

In The
Supreme Court of the United States

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WHITNEY HARPER,

Petitioner,

vs.

MAVERICK RECORDING COMPANY; UMG
RECORDINGS, INC.; ARISTA RECORDS LLC;
WARNER BROS. RECORDS INC.; SONY
BMG MUSIC ENTERTAINMENT,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

—◆—
**RESPONSE IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

—◆—

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QUESTION PRESENTED

Whether a defendant infringer of copyrights in sound recordings should be precluded from seeking a reduction in statutory damages under an “innocent infringement” defense where there is no dispute that the elements of 17 U.S.C. § 402(d) have been met, i.e., there is no dispute that the plaintiffs placed proper notices of copyright on the published copies of the sound recordings and that the defendant had access to such copies.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Respondents state as follows:

Respondent Maverick Recording Company is a joint venture between SR/MDM Venture Inc. and Maverick Partner Inc. The ultimate parent corporation of both SR/MDM Venture Inc. and Maverick Partner Inc. is Warner Music Group Corp., which is publicly traded in the United States.

Respondent UMG Recordings, Inc.'s ultimate parent corporation is Vivendi S.A., a publicly held French company.

Respondent Arista Records LLC is a Delaware limited liability company owned by Arista Music (formerly BMG Music), a New York general partnership, which is not publicly traded.

Respondent Warner Bros. Records Inc.'s ultimate parent corporation is Warner Music Group Corp., which is publicly traded in the United States.

Respondent Sony BMG Music Entertainment, n/k/a Sony Music Entertainment, is a Delaware general partnership owned by Sony Music Holdings, Inc. (98%) and USCO Sub LLC (2%), neither of which is publicly traded. Its ultimate parent corporation is Sony Corporation (Japan) which is publicly traded in the United States.

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This case involves a straightforward application of 17 U.S.C. § 402(d). Petitioner has never disputed that Respondents placed proper copyright notices on the published sound recordings at issue and that Petitioner had access to these published works. Therefore, as the Fifth Circuit correctly determined, section 402(d) bars Petitioner from asserting a so-called “innocent infringement” defense as a matter of law.

Petitioner’s primary argument for *certiorari* rests on the false premise that the circuit courts are divided on the legal standard for applying section 402(d). There is, however, no circuit split. The Second Circuit authority upon which Petitioner relies never even considered the application of section 402(d). In addition to the absence of any circuit split, this case provides an ill-suited vehicle for considering the legal standard for applying section 402(d). Petitioner’s argument that a lack of copyright notice on the specific digital recordings she infringed should defeat application of section 402(d) does not square with the plain language of the statute, ignores Petitioner’s admission that she had access to Respondents’ published works carrying the proper copyright notices, and was never raised in the lower courts. For all of these reasons, the Court should deny the Petition.



STATEMENT OF THE CASE

Respondents submit the following limited but critical correction and supplementation to Petitioner's Statement of the Case.

I. Respondents' Litigation Enforcement Program

Respondents are record companies that face the systemic problem of massive digital piracy of their copyrighted works over the Internet. Individuals, acting without authorization, have downloaded (copied) and uploaded (distributed) billions of perfect digital copies of copyrighted sound recordings over peer-to-peer ("P2P") networks. This Court has characterized this problem as "infringement on a gigantic scale," see *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940 (2005), and it has wreaked financial havoc in the recording industry. In 2004, the Department of Justice concluded that online media distribution systems are "one of the greatest emerging threats to intellectual property ownership." See Report of the Department of Justice's Task Force on Intellectual Property, *available at* <http://www.cybercrime.gov/IPTaskForceReport.pdf> at 39 (Oct. 2004). It estimated that "millions of users access P2P networks" and "the vast majority" of those users "illegally distribute copyrighted materials through the networks." *Id.*; see also *Grokster*, 545 U.S. at 923 (users employ P2P software "primarily to download copyrighted files").

Record companies, motion picture producers, and others similarly affected by the massive scope of the online infringement problem began to address the problem not by pursuing individual infringers, but by pursuing secondary liability litigation against the proprietors of the P2P networks. Through this litigation, the record companies established in the specific context of the unauthorized online “sharing” of copyrighted works that (1) when individuals use a system or network directly to infringe copyrighted material, the proprietors of that system can be secondarily liable for copyright infringement, *Grokster*, 545 U.S. at 940, and (2) that, in all cases, the individuals who “swap” music files over the Internet ultimately remain “the direct infringers.” *In re Aimster Copyright Litig.*, 334 F.3d 643, 654-55 (7th Cir. 2003); *see also* *BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005) (those who post or download music files are “primary infringers”), *cert. denied*, 547 U.S. 1130 (2006); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022-24 (9th Cir. 2001); *Arista Records LLC v. Lime Group LLC*, No. 06 CV 5936 (KMW), 2010 WL 2291485, at *14 (S.D.N.Y. May 11, 2010); *Columbia Pictures Indus., Inc. v. Fung*, No. CV 06-5578 (JCx), 2009 U.S. Dist. LEXIS 122661, at *26-29 (C.D. Cal. Dec. 21, 2009).

The successful secondary liability litigation against the proprietors of P2P networks did not, in and of itself, stop those networks from being used by individuals engaged in the unauthorized copying of sound recordings. As the *Aimster* court noted,

individuals remained “disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement.” 334 F.3d at 645. Accordingly, in 2002, the record companies decided, reluctantly, to commence a more broadly based enforcement program, designed to identify and pursue the direct infringers pirating a large number of their works.

The relevant elements of the enforcement program are not disputed. The record companies engaged a firm, MediaSentry, to gather evidence of infringement associated with users identified by their Internet Protocol (“IP”) addresses. To perform this task, MediaSentry searched P2P networks for individuals distributing infringing files for download and gathered evidence concerning that infringement, including the IP address of each individual. The record companies then commenced “Doe” actions against the individuals responsible for the IP addresses and used the discovery process to obtain records from Internet Service Providers (“ISPs”) identifying these individuals. *See Atlantic Recording Corp. v. Heslep*, No. 4:06-cv-132-Y, 2007 WL 1435395 at *1-3 (N.D. Tex., May 16, 2007) (explaining MediaSentry’s actions and the subsequent Doe proceedings, emphasizing that “MediaSentry uses the very program employed by the alleged infringing user.”)

It is also clear that nearly two years ago the record companies began transitioning away from wide-scale infringement lawsuits against individuals in favor of other enforcement mechanisms. *See*

Sarah McBride and Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1, available at <http://online.wsj.com/article/SB122966038836021137.html>. Petitioner's case is one of a very small handful of remaining cases (about five) working their way through the federal courts.

II. Petitioner's Infringement

In June 2004, MediaSentry identified an individual using the iMesh P2P file sharing program under the username "whiterney@fileshare" to distribute 544 digital audio files—including many of Respondents' copyrighted sound recordings—to millions of other users on the file sharing network. App. 17a, 34a-35a. This person was using iMesh to download and distribute well-known recordings by famous artists, including "Die Another Day" by Madonna, "White Flag" by Dido, "Dreams" by Fleetwood Mac, and "Every Breath You Take" by The Police. App. 30a-32a. By tracing the user's IP address and subpoenaing the ISP, Respondents ultimately identified Petitioner as the individual responsible for the infringement. App. 2a, 17a. Among other evidence, Petitioner provided an affidavit stating that she recognized "some of the songs . . . as music [she] listened to and may have downloaded to the computer." App. 6a. At the time she became a defendant in the case, Petitioner did not

assert an innocent infringement defense under section 504(c)(2).

In April 2008, during the course of discovery, Respondents conducted a forensic examination of Petitioner's computer. App. 3a. Among other evidence, the examination revealed that the Windows operating system had been reinstalled on the computer in March 2005. *Id.* Notwithstanding the reinstallation of Windows, the forensic examination revealed significant and compelling evidence that both corroborated Respondents' findings from the June 2004 investigation by MediaSentry and demonstrated additional, continuing infringement by Petitioner. *Id.* First, the forensic examination showed that the iMesh file sharing software was installed on Petitioner's computer and was accessed through the username "whiterney," a username created by Petitioner. App. 18a, 35a. Second, the forensic examination revealed that two more file sharing programs, KaZaA and LimeWire, had also been installed and used on Petitioner's computer. App. 18a, 36a. KaZaA was installed before March 2005, and LimeWire was installed in July 2005. *Id.*

Between July 2005 and the date of the forensic examination in April 2008, hundreds of additional copyrighted sound recordings were downloaded and stored in three separate LimeWire shared folders on the computer, all under the user profile "whitney," Petitioner's first name. App. 3a, 36a. These folders contained well-known recordings by famous artists such as "Still In Love With You" by Brooks & Dunn,

“American Idiot” by Green Day, “Cater 2 U” by Destiny’s Child, and “We Belong Together” by Mariah Carey. *See* App. 32a-34a. All three shared folders were configured to distribute these hundreds of sound recordings to other LimeWire users. App. 36a, 42a.

Petitioner does not dispute that she infringed Respondents’ copyrights in the 37 sound recordings at issue in this case. Pet. 3. In fact, the record demonstrates that Petitioner was a long-term, massive infringer of Respondents’ copyrights. She used multiple P2P file sharing programs, including iMesh, KaZaA, and LimeWire, to download and distribute Respondents’ works for years, and she created three separate shared folders under her user profile “whitney” to store hundreds of sound recordings that she had downloaded illegally. Petitioner also possessed extensive knowledge of P2P file sharing programs before she was found infringing Respondents’ copyrights in 2004. Specifically, Petitioner admitted that she knew about the widely publicized Napster P2P program in the late 1990s, understood Napster to be a website for listening to music over the Internet, and understood that Napster was shut down. After learning about Napster being shut down, Petitioner heard about a similar program, KaZaA, and then installed and used KaZaA on her computer.

Based on this evidence, Respondents moved for summary judgment and sought minimum statutory damages of \$750 per sound recording under section 504(c)(1) of the Copyright Act. Petitioner opposed summary judgment on the ground that she did not

intentionally violate any copyright laws. Specifically, Petitioner claimed she “had no knowledge or understanding of file trading, online distribution networks or copyright infringement” and “no reason to doubt” that her actions were “100% free and 100% legal.” App. 36a, 43a.

The district court granted Respondents’ motion as to liability, finding that Petitioner had infringed Respondents’ copyrights by downloading and distributing Respondents’ sound recordings over the Internet. App. 39a-42a. On the issue of damages, the district court found that Respondents had placed “proper notice” on each of the published copies of the works at issue in accordance with section 402(d) and, critically, that Petitioner had access to these properly marked works because “she owned” copies of the CDs. App. 36a, 44a. Nonetheless, the district court found that “a question remain[ed] as to whether [Petitioner] knew the warnings on compact discs were applicable in this KaZaA setting.” App. 44a. On that basis, the district court denied Respondents’ motion as to the amount of damages recoverable against Petitioner. App. 45a.

Respondents sought reconsideration of this ruling, arguing that the copyright notices on the published sound recordings to which Petitioner had access barred Petitioner from asserting an innocent infringement defense as a matter of law. App. 24a. The district court denied Respondents’ motion, ruling that Petitioner’s assertion that she “believed using KaZaA and similar products to be akin to listening to

radio over the internet” was sufficient to create an issue of fact “as to whether [Petitioner] was an innocent infringer.” App. 25a.

Respondents appealed this ruling to the Fifth Circuit. On appeal, Petitioner again pressed the same arguments she had made in the district court, i.e., that she “was too young and naive to understand that the copyrights on published music applied to downloaded music.” App. 12a. After oral argument before Judges Davis, Clement, and Elrod, the panel unanimously rejected this argument and reversed the district court. In an opinion written by Judge Clement, the panel held that Petitioner’s “reliance on her own understanding of copyright law—or lack thereof—is irrelevant in the context of § 402(d).” App. 12a. Because Respondents had placed proper notices of copyright on the copies of the published works to which Petitioner concededly had access, the panel ruled that the Copyright Act “forecloses, as a matter of law, [Petitioner’s] innocent infringer defense.” App. 13a.



REASONS FOR DENYING THE PETITION

Petitioner has presented no “compelling reasons” for this Court to grant her Petition. *See* Sup. Ct. R. 10. The application of the innocent infringement defense is settled law at the circuit level, where two circuit courts have resolved the issue according to the express statutory language of the Copyright Act.

There is no circuit authority to the contrary and no authority anywhere that supports Petitioner's arguments. The Second Circuit case Petitioner points to as the other side of the circuit split did not even involve section 402(d) or sound recordings. Furthermore, the specific factual record and procedural context of this case make it an ill-suited vehicle for the Court to consider Petitioner's arguments concerning the application of section 402(d). There is no dispute that every element of section 402(d) is satisfied. Finally, this case presents no issue of national importance that would warrant this Court's review.

I. The Court Should Deny The Petition Because It Presents No Issues That Warrant The Court's Review.

Petitioner's primary argument for certiorari is based on the demonstrably false premise that the circuit courts are divided on the legal standard for applying section 402(d) to bar an innocent infringement defense in a copyright case. *See* Pet. 13. As discussed in detail below, there is no circuit split. Both the Seventh Circuit and the Fifth Circuit, the only two circuits that have addressed the application of section 402(d) in this context, have reached the conclusion that the plain text of section 402(d) requires that proper copyright notice on the published works to which an infringer had access bars the infringer from asserting an innocent infringement defense. The Second Circuit authority upon which Petitioner relies neither raised nor considered the

application of section 402(d). For these reasons, the Petition does not present issues meriting this Court's review.

A. The innocent infringement defense under the Copyright Act.

Statutory damages for non-willful infringement range from a minimum of \$750 per work to a maximum of \$30,000 per work. 17 U.S.C. § 504(c)(1) (included in App. 49a-52a). When a copyright holder elects statutory damages, as Respondents did in the district court, it may not receive less than the minimum statutory damages amount specified in the Copyright Act for each infringed work, because courts are “constrained . . . by the specified maxima and minima.” *Columbia Pictures Indus. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1194 (9th Cir. 2001).

Subject to the limitations set forth in section 402(d), a court or jury has discretion to reduce an award of statutory damages to a sum not less than \$200 where an infringer establishes that she “was not aware and had no reason to believe that [her] acts constituted an infringement of copyright.” 17 U.S.C. § 504(c)(2) (included in App. 50a-51a). Section 402(d), however, expressly limits the application of section 504(c)(2) and precludes a defendant from asserting an innocent infringement defense where a proper notice of copyright has been placed on the published work and where the defendant “had access” to the

published work. 17 U.S.C. § 402(d) (included in App. 49a). Specifically, section 402(d) provides in relevant part:

If a notice of copyright in the form and position specified by this section appears on the published phonorecord or phonorecords to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages.

Id. As Professor Nimmer explains in discussing the interaction between sections 402(d) and 504(c)(2):

[W]hen a valid notice appears on published copies or phonorecords to which the defendant in an infringement suit had access, then no weight is given to that defendant's interposition of an innocent infringement defense in mitigation of . . . statutory damages.

4-14 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.04[B][2][a] (Matthew Bender, Rev. Ed. 2010). Thus, a proper copyright notice “will absolutely defeat a defense . . . based on allegedly innocent infringement.” 2-7 *Nimmer on Copyright* § 7.02[C][3].

Under the statute's plain language, therefore, the standard for application of section 402(d) is whether the infringer “had access” to the “published” copies of phonorecords or compact discs bearing the proper copyright notice. 17 U.S.C. § 402(d). If she did, then

she is precluded from asserting an innocent infringement defense in mitigation of statutory damages as a matter of law. *Id.* Here, Petitioner concedes such access. *See infra* at section III.A.

B. Courts of Appeal are in agreement concerning the application of section 402(d) in the context of online infringement.

The Seventh Circuit considered this very issue in an online infringement case similar to this one, where the defendant had used the KaZaA P2P program to download copyrighted sound recordings illegally. *See Gonzalez*, 430 F.3d at 888. The district court granted summary judgment to the copyright holders and awarded minimum statutory damages on 30 infringed copyrighted works. *Id.* at 889. The defendant argued for a reduction in statutory damages under section 504(c)(2) based on her claim that she did not know the plaintiffs' copyright notices applied to KaZaA. *Id.* at 891-92. The Seventh Circuit rejected this argument, holding that, because the copyright holders complied with the notice provisions of section 402(d), and because the infringer had access to the copyright notices on the published works, the infringer was precluded from asserting an innocent infringement defense. *Id.* at 892. Joined by Judges Evans and Williams in a unanimous decision, Judge Easterbrook observed:

It is undisputed that BMG Music gave copyright notice as required—"on the surface of

the phonorecord, or on the phonorecord label or container” (§ 402(c)). It is likewise undisputed that Gonzalez had “access” to records and compact disks bearing the proper notice. She downloaded data rather than discs, and the data lacked copyright notices, *but the statutory question is whether “access” to legitimate works was available rather than whether infringers earlier in the chain attached copyright notices to the pirated works.* Gonzalez readily could have learned, had she inquired, that the music was under copyright.

Id. at 892 (emphasis added). This Court denied a petition for writ of certiorari in the *Gonzalez* case. *See Gonzalez v. BMG Music*, 547 U.S. 1130 (2006).

The Fifth Circuit reached the same conclusion in this case, on a record that made the “access” question even clearer. Petitioner argued that statutory damages should be reduced under section 504(c)(2) because “she was too young and naive to understand that the copyrights on published music applied to downloaded music.” App. 12a. The panel unanimously rejected this argument and held that Petitioner’s “reliance on her own understanding of copyright law—or lack thereof—is irrelevant in the context of § 402(d).” *Id.* After acknowledging the undisputed evidence that Respondents had placed proper notice on each of the published works at issue, and that Petitioner had access to these works, App. 11a-12a, the Fifth Circuit held that “§ 402(d) forecloses, as a matter of law, [Petitioner’s] innocent infringer defense,” App. 13a.

C. Petitioner’s arguments of a circuit split fail.

In an attempt to conjure a circuit split, Petitioner argues that the Second Circuit’s decision in *D.C. Comics, Inc. v. Mini Gift Shop*, 912 F.2d 29 (2d Cir. 1990), stands for the proposition that a proper copyright notice “defeats a claim of innocent infringement only if it appears on the copy of the copyrighted work used for the infringement.” Pet. 8; *see also* Pet. 13 (claiming a “conflict among the circuits as to whether a copyright notice must appear on the copy that the infringer used to infringe in order to foreclose an argument that the infringement was innocent”). Petitioner’s argument is demonstrably false. *D.C. Comics* never even considered the application of section 402(d) to bar a claim of innocent infringement and did not even involve sound recordings to which section 402(d) is applicable. Rather, *D.C. Comics* merely addressed whether the defendants in that case had carried their burden of proving innocent infringement under section 504(c)(2). For those defendants “who failed to appear” and put on evidence in the case, the court held that they had failed to carry their burden of proof and, therefore, that judgment should enter against them for the then statutory minimum of \$500 per infringed work. *Id.* at 35. For those defendants who did appear, the court held that evidence of a lack of copyright notice on the infringing goods could support a finding under section 504(c)(2) that the defendants’ infringement was innocent. *Id.* Based on this and other evidence, the Second Circuit could not

“say that the district court abused its discretion” in reducing the damages to \$200 per work for these defendants and affirmed this part of the district court’s decision. *Id.* at 36.

Both the Fifth and Seventh Circuits agree that, under section 402(d), access to the published works carrying proper notices of copyrights precludes an innocent infringement defense, regardless of whether the defendant used the published works to infringe or some other copies. *See* App. 11a (holding that the innocent infringement defense was unavailable to Petitioner as a matter of law); *Gonzalez*, 430 F.3d at 892 (barring the defendant from asserting an innocent infringement defense because she “had ‘access’ to records and compact disks bearing the proper notice,” even though she had “downloaded data rather than discs”). *D.C. Comics* does not even address section 402(d) and cannot be said to implicate a split on the issue.

D.C. Comics merely considered whether the defendants in the case had met their evidentiary burden of proving innocent infringement under section 504(c)(2). That factual question does not arise if the legal rule of section 402(d) applies, and the criteria that determine the question of factual innocence under section 504(c)(2) are different from the requirements that Congress specified in section 402(d). The issue in *D.C. Comics* was, thus, entirely distinct. The application of section 402(d), including whether and under what circumstances section 402(d) will foreclose an innocent infringement defense, was not

raised in the case and was not before the court. Accordingly, *D.C. Comics* cannot in any way be read to create a split of authority on the question of the application of section 402(d) as Petitioner would have this Court believe.¹

II. Petitioner’s Interpretation Of Section 402(d) Contradicts The Statute’s Clear Language And Has No Support.

Both Petitioner and Amici ask this Court to grant *certiorari* so they may argue that, to prohibit an innocent infringement defense, a copyright notice must appear on the very copy of the work used by the infringer to infringe. Pet. 7, 13; Amici 27. This argument defies the plain language of the Copyright Act, has no support in any case law, and ignores the reality of online copyright infringement.

First, Petitioner’s argument ignores the statutory text. Section 402(d) forecloses application of the innocent infringement defense in all cases where “a notice of copyright in the form and position specified by this section appears on the published phonorecord or phonorecords to which a defendant in a copyright

¹ Not even Petitioner’s Amici suggest a split with the Second Circuit and cite *D.C. Comics* only for an unrelated point in a footnote. Amici 8. Respondents also note that Charles Nesson, amicus curiae and counsel of record for Amici, is affiliated with the law firm of Camara & Sibley LLP, counsel of record for Petitioner in this case. See <http://www.camarasibley.com/directory.html> (last visited on Oct. 14, 2010).

infringement suit had access.” 17 U.S.C. § 402(d) (included in App. 49a). The statute’s plain language focuses on access to the “published” work, not on whether the copy of the work a defendant used to conduct her infringing activities bears the notice. *See id.* The statute could hardly be clearer that, if the defendant in a copyright case had access to “published” works carrying proper copyright notice, then section 402(d) bars her from asserting an innocent infringement defense as a matter of law.

Petitioner argues that any copy used by an infringer to infringe is the relevant “published” copy contemplated by the statute. *See* Pet. 6 (arguing that “the published . . . phonorecords to which [Harper] had access” are “the digital music files” that she downloaded and distributed illegally). The statute, however, expressly defines a “published” work as one that is “published in the United States or elsewhere *by authority of the copyright owner.*” *See* 17 U.S.C. § 402(a) (emphasis added) (included in App. 48a). The term “published” in section 402(d), therefore, cannot be read to include any copy used by an infringer to infringe as Petitioner seems to contend. The “published phonorecord” that is the focus of the “access” inquiry under section 402(d) is the phonorecord published “by authority of the copyright owner.” *See id.* The statutory language permits no other interpretation.

Petitioner again misconstrues section 402(d) when she argues that “only notice on the copy the infringer used to infringe tends to disprove the infringer’s

innocence.” Pet. 7. This argument seeks to inject section 504(c)(2) into section 402(d), but that is not how the statute works or was written. Congress did not enact section 402(d) to address what facts or circumstances an infringer might rely on to prove her alleged innocence. Rather, Section 402(d) establishes circumstances in which the innocent infringement defense is wholly unavailable as a matter of law. Congress outlined the elements of the innocent infringement defense and the burden of proof in section 504(c)(2). *See* 17 U.S.C. § 504(c)(2) (included in App. 50a-51a). What facts an infringer might ultimately rely on to prove her alleged innocence under section 504(c)(2), such as the existence of a copyright notice on an infringing work, have no bearing on the threshold application of section 402(d), which plainly prohibits consideration of the innocent infringement defense in cases where a proper copyright notice appears on the “published” copy to which the infringer “had access.” *See* 17 U.S.C. § 402(d).

Second, Petitioners and Amici cite no authority and provide no rational justification for their argument that a law passed in the “analog” era should not be applied to illegal “digital” downloading and distribution over the Internet. *See* Amici 11; Pet. 12. The Copyright Act applies equally to all recordings, whether digital or analog. The term “phonorecord” itself is defined to include any “material objects in which sounds . . . are fixed by any method *now known or later developed*, and from which sounds can be perceived, reproduced, or otherwise communicated.”

17 U.S.C. § 101 (emphasis added). And in 1999, Congress specifically increased the minimum and maximum statutory damage awards to address the problem of online “digital” infringement. See Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 1999 U.S.C.C.A.N. (113 Stat.) 1774 (1999). The House Report describes the need for the legislation in a way that resonates with this case:

By the turn of the century the *Internet is projected to have more than 200 million users*, and the development of *new technology will create additional incentive for copyright thieves to steal protected works*. . . . Many computer users are either ignorant that copyright laws apply to Internet activity, or they simply believe that they will not be caught or prosecuted for their conduct.

H.R. Rep. No. 106-216 at section 3 (1999) (emphasis added). The idea that provisions of the Copyright Act governing statutory damages, including section 402(d), are not intended to govern online “digital” infringement like Petitioner’s is not tenable. Moreover, Petitioner’s theory would have gutted the incentives provided by section 402(d) in the analog world as well. If section 402(d) was irrelevant to a copy made from a previous copy, say on a cassette tape, then section 402(d) would have provided little protection or incentive for placing notices even in the pre-P2P era.

Third, Petitioner’s and Amici’s proposed interpretation of section 402(d) defies logic and is directly at odds with the purpose of the statute. Congress amended what is now section 402(d) as part of the 1988 Berne Convention Implementation Act (“BCIA”), Pub. L. No. 100-568 (1988), 1988 U.S.C.C.A.N. (102 Stat.) 2853 (1988). While the BCIA eliminated the *requirement* of copyright notice at publication of a work, it “preserve[d] an incentive for use of the same type of copyright notice” by amending section 402(d) to bar the innocent infringement defense in all cases where the copyright holder places proper copyright notice on the published works to which the defendant had access. 2-7 *Nimmer on Copyright* § 7.02[C][3]. The Senate Judiciary Committee made clear that the mitigation of damages under section 504(c)(2) was reserved for those cases where a copyright holder failed to include notice on its copyrighted works:

[T]he bill eliminates the mandatory notice provisions of current law, while creating a limited incentive for notice. . . . [T]he committee recognizes the value of including notice of copyright on publicly distributed works. The placement of such notices on copies of works alerts users to the fact that copyright is claimed in the work in question. . . . Accordingly, section 7(a) also *creates an additional incentive* for notice by adding to 17 USC 401 a new subsection (d), which, in specified circumstances, *will allow a copyright proprietor who places notice on copies of the work to prevent an attempt by an infringer to mitigate damages.*

S. Rep. 100-352, at 43 (1988) (emphasis added), *reprinted in* 1988 U.S.C.C.A.N. 3740. Accordingly, “[c]opyright proprietors using the prescribed notice will absolutely defeat a defense in an infringement action based on allegedly innocent infringement.” 2-7 *Nimmer on Copyright* § 7.02[C][3].

Copyright infringers, whether on the Internet or elsewhere, rarely place notice of the copyright holder’s rights on an infringing copy of a work. In the same way that a thief would not want to put on a stolen good the name of its owner before taking it to a pawn shop, unauthorized copies of sound recordings distributed on P2P networks rarely, if ever, contain proper copyright notices. Adopting Petitioner and Amici’s interpretation of section 402(d), thus, would mean that every infringer would be able to assert an innocent infringement defense. Such a result would eliminate any incentive a copyright holder might otherwise have to place proper copyright notices on the published copies of its works and would be directly at odds with the very purpose of section 402(d). Once a copyright holder has put a proper copyright notice on its published works, it has done what Congress intended it to do to warn the public of its copyrights. Such a copyright holder should not then lose the benefit of the statute merely because some infringer downstream, over whom the copyright holder has no control, rips a copy of the published work and posts it online for others to download and distribute illegally.

III. The Particular Facts And Procedural Posture Of This Case Make It Ill-Suited For This Court’s Review.

Not only has Petitioner failed to raise any issue meriting this Court’s review, but this case is particularly ill-suited for addressing the issues identified in the Petition. Even if this Court might otherwise be inclined to consider the innocent infringement defense—including the question of what constitutes an infringer’s access to copyright notices—this case does not provide a suitable vehicle based on the unique factual record, including Petitioner’s own admission of access and her failure to raise in the lower courts the arguments she seeks to raise in her Petition. Nor does this case present issues of any “national importance” as Petitioner contends.

A. The fact of Petitioner’s “access” under section 402(d) is not in dispute and the new arguments Petitioner seeks to raise in her Petition were not raised in the lower courts.

To begin with, there is no dispute concerning either Respondents’ placement of proper copyright notices on the published works in accordance with section 402(d) or Petitioner’s “access” to those works. *See* App. 36a, 44a. Petitioner admitted that she owned some of the compact discs containing the recordings at issue and that she did not “copy these files” to her computer. *See* App. 36a, 44a (framing the issue as whether Petitioner “knew the warnings on

compact discs were applicable” to her use of KaZaA).² In her brief opposing summary judgment, in her brief on appeal, and at oral argument in the Fifth Circuit, Petitioner never contested “the fact of ‘access’” to Respondents’ published works carrying proper copyright notice. *See* App. 12a. The record on Petitioner’s access is not more developed than it is only because Petitioner never contested the issue and never raised her section 504(c)(2) defense until after Respondents had filed their motion for summary judgment.

Rather than dispute that she had “access” to Respondents’ published works, Petitioner argued “only that she was too young and naive to understand that the copyrights on published music applied to downloaded music.” *Id.*; *see also id.* 24a (arguing that she had “no knowledge or understanding of file trading, online distribution networks or copyright infringement”). That argument, however, cannot defeat application of section 402(d). Because Respondents placed proper copyright notices on the published works to which Petitioner had access, section 402(d) plainly bars Petitioner from asserting an innocent infringement defense as a matter of law.

Now, in her Petition, Petitioner seeks to challenge the fact of her “access” by arguing for the first

² Amici’s contention, Amici 9, that no evidence exists “that the defendant had ever seen or had access to such jacket-covers” to physical recordings is incorrect and is belied by the factual record and the district court’s findings.

time that the only files to which she “had access” were those music files she downloaded and distributed illegally on multiple P2P networks. See Pet. 11 (“[T]he music files were the copy of the copyrighted work to which Harper had access, and those files did not bear the § 402 notice.”); Pet. 6 (arguing that the “published phonorecord[s] . . . to which [Petitioner] had access” are the “digital music files” she infringed). This argument contradicts the established facts of the case, and Petitioner’s effort to raise a new factual challenge on the question of “access” at this stage of the proceedings does not warrant this Court’s review.

Similarly, there is no reason for this Court to consider Petitioner’s contention that the Fifth Circuit erred “in failing to reach the question whether the recording companies’ placement of § 402 notices on the CD’s containing their sound recordings was sufficient to trigger § 402(d).” Pet. 11, 12. First, contrary to Petitioner’s contention, the Fifth Circuit squarely addressed this issue and held that Respondents’ placement of section 402 notices on “the published phonorecords” to which Petitioner had access precluded Petitioner from asserting an innocent infringement defense. App. 11a-12a. Second, to the extent Petitioner now complains that, in determining whether to apply section 402(d), the Fifth Circuit should have specifically considered the lack of notice on the unauthorized copies Petitioner downloaded and distributed illegally, Pet. 11, 12, the fault lies with Petitioner, not the Fifth Circuit. Petitioner never

raised that argument in the district court or in the Fifth Circuit. *Certiorari* is not a proper vehicle to address an argument that was neither raised nor resolved in the lower courts. See *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992). Third, the premise of Petitioner's new argument does not fit the facts of this case. Petitioner complains that "the defendant in a file-sharing case may never have had access to a CD corresponding to the music files" she infringed online and, thus, there would be "no relevant phonorecord to which she could have had access so as to trigger § 402(d)." Pet. 12. In this case, Petitioner never disputed that she had access to the published phonorecords corresponding to the sound recordings she infringed. She conceded as much. App. 12a. Because the rationale underlying Petitioner's new argument does not fit the facts of this case, this case provides an ill-suited vehicle for considering Petitioner's new argument.

In addition to the foregoing, because Petitioner did not raise her innocent infringement defense until after discovery had closed and after Respondents had moved for summary judgment, Respondents were denied the opportunity to develop the factual record to further rebut the new defense. In particular, Respondents were denied the opportunity to adduce and present to the district court evidence that, in addition to the published compact discs containing the works at issue, Petitioner also had access to many online sources, such as iTunes and others, which sources

contain the section 402 copyright notices on the face of the published works available online.

B. Petitioner’s argument that the Court should consider this case as one of national importance lacks merit.

Finally, Petitioner argues that the issues she seeks to raise are of “unusual national importance because of the unprecedented litigation campaign” against users of illegal file sharing networks, and that review in this case would shape “tens of thousands of cases” in the lower courts. Pet. 13-14. This argument is without merit. As Petitioner herself acknowledges, Respondents’ enforcement program ended years ago and this is just “one of such several cases” remaining. Pet. 3. Thus, contrary to Petitioner’s contention, a ruling from this Court would not impact “tens of thousands of cases” because such cases do not exist.

Petitioner has cited nothing to suggest that the courts are struggling with the application of section 402(d), or that they require guidance from this Court. The fact that the application of section 402(d) has been litigated in only a very small handful of cases out of the thousands brought by the record companies during the enforcement program further demonstrates that the use of section 402(d) is not a significantly litigated issue in copyright infringement such that it warrants this Court’s review.



CONCLUSION

The Petition should be denied.

Respectfully submitted,

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