

No. __-____

IN THE
Supreme Court of the United States

ROBERT STEVENS; STEVEN VANDEL,
Petitioners,

v.

CORELOGIC, INC.,
Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in order to satisfy the mental state requirement of “knowing, or, . . . having reasonable grounds to know” that removal or alteration of copyright management information (“CMI”) in violation of 17 U.S.C. § 1202(b) “will induce, enable, facilitate, or conceal an infringement,” a plaintiff must prove “identifiable” and “likely” future copyright infringement as a result of removal or alteration of CMI, or a “pattern of conduct” or “modus operandi” involving policing infringement by tracking CMI, as the Ninth Circuit held, or whether a plaintiff may instead simply prove that removal or alteration of CMI makes “infringement generally possible or easier to accomplish” without the need for simultaneously proving removal or alteration of CMI resulted in a “particular act of infringement,” as the Register of Copyrights has advocated.

PARTIES TO THE PROCEEDINGS

Petitioners Robert Stevens and Steven Vandel were the plaintiffs and the appellants in the proceedings below.

Respondent CoreLogic, Inc. was the defendant and the appellee in the proceedings below.

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Robert Stevens and Steven Vandel (“Photographers”) respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 899 F.3d 666 (9th Cir. Aug. 6, 2018).

The court of appeals order denying petition for panel rehearing or rehearing *en banc* (App., *infra*, 2a) is unreported but available at 2018 U.S. App. LEXIS 21731 (9th Cir. Aug. 6, 2018).

The order of the district court granting respondent’s motion for summary judgment (App., *infra*, 23a-38a) is reported at 194 F. Supp. 3d 1046 (S.D. Cal. July 1, 2016).

JURISDICTION

The court of appeals entered its judgment on August 6, 2018. On November 8, 2018, Justice Kagan extended the time for filing a certiorari petition to and including January 3, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Copyright Act (17 U.S.C.) and the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 1202 and 17 U.S.C. § 512(i) are reproduced at App., *infra*, 39a-45a.

INTRODUCTION

In 1998, Congress enacted 17 U.S.C. § 1202 as part of the Digital Millennium Copyright Act (“DMCA”) to implement the WIPO Copyright Treaty and WIPO Performances and Phonogram Treaty in force in nearly 100 countries. Generally, § 1202 pertains to “copyright management information” (“CMI”) which is defined in § 1202(c) 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:

(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).

Section 1202(b)(1) prohibits the removal or alteration of CMI. Section 1202(b)(3) prohibits distribution of copies of works with CMI removed or altered. Both subsections are enforceable in civil actions for damages. 17 U.S.C. § 1203(a) (“Any person injured by a violation of section . . . 1202 may bring a civil action in an appropriate United States district court for such violation.”). Both subsections may also be the subject of criminal prosecutions. *See* 17 U.S.C. § 1204(a).

Petitioners are real estate photographers who create and license photographs of real estate for sale to real estate agents. Petitioners retain the copyright in their photographs and include within those photographs copyright management information in

metadata, computer readable fields attached to a photograph that contain information about the image, the photographer, copyright restrictions, and other relevant information.

Respondent CoreLogic, Inc. (“CoreLogic”) makes and sells Multiple Listing Service (MLS) software platforms that the vast majority of real estate agents use to upload petitioners’ photographs and list properties for sale. Respondent also provides database information services on the real estate industry to financial services industries.

Petitioners sued respondent for, *inter alia*, violation of § 1202(b)(1) and § 1202(b)(3) because respondent removed petitioners’ CMI metadata from their photographs after those photographs were uploaded to respondent’s MLS platforms, and distributed petitioners’ photographs knowing that petitioners’ CMI metadata was removed. Respondent then took the petitioners’ metadata stripped photographs, and CMI stripped photographs taken by other real estate photographers, and distributed those photographs to respondent’s financial services customers, earning respondent nearly \$13 million in infringing revenues.

The district court granted summary judgment to respondent on petitioners’ claims under § 1202(b)(1) and § 1202(b)(3) because, according to the district court, petitioners presented “no evidence: (1) that CoreLogic knew or had reason to know that distributing images without CMI would ‘induce, enable, facilitate or conceal an infringement’ and (2) that any distribution was done without the authority of the copyright owner.” (App., *infra*, 35a).

The court of appeals for the Ninth Circuit affirmed summary judgment for respondent on petitioners’ § 1202(b) claims determining that petitioners

failed to offer any evidence to satisfy the mental state requirement of “knowing, or, . . . having reasonable grounds to know,” that respondent’s actions in stripping CMI metadata from petitioners’ photographs “will induce, enable, facilitate, or conceal” infringement. (App., *infra*, 9a).

The mental state requirement imposed by both the district court and the court of appeals goes far beyond the plain “knowing, or, . . . having reasonable grounds to know,” language of the statute. Requiring proof a “past pattern of conduct” or an “established *modus operandi*” related to specific “identifiable infringements” from the removal or alteration of CMI, or that removal or alteration of CMI “will” cause such instances of infringement in the future, imposes a burden on plaintiffs that § 1202(b) does not mandate. (App., *infra*, 10a). Rather, the mental state of “knowing, or, . . . having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement” is appropriately satisfied by proof that CMI removal or alteration makes “infringement generally possible or easier to accomplish,” as the Register of Copyrights requested that Congress “make clear.” (*see* n. 10, *infra*).

STATEMENT

A. Statutory Background

International agreements concerning copyright include the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonogram Treaty (“WPPT”). 17 U.S.C. § 101.

Article 12 of the WCT provides:

- (1) Contracting Parties shall provide ***adequate and effective legal remedies*** against any person knowingly per-

forming any of the following acts *knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention*:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, 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.

S. Treaty Doc. No. 105-17 (adopted December 20, 1996) (emphasis added).

Article 19 of the WPPT provides:

(1) Contracting Parties shall provide *adequate and effective legal reme-*

dies against any person knowingly performing any of the following acts *knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty*:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.

S. Treaty Doc. No. 105-17 (adopted December 20, 1996) (emphasis added).

DMCA § 1202 implements Article 12 of the WCT and Article 19 of the WPPT. 112 Stat. 2860, 2863, 2872-2875.

DMCA § 1202(b) provides for liability regarding removal or alteration of “copyright management information” as follows:

(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 [17 USCS § 1203], ***having reasonable grounds to know, that it will induce, enable,***

facilitate, or conceal an infringement of any right under this title.

17 U.S.C. § 1202(b) (emphasis added).

By way of background, copyright management information metadata should be considered a “standard technical measure” under 17 U.S.C. § 512(i)(2) which provides:

(2) Definition. As used in this subsection, the term “standard technical measures” means technical measures that are used by copyright owners to identify or protect copyrighted works and--

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

17 U.S.C. § 512(i)(2). 17 U.S.C.S. § 512(i)(1)(B) provides: “The limitations on liability established by this section shall apply to a service provider only if the service provider—(B) accommodates and does not interfere with standard technical measures.”

B. Factual Background

Photographers’ action alleged, *inter alia*, violations of § 1202(b) by respondent CoreLogic’s removal of CMI metadata from Photographers’ photographs,

and CoreLogic’s distribution of CMI metadata stripped photographs thereafter.

Photographers’ digital photographs of real estate for sale included CMI (e.g. author name, copyright owner name) in metadata. CMI metadata can be stored in both EXIF¹ fields (e.g. “Copyright” and “Artist”) and IPTC² fields (e.g. “Title,” “Copyright Notice,” “Creator Work Email,” and “Creator Work Telephone”).

Photographers’ real estate agent licensees uploaded digital real estate photographs with CMI metadata to CoreLogic’s MLS software platforms.

CoreLogic uniformly removed CMI metadata present at the time of upload to its MLS platforms. CoreLogic’s MLS platforms then displayed the uploaded photographs with CMI metadata removed.


CoreLogic then infringed the CMI metadata stripped photographs, including Photographers’ photographs, by distributing them through its “Partner InfoNet” program that generated nearly \$13 million in revenue from financial services information customers of CoreLogic. No effort was made to ascertain the identity of the copyright owners of the photographs, or obtain permission for their use, prior to distribution by CoreLogic.

Nearly two years after Photographers’ action was filed, and after CoreLogic filed its summary judgment motion in the district court, CoreLogic still con-

¹ “EXIF” refers to Exchangeable Image File Format. Photographers contend that there are 49 CMI metadata fields in EXIF format.

² “IPTC” refers to International Press Telecommunications Council. Photographers contend that there are 90 CMI metadata fields in IPTC format.

tinued to remove CMI metadata in IPTC format from photographs uploaded to its MLS software platforms. For example, as shown below, CoreLogic removed CMI metadata embedded in IPTC format, but did not remove the visible CMI watermark “©SquareFoot-Studios.net” circled in red.

BEFORE UPLOAD		AFTER UPLOAD	
			
CMI Field/Tag	CMI Content	CMI Field/Tag	CMI Content
Headline	39519 Coral Sky Ct Murrieta		
Copyright Owner Name	Steven Vandel		
Creator Work Email	steve@squarefootstudios.net		
Creator Work Telephone	858-201-8156		
Creator Work URL	www.squarefootstudios.net		
Copyright Flag	True		

C. Proceedings Below

The district court granted summary judgment to CoreLogic even though removal of CMI metadata in IPTC fields such as “Copyright Owner Name,” “Creator Work Email,” and “Creator Work Telephone” continued unabated after the case was filed. (App., *infra*, 27a, n.3).

On appeal, the Ninth Circuit affirmed on the sole ground that, in the court of appeals’ view, Photographers failed to satisfy § 1202(b)’s mental state requirement of “knowing, or . . . having reasonable grounds to know” that removal or alteration of CMI “will induce, enable, facilitate, or conceal an infringement of any” copyright. (App., *infra*, 9a).

The Ninth Circuit denied Photographers’ petition for panel rehearing or rehearing *en banc* (App., *infra*,

2a)., but did file an amended opinion to insert the bolded language in the sentence:

Applying that concept here, we hold that a plaintiff bringing a Section 1202(b) claim must make an affirmative showing, such as by demonstrating a past “pattern of conduct” or “modus operandi”, that the defendant was aware ***or had reasonable grounds to be aware*** of the probable future impact of its actions.

(App., *infra*,10) (emphasis added).

REASONS FOR GRANTING THE PETITION

Copyrighted digital photographs (and related CMI metadata) are exceptionally important to the Internet. The World Intellectual Property Organization (“WIPO”) and nearly 100 countries implementing the WCT and WPPT recognized the exceptional importance of the Internet and the need to protect CMI for digital works. *See* §I.A. Congress recognized the importance of the Internet and DMCA’s role in protecting CMI for copyrighted works to stop piracy. *See* §I.B.

The Ninth Circuit defied the plain language of § 1202(b) and the formal position of the Register of Copyrights to effectively rewrite portions of the mental state element. *See* §II.A and B. The Ninth Circuit made it effectively impossible for Photographers and future plaintiffs to prove its heightened § 1202(b) mental state requirements or to even plead a claim. *See* §II.C and D.

This case provides an ideal opportunity to resolve the question presented and determine the mental

state necessary to prove a violation of § 1202(b). The Ninth Circuit affirmed summary judgment solely on the single issue of defendant's mental state; all issues are *de novo*; the factual scenario is likely repeatable; and no better vehicle will emerge.

I. COPYRIGHTED DIGITAL PHOTOGRAPHS (AND RELATED CMI METADATA) ARE EXCEPTIONALLY IMPORTANT TO THE INTERNET

Copyrighted digital photographs (and related CMI metadata) are exceptionally important to the Internet. Eye catching copyrighted digital photographs on the Internet grab attention and drive commerce. As noted by the Ninth Circuit, “[r]esidential real estate sales today depend largely on online sites displaying properties for sale.” (App., *infra*, 3a).

As discussed in §I.A, WIPO and nearly 100 countries implementing the WCT and WPPT recognized the exceptional importance of the Internet and the need to protect CMI for digital works.

As discussed in §I.B, Congress recognized the importance of the Internet and DMCA's role in protecting CMI for copyrighted works to stop piracy.

A. WIPO And Nearly 100 Countries Implementing The WCT and WPPT Recognized The Exceptional Importance Of The Internet And The Need To Protect CMI For Digital Works

In 1996, when the Internet was still in its infancy, WIPO, in coordination with numerous countries around the world, hammered out two treaties: WCT

and WPPT. The International Bureau of WIPO summarized the challenges of protecting copyrights on the Internet that these two treaties addressed.

Among other things, both the WCT and the WPPT address the challenges posed by today's digital technologies, in particular the dissemination of protected material over digital networks such as the Internet. For this reason, they have sometimes been referred to as the "Internet treaties."

The WCT and WPPT were adopted by consensus, by more than 100 countries. They therefore reflect a broad international agreement as to how copyright and related rights should be handled in today's environment, including the context of digital technologies. This is because many compromises were made during the negotiation process between the demands of countries seeking stronger rights and those seeking greater protection for users and for intermediaries such as equipment and communications infrastructure providers. The ultimate result has been widely acknowledged as balanced and fair.

WIPO Report³, at 2

³ "WIPO Report" refers to a document prepared by the International Bureau of WIPO titled "THE ADVANTAGES OF ADHERENCE TO THE WIPO COPYRIGHT TREATY (WCT) AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)" accessible at

https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/advantages_wct_wppt.pdf

The two treaties safeguard “the reliability and integrity of the online marketplace by requiring countries to prohibit the deliberate alteration or deletion of electronic ‘rights management information’: that is, information which accompanies any protected material, and which identifies the work, its creators, performer, or owner, and the terms and conditions for its use.” WIPO Report, at 3.

WIPO explained that since the Internet is the “world’s biggest copy machine,” it is critical for the legal system to respond in effective and appropriate ways.

If legal rules are not set and applied appropriately, digital technology has the potential to undermine the basic principles of copyright and related rights. The Internet has been described as “the world’s biggest copy machine.” The older technologies of photocopying and taping allow mechanical copying by individual consumers, but in limited quantities, requiring considerable time, and of a lower quality than the original. Moreover, the copies are physically located in the same place as the person making the copy. On the Internet, in contrast, one can make an unlimited number of copies, virtually instantaneously, without degradation in quality. These copies in turn can be transmitted to locations around the world in a matter of minutes. The result could be the disruption of traditional markets for the sale of copies of computer programs, music, art, books and movies.

It is therefore critical to adjust the legal system to respond to the new technological environment in an effective and appropriate way both at national and international levels, as the Internet is a borderless medium; and to do so quickly, through adherence to, and implementation of, the treaties, because technologies and markets evolve increasingly rapidly.

WIPO Report, at 5.

WIPO explained: “If rightholders are secure in their ability to sell and license their property over the Internet, they will exploit this market fully and make more and more valuable works available through this medium. Appropriate limitations and exceptions will continue to safeguard public interest uses.” WIPO Report, at 5-6. “The economic importance of copyright industries in developed market economies has been well documented.” *Id.* at 6. “The treaties will encourage investment in the country, both domestic and foreign, by providing greater certainty to businesses that their property can be safely disseminated there.” *Id.* at 7.

WIPO explained that implementation of the two treaties requires technological adjuncts to copyrights be added to provide “adequate and effective legal remedies against . . . the deliberate deletion or alteration of rights management information.” *Id.* at 8.

Prior to adoption of the WCT and WPPT, WIPO “observed that the willful removal or alteration of rights management information in order to achieve financial gain is a matter which falls within the

scope of the provisions of the penal codes in most countries.”⁴

B. Congress Recognized The Importance of The Internet And The DMCA’s Role in Protecting CMI To Prevent Piracy In Copyrighted Works

One year after the enactment of the DMCA (which implemented the WCT and WPPT), Congress held a hearing “to get a better sense of whether the DMCA has provided the necessary legal framework for electronic commerce to flourish.” HR 1999 Hearing⁵, at 1.

“The Internet is changing everything, and it is enabling many people, including artists, to reach consumers directly. In the revolution of this electronic commerce age we are seeing entire economic sectors change, stock markets, retail markets and others redefining themselves.” *Id.* at 7-8.

“The Internet, for the first time, though, allows pirated products to a broader potential audience than it has ever had before.” *Id.* at 11.

⁴ WIPO, Diplomatic Conference On Certain Copyright And Neighboring Rights Questions, “Basic Proposal For The Substantive Provisions Of The Treaty For The Protection Of The Rights Of Performers And Producers Of Phonograms To Be Considered By The Diplomatic Conference” CRND/DC/5, ¶23.17 (August 30, 1996) accessible at

https://www.wipo.int/edocs/mdocs/diplconf/en/crn_r_dc/crn_r_dc_5.pdf

⁵ “HR 1999 Hearing” refers to “WIPO ONE YEAR LATER: ASSESSING CONSUMER ACCESS TO DIGITAL ENTERTAINMENT ON THE INTERNET AND OTHER MEDIA” Hearing Before The Subcommittee On Telecommunications, Trade, And Consumer Protection Of The Committee On Commerce House Of Representatives, October 28, 1999, Serial No. 106–83.

“Now how do you stop Internet piracy? Well, first the DMCA enactment helped us a lot. . . . [The] DMCA extends protection to intellectual property rights owners who use copyright management information.” *Id.* at 13.

This Court previously noted that Congress passed the DMCA because it was aware of the ease with which pirates could copy and distribute a copyrighted work in digital form.

Congress is doubtless aware of the ease with which software (and other electronic media) can be copied, and has not left the matter untouched. In 1998, Congress addressed the ease with which pirates could copy and distribute a copyrightable work in digital form.’ *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 435 (CA2 2001). The resulting measure, the Digital Millennium Copyright Act, 17 U.S.C. § 1201 et seq., ‘backed with legal sanctions the efforts of copyright owners to protect their works from piracy behind digital walls such as encryption codes or password protections.’ *Universal City Studios*, 273 F.3d at 435.

Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 458 (2007).

II. THE NINTH CIRCUIT DEFIED THE PLAIN LANGUAGE OF § 1202(B) AND THE FORMAL POSITION OF THE REGISTER OF COPYRIGHTS TO EFFECTIVELY REWRITE PORTIONS OF THE MENTAL STATE ELEMENT

Section 1202(b) provides:

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

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

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

(3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law,

knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

17 U.S.C. § 1202(b).

The plain language of the statute requires the prohibited act, such as the removal or alteration of CMI prohibited in § 1202(b)(1), be committed either “knowing[ly],” or under circumstances where the violator “[had] reasonable grounds to know,” that his or her act “will induce, enable, facilitate, or conceal an infringement of any right under this title.”

“Having reasonable grounds to know” is obviously a lower mental state than that of “knowing.” Furthermore, the defendant’s mental state pertains to an infringement “*of any right*” under Title 17, which by definition includes the right of reproduction under 17 U.S.C. § 106(1), the derivative work right under § 106(2), the distribution right under § 106(3), the public performance right under § 106(4), the display right under § 106(5), the digital audio transmission right under § 106(6), and the rights of authors to attribution and integrity under § 106A.

Thus, the plain language of § 1202(b) requires a defendant, at a minimum, to have removed or altered CMI under circumstances where it was reasonable for the defendant to know that one of the copyright holder’s rights may be infringed. But what right? And how?

The Ninth Circuit’s answer requiring proof that specific instances of infringement have previously resulted from the removal or alteration of CMI, or that removal or alteration of CMI will likely cause such instances of infringement in the future, imposes a burden on plaintiffs that § 1202(b) does not mandate.

The result is the practical impossibility to prove a defendant’s mental state under § 1202(b) even under ideal facts such as those here where CoreLogic admitted removing CMI metadata, and CoreLogic in-

fringed Photographers' CMI metadata stripped photographs through its Partner InfoNet program that generated nearly \$13 million in revenue.

On *de novo* review, the Ninth Circuit even denied Photographers access to 603 relevant, responsive (and in some cases compelled) e-mails ***between non-attorneys*** improperly listed on defendant's privilege log that likely contained facts relevant to defendant's mental state. On *de novo* review, the Ninth Circuit denied Photographers' related motion to compel non-privileged documents listed on defendant's privilege log and motion for Rule 56(d) relief to use the 603 non-emails to oppose defendant's summary judgment motion. See §II.C.

Not only is defendant's mental state practically impossible to prove under the Ninth Circuit's rulings, it is also practically impossible to plead. A district court dismissed a § 1202 claim at the pleading stage because of inadequate allegations as to defendant's mental state. See §II.D.

A. The Ninth Circuit Defies § 1202's Plain Language And The Formal Position Of The Register of Copyrights

"As with any question of statutory interpretation, our analysis begins with the plain language of the statute. It is well established that, when the statutory language is plain, we must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (citations omitted).

The plain language of § 1202(b)'s mental state element focuses on whether defendant knew (or had reasonable grounds to know) that removal of CMI metadata from Photographers' digital photos:

1. "will ***induce*** . . . an infringement" in the future;

2. “will . . . **enable** . . . an infringement” in the future;

3. “will . . . **facilitate** . . . an infringement” in the future; or

4. “will . . . **conceal** an infringement” in the past or future.

Giving each word its “ordinary, contemporary, common meaning,” shows passive conduct that does not require proof of any identifiable past or future infringement. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (citations omitted).

“Congress drafted §1202(b) to include several forms of abetting behavior, the most passive of which, ‘**enable**,’ is defined as ‘to make possible, practical, or easy.’ See *Webster’s Third New International Dictionary* 745 (1986).” *Murphy v. Millennium Radio Grp. LLC*, 2015 U.S. Dist. LEXIS 10719, at *14 (D.N.J. Jan. 29, 2015) (emphasis added).

The term “**facilitate**” is defined as “to make (something) easier; to help cause (something).”⁶

The term “**induce**” is defined as “to call forth or bring about by influence or stimulation.”⁷ *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 760 (2011) (“The term ‘induce’ means “[t]o lead on; to influence; to prevail on; to move by persuasion or influence.” *Webster’s New International Dictionary* 1269 (2d ed. 1945).”).

The term “**conceal**” is defined as “to prevent disclosure or recognition of.”⁸

⁶ www.merriam-webster.com/dictionary/facilitate

⁷ www.merriam-webster.com/dictionary/induce

⁸ www.merriam-webster.com/dictionary/conceal

The term “*will*” is “used to express futurity.”⁹

Consistent with the passive language of § 1202, the Register of Copyrights requested that Congress “make clear” that defendant’s mental state does not require “any particular act of infringement” but rather “just to make infringement generally possible or easier to accomplish.”

Liability for the removal or alteration of information requires the actor to know or have reason to know that his acts “*will induce, enable, facilitate or conceal” infringement.*

Some copyright owners have expressed concern that this standard will be too difficult to meet, requiring proof of an ultimate infringement in order to find a violation. *The Copyright Office believes that it is important to make clear*, possibly in legislative history, that *the reference to infringement does not mean that the actor must have intended to further any particular act of infringement--just to make infringement generally possible or easier to accomplish.*

(emphasis added).¹⁰

⁹ <https://www.merriam-webster.com/dictionary/will>

¹⁰ WIPO Copyright Treaties Implementation Act, and Online Copyright Liability Limitation Act: Hearing Before the H. Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary, 105th Cong. 51 (1997) (statement of Marybeth Peters, Register of Copyrights).

https://www.copyright.gov/docs/2180_stat.html.

Contrary to the above, the Ninth Circuit rejected a “possibility” standard and required “identifiable infringements” to establish defendant’s mental state:

[Photographers’] primary argument is that, because one method of identifying an infringing photograph has been impaired, someone *might* be able to use their photographs undetected. That assertion rests on no affirmative evidence at all; ***it simply identifies a general possibility that exists whenever CMI is removed.***

As we interpret Section 1202(b), this generic approach won’t wash. . . . To avoid superfluity, the mental state requirement in Section 1202(b) must have a more specific application than the ***universal possibility of encouraging infringement***; specific allegations as to how ***identifiable infringements*** “will” be affected are necessary.

(App., *infra*, 10a) (emphasis in original and added).

The Ninth Circuit’s position erroneously assumes that defendant’s mental state element will be automatically shown (and hence be superfluous) every time CMI metadata is removed. But § 1202(b)’s mental state element would likely not be established where: (1) defendant has the right to display Photographers’ photos on the Internet MLS platform; (2) defendant intentionally removes CMI metadata from photos; and (3) defendant displays the photos on the MLS, ***but does not allow download of the CMI removed photos.*** Because the photos cannot be downloaded from the Internet, the removal of CMI

metadata would not likely “induce, enable, facilitate, or conceal” an infringement.

Admittedly, the plain language of the § 1202(b) and the Register of Copyright’s position establishes a low threshold for establishing a defendant’s mental state. But a low threshold does not make the mental state element superfluous. In *Agence Fr. Presse v. Morel*, 934 F. Supp. 2d 547, 578 (S.D.N.Y. 2013) “a jury could infer . . . that adding [false CMI] ‘AFP’ to the caption would ‘induce, enable, facilitate, or conceal’ its infringement and the infringements of its subscribers.”) In *Boatman v. United States Racquetball Ass’n*, 33 F. Supp. 3d 1264, 1275-1276 (D. Colo. 2014), the court denied defendant’s motion for summary judgment after it “inferred that the Defendant was aware that removal, or failure to display, the copyright information would lead to an infringement of Mr. Boatman’s copyrights.” In *McClatchey v. AP*, 2007 U.S. Dist. LEXIS 17768, *16-17 (W.D. Pa. Mar. 9, 2007), the court found “a reasonable factfinder could conclude that by cropping out the copyright notice, Defendant had the requisite intent to induce, enable, facilitate or conceal infringement.” In *Propet USA, Inc. v. Shugart*, 2007 U.S. Dist. LEXIS 94635 *11-12 (W.D. Wash. Dec. 13, 2007), the court held that “the totality of the evidence presented provided a sufficient basis for the jury to conclude that [Propet] had reasonable grounds to know that the removal of copyright management information would induce, enable, facilitate, or conceal an infringement.”

B. The Ninth Circuit Was Not Free To Rewrite § 1202’s Mental State Element

“[O]ur constitutional structure does not permit this Court to rewrite the statute that Congress has

enacted.” *Nat’l Ass’n of Mfrs. v. DOD*, 138 S. Ct. 617, 629 (2018) (citations omitted). “Legislation is, after all, the art of compromise. . .” *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). “It is not our function ‘to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have’ intended.” *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018) (citation omitted).

As discussed below, the Ninth Circuit’s passages misinterpret § 1202(b)’s mental state to add elements of proof not required by its plain language.

1. The Ninth Circuit Erred In Requiring Proof Of “Identifiable” And “Likely” Future Infringements

The Ninth Circuit erroneously states “specific allegations as to how *identifiable infringements* ‘will’ be affected are necessary.” (App., *infra*, 10a) (emphasis added). The text of § 1202(b) does not refer to “identifiable infringements.” Further, it is impossible for Photographers to provide “specific allegations” of “identifiable infringements” that have not yet occurred or may never occur. The plain text of § 1202(b) does not require proof of any infringement.

The Ninth Circuit erroneously states that “plaintiff must provide evidence from which one can infer that *future infringement is likely*, albeit not certain, to occur as a result of the removal or alteration of CMI.” (App., *infra*, 13a). As discussed above, the passive language of § 1202(b) and the Register of Copyrights’ formal position support a “generally possible or easier to accomplish” (see n. 10, *supra*) standard as opposed to a “likely” standard.

Put in context, a defendant who knows (or should know) that its removal of CMI metadata makes fu-

ture copyright infringement generally possible or easier to accomplish is sufficiently culpable. Such a defendant should not be able to escape § 1202 liability for removing CMI metadata on the ground that defendant did not know it was “likely” that a specific person would infringe in the future.

Even under the Ninth Circuit’s higher standard, summary judgment on defendant’s mental state was erroneous because of Photographers’ evidence that CoreLogic generated nearly \$13 million from its infringing Partner InfoNet products that used Photographers’ photos without their permission. (App., *infra* 28a). The Ninth Circuit noted: “CoreLogic used photographs taken and owned by the Photographers on Partner InfoNet products.” (App., *infra*, 7a). Defendant’s Partner InfoNet infringements constitute “identifiable infringements” and defendant’s nearly \$13 million in infringing revenues over a multi-year time period raises an inference that “future infringement is likely.”

As discussed in §II.C, on *de novo* review, the Ninth Circuit denied Photographers Fed. R. Civ. Proc. 56(d) relief to obtain access to 603 relevant, responsive (and in some cases compelled) emails between non-attorneys improperly listed on defendant’s privilege log that likely would contain facts to establish the Ninth Circuit’s higher standard.

2. The Ninth Circuit Misplaced Its Reliance On A Sex Trafficking Case that Required Proof of Defendant’s Past “Pattern Of Conduct” Or “Established Modus Operandi”

The Ninth Circuit misplaced its reliance on the sex trafficking case *United States v. Todd*, 627 F.3d 329, 334 (9th Cir. 2010) (not cited by either party)

that required proof of defendant’s past “pattern of conduct” or “established *modus operandi*” to establish defendant’s mental state. (App., *infra*, 10a). The Ninth Circuit stated:

Also, recognizing that “nothing is completely stable, no plan is beyond alteration,” we have previously observed that statutes requiring knowledge that a future action “will” occur do not “require knowledge in the sense of certainty as to a future act.” *United States v. Todd*, 627 F.3d 329, 334 (9th Cir. 2010). Rather, knowledge in the context of such statutes signifies “a state of mind in which the knower is familiar with a ***pattern of conduct***” or “***aware of an established modus operandi*** that will in the future cause a person to engage in” a certain act. *Id.* Applying that concept here, we hold that a plaintiff bringing a Section 1202(b) claim must make an affirmative showing, such as by demonstrating a ***past “pattern of conduct”*** or “***modus operandi***”, that the defendant was aware or had reasonable grounds to be aware of the probable future impact of its actions.

(App., *infra*, 10a) (emphasis added).

The *Todd* opinion interpreted 18 U.S.C. § 1591(a) that contains the element “knowing that force, fraud, or coercion . . . ***will be used to cause*** the person ***to engage in a commercial sex act.***” *Todd*, 627 F.3d at 333-334 (emphasis added). Thus, § 1591(a) required both causation (“to cause”) and “a commercial sex act” to occur in the future.

In contrast, § 1202(b) does not contain causation language and does not require any infringement to occur in the future. For instance, § 1202(b)'s language provides “will . . . enable . . . an infringement” as opposed to “will cause an infringement.”

The plain language of § 1202(b) simply does not require proof of a defendant's past “pattern of conduct” or “established modus operandi.” Nor does the plain language in § 1202(b) require Photographers to establish proof of an infringement (whether past or future).

Even under the Ninth Circuit's analysis, Photographers presented proof of the added elements of defendant's past “pattern of conduct” or “established modus operandi” through evidence of defendant's infringing Partner InfoNet program. CoreLogic's nearly \$13 million in infringing revenues over a multi-year period from Partner InfoNet products show defendant's past “pattern of conduct” or “established modus operandi” with respect to defendant's infringement of Photographers' CMI metadata stripped photos.

3. The Ninth Circuit Erred By Requiring Proof of *Photographers'* Policing Infringement Using CMI Metadata To Establish *Defendant's* Mental State

What was *defendant's* mental state? The Ninth Circuit erroneously instructed to look at the conduct of *Photographers* – complete strangers to defendant – with respect to Photographers' policing of infringement using CMI metadata. The Ninth Circuit stated:

The Photographers have not offered *any* specific evidence that removal of CMI metadata from their real estate

photographs *will impair their policing of infringement*. There are *no allegations, for example, of a “pattern of conduct” or “modus operandi” involving policing infringement by tracking metadata*. *Todd*, 627 F.3d at 334. Indeed, the evidence presented cuts against any inference that CMI metadata is of *any practical significance to the Photographers in policing copyright infringement of their images*.

The Photographers have not, for example, averred that they have ever used CMI metadata to prevent or detect copyright infringement, much less how they would do so. . . . The testimony of both Stevens and Vandell *undermines any ostensible relationship between the removal of CMI metadata and their policing of infringement*.

(App., *infra* 13a-14a) (emphasis in original and added).

The plain language of § 1202(b) puts *defendant’s* mental state in issue, not *Photographers’* mental state or conduct. The focus should be on defendant’s reasonable awareness of *the potential for infringement* of Photographers’ CMI stripped photos. Where, as here, the potential infringer and the defendant are one and the same, a strong inference that defendant possessed the requisite mental state should follow.

Section 1202(b) contains no language to require proof that *Photographers* police for infringement using CMI metadata to establish *defendant’s* mental state. Also, Photographers were strangers to defendant because defendant never tracked copyright owner

information and removed CMI metadata. Since defendant did not know the identity of Photographers, then defendant certainly did not know whether Photographers used CMI metadata to police for copyright infringement. Also, since defendant removed CMI metadata, Photographers could not use CMI metadata to police for copyright infringement.

The Ninth Circuit essentially made a general argument that removal of CMI metadata has no relationship to infringement, so defendant's mental state can never be established. But the DMCA expressly recognizes a relationship between the removal of CMI metadata and infringement by its reference in 17 U.S.C. § 512(i)(2) to "technical measures that are used by copyright owners to identify or protect copyrighted work." See 17 U.S.C. § 512(i)(1)(B) ("accommodates and does not interfere with standard technical measures"); *Gardner v. Cafepress Inc.*, 2014 U.S. Dist. LEXIS 25405, at *15 (S.D. Cal. Feb. 26, 2014) ("deletion of metadata when a photo is uploaded constitutes the failure to accommodate and/or interference with 'standard technical measures.'").

Is there a relationship between the serial number on a gun and preventing or identifying a crime? Congress made it a crime under 26 U.S.C. § 5861(g) "to obliterate, remove, change, or alter the serial number or other identification of a firearm."

Is a person who finds a wallet with \$500 cash more likely to pocket the money if there is no identification in the wallet? A digital photo with CMI metadata removed is akin to a wallet with no ID.

The Ninth Circuit's antagonism toward CMI metadata is repulsive to the DMCA and the underlying two treaties it implemented with nearly 100 countries. The Ninth Circuit's argument that visible

“watermarks offer a more reliable way of indicating copyright protection than metadata” (App., *infra*, 9a, n.5) ignores that copyright owners can place much more detailed and extensive CMI in metadata.

C. The Ninth Circuit Made It Effectively Impossible To Prove Its Heightened § 1202 Mental State Requirements

The Ninth Circuit made it effectively impossible to establish § 1202(b)’s “knowing, or ... having reasonable grounds to know” mental state requirement.

First, the Ninth Circuit departed from the long standing principle that “Questions involving a person’s state of mind . . . are generally factual issues inappropriate for resolution by summary judgment.” *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1186 (9th Cir. 2016) (citations omitted). *See also Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) (“These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment.”).

Second, even on *de novo* review, the Ninth Circuit denied Photographers access to 603 relevant, responsive (and in some cases compelled) e-mails **between non-attorneys** improperly listed on defendant’s privilege log that likely contained facts relevant to defendant’s mental state. On the one hand, the Ninth Circuit ruled that the 603 “communications that the Photographers sought could have ‘shed light’ on whether, for example, CoreLogic intentionally removed CMI or knew CMI was removed without authorization — issues relevant to the district court’s summary judgment ruling, although not to our basis for affirming that ruling — and should have been addressed.” (App., *infra* 17a).

But then the Ninth Circuit erroneously ruled that the 603 emails were not “relevant to the dispositive question — whether CoreLogic’s software will “induce, enable, facilitate, or conceal” any act of infringement. (App., *infra* 18a). Relevance was not in issue and should be deemed established because the 603 emails between non-attorneys listed on defendant’s privilege log were already responsive (and in some cases compelled) to Photographers’ discovery.

Further, the Ninth Circuit cannot rule the 603 emails would not be relevant to defendant’s intent. “In any criminal case, after all, the factfinder can draw inferences about a defendant’s intent based on all the facts and circumstances of a crime’s commission.” *Rosemond v. United States*, 572 U.S. 65, 78 n.9 (2014). With respect to a defendant’s subjective intent, “there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons . . .” *Harlow*, 457 U.S. at 816-17, 102 S. Ct. at 2737.

On *de novo* review, the Ninth Circuit erred in denying Photographers’ related motion to compel non-privileged documents and for Fed. R. Civ. Proc. 56(d) relief to use those 603 emails to provide evidence to further establish defendant’s mental state.

D. District Courts May Dismiss Complaints That Cannot Plead The Ninth Circuit’s Heightened Mental State Requirements

Under the Ninth Circuit’s rulings, district courts may dismiss a plaintiff’s complaint that does not allege the heightened mental state requirements, such as proof of defendant’s “pattern of conduct” or “modus operandi.”

In *Philpot v. Alternet Media, Inc.*, 2018 U.S. Dist. LEXIS 203500, at *13-14 (N.D. Cal. Nov. 30, 2018), plaintiff's §1202 claim was dismissed based upon the Ninth Circuit's heightened mental state requirements.

The Ninth Circuit has held “that a plaintiff bringing a Section 1202(b) claim must make an ***affirmative showing***, such as by demonstrating a past ***‘pattern of conduct’ or ‘modus operandi’***, that the defendant was aware or had reasonable grounds to be aware of the probable future impact of its actions.” *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 674 (9th Cir. 2018) (emphasis added). Philpot argues that the complaint sufficiently pled Alternet's mental state by stating that Alternet should have known its alleged removal of the CMI of Willie Nelson's photograph would induce, enable, facilitate, or conceal an infringement of Philpot's rights. Opp'n to Mot. at 14. However, the Court finds that argument to be merely conclusory. As previously stated, a complaint must contain “factual allegations . . . enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555 (internal citations and parentheticals omitted). On this claim, Philpot fails to plead any facts showing that Alternet had the required mental state.

Id. (emphasis in original and added).

III. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLUTION OF THE QUESTION PRESENTED

This case is the ideal vehicle in which to resolve the question presented.

The Ninth Circuit's opinion affirming summary judgment was on the sole issue of defendant's mental state.

The Ninth Circuit's opinion only raises *de novo* issues.

The scenario of a defendant removing CMI metadata and then directly infringing the CMI metadata removed photos on the Internet is a scenario likely to be repeated over and over in other cases.

The importance of digital works (with CMI) and Internet as well as the Register of Copyrights' formal position weighs strongly in favor of ruling now rather than decades later when circuit conflict emerges.

No better vehicle will emerge.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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