Nos. 24-171 and 24-181

# In the Supreme Court of the United States

COX COMMUNICATIONS, INC., ET AL.,
PETITIONERS

*v.*

SONY MUSIC ENTERTAINMENT, ET AL.

SONY MUSIC ENTERTAINMENT, ET AL., PETITIONERS

*v.*

COX COMMUNICATIONS, INC., ET AL.

*ON PETITIONS FOR WRITS OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FOURTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**


D. JOHN SAUER
*Solicitor General*
*Counsel of Record*
YAAKOV M. ROTH
*Acting Assistant Attorney General*
MALCOLM L. STEWART
*Deputy Solicitor General*
DANIEL TENNY
SARAH N. SMITH
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTIONS PRESENTED

The Copyright Act of 1976 (Copyright Act), 17 U.S.C. 101 *et seq.*, grants copyright holders the exclusive rights to perform, display, reproduce, and distribute their protected works. 17 U.S.C. 106. Any person who violates those rights is a copyright infringer and is liable for actual or statutory damages. 17 U.S.C. 501 (2018 & Supp. I 2019); 17 U.S.C. 504. The questions presented in these petitions concern whether, and under what circumstances, an internet service provider (ISP) can be held secondarily liable for acts of copyright infringement committed by its subscribers. The questions presented are as follows:

1. Whether an ISP that continues to provide internet access to particular subscribers, after being notified that those subscribers' accounts have been used to commit acts of copyright infringement, is contributorily liable for future copyright infringement on those accounts.

2. Whether a contributory copyright infringer "willfully" violates the Copyright Act under 17 U.S.C. 504(c)(2) when it acts with knowledge that the direct infringer's actions are unlawful but does not know that its own conduct is unlawful.

3. Whether vicarious liability for copyright infringement requires proof that the defendant derived a financial benefit from the acts of infringement.

## RELATED PROCEEDINGS

United States Court of Appeals (4th Cir.):

*Sony Music Entm't* v. *Cox Commc'ns, Inc.*, No. 21-1168 (Feb. 20, 2024)

United States District Court (E.D. Va.):

*Sony Music Entm't* v. *Cox Commc'ns, Inc.*, No. 18-cv-950 (Jan. 12, 2021)

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

# In the Supreme Court of the United States

No. 24-171

COX COMMUNICATIONS, INC., ET AL.,
PETITIONERS

*v.*

SONY MUSIC ENTERTAINMENT, ET AL.

No. 24-181

SONY MUSIC ENTERTAINMENT, ET AL., PETITIONERS

*v.*

COX COMMUNICATIONS, INC., ET AL.

*ON PETITIONS FOR WRITS OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FOURTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

**INTEREST OF THE UNITED STATES**

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States in this case. In the view of the United States, this Court should grant the petition for a writ of certiorari in *Cox Communications* v. *Sony Music Entertainment*, No. 24-171, and deny the petition in *Sony Music Entertainment* v. *Cox Communications*, No. 24-181.

**STATEMENT**

These petitions arise out of a lawsuit brought by record companies and music publishers against defendant Cox Communications, an internet service provider (ISP). Plaintiffs sought to hold Cox liable for acts of copyright infringement committed by its subscribers, asserting theories of contributory and vicarious liability. After a jury found Cox liable under both theories, the Fourth Circuit upheld the jury's verdict on contributory liability but reversed on vicarious liability.

1. a. Under the Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, copyright owners possess the "exclusive rights" to perform, display, reproduce, and distribute their copyrighted works, and to prepare derivative works based upon those works. 17 U.S.C. 106. Any person who violates those rights is a copyright infringer and is liable for actual damages or statutory damages of up to $30,000 per infringed work. 17 U.S.C. 501 (2018 & Supp. I 2019); 17 U.S.C. 504(c)(1). In a case where the "infringement was committed willfully," a court may award statutory damages of up to $150,000 per infringed work. 17 U.S.C. 504(c)(2).

Although "[t]he Copyright Act does not expressly render anyone liable for infringement committed by another," this Court has recognized doctrines of secondary copyright liability. *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (quoting *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984)); see *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55 (1911). One who, "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another" can be held liable for contributory infringement. *Gershwin Publ'g Corp.* v. *Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted). And one who "profits directly from the infringement and has a right and ability to supervise the direct infringer" infringes vicariously. *Grokster*, 545 U.S. at 930 n.9.

b. The Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (17 U.S.C. 512), gave service providers, including ISPs, a safe-harbor defense to claims of copyright infringement. That defense shields ISPs from liability for copyright infringement based on, among other things, "the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider." 17 U.S.C. 512(a). To qualify for that safe harbor, the service provider must "adopt[] and reasonably implement[] * * * a policy that provides for the termination in appropriate circumstances of subscribers * * * who are repeat infringers." 17 U.S.C. 512(i)(1)(A). The DMCA states that a service provider's failure to qualify for the safe harbor "shall not bear adversely" upon consideration of any defense asserted by the service provider, including the defense that its "conduct [wa]s not infringing." 17 U.S.C. 512(*l*).

2. a. Cox provides internet service to residential and commercial subscribers for a flat monthly fee. Pet. App. 8a.[1] Plaintiffs, Sony Music Entertainment and other record companies and music publishers (collectively Sony), hold the copyrights to numerous musical works. *Id.* at 6a, 8a. An association that includes plaintiffs hired MarkMonitor, an anti-piracy company, to alert ISPs when the users of an ISP's internet service infringed plaintiffs' copyrights by downloading or distributing protected works over peer-to-peer networks

[1] All citations to "Pet. App." refer to the appendix filed in No. 24-181.

using file-sharing protocols, such as BitTorrent. *Id.* at 8a. Although MarkMonitor can identify the infringer's internet protocol (IP) address, only the ISP can match that address to a subscriber. *Id.* at 8a-9a, 42a. Cox received a "tidal wave" of such infringement notices. *Id.* at 9a. Cox's responses to the notices included no action, an email warning, a temporary suspension, or, on a handful of occasions, termination; Cox's choice among those responses depended in part on how many notices Cox had previously received regarding a particular subscriber's IP address. *Ibid.*

Sony sued Cox, alleging theories of contributory and vicarious copyright liability. Sony limited its case to acts of infringement committed in 2013 and 2014 on the accounts of subscribers for whom Cox had received three or more notices. Pet. App. 10a, 40a. The Fourth Circuit had previously held that Cox did not qualify for the DMCA safe harbor during this period because Cox's repeat-infringer policy as implemented did not satisfy the statutory safe-harbor criteria. *BMG Rights Mgmt. (US) LLC* v. *Cox Commc'ns, Inc.*, 881 F.3d 293, 301-305 (2018).

b. On cross-motions for summary judgment, the district court held that the infringement notices sent by MarkMonitor established Cox's knowledge of its subscribers' infringement as a matter of law, thus satisfying one element of Sony's claim for contributory liability. Pet. App. 9a. After trial, the jury found Cox liable for vicarious and contributory infringement. *Id.* at 10a.

The jury also found that Cox had acted willfully, which increased the maximum statutory damages to $150,000 (rather than $30,000) per infringed work. Pet. App. 10a; see 17 U.S.C. 504(c)(2). The relevant instruction told the jury that Cox's infringement was willful if

"Cox had knowledge that its subscribers' actions constituted infringement of plaintiffs' copyrights, acted with reckless disregard for the infringement of plaintiffs' copyrights, or was willfully blind to the infringement of plaintiffs' copyrights." C.A. App. 804. Cox objected to the instruction, but its objection was foreclosed by Fourth Circuit precedent upholding an identical jury instruction. See *BMG*, 881 F.3d at 312-313 & n.7; Cox C.A. Br. 55 n.3. The jury awarded Sony $99,830.29 per infringed work, for a total award of $1 billion. Pet. App. 10a.

3. The court of appeals reversed in part and affirmed in part. Pet. App. 1a-36a.

a. The court of appeals upheld the jury verdict on contributory liability. Addressing the "knowledge of the infringing activity" element, the court declined to disturb the district court's determination that notices of past infringement on a particular subscriber's account established Cox's knowledge that the subscriber was substantially certain to infringe in the future. The court held that Cox had forfeited any argument that the future-infringement question should have been submitted to the jury. Pet. App. 19a; see *id.* at 19a-21a.

The court of appeals then turned to the material-contribution element. The court held that the jury's verdict was adequately supported by evidence that (a) Cox's internet service was indispensable to the infringement on its network and (b) Cox had failed to address the infringement despite specific knowledge that it was occurring. Pet. App. 24a, 27a. The court determined that, while a mere failure to take affirmative steps to prevent unlawful conduct by others is ordinarily insufficient to establish contributory liability, "supplying a product with knowledge that the recipient will use it to infringe copyrights" is the sort of "culpable conduct" that is "'equivalent to aiding and abetting the infringement.'" *Id.* at 25a (quoting Cox C.A. Br. 43). The court also took the view that "providing the means to infringe" while knowing that the recipient will act illegally "is culpable pursuant to the common law rule that a person is presumed to intend the substantially certain results of his acts." *Id.* at 26a (emphasis omitted).

b. Because Cox had not challenged the willfulness instruction before the panel, the court of appeals also affirmed without analysis the jury's finding that the infringement was willful. See Pet. App. 8a, 32a & n.7.

c. As to vicarious liability, however, the court of appeals reversed the verdict against Cox. Pet. App. 11a-19a. The court observed that Cox charged a flat monthly fee to each of its subscribers, regardless of that person's online activities. *Id.* at 12a. The court found no evidence that customers were drawn to Cox's services or were willing to pay more for those services because of the ability to infringe. See *id.* at 15a-18a (citing *Ellison* v. *Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004)). The court rejected Sony's argument that Cox had derived a financial benefit from subscribers' infringement because Cox had declined to terminate subscribers "in order to continue collecting their monthly fee." *Id.* at 16a. "An internet service provider would necessarily lose money if it canceled subscriptions," the court explained, "but that demonstrates only that the service provider profits directly from the sale of internet access," not that it profits directly from "the *acts of infringement*." *Id.* at 17a. In light of its ruling as to the financial-benefit requirement, the court declined to consider whether Sony had established the second prerequisite to vicarious liability—*i.e.*, that Cox possessed the "right and ability to supervise its subscribers." *Id.* at 12a.

d. Although "the vicarious and contributory infringement claims were predicated on the same conduct," and the maximum statutory damages for each were "identical," the court of appeals remanded for a new damages trial. Pet. App. 28a. The court explained that it could not be confident that the jury's "highly discretionary" choice of the appropriate award within the statutory range was uninfluenced by the vicarious-infringement verdict. *Ibid.*

4. The court of appeals denied a petition for rehearing en banc. Pet. App. 134a.

**DISCUSSION**

This Court should grant certiorari to address the first question presented in Cox's petition (No. 24-171): whether an ISP materially contributes to copyright infringement by continuing to provide internet access to particular subscribers after receiving notice that copyright infringement has occurred on their accounts. The court of appeals' decision holding Cox liable departs from this Court's contributory-infringement precedents. It is also in substantial tension with this Court's recent analysis of the common law of secondary liability in *Twitter, Inc.* v. *Taamneh*, 598 U.S. 471 (2023). The contributory-infringement question is legally and practically important, and courts of appeals have taken divergent approaches to the question.

The Court should also grant review of the second question presented in Cox's petition, which concerns the circumstances under which a contributory infringer can be held liable for enhanced statutory damages based on a finding of "willful" infringement. The jury in this case was instructed that it could find Cox's violations willful if Cox knew that *its subscribers* had committed infringement. That instruction was mistaken because it allowed the jury to award enhanced damages even if Cox reasonably believed that *its own* conduct in declining to terminate infringing subscribers' internet access was consistent with the Copyright Act.

The Court should deny review, however, on the vicarious-liability question presented in Sony's petition (No. 24-181). The court of appeals correctly held that a plaintiff alleging vicarious infringement must show that the defendant profited from the infringement. There is no disagreement among the courts of appeals on this question.

## I. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' CONTIBUTORY-INFRINGEMENT HOLDING

### A. An ISP Is Not Liable For Contributory Copyright Infringement For Failing To Terminate Subscribers After Receiving Notices Of Infringement

1. a. The Copyright Act does not expressly address secondary liability for copyright infringement. Accordingly, determining the contours of contributory infringement is "a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another." *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984). The secondary-liability doctrines this Court has adopted in the copyright context "emerge[] from common law principles," *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913, 930 (2005), and "form[] an outgrowth of the tort concept of enterprise liability." 3 Melville B. Nimmer, *Nimmer on Copyright* § 12.04 (LexisNexis 2024).

This Court has addressed secondary copyright liability in two modern-era cases, *Sony* and *Grokster*. The defendant in *Sony* manufactured a product—home video tape recorders—that many customers used to infringe but that was also "capable of substantial noninfringing uses." 464 U.S. at 442. The Court concluded that the manufacturer's "sale of such equipment to the general public does not constitute contributory infringement of [the plaintiffs'] copyrights." *Id.* at 456; see *id.* at 442-456. As the Court subsequently explained, *Sony* stands for the proposition that "distributing a product with alternative lawful and unlawful uses, with knowledge that some users would follow the unlawful course," is an insufficient basis for "presuming or imputing intent to cause infringement." *Grokster*, 545 U.S. at 933, 941.

In *Grokster*, by contrast, this Court held that liability for contributory infringement could properly be imposed on two companies that had distributed software for peer-to-peer sharing of electronic files. 545 U.S. at 919-920, 923-924. The software companies had received notice that millions of specific copyrighted files could be obtained using the software, and the companies knew that users were unlawfully downloading the copyrighted files. *Id.* at 923. In ruling against the companies, however, the Court did not find that knowledge dispositive. Instead, the Court emphasized that the software companies had "clearly voiced the objective that recipients use [the software] to download copyrighted works," and had taken "active steps to encourage infringement." *Id.* at 924. Those steps provided "direct evidence" of the companies' "unlawful purpose." *Id.* at 935. The Court emphasized that the defendants' "objective" was to cause copyright infringement, and that "mere knowledge of infringing potential or of actual infringing uses" of a multi-use product are not sufficient to trigger liability. *Id.* at 937, 941.

Taken together, *Sony* and *Grokster* make clear that contributory liability for copyright infringement requires more than knowledge that others have put the defendant's products to infringing uses. Instead, it requires "culpable intent" to cause infringement. *Grokster*, 545 U.S. at 934. The *Grokster* Court recognized that such intent may properly be inferred when a defendant manufactures a product that lacks substantial noninfringing uses, *id.* at 932, or when the defendant affirmatively encourages infringing uses of a multi-use product, *id.* at 935. In assessing what (if any) additional circumstances might support a finding of the requisite culpable intent, it is appropriate to look to "rules of fault-based liability derived from the common law." *Id.* at 934-935 (footnote omitted).

b. This Court recently discussed and applied common-law rules of secondary liability in *Taamneh*, *supra*. That decision addressed the circumstances under which providers of routine services can be held liable for wrongful acts committed by others through the use of those services. The Court held that the plaintiffs, victims of a terrorist attack carried out by ISIS, had failed to state a claim against social-media platforms under the Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, 130 Stat. 852, a statute that adopted the common law of civil aiding-and-abetting liability. *Taamneh*, 598 U.S. at 483-485, 488. In so holding, *Taamneh* provided significant guidance on the common law of secondary liability.

The plaintiffs in *Taamneh* alleged that the defendant social-media platforms knew that ISIS used their services to recruit new adherents and to raise funds for terrorism, but had "failed to stop ISIS despite knowing it was using those platforms." 598 U.S. at 505; see *id.* at 478-482. The Court explained that, at common law, the "conceptual core" of secondary liability was that a defendant had "consciously and culpably 'participated' in a wrongful act so as to help 'make it succeed.'" *Id.* at 493 (brackets and citation omitted). Were it otherwise, the Court observed, "mostly passive actors like banks [would] become liable for all of their customers' [wrongdoing] by virtue of carrying out routine transactions," and "those who merely deliver mail or transmit emails could be liable for the tortious messages contained therein." *Id.* at 489, 491.

The Court held that the plaintiffs' allegations about the social-media platforms' conduct did not meet the applicable standard. It was not enough, the Court explained, that the platforms allegedly had allowed ISIS to post content, had provided algorithms that "matched ISIS-related content to users most likely to be interested in that content," and had "kn[own] that ISIS was uploading this content." *Taamneh*, 598 U.S. at 498. The Court viewed the platforms' provision of such "infrastructure" on generally applicable terms—even with knowledge that the infrastructure was being misused—as "passive assistance" rather than the requisite "active abetting." *Id.* at 499. The *Taamneh* Court's reasoning reinforces the conclusion that imposing liability on Cox for copyright infringement committed by its users, based on Cox's failure to terminate service to IP addresses associated with infringement, is incompatible with traditional common-law limitations on secondary liability.

c. If Cox had explicitly or implicitly marketed its service as being particularly useful for infringers, or if it had encouraged subscribers to use Cox's internet service to infringe, liability might be appropriate. See *Grokster*, 545 U.S. at 937-938. But as the court of appeals acknowledged, Cox's business model was indifferent to whether its subscribers used the internet for lawful or unlawful purposes. Pet. App. 19a. Sony's theory thus resembles the one the Court rejected in *Taamneh*, where the defendants allegedly had "fail[ed] to stop ISIS from using the[ir] platforms," but "there [we]re no allegations that defendants treated ISIS any differently from anyone else." 598 U.S. at 500.

Reasoning that a "person is presumed to intend the substantially certain results of his acts," the court of appeals emphasized that Cox had supplied internet access "with knowledge that the recipient [would] use it to infringe copyrights." Pet. App. 25a-26a. That analysis cannot be squared with *Grokster*'s recognition that "knowledge * * * of actual infringing uses" is not enough for liability. 545 U.S. at 937. Nor can it be reconciled with the *Taamneh* Court's rejection, based on established common-law principles, of a rule that "would effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them." 598 U.S. at 503.

Sony suggests that Cox's conduct was culpable because Cox continued to provide internet service to "*specific* customer[s]" that MarkMonitor had identified as prior repeat infringers. No. 24-171 Br. in Opp. 19. That argument likewise cannot be squared with *Taamneh*, where this Court emphasized that the parties had not identified any common-law principle "that would require

* * * communication-providing services to terminate customers after discovering that the customers were using the service for illicit ends." 598 U.S. at 501. Adoption of Sony's rule would also threaten liability for other service providers (*e.g.*, an electric utility) that might be asked to cut off service to identified customers who had previously used the service for unlawful purposes.

In addition, Sony overstates the specificity of Cox's knowledge. Even accepting "that notices of past infringement" establish Cox's "knowledge that the same subscriber was substantially certain to infringe again," Pet. App. 22a, the notices made Cox aware of past and likely future infringement on particular *accounts*; they did not identify the specific infringing *users* of Cox's internet services. See C.A. App. 509-510. Many accounts that triggered multiple notices belonged to hotels, hospitals, universities, and regional ISPs serving hundreds or thousands of individual users. See No. 24-171 Pet. 11 (citing C.A. App. 663-664, 1743). Under the decision below, Cox would be held liable for direct infringement committed by any of those users, whose identities it does not know and with whom it has no contractual relationship.

d. Finally, the DMCA safe harbor does not suggest that ISPs can be held liable in these circumstances. The DMCA gives "service provider[s]" a defense to copyright-infringement damages liability arising out of several activities, including, as relevant here, "the provider's transmitting, routing, or providing connections for, material through a system or network" controlled by the service provider. 17 U.S.C. 512(a). The defense afforded by Section 512(a) is available only if the service provider "adopt[s] and reasonably implement[s] * * * a policy that provides for the termination in appropriate circumstances of subscribers * * * who are repeat infringers." 17 U.S.C. 512(i).

That provision limits ISPs' exposure to secondary liability for copyright infringement by creating an additional defense. The provision does not imply, however, that conduct falling outside the safe harbor renders an ISP liable. To the contrary, Section 512(*l*) states that a service provider's failure to qualify for the safe harbor "shall not bear adversely" on any argument "that the service provider's conduct is not infringing under this title or any other defense." 17 U.S.C. 512(*l*); see H.R. Conf. Rep. No. 796, 105th Cong., 2d Sess. 73 (1998) ("Section 512 is not intended to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify.").

The DMCA was enacted in 1998, when the internet was in its infancy. Congress could not have foreseen then how the internet would develop, what role ISPs would play in modern life, or what forms online piracy would take. Nor could Congress have known how contributory-infringement principles would be applied in this new context. Given those uncertainties, Congress proceeded cautiously, offering a safe harbor in specified circumstances while expressly disavowing any implication that conduct falling outside the safe harbor is infringing.

### B. The Question Presented Warrants This Court's Review

1. The court of appeals adopted a sweeping view of contributory copyright infringement that has broad practical implications. The court's rule subjects ISPs to potential liability for all acts of copyright infringement committed by particular subscribers as long as the

music industry sends notices alleging past instances of infringement by those subscribers.

Given the breadth of that liability, the decision below might encourage providers to avoid substantial monetary liability by terminating subscribers after receiving a single notice of alleged infringement. Losing internet access is a serious consequence, as the internet has become an essential feature of modern life. And because a single internet connection might be used by an entire family—or, in the case of coffee shops, hospitals, universities, and the like, by hundreds of downstream users—the decision below could cause numerous non-infringing users to lose their internet access.

The DMCA safe harbor does not significantly limit the practical implications of the decision below. To qualify for the DMCA safe harbor, an ISP must "adopt[] and reasonably implement[] * * * a policy that provides for the termination in appropriate circumstances of subscribers * * * who are repeat infringers." 17 U.S.C. 512(i)(1)(A). But it is unclear precisely what steps are necessary to establish and carry out such a policy, particularly as to a subscriber (like an office or hospital) that is unable to prevent infringement by every user of its internet connection.

2. The courts of appeals disagree about the appropriate standard for imposing contributory liability in this setting, although none of their decisions has adopted the correct approach dictated by this Court's precedents. The split of authority is best understood as a 2-1 split, with the Fifth and Ninth Circuits following a different course than the Fourth Circuit did below.

The Ninth Circuit has adopted a "simple measures" test, holding that a defendant (there, a search engine) would be contributorily liable if it had "actual knowledge that specific infringing material" was available on its system and could "take simple measures to prevent further damage to copyrighted works," but failed to take such measures. *Perfect 10, Inc.* v. *Amazon.com, Inc.*, 508 F.3d 1146, 1172 (2007) (citations, emphases, and internal quotation marks omitted). That test diverges from the approach of the court below, which affirmed the jury's verdict against Cox even in the absence of a "simple measures" instruction. See Pet. App. 25a-26a; C.A. App. 788-804 (jury instructions).

The Fifth Circuit joined the Ninth Circuit in *UMG Recordings, Inc.* v. *Grande Commc'ns Networks, L.L.C.*, 118 F.4th 697 (2024), petition for cert. pending, No. 24-967 (filed March 6, 2025), which addressed a suit brought by copyright holders against an ISP. The jury in that case found the ISP liable after receiving a simple-measures instruction. *Id.* at 715. The Fifth Circuit rejected the defendant ISP's challenge to that instruction, *id.* at 716-717, and the court applied the simple-measures test in assessing (and rejecting) the ISP's argument that the jury verdict should be overturned, *id.* at 719-720. Although the Fifth Circuit's decision upholding the verdict cannot be squared with the requirement of conscious and culpable participation in the infringing conduct, see pp. 9-11, *supra*, that court's choice of a different standard in resolving a factually similar case provides an additional reason for this Court's review.

## II. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' WILLFULNESS HOLDING

The Court should also grant certiorari on the second question presented in Cox's petition, which concerns the standard used to identify "willful" violations by a contributory copyright infringer.

A. 1. The Copyright Act authorizes enhanced damages of up to $150,000 per work (rather than the otherwise-applicable cap of $30,000 per work) where a violation was committed "willfully." See 17 U.S.C. 504(c)(1) and (2). In construing statutory provisions that impose civil liability, this Court has generally read the word "willfully" to require either knowledge or reckless disregard that the defendant's conduct was unlawful. See *Safeco Ins. Co.* v. *Burr*, 551 U.S. 47, 57 (2007); *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 125-126 (1985). "If [a defendant] acts reasonably in determining its legal obligation, its action cannot be deemed willful." *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988).

Here, the jury was instructed that Cox's conduct was willful if "Cox had knowledge that its subscribers' actions constituted infringement of plaintiffs' copyrights, acted with reckless disregard for the infringement of plaintiffs' copyrights, or was willfully blind to the infringement of plaintiffs' copyrights." C.A. App. 804.[2] That instruction (which was consistent with circuit precedent) was erroneous. The instruction allowed the jury to find that *Cox* had acted "willfully" if Cox knew that its *subscribers'* actions were unlawful, even if Cox reasonably believed that Cox itself was permitted to continue providing internet access to infringing accounts.

As the court of appeals recognized, moreover, a defendant's "knowledge of the infringing activity" is a prerequisite to *any* liability for contributory infringement. Pet. App. 19a (citation omitted); see *Gershwin Publ'g*

---

[2] In light of binding circuit precedent, Cox did not challenge the instruction before the court of appeals panel, but Cox preserved the challenge for further review. See Cox C.A. Br. 55 n.3.

*Corp.* v. *Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). If (as the court of appeals believed) such knowledge is a sufficient basis for finding that the defendant acted willfully, then *all* contributory infringers could be treated as willful violators. That result would undermine Congress's two-tiered statutory-damages scheme, under which enhanced damages are reserved for the most culpable violators. See 17 U.S.C. 504(c)(1) and (2).

2. In an earlier decision, the court of appeals upheld a similar instruction on the ground that "willfulness in copyright law is satisfied by recklessness," stating that contributorily infringing "with knowledge that one's subscribers are infringing is consistent with at least reckless disregard for the copyright holder's rights." See *BMG Rights Mgmt. (US) LLC* v. *Cox Commc'ns, Inc.*, 881 F.3d 293, 312-313 (4th Cir. 2018). Sony makes the same argument in defense of the jury instruction. 24-171 Br. in Opp. 29. But a secondary infringer could hold a reasonable, good-faith belief that its *own* conduct is lawful, even if it knows that the direct infringer's conduct is not. If Cox reasonably held the view it defends in this Court with respect to the first question presented in its petition—*i.e.*, that the Copyright Act did not require Cox to terminate service to identified infringing accounts—then any violations Cox committed were not willful, even if Cox's view of its own obligations is ultimately held to be incorrect.

B. The court of appeals' willfulness holding warrants this Court's review, given the substantial legal error reflected in the instruction and its apparent prevalence in copyright suits brought against ISPs. See *Grande Commc'ns*, 118 F.4th at 706 & n.3 (noting that the jury found the ISP's contributory infringement to be "willful," but that any challenge to that finding was abandoned on appeal); *BMG*, 881 F.3d at 312-313.

## III. THIS COURT SHOULD NOT REVIEW THE COURT OF APPEALS' REJECTION OF SONY'S VICARIOUS-LIABILITY THEORY

In its own petition for a writ of certiorari, Sony asks this Court to review the court of appeals' holding that Cox could not be held vicariously liable for its customers' infringement because Cox did not financially benefit from that infringement. That holding is correct and does not warrant this Court's review.

A. 1. Vicarious liability for copyright infringement is an "outgrowth of the agency principles of respondeat superior." *Fonovisa, Inc.* v. *Cherry Auction, Inc.*, 76 F.3d 259, 261-262 (9th Cir. 1996). It applies "when the defendant profits directly from the infringement" and "has a right and ability to supervise the direct infringer." *Grokster*, 545 U.S. at 930 n.9. Unlike contributory liability, vicarious liability can apply "even if the defendant initially lacks knowledge of the infringement." *Ibid.*

To establish a defendant's vicarious liability, a copyright plaintiff must show that the defendant financially benefits from the acts of infringement and not (as Sony urges, see No. 24-181 Pet. 12) merely from the broader operation in which infringement occurs. See *Grokster*, 545 U.S. at 930 n.9; see also, *e.g.*, *Ellison* v. *Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (explaining that the key question "is whether there is a causal relationship between the infringing activity and any financial benefit a defendant reaps"); *EMI Christian Music Grp., Inc.* v. *MP3tunes, LLC*, 844 F.3d 79, 99 (2d Cir. 2016) (requiring evidence that the defendant had "an obvious and direct financial interest in the exploitation of copyrighted materials") (citation omitted), cert. denied, 582 U.S. 915 (2017). Direct financial benefit from infringement can be established in different ways and does not require evidence of a direct profit from the sale of specific goods.

A direct financial benefit from infringement can be established through evidence that the infringing activity served as a "draw" that attracted customers to the defendant's business. See *Fonovisa,* 76 F.3d at 263. Dance halls, for example, financially benefit when hired bands play popular, copyrighted music because such performances "provide the proprietor with a source of customers and enhanced income." *Shapiro, Bernstein & Co.* v. *H. L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963). Dance halls might also benefit by paying less to hire infringing bands than to hire bands that pay copyright royalties and thereby incur greater costs. *In re Aimster Copyright Litig.*, 334 F.3d 643, 654 (7th Cir. 2003), cert. denied, 540 U.S. 1107 (2004). By contrast, a landlord who charges a fixed rent regardless of what its tenant does on the leased premises does not reap a direct financial benefit from any acts of infringement the tenant might commit and so would not be vicariously liable for the tenant's conduct. See *Shapiro*, 316 F.2d at 307-308; Paul Goldsten, *Goldstein on Copyright* § 8.2.1 (3d. ed. 2025).

2. The court of appeals correctly held that Sony had not satisfied its burden of showing that Cox financially benefited from infringement on its network. As the court explained, Cox charges its customers a flat fee for internet service, regardless of what its users do online. Pet. App. 17a. There was no evidence that Cox would be forced to collect a lower fee if the users of its internet service ceased to infringe; that subscribers were drawn

to Cox's internet service because of the ability to engage in copyright infringement using that service; or that Cox had used the opportunity for customers to infringe to lend credibility to the service it offered. See *id.* at 16a-19a. Cox thus did not "in any sense" have "a financial interest in its subscribers committing infringement." *Id.* at 19a. Cox therefore was more like a landlord, whose business model is agnostic as to whether a tenant infringes, than a dance-hall proprietor who benefits from infringing performances.

In arguing that the Fourth Circuit construed the direct-financial-benefit inquiry too narrowly, Sony seeks to draw from the dance-hall and similar cases the proposition that "profit from a business that permits infringement is profit from infringement." No. 24-181 Pet. 12. As explained above, however, vicarious liability requires that the defendant benefit financially from *the infringing activity*. See pp. 19-20, *supra*. Sony attempts to meet that burden with evidence that Cox "declined to terminate infringing subscribers' internet service in order to continue collecting their monthly fees." No. 24-181 Pet. 21; see Pet. App. 16a. But that evidence does not establish that Cox financially benefited from the infringement; it shows only that Cox was unwilling to forgo profits for the provision of general internet services in order to ensure that no infringement occurred. By the same token, proof that a landlord declined to absorb a financial loss by evicting a tenant who was engaged in infringing activity on the premises would not establish that the landlord had a financial interest in the infringement itself.

B. The vicarious-liability question does not warrant the Court's review. The decision below is correct. And there is no conflict among the circuits, which all apply the same financial-benefit requirement to different fact patterns. Sony has not identified any court of appeals decision that reached a different result on facts similar to those here. See 24-181 Pet. 12-25. To the contrary, in the one other ISP case that Sony cites, the court of appeals declined to find the defendant ISP vicariously liable, emphasizing the plaintiff's failure to establish that the ISP had "received a direct financial benefit from providing access to the infringing material." *Ellison*, 357 F.3d at 1079. And in the *Grande Commc'ns* suit against a different ISP, the district court rejected the vicarious-liability claim, a decision the copyright holder did not appeal. See 118 F.4th at 705.

In addition, this case does not involve a typical vicarious-liability fact pattern, where a plaintiff seeks to hold a principal liable for the misconduct of its employee or other agent. Instead, the relationship at issue is one between a business and its infringing customer. Even if hiring a band to play infringing music that draws in customers can suffice to hold a dance hall vicariously liable for the infringement, it does not follow that a dance hall's failure to prevent its customers from recording live performances of copyrighted music on their cell phones would have the same result. That idiosyncratic feature of this case reinforces the conclusion that Sony's petition for a writ of certiorari does not warrant this Court's review.

**CONCLUSION**

The petition for a writ of certiorari in No. 24-171 should be granted. The petition for a writ of certiorari in No. 24-181 should be denied.

Respectfully submitted.

D. JOHN SAUER
*Solicitor General*
YAAKOV M. ROTH
*Acting Assistant Attorney General*
MALCOLM L. STEWART
*Deputy Solicitor General General*
DANIEL TENNY
SARAH N. SMITH
*Attorneys*

MAY 2025