

No. 20-1648

IN THE
Supreme Court of the United States

JAMES H. FISCHER,

Petitioner,

v.

SANDRA F. FORREST, *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

SETH L. HUDSON
NEXSEN PRUET, PLLC
227 West Trade Street,
Suite 1550
Charlotte, NC 28202
(704) 338-5307

DANIEL K. CAHN
Counsel of Record
LAW OFFICES OF
CAHN & CAHN, P.C.
105 Maxess Road, Suite 124
Melville, NY 11747
(631) 752-1600
dcahn@cahnlaw.com

Counsel for Respondents

306478



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Second Circuit create a conflict with the Third and Fifth Circuits when it held, after an intensive, fact-specific inquiry, that the product name, “Fischer’s Bee-Quick”—as used in the context of the single phrase “Fischer’s Bee-Quick is a safe, gentle, and pleasant way to harvest your honey” – does not constitute Copyright Management Information (“CMI”)?

2. Does the Petitioner mischaracterize the basis and scope of the Second Circuit’s holding and overstate its potential impact on innovation and growth in the copyright industry?

**CORPORATE DISCLOSURE STATEMENT
PURSUANT TO SUPREME COURT RULE 29.6**

Pursuant to Supreme Court Rule 29.6, Respondent Brushy Mountain Bee Farm, Inc. discloses the following: Brushy Mountain Bee Farm, Inc. was dissolved on December 31, 2020. As such, no parent or publicly held corporation owns 10% or more of the stock of Brushy Mountain Bee Farm, Inc.

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF CITED AUTHORITIES	v
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
I. THERE IS NO CIRCUIT SPLIT FOR THIS COURT TO RESOLVE. THE THIRD AND FIFTH CIRCUIT CASES CITED BY PETITIONER ARE DISTINGUISHABLE ON MULTIPLE GROUNDS.....	5
A. The <i>Murphy</i> case (3 rd Circuit).....	5
The “Double Scienter” Requirement	11
B. The <i>EIG</i> case (5 th Circuit).....	17
II. PETITIONER MISCHARACTERIZES THE SECOND CIRCUIT’S HOLDING AND OVERSTATES ITS IMPACT ON THE COPYRIGHT INDUSTRY	21

Table of Contents

	<i>Page</i>
A. Petitioner mischaracterizes both the basis and scope of the Second Circuit’s opinion.....	21
B. This case is not an appropriate vehicle for resolving any perceived circuit conflict	26
CONCLUSION	30

TABLE OF CITED AUTHORITIES

Page

CASES:

Energy Intelligence Grp., Inc. v. Kayne Anderson Capital Advisors, LP,
948 F.3d 261, 2020 U.S. App. LEXIS 1347
(5th Cir.)..... *passim*

Mango v. BuzzFeed, Inc.,
97 F.3d 167, 2020 U.S. App. LEXIS 25674
(2d Cir. 2020).....12

Microsoft Corp. v. AT&T Corp.,
550 U.S. 437, 127 S. Ct. 1746,
167 L. Ed. 2d 737 (2007)10

Murphy v. Millennium Radio Grp. LLC,
650 F.3d 295 (3d Cir. 2011) *passim*

Zuma Press v. Getty Images, US,
845 Fed. Appx. 54, 2021 U.S. App.
LEXIS 6139 (2d Cir. 2021)12

STATUTES AND OTHER AUTHORITIES:

17 U.S.C. § 40118

17 U.S.C. § 12016, 7, 15, 16

17 U.S.C. § 1202 *passim*

Cited Authorities

	<i>Page</i>
17 U.S.C. § 1202(b)(1)	12
17 U.S.C. § 1202(b)(2)	12
17 U.S.C. § 1202(b)(3)	12
17 U.S.C. § 1202(c)	<i>passim</i>
17 U.S.C. § 1202(c)(2)	6, 7
17 U.S.C. § 1202(c)(3)	7

STATEMENT OF THE CASE

Brushy Mountain Bee Farm is a great American story. The company was started by former school teachers, Stephen and Sandra Forrest (hereinafter, the “Forrests”). Stephen Forrest had two hobbies – beekeeping and woodworking. He began making bee hives and offering them for sale to fellow beekeepers. He was able to sell the beehives as fast as he could make them, realizing there was a need for well-made beekeeping equipment around the western North Carolina area.

Thereafter, he began constructing and selling other beekeeping equipment. The Forrests realized there was no centralized location or catalog where a beekeeper could buy their beekeeping equipment. On a part-time basis, the Forrests started Brushy Mountain for selling beekeeping equipment. 1JA 197¹.

Within a few years, the profits of Brushy Mountain surpassed the salary the Forrests earned as school teachers, so they left the teaching profession to concentrate entirely on their new business venture. Brushy Mountain eventually opened a retail location in Moravian Falls, North Carolina and continued to expand rapidly. While Brushy Mountain primarily manufactured and sold its own products, it began including products from others in its catalog. 1JA 197.

1. All citations to the Joint Appendix (JA) in the Second Circuit are preceded by a number indicating the volume. For example, the cite to “1JA 197” refers to page 197 of the first volume of the Joint Appendix. Cites to the Special Appendix in the Second Circuit begin with “SA” followed by the page number of the Special Appendix. Citations to the Petitioner’s Appendix in this Court will appear as “Pet. App. at __”.

Petitioner James H. Fischer (“Petitioner”) claims that in 2000, he began using the following four phrases (the “Phrases”), among others, in conjunction with the sale of his product – “Fischer’s Bee-Quick” – on his website:

- (a) “Are you tired of your spouse making you sleep in the garage after using Butyric Anhydride?”
- (b) “Are you tired of using a hazardous product on the bees you love?”
- (c) “Fischer’s Bee Quick is a safe, gentle, and pleasant way to harvest your honey.
- (d) “A Natural, Non-Toxic Blend of Oils and Herbal Extracts”

SA 10; SA 52 [emphasis added].

However, the Forrests both testified that they wrote the phrase “Are you tired of your spouse making you sleep in the garage”. 1JA 186; 1JA 188.

In 2002, Brushy Mountain began purchasing Fischer’s product, “Fischer’s Bee Quick” from Fischer or his distributor, and Brushy Mountain then re-sold it through its catalog.

The 2002 catalog was the first Brushy Mountain catalog that included “Fischer’s Bee-Quick”, along with about 1,000 other products. In preparing the advertisement for the catalog, Brushy Mountain created its own advertisement for “Fischer’s Bee-Quick”, hired a draftsman to make line drawings of the product, and Sandra Forrest designed the layout.

The “Fischer’s Bee-Quick” advertisement (with some variation throughout the years), read as follows:

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!

1JA 199; 1JA 204, 216-217; 1JA 267.

From at least 2005 through 2010, Fischer authorized Respondents to publish “Fischer’s Bee-Quick” advertisements using the four Phrases from Petitioner’s brochure, but the Respondents’ advertisement otherwise bore no resemblance to the brochure in content or appearance. SA 86. As previously noted, the Respondents created their own advertisements using information that they extracted from the Petitioner’s original brochure. However, aside from the four Phrases among the many used on Fischer’s brochure and website, there is no similarity between Fischer’s original brochure and Brushy’s advertisements. SA 33; SA 86; 1JA 267-268.

Around 2010, Brushy Mountain began having trouble obtaining Bee-Quick from Fischer. 1JA 188; 1JA 183. Because the supply of Bee-Quick became unreliable, Brushy Mountain was left with no choice but to purchase another product that served the same function from another supplier and replace Bee-Quick. 1JA 183-184. This other product was Natural Honey Harvester.

Brushy Mountain's 2011 catalog included the following advertisement for Natural Honey Harvester which used substantially the same language as contained in the four Phrases:

For years we have promoted the use of a natural product to harvest honey but an unreliable supply of such a product has forced us to come out with our own. This 100% Natural, non-toxic blend of oils and herb extracts works just like BeeGo® and it smells good! Natural Honey Harvester 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 hazardous products on the bees you love? Then this is the product for you!

1JA 159; 1JA 162-163. Brushy Mountain used the same or a substantially similar advertisement for Natural Honey Harvester in its 2012 through 2014 catalogs 1JA 267-268, and on its website until December 28, 2011. 2JA 281.

In 2011, after their relationship with Fischer terminated, Respondents published their advertisement for Natural Honey Harvester, which copied their own 2010 advertisement – which, in turn, they had created by extracting the Phrases and other information from Fischer's brochure and creating a new advertisement. However, Respondents replaced the textual reference in one of the Phrases – “Fischer's Bee-Quick” – with “Natural Honey Harvester.” 1JA 267-268; SA 86.

It is undisputed that the words “Fischer's Bee-Quick” were never removed from the Petitioner's original work

(i.e, the brochure), or a copy thereof. Petitioner has never challenged the fact that the Respondents' 2011 advertisement was not a copy of his original brochure and bore no resemblance to it.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CIRCUIT SPLIT FOR THIS COURT TO RESOLVE. THE THIRD AND FIFTH CIRCUIT CASES CITED BY PETITIONER ARE DISTINGUISHABLE ON MULTIPLE GROUNDS.

The Second Circuit's decision in this case is not in conflict with the Third and Fifth Circuit cases cited by Petitioner, and an examination of the facts of those two cases reveals that they are clearly distinguishable on a number of grounds. Because the cases are not analogous, Petitioner's argument that the Second Circuit imposed a new, limiting contextual requirement on the definition of CMI is incorrect. In this case, a different set of facts required a different result, and that result does not limit the definition of CMI under the DCMA, does not create a circuit split, and does not warrant this Court's review of the case on the merits.

A. The *Murphy* case (3rd Circuit)

The case of *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295 (3rd Cir. 2011) involved Peter Murphy, a photographer who was hired by a magazine publication, New Jersey Monthly ("NJM"), to take a photo for their "Best of New Jersey" issue. The photo was of two radio personalities who had been voted "best shock jocks" in New Jersey standing, apparently nude, behind a sign advertising the station.

The photo in question – which appeared on two different pages in the magazine – contained a gutter credit to the photographer, Peter Murphy, which appeared in the lower right corner on one page and the lower left corner on the other page, perpendicular to the photo. The portion of the gutter credit on the two pages that is relevant to Murphy’s claims read as follows: “Photo: Peter Murphy”.

A radio station employee then scanned the photo from the magazine but removed the gutter credit to the photographer and copyright owner, Peter Murphy, and then posted it on the radio station’s website and on another website. But the radio station went even one step further by inviting viewers of the website to alter the photo and to send in their altered versions. Ultimately, the station posted 26 altered versions of the photo to their website as well as the copy of the original photo – all without the gutter credit to Murphy.

In *Murphy*, the radio station defendants argued that even though the DCMA, 17 U.S.C. § 1202(c), clearly defines CMI to include the name of the author of the work or owner of the copyright, § 1202 cannot be read in isolation. Instead, they argued that § 1202 must be interpreted in conjunction with 17 U.S.C. § 1201, which covers systems that protect copyrighted materials. Therefore, defendants argued Murphy’s name was not CMI because, even though meeting the definition under § 1202(c)(2), it did not function as part of an “automated copyright protection or management system” under 17 U.S.C. § 1201.

The Third Circuit in *Murphy* focused on the plain text of the definitions section of § 1202(c) because the defendants were trying to argue that the photographer’s

full name, “Peter Murphy” – which is how his name appeared in the gutter credit – was not CMI, even though the statute says that it is. *See*, Pet. App. at 97A, 17 U.S.C. § 1202(c)(2) (“The name of, and other identifying information about, the author of a work”) and § 1202(c)(3) (“The name of, and other identifying information about, the copyright owner of the work”).

The *Murphy* Court properly concluded that § 1202 cannot be read to include the limitations in § 1201, which would be directly in conflict with the statute’s wording and plain meaning. But the *Murphy* case – which was correctly decided by the Third Circuit, and would have been decided the same way in the Second Circuit – is distinguishable from the case at bar for a number of reasons.

First, the gutter credit that was removed from the photo in *Murphy* was exactly that: a credit to the photographer which listed his full name, Peter Murphy. The words that were removed in that case, as relevant to Murphy’s claim, were “Photo: Peter Murphy”. Those words did not refer to a product (or, in Murphy’s case, to the radio station, or to the shock jocks, or their show).

The words that were removed in *Murphy* were a credit to the photographer and could not be reasonably interpreted any other way. The words “Photo: Peter Murphy” are not analogous to the words “Fischer’s Bee Quick”, which was part of the longer phrase “Fischer’s Bee-Quick is a safe, gentle, and pleasant way to harvest your honey.”

A gutter credit is not ambiguous. It is absolutely clear what the gutter credit in *Murphy* was. It was attribution

given to the author of the photo who, in Murphy's case, was also the copyright owner. In contrast, nothing about "Fischer's Bee-Quick" implies that Fischer is the author of the phrases in the advertisements or the copyright owner.

Another significant distinction is that in *Murphy*, the gutter credit was removed from the original work or a "copy" or "display" thereof. 17 U.S.C. § 1202(c). The *Murphy* Court stated that the original photo as published in the NJM magazine was scanned by a radio station employee, and then that image was re-posted to two different websites, but without the gutter credit to Peter Murphy.

Therefore, in *Murphy* – unlike in this case – the words that were actually removed from the photo not only plainly met the statutory definition of CMI in § 1202(c), but were also removed from a "copy" of the original work. 17 U.S.C. § 1202(c).

In contrast, the words that were removed from Respondents' 2010 advertisement (which Brushy designed itself and which bore no resemblance to Fischer's original brochure) and replaced with "Natural Honey Harvester" in its 2011 advertisement, were "Fischer's Bee-Quick". Not "Fischer's". Not "James Fischer" or "Copyright James H. Fischer", nor any other phraseology attributing anything to Mr. Fischer, other than his possibly being the owner or producer of the *product* being advertised. What was removed was the name of a product: "Fischer's Bee-Quick" – not the name of the person, James H. Fischer.

But Petitioner wants to have it both ways, disingenuously arguing that the product name is "Bee

Quick” but that the word “Fischer’s” before it is CMI. Throughout his brief, Petitioner mentions only the word “Fischer’s” being removed. *See, e.g.*, Pet. Brief at 7 (“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. Brief at 8 (“Fischer never authorized Brushy to remove his name from his advertisement”); Pet. Brief at 19 (“Fischer’s name was ‘simply replaced’ out of the advertisement he wrote...”); Pet. Brief at 21 (“the Second Circuit held that Fischer’s name...was not CMI”); Pet. Brief at 22 (“Fischer’s name was not CMI”).

However, Petitioner consistently and conveniently omits the fact that “Fischer’s” *was not the only word removed*, and that “Fischer’s” as used in the advertisement was a reference to the product, “Fischer’s Bee-Quick”, and not to the individual, as the Second Circuit and the District Court determined after a painstaking, intensive, fact-specific inquiry.

Indeed, the bottle of the product clearly labeled the product as “Fischer’s Bee-Quick,” not simply “Bee-Quick,” as did the brochure. SA 89. Petitioner continues to misrepresent that only the word “Fischer’s” was removed from the ad, when in reality, the entire phrase “Fischer’s Bee-Quick” was removed.

In *Murphy*, the statute stated the opposite of what the defendants in that case were arguing. Section 1202(c) says that CMI includes, among other things, the “name of...the author of the work”. Peter Murphy is the name of the author of the photo, and the gutter credit which read “Photo: Peter Murphy” made that abundantly clear under any reasonable analysis, which defendants did not contest.

Moreover, at page 6 of the *Murphy* decision, the Third Circuit discussed the reason for the DCMA: “The DMCA was passed in 1998 to address the perceived need of copyright owners for ‘legal sanctions’ to enforce various technological measures they had adopted to prevent the unauthorized reproduction of their works. See *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 458, 127 S. Ct. 1746, 167 L. Ed. 2d 737 (2007). It also served ‘to conform United States copyright law to its obligations under two World Intellectual Property Organization (‘WIPO’) treaties, which require contracting parties to provide effective legal remedies against the circumvention of protective technological measures used by copyright owners.” *Murphy*, 650 F.3d 295, 300.

It is curious that Petitioner argues his last name “Fischer’s” – as used in the text that was removed – is CMI, even while acknowledging that there can be CMI removal that is not actionable. Pet. Brief at 18. Petitioner makes no attempt to argue that his name was removed from his original brochure or website, or a copy or display thereof. He has fully conceded this separate but equally determinative ground for dismissal of his CMI claim.

Therefore, it is difficult to understand what Petitioner stands to gain by having the Court declare his name to be CMI, if he already knows that he has no remedy because on a totally separate ground, no CMI was ever removed from his original work or a copy thereof.

If the purpose of the statute, as the Third Circuit noted, is to address copyright owners’ perceived need for legal sanctions and to provide effective legal remedies against circumvention of protective technological

measures used by them, then declaring Fischer’s name as used in the advertisement in question as CMI would do neither of these things.

Declaring that “Fischer’s” (as used in “Fischer’s Bee-Quick is a safe, gentle, and pleasant way to harvest your honey”) is CMI would not afford the Petitioner any legal sanctions for its removal. Nor would it provide Petitioner with an effective legal remedy against circumvention of protective technological measures. In other words, nothing would be accomplished by declaring the name “Fischer’s” (as used in the “Fischer’s Bee-Quick” advertisement as a product name) to be CMI, because Petitioner would not have an actionable claim for its removal in any event.

Petitioner may be seeking a moral victory or to be the martyr for copyright owners nationwide and ‘take one for the team’. But at this stage of the proceedings, one thing is certain. Even if this Court concludes that the Second Circuit’s holding requires some type of clarification, it is nonetheless still too late for Fischer to claim that he is entitled to any relief, as his CMI removal claim fails on two separate grounds, one of which he has effectively conceded.

The “Double Scierter” Requirement

Petitioner also would not have an actionable claim in this case, in part, because there is a double scierter requirement applicable to CMI removal claims. The remover must *intentionally* remove or alter CMI; distribute CMI *knowing* that the CMI has been removed or altered without authority of the copyright owner; or distribute works or copies of works *knowing* that CMI

has been removed or altered without authority of the copyright owner, *knowing* or having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement. Pet. App. at 96A-97A, 17 U.S.C. § 1202(b)(1) - (b)(3). *See also, Mango v. BuzzFeed, Inc.*, 97 F.3d 167, 2020 U.S. App. LEXIS 25674 (2nd Cir. 2020) (defendant who distributes improperly attributed copyrighted material must have actual knowledge that copyright management information has been removed or altered without authority of the copyright owner or the law, as well as actual or constructive knowledge that such distribution will induce, enable, facilitate, or conceal an infringement); *see also, Zuma Press v. Getty Images, US*, 845 Fed. Appx. 54, 2021 U.S. App. LEXIS 6139 (2nd Cir. 2021) (reaffirming the so-called ‘double scienter’ requirement). Therefore, if the remover does not know that what they removed is protected CMI, they would not have the requisite intent or knowledge to provide the author or copyright owner with an effective legal remedy.

In *Murphy*, the radio station employee knew or should have known when they removed the words “Photo: Peter Murphy” from the scanned magazine photo, that they were removing a photo credit to the photographer or author of the photo. There is no ambiguity about the words “Photo: Peter Murphy”. The radio station must have had, or reasonably should have had, the requisite intent and knowledge about what it had removed and how it would be used and reproduced by others without proper attribution to the photographer. Any doubts about whether the radio station in *Murphy* had the requisite knowledge and intent can be resolved by its act of inviting the public to *alter* the photos, and its posting of 26 of these altered photos on its website – all without attribution to the photographer.

In contrast, Brushy Mountain did not know or believe that “Fischer’s” was CMI, or that the words “Fischer’s Bee-Quick” that were removed from its authorized 2010 advertisement to create its 2011 advertisement – both of which Brushy designed – referred to anything other than the product, Fischer’s Bee-Quick. Based upon these significant factual differences, *Murphy* is not analogous and bears no relevance to the instant case.

Petitioner also incorrectly states that the *Murphy* case would have been decided differently if the Second Circuit had applied its “context-based” approach. Pet. Brief at 22. That is simply incorrect. The Second Circuit would have decided the case the same way as the Third Circuit decided it.

Respondents respectfully submit that, on a CMI removal claim, it is always necessary for the Court to review the words or phrases removed from a copyrighted work *in context*. The Second Circuit did not break any new ground here. For example, the context of the words removed in the *Murphy* case (“Photo: Peter Murphy”) are quite clear. There is no reasonable interpretation of those words other than that they are intended to be a credit to the photographer who took the photo. But the fact that the context in which the removed words or phrases are used is readily discernible does not mean that context is not relevant, or is non-existent.

On a CMI removal claim, the Court must examine whether a remover had the requisite intent and knowledge that they were removing CMI, and/or that they knew that such removal would lead to further acts of infringement. When the words or phrases removed do not fit neatly into

the statutory definition of CMI, as they did in *Murphy*, the Court must look to the words or phrases that were removed *in context* in order to understand what information was intended to be conveyed.

The radio station in *Murphy* removed the words “Photo: Peter Murphy” which had been placed next to the photo that Peter Murphy had taken. The context in *Murphy* can only reasonably be interpreted in one way: that the words removed from the photo were attribution to the photographer. Thus, anyone attempting to remove those words would have the requisite knowledge and intent under the statute. But just because it is obvious what the context was in *Murphy* does not mean that context is irrelevant.

In the case at bar, the name removed was only part of Mr. Fischer’s name *and* it was combined with other words in the phrase “Fischer’s Bee-Quick is a safe, gentle, and pleasant way to harvest your honey”. The context in which the word “Fischer’s” was used as part of the product name, “Fischer’s Bee-Quick”, was readily discernible to the Second Circuit. The word “Fischer’s” as used in the advertisement clearly refers to the *product* and not to the author of the phrases or the copyright owner.

It was perfectly reasonable for the Court to view those words in the context of the advertisement from which they were removed in order to determine whether “Fischer’s Bee Quick” constituted CMI in the first instance; and if so, whether the words “Fischer’s Bee Quick” were removed from Petitioner’s original brochure or a copy thereof. The name “Fischer’s” as used in the “Fischer’s Bee-Quick” advertisement fails both of those tests. Contrary

to Petitioner's claim that the Second Circuit would have decided the *Murphy* case differently, the Second Circuit's holding in this case is in harmony with and would not disturb the holding in *Murphy*.

Petitioner cites to the following language from the *Murphy* decision as support for his argument that the Second Circuit incorrectly determined that "Fischer's" is not CMI:

Read in isolation, § 1202 simply establishes a cause of action for the removal of (among other things) the name of the author of a work *when it has been "conveyed in connection with copies of" the work*. The statute imposes no explicit requirement that such information be part of an "automated copyright protection or management system," as the Station Defendants claim. In fact, it 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 (emphasis added). To the extent that the *Murphy* court stated that the statute "appears" to be extremely broad, "with no restrictions on the context in which such information must be used in order to qualify as CMI", that Court was faced with a different analysis than the Second Circuit in this case.

The radio station defendants in *Murphy* were arguing that a claim under § 1202 must be analyzed in conjunction with § 1201, which deals with circumvention of copyright protection systems. The *Murphy* Court merely held

that § 1201 and § 1202 establish independent causes of action which arise from different conduct on the part of defendants, albeit with similar civil remedies and criminal penalties. *The Court even noted that some District Courts have held otherwise, and have placed such a limitation on § 1202 claims. Id.* Fischer conveniently omits the fact that other Courts *have* placed limitations on the scope of § 1202, thus narrowing its definition. The fact that the Third Circuit chose not to place such a limitation on § 1202 does not mean that all limitations in all circumstances are ‘statutorily unmoored’ or ‘unrealistic and exaggerated’. Pet. Brief at 10.

Respondents respectfully submit that the Second Circuit did not place any new limitations or restrictions on the scope of § 1202’s definition of CMI. Different facts required a different result, and the result in the Second Circuit’s Opinion is in harmony with the purpose of the DCMA. Respondents also submit that the Second Circuit correctly determined that the name “Fischer’s” – as used in the longer phrase “Fischer’s Bee-Quick is a safe, gentle, and pleasant way to harvest your honey” – is not CMI because it refers to the *product* and not to the individual, James H. Fischer. As the Court reasonably concluded:

While an author’s name can constitute CMI, not every mention of the name does. Here, “Fischer’s” is part of a product name; it is not a reference to “James H. Fischer” as the owner of a copyrighted text. Nor is the name “[t]he title and other information identifying the work” or “[t]he name of, and other identifying information about, the author of the work” as required by the statute.

Pet. App. at 17A. The Second Circuit thoroughly analyzed the facts before it, as did the District Court, and both Courts reached the same conclusion: “Fischer’s” as used in the “Fischer’s Bee-Quick” product advertisement does not qualify as CMI.

However, if this Court concludes that the Second Circuit and the District Court both erred by imposing an unnecessary limitation or restriction on § 1202, then it can issue a clarification, if the Court deems it necessary.

But even if this Court were to find that the name “Fischer’s” must be viewed in isolation (and not in the context in which the name was actually used in the allegedly infringing ad), and therefore it qualifies as CMI in this case, Petitioner’s claim for removal of CMI would still fail because, as previously noted, the word “Fischer’s” was not “conveyed in connection with copies or displays of a work.” 17 U.S.C § 1202(c).

For all of the foregoing reasons, the *Murphy* case is not analogous to the case at bar, and more importantly, the holding in *Murphy* does not in any way conflict with the Second Circuit’s holding in this case. Therefore, the writ should be denied pursuant to Supreme Court Rule 10.

B. The *EIG* case (5th Circuit)

The other case that Petitioner incorrectly argues is in conflict with the Second Circuit’s decision is the Fifth Circuit case of *Energy Intelligence Grp., Inc. v. Kayne Anderson Capital Advisors, LP*, 948 F.3d 261, 2020 U.S. App. LEXIS 1347 (5th Cir.) (hereinafter, “EIG”).

In the *EIG* case, the plaintiff was a publisher of information and news relevant to the global energy industry. The defendants were boutique investment firms who did a substantial amount of business in the energy sector. One of the defendants' employees subscribed to one of EIG's daily newsletters called *Oil Daily* under a single user license, which was upgraded years later to a license for five users.

Oil Daily was always marked with copyright notices and warnings compliant with the notice requirements of 17 U.S.C. § 401. Each newsletter contained a copyright notice on the front cover and masthead. The *Oil Daily* newsletter was emailed to subscribers as a PDF file with a filename of "DE" followed by the date in YYMMDD format.

However, in spite of the copyright notices, for many years the defendant's employee routinely shared his *Oil Daily* access with other employees and third parties, in violation of his subscription agreements and copyright law. In a deliberate attempt to evade detection by EIG, he had an assistant rename the PDF files "123" and distribute them to other employees and third parties who did not have a valid subscription.

As previously noted, the defendants ultimately purchased a 5-user license. However, they continued to circulate *Oil Daily* to at least 20 individuals on a daily basis. At trial, EIG identified 425 instances where the defendants had renamed the *Oil Daily* PDF file as "123" and distributed it to other employees and third parties.

The question in *EIG* was whether a PDF filename constitutes CMI. The Fifth Circuit held that it does,

but not because it constitutes the “name of the author, copyright owner, or performer”. Rather, this case fell under the category of “other identifying information about” the author, copyright owner, or performer. Thus, it is difficult to see the relevance of the *EIG* decision to this case. The Court in *EIG* did not address whether the last name of the copyright owner or author – when combined with other words in a longer phrase used to advertise a product – constitutes CMI. Therefore, the case is not analogous and does not provide any guidance whatsoever for this Court to rule on the Second Circuit’s determination.

Another significant distinction is that in the *EIG* case, the infringers knew exactly what they were doing, and they even exchanged emails openly *admitting* that they were renaming the PDF filename specifically to evade detection by EIG. Thus, they had the requisite knowledge and intent required under the statute.

Moreover, the *Oil Daily* newsletter that was unlawfully distributed to individuals who did not possess a valid license was *identical* to the newsletter that was emailed to the employees who did have a valid license. In other words, in *EIG* the PDF filename, which was held to constitute CMI, was removed from a copy of the original work which is required by § 1202(c).

In contrast, Brushy’s 2011 advertisement for Natural Honey Harvester bore no resemblance to the original brochure. Therefore, unlike the defendants in the *Murphy* and *EIG* cases, Brushy did not have the requisite intent, and it did not remove any words or phrases from the original or a copy thereof.

The Second Circuit correctly applied a plain reading of the statute, noting the following:

Here, “Fischer’s” is part of a product name; it is not a reference to “James H. Fischer” as the owner of a copyrighted text. Nor is the name “[t]he title and other information identifying the work” or “[t]he name of, and other identifying information about, the author of the work.”

Pet. App. at 17A.

While the *Murphy* and *EIG* cases in the Third and Fifth Circuits are distinguishable from this case on a number of significant grounds, ***neither of those decisions conflicts with the Second Circuit’s holding in this case.*** Contrary to Petitioner’s arguments, the Second Circuit would not have decided *Murphy* or *EIG* any differently.

Supreme Court review is not warranted in this case because the alleged circuit split is illusory. The Second Circuit’s opinion is aligned with other circuits, and it likewise does not split with other circuits. The Second Circuit’s approach to CMI is consistent with the Third and Fifth Circuits.

II. PETITIONER MISCHARACTERIZES THE SECOND CIRCUIT'S HOLDING AND OVERSTATES ITS IMPACT ON THE COPYRIGHT INDUSTRY

A. Petitioner mischaracterizes both the basis and scope of the Second Circuit's opinion.

The Court's finding that "context matters" was not surprising in light of the specific facts of this case, where one word – "Fischer's" – that might otherwise qualify as CMI on its own under different facts not present here, was combined with other non-CMI words that, when taken together, clearly referred to a product: "Fischer's Bee-Quick".

The District Court and the Second Circuit took a reasonable approach to this unique factual scenario that is neither "statutorily unmoored" nor "unrealistic and exaggerated", as Petitioner would have this Court believe. Pet. Brief at 10. Nor did the Court engage in "statutory supplementation" that is a "significant departure from the permissible modes of statutory interpretation." *Id.* In fact, the Court employed a plain reading of § 1202(c) and concluded that "Fischer's Bee-Quick" was not CMI because it was not "conveyed in connection with copies... of a work". 17 U.S.C. § 1202(c).

Petitioner paints a picture of a much broader holding that will affect other rightsholders across the board, regardless of the type of CMI they are trying to protect. That is simply untrue. The scope of the Second Circuit's determination that a person's last name is not CMI when it is combined with other words or phrases to advertise a

product, appears to be limited to factual scenarios that are similar to the facts of this case. Contrary to Petitioner’s contentions, the Second Circuit’s holding would have no bearing on the *Murphy* or *EIG* cases and is in harmony with those cases, and does not create a circuit split.

Petitioner also wrongly accuses the Second Circuit of omitting an important element of a CMI removal claim in its analysis: the *mens rea* requirement. Pet. Brief at 13-14. This is also incorrect. The Second Circuit expressly acknowledged that § 1202 realizes the aim of ensuring integrity in the electronic marketplace by preventing fraud and misinformation, by:

“prohibit[ing] *intentionally* providing false copyright management information... with the *intent* to induce, enable, facilitate, or conceal infringement. It also prohibits the *deliberate* deleting or altering [of] copyright management information.”

Pet. App. at 17A (emphasis added). The Court’s use of the words “intentional” and “deliberate” show that it was well aware that knowledge and intent are required.

Petitioner also fails to note that it was unnecessary for the Court to even analyze whether the Respondents had the requisite knowledge and intent, because the Court had already ruled that the text that was removed was not CMI and was not conveyed in connection with copies of Fischer’s original work. Therefore, it is a mischaracterization for Petitioner to state that the Second Circuit “forgot an element of a claim”. Pet. Brief at 14.

Petitioner also mischaracterizes the basis of the Second Circuit's holding by stating that 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. Brief at 22. This misrepresents what the Court actually said:

"Fischer's Bee Quick" used in material published by a third party like Brushy Mountain, which contains advertisements for dozens of other products from many different suppliers, cannot be reasonably construed as an identifier of the copyright holder of the advertising text. In other words, "Fischer's" in "Fischer's Bee Quick" is not used for 'managing' copyright information with respect to the text at issue.

Pet. App. at 19A. This was not the basis of the Court's holding. It was merely a comment further supporting the Court's legal conclusion, which it had already made earlier in the opinion, that "Fischer's" as used in the product advertisement in question, was not CMI. The words themselves, and the fact that those words advertised a product (and that the name "Fischer's" was not conveyed in connection with copies of the original work) formed the actual basis for the Court's holding. The Second

Circuit did not reach its determination on the CMI issue solely because the word “Fischer’s” was contained in an advertisement in a magazine that contained many other advertisements, as Petitioner would have this Court believe.

Petitioner’s arguments about computer code and other embedded CMI and the potential impact on the copyright industry are a red herring, either because (1) that type of CMI data is clearly understood by any reader or computer-savvy individual who has access to the embedded data and the ability to remove it, to be CMI (or at least some type of legally protected information); or (2) if the data is hidden and nobody can see it, it would be impossible to prove that the individual who removed the CMI data had the requisite knowledge and intent that are required on a CMI removal claim.

The same can be said about the various entities who make up the Amici Curiae. While many of these entities have worthy policy goals which Respondents fully support, Amici’s concerns that the Second Circuit’s holding in this case will “threaten the current infrastructures built upon a clear understanding of what constitutes CMI” and “bleed into its sister circuits that took an alternative approach” are unfounded. Amici Curiae Brief at 5. They mischaracterize the Second Circuit’s holding in the same way that Petitioner does. They both complain that the Second Circuit should have employed the plain text approach to interpreting the statute. But the Court did exactly that.

A plain reading of the statute reveals that in order to qualify as CMI, the name or other identifying information

about an author or copyright owner must be “conveyed in connection with copies of a work.” 17 U.S.C. § 1202(c). As previously noted, the name “Fischer’s” as used in the advertisement for “Fischer’s Bee-Quick” was never conveyed in connection with copies of his original work, and the Court stated as much. For this reason alone, the name “Fischer’s” is not CMI.

Even if the Second Circuit’s holding can be considered a narrowing of the definition of CMI, it is a limited holding that would only apply in limited circumstances, but it is nonetheless a common sense approach to a unique issue. There is no meaningful policy goal achieved by declaring a relatively common last name to be CMI when it is combined with other words such that it clearly refers to a *product*, especially where it has not been conveyed in connection with a copy of the original work. None of the purposes of the DCMA would be realized. Respectfully, it is the Petitioner and the Amici Curiae – not the Second Circuit – who seek to impose a strained interpretation of the definition of CMI upon the industry.

If this Court concludes that the Second Circuit erred when it agreed with the District Court that the name “Fischer’s” is not CMI as used in the phrase “Fischer’s Bee-Quick is a safe, gentle, and pleasant way to harvest your honey”, and that a clarification of the definition of CMI in § 1202(c) is needed, it would be a moral victory for the Petitioner, but it would not change the result.

The CMI removal claim would still be dismissed on the separate ground that no CMI was removed from a copy of Petitioner’s original work. Fischer failed to cite to any evidence in the record to dispute the Respondents’

proof that they never altered or removed any verbiage (much less any verbiage that could constitute CMI) from Fischer's original work. Petitioner has never attempted to dispute this point, and it is beyond challenge now.

Because the CMI removal claim required dismissal on the separate ground that no CMI was removed from Petitioner's original work or a copy thereof, any error by the Second Circuit in affirming the District Court's holding that "Fischer's" did not constitute CMI, would be harmless error.

The Second Circuit's opinion will have a negligible effect on future cases, if any. The Court's holding would apply in limited circumstances, but it is nonetheless a common sense approach to a unique set of facts, utilizing the plain-text approach. There is no cognizable policy goal to be achieved by declaring a relatively common last name, when used in combination with other words as the name of a *product*, to be CMI.

There is no circuit split, nor any other basis under Rule 10 for this Court to hear the case on the merits.

B. This case is not an appropriate vehicle for resolving any perceived circuit conflict.

Petitioner misstates the facts and omits an alternative and over-arching ground supporting the Second Circuit and District Court's decisions. A completely independent ground for denying the CMI removal claim is that the product name "Fischer's Bee-Quick" was not removed from the original work or a copy thereof as required by 17 U.S.C. § 1202(c) and thus does not constitute CMI.

Respondents removed the words “Fischer’s Bee-Quick” from their own advertisement – not Fischer’s ad – that Respondents created from Fischer’s brochure. Petitioner does not even attempt to challenge this undisputed finding of the District Court.

Viewing the stark differences between Fischer’s brochure and Brushy’s advertisement (i.e., different fonts and font sizes, different look and shape), the District Court – adopting the Magistrate Judge’s Report & Recommendation in its entirety – properly concluded that:

[E]ven assuming that Fischer’s brochure and website are “works” covered by the DCMA, Fischer cannot maintain a claim based on removal of CMI from either source. That is because no CMI was removed from his original brochure, his website, or a copy or display of them.

Aside from the four phrases noted above, Brushy’s advertisement bears no resemblance whatsoever to Fischer’s brochure or website. In those cases there where claims of CMI have been held viable, the underlying work has been substantially or entirely reproduced.

* * *

This requirement accords with the DCMA text that requires CMI to be “conveyed in connection with copies ... of a work ... or displays of a work.” 17 U.S.C. § 1202(c). *Fischer’s brochure and website are not, however, copied here. Aside*

from four discrete phrases among the many used on Fischer's brochure and website, there is no similarity between Fischer's original works and Brushy's advertisement. Brushy cannot be said to have removed CMI from these of Fischer's original "works".

(Pet. App. at 63A-64A) [emphasis added].

Therefore, unlike the defendants in the *Murphy* and *EIG* cases, Brushy did not remove any words or phrases from the original brochure or a copy thereof. This finding is fatal to the Petitioner's CMI removal claim. As the District Court noted:

Aside from the four phrases...Brushy's advertisement bears no resemblance whatsoever to Fischer's brochure or website. In those cases where claims of removal of CMI have been held viable, the underlying work has been substantially or entirely reproduced.

See, Pet. App. at 64A (emphasis added). The District Court properly concluded that the work of Brushy at issue "is an advertisement based upon an earlier advertisement which in turn drew upon various materials Fischer sent to Brushy." Pet. App. at 66A.

Not surprisingly, Petitioner's brief omits any mention of this completely separate basis for the dismissal of his CMI removal claim. Because there were two completely independent grounds for the District Court and Second Circuit to dismiss the claim – and Petitioner only challenges one of those grounds – his CMI removal claim fails.

This is significant because it bears on the appropriateness of this case as a vehicle to resolve any perceived circuit conflict. Petitioner would have this Court believe that this is the right case to resolve the alleged circuit conflict because the only issue before the Court would be whether “Fischer’s Bee-Quick” constitutes CMI. However, that is not true.

The lower courts also had to analyze and determine whether the words “Fischer’s Bee-Quick” were removed from Petitioner’s original work or a copy thereof. If this Court grants the Petition, then it will also have to address this other equally important ground for the Second Circuit’s affirmance of the District Court.

For these reasons, this case is not the appropriate vehicle for this Court to resolve any perceived conflict between the circuits. A more appropriate case would be one with a fact pattern that is similar to the *Murphy* and/or *EIG* cases.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Dated: October 1, 2021

Respectfully submitted,

SETH L. HUDSON
NEXSEN PRUET, PLLC
227 West Trade Street,
Suite 1550
Charlotte, NC 28202
(704) 338-5307

DANIEL K. CAHN
Counsel of Record
LAW OFFICES OF
CAHN & CAHN, P.C.
105 Maxess Road, Suite 124
Melville, NY 11747
(631) 752-1600
dcahn@cahnlaw.com

Counsel for Respondents