

18-2955-cv, 18-2959-cv

*James H. Fischer v. Sandra F. Forrest, et al.*

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In the  
**United States Court of Appeals**  
For the Second Circuit

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August Term 2019

Nos. 18-2955-cv, 18-2959-cv

JAMES H. FISCHER

*Plaintiff-Appellant,*

v.

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

*Defendants-Appellees.*

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Appeal from the United States District Court  
for the Southern District of New York

No. 14 Civ. 01304 (PAE-AJP), Paul A. Engelmayer, District Judge, Presiding.  
(Argued: December 12, 2019; Decided: August 4, 2020)

Before: PARKER AND CHIN, *Circuit Judges*, AND COTE, *District Judge*.<sup>1</sup>

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<sup>1</sup> Judge Denise Cote, of the United States District Court for the Southern District of New York, sitting by designation.

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2 Appeal from a judgment of the United States District Court for the  
3 Southern District of New York (Engelmayer, *J.*) dismissing claims under the  
4 Copyright Act, 17 U.S.C. § 101 *et seq.* and the Digital Millennium Copyright Act,  
5 17 U.S.C. § 1201 *et seq.* AFFIRMED.

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8 GREGORY KEENAN (Andrew Grimm,  
9 *on the brief*), Digital Justice Foundation,  
10 Floral Park, NY, *for Plaintiff-Appellant.*

11  
12 DANIEL K. CAHN (Seth L. Hudson,  
13 Clements Bernard Walker, Charlotte, NC,  
14 *on the brief*), Law Offices of Cahn & Cahn,  
15 Melville, NY, *for Defendants-Appellees.*

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19 BARRINGTON D. PARKER, *Circuit Judge:*

20 James H. Fischer appeals from a judgment of the United States District  
21 Court for the Southern District of New York (Engelmayer, *J.*). The district court  
22 granted summary judgment in favor of the Defendants-Appellees, Sandra  
23 Forrest, Shane Gebauer, Stephen Forrest, Jr., and Brushy Mountain Bee Farm  
24 (“Brushy Mountain”) on Fischer’s claims of copyright infringement and  
25 copyright management information (“CMI”) removal. The controversy  
26 underlying this litigation arose from the promotion by the Forrests of their own  
27 version of a honey harvesting product. The new product replaced one Fischer

1 had invented and that the Forrests had sold for many years through the website  
2 and catalogue of Brushy Mountain, a company the Forrests owned. Judge  
3 Engelmayer concluded that Fischer was not entitled to statutory damages or  
4 attorneys' fees, the relief he sought on his copyright infringement claim, because  
5 the first allegedly infringing act occurred before the work was registered. *See* 17  
6 U.S.C. § 412. The district court also concluded that Fischer failed to establish a  
7 CMI removal claim under the Digital Millennium Copyright Act ("DMCA"), 17  
8 U.S.C. § 1201 *et seq.* We agree and accordingly, we affirm the judgment of the  
9 district court.

## 10 BACKGROUND

11  
12 Fischer is an apiarist who developed a product known as Fischer's Bee-  
13 Quick in 1999. Fischer's Bee-Quick is a "honey harvesting aid" that is used to  
14 clear bees from the superstructures placed on beehives where bees store honey.  
15 Bee-Quick is sprayed on a fume board, which is placed on the superstructures.  
16 The scent causes the bees to exit the structure, at which point the honey can be  
17 harvested. Bee-Quick was distinguished from the products of Fischer's  
18 competitors because it was non-toxic and did not have the offensive odor  
19 associated with other honey harvesting aids.

1           Brushy Mountain was a mail-order business specializing in bee-keeping  
2 supplies. It was owned and operated during the relevant period by Sandra and  
3 Stephen Forrest and Shane Gebauer, its President. Brushy Mountain circulated a  
4 catalogue of products well-known in bee-keeping circles, featuring pictures and  
5 product descriptions.

6           Brushy Mountain began featuring Fischer's Bee-Quick in its catalogue in  
7 2002 and described it as follows:

8           This 100% Natural, non-toxic blend of oils and herb extracts works just like  
9 Bee Go and it smells good! Fischer's Bee Quick is a safe, gentle, and  
10 pleasant way to harvest your honey. Are you tired of your spouse making  
11 you sleep in the garage after using Bee Go? Are you tired of using a  
12 hazardous product on the bees you love? Then this is the product for you!  
13 J. App'x at 1JA-267.

14  
15           Fischer sold Bee-Quick on his own website, Bee-Quick.com, starting  
16 around 2000 and he continued to do so during the years it also was available  
17 from Brushy Mountain. The description of Bee-Quick in Fischer's brochure,  
18 which was featured on the Bee-Quick.com website, included the following  
19 phrases:

- 20           1. Are you tired of your spouse making you sleep in the garage after  
21           using Butyric Anhydride?
- 22           2. Are you tired of using hazardous products on the bees you love?
- 23           3. Fischer's Bee-Quick is a safe, gentle, and pleasant way to harvest your  
24           honey.

1 4. A Natural, Non-Toxic Blend of Oils and Herbal Extracts. J. App'x at  
2 1JA-169.

3  
4 Around 2010, Brushy Mountain claimed that Fischer's supply of Bee-Quick  
5 was unreliable and decided to stop offering it in its catalogue. In its place, Brushy  
6 Mountain started selling its own honey harvesting aid called Natural Honey  
7 Harvester. Brushy Mountain's January 2011 catalogue described its new product  
8 as follows:

9 For years we have promoted the use of a natural product to harvest honey  
10 but an unreliable supply of such a product has forced us to come out with  
11 our own. This 100% Natural, non-toxic blend of oils and herb extracts  
12 works just like Bee Go and it smells good! Natural Honey Harvester is a  
13 safe, gentle, and pleasant way to harvest your honey. Are you tired of your  
14 spouse making you sleep in the garage after using Bee Go? Are you tired  
15 of using hazardous products on the bees you love? Then this is the product  
16 for you! J. App'x at 1JA-160.

17  
18 This text remained in the catalogue largely unchanged through 2014 and was  
19 featured on the Brushy Mountain website through 2011.

20 The similarities between the two descriptions are the basis for Fischer's  
21 claims. He contends that Brushy Mountain simply replaced "Fischer's Bee-  
22 Quick" with "Natural Honey Harvester" in their advertisements, and that this  
23 substitution constitutes copyright infringement and the unlawful removal of  
24 CMI. *See* 17 U.S.C. §§ 504, 1202.

1           After Fischer initiated this action, initially as a pro se litigant, the parties  
2 engaged in extensive motion practice.<sup>2</sup> The claims that were not dismissed  
3 proceeded through discovery, and eventually the Defendants-Appellees moved  
4 for summary judgment on the remaining claims. Magistrate Judge Andrew J.  
5 Peck, who was managing the pretrial activity, recommended granting the motion  
6 in its entirety in a July 2017 Report & Recommendation. The district court  
7 adopted that Report & Recommendation in full in a February 2018 order and  
8 opinion. The district court held that § 412 of the Copyright Act barred the  
9 recovery of statutory damages for copyright infringement because the alleged  
10 infringement predated the copyright registration. *See* 17 U.S.C. § 412. The district  
11 court also held that Fischer failed to establish a violation of the DMCA because  
12 the changes that Brushy Mountain had made to its catalogue did not constitute  
13 removal of CMI. This appeal followed.

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<sup>2</sup> The Forrests moved to dismiss Fischer's initial and amended complaints in July 2014, and those motions were denied in January 2015. Fischer then obtained counsel and filed a Third Amended Complaint in December 2015, adding Shane Gebauer and Brushy Mountain as defendants. Pretrial management was referred to Magistrate Judge Andrew J. Peck. Magistrate Judge Peck, in a thorough and thoughtful January 2017 Report & Recommendation, recommended that the district court dismiss Fischer's trademark counterfeiting and New York right of publicity claims, but deny the Forrests' motion to dismiss all other claims. Judge Engelmayer adopted the Report & Recommendation in a March 21, 2017 order and opinion.

1 **STANDARD OF REVIEW**

2 We review a grant of summary judgment de novo, “resolving all  
3 ambiguities and drawing all permissible factual inferences in favor of the party  
4 against whom summary judgment is sought.” *FTC v. Moses*, 913 F.3d 297, 305 (2d  
5 Cir. 2019).<sup>3</sup> A “court shall grant summary judgment if the movant shows that  
6 there is no genuine dispute as to any material fact and the movant is entitled to  
7 judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Alabama v. North*  
8 *Carolina*, 560 U.S. 330, 344 (2010) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322  
9 (1986)).

10 **DISCUSSION**

11 **I.**

12 The Copyright Office registered Fischer’s copyright for the Bee-Quick.com  
13 website, which includes the Bee-Quick brochure, on February 7, 2011.<sup>4</sup> We

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<sup>3</sup> Unless otherwise indicated, in quoting cases, all internal quotation marks, alterations, emphases, footnotes, and citations are omitted.

<sup>4</sup> In February 2011, Fischer filed a copyright registration application for the text and image files of the Bee-Quick.com website. Fischer mistakenly included thousands of irrelevant documents in his application, and after the Copyright Office detected this error, he submitted a second and then third set of files on September 23 and September 24, 2011 respectively. The Defendants-Appellees disputed below that Fischer’s Bee-Quick brochure was included in the initial February submission, but Fischer maintains that the second and third submissions were subsets of the files submitted in February. The Copyright

1 assume Fischer's website and the text contained in it are copyrightable creative  
2 works and the registration for the website is valid.

3 As noted, Fischer has elected to pursue statutory damages. A copyright  
4 infringer can be held liable for either actual damages and profits obtained or for  
5 statutory damages. 17 U.S.C. § 504(a). However, § 412 precludes statutory  
6 damages or attorneys' fees for "any infringement of copyright in an unpublished  
7 work commenced before the effective date of its registration" or "any  
8 infringement of copyright commenced after first publication of the work and  
9 before the effective date of its registration." 17 U.S.C. § 412. The Defendants-  
10 Appellees argue that § 412 bars statutory damages because the first allegedly  
11 infringing act occurred prior to February 7, 2011, the registration date of the  
12 copyright.

13 Fischer, on the other hand, argues that § 412 does not apply because there  
14 were no pre-registration infringements by the Defendants-Appellees. There are a  
15 host of problems with this contention. First, Fischer's pleadings repeatedly

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Office issued Fischer a copyright registration dated September 24, 2011, the date of his third, corrected submission. The date of the registration was changed to February 7, 2011, the date of his first submission, after he contacted the Copyright Office to clarify that everything that was in the later submissions was in the first submission.



1 referred to the pre-registration use of the advertising text in the Brushy Mountain  
2 catalogue as infringements. For example, in the Third Amended Complaint (the  
3 operative complaint) Fischer alleged that “permission to use Plaintiff’s  
4 intellectual property in any way had been revoked, as no permission was  
5 granted to use Plaintiff’s copyrighted works in any way except specifically in the  
6 sales of [Bee-Quick].” Third Am. Compl. ¶ 26; 14 Civ. 1307, Dkt. No. 111. Fischer  
7 also alleged that the Defendants-Appellees “no longer had any of Plaintiff’s  
8 product to sell” as of March 2010 and, consequently, at that point their use of the  
9 advertising text constituted infringement. *Id.* Fischer repeated this allegation of  
10 infringement with respect to a December 10, 2010 email from Brushy Mountain  
11 informing him that it would be discontinuing Bee-Quick. Fischer alleged that  
12 “[a]t that point, Defendants immediately lost any right, license, or permission to  
13 use any of Plaintiff’s intellectual property.” *Id.* at ¶¶ 46-47. Moreover, the  
14 allegedly infringing advertisement for Natural Honey Harvester was in the  
15 Brushy Mountain catalogue mailed on January 21, 2011 and the allegedly  
16 infringing use of the Bee-Quick advertising text was on the Brushy Mountain  
17 website as early as December 26, 2010.

1 Faced with these obstacles to statutory damages, Fischer's position shifted.  
2 He now argues that the Defendants-Appellees' actions prior to his registration of  
3 the copyright are not infringements because they had a license to use his  
4 advertising material. Although Fischer posits the existence of a license, he has  
5 failed to adduce admissible evidence of its existence, much less evidence as to its  
6 scope, terms, or the dates of its creation or revocation.

7 In addition to being inconsistent with Fischer's pleadings, this argument  
8 was raised for the first time in his objections to the Magistrate Judge's July 2017  
9 Report. Judge Engelmayer correctly declined to allow Fischer to make an about-  
10 face in those objections to advance a theory of liability that contradicted his  
11 pleadings and had not been raised during summary judgement proceedings  
12 before the Magistrate Judge. *See Pan Am. World Airways, Inc. v. Int'l Bhd. of*  
13 *Teamsters*, 894 F.2d 36, 40 n. 3 (2d Cir. 1990). We see no abuse of discretion.

14 Even were we to consider Fischer's new theory of liability at this late date,  
15 it would not save his claim for statutory damages. Fischer first contends that the  
16 Defendants-Appellees had a license to use Fischer's material and that the date on  
17 which that license was rescinded presents an unresolved factual issue. As noted,

1 he has not adduced evidence sufficient to create a genuine issue of material fact  
2 as to the existence of any such license.

3         Fischer's other contention is that a factual issue exists as to when the first  
4 allegedly infringing act occurred. In support of this contention, Fischer claims  
5 that the date the first customers received Brushy Mountain's January 2011  
6 catalogue—the first catalogue to offer Natural Honey Harvester with the  
7 allegedly infringing text—must be assumed to post-date his February 7, 2011  
8 copyright registration. He fails to offer anything but speculation in support of  
9 this argument. For example, he points this Court to an order form that specified a  
10 January 21, 2011 shipping date, the authenticity of which Fischer does not  
11 contest. That date is consistent with unrefuted testimony below that established  
12 the catalogues containing the allegedly infringing material were mailed on  
13 January 21, 2011, well before the decisive registration date. Confronted with  
14 these facts, Fischer was obligated to come forth with admissible evidence  
15 creating a genuine issue of material fact as to the date of mailing. Fischer failed to  
16 do so. He points to a reference on the order form that indicated that the  
17 catalogues were initially marked for shipment on January 24, 2011 and argues  
18 that a fourteen-day shipment window would result in customers' receipt of the

1 catalogue after the February 7 registration. This reference does nothing to help  
2 Fischer. The document simply says that the catalogues were planned to be  
3 shipped on January 24 but were, in fact, shipped on January 21.<sup>5</sup> Speculations  
4 such as these are not an appropriate substitute for admissible evidence. As we  
5 have noted, “mere conclusory allegations, speculation or conjecture will not avail  
6 a party resisting summary judgment.” *Cifarelli v. Village of Babylon*, 93 F.3d 47, 51  
7 (2d Cir. 1996). For these reasons, we must conclude that the first allegedly  
8 infringing act occurred before the date of the copyright registration and no  
9 genuine issue of material fact exists concerning this issue. Consequently, § 412  
10 bars Fischer’s recovery of statutory damages.<sup>6</sup>

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<sup>5</sup> In fact, Fischer cites no authority for the proposition that the relevant date for the first alleged act of infringement is the date of receipt of the catalogue by the customers. The relevant statute states that “[t]he offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display constitutes publication.” 17 U.S.C. § 101. Even on Fischer’s account, the catalogues were printed and shipped prior to his registration of the copyright.

<sup>6</sup> Fischer argues that, even if this Court finds that statutory damages are precluded pursuant to § 412, this Court should afford him declaratory relief. Fischer bases this claim on the Defendants-Appellees’ stipulation at oral argument on the summary judgment motion that they would (1) remove any links and photos containing Fischer’s name or product on Brushy Mountain’s website, and (2) not use the four advertising phrases again in the future. At the time, Fischer agreed that this mooted his request for injunctive relief. However, on appeal, Fischer claims that the Defendants-Appellees’ stipulation is “functionally a consent decree” and that this Court should grant declaratory

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16**III.**

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. *See* 17 U.S.C. § 1202. The DMCA was passed in 1998 to implement two international treaties resulting from the 1996 World Intellectual Property Organization (“WIPO”) Convention. S. Rep. 105-190 at 1-2 (1998); *see also* 144 Cong. Rec. S205-02 (1998) (statement of Sen. Leahy). Congress’s intent in enacting the DMCA was to update the copyright laws of the United States for the “digital age.” *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 26 (2d Cir. 2012).

Generally speaking, the two major aims of the DMCA are (1) anti-circumvention of access controls, codified at 17 U.S.C. § 1201 *et seq.*, and (2) creating a safe harbor for service providers when their users or other third parties engage in infringing activities, codified at 17 U.S.C. § 512. “At its passage, the Digital Millennium Copyright Act contemplated a new world, untested in prior court decisions.” 4 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* § 12A.06[C] (Matthew Bender, Rev. Ed.) (2020).

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judgment on the basis of the stipulation. He offers no support for that contention. Moreover, Fischer did not seek declaratory relief below. The stipulation did not concede that the text at issue was Fischer’s copyrighted work nor did it concede that the Defendants-Appellees’ use of the text was an infringement.

1           This appeal focuses on the anti-circumvention component of the DMCA,  
2 and specifically on the definition of CMI in § 1202(c). Section 1202 was “required  
3 by both WIPO Treaties to ensure the integrity of the electronic marketplace by  
4 preventing fraud and misinformation.” H.R. Rep. 105-551(I) at 10 (1998); *see also*  
5 S. Rep. 105-190 (1998). Section 1202 realizes this aim by “prohibit[ing]  
6 intentionally providing false copyright management information . . . with the  
7 intent to induce, enable, facilitate or conceal infringement. It also prohibits the  
8 deliberate deleting or altering [of] copyright management information.” H.R.  
9 Rep. 105-551(I) at 10. The section is intended “to protect consumers from  
10 misinformation as well as authors and copyright owners from interference with  
11 the private licensing process.” *Id.* at 10-11; *see also* Nimmer § 12A.08[A]. While  
12 the DMCA establishes certain protections for copyright holders in a digital  
13 medium, it also establishes limitations on copyright liability in the interest of  
14 promoting growth, development, and innovation in the digital universe. H.R.  
15 Rep. 105-551(I) at 11-12.

16           In broad strokes, § 1202(c) protects the “[i]ntegrity of copyright  
17 management information” and prohibits the removal of CMI from copyrighted  
18 works. *See* 17 U.S.C. § 1202(a)-(c). The statute describes CMI as information such

1 as the author, title, and other identifying data about the copyright holder of the  
2 work. In relevant part, the term “copyright management information” is defined  
3 as:

4 any of the following information conveyed in connection with  
5 copies . . . of a work . . . or displays of a work, including in digital form,  
6 except that such term does not include any personally identifying  
7 information about a user of a work or of a copy . . . or display of a work:

8 (1) The title and other information identifying the work, including  
9 the information set forth on a notice of copyright.

10 (2) The name of, and other identifying information about, the author  
11 of a work.

12 (3) The name of, and other identifying information about, the  
13 copyright owner of the work, including the information set forth in a  
14 notice of copyright.

15 . . .

16 (6) Terms and conditions for use of the work.

17 (7) Identifying numbers or symbols referring to such information or  
18 links to such information.

19 (8) Such other information as the Register of Copyrights may  
20 prescribe by regulation, except that the Register of Copyrights may  
21 not require the provision of any information concerning the user of a  
22 copyrighted work.

23  
24 17 U.S.C. § 1202(c). To establish a violation of this subsection, a litigant must  
25 show (1) the existence of CMI on the allegedly infringed work, (2) the removal or  
26 alteration of that information and (3) that the removal was intentional. 17 U.S.C.  
27 § 1202(b).

1           Fischer alleges that his name is CMI and that by deleting the phrase  
2   “Fischer’s Bee-Quick” and replacing it with “Natural Honey Harvester,” the  
3   Defendants-Appellees violated § 1202(c) by removing his name from  
4   copyrighted material. This assertion misunderstands what constitutes CMI.

5           While an author’s name can constitute CMI, not every mention of the  
6   name does. Here, “Fischer’s” is part of a product name; it is not a reference to  
7   “James H. Fischer” as the owner of a copyrighted text. Nor is the name “[t]he  
8   title and other information identifying the work” or the “[t]he name of, and other  
9   identifying information about, the author of the work” as required by the statute.  
10   *See* 17 U.S.C. § 1202(c)(1)-(3). We grant that Natural Honey Harvester was  
11   designed as a closely resembling alternative to Fischer’s Bee-Quick, and that the  
12   advertising copy used on Brushy Mountain’s website and catalogue for Natural  
13   Honey Harvester mirrors the advertising copy that had been used for Fischer’s  
14   Bee-Quick. However, what was removed was not Fischer’s name as the  
15   copyright holder of the advertising text, but “Fischer’s” insofar as it was a part of  
16   the actual product’s name.

17           Judge Engelmayer provided an example to illustrate the problem with  
18   Fischer’s approach:



1 Imagine that the back cover of the Ian Fleming novel *Dr. No.* contained the  
2 following encomium: “In Ian Fleming’s *Dr. No*, Fleming shows his mastery  
3 of Cold War spycraft.” Imagine then that a person lifted language from  
4 that review to promote a different thriller, writing: “In John Le Carré’s  
5 *Tinker, Tailor, Soldier, Spy*, Le Carré shows his mastery of Cold War  
6 spycraft.” Whatever the other legal implications of such conduct might be,  
7 it is inconceivable that a DMCA claim would lie from the elimination of  
8 Fleming’s name. The expression at issue does not connote Fleming’s  
9 copyright ownership of anything.

10  
11 *Fischer v. Forrest*, 286 F.Supp.3d 590, 611 (S.D.N.Y. 2018). Similarly, “Fischer’s  
12 Bee-Quick” used in material published by a third party like Brushy Mountain,  
13 which contains advertisements for dozens of other products from many different  
14 suppliers, cannot be reasonably construed as an identifier of the copyright holder  
15 of the advertising text. In other words, “Fischer’s” in “Fischer’s Bee-Quick” is not  
16 used for ‘managing’ copyright information with respect to the text at issue.

17 The name of an author can, of course, constitute CMI when conveyed in  
18 connection with the relevant copyrighted work. 17 U.S.C. § 1202(c). But  
19 “Fischer’s” cannot be construed as CMI with respect to the advertising text at  
20 issue because it is simply the name of the product being described. In short:  
21 context matters.

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23

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## CONCLUSION

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We have considered Fischer's remaining arguments and conclude they are

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without merit. The judgment of the district court is **AFFIRMED**.