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Supreme Court Rules ISPs Not Liable for Users' Copyright Infringement, Reversing Billion-Dollar Verdict

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Today, in [*Cox Communications, Inc. v. Sony Music Entertainment*](#), the Supreme Court unanimously ruled that Cox Communications, an internet service provider, is not liable for copyright infringement committed by subscribers who illegally share songs, movies, and other protected works online through Cox's internet service. The Court's decision reversed Sony's billion-dollar jury verdict against Cox.

Sony sued Cox for copyright infringement, asserting that Cox was secondarily liable for copyright infringement undertaken by Cox subscribers using the internet services provided by Cox. Sony argued that Cox was liable for contributory infringement because Cox actually knew subscribers were sharing copyrighted works, based on takedown notices provided to it by Sony and others, but Cox continued to provide internet services to them. The jury agreed and the Fourth Circuit affirmed in relevant part.

The Supreme Court reversed, holding that "a company is not liable as a copyright infringer for merely providing a service to the general public with knowledge that it will be used by some to infringe copyrights." The majority opinion, authored by Justice Thomas, explains that the Court recognizes two categories of secondary liability for copyright infringement: contributory and vicarious. A service provider may be held contributorily liable for its user's copyright infringement only if it *intended* that its service be used for infringement. To establish the requisite intent, the copyright owner must show the service provider induced the infringement by actively encouraging it through specific acts, or that the service itself is tailored to the infringement, meaning that it is not capable of substantial or commercially significant non-infringing uses. At trial, Sony failed to show that Cox either promoted its service as a tool for infringement or tailored it to make infringement easier. It was therefore not enough, the Court reasoned, that Cox knew its subscribers were using Cox's services to infringe Sony's copyrights and failed to take adequate steps to stop that infringement.

The Court also rejected Sony’s argument that contributory liability should be construed more broadly, because otherwise the Digital Millennium Copyright Act safe harbor would have little practical effect. The safe harbor protects internet service providers from certain forms of secondary copyright liability if they have adopted and reasonably implemented “a policy that provides for the termination in appropriate circumstances of subscribers and account holders” who “are repeat infringers.” 17 U.S.C. § 512(i)(1)(A). The Court held that although the DMCA “create[d] new *defenses* to liability,” it did not affect Sony’s failure to introduce evidence establishing the essential elements of contributory liability.

Justice Sotomayor, joined by Justice Jackson, concurred in the judgment only. Although she agreed that Cox was not liable, Justice Sotomayor took issue with the majority’s holding that there are only two forms of secondary liability available for copyright infringement—vicarious liability and contributory liability. Justice Sotomayor urged that the “Court’s precedents have left open the possibility that other common-law theories of such liability, like aiding and abetting, could apply in the copyright context.”

The *Cox Communications* decision is a significant victory for internet service providers and other providers whose services could be used to commit copyright infringement. The Court confined contributory liability to two established theories: inducement and the provision of a service specifically designed to facilitate infringement. It also drew a clear line between knowledge and intent, holding that knowledge alone is not enough to establish liability—even when a service provider declines to terminate a known infringer’s service, at least for a business like an ISP that provides a neutral service that is readily used for both lawful and illegal uses. Going forward, copyright holders will face a steeper challenge in seeking to impose contributory liability on entities that provide such general-use services to a large base of customers.

Read alongside the Supreme Court’s recent decisions in *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos* and *Twitter v. Taamneh*, the decision continues the Court’s reluctance to expand secondary liability. Later this term, the Court will also hear *Hikma Pharmaceuticals v. Amarin Pharma, Inc.*, a case involving induced patent infringement in the skinny-label generic pharmaceutical industry. That will provide yet another data point in assessing the Court’s thinking on inducement liability.

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