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Legal Sidebar

Supreme Court to Examine Liability of Internet Service Providers for Their Users' Copyright Infringement

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The Supreme Court recently agreed to hear arguments in *Cox Communications, Inc. v. Sony Music Entertainment* during its October 2025 term. *Cox v. Sony* is a high-stakes copyright dispute brought by record companies and music publishers against an internet service provider (ISP) that resulted in a $1 billion jury verdict against the ISP. The Court's decision in *Cox v. Sony* may have substantial implications for how ISPs address copyright infringement by their users and, in particular, when ISPs must terminate users' internet access based on repeated accusations of copyright infringement (e.g., unauthorized downloading of copyrighted music).

This Sidebar reviews the copyright law underlying the dispute in *Cox v. Sony*, the history of the case in the lower courts, and the legal questions that the Court agreed to hear in its October 2025 term.

Copyright Infringement and the Internet

Copyright Basics

Copyright law grants the authors of original creative works (e.g., books, visual art, music, movies) a set of exclusive rights in their creations, including the exclusive right to copy, adapt, perform, or distribute the work. A person who takes one of these actions without the copyright holder's permission is said to infringe the copyright and may be liable for monetary damages or other legal remedies. In addition to damages based on actual economic harm, the Copyright Act allows successful plaintiffs to seek *statutory damages* of between $750 and $30,000 per work infringed, or up to $150,000 per infringed work if the defendant's infringement is "willful."

Cox v. Sony involves the purported liability of ISPs when their subscribers illegally download music over the internet. Copyright law protects the work of both the songwriters who write music and lyrics and the artists who perform and record music. It is common in the music industry for songwriters to transfer their copyrights to a music publisher (e.g., Sony/ATV Music Publishing) and for performing artists to transfer their copyrights to a record company (e.g., Sony Music Entertainment). Dozens of these companies, which own many of the most valuable music copyrights in the United States, are the plaintiffs in *Cox v. Sony.*

Secondary Liability for Copyright Infringement

The Copyright Act (in contrast to the Patent Act) does not explicitly lay out any standard for "secondary" copyright-infringement liability—that is, when one person may be held liable for the infringing acts of another person (the "direct" infringement). Federal courts have nonetheless developed standards for secondary liability by relying on common law principles or analogies to patent law.

Over time, the courts developed two distinct doctrines of secondary liability for copyright infringement (although the line between them is not always "clearly drawn"). The first doctrine, called *vicarious liability*, imposes liability "when the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer." Notably, defendants need not actually know about the specific infringing conduct to be vicariously liable, but they must directly profit from the infringement while "declining to exercise a right to stop or limit it." Under this theory, courts have held the owner of a department store chain liable for bootleg records sold by a concessionaire within its stores, and the owner of an entertainment venue liable for infringing musical performances held in its venue.

The second doctrine, called *contributory infringement*, holds liable a party who "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." Sometimes viewed as a civil form of "aiding-and-abetting" liability, contributory infringement requires that the defendant's actions "intentionally induc[e] or encourag[e]" another person's infringement. On this theory, courts have held an advertising agency liable when it knowingly places ads for infringing works sold by another business, or a distributor of an unauthorized film liable for theaters' infringing performances of the film.

The Supreme Court has decided two major secondary liability cases (both centering on contributory infringement) under the Copyright Act of 1976, the current copyright statute. In the 1984 case *Sony Corp. of America v. Universal City Studios, Inc.*, the Court addressed whether Sony, the manufacturer of the Betamax videocassette recorder (VCR), could be held liable for the copyright infringement of some Betamax purchasers. While a VCR has infringing uses (e.g., making a copy of a movie shown on TV in order to sell it), the Court found that VCRs had noninfringing uses as well (including "time-shifting," the noncommercial home recording of a broadcast television program to watch it at a more convenient time). Borrowing from patent law's "staple article of commerce" principle, the Court held that the seller of a device with both infringing and noninfringing uses could not be held secondarily liable if the device was "capable of substantial noninfringing uses." Because the VCR had such substantial noninfringing uses, the Court reversed the lower court's ruling that Sony was liable for contributory infringement.

The 2005 case *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* also involved a "dual-use" technology (i.e., a device with both infringing and noninfringing uses), but the Court reached the opposite conclusion. The defendant in *Grokster* was a distributor of peer-to-peer networking software that allowed users to share computer files with each other directly as opposed to through a central server. Although in theory this software might be used to exchange any type of digital information, in practice Grokster (like the unrelated but similar program Napster) was primarily used to share and download copyrighted music and video files. When copyright holders sued Grokster based on its users' infringing downloads, the lower court relied on *Sony* to hold that Grokster was not liable for contributory infringement because its software was capable of substantial noninfringing uses. For example, some people used Grokster to share public domain works or other material not covered by copyright.

The Supreme Court reversed, holding that Grokster was secondarily liable for its users' copyright infringement. As the concurring opinions revealed, the Court was divided on whether Grokster's file-sharing software was "capable of substantial noninfringing uses" under the *Sony* rule. (Three Justices opined that Grokster's noninfringing uses were more "anecdotal" than "substantial," while three Justices expressed the opposite view.) Ultimately, a unanimous Court read *Sony* narrowly to preclude presuming an intent to cause infringement *solely* "from the design or distribution of a product capable of substantial lawful use." On this reading, *Sony* did not "displace other theories of secondary liability" or require courts to ignore other evidence of culpable intent. One such theory was *inducement*, a form of contributory liability based on "active steps" taken to "encourage direct infringement" by another, such as "advertising an infringing use or instructing how to engage in an infringing use." On the facts, the Court found Grokster induced infringement because it "distribute[d] a device with the object of promoting its use to infringe copyright" by (among other things) marketing it to Napster users.

The "Safe Harbors" of the Digital Millennium Copyright Act of 1998

In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA) to adapt copyright law to the emerging digital age. The DMCA sought to balance the concerns of copyright holders (who feared that the ease and speed of digital copying would fuel widespread copyright infringement) with those of internet technology companies (who feared that legal uncertainty over whether ISPs were liable for infringing material online would stifle technological innovation).

The DMCA's "safe harbor" provisions for online "service providers" (broadly defined to include ISPs such as Cox and online "platforms" such as YouTube) were part of this compromise. The safe harbors provide that online service providers will not be secondarily liable for copyright infringement based on certain activities (e.g., transmitting information through a network or storing user-generated material on an online platform) if they meet a number of specific statutory requirements. One of those requirements is that the service provider must adopt and "reasonably implement ..." a policy to terminate users who are "repeat infringers."

While online service providers may choose to follow the DMCA's requirements to take advantage of the liability protection granted by the safe harbors, they are neither required to do so nor necessarily liable for copyright infringement if they do not meet the DMCA's conditions. Rather, the statute makes clear that a service provider's failure to qualify a safe harbor shall not adversely affect "any other defense" to copyright infringement liability.

The Dispute in *Cox v. Sony*

The dispute in *Cox. v. Sony* can be viewed as a follow-on action to *BMG Rights Management (US) LLC v. Cox Communications, Inc.*, an earlier copyright infringement lawsuit against the same ISP in the same jurisdiction. In that case, BMG (a music publisher) sued Cox in the U.S. District Court for the Eastern District of Virginia, alleging the ISP was liable for downloads of copyrighted music files made by its subscribers using the BitTorrent protocol (a method of peer-to-peer file sharing). When Cox invoked the DMCA's safe harbors as a defense, the lower court held that the safe harbor was not available to Cox as a matter of law because Cox failed to reasonably implement a policy to terminate repeat infringers, as required by the DMCA. A jury subsequently found Cox liable for willful contributory infringement and awarded BMG $25 million in statutory damages.

Cox appealed that verdict to the U.S. Court of Appeals for Fourth Circuit (Fourth Circuit), which affirmed in part and reversed in part. The main issue on appeal was whether Cox was entitled to the DMCA safe harbor defense. On that issue, the Fourth Circuit held that the safe harbor was unavailable because Cox failed to reasonably implement a policy to terminate repeat infringers' internet access. The court found that Cox's "thirteen-strike" policy (whereby the ISP would "consider" terminating a subscriber's internet access only after receiving 13 notices of infringement within a six-month period) was not implemented in a "consistent or meaningful way." The court concluded that internal emails showed that Cox was "very clearly determined not to terminate [any] subscribers" despite receiving millions of notices of copyright infringement on behalf of rightsholders such as BMG. On a separate issue (the jury instructions for contributory infringement), the Fourth Circuit reversed the jury verdict and remanded the case to the lower court; the case then settled before the retrial.

Following the Fourth Circuit's ruling in *BMG*, a larger group of copyright holders sued Cox for infringement, based on essentially the same facts. As in *BMG*, Sony and the other plaintiffs alleged that some of Cox's subscribers illegally downloaded thousands of copyrighted works, that Cox had knowledge of its users' infringements based on notices sent to Cox by the copyright holders' agent, and that Cox consistently failed to terminate the internet access of repeat infringers. Given the *BMG* ruling, it was already established that Cox could not rely on the DMCA safe harbor during the relevant time period, and the case went to trial. A jury found Cox liable for both contributory and vicarious infringement and awarded $1 billion in statutory damages based on a finding that Cox's infringement was willful.

Cox appealed to the Fourth Circuit, which affirmed in part and reversed in part. The appeals court agreed with Cox that the ISP was not vicariously liable for its users' copyright infringement as a matter of law. Because Cox charged its subscribers "a flat monthly fee for their internet access no matter what they did online" the court concluded that Cox did not "profit directly" from the infringement (as required for vicarious liability). The Fourth Circuit affirmed the jury's verdict on contributory infringement, however. It upheld the lower court's finding that Cox had constructive knowledge of particular users' infringement based on the notices rightsholders had sent to Cox about those users' repeated infringement. The court reasoned that this created "knowledge that particular subscribers are substantially certain to infringe" if Cox continued to provide them internet access. As to Cox's "material contribution" to the infringement, the court found the evidence sufficient for the jury to conclude that continuing to provide internet access "with knowledge that the recipient will use it to infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement." Finally, because it had reversed the vicarious-liability basis of the jury verdict, the Fourth Circuit vacated and remanded for a new trial on damages.

Arguments Before the Supreme Court

Both Cox and Sony took issue with the Fourth Circuit's ruling, and each filed a petition for a writ of certiorari asking the Supreme Court to hear the case. Sony's petition argued that the Fourth Circuit was wrong to reverse the vicarious-liability verdict because Cox directly profited from the infringement though the subscription fees it received by declining to terminate users. The Court denied Sony's petition.

Cox's petition raised two questions, both of which the Supreme Court agreed to hear. (The United States, in an amicus brief filed at the Court's invitation, urged the court to grant Cox's petition.) The first question relates to whether Cox's actions sufficed to "materially contribute" to its subscribers' copyright infringements. Cox argues that merely continuing to provide internet access to existing users is not the sort of "purposeful, culpable expression and conduct" needed under *Grokster*, which required "affirmative steps taken to foster infringement." Cox further argues that imposing secondary liability in this case conflicts with *Sony v. Universal* and the Court's recent decision in *Twitter v. Taamneh*, which held that social media companies could not be found liable for aiding and abetting terrorist groups solely based on those groups' use of the companies' generally available online services. Cox argues that *Twitter*, although not a copyright case, supports the proposition that online platforms are not liable for merely providing the "infrastructure" that users on their platform may rely on to accomplish bad acts, absent evidence of an ISP's "conscious, voluntary, and culpable participation in another's wrongdoing."

Cox's second question concerns the legal standard for when copyright infringement is "committed willfully" and therefore subject to enhanced statutory damages under 17 U.S.C. § 504(c). Willfulness is not defined in the Copyright Act, but courts have generally held that it requires the defendant to have actual awareness of the infringing activity or to act with reckless disregard for, or willful blindness to, the copyright holder's rights. Under the rule approved by the Fourth Circuit in *BMG* and applied by the jury in *Cox v. Sony*, a jury could find willful infringement if it found that Cox "had knowledge that its subscribers' actions constituted infringement," "acted with reckless disregard for the infringement," or "was willfully blind to the infringement." Cox argues that this instruction improperly allowed liability based on whether Cox knew that its *subscribers'* actions were infringing and not whether Cox knew that its *own actions* were unlawful. Because knowledge of the direct infringement is an element of contributory liability under the case law, Cox argues that the Fourth Circuit's standard effectively makes all contributory infringement "willful" and subject to enhanced damages, even if Cox believed in good faith that its actions were not infringing.

Sony, for its part, defends the Fourth Circuit's judgment on both grounds. As to the material contribution element, Sony argues that the Fourth Circuit's ruling correctly applied *Grokster* because liability was premised not only on a failure to stop another's infringement but also on other evidence of Cox's culpable intent in continuing to provide internet access to known infringers in order to avoid losing revenue. On the willfulness issue, Sony argues that the jury instruction properly allowed enhanced damages based on evidence of Cox's own recklessness in materially contributing to conduct it knew was illegal.

Considerations for Congress

Cox v. Sony raises a number of significant legal and policy issues, particularly as to the responsibilities (if any) that ISPs such as Cox should have to address copyright infringement by their subscribers.

From the perspective of the plaintiff copyright holders, the verdict in *Cox v. Sony* reflects culpable conduct by ISPs, which provide the means for copyright infringement by some users while doing very little to stop it. Sony notes that Cox terminated 600,000 subscribers for not paying their bill over a two-year period, compared with 32 terminations for repeat infringers. On this view, ISP liability is appropriate in cases such as *Cox v. Sony* so that ISPs will take a more active role in stopping repeated infringement.

From the perspective of ISPs, a ruling upholding the $1 billion verdict would have significant negative consequences for public internet access. If the lower courts' rulings in *Cox v. Sony* are upheld, Cox warns that ISPs will be forced to engage in "mass evictions" from the internet. Noting that many connections have multiple users (e.g., households, coffee shops, hospitals, universities), Cox argues that ISPs will be compelled to terminate service whenever some unidentified person uses a connection to infringe, even if the actual subscriber or most users of that connection are "entirely innocent."

Ultimately, liability in *Cox v. Sony* is based on the Copyright Act, which Congress could amend either before or in reaction to the Supreme Court's decision in the case. For example, Congress may consider amending the Copyright Act to codify the judicially developed secondary-liability doctrines, as it has done in the Patent Act. Among other things, such amendments might more precisely define what constitutes "materially contributing" to infringement or "willful" infringement subject to enhanced damages (the legal issues in *Cox v. Sony*). Congress could also modify the DMCA "safe harbors" to expand or narrow the existing immunities that ISPs and other online service providers have from copyright liability. For example, Congress may consider tightening or loosening the DMCA's requirement that ISPs implement a policy to terminate repeat infringers in order to rely on the safe harbor.

Author Information

Kevin J. Hickey
Legislative Attorney

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