

Today's Decision in *Cox Communications v. Sony Music*

This morning, the United States Supreme Court unanimously reversed a decision of the Fourth Circuit which had upheld a finding of liability against Cox Communications for the copyright-infringing acts of its customers. The case has important implications for companies whose technology interacts with material subject to copyright law, including generative AI platforms. The plaintiffs—Sony Music Entertainment and other music copyright owners—claimed that Cox, in its role as an internet service provider, was liable for Cox's customers' uploading and downloading of the plaintiffs' copyrighted music on the internet. Some of these customers were allegedly known by Cox to have been repeat infringers. A jury had awarded \$1 billion in damages (for about 10,000 works) against Cox on theories of contributory and vicarious infringement. The Fourth Circuit had reversed the vicarious infringement basis for liability but affirmed the contributory infringement basis. The Supreme Court agreed to review the contributory issue.

I. The Supreme Court's Decision

The Supreme Court unanimously reversed the Fourth Circuit's decision, stating:

The provider of a service is contributorily liable for the user's infringement only if it intended that the provided service be used for infringement. The intent required for contributory liability can be shown only if the party induced the infringement or the

provided service is tailored to that infringement. A provider induces infringement if it actively encourages infringement through specific acts.

Justice Thomas's opinion for the Court held that mere knowledge that people are using a defendant's product or service to directly infringe is insufficient for contributory infringement. Instead, there must be either: (1) inducement of specific acts (such as promoting or marketing the product as a tool to infringe copyright), or (2) evidence that the product/service was tailored to facilitate direct infringement.

The Court explained that a product or service will not be found to have been "tailored to" facilitating infringement if the product or service is capable of substantial or commercially significant noninfringing uses. Nor is a failure to take affirmative steps to prevent infringement sufficient to support contributory liability. Combined, these holdings dramatically limit contributory infringement liability.

Here, the Court found Cox had simply provided Internet access, which of course can have many legitimate purposes. This framework protects general purpose products, limiting liability to a small group of piracy-specific products. The "inducement" prong for liability is limited, as well. It requires active encouragement of specific acts of infringement through, for example, promoting and marketing of the product or service as a tool for infringement. This too will be rare.

Justices Sotomayor and Jackson issued a concurring opinion, agreeing with the result but not the reasoning. They objected to what they see as the majority's limitation of secondary liability to the classic theories of contributory infringement and vicarious liability. They also expressed concern that the majority opinion will render the DMCA safe harbors meaningless, given that secondary liability will rarely be found, and thus one will not need the safe harbors. That may be an exaggeration. But the concurring opinion may be more important because its "parade of horrors" illustrates the breadth of the majority opinion.

II. Takeaways for Technology Companies

Today's decision helps ISPs, technology companies, and AI companies avoid secondary liability for any acts of direct infringement by their users. Although the Court did not address any of the 90 or so cases pending against AI companies, its decision will influence how those existing and future cases will be resolved.

For the claims that are based on the outputs of generative AI products, for example, it will be more difficult for copyright owners to prevail on a claim of contributory infringement. Absent other facts, new generative AI tools (and other tech products) likely do not induce infringement, nor are they tailored to be infringing. Instead, they should qualify as having commercially significant non-infringing uses. Whether AI companies can be held liable for direct infringement is, of course, a separate question, the answer to which remains unsettled.

The Court did not address vicarious infringement, another form of secondary liability. By declining to grant cert on that issue, the Court upheld the Fourth Circuit's favorable ruling for the ISPs (and in turn, other tech companies facing secondary infringement claims). Because Cox did not charge its subscribers on the basis of whether they engaged in infringing conduct, the copyright owners could not establish that Cox received a "direct financial benefit" from its

subscribers' acts of infringement—one of two prima facie elements of a claim for vicarious infringement.

Even with the favorable ruling for ISPs and technology companies, potential defendants would be wise to continue to maintain their DMCA policies, including repeat infringer policies. The concerns expressed by Justices Sotomayor and Jackson could be brought into sharper relief by some follow-on case brought against a service provider who does literally nothing to stem rampant infringement by repeat offenders. And in the wake of this decision content owners will almost certainly seek to have Congress impose new requirements on service providers to, at a minimum, take down infringing content when asked to do so.

Tech companies should also be cautious about how they describe the features of their products in any promotional or marketing material, so that they are not construed as inducing copyright infringement. The Court clarified today that these affirmative statements can be the basis for a finding of liability under the inducement theory, even if the product is capable of substantial non-infringing uses.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:



Andrew H. Schapiro

Partner

Chicago

andrewschapiro@quinnemanuel.com Tel: 312-705-7403



Robert M. Schwartz

Partner

Los Angeles

robertschwartz@quinnemanuel.com Tel: 213-443-3675



Bill Patry

Of Counsel

New York

williampatry@quinnemanuel.com Tel: 212-849-7064



Moon Hee Lee

Associate

Los Angeles

moonheelee@quinnemanuel.com Tel: 213-443-3627

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