

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.*

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

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**REPLY BRIEF FOR PETITIONER**

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Gregory Keenan  
DIGITAL JUSTICE  
FOUNDATION  
81 Stewart Street  
Floral Park, NY 11001  
  
James Banker  
DIGITAL JUSTICE  
FOUNDATION  
701 Pennsylvania Ave.  
NW  
Washington, DC 20004

Andrew Grimm  
*Counsel of Record*  
DIGITAL JUSTICE  
FOUNDATION  
15287 Pepperwood Drive  
Omaha, NE 68154  
(531) 210-2381  
andrew@digitaljustice  
foundation.org

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## ARGUMENT

### I. THE CIRCUIT SPLIT IS NOT ILLUSORY.

Respondents argue that the Circuit split identified in the Petition between the Second Circuit and the Third and Fifth Circuits is “illusory.” BIO.20. Yet, despite Respondents’ valiant efforts, they simply cannot harmonize the Second Circuit’s context-matters interpretation of Section 1202(c) with approaches that say just the opposite, *i.e.*, that there are no restrictions on the context of CMI. The Circuits are in conflict over how to interpret Section 1202(c).

The Third Circuit began with the text: “We begin, *as we must*, with the *text* of § 1202.” Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295, 302 (3d Cir. 2011) (emphasis added). It regularly spoke of “ordinary meaning” and “plain language” and enforcing statutory text “according to its terms.” Id.

The Fifth Circuit too made clear that it was analyzing what the DMCA required “*textually*[.]” Energy Intelligence Grp., Inc. v. Kayne Anderson Capital Advisors, L.P., 948 F.3d 261, 276 (5th Cir. 2020) (hereinafter “EIG”) (emphasis added). Applying a plain-text approach, the Fifth Circuit made short work of a definitional dispute about CMI because “CMI is defined broadly.” Id. at 277.

Although Respondents insist that the Second Circuit employed a “plain text approach” below, BIO.24, phrases like “plain text” never appear in the Second Circuit’s opinion. Nor is there any similar discussion of the need to apply the ordinary meaning of the statute as written.

In fact, the word “text” only appears in the Second Circuit’s opinion when referring to the words in Petitioner’s *advertisement*—not the words in the *statute*, *i.e.*, the statutory text. In this sense, the Second Circuit does more than fail to apply a plain-text approach: it fails even to pay lip service to one.

Then, the Second Circuit strayed from the text, subtly but critically shifting from §1202(c)’s definition of what CMI “means” to an assertion of what “can constitute” CMI. Thus, contrary to what Respondents argue, the Second Circuit does not apply a plain-text approach. Instead, it gives a judicial supplementation in conflict with the Third and Fifth Circuits’ plain-meaning approach.

The conflict is apparent in the language of the opinions. When one Circuit emphatically concludes that “*context matters*” and another Circuit says that there are “*no restrictions on the context*” in which such information must be used in order to qualify as CMI—that’s a conflict.

Respondents resist acknowledging the Circuit split by observing that the Third Circuit was distinguishing Section 1202(c) from Section 1201. BIO.6.

True, the Third Circuit in Murphy was refusing to read a separate statutory section, Section 1201, as a limitation on Section 1202(c)'s definition. The Third Circuit's rationale for this refusal to limit the definition of CMI was textual: "If, in fact, § 1201 and § 1202 were meant to have such interrelated interpretations, it is peculiar that there is no explicit indication of this in the *text of either provision*." Murphy, 650 F.3d at 303 (emphasis added).

In this sense, the problem with the Second Circuit's opinion is a variation on a theme. The Third Circuit refused to limit CMI to a particular context, *i.e.*, "automated systems[.]" because the text did not support that contextual limitation. Id. at 301. The Fifth Circuit likewise refused to ban CMI from a particular context, *i.e.*, "a PDF's file name[.]" EIG, 948 F.3d at 277. Again, the text did not support such a contextual limitation: "[n]othing in § 1202 indicates that a digital file name cannot be CMI." Id.

The Second Circuit *did* forbid CMI from a particular context, *i.e.*, from being "part of a product name[.]" Pet.App.17A. The Second Circuit did so because it took an entirely different view of Section 1202(c), *i.e.*, that "context matters." Pet.App.19A.

The Third Circuit would question where *in Section 1202(c)* this context-matters requirement came from. And, the Fifth Circuit would question what “*in § 1202* indicates that a [product] name cannot be CMI.” After all, there is nothing mutually exclusive between any of the categories of CMI and a filename or between any of the categories of CMI and a product name.<sup>1</sup>

One Circuit says context matters. Another says context doesn’t. One Circuit reads in a product-name limitation. Another found no file-name limitation and its rationale for doing so would readily defeat any product-name limitation.

The conflict is clear.

Respondents attempt to distinguish Murphy and EIG, however, by suggesting that they would have turned out the same had the Second Circuit’s approach been applied there. Neither argument holds water.

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<sup>1</sup> Petitioner’s product name is Bee-Quick®, as registered with the U.S.P.T.O. “Fischer’s” is technically *adjacent* to the product name in the advertisement. This distinction, however, would not matter under either approach. The Second Circuit’s context-matters approach would still view the proximity of Petitioner’s name to the product name as removing any apparent copyright significance “contextually.” By contrast, even if Petitioner’s name were part of the product name, the Third and Fifth Circuit’s view readily permits CMI to be part of a product name, when the information meets the requirements of §1202(c).

Respondents point out that the works in EIG were “always marked with copyright notices and warnings compliant with the notice requirements of 17 U.S.C. § 401.” EIG, 948 F.3d at 266. That much is true but it played no part in the Fifth Circuit’s analysis of file names. Id. at 276-277.

Furthermore, Respondents would differentiate the CMI at issue in Murphy—the words “Photo: Peter Murphy” placed near a photograph taken by Mr. Murphy—by arguing that its copyright significance there was “not ambiguous[.]” BIO.7.

Yet, Respondents oversimplify the issue. Yes, of course, “Photo: Peter Murphy” indicates that Peter Murphy took the photo such language is adjacent to. It’s an indication of origin of the photograph—just as the word “Fischer’s” in “Fischer’s Bee-Quick” is an indication of the origin of Bee-Quick.

Yet an indication of origin of a photograph has no inherent copyright significance. Photographers who take photographs as an employee within the scope of their employment are neither the copyright author nor the copyright owner inherently. §101 (defining work made for hire), §201(b) (determining authorship for works made for hire). Thus, there is no unambiguous or apparent copyright significance to the phrase “Photo: Peter Murphy”—contrary to what Respondents simply assume.

Indeed, the very complexities of copyright authorship, ownership, *etc.*, explains why the Second Circuit's context-matters requirement is unworkable. Perhaps that's why the Third Circuit and the Fifth Circuit rightfully did not choose or employ such an approach. Sticking to the plain text strictly tethers the CMI protections to information that in fact *has* copyright significance, not merely information that might or might not *appear* to have such significance at first glance.

## II. THE SECOND CIRCUIT ERRED.

Although Respondents certainly agree with the Second Circuit’s approach, their Brief says little to justify such an approach. For example, Respondents think that the word “Fischer’s” cannot be CMI unless it “**implies** that Fischer is the author [...] or the copyright owner.” BIO.8 (emphasis added). In other words, Respondents too think that information must be apparently copyright-related to qualify as CMI.

Yet, Respondents never tether such a requirement to the text of §1202. Nor did the Second Circuit. None point to anything in §1202 that would require CMI to not only meet its definition in §1202(c), but also be apparently copyright-related on its face when viewed in context. Section 1202(c) simply does not have such a requirement.

By contrast, Sections 401 and 402 of the Copyright Act *do* include that requirement, showing that Congress knew how to include such a requirement and chose *not* to include it in Section 1202(c). That’s a fundamental flaw in the Second Circuit’s approach: “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Nken v. Holder*, 556 U.S. 418, 430 (2009).

Both §§401 and 402 pertain to copyright notice. Section 401(b) sets out the “three elements” of notice—the © symbol, the year of first publication, and the name of the copyright owner. §401(b). Section 402(b) mirrors these same elements, except sound recordings use the ℗ symbol. §402(b).

Notably, meeting the three elements isn’t enough to constitute a copyright notice because §§401 and 402 also have requirements pertaining to the position of copyright notice, *i.e.*, where the notice is placed in context to the work: “The notice shall be affixed [...] in such manner and location as to give reasonable notice of the claim of copyright.” §§401(c), 402(c) (emphasis added).

In a nutshell, copyright notice is what the Second Circuit is essentially requiring via its context-matters approach to CMI. It is basically saying that CMI needs to give “reasonable notice” of the claim of copyright.

Admittedly, a last name—“Fischer’s”—next to a product name—Bee-Quick—doesn’t give reasonable notice of a copyright claim. It doesn’t need to in order to be CMI. Section 1202(c)’s CMI definition has no such requirement of reasonable notice. Rather, it is §§401 and 402 that do.

By including the requirement of reasonable notice of the claim of copyright in Sections 401(c) and 402(c) and excluding it from Section 1202(c), Congress gave a clear statutory indication: “Considering that the DMCA was passed expressly as an adjunct to preexisting copyright law, had Congress intended CMI to be equivalent to a notice of copyright, it could and would have said so.” Goldstein v. Metro. Reg’l Info. Sys., 2016 U.S. Dist. LEXIS 106735, at \*25 (D. Md. Aug. 11, 2016).<sup>2</sup> Congress didn’t.

Thus, the Second Circuit and Respondents err by imposing requirements found only in §§401 and 402 upon §1202(c). For example, for copyright notice, courts have discussed whether a purported copyright notice sufficiently “implies that the copyright holder claims protection[.]” Broderbund Software, Inc. v. Unison World, Inc., 648 F. Supp. 1127, 1135 (N.D. Cal. 1986). A copyright notice often had to be “legible to the naked eye, because a notice that is distinguishable only by use of a magnifying glass or other special equipment does not truly give ‘reasonable notice of the claim of copyright[.]’” 2 NIMMER ON COPYRIGHT § 7.11[B] (2021).

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<sup>2</sup> Copyright notice is optional. §§401(a) (“may”), 402(a); see also Metzke v. May Dep’t Stores Co., 878 F. Supp. 756, 759 (W.D. Pa. 1995) (“In 1988, the United States Congress [...] eliminated the notice requirement for all works copyrighted on or after March 1, 1989.”).

Such requirements—implication of copyright claims, legibility to ordinary users—are akin to what the Second Circuit requires in its context-matters approach. That’s a fine interpretation of §§401 and 402, but it’s an untenable interpretation of §1202.

Respondents make two other points to argue that the name “Fischer’s” is not CMI. First, Respondents suggest that the advertisement context of a product name changes the analysis. E.g., BIO.8 (“*product* being advertised” (emphasis in original)).

Yet, where the Copyright Act wants to treat advertisements differently, it does so expressly. E.g., 17 U.S.C. §§ 101 (defining “work of visual art” to exclude “any merchandising item or advertising”), 111(c)(3) (permitting certain removals of “commercial advertisements”); cf. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (Holmes, J.) (A “picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement.”).

Second, Respondents suggest a full name is necessary. BIO.7 (“full name”). Again, §§401 and 402 refute this suggestion. Section 1202(c) expressly states that the “information set forth in a notice of copyright” is CMI. §1202(c)(3). Thus, meeting the requirements for a copyright notice is *sufficient* to be CMI.

As such, it is not necessary for CMI to use a full name because Sections 401 or 402 permit *either* “the name” *or* “an abbreviation by which the name can be recognized” *or* “a generally known alternative designation of the owner.” §401(b)(3). Copyright notice plainly doesn’t require a full name.

In sum, §1202(c) does not require a full name because it incorporates by reference to §§401-402’s copyright notice examples of CMI that don’t need full names.

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The Second Circuit’s approach would force *all* CMI to function as copyright notice, even though the statute does not require that all CMI give copyright notice. Thus, the Second Circuit erred.

### III. THE ISSUES HERE ARE SIGNIFICANT.

Respondents characterize this definitional dispute over CMI as significant only for copyright holders. BIO.11 (“martyr for copyright owners”). That’s an incorrect characterization. The public has a stake and meaningful interest in robust CMI protections as well.

Yet, even if the significance of CMI were limited to copyright holders, *amici* handily demonstrate that a broad and diverse group of copyright holders have a significant stake in the robust protection of CMI. Photographers and other individual creators need CMI protections to earn a livelihood in an Internet era. *Amici.Br.18-23*. Leading entertainment companies base innovative business models on CMI protections. *Amici.Br.23-27*.

Furthermore, groups well beyond those we traditionally think of as copyright holders have reliance interests related to CMI as well. For Indigenous communities, CMI protections help reclaim and reanimate culture and heritage. *Amici.Br.10-18*. These interests alone make the issue significant—and significant to a broader swath of American society than one might initially think. Such interests are threatened by the Second Circuit’s context-matters approach.

The Second Circuit's requirement that the copyright relevance of any would-be CMI be immediately apparent in context would threaten the innovation and development of rights-identifying information. It would stymie the very purpose of Section 1202 to permit machine-readable rights information.

Indeed, the Second Circuit's context-matters approach is ill-defined. By going beyond the statutory framework without clear limiting principles or heuristics to guide where and how context matters, the Second Circuit's approach is hard to predict. It would be hard to know *ex ante*—without the benefit of years of litigation and appeals—whether certain identifying information is sufficiently copyright-related on its face.

The Second Circuit's approach would both trammel innovation and burden courts. Any new use of CMI would need to be litigation tested or to otherwise bear the risk that years of investments and effort are undone by an unpredictable “context matters” result. In this sense, the Second Circuit's atextual approach is counterproductive: it encourages extensive litigation or unnecessary risk bearing without clear answers or limits. Such line-drawing and administrability problems were why the once-mandatory copyright notice provisions of Sections 401 and 402 used to cause judicial headaches.

Back when copyright notice was mandatory, litigants intensively disputed whether particular copyright notice “g[a]ve reasonable notice of the claim of copyright.” §§ 401(c), 402(c). One purpose of Section 1202 was to avoid this administrability morass.

And, although the negative consequences of the Second Circuit’s CMI rule might be felt most acutely by copyright holders, such effects are not confined to copyright holders: “Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible.” Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994). Robust legal protection of CMI, therefore, serves a vitally important public interest. Robust CMI protection facilitates the management of copyrights so that more members of the public can access, use, and enjoy creative works.

Respondents boldly conclude that there would be “no meaningful policy goal” furthered by granting the Petition. BIO.25. To the contrary, Congress’ policy goal was discussed at length in the Petition. Congress wanted to provide robust legal protections to engender continued growth of licensing markets that supports millions of licenses, to support technological innovation in licensing markets, and to aspire toward a global online marketplace for copyrighted works.

The Second Circuit's approach endangers this progress. Petition at 2-9.

#### **IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE CIRCUIT SPLIT.**

The facts of this case present a perfect foil between the competing approaches to interpreting §1202(c). Admittedly, almost no one looking at Fischer's advertisement would intuit from that context alone that "Fischer's" refers to the copyright owner and copyright author. Nonetheless, Fischer's name *is* in fact the name of the copyright owner and the name of the copyright author. Thus, this case is a good vehicle for resolving the Circuit split over whether CMI must be apparently copyright-related in context.

Respondents, however, raise what they view as several alternative grounds upon which the Second Circuit might have ruled. E.g., BIO.25 (raising purported "separate ground"). Respondents even think that Petitioner has "effectively conceded" an element of the claim. BIO.11. Yet Petitioner has not conceded any elements of his claim and the Second Circuit was quite clear about the grounds upon which it decided this case.

The Second Circuit's opinion stated Fischer's position that Respondents removed the CMI: "Fischer next argues that the Defendants-Appellees violated the DMCA when they removed 'Fischer's Bee-Quick' from the advertising copy on the Brushy Mountain website." Pet.App.14A. Petitioner never conceded the removal element.

Furthermore, Respondents' alternative grounds are not at issue here. The Second Circuit was clear that "[t]his appeal focuses [...] *specifically on the definition of CMI in § 1202(c).*" Pet.App.15A (emphasis added). The dispute here is about "what constitutes CMI." Pet.App.17A. Respondents may very well believe that they could prevail on separate elements of a §1202 claim, but Petitioner has not conceded any elements and the Second Circuit did not rule on them.

Respondents can preserve those separate arguments about separate issues and press them upon remand if need be. See, e.g., *Env'tl Def. v. Duke Energy Corp.*, 549 U.S. 561, 581–82 (2007) (explaining that respondent's alternate argument was not addressed below, and, to the extent it is not procedurally foreclosed, respondent "may press it on remand"); *Whitman v. Dep't of Transp.*, 547 U.S. 512, 515 (2006) ("The various other issues raised before this Court, but not decided below, may also be addressed on remand," including multiple issues that could bar petitioner from ultimately prevailing.).

**CONCLUSION**

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

Respectfully submitted,

Gregory Keenan  
DIGITAL JUSTICE  
FOUNDATION  
81 Stewart Street  
Floral Park, NY 11001

James Banker  
DIGITAL JUSTICE  
FOUNDATION  
701 Pennsylvania Ave.  
NW  
Washington, DC 20004

Andrew Grimm  
*Counsel of Record*  
DIGITAL JUSTICE  
FOUNDATION  
15287 Pepperwood Drive  
Omaha, NE 68154  
(531) 210-2381  
andrew@digitaljustice  
foundation.org

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