Michael M. Edelstein v. Google Inc. Doc. 15

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MICHAEL M. EDELSTEIN,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

Case No. CV 10-01847 DMG (SHx)

Hon. Dolly M. Gee

DEFENDANT GOOGLE INC.'S OPPOSITION TO PLAINTIFF'S *EX PARTE* APPLICATION FOR TRO AND PRELIMINARY INJUNCTION; EXHIBIT A

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I. SUMMARY OF ARGUMENT

Plaintiff's *ex parte* application for a temporary restraining order and preliminary injunction is frivolous and should be denied because:

(1) each claim of Plaintiff's complaint fails to state claim upon which relief may be granted and is subject to dismissal under F.R.C.P. Rule 12(b)(6);

(2) Plaintiff's *ex parte* application requests relief that improperly goes far beyond what is requested in the complaint or even available under the law;

(3) there is no urgency or threat of irreparable harm, as demonstrated by Plaintiff's two-month delay in seeking injunctive relief since filing his complaint, and 14-month delay since the last allegedly wrongful post occurred on the third-party website about which he complains; and

(4) Plaintiff seeks a prior restraint that would violate the First Amendment.

II. PLAINTIFF'S CLAIMS AGAINST GOOGLE

This is Plaintiff's second lawsuit against Google in a little more than two months. The first lawsuit ended on March 10, 2010, when Chief Judge Audrey B. Collins denied Plaintiff's Application for Leave to File Action without Prepayment of Full Filing Fee and his request for immediate injunctive relief. *See* Exhibit A (March 10, 2010 Order). Judge Collins held that both of Plaintiff's claims under 17 U.S.C. §106A and 17 U.S.C. § 1202 failed to state a claim upon which relief could be granted. *See id.* Less than a week later, Plaintiff filed this lawsuit, which suffers from the same defects as his previous suit.

Plaintiff alleges that he posted numerous videos to the website YouTube.com. Complaint, ¶ 8. In the videos, Plaintiff falsely claims to be author Stephen King and disparages Warner Brothers. *See* http://www.youtube.com/watch?v=vvNC87JuXcY; http://www.youtube.com/watch?v=PSmFvXKtifw&feature=related; http://www.youtube.com/watch?v=pie0wNRPEF4. If a viewer clicks a box below the videos, a link to Plaintiff's website appears, http://theweinerbrothersvptour.blogspot.com. Plaintiff's website is primarily

devoted to criticizing Warner Brothers, where Plaintiff claims to have formerly been employed. Complaint, ¶ 8; http://theweinerbrothersvptour.blogspot.com.

Plaintiff alleges that the person(s) responsible for another website, www.michaeledelsteinsslandercampaigns.blogspot.com, used an image of Plaintiff taken from one of his YouTube videos in order to create a new image for their website by placing a sign under Plaintiff's picture reading "West Palm Beach Sheriffs Office 92 FLO 000000." Complaint, ¶¶ 7, 8. That website is hosted on www.blogspot.com, which is operated by Google and offers free weblog publishing tools and storage services to individuals who create and maintain their own Internet blogs featuring content of their (not Google's) choice.[1] (Plaintiff's website, http://theweinerbrothersvptour.blogspot.com, also is on www.blogspot.com.)

Plaintiff alleges that www.michaeledelsteinsslandercampaigns.blogspot.com contains libelous posts about him that are "prejudicial to his honor or reputation." Complaint, ¶¶ 6, 7. But while much of his Complaint and *ex parte* papers concern those allegedly harassing and libelous statements and the harm they supposedly have caused his reputation, the Complaint does not include a claim for libel. Rather, the Complaint alleges only two copyright claims against Google for alleged violation of 17 U.S.C. § 106A; and alleged violation of 17 U.S.C. § 1202. *Id.*, ¶¶ 12-23.

III. PLAINTIFF'S *EX PARTE* APPLICATION SHOULD BE DENIED.

Plaintiff is entitled to injunctive relief only if he establishes all of the following: "'that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 957 (9th Cir. 2010) (quoting *Winter v. Natural Res. Def. Council*, --- U.S. ---, 129 S.Ct. 365, 374 (2008)). Plaintiff bears the burden

[1] A "web log" or "blog" is a website usually maintained by an individual that features ongoing diary-like entries containing that individual's commentary and related material such as photos or video. *See* http://en.wikipedia.org/wiki/Weblog.

of providing evidence making a "clear showing" for each element. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). "A higher bar than usual is set for those seeking injunctive relief" in instances where, as here, "there is at least *some risk* that constitutionally protected speech will be enjoined," *McDermott*, 593 F.3d at 957-958 (emphasis added). In such instances, "only a particularly strong showing of likely success, and of harm . . . as well, could suffice to justify issuing the requested injunction." *Id.* at 958 (internal quotations omitted).

A. Plaintiff's *Ex Parte* Application Improperly Goes Beyond the Claims and Relief Sought in His Complaint and Available Under the Law.

Plaintiff violates one of the fundamental rules of injunctive relief by relying on allegations and statutory claims outside his Complaint and by requesting injunctive relief that goes far beyond the limited relief even hypothetically available to him:

> As the Supreme Court has long noted, a preliminary injunction must relate to the allegations in the complaint. *De Beers Consol. Mines v. U.S.*, 325 U.S. 212, 220, 65 S.Ct. 1130, 1134, (1945). That is, it is appropriate for a preliminary injunction "to grant intermediate relief of the same character as that which may be granted finally." *Id.* If there is no relation, it is not an injunctive relief situation.

Endsley v. Mayberg, 2010 WL 1493610, *3 (E.D. Cal. April 14, 2010).

Plaintiff's Complaint alleges two copyright claims under 17 U.S.C. §§ 106A and 1202, and seeks injunctive relief ordering the removal of the image that allegedly infringes his copyright from www.michaeledelsteinsslandercampaigns.blogspot.com and other websites controlled by Google. Complaint, ¶¶ 12-23, Request for Relief. But Plaintiff also seeks removal of any libelous statements about him on those websites, relief that goes far beyond the relief potentially available from Plaintiff's copyright claims. Those claims could never justify removal of libelous statements because injunctive relief under the Copyright Act is limited to orders that "prevent or restrain *infringement of a copyright*." 17 U.S.C. § 502(a) (emphasis added).

Plaintiff's *ex parte* application goes even further in seeking impermissible relief. First, Plaintiff claims to be seeking injunctive relief based on many statutes that are not alleged in the Complaint, *i.e.*, "17 U.S.C. § 502," "California Civil Code § 980 and Code Civ. Proc. § 527.6," "15 U.S.C. § 1125," and "47 U.S.C. § 223." *Ex Parte* at 2, 5-8. Second, Plaintiff requests relief that is not limited to the images and derogatory statements on www.michaeledelsteinsslandercampaigns.blogspot.com. Instead, "Plaintiff seeks removal of [his] copyrighted image *and name* from Google Inc., www.google.com (search engines); www.blogspot.com websites,[2] posting or maintaining *on the Internet and World Wide Web, any web page*, directly or indirectly, that includes, in its file name, URLs, Metags [sic] or text, *all Internet search engines, registers or other persons*, wherever located, in concert with them associated links at: michaeledelsteinsslandercampaigns.blogspot.com." *Id.* at 2 (emphasis added). Plaintiff appears to be asking that the allegedly infringing image and ***any mention of his name*** be removed from ***every*** website on the Internet, an injunction not just against Google, but against the world.[3]

B. Plaintiff Has No Chance of Prevailing on Either of His Claims, Both of Which Are Subject to Dismissal Under F.R.C.P. Rule 12(b)(6).

Google is preparing a Motion to Dismiss the Complaint with prejudice pursuant to F.R.C.P. Rule 12(b)(6), which will make plain that both of Plaintiff's claims fail as a matter of law.

Plaintiff's first claim under 17 U.S.C. § 106A fails to state a claim upon which relief may be granted for the following separate and independent reasons:

- Plaintiff's claim fails for the same reason it was previously rejected by Judge Collins: Plaintiff does not allege that he is the "author of a work of visual art,"

[2] Of course, this would require the removal from www.blogspot.com of Plaintiff's *own website*, http://theweinerbrothersvptour.blogspot.com.

[3] Determining the scope of Plaintiff's request for injunctive relief is impeded by his failure to provide a Proposed Order, as required under C.D. Cal. Local Rules 7-19 and 65-1 and this Court's March 26, 2010 Initial Standing Order, ¶ 6.

as required by 17 U.S.C. § 106A. Ex. A at 2 (March 10, 2010 Order). Plaintiff does not allege that he is the author of the infringed work. Nor does Plaintiff allege modification of "a work of visual art," as that term is defined in the Copyright Act. 17 U.S.C. § 101 provides that "[a] 'work of visual art' is . . . (2) a still photographic image produced for exhibition purposes only, *existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.*" 17 U.S.C. § 101 (emphasis added). A photographic "work of visual art" is a piece of fine art akin to a painting, not any random image on the Internet.[4]

- Plaintiff's claim is, in reality, a disguised defamation claim barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230. While labeled as a copyright claim, the true gravamen of the claim is that Plaintiff is being libeled and his reputation damaged by the image and derogatory statements about him on michaeledelsteinsslandercampaigns.blogspot.com. Complaint, ¶¶ 6-9, 25, 29. The alleged copyright infringement is wholly incidental, and the claimed harms are entirely reputational. *Id.*[5] But Section 230 bars any claim against Google based on the allegedly libelous statements made by the third parties who operate michaeledelsteinsslandercampaigns.blogspot.com. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (Section 230(c)(1) immunizes website operator from claims based on operator's "deciding whether to publish or to withdraw from publication third-party content").

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[4] Plaintiff's reliance on the Berne Convention is misplaced. Complaint, ¶¶ 16-19. Congress stated that "[t]he provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work …" *Id.*, ¶ 17 (quoting Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, Section 3, available at http://www.copyright.gov/title17/92appii.html#a2-1). Thus, the Copyright Act's definition of "a work of visual art" governs his claim. 17 U.S.C. § 101.

[5] *See Carafano v. Metrosplash.com Inc.*, 207 F.Supp.2d 1055, 1076 (C.D. Cal. 2002) ("First Amendment limitations are applicable to all claims whose gravamen is the alleged injurious falsehood of a statement"), *aff'd* 339 F.3d 1119 (9th Cir. 2003).

Plaintiff's second claim under 17 U.S.C. § 1202 also fails to state a claim upon which relief may be granted for the following separate and independent reasons:

- Plaintiff's claim fails for the same reason it was previously rejected by Judge Collins: Plaintiff does not identify any alleged "copyright management information" that was altered or falsified and then distributed by Google, as required under 17 U.S.C. § 1202. Ex. A at 3 (March 10, 2010 Order). In response to Judge Collins' ruling, Plaintiff appears to have simply inserted phrases such as "[c]opyright and [sic] management information" and "false law enforcement management information" randomly into his new Complaint. Complaint, ¶8. Under 17 U.S.C. § 1202 and the case law, the items that Plaintiff claims were falsified or altered do not qualify as "copyright management information." *See, e.g., IQ Group, Ltd. v. Wiesner Pub., LLC*, 409 F. Supp. 2d 587, 597-598 (D.N.J. 2006) (holding that "copyright management information" is limited to "component[s] of an automated copyright protection or management system" and does not apply to routine copyright labeling information); *accord Murphy v. Millennium Radio Group LLC*, 2010 WL 1372408, *3 (D.N.J. Mar. 31, 2010).
- Plaintiff's Complaint does not allege that he has a copyright registration in the allegedly infringed work. Registration is a prerequisite to bringing a claim for infringement under the Copyright Act. *See* 17 U.S.C. § 411(a); *Reed Elsevier, Inc. v. Muchnick*, --- U.S. ---, 130 S.Ct. 1237, 1242 (2010).

In addition to these defects, both of Plaintiff's claims also fail for the following additional reasons that justify denial of injunctive relief:

- Plaintiff's claims are barred by the doctrine of unclean hands, which "is a traditional defense to an action for equitable relief." *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 281 (7th Cir. 1992). Plaintiff falsely claims to be Stephen King in YouTube videos that form the basis of his copyright claims, and viewer comments

indicate that some viewers have been duped by Plaintiff, who bears a strong resemblance to King. *See* http://www.youtube.com/watch?v=vvNC87JuXcY; http://www.youtube.com/watch?v=PSmFvXKtifw&feature=related. It would be inequitable for Plaintiff to obtain injunctive relief based on a claim that his copyrighted work is being "distorted" in a manner that misleads the public and is "prejudicial to his … reputation," when he falsely attributes his diatribes against Warner Brothers to Stephen King in a manner that deceives the public and disregards King's own reputation. 17 U.S.C. § 106(a)(3)(A).[6]

- Google is immunized from liability by the safe harbor afforded Internet service providers by 17 U.S.C. § 512(c), and by the fair use doctrine, 17 U.S.C. § 107.

C. Plaintiff's Delay in Bringing Suit and in Seeking Injunctive Relief Shows That No Real Emergency or Threat of Irreparable Harm Exists.

Plaintiff did not file a lawsuit against Google until ***one year after*** the last post on www.michaeledelsteinsslandercampaigns.blogspot.com about which he complains, a post dated March 23, 2009. The suit was filed on March 15, 2010, ***more than two months*** before he sought this *ex parte* relief. "Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir.1985).[7]

Moreover, Plaintiff has failed to provide any ***evidence*** demonstrating a probability of irreparable harm. Instead, he offers only unsupported and speculative assertions. But "[s]peculative injury does not constitute irreparable injury." *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984). Furthermore, arguments like Plaintiff's that are not supported by actual evidence can never justify

[6] Plaintiff's reliance on *Cornwell v. Sachs*, 99 F. Supp. 2d 695 (E.D. Va. 2000) and other cases is misplaced because in those cases the plaintiffs satisfied their burden of establishing all the requirements for injunctive relief. *Ex Parte* at 2-4. By contrast, Plaintiff cannot establish any of the prerequisites for injunctive relief.

[7] *See also Tough Traveler, Ltd. v. Outbound Products*, 60 F.3d 964, 969 (2d Cir. 1995) (no irreparable harm where plaintiff delayed nine months before filing suit based on alleged infringement, and four more months before seeking injunction).

injunctive relief. *See Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 803 (3d Cir. 1989) (injunction forbidden when there is "no clear factual record apart from general statements" about irreparable harm).[8] Finally, the only potential harm Plaintiff identifies is harm to his ***reputation*** caused by the allegedly libelous nature of the image and statements on www.michaeledelsteinsslandercampaigns.blogspot.com. He does not allege any harm to the potential market for his allegedly infringed YouTube videos, nor that a market exists at all. Plaintiff failed to bring a libel claim, and, as explained, *supra*, 47 U.S.C. § 230(c)(1) would bar any such claim if he did.

D. Plaintiff Seeks a Prior Restraint that Would Violate the First Amendment and Irreparably Harm Google and the Public Interest.

The Supreme Court has long held that restraining publication of information undermines the "main purpose" of the First Amendment, which is "to prevent all such previous restrains upon publications as [have] been practiced by other governments." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The Court has stated that prior restraints may be justified, if at all, only in the most extreme circumstances – such as to prevent disclosure of troop movements in wartime, *Near v. Minnesota*, 283 U.S. 697, 716 (1931), or to "suppress[] information that would set in motion a nuclear holocaust," *New York Times Co. v. United States*, 403 U.S. 713, 726 (1977) (Brennan, J., concurring). Given this heavy presumption against the constitutionality of prior restraints, it is not surprising that "the Supreme Court has never upheld a prior restraint, even when faced with the competing interest of national security or the Sixth Amendment right to a fair trial." *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir. 1996).[9]

[8] Likewise, while Plaintiff cites state and federal laws regarding cyberstalking, he fails to provide any evidence showing what irreparable harm, if any, he faces.

[9] Nor may injunctive relief automatically issue even where the court finds that copyright infringement has likely occurred. *See eBay, Inc v. MercExchange, L.L.C.*, 547 U.S. 388, 391-393 (2007). Rather, copyright claims are subject to same traditional considerations that govern injunctive relief for all claims. *See id.* Here, those considerations weigh entirely against injunctive relief.

These constitutional principles and precedents bar the injunctive relief sought by Plaintiff, who seeks to prohibit publication of the allegedly infringing image and any mention of his name on the Internet. This is a textbook prior restraint. Also, the only threatened harm he identifies is reputational, and the law does not permit prior restraints to prevent reputational harm. *See CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (Blackmun, J., in chambers); *Metro. Opera Ass'n, Inc. v. Local 100*, 239 F.3d 172, 177 (2d Cir. 2001) ("courts have long held that equity will not enjoin a libel").

The balance of equities tips strongly in favor of denying Plaintiff's *ex parte* application as well. "The first amendment informs us that the damage resulting from a prior restraint – even a prior restraint of the shortest duration – is extraordinarily grave." *CBS, Inc. v. District Court*, 729 F.2d 1174, 1177 (9th Cir. 1984). Moreover, the prior restraint sought by Plaintiff would negatively affect the rights of not only Google, but also third parties, *i.e.*, the public who have a First Amendment interest "in receiving information," as well as the individual(s) responsible for www.michaeledelsteinsslandercampaigns.blogspot.com. *Pacific Gas and Elec. Co. v. Public Utilities Com'n of California*, 475 U.S. 1, 8 (1986).

E. Plaintiff's Claim That Only a Minimal Or No Bond Would Be Necessary Is Incorrect.

Plaintiff's claim that only a minimal or no bond is necessary because the action only involves "a free blogging website that is damaging plaintiff" is belied by the far-reaching injunctive relief that Plaintiff actually seeks. Plaintiff requests that Google be ordered to remove the allegedly infringing image – plus all mention of Plaintiff's name – from not just that website, but from any other websites controlled by Google, and apparently also from any other websites on the Internet. Compliance with this far-reaching injunctive relief, to the extent it is even possible, would be costly and time-consuming and could subject Google to complaints and even litigation.

/ / /

Therefore, a security bond of at least $50,000 would be necessary to provide Google the protection to which it is entitled under Federal Rule of Civil Procedure Rule 65.

Dated: May 25, 2010

BOSTWICK & JASSY LLP

By: /S/ - Gary L. Bostwick

Attorneys for Defendant
GOOGLE INC.

EXHIBIT A

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2010 MAR -5 PM 2:35

CLERK, U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
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BY MICHAEL M. EDELSTEIN

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LOS ANGELES

BY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

V.

GOOGLE INC.

PLAINTIFF(S)

DEFENDANT(S)

CASE NUMBER

CV10- 1648 UA (DUTYx)

ORDER RE LEAVE TO FILE ACTION WITHOUT PREPAYMENT OF FILING FEE

IT IS ORDERED that the complaint may be filed without prepayment of the filing fee.

Further proceedings in this matter are subject to the orders of the Judge to whom the case is assigned.

Date

United States Magistrate Judge

IT IS RECOMMENDED that the request of plaintiff/petitioner to file the action without prepayment of the filing fee be **DENIED** for the following reason(s):

☐ Inadequate showing of indigency

☐ District Court lacks jurisdiction

☐ Legally and/or factually patently frivolous

☐ Immunity as to _____

☑ Other: See Attachment.

Comments:

3/5/10
Date

United States Magistrate Judge

IT IS ORDERED that the request of plaintiff to file the action without prepayment of the filing fee is:

☐ **GRANTED**

☒ **DENIED (See comments above).**

Prayer for Injunctive Relief also Denied.

3/9/10
Date

United States District Judge

Michael M. Edelstein v. Google, Inc.
No. CV 10-1648

IT IS RECOMMENDED that Plaintiff's Application for Leave to File Action without Prepayment of Full Filing Fee ("IFP Request") be denied without prejudice. In light of the foregoing recommendation, it is further recommended that plaintiff's request for immediate injunctive relief be denied without prejudice.

Plaintiff Michael M. Edelstein, who is at liberty and is proceeding pro se has lodged a complaint for damages and injunctive relief against Google, Inc. ("Google" or "defendant"). Plaintiff raises two claims for relief predicated upon 17 U.S.C. § 106A and 17 U.S.C. § 1202. In essence, plaintiff complains that copyrighted images depicting plaintiff have been modified by users of Google and websites accessible through Google in a manner which is prejudicial to plaintiff. Plaintiff further alleges that the foregoing websites are making false and derogatory statements about him in conjunction with the display of altered photos of plaintiff.

An IFP request may be denied if a complaint fails to state a claim. See 28 U.S.C. § 1915(e). Plaintiff here fails to state a claim against defendant.

Claim One

Title 17, U.S.C. section 106A provides that, subject to certain limitations, "the author of a work of visual art" shall have the right to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation. 17 U.S.C. § 106A(a)(3)(A). "Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner." 17 U.S.C. § 106A(b). Here, the complaint alleges that parties using Google have modified plaintiff's copyrighted images in a manner which is assertedly prejudicial to plaintiff's reputation. As the complaint does not allege that plaintiff is the "*author*" of a work of visual art so modified, plaintiff's first claim fails to state a claim for relief under Section 106A(a)(3)(A).

Claim Two

Title 17, U.S.C. section 1202 prohibits any person knowingly and with intent to induce, enable, facilitate or conceal infringement, from providing false copyright management information or distributing or importing for distribution false copyright management information. It further prohibits any person, without the authority of the copyright owner or the law, from (a) intentionally removing or altering copyright management information, (b) distributing or importing 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 (c) distributing, importing for distribution, or publicly performing works or copies of works knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, if, as to each of the foregoing, the person knows or has reasonable grounds to know that it will induce, enable, facilitate or conceal any infringement of right under Title 17. 17 U.S.C. §§ 1202(a), (b).

"Copyright management information" includes any of the following information conveyed in connection with copies of work or displays of works, including in digital form, except that it does not include any personally identifying information about a user of a work, copy or display of a work: the title and other information identifying the work, including the information set forth on a notice of copyright; the name of, and other identifying information about, the author or copyright owner of a work; terms and conditions for use of the work; and identifying numbers or symbols referring to such information or links to such information. 17 U.S.C. §§ 1202(c).

The complaint does not adequately specify the "copyright management information" in issue or the conduct of defendant which constitutes a violation of Section 1202 relative to such copyright management information.

Consequently, plaintiff's IFP Request and his accompanying request for immediate injunctive relief should be denied.