

No. 18-878

In The
Supreme Court of the United States

ROBERT STEVENS; AFFORDABLE AERIAL
PHOTOGRAPHY, INC.; and STEVEN VANDEL,

Petitioners,

v.

CORELOGIC, INC.,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF AMICI CURIAE OF
AMERICAN PHOTOGRAPHIC ARTISTS
AND DIGITAL JUSTICE FOUNDATION
IN SUPPORT OF PETITIONERS**

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**STATEMENT OF
INTEREST OF *AMICI CURIAE*¹**

The American Photographic Artists (APA) is a 501(c)(6) non-profit trade organization for photographers and visual artists that represents their interests around the world. APA's membership includes numerous professional photographers, photo assistants, educators, and students. Recognized for its broad industry reach, APA works to champion the rights of photographers and image-makers worldwide. APA is a leading national organization run by and for professional photographers, providing essential business resources to help its members achieve their professional and artistic goals.

The Digital Justice Foundation (DJF) is a non-profit legal organization dedicated to protecting individual rights in digital spaces, with a particular focus on being a voice for underrepresented individual users and consumers. As part of this mission, the DJF advocates for individual rights, including civil liberties, privacy rights, and intellectual property rights, especially where such rights are implicated by the internet and other digital technologies.

¹ Pursuant to Supreme Court Rule 37.2(a), *amici* have timely notified counsel of record of their intent to file an *amicus* brief in support of Petitioner. Consent from all Parties was granted. Further, pursuant to Supreme Court Rule 37.6, No party other than the *amici curiae*, their members, or their counsel have authored the brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The Ninth Circuit's holding created serious problems for photographers, artists, and other content creators and their ability to control the distribution of their copyrighted material over the internet. Since its inception, the United States copyright system has encouraged progress in the areas of technology and the creative arts. The internet provides tremendous potential for the dissemination of creative works, but that potential extends to the dissemination of illicit copies of those works. The Digital Millennium Copyright Act (DMCA) was enacted with the express aim of bringing the copyright laws in line with a digital, global marketplace. It accomplished this aim by striving to reach a balance that sufficiently incentivizes copyright owners to engage with the online market while also ensuring that they do not lose complete control of their works when these works are exhibited or distributed online.

Authors and copyright holders have engaged with the digital marketplace to exhibit and make their works available to the public and instituted safeguards to ensure that viewers of their copyrighted works receive notice of their authorship and ownership. Copyright owners' appending of metadata containing such identifying information to their work is increasingly one of the most important precautions taken to protect their rights.

Copyright owners stand to lose a considerable amount of control over their copyrighted works if the exacting, extra-statutory standard imposed by the

Ninth Circuit's decision were to stand. Particularly because the knowledge standard employed by the Ninth Circuit was based primarily on analysis of a criminal statute requiring actual knowledge, the Ninth Circuit's opinion operated without awareness of the policies underlying the DMCA and the statutory text that undergirds them.

In addition to copyright holders, consumers also stand to lose under the Ninth Circuit's decision. By excusing the mass removal of CMI below, the Ninth Circuit's precedent leaves consumers more likely to unwittingly infringe copyright. Already, accurately identifying copyright owners is a significant problem for consumers and users who would like to license copyrighted works. Likewise, sufficiently warning inadvertent infringers to avoid infringement is difficult over the internet. The Ninth Circuit's opinion will exacerbate these problems, harming consumers by making them less likely to know who authored a work and under what conditions they may use the work. Conversely, granting certiorari to reverse the Ninth Circuit would assist in protecting the consumer interest in the integrity of copyright management information.



ARGUMENT

I. The DMCA was Enacted to Protect the Interests of Copyright Owners in the Digital Age.

The Constitution not only empowered Congress to establish a system of copyrights, but also explicitly stated why such a system was necessary: “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;” U.S. Const. art. I, § 8, cl. 8. The Framers created a system of copyrights that incentivized artists to create new works based on the belief that we, as a society, are richer when there are more creative works for the public to consume.

In analyzing the policy behind the Copyright Act, this Court has recognized that “copyright supplies the economic incentive to create and disseminate ideas.” *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985). When Congress enacted the DMCA to implement the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty, it did so with the intent to further the purposes of the Copyright Act by ensuring that creators were protected in the newly emerging digital landscape. Specifically, the DMCA modernized the Copyright Act to address what were

then current and contemplated issues presented by technological advancements around the globe:²

These treaties will become effective at a time when technological innovations present us with great opportunities for the global distribution of copyrighted works. These same technologies, however, make it possible to pirate copyrighted works on a global scale with a single keystroke. The WIPO treaties set clear and firm standards-obligating signatory countries to provide “adequate legal protection” and “effective legal remedies” against circumvention of certain technologies that copyright owners use to protect their works, and against violation of the integrity of copyright management information. This Act implements those standards, carefully balancing the interests of both copyright owners and users.

1998 U.S.C.C.A.N. 671, 671.

Given the emergence of “single keystroke” piracy, it was more important than ever for copyright holders to attach their names, titles, and other identifying information to their work, and to ensure that information

² “‘Digital Millennium’ may seem grandiose, but in fact it accurately describes the purpose of the bill—to set copyright law up to meet the promise and the challenge of the digital world in the new millennium. Digital ‘world’ is appropriate here, because the Internet has made it possible for information—including valuable American copyrighted works—to flow around the globe in a matter of hours, and Internet end users can receive copies of movies, music, software, video games and literary and graphic works that are as good as the originals.” 144 Cong. Rec. S11887-01, 144 Cong. Rec. S11887-01, S11889, 1998 WL 716423.

remained intact, as that work was now subject to dissemination to the far reaches of the internet with the push of a button. Thus, the most important provision of the DMCA for copyright holders was the promulgation of a new remedy that could be employed against a party that removed such identifying information. To wit, if a copyright owner includes identifying information in conjunction with his or her work, then 17 U.S.C. § 1202(b) makes illegal the removal of that copyright management information (CMI):

(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.

In defining what constitutes CMI, Congress, evincing an intent that the provision be construed broadly, made every indication that CMI was meant to include a wide array of information. 17 U.S.C. § 1202(c) (CMI means titles, names of owners and authors and performers, terms and conditions, and even numbers and symbols).

The definition of CMI is not only broad, but also non-hierarchical. Information stated in the metadata of photographs is afforded the same protection and weight as watermarks on the photograph itself.³ Through this approach, Congress granted authors sufficient leeway to make their works available in evolving media—particularly the internet—while ensuring their rights management information can be appended and protected in a manner that is suitable for those media. It also allows owners to participate meaningfully in the digital marketplace. Such participation was a principal goal behind the enactment of the DMCA: “Due to the ease with which digital works can be copied . . . copyright owners will hesitate to make their works readily available on the Internet without

³ A suggestion that there should be some sort of comparison among the various methods of appending CMI information to a photograph, is strictly contrary to the plain reading of the statutory text. In its opinion, the Ninth Circuit relied on a secondary source “recommending that photographers ‘put the copyright management information on the face of the image, such as in a watermark, rather than rely solely on information contained in metadata’ because the use of image editing software to clone over a watermark is more likely to be seen as intentional than the removal of metadata.” *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 673, n.5 (9th Cir. 2018) (*Corelogic*).

reasonable assurance that they will be protected against massive piracy.” S. Rep. No. 105-190, at 8 (1998).

The knowledge requirement set forth in the DMCA should be construed with that same broad latitude, employing an interpretation that seeks to protect artists’ rights. The Ninth Circuit’s holding that a plaintiff asserting a claim under 17 U.S.C. § 1202(b)(1) “must provide evidence from which one can infer that future infringement is likely, albeit not certain to occur as a result of removal or alteration of CMI”⁴ is antithetical to both the statute and the clear policy underlying the DMCA.

II. The Ninth Circuit’s Opinion Frustrates the Policy of the Copyright Act and Threatens Copyright Owners’ Ability to Enforce Their Rights.

The Ninth Circuit’s interpretation of the knowledge standard is not in accord with either the text of the Copyright Act or its underlying policy and was incorrect for at least three reasons.

First, companies that consistently engage with photography in their businesses and use technology to strip and remove metadata containing CMI from photographs know, or have reason to know, that said removal will facilitate further infringement. Indeed, this stripping makes available the works online bereft of

⁴ *Corelogic*, 899 F.3d at 675.

CMI and vulnerable to witting and unwitting copying. Section 1202 was specifically promulgated to ensure that CMI would not be removed and its enactment acknowledged that the removal of CMI facilitates further infringement. A software company like Corelogic would certainly know that its software was removing CMI and distributing the modified works bereft of CMI. Yet, the Ninth Circuit, citing the subcommittee hearings on the WIPO Copyright Treaties, notes that Section 1202 did not apply because it was not shown that Corelogic had not “innocently”⁵ removed the CMI. This is hard to square with the actual text of that Section, which requires only that the removal be “intentional” and with reason to know that the removal would “induce, enable, facilitate, or conceal an infringement of any” copyright. 17 U.S.C. § 1202(b)(1). Requiring an artist to prove that an act comprising the use of computer software to strip metadata was not “innocent” at the summary judgment stage, as the Ninth Circuit required, is untenable and not keeping with the intent of the statute. This is particularly poignant because 17 U.S.C. § 1203(c)(5) shifts the burden for proving a violation was innocent to the violator, allowing the court to, in its discretion, remit damages. Even then, a violation has occurred, and the Ruling’s mandate that a plaintiff must prove that an act was “innocent” is contradicted by the statutory text.

Indeed, in “hold[ing] that a plaintiff bringing a Section 1202(b) claim must make an affirmative

⁵ *Corelogic*, 899 F.3d at 675.

showing, such as by demonstrating a past ‘pattern of conduct’⁶ or ‘modus operandi,’ that the defendant was aware or had reasonable grounds to be aware of the probable future impact of its actions[,]”⁷ the Ninth Circuit erred. It was certainly reasonable, especially at the summary judgment stage, to infer that a company engaged in the dissemination of photographs knew that by stripping thousands of photographs of metadata and distributing them across the internet it was increasing the likelihood of others exploiting those photographs without permission and facilitating such exploitation. To impose a more stringent requirement than what is expressly provided for in the statute would lead to an enormous burden on photographers seeking to maintain the integrity of their intellectual property.

Second, in explaining what constitutes knowledge of probable future impact, the Ninth Circuit relied on *United States v. Todd*,⁸ a criminal case involving sex trafficking. The Trafficking Victim’s Protection Act (TVPA), which the *Todd* court was analyzing, has far more exacting language related to knowledge than Section 1202. It analyzed what knowing could mean in this context: a criminal defendant can be ascribed knowing about certain conduct when he or she has

⁶ This approach would essentially give infringers a “free pass” on their first or perhaps even first few violations of the statute because it would require multiple infringements for a “pattern of conduct” to be established.

⁷ *Corelogic*, 899 F.3d at 674.

⁸ 627 F.3d 329 (9th Cir. 2010).

engaged in such a pattern or practice before.⁹ The TVPA dealt solely with knowing conduct, whereas the DMCA is concerned with the transmission of copyrighted works with “reasonable grounds to know that it will induce, enable, facilitate, or conceal an infringement.”

However, the same is not the case in the digital copyright context. Specifically, one does not need to have actual knowledge of a separate infringement. The DMCA itself was implemented with the policy aim of curbing widespread infringement over the internet and to encourage photographers and other copyright owners to engage meaningfully with the internet while being assured that their ownership interests would be protected. The deleterious effects of rampant unauthorized copying on the internet was so pervasive even twenty years ago that it spurred Congress and the governing bodies of the dozens of other signatories to the WIPO Treaty to engage in a unified push to temper that infringement.

The internet and its effects on artists are more ubiquitous today than they were when the DMCA was first enacted. The potential for a person or entity

⁹ “[The defendant] had an established practice of living off the earnings of [the first victim]. . . . The jury could conclude that [the defendant] knew he would follow the same pattern with [the other victims]. Just as a mother who has had one child in school and prepared his lunch knows that she will prepare the school lunch for her second child, just as a judge knows that his law clerks will use Westlaw, so [the defendant] knew that he would use coercion to cause his sex workers to make money for him.” *Todd*, 627 F.3d at 334 (9th Cir. 2010).

operating in the present day to not have reasonable grounds to know that the removal of identifying information from a photograph or other copyrighted work would not facilitate an infringement of that work is nonexistent. The Ninth Circuit referred to this tact as an unacceptable “generic” approach.¹⁰ However, the risk of increased infringement for unclaimed content on the internet is not a mere possibility. It is a reality and a certainty—one that the DMCA was designed to address.

The foregoing is especially true because precedent does not require a plaintiff to satisfy a knowledge requirement when the information needed to do so is wholly within the possession of the defendant: “How [a copyright defendant] came to possess [plaintiff’s] photographs—and thus whether it had knowledge that the CMI had been removed—is a fact ‘particularly within’ [the defendant’s] knowledge. It would be unfair to burden [the plaintiff] at the summary judgment stage with proving that knowledge with greater specificity.” *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1189 (9th Cir. 2016). Once uploaded to the internet, there are myriad ways for a third-party to copy, distribute, and disseminate a photograph. The creator of that photograph would not be privy to these machinations and requiring the creator to plead the unique facts

¹⁰ “[The assertion that because one method of identifying an infringing photograph has been impaired, someone might be able to use their photographs undetected] simply identifies a general possibility that exists whenever CMI is removed.” *Corelogic*, 899 F.3d at 673 (9th Cir. 2018).

regarding how a particular infringer came to acquire, modify, and distribute that photograph, and the intent associated with each step, would be a near impossibility.

Third, the Ninth Circuit imposed a requirement found nowhere in the text of the statute by stating that the photographers had “not offered any specific evidence that removal of CMI metadata from their real estate photographs will impair their policing of infringement.” *Corelogic*, 899 F.3d at 675 (9th Cir. 2018). This is not a requirement within the language of the DMCA and has potentially disastrous effects for photographers, most of whom do not have the time and resources to constantly police their metadata.

III. The DMCA Also Has Important Pro-Consumer Benefits That the Ruling Below Undermines.

It is “undisputed that the DMCA was intended to expand—in some cases . . . significantly—the rights of copyright owners.” *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 303 (3d Cir. 2011). The DMCA was also intended, however, to have pro-consumer effects.

Beyond copyright holders’ interests, the DMCA was enacted to advance consumers’ interests both by warning unwitting consumers about the licensed uses of a work and by identifying the creator of the work. With such knowledge, consumers could more readily avoid copyright infringement—a strict liability tort—and more readily identify additional works by a creator they appreciate.

These pro-consumer effects are part of the purpose of the DMCA. In addition to international treaties, a 1995 white paper prepared by the Clinton Administration's Working Group on Intellectual Property Rights greatly impacted the DMCA. Kyle Dickinson, *Note: Copyright Management Murk*, 22 DePaul J. Art Tech. & Intell. Prop. L. 485, 487-488 (2012). This white paper reasoned that protecting CMI from removal would have meaningful pro-consumer effects. Bruce A. Lehman et al., *Intellectual Property & the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, 60-65 (1995) (hereinafter Report).

The Report acknowledged that the democratization of copyright law had made it more difficult to identify the creator or owners of copyrighted works. Report at 60-62. Congress had made the traditional copyright notice—largely consisting of © symbols—optional. Report at 60. Likewise, Congress had made copyright registration permissive, rather than mandatory. Report at 61-62.¹¹ These reductions in formal prerequisites to copyright protection were beneficial because they

¹¹ Copyright registration is a precondition to pursuing a copyright infringement lawsuit for a work created in the U.S. See 17 U.S.C. § 411(a). Registration, however, is *not* a precondition to infringement. Thus, without CMI, an individual may infringe copyright in an unregistered work and face a lawsuit *after* the work is registered. Cf. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 158, 130 S. Ct. 1237, 1242, 176 L. Ed. 2d 18, 25 (2010) (Section 411(a) “establishes a condition—copyright registration—that plaintiffs ordinarily must satisfy before *filing* an infringement claim and invoking the Act’s remedial provisions.” (emphasis added)).

democratized copyright, permitting creative individuals to benefit from copyright without also becoming well-versed in arcane legal procedures or hiring counsel.

However, the lack of formal prerequisites introduced the problem that consumers and users faced more difficulty in identifying the copyright owner and the terms and conditions of use. Report at 62-63. A potential user could not be sure that the protected work would be identified by a copyright symbol or be listed among registered works at the U.S. Copyright Office, especially as copyrighted works traversed the internet.

To ameliorate this identification problem, CMI, under the DMCA, would act as the “license plate for a copyrighted work on the information superhighway.” Report at 235. Because CMI must be “conveyed in connection with copies or phonorecords of a work,” CMI would eliminate problems that consumers faced in identifying the copyright owner or terms of use. See 17 U.S.C. § 1202(c). In turn, consumers could more readily make authorized uses of copyrighted works, including by licensing the work, at a reduction in the frequency of infringement and in transaction costs. Report at 235.

For example, suppose a photographer wanted her works to be freely used according to a Creative Commons license, so long as her authorship was credited. The DMCA would help consumers to know the photographs were free to use so long as the users attributed the photograph properly. See 17 U.S.C. § 1202(c)(6) (protecting as CMI the “[t]erms and conditions of the

user of a work”). Conversely, if someone stripped the CMI, both the consumers and the photographer suffer. Certain consumers would infringe—unwittingly copying and displaying the photographs without attribution. Others, who do not know the work is free to use, might simply refrain from using the work. The point is that the CMI helps the consumers by “substantial[ly] reduc[ing] tracing and transaction costs.” Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 Colum. J.L. & Arts 61, 70 (2002).

Indeed, identification of authors is considered one of the largest problems in copyright today. The problem of orphan works, i.e., “works whose owners cannot be located by a reasonably diligent search,” has become pervasive. David R. Hansen et al., *Solving the Orphan Works Problem for the United States*, 37 Colum. J.L. & Arts. 1, 3 (2013). CMI is part of the solution but can only meaningfully limit the number of orphan works in copyright protection if it is enforced.

Moreover, protecting CMI advances consumer interests because CMI permits greater appreciation of copyrighted works. Knowing the identity of a work’s author “is likely to be significant to the audience’s perception or valuation of the resulting work.” Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 Utah L. Rev. 789, 796 (2007). Consumers appreciate a song more because they know who sings it. Knowing that it is Stevie Nicks of Fleetwood Mac who belts out the poignant lyrics of the hit-single “Landslide” makes it more meaningful to Fleetwood Mac fans. Conversely, for those listeners unfamiliar with Ms. Nicks and

Fleetwood Mac, CMI's attribution of authorship helps the consumer to find other songs her or she may like, namely other Fleetwood Mac songs.

In sum, the DMCA's protections of CMI help consumers as well as copyright holders. Consumers can avoid infringement, better license works, use free works, and better appreciate works. Unfortunately, the Ninth Circuit's opinion below undermines these protections by excusing en masse CMI removal through an extra-statutory reading of the intention requirements in the DMCA. Such a reading excuses an entity that should know better at the risk of leaving consumers less aware of—and in greater risk of—copyright infringement.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: February 7, 2019 Respectfully submitted,
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