

No. 20-____

IN THE
Supreme Court of the United States

JAMES H. FISCHER,

Petitioner,

v.

SANDRA F. FORREST, SHANE R. GEBAUER,
BRUSHY MOUNTAIN BEE FARM, INC.,
STEPHEN T. FORREST, JR.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Digital Millennium Copyright Act protects the integrity of copyright management information (“CMI”), a defined term. 17 U.S.C. § 1202(c). Section 1202(c) enumerates eight types of CMI. §1202(c)(1)-(8). Pertinent here, Section 1202(c) defines CMI as the “name” of the “author” of a copyrighted work and also as the “name” of the “copyright owner” of a work. §1202(c)(2), (c)(3).

Here, an author and copyright owner of a work included his last name in the text of that work. The Second Circuit held that his name in the text was not CMI. Departing from the plain-text approach taken by the Third and Fifth Circuits, the Second Circuit held that being the name of the author or the copyright owner is not sufficient to be CMI. The Second Circuit further required that it be apparent from context that the name is copyright-related.

Thus, the questions presented are:

1. Whether the name of the author of a copyrighted work is CMI—or whether it must also be apparent from context that the name is copyright-related.
2. Whether the name of the copyright owner of a copyrighted work is CMI—or whether it must also be apparent from context that the name is copyright-related.

RELATED PROCEEDINGS

Fischer v. Forrest, No. 1:14-cv-1304-PAE-AJP
(S.D.N.Y. Feb. 16, 2018).

Fischer v. Forrest, No. 18-2955 (2d Cir. Aug. 4,
2020).¹

¹ There is a companion case, Fischer v. Forrest, No. 1:14-cv-1307-PAE-AJP (S.D.N.Y. Feb. 16, 2018), that was appealed, Fischer v. Forrest, No. 18-2959 (2d Cir. Aug. 4, 2020). Both cases were adjudicated jointly in the trial court and on appeal, though never formally consolidated.

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Petitioner Fischer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a) is published at 968 F.3d 216. Its discussion pertaining to CMI is at 968 F.3d at 222-224 (Pet. App. 14a-19a).

The district court's opinion and order adopting the magistrate judge's report and recommendation is published at 286 F. Supp. 3d 590. Its discussion pertaining to CMI is at 286 F. Supp. 3d at 608-611.

The report and recommendation by the magistrate judge is unpublished but may be found at 2017 U.S. Dist. LEXIS 109682. Its discussion pertaining to CMI is at *41-*49.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was issued on August 4, 2020. The time to file a petition for rehearing was extended until September 1, 2020. Petitioner Fischer timely petitioned for rehearing. His petition for rehearing was denied on October 15, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provision of the Digital Millennium Copyright Act (“DMCA”) pertaining to copyright management information (“CMI”), 17 U.S.C. § 1202, is reproduced in the Appendix to this Petition at 26a-32a. The definition of CMI is found in §1202(c), reproduced at 27a-28a.

Also, two sections of the Copyright Act pertaining to the distinct legal concept of copyright notice, 17 U.S.C. §§ 401-402, are also reproduced in the Appendix to this Petition at 22a-25a.

STATEMENT OF THE CASE

1. In 1998, Congress crafted an ingenious solution to a longstanding copyright problem.

The problem was as tenacious as it was simple: even once a copyrighted work is created, it’s often hard to get it licensed and distributed. For very valuable works, such as blockbuster movies and bestselling novels, there are entire businesses dedicated to distributing such works to the public. Thus, for prominent works, copyright’s panoply of exclusive property rights creates a functioning market.

Yet, for most works, copyright hadn’t always worked that way.

An appealing amateur photograph or compelling personal essay won't have dedicated staff to distribute it to the public, or even to find interested licensees and users. Even if there were interested licensees, the search costs and transaction costs of finding the rightsholders and asking their permission or negotiating a license were often prohibitive. So, while copyright created functioning markets for the most economically valuable works, copyright's panoply of exclusive rights would often prove little use where potential licensees could not locate rightsholders to strike a deal.

In 1998 and with the advent of the Internet, Congress recognized enormous opportunities to use technology to address these problems. Technology could match rightsholders with licensees. Technology could radically reduce transaction costs, using standardized licenses. Technology could even automate licensing entirely. With the Internet, Congress saw the opportunity to establish the legal architecture for a global online market in copyrighted works.

Yet all of these promising solutions depended upon excellent tracking and identifying of rightsholders, users, terms, conditions, *etc.* Online markets would need legal rules to clarify and enforce property rights just as all markets always have—or risk becoming chaotic.

2. To that end, Congress enacted special protections for certain types of copyright-related information in the Digital Millennium Copyright Act (“DMCA”), the “most substantial revision” of the nation’s copyright laws in decades. DMCA Section 104 Report, U.S. Copyright Office (Aug. 2001), <https://tinyurl.com/669pncpj>.

These types of protected information were termed copyright management information (“CMI”). Protecting their integrity was a cornerstone of the Congress’ efforts in the DMCA to provide “the legal platform for launching the global digital online marketplace for copyrighted works.” S. Rep. No. 105-190, at 8 (1998).

As Congress envisioned it, giving CMI legal protections would assist “in tracking and monitoring uses of copyrighted works, as well as licensing of rights and indicating attribution, creation and ownership[.]” Id. at 16. In other words, CMI would play a central role in expanding copyright markets dramatically.

Congress’ legal protection of CMI has proven to be an immense success. Since the passage of the DMCA, CMI has played a part in the development of new licensing models for copyrighted works. Today, machine-readable versions of copyright licenses have been adopted at scale; automated licensing decisions are routinely made now; and ordinary citizens have

begun licensing their copyrighted works under standardized electronic licenses by the millions, often to fellow citizens. New technologies—technologies like “smart” contracts and blockchain ledgers—offer promise for the continued growth and expansion of access to copyrighted works.

Yet, a recent decision by the Second Circuit, the decision below, imperils this progress and threatens to stifle this innovation and growth in these markets. That’s because, in departing from the plain text, the Second Circuit adopted a myopic holding that requires information’s copyright significance to be readily apparent to a human reader in order to qualify as CMI.

Such a rule misses the value of a broad scope for CMI. Much of the value and importance of CMI is that it is legally protected information that can facilitate automated, machine-readable contracts. CMI can exist in forms that aren’t readily visible or perceivable to the naked eye but are still useful for facilitating the very markets that CMI has been instrumental in supporting for the past two decades. CMI can exist in codes or symbols that are indecipherable to humans and still worthy of legal protection because they facilitate licensing and transactions by machines with human end-users.

Course correcting here, however, would not be difficult.

That's because the Second Circuit's significant policy error was to introduce uncertainty into the definition of CMI by *departing* from the plain meaning of the statutory text. In so doing, the Second Circuit created a Circuit split. Thus, correcting the Second Circuit's error simply requires doing what this Court does often—instructing the lower courts to apply the text as written.

3. Despite its significance to the technological development of licensing markets generally, the case below involves a relatively straightforward commercial dispute between a beekeeper and his one-time distributor.

Petitioner James Fischer is a beekeeper who invented a honey-harvesting product and called the product Bee-Quick®. Pet. App. 3a. As part of Fischer's marketing for Bee-Quick, he wrote a humorous advertisement that included his own name in the text:

This 100% Natural, non-toxic blend of oils and herb extracts works just like Bee Go and it smells good! **Fischer's** Bee Quick is a safe, gentle, and pleasant way to harvest your honey. Are you tired of your spouse making you sleep in the garage after using Bee Go? Are you tired of using a hazardous

product on the bees you love? Then this
is the product for you!

Pet. App. 4a (emphasis added). Critically here, Fischer is both the copyright author and copyright owner of this advertising text. See Pet. App. 8a-9a (assuming as much given the procedural posture).

Enter Brushy. Respondent Brushy Mountain Bee Farm, Inc., and its then leadership Respondents Sandra Forrest, Stephen Forrest, and Shane Gebauer (collectively “Brushy”) sold beekeeping products online and through sales catalogs. For many years, Fischer permitted Brushy to place copies of his Bee-Quick advertisement in Brushy’s sales catalogs and on Brushy’s website to sell Fischer’s product.

Eventually, however, Brushy stopped selling Bee-Quick. Pet. App. 5a. Yet Brushy did *not* stop using Fischer’s advertisement. Brushy continued using copies of this Bee-Quick advertisement but, now, to advertise Brushy’s competing product called Natural Honey Harvester. Pet. App. 5a.

To repurpose Fischer’s advertisement for this different product, Brushy removed two names from the advertisement: (1) Fischer’s name, *i.e.*, Fischer’s; and (2) the original product name, *i.e.*, Bee Quick. Pet. App. 5a-6a.

Then, Brushy posted copies of this altered advertisement to its website and published copies in its later sales catalogs—all with Fischer’s name removed. The altered advertisement uses Fischer’s words verbatim—except for the removal of Fischer’s name and his product’s name. Pet. App. 6a.

Fischer never authorized Brushy to remove his name from his advertisement or to use copies of his advertisement to sell a competing product. Fischer asked Brushy to stop. For years, Brushy didn’t. Fischer sued.

4. The district court dismissed Fischer’s CMI claim at summary judgment, holding that Fischer’s last name in the text of the advertisement did not constitute CMI. Fischer v. Forrest, 286 F. Supp. 3d 590, 611 (S.D.N.Y. 2018) (“Fischer’s’ has no CMI significance as used in the advertisement.”).

Fischer appealed.

On appeal, the Second Circuit addressed whether the name Fischer’s in the advertisement was CMI. Pet. App. 17a. Fischer asserted that his name in the advertisement is CMI. That’s because Fischer’s name is the name of the author of the advertisement. §1202(c)(2). Fischer’s name is also the name of the copyright owner of the advertisement. §1202(c)(3).

The Second Circuit, however, held that Fischer’s name as used in the advertisement was not CMI. Pet. App. 17a (“This assertion misunderstands what constitutes CMI.”).

The Second Circuit held that merely being the name of the author or copyright owner of the work is not enough. Pet. App. 17a (“While an author’s name can constitute CMI, not every mention of the name does.”). Instead, the Second Circuit further required that it be apparent in context to a reader that the name is the name of the copyright holder. Pet. App. 19a. In sum, the Second Circuit held that Fischer’s name “cannot be reasonably construed as an identifier of the copyright holder” in its context. Pet. App. 19a (“context matters”).

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT ERRED WHEN IT CREATED A CIRCUIT SPLIT WITH THE THIRD AND FIFTH CIRCUITS ON SECTION 1202(c)'S DEFINITION OF CMI.

The Third and Fifth Circuits have applied Section 1202(c)'s definition of CMI according to its plain terms, acknowledging that CMI's definition is "extremely broad." In doing so, both Circuits rejected arguments second-guessing the policy wisdom of Congress' broad definition.

The Second Circuit, however, departed from the Third and Fifth Circuit's plain-text approach to Section 1202(c) by introducing an extra-statutory requirement. The Second Circuit's approach indulges policy concerns that the Third Circuit had rejected as "statutorily-unmoored" and the Fifth Circuit had rejected as "unrealistic and exaggerated." See Section I.A, *infra*.

Not only does the Second Circuit's departure from the text create a Circuit split, it also contravenes this Court's repeated instructions on how to interpret the Copyright Act specifically and statutes generally, *i.e.*, according to the plain text. In this sense, the Second Circuit's statutory supplementation is a significant departure from permissible modes of statutory interpretation. See Section I.B, *infra*.

A. The Second Circuit departed from the plain-text approach taken by the Third and Fifth Circuits.

1. The Second Circuit’s opinion below took a radically different approach to the definition of CMI in §1202(c) than the plain-text approach adopted by the Third and Fifth Circuits before it.

Applying the text, the Third Circuit held that §1202(c)’s definition of CMI has “*no restrictions on the context* in which such information must be used in order to qualify as CMI.” Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295, 302 (3d Cir. 2011) (emphasis added). By contrast, the Second Circuit held that “*context matters*” when holding that Fischer’s name was *not* CMI; to the Second Circuit, the information must clearly “connote” something about copyright in addition to meeting the definition in §1202(c). Pet. App. 18a-19a (emphasis added).

The Fifth Circuit held that any of the information enumerated in §1202(c) “*is*” CMI when conveyed with copies of a copyrighted work. Energy Intelligence Grp., Inc. v. Kayne Anderson Capital Advisors, L.P., 948 F.3d 261, 277 (5th Cir. 2020) (emphasis added) (hereinafter “EIG”). By contrast, the Second Circuit held that such information merely “*can* constitute CMI [but] not every mention of [it] does.” Pet. App. 17a (emphasis added).

The Second Circuit’s conflicting approach to §1202(c) stems from its concerns about overbreadth. The Second Circuit approvingly quoted the district court’s incredulity at the breadth of CMI’s definition—finding it “inconceivable” that Congress had intended for the definition of CMI to be as broad as its plain text indicates. See Pet. App. 18a. To the Second Circuit, an author’s name is not CMI if the name’s usage does “not connote [the author’s] copyright ownership of anything.” Id. Merely *being* one of the enumerated categories of information in §1202(c) is not enough, in the Second Circuit’s view. See id.

The Third and Fifth Circuits, however, have rejected similar overbreadth concerns as readily addressed by the *other elements* of a Section 1202 claim—*not* by CMI’s definition.

The Third Circuit noted, for example, that “those intending to make fair use of a copyrighted work are unlikely to be liable under § 1202” because §1202 has a separate element requiring that CMI removal must be likely to “‘induce, enable, facilitate or conceal’ an *infringement.*” Murphy, 650 F.3d at 302 n.8 (emphasis added). (A fair use “is *not an infringement* of copyright.” 17 U.S.C. § 107 (emphasis added).) In other words, the breadth of CMI’s definition is tempered by the availability of numerous defenses to copyright infringement. See 17 U.S.C. §§ 107-122 (listing affirmative defenses).

The Fifth Circuit also noted that still other elements of a §1202 claim—*not* the CMI definition itself—readily assuage overbreadth concerns. Because §1202 has *two* separate *mens rea* requirements, the Fifth Circuit characterized overbreadth concerns about CMI’s definition as “exaggerated and unrealistic.” EIG, 948 F.3d at 277 n.16. The potentially overbroad scope of CMI’s definition is tempered by the limiting principles provided in the other elements of a §1202 claim. See id.

Recognizing that other aspects of §1202 (the applicability of affirmative defenses to copyright and two *mens rea* requirements) acted as limiting principles, the Third and Fifth Circuits concluded that there was no absurdity to the broad textual definition of CMI. See Murphy, 650 F.3d at 302; EIG, 948 F.3d at 277 n.16. Accordingly, both Circuits applied §1202(c)’s expansive definition according to its text. Murphy, 650 F.3d at 305; EIG, 948 F.3d at 277.

The Second Circuit, however, entirely overlooked one of these elements that the Third and Fifth Circuits view as a limiting principle. This element requires that §1202(b) violations must be done “knowing, or [...] having reasonable grounds to know, that [violations] will induce, enable, facilitate, or conceal an infringement of any right under this title.” 17 U.S.C. § 1202(b) (applying to §1202(b)(1)-(3)).

The Second Circuit simply omitted this important element of a claim. See generally Pet. App. 14a-19a. Indeed, the Second Circuit’s listed elements for “a violation of this subsection [1202(b)]” *nowhere* makes mention of the key limiting element. Pet. App. 17a. (listing the elements as “(1) the existence of CMI on the allegedly infringed work, (2) the removal or alteration of that information and (3) that the removal was intentional” *without* mentioning the additional element quoted above).

It’s understandable that, if a court forgot an element of a claim, that court might have overbreadth concerns. Yet those overbreadth concerns would be “exaggerated and unrealistic” because they would arise out of the court’s own failure to state the claim’s elements correctly—especially where the forgotten element functions as the essential limiting principle.

Having missed an element that functions as an essential limiting principle for claims under Section 1202(b), the Second Circuit instead supplemented the definition of CMI with a context requirement nowhere found in or supported by the text. Pet. App. 19a (“context matters”). By contrast, the Third and Fifth Circuits, which had not overlooked this key limiting element of a CMI claim, refused to rewrite the statutory text to address overbreadth concerns about CMI’s definition.

With the other elements in mind, the Third and Fifth Circuits have characterized requests to deviate from the plain text as “statutorily-unmoored[.]” Murphy, 650 F.3d at 305, or based on policy concerns that are “exaggerated and unrealistic[.]” EIG, 948 F.3d at 277 n.16.

In contrast with the Second Circuit, the Third and Fifth Circuits have stuck with the text’s “extremely broad” definition of CMI as written. See Murphy, 650 F.3d 302; EIG, 948 F.3d at 277 (“CMI is defined broadly.”).

2. The Third Circuit adopted a plain-text approach to Section 1202(c)’s definition of CMI in Murphy. There, a defendant had posted copyrighted photographs to its website without including the photographer’s name, which had been included near the original photograph when published in a magazine. 650 F.3d at 299. In deciding the appeal, the Third Circuit acknowledged that the DMCA had been “criticized in some circles for its ‘potentially overbroad scope[.]’” Id. at 300.

Taking “no position” on “other elements of a § 1202 claim, such as whether the [defendants] acted knowing that the removal would induce or enable infringement[.]” id. at 301 n.6, the Third Circuit addressed the defendants’ request “to impose an additional limitation on the definition of CMI” itself, id. at 301.

As its interpretive approach, the Third Circuit expressly adopted a plain-text approach: “When the statute’s language is plain, the sole function of the courts—at least where the disposition required by the test is not absurd—is to enforce it according to its terms.” Id. at 302.

The Third Circuit found “nothing particularly difficult about the text of § 1202.” Id. at 302. It noted that the definition of CMI “appears to be extremely broad, with no restrictions on the context in which such information must be used in order to qualify as CMI.” Id.

To the Third Circuit, the defendants’ overbreadth objections raised a possible “problem of policy, not of logic.” Id. It concluded that the plain text governed because “[w]hether or not this result is desirable, it is not *absurd*, as might compel us to make a more restrictive reading of § 1202’s scope.” Id. (italics in original).

Thus, the Third Circuit refused to “rewrite § 1202 to insert a term[,]” finding no “compelling justification indeed to adopt such a statutorily-unmoored interpretation.” Id. at 305. Given that the other elements of a §1202 claim acted as limiting principles, the Third Circuit was not concerned that the DMCA might “swallow up’ the Copyright Act” entirely. Id. at 302 n.8.

3. The Fifth Circuit has also adopted a plain-text approach to §1202(c)'s definition of CMI. It too rejected overbreadth concerns about §1202(c)'s definition in EIG.

EIG involved a plaintiff whose oil-sector newsletter was distributed daily as a “PDF [] named in the format ‘DE’ followed by the date in YYMMDD format.” 948 F.3d at 267. Each newsletter was distributed with this “naming convention[.]” Id. at 277. For example, the newsletter distributed on March 13, 2013 was named DE130313.pdf. See id. The defendant in EIG renamed each file to be 123.pdf and then redistributed copies beyond its license. See id. at 267. The Fifth Circuit held that the plaintiff's filenames constituted CMI. Id.

The Fifth Circuit applied a plain-text approach. Id. at 277. Noting that “CMI is defined broadly[.]” it held that CMI “*is* ‘*any* of the” information enumerated in §1202(c). Id. (emphasis added). Because “[n]othing in § 1202 indicates that a digital file name cannot be CMI[.]” a filename that *is* one of the types of information enumerated in §1202(c) *is* CMI. Id. at 277.

Almost no one would immediately think that DE130313.pdf is a copyrighted work's title (or that it connotes anything about copyright) rather than merely being a filename. Yet because the filename *was* the copyright title, it *was* CMI. See id. at 277.

The defendant in EIG raised overbreadth concerns pointing out that “downloading and renaming files is a common practice in the modern Internet era.” Id. at 266-267. The Fifth Circuit rejected such overbreadth concerns as lacking “merit.” Id. at 277. The Fifth Circuit reasoned that such “policy concerns are exaggerated and unrealistic” because §1202’s other elements protected potential defendants from overbreadth. Id. at 277 n.16.

Mere removal of CMI does *not* state a claim; would-be defendants must also remove CMI with two types of *mens rea*. See id.; compare §1202(b)(2) (violations must be done “knowing that the CMI has been removed or altered without authority of the copyright owner or the law”), (b)(3) (same) with §1202(b) (catch-all provision requiring “knowing, or, [...] having reasonable grounds to know, that [CMI removal] will induce, enable, facilitate, or conceal an infringement of any right under this title”).

In other words, the broad definition of CMI only applied to, *i.e.*, only punished, those who should know better. See EIG, 948 F.3d at 277 n.16. The innocent remover would still be removing CMI—it just wouldn’t be actionable. See id. Thus, the Fifth Circuit concluded, like the Third Circuit had, that the other elements of a §1202 claim handily addressed overbreadth concerns about the expansive scope of §1202(c)’s definition. See id.

4. The Second Circuit, however, departed from the plain-text approach. The facts here are similar to those faced by the Third Circuit in Murphy. Here, Mr. Fischer’s name was “simply replaced” out of the advertisement he wrote and then that advertisement was posted on websites without his name. Pet. App. 6a.

The Second Circuit acknowledged that, under the plain text, CMI “is defined as:

any of the following information conveyed in connection with copies ... of a work[:]

(1) The title [...]

(2) ***The name of***, and other identifying information about, ***the author*** of a work [and]

(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.”

Pet. App. 16a (emphasis added).

Then, the Second Circuit departed from the textual definition, stating that “[w]hile an author’s name can constitute CMI, not every mention of the name does.” Pet. App. 17a (emphasis added).

Although Fischer’s name *is* the name of the author and of the copyright owner of the relevant copyrighted work, the Second Circuit did not think that was enough to be CMI. *Id.* The Second Circuit further required that Fischer’s name clearly be a reference to “the owner of a copyrighted text[.]” *Id.* Given that Fischer’s name was not clearly copyright-related in context—even though his name *is* the name of the copyright author and copyright owner—the Second Circuit held that “what was removed was not Fischer’s name as the copyright holder of the advertising text[.]” Pet. App. 18a.

Going beyond the plain text’s requirement that CMI merely *be* the name of the author or copyright owner conveyed with copies of the work, the Second Circuit added requirements to §1202(c)(2)-(3)’s definition:

- that the name “***connote*** [Fischer’s] copyright ownership[.]”
- that the name “be ***reasonably construed*** as an identifier of the copyright holder of the advertising text[.]” and
- that the name be “used for ***‘managing’*** copyright information[.]”

Pet. App. 18a-19a (emphasis added).

Notably, the Second Circuit never attempted to justify these additions with respect to the text of §1202(c); the Second Circuit nowhere committed itself to applying the plain text as written. See id.

Instead, using a deeply flawed hypothetical, the Second Circuit echoed the district court’s belief that it was “*inconceivable* that a DMCA claim would lie from the elimination of [author’s] name” from a work. Pet. App. 18a (emphasis added).

In so stating, the Second Circuit appears to have entirely overlooked the key limiting principles—the other elements of a §1202 claim—that were noted by the Third and Fifth Circuits when addressing just these kinds of overbreadth concerns. See id.

After fashioning its additional requirement that the information listed in §1202(c) must also “connote” copyright ownership, the Second Circuit held that Fischer’s name—the name of the copyright author and copyright owner—was not CMI. Pet. App. 19a.

5. The Second Circuit’s approach directly conflicts with the plain-text approach adopted by the Third and Fifth Circuits. Neither the outcome in Murphy nor the outcome in EIG would survive the Second Circuit’s additional requirement that some copyright significance must be apparent on the face of CMI.

For example, Murphy involved CMI related to a photograph that was published in a broader “magazine *New Jersey Monthly* (“*NJM*”)” where “*NJM* used the photo to illustrate a[single] article”. Murphy, 650 F.3d at 298-99.

Under the Second Circuit’s approach, attribution to a photograph within a broader magazine or catalog would be rejected as not CMI. To the Second Circuit, Fischer’s name was not CMI because it was “used in material published by a third party [...] which contains advertisements for dozens of other products from many different suppliers[.]” Pet. App. 19a.

Notably, the photograph in Murphy was used in a similar context: a magazine published by a third party containing dozens of other articles, photographs, and advertisements. So, under the Second Circuit’s approach, the photographer’s name in Murphy wasn’t properly held by the Third Circuit as being CMI. The Second Circuit’s approach below would have led to the opposite outcome than the outcome reached by the Third Circuit in Murphy.

The same goes for EIG. Take the filename DE130313.pdf, a “PDF [] named in the format ‘DE’ followed by the date in YYMMDD format.” See EIG, 948 F.3d at 267. Under the Fifth Circuit’s approach, this filename counts as CMI because it meets the statutory definition. Id. at 277.

By contrast, the Second Circuit would have rejected these filenames as not CMI because they “do[] not connote [EIG’s] copyright ownership of anything” and “cannot be reasonably construed as an identifier” of the copyrighted title rather than a simple PDF filename without knowing more. See Pet. App. 18a-19a. Under the Second Circuit’s approach, such a pdf filename could not “be construed as CMI with respect to the [file] at issue because it is simply the name of the [file] being described.” Pet. App. 19a.

In sum, the Second Circuit’s extra-textual approach is in direct conflict with the Third and Fifth Circuit’s plain-text approach. The Second Circuit’s additional requirement that CMI must also “connote” something about copyright would lead to the opposite outcomes on the definition of CMI than those adopted by the Third and Fifth Circuits applying the plain text of §1202(c).

This direct conflict is apparent in the Circuits’ rationales. While the Second Circuit says “context matters[,]” Pet. App. 19a, the Third Circuit says the text “appears to be *extremely broad*, with *no restrictions on the context* in which such information must be used in order to qualify as CMI.” Murphy, 650 F.3d at 302. While the Fifth Circuit says that CMI “*is* [...] ‘[t]he name of, and other identifying information about,’ the author, copyright owner, or performer,” EIG, 948 F.3d at 277, the Second Circuit merely says it that the “name of an author *can*, of

course, constitute CMI[.]” Pet. App. 19a. The plain text supports the interpretation of the Third and Fifth Circuits. By “rejecting a straightforward reading of § 1202[(c),]” see Murphy, 650 F.3d at 303, and adding additional requirements to the text, the Second Circuit created a Circuit split.

B. The Second Circuit deviated from this Court’s repeated instructions to apply the plain text of statutes as written.

Beyond creating a Circuit split, the Second Circuit’s imposition of extra-statutory requirements is at odds with how this Court interprets the Copyright Act specifically and statutes generally. The Second Circuit’s supplementation is especially ill-considered because other sections of the Copyright Act—Sections 401(c) and 402(c)—show that Congress knew how to include the kinds of additions that the Second Circuit reads into the text of §1202(c) had Congress wanted. Thus, the Second Circuit’s statutory reading contravenes axiomatic principles of statutory interpretation handed down by this Court.

* * *

In copyright cases, like other statutory-interpretation cases, the “controlling principle” is “the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written.” Star Athletica, L.L.C v. Varsity Brands, Inc., 137 S. Ct. 1002, 1010 (2017). Courts must begin and end their “inquiry with the text[.]” Id.

Therefore, the Second Circuit’s error was to fail to apply the text of the Copyright Act as written. The text of §1202(c) states that CMI “**means**” any of the eight enumerated types of information when “conveyed with copies” of a copyrighted work. §1202(c) (emphasis added). Not can mean. Not sometimes means. The text says “means[.]” It’s supplying a definition.

Most relevant here, the text says that CMI “**means** [...] The name of, and other identifying information about, the author of a work.” §1202(c), (c)(2) (emphasis added). The same goes for the name of the copyright owner. §1202(c), (c)(3). The text is supplying a sufficient condition to determine if information is CMI when “conveyed in connection with copies [...] of a work[.]” §1202(c).

Yet, the Second Circuit shifted this requirement in a subtle but radical way, saying that “[w]hile an author’s name **can constitute** CMI, not every mention of the name does.” Pet. App. 17a (emphasis added). In doing so, the Second Circuit changed a sufficient condition into a necessary condition—and then added further conditions not found in the text. This Court, however, has repeatedly instructed that the federal courts are not to rewrite statutes in this way.

Adding an additional requirement that the information also *connote* something about copyright in addition to *being* the required information, as the Second Circuit did, violates the “fundamental principle of statutory interpretation that ‘absent provision[s] cannot be supplied by the courts.’” See Rotkiske v. Klemm, 140 S. Ct. 355, 360-361 (2019) (citing Scalia & Garner, Reading Law: The Interpretation of Legal Texts 94 (2012)).

This Court has invoked this statutory principle repeatedly in a variety of statutory contexts. Courts “may *not* narrow a provision’s reach by inserting words Congress chose to omit.” E.g., Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1725 (2020) (emphasis added). The courts are “*not* at liberty to insert [an] absent qualifier”—as the Second Circuit did. See Mount Lemmon Fire Dist. v. Guido, 139 S. Ct. 22, 26 (2018) (emphasis added).

Moreover, the Second Circuit should not have “limit[ed] this inquiry to the text of §[1202(c)] in isolation.” See Star Athletica, 137 S. Ct. at 1010 (instructing courts to “look to the provisions of the whole law” to determine meaning in context). After all, “[s]tatutory language cannot be construed in a vacuum” as the Second Circuit construed §1202(c). See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 368 (2018).

The Second Circuit might have also compared §1202(c) with §401(c) and §402(c), “which [the Second Circuit] did not analyze[.]” See id. Both demonstrate that Congress clearly knew how to require that the copyright information give reasonable notice connoting a claim of copyright. See 17 U.S.C. §§ 401(c), 402(c).

Section 401 expressly pertains to copyright notice and requires that the notice be provided “in such manner and location as to give reasonable notice of the claim of copyright.” 17 U.S.C. § 401(c) (emphasis added); § 402(c) (same). Effectually, that’s what the Second Circuit is requiring when it supplements Section 1202(c) saying that Fischer’s name must “connote” his copyright authorship and copyright ownership—*i.e.*, must give reasonable notice of his claim of authorship.

Yet, that language appears in Sections 401(c) and 402(c)—not in §1202(c). Thus, Sections 401 and 402 demonstrate that “Congress has enacted statutes that expressly include the language” that the Second Circuit would like to “read in”—in other provisions of the Copyright Act. See Rotkiske, 140 S. Ct. at 361. As such, the Second Circuit’s “[a]textual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision.” Id. (emphasis added).

In sum, Congress knew how to create the kinds of reasonable-notice requirements found in the copyright-notice Sections 401(c) and 402(c). Yet Congress *omitted* any comparable requirement from Section 1202(c). Therefore, reading such requirements into §1202(c), as the Second Circuit did, is “particularly inappropriate.”

Thus, the Second Circuit’s holding below is in error in a way that conflicts with this Court’s precedents and the Third and the Fifth Circuits, which had applied a plain-text approach to Section 1202(c).

II. RESOLVING THE CIRCUIT SPLIT OVER SECTION 1202(c)'S DEFINITION OF CMI IS IMPORTANT.

A. The Second Circuit's split from the Third and Fifth Circuits undermines national uniformity and predictability in licensing markets.

Resolving the present Circuit split is particularly important because it's a split in copyright—an area of law where national uniformity is especially important. See Bonito Boats v. Thunder Craft Boats, 489 U.S. 141, 162 (1989) (“fundamental purposes” underlying Constitution’s Patent and Copyright Clauses to “promote national uniformity in the realm of intellectual property”).

Courts have been mindful that “the creation of a circuit split would be particularly troublesome in the realm of copyright.” Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881, 890 (9th Cir. 2005). After all, Circuit splits in copyright have the undesirable effect of leaving “different levels of protection in different areas of the country, even if the same alleged infringement is occurring nationwide.” Id. Such concerns are particularly pronounced due to the Internet where copyrighted works rapidly transgress geographic boundaries.

Moreover, Circuit splits in copyright threaten to frustrate the predictability and certainty that are the cornerstones of an effective copyright system.

In drafting the 1976 Copyright Act, Congress had a “paramount goal” of “enhancing predictability and certainty” of copyright protections. See Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 749 (1989) (citing H.R. Rep. No. 94-1476).

Taken together, all of these policy imperatives—for national uniformity, predictability, and certainty—are implicated in the present Circuit split on the interpretation of the DMCA’s definition of CMI.

After all, CMI was intended to play an essential role in “establishing an efficient Internet marketplace” and “to facilitate licensing of copyright for use on the Internet.” S. Rep. 105-190 at 11 n.18. Yet, for CMI to serve this essential function there must be predictability, certainty, and uniformity as to *what CMI is*. And, that certainty has been called into question by the Second Circuit’s recent departure from the plain-text approach taken by the Third and Fifth Circuits.

To get a sense of the sizeable impact of uncertainty in CMI, consider that there are hundreds of millions of licenses made online. See Jacobsen v. Katzer, 535 F.3d 1373, 1378 (Fed. Cir. 2008) (“close to 100,000,000 works licensed under various Creative Commons licenses.”); Nov. 13, 2013 Comments of Copyright Clearance Center to USPTO, <https://tinyurl.com/78vvat4w> (accessed Mar. 15,

2021) (licensing “hundreds of millions of rights to tens of millions of works” online).

Such online licensing services depend on machine-readable information and metadata. See Authors, Attribution, and Integrity: Examining Moral Rights in the United States, U.S. Copyright Office, 85 (Apr. 23, 2019), <https://tinyurl.com/vtt5956k> (“Information that is used to identify works [...] often takes the form of metadata.”). That’s why “section 1202 defines the *kind* of information that qualifies as protected CMI [but] does *not* detail *the form* that CMI can take.” Id. (emphasis added). Yet the Second Circuit’s approach would strip information that is only machine-readable information from CMI protections because it would not “connote” anything about copyright to a typical human reader.

Therefore, resolving the current Circuit split over the definition of CMI in §1202 is important. The plain text approach followed by the Third and Fifth Circuit’s, applying “the congressionally composed text[,]” as written, promotes the fundamental purposes of copyright law: national uniformity, predictability, and certainty. See Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 892 (2019). After all, interpreting Section 1202(c) with fidelity to the Congressionally enacted text “will provide greater certainty in the law, and hence greater predictability[.]” Scalia & Garner, Reading Law: The Interpretation of Legal Texts, 9-10 (2012).

By contrast, the conflicting approach taken by the Second Circuit undermines these virtues of predictability and certainty, creates a Circuit split that disrupts the national uniformity of copyright law, and does so by deviating from the text and imposing an ad hoc and unpredictable judicially created context requirements upon the definition of CMI. But, “the statutory text does not justify [such] judge-made limitation[s] on the application of § 1202[.]” Jane C. Ginsburg, The Most Moral of Rights: The Right to be Recognized as the Author of One's Work, 8 George Mason J. Int'l Commercial L. 44, 61 (2016).

Thus, resolving this Circuit split and retethering the statutory definition of CMI to the plain text enacted by Congress would restore the fundamental aim of national uniformity in copyright law.

B. The Second Circuit’s approach endangers millions of existing licenses as well as the emergence of innovative licensing technologies.

The instant Circuit split over the proper interpretation of §1202(c) implicates millions of existing licenses that rely on machine-readable information and metadata. The Second Circuit’s judicially created apparent-in-context requirement for CMI risks disqualifying such information from being protected as CMI.

One of the DMCA's primary aims was to create "the legal platform for launching the global digital on-line marketplace for copyrighted works." S. Rep. No. 105-190, at 8. As part of this goal, Congress envisioned CMI as an "important element in establishing an efficient Internet marketplace[.]" 4 Nimmer on Copyright § 12A.08 (2020) (citing S. Rep. No. 105-190, at 16).

The statute's "extremely broad" definition of CMI, see Murphy 650 F.3d at 302 (3d Cir. 2011), furthered Congress' goal by ensuring that "[s]uch information [could] assist in tracking and monitoring uses of copyrighted works, as well as licensing of rights and indicating attribution, creation and ownership." S. Rep. No. 105-190, at 16.

The broad statutory definition of CMI left flexibility for new types of information to be used in untested digital contexts to manage copyrighted works. Because CMI was "aimed primarily at the Internet and similar environments" Congress moved beyond the conventions of the "typeset 'page,' which [were] an anachronistic concept in the Internet context." 4 Nimmer on Copyright § 12A.09 (2020) at n.13.

Instead, §1202(c) anticipated new types of information that would enable previously unimaginable licensing models and use emergent

digital technologies to create new licensing markets on the Internet.

For example, the Register of Copyright's envisioned "the development of voluntary coding systems which [could] refer users to a complete and up-to-date database of licensing information."² Marybeth Peters, Statement before Subcommittee on Courts and Intellectual Property (Setp. 16, 1997), https://www.copyright.gov/docs/2180_stat.html; *see* 17 U.S.C. §1202(c)(7). Congress chose to bet on technology and the free market, "free from governmental regulation" to create efficient licensing markets on the Internet. S. Rep. No. 105-190, at 16 (1998). CMI would be the essential "element" in this new digital marketplace. *Id.*

Almost immediately after passage of the DMCA, there was remarkable growth and innovation in licensing. The new licensing models reimagined what copyright licensing could look like in the digital environment. New licensing models and technologies, making use of CMI, began to emerge early in the 21st Century.

Take for example the innovations to copyright licensing pioneered by Creative Commons, "a non-profit" providing "free legal tools" that provides an

² https://www.copyright.gov/docs/2180_stat.html.

assortment of customizable copyright licensing options.³

Creative commons licenses rely on a machine-readable version of the license’s provisions, written in language that search engines and other software systems can comprehend, effectively automating the license.⁴

These “machine readable” licensing terms provide “a summary of the key freedoms and obligations written into a format that software systems, search engines, and other kinds of technology can understand.”⁵ And these innovations on traditional copyright licensing has allowed Creative Commons to “develop[] a standardized way to describe licenses that software can understand called CC Rights Expression Language (CC REL)[.]”⁶

In 2003, Creative Commons had “one million licenses.” Paul Goldstein, Copyright’s Highway, 189 (2019). Just five years later, there were “close to 100,000,000 works licensed under various Creative Commons licenses.” Jacobsen v. Katzer, 535 F.3d 1373, 1378 (Fed. Cir. 2008).

³ <https://creativecommons.org/faq/#what-is-creative-commons-and-what-do-you-do>.

⁴ <https://creativecommons.org/faq/#what-is-creative-commons-and-what-do-you-do>.

⁵ <https://creativecommons.org/licenses/>.

⁶ <https://creativecommons.org/licenses/>.

By 2018, there were over “1.4 billion[.]” Goldstein, Copyright’s Highway 189. And, “these licenses encompass[] not just the printed word but such varied content as educational resources, data compilations, museum collections, music, video, and photography.” Id. Such licensing innovations empowered ordinary citizens to begin licensing their copyrights online at an unprecedented scale.

But such licenses pose an interpretative dilemma. Whereas the Third and Fifth Circuits’ plain-text interpretation of §1202(c) would readily treat such machine-readable licensing information as CMI, see 1202(c), the same cannot be said for the Second Circuit’s approach. Below, the Second Circuit demanded that the copyright significance of the information must be readily apparent to constitute CMI. But machine-readable licensing information and metadata facilitating automated licensing would not be apparent to the judicial viewer.

The Second Circuit’s extra-statutory demands on CMI’s definition under §1202(c), highlights how the Circuit split could threaten the licensing technologies that have, to date, been advancing the very purposes that Congress had in mind when it enacted legal protections for CMI. After §1202 was enacted, new technologies started to emerge, making use of machine-readable information and metadata to enable automated licensing methods.

Digital photographs began creating “metadata” that was “embedded automatically upon the creation of a digital photo.” Ginsburg, Most Moral of Rights, 8 George Mason J. Int’l Commercial L. at 65. “CMI metadata embedded in the files identifies, among other things, ownership, copyright, and contact information, and information about the contents of the photo.” Id.

And, entrenched industry leaders have begun employing similar CMI-based licensing technologies. ASCAP, one of America’s oldest collecting rights societies, “was collaborating with its collecting society counterparts in France and Britain to build a blockchain system[.]” Goldstein, Copyright’s Highway, 192. The goal of this blockchain-licensing system was “to prototype how the music industry could create and adopt a shared, decentralized database of musical work metadata with real-time update and tracking capabilities.” Id.

There have been other pioneering uses of emergent technology to expand licensing markets and reduce transaction costs of licensing, relying on technologies such as automated licensing, smart contracts, and blockchain. Since §1202(c)’s enactment, the public has demonstrated a remarkable appetite for licensing their works online under new licensing models.

And, the free market has been innovating to create automated and frictionless licensing models for the digital marketplace. This was the vision underlying the legal protections in §1202 generally and the broad and expansive legal definition of CMI in § 1202(c) specifically.

Thus, there could not be a worse time for judicial interventionism to interfere with the remarkable innovation in copyright licensing models and investment in licensing technologies. The Second Circuit's approach threatens to undermine the continued growth toward an "efficient Internet marketplace in copyrighted works[.]" S. Rep. 105-190, at 16.

The Second Circuit's reworking of the statute's plain text overlooks that CMI is not just about human readers but also about machine-readable information. CMI is not just about the type of copyright notice from typeset print for the human but also about tracking uses across the global Internet using sophisticated data techniques that expand access to copyrighted works.

While the plain text of CMI's definition would readily permit the continued growth of these tools, see 17 U.S.C. §1202(c)(6), (c)(7), the Second Circuit's extra-statutory element requiring the information be apparent-in-context threatens to arbitrarily limit the scope of CMI and related innovation.

* * *

Congress had a vision when it enacted the broad definition of CMI. Since the statute's enactment, there has been tremendous innovation in licensing models and the development of promising new licensing technologies. Congress' goal of establishing "an efficient Internet marketplace in copyrighted works free from governmental regulation" has been coming to fruition since Section 1202 was passed.

Yet, the Second Circuit's judicial interventionism threatens to stifle this innovation and frustrate Congress' vision just as its vision is coming into fruition. And, the Second Circuit's rule threatens to hamstring innovation just as new and promising licensing technologies are arriving on the scene to help the evolution of copyright licensing in the digital marketplace. By contrast, the plain-text approach of the Third and Fifth Circuits would preserve and promote the continued growth and innovation in these areas.

III. THE SECOND CIRCUIT'S HOLDING IS CONTRARY TO SECTION 1202'S PURPOSES.

The Second Circuit's extra-statutory holding is also wrong because it undermines §1202's purposes. The Second Circuit's holding excludes from the definition of CMI certain identifying information. Even if such information does not self-evidently disclose its copyright relevance, such information is nonetheless helpful in identifying rightsholders, authors, *etc.*

The statute uses the phrase "identifying information" or similar terms repeatedly when defining CMI. 17 U.S.C. § 1202(c)(1) ("information identifying the work"), (c)(2) ("identifying information"), (c)(3) ("identifying information") (c)(4) ("identifying information"), (c)(5) ("identifying information"), (c)(7) ("Identifying numbers or symbols").

The statute's "purpose, revealed by its language" is to protect the integrity of identifying information. See *United States v. Stitt*, 139 S. Ct. 399, 405 (2018). It is apparent on the statute's face that it is protecting information that will help to identify key copyright stakeholders.

Even information that does not proclaim its copyright significance can still be profoundly helpful in identifying a work's author, owner, performer, *etc.* Here, it is true that Fischer's name in his

advertisement is not overtly about copyright. Nonetheless, identifying Fischer as the copyright owner and author of the advertisement would be easier *with* his name in the advertisement than *without* it. His name there is identifying information.

Ultimately, the value of protecting identifying information is perhaps easiest explained via an example that illustrates why such information would help identify the rightsholder even if it does not directly connote its copyright significance.

Consider the following 1968 advertisement with certain identifying information omitted:

**Collect 25¢ for 2 “Milk Pitcher Seals,”
or 50¢ for 4 “Pitcher Seals”**

This year you can DOUBLE your Free Milk Money from [...] Collect 25¢ from any two different color “Milk Pitcher Seals” from specially-marked packages of [...] Or, you can “tall up” your Milk Money and get 50¢ for four package “Seals” (two from one product, plus one “Seal” from each of the other two products).

“Double Your Milk Money Advertisement,” LIFE Magazine (June 14, 1968 ed.), <http://tinyurl.com/y5gsfm5m>.

With the identifying information taken out, it's hard to have any idea who owns the copyright just from reading the advertisement.

Now, consider the same advertisement with the identifying information put back in:

**Collect 25¢ for 2 “Milk Pitcher Seals,”
or 50¢ for 4 “Pitcher Seals”**

This year you can DOUBLE your Free Milk Money from ***Kellogg's***. Collect 25¢ from any two different color “Milk Pitcher Seals” from specially-marked packages of ***Kellogg's*** Corn Flakes®, Rice Krispies®, Special K® (see sample in this ad). Or, you can “tall up” your Milk Money and get 50¢ for four package “Seals” (two from one product, plus one “Seal” from each of the other two products).

“Double Your Milk Money Advertisement,” LIFE Magazine (June 14, 1968 ed.), <http://tinyurl.com/y5gsfm5m> (emphasis added).

When the identifying information—product names and the company names—are not omitted, there's at least one clear starting point for identifying the copyright holder: Kellogg's—even though there is nothing in the 1968 advertisement to specifically connote that Kellogg's is the author or owner of this advertisement.

Kellogg's turns out to be a good place to start searching. A quick search of the Copyright Office's online records reveals that Kellogg's is in fact the copyright owner of the 1968 advertisement.⁷

The same goes for Fischer. No, his name doesn't proclaim his copyrights. Yet the Second Circuit's holding still undermines §1202(c)'s purpose because Fischer's name in the text of the advertisement does fulfill a CMI function. His name in the advertisement *is* identifying information that would help identify the owner of the copyright if someone was trying to find out.

In that sense, the Second Circuit was plainly wrong when it stated that Fischer's name in the advertisement was “not used for ‘managing’ copyright information with respect to the text at issue.” Pet. App. 19a.

The statutory definition speaks of “identifying information”—not the Second Circuit's “managing” information. And, Fischer's name in the text of the advertisement *is* identifying information that helps fulfill CMI functions and purposes.

⁷ The pertinent copyright registration numbers are KK 207-602 for the original registration and RE 744-433 for the renewal copyright.

IV. THIS CASE IS AN APPROPRIATE VEHICLE TO RESOLVE THE CIRCUIT SPLIT.

This case presents an appropriate vehicle for deciding an important question of statutory interpretation regarding CMI. The issue is squarely presented. The Second Circuit has adopted a legal interpretation of the meaning of CMI as defined in §1202(c). Pet. App. 15a-19a.

There is no factual uncertainty going to the question of CMI here. The word “Fischer’s” in the advertisement is undeniably Fischer’s last name and it’s also undeniable that the name there does not naturally “connote” anything about copyright to an ordinary reader. Pet. App. 18a. Thus, the case presents a perfect foil between the plain-text approach adopted by the Third and Fifth Circuits and separate approach adopted by the Second Circuit below.

Also, on this procedural posture, Fischer’s copyright ownership in the advertising text is presumed. The Second Circuit rightfully “assume[d] Fischer’s website and the text contained in it are copyrightable creative works and the registration for the website is valid.” *Id.* at 8a-9a. In turn, that means Fischer is the pertinent “Copyright Claimant” and author listed on the Copyright Office’s website. When, for example, §1202(b) refers to the “authority of the copyright owner” that means Fischer on this procedural posture.

All in all, the undersigned are aware of no vehicle problem that would prevent this Court from answering the statutory question presented.

CONCLUSION

For the foregoing reasons, Petitioner Fischer respectfully requests that this Petition be granted.

Respectfully submitted,

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