No. 23A___

IN THE

Supreme Court of the United States

SONY MUSIC ENTERTAINMENT, ET AL.,

Applicants,

v.

COX COMMUNICATIONS, INC. AND COXCOM, LLC,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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May 29, 2024

APPLICATION

To the Honorable John G. Roberts, Chief Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Fourth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicants Sony Music Entertainment; Arista Music; Arista Records, LLC; LaFace Records LLC; Provident Label Group, LLC; Sony Music Entertainment US Latin LLC; Volcano Entertainment III, LLC; Zomba Recordings LLC; Sony/ATV Music Publishing LLC; EMI AI Gallico Music Corp.; EMI Algee Music Corp.; EMI April Music Inc.; EMI Blackwood Music Inc.; Colgems-EMI Music Inc.; EMI Consortium Music Publishing Inc., d/b/a EMI Full Keel Music; EMI Consortium Songs, Inc., d/b/a EMI Longitude Music; EMI Feist Catalog Inc.; EMI Miller Catalog Inc.; EMI Mills Music, Inc.; EMI Unart Catalog Inc.; EMI U Catalog Inc.; Jobete Music Company, Incorporated; Stone Agate Music; Screen Gems-EMI Music, Incorporated; Stone Diamond Music Corp.; Atlantic Recording Corporation; Bad Boys Records LLC; Elekta Entertainment Group, Incorporated; Fueled By Ramen LLC; Roadrunner Records, Inc.; Warner-Tamerlane Publishing Corporation; WB Music Corporation; Unichappell Music, Incorporated; Rightsong Music Inc.; Cotillion Music, Incorporated; Intersong U.S.A., Inc.; UMG Recordings, Incorporated; Capitol Records, LLC; Universal Music Corporation; Universal Music-MGB NA LLC; Universal Music Publishing Inc.; Universal Music Publishing AB; Universal Publishing Limited; Universal Music Publishing MGB Limited; Universal Music – Z

Tunes LLC; Universal/Island Music Limited; Universal/MCA Music Publishing Pty. Limited; Polygram Publishing, Inc.; Songs of Universal, Inc.; Warner Records, Inc. f/k/a W.B.M. Music Corp.; Warner Chappell Music, Inc., f/k/a Warner/Chappell Music, Inc.; and W.C.M. Music Corp., f/k/a W.B.M. Music Corp., respectfully request a 60-day extension of time, to and including August 16, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit this case.

1. The Fourth Circuit issued its decision on February 20, 2024. *See Sony Music Ent.* v. *Cox Commc'ns, Inc.*, 93 F.4th 222 (Appendix A). Applicants and Respondents each timely sought panel rehearing and rehearing en banc. The Fourth Circuit denied rehearing on March 19, 2024 (Appendix B). Unless extended, the time to file a petition for a writ of certiorari will expire on June 17, 2024. This application is being filed more than ten days before the petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. Applicants are the world's leading record companies and music publishers. After discovering rampant online piracy of their copyrighted works on high-speed internet service provided by Cox Communications, Inc. and CoxCom, LLC (collectively, "Cox"), Applicants sued Cox for vicarious and contributory copyright infringement for continuing to provide that service to known repeat infringers. Applicants asserted claims for infringement of more than 10,000 copyrighted works.

3. Under the Digital Millenium Copyright Act (DMCA), internet service providers typically are protected against copyright-infringement liability if they meet

certain statutory requirements. One requirement is that the provider must have "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). In a separate case, the Fourth Circuit concluded that Cox could not seek cover in the DMCA's safe harbor because of Cox's woefully inadequate policies. *See BMG Rts. Mgmt. (US) LLC* v. *Cox Commc'ns, Inc.*, 881 F.3d 293, 303 (4th Cir. 2018) (observing that Cox "made every effort to avoid reasonably implementing" its repeat-infringer policy). This ruling meant that the DMCA's safe harbor was unavailable to Cox when Applicants sued Cox. *See* App. 5a-6a.

4. Applicants' petition will concern their vicarious-liability claim. A defendant is vicariously liable for the copyright infringement of a third party when the defendant "profits directly from the infringement and has a right and ability to supervise the direct infringer." *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913, 930 n.9 (2005); *see also Shapiro, Bernstein & Co.* v. *H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963). "The essential aspect of the 'direct financial benefit' inquiry is whether there is a causal relationship between the infringing activity and any financial benefit a defendant reaps * * * ." *Ellison* v. *Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004).

5. As relevant here, Applicants sought to show that Cox earned a direct financial benefit from its users' infringement through evidence that Cox "repeatedly declined to terminate infringing subscribers' internet service in order to continue collecting their monthly fees." App. 14a. As the Fourth Circuit acknowledged,

"[e]vidence showed that, when deciding whether to terminate a subscriber for repeat infringement, Cox considered the subscribers' monthly payments." *Id.* By not terminating these repeat infringers, Cox received subscription revenues it would not have otherwise obtained.

6. After a twelve-day trial, the jury returned a special verdict finding Cox liable for both vicarious and contributory infringement of Plaintiffs' 10,017 copyrighted works. *See* App. 8a. "The jury also found that Cox's infringement was willful, which increased the available maximum statutory damages to $150,000 per work." *Id.* The jury awarded Applicants statutory damages of $99,830.29 for each infringed work, for a total damages award of $1 billion. *See id.* This award is well within the guidelines for willful infringement; it is roughly $500 million shy of the statutory maximum.

7. The Fourth Circuit reversed the jury's vicarious-liability verdict. App. 4a-5a, 17a. Although the court "affirm[ed] the jury's finding of willful contributory infringement," it concluded that its vicarious-liability reversal required a remand for a new trial on damages. App. 4a-5a, 24a-26a.

8. The Fourth Circuit's vicarious-liability ruling stemmed from its understanding of that doctrine's "direct financial benefit" requirement. Vicarious liability, the court explained, "demands proof that the defendant profits directly from the *acts of infringement* for which it is being held accountable." App. 15a. In the court's view, such an immediate causal connection may exist where "copyright infringement draws customers to the defendant's service or incentivizes them to pay

more for their service." App. 14a. "Cox's financial interest in retaining subscriptions to its internet service" did not satisfy this rubric. App. 15a. As the Fourth Circuit held, "[t]he continued payment of monthly fees for internet service, even by repeat infringers, was not a financial benefit flowing directly from *the copyright infringement itself*." App. 14a.

9. The Fourth Circuit's conclusion that vicarious liability in this context can attach only where "copyright infringement draws customers to the defendant's service or incentivizes them to pay more for their service" warrants this Court's review. Internet service providers, like many businesses, create a platform for the distribution of copyrighted material. But, until the decision below, no court has so strictly construed vicarious liability's direct-financial-benefit requirement. For example, in *Fonovisa, Inc.* v. *Cherry Auction, Inc.*, 76 F.3d 259, 263 (9th Cir. 1996), the Ninth Circuit held that a flea-market operator directly benefitted from the sale of bootleg records in the flea market because the operator earned "admission fees, concession stand sales and parking fees * * * from customers who want to buy the counterfeit recordings at bargain basement prices." In *Gershwin Publishing Corp.* v. *Columbia Artists Management, Inc.*, 443 F.2d 1159, 1163 (2d Cir. 1971), the Second Circuit held that a concert promoter "derived substantial financial benefit from the actions of the primary infringers," even though those infringers paid the promoter the same fee whether they infringed or not. And in the "dance hall cases," *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 437 n.18 (1984), courts held "dance hall proprietor[s] liable for the infringement of copyright resulting from the

performance of a musical composition by a band or orchestra whose activities provide the proprietor with a source of customers and enhanced income," *Shapiro*, 316 F.2d at 307 (discussing, e.g., *Dreamland Ball Room, Inc.* v. *Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929)). None of these courts required a showing of "draw" or that the copyright infringement incentivized customers to pay more; they instead concluded that the defendant's continued receipt of fees flowing from copyright infringers is a direct financial benefit from the infringing activity.

10. It is not surprising that no other court has adopted the Fourth Circuit's strict causation requirement: That requirement is antithetical to the principles undergirding the vicarious-liability doctrine. The purpose of vicarious liability is to impose liability where the defendant "has the power to police carefully the conduct of [the direct infringer,] * * * thus placing responsibility where it can and should be effectively exercised." *Shapiro*, 316 F.2d at 308. And "[w]hen an individual seeks to profit from an enterprise in which identifiable types of losses are expected to occur, it is ordinarily fair and reasonable to place responsibility for those losses on the person who profits." *Polygram Int'l Publ'g, Inc.* v. *Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1325 (D. Mass. 1994). The direct-financial-benefit requirement thus ensures that a defendant has a sufficient interest in the underlying infringement such that it is fair to require the defendant to police it. And infringement can obviously benefit defendants in ways other than drawing more customers or encouraging them to pay higher prices.

11. Applicants request this extension of time to permit counsel to research the relevant issues and to prepare a petition that fully addresses the important questions raised by the proceedings below. Over the next several weeks, Ms. Stetson, counsel of record, is occupied with briefing deadlines for a variety of matters, including: filing a reply in support of a petition for a writ of certiorari in *Brandon Council* v. *United States*, No. 23-953, on June 14; a brief in *AstraZeneca Pharmaceuticals LP, et al.* v. *Department of Health and Human Services*, No. 24-1819 (3d Cir.), on June 25; and a brief in opposition in *Smith & Wesson Brands, Inc., et al.* v. *Estados Unidos Mexicanos*, No. 23-1141, on July 3. Ms. Stetson is also anticipating emergency filings in federal district court in a complex agency case.

12. Applicants also request this extension of time to align the Petitioners' and Respondent's schedules. Cox is also filing a petition for a writ of certiorari in this case. On May 28, 2024, Cox filed an application to extend the time to file that petition by 60 days. *See Cox Communications, Inc., et al.* v. *Sony Music Entertainment, et al.*, No. 23A-___ (pending docketing). Petitioners consented to that request. Petitioners now seek an equivalent extension.

13. Counsel for Cox has advised that Cox has no objection to this extension.

14. For these reasons, Applicants respectfully request that an order be entered extending the time to file a petition for certiorari to and including August 16, 2024.

Respectfully Submitted,

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