No. 24-181

IN THE

Supreme Court of the United States

SONY MUSIC ENTERTAINMENT, ET AL.,

Petitioners,

v.

COX COMMUNICATIONS, INC. AND COXCOM, LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Fourth Circuit has held that vicarious liability for copyright infringement requires that the defendant profit narrowly and directly from the act of infringement itself, as opposed to profiting from the operation in which the infringement takes place.

That decision splits from the other courts of appeals. In response, Cox attempts to obscure this split by, first, separating the cases discussing internet service providers' liability from those discussing other infringers; and second, waving away the non-ISP cases as cases that "involve draws." Both moves are missteps. As to the first, the courts of appeals do not distinguish between ISP infringers and other infringers;

courts cite and apply these precedents interchangeably. And Cox's second move effectively concedes the split that they attempt to obscure. If those other cases involve draws, then this one does, too. A description of "draw" broad enough to capture pirated records sold at a swap meet through an independent vendor, or stolen photographs of stem cells on a website selling nutritional supplements, is broad enough to encompass the music stolen through Cox's service.

The decision below is also wrong. Cox attempts to fill the gaps in the Fourth Circuit's reasoning with a revisionist retelling of the origins of vicarious liability for copyright infringement, novel readings of this Court's precedent, and an appeal to the legislative history of statutory provisions not at issue here. But those arguments are weak and misleading. Courts have long understood that vicarious liability for copyright infringement does not require a formal agency relationship between the direct and secondary infringer. And Cox's citations to the legislative history of the Digital Millenium Copyright Act only serve to underscore that Congress knew ISPs could be vicariously liable for subscribers' infringement and chose to permit that liability for ISPs—like Cox—who have proved to be such poor stewards of their obligations to protect copyright that the statute's safe harbor is closed to them.

This split is damaging and important to correct. Cox downplays the importance of the Fourth Circuit's ruling, but the scope of the harm is clear from the docket. Plaintiffs here are the leading record companies and music publishers in the world. And everyone else whose livelihood depends on their ability to protect their creative works—authors, songwriters, composers, journalists, television and filmmakers, graphic and visual artists, and software developers—has lined up behind Plaintiffs to ask this Court to reverse the Fourth Circuit's decision. As the creative industry explains, the decision below upsets the careful balance Congress struck in the DMCA to ensure that technological innovation does not spell the end of creative innovation.

The petition should be granted.

ARGUMENT

I. THE SPLIT IS REAL.

A. Courts Are Split On How The Profit Requirement Applies To ISPs.

Courts are split on how to interpret the profit element of vicarious copyright infringement. Most find liability where the defendant expects to profit from the operation in which infringement occurs. But the Fourth Circuit permits liability only where the defendant profits directly from the infringement itself.

1. Cox first urges this Court to narrow its review of the split to cases involving internet service providers. Opp. 11-13, 18. But courts do not treat cases involving internet service providers as unique. They cite and apply cases involving a "chain store, dance-hall proprietor, and file-sharing program operator" interchangeably. *Leonard* v. *Stemtech Int'l Inc.*, 834 F.3d 376, 389 (3d Cir. 2016). And, as Cox concedes, the Fourth Circuit cited and discussed cases involving flea markets and department stores as part of its profit analysis. *See* Opp. 8; Pet. App. 12a-14a.

Cox attributes its narrow focus to the legislative history of an inapplicable statute, the DMCA. Opp. 11-12. In the DMCA, Congress crafted a safe harbor for internet service providers to shield them from secondary liability—if service providers take reasonable steps to prevent infringement. 17 U.S.C. § 512(i)(1)(A). Cox refused to take those steps. *See BMG Rights Mgmt.* v. *Cox Commc'ns, Inc.*, 881 F.3d 293, 303 (4th Cir. 2018). Having found itself locked out of the safe harbor, there is no other bespoke copyright doctrine for ISPs in which Cox can take refuge.

2. In any event, narrowing the focus of the split does not eliminate it. The Ninth Circuit reached the same result in *Ellison* that the Fourth Circuit reached below, but the reasoning of the two cases could not be more different.

As explained in the petition, *see* Pet. 18, *Ellison* held that the plaintiff's vicarious copyright infringement claim failed only because he could not establish that "AOL attracted or retained subscriptions because of the infringement or lost subscriptions because of AOL's eventual obstruction of the infringement." *Ellison* v. *Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004). Such evidence, the Ninth Circuit noted, would have established that infringement was a "draw" to the defendant's services, just as the sale of infringing records was a "draw" to the swap meet in *Fonovisa*. *Id.*; *see also* 6 Patry on Copyright § 21:75 (explaining that *Ellison*'s stated requirement "of a 'direct' financial benefit" is a misnomer because of "*Ellison*'s more liberal approach to a draw").

The evidence that the Ninth Circuit said was missing in *Ellison* was before the jury below. The Fourth Circuit acknowledged that Plaintiffs had shown "that when deciding whether to terminate a subscriber for repeat infringement, Cox considered the subscriber's monthly payments" and that "Cox repeatedly declined to terminate infringing subscribers' internet service in order to continue collecting their monthly fees." Pet. App. 16a. But the Fourth Circuit nevertheless refused to affirm the jury's vicarious liability finding, "disagree[ing]" with the District Court's conclusion that this evidence "demonstrated the requisite connection between the customers' continued infringement and Cox's financial gain." *Id.* at 16a-17a.

The Ninth Circuit's other technology cases—which Cox does not discuss—emphasize the divergence in the Fourth and Ninth Circuit's reasoning. For example, in *A&M Records, Inc.* v. *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), the Ninth Circuit upheld a vicarious liability finding even though the defendant operated a service that was *free* to its infringing users. *Id.* at 1011, 1024. Cox is simply wrong when it insists that the Ninth Circuit requires "profit—of any size—because of the infringement." Opp. 13 (internal quotation marks omitted). The Ninth Circuit instead understands the "direct financial interest" element as "encompass[ing] a *possible, indirect* benefit." 3 Nimmer on Copyright § 12:04[A][2] (Matthew Bender, Rev. Ed. 2015) (emphasis added) (collecting cases).

B. The Decision Below Cannot Be Reconciled With Cases Outside The ISP Context.

Cox's secondary argument regarding the split relies heavily on italic font. Cox notes that most courts have stated that "vicarious liability depends on proof of a direct financial benefit *from the infringement*." Opp. 13 (emphasis in original). And this, Cox says, proves that the Fourth Circuit has broken no new ground—that no Circuit has ever adopted Plaintiffs' view of the profit element, "even implicitly." *Id.* at 15; *see id.* at

13-22. But Plaintiffs allege a split regarding the content of that requirement, not its existence.

Courts have long understood that "proof of a direct financial benefit *from the infringement*" includes evidence that the defendant profited *from the operation in which infringement occurred*, even if the benefit cannot be traced precisely and exclusively to the performance of infringing works. That is the whole point of the "draw" theory examined by the Ninth Circuit in *Fonovisa* and discussed by practically every vicarious copyright liability case since. The Fourth Circuit broke with that majority view when it held that liability requires evidence that the defendant expects commercial gain from the act of infringement itself.

Start with the dance hall cases. Cox tries to reconcile the Fourth Circuit's reasoning with those cases by noting that "the Fourth Circuit found that infringement did not serve as a 'draw'" because "there was no evidence that Cox purposefully 'employ[ed]' acts of infringement to attract subscribers." Opp. 17. But, of course, other decisions—including one Cox cites on the preceding page of its Opposition—hold that infringement does serve as a draw even without evidence that a defendant purposefully employed infringement to attract customers. *Dreamland Ball Room* v. *Shapiro, Bernstein & Co.*, 36 F.2d 354, 355 (7th Cir. 1929); *see also* Opp. 16. A dance-hall owner who "did not direct the playing of any selection" and "did not know that any musical selection played by the orchestra was copyrighted" is *still* "liable." *Dreamland*, 36 F.2d at 355; *see also Realsongs* v. *Gulf Broad. Corp.*, 824 F. Supp. 89, 91-92 (M.D. La. 1993) (similar).

Cox's efforts to distinguish the modern cases likewise fail. *See* Opp. 19-22. Cox argues that the Ninth Circuit permitted liability in *Fonovisa* v. *Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996), "only because the opportunity to make those infringing purchases was clearly a 'draw' for customers." Opp. 19. But Cox fails to acknowledge that the "clear" evidence of a draw in *Fonovisa* was simply the evidence that "the defendants reap substantial financial benefits from admission fees, concession stand sales and parking fees." *Fonovisa*, 76 F.3d at 263. The Ninth Circuit did not cite or rely on evidence that people came to the market *because of* the opportunity to infringe. It was enough that some attendees purchased infringing records, and the marketplace owner profited from their attendance—an "indirect benefit" because "the actual receipts to defendant were generalized, rather than traceable directly to the infringement." 3 Nimmer on Copyright § 12:04[A][2].

Indeed, the Ninth Circuit rejected the precise argument that the Fourth Circuit embraced. The Fourth Circuit declined to impose liability because, "[a]s Cox points out, * * * Cox would receive the same monthly fees even if all of its subscribers stopped infringing." Pet. App. 17a. But the marketplace owner in *Fonovisa* pressed the same argument, asserting that it "receive[d] its rental payment regardless of whether the vendor makes any sales whatsoever." Cherry Auction Br., 1994 WL 16014410, at *9. The Ninth Circuit, however, did not accept that argument. *Fonovisa*, 76 F.3d at 263.

Cox similarly stumbles in its attempt to distinguish *Leonard* v. *Stemtech International Inc.*, 834 F.3d 376 (3d Cir. 2016), and *EMI Christian Music Group, Inc.*

v. *MP3tunes, LLC*, 844 F.3d 79 (2d Cir. 2016). Cox says both decisions merely "show[ ] that there are various ways of proving draw." Opp. 20-21. That is just another way of conceding that the Fourth Circuit incorrectly concluded that there is only one way of proving draw. Plaintiffs offered, and the jury accepted, evidence equivalent to that offered in *Leonard* and *MP3tunes*. *See* Pet. 19-20, 22-23.

Given these decisions, it is hard to understand Cox's contention that "[n]one of the cases say that" they are "imposing liability only because 'the defendant profited from the larger operation in which the infringement occurred.'" Opp. 16. All Circuits *except* the Fourth Circuit follow this rule. *See, e.g.*, *Fonovisa*, 76 F.3d at 263 (defendant profited from copyright infringement through "admission fees, concession stand sales and parking fees"); *Leonard*, 834 F.3d at 389 (defendant profited from copyright infringement through evidence that the copyrighted photographs "len[t] legitimacy" to the defendant's nutritional supplements); *MP3tunes*, 844 F.3d at 99 (defendant used the infringing material to "attract free users * * * whom [the music service provider] could thereafter 'upsell'").

II. THE FOURTH CIRCUIT'S VICARIOUS LIABILITY HOLDING IS WRONG.

A. Offering a revisionist reading of two seminal copyright cases, Cox attempts to bolster the Fourth Circuit's impermissibly narrow conception of vicarious liability by arguing that such liability "attaches only when the defendant has an agency-like relationship with the infringer." Opp. 22; *see also id.* at 23-24 (citing *Gershwin Publ'g Corp.* v. *Columbia Artists Mgmt., Inc.*, 443 F.2d 1159 (2d Cir. 1971), and *Shapiro,* *Bernstein & Co.* v. *H. L. Green Co.*, 316 F.2d 304 (2d Cir. 1963)).

Cox waived this argument. In the District Court, it never pushed for an agency requirement in the jury instruction, Dist. Ct. Dkt. 605-606, or in its briefing of the vicarious liability issue, Dist. Ct. Dkt. 328, 404, 453. Regardless, the treatise Cox cites reads the same cases the opposite way. It explains that "courts have expanded vicarious copyright liability beyond the traditional respondeat superior model to non-agency relationships, such as landlord-tenant relationships." Patry on Copyright § 21:64 (Sept. 2024 ed.) (citing *Gershwin*, 443 F.2d 1159, and *Shapiro, Bernstein*, 316 F.2d 304); *see also* 3 Nimmer on Copyright § 12.04[A][2] (similarly explaining that, in the copyright context, "vicarious liability exceeds the traditional scope of the master-servant theory"). The majority of the courts of appeals that have addressed this issue have recognized the same thing. *See Leonard*, 834 F.3d at 388 (collecting cases).

B. Cox also offers a revisionist reading of this Court's secondary copyright liability cases.

First, Cox suggests that *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913 (2005), and *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984), support its view. Opp. 24-25. But neither of those cases was about vicarious liability. The Court resolved *Grokster* on an inducement theory, 545 U.S. at 936-937, 941, and *Sony* on a contributory liability theory, 464 U.S. at 456.

Second, Cox declares that *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917), "has nothing to do with vicarious liability." Opp. 25. But, once again, Cox's reading of the case is unique. As Patry explains, "[i]n *Herbert* v.

Shanley, the court imposed vicarious liability on a hotel that had hired musicians to play in its restaurant for the entertainment of its customers." Patry on Copyright § 21:65 (footnote omitted). *Herbert*'s reasoning subsequently was "applied by lower courts in a variety of fact settings," which "came to be known as the 'dance hall' cases"—the foundation of vicarious liability precedents. *Id.*

C. Cox also tries to muddy the waters on Congressional purpose by arguing that the "far more relevant" legislative history is that of the DMCA's safe harbor. Opp. 27. But this is not a DMCA case; Cox proved itself undeserving of the DMCA's safe harbor protection. *See supra* at 4. In any event, while Cox argues that the DMCA codified elements of vicarious-liability law, courts acknowledge that the safe harbor provision is "[not] coextensive with vicarious liability," *Viacom Int'l, Inc.* v. *YouTube, Inc.*, 676 F.3d 19, 37 (2d Cir. 2012). Indeed, the committee report Cox cites reveals that "the Committee decided to *leave current law in its evolving state* and, *instead*, to create a series of 'safe harbors,' for certain common activities of service providers." S. Rep. 105-190, at 19 (emphases added); *see also* Copyright Alliance Br. 21-23.

D. Finally, Cox trots out a parade of horribles, insisting that if an ISP has a financial interest in almost anything a user does online, then it will be liable for almost anything, too. Opp. 29. Congress already addressed that potential issue in the DMCA. The DMCA's generous safe harbor provisions provide the necessary "guardrails on vicarious liability" in this context. *Id*. The Fourth Circuit found Cox ineligible for that protection. Pet. App. 39a-40a n.4. But

Congress's protection is still available to companies that *do* comply with the DMCA.

III. REVIEW IS NEEDED NOW.

A. The Question Presented Is Important.

The Fourth Circuit's decision "destroys" the balance that Congress struck in the DMCA, "effectively confer[ring] the benefits of the DMCA safe harbor (no monetary liability), while jettisoning the requirements for that benefit (taking minimal steps to curb online infringement)." NMPA Br. 24. "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." Copyright Alliance Br. 3-4.

Cox maintains that the decision below does not have "collateral consequences * * * in other contexts." Opp. 31. That is wrong. Cox appears to believe that ISPs are uniquely exempt from secondary liability, even if they decline to take the reasonable steps needed for the safe harbor. But no one else believes that. *See supra* at 3-5; *see also* NMPA Br. 20-21. Cox waves away Plaintiffs' hypotheticals as clear examples of liability, Opp. 31, but that liability is only clear under the Plaintiffs' broader understanding of draw. The Fourth Circuit's version of draw requires the *infringement itself* to "draw[ ] customers to the defendant's service or incentivize[ ] them to pay more for their service." Pet. App. 16a. But in each hypothetical, from the restaurant playing copyrighted music to the law firm associate using an old Westlaw account, there is no direct link between the infringement and the attraction of customers to the business, and thus no way to prove that the defendant profited from infringement.

B. This Case Is A Suitable Vehicle.

There are no barriers to review. Cox suggests that a grant would be complicated by Cox's intention to challenge the second element of vicarious liability, pertaining to the right and ability to control. Opp. 32-33. But that is an empty threat; Cox forfeited that argument long ago. In the District Court, Cox distinguished between its business and residential customers. On appeal, Cox challenged the jury verdict only as to *business* customers and did not dispute that it possessed the right and ability to limit infringement by the other 95% of its subscribers. *See* Dist. Ct. Dkt. 682 at 20-22; Dist. Ct. Dkt. 699 at 9 n.6.

Cox also strangely claims that "Plaintiffs did not preserve the question presented." Opp. 33. But Plaintiffs advocated for the same view of vicarious liability before the Fourth Circuit that they ask for here. *See* Sony CA4 Br. 35-36. The Fourth Circuit, for its part, understood Plaintiffs' position on the question presented. That is why the decision below devotes several pages to it. Pet. App. 11a-19a. The question presented is preserved by virtue of that treatment alone. *See* *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (explaining that this Court's "traditional rule[s] * * * permit[ ] review of an issue not pressed so long as it has been passed upon").

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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