No. 24-_

IN THE

Supreme Court of the United States

SONY MUSIC ENTERTAINMENT, ET AL.,

Petitioners,

v.

COX COMMUNICATIONS, INC. AND COXCOM, LLC,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Copyright Act grants the holder of a copyright the exclusive right to reproduce, publicly perform, and publicly distribute the underlying creative work, subject to some exceptions. *See* 17 U.S.C. § 106. In addition to codifying liability for direct infringement, the Act incorporates certain "doctrines of secondary liability" drawn from "common law principles," including vicarious liability. *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913, 930-931 (2005). A defendant "infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." *Id.* at 930. The circuits are split, however, on *how* a defendant must benefit from direct infringement in order to be vicariously liable.

The question presented is:

Whether the profit requirement of vicarious copyright infringement permits liability where the defendant expects commercial gain from the enterprise in which infringement occurs (as the First, Second, Third, Seventh, and Ninth Circuits have held), or whether the profit requirement of vicarious copyright infringement permits liability only where the defendant expects commercial gain from the act of infringement itself (as the Fourth Circuit has held).

PARTIES TO THE PROCEEDING

Petitioners in this Court are 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 Music Publishing (US) LLC (f/k/a Sony/ATV Music Publishing LLC); EMI Al 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 Co., Inc.; Stone Agate Music; Screen Gems-EMI Music, Inc.; Stone Diamond Music Corp.; Atlantic Recording Corporation; Bad Boys Records LLC; Elektra Entertainment Group Inc.; Fueled by Ramen LLC; Roadrunner Records, Inc.; Warner Records Inc. (f/k/a Warner Bros. Records Inc.); Warner-Tamerlane Publishing Corp.; W Chappell Music Corp., d/b/a WC Music Corp. (f/k/a WB Music Corp.); Unichappell Music Inc.; Rightsong Music Inc.; Cotillion Music, Inc.; Intersong U.S.A., Inc.; Warner Chappell Music, Inc. (f/k/a Warner/Chappell Music, Inc.); W.C.M. Music Corp. (f/k/a W.B.M. Music Corp.); 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.; and Songs of Universal, Inc.

Respondents are Cox Communications, Inc. and Coxcom, LLC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners 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 Music Publishing (US) LLC (f/k/a Sony/ATV Music Publishing LLC; EMI Al 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 Co., Inc.; Stone Agate Music; Screen Gems-EMI Music, Inc.; and Stone Diamond Music Corp. are wholly-owned, indirect subsidiaries of Sony Music Corporation, which is a publicly-held company organized under the laws of Japan. No publicly-held company owns more than 10% of Sony Music Corporation's stock.

Petitioners Atlantic Recording Corporation; Elektra Entertainment Group Inc.; Fueled by Ramen LLC; Roadrunner Records, Inc.; Warner Records Inc. (f/k/a Warner Bros. Records Inc.); Warner-Tamerlane Publishing Corp.; W Chappell Music Corp., d/b/a WC Music Corp. (f/k/a WB Music Corp.); Unichappell Music Inc.; Rightsong Music Inc.; Cotillion Music, Inc.; Intersong U.S.A., Inc.; 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.); are wholly-owned, indirect subsidiaries of Warner Music Group Corp., a publicly traded company with more than ten percent (10%) of its stock owned by AI Entertainment

Holdings LLC and certain of its affiliates, which are not publicly traded companies.

Petitioner Bad Boy Records LLC is a joint venture in which Atlantic Recording Corporation, an indirectly wholly-owned subsidiary of Warner Music Group Corp., holds a fifty percent (50%) interest. Bad Boy Records, which is not a publicly traded company, holds the remaining fifty percent (50%) interest in Bad Boy Records LLC.

Petitioners 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; Music Corporation of America, Inc., d/b/a Universal Music Corp.; Polygram Publishing, Inc.; and Songs of Universal, Inc. are wholly owned indirect subsidiaries of Universal Music Group N.V., a Netherlands public limited company. Compagnie de Cornouaille SAS and PS VII Master, L.P. own more than 10% of Universal Music Group N.V.'s stock. No other company owns 10% or more of Universal Music Group N.V.'s stock.

STATEMENT OF RELATED CASES

U.S. Supreme Court:

- *Cox Communications, Inc. and CoxCom, Inc.* v. *Sony Music Entertainment, et al.*, No. __ (Aug. 15, 2024) (petition for a writ of certiorari)
- *Cox Communications, Inc. and CoxCom, Inc.* v. *Sony Music Entertainment, et al.*, No. 23A1066 (application for an extension of time for Cox Communications and CoxCom to file a petition for a writ of certiorari) (granted June 3, 2024)

U.S. Court of Appeals for the Fourth Circuit:

- *Sony Music Entertainment, et al.* v. *Cox Communications, Inc. and CoxCom, LLC*, No. 22-1451 (appeal of a post-trial ruling under Federal Rule of Civil Procedure 60(b)) (judgment not yet entered)
- *Sony Music Entertainment, et al.* v. *Cox Communications, Inc. and CoxCom, LLC*, No. 21-1168 (Feb. 20, 2024) (decision below)

U.S. District Court for the Eastern District of Virginia:

- *Sony Music Entertainment, et al.* v. *Cox Communications, Inc. and CoxCom, LLC*, No. 1:18-cv-00950-LFO-JFA (March 23, 2022) (order denying relief under Federal Rule of Civil Procedure 60(b))

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PETITION FOR A WRIT OF CERTIORARI

Sony Music Entertainment and its co-petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

INTRODUCTION

This petition raises an important question regarding the scope of vicarious liability under the Copyright Act.

The Copyright Act grants the holder of a copyright the exclusive right to reproduce, publicly perform, and publicly distribute the underlying creative work, subject to some exceptions. *See* 17 U.S.C. § 106. In addition to making direct infringement of any of those exclusive rights actionable under the Act, Congress incorporated into the Act certain "doctrines of secondary liability" drawn from "common law principles," including vicarious liability. *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913, 930-931 (2005). A defendant "infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." *Id.* at 930.

At issue in this case is the nature of that profit requirement. This Court has never addressed the contours of vicarious liability for copyright infringement, but lower courts have long understood that the Copyright Act permits copyright owners to pursue claims for vicarious liability where the defendant expects to profit from the broader operation in which infringement occurs. *See, e.g.*, *Fonovisa* v. *Cherry Auction, Inc.*, 76 F.3d 259, 263 (9th Cir. 1996) (rejecting the notion that vicarious liability requires the plaintiff to "directly tie[] * * * the sale of particular infringing items" to the financial benefit reaped by the defendant). That tradition stretches as far back as the "so-called 'dance hall cases,'" from the first half of the twentieth century, where nightclub owners and restauranteurs were held vicariously liable for copyright infringement by bands performing at the establishments even if their patrons did not pay a cover charge associated with the infringing music that they heard there. *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 437 n.18 (1984); *see also id*. at 437 (calling "the imposition of vicarious liability" in these cases "manifestly just"). Even if the owner of the establishment "does not" "benefit[] directly from the infringement that he encourages," the owner is still held liable because he benefitted from the broader operation in which infringement occured. *In re Aimster Copyright Litig.*, 334 F.3d 643, 654 (7th Cir. 2003).

Consistent with that principle, a federal jury found that Respondents Cox Communications and CoxCom (collectively, "Respondent" or "Cox") had vicariously infringed thousands of Plaintiffs' copyrighted works because Cox had profited from its subscribers' infringement on its internet service. As the District Court explained, the jury had ample evidence that Cox profited from its subscribers' infringement, including evidence "that when deciding whether to terminate a subscriber for repeat infringement, Cox considered the subscriber's monthly payments," and "Cox repeatedly declined to terminate infringing subscribers' internet service in order to continue collecting their monthly fees." Pet. App. 16a.

Despite this clear evidence of profit, the Fourth Circuit reversed the jury's vicarious-liability finding. In the panel's view, the profit requirement "demands proof that the defendant profits directly from the *acts of infringement* for which it is being held accountable." Pet. App. 17a (emphasis in original). Because "[a]n internet service provider would necessarily lose money if it canceled subscriptions," proof that Cox pursued "[t]he continued payment of monthly fees for internet service, even by repeat infringers * * * demonstrates only that the service provider profits directly from the sale of internet access." *Id*. "The continued payment of monthly fees for internet service, even by repeat infringers, was not a financial benefit flowing directly from *the copyright infringement itself*." *Id*. (emphasis in original).

The Fourth Circuit's requirement that the defendant profit directly from the act of infringement itself—as opposed to profiting from the operation in which infringement occurs—stands opposite to the rest of the field. Every other circuit to have considered the question has employed a different approach to the profit requirement, asking instead whether the defendant profits from the operation in which infringement occurs.

The Fourth Circuit's approach to the profit requirement of vicarious liability is also wrong on the merits. It is inconsistent with this Court's precedent; although this Court has never addressed vicarious copyright infringement, this Court has held that the Copyright Act itself does *not* require evidence of a profit from the sale of a specific product. The Fourth Circuit's rule is contrary to Congress's stated purpose in enacting the 1976 Amendments to the Copyright Act. It is incompatible with the first principles that animate secondary liability. And it eliminates an especially important tool in the digital age where pursuing direct infringers—in this case, thousands of faceless individuals who cannot be identified except through an internet service provider like Respondent—is impractical at best and impossible at worst.

This Court should grant review to vindicate its Copyright Act precedent, to resolve the confusion among the lower courts regarding the scope of vicarious liability in the digital age, and to protect the rights of creators.

The petition should be granted.

OPINIONS BELOW

The Court of Appeals' opinion (Pet. App. 1a-36a) is published at 93 F.4th 222. The District Court's opinion denying Cox's motion for judgment as a matter of law regarding the jury's vicarious-liability finding (Pet. App. 37a-130a) is published at 464 F. Supp. 3d 795.

JURISDICTION

The Fourth Circuit issued its decision on February 20, 2024. Petitioners and Respondent each timely sought panel rehearing and rehearing en banc. The Fourth Circuit denied rehearing on March 19, 2024. On June 3, 2024, Chief Justice Roberts extended the time to file a petition for a writ of certiorari to August 16, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Plaintiffs are the leading record companies and music publishers in the world. *See* Pet. App. 6a, 38a-39a. They own or control the copyrighted works of some of the most iconic recording artists and songwriters of our time. *Id.* Their businesses depend on developing musical talent and protecting the sound recordings and musical compositions these artists and songwriters create.

Online music piracy costs Plaintiffs billions of dollars a year. Music piracy has long been an issue, but the advent of the internet made stealing music easier and faster than ever. Historically, web services like Napster allowed infringers to download one recording at a time from one location using a centralized database. More recently, however, platforms using file-sharing protocols like BitTorrent and Gnutella have become the dominant channels for theft of copyrighted music. *See* Pet. App. 41a. These "peer-to-peer" (P2P) protocols allow individual users ("peers") to download and upload music files directly from and to multiple users simultaneously. *See id.*; *see also* Pet. App. 8a; *BMG Rights Mgmt. (US) LLC* v. *Cox Commc'ns, Inc.*, 881 F.3d 293, 298-299 (4th Cir. 2018) (explaining P2P and BitTorrent). They also do not rely on a single central repository that can be targeted or shut down. Peers can be identified only by their internet protocol (IP) addresses, meaning that only their internet service providers (ISPs), like Cox, know the peers' identities. Pet. App. 8a-9a. This process exponentially increases both the efficiency and volume of online piracy and the difficulty of combatting it—and thus fosters a staggering amount of infringement.

In an effort to combat online piracy, the record-company Plaintiffs, through their trade association, the Recording Industry Association of America (RIAA), began sending infringement notices to Cox when its subscribers were observed distributing or downloading Plaintiffs' works through P2P networks. Pet. App. 8a-9a, 41a-42a. Cox largely ignored these notices. Cox's lax policies and practices ensured that infringement would continue apace on Cox's platform. Pet. App. 9a, 42a-44a & n.7, 108a-109a.

Cox also openly prioritized its profits over limiting infringement. Cox's "abuse team"—charged with addressing copyright infringement on Cox's service—confirmed as much. The abuse-team leader himself instructed team members to give repeat infringers who otherwise should have been terminated under Cox's own policies a "clean slate" so that Cox could "collect a few extra weeks of payments for their account ;-)." CA4 J.A. 1485 (Vol. 5) (Aug. 27, 2021). The abuse team was told "to hold on to every subscriber we can" and to "keep customers and gain more RGU's" ("revenue generating units," otherwise known as "subscribers").

CA4 J.A. 1484, 1480 (Vol. 5) (Aug. 27, 2021). Another supervisor offered similar instructions to retain flagrant infringers—who were particularly lucrative customers—explaining that one infringing "customer will likely fail again, but let's give him one more chan[c]e. * * * [H]e pays 317.63 a month," Pet. App. 110a (quoting PX347), and that another notorious infringer "pays us over $400/month and if we terminate their [sic] internet service, they will likely cancel the rest of their services," *id.* (quoting PX342).

In this way, Cox profited from subscription revenues it would not have otherwise obtained. Between February 2013 and December 2016, Cox received *$208 million* in revenue from subscribers caught infringing three or more times. CA4 J.A. 593-594 (Corrected Vol. 2) (Sept. 8, 2021), 1709 (Vol. 5) (Aug. 27, 2021). By contrast, Cox did not hesitate to terminate users when its own revenues were at stake. In 2013 and 2014, Cox disconnected almost 620,000 subscribers—approximately 25,000 per month—for failure to pay their internet bills. Pet. App. 109a. In the same period, Cox terminated just 32 subscribers for copyright infringement. *Id.*

2. In July 2018, Plaintiffs sued Cox for contributory and vicarious infringement of 10,017 of Plaintiffs' copyrighted sound recordings and musical compositions.

"[T]o establish contributory liability," a plaintiff need only show that the defendant "provid[ed] the site and facilities for known infringing activity," especially where "it would be difficult for the infringing activity to take place in the massive quantities alleged without the support services provided by the [defendant]." *Fonovisa*, 76 F.3d at 264.

With respect to Plaintiffs' contributory-liability claim, the District Court found at the summary-judgment stage that "[n]o genuine issue of material fact remains" as to "the knowledge element of contributory liability," because the notices that RIAA sent to Cox regarding its subscribers' infringement showed that Cox had "knowledge of specific conduct which allegedly infringed all sound recordings and musical compositions identified in suit." *Sony Music Ent.* v. *Cox Comm'ns, Inc.*, 426 F. Supp. 3d 217, 233 (E.D. Va. 2019). And at trial, the evidence showed that Cox continued to provide known repeat infringers with high-speed internet service, without which its subscribers could not infringe. *See* Pet. App. 43a-44a. The jury also heard testimony that P2P infringement on Cox's network was extensive and persistent, and that Cox's provision of high-speed internet service was the necessary ingredient for the massive quantity of infringement that occurred. *See* Pet. App. 60a-61a, 62a-63a.

To establish vicarious liability, a plaintiff must point to evidence that the alleged vicarious infringer "profit[ed] from direct infringement while declining to exercise a right to stop or limit it." *Grokster*, 545 U.S. at 930. "Profit" here refers to "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). And "the ability to block infringers' access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise." *A&M Recs., Inc.* v. *Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001); *Arista Records, Inc.* v. *Usenet.com, Inc.*, 633 F. Supp. 2d 124, 157 (S.D.N.Y. 2009) (quoting *Napster*).

With respect to Plaintiffs' vicarious-liability claim, the evidence at trial showed that Cox continued to provide service to known serial infringers, and indeed took deliberate steps to ensure that infringement continued unabated so Cox could continue to reap massive profits from these known serial infringers. The trial evidence also showed that repeat infringers were particularly profitable. Cox's business model is built on charging customers increased fees for higher speeds and data usage. *See* Pet. App. 135a-139a, 144a-145a. And ample evidence showed that infringing P2P activity consumes significant bandwidth and creates the need for subscribers to purchase more expensive plans, with higher monthly payments for Cox. *See* Pet. App. 139a-143a. The evidence at trial also showed that Cox's subscriber terms of service permitted Cox to take a variety of actions against repeat infringers, including suspension or termination of their access to Cox's services. Pet. App. 42a.

After twelve days of trial, the jury returned a special verdict finding Cox liable for willful contributory and vicarious copyright infringement of Plaintiffs' copyrighted works. The jury awarded Plaintiffs $1 billion in damages for the infringement of 10,017 copyrighted works.

3. Cox appealed. The Fourth Circuit reversed the District Court's judgment as to vicarious liability and remanded for a new trial on damages. Pet. App. 7a, 35a-36a.[1]

The Fourth Circuit's vicarious-liability ruling stemmed from its cramped view of the profit

[1] The Fourth Circuit affirmed the jury's finding of willful contributory infringement. Pet. App. 7a, 35a.

requirement. The District Court concluded that Plaintiffs had shown direct financial benefit through evidence "that when deciding whether to terminate a subscriber for repeat infringement, Cox considered the subscriber's monthly payments," and that "Cox repeatedly declined to terminate infringing subscribers' internet service in order to continue collecting their monthly fees." Pet. App. 16a. The Fourth Circuit saw it differently. In its view, the profit requirement "demands proof that the defendant profits directly from the *acts of infringement* for which it is being held accountable." Pet. App. 17a (emphasis in original). Thus, only if the infringement itself "draws customers to the defendant's service or incentivizes them to pay more for their service" may the defendant be said to "profit" from infringement. Pet. App. 16a. And because "[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*," the evidence of Cox's avid support of flagrant infringers failed the test. Pet. App. 17a (emphasis in original).

The Fourth Circuit rejected the rest of Plaintiffs' copious trial evidence as similarly insufficient to meet the demanding vicarious-liability standard it had articulated. Plaintiffs had introduced evidence that "roughly 13% of Cox's network traffic was attributable to peer-to-peer activity and over 99% of peer-to-peer usage was infringing," such that the jury could permissibly "infer from the volume of infringing activity on Cox's network that the ability to infringe was a draw for customers." *Id.* The panel rejected this argument, holding that the profit standard required direct evidence that "infringing subscribers purchased internet access because it enabled them to infringe copyrighted music," or that "customers chose Cox's internet service * * * because of any knowledge or expectation about Cox's lenient response to infringement." Pet. App. 18a.

Plaintiffs also had put on evidence at trial that "subscribers were willing to pay more for the ability to infringe," as demonstrated through evidence that (1) Cox maintained "a tiered pricing structure by which it charged customers higher monthly fees for increased data allowances," (2) "peer-to-peer activity" required increased data, (3) "residential subscribers who were the subject of 20 or more infringement notices * * * paid Cox more per month, on average, than residential subscribers who were the subject of only 1 or 2 infringement notices," and (4) "Cox advertised its network speeds in relation to how quickly a user could download songs." *Id*. The panel concluded that this evidence, too, was insufficiently tailored: "None of this raises a reasonable inference that any Cox subscriber paid more for faster internet in order to engage in copyright infringement." *Id.* After all, it also takes bandwidth to "legally stream[] movies, television shows, and music," and "[s]ubscribers may have purchased high speed internet for lawful streaming and downloads or because their households had many internet users." Pet. App. 18a-19a.

4. Plaintiffs and Cox each timely sought panel rehearing and rehearing en banc. The Fourth Circuit denied rehearing. Pet. App. 131a-134a.

REASONS FOR GRANTING THE PETITION

This petition readily satisfies the traditional criteria for review. The Fourth Circuit's narrow conception of the profit requirement of vicarious liability creates a square conflict with the First, Second, Third, Seventh, and Ninth Circuits, and entrenches an erroneous understanding of profit that has been percolating in the district courts for years.

The Fourth Circuit's decision is also wrong. It breaks with this Court's precedent, which recognizes that profit from a business that permits infringement is profit from infringement; contravenes Congress's stated purpose in enacting the relevant provision of the Copyright Act; and is divorced from the common-law principles that animate secondary liability.

The Fourth Circuit's new test will also have far-reaching consequences across the law of copyright; by substantially narrowing the scope of vicarious liability, the Fourth Circuit's rule removes a core incentive to stop or limit piracy. Certiorari is warranted.

I. The Fourth Circuit's Holding Creates A Circuit Split On The Profit Requirement Of Vicarious Copyright Infringement.

The courts of appeals are divided on how to interpret the profit requirement of vicarious copyright infringement. The majority of courts find liability where the defendant expects to profit from the operation in which infringement occurs. But some courts—including the Fourth Circuit—employ a strict causation requirement, permitting liability only where the defendant profits directly from the acts of infringement themselves.

A. The Majority Of The Courts Of Appeals That Have Addressed This Issue Permit Vicarious Liability Where The Defendant Expects To Profit From The Broader Operation In Which Infringement Occurs.

The majority of the courts of appeals that have addressed this issue adhere to the traditional understanding of vicarious liability employed in the "so-called 'dance hall cases,'" from the first half of the twentieth century, where nightclub owners were held vicariously liable for copyright infringement by bands performing at the clubs. *Sony,* 464 U.S. at 437 n.18; *see also id*. at 437 (calling "the imposition of vicarious liability" in these cases "manifestly just"). These courts have concluded that holding a defendant vicariously liable for copyright infringement is appropriate where the defendant profited from the operation in which infringement occurred, even if profit cannot be traced precisely and exclusively to the performance of infringing works.

1. The majority approach is rooted in what are known as the "dance-hall cases." The leading example is *Dreamland Ball Room* v. *Shapiro, Bernstein & Co.*, where the Seventh Circuit considered whether dance-hall operators were liable for copyright infringement where a hired orchestra "at times" played copyrighted music without authorization. 36 F.2d 354, 355 (7th Cir. 1929). The operators argued that they did not direct that any particular musical selection be played, did not know that the orchestra played copyrighted music, and did not know that the orchestra played that copyrighted music without authorization. *Id.* Nor was there evidence that the operators had intentionally charged customers for the benefit of listening to

copyrighted music, or bargained for a discount on the orchestra's fees based on their intention to play infringing music. The Seventh Circuit nevertheless found that the dance-hall operators were liable. As the court explained, the "authorities are, we believe, unanimous in holding that the owner of a dance hall at whose place copyrighted musical compositions are played in violation of the rights of the copyright holder is liable, if the playing be for the profit of the proprietor of the dance hall." *Id.*

Those "unanimous" authorities in 1929 multiplied in the ensuing decades: "[T]he cases are legion which hold the dance hall proprietor 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, Bernstein & Co.* v. *H. L. Green Co.*, 316 F.2d 304, 307-308 (2d Cir. 1963) (collecting cases).

In the century between *Dreamland Ball Room* and this case, courts continue to recognize the dance-hall scenario as the "canonical illustration" of vicarious infringement. *Aimster*, 334 F.3d at 654. As the Seventh Circuit explained in *Aimster*, a dance-hall owner "does not" "benefit[] directly from the infringement"; it "benefit[s]" only "to the extent that competition will force the dance band to charge the dance hall a smaller fee for performing if the band doesn't pay copyright royalties and so has lower costs than it would otherwise have." *Id*.

The "dance hall" principle also is not limited to dance-hall facts. Courts have applied the same rule to uphold vicarious-liability findings against an array of defendants whose establishments played infringing music where the defendant profited from the larger operation in which infringement occurred.

In a case this Court has cited with approval, *see Sony*, 464 U.S. at 437 n.18, the First Circuit held that a racetrack that hired a contractor to play music in between races was vicariously liable for the contractor's infringing performances, even though the plaintiff had offered no evidence that racetrack patrons came to the racetrack to hear the music played between races, nor evidence that the patrons wanted to hear *unlicensed* music as opposed to music that did not infringe plaintiffs' copyrights. *Famous Music Corp.* v. *Bay State Harness Horse Racing & Breeding Ass'n, Inc.*, 554 F.2d 1213, 1214 (1st Cir. 1977).

In another case this Court has referenced, *see Sony*, 464 U.S. at 437 n.18, the Second Circuit held that a music-festival promoter was vicariously liable for musical artists' performance of copyrighted works at the festival, even though the promoter was paid the same fee for its services regardless of whether the performing artists chose to infringe. *Gershwin Publ'g Corp.* v. *Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1163 (2d Cir. 1971). This Court characterized that fee as a "substantial benefit from the actions of the primary infringers." *Sony*, 464 U.S. at 437 n.18.

As Judge Keeton explained in *Polygram International Publishing, Inc.* v. *Nevada/TIG, Inc.*, 855 F. Supp. 1314 (D. Mass. 1994)—an opinion acknowledged as "[t]he most * * * comprehensive discussion of the evolution of the doctrine of vicarious liability for copyright infringement," *Fonovisa*, 76 F.3d at 262—the dance-hall and similar cases rely "on an inferred, overall benefit that a performance of music confers on an establishment," 855 F. Supp. at 1330. After all, "it is widely accepted that restaurant owners may be held vicariously liable for infringing performances by musicians," but none of the cases say "how many minutes of music per meal * * * it take[s] to show" a "financial benefit to a restaurant." *Id*. at 1331. These courts thus look for "commercial gain from the overall operation and either a direct or indirect financial benefit from the infringement itself." *Id.* In Judge Keeton's words, this approach best "serves to limit vicarious infringement to the activities of those who in some measure profit from the infringement, while at the same time defining the benefit from the infringing activity itself in a manner that allows the court to acknowledge the more intangible, indirect benefits from performances." *Id.*

2. Even beyond the unauthorized *public* playing of copyrighted works, courts' approach to vicarious liability has remained the same. As the Ninth, Third, and Second Circuits have held, Plaintiffs can show profit through evidence that the defendant expects commercial gain from the broader operation in which infringement occurs.

The Ninth Circuit has issued the leading cases on the profit requirement of vicarious liability. In *Fonovisa*, the defendant, Cherry Auction, operated a flea market—otherwise known as a "swap meet"—where "over 900 vendors" rented stalls from Cherry Auction to "sell their goods on any given day." Cherry Auction Br., 1994 WL 16014410, at *3-4. Some of those 900-plus vendors sold counterfeit copies of music recordings owned by the plaintiff. *Fonovisa*, 76 F.3d at 261. Cherry Auction argued that Fonovisa could not prove the auction had received any financial benefit from those vendors; after all, the auction owner explained, Cherry Auction "does not receive any percentage of the sales. Indeed, Cherry Auction receives its rental payment regardless of whether the vendor makes any sales whatsoever." Cherry Auction Br., 1994 WL 16014410, at *9. The district court rejected Fonovisa's vicarious-liability claim. 76 F.3d at 262.

The Ninth Circuit reversed. As the court explained, "the defendants reap substantial financial benefits from admission fees, concession stand sales and parking fees, all of which flow directly from customers who want to buy the counterfeit recordings at bargain basement prices." *Id.* at 263. That was sufficient to state a claim for vicarious copyright infringement. *Id.* at 263-264.

In so holding, the Ninth Circuit rejected the defendant's argument that vicarious liability requires a strict causal link—such as "a commission, directly tied to the sale of particular infringing items"—between the defendant's profit and the act of infringement. *Id*. at 263. Swap-meet attendees did not pay some separate premium for infringing works. *Id*. What mattered instead was the commercial gain from the broader operation: *All* attendees, whether they shopped for counterfeit recordings or handmade textiles, paid the same admission fees and other expenses. *Id.* Like the dance-hall cases, the court explained, the infringement "enhance[d] the attractiveness of the venue to potential customers." *Id*.; *see also id.* at 263-264 (explaining that "the sale of pirated recordings at the Cherry Auction swap meet is a 'draw' for customers, as was the performance of pirated music in the dance hall cases and their progeny").

The Ninth Circuit has applied the same approach to internet service providers. In *Ellison*, the Ninth Circuit held that an ISP was *not* vicariously liable for its subscribers' infringement. The court explained that its holding rested on the lack of evidence that the ISP "attracted or retained subscriptions because of the infringement or lost subscriptions because" the ISP blocked infringement. 357 F.3d at 1079. Such evidence, the Ninth Circuit noted, would have established that infringement was a "draw" to the defendant's services, just as the sale of infringing records was a "draw" to the swap meet in *Fonovisa*. *Id.* In so holding, the Ninth Circuit expressly noted that vicarious liability could be supported by a "causal relationship between the infringing activity and any financial benefit * * * regardless of *how substantial* the benefit is in proportion to a defendant's overall profits." *Id.* (emphasis in original); *see also, e.g.*, *Fahmy* v. *Live Nation Ent., Inc.*, No. 2:15-CV-01158-CAS, 2015 WL 3617040, at *10 (C.D. Cal. June 8, 2015) (noting "that courts including the Ninth Circuit have understood the direct financial interest element as encompassing a possible, indirect benefit") (internal quotation marks and alteration omitted).

The Third Circuit agrees. In *Leonard* v. *Stemtech International Inc.*, 834 F.3d 376 (3d Cir. 2016), the Third Circuit held that a plaintiff can demonstrate that a defendant profited from copyright infringement through evidence that the copyrighted material "len[t] legitimacy" to the defendant's product. *Id.* at 389 (citing *Ellison*, 357 F.3d at 1078-79). That case involved a plaintiff photographer whose photographs of stem cells were used, without permission, by the defendant nutritional supplements company's distributors. A jury found the defendant vicariously liable for the copyright infringement. The defendant's customers did not come to the distributors' websites to purchase or view photographs of stem cells. Nor was there evidence that customers paid more for supplements because of the photographs. Indeed, as the district court had noted, the plaintiff did not "prove that any of the infringement drove [the defendant's] sales or caused anyone to sign up as a distributor for [the defendant]." *Leonard* v. *Stemtech Health Scis., Inc.*, No. CV 08-067-LPS-CJB, 2014 WL 3367092, at *2 (D. Del. July 8, 2014), *vacated in part and remanded sub nom. Leonard* v. *Stemtech Int'l Inc.*, 834 F.3d 376 (3d Cir. 2016). The Third Circuit nevertheless upheld the jury's verdict, explaining that "[t]he jury could reasonably have credited the testimony from Stemtech officials indicating that images of stem cells lend legitimacy to products that purportedly enhance stem cell production and from this infer that the images could have drawn customers to buy the product, which would financially benefit Stemtech." 834 F.3d at 389.

The Second Circuit reached the same conclusion in *EMI Christian Music Group, Inc.* v. *MP3tunes, LLC*, 844 F.3d 79 (2d Cir. 2016). There, an individual defendant, who "was the near-exclusive funder" of an online music service provider, was found vicariously liable for copyright infringement "that drew subscribers" to the service provider's website. *Id.* at 99. The Second Circuit held that the district court had not erred in instructing the jury that an "obvious and direct financial interest * * * may be established where infringing material acts as a 'draw' to attract subscribers to a defendant's business, *even if it is not the primary, or even a significant draw*." *Id.* (ellipsis in original) (emphasis added and internal quotation marks omitted). The court explained that there was "ample evidence" to support a profit finding, citing evidence that the music service provider's employees "emphasized the availability" of the infringing material "in connection with trying to get users to" make purchases, and that, using the infringing material, the defendant "sought to * * * attract free users * * * whom [the music service provider] could thereafter 'upsell.'" *Id.* (internal quotation marks omitted). The court did not cite evidence establishing the actual results of those efforts. Instead, it was enough for the Second Circuit that the business owner wanted to attract and retain customers, and that permitting the use of infringing works was part of that effort.

Numerous district court decisions spread across this same hundred-year period are in accord with this approach. *See, e.g.*, *J & J Sports Prods., Inc.* v. *Enriquez*, No. 1:19-CV-2384 (ERK), 2019 WL 4963108, at *4 (E.D.N.Y. Oct. 7, 2019) (holding restauranter vicariously liable for displaying telecast of boxing event on restaurant televisions because "it can reasonably be inferred that he did it to attract patrons to the restaurant (or get them to stay longer) in order to increase the restaurant's sales, and thus his own income"); *Polygram*, 855 F. Supp. at 1330 (holding organizers of a computer trade show vicariously liable for performance of copyrighted songs played by exhibitors during show); *Broadcast Music, Inc.* v. *Blumonday, Inc.*, 32 U.S.P.Q.2d 1474, 1994 WL 259253, at *2 (D. Nev. 1994) (holding proprietors of a restaurant vicariously liable where the court recognized that the "direct financial interest" need only "be tied to the operation as a whole, not exclusively to the infringement"); *Realsongs* v. *Gulf Broad. Corp.*, 824 F. Supp. 89, 92 (M.D. La. 1993) (holding that radio station could be held vicariously liable for infringing songs played by third parties who paid flat fees for air time because the stations "still have a direct financial interest in the infringing activity if the station is a for-profit enterprise and defendants benefit from its operation"); *Buck* v. *Pettijohn*, 34 F. Supp. 968, 968 (E.D. Tenn. 1940) (holding owner of night club vicariously liable, even though no admission charged to hear orchestra, because he "received benefits to his business by this orchestral performance").

B. A Minority Of Courts Permits Vicarious Liability Only Where The Defendant Profits Directly From The Act Of Infringement Itself.

1. In contrast to the approach adopted by the First, Second, Third, Seventh, and Ninth Circuits, the Fourth Circuit stands alone among the courts of appeals in "demand[ing] proof that the defendant profits directly from the *acts of infringement* for which it is being held accountable." Pet. App. 17a (emphasis in original). Because of this demanding standard, the Fourth Circuit found insufficient evidence that courts on the majority side of the split would have accepted.

To start, the Fourth Circuit declared it insufficient that Plaintiffs showed direct financial benefit through evidence "that when deciding whether to terminate a subscriber for repeat infringement, Cox considered the subscriber's monthly payments," and evidence that "Cox repeatedly declined to terminate infringing subscribers' internet service in order to continue collecting their monthly fees." Pet. App. 16a.

Yet the Ninth Circuit has recognized that the same evidence—that the provider "attracted or retained subscriptions because of the infringement or lost subscriptions because" the provider blocked infringement—would show financial benefit. *Ellison*, 357 F.3d at 1079; *see supra* p. 18. The Ninth Circuit also employed this reasoning in *Napster*, 239 F.3d 1004, where it upheld a vicarious-liability finding even though the defendant operated a service that was free to its infringing users. As the district court explained, Napster could "monetize" its userbase through various revenue sources, such as targeted e-mail, advertising, and direct marketing. *A & M Records, Inc.* v. *Napster, Inc.*, 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000), *aff'd in part and rev'd in part on other grounds*, 239 F.3d 1004. The Ninth Circuit therefore concluded that the defendant company "financially benefits from the availability of protected works on its system" because the defendant's "future revenue" depended on "increases in userbase." 239 F.3d at 1023.

Similarly, much of the Fourth Circuit's reasoning turned on the fact that Cox's subscribers used its internet service for more than infringement. *See, e.g.*, Pet. App. 18a ("No one disputes that Cox's subscribers need the internet for countless reasons, whether or not they can infringe.'"); Pet. App. 19a ("Subscribers may have purchased high speed internet for lawful streaming and downloads or because their households had many internet users; Sony's expert didn't claim to know why any customer purchased a higher tier of service."). The Fourth Circuit reasoned that, because subscribers used the internet for noninfringing activities, Petitioners could not show that subscribers were drawn to Cox's service by the possibility of infringement or that Cox subscribers paid more for the ability to infringe.

Yet courts on the majority side of the split do not require a showing that the customers were attracted to the defendant vicarious infringer's service because of the opportunity to infringe the plaintiff's copyrights. Instead, these courts look only to the defendant vicarious infringer's motives in permitting the infringement. For example, as discussed above, *supra* pp. 18-19, the Third Circuit upheld a vicarious-liability finding for infringement of copyrighted *photographs* on a website *selling nutritional supplements*. *See Leonard*, 834 F.3d at 389. The defendant nutritional supplement company's customers did not come to the defendant's website to purchase photographs. The customers sought supplements. Nor was there any proof that the customers were persuaded to purchase defendant's supplements because of the plaintiff's photographs. *See Leonard*, 2014 WL 3367092, at *2 (district court opinion noting that the plaintiff did not "prove that any of the infringement drove Defendant's sales"). However, because the defendant had used the photographer's works to enhance the attractiveness of the defendant's website, the Third Circuit upheld the vicarious-liability finding and agreed that the profit requirement had been satisfied. *Leonard*, 834 F.3d at 389.

2. Several district courts in other circuits have taken a similar tack to the Fourth Circuit, *see, e.g.*, *Klein & Heuchan, Inc.* v. *Costar Realty Info., Inc.*, 707 F. Supp. 2d 1287, 1298-99 (M.D. Fla. 2010), *aff'd*, 425 F. App'x 833 (11th Cir. 2011) (per curiam), including in the context of claims made by creators against ISPs. *See, e.g.*, *UMG Recordings, Inc.* v. *Bright House Networks, LLC*, No. 8:19-cv-710-MSS-TGW, 2020 WL 3957675, at *6 (M.D. Fla. July 8, 2020); *UMG Recordings, Inc.* v. *Grande Commc'ns Networks, LLC*, 2018 WL 1096871,

at *9-10 (W.D. Tex. Feb. 28, 2018), *adopted by* 2018 WL 2182282 (W.D. Tex. Mar. 26, 2018), *amended and superseded by* 2018 WL 1905124 (W.D. Tex. Mar. 28, 2018).

Bright House is illustrative. Much like the Fourth Circuit, the *Bright House* court noted that "*access* to infringing content generally available on the internet is one of many reasons motivating some subscribers to enroll with any ISP." 2020 WL 3957675, at *5 (emphasis in original). According to the court, an ISP merely "offers a conduit to the 'World Wide Web'" and "the available infringing content is found on the robust peer-to-peer sharing platforms ubiquitous to the internet and driven largely by BitTorrent (and similar networks), which are * * * in no way affiliated with or controlled by Bright House or any other ISP, for that matter." *Id.* The court therefore dismissed the plaintiffs' vicarious-liability claim because the plaintiffs did "not allege that there is anything unique about the service [the ISP defendant] offers * * * as a portal to this alleged contraband content" or that "access to infringing content is the *main* draw to Bright House's service." *Id.* Indeed, that court understood the direct financial benefit inquiry to be so demanding that "the very success of the defendant's venture must depend on the infringing activity." *Id*. at *4 (internal quotation marks and alterations omitted).

Grande is similar. There, the district court held that rightsholders had failed to adequately plead the profit requirement of their vicarious-liability claim against the ISP Grande Communications. *See Grande*, 2018 WL 1096871, at *10. The plaintiffs had alleged that "the availability of music—and particularly [the plaintiffs'] music—acts as a powerful draw for user[s] of [defendant's] service, who use that service to download infringing music files using BitTorrent protocols." *Id.* (internal quotation marks omitted). The district court rejected those allegations on the ground that they "would impose liability on every ISP, as the music at issue is available on the Internet generally, as is the BitTorrent protocol, and is not something exclusively available through Grande's services." *Id.* The district court opined that the plaintiffs should have offered more particularized allegations of a causal connection between the ISPs' alleged conduct and the alleged direct infringement. *Id.*

II. The Fourth Circuit Is Wrong.

The Fourth Circuit's approach to the profit requirement of vicarious liability is flawed from every angle. It is inconsistent with this Court's precedent, which holds that the Copyright Act does *not* require evidence of a profit from the sale of a specific product. It is contrary to Congress's stated purpose in enacting the 1976 Amendments to the Copyright Act that govern this case. And it is incompatible with the first principles that animate secondary liability.

A. The Minority Approach Is Inconsistent With This Court's Precedent.

1. Nearly eighty years before *Fonovisa*, this Court considered whether a "defendant hotel company" could be held liable for the infringing performance of "an orchestra employed and paid by the company." *Herbert* v. *Shanley Co.*, 242 U.S. 591, 594 (1917). At that time, and as relevant here, the Copyright Act granted rightsholders the exclusive right "[t]o perform the copyrighted work publicly for profit if it be a musical composition." Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075. In analyzing whether

that "profit" element had been satisfied, this Court held that the Copyright Act did not require evidence of a direct profit from the sale of a specific product. As the Court explained, "there is no need to construe the statute so narrowly" that it would permit the hotel to escape liability based on the fact that hotel restaurant patrons paid only for their meal. *Herbert*, 242 U.S. at 594. The infringing performance instead is "part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important." *Id*. at 594-595. "Whether it pays or not, the purpose of employing it is profit, and that is enough." *Id*. at 595.

Many other lower court decisions followed suit. As explained above, in the "so-called 'dance hall cases,'" *Sony,* 464 U.S. at 437 n.18, the courts determined that financial benefit "could be *inferred* from the very fact of playing music in a profit-making establishment." *Polygram*, 855 F. Supp. at 1330 (emphasis in original). The profit element was satisfied by a showing that music was played at these establishments for the enjoyment of the customers. These lower courts did not require proof that the specific copyrighted works of the plaintiffs attracted customers or caused them to pay more. And this Court later endorsed those decisions as "situations in which the imposition of vicarious liability is manifestly just." *Sony,* 464 U.S. at 437.

Herbert's interpretation of a "predecessor" Copyright Act provision can "shed some light" on the current statute. *Keene Corp.* v. *United States*, 508 U.S. 200, 210 (1993). That is especially true here, where courts continue to rely on *Herbert*'s reasoning, including in analyzing the profit requirement of vicarious-liability claims. *See, e.g.*, *Joe Hand Promotions, Inc.* v. *Griffith*, No. 3:20-CV-382, 2023 WL 4752375, at *7 (E.D. Tenn. July 25, 2023) (citing *Herbert*'s profit analysis in support of conclusion that defendant is vicariously liable for infringement); *Klein & Heuchan, Inc.* v. *CoStar Realty Info., Inc.*, No. 8:08-cv-1227-T-30EAJ, 2011 WL 6097980, at *4 (M.D. Fla. Dec. 7, 2011) (similar).

2. The Fourth Circuit's reasoning cannot be reconciled with *Herbert*. The Fourth Circuit seized on the fact that "Cox's subscribers need the internet for countless reasons, whether or not they can infringe." Pet. App. 18a. Yet, as this Court made clear in *Herbert*, it makes no difference that accessing infringing content is only one of many things that customers do. Because Cox expressly refused to terminate its subscribers so it could continue to collect subscription revenue from those subscribers, the infringement contributes to "part of a total for which the public pays," even if "the price of the whole is attributed" to noninfringing uses. *Herbert*, 242 U.S. at 594-595.

The Fourth Circuit therefore erred in disregarding the evidence that "Cox repeatedly declined to terminate infringing subscribers' internet service in order to continue collecting their monthly fees," and in concluding that "[t]he continued payment of monthly fees for internet service, even by repeat infringers," "demonstrates only that the service provider profits directly from the sale of internet access" and cannot show that Cox benefitted directly from infringement. Pet. App. 16a-17a. If Cox's subscribers infringed, and Cox retained infringers' business in order to retain infringers' subscription revenue, then the causal connection between the infringing conduct and the financial benefit to Cox is obvious. Cox's purpose for providing its subscribers with access to the internet—including massive amounts of infringing content—is "profit," and that "is enough." *Herbert*, 242 U.S. at 595.

B. The Minority Approach Is Contrary To Congressional Purpose.

Congress reaffirmed the understanding of profit that this Court described in *Herbert* (and later endorsed in *Sony*) when it enacted the Copyright Act of 1976. "Congress was aware when debating the 1976 amendments that the law had been interpreted as imposing vicarious liability on proprietors of nightclubs and other establishments for the infringements of musicians," and "the Judiciary Committee considered a proposed amendment to the Act that would have exempted such proprietors from vicarious liability." *Polygram*, 855 F. Supp. at 1326 (citing H.R. Rep. No. 94-1476, at 159-160 (1976) ("House Report")). However, "[t]he Committee decided * * * to reject the amendment because" it concluded that "'no justification exists for changing existing law and causing a significant erosion of the public performance right.'" *Id.* (quoting House Report at 160).

Instead of narrowing the scope of vicarious liability, the Committee embraced the "well-established principle of copyright law" that the profit component of vicarious liability can be met through evidence that the defendant benefits from the operation as a whole, as opposed to from the infringement itself. House Report at 159. As Congress put it: "To be held a related or vicarious infringer in the case of performing rights, a defendant must either actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program, and *expect commercial gain from the operation and either direct or indirect benefit from the infringing performance*." *Id.* at 159-160 (emphasis added).

In declining the proposed revision to the Act, Congress effectively codified the dance-hall cases' understanding of profit in the context of vicarious liability. *See Sekhar* v. *United States*, 570 U.S. 729, 733 (2013) (recognizing that when a legal concept "is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 320-326 (2012) (describing "canon of imputed common-law meaning" and "prior-construction canon"). The best reading of the Copyright Act's grant of the exclusive right to reproduce, perform, and distribute the underlying creative work is therefore one that incorporates a reading of vicarious liability's profit requirement that is tied to the enterprise, not to the infringement. *See* 17 U.S.C. § 106. The Fourth Circuit's narrow understanding of profit is impossible to reconcile with Congress's understanding of the "existing law." House Report at 160.

C. The Minority Approach Is Divorced From First Principles.

One of the most basic principles animating the common law is that legal responsibility for harm should fall on the person who can limit or eliminate harm in the most cost-effective way. This principle, sometimes described as finding the "least cost avoider" or "most efficient risk bearer," is fundamental to our legal system. Every first-year law student in America studies Judge Learned Hand's famous formula for determining when there is liability for negligently caused harm: "if the probability be called P; the injury L; and the burden [of adequate precautions to avoid the injury], B; liability depends upon whether B is less than L multiplied by P; i.e., whether B less than PL." *United States* v. *Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). And, in learning that principle, every student comes to understand that the common law considers the party who is the "least cost avoider" or the "most efficient risk bearer" to be legally responsible for unintended harm.

Tort law is organized around that principle, and so are the rules for enforcement of contracts and property rights, including intellectual-property rights. Indeed, the "background * * * policy justification[] for vicarious liability" for copyright infringement is efficient harm avoidance—or, put in different words, "[t]he law of vicarious liability treats the expected losses" of copyright infringement "as simply another cost of doing business." *Polygram*, 855 F. Supp. at 1325-26.

The principle of efficient harm avoidance is particularly important in situations where the injured party cannot efficiently deter the person who is directly liable. The prospect of secondary liability creates an incentive for the party able to prevent the harm at the lowest cost to take steps to do so. Without the motivation of avoiding secondary liability, the least cost avoider would have no reason, from an economic perspective, to make efforts to prevent or minimize the harm. Holding the business liable for the infringement of those it controls and supervises acknowledges that the "enterprise and the person profiting from it are better able than either the innocent injured plaintiff or the person whose act caused the loss to distribute the costs and to shift them to others who have profited from the enterprise." *Id.* at 1325; *see also, e.g.*, *Shapiro, Bernstein & Co.*, 316 F.2d at 307 ("[T]he purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.").

Viewed through this lens, the Fourth Circuit's reasoning is completely backwards. The principle of efficient harm avoidance is served by focusing on the defendant's overall profits from the business in which the infringement occurs: "By focusing on benefit received from and control over an enterprise, a court can evaluate the defendant's ability to spread losses and police conduct within the enterprise, as well as the underlying fairness of holding the defendant liable." *Polygram*, 855 F. Supp. at 1326. But if the analysis is as narrow as the Fourth Circuit claims, then the court will be unable to assess the defendant's role in the larger scheme. In construing direct financial benefit so narrowly as to absolve from liability the party who can most efficiently limit harm, the Fourth Circuit has issued a decision that is impossible to reconcile with the foundation of secondary liability.

III. Review Is Needed Now.

For at least three reasons, the Fourth Circuit's interpretation of the profit requirement for vicarious copyright infringement liability warrants this Court's review.

First, the Fourth Circuit's test is not only wrong; it is fundamentally unworkable. Vicarious liability is an especially important tool in the digital age where pursuing direct infringers—in this case, thousands of faceless individuals who cannot be identified except through an ISP like Respondent—is impractical at best and impossible at worst. *See Grokster*, 545 U.S. at 929-930 ("When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement."). The Fourth Circuit's rule makes it easy for ISPs to avoid liability by structuring their fees so that the ability to infringe is bundled in with some other service.

In requiring such an unnecessarily close correspondence between the vicarious-liability defendant and the financial benefit from the infringement, the Fourth Circuit has created a regime where liability depends entirely on the nature and outcome of a business's commercial pursuits. But it must not be that, for example:

- A restaurant can broadcast copyrighted music over the restaurant's sound system and avoid vicarious liability—unless the copyright holder can point to a separate charge the diners paid for that music or show that playing the infringing music specifically attracted diners.
- A company can air a commercial using copyrighted music without authorization and escape vicarious liability—unless the rightholder can show that someone purchased the advertised product because of the music in the ad.
- An investment bank can allow an analyst to pull spreadsheets off a Bloomberg Terminal

and distribute them to clients, and not be vicariously liable—unless Bloomberg can point to a particular transaction with a positive outcome that was informed by the spreadsheets.

- A law firm can hire former judicial clerks as associates, allow them to do legal research using their old government Westlaw accounts, and avoid vicarious liability for that copyright infringement—unless there is proof that that particular research led to the grant of a motion.

Those hypotheticals may all be permitted under the Fourth Circuit's new rule. After all, in the Fourth Circuit's view, vicarious liability "demands proof that the defendant profits directly from the *acts of infringement* for which it is being held accountable," Pet. App. 17a (emphasis in original), such that financial benefit may be profit from infringement only "[i]f copyright infringement draws customers to the defendant's service or incentivizes them to pay more for their service." Pet. App. 16a.

Second, this Court's intervention is necessary to provide guidance to lower courts on vicarious liability for copyright infringement. The Court has issued two major decisions regarding secondary liability for copyright infringement in the digital age. Neither case analyzed the profit requirement, even though the plaintiffs pleaded the theory of vicarious liability in both cases. Indeed, this Court acknowledged in *Sony* that some of its reasoning would have implications for vicarious-liability claims, but ultimately chose to resolve the case on contributory-infringement grounds. 464 U.S. at 435 n.17. Twenty years later, in *Grokster*, this Court "resolve[d] the case based on an inducement theory," therefore finding "no need to analyze separately MGM's vicarious liability theory." 545 U.S. at 930 n.9. It is time to call the question.

Third, this petition is an ideal vehicle to resolve the scope of the profit requirement. The Fourth Circuit's vacatur of the jury's vicarious-liability finding turned exclusively on its conclusion that Petitioners "failed, as a matter of law, to prove that Cox profits directly from its subscribers' copyright infringement." Pet. App. 12a. The facts that underpin the jury's profit finding—Cox's fees, its employees' emails, its advertising, and its network traffic—are not in dispute. And the Fourth Circuit's error plainly was outcome-determinative: The panel's erroneous interpretation of the vicarious-liability standard wiped out a $1 billion jury verdict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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