Supreme Court, U.S.
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No. 10-94

In the Supreme Court of the United States

WHITNEY HARPER,

Petitioner,

v.

MAVERICK RECORDING COMPANY; UMG RECORDINGS INC.; WARNER BROTHERS RECORDS INC.; SONY BMG MUSIC ENTERTAINMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the inadvertent innocent infringer defense to copyright infringement be eliminated for all Internet music downloading?

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PETITION FOR A WRIT OF CERTIORARI

Whitney Harper respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a to 14a) is reported at 598 F.3d 193. The opinion of the district court granting respondents' motion for summary judgment (App., *infra*, 27a to 47a) is unreported. The opinion of the district court denying both sides' motions for reconsideration (App., *infra*, 15a to 26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Copyright Act provides in relevant part that:

> "In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200." 17 U.S.C. 504(c)(2).

The Copyright Act also provides that the owner of a copyright in a sound recording published in the United States may place a notice on the publicly distributed phonorecords of that sound recording and that doing so will have certain evidentiary effect. 17 U.S.C. 402. Section 402 provides in relevant part that:

> "The notice shall be placed on the surface of the phonorecord, or on the phonorecord label or container, in such manner and location as to give reasonable notice of the claim of copyright." 17 U.S.C. 402(c).

And:

> "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, except as provided in the last sentence of section 504(c)(2)." 17 U.S.C. 402(d).

The pertinent provisions of the Copyright Act are reprinted in an appendix to this petition. App., *infra*, 48a to 52a.

STATEMENT

1. Petitioner Whitney Harper, age 16 when she downloaded 37 songs using the file-sharing program KaZaA, did not understand the nature of file-sharing networks. She believed that listening to music using a file-sharing network was akin to listening to a noninfringing Internet radio station. She did not realize that listening to music in this way involved copying and distributing copyrighted works without authority from the copyright holders in violation of the Copyright Act.

Harper discovered that her acts constituted infringement only when the respondent recording companies filed this case. The Recording Industry Association of America (RIAA), the recording companies' industry group, discovered Harper's infringement as part of a multi-year campaign to identify and sue individuals who used file-sharing networks to listen to music. This case is one of several such cases now percolating through the federal courts. It would be the first such case to reach this Court.

The RIAA discovered Harper's infringement through the activities of its digital investigating agent, Media Sentry. Media Sentry logged on to the file-sharing network that Harper was using and observed an individual on that network with the username whiterney@fileshare at the IP address 24.174.166.204. Media Sentry traced that IP address to Time Warner Cable, Harper's family's Internet service provider. The RIAA's recording-company members then filed a Doe lawsuit against the unknown infringer behind this username and IP address, subpoenaed Time Warner's

records, and discovered that Time Warner had assigned that IP address to Harper's family.

The respondent recording companies initially sued Steve Harper, Whitney Harper's father. The United States District Court for the Western District of Texas (Judge Xavier Rodriguez) had jurisdiction under 28 U.S.C. § 1331. Once it became clear that Whitney Harper was the KaZaA user who the RIAA had detected, the recording companies amended their complaint to proceed against Whitney Harper only. The recording companies moved for summary judgment, entry of a judgment of $750 in statutory damages per sound recording for infringement of 37 sound recordings, and entry of an injunction enjoining further infringement.

Harper agreed to the injunction, but contested the amount of the statutory damages. Harper contended that she was an "innocent infringer" entitled to ask a jury to reduce statutory damages to a minimum of $200 per song. The sole question presented by this appeal is whether Harper — and, with her, the thousands of other young Americans who shared music online — can rely on the defense of innocent infringement when she did not know that what she was doing was infringement and the music files that she copied bore no statutory copyright notice.

2. a. The Copyright Act provides for statutory damages for copyright infringement. *See* 17 U.S.C. 504(a)(2), (c)(1). Ordinarily, an infringer is liable for one award of statutory damages "in a sum of not less than $750 or more than $30,000 as the court considers just," 17 U.S.C. 504(c)(1), per work infringed. If the infringer proves that she "was not aware and had no

reason to believe that * * * her acts constituted an infringement," 17 U.S.C. 504(c)(2), then the low end of this statutory range is reduced to $200. In particular, § 504(c)(2) provides that:

> "In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200." 17 U.S.C. 504(c)(2).

The effect of § 504(c)(2) is to protect, at least in part, infringers who infringe by mistake. The Copyright Act recognizes that copyright holders can take steps to prevent such mistakes by giving notice on copies of copyrighted works that the works are copyrighted. In particular, with respect to sound recordings, the Copyright Act provides that a copyright owner can avoid the defense of innocent infringement by including a statutory notice on the published phonorecords that contain the copyrighted sound recording.

17 U.S.C. 402 governs this statutory notice. Section 402(a) provides generally that: "Whenever a sound recording protected under this title is published in the United States * * * a notice of copyright as provided by this section may be placed on publicly distributed phonorecords of the sound recording." Section 402(b) specifies the form of the notice: "it shall consist of the following three elements: (1) the symbol (the letter P in a circle); and (2) the year of first publication of the sound recording; and (3) the name of

the owner of copyright in the sound recording." Section 402(c) requires that "[t]he notice * * * be placed on the surface of the phonorecord, or on the phonorecord label or container, in such manner and location as to give reasonable notice of the claim of copyright."

Section 402(d) provides that an infringer cannot rely on the innocent-infringement defense if the owner of a copyright in a sound recording includes a § 402 notice "on the published phonorecord or phonorecords to which [the] defendant * * * had access":

> "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." 17 U.S.C. 402(d).

b. The respondent recording companies included § 402 notices on the CD's that they published and sold. Harper, however, did not infringe by copying and distributing a CD that bore such a notice. She infringed by copying and distributing music files that bore no such notice. Because "the published phonorecord * * * to which [Harper] had access," that is, the digital music files, did not contain a § 402 notice, the recording companies cannot rely on § 402(d) to prevent Harper from proving that she was an innocent infringer.

This Court has not yet interpreted § 402(d). In particular, this Court has not decided whether a

plaintiff may rely on § 402(d) to avoid a defense of innocent infringement in a case in which the plaintiff included the § 402 notice on the phonorecords on which it published its sound recordings, but the § 402 notice did not appear on the copies of the sound recordings that the defendant used to commit the infringement. This Court should hold that a § 402(d) notice allows a plaintiff to avoid a defense of innocent infringement only when the notice appears on the copy of the copyrighted sound recordings that the defendant used to infringe.

There are two potential readings of § 402(d). Under the first, § 402(d) eliminates innocent infringement whenever the copyright holder's published copies of its sound recording bear the § 402 notice. Under the second, § 402(d) eliminates innocent infringement only when the copy that the infringer used to infringe bears the § 402 notice. As between these two readings, the second is preferable because only notice on the copy that the infringer used to infringe tends to disprove the infringer's innocence. Congress should not be presumed to have required courts to conclude otherwise — in this case, to conclude that notice on a CD in the record store tends to disprove the innocence of an infringer who infringed using only music files on the Internet — in § 402(d) when an alternative reading is equally consistent with the text.

This alternative reading is also to be favored because it is more consistent with innocent-infringement decisions outside the context of sound recordings. Outside the sound-recording context, where the question is whether a copyright notice not drafted pursuant to any special section of the Copyright Act defeats a claim of innocent

infringement, the lower courts have held that such a notice defeats a claim of innocent infringement only if it appears on the copy of the copyrighted work used for the infringement. *See, e.g., D.C. Comics Inc. v. Mini Gift Shop*, 913 F.2d 29, 35 (2d Cir. 1990) ("[T]he district court was presented with evidence that there were no copyright notices on the infringing goods and that a layman would not be able to distinguish between licensed and unlicensed goods based on the style or quality of the art work. This evidence tends to establish that defendants' infringement was innocent.").

This makes sense because only a notice that appears on the copy of the copyrighted work used for infringement has anything to do with whether the infringement at issue was innocent, that is, with whether the infringer knew that she was forbidden from copying and distributing the copy of the work before her. *Cf.* S. Rep. 100-352, 1988 U.S.C.C.A.N. 3706, 3741 ("the proprietor must prove that the copies to which the defendant had access bore such notice"). The need to ensure that a notice that eliminates the statutory defense of innocent infringement in fact gives notice that certain conduct would be infringing is at its maximum in a case like this, where a 16-year-old girl was faced with a new technology that was, to her, indistinguishable from legal alternatives such as Internet radio.

3. a. In the district court, the recording companies moved for summary judgment that they were entitled to statutory damages in the amount of $750 per work, the ordinary statutory minimum. *See* App., *infra*, 37a.

Harper responded that she was an innocent infringer. She submitted an affidavit in which she averred that she "had no knowledge or understanding of file trading, online distribution networks or copyright infringement"; that "Kazaa and similar products did not inform [her] that the materials available through their service were stolen or abused copyrighted material"; and that she "had no way of learning this information prior to this lawsuit." App., *infra*, 43a. Both in her affidavit and in her deposition in this case, Harper testified "that she believed using KaZaA and similar products to be akin to listening to radio over the internet and did not know that the Recordings were being either downloaded or distributed." App., *infra*, 44a to 45a.

The recording companies replied that Harper's state of mind was irrelevant because they had included the § 402 statutory notice "on each of the containers and on the surface of the compact discs of the Recordings." App., *infra*, 43a. The recording companies contended that, by doing so, they had "provided notice such that Defendant could have learned that the Recordings were copyrighted," App., *infra*, 43a, even though no notice appeared on the music files that Harper actually listened to on KaZaA.

The district court held that Harper's affidavit created a genuine issue of material fact as to whether she was an innocent infringer. App., *infra*, 44a to 45a. The district court found the recording companies' argument "not completely satisfactory" because, "In this case, there were no compact discs with warnings." App., *infra*, 44a to 45a. "Although proper notice was provided on the cover of each of the Recordings, a question remains as to whether Defendant knew the

warnings on the compact discs were applicable in this KaZaA setting." App., *infra*, 44a.

The district court ordered the parties to advise whether they would accept a settlement of $200 per work, the minimum statutory damages against an innocent infringer. *See* App., *infra*, 45a. The district court denied the recording companies' motion for reconsideration and restated its conclusion that Harper's testimony "that she believed using KaZaA and similar products to be akin to listening to radio over the internet and did not know that the Recordings were being either downloaded or distributed," App., *infra*, 25a, entitled Harper to a trial on innocent infringement. The district court emphasized that the recording companies "ha[d] not introduced any evidence to contradict that Defendant did not have an understanding of the nature of file-sharing programs and copyright * * * sophisticated enough to have reason to know that her actions infringed Plaintiffs' copyrights." App., *infra*, 25a.

b. The United States Court of Appeals for the Fifth Circuit (Judges Edith Brown Clement, W. Eugene Davis, and Jennifer Elrod) reversed. *See* App., *infra*, 2a. The court of appeals held that, although Harper's affidavit and deposition testimony created a triable issue of fact as to whether she was an innocent infringer, Harper was nonetheless foreclosed from relying on the defense of innocent infringement by § 402(d). *See* App., *infra*, 11a to 13a. The court of appeals held that the recording companies' having placed a § 402 notice on physical CD's prevented Harper from relying on the innocent-infringer defense as a matter of law. In relevant part, the court of appeals wrote:

> "Harper's reliance on her own understanding of copyright law — or lack thereof — is irrelevant in the context of § 402(d). The plain language of the statute shows that the infringer's knowledge or intent does not affect its application. Lack of legal sophistication cannot overcome a properly asserted § 402(d) limitation to the innocent infringer defense." App., *infra*, 12a.

c. The court of appeals was correct in holding that the infringer's mental state has nothing to do with whether § 402(d) forecloses a defense of innocent infringement. Although the infringer's mental state is central to the merits of that defense, § 402(d) forecloses assertion of the defense whatever its merits if the copyright owner has provided statutory notice as required by § 402(b)–(c). The court of appeals erred, however, 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).

The court of appeals simply assumed that placing the § 402 notice on the CD's sufficed to trigger § 402(d) even though, as the district court held, the infringement in this case did not involve any CD's, but rather involved only music files on KaZaA. This was error. Section 402(d) requires that the § 402 notice "appear[] on the published phonorecord or phonorecords to which a defendant in a copyright infringement suit had access." 17 U.S.C. 402(d). Here, the music files were the copy of the copyrighted work to which Harper had access, and those files did not bear the § 402 notice.

d. The problem is in part the familiar one of interpreting a statute that was not designed to address a new technology, here, a Copyright Act that long predates the advent of file sharing, or even the Internet. Section 402(d) is much clearer where the infringement in question is the copying or distribution of a phonorecord. There, "the published phonorecord * * * to which [the] defendant * * * had access" is the phonorecord from which the defendant made his infringing copies — or some officially published phonorecord in the defendant's possession. If that copy contains the § 402 notice, then the defendant may not assert that he is an innocent infringer.

The advent of file sharing complicates this picture because the defendant in a file-sharing case may never have had access to a CD corresponding to the music files that she listened to, and thereby copied and distributed, on the file-sharing network. For such a defendant, there either is no relevant phonorecord to which she could have had access so as to trigger § 402(d), or the relevant "phonorecord" is the music file itself, which does not bear any § 402 notice. Either way, § 402(d) does not apply. And either way, the court of appeals erred by failing to address the critical issue in this case, whether a recording company may avoid the defense of innocent infringement under § 402(d) when the § 402 notice appears on its published CD's, but not on the music files that the defendant downloaded.

If this Court adopts the recording companies' rule, that copyright notices on CD's in the record store suffice without more to defeat a defense of innocent infringement, then downloading music on the Internet can never be innocent infringement. If this Court

adopts Harper's rule, that a copyright notice defeats innocent infringement only if it appears on the copy of the copyrighted work that the infringer used to infringe, then infringers like Harper will not necessarily be held to be innocent infringers. But they will at least be able to offer evidence of their state of minds and submit their actual innocence to be decided by a jury. That is the right that Harper was denied in this case.

REASONS FOR GRANTING THE PETITION

1. The circuits are split on whether a plaintiff may avoid the defense of innocent infringement by including a copyright notice on published copies of its copyrighted work even though those copies are not the copies that the infringer used for its infringement. On one hand, the Fifth Circuit in this case and the Seventh Circuit in *BMG Music v. Gonzalez*, 430 F.3d 888, 891–92 (7th Cir. 2005), have held that a defendant who listens to music on a file-sharing network is barred by § 402(d) from claiming to be an innocent infringer. On the other hand, the Second Circuit in *D.C. Comics* held that, where "there were no copyright notices on the infringing good and * * * a layman would not be able to distinguish between licensed and unlicensed goods," a "defendants' infringement was innocent." 913 F.2d at 35. Granting certiorari is appropriate to resolve this 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.

2. The question in this case is of unusual national importance because of the unprecedented litigation

campaign that the RIAA has been waging against those who listen to music on file-sharing networks. The RIAA's recording-company members have sued or threatened to sue almost 40,000 individuals in the federal courts as part of their campaign against file sharing. The recipients of these threats, many of them, like Harper, students unable to afford counsel, must pay settlements between $3,000 and $12,000 or litigate against the RIAA. If they choose to litigate, they face potentially millions of dollars in statutory damages and must shoulder the expense of federal litigation or find *pro bono* counsel.

For this reason, cases like this one will rarely reach judgment in the district courts, even more rarely obtain consideration by the courts of appeals, and almost never arrive at this Court on a petition for certiorari. And this is so even though the relevant rule of law is shaping tens of thousands of cases brought by recording companies against individuals in the lower courts and the primary conduct of millions of other individuals. If this Court agrees with Harper that the question presented by this case — whether copyright infringement by listening to music on the Internet can ever be innocent infringement — is worth resolving correctly, finally, and nationally, then this Court should take the opportunity to do so now. The opportunity is unlikely to come again.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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