No. 24-181

IN THE

Supreme Court of the United States

SONY MUSIC ENTERTAINMENT, *et al.*,

Petitioners,

v.

COX COMMUNICATIONS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF COPYRIGHT ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The undersigned *amicus curiae* respectfully submits this brief in support of the petition for a writ of certiorari filed by Petitioners Sony Music Entertainment, *et al.*, to review the decision of the United States Court of Appeals for the Fourth Circuit.[1]

INTEREST OF *AMICUS CURIAE*

The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) membership organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. It represents the copyright interests of over two million individual creators across the entire spectrum of creative industries—including authors, songwriters, musical composers and recording artists, journalists, documentarians, television and filmmakers, graphic and visual artists, photographers and software developers—and the small businesses that are

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Only *amicus curiae* made such a monetary contribution. Some Copyright Alliance members are, or are affiliates of, Petitioners in this matter. Some may join other *amicus* briefs in support of Petitioners. Counsel of record received timely notice of *amicus curiae's* intent to file this brief under Rule 37.2.

affected by the unauthorized use of their works. The Copyright Alliance's membership encompasses these individual creators, creative union workers, and small businesses in the creative industry, as well as the organizations and corporations that support and invest in them. The livelihoods of this diverse array of creators and companies depend on the exclusive rights guaranteed by copyright law.

The Copyright Alliance's members rely heavily on copyright law to protect and commercialize their works, which in turn incentivizes the creation of new works and promotes the progress of the arts. The Copyright Alliance and its members have a strong interest in the proper application of copyright law, including with respect to the legal frameworks balancing creators' rights against service provider immunities. The Copyright Alliance submits this *amicus curiae* brief to help the Court understand why it should grant certiorari, as this case carries significant implications for creators and Internet service providers ("ISPs"), like Respondents, who did not meet the threshold statutory requirements for one of the Digital Millennium Copyright Act ("DMCA") safe harbors and should not be allowed to get off scot-free when they knowingly facilitated infringement and financially benefited from illegal activity. *Amicus curiae* submits this brief in support of Petitioners' request for certiorari seeking the reversal of the Fourth Circuit's decision, pursuant to Sup. Ct. R. 37.

SUMMARY OF ARGUMENT

In narrowing the scope of vicarious liability, the Fourth Circuit has created a dangerous precedent that will devastate millions of copyright owners already struggling to protect the work they share with the public. Far from merely mediating a dispute between large music rightsholders and ISPs, the Fourth Circuit's decision, wrongly interpreting what it means to profit under vicarious liability, imperils the entire creative community. The artists, authors, filmmakers, musicians, and countless other creators who enrich our culture deserve better. This is a community already struggling to recover from pandemic-era shutdowns and the corresponding surge in online infringement, not to mention the proliferation of generative artificial intelligence ("GAI") activity that can exacerbate infringement at an unprecedented scale. Congress, as well as the majority of circuits that have correctly interpreted vicarious liability for over a century, would support creators and reduce infringement by maintaining incentives for ISPs to do their part—which is often merely the minimum—in combatting it. By contrast, the Fourth Circuit has chosen to do the opposite by rewarding bad actors. This cannot be. To allow the Fourth Circuit's incorrect decision to stand is to upend the balance of our entire online ecosystem, emboldening other ISPs to abandon their efforts to comply with the DMCA. With this ruling, no ISP will take the DMCA seriously, feel compelled to respond

to proper notices of infringement, or terminate a repeat infringer—no matter how egregious their behavior.

Crafted by Congress as a compromise between copyright owners and ISPs to encourage the growth of the Internet while ensuring an effective means of enforcing copyright law, Section 512 of the DMCA plays a significant role in the copyright regime. Section 512 exempts ISPs from monetary liability for the infringements of their users through "safe harbors," provided they meet certain requirements, including having and implementing a reasonable policy surrounding the termination of repeat infringers. 17 U.S.C. § 512(i)(1)(A). Although ISPs can, and often do, readily meet these requirements, Respondents Cox Communications, Inc. and CoxCom, LLC (collectively, "Respondents") chose not to. They should have been held liable. Yet, notwithstanding their numerous overt failings, the Fourth Circuit granted them a free pass, departing from the majority-held view of the vicarious liability doctrine that ISPs profit from infringement when they profit from the operation in which the infringement occurs. Instead holding that ISPs must profit directly from infringement on their platforms—which is nearly impossible to prove—the Fourth Circuit so narrows the definition of profit that it essentially renders vicarious liability a nullity. Crucially, the lower court upsets the balance Congress intended from the DMCA. Without the sword of liability hanging over

their heads for turning a blind eye to infringers on their platforms, ISPs will have no incentive to seek the benefits the DMCA safe harbor was designed to provide. Indeed, Respondents seek to undo any measure of liability for their provision of Internet service to known infringers. With their parallel petition for a writ of certiorari regarding the Fourth Circuit's affirmation of their liability for willful contributory infringement, Respondents make clear their aim of chipping away at the doctrines that ensure ISPs do their part in addressing infringement occurring on their platforms, from secondary liability to the DMCA. *See generally* Petition for Writ of Certiorari, *Cox Commc'ns, Inc. v. Sony Music Entm't* (2024) (No. 24-171). Although the balance struck by Congress when it enacted the DMCA has since tilted considerably in favor of ISPs, ultimately, it remains the best tool for creators to bring ISPs to task to cooperate in combatting infringement. This cooperation is exactly what Congress sought with the DMCA, intending robust doctrines of secondary liability to bring ISPs to the table. With this ruling, however, the lower court eviscerates the DMCA and encourages other ISPs to follow Cox's lead and flout its requirements, opening the flood gates to infringers online.

ARGUMENT

I. *COX* SUBSTANTIALLY AND DETRIMENTALLY IMPACTS CREATIVE INDUSTRIES.

Cox wrongly elevates the economic interests of large ISP companies at the expense of creators struggling to make ends meet in an increasingly uphill battle to combat online piracy. By imposing a strict causation requirement upon determinations of profit within the standard for vicarious liability, *Cox* undercuts the crucial balancing of rights online—as set forth in DMCA Section 512—relegating copyright law to an inconsequential afterthought.

Now more than ever, creators need the statutory protections enacted by Congress to preserve their exclusive rights, yet the Fourth Circuit would upend these protections based on its misunderstanding of vicarious liability. Alone among courts of appeals in its view that an ISP need only be held accountable for infringing activity if it directly profits from the infringement rather than from maintaining the operation in which the infringement occurs, the Fourth Circuit has propounded a harmful standard. Its practical effects could not come at a worse time. Creators are facing a post-pandemic juncture dominated by breakneck advancements in public-facing GAI models that are, on the one hand, often built upon the wide-scale infringement of creators' works, and, on the other, workhorse systems enabling

users to commit further infringement to an exponential degree. Narrowing the scope of vicarious liability now not only represents a clear legal departure but will enable ISPs to flout their obligations to regulate infringement online, injuring creators at a time when industries and livelihoods alike hang in the balance.

A. *Cox* Exacerbates The Significant Threats Creators Face In Supporting Their Livelihoods While Striving To Share And Safeguard Their Works Online.

In narrowing the scope of vicarious liability, *Cox* ultimately disregards the rights of copyright owners. This is far from what the Founding Fathers and Congress intended. The underlying purpose of copyright enshrined in the Constitution ensures that creators are incentivized to create works for the ultimate promotion of "the progress of Science and useful Arts . . . ." U.S. Const. art. I, § 8, cl. 8. "[T]he limited grant is a means by which an important public purpose may be achieved," as "[i]t is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

As technology has advanced and the Internet has become a predominant means of publicly disseminating copyrighted works, Congress has striven to maintain balance between competing interests online, to safeguard creators' rights even while accommodating technology. During its consideration of the DMCA, Congress weighed, on the one hand, a then-nascent Internet aiming to provide greater legal access to copyrighted works and, on the other, the preservation of copyright owners' exclusive rights. *See* H.R. Rep. No. 105–551, pt. 2 at 21 (1998).

By wrongly assessing what it means to profit within the standard for vicarious liability, the Fourth Circuit has, however, adopted a position that threatens this balance. Its ruling elevates the economic interests of large tech companies that provide Internet access over copyright's economic incentives to stimulate creators to create works for the benefit of the public. This position contravenes the objectives of copyright and devalues a significant component of our economy and culture. Fundamentally, it harms creators. Those both renowned and unknown depend on copyright's grant of exclusive rights to monetize their creations. Yet, individual artists and creators in particular face declining incomes as they struggle to support their livelihoods with their creative work. *See* Karen K. Ho, *Economic Survey of Artists in New York Shows 57 Percent Earn $25,000 or Less*, ARTnews (June 27, 2024), https://www.artnews.com/art-news/news/

economic-survey-artists-new-york-state-57-percent-earnings-25000-creatives-rebuild-1234710735/; *Key Takeaways from the Authors Guild's 2023 Author Income Survey*, Authors Guild, https://authorsguild.org/news/key-takeaways-from-2023-author-income-survey/ (last updated Oct. 25, 2023) ("[H]alf of all full-time authors continue to earn below minimum wage in many states . . . ."); Amy X. Wang, *The Median U.S. Musician Is Still Making Under $25,000 a Year*, Rolling Stone (June 27, 2018), https://www.rollingstone.com/pro/news/the-median-u-s-musician-is-still-making-under-25000-a-year-666833. The recent COVID-19 pandemic has only compounded this struggle, as creative communities attempt to bounce back from the loss of revenue streams following years-long nationwide shutdowns and the corresponding uptick in online infringement. *See, e.g.*, Trina Mannino, *Performing Arts Sector Faces Change Four Years After Pandemic Start*, All Arts (Apr. 26, 2024), https://www.allarts.org/2024/04/new-york-city-performing-arts-pandemic/. The Fourth Circuit decision will only compound these struggles.

Members of the creative communities have spoken out about the difficulties they face. For example, photographer Jeffrey Sedlik testified before a Senate subcommittee that he makes a living creating and licensing photographs that appear in many media formats. *Is the DMCA's Notice-and-Takedown System*

Working in the 21st Century?: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary, 116th Cong. 2 (2020) (statement of Jeffrey Sedlik). Yet he spends his days and nights enforcing his rights by reporting infringements, without which his work would be valueless and he would not be able to feed his family. *Id.* Responding to a recent Copyright Alliance member survey, he underscored the struggle of "generat[ing] revenue by creating and licensing new works" while being "forced to compete with hundreds of thousands of unlicensed, unpaid, infringing uses of my works on service providers' platforms and websites." Jeffrey Sedlik, Comment, Copyright Alliance Member Survey (2024) [hereinafter CA Survey].

Pulitzer Prize-winning author, T.J. Stiles, echoed these sentiments, acknowledging the myriad "financial stresses of [a] creator's life," such that "even small income streams matter," as, in his case, for example, "[t]he annual royalties from my first biography . . . pay for my family's dental insurance." Stiles, *Id.* The effects of piracy are also felt by small business owners, who rely on the ability to monetize creative works to sustain their businesses and pay their employees. For example, Kathy Wolfe, the owner of an independent film company, reported that she lost over $3 million in revenue in one year from excessive pirating of her top 15 film titles, and due to these losses, had to cut her employees' pay and

discontinue her own salary. *See* Christopher S. Stewart, *As Pirates Run Rampant, TV Studios Dial Up*, Wall St. J. (Mar. 3, 2013), https://www.wsj.com/articles/SB10001424127887324906004578292232028509990. The piracy plaguing creators simply trying to earn a living will only be exacerbated by *Cox*.

In addition to grappling with the legacy of piracy incident to the advent of the Internet, creators today face a unique juncture that is magnifying infringement online. For one, the recent pandemic and uptick in Internet use has led to a surge in online piracy. Discussing the pandemic's particular effects, actor and director Carson Elrod testified before a House of Representatives subcommittee that like the many millions of arts workers throughout the country, he "cobble[s] together [his] income from a combination of disparate and wildly different employers" and that, along with this community, in March of 2020 "[his] world was turned completely upside down." *The Power, The Peril, and the Promise of the Creative Economy: Hearing Before the H. Comm. on the Judiciary*, 117th Cong. 1–2 (2022) (statement of Carson Elrod). During the pandemic, he faced "total unemployment" and watched as "long-time institutions closed permanently," from talent agencies to small business comedy venues. *Id.* at 3, 8. To add insult to injury, creators like Elrod have had to contend with a rising demand for pirated content, as the world increasingly shifted online. A recent

report by the Office of the U.S. Trade Representative, emphasized the "unprecedented spike in online piracy" occasioned by the shuttering of live creative arts destinations. *2022 Review of Notorious Markets for Counterfeiting and Piracy*, Office of the U.S. Trade Rep. at 7, https://ustr.gov/sites/default/files/2023-01/2022%20Notorious%20Markets%20List%20(final).pdf [hereinafter U.S. Trade Report]. Formerly shuttered piracy apps, such as "Popcorn Time" reemerged," leading, for example, to a 5600% rise in illegal streaming of the film *Contagion* and "9.2 million illegal streams, of which more than 1.1 million were in the U.S." of *The Conjuring: The Devil Made Me Do It*. Ian Carstens, *Outdated United States' Online Copyright Infringement Practices: What We Can Learn from the International Community*, 24 San Diego Int'l L.J. 335, 367–68 (2023). This surge did not end as social distancing concluded, however. Rather, post-pandemic "the global demand for digital media and entertainment content is increasing," and so is infringement. U.S. Trade Report at 7.

Since publication of this report, online infringement has only grown worse, occasioned by the advent of GAI, a rapidly proliferating technology built upon mass ingestion of scraped online content. The financial stress this causes creators is manifest. Many GAI systems are trained, by design, on billions of works ingested without authorization, scraped indiscriminately from the Internet where they are

made available illegally. Without a robust vicarious liability doctrine that motivates ISPs to comply with the requirements for Section 512 safe harbor protection and combat infringement, rightsholders will have no recourse to remove online pirated material, such that GAI models will invariably continue to train on pirated content. *See* Alex Hern, *Fresh Concerns Raised Over Sources of Training Material for AI Systems*, Guardian (Apr. 20, 2023), https://www.theguardian.com/technology/2023/apr/20/fresh-concerns-training-material-ai-systems-facist-pirated-malicious. This practice will harm creators. As licensing models emerge for copyrighted works as training material, the availability of pirated copies undercuts what is poised to become another revenue source for creators. Moreover, the inclusion of pirated content drastically reduces the possibility for "clean" datasets, particularly where, in practice, such sets are often "packaged and repacked [] many times" for use in training numerous GAI models. Edd Gent, *Public AI Training Datasets Are Rife With Licensing Errors*, IEEE Spectrum (Nov. 8, 2023), https://spectrum.ieee.org/data-ai. And, as technologists have cautioned, "unlearning isn't as straightforward as learning," but, rather, is like "trying to remove specific ingredients from a baked cake, [*i.e.*] nearly impossible." Alison Snyder, *Machine Forgetting: How Difficult It Is to Get AI to Forget*, Axios (Jan. 12, 2024), https://www.axios.com/2024/01/12/ai-forget-unlearn-data-privacy. A GAI model,

once trained on pirated data, will typically retain it for its lifespan, notwithstanding subsequent training and evolution. In this way, pirated content will be baked into the foundation of the majority of GAI models, undercutting creators' ability to control and monetize their works.

The creative community has begun to voice, en masse, their concerns around indiscriminate scraping of content—pirated and otherwise—which forms the current modus operandi for some GAI model training, as well as the difficulties and financial threats this practice poses. Karla Ortiz, a San-Francisco-based artist, recently testified before a Senate subcommittee that the GAI industry is expected to grow to "nearly $2 trillion USD by 2030" all "without any compensation" for the creators whose works it has unauthorizedly consumed, an insult underscored by the fact that this technology is "completely reliant upon" "a huge collection of images, media, and text descriptions scraped from the web . . . ." *Artificial Intelligence and Intellectual Property – Part II: Copyright*: *Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. 1, 6 (2023) (statement of Karla Ortiz). Jeff Harleston, General Counsel and Executive Vice President of Business and Legal Affairs at Universal Music Group echoed these concerns, noting that "generative AI companies are often obtaining [creative] content from sources that explicitly prohibit downloading and use of that content . . . . [with] examples of AI-generated

music, [for instance,] being used to generate fraudulent plays on streaming services, siphoning income from human creators." *Artificial Intelligence and Intellectual Property – Part II: Copyright: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. 2 (2023) (statement of Jeff Harleston). This mass unauthorized ingestion of scraped online content deprives creators of just compensation for use of their works. The indiscriminate inclusion of pirated material within such content exacerbates this issue, as GAI engineers gain access to works creators may not have intended for use as data or wished to monetize and license. Allowing *Cox* to water down vicarious liability will only magnify matters by making it harder for creators to ensure that pirated content is not used to train GAI models.

B. *Cox* Will Disincentivize Creators From Sharing Their Works Online, Which In Turn Will Chill Creation And Harm The Economy.

Though piracy—which now encompasses the explosion in GAI data scraping—presents a grave threat, Internet platforms remain crucial for creators to monetize their work. For instance, singer-songwriter Morgan Kibby testified before a House of Representatives committee about her reliance on platforms to generate income, especially during the pandemic when she was unable to tour in person.

Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades: Hearing Before the H. Comm. on the Judiciary, 116th Cong. 4–5 (2020) (statement of Morgan Kibby). She testified that every dollar counts because something as small as $100 will keep the lights on in her studio. *Id.* Don Henley, founding member of the Eagles, echoed her sentiments, noting that, given how COVID-19 recently decimated the industry, a predominant source of income for musicians is from licensing digital music services. *Section 512 of the Digital Millennium Copyright Act: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 116th Cong. 1–2 (2020) (oral statement of Don Henley). Musician Randy Travis has also stressed the predominance of "streaming, social media, and downloading," that "ha[ve] all but replaced physical record and CD sales . . . ." *Radio, Music, and Copyrights: 100 Years of Inequity for Recording Artists: Hearing Before the Subcomm. On Courts of the H. Comm. on the Judiciary*, 118th Cong. 1–2 (2024) (statement of Randy and Mary Travis). Because every dollar counts, enforcement against unlicensed uses is crucial. *See* Matt Bass, *RIAA Mid-Year 2024 Recorded Music Revenue Report*, RIAA, https://www.riaa.com/wp-content/uploads/2024/08/RIAA-Mid-Year-2024-Revenue-Report.pdf (last visited Sept. 19, 2024); Amy X. Wang, *Musicians Get Only 12 Percent of the Money the Music Industry*

Makes, Rolling Stone (Aug. 7, 2018), https://www.rollingstone.com/pro/news/music-artists-make-12-percent-from-music-sales-706746. Allowing *Cox* to narrow vicarious liability to the point of inutility will impede creators from making a living from their works, dissuading participation in their fields and halting their creation of the works that enrich our culture.

It is only fair to ensure the creative community be able to monetize its works when, collectively, this community contributes trillions to the U.S. gross domestic product ("GDP") every year. *See* Robert Stoner & Jéssica Dutra, Secretariat Economists, *Copyright Industries in the U.S. Economy: The 2022 Report* at 7–8, https://www.iipa.org/files/uploads/2022/12/IIPA-Report-2022_Interactive_12-12-2022-1.pdf (reporting that copyright industries, which account for approximately 16.1 million workers, added more than $1.8 trillion to the economy from 2018 to 2021); *see also* Andrew A. Toole et al., *Intellectual Property and the U.S. Economy: Third Edition* at 3, https://www.uspto.gov/sites/default/files/documents/uspto-ip-us-economy-third-edition.pdf (estimating that IP-intensive industries accounted for $7.8 trillion in value added in 2019). According to an annual report prepared for the International Intellectual Property Alliance in 2022, the value added by copyright industries to the U.S. economy increased steadily from 2018 to 2021, and, by 2021,

accounted for 7.76 percent of the U.S. GDP. Stoner & Dutra, *supra*, at 8. Depriving copyright owners of a means to enforce their rights would create a stark contrast whereby their contributions to copyright industries help keep the economy afloat, yet they cannot afford a basic living.

The *Cox* decision would do more than affect just rightsholders, however; it would also harm the public, and ultimately the economy, by chilling the creation of new works. In addition to economic gains, copyright serves the fundamental purpose of stimulating creation to benefit the country's shared wealth of knowledge and culture. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) ("[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works . . . ."). For creators, who sustain their pursuits from the monetary returns that copyright enables, the threat of extensive infringement without recourse looms large. Many creators lack the resources to litigate, and accordingly they rely upon the DMCA to curb infringement. Without the appropriate balance between the DMCA and secondary liability to incentivize ISPs to implement reasonable policies addressing repeat infringers, creators will lose much-needed revenue to infringement and ultimately be forced to abandon their creative pursuits to support themselves. This harm will be borne by the public, which will be deprived of the music, art, writing, and performance

that is possible when creators and artists are able to monetize their rights and financially support their work. *See* H.R. Rep. 105-551, pt. 2 at 35 ("Throughout our history, the ability of individual members of the public to access and to use copyrighted materials has been a vital factor in the advancement of America's economic dynamism, social development, and educational achievement.").

Faced with this drastic landscape, where a legacy of digital piracy is now compounded by the advent of GAI and the pandemic's after-effects, creators need online guardrails around the misuse of their works more than ever before. GAI, for instance, continues to outpace the law, as Congressional and federal agencies continue considering legal reforms, with caselaw still largely prospective or merely in early pleadings. Meanwhile, a post-pandemic world conducting more and more of itself online has led to an ongoing piracy boom with which creators continue to grapple. *See* Roy Kafuman, *Copyright and Licensing in the Time of COVID-19*, Copyright Clearance Center (Sept. 29, 2020), https://www.copyright.com/blog/copyright-and-licensing-in-the-time-of-covid-19/; *Film & TV Piracy Surge During COVID-19 Lockdown*, MUSO, https://www.muso.com/magazine/film-tv-piracy-surge-during-covid-19-lockdown#:~:text=New%20data%20released%20from%20MUSO,lockdown%20was%20enforced%20in%20March (last visited Sept. 19,

2024). Through it all, creators' primary recourse has remained the DMCA. Fostering balance between the interests of ISPs, users, and rightsholders, it is still the paramount, and sometimes the only, piece of legislation speaking to the novel issues facing creators today. The Fourth Circuit's attempt, then, to redefine vicarious liability contravenes the aims of the DMCA, sabotaging the incentives for ISPs to comply with its safe harbor thresholds. In turn, swathes of infringers will be given carte blanche to remain online, infringing, and subverting creators' livelihoods and creative output.

II. *COX* THREATENS THE CRUCIAL BALANCES OF THE DMCA.

The DMCA's crucial balancing of competing online interests would be thoroughly subverted in favor of ISPs by allowing the Fourth Circuit's incorrect take on vicarious liability to stand. Diminishing creators' ability to effectively coordinate with ISPs regarding infringement was not Congress's intent in establishing the DMCA. Nor was it for a single court to rewrite the rules of secondary liability and upend the legislated incentives for safe harbor qualification, even though that is Respondent's bent, as it pushes this Court to also reconsider the mandates of contributory liability. However, narrowing secondary liability will have the immediate effect of disincentivizing ISPs from adopting and implementing repeat infringer policies as well as the

other requirements for safe harbor. In the version of the Internet presaged by *Cox*, ISPs will no longer need safe harbor at all, because, in many instances, they will no longer be held monetarily and secondarily liable for the infringement on their platforms. By upsetting vicarious liability, the Fourth Circuit will effectively eviscerate the purpose and effectiveness of the DMCA.

A. Congress Crafted The Careful Balances Of Section 512 Of The DMCA With Secondary Liability In Mind.

DMCA Section 512 integrally balances the interests of Internet platforms, users, and rightsholders. Enacted in 1998, it serves as a compromise between rightsholders and Internet platforms to encourage the growth of the Internet while also ensuring that rightsholders may effectively protect their valuable intellectual property online. *See* H.R. Rep. No. 105-551, pt. 2 at 21 ("[T]he Committee believes it has appropriately balanced the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the Internet."). Congress crafted Section 512, which provides monetary limitations on liability for ISPs, to "preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital

networked environment." S. Rep. 105-190, at 20 (1998).

To qualify for any of the four categories of services subject to safe harbor protection, in addition to the requirements of a particular safe harbor, ISPs must first meet the threshold statutory requirements, which include, most notably, adopting and reasonably implementing a repeat infringer policy. *See* 17 U.S.C. § 512(i).

The functionality of this process depends, however, upon Section 512's coexistence with long-held principles of secondary liability, which *Cox* now seeks to jettison. In crafting Section 512, Congress was tasked with deciding which entity—creators or ISPs—to obligate to monitor the Internet for infringement. Seeking to confer room for a then-young Internet to grow without excessive affirmative legal obligation, Congress settled on creators. However, the responsibility to police infringements constituted a clear burden, particularly considering the enormity of the Internet and the limited wherewithal of creators. The saving grace behind burdening creators in this way was, then, Congress's faith in the continued application of common law rules of secondary liability. H.R. Rep. No. 105-551, pt. 2 at 3. Although not responsible for actively policing their own platforms, ISPs would still be accountable for infringement uncovered there pursuant to the

longstanding traditions of secondary liability, including vicarious liability. To avoid monetary liability, they could simply choose to comply with the DMCA, seeking safe harbor. Secondary liability would be the carrot to incentivize safe harbor compliance. That incentive will be gutted, however, if *Cox* stands.

B. *Cox* Will Destroy The Careful Balancing Of Interests Intended Under Section 512.

By narrowing the profit requirements within vicarious liability, the Fourth Circuit's decision ties the hands of one of the few secondary liability doctrines creators may invoke when facing infringement online, culminating in a significant threat to the balance of interests Congress intended under Section 512.

If *Cox* stands, ISPs will no longer be incentivized to seek safe harbor under the DMCA and comply with its basic requirements to curb infringement on their platforms. Without the sword of vicarious liability (or at the very least, one swapped from steel to stunt-prop), ISPs will have no need for a shield. The same outcome will inhere should the Court upset the doctrine of contributory infringement. ISPs will be well aware that any author undertaking the significant costs of litigation will be going into battle with diminished doctrines of liability unlikely to sway

any factfinder. They will therefore be emboldened to shirk the duties of their repeat infringer policies or abandon their implementation outright, as Cox did. *Cf.* Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 Notre Dame L. Rev. 499, 513–14 (2017) (discussing how the DMCA requirements are "optional, in the sense that platforms could ignore the safe harbors and simply accept the risk of copyright infringement claims in relation to user content, but almost none elect to do so" because the safe harbor conditions have become a "de facto standard"). ISPs that do not wish to terminate users, which may affect their bottom line, could simply adopt Cox's approach as a road map, rather than complying with the DMCA's safe harbor provisions. Cox was an outlier for flouting the DMCA's mandates and still expecting safe harbor,[2] but by ratifying its approach, the Fourth Circuit is paving the way for other ISPs to follow course and usher in a wave of widespread, sanctioned online piracy, at creators' expense.

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[2] To be clear, Cox did not assert a DMCA defense, and therefore the outcome did not turn on Cox's eligibility—or lack thereof, *see BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 301–05 (4th Cir. 2018)—for safe harbor. That said, the DMCA still loomed large, and Cox's self-inflicted failure to qualify for safe harbor was primarily why it found itself in court. Had Cox attempted to qualify for safe harbor, by merely adopting and implementing a reasonable policy, it could have shielded itself from infringement claims. Instead, it propounded a litigation position that would render the DMCA itself a nullity and succeeded in convincing the Fourth Circuit to adopt an erroneously narrow view of vicarious liability.

C. Under The Current DMCA, Creators Shoulder An Outsized Burden In Protecting Their Works.

In a sense, the lower court's incorrect ruling is just one more affront for the creative industries, which, long plagued by online infringement, have been fighting it with a DMCA that many now consider flawed. As discussed, from the outset, creators were tasked under the DMCA with policing infringement online. With this apportioning of responsibilities, Congress struck a balance, but one skewed heavily in favor of ISPs, by design, to protect a developing Internet. In the decades following the DMCA's enactment, however, ISPs have come to dominate the economy. Individual creators, trailing behind ISPs given a decades-old head start, have been left struggling to protect their rights.

This disequilibrium has caused outsized damage, particularly on individual creators. As T.J. Stiles noted in the CA Survey, "[b]ecause of copyright, the creative economy is one of the last areas in which the individual is a key player," but that fact makes "authors and other creators [] uniquely vulnerable" to piracy and the burden of tracking it. Stiles, Comment, CA Survey. Echoed Jeffrey Sedlik, "[e]nforcing rights under the DMCA is an impossible task," particularly for visual artists who "[m]ost[ly] . . . operate as micro-businesses, often with no

employees. . . . It is an untenable situation" that leaves "no time [] to create new works." Sedlik, *Id.* Musician and producer Blake Morgan concurred that "[t]he time it would take [to police for infringement] alone would mean I'd never be able to write another song or make another record." Morgan, *Id.* Stiles further underscored the "impossible" task an "individual author [shoulders] to track every pirate organization and issue take-down notices," noting that even when an author does, "often nothing happens." Stiles, *Id.* This is because, per Emmy Award-winning cinematographer Brandon Clement, the DMCA as currently enacted "allow[s] social media companies to leave loopholes for repeat infringers" and is missing processes for speedier handling of takedown requests, particularly as "almost all views and monetization of content happens in the first 48 hours [of infringing content being uploaded]." Clement, *Id.*

Clearly, notwithstanding the burden on creators to put down their work to police infringements of their work, the reward for their efforts is often radio silence, delay, or similar obfuscation. Cox itself demonstrated textbook examples of how an ISP may frustrate an author's good faith efforts to comply with the DMCA and initiate what is supposed to be a coordinated response to infringement. For instance, although Cox had a policy to receive and process infringement notices, as detailed in Petitioner's brief, Cox failed in many respects, capping the number of

notices it would accept from particular copyright owners or the daily suspensions it would implement. *See* Petition for Writ of Certiorari, at 9a, *Sony Music Entm't v. Cox Commc'ns, Inc.* (2024) (No. 24-181).

The U.S. Copyright Office concurs that something is amiss. In its recent comprehensive Section 512 report, the Office recognized that the balance struck by Congress in enacting the DMCA has since tilted considerably in favor of ISPs. *See* U.S. Copyright Office, *Section 512 of Title 17* at 84 (May 2020), https://www.copyright.gov/policy/section512/section-512-full-report.pdf ("Over the decades, the shift in the balance of the benefits and obligations for copyright owners and OSPs under section 512 has resulted in an increasing burden on rightsholders to adequately monitor and enforce their rights online, while providing enhanced protections for OSPs in circumstances beyond those originally anticipated by Congress."), 197 ("The Copyright Office concludes that the balance Congress intended when it established the section 512 safe harbor system is askew."); *see also id.* at 109, 136. Simply put, ISPs no longer need the leg up provided to them under a DMCA enacted to facilitate an emerging Internet, and in fact, have begun, as the Copyright Office and other first-hand accounts illustrate, to slacken in complying altogether. It is unsettling to imagine what they will feel emboldened to do pursuant to further relaxation of the law, with the gutting of vicarious liability.

With an Internet now boasting near-instantaneous download speeds, every day, hour, and even minute that a pirated copy remains online can be incredibly damaging. *See MUSO Study Shows Strong Correlation Between Box Office and Unlicensed Audience Data*, MUSO, https://www.muso.com/magazine/correlation-between-box-office-and-unlicensed-audience-data (last visited Sept. 19, 2024). Creators who have labored years over a single work face ruination with the click of an infringer's mouse. With piracy on the rise, now more than ever, creators need meaningful recourse to protect their works, as copyright intended.

In the face of the existing disequilibrium of Section 512, which nonetheless remains creators' best tool for fighting infringement, there is no room for additional error. Yet that is exactly what the Fourth Circuit's outlier ruling on vicarious liability occasions. The DMCA's support for creators will be further undercut as ISPs are emboldened to adopt infringement as part of their profit models. This ruling will allow the foxes rule of the henhouse, as ISPs bent only on their bottom line will give swathes of infringers carte blanche to remain online, infringing, and subverting creators' revenue streams and livelihoods. Creators will suffer and be forced to reconsider participation in their fields. Society will miss out on what the Founding Fathers intended, progress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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