I Want My CMI: The Scope of Copyright Management Information under Section 1202 of the Digital Millennium Copyright Act

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Comment

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I. INTRODUCTION

This comment will examine the definition and scope of “copyright management information” (“CMI”) under section 1202 of the Digital Millennium Copyright Act (“DMCA”).

There is a spectrum of ways CMI can be defined; at one extreme, it is defined by the plain meaning of section 1202, at the other, CMI includes only digital components of automated copyright protection or management systems. District courts have held consistent with both ends of the spectrum, and have also taken intermediate positions regarding CMI’s definition. As described below, the only appellate decision to consider this issue held that CMI includes anything falling under any of the eight categories of CMI as defined in section 1202(c), and is not limited to components of an automated copyright protection or management system, while a few district courts have held to the contrary. These courts divided on whether section 1202 is ambiguous regarding the definition of CMI and therefore, whether it is appropriate to look beyond the plain meaning of the statute to various other sources for guidance on the intended scope of CMI. They also disagree whether interpreting section 1202 in the context of the rest of the DMCA changes the meaning of CMI in any appreciable way, and how the goals of the

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2 Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295 (3d Cir. 2011).
5 Murphy, 650 F.3d at 305 (holding CMI under section 1202 not restricted to context of automated copyright protection or management systems).
6 See, e.g. Textile Secrets, 524 F. Supp. 2d at 1199 (concluding that section 1202 is not applicable outside of circumstances related to technological measures or other processes).
7 Compare Murphy, 650 F.3d at 302 (nothing about the text of section 1202 is difficult to interpret) with IQ Grp., 409 F. Supp. 2d at 592 (conceding plain meaning of statute might conceivably include logo, but holding that logo was not CMI under 1202). Cf. Laura Little, Characterization and Legal Discourse, 46 J. LEGAL ED. 372 (1996) (explaining the use and prevalence of characterization as a tool in legal discourse).
8 Compare Murphy, 650 F.3d at 302-03 (finding provision regarding circumvention of “technological measures,” section 1201, does not restrict meaning of CMI in section 1202) with Textile Secrets, 524 F. Supp. 2d at 1201 (holding that section 1202, when contemplated in DMCA as a whole, was not intended to apply outside of
statute affect the scope of CMI.\textsuperscript{9} Courts are also divided about whether the legislative history necessarily limits the definition of CMI beyond the plain meaning of the statute.\textsuperscript{10}

The following section of this comment outlines the existing law, including legislative history and case law surrounding section 1202 and the DMCA as a whole. Next, Section III discusses and analyzes courts’ different constructions of section 1202. Finally, Section IV concludes that a plain meaning approach to defining CMI is the correct one.

\section{Overview of Existing Law}

\subsection{The Statute}

Under section 1202, the DMCA protects CMI placed\textsuperscript{11} by a copyrighted work’s owner from unauthorized tampering.\textsuperscript{12} It prohibits knowingly providing or distributing false CMI with the “intent to induce, enable, facilitate, or conceal infringement,”\textsuperscript{13} and the unauthorized removal or alteration of CMI.\textsuperscript{14}

Section 1202(c) of the Act defines CMI as:

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:

\begin{itemize}
\item \textit{circumstances related to the “Internet, electronic commerce, automated copyright protections or management systems, public registers, or other technological measures or processes”).}
\item \textit{Compare Murphy, 650 F.3d at 303 (finding legislature intended DMCA to expand rights of copyright owners) with Textile Secrets, 524 F. Supp. 2d at 1202 (holding scope of DMCA was intended to encompass the Internet and other electronic transactions)}.\textsuperscript{9}
\item \textit{See Murphy, 650 F.3d at 304 (finding legislative history of DMCA does not actually contradict the plain meaning of the statute)}.\textsuperscript{10}
\item \textit{“Placed” means that the copyright owner has affirmatively included certain information on or near the copyrighted work. See infra n. 15, 16}.\textsuperscript{11}
\item \textit{Agence France Presse v. Morel, 769 F. Supp. 2d 295, 304 (S.D.N.Y. 2011)}.\textsuperscript{12}
\item 17 U.S.C.A. § 1202(a).\textsuperscript{13}
\item 17 U.S.C.A. § 1202(b).\textsuperscript{14}
\end{itemize}
(1) The title and other information identifying the work, including the information set forth on a notice of copyright.

(2) The name of, and other identifying information about, the author of a work.

(3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.

(4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.

(5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.

(6) Terms and conditions for use of the work.

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

(8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.15

The statute does not require that the CMI appear on the work itself, so long as it is “conveyed in connection with copies” of a work; for example, if an author’s designations appear next to an image on a website16 or magazine page,17 viewers will understand them to refer to authorship.

15 17 U.S.C.A. § 1202(c).
16 Morel, 769 F. Supp. 2d at 305.
17 See Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295, 299 (3d Cir. 2011) (holding “gutter credit,” credit placed in margin of magazine page which usually runs perpendicular to corresponding image, qualifies as CMI).
B. BACKGROUND AND GOALS OF THE DMCA AND SECTION 1202

The DMCA was enacted in 1998 to address the unique problems of copyright enforcement created by the increasing use of technology and the internet.\(^\text{18}\) It was enacted to implement the World Intellectual Property Organization ("WIPO") Copyright Treaty and Performances and Phonograms Treaty ("WIPO Treaties").\(^\text{19}\) WIPO is an agency within the United Nations specially charged with promoting protection of intellectual property on an international level.\(^\text{20}\) The WIPO Treaties, which were adopted in 1996,\(^\text{21}\) also focus in part on protecting the rights of authors by providing solutions to the problems raised by new technology.\(^\text{22}\) CMI is defined in Article 12 of the WIPO Treaties as:

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\text{[I]nformation which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.}^{\text{23}}
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The treaties also specifically allow a “double protection for technical measures,” meaning that they provide separate protection for modification or removal of both “effective technical measures” and “rights management information;”\(^\text{24}\) what is more commonly known in the United States as CMI.\(^\text{25}\)

\(^\text{18}\) See Textile Secrets Int'l, Inc. v. Ya-Ya Brand Inc., 524 F. Supp. 2d 1184, 1196 (C.D. Cal. 2007) (stating that, even prior to DMCA, Congress had been tackling problems of copyright enforcement created by digital technology).
\(^\text{19}\) Universal City Studios, Inc. v. Corley, 273 F.3d 429, 440 (2nd Cir.2001).
\(^\text{21}\) Textile Secrets, 524 F. Supp. 2d at 1197-98.
\(^\text{22}\) See WIPO Treaty, Apr. 12, 1997, art. 11, S. Treaty Doc. No. 105-17 (1997) (expressing this goal in preamble).
\(^\text{23}\) Textile Secrets, 524 F. Supp. 2d at 1198 (citation omitted).
\(^\text{24}\) Textile Secrets, 524 F. Supp. 2d at 1198.
The problem of digital copyright enforcement was also addressed in the United States prior to the WIPO treaties.\textsuperscript{26} Congressional hearings on the topic spanned several years before the treaties were enacted.\textsuperscript{27} Congress felt the need to act because it feared that traditional copyright enforcement means were ineffective for containing piracy of copyrightable works in digital form.\textsuperscript{28} Section 1202 of the DMCA originated in the Report of the Working Group on Intellectual Property Rights ("Working Group"), known as the "White Paper,"\textsuperscript{29} a report released in 1995.\textsuperscript{30} The Working Group was included within the Information Infrastructure Task Force ("IITF"), which was established under the Clinton Administration to develop comprehensive information technology and telecommunication policies.\textsuperscript{31} The Working Group itself was established "to make recommendations on any appropriate changes to U.S. intellectual property law and policy."\textsuperscript{32} The White Paper included a draft of section 1202 and discussed the rationale behind it.\textsuperscript{33} It stated, "[t]o implement . . . rights management functions, information will likely be included in digital versions of a work (i.e., copyright management information) [and] to inform the user about the authorship and ownership of a work (e.g., attribution information)," which could be included in digital signatures, for example.\textsuperscript{34}

Committees from both the Senate and the House of Representatives also published reports regarding the DMCA prior to its enactment in 1998,\textsuperscript{35} but section 1202 was only briefly discussed.\textsuperscript{36} These reports stated that the Act was intended to help manage copyright

\textsuperscript{26} Corley, 273 F.3d at 440.
\textsuperscript{27} Id.
\textsuperscript{28} Id. at 435.
\textsuperscript{29} Textile Secrets, 524 F. Supp. 2d at 1196.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} IQ Grp., 409 F. Supp. 2d at 594 (D.N.J. 2006).
\textsuperscript{34} Id. at 595.
\textsuperscript{35} Textile Secrets, 524 F. Supp. 2d at 1198.
\textsuperscript{36} IQ Grp., 409 F. Supp. 2d at 596.
enforcement problems during a time when “borderless digital means of dissemination,” such as the internet, were increasing in popularity.\textsuperscript{37} A Senate Committee Report stated:

CMI need not be in digital form, but CMI in digital form is expressly included. It is important to note that the DMCA does not require CMI, but if CMI is provided, the bill protects it from falsification, removal or alteration. Information that is not defined as CMI under the bill would not be protected by these provisions\textsuperscript{38}.

The House Committee similarly explained that section 1202 was needed to “ensure the integrity of the electronic marketplace.”\textsuperscript{39}

C. STATUTORY INTERPRETATION

This section gives an account of a conventional method of statutory interpretation and does not constitute a final word on this contentious subject. Statutory interpretation typically begins with the “cardinal canon” that a statute is complete and its language is specifically designed to do exactly what it says.\textsuperscript{40} Therefore, the first step of statutory interpretation begins with the text of the statute itself.\textsuperscript{41} The judicial inquiry goes no further if the language of the statute is clear and unambiguous.\textsuperscript{42} “When a statute’s language is clear, courts [. . .] do not resort to legislative history to cloud a statutory test but instead enforce [the statutory language] according to its terms.”\textsuperscript{43} Legislative history can create more uncertainty than clarity about a

\textsuperscript{37}Textile Secrets, 524 F. Supp. 2d at 1199.
\textsuperscript{38}Id.
\textsuperscript{39}Id. at 1198-99 (citation omitted).
statute, making it difficult to rely on in many instances. If the statute is ambiguous, only then is it appropriate for the court to consult the legislative history surrounding the statute to glean Congress’ intent and resolve the ambiguity in that context.

Whether or not a statute is ambiguous is determined in light of the statute as a whole. A statute is not ambiguous merely because it contains superfluous language or is otherwise poorly drafted. Courts should also avoid interpretations of statutes that render language superfluous; however this is not an absolute prohibition against surplusage in all instances.

In Rubin v. U.S., a case where a statute was interpreted based on its plain meaning alone, the Supreme Court addressed the issue of whether a pledge of stock to a bank as collateral for a loan is an “offer or sale” of a security under section 17(a) of the Securities Act of 1933, a federal statute prohibiting fraudulent interstate transactions. A “sale” is defined by the act as a “disposition of [an] interest in a security, for value.” In Rubin, William Rubin, the petitioner and vice president of Tri-State Energy, Inc. was charged with violation of and conspiracy to violate various federal antifraud statutes for submitting false and misleading information in application for a loan from Bankers Trust, Inc. Rubin had offered stock in six companies as collateral for the loan, but the stock turned out to be essentially worthless. He did not deny that he had engaged in conspiracy to commit fraud, but instead alleged that those pledges of stock did

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45 Germain, 503 U.S. at 255 (Stevens, J. concurring).
47 See Lamie, 540 U.S. at 535-36 (e.g. because statute is awkward or contains grammatical errors).
48 Germain, 503 U.S. at 253.
49 If interpretation of a statute causes surplusage, that does not necessarily mean he statute is always ambiguous. In fact, “[r]edundancies across statutes are not unusual events in drafting, and so long as there is no positive repugnancy between two laws... a court must give effect to both.” Accord Germain, 503 U.S. at 253 (citation omitted).
50 15 U.S.C. § 77q(a) (West 2012); Rubin, 449 U.S. at 425.
51 15 U.S.C. § 77b(3); Rubin, 449 U.S. at 429.
53 Id. at 427.
not constitute “offers” or “sales” under section 17(a) of the Act.\textsuperscript{54} Rubin’s interpretation of the statute, the court said, “not only is cramped but conflicts with the plain meaning of the statute and its purpose as well.”\textsuperscript{55} The Court determined that a “sale” under the plain text meaning of the statute includes securing a loan by pledging shares of stock, and therefore that Rubin was had violated the statute, because the terms of the statute were unambiguous and consistent with the purposes of the Act as a whole.\textsuperscript{56}

By contrast, \textit{U.S. v. Dauray} is a case where a statute was held to be ambiguous.\textsuperscript{57} Charles Dauray was charged with possessing child pornography under 18 U.S.C. § 2252(a)(4)(B),\textsuperscript{58} which prohibited certain materials involving the sexual exploitation of minors, specifically “possession of 3 or more books, magazines, periodicals, films, video tapes, or other matter that have passed in interstate or foreign commerce and which contain any visual depiction [of] a minor engaged in sexually explicit conduct.”\textsuperscript{59} Dauray stipulated to the possession of certain “visual depictions,” in the form of thirteen unbound photos of minors.\textsuperscript{60} He asserted, however, that the indictment failed to charge an offense under the statute because the individual photos being “visual depictions” themselves could not also contain visual depictions.\textsuperscript{61} \textit{Dauray} recognized that the statute’s language lent itself to two valid dictionary definitions of the word “contain;” the defense and the prosecution each relied on a different definition, but only one could sustain the conviction.\textsuperscript{62} Because the definitions relied upon by each side led to legitimate,

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\textsuperscript{54} \textit{Id.} at 428-29.
\textsuperscript{55} \textit{Id.} at 431.
\textsuperscript{56} 15 U.S.C. § 77b(3); \textit{Rubin}, 449 U.S. at 429.
\textsuperscript{57} \textit{U.S. v. Dauray}, 215 F.3d 257, 259 (2d Cir. 2000).
\textsuperscript{59} \textit{Dauray}, 215 F.3d at 259.
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.}
\textsuperscript{62} \textit{Id.} at 260-61.
\end{flushleft}
but conflicting interpretations of the statute, the court determined it was ambiguous.\textsuperscript{63} It held that the rule of lenity required the ambiguity be resolved in favor of the criminal defendant, Dauray, and dismissed the indictment because the individual photos did not fall under the terms of the statute.\textsuperscript{64}

If a statute is ambiguous, then the court looks beyond the statutory text to other, innumerable canons of interpretation.\textsuperscript{65} If neither the statutory text nor cannons of interpretation help elucidate Congress’ intent, the court may consider the legislative history of the statute to assist in making that determination.\textsuperscript{66} One canon of statutory interpretation is to look to the structure of the statute.\textsuperscript{67} Another canon dictates that courts should not effectively add new language to the text of a statute where the results created by a plain meaning interpretation of the statute are not absurd.\textsuperscript{68} This would be, “not a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope.”\textsuperscript{69} There is a distinction between allowing courts, where necessary, to fill in gaps that Congress has left by silence, and redrafting rules they have affirmatively enacted;\textsuperscript{70} the latter is not permissible because it goes beyond the judiciary’s duty.\textsuperscript{71}

If the plain language of the statute would create absurd results, the court must treat the statute as if it is ambiguous,\textsuperscript{72} and the intent of the drafters controls.\textsuperscript{73} “At least where the

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\textsuperscript{63} Id. at 262.
\textsuperscript{64} 18 U.S.C.A. § 2252; \textit{Dauray}, 215 F.3d at 264.
\textsuperscript{66} \textit{Dauray}, 215 F.3d at 264.
\textsuperscript{67} Id. at 262-63.
\textsuperscript{68} See \textit{Lamie}, 540 U.S. at 538 (finding petitioner’s interpretation of statute was at odds with this prohibition).
\textsuperscript{69} Id. (citing Iselin v. U.S., 270 U.S. 245, 251 (1926)).
\textsuperscript{70} Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978).
\textsuperscript{71} See Iselin v. U.S., 270 U.S. 245, 251 (1926) (holding that supplying omissions is outside scope of judicial function).
\textsuperscript{72} Regardless of its actual ambiguity, or lack thereof. \textit{Lamie}, 540 U.S. at 536.
\textsuperscript{73} \textit{Ron Pair}, 489 U.S. at 242.
\end{footnotesize}
disposition required by the text is not absurd,” if a statute’s language is clear, the courts’ sole function is to enforce it according to its terms.\footnote{Lamie, 540 U.S. at 534 (citing Hartford Underwriters, 530 U.S. at 6).} This “absurdity” arises in the rare case where the results of a plain meaning interpretation of the statute would be clearly and demonstrably contrary to the intentions of its drafters.\footnote{Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982). See also Germain, 503 U.S. at 254 (finding statute applied by its terms because it did not lead to results contrary to Congress’ intent); Rubin, 449 U.S. at 430 (holding statute unambiguous and no extraordinary circumstance present which would otherwise call for further judicial inquiry).} Courts do not ordinarily look beyond the plain meaning of a statute where its terms are clear—such circumstances are exceptional.\footnote{Rubin, 449 U.S. at 430 (citing Tennessee Valley Auth. v. Hill, 437 U.S. 153, n. 29 (1978)).}

D. THE PLAIN TEXT APPROACH

One prevailing approach to the definition of CMI is that the plain meaning of section 1202 is controlling, and that it need not be digital or part of an automated copyright protection or management system.\footnote{Murphy, 650 F.3d at 302.} In \textit{Murphy v. Millennium Radio Grp.}, Photographer Peter Murphy filed suit against the owner of the radio station WXXW for multiple claims, including violation of section 1202.\footnote{Id. at 298.} Murphy was hired by a magazine, the New Jersey Monthly (“NJM”), to take a photo of the hosts of a show on WXXW, and he retained the copyright to the image.\footnote{Id. at 299.} An employee of the radio station posted the photo on the internet, having removed part of the original caption and the gutter credit of that magazine where it originally appeared.\footnote{Id. at 298-99.} Murphy claimed that WXXW violated section 1202 of the DMCA by reproducing the photo without the credit identifying him as the author, which he alleged was CMI.\footnote{Id. at 299.} He contended that the gutter
credit of the photo was CMI and thus section 1202 applied because it contained “the name of ... the author of [the Image]” and was “conveyed in connection with copies of” it, and that it was “removed or altered” consistent with the terms of the statute.82

The defendants in Murphy did not deny that they had removed the gutter credit and caption, but instead argued that these things were not CMI under section 1202, and therefore they did not violate that statute.83 They contended that “despite the apparently plain language of section 1202,” it must be read in conjunction with the other sections of the DMCA and the legislative history, and therefore “information like the name of the author of a work is not CMI unless it also functions as part of an automated copyright protection or management system.”84

Murphy vacated the district court’s decision to grant summary judgment in favor of the defendants,85 holding that the gutter credit was not prevented from qualifying as CMI under section 1202.86 The court found that the definition of CMI under the statute is anything falling under the plain language of one of the eight categories of section 1202(c), regardless of whether or not it is a component of an automated copyright protection or management system.87 The court did not feel compelled to look beyond the plain meaning of the text when interpreting the statute because it determined the result of applying the plain text interpretation was not so absurd or extreme so as to require it.88 Murphy did not see the necessity of a discussion regarding whether or not the results of its interpretation of section 1202 produced desirable results, as opposed to absurd ones, stating “[i]f there is a difficulty here, it is a problem of policy, not of

82 Murphy, 650 F.3d at 301.
83 Id.
84 Id.
85 Id. at 310.
86 Id. at 305.
87 Murphy, 650 F.3d at 302.
88 See Id. (explaining sole function of courts is to enforce statute according to its terms when its language is plain and the disposition required by text is not absurd) (citing Alston v. Countrywide Fin. Corp., 585 F.3d 753, 759 (3d Cir.2009)).
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logic. However, the court did go one step further and stated that even if it were appropriate to consider the legislative history of section 1202 and the DMCA in interpreting the scope of CMI, they do not require a definition of CMI that is limited to components of automated copyright protection or management systems.90

A number of other district courts have agreed with Murphy that CMI is defined solely based on the plain meaning of section 1202.91 In AP v. All Headline News, the Associated Press alleged that All Headline News ("AHN"), an online company that supplies news stories to customer websites, had copied its news stories without permission.92 The AP sued AHN under section 1202(b), claiming they had altered or removed CMI from those news stories when they repurposed them as their own, citing six specific instances of this behavior.93 AHN filed a motion to dismiss this claim.94 The AP is a news organization known for reporting breaking news, whereas AHN does not do any original reporting, but instead has its employees aggregate the text of pre-existing news stories, frequently those originally reported by the AP, to “republicate” and credit as an AHN piece.95 The court held in favor of the AP, finding that the plain text definition of CMI applied because AHN did not provide any textual support for its assertion that CMI is limited to “the technological measures of automated systems.”96

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89 Id.
90 See Id. (finding defendants were essentially asking it to rewrite section 1202 and insert absent term, “automated copyright protection or management system”).
91 E.g. Morel, 769 F. Supp. 2d at 306 (applying plain meaning of statute in determining designations appearing next to the original images were CMI); Cable v. Agence France Presse, 728 F. Supp. 2d 977, 981 (N.D. Ill. 2010) (applying statutory definition of CMI). See also All Headline News, 608 F. Supp. 2d at 461 (applying statutory text as written before considering legislative history).
93 The AP had other claims under the federal Copyright Act, 17 U.S.C. §§ 106, and the Lanham Act, 15 U.S.C. §§ 1114 & 1125(a), which are not relevant here. Id.
94 AHN filed a motion to dismiss all claims except the claim for copyright infringement. Id. at 457.
95 Id. at 457-58.
96 Id. at 462.
Agence France Presse v. Morel also rejected the definition of CMI as components of automated copyright protection or management systems and instead followed the precedent of All Headline News.\textsuperscript{97} In Morel, the news organization Agence France Presse ("AFP") sued for a declaratory judgment that they had not infringed photographer David Morel’s pictures of the aftermath of the June 22, 2010 earthquake in Port-au-Prince, Haiti.\textsuperscript{98} The same day Morel took the photos, he posted them on a third party application of Twitter called Twitpic,\textsuperscript{99} and although the actual images did not include CMI, the attributions “Morel” and “by photomorel” were on the webpage next to them.\textsuperscript{100} Another man, Lisandro Suero, copied Morel’s photos and posted them to his own Twitpic page without attribution to Morel.\textsuperscript{101} After Suero tweeted that he had exclusive photos of the earthquake, AFP downloaded the photos from his Twitpic page and labeled them with a credit line designating AFP as a licensing agent and Suero as the photographer.\textsuperscript{102} According to Morel, they did this without taking the proper actions to verify the authorship and authenticity of the photos.\textsuperscript{103} Morel made several counterclaims against AFP and other third party defendants, including the allegation that AFP had violated section 1202 by providing incorrect attribution information on the photos, which they failed to correct even after they were notified of the mistake.\textsuperscript{104} Morel alleged that the attributions on his Twitpic site were CMI.\textsuperscript{105} The court held that the plain language of section 1202 is controlling, and therefore

\textsuperscript{97} Morel, 769 F. Supp. 2d at 305 (S.D.N.Y. 2011); All Headline News, 608 F. Supp. 2d at 461-62.
\textsuperscript{98} Morel, 769 F. Supp. 2d at 298-301.
\textsuperscript{100} Morel, 769 F. Supp. 2d at 298-305.
\textsuperscript{101} Id. at 299.
\textsuperscript{102} Id. at 300.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 305.
\textsuperscript{105} Morel, 769 F. Supp. 2d at 304.
agreed that the attributions fell under that statutory definition as “the name of, and other identifying information about, the author of a work.”

**E. BEYOND THE PLAIN MEANING**

Several district courts have held that there is more to the definition of CMI than its plain language; that it must involve something digital, or some technological process. For example, *IQ Group, Ltd. v. Wiesner Pub, LLC*, was one of the first cases to examine the scope of the definition of CMI under section 1202; however, it has been overruled by *Murphy*. IQ Group, an advertising service provider, filed suit against another advertising service, Wiesner, alleging violations of section 1202, among other claims. IQ distributed email advertisements for two insurance companies containing a graphic used by IQ as a logo and a hyperlink that directed viewers to IQ’s website when clicked. Subsequently, Wiesner was hired by the same two insurance companies. Wiesner modified the original IQ ad by removing the IQ logo and link, added new information, and then distributed the new ad by email. IQ claimed that these actions by Wiesner constituted removal of CMI under section 1202(b)(1), distribution of false CMI under section 1202(a)(2), distribution of CMI knowing that CMI has been removed or altered under section 1202(b)(2), and finally, distribution of copies of works knowing that CMI

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107 *See, e.g.* McClatchey v. AP, No. 3:05-CV-145, 2007 WL 776103 (W.D. Pa. Mar. 9, 2007) (finding CMI may include non-digital information as well as digital); *Textile Secrets*, 524 F. Supp. 2d at 1199 (concluding section 1202 is not applicable outside of circumstances related to technological measures or other processes); *IQ Grp.*, 409 F. Supp. 2d at 589 (holding that information must function as component of an automated copyright protection or management system to qualify as CMI under section 1202).
109 *Murphy*, 650 F.3d at 304-05.
110 *IQ Grp.*, 409 F. Supp. 2d at 589.
111 *Id.*
112 *Id.* at 589, 591.
113 *Id.*
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has been removed under section 1202(b)(3). Wiesner moved for summary judgment on these claims, alleging that the logo and hyperlink were not CMI under the meaning of the statute, and the motion was granted. IQ Group held that a hyperlink and logo were not CMI under the meaning of section 1202. The court determined the logo and hyperlink were not CMI, despite IQ’s contention that the logo and hyperlink fell clearly under several of the eight categories of CMI listed in section 1202(c) because the statute should be interpreted to define CMI only as “component[s] of an automated copyright protection or management system.”

In Textile Secrets v. Ya-Ya Brand, a textile design and sales company, Textile Secrets International (“TSI”), sued a clothing designer, Ya-Ya Brand, Inc., claiming, among other things, violation of section 1202 for removal of CMI. TSI alleged that Ya-Ya made copies of its copyrighted fabric design for use in several garments and, in the process, removed CMI from it. Sample yardage of the fabric sold by TSI had markings of its name and the copyright symbol on the selvage, and a tag was attached which stated that the design is a registered work of the plaintiff’s. TSI alleged that by removing this information and making copies of the design, the defendant violated section 1202(b). The court found in favor of the defendant,

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114 Id. at 591.
115 IQ Grp., 409 F. Supp. 2d at 589.
116 Id. at 599.
117 IQ asserted that the logo fell 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”), and also that the hyperlink fell under categories 3 and 7, and that the hyperlink pointed to a website containing information falling within category 6 (“[t]erms and conditions for use of the work”). IQ Grp., 409 F. Supp. 2d at 591.
118 Id. at 593, 597.
119 Textile Secrets, 524 F. Supp. 2d at 1188.
120 Id. at 1187.
121 Selvage is the otherwise empty border of fabric that is not intended to be used after the fabric is sold. Id. at n. 7.
122 Id. at 1194.
123 Including other claims, such as copyright infringement. Id. at 1187.
holding that the copyright notice on the selvage of the fabric design was not CMI under the meaning of section 1202.\textsuperscript{124}

Textile Secrets said applying a plain language interpretation of section 1202 would be improper.\textsuperscript{125} It found that the plain meaning definition of CMI would create “impracticable results” because it would trigger the statute whenever virtually anything where the author has fixed her name has been tampered with.\textsuperscript{126} It said,

Interpreting the phrase “including in digital form” to mean that copyright management information exists wherever copyright information is located (i.e., on all non-digital works, such as fabric, as well as digital works), would in effect result in the DMCA replacing existing copyright law, as the Act would theoretically apply to all instances of copyright infringement where copyright information was falsified, altered or removed as set forth in subdivisions (a) and (b) of § 1202 . . . [I]ts purpose was to give an added layer of protection to certain works that were vulnerable to infringement due to advances in modern technology, namely the Internet and electronic commerce.\textsuperscript{127}

Textile Secrets found that such a “wide-reaching” interpretation of CMI would produce incongruous effects considering that, under section 1201, the DMCA also prohibits the circumvention of technological measures that protect copyrighted works.\textsuperscript{128}

The plain language definition and corresponding results, the court added, are also not supported by the legislative history and goals behind the DMCA and section 1202.\textsuperscript{129} Textile Secrets examined the legislative history of the act, including the WIPO treaties,\textsuperscript{130} the White Paper,\textsuperscript{131} and committee reports.\textsuperscript{132} It concluded that, within the context of the legislative history, there is more to the definition of CMI than the plain text of section 1202.\textsuperscript{133} Textile Secrets held

\begin{itemize}
  \item \textsuperscript{124} Textile Secrets, 524 F. Supp. 2d at 1201.
  \item \textsuperscript{125} Id. at 1195.
  \item \textsuperscript{126} Id. (citing IQ Grp., 409 F. Supp. 2d at 593).
  \item \textsuperscript{127} Id. at 1202.
  \item \textsuperscript{128} Id. at 1195.
  \item \textsuperscript{129} Textile Secrets, 524 F. Supp. 2d at 1203.
  \item \textsuperscript{130} Id. at 1198.
  \item \textsuperscript{131} Id. at 1196 (finding White Paper understood CMI to be a kind of digital “license plate”).
\end{itemize}
that the statute was only implicated in situations where a technological process is used in the placement or removal of CMI.\textsuperscript{134} It did not, however, go so far as to outline the specific scope of section 1202 beyond the facts of that case.\textsuperscript{135}

Finally, \textit{McClatchey v. Associated Press} involved a claim under section 1202 for the removal of the copyright notice from a copy made of a physical photograph.\textsuperscript{136} Valencia McClatchey sued the AP for removing and distributing false copyright information under section 1202(a) and (b) and the Defendant AP moved for summary judgment.\textsuperscript{137} McClatchey had copyright protection in a photograph she had taken of the Flight 93 crash in Shanksville, PA on September 11, 2001.\textsuperscript{138} An AP reporter visited McClatchey’s home under the pretense of writing a story about her and took a picture of the photograph, which was then reproduced in the AP article and distributed to the AP’s member news organizations without McClatchey’s permission.\textsuperscript{139} She alleged that the picture of the photo was cropped to remove the title and copyright notice she had included in the original; however the AP asserted the copyright notice was not CMI because it was not “digital.”\textsuperscript{140} McClatchey used a software program called “My Advanced Brochures” on her computer to print her name, the photograph’s title and the copyright notice on all of the printouts she made of it.\textsuperscript{141} \textit{McClatchey} denied the defendant’s motion for summary judgment, holding that section 1202 applied to the title and copyright

\begin{footnotes}
\textsuperscript{132} \textit{Id.} at 1198 (describing section 1202 as second “technical adjunct” to copyright law required to implement WIPO treaties).
\textsuperscript{133} \textit{Id.} at 1201.
\textsuperscript{135} \textit{Textile Secrets}, 524 F. Supp. 2d at 1201.
\textsuperscript{136} \textit{McClatchey}, No. 3:05-CV-145, 2007 WL 776103, at *1.
\textsuperscript{137} \textit{Id.} at *1.
\textsuperscript{138} \textit{Id.} (does not elaborate as to definition of “digital”).
\textsuperscript{139} \textit{Id.} at *2.
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{McClatchey}, No. 3:05-CV-145, 2007 WL 776103, at *5.
\end{footnotes}
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It determined that this information was CMI, specifically because a computer program was used to print it on the photograph. According to the court, CMI does include protection for non-digital information, and therefore the copyright notice fell under the scope of CMI because it involved the use of a “technological process.”

F. ANALYSIS OF PRIOR LAW

Some courts construed CMI under section 1202 as only including digital forms or digital components of an automated copyright protection or management system because they said the language of 1202 was ambiguous or lead to absurd results, and because they found the legislative history supports this “narrowing interpretation.”

Textile Secrets said:

[T]he Court looks to § 1202 not in isolation, but within the overall statutory scheme of the DMCA to ensure that the language at issue is considered in its proper context. Section 1202 is found within Chapter 12 of the Copyright Act. The first statutory provision in Chapter 12, 17 U.S.C. § 1201, provides that “[n]o person shall circumvent a technological measure that effectively controls access to a [protected] work” (17 U.S.C. § 1201(a)(1)(A)), and goes on to prohibit the manufacturing, importing, offering to the public, providing, or otherwise trafficking in any technology, product, service, device, component, or part thereof. . .

Textile Secrets found that because the focus of section 1201 was the circumvention of technological measures that protect copyrighted works, CMI must be defined in that context and not be given “limitless scope.”

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142 Id. at *2.
144 See McClatchey, No. 3:05-CV-145, 2007 WL 776103, at *5 (concluding definition of CMI must include non-digital forms so that terms “including digital forms” are not rendered superfluous).
145 It is difficult to find specific mention of either term in these cases, although they use phrases and reasoning that sound very similar. See e.g. Textile Secrets at 1195 (finding that results of applying literal meaning of section 1202 would “not be proper”).
146 Id.; IQ Grp., 409 F. Supp. 2d at 593.
147 Textile Secrets, 524 F. Supp. 2d at 1194-95.
148 Id. at 1195. But see McClatchey, No. 3:05-CV-145, 2007 WL 776103 at *6 (cropping copyright notice from photo seems to be precisely what section 1202 is directed to address).
Courts that support this definition of CMI also rely heavily on the argument that it is supported by the legislative history surrounding the DMCA, and specifically section 1202. In general, authors’ rights have traditionally been managed by people, as opposed to digital systems, but some courts argue that because the WIPO treaties and DMCA were enacted to deal with the unique copyright protection problems created by technological advances, the rights that they contain should be read to extend only to digital forms of CMI. IQ Group stated that:

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.

The WIPO Treaties aim to protect the technological measures of copyright protection by way of CMI. Because the DMCA was enacted to implement the WIPO treaties, some courts reasoned that the DMCA may have been constructed with reference to them. The White Paper also “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.” The focus of the White Paper is distinctly on digital versions of a work and digital systems for managing works. IQ Group also pointed to Committee Reports as further evidence of the legislature’s
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intent, which suggested digital watermarks as an example of CMI, and stated CMI’s purpose “is to facilitate licensing of copyright for use on the Internet and to discourage piracy,” and “ensure the integrity of the electronic marketplace by preventing fraud and misinformation.”

Another main reason courts have defined CMI as digital information or parts of an automated copyright protection or management system is because they fear the consequences of applying the plain language definition. IQ Group cited the possibility that trademark and copyright law would overlap if the plain meaning interpretation of CMI was followed. Concern surrounding the DMCA related to the distinction between copyright and trademark law comes from Dastar Corp. v. Twentieth Century Fox Film Corp., where the Supreme Court of the United States cautioned against blurring the two doctrines in certain circumstances, as is explained in further detail below. IQ Group worried that allowing a trademark such as the IQ logo to trigger copyright protection under the DMCA would be doing just that, turning “the DMCA into a species of mutant trademark/copyright law.” This is something, it said, Congress did not intend.

Murphy drew a different conclusion about section 1202 because it determined that the plain language was sufficiently unambiguous and therefore saw no need to consult the legislative history of the statute. As long as the result is not absurd, the court said, it is not compelled to read the statute in a more restrictive way. In Morel, the court held the author’s identifying

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156 IQ Grp., 409 F. Supp. 2d at 596.
157 See, e.g. Textile Secrets, 524 F. Supp. 2d at 1195 (holding that literal interpretation of section 1202 would lead to impracticable results).
159 Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003). See discussion infra Part III.B.
161 Id.
162 Accord Murphy, 650 F.3d at 302 (finding text of section 1202 clear and unambiguous); Interplan Architect, No. 4:08-cv-03181, 2009 WL 6443117, at *5 (finding terms of section 1202 not sufficiently ambiguous to resort to legislative history).
163 Murphy, 650 F.3d at 302.
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information was CMI because it “fell squarely within the statutory definition” and refused to address the legislative history because the statute’s language was clear. ¹⁶⁴ Not only is the text of the statute clear, but it is also actually consistent with the goals of the statute as expressed in the legislative history. ¹⁶⁵

In cases that applied a plain text definition of CMI, the courts were not persuaded that CMI is required to be a component of an automated copyright protection or management system, even when read in context of the DMCA as a whole or in conjunction with section 1201. ¹⁶⁶ If sections 1201 and 1202 were meant to be interpreted in an interrelated way, it is strange that nothing in the text explicitly indicates that intention. ¹⁶⁷ “Section 1201 does not mention copyright management information; in fact, it does not refer to section 1202 at all. ¹⁶⁸ Nor does the statute contain the phrase “automated copyright protection or management systems.” ¹⁶⁹

These courts that applied the plain meaning approach to defining CMI were also not persuaded that the legislative history mandates anything different. ¹⁷⁰ The White paper, WIPO Treaties and Committee Reports “often describe CMI as information [that] will likely be included in digital versions of a work,” but doesn’t specifically address whether or not CMI may be in other forms, apparently leaving that question open. ¹⁷¹ “[T]he DMCA was intended to expand—in some cases [. . .] significantly—the rights of copyright owners.” ¹⁷²

¹⁶⁴ See Morel, 769 F. Supp. 2d at 306 (applying express statutory definition following the reasoning of All Headline News, 608 F. Supp. 2d 454).
¹⁶⁵ See Murphy, 650 F.3d at 302 (finding legislative history of DMCA does not actually contradict plain meaning interpretation advocated by plaintiff). Cf IQ Grp., 409 F. Supp. 2d at 592 (conceding plain meaning interpretation not implausible based on language of statute).
¹⁶⁶ See e.g., Murphy, 650 F.3d at 303 (finding nothing about section 1201 expressly limits definition of CMI).
¹⁶⁷ Id. at 302-03.
¹⁶⁸ Id. at 303.
¹⁶⁹ Id. (internal quotation marks omitted).
¹⁷⁰ See e.g. Id. (concluding legislative history is not an “extraordinary showing of contrary intentions” which would compel an interpretation other than what is given by plain meaning of statute).
¹⁷¹ Murphy, 650 F.3d at 304-05 (internal quotation marks omitted).
¹⁷² Id. at 303.
Furthermore, the “narrow” interpretation given to CMI based on the DMCA’s legislative history by *IQ Group* and other courts is not reliable because it is diametrically opposed to the text of the statute.\(^{173}\)

### III. DISCUSSION

There are two approaches to the definition of CMI under section 1202; the plain text approach, and the approach that there is something beyond the plain meaning of the statute.\(^{174}\) Some courts have held the plain text approach is correct,\(^{175}\) while others have taken the other position.\(^{176}\) Courts that object to a literal interpretation of the definition of CMI under section 1202 have done so for a few reasons. First they say the language of the statute is unclear or leads to results contrary to what Congress intended.\(^{177}\) Second, they predict that such a “very broad” reading of section 1202 would cause copyright and trademark doctrines to overlap impermissibly.\(^{178}\) A final concern that may arise is that defining CMI based on section 1202’s plain meaning would create something like a right of attribution, which traditionally has only been recognized in limited instances in the United States.\(^{179}\) The plain text interpretation is the correct approach to the definition of CMI, however, for the reasons explained below.

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\(^{173}\) The text of the statute would include things which the narrower approach taken by *IQ Grp.*, 409 F. Supp. 2d at 587, would not include. *Morel*, 769 F. Supp. 2d at 306.


\(^{175}\) E.g. *Murphy*, 650 F.3d at 305 (refusing to limit scope of CMI to “automated copyright protection or management systems”).


\(^{177}\) See *Textile Secrets*, 524 F. Supp. 2d at 1203.

\(^{178}\) *IQ Grp.*, 409 F. Supp. 2d at 592.

\(^{179}\) Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34-35 (2003); Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 82 (2d Cir. 1995).
A. THE PLAIN TEXT OF SECTION 1202 IS CLEAR AND NOT ABSURD

The plain meaning of the definition of CMI under section 1202 is unambiguous and the legislative history does not make a strong showing of a contrary intent, therefore CMI is only limited by the language of section 1202(c), as the third circuit found in Murphy.\(^{180}\) The definition of CMI taken by Textile Secrets, IQ Group and McClatchey requires essentially that additional terms be written in as a part of the statutory definition of CMI; terms which appear “nowhere in the text of the DMCA and which [lack] a clear definition.”\(^{181}\) The radio station defendants in Murphy conceded that the language of section 1202 was apparently plain and unambiguous.\(^{182}\) Unlike Dauray, for example, the different interpretations of the statute in Murphy did not turn on conflicting, legitimate dictionary definitions.\(^{183}\) The terms on 1202(c) are fairly straightforward.\(^{184}\) Section 1202(c) specifically states that CMI is information conveyed with a copy or phonorecord of a copyrighted work includes information in digital form,\(^{185}\) but does not say it is limited it, which indicates that information in non-digital form is included as well. CMI in non-digital form is the most straightforward meaning from the definition, so digital forms were specifically mentioned to ensure their inclusion. Even if any of the terms within 1202 were ambiguous, the Murphy defendants’ asserted definition of CMI is not based in any definition of those terms, or, in fact anywhere in the text.\(^{186}\) Murphy did not look beyond the plain meaning of

\(^{180}\) Murphy, 650 F.3d at 302-05.
\(^{181}\) See Id. at 305 (referring to “component of an automated copyright management or protection system).
\(^{182}\) Id. at 301.
\(^{183}\) U.S. v. Dauray, 215 F.3d 257, 260 (2d Cir. 2000).
\(^{184}\) Murphy, 650 F.3d at 302.
\(^{185}\) 17 U.S.C.A. § 1202(c).
\(^{186}\) See Id. (emphasizing defendants’ definition of CMI was “statutorily unmoored”); Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 462 (S.D.N.Y. 2009) (finding no support in text for limiting DMCA’s to digital forms or processes).
the text once it determined it was not ambiguous, because it determined the result of doing so was not so absurd or extreme so as to require it.\textsuperscript{187}

\textit{Textile Secrets} neglected to do any real analysis of the ambiguity or lack thereof of section 1202. Instead, it appeared to jump directly to an analysis of whether the plain meaning of the statute created absurd results, although it did not use that term.\textsuperscript{188} It only stated that the plain language interpretation would lead to “impracticable” results.\textsuperscript{189} Bypassing the examination of the ambiguity of a statute’s text is appropriate in some instances, because if a statute's results are \textit{absurd}, it is essentially treated as though it were ambiguous, regardless of its plain meaning.\textsuperscript{190} However, improper results, as \textit{Textile Secrets} claimed to have found,\textsuperscript{191} do not meet the absurdity threshold\textsuperscript{192} because traditionally the plain language of a statute is disregarded only in rare circumstances\textsuperscript{193} where the results of the plain meaning interpretation are so contrary to the intent of the legislature that it demands a different construction.\textsuperscript{194} The results of the plain meaning interpretation of CMI are actually consistent with the intent of the DMCA, which is discussed in greater detail below.\textsuperscript{195}

Once a statute has been deemed unambiguous, the judicial inquiry is complete, except in “rare and exceptional circumstances.”\textsuperscript{196} However, \textit{Murphy} did go further and bootstrap its

\begin{footnotesize}
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\item[187] \textit{Murphy}, 650 F.3d at 302.
\item[188] See \textit{Textile Secrets}, 524 F. Supp. 2d at 1195 (finding results of literal interpretation of section 1202 would be too wide-reaching).
\item[189] Id.
\item[191] \textit{Textile Secrets}, 524 F. Supp. 2d at 1195.
\item[192] See \textit{Murphy}, 650 F.3d at 305 (finding \textit{IQ Grp.}, 409 F. Supp. 2d 587, reasoning not so compelling that it warranted insertion of terms into section 1202).
\item[195] See \textit{Murphy}, 650 F.3d at 303 (finding plain meaning interpretation of 1202 consistent with purpose of DMCA to provide greater protection for copyright owners).
\item[196] \textit{Rubin}, 449 U.S. at 430 (citation omitted).
\end{itemize}
\end{footnotesize}
argument by addressing some cannons of statutory interpretation, including that courts must not read in language that is not explicitly in the statute where a plain meaning interpretation does not create absurd results.\textsuperscript{197} It recognized that it is not in the court's power to effectively redraft a statute, stating that if there was a problem with the results of the plain meaning interpretation of the statute, it was an issue for the legislature to address.\textsuperscript{198} Murphy went further to say that, “[i]f, in fact, § 1201 and § 1202 were meant to have . . . interrelated interpretations, it is peculiar that there is no explicit indication of this in the text of either provision.”\textsuperscript{199}

There is also no need to look to legislative history once it has been established that the plain language of the statute is not ambiguous.\textsuperscript{200} If the statutory text is clear, courts do not consider legislative history, despite any presence of “contrary indications in the statute's legislative history.”\textsuperscript{201} Even if it were proper to take the legislative history surrounding the DMCA into consideration, it does not preclude the definition of CMI from including things other than digital information or components of automated copyright protection or management systems because it is not clear that the legislature intended to limit it in that way.\textsuperscript{202} While the legislative history does support a more limited definition of CMI, the plain text definition is not clearly contradictory of it, either.\textsuperscript{203}

The IITF white paper describes CMI as “information [that] will likely be included in digital versions of a work ... to inform the user about the authorship and ownership of a work.” IQ Group, 409 F.Supp.2d at 594. This description leaves the question of just how that information will be included—that is, whether it must be used in some form of “an

\textsuperscript{197} Murphy, 650 F.3d at 303; Lamie v. U.S. Tr., 540 U.S. 526, 538 (2004).
\textsuperscript{198} See Murphy, 650 F.3d at 302 (finding these results were not absurd, but a policy problem).
\textsuperscript{199} Id. at 303.
\textsuperscript{200} Germain, 503 U.S. at 254 (finding judicial inquiry ends with text of statute).
\textsuperscript{202} Murphy, 650 F.3d at 304 (finding that legislative history did not explicitly contradict plaintiff’s contention that anything falling under plain meaning of section 1202 is CMI for purposes of the statute).
\textsuperscript{203} See Id. (explaining legislative history is not contradictory of plain meaning definition of CMI). Contra Textile Secrets, 524 F. Supp. 2d at 1203 (holding an expansive construction of CMI is contrary to intent of Congress).
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automated copyright protection or management system” or whether it can be conveyed by other means—entirely open.204

IQ Group argued that, because the goal of the WIPO treaties was to protect automated copyright protection systems, CMI under section 1202 only includes components of those systems.205 Although the DMCA was likely informed somewhat by them, section 1202 was drafted before the WIPO treaties, and “Congress was certainly free, in implementing the WIPO treaties, to define copyright management information” differently.206 Furthermore, it is not clear that the WIPO Treaties did themselves intend to define CMI the way IQ Group suggested. Although the WIPO treaties gave special emphasis to “effective technical measures” by providing protections for both them and CMI,207 the separate terms suggest that these are two distinct things and therefore one (technical measures) does not wholly encompass the other (CMI).208 The Committee Reports are similarly not dispositive of a definition of CMI that includes non-digital forms.209 The Senate Committee Report describes CMI as including “such items as the title of the work, the author ... CMI need not be in digital form, but CMI in digital form is expressly included.”210 They did not intend to exclude other forms of CMI under 1202 merely because they refer to components of automated copyright management systems as CMI; if it were the Legislature’s intention to define CMI in a narrow way, they could have done so.211

Regarding the DMCA as a whole, evidence of Congress’ intent actually points away from an intent to limit CMI only to components of automated copyright protection and management

204 Murphy, 650 F.3d at 304.
205 IQ Grp., 409 F. Supp. 2d at 597.
206 Murphy, 650 F.3d at 305.
207 E.g. “rights management information.” Supra n. 25.
208 Textile Secrets, 524 F. Supp. 2d at 1198 (describing that the WIPO treaties allow a “double protection for technical measures”).
209 Murphy, 650 F.3d at 304-05 (rejecting the IQ Grp., 409 F. Supp. 2d 587, interpretation of CMI based, in part, on legislative intent embodied in Senate Committee Reports).
210 Id. at 304 (citation omitted).
211 Cf Dastar, 539 U.S. at 34 (finding that Congress traditionally makes additions to copyright law with certain amount of specificity).
systems, but rather towards the larger goal of expanding copyright protection rights. As Murphy stated, one of the goals of the DMCA was to provide copyright owners with greater copyright protections. The effect of the plain language interpretation of CMI would provide for a cause of action in many cases where previously only an action for copyright infringement would have been available, consistent with that aim.

**B. THE PLAIN TEXT APPROACH IS CONSISTENT WITH DASTAR**

One issue surrounding the plain meaning interpretation of CMI is that it would give rise to a blend of trademark and copyright law. IQ Group expressed concern that if CMI is interpreted according to the text of the statute alone, a trademark would in some instances invoke the DMCA protection of copyrights. This is problematic, the court said, because it would eliminate the strict differentiation between trademark and copyright law protection so important to their respective statutory schemes. Because there are different statutory requirements for trademark and copyright protection, blurring the two would allow copyright and/or trademark owners to essentially sneak in the back door and get the protection of either or both trademark and copyright law without having first satisfied their respective requirements. The Supreme Court warned against overlaps between trademark and copyright law in *Dastar Corp. v. Twentieth Century Fox Film Corp.* IQ Group said that “intellectual property owners should

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212 Murphy, 650 F.3d at 303 (finding purpose of DMCA as a whole was undisputedly to expand rights of copyright owners).
213 Id.
214 Id. at 302.
215 See e.g., IQ Grp., 409 F. Supp. 2d at 592 (finding one reason not to define CMI based on plain language of section 1202 was because it would give rise to claims with overlapping trademark and copyright issues).
216 Id. at 591-92.
217 Id. at 592.
218 See Id. at 592-93 (finding plain meaning interpretation of CMI would cause two legal schemes to overlap, allowing characterization of something as either a trademark or copyright issue to give it protection).
219 Dastar, 539 U.S. at 33-34.
not be permitted to re-categorize one form of intellectual property as another." Aside from the problems this would create, this was not the intention of the Legislature, according to some courts.

In *Dastar*, Dastar Corp. released a video set in 1995 about various World War II campaigns in Europe using edited footage from the original television series based on Dwight Eisenhower’s book, Crusade in Europe. The original television series was in the public domain, but Fox had re-acquired the exclusive television rights to the book in 1988, and subsequently, SFM Entertainment and New Line Home Video, Inc. purchased from it the exclusive rights to distribute Crusade on video. Fox, SFM and New Line all sued Dastar alleging that it had infringed their exclusive television rights in the book. They later amended their complaint to include a violation of section 43(a) of the Lanham Act, based on Dastar’s alleged reproduction of the series without proper credit, as “reverse passing-off.”

The Supreme Court stated that the problem with recognizing the Lanham Act claim in that instance, which essentially contended that the term “origin” under section 43(a) of the Lanham Act required attribution of un-copyrighted materials, would have cause the Lanham Act to conflict with Copyright law because, once the copyright monopoly period has expired, the public is free to copy that work without credit or attribution. It stated,
[I]n construing the Lanham Act, we have been careful to caution against misuse or over-extension” of trademark and related protections into areas traditionally occupied by patent or copyright. . . . The Lanham Act . . . does not exist to reward manufacturers for their innovation in creating a particular device; that is the purpose of the patent law and its period of exclusivity.”

A unanimous Supreme Court reversed the Ninth Circuit below, holding that section 43(a) of the Lanham Act does not require accreditation in the copying of works in the public domain, and therefore the plaintiff’s Lanham Act claim failed. It said that finding otherwise would effectively allow trademark law to extend copyright protection over an unlimited period of time; something that is not in Congress’ power to do.

The meaning of CMI under section 1202 will create some overlap between copyright and trademark law if the plain meaning approach is applied. The case discussed earlier, IQ Group, serves as a good illustration of this. In IQ Group, the plaintiffs alleged that the removal of their logo, acting as a service mark because it indicated the source of the advertising services, would also trigger section 1202 protection. The court worried about the precedent this would create, stating, “[i]f every removal or alteration of a logo attached to a copy of a work gives rise to a cause of action under the DMCA, the DMCA becomes an extension of, and overlaps with, trademark law.” Aside from being problematic, it said, this result is not something Congress intended.

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229 Id. at 34 (internal quotation marks omitted) (citing TrafFix Devices, Inc. v. Marketing Displays, Inc., 532 U.S. 23, 29 (2001)).
230 Dastar, 539 U.S. at 23.
231 Id. at 37-38.
232 Dastar, 539 U.S. at 37 (citing Eldred v. Ashcroft, 537 U.S. 186, 208 (2003)).
233 IQ Grp., 409 F. Supp. 2d at 592-93.
234 Id. at 592.
235 Id.
236 See Id. (finding literal meaning of CMI would be “extreme” because it would allow trademarks to trigger DMCA protections).
IQ Group’s conclusion that Dastar prevented a literal approach to section 1202 was erroneous, because its interpretation of Dastar was unnecessarily broad.\textsuperscript{237} Dastar “did not hold that trademark and copyright cannot overlap as a fundamental manner, but merely that trademark law as currently written could not be used in that case to create control after copyright rules ended the owner’s right to control.”\textsuperscript{238} That is a different conflict than the overlap between trademark and copyright law in cases involving section 1202 claims.\textsuperscript{239} IQ Group’s analysis also goes beyond the language of section 1202 and tries to achieve perfect conceptual separation between trademark and copyright; but Congress has not explicitly said that this is its intent.\textsuperscript{240} Until Congress says otherwise, the court is not in a position to decide whether or not the overlap here between trademark and copyright doctrines is desirable and should interpret the statute based on its plain meaning.\textsuperscript{241}

C. THE U.S. SHOULD ALLOW FOR GREATER RECOGNITION OF A RIGHT OF ATTRIBUTION

Another possible concern that might arise under the plain meaning interpretation of CMI is that it could be used to create a form of a right of attribution, when this right is not formally recognized in the United States except in a certain narrow category of situations.\textsuperscript{242} “The DMCA may contain the seeds of a more general attribution right: with sufficient ingenuity and effort,

\textsuperscript{238} Id.
\textsuperscript{239} \textit{Compare Dastar}, 539 U.S. at 33-34, 37 (finding that Lanham act could not be used to prevent public from copying a work without attribution once its copyright expired, or else it would create a “species of perpetual patent and copyright”), \textit{with IQ Grp.}, 409 F. Supp. 2d at 592-93 (refusing to recognize section 1202 claim where alleged CMI was also a trademark because it would cause an overlap in the two doctrines by allowing a trademark to invoke copyright protections).
\textsuperscript{240} Raymond T. Nimmer, \textit{DMCA: Copyright management information}, 1 Information Law § 4:24 (Westlaw 2011).
\textsuperscript{241} See \textit{Murphy}, 650 F.3d at 302, 305 (interpreting section 1202 according to its plain meaning, in absence of absurdity or other compelling reason to do otherwise, regardless of whether or not the results of that approach are desirable).
\textsuperscript{242} \textit{Dastar}, 539 U.S. at 34-35; Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 82 (2d Cir. 1995).
these seeds might be made to germinate. The seeds may be found in the section 1202 provision on ‘Copyright Management Information’.”243 The right of attribution is regarded as one of many so called moral rights244—rights designed to protect the paternity and integrity interests of the author in their works, i.e., non-pecuniary, personal interests.245 This right generally protects artists’ right to be recognized by name as the author of their works and to prevent their name from being falsely attached to works made by others.246

This kind of right is neither novel nor scarcely recognized, at least on an International scale. Article 6bis of the Berne Convention includes provisions that protect certain moral rights.247 The paternity right under that section allows authors both to defensively claim recognition of their authorship by others and to affirmatively dictate the way that authorship is designated.248 Under Article 9 of the trade related aspects of property rights (TRIPs) agreements, members agreed to comply with Articles 1 through 21 of the Berne Convention, however, to the exclusion of Article 6bis and any of the rights included under that section.249 Because that Article of the Berne Convention is specifically excluded, Berne members can recognize terms of protection for moral rights of their choosing.250 The moral rights conveyed under Article 6bis of the Berne Convention are, in reality, more limited than what many European countries, including

244 Carter, 71 F.3d at 81.
246 Carter, 71 F.3d at 81.
248 Id. at 238.
249 Id. at 233.
250 Id. at 231.
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Germany, France, Spain and Italy, actually allow.\textsuperscript{251} For instance, those countries also recognize the divulgation right, which allows the author to dictate the terms of revealing his work to the public, and the corollary right to withdraw.\textsuperscript{252}

Although Continental copyright doctrines, do recognize attribution as a part of the concept of the moral right,\textsuperscript{253} attribution has traditionally only been protected under U.S. Copyright law to a very limited extent.\textsuperscript{254} For example, under the Visual Artists Rights Act (VARA), certain authors of a very limited class of visual works have protection of the moral rights of integrity and attribution.\textsuperscript{255} “Nonetheless, American courts have in varying degrees [further] acknowledged the idea of moral rights, cloaking the concept in the guise of other legal theories, such as copyright, unfair competition, invasion of privacy, defamation, and breach of contract.”\textsuperscript{256} \textit{Dastar} did not address the moral rights claim made by the plaintiff and its amici, casting doubt on the use of section 43(a) of the Lanham Act to establish what would have been similar to an attribution right, but it is unclear whether it did so merely on the basis that the claim was for a work whose copyright had expired.\textsuperscript{257} A future case with a subsisting copyright would provide a promising opportunity for the Court to address this question.\textsuperscript{258}

The basis of \textit{Textile Secrets’} finding that a literal reading of section 1202 would lead to impracticable results is because it was concerned that would effectively create an attribution right for works of all kinds.\textsuperscript{259} It said, “[a]dopting plaintiffs approach to the statute, a literal interpretation of “copyright management information” as defined in section 1202(c) would in

\textsuperscript{251} Id. at 234.
\textsuperscript{253} See Gilliam v. Am. Broad. Companies, Inc., 538 F.2d 14, 24 (2d Cir. 1976) (citation omitted) (stating European concept of the moral right, or droit moral, protects right of author to have his works attributed to him).
\textsuperscript{254} 17 U.S.C.A. § 106A; \textit{Dastar}, 539 U.S. at 34-35; \textit{Carter}, 71 F.3d at 82.
\textsuperscript{255} Mass. Museum of Contemporary Art Found., Inc. v. Buchel, 593 F.3d 38, 49 (1st Cir. 2010).
\textsuperscript{256} \textit{Carter}, 71 F.3d at 82.
\textsuperscript{258} Id.
\textsuperscript{259} \textit{Textile Secrets}, 524 F. Supp. 2d at 1195.
effect give section 1202 limitless scope in that it would be applicable to all works bearing copyright information as listed in section 1202(c)(1)-(8). In other words, section 1202 would apply “wherever any author has affixed anything that might refer to his or her name.”

CMI, even when limited to digital forms and/or components of automated copyright management systems, is meant to assist in indicating attribution, on top of its tracking and monitoring purposes. The DMCA would not create a complete right of attribution because it does not allow for an affirmative requirement of CMI, no matter how that term is interpreted, but only protects it from falsification, removal or alteration if it is provided. However, although information that is not defined as CMI under the Act would not be protected by it, it might be protected under other laws.

*Textile Secrets* was quick to reject the definition of CMI under the plain meaning of the statute. It argued that a such a wide reaching definition would be improper because that would mean section 1202 would be applicable to all works bearing CMI as defined under 1202(c)(1)-(8). It did not consider whether such a result might actually be desirable and achievable. Moreover, a policy inquiry about the appropriateness of such an outcome might be better left to the legislature itself.

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260 Id.
261 *IQ Grp.*, 409 F.Supp.2d at 593.
262 *Textile Secrets*, 524 F. Supp. 2d at 1199.
263 See *Id.* (citation omitted) (outlining limitations of DMCA’s protection of CMI).
264 *Id.* (citation omitted).
265 See *Id.* at 1196 (finding plain meaning approach would lead to “impracticable results”).
266 See *Id.* (reasoning that, if interpreted literally, section 1202 would apply wherever an author has affixed anything that refers to herself).
267 See *Textile Secrets*, 524 F. Supp. 2d at 1196 (rejecting a literal interpretation of CMI because it would create impracticable results).
268 See *Murphy*, 650 F.3d at 302 (finding whether or not the result of broad reading of 1202 is desirable a “problem of policy, not of logic”).
IV. CONCLUSION

The interpretation of section 1202 of the DMCA has been divided regarding whether the meaning of CMI under that section is merely its plain-text definition, or whether there is some other limitation, either that it must be in digital form, some digital process is involved, or that it is a component of a copyright management or protection system. The plain meaning approach is the correct interpretation of CMI. In reaching their conclusion that CMI is defined by its plain meaning, Murphy and other courts correctly applied all the steps of statutory construction. The language of section 1202 is clear and unambiguous and does not create absurd results. Incidentally, the plain language of the statute also comports with the purposes of the statute as a whole and the legislative history behind it, although it is not appropriate or necessary to consult legislative history after it has been determined that a statute is not ambiguous. Although this interpretation of CMI will result in some overlap of trademark and copyright doctrines, the plain meaning approach is consistent with what courts have done in these instances. Finally, although some might argue that a plain meaning interpretation of section 1202 is not appropriate because it would create something like a right of attribution; it is up to Congress to determine whether this effect of the statute is desirable, so long as the results of implementing the plain meaning of the text are not absurd.

269 See Murphy v. Millennium Radio Group LLC, 650 F.3d 295, 302 (3d Cir. 2011) (finding statutory text clear, unambiguous, and does not create absurd results).
270 Id.
271 See Id. (finding purpose of DMCA to expand and not restrict the rights of copyright owners).
273 Cf. IQ Grp., Ltd. v. Wiesner Pub., LLC, 409 F. Supp. 2d 587, 592 (D.N.J. 2006) overruled by Murphy, 650 F.3d 295 (finding the plain meaning interpretation of CMI would impermissibly blend trademark and copyright law).
274 See Raymond T. Nimmer, DMCA: Copyright management information, 1 Information Law § 4:24 (Westlaw 2011) (finding Dastar, 539 U.S. 23, only prohibited copyright owner from using trademark law to create control in that case after copyright had expired).
275 See Id. at 302 (finding only if plain meaning of statute created absurd results would court be compelled to take more restrictive reading of it).