

Cox Communications, Inc. v. Sony Music Entertainment

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93 F. 4TH 222 (4TH CIR. 2024)

In *Sony Music Entertainment v. Cox*, the Fourth Circuit decided that because users of Cox Communication's internet and cable television services had infringed Sony's copyrights by downloading and distributing thousands of songs without permission, Cox was properly found liable for willful contributory infringement. However, the court reversed the vicarious liability verdict and remanded for a new trial on damages because, under the Safe Harbor Provision of the Digital Millennium Copyright Act, 17 U.S.C. § 512, Cox did not profit from its subscribers' acts of infringement.

I. BACKGROUND

Defendant Cox Communication sells internet, telephone, and cable television to six million homes and businesses across the United States.¹ Plaintiffs Sony Music Entertainment and other record companies and music publishers own extensive quantities of copyrighted musical works.² Between 2013 and 2014, users of Cox's internet service infringed copyright by downloading or distributing songs without permission from Sony.³ Consequently, Sony sued Cox to hold it liable for its customers' infringement of their copyrights.⁴

Copyright owners have the exclusive right to reproduce, distribute, perform, display and prepare derivative works based upon their copyrighted works.⁵ Whenever these exclusive rights are violated by copyright infringers, the copyright owner may institute an action and receive either statutory damages or actual damages plus the infringer's profits.⁶ However, the Digital Millennium Copyright Act (DCMA), Safe Harbor Provision, protects internet service providers (ISPs), like Cox, from monetary liability only if those ISPs reasonably implement a policy to terminate repeat infringers.⁷

Here, the case proceeded to trial on two theories of secondary liability: vicarious and contributory liability.⁸ Vicarious liability for a third party's

1. *Sony Music Entertainment v. Cox Communications, Inc.*, 93 F.4th 222, 227 (4th Cir. 2024).

2. *Id.*

3. *Id.* at 228.

4. *Id.* at 227.

5. 17 U.S.C. § 106.

6. *Sony*, 93 F.4th at 227.

7. 17 U.S.C. § 512.

8. *Sony*, at 227 (4th Cir. 2024).

copyright infringement requires that the defendant 1) profits directly from the infringement and 2) has a right and ability to supervise the direct infringer.⁹ Willful contributory infringement requires a defendant causes or materially contributes to infringing conduct.¹⁰ The maximum statutory damages for contributory infringement is \$150,000 per work.¹¹ At trial in the District Court for the Eastern District of Virginia, the jury found Cox liable for both willful contributory and vicarious infringement of 10,017 copyrighted works, awarding \$99,830.29 per infringed work, for a total of \$1 billion in statutory damages, to which Cox appealed.¹²

II. ANALYSIS

A. Although Cox Does Benefit Monetarily from Subscribers' Copyright Infringement, They Cannot be Held for Vicarious Liability

First, the court began its analysis by establishing whether Cox may be held vicariously liable for their users' copyright infringement.¹³ The court stated a "defendant who 'has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities' is [vicariously] liable."¹⁴ The court reasoned that because Sony failed, as a matter of law, to prove that Cox profits directly from its subscribers' copyright infringement, it would not reach the additional question of Cox's right and ability to supervise its subscribers.¹⁵ In Cox's argument, it does not profit directly from its subscribers' infringement because subscribers pay a flat monthly fee for their internet access package, no matter what they do online.¹⁶ The court reflected that vicarious liability for copyright infringement is "an outgrowth of the agency principles of respondeat superior."¹⁷ In referencing a landmark case on vicarious liability, the court noted that when a department store was held accountable for infringing sales of "bootleg" records by a concessionaire operating in its stores, it was because the store retained the ultimate right to supervise the concessionaire and its employees, as well as receiving a percentage of record sale, whether bootleg or legitimate.¹⁸

Nonetheless, the court noted that other courts have recognized that a defendant may possess a financial interest in a third party's infringement of

9. See, e.g. *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 545 U.S. 913, 1003 (2005); *Sony Corp. v. Universal City Studios Inc.*, 464 U.S. 417, 439 (1984).

10. See, e.g. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

11. *Sony*, 93 F.4th at 229 (citing 17 U.S.C. § 504(c)(1)-(2)).

12. *Entertainment v. Cox Commc'ns., Inc.*, 93 F.4th 222, 229 (4th Cir. 2024).

13. *Id.* at 229-30 (citing *Metro-Goldwyn-Mayer Studios Inc.*, 545 U.S. at 930).

14. *Id.* at 230 (quoting from *Gershwin Publ'g. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

15. *Id.*

16. *Id.* (quoting Opening Br. 27).

17. *Id.* (quoting *Fonovisa, Inc.*, 76 F.3d at 262; see also *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001)).

18. *Sony*, 93 F.4th at 230 (referencing *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307-08 (2d Cir. 1963)).

copyrighted music even without a strict correlation between each act of infringement and profits, such as where an operator at a swap meet collected admission fees, concession stand sales and parking fees from customers who wanted to buy counterfeit recordings.¹⁹ Yet, applying these principles to copyright infringement in cyberspace, the court stated that courts and Congress agree that receiving a one-time set-up fee and flat periodic payments for service from both infringing and non-infringing users ordinarily would not constitute receiving a financial benefit directly attributable to the infringing activity, but where the value of the service lies in providing access to infringing material, those flat fees may constitute a direct financial benefit.²⁰ The court noted that the file-sharing service Napster, for example, had a direct financial interest in its users' exploitation of copyrighted music, as an increasing volume of pirated music available drew more users to register with Napster, and therefore revenue depended upon increases in its userbase.²¹ Yet, it stated America Online (AOL) was not vicariously liable for copyright infringement when there was no evidence that AOL customers either subscribed because of the available infringing material or canceled subscriptions when the material was no longer available.²² The court stated that the "crux of the financial benefit inquiry" is whether a causal relationship exists between the infringing activity and a financial benefit to the defendant.²³ Therefore, the court states that Sony had to show that Cox profited from its subscribers' infringing download and distribution of Plaintiffs' copyrighted songs, but it did not.²⁴

The court disagreed with the trial court that there was enough evidence that Cox repeatedly declined to terminate infringing subscribers' internet service in order to continue collecting their monthly fees.²⁵ Instead, the court reasoned that the continued payment of monthly fees, even by repeat infringers, was not a financial benefit "flowing directly from *the copyright infringement itself*."²⁶ The court also reasoned that Cox would receive the same monthly fees even if all of its subscribers stopped infringing, and that retaining subscriptions did not give it a financial interest in its subscribers activities, whether that be copyright infringement or any other unlawful acts.²⁷ The court also wrote that vicarious liability "demands proof that the defendant profits directly from the *acts of infringement* for which it is being held accountable."²⁸ The court refuted all of Sony's alternative theories, deciding that none raised a reasonable inference that any Cox subscriber paid more for faster internet in order to engage in copyright infringement, and that ultimately Sony offered no adequate theory to establish the required causal

19. *Id.* at 231 (citing *Fonovisa*, 76 F.3d at 263).

20. *Id.* at 233 (citing *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (quoting S. Rep. 105-190, at 44, 45 (1998))).

21. *Id.* (citing *Napster*, 239 F.3d at 1023).

22. *Id.* (citing *Ellison*, 357 F.3d at 1079).

23. *Id.* at 231.

24. *Sony*, 93 F.4th at 232.

25. *Id.* (referencing, J.A. 1499).

26. *Id.* (emphasis added).

27. *Id.*

28. *Id.* (emphasis added).

connection between subscribers' copyright infringement and increased revenue to Cox to establish vicarious liability.²⁹

B. Allowing Users to Download or Distribute on Cox's Network Constitutes Contributory Liability

Next, the court analyzed whether Cox was liable for contributory infringement.³⁰ Under contributory liability, "one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, is liable for the infringement, too."³¹ The court noted that it had recently clarified the intent necessary to prove contributory infringement by an internet service provider based on its subscribers' direct infringement in *BMG v. Cox Communications*, where it held that intent to cause infringement may be shown by "willful blindness" or "knowledge that infringement [was] substantially certain to result from the sale" of internet service to a customer.³² Under this test, general knowledge of infringement occurring on the network is not enough, and in that case, Cox could not be contributorily liable absent "knowledge that infringement [was] substantially certain to result from Cox's continued provision of Internet access to particular subscribers."³³

In this case, the court noted knowledge that particular subscribers are substantially certain to infringe is a "predictive question."³⁴ Here, the court stated that Cox did not argue to the district court, as it then appealed, that notices of past infringement failed to establish its "knowledge that the same subscriber was *substantially certain to infringe again*."³⁵ Therefore, because Cox did not press this argument in the district court, it is forfeited in its appeal.³⁶ Consequently, the court declined to consider this new issue on appeal.³⁷

Concerning the material contribution element of contributory liability, the court agreed with the district court, which declined to disturb the jury's contributory liability verdict because "sufficient evidence supported a finding that Cox materially contributed to its subscribers' direct infringement of Plaintiffs' copyrights."³⁸ It argued that a reasonable jury could have found that Cox provided service with "actual knowledge of infringement occurring on specific subscribers' accounts, yet failed to address that infringement on its network."³⁹ In the district court, all parties agreed that infringement notices

29. *Id.* at 233.

30. *Sony*, 93 F.4th at 233.

31. *Id.* (citing *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004) (quoting *Gershwin Pub.*, 443 F.2d at 1162)).

32. *Id.* at 234. (referencing *BMG Rights Mgmt. v. Cox Commc'ns*, 881 F.3d 293, 307 (4th Cir. 2018)).

33. *Id.* at 234.

34. *Id.*

35. *Sony*, 93 F.4th at 234.

36. *Id.* at 235 (citing *In re Under Seal*, 749 F.3d 276, 287 (4th Cir. 2014)).

37. *Id.*

38. *Id.*

39. *Id.* (citing *Sony Music Ent. v. Cox Commc'ns, Inc.*, 464 F. Supp. 3d 795, 816 (E.D. Va. 2020)).

to Cox of specific instances of infringement were sufficiently detailed to prove knowledge of subscribers' past infringement, and the Fourth Circuit agreed.⁴⁰

III. CONCLUSION

For the foregoing reasons, the Fourth Circuit affirmed the District Court's decision on the willful contributory liability claim but reversed and remanded on the vicarious liability claim. Cox Communications petitioned the Supreme Court of the United States for a writ of certiorari, and the Court granted the petition on June 30, 2025.⁴¹ Oral arguments in the case took place on December 1, 2025.⁴²

40. *Id.* at 234.

41. *See* Docket, *Cox Commc'ns, Inc. v. Sony Music Ent.*, No. 24-171 (U.S.), <https://www.supremecourt.gov/docket/docketfiles/html/public/24-171.html> [<https://perma.cc/EMP8-5SWH>].

42. *Id.*

