Nos. 24-171 & 24-181

In the
Supreme Court of the United States

COX COMMUNICATIONS, INC. et al.,

Petitioners / Cross-Respondents,

v.

SONY MUSIC ENTERTAINMENT et al.,

Respondents / Cross-Petitioners.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

The government's brief ignores the record and elides what this case is really about. By its telling, one would think the Fourth Circuit held that an ISP can be contributorily liable just for adopting a policy of policing subscriber infringement that is less than foolproof. That is not this case. Cox was held liable not because it failed to do *enough* to police infringement, but because it took *no* meaningful steps to stop infringement and continued serving specific, identifiable subscribers even after receiving explicit notice of their repeat (and often rampant) infringement. Cox did not continue serving those subscribers because they were hospitals or universities, or because they were not responsible for the infringement on their accounts. Cox kept supplying the means of infringement because it said "F the dmca!!!," C.A.App.1495, and adopted an express policy of prioritizing profits from subscription fees over compliance with the Copyright Act or the DMCA. The Court need not take any of that on Plaintiffs' word: There was a trial, and the extensive record thoroughly convinced a jury, the district court, and the Fourth Circuit that Cox not only contributed to subscriber infringement, but did so willfully.

Against that evidence, the government's recommendation to grant Cox's petition while denying Sony's is bewildering. Every circuit that has faced facts like these has agreed that they can and should give rise to contributory liability, so the only real question should be whether they give rise to vicarious liability too. Yet the government urges the Court to grant (limited) review and to bail-out an ISP that could have avoided liability entirely by availing itself of an easily satisfied safe-harbor but instead chose to look the other way and hope that its "unwritten semi-policy" would not come out in litigation. C.A.App.1484-86. Letting Cox off the hook for that choice would be inexplicable. The whole point of providing a defense against monetary damages for ISPs that take good-faith steps to terminate repeat infringers is to create a "strong incentive[]" for ISPs "to cooperate" with "copyright owners" "to detect and deal with copyright infringements that take place in the digital networked environment." S. Rep. 105-190 p.20 (1998). Besides unsettling decades of precedent, the government's crabbed conception of secondary liability usurps Congress' policy choice and renders that incentive scheme a dead letter. And while the government expresses concern about subscribers losing vital online access, Cox showed no qualms when terminating hundreds of thousands of subscribers for failing to pay their bills. Regardless, thanks to the DMCA, individuals interested in online access but not rampant infringement have multiple options among copyright-compliant ISPs.

The only issue on which the circuits are split and this Court's certiorari criteria are satisfied is vicarious liability. Thus, the last thing this Court should do is grant certiorari just to second-guess the Fourth Circuit's contributory-liability and willfulness holdings. And excising the vicarious-liability question from the case would just artificially constrain the Court's consideration of the tools available to hold ISPs accountable when, as here, they choose to put profit above protecting copyrights.

I. The Questions Cox Presents Are Not Certworthy.

A. Cox Would Face Contributory Liability In Any Jurisdiction.

1. For over a century, this Court has recognized that supplying a tool essential to infringement to someone with knowledge that they plan to use it to infringe triggers contributory liability, because courts can presume "the purpose and intent that it would be so used." *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48-49 (1912), *overruled on other grounds*, *Motion Picture Patents Co. v. Universal Film Mfg.*, 243 U.S. 502 (1917). The Court reiterated that rule 40 years ago, confirming that those who are in "ongoing relationship[s]" with known infringers and "in a position to police" their infringement but choose not to do so can be held contributorily liable. *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 437-38 & n.18 (1984). The Court reaffirmed that rule in *MGM Studios v. Grokster*, explaining that those who provide services "capable of substantial noninfringing uses" may be held contributorily liable if they "intentional[ly] facilitat[e]" their use for "infringement." 545 U.S. 913, 939 & n.12 (2005). And Congress wrote the DMCA against that backdrop, providing ISPs with a get-out-of-damages-free card "only if" they "adopted and reasonably implemented … a policy that provides for the termination in appropriate circumstances of subscribers … who are repeat infringers." 17 U.S.C. §512(*i*)(1)(A).

Applying that rule, this is a straightforward case. Cox was not held liable because it was an unwitting aid to infringement, or because it was merely aware that its service was *capable* of infringing uses by unidentified subscribers. Cox was held liable because it was repeatedly put on express notice that specific subscribers were engaged in rampant infringement, yet it chose to keep supplying them with internet access anyway—because it was more interested in protecting its own profits than Plaintiffs' copyrights. *See, e.g.*, C.A.App.1498 (declining to terminate repeat infringer because "[he] pays us over $400/month"); C.A.App.1499 (acknowledging repeat infringer "will likely fail again" but "giv[ing] him one more chan[c]e[because] he pays 317.63 a month"); C.A.App.1485 ("if the customer has a cox.net email we would like to start the [copyright-infringement] warning cycle over, hold for more, etc." so "we can collect a few extra weeks of payments for their account"). And Cox could not invoke the defense Congress provided in the DMCA because it did not meaningfully implement a policy "for the termination in appropriate circumstances of … repeat infringers." 17 U.S.C. §512(*i*)(1)(A). Cox instead blustered "F the dmca!!!," C.A.App.1495, and refused to *truly* terminate anyone (unless, of course, they refused to pay).[1]

The government does not identify any case rejecting contributory liability on facts like those—because none exists. Each court that has considered

[1] *See, e.g.*, C.A.App.1484 ("if a customer is terminated for DMCA, you are able to reactivate them after you give them a stern warning … do what is right for our company and subscribers"); C.A.App.1487 (explaining that "a suspension that is called a termination" "for DMCA" purposes should be promptly followed by reinstatement because "we don't want to lo[]se the revenue"); *id.* ("this is a relatively new process that we've been doing for the past year, again, to retain revenue").

anything comparable has concluded that an ISP can be contributorily liable if it was on notice "of specific acts of infringement" and "fail[ed] to" try to stop it. *Luvdarts, LLC v. AT&T Mobility*, 710 F.3d 1068, 1071-73 (9th Cir. 2013); *see also UMG Recordings v. Grande Comm'cns Networks*, 118 F.4th 697, 704 (5th Cir. 2024) (affirming contributory liability where ISP admitted it "could have received a thousand notices about a customer, and it would not have terminated that customer"), *petition for cert. pending*, No. 24-967 (filed March 6, 2025). As the Fifth Circuit aptly put it, "continued provision of internet services to known infringing subscribers, without taking simple measures to prevent infringement, constitutes material contribution." *Grande*, 118 F.4th at 720.

The government's strained effort to find a circuit split lurking in that consensus goes nowhere. To be sure, there was no simple-measures instruction in this case. But that is because Cox did not ask for one. D.Ct.Dkt.606-1 p.31. And the Fourth Circuit did not address the simple-measures formulation because *Cox* urged the court not to rely on it—presumably because it understood that pressing the simple-measures idea would only highlight its abject failure to satisfy the DMCA. Cox.CA4.Op.Br.48. Given Cox's failure to press the issue, there is no reason to think the Fourth Circuit disagrees with the Fifth and Ninth Circuits' view that failing to take even "simple measures" to prevent known infringement constitutes contributory infringement—which likely explains why Grande has not tried to claim a split on that issue even after seeing the government's brief. *See* No. 24-967 Pet.17-20; Reply.7.n.5. Nor is there any reason to think Cox could have prevailed under a simple-measures instruction; a company that fails to satisfy the DMCA by a mile would be hard pressed to prevail under the simple-measures test.

2. Unable to deny that Cox would face contributory liability in each circuit that has addressed the question, the government invokes *Twitter v. Taamneh*, 598 U.S. 471 (2023), a non-copyright case that cites neither *Sony* nor *Grokster*. But *Taamneh* is inapposite factually as well as legally. *Taamneh* did not involve an effort to hold social-media services liable for continuing to serve specific users that they *knew* were using their services to facilitate terrorism. If it did, and the defendants said "F the ATA, we need to keep users," the case would almost certainly have come out the other way. Instead, as this Court recently confirmed, *Taamneh* involved an effort to hold services liable for "fail[ing] to identify" users who might be putting their services to illegal use. *Smith & Wesson v. Mexico*, 2025 WL 1583281, at *6, 8 (2025).

It was in *that* context that *Taamneh* said that "plaintiffs identify no duty that would require defendants or other communication-providing services to terminate customers after discovering that the customers were using the service for illicit ends." 598 U.S. at 501. And both cases the Court cited to support that proposition involved defendants failing to stop the transmission of unlawful content of which they were not specifically aware, not a defendant who (like Cox) continued to serve particular subscribers it *knew* were using its service to break the law. Moreover, the Court quickly caveated that "there may be situations where some such duty exists." *Id.* *Taamneh* thus in no way disturbs the long-settled rule that there *is* a duty in copyright law not to “cause[] or materially contribute[] to the infringing conduct of another.” *Gershwin Publ’g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *Mexico*, 2025 WL 1583281, at *6 (“‘failures,’ ‘omissions,’ or ‘inactions’” can “support” secondary “liability” when there is “an ‘independent duty to act’”).

3. All of that answers the government’s professed concerns that the consensus rule might force ISPs to “terminat[e] subscribers after receiving a single notice of alleged infringement” to avoid liability. US.Br.15. Congress heeded that concern, which is why it provided a safe-harbor that does not demand zero tolerance, but rather protects ISPs implementing reasonable policies so long as they terminate users who continue to infringe after being sufficiently warned. The DMCA also permits an ISP to take a more tailored approach toward accounts that serve “coffee shops, hospitals, universities, and the like” (which Cox did not). US.Br.15.

Put differently, an ISP that uses a more tailored policy for subscribers who can show, in response to an infringement notice, that they did not do the infringing can rest easy under the DMCA. 17 U.S.C. §512(g)(3). The problem for *Cox* is it showed only disdain for the DMCA, allowing *13 strikes* before even contemplating “soft terminating” accounts—then promptly reinstated the handful of accounts it terminated—all while not hesitating to impose the “serious consequence,” US.Br.15, of termination on more than 600,000 subscribers who failed to timely pay their bills, Pet.App.9a.

To be sure, failure to qualify for the DMCA's defense does not itself prove liability. 17 U.S.C. §512(*l*). But the defense is premised on the existence of secondary liability for ISPs and reflects Congress' effort to balance the interests of ISPs and the importance of preserving copyright against the threat of perfect and nearly costless digital copies. Why the government seeks to destroy that legislative balance and render the safe-harbor a nullity—in the extreme context of an ISP thumbing its nose at Congress' efforts—is a mystery. While the government's brief reflects some skepticism about the common-law nature of secondary-infringement law, that makes it all the more inexplicable that it would render Congress' handiwork irrelevant, and reward a party that openly disregarded the DMCA and thwarted the Copyright Act's "ultimate aim" "to secure a fair return for an 'author's' creative labor." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

B. Cox's Willfulness Argument Is Forfeited and Meritless.

As for willfulness, Cox "d[id] not challenge the jury instructions … on appeal," Sony.Pet.App.32a, which is reason enough to decline review. That said, the government does not embrace Cox's argument that the circuits are split on this issue, because they are not. Sony.BIO.24-28. It instead just says the Fourth Circuit got this issue wrong too. But the government's argument conflates "knowledge of the infringing activity," US.Br.17-18, with what the jury instruction actually required, which is "knowledge that its subscribers' actions *constituted infringement*," C.A.App.804 (emphasis added). And contrary to the government's contentions, it is not true that contributory liability attaches only when one knows that the conduct is *unlawful*; contributory liability can attach when one knows the conduct is *occurring*, even if s/he fails to appreciate the legal consequences. *Cf. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581-82 (2010).

At any rate, Cox does not challenge the parts of the instruction that permitted a willfulness finding based on reckless disregard for, or willful blindness to, the legal consequences. C.A.App.804. That makes this a particularly poor vehicle for addressing the willfulness question given overwhelming evidence that Cox looked the other way if (but only if) known infringers kept paying their bills. *See supra* p.4. Those facts more than suffice to show willfulness even under Cox's preferred test.

II. The Court Should Review The Fourth Circuit's Vicarious-Liability Holding.

The only aspect of this case that warrants review is the Fourth Circuit's vicarious-liability holding, which splits from (at least) the Third and Ninth Circuits and departs from decades of settled precedent to boot.

1. "One infringes … vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." *Grokster*, 545 U.S. at 930. The record is replete with evidence that Cox did just that. *See supra* p.4. As that evidence confirms beyond cavil, Cox declined to exercise its unquestionable right to terminate known repeat infringers because it did not want to lose their business. If that is not profit motive, it is hard to see what is.

The Fourth Circuit waved that evidence away on the theory that Cox did not "profit[] directly from its subscribers' copyright infringement" because "subscribers paid a flat monthly fee for their internet access no matter what they did online." Sony.Pet.App.12a, 17a. That holding runs headlong into Third and Ninth Circuit cases (among others), which recognize that defendants are not immune from vicarious liability just because different business models may enable them to profit from infringement in different ways. Sony.Pet.13-21, Sony.Reply.4-8. *Leonard v. Stemtech International* held a merchant vicariously liable for using infringing artwork on its website, 834 F.3d 376, 389 (3d Cir. 2016), even without "pro[of] that" the infringing art "drove … sales," 2014 WL 3367092, at *2 (D. Del. 2014). And *Ellison v. Robertson* said that a subscription service whose "future revenue is directly dependent" on the size of "its userbase" could be held vicariously liable if "[t]he record" shows that it abided infringement instead of "obstruct[ing]" it so the service could "retain[] subscriptions" instead of "los[ing]" them. 357 F.3d 1072, 1079 (9th Cir. 2004). That is precisely what the record showed here—and what the Fourth Circuit held is not enough.

The government tries to defend that holding by invoking the Fourth Circuit's strained analogy to landlord/tenant law. US.Br.20-21; Sony.Pet.App.14a. n.2. But that analogy undermines its arguments, as courts routinely "impos[e] liability on a landlord for the actions of a tenant" "when a landlord knows that the tenant is engaging" in the unlawful conduct. *Bowers v. Wurzburg*, 528 S.E.2d 475, 479-82 (W. Va. 1999) (collecting examples). That knowledge-based "exception to the general rule of landlord immunity" is designed "to prevent a landlord from knowingly profiting (via the receipt of rent) … while passing the liability buck onto the tenant." *Id.* So, too, here: Imposing liability on an ISP that refuses to terminate known infringers because it does not want to lose their subscription fees prevents an ISP from knowingly profiting from its subscribers' unlawful conduct.

2. While the vicarious-liability issue is certworthy in its own right, it would make particularly little sense to accept the government's proposal to deny review on that question while granting it on the contributory-liability question—especially when there is *actually* a split on the former, not the latter. As this Court recognized in *Sony*, "the lines between direct infringement, contributory infringement, and vicarious liability are not clearly drawn," so "reasoned analysis of" a "contributory infringement claim necessarily entails consideration of arguments and case law which may also be forwarded under the other labels." 464 U.S. at 435 n.17. Reinforcing the point, Congress did not distinguish between contributory and vicarious liability in the DMCA. It instead provided a limited defense against *all* forms of secondary liability—thus reflecting its judgment that *both* would be available against ISPs in at least some circumstances. *See* 17 U.S.C. §512(*i*)(1)(A).

It is impossible to square the government's position with Congress' manifest concern that digital technology—and the prospect of quick, costless, and perfect digital copies—poses an existential threat to copyrights and the creators and businesses that depend on robust copyright protection. Indeed, if the

Court were to accept the version of contributory infringement envisioned by the government, only a robust form of vicarious liability would protect copyrights and rescue the DMCA safe-harbor from futility. Conversely, if the Court accepts the Fourth Circuit's narrow version of vicarious liability, that would strengthen the case for more robust protection against contributory infringement. Carving out vicarious liability from this Court's review would make particularly little sense given the split in the circuits and the undeniable reality that the Court has not weighed in on vicarious liability in this context since *Herbert v. Shanley Co.*, 242 U.S. 591 (1917). And the Court should not tailor the scope of its review to the government's preferences when those preferences have far more to do with the government's views on the merits than with the traditional criteria for certiorari.

CONCLUSION

The Court should grant Sony's petition and deny Cox's. If the Court disagrees, it should grant both.

Respectfully submitted,

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