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Ronald L. Johnston, Arnold & Porter, Editor-in-Chief

Knowledge Is Not Enough: U.S. Supreme Court Limits Contributory Copyright Liability for ISPs

By David Parker and John Gary Maynard

In a 7-2 decision reversing the Fourth Circuit, the U.S. Supreme Court limited contributory copyright liability for Internet Service Providers. Writing for the majority, Justice Thomas held that an ISP's *knowledge* that its subscribers are committing copyright infringement is not sufficient to establish contributory liability. Instead, the ISP must *intend* its service to be used for infringement, which can be shown in only one of two ways—through active inducement or by providing a service tailored to infringement.

Justice Sotomayor, joined by Justice Jackson, concurred in the judgment, but disagreed that active inducement and infringement-tailored services are the only two ways to prove contributory infringement. These justices would have instead allowed for other paths to contributory infringement—including aiding and abetting liability—but ultimately concluded that

no other theory would have supported contributory infringement in this particular case.

Cox Communications, Inc. is one of the nation's largest internet service providers, serving approximately six million subscribers.

By eliminating a significant category of secondary copyright liability risk, the decision is a landmark for internet service providers, technology platforms, and any business that provides internet-connected services.

BACKGROUND

Cox Communications, Inc. is one of the nation's largest internet service providers, serving approximately six million subscribers. Like all ISPs, Cox knows which IP address corresponds to which subscriber account, but it cannot identify which individual user within a household, business, or institution is engaging in any particular activity online.

The authors, attorneys with Hunton Andrews Kurth LLP, may be contacted at dparker@hunton.com and jgmaynard@hunton.com, respectively.

Sony Music Entertainment and other major music copyright owners enlisted an outside company (MarkMonitor) to detect online infringement of their copyrights and trace the infringement to particular IP addresses. Over a roughly two-year period, MarkMonitor sent Cox 163,148 notices identifying subscriber IP addresses associated with apparent infringement. For its part, Cox maintained an escalating enforcement system: after receiving a second notice for an account, Cox sent a warning; after additional notices, it suspended service until the subscriber acknowledged the warning; and after 13 notices, it terminated the subscriber's service entirely. Cox also contractually prohibited subscribers from using their connections to infringe copyrights.

Sony nonetheless sued Cox in the Eastern District of Virginia, advancing theories of both contributory and vicarious liability. The jury found for Sony on both theories, further found Cox's infringement willful, and awarded \$1 billion in statutory damages. The Fourth Circuit affirmed as to contributory liability—reasoning that supplying a product with knowledge that the recipient will use it to infringe is sufficient—but reversed on vicarious liability and remanded for reassessment of damages.

The Supreme Court granted certiorari on the contributory liability question alone.

THE COURT'S ANALYSIS

The Majority Opinion (Justice Thomas, Joined by Six Justices)

Justice Thomas began by emphasizing that the Copyright Act does not expressly create secondary liability, and that the Court is reluctant to expand judge-made liability doctrines beyond their established boundaries. The opinion then explained that a service provider is contributorily liable for a subscriber's infringement *only* if it intended the service to be used for infringement. Importantly, that intent can be demonstrated in just two ways:

- *Inducement*: The provider actively encouraged infringement through specific acts—such as promoting or marketing its service as a tool for infringement, as in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*¹
- *Tailored service*: The provided service is not capable of substantial or commercially significant noninfringing uses—drawing on the standard from *Sony Corp. of America v. Universal City Studios, Inc.*²

Applying this framework, the Court found that Cox satisfied neither prong. First, Cox did not induce infringement: it never promoted its service as a tool for piracy, and it actively discouraged infringement through warnings, suspensions, and account terminations. Second, Cox's internet service was also plainly capable of substantial noninfringing uses—internet access is used for countless lawful purposes every day.

Justice Sotomayor agreed that Cox is not liable on this record, but wrote separately to criticize the majority's framework as unnecessarily rigid.

The majority expressly rejected the Fourth Circuit's holding that knowledge alone suffices. Drawing on its precedents in *Kalem Co. v. Harper Brothers*,³ *Sony*, and *Grokster*, the Court reiterated that mere knowledge that a service will be used to infringe—or a failure to take affirmative steps to prevent infringement—is insufficient to establish the intent required for contributory liability.

The Sotomayor Concurrence (Joined by Justice Jackson)

Justice Sotomayor agreed that Cox is not liable on this record, but wrote separately to criticize the majority's framework as unnecessarily rigid. Her concurrence made two principal points.

First, she argued that the majority's two-track framework is inconsistent with *Sony* and *Grokster*, which preserved other common-law theories of secondary liability. She contended that aiding-and-abetting liability, for example—a well-established common-law doctrine—should remain available in copyright cases. But she nevertheless concluded that Cox could not be held liable under such a theory because the plaintiffs failed to prove the necessary intent.

Second, she reasoned that the majority's rule effectively renders the safe-harbor provision in the Digital Millennium Copyright Act obsolete. This provision protects ISPs from secondary copyright liability if they “adop[t] and reasonably implement[] . . . a policy that provides for the termination in appropriate circumstances” involving repeat infringers. But because ISPs no longer face realistic secondary-liability exposure for copyright infringement on their networks, they have no incentive to implement repeat-infringer policies or otherwise police their networks. As Cox's own counsel conceded at oral argument, the safe harbor

will not do anything going forward under the majority's rule.

PRACTICAL IMPLICATIONS

Cox Communications is a significant win for service providers and a potentially transformative decision for the digital economy. Several practical implications merit attention:

- *ISPs gain broad protection from knowledge-based copyright claims.* Under the Court's framework, an ISP cannot be held contributorily liable for its subscribers' copyright infringement solely because it knew about the infringement and continued to provide service. This eliminates the legal theory that underpinned the original \$1 billion verdict against Cox and that had been endorsed by the Fourth Circuit. ISPs that receive notice of a subscriber's infringement can no longer face contributory liability exposure merely for continuing to serve the flagged account.
- *The DMCA safe harbor is now less important.* Because ISPs no longer face the predicate liability that the DMCA's safe harbor was designed to shield against, the statutory incentive to maintain and enforce repeat-infringer policies is substantially weakened. ISPs may reevaluate the costs and burdens of their existing enforcement programs.
- *The decision's logic extends beyond ISPs.* The Court's holding is framed in terms of "service providers" generally, not ISPs specifically. Cloud computing

platforms, web-hosting services, content delivery networks, and other businesses that provide internet-connected infrastructure used by third parties for both lawful and unlawful purposes may benefit from the same reasoning. Any service that is capable of substantial noninfringing uses and that does not actively induce infringement should fall outside the scope of contributory liability under this framework.

- *Copyright owners will need new enforcement strategies.* With secondary liability against ISPs largely foreclosed, copyright holders will need to rely more heavily on other mechanisms: direct actions against individual infringers, DMCA takedown notices directed at hosting platforms (which remain governed by §512's notice-and-takedown procedures), and potentially legislative reform.
- *Vicarious liability remains a live theory.* The Court did not address vicarious liability, which the Fourth Circuit had already reversed on the facts of this case. Copyright owners may continue to pursue vicarious-liability claims where they can demonstrate that a provider has both the right and ability to supervise the infringing activity and a direct financial interest in the infringement.

Notes

1. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).
2. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).
3. Kalem Co. v. Harper Brothers, 222 U.S. 55 (1911).

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