

Copyright Management Information: The Intellectual Property You Didn't Know You Have

WRITTEN BY

Glenn G. Pudelka | A. Tucker Davison

When you think of intellectual property, what comes to mind? Most likely, it is some combination of patents, trademarks, copyrights, and trade secrets. But what if there were a fifth category of intellectual property you may not have heard of before? You may have been using it without realizing it, and it may provide protection for your copyrights. If the title of this article didn't give it away, we are talking about copyright management information, or CMI, as it is commonly referred to.

What is CMI? Let's discuss this in reverse order. Instead of starting with the legal definition, let's review some real-world examples that help solidify the concept. Sound good?

Think of the last book you read. Was it a novel, a legal textbook, or perhaps a bedtime story for your children? Regardless of the answer, somewhere on that book is the "copyright notice." You know, the tiny script that includes a "©" with the year of publication and the publisher's name. That is CMI.

How about one more example? Now think about the last time you went to an amusement park and had your photo taken while on a roller coaster. At the end of the ride, you pass by a stand displaying your photo on a screen with a watermark in the middle of the image that offers to sell you a copy of your photo. Sure, you could take a picture of the screen with your phone, but the watermark would remain. That watermark may be a form of CMI.

So why is the "copyright notice" on the book or watermark on a photo included? Without knowing more about CMI, you would probably say it is to identify the copyright holder. But what about the watermark on the photo? You might say that the watermark is to identify who has the legal rights to the image. Both are correct and are subsumed in the definition of CMI.

CMI comes from the Digital Millennium Copyright Act (DMCA), which defines it broadly by listing eight specific categories of protected information conveyed in connection with copies of a work that effectively identify the work, author, or rights holder. 17 U.S.C. § 1202(c). These eight enumerated categories are:

- (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.

17 U.S.C. § 1202(c). In short, if information exists on a work that identifies the party with an interest in the work, that may be CMI.

Importantly, despite CMI being created by the DMCA, it “is not restricted to the context of ‘automated copyright protection or management systems.’” *Murphy v. Millennium Radio Group LLC*, 650 F.3d 295, 305 (3d Cir. 2011). Indeed, any cause of action under § 1202 of the DMCA may exist whenever the CMI is falsified or removed, “regardless of the form in which that information is conveyed.” *Murphy v. Millennium Radio Group LLC*, 650 F.3d 295, 305 (3d Cir. 2011).

Remember our example of the watermark on the photograph from the roller coaster, how can that be CMI if the photographer wasn’t able to get a federal registration by the time you viewed the photo at the booth? It is important to know that a copyright registration is not required for information to qualify as CMI or for that CMI to have protection under Section 1202 of the DMCA. While it may be true that the existence of a copyright registration is a prerequisite for an action for copyright infringement, claims under the DMCA for falsifying or removing CMI are separate and distinct from copyright infringement and require no such prerequisite registration. *Med. Broad. Co. v. Flaiz*, No. CIV.A. 02-8554, 2003 WL 22838094, at *3 (E.D. Pa. Nov. 25, 2003).

So why should you care about CMI? Well, aside from the general desire to protect your intellectual property, claims under the DMCA for falsifying or removing CMI can result in large damages awards. Specifically, Section 1203 of the DMCA indicates that a person violating Section 1202 is liable for either (A) the actual damages and any additional profits of the violator, or (B) statutory damages. 17 U.S.C. § 1202(c)(1). This may not seem that impressive, except for the fact that an award of statutory damages for violations of Section 1202 is based on a per violation calculation, as opposed to the per infringement framework of copyright infringement, “in the sum of not less than \$2,500 or more than \$25,000.” 17 U.S.C. § 1202(c)(3). Given that federal courts have consistently adopted a violation counting methodology that focuses on the accused’s conduct rather than the number of people affected by that conduct (i.e., an “each violative act” standard), it is not hard to see how a damages model can quickly multiply. For instance, let’s go back to our amusement park visitor. Assume the rider takes the photo, removes the watermark, and sends it to each of their three friends who are also in the photo. Then, the visitor posts the non-watermarked photo on three different social media platforms. Under the “each violative act”

standard, our rider has just committed six violations in a short period of time and may now be faced with statutory damages of \$150,000.

Let's close this article in the same way we started. When you think of intellectual property, what comes to mind now?

RELATED INDUSTRIES + PRACTICES

- Intellectual Property
- Trademark + Copyright