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Gutters and Hyperlinks: The DMCA and Proper Position of Copyright Management Information

Russell W. Jacobs

Starbucks Coffee Company

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**Gutters and Hyperlinks: The DMCA and Proper Position of
Copyright Management Information**

Russell W. Jacobs



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By Russell W. Jacobs*

TABLE OF CONTENTS

I.	CMI in the DMCA	164
II.	CMI Before the Courts.....	165
III.	The Statute and the Statutory History	167
IV.	The Behavior of Users of Copyrighted Works	171

¶1 The Digital Millennium Copyright Act of 1998 (the “DMCA”) added Chapter 12 – entitled “Copyright Protection and Management Systems” – to U.S. copyright law.¹ Section 1202 in Chapter 12 prohibits the removal, alteration, or falsification of “copyright management information” (“CMI”).² The DMCA’s definition of CMI includes eight types of information about a copyrighted work, such as the information in the copyright notice (© / Year of Creation / Copyright Owner), the title, the author, and the terms of use.³ While few court decisions have addressed the CMI provisions of the DMCA, three central questions on the provisions have emerged, namely: (1) whether the provisions protect only digital works or also non-digital works, (2) whether the CMI needs to appear on the body of the copyrighted work itself, and (3) the state of mind of the party alleged to have manipulated the CMI necessary to establish liability.⁴ This author addressed the first question in a prior article by concluding that the plain language and legislative history of DMCA Section 1202 compelled a broad interpretation of the provisions to apply to non-digital works as well as digital works.⁵ The present piece focuses on the

* Director, corporate counsel, Starbucks Coffee Company, Seattle, WA; J.D., Columbia University School of Law, 2002; A.B., The University of Michigan, 1999. This Article contains the views of the author. Starbucks Coffee Company does not necessarily share those views. The author extends his gratitude to Marc Duyungan.

¹ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2861 (1998).

² 17 U.S.C. § 1202 (West 2012).

³ *Id.* at § 1202(c).

⁴ See Jane Ginsburg, *Moral Rights in the U.S.: Still in Need of a Guardian Ad Litem*, 30 CARDOZO ARTS & ENT. L.J. 73, 75 (2012) (“The caselaw has addressed three issues: what is ‘copyright management information?’; where must copyright management information appear in order to be protected?; and what level of knowledge or intent violates § 1202?”); Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L.R. 41, 71-73 (2007) (noting these open issues regarding DMCA Section 1202).

⁵ 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 (2011).

second question, that is, where the CMI must appear in relation to the copyrighted work in order to qualify for protection.

Some courts have held that the DMCA only protects CMI that appears on the body of the copyrighted work, or that appears in the area around the work.⁶ Under this approach, CMI, such as a copyright notice that appears on the copyrighted photograph, poem, sculpture, or other work, would qualify for protection under Section 1202. However, CMI on the back of the work, on a hyperlinked webpage, or in a statement at the beginning of a collective work would not. Other courts have declined to limit DMCA Section 1202 to CMI appearing directly on the work itself.⁷ This article favors the latter approach and argues that the plain language of the statute, as well as other sections of the United States Copyright Act, 17 U.S.C. Sections 101-810 (the “Copyright Act”) and the statutory history of the DMCA, only require that the CMI appear with or be accessible in conjunction with the work. The author then explores how this dispute on Section 1202 touches on larger questions regarding how to advise users of copyrighted works of the ownership information and terms of use for those works.

I. CMI IN THE DMCA

The divergence in the case law stems from the language of Section 1202. This section prohibits (a) the knowing and intentional provision, distribution, or importation for distribution of CMI that is false, and (b) the intentional removal or alteration of CMI.⁸ The statute defines “copyright management information” as the “following information conveyed in connection with copies or phonorecords of a work or performances or

⁶ *E.g.*, *Personal Keepsakes, Inc. v. PersonalizationMall.com, Inc.*, No. 11 C 5177, slip op. at 13-17 (N.D. Ill. Feb. 8, 2012) (limiting application of Section 1202 to CMI that appears on the body of the work or in the area around the work), *petition to alter denied* (N.D. Ill. May 24, 2012); *Schiffer Publ'g, Ltd. v. Chronicle Books, L.L.C.*, No. 03 C 4962, 2004 WL 2583817, at *10-11 (E.D. Pa. Nov. 12, 2004) (same); *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1121-1122 (C.D. Cal. 1999) (limiting application of Section 1202 to CMI that appears on the body of the work), *rev'd and remanded in part on other grounds*, 336 F.3d 811 (9th Cir. 2003).

⁷ *Murphy v. Millennium Radio Group L.L.C.*, 650 F.3d 295, 305 (3d Cir. 2011) (photographer's name in the printed “gutter” credit qualified as CMI); *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 305-06 (S.D.N.Y. 2011) (denying motion to dismiss Section 1202 claims and declining to hold as a matter of law that Section 1202 only applies to CMI on the body of the work); *Banxcorp v. Costco Wholesale Corp.*, 723 F. Supp. 2d 596, 609-11 (S.D.N.Y. 2010) (same).

⁸ 17 U.S.C. § 1202(a)-(b).

(a) False Copyright Management Information.— No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement—

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

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

(b) Removal or Alteration of Copyright Management Information.— No person shall, without the authority of the copyright owner or the law—

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

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

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

displays of a work, including in digital form:” the information in the copyright notice; the title of the work; the names of the authors, copyright owners, writers, performers, and directors; identifying information and symbols about any of the foregoing or the work (and links to such information); the terms and conditions of use; and any other information required by the Register of Copyrights.⁹

¶4 Section 1203 sets forth the following civil remedies for violations of Sections 1202(a) and (b): injunctive relief, an order for the impounding, modification, or destruction of devices involved in the violation, damages, and costs and attorney’s fees.¹⁰ Section 1204 creates criminal sanctions in the event of a violation committed “willfully and for purposes of commercial advantage or private financial gain.”¹¹

II. CMI BEFORE THE COURTS

¶5 Some courts have read Section 1202 to impose a requirement of immediate proximity between the copyrighted work and the CMI. In *Kelly v. Arriba Soft Corp.*, decided just one year after the enactment of the DMCA, the court granted summary judgment against the plaintiff photographer on the DMCA Section 1202 claims.¹² In that case, the plaintiff included CMI in the area around his photographs, but not directly on them, and the defendants’ copies omitted the CMI.¹³ The court declined to find liability under Section 1202, noting that “[b]ased on the language and the structure of the statute, the Court holds that this provision applies only to the removal of copyright management information on a plaintiff’s product or original work.”¹⁴

⁹ *Id.* at §1202(c).

§ 1202(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.
- (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.

¹⁰ *Id.* at § 1203.

¹¹ *Id.* at § 1204.

¹² *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d at 1122-23 (C.D. Cal. 1999), *rev’d and remanded in part on other grounds*, 336 F.3d 811 (9th Cir. 2003).

¹³ *Id.* at 1121-22.

¹⁴ *Id.* at 1122.

¶6 A subsequent decision took a slightly less restrictive approach. The court in *Schiffer Publishing, Ltd., v. Chronicle Books, L.L.C.* opined that CMI in the area around a work (not just on the work) may qualify for protection under Section 1202, but it concluded that the defendants had not removed any CMI from the works in question.¹⁵ The court granted judgment for the defendants accused of removing CMI from photographs they had copied and included in their own book.¹⁶ In the court's view, the defendants had not removed any CMI since the original publication contained a copyright notice only at the beginning of the volume, and not on the individual images contained therein.¹⁷ Accordingly, "this Court holds that, to be actionable under § 1202(b), a defendant must remove copyright management information from the 'body' of, or area around, plaintiff's work itself."¹⁸

¶7 More recently, the *Personal Keepsakes, Inc. v. PersonalizationMall.com, Inc.* court dismissed DMCA Section 1202 claims, because the copyright ownership statement appeared on a separate webpage from the works.¹⁹ The court acknowledged the persuasiveness of the approaches in the *Kelly* and *Schiffer Publishing* decisions that the CMI must appear in the "body" of or the "area around" the work, finding this limitation "consistent with the text of the statute, which requires the CMI to be 'conveyed' with the copyrighted work."²⁰

Such a rule prevents a 'gotcha' system where a picture or piece of text has no CMI near it, but the plaintiff relies on a general copyright notice buried elsewhere on the website. For the purposes of this motion, the Court need not determine exactly how close the CMI must be to the work to pass muster under the DMCA. However, as a matter of law, if a general copyright notice appears on an entirely different webpage than the work at issue, then that CMI is not "conveyed" with the work and no claim will lie under the DMCA. PKI cannot base a DMCA claim on Defendants' general copyright notices placed elsewhere on the site.²¹

The court later denied the plaintiff's motion to alter the opinion dismissing the Section 1202 claims, reaffirming its reasoning, and adding that "since separating a work from CMI that is not located anywhere near that work does not rise to the level of 'removal' under § 1202(b), it naturally follows that copyright information posted in an entirely different place from the work at issue does not constitute falsification under 17 U.S.C. § 1202(a)."²²

¶8 Other decisions have departed from the narrow view in *Schiffer Publishing*, *Kelly*, and *Personal Keepsakes* and declined to require that the CMI appear on the copyrighted

¹⁵ *Schiffer Publ'g, Ltd. v. Chronicle Books, L.L.C.*, No. 03 C 4962, 2004 WL 2583817, at *1410-11 (E.D. Pa. Nov. 12, 2004).

¹⁶ *Id.*

¹⁷ *Id.* at *1410.

¹⁸ *Id.* at *1410-1.

¹⁹ *Personal Keepsakes, Inc. v. PersonalizationMall.com, Inc.*, No. 11 C 5177, slip op. at 17 (N.D. Ill. Feb. 8, 2012), *petition to alter denied* (N.D. Ill. May 24, 2012).

²⁰ *Id.* at 17.

²¹ *Id.*

²² *Personal Keepsakes, Inc. v. Personalization Mall.com, Inc.*, No. 11 C 5177, slip op. at 2 (N.D. Ill. May 24, 2012).

work itself, or even in the area around the work in order for DMCA Section 1202 to apply. In *Banxcorp v. Costco Wholesale Corp.*, the plaintiffs alleged that the defendants violated DMCA Section 1202(b) by removing and altering the copyright notices from websites containing their research reports.²³ On the motion to dismiss, the court rejected the defendants' argument that the DMCA claims failed as a matter of law under *Schiffer Publishing* and *Kelly*.²⁴ The court denied the motion to dismiss and declined to hold "as a matter of law, [that] CMI must be placed on the actual information on a website in order to state a claim under the DMCA."²⁵

¶9 Two subsequent cases took similar approaches when considering copyright credit lines in the gutter areas underneath a photograph. In *Agence France Presse v. Morel*, the court denied a motion to dismiss a claim under Section 1202, rejecting the defendants' arguments that a claim for removal or alteration of CMI only arises with removal of CMI from the photograph itself.²⁶ The *Agence France Presse* court explained that the statute does not state that the CMI must appear on the work itself, but rather "the DMCA defines CMI as information 'conveyed in connection with copies' of a work."²⁷ In *Murphy v. Millennium Radio Group L.L.C.*, the Third Circuit (the only Court of Appeals to consider this question) reversed a grant of summary judgment against a photographer.²⁸ The court observed that the statute defined CMI as any of the eight listed types of information "conveyed in connection with copies . . . of a work."²⁹ Accordingly, the court concluded that a cause of action could arise under Section 1202 "regardless of the form in which that information is conveyed" and that the photograph gutter credit qualified as CMI and its removal could trigger liability under Section 1202.³⁰

III. THE STATUTE AND THE STATUTORY HISTORY

¶10 None of the decisions discussed in the prior Section provide significant analysis of the statutory language of Section 1202 and only highlight the wording "conveyed in connection with" if any wording at all. The courts that have considered this wording have offered contrary interpretations. The *Personal Keepsakes* court determined that the term "conveyed" in the definition of CMI signified that the CMI must appear on the body of, or in the area around, the copyrighted work.³¹ At the other end, the *Murphy* court concluded that the language "conveyed in connection with copies of a work" did not limit protected CMI to any particular form.³² Likewise, the *Agence France Presse* court held that the CMI definition of information "conveyed in connection with" copies of a work

²³ *Banxcorp v. Costco Wholesale Corp.*, 723 F. Supp. 2d 596, 609-10 (S.D.N.Y. 2010).

²⁴ *Id.* at 610 n.11.

²⁵ *Id.* at 611.

²⁶ *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 305-06. (S.D.N.Y. 2011).

²⁷ *Id.* at 305 (citing 17 U.S.C. § 1202(c)).

²⁸ *Murphy v. Millennium Radio Group L.L.C.*, 650 F.3d 295, 305, 310 (3d Cir. 2011) (concluding that the location of the photographer's name in the printed "gutter" credit did not prevent it from qualifying as CMI).

²⁹ *Id.* at 305 (citing 17 U.S.C. §1202(c)).

³⁰ *Id.*

³¹ *Personal Keepsakes, Inc. v. Personalization Mall.com, Inc.*, Case No. 11 C 5177, slip op. at 16-17 (N.D. Ill. Feb. 8, 2012), *petition to alter denied* (N.D. Ill. May 24, 2012).

³² *Murphy*, 650 F.3d at 305.

compelled a reading of the statute that did not require the CMI to appear on the work itself.³³

¶11 From a plain reading of the statute, the *Murphy* and *Agence France Presse* decisions have the better arguments. The wording “conveyed in connection with” signals that the CMI must accompany the work when the copyright owner transfers the copy to the user, as opposed to remaining in a fixed location apart from the copy. Some “connection” must exist between the CMI and the work, but the statute does not obligate a connection of immediate physical proximity. For example, it does not say the information must be “conveyed on” the work. Section 1202 merely requires that the CMI somehow accompany the work, while the “how” is left up to the copyright owner. The drafters of the DMCA could not capture all of the possible positions of CMI in an exhaustive and definitive list. Such positions will depend on the type of copyrighted work, the various forms that CMI may take, and the ways CMI may accompany a work, all of which will change over time as new types of works and ways of conveying them emerge.

¶12 Moreover, the CMI definition expressly identifies certain information neither on nor immediately proximate to the copyrighted work as within the scope of Section 1202. Subsection (7) includes “identifying numbers or symbols referring to such information” and “links to such information” in the definition of CMI.³⁴ The wording “such information” most likely refers to the terms of use, *i.e.* the “information” that is listed in the immediately prior subsection.³⁵ “Such information” could also refer to all of the preceding categories of information. Under either interpretation, the information protected under subsection (7) resides apart from the work, accessed through codes or links, such as the terms of use on a separate webpage retrieved through a hyperlink.

¶13 The statutory history supports a more permissive reading that the CMI need only “appear with”, or “be accessible in conjunction with” the work. The House and Senate Committee Reports contain identical language making clear their intention that the language would apply in “the broadest sense” and that information merely “be accessible in conjunction with” or “appear with” the work for Section 1202 to apply.³⁶

To fall within the definition, there is a threshold requirement that the information be conveyed in connection with copies or phonorecords, performances or displays of the copyrighted work. The term ‘conveyed’ is used in its broadest sense and is not meant to require any type of transfer, physical or otherwise, of the information. It merely requires that the information be accessible in conjunction with, or appear with, the work being accessed.³⁷

Terms of use “accessible in conjunction with” a copyrighted work via a hyperlink, as well as gutter credits that “appear with” the photographs, comport with these stated intentions of Congress.

³³ *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 306 (S.D.N.Y. 2011) (emphasis in original) (citing 17 U.S.C. § 1202(c)).

³⁴ 17 U.S.C. § 1202(c)(7).

³⁵ *Id.* at § 1202(c)(6).

³⁶ S. Rep. No. 105-190, at 35 (1998); H.R. Rep. No. 105-551, pt. 1, at 21 (1998).

³⁷ S. Rep. No. 105-190, at 35; H.R. Rep. No. 105-551, pt. 1, at 21.

¶14 In the Copyright Office’s testimony on the legislation, Register of Copyrights Marybeth Peters approved of the “conveyed in connection with” wording because it clarified the need for “a link” between the CMI and the copy of the work in question.³⁸

It limits the context in which information is protected to information ‘conveyed in connection with’ copies, performances or displays of a work. This provides a link between the information and a particular manifestation of the copyrighted work, and avoids any application of the provision to such information that may happen to be contained on a piece of paper in a file somewhere.³⁹

¶15 An earlier bill, which did not pass, had attempted to define copyright management information by listing certain types of information, while neglecting to require a tie between that information and the specific allegedly infringing copy.⁴⁰ With this context in mind, Register Peters offered her preference for an approach that required a “link” between the CMI and the work, something more accessible than CMI archived in a remote file unknown by the user.⁴¹ Nothing in the testimony suggests that she understood the definition to require that the CMI appear directly on the work. Inclusion of CMI on a webpage accessed via a hyperlink on the page bearing the copyrighted work would satisfy Register Peters’s proximity concerns. The hyperlink provides the “link” between the work and the CMI, and is more accessible than a remote archive.

¶16 Other sections of the Copyright Act support a reading of Section 1202 that protects CMI not on the body of, or directly proximate to, the copyrighted work. Namely, Chapter 4 of the Copyright Act discusses the positions of a copyright notice that will provide adequate “notice” of the copyright claim to users.⁴² Under this chapter, a copyright owner does not need to include a copyright notice with the work in order to protect the copyright in the work.⁴³ However, if a work bears a copyright notice in the proper form and position, an infringer cannot benefit from a defense of innocent infringement.⁴⁴ DMCA Section 1202 similarly promotes the inclusion of the copyright notice and other CMI by creating civil and criminal liability against those who alter, remove, or falsify such CMI.⁴⁵ Given the similarities in these provisions, Chapter 4 provides strong guidance of the proximity between the CMI and the work necessary to inform the user of the copyright terms under Section 1202. Significantly, when the

³⁸ *Legislative Hearing on the “WIPO Copyright Treaties Implementation Act” H.R. 2281 and the “Online Copyright Liability Limitation Act” H.R. 2180 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary, 105th Cong. (1997), available at http://www.copyright.gov/docs/2180_stat.html [hereinafter Sept. 16, 1997 Testimony] (statement of Marybeth Peters, Register of Copyrights) (unpaginated).*

³⁹ *Id.*

⁴⁰ NII Copyright Protection Act of 1995, S.1284, H.R. 2441, 104th Cong. § 1202(c) (1995). (“DEFINITION. -- As used in this chapter, “copyright management information” means the name and other identifying information of the author of a work, the name and other identifying information of the copyright owner, terms and conditions for uses of the work, and such other information as the Register of Copyrights may prescribe by regulation.”)

⁴¹ *Sept. 16, 1997 Testimony, supra* note 38.

⁴² 17 U.S.C. ch. 4.

⁴³ *Id.* at § 401(a).

⁴⁴ *Id.* at § 401(d).

⁴⁵ *Id.* at § 1202 *et seq.*

Copyright Act sets forth the acceptable positions for a copyright notice, it does not require that the copyright notice appear directly on the work.⁴⁶

¶17 Chapter 4 of the Copyright Act directs generally that the manner and location of the notice “give reasonable notice of the claim of copyright.”⁴⁷ Under the rulemaking authority granted by the Copyright Act,⁴⁸ the Copyright Office likewise declined to mandate a particular location, focusing instead on the ability of the user to locate the notice.⁴⁹ While the Copyright Act and the Copyright Office do suggest appropriate positions of the copyright notice on particular types of works, they do not limit valid positions to the body of the work or the area around it. Acceptable locations include a container for the work,⁵⁰ the beginning or end of the work or volumes containing works,⁵¹ the back of a copy,⁵² and a label or tag attached to a copy.⁵³

¶18 The foregoing authorities provide support for the *Murphy* and *Agence France Presse* courts’ shared acceptance of CMI in the gutter area around a photograph and counter the *Kelly* court’s position requiring that the CMI appears on the body of the photograph.⁵⁴ A gutter credit, by definition, appears on the front of the work, a position deemed acceptable by the Copyright Office.⁵⁵

¶19 The *Schiffer Publishing* decision considered individual works taken from a compilation, concluding that the copyright notice at the beginning of the collective work did not provide proper notice for the individual artworks in the volume.⁵⁶ However, under Chapter 4, one copyright notice suffices for a compilation – each separate contribution does not need to bear its own separate notice.⁵⁷ Further, as the Supreme Court confirmed in *New York Times Co. v. Tasini*, even if the collective work and the contributions have different copyright owners, a single notice for the compilation

⁴⁶ *Id.* at § 401(c) (“The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright.”), § 402(c) (on the container), and § 404(a) (at the beginning of a compilation).

⁴⁷ *Id.* at § 401(c).

⁴⁸ *Id.*

⁴⁹ 37 C.F.R. § 201.20(c) (2012) (accepting notices “not concealed from view upon reasonable examination” or in locations that a person looking for a notice “would be reasonably certain to find” such notice).

⁵⁰ 17 U.S.C. § 402(c) (phonorecords); 37 C.F.R. § 201.20(g) (digital works).

⁵¹ 37 C.F.R. § 201.20(d) (works published in book form); *Id.* § 201.20(g) (digital works).

⁵² *Id.* § 201.20(e) (single-leaf works); U.S. COPYRIGHT OFFICE, *CIRCULAR 3. COPYRIGHT NOTICE* (2011) (pictorial, graphic, and sculptural works), available at <http://www.copyright.gov/circs/circ03.pdf>.

⁵³ U.S. COPYRIGHT OFFICE, *supra* note 52.

⁵⁴ Compare *Murphy v. Millennium Radio Group L.L.C.*, 650 F.3d 295, 305 (3d Cir. 2011) (protecting CMI in gutter credit on photograph); *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 306 (S.D.N.Y. 2011) (same), with *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999) (declining to protect CMI placed next to photograph), *rev’d and remanded in part on other grounds*, 336 F.3d 811 (9th Cir. 2003).

⁵⁵ 37 C.F.R. § 201.20(e) (single-leaf works). U.S. COPYRIGHT OFFICE, *supra* note 52.

⁵⁶ *Schiffer Publ’g, Ltd. v. Chronicle Books, L.L.C.*, No. 03 C 4962, 2004 WL 2583817, at *5 (E.D. Pa. Nov. 12, 2004).

⁵⁷ 17 U.S.C. § 404(a) (only one copyright notice necessary for collective work, even if individual contributions have different copyright owner); *Marobie-FL, Inc. v. Nat’l Assoc. of Fire Equip. Distribs & Nw. Nexus, Inc.*, 983 F. Supp. 1167, 1174 (N.D. Ill. 1997) (each individual clip art image did not need a copyright notice because the software containing the images constituted a compilation and it bore terms of use in multiple places). See also 37 C.F.R. § 201.20(f) (although each contribution need not have its own separate copyright notice, it may, and such notice may appear on the separate work, but also with the compilation’s copyright notice or in the compilation’s table of contents).

provides proper notice for the individual contributions as well.⁵⁸ The copyright notice for the compilation in question in *Schiffer Publishing* meets the requirements of Chapter 4, suggesting that this degree of proximity would also satisfy Section 1202.

IV. THE BEHAVIOR OF USERS OF COPYRIGHTED WORKS

¶20 The *Schiffer Publishing*, *Personal Keepsakes*, and *Kelly* courts took the view that copyright owners should only expect users of copyrighted works to look for CMI directly on or immediately proximate to the work. The *Personal Keepsakes* court adopted the rule of immediate proximity because “[s]uch a rule prevents a ‘gotcha’ system where a picture or piece of text has no CMI near it, but the plaintiff relies on a general copyright notice buried elsewhere on the website.”⁵⁹ This rule runs counter to the expectations of user behavior set forth in the Copyright Act and in the legislative history of the DMCA. Subsection 1202(c)(7) expressly includes links to terms of use within the definition of CMI, revealing an expectation that users will access such terms of use.⁶⁰ The regulations issued pursuant to Chapter 4 assume that users will look on the back of works, on tags, or at the beginning or end of a work.⁶¹ The statutory history for the DMCA indicates that the drafters envisioned that users would seek out the terms of use and other important information about the work, with the CMI acting as a license plate for copyrighted works.⁶²

¶21 Given the length of many terms of use for web-based materials, it proves impractical to locate these terms immediately proximate to the work. Instead, website operators may post the terms on a separate webpage accessed through a hyperlink on the page containing the content.⁶³ Courts have enforced such positioned terms of use.⁶⁴

⁵⁸ *New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 496 (2001) (copyright notice for newspaper provided proper notice for article in newspaper, even though the article had a different copyright owner) (citing H.R. Rep. No. 94 – 1476 at 122 (1976)).

⁵⁹ *Personal Keepsakes, Inc. v. Personalization Mall.com, Inc.*, No. 11 C 5177 (N.D. Ill. February 8, 2012), *petition to alter denied* (N.D. Ill. May 24, 2012).

⁶⁰ 17 U.S.C. § 1202(c)(7).

⁶¹ 37 C.F.R. § 201.20(d) (beginning or end of book is an acceptable position); *Id.* at § 201.20(e) (back of single-leaf work is an acceptable position); *Id.* at § 201.20(g) (beginning or end of machine-readable work is an acceptable position); U.S. COPYRIGHT OFFICE, *supra* note 52.

⁶² S. Rep. No. 105-190, at 14 (noting that in order for an electronic marketplace to function effectively, consumers will look for accurate CMI); H.R. Rep. No. 105-551, pt. 1, at 10 (same); *Sept. 16, 1997 Testimony*, *supra* note 38 (same); U.S. PATENT AND TRADEMARK OFFICE, INTELLECTUAL PROPERTY RIGHTS AND NATIONAL INFRASTRUCTURE, 174, 235 (1995), *available at* <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf> (CMI will act as a license plate); *See Jacobs, supra* note 5, at 124-30 (discussing statutory history indicating that the drafters intended that DMCA Section 1202 would encourage copyright owners to include CMI and users to look for it).

⁶³ *See, e.g., CORBIS IMAGES, Content License Agreement, available at* http://www.corbisimages.com/Content/LicenseInfo/Certified_EULA_US.pdf (last visited Aug. 20, 2012); GETTY IMAGES, *License Agreements, available at* <http://www.gettyimages.com/Corporate/LicenseAgreements.aspx> (last visited Aug. 20, 2012); and HULU, *Terms of Use, available at* <http://www.hulu.com/terms> (last visited Aug. 20, 2012).

⁶⁴ *Register.com, Inc. v. Verio, Inc.*, 356 F. 3d. 393, 403 (2d Cir. 2004) (enforcing terms of use of website even though the user did not have to click an icon to agree to be bound by those terms); *Burcham v. Expedia, Inc.*, No. 4:07CV1963 CDP, 2009 WL 586513, at *4 (E.D. Mo. Mar. 6, 2009) (enforcing website terms of use against customer who either did not read them or see them when the website offered its services on the condition that the user agree to its terms); Woodrow Hartzog, *The New Price to Play: Are Passive Online Media Users Bound by Terms of Use?*, 15 COMM. L. & POL’Y 405 (2010) (discussing the

Under this view, from a contract-law perspective, content providers who posted accessible terms of use may reasonably expect users of copyrighted content will consult those terms of use before enjoying the content, or copying or disseminating it. This contract-law perspective aligns with the broad interpretation that DMCA Section 1202 encompasses CMI contained on a hyperlinked webpage or in positions other than directly on the copyrighted work.

¶22 The immediate proximity approach ignores other scenarios of copyright infringement. Performing arts pieces in fields such as dance, music, and theater, may provide CMI in a printed program distributed at the performance. Motion pictures contain copyright information in the opening or closing sequences. A printed book posts CMI on or near the title page. When an infringer creates an unauthorized copy of less than the entirety of any of these works, he or she may selectively choose not to copy the portion bearing the CMI. If the infringer can escape Section 1202 liability by tailoring the copying to avoid the CMI, then DMCA Section 1202 has little force. The provision would only apply when the copyright owner superimposes the CMI onto the entirety of the work, an unattractive and impractical option. Imagine a copyright notice ghost-stamped across every photograph or every page of a book, projected continuously throughout theatrical performances, or printed onto the surfaces of sculptures.

¶23 Copyright owners should post CMI in accessible locations so that users may know the parameters of the use of the work. They should not play a game of “gotcha.” And users should come to expect to look for CMI and be held accountable for following the terms of use if they want to avoid fraud in the marketplace, especially on the Internet, where inauthentic and unauthorized copies can flourish.⁶⁵ Use of a clearly marked and accessible hyperlink on a webpage containing a copyrighted work meets the needs of both parties. The copyright owner can present the work with minimal interferences and also communicate terms of use. The user can enjoy the work without a copyright notice ghosted over it, yet has assurances of the authenticity of the work and can understand the limitations the copyright owner has placed on the use. Unless users engage with and abide by such hyperlinked terms of use, copyright owners may become frustrated at unauthorized uses. Copyright owners may then impose restrictive mechanisms on their works, such as digital watermarks, use conditioned on clicking assent to terms of use, or technological locks that make it harder to copy or distribute works. Increased adherence to and enforcement of the CMI provisions in the DMCA may help to create social expectations that users will look for and rely on terms of use. This robust use of Section 1202 could thus curb the imposition of widespread restrictive mechanisms and further the desire of copyright owners and consumers alike for broad distribution of copyrighted works.

tendency of courts to enforce online terms of use against engaged users); Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 846-848 (2007) (noting that courts will enforce “browsewrap licenses” – terms of use on a hyperlinked page that do not require that the user click to indicate their assent – if the user had adequate notice of the terms).

⁶⁵ Jacobs, *supra* note 5, at 154 (“The attachment of accurate and full information to a copyrighted work benefits the users who know they are getting an authentic work and can access any terms and conditions of use.”).