No.

IN THE

Supreme Court of the United States

COX COMMUNICATIONS, INC. AND COXCOM, LLC,
Petitioners,
v.
SONY MUSIC ENTERTAINMENT, ET AL.,
Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Application to the Honorable John G. Roberts, Jr.,
as Circuit Justice for the Fourth Circuit

Pursuant to Supreme Court Rule 13.5, Applicants Cox Communications, Inc. and CoxCom, LLC (collectively, "Cox") request a 60-day extension of time, to and including August 16, 2024, within which to file a petition for a writ of certiorari.

1. The decision below is *Sony Music Entertainment v. Cox Communications, Inc.*, No. 21-1168 (4th Cir. 2024). The Fourth Circuit issued its opinion on February 20, 2024, *see* App. A. The subsequent decision denying the petition for rehearing en banc and the petition for rehearing and rehearing en banc was issued on March 19, 2024, *see* App. B. Unless extended, Applicants' time to seek certiorari in this Court expires June 17, 2024. Applicants are filing this application at least ten days before that date. *See* S. Ct. R. 13.5. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1). Respondents do not object to this extension request.

2. This case concerns (i) whether a provider of online services can be subject to contributory-infringement liability by providing general internet services with mere knowledge that someone is likely to use those services to infringe and (ii) whether the provider's mere knowledge of a user's direct infringement is sufficient to render its conduct willful under 17 U.S.C. § 504(c).

Sony and other owners of copyrighted musical works (Respondents) alleged that, between 2013 and 2014, subscribers to Cox's internet service committed infringement by downloading or distributing copyrighted music files. App. A at 6. Respondents thus sued Cox on two theories of secondary liability: vicarious and contributory infringement. *Id.* at 4. A jury found for Respondents on both theories based on jury instructions grounded in untenable secondary-liability standards. *See id.* And the jury ultimately awarded Respondents $1 billion in damages, which included enhanced statutory damages based on a finding of willfulness. *Id.* On appeal, the Fourth Circuit declined to find Cox "vicariously liable for its subscribers' copyright infringement," reversing the jury verdict and vacating the damages award. *Id.* at 16. However, the Fourth Circuit affirmed the contributory-liability verdict, remanding for a new damages trial and concluding that an online services provider can be liable for "supplying" its service "with knowledge that the recipient will use it to infringe copyrights." *Id.* at 22. Cox filed a petition for en banc rehearing, which the Fourth Circuit denied. App. B.

The Fourth Circuit's decision conflicts with the decisions of other circuits, both on the contributory-infringement issue and the willfulness issue. Both the Second

and Ninth Circuits have set out contributory-infringement standards that are less expansive in imposing secondary liability and under which Cox would be entitled to judgment as a matter of law.[1] The Second Circuit has held that the "provision of equipment does not amount to contributory infringement if the equipment is 'capable of substantial noninfringing uses'" absent conduct "influenc[ing]" or "encourag[ing] unlawful copying." *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693 (2d Cir. 1998); *see also EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 100 (2d Cir. 2016) (requiring "affirmative steps" showing distribution of product "with the object of promoting its use to infringe" (citing *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005))). The Ninth Circuit has adopted a simple-measures test. Under that test, a defendant may be held liable when two conditions are met: (i) "it has actual knowledge that specific infringing material is available using its system" and (ii) it can take simple measures (i.e., "reasonable and feasible" steps) to "prevent further damage to copyrighted works" but has failed to do so. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007). The Fourth Circuit also ignored the principles animating this Court's recent decision in *Twitter v. Taamneh*, which acknowledged that internet providers generally do not "incur culpability merely for providing their services to the public writ large"—even when defendants have knowledge of others using those services for illicit purposes. 143 S. Ct. 1206 (2023).

[1] The Fifth Circuit is currently considering a similar question in *UMG Recordings, Inc. v. Grande Communications Networks, LLC*, No. 23-50162 (5th Cir.).

As for willfulness, the Fourth Circuit's approach, laid out in *BMG Rights Management (US) LLC v. Cox Communications, Inc.*, 881 F.3d 293 (4th Cir. 2018), renders conduct willful simply when an online service provider knows that *someone else* uses the service for unlawful purposes. That approach conflicts with the Eighth Circuit's holding that a company that did not "underst[and] *its own* actions to be culpable" and "w[as] not reckless" in adopting that view has not been willful. *RCA/Ariola Int'l Inc. v. Thomas & Grayston, Co.*, 845 F.2d 773 (8th Cir. 1988) (emphasis added). The Fourth Circuit's approach to willfulness also conflicts with this Court's willfulness holdings in other contexts, which emphasize that willfulness hinges on a defendant's awareness that its *own* conduct is wrongful. *See, e.g.*, *Safeco Ins. v. Burr*, 551 U.S. 47, 68 (2007); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988).

The issues presented are also of exceptional importance to providers of online services and the public writ large because the Fourth Circuit's expansive view of secondary liability threatens internet access for many, including individuals, businesses, schools, and libraries.

3. A 60-day extension within which to file a certiorari petition is reasonable and necessary. The request is justified by undersigned counsel's press of business on other pending matters. Among other things, counsel have a reply brief in *United States v. Sullivan*, No. 23-927 (9th Cir.), due June 6; a reply brief in *Google LLC v. Sonos, Inc.*, No. 24-1097 (Fed. Cir.), due June 14; an opening brief in *Smart Apparel v. Nordstrom*, No. 24-2269 (9th Cir.), due June 21; a reply brief in *Rex Medical, L.P.*

v. Intuitive Surgical, Inc., Nos. 24-1072, -1125 (Fed. Cir.), due July 3; and an opening brief in *Gilead Tenofovir Cases*, No. S283862 (Cal.), due July 15.

The requested 60-day extension would cause no prejudice to Respondents, who have advised that they have no objection to the extension.

Respectfully submitted,

/s/E. Joshua Rosenkranz
E. Joshua Rosenkranz
Counsel of Record
Christopher J. Cariello
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

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