

No. 22-1053

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**

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The Second Circuit's decision below explicitly holds that direct liability for copyright infringement extends only to "the person who actually presses the button" to make the infringing copies. Pet.App.21. That impossibly narrow understanding of direct infringement contravenes the text of the Copyright Act, this Court's precedent, settled common-law principles, and decisions from several other courts of appeals. And as multiple amici have underscored, the decision below will have serious negative consequences, threatening to leave wide swathes of classic infringement behavior unremedied in one of the Nation's most important forums for copyright litigation. This Court's review is plainly warranted.

Sagan's opposition brief is a study in misdirection. Rather than explain how the Second Circuit's refusal to find direct infringement here can be reconciled with text, precedent, common law or common sense, Sagan characterizes the decision as an application of the Second Circuit's "well-established 'volitional-conduct' requirement." BIO.1. That is nonsense. This is not a case where the defendant supplied a machine but otherwise refrained from volitional conduct. Volitional conduct abounds here. The only question is whether Sagan's volitional conduct in authorizing the uploading of copyrighted works is direct infringement where he delegated the volitional conduct of pushing the copying button to an underling. The Second Circuit alone holds that Sagan's wholly volitional conduct does not constitute direct infringement.

Sagan's other principal effort at misdirection—alleging that this case is nothing more than an

unforced pleading error—is entirely question-begging. If the Second Circuit’s novel holding is correct, and one who directly violates the copyright holder’s exclusive right to authorize copying is only indirectly liable for the copying of the button-pusher, then petitioners erred in limiting their claim against Sagan to direct infringement. But if the First, Third and Ninth Circuits are correct that Sagan’s authorization of illicit copying and distribution was direct infringement even if an underling pushed the copying button, then there was no pleading error at all. That the complaint alleged only direct infringement just underscores that this case cleanly presents the question presented. This Court should grant certiorari to resolve that question and reverse the Second Circuit’s novel and atextual holding.

ARGUMENT

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

The decision below is egregiously wrong under the text of the Copyright Act and settled law. By its express terms, the Copyright Act gives a copyright owner the “exclusive rights” not only to copy and distribute the copyrighted work, but also “to authorize” such copying and distribution. 17 U.S.C. §106. In equally clear terms, the statute declares anyone who violates “any of the exclusive rights of the copyright owner” to be “an infringer of the copyright.” *Id.* §501. The import of that text is straightforward: Anyone who “authorize[s]” someone else to make or distribute copies directly infringes the copyright owner’s “exclusive rights,” even if the person

authorizing the copying does not himself push the copier button.

This Court recognized as much in *Sony*, explaining that infringement includes “authorizing the use of the copyrighted work,” and so “one who authorizes the use of a copyrighted work without actual authority from the copyright owner” is an infringer. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433, 435 n.17 (1984). The leading treatises uniformly confirm the point, explaining that a “direct infringer ... need not itself actually create the infringing work.” W. Patry, *Patry on Copyright* §21:40 (2023); *see* Pet.19 (providing additional citations). That same rule follows equally from common-law principles, under which a principal who authorizes his agent to commit a tort “is subject to direct liability,” not vicarious liability. Restatement (Third) of Agency §7.03 (2006); *see* Pet.21-22.

Sagan makes almost no effort to reconcile the decision below with any of that. *See* BIO.17-19. He does not dispute that the Copyright Act grants copyright owners the exclusive right “to authorize” copies, in addition to the exclusive right to make and distribute those copies. 17 U.S.C. §106. Instead, Sagan offers a novel (and atextual) theory: He argues that violating the exclusive right to make and distribute copies is direct infringement, but violating the exclusive right to authorize copies is only contributory infringement. BIO.17-18. That nonsensical approach finds no basis in the Copyright Act, which enumerates all its exclusive rights together and applies the same provision to make anyone who violates any exclusive right “an infringer of the

copyright.” 17 U.S.C. §§106, 501. The notion that direct infringement of the exclusive right to authorize copying can only give rise to secondary liability has no ground in the statutory text.

Nor does Sagan’s theory follow from *Sony*. *Contra* BIO.18. On the contrary, *Sony* confirms the correct rule: a person “who violates any of the exclusive rights of the copyright owner,” including by “authorizing the use of the copyrighted work,” is a direct infringer. 464 U.S. at 433. By contrast, vicarious and contributory liability doctrines apply when a copyright owner seeks to hold the defendant “liable for infringement committed by another,” on the theory that the defendant encouraged, enabled, or profited from the other party’s direct infringement. *Id.* at 434-35; *see* Pet.7-9. To be sure, as *Sony* recognizes, a person who commits direct infringement by authorizing illicit copying may *also* be liable on a contributory infringement theory. 464 U.S. at 435-37. But nothing in *Sony* remotely *excludes* direct liability for violating the copyright owner’s exclusive authorization right, much less limits direct liability to the person who literally “presses the button” on the copier. *Contra* Pet.App.21. Beyond Sagan’s problems with the text and *Sony*, he does not dispute that every major treatise contradicts his and the Second Circuit’s view, or that his position contravenes other provisions of the Copyright Act and longstanding common-law agency principles. Pet.19-22; *supra* p.2.

In short, it is Sagan—not petitioners—who “conflates direct infringement with contributory infringement.” BIO.17. Direct infringement occurs when the defendant himself violates one of the

exclusive rights that the Copyright Act protects, including the right “to authorize” copying of the copyrighted work. 17 U.S.C. §§106, 501; *Sony*, 464 U.S. at 433. Contributory infringement, by contrast, occurs when a person “intentionally induc[es] or encourag[es] direct infringement” by another, without necessarily violating the copyright owner’s rights himself. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005); see Pet.8-9. There are many ways to induce or encourage direct infringement without authorizing it. But one who personally authorizes copying or distribution of copyrighted works is a direct infringer, see, e.g., *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 970 (9th Cir. 1992) (“infringement by authorization is a form of direct infringement”), even if the authorizer never “actually presses the button” to make the copies. *Contra* Pet.App.21.

Unable to defend the decision below, Sagan tries to rewrite it, claiming that the Second Circuit’s holding was just “a straightforward application of the volitional-conduct requirement.” BIO.21. Nonsense. This is not a case where a defendant supplies equipment that then facilitates third-party copying without any further volitional conduct from the defendant, as in the cases Sagan invokes. See BIO.21-23. Whatever the validity of the Second Circuit’s doctrine in those circumstances, it has nothing to do with the decision below or the circuit split. No other court has *ever* held that the volitional conduct doctrine (or anything else) limits direct liability in all circumstances to the person who “actually presses the button” to create the infringing copies. Pet.App.21; *contra* BIO.21-22. And contrary to what Sagan now

suggests, that is precisely what the Second Circuit did below—not in “a single line at the end of [its] discussion,” *contra* BIO.3, but three separate times across three paragraphs, *see* Pet.App.21 (“[D]irect liability attaches only to ‘the person who actually presses the button.’”); Pet.App.21 (no direct liability “if a copyright is not infringed by a corporate officer’s own hand”); Pet.App.22 (reversing because “there is no evidence that Sagan is the one who ‘actually pressed the button’ (brackets omitted)). Indeed, even Sagan ultimately concedes that the Second Circuit found no direct liability because the evidence did not show “that [Sagan] *himself* uploaded the recordings.” BIO.23. That is no mere “restatement of the volitional-conduct requirement,” *contra* BIO.23, but a dramatic limitation on direct infringement which gives an inexplicable pass to individuals who directly infringe the exclusive right to authorize copying, but refrain from pressing the copier button themselves.

In reality, there is no shortage of volitional conduct in this case: Sagan volitionally authorized copying and distribution and his agent then volitionally pushed the requisite button. The only question here is what volitional conduct counts, and in particular whether Sagan’s wholly volitional authorization constitutes direct infringement. Pet.24-25; *see Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 454 (2014) (Scalia, J., dissenting) (recognizing that “[t]he volitional-conduct requirement is not at issue in most direct-infringement cases”). On that question—the question presented here—the Second Circuit stands alone and without any support in text, precedent, common-law tradition or common sense.

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

The decision below is not only wrong, but also in sharp conflict with other circuits—including at least one decision on near-identical facts. *See* Pet.25-30. Sagan’s efforts to paper over the split are markedly unavailing.

Sagan’s lead problem, of course, is the First Circuit’s decision in *Society of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29 (1st Cir. 2012), which held on materially indistinguishable facts that Archbishop Gregory *could* be held directly liable for instructing Father Peter to post infringing materials online—and squarely rejected the argument that direct liability could not apply because Archbishop Gregory never pressed the button to upload those infringing materials himself. Pet.26-28. Faced with that seemingly irreconcilable conflict, Sagan boldly claims that *Gregory* is “highly distinct from this case” because Archbishop Gregory had Father Peter post infringing works on Archbishop Gregory’s *personal* website, whereas Sagan had Lundberg post infringing works on *his companies’* websites. BIO.11. But Sagan does not (and cannot) explain why that distinction should make any difference. Nothing in *Gregory*’s holding that a defendant who “engaged in sufficient acts of authority and control ... may be held liable for direct infringement” turns on whether that authority and control was directed to a personal website or the Archdiocese’s website. 689 F.3d at 57. Similarly, nothing in the Second Circuit’s contrary holding that “direct liability attaches only to ‘the person who

actually presses the button,” turns on whether the button-pushing uploads to the authorizer’s personal or corporate website. Pet.App.21.

Sagan bravely persists, asserting that any attempt to compare *Gregory* with this case would require “disregard[ing] corporate formalities.” BIO.12. But the distinction between the authorizer’s personal and corporate websites would have to matter before corporate formalities were even implicated, and the distinction is utterly immaterial. The corporate form provides no immunity to any form of direct infringement, whether by authorization, copying, or distributing. To the extent Sagan implies that only the corporation can be liable absent veil-piercing, BIO.12, that fundamentally misunderstands basic principles of corporate law. Where, as here, a plaintiff seeks to hold a corporate officer liable for *his own conduct*, the corporate veil has no role to play. That is as true when the corporate officer authorizes unlawful copying as when she authorizes securities fraud or any other unlawful act. See M. Nimmer & D. Nimmer, Nimmer on Copyright §12.04[A][1] (2023) (where corporate officer engages in infringement in the scope of his duties, both the officer and the corporation are liable).

Sagan’s other attempts to distinguish *Gregory* fare no better. Sagan emphasizes that Archbishop Gregory personally owned the server, website, and computers at issue, and exercised ultimate control over the website’s content. BIO.11-12. But Sagan likewise exercised control over the content on his companies’ websites, see Pet.App.22 (recognizing that Sagan “instructed [Lundberg] as to which concerts to

make available for download”), and nothing suggests that *Gregory* would have turned out differently if the Archbishop had exercised control of his website through a corporate entity rather than directly. *Contra* BIO.11-12. Finally, Sagan invokes the volitional conduct canard by noting that *Gregory* “expressly declined to address” that issue. BIO.11. But *Gregory* had no need to address that issue, because, as already explained, the issue in *Gregory* and here is not lack of volitional conduct, but whether the volitional conduct of authorizing improper copying constitutes direct infringement when the defendant did not engage in the volitional conduct of pushing the button himself. On *that* question, *Gregory* says yes, and the decision below says no. *Compare* Pet.App.21-22, *with* 689 F.3d at 54-58. The split could not be clearer.

Sagan has no more success in minimizing the conflict between the decision below and the Third and Ninth Circuits. As to the Third Circuit, Sagan claims that *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986), turned on contributory rather than direct infringement. BIO.15-16. Not so. *Columbia Pictures* held that Aveco “infringed [the plaintiffs’] exclusive rights to publicly perform and authorize public performances of their copyrighted works.” 800 F.2d at 60-61; *id.* at 61-62 (infringement by “authorizing the public performance”). That is direct infringement, not contributory infringement—which is why *Columbia Pictures* nowhere analyzes the elements of contributory infringement, including whether the defendant “intentionally induc[ed] or encourag[ed] direct infringement.” *Grokster*, 545 U.S. at 930. That the word “contributory” appears once in

the decision—in a quote from a House Report—does not make *Columbia Pictures* a contributory infringement case.

As to the Ninth Circuit, *Lewis Galoob* squarely holds that “infringement by authorization is a form of direct infringement,” 964 F.2d at 970, which cannot be reconciled with the Second Circuit’s decision to limit direct liability to the person who pushes the button. That is no mere dicta, *contra* BIO.14, and the fact that *Lewis Galoob* ultimately found fair use, *id.* at 969-72, does not undermine the stark conflict between the Ninth Circuit’s understanding of direct infringement and the Second Circuit’s. *See* Pet.29-30; *Bell v. Wilmott Storage Servs., LLC*, 12 F.4th 1065, 1081 (9th Cir. 2021) (direct liability attaches where defendant “exercised control” or “selected any material for upload”); *contra* BIO.14-15. The Second Circuit’s rule also conflicts with the settled rule in patent cases, which Sagan barely mentions. Pet.30-31; *contra* BIO.24 n.15.

III. The Question Presented Is Important And Cleanly Presented.

The question presented is critically important for copyright owners. As *amici* attest, the decision below threatens to seriously undermine copyright enforcement in the media capital of the world and deprive copyright owners of meaningful remedies for wide swathes of classic infringing behavior. Those severe negative consequences readily warrant this Court’s review.

Sagan does not dispute that the Second Circuit’s decision will allow even the most willful copyright infringers to evade direct copyright liability as long as

they ensure someone else physically presses the copy button. Pet.31-32. Instead, he claims that problem is immaterial, because the decision below did not *also* eliminate “contributory infringement or other species of vicarious liability.” BIO.24. But as the petition explains (and Sagan never disputes or even addresses), vicarious liability and contributory infringement are not substitutes for direct liability; they are distinct doctrines that require proof of additional elements that direct liability does not, and that may be lacking in some obvious cases of direct infringement. Pet.33-34. As a result, the decision below effectively immunizes some instances of even blatant infringement—and at the very least, massively complicates copyright litigation in the Second Circuit (and distorts settlement dynamics) by requiring plaintiffs with straightforward direct liability claims to instead develop and prove the additional elements necessary for vicarious liability or contributory infringement. Pet.34-35; *accord* RIAA.Br.11-17; MPA.Br.15-23. This case well illustrates the problem, as Sagan was able to avoid direct infringement for authorizing the widespread distribution of enormously valuable bootleg recordings, directly devaluing the copyrights lawfully owned by petitioners. Sagan has no answer to those obvious problems.¹

¹ Sagan asserts that he paid royalties under compulsory licenses for some of the works before petitioners sued. BIO.1-2, 6. That is just further misdirection. Those disputed licenses relate only to certain audio recordings, not the numerous audiovisual works at issue. App.6-8. Sagan’s discussion of licenses for certain sound recordings is similarly irrelevant, as

Sagan’s principal vehicle objection actually serves to underscore that this case is a perfect vehicle to address the question presented. He repeats (and repeats, and repeats) that Petitioners did not plead vicarious liability or contributory infringement, *see* BIO.3, 4, 7, 13, 15, 16, 17, 19, 20, 24, 25. But whether that was a fatal self-inflicted wound—or instead a perfectly rational response to Sagan’s direct infringement of petitioners’ exclusive rights to authorize copying and distribution of copyrighted works—is *the question presented*. It may be that future litigants may try to cover their bases by alleging both direct liability and vicarious and contributory infringement (while shouldering the additional burdens of those secondary liability theories), but that only underscores why this is an *ideal* vehicle for assessing whether *direct* liability is available here, as there is no alternative ground for recovery that could complicate this Court’s effort to resolve the question presented.²

Finally, whatever Sagan may mean by his passing reference to “issues of waiver,” BIO.20, he does not and cannot claim that petitioners waived the direct liability theory that they have pressed throughout. Put simply, petitioners have asserted direct liability throughout this case because—as the statutory text,

this case involves only wholly unlicensed infringement of the copyrights on the underlying compositions. App.6; *contra* BIO.6.

² Sagan mistakenly claims the district court applied the wrong standard; it correctly found that Sagan “personally participated in the infringing activity.” Pet.App.93; *contra* BIO.19-20. Regardless, any district-court error hardly justifies ignoring the Second Circuit’s split-creating error.

this Court's precedent, common-law principles, and other courts of appeals confirm—direct liability is precisely what should apply when a defendant unlawfully authorizes another person to make infringing copies. The Second Circuit's contrary holding that such cases must instead be relegated to complicated doctrines of vicarious or contributory liability is plainly incorrect, seriously problematic, and desperately in need of further review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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