

No. 22-1053

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In The  
Supreme Court of the United States

ABKCO MUSIC INC., et al.,

*Petitioners,*

v.

WILLIAM SAGAN, et al.,

*Respondents.*

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

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**BRIEF OF RECORDING INDUSTRY  
ASSOCIATION OF AMERICA (RIAA),  
AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS, AND PUBLISHERS (ASCAP), AND  
BROADCAST MUSIC, INC. (BMI) AS AMICI  
CURIAE IN SUPPORT OF PETITIONERS**

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## INTEREST OF AMICI CURIAE<sup>1</sup>

The Recording Industry Association of America (“RIAA”) supports and promotes the creative and financial vitality of recorded music and the people and companies that create it in the United States. RIAA’s several hundred members—ranging from major American music groups with global reach to artist-owned labels and small businesses—make up the world’s most vibrant and innovative music community. RIAA members create, manufacture, and/or distribute the majority of all legitimate recorded music produced and sold in the United States.

The American Society of Composers, Authors, and Publishers (“ASCAP”), founded in 1914, is the only U.S. performing rights organization founded and governed by music creators. ASCAP is also the only U.S. performing rights organization that operates on a not-for-profit basis, delivering royalties only to its songwriter, composer, lyricist, and music publisher members, not to private investors. ASCAP’s more than 900,000 members are the creators and owners of the copyrights in more than 18 million musical works. ASCAP licenses the right to publicly perform its members’ copyrighted musical works to hundreds of thousands of music users, including thousands of audio-only and audio-visual Internet streaming

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<sup>1</sup> Counsel of record for all parties received timely advance notice of intent to file. S. Ct. R. 37(2). No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel made a monetary contribution intended to fund the brief’s preparation or submission.

services. ASCAP collects the licensing fees, processes trillions of performances every year, and pays royalties to members based on performances of their works. The ASCAP license is an efficient solution for businesses to legally perform ASCAP music while respecting the right of songwriters and composers to be paid fairly. ASCAP's members also rely on ASCAP to prosecute copyright infringement actions on their behalf when music users engage in the unauthorized public performance of ASCAP's members' works.

Broadcast Music, Inc. ("BMI") is a performing rights organization that licenses the public performance right in the United States of the more than 20.6 million songs and musical compositions in its repertoire. BMI contracts with approximately 1.3 million songwriter, composer, and music publisher affiliates and licenses the performance right to songs in its repertoire to music users for a fee. BMI tracks the public performances of songs in its repertoire and uses that information to distribute license fees collected (less certain deductions) to its affiliates as royalties, ensuring that they are fairly compensated for the public performance of their works. BMI also protects the rights of its affiliates by bringing claims against unlicensed music users for unauthorized use of BMI's repertoire.

As organizations representing a wide array of copyright owners, amici have a strong interest in review of the Second Circuit's atextual rule—a rule that provides a roadmap for parties to mastermind and profit from acts of copyright infringement, yet escape direct liability. Under the Second Circuit's rule, only the person who actually "presses the button" can

be held liable for direct infringement—not the company owner standing at that person’s shoulder, ordering him to do so. This rule conflicts with the law applied in other circuits and flouts the text of the Copyright Act, excising from that statute the “authorization” prong of direct infringement. And the error is of grave consequence, given the Second Circuit’s centrality as an important forum for copyright litigation and the harm generated by opening a loophole in the law governing direct infringement.

The courts of appeals are divided, the Second Circuit is on the wrong side of the split, and the question is of exceptional importance. This Court should grant review and reverse.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

With the stroke of a pen (or, perhaps, the press of a button), the Second Circuit has substantially narrowed Congress’s intended scope of direct infringement liability under the Copyright Act, eviscerating direct liability for people who are the moving force behind acts of unlawful copying, distribution, or performance of copyrighted works.

Now, in the Second Circuit, anyone can acquire copyrighted sound recordings, musical compositions, or any other copyrighted work, set up a business based on infringing that material, direct how it is to be copied, distributed, and/or publicly performed, and illegally profit from that infringement—all while escaping direct liability. How? No elaborate scheme is

required. All it takes is a literal “middle man.” By simply ordering someone else to perform the physical act of copying, uploading, or streaming a file, a company’s owner can evade liability for acts of infringement undertaken at the owner’s explicit direction. This is not what Congress intended. It is not the law in other courts of appeals. And it cannot be rescued by telling owners of infringed works that they are welcome to bear the added burden of trying to prove more complex theories of secondary liability instead.

The court’s brief explanation of its new rule cannot be justified by even its own internal reasoning. Not only is there no basis in the Copyright Act’s text (which the court ignored) for a button-push limitation on direct liability, there is no basis for the rule in the precedent the court relied upon. The Second Circuit’s approach makes no sense when assessing the liability of a principal who directs an agent to undertake the infringing act on the principal’s behalf. In this context, it has long been the rule—and remains the rule in other courts of appeals—that the principal is directly liable even if she hires someone else to press the button. It makes no sense for the most responsible party—the mastermind directing the infringement (and profiting from it)—to be shielded by the simple expedient of hiring someone to carry out the physical infringing act.

The consequences of the Second Circuit’s flat-wrong rule make review essential now, before the rule can do substantial damage to copyright law and copyright owners’ ability to protect and fairly profit from their creations. Without correction, the Second



Circuit’s decision operates as a roadmap for willfully infringing valuable copyrighted works—and profiting from such infringement—without fear of direct liability. Copyright owners of all kinds will pay the price if the Court gives the green light to this scheme for infringing business models.

Contrary to the Second Circuit’s unsubstantiated justification for its atextual rule, potential recourse to judicially created secondary liability doctrines is not an effective substitute for the direct liability Congress intended. Requiring resort to such often complex claims will have less deterrent force, unnecessarily waste the time and resources of courts and copyright owners, and risk scenarios where no one is found liable for undisputable infringement. This Court’s intervention is essential to restore uniformity to copyright law and prevent the infringement invited by the Second Circuit’s artificially narrow interpretation of direct infringement.

## ARGUMENT

### **I. Limiting Direct Infringement Liability to Those Who “Press the Button” Is Atextual and Makes No Sense.**

The Second Circuit’s ruling not only squarely conflicts with decisions of other courts of appeals, *Pet. 25-31*, it cannot be justified by the Copyright Act’s text, the precedent the court relied upon, or the policy interests undergirding the Act.

The Copyright Act provides the owner of a copyright the “exclusive rights to do and to authorize” a variety of acts, including reproducing and

distributing protected musical works for sale, as Respondent authorized here, and publicly performing such works—which, in the context of streaming music and audio-visual services, may also be accomplished by the simple press of a button. 17 U.S.C. § 106. Direct liability for copyright infringement lies when an actor personally engages in infringing conduct, and under the Act’s plain text, infringing conduct includes “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).

The conduct at issue here falls within the heartland of personal participation in infringement. When a person sets up a business with the purpose of profiting from infringement, acquires the protected material, masterminds how to unlawfully distribute or perform the protected works, decides which works will be made available, and directs the infringing acts, Congress intended that person to be directly liable for copyright infringement. This straightforward reading of the statutory text is also entirely consistent with traditional agency principles, *see* Pet. 21-22; 6 William F. Patry, *Patry on Copyright* § 21:41 (2023) (explaining that direct infringement applies where the defendant “either directly or through an agent” commits the infringing act).

The Second Circuit did not grapple at all with the Act’s text in holding otherwise. Instead, the court adopted a highly circumscribed standard where direct liability for infringement “attaches only to ‘the person who actually presses the button.’” Pet. App. 21 (quoting *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008)). But that press-the-

button standard is drawn from a wholly inapt context. *Cartoon Network* adopted its “press the button” rule to clarify that any volition or causal requirement for infringement would not be satisfied when actors merely provide technology that can, but need not, be used for infringing copying, and do so without directing how such technology should be used. It did not purport—and expressly disclaimed—to state a rule for cases like this, where a principal directs and controls its agent’s infringing acts.

*Cartoon Network* involved a cable company that intended to supply customers with digital video recorders—equipment that facilitated both infringing and noninfringing uses—where the end user chose the content to be recorded. 536 F.3d at 131. While limiting liability there to “the person who actually presses the button to make the recording,” the *Cartoon Network* court expressly declined to “decide today whether one’s contribution to the creation of an infringing copy may be so great that it warrants holding that party directly liable for the infringement, even though another party has actually made the copy.” *Id.* at 133. The *Cartoon Network* court’s reticence reflects that the potentially-infringing-technology context is very different from direct involvement in deciding which works to infringe, how to accomplish the infringement, and ordering an agent to do so. Yet the panel’s ruling here simply blinked away this critical difference.

The district court decisions cited by the panel likewise provide no support for a rule exempting executives from direct liability when they direct others to engage in copyright infringement. In *Zappa v. Rykodisc, Inc.*, 819 F. Supp. 2d 307 (S.D.N.Y. 2011),

the defendant was not found liable because he did not induce or encourage or authorize infringement, but rather “took pains to ensure that [the ultimate distributor] was aware of the [copyright] restrictions.” *Id.* at 316. As for *UMG Recordings v. Escape Media Grp.*, No. 11 Civ. 8407, 2014 U.S. Dist. LEXIS 137491 (S.D.N.Y. Sep. 29, 2014), the defendant officers were found personally liable for their own button pushes (infringing uploads to a music sharing site). Pet App.21 (citing 2014 U.S. Dist. LEXIS 137491, at \*70). But the panel here failed to mention that those defendant officers were also found liable for direct infringement because they “instructed their employees to repeatedly upload substantial volumes of popular copyrighted music files.” *Id.* at \*60. Through providing those instructions, the officers’ conduct met the “required volitional conduct necessary to support a finding of direct infringement.” *Id.*

Direct liability for ordering employees to infringe makes sense; insisting that direct liability attaches to only those who “press the button” does not. Other courts of appeals have thus rejected the Second Circuit’s broad atextual escape hatch from direct liability. In *Society of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29 (1st Cir. 2012), the First Circuit found liability on facts nearly identical to those here, despite the defendant’s insistence that he should not be held liable because he “himself did not volitionally copy or post” any of plaintiff’s copyrighted works on his website. *Id.* at 54. The First Circuit rejected that argument, holding that because the defendant “held authority and control over the Website, and ... knew of and assented to [his agent’s]

postings of” the copyrighted works, he could be held liable “regardless of whether the law mandates a showing of volitional conduct to establish direct infringement.” *Id.* at 56-57. The defendant’s “acts of authority and control over the server and material actually posted” were enough to warrant liability for direct infringement. *Id.* at 57.

As the First Circuit’s decision illustrates, even assuming some “volition” or proximate cause requirement for direct liability, it is easily satisfied here. Whatever its contours, any such requirement is met when a company principal instructs an agent “as to ‘which concerts to make available to download or not,’” and makes “plans ‘to start digitizing tape recordings with an eye towards making them available on a public website.’” Pet. App. 22. Even proponents of the volition requirement—in the wholly distinct neutral technology context—would absolve only those who are “totally indifferent to the material’s content,” but not those who authorize the provision of a “prearranged assortment of [protected works].” *Am. Broad Cos. v. Aereo*, 573 U.S. 431, 454, 456 (2014)

(Scalia, J., dissenting) (citations omitted). Respondent falls into the latter category.<sup>2</sup>

By announcing its crabbed and atextual push-the-button volition standard, the Second Circuit has eviscerated the scope of direct infringement under the Copyright Act. It also has strayed from its own precedent, and clashed with other courts of appeals. This Court’s intervention is urgently needed to restore uniformity to national copyright law, correct the Second Circuit’s course, and maintain the scope of liability for direct infringement as Congress intended.

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<sup>2</sup> As the First Circuit noted in *Gregory*, the “volitional act” defense has met only “varying degrees of success.” 689 F.3d at 55. Compare *id.*, with *Spanski Enters. v. Telewizja Polska S.A.*, 883 F.3d 904, 912 (D.C. Cir. 2018) (recognizing that it is an open question whether volitional conduct or proximate cause is required for direct infringement), and *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 669 (9th Cir. 2017) (equating volition with proximate cause). But until the decision here, no circuit had ruled that direct infringement liability was limited to the person who actually pressed the button. See, e.g., *Princeton Univ. Press v. Mich. Doc. Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (direct liability for copy shop, not copy shop employees, which reproduced materials selected by university professors).

## **II. Review Is Crucial to Protect Copyright Owners from the Negative Consequences of Artificially Narrow Direct Liability.**

### **A. The Second Circuit's Rule Invites Infringement.**

The Second Circuit's rule also threatens to do great harm to copyright owners. By making it easy for infringers to create and control businesses predicated on exploiting infringing material without fear of direct liability, the rule creates bad incentives that will encourage more people to try to unlawfully profit from the unauthorized exploitation of others' copyrighted works. The net effect is to erode crucial protections for copyright owners.

Since the emergence of online music piracy in the early 2000s, the music industry has worked hard to develop a legitimate marketplace for licensed digital recordings. Consumers now have access to the music they love through authorized, non-infringing services that offer downloads, streaming, videos, and many other formats. *See, e.g.,* Music Matters, *Why Music Matters*, <https://whymusicmatters.com/> (identifying licensed music services). The development of such licensed services, paired with copyright owners' robust enforcement of the rights expressly provided by the Copyright Act, has helped to combat the proliferation of enterprises like Respondent's, built to profit from the unauthorized use of music. But music piracy of course persists, and the Second Circuit's button-press-required rule will undermine the progress that the industry has made.

One of the district court decisions wrongly relied upon by the Second Circuit illustrates the point. In *UMG Recordings*, 2014 U.S. Dist. LEXIS 137491, at \*3-4, the district court considered a copyright claim against a company that operated a music streaming service called “Grooveshark” and its two co-founders. Rather than obtain licenses, the company “decided to launch its service utilizing infringing content in order to grow faster,” avowedly “bet[ting] the company” on the idea that it is “easier to ask forgiveness than it is to ask permission.” *Id.* at \*6-7. To build their library, both co-founders sent emails to their employees urging them to upload popular music to the service. *Id.* at \*7-9, \*11. The district court held that the co-founders directly infringed by issuing these directives to infringe. *Id.* at \*60. Under the Second Circuit’s new rule, however—whereby a corporate officer cannot be liable for direct infringement unless “a copyright is ... infringed by a corporate officer’s own hand,” Pet. App. 21—the Grooveshark founders’ purposeful direction to engage in infringing conduct no longer would be sufficient to establish their own direct liability.

How many more websites like “Grooveshark” and other services trafficking in infringing music will be encouraged by the Second Circuit’s gift of newfound freedom from direct liability for the people who call the (infringing) shots? The answer is countless, as the Second Circuit’s decision offers an easy-to-follow roadmap for avoiding direct liability: design the unlawful service, direct the infringement, capture the profit, but hire someone else to press the button. The business owners who make the infringement happen at scale, thereby causing the most harm, would be the



ones off the direct-liability hook, to the detriment of copyright owners of all kinds, be they music publishers, record labels, filmmakers, authors, or artists.

The harm is only magnified by the outsized role the Second Circuit plays in copyright law. In 2022, about a fifth of all copyright cases nationwide were filed in the Second Circuit, with more filed there than in any other court of appeals besides the Ninth Circuit (which is at odds with the Second Circuit on this very question), Pet. 29-30). Admin. Off. of U.S. Courts, *Judicial Business*, Table C-7 (Sept. 30, 2022), <https://tinyurl.com/2rsjdnjd>.

The Second Circuit's new rule will likely only increase its already outsized role as a copyright litigation forum, because anyone who wishes to exploit infringing content for profit will be encouraged to locate their infringement-centered businesses within the Circuit. Direct liability is a crucial tool in the copyright enforcement toolkit. Making the Second Circuit a safe haven for those most responsible for infringing enterprises will encourage infringement and seriously impair the ability of copyright owners nationwide to protect their creative work.

**B. Secondary Liability Is Not an Effective Substitute for Direct Liability.**

The Second Circuit apparently believed that constraining direct liability for those pulling the infringement strings was not problematic, because such conduct could be addressed through claims of

secondary liability, such as vicarious liability.<sup>3</sup> But secondary liability doctrines cannot fill the gaping holes created by the Second Circuit’s press-the-button standard for direct infringement liability. Relying only on complex judicially crafted indirect forms of secondary liability to address top-down directed acts of infringement means more wasted resources to litigate copyright cases, and an increased likelihood that infringement will slip through the cracks without redress.

Secondary liability requires proof of elements that direct liability does not. Paul Goldstein, Goldstein on Copyright § 8.0 (3d ed. 2022) (noting that direct liability “does not require proof of the additional elements that must be shown in secondary liability cases”). These elements can raise complex fact and legal disputes that reduce the predictability of infringement cases and decrease copyright law’s deterrent effect. Vicarious liability, for example, requires proof of (1) “the right and ability to supervise the infringing activity” and (2) a “direct financial interest in such activities.” *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). The scope of qualifying supervisory authority and sufficiency of the financial interest are

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<sup>3</sup> The Second Circuit mistakenly asserted that the district court had applied a vicarious liability standard in holding Respondent directly liable. Pet. App. 21. Although the district court did discuss the vicarious liability standard, Pet. App. 93, the court expressly granted summary judgment on the basis of direct liability alone, holding that Respondent’s “direction and management” established that he “personally participated in the infringing activity.” Pet. App. 93-94 & n.33.

often hotly contested. Courts do not always agree on how the various elements of claims of secondary infringement are satisfied, which can lead to inconsistent decisions.

In addition, the complexity required to establish secondary liability increases the time and resources required to litigate copyright cases. Contributory infringement, for example, requires plaintiffs to establish a defendant's knowledge of and material contribution to infringement. *See, e.g., Matthew Bender & Co. v. West Publ'g. Co.*, 158 F.3d 693, 706 (2d Cir. 1998). This knowledge requirement is absent from direct liability, and it often complicates the task of pleading and proving liability.

Artificially and atextually narrowing the scope of statutorily defined direct liability, and shunting claims into secondary liability doctrines, thus inexorably increases copyright owners' litigation costs and lengthens the time necessary to resolve cases. *See Judicial Business, supra*, at Table C-5 (for cases in Second Circuit, median time of over 48 months to resolve at trial, compared to 16 months for cases resolved pre-trial but after motion-to-dismiss stage). These burdens make it more difficult for copyright owners to secure redress for infringement premised on secondary theories of liability.

Moreover, given the additional elements that must be pled under secondary liability doctrines, such claims are sometimes dismissed at early stages of litigation, while direct liability claims move forward. Reviewing district court decisions within the Second Circuit in just the past five years turns up several such examples. *See, e.g., Krisko v. Marvel Ent., LLC*, 473 F.

Supp. 3d 288, 307-08 (S.D.N.Y. 2020); *McGucken v. Newsweek LLC*, 464 F. Supp. 3d 594, 610 (S.D.N.Y. 2020); *Hartmann v. Google LLC*, No. 20 Civ. 5778, 2022 U.S. Dist. LEXIS 41129, at \*1-2, \*14-19 (S.D.N.Y. Mar. 8, 2022); *Palmer/Kane LLC v. Benchmark Educ. Co. LLC*, No. 18-CV-9369, 2020 U.S. Dist. LEXIS 4077, at \*26-30 (S.D.N.Y. Jan. 6, 2020).

These differential outcomes highlight the possibility that pushing direct-infringement conduct into a secondary liability analysis could not only make it harder to obtain redress but also leave no one directly liable for clear infringement. When Unlicensed Free Music LLC sets up shop in New York City, encouraged by the ruling here, and the owner tells his one employee precisely what sound recordings to copy and upload, who would be liable for direct infringement? The employee would argue that he should avoid liability because the “act was required as a part of his employment and ... he was not permitted to exercise discretion, judgment, or responsibility in the conduct of his duties.” 3 David Nimmer & Melville Nimmer, *Nimmer on Copyright* § 12.04[A][1] (2023). And the owner would contend that he should not be liable because he did not “press the button” under the Second Circuit’s rule. Perhaps the LLC would be liable for the employee’s acts, *see id.*, but that could be useless for either redress or deterrence if the business is judgment proof (as is common with businesses designed for infringement, and as happened here, *see* Pet. 32).

To be sure, the copyright holder could pursue the owner on theories of contributory infringement or vicarious liability, but what if the owner disavowed

knowledge, disputed that he materially contributed to the infringement, or challenged the other elements of these claims? Maybe the copyright holder would prevail, but it would require substantially more discovery and the expenditure of more litigation resources to achieve that result. And the Second Circuit's ruling heightens the possibility that claims that would have survived as direct infringement will be dismissed as secondary infringement. The assumption that secondary liability will save the day is thus cold comfort to copyright owners.

Recourse to secondary liability as the first line of defense against the owners and officers who direct and mastermind copyright infringement (but task others to "press the button") raises far more questions than it answers, and will not forestall the negative consequences of the Second Circuit's atextual limitation of direct liability.

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This Court's intervention is urgently needed to resolve the circuit split and correct the Second Circuit's errant course. Allowing the issue to percolate will only make the situation worse, with no upside for enforcing the statute that Congress actually wrote. The time has come to clarify the strength of the "authorizing" prong of direct infringement liability under the Copyright Act.

**CONCLUSION**

The Court should grant the petition for writ of certiorari.

Respectfully submitted.

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