

No. _____

In the
Supreme Court of the United States

ABKCO MUSIC, INC., et al.,

Petitioners,

v.

WILLIAM SAGAN, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

PAUL D. CLEMENT

Counsel of Record

C. HARKER RHODES IV*

JAMES Y. XI*

CLEMENT & MURPHY, PLLC

706 Duke Street

Alexandria, VA 22314

(202) 742-8900

paul.clement@clementmurphy.com

*Supervised by principals of the firm who
are members of the Virginia bar

Counsel for Petitioners

April 27, 2023

QUESTION PRESENTED

Respondent William Sagan purchased thousands of bootleg concert tapes that were made by various concert promoters and venue operators without the consent of either the performers or the owners of the copyrights in the musical works being performed. He bought them forewarned about the lack of necessary authorizations and licenses. Undeterred, Sagan used his position as the president, CEO, and sole owner of respondent Norton LLC to commercially exploit those bootleg concert recordings on the Internet on a massive scale. Sagan hired his brother-in-law and specifically directed him to digitize the tapes and make them available for download or streaming online, eventually putting tens of thousands of concert recordings up for sale—all without licenses for the copyrights in the underlying musical works. The district court held that Sagan was directly liable for copyright infringement for acquiring the bootleg recordings, developing the plan to digitize them and distribute them online, and instructing his brother-in-law which recordings to post online. The Second Circuit reversed, concluding that Sagan was not liable for direct infringement because “direct liability attaches only to ‘the person who actually presses the button,’” and Sagan instructed his employee to post the recordings instead of doing so himself.

The question presented is:

Whether direct liability for copyright infringement is limited to the person who actually “presses the button” to make the infringing copies.

PARTIES TO THE PROCEEDING

Petitioners are ABKCO Music, Inc.; Colgems-EMI Music Inc.; Sony Music Publishing (US) LLC; EMI April Music Inc.; EMI Blackwood Music Inc.; EMI Consortium Music Publishing, Inc.; EMI Consortium Songs, Inc.; EMI Feist Catalog Inc.; EMI Robbins Catalog Inc.; EMI Unart Catalog, Inc.; Jobete Music Co., Inc.; Screen-Gems-EMI Music Inc.; Stone Agate Music; Stone Diamond Music Corp.; Iagem Music LLC; Peer International Corporation; PSO Limited; Peermusic Ltd.; Peermusic III, Ltd.; Songs Of Peer, Ltd.; Lyric Copyright Services, L.P. o/b/o Crescendo Royalty Funding, L.P.; Warner-Tamerlane Publishing Corp.; and W Chappell Music Corp. d/b/a WC Music Corp. Petitioners were plaintiffs/counter-defendants in the district court and appellees/cross-appellants in the Second Circuit.

Respondents are William Sagan; Norton LLC; and Bill Graham Archives, LLC, d/b/a Wolfgang's Vault, Concert Vault, Music Vault, and Daytrotter. Respondents were defendants/counterclaimants in the district court and appellants/cross-appellees in the Second Circuit.

CORPORATE DISCLOSURE STATEMENT

ABKCO Music, Inc. is a wholly owned subsidiary of ABKCO Music & Records, Inc. No publicly traded company owns 10% or more of the stock of ABKCO Music, Inc.

Colgems-EMI Music Inc. is a wholly owned, indirect subsidiary of Sony Group Corporation, a publicly traded company organized under the laws of Japan. No publicly traded company other than Sony Group Corporation owns more than 10% of the stock of Colgems-EMI Music Inc.

Sony Music Publishing (US) LLC, formerly EMI Algee Music Corp., is a partially owned, indirect subsidiary of Sony Group Corporation, a publicly traded company organized under the laws of Japan. No publicly traded company other than Sony Group Corporation owns more than 10% of the stock of Sony Music Publishing (US) LLC.

EMI April Music Inc. is a wholly owned, indirect subsidiary of Sony Group Corporation, a publicly traded company organized under the laws of Japan. No publicly traded company other than Sony Group Corporation owns more than 10% of the stock of EMI April Music Inc.

EMI Blackwood Music Inc. is a wholly owned, indirect subsidiary of Sony Group Corporation, a publicly traded company organized under the laws of Japan. No publicly traded company other than Sony Group Corporation owns more than 10% of the stock of EMI Blackwood Music Inc.

EMI Consortium Music Publishing, Inc. d/b/a EMI Full Keel Music is a wholly owned, indirect

subsidiary of Sony Group Corporation, a publicly traded company organized under the laws of Japan. No publicly traded company other than Sony Group Corporation owns more than 10% of the stock of EMI Consortium Music Publishing, Inc. d/b/a EMI Full Keel Music.

EMI Consortium Songs, Inc. d/b/a EMI Longitude Music is a wholly owned, indirect subsidiary of Sony Group Corporation, a publicly traded company organized under the laws of Japan. No publicly traded company other than Sony Group Corporation owns more than 10% of the stock of EMI Consortium Songs, Inc. d/b/a EMI Longitude Music.

EMI Feist Catalog Inc. is a wholly owned, indirect subsidiary of Sony Group Corporation, a publicly traded company organized under the laws of Japan. No publicly traded company other than Sony Group Corporation owns more than 10% of the stock of EMI Feist Catalog Inc.

EMI Robbins Catalog Inc. is a wholly owned, indirect subsidiary of Sony Group Corporation, a publicly traded company organized under the laws of Japan. No publicly traded company other than Sony Group Corporation owns more than 10% of the stock of EMI Robbins Catalog Inc.

EMI Unart Catalog Inc. is a wholly owned, indirect subsidiary of Sony Group Corporation, a publicly traded company organized under the laws of Japan. No publicly traded company other than Sony Group Corporation owns more than 10% of the stock of EMI Unart Catalog Inc.

Jobete Music Co., Inc. is a wholly owned, indirect subsidiary of Sony Group Corporation, a publicly

traded company organized under the laws of Japan. No publicly traded company other than Sony Group Corporation owns more than 10% of the stock of Jobete Music Co., Inc.

Screen Gems-EMI Music Inc. is a wholly owned, indirect subsidiary of Sony Group Corporation, a publicly traded company organized under the laws of Japan. No publicly traded company other than Sony Group Corporation owns more than 10% of the stock of Screen-Gems-EMI Music Inc.

Stone Agate Music is a division of Jobette Music Co., Inc., a wholly owned, indirect subsidiary of Sony Group Corporation, a publicly traded company organized under the laws of Japan. No publicly traded company other than Sony Group Corporation owns more than 10% of the stock of Stone Agate Music.

Stone Diamond Music Corp. is a wholly owned, indirect subsidiary of Sony Group Corporation, a publicly traded company organized under the laws of Japan. No publicly traded company other than Sony Group Corporation owns more than 10% of the stock of Stone Diamond Music Corp.

Rodgers & Hammerstein Holdings, LLC is a wholly owned indirect subsidiary of Concord Music Group, Inc. No publicly traded company owns more than 10% of the stock of Rodgers & Hammerstein Holdings, LLC.

Peer International Corporation is a wholly owned indirect subsidiary of Peermusic III, Ltd. No publicly traded company owns 10% or more of the stock of Peer International Corporation.

PSO Limited is a wholly owned indirect subsidiary of Peermusic III, Ltd. No publicly traded company owns 10% or more of the stock of PSO Limited.

Peermusic Ltd. is a wholly owned indirect subsidiary of Peermusic III, Ltd. No publicly traded company owns 10% or more of the stock of Peermusic Ltd.

Peermusic III, Ltd. has no corporate parents, and no publicly traded company owns 10% or more of the stock of Peermusic III, Ltd.

Songs of Peer, Ltd. is a wholly owned subsidiary of Peermusic III, Ltd. No publicly traded company owns 10% or more of the stock of Songs of Peer, Ltd.

Lyric Copyright Services, L.P. o/b/o Crescendo Royalty Funding, L.P., formerly Spirit Catalog Holdings S.A.R.L. and Spirit Two Music, Inc., is a wholly owned indirect subsidiary of Lyric Capital Holdings I, L.P. No publicly traded company owns 10% or more of the stock of Lyric Copyright Services, L.P. o/b/o Crescendo Royalty Funding, L.P.

Warner-Tamerlane Publishing Corp. is a wholly owned indirect subsidiary of Warner Music Group Corp., which is a publicly traded company with more than 10% of its stock owned by AI Entertainment Holdings LLC and certain of its affiliates, which are not publicly traded companies.

W Chappell Music Corp. d/b/a WC Music Corp., formerly WB Music Corp., is a wholly owned indirect subsidiary of Warner Music Group Corp., which is a publicly traded company with more than 10% of its stock owned by AI Entertainment Holdings LLC and

certain of its affiliates, which are not publicly traded companies.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings in the U.S. Court of Appeals for the Second Circuit and the U.S. District Court for the Southern District of New York:

ABKCO Music, Inc. v. Sagan, Nos. 20-3816, 20-4020, 20-4099 (2d Cir.) (opinion issued on October 6, 2022; decision denying plaintiffs' petition for rehearing and rehearing en banc issued on November 28, 2022).

ABKCO Music, Inc. v. Sagan, No. 15-cv-4025 (S.D.N.Y.) (opinion and order granting partial summary judgment to plaintiffs filed on April 9, 2018; opinion and order denying defendants' motion for reconsideration filed on March 26, 2019; judgment entered July 23, 2020; motion for new trial denied Nov. 13, 2020).

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT.....	iii
STATEMENT OF RELATED PROCEEDINGS.....	viii
TABLE OF AUTHORITIES.....	xi
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	5
JURISDICTION	5
STATUTORY PROVISIONS INVOLVED.....	5
STATEMENT OF THE CASE	5
A. Statutory Background.....	5
B. Factual Background.....	9
C. Procedural Background.....	11
REASONS FOR GRANTING THE PETITION.....	15
I. The Decision Below Contravenes The Statutory Text And Settled Law.....	17
II. The Decision Below Conflicts With Decisions From Other Circuits.....	25
III. The Question Presented Is Important And Cleanly Presented	31
CONCLUSION	36
APPENDIX	
Appendix A	
Opinion, United States Court of Appeals for the Second Circuit, <i>ABKCO Music, Inc. v.</i> <i>Sagan</i> , No. 20-3816 (Oct. 6, 2022)	App-1

Appendix B

Order, United States Court of Appeals for the
Second Circuit, *ABKCO Music, Inc. v. Sagan*,
No. 20-3816 (Nov. 28, 2022) App-32

Appendix C

Opinion and Order, United States District
Court for the Southern District of New York,
ABKCO Music, Inc. v. Sagan, No. 15 Civ.
4025 (Apr. 9, 2018) App-34

Appendix D

Opinion and Order, United States District
Court for the Southern District of New York,
ABKCO Music, Inc. v. Sagan, No. 15 Civ.
4025 (Mar. 26, 2019)..... App-98

Appendix E

Relevant Statutory Provisions App-117
17 U.S.C. §106 App-117
17 U.S.C. §501 App-117

TABLE OF AUTHORITIES

Cases

<i>Akamai Techs., Inc.</i> <i>v. Limelight Networks, Inc.</i> , 797 F.3d 1020 (Fed. Cir. 2015).....	30
<i>Am Broad. Cos. v. Aereo, Inc.</i> , 573 U.S. 431 (2014).....	24, 25
<i>Bell v. Wilmott Storage Servs., LLC</i> , 12 F.4th 1065 (9th Cir. 2021).....	9
<i>Brammer v. Violent Hues Prods., LLC</i> , 922 F.3d 255 (4th Cir. 2019).....	9
<i>Broad. Music, Inc. v. Meadowlake, Ltd.</i> , 754 F.3d 353 (6th Cir. 2014).....	8
<i>Cap. Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984).....	6
<i>Cartoon Network LP v. CSC Holdings, Inc.</i> , 536 F.3d 121 (2d Cir. 2008).....	24, 25
<i>Columbia Pictures Indus., Inc. v. Aveco, Inc.</i> , 800 F.2d 59 (3d Cir. 1986).....	19, 24, 28, 29
<i>CoStar Grp., Inc. v. LoopNet, Inc.</i> , 373 F.3d 544 (4th Cir. 2004).....	30
<i>Crowell v. Baker Oil Tools, Inc.</i> , 143 F.2d 1003 (9th Cir. 1944).....	30
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003).....	5, 6
<i>EMI Christian Music Grp., Inc.</i> <i>v. MP3tunes, LLC</i> , 844 F.3d 79 (2d Cir. 2016).....	9

<i>Gershwin Publ'g Corp.</i> <i>v. Columbia Artists Mgmt., Inc.</i> , 443 F.2d 1159 (2d Cir. 1971)	7, 34
<i>Impression Prods., Inc. v. Lexmark Int'l, Inc.</i> , 581 U.S. 360 (2017).....	31
<i>Lewis Galoob Toys, Inc.</i> <i>v. Nintendo of Am., Inc.</i> , 964 F.2d 965 (9th Cir. 1992).....	19, 24, 29
<i>Metro-Goldwyn-Mayer Studios Inc.</i> <i>v. Grokster, Ltd.</i> , 545 U.S. 913 (2005).....	7, 8, 34
<i>Nelson-Salabes, Inc.</i> <i>v. Morningside Dev., LLC</i> , 284 F.3d 505 (4th Cir. 2002).....	30
<i>Perfect 10, Inc. v. Giganews, Inc.</i> , 847 F.3d 657 (9th Cir. 2017).....	30
<i>Soc'y of the Holy Transfiguration Monastery,</i> <i>Inc. v. Gregory</i> , 689 F.3d 29 (1st Cir. 2012)	19, 24, 26, 27, 28
<i>Sony Corp. of Am.</i> <i>v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	3, 6, 7, 15, 19, 23, 24, 26, 31
<i>Twentieth Century Music Corp. v. Aiken</i> , 422 U.S. 151 (1975).....	6
<i>VHT, Inc. v. Zillow Grp.</i> , 918 F.3d 723 (9th Cir. 2019).....	29
Constitutional Provisions	
U.S. Const. art. I, §8, cl. 8	5
Statutes	
17 U.S.C. §106	6, 15, 17, 18, 20, 23

17 U.S.C. §106(1)	6
17 U.S.C. §106(3)	6
17 U.S.C. §§108(a)-(e)	20
17 U.S.C. §108(f)(2)	20
17 U.S.C. §501	6, 18, 23
17 U.S.C. §504(b)	21
17 U.S.C. §504(c)	21
Other Authorities	
Admin. Office of the U.S. Courts, <i>Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark</i> (Feb. 13, 2020), https://bit.ly/3KNh7Tw	33
D. Chisum, <i>Chisum on Patents</i> (2023)	30
P. Goldstein, <i>Goldstein on Copyright</i> (2023)	19, 24
H.R. Rep. No. 94-1476 (1976)	26
M. Nimmer & D. Nimmer, <i>Nimmer on Copyright</i> (2023)	19, 33
Restatement (Second) of Agency (1958)	21
Restatement (Third) of Agency (2006)	21, 22, 27
Ethan Smith, <i>Music Stash Recalls When Rock Was Young</i> , <i>Wall St. J.</i> (Dec. 13, 2005), https://on.wsj.com/3He26I8	1, 9
W. Patry, <i>Patry on Copyright</i> (2023)	19, 20, 22, 24, 30

PETITION FOR WRIT OF CERTIORARI

This case involves the scope of direct liability for copyright infringement for selling massive numbers of bootleg concert recordings over the Internet. Disregarding the clear statutory text and established precedent, the Second Circuit held that respondent William Sagan—who owned and operated the companies that sold the infringing recordings and who specifically instructed his employee as to which recordings to make available—could escape liability for direct infringement because he did not personally “press the button” to create and upload those infringing recordings. That absurdly narrow understanding of direct infringement is plainly wrong under the text of the Copyright Act and accepted principles of primary and secondary liability. The decision cannot be reconciled with decisions from several other courts of appeals, including an opinion from the First Circuit reaching the exact opposite conclusion on materially indistinguishable facts. And the decision creates terrible incentives, as it makes avoiding direct-infringement liability for corporate executives as easy as ordering their employees to make the infringing copies rather than running the copier themselves. This Court should grant review and reverse.

In the early 2000s, William Sagan acquired “the most important collection of rock memorabilia and recordings ever assembled.” Ethan Smith, *Music Stash Recalls When Rock Was Young*, Wall St. J. (Dec. 13, 2005), <https://on.wsj.com/3He26I8>. The recordings at issue came primarily from the archives of the late Bill Graham, a legendary concert promoter enshrined

in the Rock & Roll Hall of Fame, and included never-before-seen audio and video tapes of live performances from artists like The Rolling Stones, The Who, and the Grateful Dead. Graham never tried to commercialize those recordings for an obvious reason: while the recordings were relatively high quality, they were pure bootlegs—i.e., he lacked permission from the artists or the copyright holders to make or commercialize the recordings.

Sagan was not similarly deterred. Even though Sagan knew full well that Graham lacked permission from artists and copyright holders to reproduce and distribute the bootleg concert recordings, and that Sagan purchased the recordings at a steep discount as a direct result, Sagan set about commercializing those recordings over the Internet on a massive scale. Sagan hired his brother-in-law, Michael Lundberg, to digitize the bootleg recordings and make them available online, specifically telling Lundberg which recordings to upload and ultimately posting thousands of recordings for public download without obtaining permission from the musicians who performed the songs or the songwriters or publishers of the songs themselves. On those undisputed facts, the district court had no trouble concluding that Sagan was directly and personally liable for that massive and blatant copyright infringement as a matter of law.

The Second Circuit reversed in relevant part. The court recognized that it was Sagan who “made plans to start digitizing tape recordings with an eye towards making them available on a public website,” and who “instructed” his employee Lundberg “which concerts to make available for download.” App.22. But the

Second Circuit nevertheless held that Sagan escaped direct liability for the resulting infringement, because (according to the Second Circuit) direct liability attaches only to “the person who actually presses the button,” and Sagan had his employee push the button to make and distribute the infringing copies instead of pushing that button himself. App.21-22.

That result cannot be squared with statutory text, settled law, or common sense. The Copyright Act protects creators against far more than the kid in the copy-room. It gives copyright owners not just the exclusive rights to copy and distribute their works, but also the exclusive right to “authorize” those acts, and makes clear that anyone who violates *any* of these rights has committed infringement, with enhanced liability for those who do so willfully. This Court has accordingly recognized that infringement includes not only “using” but also “authorizing the use of” a copyrighted work without the owner’s permission. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984). Numerous treatises confirm the point, explaining that both the statutory text and established principles of agency law impose direct liability on (and focus on the willfulness of) the person who orders someone to make infringing copies, not just the person who follows the orders. That understanding is compelled not only by settled law, but by common sense: it would be absurd if a corporate executive who orders her staff to print a million infringing copies of a copyrighted work with full knowledge of their infringing nature could escape direct liability in lieu of the low-level employee who follows those instructions and actually and unwittingly pushes the print button.

Unsurprisingly, the decision below also cannot be reconciled with the law in other federal courts of appeals. It squarely conflicts with an exact opposite decision from the First Circuit, which has explicitly held on materially identical facts that direct liability attaches to a person who authorizes someone else to post infringing materials online, not just the person who pushes the upload button. It also conflicts with decisions from the Third and Ninth Circuits, which similarly recognize that direct liability extends to the person who authorizes the infringing copying and not just the person who performs the physical act. And it conflicts with the long-settled rule in patent law.

The consequences of the erroneous decision below are amplified by the Second Circuit's centrality as a forum for copyright litigation. If permitted to stand, the Second Circuit's approach would allow corporate officers to evade direct liability for deliberate copyright infringement, as long as they are clever enough to leave the button-pushing to staff. Those problems cannot be papered over by artificially expanding secondary-liability theories like vicarious liability or contributory infringement to cover the gap. Direct liability is a different animal from vicarious liability and contributory infringement, with different elements and different rules. Moreover, limiting direct liability to the button-pushers creates the prospect of frustrating the willfulness inquiry that is central to the Act's remedial scheme. The decision below reaches the wrong result in a central forum and creates a massive hole in a critical statute. This Court should grant certiorari.

OPINIONS BELOW

The Second Circuit’s opinion below is reported at 50 F.4th 309 and reproduced at App.1-31. The district court’s opinion and order granting plaintiffs’ motion for summary judgment in part and denying in part is not reported, but is available at 2018 WL 1746564 and reproduced at App.34-97. The district court’s opinion and order denying defendants’ motion for reconsideration is not reported, but is available at 2019 WL 1382074 and reproduced at App.98-116.

JURISDICTION

The Second Circuit issued its opinion below on October 6, 2022, and denied a timely petition for rehearing on November 28, 2022. Justice Sotomayor extended the time to file a petition to April 27, 2023. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Copyright Act are reproduced at App.117-18.

STATEMENT OF THE CASE

A. Statutory Background

1. The Constitution empowers Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, §8, cl. 8. The basic “philosophy behind the clause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.” *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003). Copyright law thus “promot[es] broad public availability of literature,

music, and the other arts” by “rewarding the creators of copyrighted works,” *Cap. Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 710 (1984), thereby providing an “incentive” designed “to stimulate artistic creativity for the general public good.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). In other words, copyright law “celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge.” *Eldred*, 537 U.S. at 212 n.18 (emphasis omitted).

To that end, the Copyright Act grants copyright owners “exclusive rights to do and to authorize” certain uses of their works. 17 U.S.C. §106. Among those are the exclusive rights “to reproduce” the copyrighted work and “to distribute” it to the public. *Id.* §§106(1), (3). Anyone “who violates any of the exclusive rights of the copyright owner” is “an infringer of the copyright.” *Id.* §501. As those interlocking statutory provisions make clear, infringement includes “using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute.” *Sony*, 464 U.S. at 433 (emphasis added). That is, under the plain language of the Act, “an infringer is not merely one who *uses* a work without authorization by the copyright owner, but also one who *authorizes* the use of a copyrighted work without actual authority from the copyright owner.” *Id.* at 435 n.17 (emphasis added). A person who infringes any of the exclusive rights provided by the Copyright Act is subject to direct liability for that infringement, including damages—either actual or statutory damages enhanced in cases of willfulness—and injunctive relief. *See id.* at 433-34.

2. In addition to direct liability, this Court has recognized two forms of secondary liability for persons who profit from or enable acts of copyright infringement. See *Sony*, 464 U.S. at 434-35 (recognizing that although the Copyright Act “does not expressly render anyone liable for infringement committed by another,” that “does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity”). Those secondary liability doctrines are vicarious liability, which is “imposed in virtually all areas of the law,” and contributory infringement, which the Court described as “merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.” *Id.* at 435. Although some defendants may be liable under multiple theories, direct liability is a distinct doctrine from either vicarious liability or contributory infringement, and the latter theories each require proof of different elements. In particular, because vicarious liability and contributory infringement each seek to hold the defendant liable for *someone else’s* independent decision to infringe, those doctrines require proof of additional elements that direct liability does not.

Vicarious liability, for example, applies where the defendant “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.” *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); see, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (defining vicarious liability as “profiting from direct

infringement while declining to exercise a right to stop or limit it”). The essence of vicarious liability is thus the right to control the infringing conduct and the derivation of financial gain from that conduct, as distinct from any direct instruction or authorization to engage in infringement. For example, a restaurant owner can be held vicariously liable for infringing musical performances at his restaurant if he had the right and ability to stop the performances and derived a financial benefit from the performances (such as when the performances bring in more guests), even if he never actually told the band to play unlicensed music. *See, e.g., Broad. Music, Inc. v. Meadowlake, Ltd.*, 754 F.3d 353 (6th Cir. 2014). By contrast, direct liability does not require proof either that the defendant had the right and ability to supervise the infringing activity or that the defendant had a direct financial interest in that activity; the defendant can be held directly liable for participating in or authorizing the infringing conduct even if he had no right to control that conduct or financial interest in doing so (for instance, when an infringer convinces a friend to help make and distribute free copies of musical recordings based on a belief that all music should be free).

Contributory infringement likewise requires additional proof that direct infringement does not. A person engages in contributory infringement by “intentionally inducing or encouraging direct infringement.” *Grokster*, 545 U.S. at 930. As that description suggests, contributory liability requires evidence of “intent to promote infringing uses.” *Id.* at 931. That contrasts sharply with direct liability for copyright infringement, which “is a strict liability tort”

and has no scienter requirement. *Bell v. Wilmott Storage Servs., LLC*, 12 F.4th 1065, 1081 (9th Cir. 2021); see, e.g., *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 265 (4th Cir. 2019); *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 89 (2d Cir. 2016).

B. Factual Background

William Sagan is the founder, president, CEO, and sole owner of his company Norton LLC. App.40. In July 2002, Sagan used Norton LLC to acquire Bill Graham Archives LLC, which owned the private archives of the late Bill Graham—a legendary concert promoter who “virtually invented the modern concert business in the mid 1960s” and was inducted into the Rock and Roll Hall of Fame a year after his death in 1991. Smith, *supra*. Unbeknownst to the performers at the concerts he promoted, Graham often taped their performances to create a personal archival record of the concert, generating a large collection of bootleg recordings made without permission from either the performers being recorded or the owners or administrators of the copyrights in the musical works being performed. The list of those recordings, along with other bootleg recordings Sagan later acquired, “reads like a veritable who’s who of rock, soul, and alternative music, containing the performances of The Rolling Stones, The Who, the Grateful Dead, Willie Nelson, Ray Charles, Aretha Franklin, and Carlos Santana, to name a few.” App.35. “The list of songwriters who penned the works embodied in those performances is no less impressive and diverse, including legends such as Hoagy Carmichael, Carol

King, Mick Jagger, Keith Richards, Pete Townshend, and Green Day, among others.” App.35.

Although Graham created “a world-famous archive of concert footage,” he did not exploit the recordings commercially (with a few limited exceptions, such as in documentaries), App.41 n.9, and discussed donating his collection to a museum before he died, C.A.Supp.App.297. The reason for Graham’s reticence in commercializing his archive was straightforward: Graham never sought or received permission from either the performers or the owners or administrators of the copyrighted musical works to make the recordings, let alone to use them for commercial purposes. App.40. Accordingly, when Sagan purchased Graham’s archives in 2002, the purchase agreement warned him that he was acquiring just the physical recordings, and that the seller made no representation regarding any rights to exploit the recordings for profit. App.4. Sagan was further warned that he would have to seek permission from record companies and the artists themselves to exploit the recordings, and that he “may be buying the world[’s] greatest private collection [of recordings] that no one will ever hear.” App.2. Sagan heard similar warnings from other sellers as he continued to build his collection of bootleg recordings over the ensuing years. App.4-5. Tellingly, Sagan tried multiple times to obtain permission to commercialize some of the recordings, but was rebuffed. App.92.

Sagan was undeterred and set out to commercialize the bootleg recordings on a massive scale. Sagan hired his brother-in-law, Matthew Lundberg, as his Chief Technology Officer, and

directed Lundberg to digitize the recordings and to make them available for the public to purchase through websites run by Sagan and his companies. Those websites included *WolgangsVault.com* (later called *Wolgangs.com*), named after Bill Graham's given name, Wolfgang, which Sagan used to offer thousands of unlicensed audio and audiovisual recordings for download and streaming. App.45-46. Sagan also commercialized the bootleg recordings he had acquired through the websites *ConcertVault.com*, *MusicVault.com*, and *Daytrotter.com* (all operated by Sagan and his companies), a Music Vault channel on YouTube, and a Wolfgang's mobile app. *See* App.45-46.

As the undisputed evidence showed, Sagan personally directed that extensive and sweeping campaign of copyright infringement. He was "deeply involved in the acquisition of the recordings at issue," including the agreements that "clearly disclaimed intellectual property rights and in many instances documented the licensing issues the collections presented." App.92. He was the one who "made plans 'to start digitizing tape recordings with an eye towards making them available on a public website.'" App.93. And Sagan gave Lundberg precise directions as to what infringing recordings to copy and make available to the public, specifically "instruct[ing] him as to 'which concerts to make available for download or not.'" App.93.

C. Procedural Background

1. Petitioners are music publishers who own or hold exclusive licenses to the copyrighted musical works included in many of the recordings Sagan

commercialized. App.6. Collectively, petitioners have spent billions of dollars to develop or obtain their interest in their copyrighted works and to license those works for public enjoyment. Because Sagan's unauthorized copying and distribution of his collection of bootleg recordings threatens the value of petitioners' investment in their copyrighted works, petitioners sued Sagan and his companies in 2015, alleging direct liability for copyright infringement. App.6. In particular, petitioners asserted that Sagan and his companies had infringed their copyrights in 197 musical works by making audio and audiovisual recordings of those works available for download and streaming from their websites without a license to do so, illegally exploiting more than 1,175 recordings. App.6-7. As remedies, petitioners sought, *inter alia*, enhanced statutory damages for willful infringement and a permanent injunction against the infringing conduct. App.7.

After several years of discovery, both parties moved for summary judgment. In March 2018, the district court held that Sagan and his companies had, as a matter of law, infringed all 197 of the musical works at issue in the case. App.59-87. It also concluded as a matter of law that 167 of the works had been willfully infringed, in light of the "voluminous, undisputed record evidence demonstrating that [Sagan and his companies] were on notice that the recordings they acquired lacked the consents and authorizations necessary to exploit them." App.89. The district court did not limit its finding to the corporate defendants, and granted summary judgment against Sagan himself, finding that the "undisputed record evidence establishes that Sagan is

personally liable for direct infringement.” App.92. As that evidence showed, Sagan not only had “final decision-making authority” over his companies, but was “deeply involved” in the acquisition of the infringing recordings and the decision to make them publicly available for profit, and personally “instructed” his employee Lundberg “which concert[s] to make available for download or not.” App.92-93.

Sagan moved for reconsideration on his direct-infringement liability, which the district court denied. App.112-13. The court explained again that Sagan had “personally directed the infringing activity,” including by “actually instruct[ing] his employees with respect to ‘which concert[s] to make available for download or not.’” App.113. That evidence, the court concluded, demonstrated that Sagan was directly liable “as a matter of law” for the infringement of petitioners’ copyrights. App.113. The district court also noted in a footnote that Sagan might “also be liable for ‘contributory infringement,’” but had no need to address that theory further because Sagan could “be held liable under either direct or secondary theories for his personal direction of infringement.” App.113 n.12.

The case then proceeded to trial on willfulness as to the 30 works where the district court had not granted summary judgment on that issue for petitioners, and damages for all 197 works at issue. App.8. After nine days of trial, the jury found that the 30 works had not been willfully infringed and awarded petitioners a total of \$189,500 in statutory damages. App.2.

2. In just three paragraphs of a forty-plus-page opinion, the Second Circuit reversed in relevant part. The Second Circuit agreed that making the bootleg recordings available on the Internet for the public to purchase “infringed each musical work included in an audiovisual recording.” App.12.¹ But despite recognizing that massive and sweeping infringement of petitioners’ copyrights, the Second Circuit held that Sagan could not be held liable for direct infringement, on the sole basis that Sagan did not himself perform the physical act of posting the infringing recordings to his companies’ websites. App.21-22. In the Second Circuit’s view, direct liability for copyright infringement “attaches only to ‘the person who actually presses the button’” to make or distribute the infringing copies. App.21. That is, according to the Second Circuit, a corporate officer can only be subject to direct liability for copyright infringement if the copyright is “infringed by [the] corporate officer’s own hand.” App.21.

The Second Circuit recognized that Sagan was the one who had “made plans ‘to start digitizing tape recordings with an eye towards making them available on a public website,’” and that he had specifically “instructed [Lundberg] as to ‘which concerts to make available for download or not.’” App.22. But in the Second Circuit’s view, even the undisputed evidence that Sagan had explicitly directed Lundberg to post specific infringing recordings for sale on the Internet was insufficient as

¹ The Second Circuit vacated the judgment of infringement as to 51 audio-only recordings on grounds not relevant here. See App.12-15.

a matter of law to hold Sagan liable for direct infringement, because there was “no evidence that Sagan is the one who ‘actually pressed the button.’” App.22 (brackets omitted).

REASONS FOR GRANTING THE PETITION

This should have been an easy case. The infringement was egregious and the responsible perpetrator was obvious. The decision to excuse that perpetrator from direct liability contradicts text, precedent, and common sense.

The Copyright Act provides copyright owners with the exclusive right not just to reproduce and distribute their works, but “*to authorize*” their reproduction and distribution as well. 17 U.S.C. §106 (emphasis added). This Court’s precedent confirms what the text makes clear: that “authorizing the use of the copyrighted work” is a form of infringement, such that “one who authorizes the use of a copyrighted work without actual authority from the copyright owner” is liable as a direct infringer. *Sony*, 464 U.S. at 433, 435 n.17. That rule makes perfect sense—creators need protection from more than the kid in the copy-room—and resolves this case. Respondent William Sagan acquired a trove of concert recordings that were taped without the permission of the performers whose performances were recorded or the songwriters or publishers of the songs that were performed; he then directed his employee to reproduce the recordings and distribute them on the Internet at a massive scale, even though he did not have the authority from the copyright owners or their representatives to do so. Under the plain text of the Copyright Act, this Court’s

precedent, and common sense, Sagan is liable as a direct infringer. It is as simple as that.

The Second Circuit reached a contrary conclusion only by adopting an impossibly narrow understanding of direct liability for copyright infringement, holding that direct liability “attaches only to ‘the person who actually presses the button.’” App.21. Although the Second Circuit recognized that Sagan “made plans to start digitizing tape recordings with an eye toward making them available on a public website,” and specifically “instructed” his employee “as to which concerts to make available for download,” it nevertheless concluded that Sagan was not liable for direct infringement because he did not personally perform the physical act of “press[ing] the button” to copy and upload the recordings on the Internet. App.21-22. As noted, that extraordinarily cramped view of direct liability cannot be reconciled with either the text of the Copyright Act or this Court’s precedent. Unsurprisingly, it also conflicts with decisions from other courts of appeals, which have recognized that direct infringement liability extends to persons who order or authorize the creation of infringing copies—not just the person who physically pushes the “copy” button. It likewise conflicts with the long-standing and sensible approach in patent law.

The Second Circuit’s decision is not only profoundly mistaken, but will have serious negative consequences. By limiting direct infringement liability to “the person who actually presses the button,” the Second Circuit’s mistake allows individuals setting out to commercially exploit the copyrighted works of others to effectively immunize

themselves from direct liability just by ordering a low-level associate to handle the task of actually making the infringing copies. That gets matters exactly backwards and makes a hash out of the Copyright Act's remedial framework, which treats willful infringement more seriously than mechanically pushing a button. Nor can the problems with the decision below be solved by artificially expanding various forms of secondary liability to fill the gap that the Second Circuit's approach creates. Direct liability, vicarious liability, and contributory infringement are distinct doctrines with distinct elements. By adopting an exceptionally narrow view of direct liability and forcing copyright claims into various forms of secondary liability instead, the decision below risks leaving wide swaths of classic infringement behavior unremedied and adding distracting and unwarranted complications to countless copyright cases. It also makes little sense to expand judicially created doctrines of secondary liability at the expense of statutorily mandated direct liability for infringing the exclusive right to authorize copying and distribution. This Court should not allow the misguided and consequential decision below—from one of the most important circuits for copyright litigation in the Nation—to stand.

I. The Decision Below Contravenes The Statutory Text And Settled Law.

Section 106 of the Copyright Act provides that “the owner of copyright under this title has the exclusive rights to do and to authorize” both the reproduction of the copyrighted work and its distribution. 17 U.S.C. §106. Section 501 further

provides that anyone “who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 ... is an infringer of the copyright.” *Id.* §501. Under a straightforward reading of that statutory text, a person who directs or orders someone else to make or distribute copies of a copyrighted work without permission of the copyright owner is directly liable under the Act for copyright infringement of the exclusive right to authorize such acts, even if that person does not personally perform the physical act of making the infringing copies. That straightforward reading of the text is confirmed by this Court’s precedent and other provisions of the Copyright Act, as well as by longstanding common-law principles and common sense. The Second Circuit seriously erred by concluding otherwise.

1. The Copyright Act grants copyright owners the “exclusive rights” not only to reproduce and distribute copies of the copyrighted work, but “to authorize” that reproduction and distribution as well. 17 U.S.C. §106. The prohibition on infringement broadly protects all of those exclusive rights, reaching “[a]nyone who violates any of the exclusive rights of the copyright owner.” *Id.* §501. By their plain terms, those provisions make clear that a person who authorizes the copying or distribution of an infringing work is just as liable for direct infringement as a person who physically copies or distributes it. In this Court’s words, because infringement includes “using or *authorizing the use* of the copyrighted work,” an infringer “is not merely one who uses a work without authorization by the copyright owner, but also one who authorizes the use of a copyrighted work without actual authority from

the copyright owner.” *Sony*, 464 U.S. at 433, 435 n.17 (emphasis added).

Given that unambiguous statutory text and this Court’s precedent, it is quite literally hornbook law that a “direct infringer ... need not itself actually create the infringing work.” W. Patry, *Patry on Copyright* §21:40 (2023). Instead, if “Company A takes the plaintiff’s work, and sends it to Company B instructing B to copy the plaintiff’s work,” then “A is a direct infringer,” even though Company A simply ordered the creation of the infringing works and did not perform the physical act of copying. *Id.*; *see, e.g.*, M. Nimmer & D. Nimmer, *Nimmer on Copyright* §12.04[A][1] (2023) (“Those who participate in the copyright infringement are often held liable, even if they have not ‘personally duplicated the designs’ at issue.”); P. Goldstein, *Goldstein on Copyright* §8.1.1.1 (2023) (defendant who “selected the offending materials for inclusion in the [infringing work] ... could properly have been characterized as a direct infringer”). Courts around the country have likewise correctly recognized that settled law. *See, e.g.*, *Soc’y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 56 (1st Cir. 2012); *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 970 (9th Cir. 1992); *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 61-62 (3d Cir. 1986); *see also infra* pp.25-30.

That result is compelled by common sense as well as statutory text. If the moving force in a scheme to commercially exploit copyrighted works orders a low-level associate to start running the presses to print infringing copies, it would make no sense to say that

the mastermind who authorized the copying is not liable for direct infringement just because the hapless associate was the one who actually operated the printer. Likewise, if a customer walks into a copy store with a new best-seller and asks the clerk behind the counter to run off a thousand copies, it would be incomprehensible to excuse the customer from liability for direct infringement as long as the clerk is the one who physically presses the “copy” button. The key question under the Copyright Act is not just who pushes the button, but also who “authorize[s]” the infringing act. 17 U.S.C. §106; *see, e.g.*, Patry on Copyright §21:40 (direct liability extends to acts done “by *or on behalf of* a defendant” (emphasis added)).

Other provisions of the Copyright Act reinforce that conclusion. For example, section 108 provides a limited exception from liability for libraries and their employees in certain circumstances when they reproduce and distribute copyrighted works at the request of a library patron. 17 U.S.C. §§108(a)-(e). But section 108 makes clear that “[n]othing in this section” “excuses a person ... who *requests a copy* ... under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy.” *Id.* §108(f)(2) (emphasis added). The Copyright Act thus presupposes that the library patron who asks a librarian to make a copy can be directly liable for copyright infringement, even though the patron does not do the physical copying herself. That sound principle is not limited to libraries, but extends to retail photocopy shops and to the workplace.

Similarly, the Copyright Act’s remedial scheme makes clear that willful infringement is particularly threatening to the value of copyrighted works and so merits enhanced statutory damages. Thus, while statutory damages are limited to \$30,000 in cases of non-willful infringement, a court may award up to \$150,000 in statutory damages for willful infringement. 17 U.S.C. §504(c). That regime could be readily frustrated if the willful exploiter of valuable copyrights could delegate the physical act of infringement to a low-level associate shielded from knowledge. The statute also provides for the “profits of the infringer” as a supplement to actual damages from the infringement. *Id.* §504(b). Needless to say, the mastermind authorizing illicit button-pushing on a substantial scale is far more likely to be earning substantial profits than the button-pushers themselves.

Longstanding common-law principles confirm this same result. The common law has long recognized the general rule that a “principal is subject to *direct liability* to a third party harmed by an agent’s conduct” when “the agent acts with actual authority or the principal ratifies the agent’s conduct” and “the agent’s conduct, if that of the principal, would subject the principal to tort liability.” Restatement (Third) of Agency §7.03 (2006) (emphasis added); *see also* Restatement (Second) of Agency §212 (1958) (explaining that a “person is subject to liability for ... conduct which results from his directions as he would be for his own personal conduct if, with knowledge of the conditions, he intends the conduct”). As the Restatement explains, that liability is “termed ‘direct liability’”—as opposed to “vicarious liability”—because

the third party's injuries stem from the "principal's own fault." Restatement (Third) of Agency §7.03, cmt. b. The principal thus faces "direct liability" for his agent's conduct where the principal "manifest[s]" that he "wishes the agent so to act." *Id.*; *see also* Patry on Copyright §21:41 (explaining that direct infringement applies where the defendant "either directly *or through an agent*" commits the infringing act (emphasis added)).²

2. Under that settled law, this should have been an easy case. As the district court explained, the undisputed evidence showed that Sagan "personally directed the infringing activity," and Sagan "point[ed] to no evidence" contradicting that fact. App.113. Despite knowing that he had never obtained permission from the owners or administrators of the copyrights on the underlying works, Sagan—who conceded he had "final decision-making authority" over every aspect of his company—took thousands of bootleg recordings and made them available for profit on a commercial website, explicitly instructing his employee Lundberg "which concerts to make available for download." App.91-92. That record makes it crystal clear that Sagan "authorize[d] the use of a copyrighted work without actual authority from the

² By contrast, a principal may be subject to "vicarious liability" when "an agent who is an employee ... commits a tort while acting within the scope of employment." Restatement (Third) of Agency §7.03, cmt. b; *see, e.g.*, Patry on Copyright §21:40 (secondary liability, such as vicarious liability, "results from acts not done by or on behalf of a defendant, but from an act of direct infringement committed by another whose relationship with the defendant is deemed sufficient to justify imposing derivative liability on the defendant").

copyright owner.” *Sony*, 464 U.S. at 435 n.17. The district court therefore correctly held Sagan liable for direct infringement as a matter of law.

3. The Second Circuit nevertheless disagreed, adopting an impossibly narrow view of direct infringement under which direct liability “attaches only to ‘the person who actually presses the button.’” App.21. The Second Circuit recognized that Sagan had “made plans to start digitizing tape recordings with an eye towards making them available on a public website” and specifically “instructed” his brother-in-law “which concerts to make available for download,” but nonetheless concluded that Sagan could not be held liable for direct infringement because he did not personally perform the physical act of “press[ing] the button” to copy the infringing recordings and upload them to the Internet. App.22.

That analysis cannot be squared with the statutory text or settled law—which is presumably why the Second Circuit made no attempt to ground its holding in the language of the Copyright Act or reconcile it with established contrary precedent. Nothing in the Copyright Act narrowly limits direct liability for infringement to the specific individual who personally commits the physical act of making the infringing copy; on the contrary, the Act expressly extends direct liability to any person who violates the copyright owner’s exclusive right “to authorize” copies of the work. 17 U.S.C. §§106, 501. That is precisely why this Court, multiple lower-court decisions, and leading treatises have all recognized that a defendant can be directly liable for copyright infringement even if that defendant did not personally perform the act of

copying the work. *Sony*, 464 U.S. at 435 n.17; *Gregory*, 689 F.3d at 56; *Lewis Galoob*, 964 F.2d at 970; *Columbia Pictures*, 800 F.2d at 61-62; Patry on Copyright §21:40; Nimmer on Copyright §12.04[A][1]; Goldstein on Copyright §8.1.1.1.

The Second Circuit relied on its own precedent addressing copyright liability in a completely different context—namely, where copyright owners seek to impose liability on defendants who provide technology that others can use to make unauthorized copies. App.21-22 (citing *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008)). In *Cartoon Network*—the case from which the decision below drew its “presses the button” standard—the copyright owners sued a cable company for supplying its customers with digital video recording systems (DVRs), which are machines that enable customers to record their favorite shows. The Second Circuit held that the cable company was not liable for direct infringement, because it did not engage in any “volitional conduct that causes the copy to be made”; instead, it simply provided technology that made it possible for others to make infringing (or non-infringing) copies if they chose to do so. 536 F.3d at 131. In that context, the Second Circuit held, it was only the “operator” of the DVR—“the person who actually presses the button to make the recording”—that “supplie[d] the necessary element of volition” in making the infringing copy and so only the operator could be held liable for direct infringement. *Id.*; see, e.g., *Am Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 453 (2014) (Scalia, J., dissenting) (arguing that a defendant “may be held directly liable only if it has engaged in volitional conduct that violates the Act”).

That is nothing like this case. When a defendant simply provides technology that might (or might not) be used for infringing purposes, but does not choose what content is copied or performed using the technology, there may be serious questions as to whether that defendant has provided the “element of volition” for direct liability. *Cartoon Network*, 536 F.3d at 131. But where—as here—a defendant specifically instructs someone else to make and distribute infringing copies of particular works (here, by uploading thousands of bootleg concert recordings to a public website), there is no need to look any further to find a volitional act of infringement. Once “the defendant has acted” by authorizing someone else to make the illicit copies, any “volitional-conduct requirement is not at issue,” *Aereo*, 573 U.S. at 454 (2014) (Scalia J., dissenting), and the defendant can be held directly liable for authorizing that illicit copying to occur. The Second Circuit seriously erred by holding otherwise and limiting direct liability for copyright infringement to only the person who “actually presses the button.” App.21.

II. The Decision Below Conflicts With Decisions From Other Circuits.

The Second Circuit’s decision conflicts not only with statutory text and this Court’s precedents, but also (as an unsurprising result) with decisions from several other courts of appeals. The First Circuit has squarely held that a defendant who directs another person to commit infringement is himself directly liable for copyright infringement, and the Third and Ninth Circuits have likewise recognized that direct liability is not narrowly limited to the person who

actually presses the button to make the infringing copies. This Court should intervene and restore clarity and uniformity on this important issue.

1. The decision below squarely conflicts with the First Circuit's decision in *Gregory*, which explicitly holds that direct liability extends to a defendant who instructs someone else to engage in infringement but does not himself press the button to create the infringing copies. In *Gregory*, the Society of the Holy Transfiguration Monastery sued Archbishop Gregory, who ran a competing monastery, after a priest named Father Peter at the competing monastery posted the Society's copyrighted translations of religious texts on the Archbishop's public website. 689 F.3d at 35-37. Archbishop Gregory argued that he could not be held directly liable for copyright infringement because he was "not the person who posted the disputed Works on the website"; instead, he "relied on Father Peter" to "build, design, and program the [w]ebsite," and it was Father Peter who had actually pressed the button to upload the infringing content, *id.* at 36-37, 54, 56.

The First Circuit squarely rejected that argument and held Archbishop Gregory "liable for direct infringement." *Id.* at 57. Quoting from this Court's decision in *Sony*, the First Circuit explained that "an infringer is 'not merely one who uses a work without authorization by the copyright owner, *but also one who authorizes the use of the copyrighted work without actual authority from the copyright owner.*'" *Id.* (emphasis in *Gregory*) (quoting *Sony*, 464 U.S. at 435 n.17); *see also* H.R. Rep. No. 94-1476, at 61 (1976) (explaining that "a person who lawfully acquires an authorized copy of a motion picture would be an

infringer if he or she engages in the business of renting it out to others for purposes of unauthorized public performance”). Although Archbishop Gregory did not personally upload the infringing material to the website, he was nevertheless directly liable for the infringement because he gave Father Peter “express authorization” to “engage in acts that would violate the Monastery’s display right” by uploading the copyrighted translations. 689 F.3d at 57.

That conclusion, the First Circuit explained, also followed from established common-law “agency principles.” *Id.* at 56. Under traditional agency doctrine, “a principal (here, the Archbishop) may be held liable for the authorized acts of its agent (here, Father Peter).” *Id.* (citing Restatement (Third) of Agency §1.01 (2006)). In particular, a “principal is subject to liability to a third party harmed by an agent’s conduct when the agent’s conduct is within the scope of the agent’s actual authority or ratified by the principal.” *Id.* at 57 (quoting Restatement (Third) of Agency §7.04)). The First Circuit had no trouble concluding that Father Peter “acted as the Archbishop’s agent” in posting the infringing material to the Archbishop’s website, given that Archbishop Gregory authorized Father Peter to upload content onto the website and told him what content to upload. *Id.* at 56. The Archbishop was therefore directly liable for the resulting infringement. *Id.* at 56-57.³

³ Because the First Circuit held that Archbishop Gregory was directly liable, it found no need to decide whether he might also be liable under distinct theories of vicarious liability or contributory infringement. *Gregory*, 689 F.3d at 58 n.20.

The First Circuit's decision in *Gregory* is plainly irreconcilable with the Second Circuit's decision below. Indeed, the relevant facts are materially indistinguishable: In both cases, the defendant instructed someone else to post infringing material to a public website, and those instructions were carried out. *Compare Gregory*, 689 F.3d at 35-37, 56-57, with App.21-22. In the First Circuit, that is sufficient to impose direct liability on the authorizer. In the Second Circuit, it is not. Only this Court can resolve that square conflict.

2. The decision below also runs contrary to decisions from other circuits recognizing that direct liability for copyright infringement is not narrowly confined to "the person who actually presses the button." App.21. The Third Circuit, for instance, made that clear in *Columbia Pictures*. In that case, several movie production companies sued the defendant for renting out viewing rooms for the public to watch movies that the companies had produced. 800 F.2d at 61-62. The movie production companies alleged that the defendant violated their exclusive right "to perform the copyrighted work publicly" and to "authorize" such performances. *Id.* The Third Circuit acknowledged that the defendant did not itself "perform" the copyrighted work; instead, it was the defendant's customers who "actually place the video cassette in the video cassette player and operate the controls." *Id.* at 62.

That fact, however, was not sufficient to excuse the defendant in *Columbia Pictures* from direct liability. Instead, the Third Circuit recognized, the defendant could "still be responsible as an infringer

even though it does not actually operate the video cassette players.” *Id.* As the Third Circuit explained, the Copyright Act also grants copyright owners “the exclusive rights to ‘authorize’ public performances”; and in the Third Circuit’s view, by providing its customers with a viewing room and the other “requisites of a public performance,” the defendant in *Columbia Pictures* had violated that right, even though it was the customers who “actually operate the video cassette players.” *Id.* That reasoning and result cannot be squared with the rule that the Second Circuit adopted in this case: that “direct liability attaches only to ‘the person who actually presses the button.’” App.21.

The Ninth Circuit has likewise suggested that a person who directs another to do the copying is liable as a direct infringer even if that person does not perform the physical act of copying himself. In *Lewis Galoob*, the Ninth Circuit considered a “direct infringement by authorization argument,” and recognized in no uncertain terms that “infringement by authorization is a form of direct infringement.” 964 F.2d at 970. While the Ninth Circuit ultimately concluded that the defendant’s use of the plaintiff’s works in that case was fair use, *id.* at 972, its explicit acknowledgment that a defendant can be held directly liable for *authorizing* (rather than personally creating) an infringing copy runs directly contrary to the Second Circuit’s holding below that direct liability extends only to the person who commits the physical act of copying. *Id.* at 970; *see, e.g., VHT, Inc. v. Zillow Grp.*, 918 F.3d 723, 732 (9th Cir. 2019) (direct liability requires only that defendants be “actively involved in the infringement,” such as by “select[ing] any material

for upload” (emphasis omitted)); *Perfect 10, Inc. v. Giganeews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017) (direct liability requires only “conduct that can reasonably be described as the direct cause of the infringement” (emphasis omitted)).⁴

The Second Circuit’s decision also departs from the long-standing rule in patent law, where it is again hornbook law that courts assess “direct infringement” by applying “standard principles of agency law” to “determin[e] the liability of a principal for the infringing acts of an agent or servant.” 5 D. Chisum, *Chisum on Patents* §16.06 (2023); *see, e.g., Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1023 (Fed. Cir. 2015) (recognizing that a defendant “is liable for infringement ... if it acts through an agent (applying traditional agency principles)”; *Crowell v. Baker Oil Tools, Inc.*, 143 F.2d 1003, 1004 (9th Cir. 1944) (considering it “obvious” that a defendant “may infringe a patent if he employ an agent for that purpose,” and need not “himself be a manufacturer of the alleged infringing devices”). This Court has

⁴ Decisions on this issue in the Fourth Circuit point in both directions, underscoring the need for further review. On the one hand, the Fourth Circuit has said that direct liability can be premised on “actual infringing conduct with a nexus sufficiently close and causal to the illegal copying.” *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004), which appears broader than the “actually presses the button” test adopted below, App.21. On the other hand, the Fourth Circuit has also said that a firm that instructed another to copy certain architectural drawings “may not have directly infringed” those works, *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 513 (4th Cir. 2002), in a decision that a leading treatise comments “confuse[s]” direct and secondary liability, Patry on Copyright §21:40.

previously recognized that given their shared constitutional roots and common objectives, a conflict in approach between copyright and patent law that does not emanate from differing statutory text merits further investigation. *See, e.g., Impression Prods., Inc. v. Lexmark Int’l, Inc.*, 581 U.S. 360, 377-79 (2017) (acknowledging the “historic kinship between patent law and copyright law” (quoting *Sony*, 464 U.S. at 439)).

In sum, the flawed decision below creates a clear and irreconcilable conflict in the federal courts of appeals over whether direct liability for copyright infringement is limited to the person who actually performs the physical act of making the infringing copies. The decision below also departs from the settled and sensible rule applied under patent law. This Court should not allow these conflicts to persist.

III. The Question Presented Is Important And Cleanly Presented.

The serious distortions created by the decision below confirm the pressing need for this Court’s review. If permitted to stand, the decision below will severely distort copyright law in one of the most important forums for copyright litigation in the country, and immunize blatant and willful copyright infringers from any direct liability as long as they take the simple step of delegating the actual button-pushing to an unwitting subordinate. That rule will create serious problems for copyright holders and needless headaches for courts and litigants, as copyright infringement suits that should be straightforward direct liability cases resolved based on clear statutory text will instead be diverted into ill-

fitting and judicially fashioned secondary liability doctrines that require proof of additional elements and may allow some willful infringers to escape liability altogether. Those important and problematic consequences warrant this Court's review.

The Second Circuit's impossibly narrow understanding of direct liability for copyright infringement—which is now binding federal law in the media capital of the world (and no other circuit)—will skew copyright litigation and excuse even the most willful infringers from direct liability. The publishing executive who orders her printing staff to run off a million copies of someone else's best-seller, the anti-copyright activist who directs subordinates to upload thousands of unlicensed songs to the Internet for public streaming, and the copy-store customer who directs the clerk to make a hundred copies of a collection of copyrighted photographs would all escape direct liability as long as they ensure some other finger actually presses the button to make the infringing copies.

The Second Circuit's rule will create significant hurdles for copyright enforcement. Under the decision below, copyright holders will almost never be able to impose direct liability on the most culpable infringers—those who plan and direct widespread, value-destroying acts of infringement—even when (as here) the companies through which they operate and the employees who actually make the infringing copies may all be judgment-proof. That approach will also complicate the Copyright Act's remedial scheme by creating questions about whose knowledge counts for

willfulness inquiries and whose profits count for purposes of recovering ill-gotten gains.⁵

Those distortions would be serious enough in any Circuit, but they are particularly problematic in the Second Circuit, which (along with the Ninth Circuit) handles a disproportionate share of copyright litigation. In 2017 and 2018, for example, roughly a quarter of all copyright cases were filed within the Second Circuit. *See* Admin. Office of the U.S. Courts, *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark* (Feb. 13, 2020), <https://bit.ly/3KNh7Tw> (interactive map). That both magnifies the consequences of the decision below and the seriousness of the split among the circuits.

Those serious problems cannot be solved, as the Second Circuit apparently believed, by expanding secondary liability to make up for the Second Circuit’s artificial contraction of direct liability. *Contra* App.21-22. Direct liability, vicarious liability, and contributory infringement are discrete doctrines, and the latter doctrines require proof of additional elements that can allow certain wrongdoers to escape liability.

Vicarious liability, for instance, requires proof that the defendant had (1) “the right and ability to supervise the infringing activity” and (2) a “direct financial interest in such activities”—neither of which is required for direct liability, and both of which may

⁵ The employees who actually make the infringing copies may also be separately immune from direct liability if that act was required as part of their employment, *see* Nimmer on Copyright §12.04[A][1], potentially leaving no one at all subject to direct liability under the Second Circuit’s rule.

raise difficult factual issues. *Gershwin Publ'g*, 443 F.2d at 1162; see *Grokster*, 545 U.S. at 930 (vicarious liability requires “profiting from direct infringement while declining to exercise a right to stop or limit it”). A person who tells a friend to make infringing copies for him may lack a formal right to supervise the infringing activity, and a nonprofit executive who just believes that music should be free may lack any direct financial interest in having his employees post unlicensed songs on the Internet for public download. Likewise, liability for contributory infringement requires “intentionally inducing or encouraging direct infringement,” *Grokster*, 545 U.S. at 930, a scienter requirement that is wholly absent in direct liability cases and may be difficult or impossible to prove in particular circumstances (for instance, when a person tells another to make copies without knowing or caring whether those copies will infringe).

Absent the Second Circuit’s error, direct liability would be readily available to handle these cases. Under the decision below, however, direct liability is unavailable, and relying on vicarious liability or contributory infringement would require resolving complicated factual issues at trial in cases that should instead be decided at summary judgment (and would be decided at summary judgment in other circuits). That dynamic will distort both in-court litigation and out-of-court settlement discussions, undermine copyright enforcement, and create unnecessary and unwarranted complexity in countless copyright cases. There is also an important methodological problem in addition to these practical consequences. Both vicarious liability and contributory infringement are judicially crafted doctrines, whereas the text of the

Copyright Act explicitly imposes direct liability for “anyone” who infringes on the exclusive right to authorize copying and distribution. While the judicially crafted doctrines may play a useful role in filling statutory gaps, it makes no sense to ignore the clear import of the statutory text, and then expand judicially created doctrines to fill a gap that Congress itself did not create. This Court should not permit the decision below to impose those adverse consequences without further review.

In short, the decision below creates an outlier rule that departs from the statutory text, this Court’s precedent, and settled law, and is plainly wrong; produces a clear and irreconcilable circuit split; and distorts copyright law in one of the nation’s most important forums for copyright litigation in a way that will create massive practical problems for countless courts and litigants. This Court should intervene and restore uniformity to the law by correcting the Second Circuit’s egregious error.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

PAUL D. CLEMENT

Counsel of Record

C. HARKER RHODES IV*

JAMES Y. XI*

CLEMENT & MURPHY, PLLC

706 Duke Street

Alexandria, VA 22314

(202) 742-8900

paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Petitioners

April 27, 2023