

No. 20-1648

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**In the Supreme Court of the United States**

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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*

\_\_\_\_\_  
**BRIEF OF *AMICI CURIAE* INFORMATION DIGNITY  
ALLIANCE, AMERICAN SOCIETY OF MEDIA  
PHOTOGRAPHERS, ERIC PRIEST, LOCAL CONTEXTS,  
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION  
(NPPA), AMERICAN PHOTOGRAPHIC ARTISTS (APA),  
AMERICAN SOCIETY FOR COLLECTIVE RIGHTS  
LICENSING (ASCRL), GRAPHIC ARTISTS GUILD, INC.  
(GAG), NORTH AMERICAN NATURE PHOTOGRAPHY  
ASSOCIATION (NANPA) SUPPORTING PETITIONER**

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## INTEREST OF AMICI CURIAE<sup>1</sup>

**The Information Dignity Alliance (IDA)** is a 501(c)(3) non-profit focused on clarifying existing laws to ensure the continued protection of individual autonomy, personhood, and privacy in the Information Age. The IDA sees copyright law as an effective tool to protect natural rights associated with creative works of authorship. The IDA believes that the proper application of existing copyright law advances individual autonomy and dignity.

**American Society of Media Photographers, Inc. (ASMP)** is a 26 U.S.C. 501(c)(6) non-profit trade association representing thousands of members who create and own substantial numbers of copyrighted photographs. These members all envision, design, produce, sell, and license their photography in the commercial market to entities as varied as multinational corporations to local mom and pop stores, and every group in between. In its seventy-six-year history, ASMP has been committed to protecting the rights of photographers and promoting the craft of photography.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have been timely notified of intent to file this *amicus* brief in support of Certiorari. Consent from all parties was granted. Further, pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae*, their members, or their counsel have made a monetary contribution intended to fund the preparation or submission of this brief.



**Eric Priest** is an Associate Professor at the University of Oregon School of Law. Eric has researched and taught copyright law for more than a decade. Eric researches in the area of intellectual property law, with a focus on copyright law in the information age and creative industry ecosystems in the U.S. and China.

**Local Contexts** is an Indigenous digital ethics initiative supported by the Equity for Indigenous Research and Innovation Co-ordinating Hub (ENRICH) based at New York University and the University of Waikato. Local Contexts works to enhance and legitimize locally based decision-making and Indigenous governance frameworks for determining ownership, access, and culturally appropriate conditions for sharing historical, contemporary and future collections of cultural heritage and Indigenous data. Local Contexts offers digital strategies for recognizing Indigenous provenance, protocols and permissions for using cultural works and data through the TK (Traditional Knowledge) & BC (Biocultural) Labels and Notices. Local Contexts is focused on increasing Indigenous involvement in data governance and advancing aspirations for Indigenous data sovereignty and Indigenous innovation.

**National Press Photographers Association (NPPA)** is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing, and distribution. NPPA's members include video and still photographers,

editors, students, and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the Voice of Visual Journalists, vigorously promoting the constitutional and intellectual property rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

**American Photographic Artists (APA)** is a leading national organization run by and for professional photographers. APA strives to improve the environment for photographic artists and clear the pathways to success in the industry. Recognized for its broad industry reach, APA continues to expand benefits for its members and works to champion the rights of photographers and image-makers worldwide.

**American Society for Collective Rights Licensing (ASCRL)** is a 501(c)(6) not for profit corporation founded in the United States to collect and distribute collective rights revenue for photography and illustration to United States authors and rights holders and to foreign national authors and rights holders whose works are published in the United States. ASCRL represents over 16,000 illustrators and photographers, and is the leading collective rights organization in the United States for this constituency of rights owners. ASCRL is a zealous defender of the primary rights of illustrators and photographers, and ASCRL actively engages in policy and legislative initiatives that advance their interests.

**Graphic Artists Guild, Inc. (GAG)** has advocated on behalf of graphic designers, illustrators, animators, cartoonists, comic artists, web designers, and production artists for over 50 years. The *Graphic Artists Guild Handbook: Pricing & Ethical Guidelines* provides graphic artists and their clients guidance on best practices and pricing standards.

**North American Nature Photography Association (NANPA)** is a 501(c)(6) non-profit organization founded in 1994. NANPA promotes responsible nature photography as an artistic medium for the documentation, celebration, and protection of our natural world. NANPA is a critical advocate for the rights of nature photographers on a wide range of issues, from intellectual property to public land access.

## **SUMMARY OF ARGUMENT**

Congress passed the DMCA in 1998 to update copyright law for the digital age. Among the updates that Congress enacted was the addition of protections for Copyright Management Information (“CMI”). CMI is defined to include eight enumerated categories of information (e.g. author’s name, copyright owner’s name, terms and conditions for use of the work, or even “identifying numbers or symbols referring to such information or links to such information”, etc.) 17 U.S.C. § 1202(c). Congress’s vision of CMI was to ensure that the public would be able to find works and authors online as well as to help protect those authors from digital infringement. Congress wrote a broad and

flexible definition of CMI leaving it to the private sector to create new ways of identifying works. This is exactly what happened.

Relying upon Congress's broad definition, many entities and individuals have made new and innovative uses of CMI. Indigenous communities are using CMI to reclaim, reanimate, protect and, looking-forward, preserve their culture and heritage. Photographers depend upon CMI for their livelihood and to protect and license their works online. Content-streaming companies have created an entire industry with the help of CMI.

All of these uses rely upon a clear reading of the statute as written. The Second Circuit strayed from the text by interjecting an ill-defined "context matters" approach. The Second Circuit's extra-statutory interpretation of the law can threaten the current infrastructures built upon a clear understanding of what constitutes CMI. Due to the internet's ability to transcend geographical boundaries, the Second Circuit's decision will bleed into its sister circuits that took an alternative approach. Respectfully, this Court should grant Certiorari, and clarify the law.

## ARGUMENT

### **I. A driving impetus for passing the DMCA's protection of CMI was the importance of rights information for all stakeholders.**

The dawn of the internet spurred the Clinton Administration to establish a committee to implement the Administration's vision for updating copyright law for the new millennium. The revisions updating copyright law tackled three emerging issues: online liability for intermediaries, the protection of technological protection measures, and copyright management information ("CMI"). CMI includes eight enumerated categories of information conveyed in connection with copies of a work, e.g., title of the work, name of the author or copyright owner, terms and conditions for use of the work, or even "identifying numbers or symbols referring to such information or links to such information." 17 U.S.C. § 1202(c).

While it took several years to update copyright law, the delay was not because of a disagreement about CMI. Rather, the complexities of the other issues and the debates surrounding them caused contention and delays in passing this legislation. See generally 10 NIMMER ON COPYRIGHT II, at 8 (2021) (Senate Judiciary Committee Report adopting CMI proposal by unanimous consent). Perhaps CMI did not spur disagreement because it was a win-win for all parties involved. Artists would be identified alongside their works online, users of copyrighted works would have

access to information needed to use and license works, and the public could discover more works by their favorite artists. The only party that would not benefit from CMI would be infringers. Ultimately, Congress passed the Digital Millennium Copyright Act (“DMCA”) codifying the legal protections of CMI.

Congress’s vision for CMI was to ensure that the public would be able to find works and authors on the internet. Having some type of identification system was important since copyright registration is not mandatory for protection, and since “only a minority of copyright works will ever be registered, no matter how easy the process may be.” Neil Turkewitz, Copyright Modernization: Unbreaking Copyright, (July 6, 2020), <https://bit.ly/3h3JUTJ>. While CMI was never intended to be required, the hope was to encourage copyright owners “to include the information to enable the public to more easily find and make authorized uses of copyrighted works.” Bruce A. Lehman et al., Intellectual Property and the National Information Infrastructure: The Report on Working Group on Intellectual Property Rights, 235-236 (September 1995) [hereinafter NII DMCA White Paper]. All identifying information in connection with copyright works would fulfill this purpose; “the public has an interest in knowing who created a work of authorship so that readers, viewers, listeners (etc.), can continue to enjoy past or future works by authors who have earned their approbation.” Jane C. Ginsburg, The Most Moral of Rights: The Right to be Recognized as the Author of One’s Work, 8 *George Mason Int’l L.J.* 44, 46 (2016). Congress understood

that “everyone gains when we provide greater transparency about ownership and licensing.” Turkewitz, Copyright Modernization. The DMCA’s broad definition of CMI helped secure the spirit of copyright law: to connect the public with creators and their creative works.

When addressing the challenges posed by the internet Congress had to decide how to approach digital licensing and identification. The Committee decided not to prescribe any specific methods, and instead depended upon and encouraged the private sector to develop and determine how best to identify works. And, the private sector did just that. Congress’s preference to have the private sector develop CMI led to a technology-agnostic statutory definition of CMI. See generally NII DMCA White Paper, at 235-236. This allowed for a nimble threshold independent of technological advancements or changes. This flexible approach requires minimal updates from Congress. The statute counter-balanced its broad definition with several limiting principles, including a double scienter requirement, intent and knowing. 17 U.S.C. § 1202(a); GOLDSTEIN ON COPYRIGHT § 7.18 (2021). Therefore, the broad definition of CMI can capture the diverse uses of CMI while other parts of the statute limit liability to bad actors.

When drafting the DMCA, the issues that related to the internet forced Congress to re-conceptualize how to assert rights, and trace the authorship, of protected works. The Committee saw CMI working “as a kind of license plate for a work on the information

superhighway, from which a user may obtain important information about the work.” NII DMCA White Paper, at 235. While the superhighway analogy is an artifact from the dawn of the internet, it works as an illustrative tool of the mechanical systems in place online and how CMI interacts with them today. Congress’s “license plate,” i.e. CMI, would allow those who saw the author’s property to identify that author or the work as the property moves across the internet on Congress’s envisioned “information superhighway”.

In its search for a solution to the problems posed by the impending digital infrastructure, Congress was able to pass a broad definition of CMI. The statute’s text clearly offers a broad definition under which context does not matter. Energy Intelligence Grp., Inc. v. Kayne Anderson Capital Advisors, L.P., 948 F.3d 261, 277 (5th Cir. 2020) (“*CMI is defined broadly*”) (emphasis added). Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295, 302 (3d Cir. 2011) (*The definition of CMI is “extremely broad, with no restrictions on the context in which such information must be used in order to qualify as CMI”*) (emphasis added). Since CMI’s enactment in 1998, the private sectors have done just what the committee had hoped: utilized the broad definition of CMI.

This amicus brief will discuss three examples that speak to the immense success of Congress’s broad definition: Indigenous communities, photographers and visual artists, and content-streaming services.



- II. Congress’s broad definition of CMI has empowered and protected eclectic groups of entities ranging from marginalized groups to established industries.**
- a. Individual citizens and non-profits have innovatively utilized the expansive definition of CMI, working with Indigenous groups to use CMI to reclaim, reanimate, protect and, looking-forward, preserve, their culture and heritage.**

Local Contexts, an initiative based out of New York University, works with Indigenous communities and other copyright owners of cultural materials to attach human and machine-readable digital tags, known as the Traditional Knowledge Notices or Labels (“TK Label”), to works that originated within Indigenous communities.

Creative works of Indigenous communities have often been removed from Indigenous land by people outside of the community. Through this removal, these works have become decontextualized and are missing important attribution information. This decontextualization takes away from the work itself because it erases Indigenous relationships to the work, including authorship and culturally sensitive terms of use. In response, Local Contexts has created an ingenious solution to support Indigenous communities in reclaiming association with their

creative works, and, in turn, over pieces of their cultural heritage. This reclamation is partially possible because the Labels re-establish a connection to works originating from Indigenous communities. While not all of these works are protected under copyright, and not all of these Labels would constitute CMI, in many instances CMI is the legal bedrock upon which many of these Labels rest.

The separation of Indigenous communities and their creative works have had major impacts on Indigenous culture and community well-being. This disconnection between Indigenous communities and their creative works became “embedded into institutional infrastructures, catalogues, and records...including through citational practices.” Jane Anderson & Kimberly Christen, Decolonizing Attribution: Traditions of Exclusion, 5 *J. Radical Libr’ship* 113, 124 (2019). Viewing these works without any context of where they came from, what they were used for, or who was included in the work, strips the works of cultural context and offers them to the public in cultural isolation. Without this critical information, what can be really known about Indigenous culture is limited. This affects the visibility of Indigenous peoples and issues within public discourse, as well as how Indigenous histories and experiences are shared and inform a national narrative. When Indigenous history and experience is told exclusively from an outsider’s perspective, the public’s understanding of that history and experience is hallowed. When Indigenous peoples and communities don’t have possession rights over their

creative works, bias and exclusion can continue to perpetuate impoverished public records.

In response to these issues, Local Contexts works with Indigenous communities as well as legal rights holders of these cultural materials to attach TK Labels to works that originated in Indigenous communities. Every unique community developed TK Label includes a permanent digital identifier that “recognize[s] that there could be accompanying cultural rights, protocols and responsibilities that need further attention for future sharing and use of this material.” There are currently 18 TK Labels. Within the suite of Labels, some include familiar types of CMI like attribution or non-commercial use. 17 U.S.C. § 1202(c)(2),(6). However, there are additional Labels that indicate terms of use like seasonal requirements. For example, the Seasonal Label recognizes that with some content there are special responsibilities around the care of the material. (e.g. a song intended to be played after the first snowfall). TK Labels, Local Contexts, <https://localcontexts.org/labels/traditional-knowledge-labels/>.



While not every TK Label is CMI, some of these Labels comport to the definition under the plain-text meaning. The TK Labels have two main goals. First, they offer Indigenous communities a practical mechanism to engage and build relationships with institutions that hold and steward Indigenous artifacts. TK Labels have a second goal that comports with the concept of CMI, to empower Indigenous communities to also protect the works they create today. More specifically, Indigenous communities can attach Labels to works that are created in the present. Some of these TK Labels fall within the terms of use definition 17 U.S.C. § 1202(c)(6) (“Terms and conditions” for use of a copyrighted work included as category of CMI). For example, similar to Creative

Commons licenses, the TK Attribution Labels give guidelines about how to attribute the work and the TK Non-Commercial Label advises individuals that the work is not for commercial use. The primary goal of laying out the terms of use for Indigenous works is to establish norms and standards for cultural institutions to preserve and engage with Indigenous cultures into the future. The collection and extraction of Indigenous works has perpetuated “well-worn habits and traditions of erasure...that persist in marginalizing Indigenous peoples’ voices and perspectives.” Jane Anderson & Kimberly Christen, Decolonizing Attribution: Traditions of Exclusion, 5 J. Radical Libr’ship 113, 115 (2019). The TK Labels are a tool to reverse this habit of Indigenous erasure. They are a direct tool for Indigenous communities to reclaim their cultural heritage through cultural terms of use, attribution, and norm-setting.

The TK Labels offer a bridge between Indigenous communities and the works that may or may not reside within them through a robust centering of proper attribution. Attribution rights for Indigenous groups go beyond just a Label. It initiates a different process of relationship building and can help break down barriers and give Indigenous communities a seat at the table to make decisions about access, ownership and future uses of their works. Deliberate exclusion of Indigenous groups, misattribution, or non-attribution “profoundly affect how Indigenous peoples can participate in their own public and published narratives, how sovereignty can be enacted and maintained, how access to heritage is made possible,

[and,] how histories and narratives can be retold[.]” Id at 124. Therefore, by utilizing the broad definition of CMI to protect some of these Labels, Local Contexts in partnership with Indigenous communities, can begin to reinvigorate cultural perspectives and establish norms around culturally responsible and ethical use of Indigenous works, and offer these groups a voice in future uses of Indigenous cultural heritage.

The Passamaquoddy Tribe in Maine serves as an illustrative example of the power of the TK Labels. Current citizens of the Passamaquoddy Tribe worked with the Library of Congress to restore proper attribution and credit to the first wax cylinder recordings ever made on Native lands in 1890. Members of the Passamaquoddy community were able to review the almost indecipherable recordings to extract the words and rhythm. Through this project with the Library of Congress, the current Passamaquoddy community were able to revitalize songs and bring them back into the institutional and public record, reestablishing Passamaquoddy cultural context. Not only is the Tribe properly attributed and connected to these recordings for the first time in 130 years, they are also elaborating and extending the songs, creating new dances and innovating around their own cultural works. New recordings of Passamaquoddy citizens singing a song that was previously lost creates community connection. These recordings are displayed with proper attribution through the TK Labels in the Library of Congress, but importantly also on the Passamaquoddy’s own website, <https://passamaquoddypeople.com/>. These

Labels highlighting newly created works on the Passamaquoddy Tribe website fit well within CMI's statutory definition.

song, but it added humor at social gatherings.

**TRADITIONAL KNOWLEDGE:**  
According to Fewkes documentation from Peter Selmore this is a song trade: "The participants, one or more in number, go to the wigwam and sing a song. The leader then enters, and dancing about, sings at the door of the hut. He then points out some object in the room. The owner is obliged to sell the object pointed out, or to barter something for it. For this song and dance the women would wear traditional Passamaquoddy in beards, loose robe and leggings. The face of the leader was painted and his hair would be tied up so that it stood up. Wayne Newell adds that the person who is the leader for this song needed to be able to encourage participation, to help gain momentum in the trading. The leader was usually male, but sometimes female. There are many versions of this song. The Maliseets have a version and so do the Mi'kmacs. Grace Davis (Passamaquoddy) continues to sing a version of this song. Wayne Newell is teaching it to other members of the Passamaquoddy community.

**TK Attribution Label (TK A)**


**Elihtasik**  
(Trans. How it is done)  
This label is being used to correct historical mistakes or exclusions pertaining to this material. Elihtasik means 'how it is done'. When using anything that has this Label, please use the correct attribution. This may include individual Passamaquoddy names, it may include Passamaquoddy as the correct cultural affiliation or it may include Passamaquoddy Tribe as the tribal designation. For further advice please contact: Donald Soctomah (passamaquoddypeople@gmail.com)

**SOURCE:**  
Jesse Walter Fewkes collection of Passamaquoddy cylinder recordings (DLC) 2013655231

**IDENTIFIER:**  
AFC 1972/003: SR29

**TYPE:**  
music recording

**FORMAT:**  
wax cylinder



The TK Labels offer a voice for the Passamaquoddy community through attribution of the works they created and for new works being created that draw from and allow the community to continue to convey its unique and rich culture. Many members of the Passamaquoddy tribe had lost these songs due to a disconnect between the community and its cultural works. But, moving forward, these communities can

stay connected with their cultural heritage and bring this cultural heritage to the public at large via TK Labels. The human-readable labels even include contact information for the Tribe in case a person has questions about or wants advice on the instructions within the TK Labels. Now, using the TK Labels, the Passamaquoddy people can preserve their heritage within their community and also educate the public beyond their community about the proper and respectful use of their cultural works.

As all of society shifts towards digital infrastructures, Indigenous communities using TK Labels have given themselves the opportunity to seamlessly integrate into the future because all these Labels are also machine-readable. This machine-readability sets up the preservation of cultural contexts of new works from the start but also allows those works to be connected back to communities through permanent identifiers. The Labels are a beautiful example of how previously marginalized communities can utilize technology to reclaim and reassert control over what was once lost in the physical world. The innovative use of TK Labels provides a concrete example of how diverse segments of society are utilizing CMI to harness the power of new digital infrastructures.



**b. Visual artists, including photographers, are uniquely dependent upon CMI to protect their works online and earn their livelihood in a digitized society.**

Of all of the groups that rely upon CMI, photographers, graphic artists, and other visual creators are perhaps the most reliant. Because of this, photographers have been at the forefront of finding methods to protect online works and facilitate licensing. CMI is the legal architecture in which these practices have been built. For decades, photographers and other visual creators have been placing “watermarks” across the surface of their images for multiple purposes: to provide easy identification of their works in a crowded marketplace; to provide potential clients the ability to know who took the photograph they love; and, for the critical task of providing security against copyright infringement. E.g., Dunja Djudjic, “Google Proposes Solution That Makes Watermarks More Difficult to Remove, DIY Photography” (Aug. 18, 2017), <https://bit.ly/3h0HuXf> (noting new technique to protect photographers’ watermarks from removal). With the advent of digital photography, not only have photographers relied upon visible watermarks, but additionally, they have put their contact information and copyright status in the metadata embedded in each image. See Susan Carr, Understanding Licensing – The Key to Being a Professional Photographer, in Prof’l Bus. Practices in Photography 3 (7th ed., 2008).

Photographers and other visual artists are uniquely dependent upon CMI for their livelihoods. CMI protection is vital to these individuals and small businesses that fuel the creative economy of the United States. See, e.g., Stephen E. Siwek, Copyright Industries in the U.S. Economy: The 2018 Report 3 (2018), <https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf> (industries with “primary purpose” of creating and distributing creative content contribute \$1.3 trillion to U.S. GDP annually). According to the Bureau of Labor Statistics, in 2020 median pay for a photographer was roughly \$41,000 a year. Occupational Outlook Handbook: Photographers (2020), U.S. Bureau of Labor Statistics (last modified Apr. 9, 2021), <https://bit.ly/2Srmyip> (median pay of \$41,280 per year or \$19.85 per hour). Thus, the importance of protection is vital. Photographers, graphic designers, and others similarly situated are forced to pick between two options making a difficult choice – protect their copyrights through often cost-prohibitive litigation, or, as is more commonly elected, to abandon seeking redress for infringement upon their intellectual property at all. Removing vital tools for creators to identify themselves and protect their works, such as weakening CMI-based protections, is simply another burden thrust upon the shoulders of those who are least able to bear it.

The internet introduced the visual artist to a dilemma: survival in a crowded digital space requires visual artists to post their content online but doing so is problematic. Survival in this competitive and difficult industry is dependent upon visual creators

employing digital resources to share their work. There is no viable path to succeed without sharing the work you have created. Photographers and designers no longer send around portfolios to attract business; that antiquated idea of walking from agency to agency is simply that – a relic of a pre-internet landscape. Now, creators utilize websites, social media, and other digital platforms. Today, their livelihoods depend upon their digital presence. However, this leads to the visual creator’s paradox: to be competitive, visual artists must post content online, but posting their content online makes their content uniquely vulnerable to theft, i.e., to unauthorized copying or to uncredited and unpaid disseminations. Each day countless images are stolen and used without a valid license. Cf. Timothy B. Lee, “Instagram just threw its users of its embedding API under the bus,” *ArsTechnica* (June 4, 2020), <https://bit.ly/2SYgrTe>. Consequently, these unauthorized copies of stolen works can make further licensing more difficult. Absent clear and persistent CMI, the unlicensed copies can obfuscate the creator’s online presence and can prevent potential clients from tracing a work back to its author. And, absent CMI, many works fall victim to the orphan works problem.

The orphan works problem is uniquely prevalent amongst visual creators. The term “orphan works” is “used to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.” U.S. Copyright Office, Report on Orphan

Works 2 (Jan. 2006), <https://www.copyright.gov/orphan/orphan-report-full.pdf>). This Court has explicitly recognized “the so-called ‘orphan works’ problem” that leads to “the difficulties [that] would-be users of copyrightable materials may face in identifying or locating copyright owners.” Golan v. Holder, 565 U.S. 302, 334 (2012) (citing U.S. Copyright Office, Report on Orphan Works 21-40 (2006)). The orphan works problem is uniquely prevalent amongst photographic works: “With no author name attached, the vast majority of published photographs are destined to become orphan works immediately upon publication. Photographers have long been susceptible to the separation of authorship information from their works.” Jeffrey Sedlik, The Orphan Works Dilemma: Challenges and Recommendations, Advertising Photographers of America (Mar. 15, 2006). This is why CMI is crucial.

While visual creators bear the brunt of digital sharing issues, they have also been at the forefront of solving these problems. Congress’s broad definition of CMI has empowered photographers to creatively use CMI to alleviate the inherent risks that come with posting their works online Cf., Energy Intelligence Grp., Inc., 948 F.3d at 277 (“*CMI is defined broadly[.]*” (emphasis added)). These protections remain critical. For example, over 15 million users utilize the PLUS Coalition. Jeffrey Sedlik, Is the DMCA’s Notice-and-Takedown System Working in the 21st Century?: Responses of Jeffrey Sedlik to Chairman Tillis’ Questions for the Record, 1 (June 23, 2020). The PLUS Coalition is an “initiative to create and broadly deploy

a Standard Technical Measure (STM) allowing creators and copyright owners to store (“embed”) standardized ...(CMI) within digital photographs, where that metadata can be readily accessed and acted upon by online service providers (OSPs) and the public.” *Id.* Not only are visual artists using new forms of CMI, they are also using well-established forms. For example, “[e]mbedded metadata for photographs and other visual works is a mature technology, broadly employed in and recognized by all manner of devices for more than 30 years.” *Id.* Visual artists’ use of embedded metadata is a prime example of an established infrastructure created in reliance upon a broad definition of CMI.

Visual artists, such as photographers, are uniquely implicated by judicial interpretations of CMI. Not only for the dissemination of their works but for their entire livelihood. These creators are now at the mercy of judicial whims deciding on a case-by-case basis what constitutes CMI. It is imperative to protect these visual creators by ensuring that the statute’s broad definition of CMI that they have always relied upon remains in place. Clarity from this Court about the definition of CMI will help these artists navigate their rights and protect their livelihoods.

**c. As expected, leading entertainment companies adopted CMI into their core business models by using streaming services to distribute creative works to the public.**

A new style of service that has now permeated the modern American life to the point of ubiquity is the streaming service. From movies to music to e-books, streaming services have infused themselves into the everyday life of many Americans. For example, 78% of U.S. households subscribe to at least one video-on-demand service such as Amazon, Netflix, or Hulu. Jonathan Berr, Consumers Can't Get Enough Video Streaming, *Forbes* (Aug. 31, 2020), <https://bit.ly/3wVLopJ>. This multi-billion-dollar industry has revolutionized modern life. “Video Streaming Market Size, Share & Industry Analysis”, *Fortune Business Insights* (June 2020), <https://bit.ly/3qrgxz1> (global video streaming market valued at “\$342.44 billion in 2019”). Individuals can now access every episode of *Law & Order* online at the click of a button; access the entire discography of the Beatles instantly within the palm of their hand; or access the entire bibliography of writer Haruki Murakami contained within a slim device. These modern marvels have given the public unprecedented access to copyrighted works.

These streaming services spread content and culture. This access to copyrighted works plays to the heart of copyright’s purpose. As this Court has noted, “the Framers intended copyright itself to be the engine

of free expression.” Eldred v. Ashcroft, 537 U.S. 186, 219 (2003). In this digital age, it is.

Copyright and technology have always been closely intertwined; with the advent of the printing press being the catalyst for copyright in the first place, “copyright was technology’s child from the start.” Paul Goldstein, Copyright’s Highway: From Guttenberg to the Celestial Jukebox, 21 (2d ed. 2019). Now, the internet has radically reduced the transaction cost of distribution (just as the printing press did upon its introduction). This reduced cost has allowed for the dissemination of and access to more and more copyright works, enriching the public and citizens of the United States.

Digital content streaming services have built their entire industry upon technology practices that rely on, and that are facilitated by, CMI. “Streaming services now provide the dominant way in which [content] is distributed and consumed online. Digital rights management (DRM) lies at the heart of this trend and has evolved alongside a movement from copy-based to streaming-based consumption.” Nick Scharf, The Evolution and Consequences of Digital Rights Management in Relation to Online Music Streaming, 1 (June 2021). “CMI is central to an effective DRM system, as it is information that describes the work and how it may be used.” Jeffrey P. Cunard et al., Current Developments in the Field of Digital Rights Management, World Intellectual Property Organization Standing Committee on Copyright and Related Rights, 52 (May 4, 2004),

<https://bit.ly/3xS6HbH>. These technologies rely upon CMI to facilitate the seamless and automated distribution of works, allowing an individual to sit on her couch, click play, and watch as the movie appears on her tv in the comfort of her own home. Coralie Mercier, “Information about W3C and Encrypted Media Extensions (EME)”, World Wide Web Consortium (W3C) (Mar. 2016), <https://www.w3.org/2016/03/EME-factsheet>. But, these technologies can’t work without CMI.

These automated uses were at the heart of the initial vision of CMI: “To implement these rights management functions, information will likely be included in digital versions of a work (i.e., copyright management information) to inform the user about the authorship and ownership of a work (e.g., attribution information) as well as to indicate authorized uses of the work (e.g., permitted use information).” NII DMCA White Paper at 191.

In the streaming context, CMI, and the digital rights management tools that use CMI, are part of a machine-automated ecosystem. The CMI is read and processed by machines. This ecosystem consists of systems, e.g. the infrastructure required to stream video content, that transmit content from devices to TVs looking for CMI information. These systems were created to ensure “that the person reading, viewing, or using the product is really the person who is supposed to have access to it, either through purchase or belonging to an identified class of users.” Frederick W. Dingley & Alex B. Matamoros, Digital Rights



Management: What is Digital Rights Management?, 4 (2016). Machine-readable CMI helps copyright-protected works safely navigate across the information superhighway with its CMI license plate, embodying Congress's vision. These systems act as a gatekeeper, only transmitting the content to trusted destinations. If the CMI is removed, the safety barriers that accompanied the works are gone, resulting in a digital copy with no protections accompanying it. *Id.* at 46-47. This copy, untethered to any limiting function, can whiz around the internet without triggering any of the mechanisms within a system intended to flag its unauthorized transmission. Stripped of its CMI, this copy can lead to a domino-effect of wide-spread distribution and more illegal copies. This rampant spread of protected works could hardly be clawed back once let loose. Therefore, having a strong definition of CMI protects the integrity of this information in the first place.

Relying on the broad definition of CMI, creators can utilize these technologies to help facilitate the safe dissemination of creative works. All of the heavy-lifting done by CMI in this context is behind-the-scenes. Individuals streaming content to their televisions don't see the CMI that allowed their TV to receive the content from streaming services. These individuals don't decipher the "context," or copyright significance, of the machine-readable CMI. Therefore, the Second Circuit's extra-statutory interpretation below undermines the context-agnostic approach to CMI that a machine would employ when exposed to these works.

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All of these uses are imperiled by the Second Circuit's decision below. The Second Circuit's case-by-case context requirement threatens the already-in-place infrastructures of the individuals and groups listed above, among many others who are similarly situated. These uses of CMI serve the public good by connecting people with Indigenous communities, visual artists such as photographers, and limitless streaming-content. The Second Circuit's decision risks the investments that these individuals and groups have relied upon.

### **III. The Second Circuit's decision leads this Court to an important crossroads.**

As discussed throughout this amicus brief, the plain-text reading of the statute has facilitated the growth and development of a panoply of publicly beneficial uses of CMI. Indigenous groups use CMI to reclaim their cultural heritage. Photographers and other visual artists use CMI to protect their livelihoods. Content-streaming services use CMI to protect copyrighted works when streaming content. This is what Congress envisioned. Yet the Second Circuit's opinion threatens these uses without even considering them.

Perhaps, the Second Circuit's opinion suggests that the panel of judges overlooked the significance of the issue presented in connection with a bee-keeper's ad. Yet, their decision not only affects the bee-keeper's

ad, but also has significant implications to all of those listed within this brief, and others similarly situated. After all, the extra-statutory requirement imposed by the Second Circuit requires all of the innovators and users of CMI to understand an ill-defined copyright context in which information must be used to constitute CMI. In many of the established uses discussed throughout this brief, the copyright significance of CMI would not be readily apparent to the average person. Even more so, many of the established uses are machine-readable, so almost no person would be able to easily recognize the copyright significance. But, there is no need for the Second Circuit to fashion an extra-statutory limit to the definition of CMI. For liability to attach, it isn't the average person who must readily understand the significance – it is the person removing the CMI who must know. It is not a judicial role to rewrite statutes. Especially when all of the policy implications of such a decision are not thought through. In this case, the definition of CMI was judicially reworked to haphazardly add an ill-defined “context matters” requirement to the statutory definition.

The Second Circuit grossly erred by splitting off from its sister circuits when looking at CMI. Its error will not stay confined to the Second Circuit alone. The digital economy does not stay confined to geographical boundaries. Therefore, the decision to limit CMI's definition in one circuit affects creators in all circuits. That is why it is imperative to resolve this circuit split now.

The future of CMI is at a crossroads. Denying certiorari and allowing the circuit split to persist will have harmful effects on creators and the public at large, including those detailed in this brief, who all rely upon CMI for publicly beneficial purposes. Granting certiorari in this case will give this Court the opportunity to clarify this fundamental definition, give certainty to those who rely upon the definition of CMI, and resolve the circuit split.

### CONCLUSION

Respectfully, the petition for a writ of certiorari should be granted.

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Respectfully Submitted,

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