Legislation . . . is unlikely where there is little organized demand (distributed benefits), or where demand is met by strong opposition (because of concentrated costs)."²³

Copyright law is arguably no different. The benefits of broad copyright protection have been concentrated in relatively few industries historically, while the cost of protection is spread among every user of copyrighted works (which is essentially every person, as digital media consumption becomes increasingly ubiquitous).²⁴ Due to uncertainty and divide over what level of copyright protection is optimal, special interest groups have greater capacity to persuade legislators that their position (usually broader protection) is correct.²⁵ One could argue this legislative failure leads to an imbalance of power within copyright law, where copyright owners monopolize the creative industry at the expense of public access. On the other hand, it could simply be said that content platform companies have significant discipline in messaging and deep pockets; as a result, they will obviously be the participants who most effectively achieve their goals through lobbying.

The Digital Millennium Copyright Act, of which § 1202 is a part, has been criticized as being private-interest legislation that goes too far in failing to preserve access to works for beneficial uses that would ultimately cause negligible harm to a copyright owner.²⁶ The DMCA was the product of both U.S.-led studies of copyright law and World Intellectual Property Organization (WIPO) treaty negotiations.²⁷ In 1993, U.S. President Bill Clinton selected intellectual property experts to propose changes to intellectual property law that would address the

20. See generally *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (holding that Congress had the authority to extend the terms of existing copyrights); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405 (2017) (emphasizing Congress's place in crafting copyright law); *Golan v. Holder*, 565 U.S. 302 (2011) (defending Congress's decision to restore copyright in foreign works previously in the public domain).

21. See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 288 (1988).

22. *Id.* at 288-89.

23. *Id.*

24. Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567, 582 (2006). This article critiques the Copyright Act of 1976, but these criticisms of the legislative process concerning copyright matters are reflective of this body of law as a whole.

25. *Id.*

26. *Id.* at 591-92.

27. Russell W. Jacobs, *Copyright Fraud in the Internet Age: Copyright Management Information for Non-Digital Works Under the Digital Millennium Copyright Act*, 13 COLUM. SCI. & TECH. L. REV. 97, 100-01 (2012).

issues presented by emerging technology.²⁸ In 1995, the Working Group on Intellectual Property Rights (Working Group) issued its “White Paper,” which addressed both the opportunities increased dissemination of content would provide and the potential friction between the emerging Internet and owners of intellectual property.²⁹ The Working Group specifically addressed the need for legal changes in order to keep up with the times, stating:

The emergence of integrated information technology is dramatically changing, and will continue to change, how people and businesses deal in and with information and entertainment products and services, and how works are created, reproduced, distributed, adapted, displayed, performed, owned, licensed, managed, presented, organized, sold, accessed, used and stored. This leads, understandably, to a call for adaptation of—or change in—the law.³⁰

The White Paper addressed this tension, predicting that CMI “will serve as a kind of license plate for a work on the information superhighway” and as such should be protected when given.³¹ The legislation based on this White Paper did not pass.³² The Clinton administration then engaged with WIPO to create two copyright treaties containing similar provisions to the White Paper.³³ When this treaty-implementing legislation came before Congress in 1997, many notable people in the entertainment industry testified in favor of increased copyright protections, including Fritz Attaway, the President of the Motion Picture Association of America, and famous American singer-songwriter Johnny Cash.³⁴ Congress passed the DMCA in 1998, ultimately providing the additional copyright protection many influential constituents craved.³⁵ One could view CMI as a mere product of that public choice process, meant to be wielded as an additional tool in big copyright players’ arsenals.

However, some cautious optimism around copyright’s ability to also serve smaller creators is warranted. Consider again Mango, a proverbial David, and his dispute with a Goliath, BuzzFeed. BuzzFeed included one of Mango’s photographs in an article—without any license from, or attribution to, Mango.³⁶ Instead, the reposted photograph was

28. *Id.*

29. *See generally* INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995).

30. *Id.* at 12.

31. *Id.* at 235.

32. Jacobs, *supra* note 27, at 100.

33. *Id.* at 101.

34. S. REP. NO. 105-190, at 6 (1998).

35. Pub. L. No. 105-304, 112 Stat. 2863 (1998) (codified as amended at 17 U.S.C. §§ 1201-1205 (2000)).

36. *Mango v. BuzzFeed, Inc.*, 356 F. Supp. 3d 368, 372 (S.D.N.Y. 2019).

accompanied by an altered gutter credit, falsely attributing the subject-plaintiff's law firm.³⁷ Mango brought suit for infringement and CMI removal, recovering \$3,750 for the unlicensed use of the photograph, \$5,000 for the alteration of the gutter credit that appeared alongside the photograph, and the cost of his attorney's fees.³⁸ The Second Circuit affirmed this judgment.³⁹ Cases like Mango's demonstrate that, while the DMCA may possibly be the product of legislative capture by "bigger" copyright players, the process that created it does not negate its potential to aid smaller copyright owners alongside the industry titans. The prototypical CMI case involves stripping an author's name off the author's work and reposting it, effectively taking credit for work that belongs to another.⁴⁰ Because a name holds significant intrinsic value, the effects of this omission are similarly felt, regardless of an author's size or circumstance.⁴¹ Thus, a holistic understanding of CMI has the potential to serve all authors' interests in a balanced way.

II. MORAL RIGHTS AND CMI

Implicit in the preceding discussion is the American emphasis on economic incentives for creative endeavors.⁴² This widely adopted utilitarian theory of copyright argues that copyright protection contributes to the Constitution's "progress of Science" by maintaining adequate fiscal incentives to encourage creators to produce new works.⁴³ Indeed, copyright law rewards creators with exclusive rights vested in their works, which can be enforced to create "artificial scarcity in the marketplace, thus increasing the monetary value of the work."⁴⁴ The implied converse of this argument follows that, absent this economic incentive, people are unlikely to create because their actions would go uncompensated. Through this lens, CMI can simply be viewed as an avenue for potential licensees to track down authors to provide payment for use of the author's work. It is this underlying incentive rationale that has set the tone for CMI cases. Simply relying on economics, however, does not tell the full story of what CMI can accomplish.

The utilitarian rationale, standing alone, does not explain why many people often create but seek no direct payment for that labor. Internet forums provide ample examples of such behavior. Some creators write chapters upon chapters of stories that they upload to

37. *Id.* at 373.

38. *Id.* at 375-76, 378-79.

39. *Mango v. BuzzFeed, Inc.*, 970 F.3d 167, 174 (2d Cir. 2020).

40. *See infra* Part II (discussing the public's idea of copyright being used as a tool to prevent plagiarism).

41. *See infra* notes 49-51 and accompanying text.

42. JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, *COPYRIGHT LAW: CASES AND MATERIALS* v3.0 10 (2021).

43. *Id.*; U.S. CONST. art. I, § 8, cl. 8.

44. DEREK MILLER, *COPYRIGHT AND THE VALUE OF PERFORMANCE, 1770-911* (2018).

Wattpad; others post their code on Stack Overflow.⁴⁵ Most of these creators never see a dime for their work. Despite what economists would have you believe, people are not always economically rational, bottom-line driven actors. MIT's Sloan School of Management surveyed open-source contributors on what motivated them; intellectual stimulation and enjoyment of the creative process prevailed over external, financial motivators.⁴⁶ Extensive classic literature demonstrates the act of creation has long been associated with transformative acts like giving birth and being gifted with divine inspiration.⁴⁷ Copyright scholar and moral rights advocate Roberta Rosenthal Kwall suggests that this literature evinces that creation is both deeply personal and an act of guardianship.⁴⁸ This personality theory-driven approach to copyright underscores the argument that respect for authors' autonomy and personality, not economic incentives, require the recognition of property rights in creative works.⁴⁹

But personality theory and economic justifications are not necessarily at odds with one another, as evidenced by the reputation market.⁵⁰ Professionals across all sorts of industries will share the fruits of their creative labor, believing it will enhance their reputation and yield them profit down the line.⁵¹ However, reputation is also inherently tied to the concept of individuality and personhood; these actors want their names to evoke a certain image of themselves as being skilled or reputable in their respective fields. Such expressive incentive thus entangles itself in both moral and economic rationales.⁵² Despite whether one focuses on economic or personality-rooted justifications, creators' names can have significant value.

The moral right of attribution is the right to have one's name associated with one's work and is a balanced expressive incentive for copyright.⁵³ Attribution serves moral rights purposes insofar as it

45. WATTPAD, <https://www.wattpad.com> [<https://perma.cc/2TCZ-QQQH>] (last visited July 31, 2022); STACK OVERFLOW, <https://stackoverflow.com> [<https://perma.cc/7KEN-DH68>] (last visited July 31, 2022).

46. REBECCA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY* 11-12 (2010) (citing SUSAN SCAFIDI, *WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW* 117 (2005)).

47. *Id.* at 12-21.

48. *Id.* at 21. Kwall's book emphasizes an author's intrinsic creative process and subjective view of the meaning and message of their work.

49. FROMER & SPRIGMAN, *supra* note 42, at 15.

50. Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 59-62 (2007).

51. *Id.*

52. FROMER & SPRIGMAN, *supra* note 42, at 16 ("The ways in which intellectual property laws can protect creators' labor and personhood interests and employ rhetoric communicating concern for these interests can be seen as expressive incentives. The law's careful use of expressive incentives can bolster the utilitarian inducement to create valuable intellectual property.")

53. *Id.* at 15-16.

acknowledges the author's role, labor, and personality in conjunction with the work, but it also facilitates licensing and the reputation market.⁵⁴ While protected in many European countries like France, the Netherlands, Spain, and Belgium,⁵⁵ the right of attribution has so far only received lip service in the United States outside of the limited scope of the Visual Artists Rights Act.⁵⁶ The United States' acceding to the Berne Convention is another example of copyright lobbying that predates CMI.⁵⁷ As a result of the Berne Convention Implementation Act, Congress pared back on copyright formalities to realign the U.S. copyright system with those abroad.⁵⁸ However, other potential changes, like adopting the moral rights components of the Berne Convention, were met with a mix of support and opposition. The majority of those who testified before Congress argued against any change to U.S. law concerning an author's right to control attribution or the integrity of a work, stating that current U.S. law was sufficient.⁵⁹ One such advocate was Peter Nolan, a Walt Disney Productions Vice President who spoke on behalf of the Motion Picture Association of America and argued that the preexisting U.S. law in unfair competition, trademark, privacy, and § 106 exclusive rights in copyrighted works precluded any need for additional statutory moral rights.⁶⁰ Others, like Sydney Pollack, representative from the Director's Guild of America, argued that the existing U.S. laws were insufficient to provide the

54. See Lastowka, *supra* note 50, at 58-60.

55. Séverine Dusollier, *Some Reflections on Copyright Management Information and Moral Rights*, 25 COLUM. J.L. & ARTS 377, 392 (2003). While the protection of the right of attribution differs from country to country, the general premise is the same:

This right is generally thought to imply that the name of the author should appear on any reproduction or on any copy of the work. It may be termed the "right of signature." . . . Some countries also recognize a certain right of authorship for artists-performers. This is the case in Belgium, which grants performers both the right to append their name and the right to prohibit an inexact attribution.

Id.

56. S. REP. NO. 105-190, at 16 (1998) ("[CMI] will assist in . . . indicating attribution, creation and ownership."); see also *supra* note 18.

57. U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 18, at 23.

58. FROMER & SPRIGMAN, *supra* note 42, at 163.

59. U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 18, at 23.

60. *Id.* at 23 & n.100. The exclusive rights in copyrighted works are as follows: (1) the right of reproduction; (2) the right to prepare derivative works; (3) the right of distribution; (4) the right of public performance; (5) the right of public display; and (6) the right of public performance via digital transmission for sound recordings. See 17 U.S.C. § 106.

moral rights that Berne demanded.⁶¹ Ultimately, Congress concluded that existing U.S. law provided a “patchwork” system that, in its totality, more or less amounted to the moral rights outlined in the Berne treaty.⁶²

Yet § 1202 can be read as a U.S. law that encompasses both economic and moral theories, striking their balance. Attribution may feel distant when abstracted, but in the digital age, attribution can be found everywhere: via contact information, social media handles, email addresses, etc. Divorce the name from its accompanying work and often you’re missing an integral piece of the puzzle. Many recognize this and act accordingly online; as such, attribution arguably already exists *de facto* in the way Americans interact with media.

People are most likely to obey laws that they view as following public morality.⁶³ Despite the ubiquity of media in day-to-day life since the digital age, there remains an intellectual disconnect between how intellectual property rights work and how they are *believed* to work in the United States. The disconnect between the incentive versus moral rights debate has been described as “orthogonal to how most users and many creators understand intellectual property law.”⁶⁴ The results of one study led to what its authors dubbed “the plagiarism fallacy,” the most common perception of intellectual property law among the American public is that it is designed to prevent plagiarism.⁶⁵ This is a plausible view; the notion of plagiarism is rooted in a sense of moral, compulsory attribution, often creating an extra-legal property right.⁶⁶ While this “right” is in fact extra-legal, it is nevertheless impactful. Over one million YouTube videos state some form of “no copyright infringement intended” alongside a citation to the original source in the mistaken belief that doing so will protect the creators from infringement suits.⁶⁷ Nevertheless, these phenomena provide a perfect example of public morality indicating what many think the law is, and in

61. U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 14, at 23 & n.102.

62. Justin Hughes, *American Moral Rights and Fixing the Dastar “Gap,”* 3 UTAH L. REV. 659, 665 (2007). This “patchwork” of protection includes the right to prepare derivative works under copyright law, the prohibition on distortion of musical compositions under copyright law, restrictions on the termination of licenses and transfers under copyright law, § 43(a) of the Lanham Act under trademark law, state right of publicity laws, state unfair competition laws, state contract law, state fraud and misrepresentation laws, state defamation laws, and finally, any state moral rights legislation. *Id.* at 666.

63. KWALL, *supra* note 46, at 5 (citing Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT’L L. & POL. 219, 225-26 (1997)).

64. Gregory N. Mandel, Anne A. Fast, & Kristina R. Olson, *Intellectual Property Law’s Plagiarism Fallacy*, 2015 BYU L. REV. 915, 915 (2016).

65. *Id.*

66. Brian L. Frye, *Plagiarize This Paper*, 60 IDEA 294, 314 (2020).

67. Mandel et. al., *supra* note 64, at 932.

some sense, what the law should be.⁶⁸ Adopting some form of attribution into the U.S. copyright system could arguably realign it with both public opinion and the Berne Convention.

If copyright law is to keep up with the digital marketplace and modern notions of fairness, “[a]ttribution must become more central to copyright law.”⁶⁹ Relying on incentive theory alone overlooks the crucial and increasingly reimagined social media-centered reputation markets and intrinsic motivators that lead authors to create, even despite the possibility that they could never financially profit from their expression. Economic incentives are undoubtedly an important driver in copyright law discourse; however, they are often misrepresented as being the discourse itself rather than an element within it. Therefore, a holistic justification for modern copyright trends in the digital age must implicate both moral and economic rationales in its argument.

If hoping to adopt an unqualified right of attribution, however, § 1202 as it currently stands is admittedly a deeply flawed vehicle. CMI has strayed from its Berne counterpart of “rights management information,” which is intended to exist completely separate from authors’ economic rights.⁷⁰ Section 1202(b) states that CMI may not be removed or altered when one reasonably knows that such alteration “will induce, enable, facilitate, or conceal *an infringement of any right under this title*.”⁷¹ In many moral rights proponents’ eyes, CMI removal necessarily being tied to infringement leaves attribution bound up with an economic right, “divorc[ing] [CMI] from any independent concern about authorial interests in attribution.”⁷² After all, even deliberate miscrediting, absent a showing that such miscrediting was tied to infringement, would not give rise to a claim under § 1202(b).⁷³ At most, under current law, such non-infringing miscrediting would violate some moral norms.⁷⁴ In response, proponents of strong moral rights advocate for changes to the text of § 1202 itself.

One such proposal can be found in a 2019 Copyright Office report advocating for an addition to § 1202, titled “1202A,” that would specifically address attribution, reading:

No person shall, without the authority of the author or the law, knowingly remove or alter any copyright management information *with the*

68. *Id.* at 937.

69. Lastowka, *supra* note 50, at 64.

70. See Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9 (2001), for an in-depth comparison of CMI and its European counterpart, rights management information. In particular, Ginsburg argues that CMI is not the robust protection of attribution rights that Berne demands; as far as § 1202 is concerned, only alteration that produces infringement would be implicated. *Id.*

71. 17 U.S.C. § 1202(b) (emphasis added).

72. Lastowka, *supra* note 50, at 73.

73. Ginsburg, *supra* note 70, at 13.

74. *Id.*

*intent to conceal the individual author's attribution information. . . . As used in this section, the term "copyright management information" has the same meaning as used in section 1202(c) . . . [and] the term "attribution information" means the name of, and other identifying information about, the author of a work.*⁷⁵

The proposed § 1202A supplants the economic justification—infringement—with attribution wholesale. As it is merely a report from an agency, the Copyright Office's recommendation is not legally controlling nor unilaterally capable of changing statutory language. At most, the report would be entitled to little deference as a persuasive authority if implicated.⁷⁶ Absent an applicable rewrite of the statute, like the suggested one above, or direction from the Supreme Court, U.S. courts currently lack the authority to fully embrace moral rights.

Nevertheless, CMI can present an ideal avenue for formally acknowledging a cabined right of attribution in U.S. copyright law. While CMI does not need to include an author's name, a broad reading of the definition within § 1202(c) would robustly protect a copyright owner or author's attribution right when their name is conveyed in conjunction with their work.⁷⁷ Legislative history indicates that CMI was expressly contemplated by Congress to act in this way; the Senate Report states that "[CMI] will assist in . . . indicating attribution, creation, and ownership."⁷⁸ The aforementioned "patchwork protection" of moral rights does not provide a bright-line rule for implicating and asserting authors' moral rights; as the name suggests, each cause of action fixes a moral rights concern in its own specific area.⁷⁹ CMI should be added to the patchwork, viewed as an acknowledgement of attribution in copyrighted works when it is given.

A broadened definition and scope of applicability within § 1202's existing language will move the United States closer to a more effective moral rights framework. Expanding the scope of CMI in this manner would give effect to an "American brand" of attribution; while not a total, compulsory protection, acknowledging attribution as tied to § 1202 and infringement would neatly adopt it into the American framework and promote moral justifications in tandem with the already well-acknowledged economic rationale. Reading the definition of CMI within § 1202(c) to its full extent would allow for authors and

75. U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 14, at 98. The Copyright Office reached its conclusion after receiving and considering forty-six initial comments and sixteen reply comments from groups interested in expressing their views concerning moral rights in America. *Id.* at 9.

76. FROMER & SPRIGMAN, *supra* note 42, at 579.

77. U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 14, at 89-90.

78. S. REP. NO. 105-190, at 16 (1998).

79. U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 14, at 23-24.

copyright owners who convey their name in connection with their work to recover against its alteration or removal in more instances and with greater consistency. Thus, § 1202 will gain some actual teeth.

CMI's ties to infringement are also not fatal to its usefulness in the U.S. copyright schema. By permitting CMI claims on top of infringement claims, the law does allow a form of separate moral rights. There are well-known economic harms that often result from copyright infringement—a loss of licensing fees for authors and owners, possible dilution of potential market for the original work going forward, and the like.⁸⁰ However, as evidenced in *Mango v. BuzzFeed*, courts will assess damage awards—actual or statutory—for CMI claims separate from infringement, and specifically account for the circumstances surrounding the CMI removal or alteration.⁸¹ In this way, § 1202 can be viewed as acknowledging the additional moral harms—namely, failure to attribute—that may occur in conjunction with an infringement.

III. STATUTORY INTERPRETATION AND THE CURRENT STATE OF THE LAW

This Note's focus on the text demands an interrogation of statutory interpretation. Two primary techniques of statutory interpretation—textualism and purposivism—represent the dominant methods by which a court may decipher a statute's text.⁸² Proponents of textualism argue that judges must closely follow the meaning of a clear statutory text, even if the result is arguably antithetical to the legislation's purpose.⁸³ Textualists specifically reject the use of legislative history to determine a statute's meaning, believing that there is an inherent legislative compromise embedded in statutory text.⁸⁴ In a textualist's view, to stray from the text itself is to ignore the collaboration that led to the statute's final product.⁸⁵ Purposivists maintain that legislators enact statutes to further a specific purpose or goal, so the statutory text should be read in a way that advances the general issue the legislation was written to combat.⁸⁶ Intentionalism, a third form of statutory interpretation, differs slightly from purposivism. Intentionalists

80. For a classic example of the economic harms that are considered following an unauthorized use, see *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546-47, 566-69 (1985).

81. *Mango v. BuzzFeed, Inc.*, 356 F. Supp. 3d 368, 378 (S.D.N.Y. 2019). The damages inquiry for CMI mirrors the determination of damages for infringement; courts typically assess the circumstances surrounding the violation and the willfulness of the violation.

82. VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 10-11 (2022), <https://crsreports.congress.gov/product/pdf/R/R45153> [<https://perma.cc/QZ27-4SWQ>].

83. JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 55-56 (Robert C. Clark et al. eds., 3d ed. 2010).

84. *Id.* at 56.

85. See BRANNON, *supra* note 82, at 14-15.

86. MANNING & STEPHENSON, *supra* note 83, at 22.

attempt to derive the legislature's likely intent from legislative history to discern what the legislature would have specifically intended were the precise question at issue to confront them.⁸⁷ Intentionalism has, however, been criticized as being an impossible exercise; purposivism and textualism are favored by virtue of their shared goal to discern objective intent.⁸⁸

At first glance, the purposivist and textualist camps in the CMI debate appear completely at odds with one another. Many purposivist courts opted to construe § 1202's purpose narrowly, despite the text's broad language.⁸⁹ Upon closer inspection however, it is entirely possible to reach a generally broad reading of § 1202(c) from a purposivist, textualist, and even possibly an intentionalist perspective. This rare convergence of "The Big Three" forms of statutory interpretation indicates that the position of broad CMI is not as untenable as some would make it out to be. Ultimately, purposivism (and its close cousin, intentionalism) can be utilized to support either a broad or narrow interpretation of CMI, by virtue of their flexibility. The aforementioned policy argument surrounding CMI, however, tips the scales in favor of a broad reading, except in instances where the copyright claim being asserted actually falls outside of the acceptable scope of copyright law at large.

A. *The Textualist Viewpoint*

Turning to the plain text of § 1202(c), the language employed is generally broad, taking care to make special inclusions to clarify what CMI encompasses. 17 U.S.C. § 1202(c) reads, in its entirety:

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

- (1) The title and other information identifying the work, including the information set forth on a notice of copyright.
- (2) The name of, and other identifying information about, the author of a work.
- (3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.
- (4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.

87. *Id.*

88. See BRANNON, *supra* note 82, at 10-12.

89. See *infra* Section III.B.

- (5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.
- (6) Terms and conditions for use of the work.
- (7) Identifying numbers or symbols referring to such information or links to such information.
- (8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.⁹⁰

Most of the CMI debate stems from the emphasized, operative phrase “conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form.”⁹¹ The phrasing itself—as many courts addressing the issue have conceded—is undeniably extensive.⁹² To be “conveyed in connection with” the particular work merely requires that the CMI appear in conjunction with the work; no particular mode of conveyance or other requirement is enumerated.

Also, the statute does specifically include the phrase “including in digital form.” Some courts, while not saying so explicitly, have employed the *expressio unius* (roughly meaning, “the expression of one thing implies the exclusion of others”) semantic canon of construction.⁹³ Courts seeking to narrow § 1202’s applicability to non-digital cases see “including in digital form” and read the lack of non-digital forms’ mentioning as evidence it is not implicated.⁹⁴ However, another mode of statutory construction is *noscitur a sociis* (roughly meaning, “a word is known by its associates”).⁹⁵ Employing *noscitur a sociis*, one can see that the word “including” is doing some heavy lifting. Indeed, § 101 of the Copyright Act explicitly states that “the terms ‘including’ and ‘such as’ are illustrative and not limitative,” showing that the statute itself intended for *noscitur a sociis* to be employed.⁹⁶ Had the statute merely read “conveyed in connection with a work in digital form,” it would be easy to conclude the statute only refers to digital forms of CMI. However, “including in digital form” carefully highlights

90. 17 U.S.C. § 1202(c) (emphasis added).

91. *See id.*

92. *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 302 (3d Cir. 2011) (“[Section 1202] appears to be extremely broad, with no restrictions on the context in which such information must be used in order to qualify as CMI.”); *Energy Intel. Grp., Inc. v. Kayne Anderson Cap. Advisors, L.P.*, 948 F.3d 261, 277 (5th Cir. 2020) (“CMI is defined broadly.”); *Textile Secrets Int’l, Inc. v. Ya-Ya Brand Inc.*, 524 F. Supp. 2d 1184, 1195 (C.D. Cal. 2007) (“[A] literal interpretation of ‘copyright management information’ as defined in § 1202(c) would in effect give § 1202 limitless scope . . .”).

93. MANNING & STEPHENSON, *supra* note 83, at 275.

94. *See infra* Section III.B.

95. MANNING & STEPHENSON, *supra* note 83, at 275.

96. *See* 17 U.S.C. § 101.

the fact that digital forms of CMI are indeed included; digital forms can provide an example of protected CMI. It does not logically follow, however, that non-digital forms of CMI are excluded. The general trend has turned towards reading the text of § 1202(c) broadly, and the resulting case law provides clear and consistent application of § 1202 across a range of presented questions.⁹⁷

There has been much debate surrounding whether CMI is only applicable to digital—not physical—copyrighted works. Some purposivist courts have cited the DMCA’s purpose as being only applicable to digital markets, both by virtue of it being the “Digital Millennium Copyright Act” and its inclusion of § 1201, a provision banning the circumvention of technological protections for copyrighted work.⁹⁸ Yet, as the Third Circuit stated in *Murphy v. Millennium Radio Group, LLC*, “Section 1201 does not mention [CMI]; in fact, it does not refer to § 1202 at all . . . and the definition of CMI is located squarely in § 1202.”⁹⁹ In *Murphy*, the defendant radio station scanned a magazine page containing plaintiff’s photograph, cut off the gutter credit identifying plaintiff as the photographer, and posted the photograph to its website and Myspace.¹⁰⁰ Criticizing defendant’s argument that the physical nature of the photo in the magazine rendered § 1202 inapplicable, the Third Circuit reasoned that:

[Section 1202] appears to be extremely broad, with no restrictions on the context in which such information must be used in order to qualify as CMI. If there is a difficulty here, it is a problem of policy, not of logic. 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. Whether or not this result is desirable, it is not *absurd*, as might compel us to make a more restrictive reading of § 1202’s scope.¹⁰¹

Regarding the “name” component of § 1202(c), the Fifth Circuit affirmed a jury’s verdict that a file name constituted CMI in *Energy Intelligence Group, Inc. v. Kayne Anderson Capital Advisors*.¹⁰² Plaintiff Energy Intelligence Group (EIG) brought suit against Kayne Anderson Capital Advisors, LP and Kayne Anderson Fund Advisors, LLC (KA, collectively) after EIG discovered that KA distributed copies of EIG’s “Oil Daily” newsletters to employees and third parties who were not subscribers.¹⁰³ Furthermore, KA attempted to conceal this

97. U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 14, at 87-88.

98. *See infra* Section III.B.

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

100. *Id.* at 298-99.

101. *Id.* at 302.

102. *Energy Intel. Grp., Inc. v. Kayne Anderson Cap. Advisors, L.P.*, 948 F.3d 261, 277 (5th Cir. 2020).

103. *Id.* at 264.

infringement from EIG, renaming the Oil Daily PDF files as “123.”¹⁰⁴ The jury found that KA intentionally altered CMI for Oil Daily 425 times and met § 1202’s knowledge requirement.¹⁰⁵

KA unsuccessfully argued that a PDF filename was not CMI “because it is not listed in § 1202(c) and because downloading and renaming files is a common practice in the modern Internet era.”¹⁰⁶ Rejecting both arguments, the Fifth Circuit reasoned:

Nothing in § 1202 indicates that a digital file name cannot be CMI. Rather, a PDF’s file name may be CMI if it is “conveyed in connection with copies” of the underlying work and contains a “title and other information identifying the work.” See 17 U.S.C. § 1202(c)(1). EIG presented evidence at trial indicating that the “DE” naming convention was “information identifying” each *Oil Daily* newsletter. Therefore, the PDF file names of *Oil Daily* were CMI.¹⁰⁷

The court’s plain-text approach here applies textualism clearly. Addressing defendant’s floodgates argument, the opinion includes a footnote stating: “KA’s policy concerns are exaggerated and unrealistic. Liability under § 1202(b) requires knowledge. . . . At trial, EIG presented evidence of KA’s knowledge: KA employees believed that by renaming the *Oil Daily* newsletters ‘123,’ they would be able to avoid detection of illicit sharing.”¹⁰⁸ On the grounds of both statutory interpretation and policy, the Fifth Circuit promoted a broad interpretation of CMI and acknowledged § 1202’s intrinsic safeguards against floodgates policy arguments. The above cases show how the statutory text can be read to protect various instances of CMI, including non-digital CMI, from removal. However, it is concededly easiest to apply textualism in relatively clear-cut fact patterns like those outlined above. Nevertheless, even in more difficult circumstances that will shortly be examined in further detail,¹⁰⁹ these above courts’ approaches should serve as the standard.

B. *Intentionalism and Purposivism*

Intentionalists and purposivists both rely on legislative history, with purposivists taking the extra step of relying on the policy’s overall context to ascertain Congressional purpose.¹¹⁰ Members of Congress clarified certain portions of § 1202(c) in the Senate and House Reports on the DMCA, indicating two main areas of CMI that Congress

104. *Id.*

105. *Id.* at 269.

106. *Id.* at 276-77.

107. *Id.* at 277.

108. *Energy Intel. Grp., Inc. v. Kayne Anderson Cap. Advisors, L.P.*, 948 F.3d 261, 277 n.16 (5th Cir. 2020).

109. See *infra* Parts IV-V.

110. BRANNON, *supra* note 82, at 11-13.

intended to be read broadly. Considering the digital versus non-digital debate, the Senate Report reads, “CMI need not be in digital form, but CMI in digital form is expressly included [in the definition of CMI].”¹¹¹ Furthermore, both reports state that “[t]he term ‘conveyed’ is used in its broadest sense and is not meant to require any type of transfer, physical or otherwise, of the information . . . [and] merely requires that the information be accessible in conjunction with, or appear with, the work being accessed.”¹¹² The legislative history of the DMCA is certainly not without its flaws; for instance, the House Judiciary Committee included references to already-deleted provisions of § 1202 while failing to give commentary on newer suggested provisions.¹¹³ However, in the instances like those above where there is an uncontested statement on point and bicameral support for a broad reading of the word “convey,” the implications are hard to ignore. As such, intentionalists relying on these legislative clues would stop the inquiry here and construe these portions of § 1202(c) liberally, as indicated. Congress had spoken: all CMI, digital or non-digital, appearing with the works being accessed was intended to be protected by § 1202(c).

As aforementioned, many lower courts in the aughts adopted a purposivist approach, consciously narrowing the applicability of § 1202. Such was the case in *Textile Secrets International v. Ya-Ya Brand Inc.*, wherein the Central District of California held that § 1202 was inapplicable where the facts did not implicate a technological process.¹¹⁴ Plaintiff Textile Secrets International, or “TSI,” created a peacock feather design that was copyrighted and included an internal designation “JPG08” or “FEATHERS.”¹¹⁵ The FEATHERS design’s sample yardage contained markings on the border of the fabric that included the name “Textile Secrets International” and the copyright symbol.¹¹⁶ When the fabric was sold to a customer, a tag identifying the design as a registered work of TSI was also attached.¹¹⁷ Defendant “Ya-Ya” created five garments whose designs bore a resemblance to TSI’s FEATHERS, which Ya-Ya sold to customers.¹¹⁸ The garments bearing the allegedly infringing design did not include TSI’s CMI from the fabric border or tag; as such, TSI contended that their omission amounted to CMI removal.¹¹⁹

111. S. REP. NO. 105-190, at 16 (1998).

112. *Id.* at 35; H.R. REP. NO. 105-551, at 21 (1998).

113. David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA’s Commentary*, 23 CARDOZO L. REV. 909, 943-44 (2002).

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

115. *Id.* at 1188.

116. *Id.* at 1192-93.

117. *Id.* at 1193.

118. *Id.* at 1188.

119. *Id.* at 1193.

Despite acknowledging that the plain language of the statute called for a broad reading, the *Textile Secrets* court opted to view § 1202 in light of the overall statutory scheme of the DMCA.¹²⁰ Turning to legislative history and citing its focus on the digital marketplace, the court extrapolated from § 1201 that § 1202 only applied in circumstances involving CMI created via technological measures, or CMI that was somehow related to the Internet and electronic commerce.¹²¹ The court determined that the purpose of the DMCA was to create “an added layer of protection” for digital works alone.¹²² The CMI removal claim was disposed of on similar grounds, as there was no evidence that Ya-Ya had “employed any technological process in either their removal of the copyright information from the design or in their alleged distribution of the design.”¹²³

The *Textile Secrets* court heavily relied on the decision in *IQ Group, Ltd. v. Wiesner Publishing, LLC*, which similarly disposed of the case on the grounds that the alleged CMI was not a component of an automated copyright protection or management system.¹²⁴ Relying on the WIPO treaties, the White Paper, and repeated references to technology and the Internet in the legislative history, these courts viewed § 1202 as being most appropriately relegated to the digital realm.¹²⁵ On one level, this turn to the legislative history to discern a purpose is an unnecessary step, as the text of § 1202 is clear. However, even a purposivist approach can also yield a broad construction of § 1202. One of the main critiques of purposivism is that a thing’s “purpose” can be drawn on a variety of levels.¹²⁶ On a different level, the legislative history could also suggest that the DMCA was enacted to update U.S. copyright law for the digital age generally. The Senate Report on the DMCA stated that CMI “is an important element in establishing an efficient Internet marketplace in copyrighted works free from governmental regulation . . . [and] will assist in tracking and monitoring uses of copyrighted works, as well as licensing of rights and indicating attribution, creation and ownership.”¹²⁷ The Senate Report does also explicitly state that “[t]he purpose of CMI is to facilitate licensing of copyright for use on the Internet and to discourage piracy.”¹²⁸

120. *Textile Secrets Int’l, Inc. v. Ya-Ya Brand Inc.*, 524 F. Supp. 2d 1184, 1194 (C.D. Cal. 2007).

121. *Id.* at 1201-02.

122. *Id.* at 1202 n.17.

123. *See id.* at 1201-02.

124. *IQ Group, Ltd. v. Wiesner Publ’g., LLC*, 409 F. Supp. 2d 587, 598 (D.N.J. 2006).

125. *Id.*; *Textile Secrets*, 524 F. Supp. 2d at 1196-1200.

126. *See* BRANNON, *supra* note 82, at 14 (“Detractors argue that it is likely impossible to find *one* shared intention behind any given piece of legislation . . .”) (emphasis added).

127. S. REP. NO. 105-190, at 16 (1998).

128. *Id.* at 11 n.18.

Since digital media and the Internet are now ubiquitous, however, this purpose is implicated nearly everywhere. As a note from Senator Leahy in the Senate Report states, “This bill is a well-balanced package of proposals that address the needs of creators, consumers[,] and commerce *in the digital age and well into the next century.*”¹²⁹ If the purpose of the DMCA, enacted in 1998, was to provide an applicable framework for copyright law “well into the next century,” it understandably follows then that Congress purposefully meant to create a broad, flexible standard to apply to CMI as it exists within the digital era. Extending CMI to even non-digital contexts does not necessarily mean that the Internet will not be ultimately implicated. Even traditionally non-digital, physical items are now regularly subjected to the digital marketplace in some way, as was the case in *Murphy*.¹³⁰ While such conclusions may not precisely align with the purposivist courts’ narrowly identified purpose for § 1202, they find further bolstering when reconciled with the statute’s text and a modern understanding of the Internet.

While the recent trend has turned towards textualism and moved away from a purely digitally confined reading of the statute, the *Textile Secrets* and *IQ Group* courts did cite a valid reason for their readings of § 1202. The courts feared CMI becoming universally applicable if not constrained to digital works; the *Textile Secrets* court reasoned that a literal interpretation of CMI would make § 1202 essentially limitless in scope, applying wherever an author affixed something referring to their name and thus leading to “impracticable results.”¹³¹ However, a broad reading of § 1202(c) does not automatically make CMI claims tenable; this reading has the same limits that are applicable to other areas of copyright.

IV. EXTERNAL LIMITS: TRADEMARK LAW

Courts have often read in extra-statutory limits on what can constitute CMI to prevent what they viewed as absurd results.¹³² While this Note advocates for an expansive definition of CMI, some form of upper limit is indeed needed. CMI concededly cannot take the *broadest* possible form, particularly when reconciling trademark and copyright. Conflating the two in this area would blur the lines between a CMI-related brand of attribution and trademark attribution. Such potential for conflation suggests that some boundaries are required—after all, a

129. *Id.* at 69 (emphasis added).

130. Defendant Millennium Radio Group scanned the photograph at issue from an actual magazine page before uploading it to the Internet. *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 298-99 (3d Cir. 2011).

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

132. *See supra* Section III.B.

statutory interpretation that renders another statute superfluous is to be avoided.¹³³ In order to avoid a reading of § 1202 that would make it duplicative of trademark, CMI claims must be tied to the authorship or ownership implicated in a creative work.

In *Fischer v. Forrest*, the Second Circuit read an extra-statutory context requirement into § 1202.¹³⁴ Plaintiff-appellant James Fischer had written advertising text for his honey harvesting product (alternatively referred to as “Bee-Quick” and “Fischer’s Bee-Quick”) for his Bee-Quick.com website and advertising brochures.¹³⁵ Defendant Brushy Mountain (run by a husband and wife, the Forrests) was a mail-order small business that specialized in beekeeping supplies.¹³⁶ Brushy Mountain began selling Bee-Quick in 2002 and ran Fischer’s ad in its catalogue until 2010, when Fischer’s supply of Bee-Quick became unreliable.¹³⁷ Brushy Mountain began selling its own honey harvesting aid using the same language from Fischer’s advertisement, only replacing “Fischer’s Bee-Quick” with “Natural Honey Harvester.”¹³⁸ On appeal before the Second Circuit, Fischer brought both copyright infringement and CMI removal claims, contending that Brushy Mountain’s replacement of his product name in his copyrighted text constituted a removal of CMI.¹³⁹

The Second Circuit disagreed, stating, “The name of an author can, of course, constitute CMI when conveyed in connection with the relevant copyrighted work. But ‘Fischer’s’ cannot be construed as CMI with respect to the advertising text at issue because it is simply the name of the product being described. In short: context matters.”¹⁴⁰ The court suggests that, had Fischer’s name appeared in a different context besides simply being a part of the product name, it would surely constitute CMI.¹⁴¹ The Second Circuit describes Fischer’s name as merely describing the product, not as managing Fischer’s copyright or identifying him as the copyright owner of the advertising text.¹⁴² The Second

133. *Dastar Corp. v. Twentieth Century Fox Corp.*, 539 U.S. 23, 35 (2003).

134. *Fischer v. Forrest*, 968 F.3d 216, 224 (2d Cir. 2020).

135. *Id.* at 218.

136. *Id.*

137. *Id.* at 218-19.

138. *Id.* Both ads contained the following phrases, either exactly or almost exactly:

- (1) Are you tired of your spouse making you sleep in the garage after using [other product/chemical]?
- (2) Are you tired of using hazardous products on the bees you love?
- (3) [Product name] is a safe, gentle, and pleasant way to harvest your honey.
- (4) A Natural, Non-Toxic Blend of Oils and Herbal Extracts.

Id.

139. *See Fischer*, 968 F.3d at 219.

140. *Fischer v. Forrest*, 968 F.3d 216, 224 (2d Cir. 2020) (citation omitted).

141. *Id.*

142. *Id.* at 223.

Circuit included the following example from one of the initial district court judge's opinions in the *Fischer* case:

Imagine that the back cover of the Ian Fleming novel *Dr. No*. contained the following encomium: "In Ian Fleming's *Dr. No*, Fleming shows his mastery of Cold War spycraft." Imagine then that a person lifted language from that review to promote a different thriller, writing: "In John Le Carré's *Tinker, Tailor, Soldier, Spy*, Le Carré shows his mastery of Cold War spycraft." *Whatever the other legal implications of such conduct might be*, it is inconceivable that a DMCA claim would lie from the elimination of Fleming's name. *The expression at issue does not connote Fleming's copyright ownership of anything.*¹⁴³

However, Fischer's name was nonetheless still "conveyed in connection with"¹⁴⁴ a copy of Fischer's arguably copyrighted text as the statutory text demands.¹⁴⁵ The Second Circuit's approach does undeniably stray from the clear statutory text of § 1202(c) that other circuits have adopted since the *Textile Secrets* and *IQ Group* days—but the court ultimately reached the right result, hinting at the limits of copyright.

Again, CMI concededly cannot take the *broadest* possible view, as moral rights absolutists would prefer,¹⁴⁶ due to concerns of copyright encroaching upon trademark law.

Trademark law allows the providers of goods and services the right to secure and foster the goodwill flowing from accurate attribution, and to prevent misattribution of inferior products that they did not produce. It also serves the public by creating private causes of action to prevent deceptive and misleading speech.¹⁴⁷

In *Dastar Corp. v. Twentieth Century Fox Corp.*, the Supreme Court would not allow a § 43(a) Lanham Act claim for misattribution to apply to a once-copyrighted work that had fallen into the public domain.¹⁴⁸ Doing otherwise, as Justice Scalia wrote, would essentially create a species of perpetual patent and copyright, which is impermissible under the intellectual property clause of the Constitution.¹⁴⁹ Some scholars advocate for a narrow reading of *Dastar*, rendering it applicable only to cases that implicate the public domain, due to its unusual

143. *Id.* (emphasis added).

144. 17 U.S.C. § 1202(c).

145. *See Fischer v. Forrest*, 968 F.3d 216, 220 (2d Cir. 2020) ("We assume Fischer's website and the text contained in it are copyrightable creative works and the registration for the website is valid.")

146. Ginsburg, *supra* note 70, at 9.

147. Lastowka, *supra* note 50, at 74.

148. *Dastar Corp. v. Twentieth Century Fox Corp.*, 539 U.S. 23, 35 (2003).

149. *Id.* at 37; *accord* U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Respective Writings and Discoveries[.]") (emphasis added).

facts.¹⁵⁰ Many lower courts, however, have interpreted *Dastar* as a bright-line rule policing the boundary between copyright and trademark.¹⁵¹ Discussing the matter of the correct dividing line between copyright and trademark writ large is generally outside of the scope of this Note. What is specifically within the purview of this Note, however, is to provide some clarity for cases that may implicate attribution problems under trademark law, under § 1202, or both.

The question of whether a product name or a business logo can constitute CMI drives to a specific dimension of the copyright/trademark debate. Professor Mark McKenna argues that post-*Dastar*, “[m]isrepresentations of the origin of physical goods are actionable under the Lanham Act; other sorts of misrepresentations, including but not limited to misrepresentations of the origin of creative content, are not actionable.”¹⁵² Arguably, such misrepresentations of the origin of creative content are where § 1202 most clearly comes into play. When a creative work is infringed, its creative content is reproduced; the work itself is not “repackaged” in the trademark sense.¹⁵³ Thus, in cases that concern copyright infringement, the only appropriate claim would fall under § 1202 (incorrect CMI conveyed in connection with *copies* of a work), not § 43(a) of the Lanham Act (a false designation of origin which is likely to cause confusion as to the origin of goods). The line between these two concepts, however, becomes blurred when a name is removed from a work, as the name may be referring to the origin of the good, not necessarily the author of the copyrighted material, and vice versa. Such was the case in *Fischer*.

Fischer’s initial complaint accused the Forrests of “marketing a knock-off of [Fischer’s] product” and alleged the Forrests’ “illegal use of [Fischer’s] intellectual property was intended to create the false impression that [the Forrests are] now manufacturing and/or still selling Fischer’s product.”¹⁵⁴ The complaint also separately alleged that the CMI the Forrests removed was not “Fischer’s” as part of “Fischer’s Bee-Quick,” but instead were copyright notices and embedded metadata initially present on sales materials Fisher had provided to the Forrests.¹⁵⁵ Fisher also attempted to raise trademark infringement

150. See generally Hughes, *supra* note 62.

151. Lastowka, *supra* note 50, at 75-76.

152. Mark P. McKenna, *Dastar’s Next Stand*, 19 J. INTELL. PROP. L. 357, 374 (2012).

153. *Id.* at 375 (discussing *Cable v. Agence France Presse*, 728 F. Supp. 2d 977 (N.D. Ill. 2010), as improperly classifying a digital reproduction of plaintiff’s photographs as the defendant repackaging the photographs under a Lanham Act lens).

154. Complaint ¶ 2, *Fischer v. Forrest*, No. 14-CV-1304 (S.D.N.Y. Feb. 27, 2014).

155. *Id.* ¶ 35 (“Plaintiff provided . . . jpg-format images of brochures, flyers and other sales materials, each image with imbedded EXIF metadata including appropriate copyright notices . . . [and] visible text copyright notices, visible on the face of each image.”).

claims, but they were recommended for dismissal by the magistrate judge.¹⁵⁶ Eventually, these alleged copyright notices and metadata fell to the wayside and were replaced by “Fischer’s” as being the crux of the CMI claim.¹⁵⁷

As Fischer made clear in his initial complaint, the true issue here is one of alleged passing off, or that the Forrests were trying to capitalize on Fischer’s goodwill to sell their product. While an infringement claim was plausibly brought for the copying of Fischer’s advertising text, the nature of his CMI argument confuses the aforementioned distinction between copyright and trademark. The deletion of “Fischer’s Bee-Quick” is not a misrepresentation of the origin of Fischer’s advertising text. It simply refers to the product name. In this sense, the Second Circuit was right—context matters. But it matters specifically in Fischer’s case, where a CMI removal claim is incorrectly being wielded to fight possible trademark confusion. So, how was the Second Circuit to dispose of Fischer’s passing-off claim that had been disguised as a CMI issue?

Which cause of action would be appropriate—DMCA or Lanham Act-based—should hinge on the nature of the defendant’s use. Professor McKenna offers a bright-line rule for separating copyright and trademark claims generally; he argues that claims where a plaintiff alleges possible confusion arising out of the content of a defendant’s expressive work should be barred from trademark causes of action altogether.¹⁵⁸ As McKenna himself concedes, this argument for extending *Dastar* would broadly deny many trademark claims in possible instances where a defendant’s use includes non-copyrightable features.¹⁵⁹ Arguments on the wisdom of this proposition writ large aside, McKenna’s framework provides a useful test in this limited CMI context.

A slight revision of McKenna’s proposed approach to the copyright-trademark distinction to focus on CMI yields a general standard. In instances of names possibly implicating both trademark and copyright law, claims asserting confusion over the author of creative content are suitable for CMI consideration; claims alleging confusion over the origin of a good or service can be addressed via trademark law. They

156. See *Fischer v. Forrest*, 968 F.3d 216, 219 n.2 (2d Cir. 2020) (“Magistrate Judge Peck, in a thorough and thoughtful January 2017 Report & Recommendation, recommended that the district court dismiss Fischer’s trademark counterfeiting and New York right of publicity claims Judge Engelmayer adopted the Report & Recommendation in a March 21, 2017 order and opinion.”).

157. Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment at 15, *Fischer v. Forrest*, No. 14-CV-1304 (S.D.N.Y. May 8, 2017) (“While defendants focus on the brochure, they totally ignore this court’s finding in deciding the initial dismissal motions that the product name ‘Fischer’s Bee Quick,’ by virtue of containing the plaintiff’s name, also constituted CMI.”). Fischer also argued that his trademark infringement claim should be allowed to continue. See *id.*

158. McKenna, *supra* note 152, at 381-82.

159. *Id.* at 385.

do not need to be kept entirely separate and may overlap. The main crux of the inquiry is considering what harm is resulting from the defendant's conduct. As Fischer indicated in his complaint, one concern was consumer confusion; the complaint's facts describe Brushy Mountain as misappropriating Fischer's "uniquely original copyrighted creative works" (the ads and sales flyers) to "sell an unauthorized knock-off."¹⁶⁰ Consumers reading the advertisement would likely not be confused over who *authored* the text they were reading, as no author was indicated. Thus, any cause of action for Brushy Mountain's removal of "Fischer" in that context would be better suited for consideration under trademark law.

Its misplaced reliance on automated copyright management systems aside, the District Court of New Jersey did also explain this necessary upper limit on CMI in the *IQ Group* opinion.¹⁶¹ IQ Group was a business whose primary business model was advertising for insurance companies; particularly, IQ Group sent emails containing ads to insurance agents.¹⁶² Two insurance companies hired IQ Group to send ads; when IQ sent the ads via email, the ads bore the IQ logo and a hyperlink that directed the user to IQ's website.¹⁶³ The insurance companies later provided Wiesner, IQ's business competitor, with the ads that IQ had previously distributed.¹⁶⁴ Wiesner replaced the IQ logo and hyperlink with links that would direct users to the clients' websites.¹⁶⁵ IQ brought suit against Wiesner, alleging that their deletion of the IQ logo and hyperlink off the ad constituted CMI removal.¹⁶⁶

The question here was not necessarily one of misrepresenting the author of the creative content, as there was a dispute over whether IQ or one of the insurance companies had created the ad.¹⁶⁷ Rather, both IQ and the court proceeded under the assumption that IQ used its logo in the ads to indicate itself as the *origin of the advertising services* being provided—an operation that falls squarely within trademark law. The court considered the divide between copyright and trademark law as implicated by the facts at hand, stating:

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

160. Complaint ¶ 21, *Fischer v. Forrest*, No. 14-CV-1304 (S.D.N.Y. Feb. 27, 2014).

161. *IQ Group, Ltd. v. Wiesner Publ'g., LLC*, 409 F. Supp. 2d 587, 592 (D.N.J. 2006).

162. *Id.* at 589.

163. *Id.*

164. *Id.*

165. *Id.*

166. *See id.*

167. *IQ Group, Ltd. v. Wiesner Publ'g., LLC*, 409 F. Supp. 2d 587, 589 (D.N.J. 2006).

trademark to invoke DMCA protection of copyrights, eliminating the differentiation of trademark from copyright that is fundamental to the statutory schemes. If every removal or alteration of a logo attached to a copy of a work gives rise a cause of action under the DMCA, the DMCA becomes an extension of, and overlaps with, trademark law.¹⁶⁸

Absent any real showing that IQ Group was the proper author of the advertisements, or “source” of the actual creative content in question, dismissing the CMI claims was ultimately correct.

Applying this modified McKenna standard, both *Fischer* and *IQ Group* were ultimately properly decided. Trademark and CMI-based attribution claims may surely overlap; businesses own copyrights. Characters can be both trademarked and copyrighted. Complete separation of the two statutory schemes should not be the endgame in this arena; they just should not be treated as duplicative causes of action for the exact same conduct and allegedly resulting harm. CMI claims and trademark attribution should be seen as complementary to one another, not incorrectly blurred together into a single, interchangeable property right.¹⁶⁹ Had *Fischer*’s advertising text been written in first person or IQ Group’s logo appeared in a context that implicated both trademark and copyright law—the name or logo was used to attribute both the source of the creative content *and* the product or service being advertised—the resulting name or logo could serve both copyright and trademark purposes. As the facts stand however, both plaintiffs in *Fischer* and *IQ Group* made the fatal error of conflating copyright and trademark goals, alleging that each name/logo was copyright-related without proper evidence to establish themselves as the author of the work in question. Their respective remedies could have potentially been based elsewhere in the “patchwork protection” of American moral rights; CMI was not the proper avenue under the given facts.

What, then, of a seemingly less clear-cut question within this attribution-distinction framework? To provide further illustration, consider two lawsuits initiated by the small business “etrailer.”¹⁷⁰ Both suits stem from the same operative facts: etrailer brought suit against defendants who allegedly copied photographs from the etrailer.com website.¹⁷¹ The copied photos consisted of etrailer’s offered products from other vendors, which bore the etrailer logo in the pictures.¹⁷² The defendants then removed or obscured the etrailer logo from the photos

168. *Id.* at 592.

169. Lastowka, *supra* note 50, at 76.

170. According to etrailer’s LinkedIn page, the company began as a “small family business” and now employs between 201 and 500 employees. etrailer, LINKEDIN, <https://www.linkedin.com/company/etrailer.com-bropfs-home-sales> [https://perma.cc/39JH-NWU4] (last visited July 31, 2022).

171. etrailer Corp. v. Automatic Equipment Mfg., Co., No. 18-CV-351, 2019 WL 1596833, at *3 (D. Neb. Apr. 15, 2019); etrailer Corp. v. TexTrail, Inc., No.19-CV-2490-NAB, 2019 U.S. Dist. LEXIS 212304, at *3 (E.D. Mo. Dec. 10, 2019).

172. *etrailer*, 2019 WL 1596833, at *3; *etrailer*, 2019 U.S. Dist. LEXIS 212304, at *3.

before uploading the images to their own websites.¹⁷³ The U.S. District Court for the District of Nebraska granted the defendant's motion to dismiss pursuant to Rule 12(b)(6), holding that etrailer's stamped logo informed the public that they sold a particular product, not that etrailer was the author of the photograph ("etrailer I").¹⁷⁴ As such, the logo as it appeared in the photograph was "not the kind of information § 1202 was intended to protect."¹⁷⁵ However, the U.S. District Court for the Eastern District of Missouri denied the defendant's motion for summary judgment in a similar case ("etrailer II").¹⁷⁶ The Missouri district court reasoned that "a sticker containing a copyright owner's name and logo, placed prominently on a picture's object piece as an indication of ownership of the pictorial work for the purpose of copyright control and management, may constitute CMI under the plain language of § 1202."¹⁷⁷

Conceded issues concerning the photographs' copyrightability/minimal amount of creativity aside,¹⁷⁸ the attribution-distinction trademark test can be applied here. Etrailer was not the origin of the products it sold; etrailer did, however, place its logo on the products via stamp or sticker before taking the photos. The defendants in etrailer I and II copied the photographs off the etrailer website and digitally removed the etrailer logo to use the images on their own websites and catalogues, eliminating the need for the defendants to license the photographs from etrailer or take photographs of the products themselves.¹⁷⁹ Focusing on the nature of the defendant's use, the etrailer logo was removed not to provide a false origin of the products, but to avoid indicating that etrailer was the author of the creative content. Were the photos found to have been copyrightable, etrailer would have appropriately characterized the logo removal as CMI removal.

V. INTERNAL LIMITS: DOUBLE SCIENTER AND FAIR USE

While the previous section addressed the upper policy limits of CMI's definition, § 1202's internal safeguards also protect innocent

173. *etrailer*, 2019 WL 1596833, at *3; *etrailer*, 2019 U.S. Dist. LEXIS 212304, at *3.

174. *etrailer*, 2019 WL 1596833, at *4.

175. *Id.*

176. *etrailer*, 2019 U.S. Dist. LEXIS 212304, at *12.

177. *Id.* at *11.

178. As the U.S. District Court for the District of Nebraska correctly pointed out, etrailer did not give any facts "regarding the staging of its photographs, decisions that etrailer made regarding lighting, facts regarding the arrangement of the items in the photographs, the purpose of the background against which the towing part were set, or any other element that would . . . [make] the work etrailer's creation." *etrailer*, 2019 WL 1596833, at *2.

179. *Id.* ("In 2015, the defendant's representative contacted the plaintiff's representative and asked for permission to use the plaintiff's photographs. The defendant's request was specifically denied. Notwithstanding the denial, the defendant incorporated the images the plaintiff created of the defendant's products into its website and catalogue.") (citation omitted).

CMI removers, even in instances of actual CMI removal. Sections 1202(a) and 1202(b) both include a double scienter requirement—to be held liable for providing false CMI or altering/removing CMI, there is both a knowledge and an intent requirement.¹⁸⁰ Furthermore, § 1203(c)(5)(A) dictates that a “court in its discretion may reduce or remit the total award of damages in any case in which the violator sustains the burden of proving, and the court finds, that the violator was not aware and had no reason to believe that its acts constituted a violation.”¹⁸¹ In order to be held liable for violating one of these CMI provisions, the defendant would need to act with intent, knowing or having reasonable grounds to know that their actions will induce, enable, facilitate, or conceal an infringement of a copyrighted work.¹⁸² Accidental or oblivious violators of this section would not be implicated; the broad definition of CMI proposed would only work against those who both intentionally tampered with the CMI and reasonably knew that such tampering could result in infringement.

The double scienter requirement allows copyright owners and authors to recover against knowing bad actors who remove or falsify CMI for their own gain at the expense of the owner/author. Thus, a broad reading of § 1202 would not create a free-for-all right to sue whenever CMI would be implicated,¹⁸³ as the *Textile Secrets* court had feared.¹⁸⁴ As the court in *Mango v. BuzzFeed* explained in reasoning that BuzzFeed had violated § 1202(b)’s prohibition on distribution, incorporating the double scienter to prove liability requires showing:

- (1) the existence of CMI on the infringed work; (2) distribution of the infringed work containing missing and/or altered CMI; (3) that the distribution was done *knowing* that the CMI was removed and/or altered without permission; and (4) that the distribution was done *knowing* that it would induce, enable, facilitate, or conceal an infringement.¹⁸⁵

In the *Mango* case, the court found the following: the photograph’s gutter credit indicating Mango as the photographer constituted CMI; BuzzFeed altered the gutter credit to read “Fisher & Taubenfeld”; BuzzFeed knew the gutter credit was removed because a BuzzFeed employee was the one who had removed it; and finally, BuzzFeed had reason to know that distribution of the photograph with the altered CMI

180. 17 U.S.C. § 1202(a)-(b).

181. *Id.* § 1203(c)(5)(A).

182. *Id.* § 1202(b).

183. In anticipation of the counterargument that innocent violators would still be forced to defend themselves against wrongful litigation, it is noteworthy to turn to Rule 9 of the Federal Rules of Civil Procedure. While knowledge and intent are allowed to be alleged generally in a complaint, they must nevertheless be plausibly pleaded in order to survive a motion to dismiss. While state of mind considerations are often left to be determined by the trier of fact, truly frivolous litigation may be disposed of in this preliminary stage.

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

185. *Mango v. BuzzFeed, Inc.*, 356 F. Supp. 3d 368, 377 (S.D.N.Y. 2019) (emphasis added).

would conceal infringement, especially because the employee who had removed the CMI knew from training and experience that Buzzfeed was required to get permission to use photographs.¹⁸⁶ Examining the third and fourth prongs, it would logically follow that defendants who accidentally removed CMI (meaning they did not intend to commit the act of removal) and/or would not have reasonably known that their actions would conceal or enable infringement would be free from liability under § 1202(b).

As such, the double scienter requirement and its ties to infringement can guide CMI analysis. Recall *Textile Secrets*; its unique fact pattern concerning the FEATHERS design provides an excellent exercise in applying the broad construction of § 1202(c) without the floodgates bursting.¹⁸⁷ The CMI removal claim was originally disposed of, as there was no evidence that Ya-Ya Brand had “employed any technological process in either their removal of the copyright information from the design or in their alleged distribution of the design.”¹⁸⁸

Again, § 1202(c) and the double scienter can work in tandem to prevent unjust results. Applying the aforementioned broad construction of § 1202(c) to the facts in *Textile Secrets*, the border attribution would constitute CMI. The inclusion of a copyright symbol indicates TSI as being the design’s author and shows that this claim was properly brought under a CMI, not trademark, framework. Like *Murphy*, the core of this CMI claim stemmed from an omission: the original FEATHERS pattern included the trim attribution, while the allegedly infringing copy did not. Recall that in *Murphy*, the original photograph appeared in a magazine.¹⁸⁹ When the magazine was scanned in order to create an infringing copy of the image, the magazine was not positioned on the scanner to include the gutter credit containing CMI.¹⁹⁰ *Murphy* is arguably analogous to *Textile Secrets* in this manner.

To recover, however, the plaintiff would also need to prove both scienter elements in § 1202(b): that the removal (in the form of omission) itself was intentional and done knowing (or having reasonable grounds to know) that it would “induce, enable, facilitate, or conceal” the infringement. Again, a broad view of CMI within § 1202(c) would acknowledge attribution in virtually all instances where it is given in connection with a work. It would not, however, necessarily create an onslaught of litigation because of § 1202(b); intent and knowledge constrain damage recovery to knowing actors.

186. *Id.* at 377-78.

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

188. *Id.* at 1201-02.

189. *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 298-99 (3d Cir. 2011).

190. *Id.*

In *Textile Secrets*, the court decided that summary judgment was inappropriate for the attached infringement claim, as there was an issue of genuine material fact regarding the author of the FEATHERS design and who, consequently, had standing to bring suit over potential infringement.¹⁹¹ Absent a valid infringement claim, there was insufficient evidence to show that defendant Ya-Ya Brand even met the double scienter requirements—it would be rare indeed to have an instance of CMI removal *knowing* it would conceal an infringement without an actual infringement occurring. Had the *Textile Secrets* court reached the scienter issue, TSI would still need to present evidence that the CMI removal was done intentionally and knowingly, a potentially high bar to clear in the absence of actual copying.

Again, the *Energy Intelligence* court acknowledged this reality when dismissing KA's floodgates argument.¹⁹² This case also highlights why § 1202's ties to infringement are needed; if found to simply be a non-infringing lookalike, Ya-Ya Brand's peacock feathers design did not wrongfully omit CMI from a copy of FEATHERS. To hold otherwise and allow TSI to recover for CMI removal against Ya-Ya Brand, absent an infringement, would ultimately amount to a penalty against Ya-Ya for bearing any similarity to FEATHERS at all. This would be an untenable result.

Next, when talking about “innocent infringers,” it would be remiss to exclude discussion on fair use. Section 1202 does not explicitly include a fair use exception written into the statute, nor does it reference fair use within the Copyright Act.¹⁹³ However, a number of considerations indicate that fair use and broad CMI protection do not necessarily conflict. Limits on the removal of CMI would arguably not obstruct criticizing, commenting, or parodying an original work. In fact, for a critique, comment, or parody to serve its intended purpose, it almost automatically follows that the source of the original work must be left intact or attribution must be given in some form.¹⁹⁴ Moreover, attribution and fair use can even play nice together, as “[d]espite the absence of any explicit mention of attribution in the fair use factors, some judges have seen fit to incorporate attribution in their opinions, finding it to be an equitable consideration guiding fair use analysis.”¹⁹⁵ Arguably, under the fourth fair use factor that analyzes market

191. *Textile Secrets Int'l, Inc. v. Ya-Ya Brand Inc.*, 524 F. Supp. 2d 1184, 1192 (C.D. Cal. 2007).

192. *Energy Intel. Grp., Inc. v. Kayne Anderson Cap. Advisors, L.P.*, 948 F.3d 261, 277 n.16 (5th Cir. 2020) (“KA’s policy concerns are exaggerated and unrealistic. Liability under § 1202(b) requires knowledge. . . . At trial, EIG presented evidence of KA’s knowledge. . . .”).

193. 17 U.S.C. § 107; *Id.* § 1202.

194. *See generally* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

195. Lastowka, *supra* note 50, at 88.

harm done to the original work by the “infringement,” providing attribution could help preserve the market for the original work by indicating who could be contacted for its license.

However, there could be instances where retaining CMI and making a fair use of a work conflict. The most blatant example of this would be if someone removed the CMI from a work as a form of commentary in and of itself. Since a fair use is categorically not “an infringement of any [exclusive] right,” CMI removal in what is ultimately deemed an earnestly intentioned fair use would necessarily negate the second required prong in the double scienter.¹⁹⁶ Ultimately, even if the above considerations prove futile, there exist “traditional contours”¹⁹⁷ or even constitutional avoidance¹⁹⁸ canon lines of reasoning that can be invoked to protect fair use considerations in this space.

CONCLUSION

Ultimately, the best way to interpret § 1202(c) is to read its text broadly, cabining its definition only when a plaintiff may be trying to improperly disguise a purely trademark-based attribution claim.¹⁹⁹ Such an interpretation of § 1202(c) serves both economic and moral goals, creating a more robust attribution right for authors to wield in a manner that does not create additional conflict within the preexisting U.S. copyright system. Furthermore, the broad construal of CMI within § 1202’s meaning is consistent with the statute’s text, its legislative history, and, arguably, the overarching purpose Congress enacted the DMCA to serve.

In order to recover for CMI removal or alteration however, a plaintiff must show that the defendant meets the double scienter requirements: an intentional act of removal/omission with reasonable knowledge that such action would induce, enable, facilitate, or conceal an infringement. Implicit to the success of a § 1202 claim are valid copyright and valid infringement claims; requiring otherwise would negate the inclusion of the § 106 exclusive rights in § 1202(c), or the reasonable knowledge scienter in § 1202(b), respectively.²⁰⁰ Adhering

196. Susuk Lim, *A Survey of the DMCA’s Copyright Management Information Protections: The DMCA’S CMI Landscape After All Headline News and McClatchley*, 6 WASH. J.L. TECH. & ARTS 297, 307 (2011); 17 U.S.C. § 1202(b).

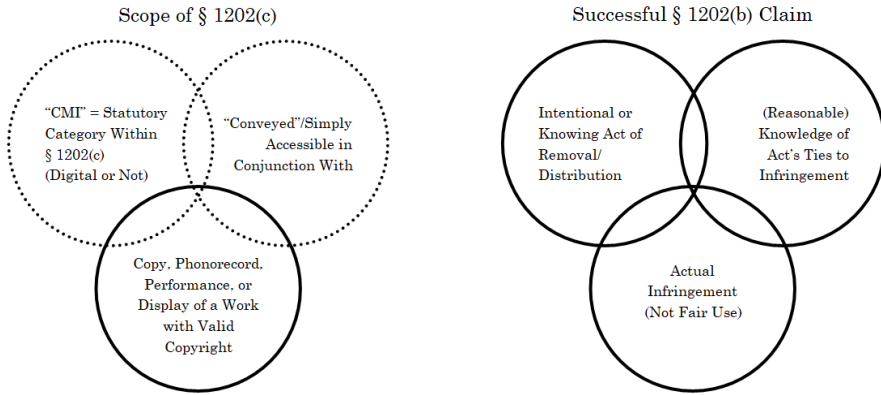
197. See *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (*accord* *Golan v. Holder*, 565 U.S. 302 (2012)), in which Justice Ginsburg described both the idea-expression distinction and fair use as “the traditional contours” of copyright law. Unless Congress tampers with the traditional contours of copyright law, strict scrutiny of Congress’s actions is not required; the Court will instead utilize a rational basis deference when viewing Congress’s actions with respect to copyright law.

198. See MANNING & STEPHENSON, *supra* note 83, at 331 (discussing “[t]he doctrine that courts should construe statutes to avoid serious constitutional problems”).

199. See *supra* Part IV for an analysis of when to cabin § 1202(c) with respect to trademark concerns.

200. See *supra* Part V for an analysis of how such limits are vital to a valid CMI claim.

to these limits will not upset the broad definition of CMI within § 1202(c) and will prevent a flood of incoming § 1202(b) violations. Within the nexus of these requirements lies a clear-cut CMI action. These limits can be depicted pictorially as follows, with the dotted circles indicating where the broad construction applies.



These limits provide courts with an appropriate, holistic framework for working through CMI claims of any nature. Thus, there can be greater consistency in legal outcomes without further guidance from Congress or the Supreme Court. Furthermore, adhering to these limits will allow authors to vindicate both their economic and moral rights in their work, acknowledging the central role that attribution plays in creative undertakings. This framework will be especially helpful in the coming years; as the digital marketplace and social media continue to boom, the number of CMI cases being litigated will likely continue to rise as they have since the DMCA's enactment in 1998.²⁰¹

201. U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY, *supra* note 14, at 87.