

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 IN OPPOSITION**

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## QUESTIONS PRESENTED

Petitioners are before this Court because they made a pleading error and now seek to gin up a circuit split to fix their mistake. There is no split. The Second Circuit simply applied the well-established “volitional-conduct” requirement when deciding a claim for direct copyright infringement, which other circuits have repeatedly endorsed. Petitioners’ arguments that the Second Circuit’s application of that requirement here conflicts with the Copyright Act and creates skewed incentives is wrong; what they call a “hole in the statute” is really just a hole in their own pleading, and facts that do not implicate Mr. Sagan personally.

The questions presented are:

- (1) Does a corporate officer acting in that capacity engage in the volitional conduct required for personal direct liability for copyright infringement by providing general instructions to another corporate employee about making the company's historic, live music recordings available for streaming through a company-owned website?
- (2) When a copyright plaintiff seeks to impose liability based on a vicarious-liability standard but did not plead any claim for vicarious or any other secondary infringement claim, can a claim for direct infringement be sustained?

**CORPORATE DISCLOSURE STATEMENT**

Respondents Norton LLC, Bill Graham Archives LLC, and William Sagan, by and through their attorneys, Winston & Strawn LLP, disclose the following under Rule 29.6:

1. Norton LLC is the parent company of Bill Graham Archives, LLC; and
2. No publicly held corporation owns 10% or more of the stock of Norton LLC or Bill Graham Archives, LLC.

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## INTRODUCTION

The Second Circuit’s decision below relied on the well-established “volitional-conduct” requirement for direct copyright infringement. There is no circuit split regarding the contours of that requirement, much less one that any court of appeals has recognized. Indeed, this Court acknowledged the volitional-conduct standard more than a decade ago and chose not to disturb it. *See Am. Broad. Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431, 453–54 (2014) (Scalia, J., dissenting) (“[O]ur cases are fully consistent with a volitional-conduct requirement.”).

This case arises out of Respondents Norton LLC’s and Bill Graham Archives LLC’s (“Corporate Respondents”) purchase and use of historic, but languishing, concert recordings. The Corporate Respondents lawfully acquired these concert recordings and their associated intellectual property rights, such as they were, through over a dozen separate transactions. *See* Pet. App. 96 (recognizing that “there is no question” that Corporate Respondents owned the recordings at issue, and there is public interest in making such recordings available). The Corporate Respondents brought these dormant recordings to life by procuring, restoring, investing in, and offering them to the public for streaming through their company-owned website, [www.wolfgangs.com](http://www.wolfgangs.com).

As part of making these recordings available to the public, beginning in 2007, the Corporate Respondents secured licenses and made various statutory licensing and royalty payments intended to cover the uses they were making of the concert recordings, including agreements with major record labels. *See* Pet. App. at 5–6. For many years, along with other royalties and during an evolving era in music distribution, the Corporate Respondents paid Petitioners under these

licenses. Defs.’ Mem. Supp. Summ. J. at 9–10, 14, *ABKCO Music, Inc., et al., v. Sagan, et al.*, No. 15 Civ. 4025 (ER) (HBP), 2018 WL 1746564 (S.D.N.Y. Apr. 9, 2018), Dkt. No. 164.

After years of receiving these payments, Petitioners—some of the world’s largest music publishing companies—sued for copyright infringement. Petitioners’ claims did not involve all (or even most) of the Corporate Respondents’ original live music recordings, but only a relatively small portion of their collection.

In a fateful move that provides the real explanation for their Petition, Petitioners did *not* sue Mr. Sagan for contributory copyright infringement or any other form of vicarious or secondary liability. Instead, their complaint alleged only that Mr. Sagan *directly* infringed their copyrights—the same theory they alleged against the Corporate Respondents. Suppl. Compl. at 23–24, *ABKCO Music*, No. 15 Civ. 4025 (ER) (HBP), 2018 WL 1746564, Dkt. No. 141; *see also* Pet. App. 21. When Petitioners finally moved the district court for summary judgment, however, they invoked a secondary liability theory against Mr. Sagan—citing cases relying on the vicarious-liability standard. *See* Pls.’ Mem. Supp. Summ. J. at 50–52, *ABKCO Music*, No. 15 Civ. 4025 (ER) (HBP), 2018 WL 1746564, Dkt. No. 201.

Despite this disconnect, which Respondents repeatedly pointed out,<sup>1</sup> the district court granted summary judgment against Respondents, including against Mr. Sagan personally. In fact, its analysis

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<sup>1</sup> *See* Defs.’ Mem. Supp. Recons. at 20–23, *ABKCO Music*, No. 15 Civ. 4025 (ER) (HBP), 2018 WL 1746564, Dkt. No. 258; Defs.’ Mem. Supp. Summ. J. at 24–25, *ABKCO Music*, No. 15 Civ. 4025 (ER) (HBP), 2018 WL 1746564, Dkt. No. 164.

relied on the vicarious-liability standard—focusing on Mr. Sagan’s supposed “ability to supervise infringing activity,” “financial interest in that activity,” and “final decision-making authority” for the Corporate Respondents. Pet. App. 93 (quoting *Capitol Records LLC v. Redigi Inc.*, 2014 WL 4354675, at \*2 (S.D.N.Y. Sept. 2, 2014)).

On appeal, the Second Circuit reversed as to Mr. Sagan personally. Pet. App. 21–22. But contrary to Petitioners’ hyperbolic assertion that the panel left a “massive hole” in the copyright statute, the panel *agreed* with the district court that a “corporate officer with an obvious and direct financial interest, and a power of supervision to effect an infringement, may be vicariously liable.” Pet. App. 21. Petitioners, however, “pled only direct liability,” so the panel held that the district court could grant summary judgment only on that basis. *Ibid.* Thus, far from creating a “hole” through which corporate officers could “escape” or “evade” liability if “clever enough to leave the button-pushing to staff” (Pet. 3–4), the panel held that such officers *could* be liable under a vicarious-liability standard—but only if the plaintiff pleaded and proved such a claim. The problem was not a gap in the statute, but a “massive hole” in Petitioners’ pleading.<sup>2</sup>

Ignoring their own pleading defect almost entirely, Petitioners and their Amici focus instead on a single line at the end of the panel’s discussion of Mr. Sagan’s personal liability. There, the panel applied the Second Circuit’s established volitional-conduct requirement for *direct* infringement, concluding that Mr. Sagan’s “instructions [to Corporate Respondents’ employees]

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<sup>2</sup> Even if Petitioners had pleaded vicarious liability, they did not establish the factual prerequisites for liability under that standard. But the panel did not have to address that issue because of their threshold failure to plead that theory.

and plans” were not enough to treat him as a direct infringer who “actually pressed the button.” Pet. App. 22.

Petitioners suggest that the panel’s reference to “pressing the button” departs from other circuits’ law. But that language is simply a shorthand for the volitional-conduct requirement, which again, has been widely accepted. That shorthand is also consistent with both the Second Circuit’s longstanding law and the law of other circuits. *See, e.g., Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008) (noting that the “person who actually presses the button to make the recording, supplies the necessary element of volition”); *see also Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1053 (9th Cir. 2020) (“A direct infringement claim turn[s] on ‘who made’ the copies[.]”) (quoting *Fox Broad. Co. v. Dish Network LLC*, 747 F.3d 1060, 1067 (9th Cir. 2014)); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004) (showing that direct liability attaches to the “the party who *actually engages* in the infringing conduct”).

There is no circuit split. The panel correctly and appropriately applied the volitional-conduct requirement. Petitioners’ cries of skewed incentives and limited protections for copyright holders are baseless. The problem was not a hole in the law, but a hole in Petitioners’ own pleading. In fact, the panel’s opinion may provide *more* protection for copyright holders by providing a roadmap for how to plead vicarious liability. And even if this Court wanted to address the volitional-conduct requirement, the Second Circuit’s short analysis in this case—based primarily on a case-specific pleading issue—is not the right vehicle.

The Petition should be denied.

## STATEMENT OF THE CASE

### A. Factual Background

In 2002, Respondent Norton LLC (of which Mr. Sagan is the president and CEO) lawfully purchased the original archives of the late concert promoter Bill Graham and the associated intellectual property rights in the recordings. Pet. App. 4. This archive contained many live audio and audiovisual musical recordings of songs by legendary musical artists. *Id.* at 35. Petitioners’ assertion that Respondents were “warned” that they were purchasing only “physical copies” is inaccurate. According to Norton’s purchase agreement with Bill Graham Enterprises (“Seller”), it acquired “*all* Intellectual Property rights” related to the archives “to the extent that either Seller or any of its Affiliates possesses such rights.”<sup>3</sup> Pet. App. 4 (emphasis added) (quoting Pls.’ Supp. App. at 1334, *ABKCO Music, Inc., et al., v. Sagan, et al.*, 50 F.4th 309 (2d Cir. 2022) (Nos. 20-3816 (Dkt. No. 147), 20-4020 (Dkt. No. 78), 20-4099 (Dkt. No. 77))).

After the 2002 purchase, the Corporate Respondents continued to buy additional historic live concert recordings, including recordings from the “King Biscuit Flower Hour,” its legendary sound engineer Dave Hewitt, and others. *Id.* at 42. Contrary to Petitioners’

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<sup>3</sup> Petitioners refer to the recordings as “bootlegs,” but they brought no “anti-bootlegging” claims in this case. Indeed, the Second Circuit noted that Petitioners’ assertions of bootlegging are dubious, given that the recordings at issue were created before the “anti-bootlegging” statute came into effect. Pet. App. 15 n.7. Putting aside Petitioners’ derogatory characterizations, it is apparent from viewing these historic recordings that they were made professionally, on professional equipment, and that the artists, many of whom interact with the cameras, must have known of and consented to the recordings, whether impliedly or explicitly.

characterization that the works at issue here were predominantly from the Bill Graham collection, most of the music at issue is from King Biscuit Flower Hour and Dave Hewitt, amongst others, all of which were acquired under written purchase agreements proclaimed to transfer all associated intellectual property rights in the original recordings.

Beginning in or around 2006, the Corporate Respondents began making their recordings available to the public through various websites owned by the Corporate Respondents. Pet. App. 5.

As part of the process of making the recordings accessible to the public, the Corporate Respondents obtained compulsory mechanical licenses for the musical compositions at issue, working with various, well-established licensing agencies. *Ibid.* Respondents fulfilled the royalty payments to Petitioners under their mechanical licenses, and Petitioners never returned or rejected these payments. Defs.' Mem. Supp. Summ. J. at 9–10, 14, *ABKCO Music*, No. 15 Civ. 4025 (ER) (HBP), 2018 WL 1746564, Dkt. No. 164.

In or around 2008, Respondents settled a dispute with major record labels and shortly thereafter entered “Joint Exploitation Agreements” with UMG Recordings Inc., Warner Music, Inc., and Sony Music Entertainment, all of which acknowledge that the Corporate Respondents are owners of the copyrighted recordings and that the Corporate Respondents could exploit the sound recordings at issue through certain statutory and other licenses. Pet. App. 6.

## **B. Procedural Background**

### **1. Petitioners Filed Suit, Alleging Only Direct Copyright Infringement**

In 2015, Petitioners filed suit against Respondents, alleging that Respondents infringed the copyrights in Petitioners' music compositions by making the audio and audiovisual recordings of those works available for download and streaming. *Ibid.* As to Mr. Sagan, Petitioners pleaded only a claim for direct infringement—they did not plead contributory infringement, vicarious liability, or any other secondary theory of liability. *Id.* at 21, 92–94.

Petitioners' position was that the license and royalty payments Corporate Respondents already made were insufficient because they should have been required to negotiate separate “synchronization” licenses for streaming the audiovisual recordings.<sup>4</sup> In defense, the Corporate Respondents argued that synchronization licenses were unnecessary because, unlike a movie or a commercial where a track is added to separate visual images, the music and images in live concert recordings are inherently linked from the time of fixation. *See* Defs.' Mem. Supp. Summ. J. at 15–18, *ABKCO Music*, No. 15 Civ. 4025 (ER) (HBP), 2018 WL 1746564, Dkt. No. 164.

Years of litigation ensued as to whether synchronization licenses were required, though that question was never fully answered by the lower courts. *See* Pet. App. 65 n.24. Instead, the district court ultimately held that the Corporate Respondents' licensing payments did not cover the audiovisual uses

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<sup>4</sup> The Corporate Respondents have never actually made available for download any audiovisual work—which will be relevant to issues on remand now that the distinction between audiovisual and audio only has been drawn by the Second Circuit.



whether or not synchronization licenses were required. *Ibid.*

## **2. The District Court Granted Summary Judgment Against Mr. Sagan, Relying on an Incorrect Legal Standard**

In late 2017, Petitioners moved the district court for summary judgment on liability. Pls.' Mem. Supp. Summ. J. at 3, *ABKCO Music*, No. 15 Civ. 4025 (ER) (HBP), 2018 WL 1746564, Dkt. No. 201. Perhaps in recognition that they could not satisfy the Second Circuit's requirements for direct liability against Mr. Sagan, Petitioners' arguments as to Mr. Sagan focused on the standard for vicarious liability—even though their complaint alleged only direct infringement. *See id.* at 50–52. Specifically, Petitioners relied on the vicarious liability test (*see id.* at 50; *see also* Section II) used in *Stumm v. Drive Entertainment Inc.*, 2002 WL 5589, at \*5 (S.D.N.Y. Jan 1., 2002), which states:

[A]n individual, including a corporate officer, who has the ability to supervise infringing activity and has a financial interest in that activity, or who personally participates in that activity is personally liable for the infringement.

The district court adopted and applied this incorrect standard in granting summary judgment for direct infringement against Mr. Sagan. Pet. App. 92–94. The district court affirmed its ruling again on a motion for reconsideration. *Id.* at 112–13.

## **3. The Jury Awarded Minimal Statutory Damages and the District Court Denied a Request for a New Trial (but Granted Fees)**

Although the district court granted summary judgment on liability, the question of statutory

damages remained, along with whether 30 of the recordings at issue were willfully infringed. *Id.* at 8. A jury trial on damages began in early 2020. *Ibid.* Petitioners asked the jury for the maximum available statutory damages of nearly \$30 million on 197 works, but the jury awarded only \$189,500—essentially the smallest amount it could legally award in light of the district court’s liability findings. *Ibid.*

Petitioners moved for a new trial, as well as attorneys’ fees and costs. *Ibid.* The district court denied Petitioners’ motion for a new trial, but granted their motion for attorney’s fees, awarding Petitioners roughly \$2.4 million. *Ibid.*

#### **4. The Second Circuit Affirmed in Part and Reversed in Part**

Respondents appealed, and Petitioners cross-appealed. *Id.* at 2–3. The Second Circuit affirmed in part with respect to liability against the Corporate Respondents, but it vacated the district court’s grant of summary judgment in Petitioners’ favor entirely as to audio-only recordings and vacated the award of attorney’s fees. *Id.* at 12–15, 30. Most important here, it also reversed the district court’s direct liability holding as to Mr. Sagan in his personal capacity. *Id.* at 21–22.

The panel first explained that a “corporate officer with an obvious and direct financial interest, and a power of supervision to effect an infringement, *may* be vicariously liable” for copyright infringement. *Id.* at 21 (emphasis added) (citing *EMI Christian Music Grp. v. MP3tunes, LLC*, 844 F.3d 79, 99 (2d Cir. 2016)). The panel noted, however, that while the district court recited and applied the standard for “vicarious liability,” Petitioners “pled only direct liability.” *Ibid.* For that reason, it was an error to rely on the standard

for vicarious liability against Mr. Sagan—summary judgment had to be premised on direct liability alone. *See ibid.*

The panel then noted that the only evidence that could have supported a finding of direct liability was testimony from another corporate officer that Mr. Sagan provided instructions on “which concerts to make available for download or not” and was involved with plans to “start digitizing tape recordings” with an “eye towards” eventually making them publicly available. *Id.* at 22. The panel held that such “instructions and plans” were insufficient to meet the volitional-conduct requirement for direct infringement. *Ibid.* (quoting *Cartoon Network*, 536 F.3d at 131, for the proposition that direct liability falls on those who “actually press[ed] the button”).

## **REASONS FOR DENYING THE PETITION**

### **I. There is No Circuit Split or Statutory Conflict Warranting Certiorari**

Petitioners and their Amici base their argument for granting certiorari primarily on the false premise that the panel’s decision creates a circuit split and conflicts with the text of the Copyright Act. Pet. 3–4, 16–18, 25–31; *see* Amicus Br. of MPA 2, 10–15; Amicus Br. of Coalition 3–4. That argument cannot withstand scrutiny.

#### **A. There is No Circuit Split**

Petitioners’ attempt to manufacture a circuit split on the standard for individual direct liability is baseless. Even a cursory examination of the cases Petitioners rely on shows that all are materially distinguishable from this case—some do not even address the relevant legal question.

Petitioners' lead authority for the supposed circuit split is the First Circuit's opinion in *Society of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 55–56 (1st Cir. 2012). See Pet. 26–28; see also Amicus Br. of MPA 10–11; Amici Br. of Coalition 8–9. But *Gregory* involved a defendant who instructed his *own* agent to publish copyrighted works on defendant's *own* behalf to his *personal* website. 689 F.3d at 55–56. On that basis alone, *Gregory* is highly distinct from this case. Here, Mr. Sagan, to the extent he provided any instructions, provided them to an agent of the *Corporate Respondents*, on the *Corporate Respondents'* behalf, about materials ultimately available on the *Corporate Respondents'* website.

In any event, *Gregory* cannot possibly evidence a circuit split on the fundamental legal issue in question—whether direct infringement requires volitional conduct—because it expressly declined to address that question. 689 F.3d at 55 (“We need not determine whether a volitional act *must* be shown to establish direct copyright infringement.”).

Moreover, *Gregory's* analysis, which assumed without deciding that direct liability required volitional conduct, hinged on facts that differ significantly from this case. See *ibid.* Three factual differences are particularly notable. First, *Gregory* repeatedly stated the importance of the defendant's individual ownership of the server, website, and computers at issue. *Id.* at 55 (“[I]mages of the Works were displayed via his computer.”), 56 (“[H]e performed several acts to ensure that copies of the Works were available on *his server* and posted to *his Website.*”) (emphases added). Here, in contrast, the Corporate Defendants, not Mr. Sagan, owned the websites and computers at issue. Second, the defendant in *Gregory* *conceded* that he was personally

“responsible for the content of the website since [its] inception.” 689 F.3d at 56. Mr. Sagan, of course, has made no such concession. Third, and despite the defendant’s concession, the *Gregory* court then conducted an agency analysis, concluding that the individual who “pressed the button” to upload the works at issue had been acting as the defendant’s *personal* agent. 689 F.3d at 56 (“Father Peter acted as the [defendant’s] agent in both building and handling the technical aspects of the Website.”). Here, in contrast, the individual who uploaded the works at issue was the *Corporate Respondents’* employee, not Mr. Sagan’s.

Remarkably, Petitioners and their Amici seize on *Gregory’s* agency analysis to argue *for* a circuit split, asserting that Mr. Sagan should be liable for direct infringement under agency principles. *See* Pet. 21, 27; Amicus Br. of MPA 10–11; Amicus Br. of Coalition 4 (“It has long been the rule...that the principal is directly liable even if she hires someone else to press the button.”). But Petitioners’ conflation of *Gregory’s* agency analysis with this case completely disregards corporate formalities. Again, the officer that uploaded the files here was the *Corporate Respondents’* employee, *not* Mr. Sagan’s, and both he and Mr. Sagan were plainly acting within the scope of their corporate responsibilities. Thus, under the “corporate shield” doctrine, the acts of the *Corporate Respondents’* agent could not be imputed to Mr. Sagan personally unless the company was used to achieve fraud or so dominated by Mr. Sagan that it could be called his alter ego. *See Gartner v. Snyder*, 607 F.2d 582, 586 (2d Cir. 1979).

Relatedly, corporate officers “are not liable for the infringements” of a “corporation” unless a particular officer engaged in “acts other than as an officer” and

for which there is a “special showing” that the officer “willfully and knowingly...personally participates” in the infringing activity, or that the corporation was used to avoid personal liability. *Dangler v. Imperial Mach., Co.*, 11 F.2d 945, 947 (7th Cir. 1926).

Petitioners below made no showing that the Corporate Respondents’ officer was Mr. Sagan’s *personal* agent. They did not even *attempt* to do so because, again, they relied solely on a standard for vicarious liability (despite not having pleaded any such theory in their complaint). *See* Pet. App. 21; Pls.’ Mem. Supp. Summ. J. at 50–52, *ABKCO Music*, No. 15 Civ. 4025 (ER) (HBP), 2018 WL 1746564, Dkt. No. 201. Nor did Petitioners prove that Mr. Sagan acted in any way other than as an officer of the Corporate Respondents, and so made no special showing necessary for individual liability.<sup>5</sup> There is thus no conflict with *Gregory*—the conflict is between Petitioners’ arguments now and the theories they argued below.

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<sup>5</sup> Amici Coalition cites *UMG Recordings v. Escape Media Group, Inc.*, 2014 WL 5089743, at \*22 (S.D.N.Y. Sept. 29, 2014) in an attempt to discredit the Second Circuit’s holding regarding Mr. Sagan’s liability. *See* Amici Br. of Coalition 8, 12. According to Amici Coalition, the officers of the defendant company in that case were found directly liable for “instruct[ing]” employees to illegally upload music files. *Id.* at 8 (quoting *Escape*, 2014 WL 5089743, at \*22). However, this assertion is incorrect, as the defendant *company*, like the Corporate Respondents in the case at issue, was found directly liable for the infringing actions. *Escape*, 2014 WL 5089743, at \*19 (“Plaintiffs allege that defendant Escape is liable for both direct and secondary copyright infringement. Plaintiffs claim that defendant Escape is liable for direct copyright infringement under the theory of *respondeat superior*.”); *see* Pet. App. 12. Both co-founders of the defendant company were actually found directly liable because they each *personally* uploaded music files to the company website. *Escape*, 2014 WL 5089743, at \*26. Here, however, Mr. Sagan did not personally upload any recordings.

Petitioners’ and Amici’s claimed split with the Ninth Circuit, based on *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 964 F.2d 965, 970 (9th Cir. 1992), fares no better.<sup>6</sup> To begin with, *Lewis Galoob* cannot create any split on the direct liability standard because the court noted that “Nintendo’s complaint does not allege direct infringement, nor did it try the case on that theory.” See 964 F.2d at 970. Thus, any discussion of that standard in *Lewis Galoob* was dicta.

In any event, *Lewis Galoob* is far afield of this case. The court there was focused on a fair-use defense. *Lewis Galoob*, 964 F.2d at 969–72. Nintendo alleged that the maker of the “Game Genie” device, which allowed users to alter certain features in Nintendo video games, could be liable for “authorizing” copyright infringement even if the underlying use by consumers was considered fair use. *Id.* at 967, 970–71. In that context, the Ninth Circuit stated in passing that “authorization” could establish infringement, but only if the use being authorized was also infringing. *Id.* at

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<sup>6</sup> Amicus MPA also claims a split with the Ninth Circuit based on *Bell v. Wilmott Storage Services, LLC*, 12 F.4th 1065, 1081–82 (9th Cir. 2021). Amicus Br. of MPA 11–12. In *Bell*, the defendant, Wilmott Storage Services, purchased a website containing a copyrighted image, continued operating and updating that website, and was eventually sued for infringement. 12 F.4th at 1069–70. The court held that Wilmott engaged in sufficient volitional conduct to be liable, even if it did not post the photo and claimed ignorance of its presence, because Wilmott owned, managed, and updated the website at issue and had “assum[ed] responsibility” for its contents. *Id.* at 1081–82. MPA, repeatedly referring to Wilmott as a “he,” suggests that this is analogous to this case. Amicus Br. of MPA 11. But Wilmott was not a “he”—it was a company—and the infringement at issue occurred on a website that Wilmott itself owned and operated. *Bell*, 12 F.4th at 1069–70, 1081–82. Here, it was not Mr. Sagan, but the Corporate Respondents, who owned the website where the songs at issue were made accessible. *Bell* has nothing at all to do with imposing direct liability personally on a corporate officer for the contents of a company-owned website.

970.

To the extent direct infringement was even at issue in *Lewis Galoob*, nothing in that case conflicts with the application of the volitional-conduct requirement here. *Lewis Galoob* did not discuss the volitional-conduct requirement, and it involved nothing like the case here, in which the question is the personal liability of a corporate officer for the acts of another corporate officer acting within his corporate responsibilities. In any event, there is no evidence that any general discussion or authorization by Mr. Sagan was directed towards *infringing* recordings rather than generally making music available,<sup>7</sup> nor any evidence that any “authorization” was on behalf of Mr. Sagan, as opposed to on behalf of the Corporate Respondents.

Petitioners’ suggestion that the Third Circuit’s decision in *Columbia Pictures Industries v. Aveco, Inc.*, 800 F.2d 59, 61–62 (3d. Cir. 1986), evidences a circuit split is equally misplaced. Petitioners assert that *Aveco* held that the defendant, who rented rooms where the public could watch copyrighted movies, could not avoid “direct liability” even though it was the defendant’s customers who “actually place[d] the video cassette in the video cassette player.” Pet. 28 (quoting *Aveco*, 800 F.2d at 62); *see also* Amicus Br. of MPA 12 n.3 (repeating the same argument). But Petitioners’ assertion that *Aveco* is a case about *direct* liability conflicts with the opinion itself. The *Aveco* court expressly stated that the case addressed *contributory* liability—a secondary liability theory that, again, Petitioners here did not plead. 800 F.2d at 62. Since it was decided, courts have repeatedly recognized that *Aveco* is about contributory—not direct—

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<sup>7</sup> Recall, again, that this case involved only a proportionally minor subset of Corporate Respondent’s live-music recordings.



infringement. See, e.g., *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (“[W]e agree with the Third Circuit’s analysis in [*Aveco*] that providing the site and facilities for known infringing activity is sufficient to establish *contributory* liability.”) (emphasis added); *Cable/Home Commc’n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845 n.29 (11th Cir. 1990) (citing *Aveco* for the proposition that “[a]lthough defendant’s customers actually placed the video cassette...defendant was liable for *contributory* infringement”) (emphasis added); *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 986 (D. Ariz. Apr. 29, 2008) (showing that *Aveco* stands for the proposition that “the business is liable for contributory infringement, *not direct infringement*”) (emphasis added).<sup>8</sup>

Petitioners may now wish they had pleaded and pursued contributory infringement, vicarious liability, or some other secondary liability theory, but they did not. And they do not challenge the Second Circuit’s holding that because they “pled only direct liability,” they could win summary judgment or otherwise prevail only “on that basis alone.” Pet. App. 21. They cannot create a circuit split by ignoring this

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<sup>8</sup> Petitioners and their Amici suggest that the Second Circuit’s holding may prevent copyright owners from recovering against solvent individuals through insolvent companies. Pet. 32; Amicus Br. of MPA 3; Amici Br. of Coalition 16. That is baseless. Because Respondents did not post a bond pending appeal, Petitioners had over a year to attempt to collect on the initial district court judgment from either Mr. Sagan or the companies. Pls.’ Mem. Supp. to Extend Restraining Notices at 1–3, *ABKCO Music*, No. 15 Civ. 4025 (ER), 2018 WL 1746564 (S.D.N.Y. Nov. 4, 2022), Dkt. 469. But Petitioners present nothing suggesting that Mr. Sagan, or the Corporate Respondents, are or were hiding assets to avoid liabilities.

distinction.<sup>9</sup>

### **B. The Second Circuit’s Holding Does Not Conflict with the Text of the Copyright Act**

Petitioners’ argument that the panel’s decision conflicts with the text of the Copyright Act conflates direct infringement with contributory infringement. This sleight of hand is understandable—Petitioners pleaded themselves out of secondary-liability theories, and so can prevail only if they can slot this case into a direct-infringement theory. But the supposed “conflict” they posit between the panel’s decision and the Copyright Act disappears once this distinction between direct and secondary liability is understood.

Petitioners’ key argument is that Section 106 of the Copyright Act provides copyright owners with the exclusive right not just to distribute and copy their works, but the right to “authorize” their distribution and copying. Pet. 17–18. They argue that this Court has thus held that a person directly infringes a copyright not only when they copy or distribute a work,

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<sup>9</sup> While Petitioners and Amicus MPA suggest that the Ninth Circuit has been harsher than the Second Circuit in extending liability for copyright infringement (*see* Pet. 29–30; Amicus Br. of MPA 11–13), in reality, the Ninth Circuit has actually been likewise reluctant to extend liability to corporate entities that engage in conduct that amounts to “little more than what is legally and customarily required of corporate board members.” *See UMG Recordings, Inc. v. Shelter Cap. Partners, LLC*, 667 F.3d 1022, 1029 (9th Cir. 2011) (quoting *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 2009 WL 10739630, at \*1 (C.D. Cal. May 5, 2009)). In fact, in *Shelter*, the Ninth Circuit even declined to hold investor companies liable for contributory infringement and vicarious liability, the latter of which was the standard erroneously put forth by Petitioners at the district court level. 667 F.3d at 1045–47 (stating that the investor defendants could not be held liable under secondary theories of liability because those arguments hinged on the entities acting in concert, which was not pleaded in the plaintiff’s complaint); *see* Pet. App. 21.

but when they “authorize” the use of a copyrighted work without permission from the copyright owner. *Id.* at 18–19 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433, 435 n.17 (1984)).

Contrary to Petitioners’ suggestion, though, the court in *Sony* was clear that it was analyzing *contributory* infringement, which it characterized as a species of vicarious liability.<sup>10</sup> *See* 464 U.S. at 434–43 (“[A]s in other situations in which the imposition of vicarious liability is manifestly just, the ‘contributory’ infringer was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner.”). Indeed, this Court noted that, unlike the Patent Act, the Copyright Act does *not* “expressly render anyone liable for infringement committed by another.” *Id.* at 434. It recognized, still, that “vicarious liability is imposed in virtually all areas of the law,” and affirmed that the “concept of contributory infringement” could be appropriately employed in the copyright context. *Id.* at 435, 437 (acknowledging that the doctrine of contributory infringement had “been applied in a number of lower court copyright cases involving an ongoing relationship between the direct infringer and the contributory infringer at the time the infringing conduct occurred”). Petitioners thus are correct that *Sony* recognized that liability could extend beyond those who themselves engage in the copying at issue. But it did so through doctrines of vicarious liability.

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<sup>10</sup> Petitioners recognize elsewhere in their briefing that contributory infringement is a distinct species of copyright liability. Pet. 7 (“[D]irect liability is a distinct doctrine from either vicarious liability or contributory infringement.”). Their suggestion that contributory liability is fully distinct from vicarious liability (*see ibid.*), however, is incorrect. As *Sony* explains, contributory infringement is a species of vicarious liability. *See* 464 U.S. at 434–43.

Petitioners' suggestion that the decision below conflicts with *Sony* and the Copyright Act makes sense only if this distinction between direct infringement and vicarious liability is ignored. Nothing in the Second Circuit's decision purported to narrow the doctrine of contributory infringement. The panel simply did not address whether or to what extent Mr. Sagan's conduct could have subjected him to liability for contributory infringement, or any other species of vicarious liability. It did not need to address that question because, as the panel noted, Petitioners did not plead vicarious liability.

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In sum, contrary to Petitioners' and Amici's contentions, the Second Circuit's decision does not conflict with the law of other circuits or the text of the Copyright Act.

## **II. This Case is a Poor Vehicle for Addressing the Question Presented**

Even if the Second Circuit's holding created a conflict with the Copyright Act and other federal courts of appeal, which it does not, this case would be a poor vehicle for addressing the conflict because of Petitioners' pleading errors discussed below.

At the district court level, Petitioners pleaded only direct infringement against Mr. Sagan. Pet. App. 21, 92. Yet, when they moved for summary judgment, Petitioners relied on the standard for vicarious liability. Pls.' Mem. Supp. Summ. J. at 50–52, *ABKCO Music*, No. 15 Civ. 4025 (ER) (HBP), 2018 WL 1746564, Dkt. No. 201. The district court adopted this standard, citing dicta from a case stating that “a corporate officer, who has the ability to supervise infringing activity and has a financial interest in that

activity, or who personally participates in that activity is personally liable for infringement.” Pet. App. 92 (quoting *Redigi*, 2014 WL 4354675, at \*2). This statement, however, is simply a restatement of the vicarious-liability standard, under which “one may be vicariously liable if he 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).<sup>11</sup>

Petitioners and their Amici suggest that Supreme Court review is necessary due to the Second Circuit’s “erroneous” interpretation of copyright infringement. Pet. 4; see Amicus Br. of MPA 2–4; Amici Br. of Coalition 3. But the primary reason for the Second Circuit’s reversal was Petitioners’ reliance on an incorrect legal standard where there were insufficient facts for direct infringement. See Pet. App. 21–22.

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For similar reasons, this case is an exceptionally poor vehicle to address—as Petitioners suggest—the borders between direct infringement, contributory infringement, and other species of vicarious liability. See Pet. 4. Petitioners pleaded one doctrine, argued another before the district court, and now seek to create a “circuit split” based on law about both. Any attempt to address the overlap of those doctrines in the context of this case would thus be muddled and hampered by issues of waiver.

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<sup>11</sup> Amici Coalition appears to conflate the standards for direct liability and vicarious liability. Amici Br. of Coalition 14 n.3 (stating that the standard adopted by the district court was the standard for direct liability).

### III. The Decision Below is Consistent with the Longstanding Principle of Volitional Conduct

For the reasons discussed above, this case is not appropriate for this Court’s review, regardless of the merits. But in any event, there is no error for this Court to correct. The Second Circuit’s holding is a straightforward application of the volitional-conduct requirement for direct infringement, which has been adopted by other circuits, has not been expressly rejected by any circuit, and is consistent with this Court’s 2014 *Aereo* ruling.

The Second Circuit’s brief direct-infringement analysis, while secondary to its concern that the district court applied the wrong standard, was based squarely on the volitional-conduct requirement. Pet. App. 21–22. Specifically, it relied on the Second Circuit’s longstanding rule that “[d]irect liability requires ‘volitional conduct’ that ‘causes’ the copying or distribution.” *Id.* at 21. (quoting *Zappa v. Rykodisc, Inc.*, 819 F. Supp. 2d 307, 315 (S.D.N.Y. Aug. 17, 2011)); *see also Cartoon Network*, 536 F.3d at 131 (“[V]olitional conduct is an important element of direct liability.”). As the Second Circuit has explained in past cases, the volitional-conduct requirement is essentially akin to a proximate cause inquiry. *Cartoon Network*, 536 F.3d at 132 (defendant’s actions must be “sufficiently proximate” to the alleged infringement).

The Ninth Circuit has likewise acknowledged the volitional-conduct requirement, holding that “direct infringement requires the plaintiff to show causation (also referred to as ‘volitional conduct’) by the defendant.” *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017); *see also VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 731 (9th Cir. 2019).

Reinforcing the alignment of the circuits, the Ninth Circuit, like the Second, has emphasized the importance of causation in this analysis. *See VHT*, 918 F.3d at 731 (direct liability must be based on conduct that was the *direct cause* of the infringement).

The Fourth Circuit too has recognized the volitional-conduct requirement.<sup>12</sup> *See CoStar*, 373 F.3d at 550. And, again, the Fourth Circuit has recognized the kinship with causation, holding that volitional conduct occurs when a defendant *actively* engages<sup>13</sup> in conduct with a “nexus sufficiently close and causal to the illegal copying that one could conclude that the [defendant] *himself* trespassed on the exclusive domain of the copyright owner.” *Ibid.* (emphasis added).

This Court has acknowledged the adoption across circuits of the volitional-conduct requirement and declined to adjust that test. *See Aereo*, 573 U.S. at 453 (Scalia, J., dissenting). In fact, as Justice Scalia has explained, the volitional-conduct requirement is “fully consistent” with the relevant cases decided by this Court. *See id.* at 454 (Scalia, J., dissenting).<sup>14</sup>

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<sup>12</sup> The Third Circuit has cited the Fourth Circuit’s opinion in *CoStar* for this requirement. *See, e.g., Star Pac. Corp. v. Star Atl. Corp.*, 574 F. App’x 225, 230 (3d Cir. 2014); *Parker v. Google, Inc.*, 242 F. App’x 833, 836–37 (3d Cir. 2007).

<sup>13</sup> Amicus MPA claims that volitional conduct turns on whether the “copier” is a human or a piece of technology. Amicus Br. of MPA 15. That is wrong. Rather, as *CoStar* states, one of the lynchpins of volitional conduct is *active* conduct that causes the infringement. *See* 373 F.3d at 550. An automated system typically responds, automatically, to a command or request. Such a system, without human intervention, usually acts as a passive conduit that does not engage in active, volitional conduct. *See CoStar*, 373 F.3d at 558–59 (Gregory, J., dissenting).

<sup>14</sup> Amicus MPA cites *Aereo* to suggest that the volitional-conduct requirement is “relevant *only*” when a direct infringement claim is asserted against a defendant who operates an automated, user-

Applying these principles here, the Second Circuit correctly held that Mr. Sagan did not engage in volitional conduct that caused the infringement. Mr. Sagan’s alleged actions, the panel noted, involved preliminary and general planning to place works owned by the company on a company website and were insufficient to suggest that he *himself* uploaded the recordings. *See CoStar*, 373 F.3d at 550. That was far from error—to the contrary, the record is quite clear that there were several separate and complicated licensing and royalty discussions separate from Mr. Sagan’s discussions determining which specific songs may have been subject to claims of copyright infringement. It was not an error for the Second Circuit to hold that discussions about making company assets available on a company-owned website do not suffice to satisfy the requisite volitional conduct.

Petitioners and their Amici myopically focus on the Second Circuit attaching liability to the “button pusher.” *See* Pet. 3; Amicus Br. of MPA 10; Amici Br. of Coalition 7. But this phrase coined by the Second Circuit, like the similar verbiage the Fourth Circuit used in *CoStar*, 373 F.3d at 550 (“the party who *actually engages* in the infringing conduct”), is simply a restatement of the volitional-conduct requirement,

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controlled system. *See* Amicus Br. of MPA 9 (emphasis added) (citing *Aereo*, 573 U.S. at 454 (Scalia, J., dissenting)). But Justice Scalia neither stated nor suggested that the volitional-conduct requirement is relevant only when the defendant operates an automated system. *See Aereo*, 573 U.S. at 454 (Scalia, J., dissenting). Rather, he stated that the requirement for volitional conduct “comes right to the fore” when such a situation is at play. *Ibid.* Furthermore, Justice Scalia emphasized the importance of the volitional-conduct requirement by stating, “A defendant may be held directly liable *only* if it has engaged in volitional conduct that violates the Act.” *Id.* at 453 (Scalia, J., dissenting) (emphasis added).



which the Second Circuit faithfully applied. *See Cartoon Network*, 536 F.3d at 132.

The Second Circuit’s holding aligns with relevant precedent regarding the longstanding volitional-conduct requirement and does not, as Petitioners and their Amici argue, “narrow” the scope of direct liability<sup>15</sup> or “encourage” infringement.<sup>16</sup> *Contra* Amicus Br. of MPA 19; Amici Br. of Coalition 13, 15; *see* Pet. 28. The panel in no way limited or narrowed the protections offered to copyright holders in the form of contributory infringement or other species of vicarious liability. To the contrary, the panel *reaffirmed* the availability of vicarious liability and restated the standard in a way consistent with Petitioners’ own arguments—it simply recognized that Petitioners had not actually pleaded that theory.

For a similar reason, Petitioners and their Amici are also wrong that the Second Circuit’s holding will “immunize” those who willfully authorize infringing activity.<sup>17</sup> *Contra* Pet. 31; *see* Amicus Br. of MPA

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<sup>15</sup> Despite Petitioners’ and Amicus MPA’s claims (*see* Pet. 30; Amicus Br. of MPA 6), the Second Circuit’s holding also aligns with patent cases. *See, e.g., Hoover Grp., Inc. v. Custom Metalcraft, Inc.*, 84 F.3d 1408, 1411 (Fed. Cir. 1996) (stating that corporate protection for corporate officers should only be pierced to impose personal liability in limited circumstances).

<sup>16</sup> Amici attempts to convince the Court that despite no actual examples of these hypothetical concerns, the Second Circuit’s holding will be a catastrophe for the movie, television, and music industries due to mass piracy. *See* Amicus Br. of MPA 15–23; Amici Br. of Coalition 11–17. As stated above, those who engage in enough volitional conduct to proximately cause infringement can still be held directly liable. *See CoStar*, 373 F.3d at 550. And where appropriate, defendants can also still be liable for secondary liability, such as vicarious or contributory infringement.

<sup>17</sup> Amici further states that the Second Circuit’s holding will lead to scenarios where “no party” is liable for direct infringement. Amicus Br. of MPA 19; *see* Amici Br. of Coalition 5. But this argument ignores the fact that the Corporate Respondents were

18–19; Amici Br. of Coalition 4, 11. Any individual or entity may be held directly liable for copyright infringement, whether or not they act willfully,<sup>18</sup> *if* they engage in the volitional conduct required to impose such liability. *See CoStar*, 373 F.3d at 550. And, even if they do not, they may be held liable for contributory infringement—the plaintiff is simply required to plead and prove such a theory. In short, the Second Circuit did not, as Petitioners claim, create a “massive hole in a critical statute.” Pet. 4. It simply recognized a hole in Petitioners’ pleading. That is a case-specific issue of Petitioners’ own making, not a basis for this Court to intervene.

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### CONCLUSION

The Second Circuit’s application of the volitional-conduct requirement aligns with its application in other circuits. The petition should be denied.

Respectfully submitted.

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found directly liable for infringing Petitioners’ compositions with respect to the audiovisual works, and damages for that were already assessed. Pet. App. 12.

<sup>18</sup> According to the Ninth Circuit, willful infringement requires a plaintiff to prove “(1) that the defendant was actually aware of the infringing activity, or (2) that the defendant’s actions were the result of ‘reckless disregard’ for, or ‘willful blindness’ to, the copyright holder’s rights.” *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 944 (9th Cir. 2011) (quoting *Island Software & Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005)).

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