

When Does a Service Provider Become Liable for Its Users' Piracy? The Supreme Court Grants Cert in *Cox v. Sony* to Address Issues of Contributory Infringement and Willful Infringement

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Twenty years ago, the Supreme Court held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005). In the *Grokster* case, the Supreme Court found that peer-to-peer file sharing companies could be liable for copyright infringement for their users’ deployment of file sharing software. There, the Court found that liability was warranted because the file sharing companies knew that its users were infringing, and the companies materially contributed to that infringement.

Since *Grokster*, courts have had to determine whether internet service providers (who are not direct infringers) can be held liable when they know that their users are using their services, *i.e.*, the internet, to distribute infringing materials. Appellate courts have developed three approaches: (1) the Second and Tenth Circuits require knowledge and some affirmative steps taken by the ISP to assist, aid, or promote infringement; (2) the Ninth Circuit likewise requires knowledge, but also requires an ISP to take reasonable steps to remove the infringing materials if it does have knowledge; and (3) in 2018 the Fourth Circuit concluded that an ISP could not be contributorily liable without “knowledge that infringement [by a subscriber was] substantially certain to result from [the ISP’s] continued provision of Internet access to particular subscribers.” See *BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293, 311-12 (4th Cir. 2018) (“Put another way, the proper standard requires a defendant to have specific enough knowledge of infringement that the defendant could *do* something about it.”).

Doctrinally, of course, this is interesting. But, as Cox Communications learned, this Circuit split can mean literally billions of dollars for ISPs. Cox, which provides internet services to millions of people, received notices from Sony and others that certain users were using their service to infringe. Cox responded with warnings to users, temporary service suspensions, and sometimes termination of service. But not all who infringed had their services terminated. As a result, Sony and others sued. A jury awarded Sony and its fellow plaintiffs \$1 billion in statutory damages, concluding that Cox materially contributed to the copyright infringement of its users and that it did so willfully.

On appeal, the Fourth Circuit affirmed the award. The Fourth Circuit reasoned that Cox materially contributed to the infringement of its users because internal emails “impl[ied] that Cox continued providing internet service to certain habitual infringers despite believing they would infringe again.” *Sony Music Ent. v. Cox Commc’ns, Inc.*, 93 F.4th 222, 234 (4th Cir. 2024). It then upheld the finding of willfulness, based only on a finding of contributory liability.

On June 30, 2025, **the Supreme Court granted cert** to address two questions—first, whether Cox can be liable for infringement, and, second, whether Cox’s conduct could be considered willful under the Copyright Act.

The Supreme Court’s decision next term will reshape the future of copyright litigation:

- It will immediately impact ISPs. And a win for Cox will remove (or curtail) a way for copyright holders to enforce their copyrights.
- As for willfulness, it is often difficult to accurately calculate actual damages in online copyright piracy litigation. Thus, plaintiffs often seek statutory damages, and often also contend that the infringement is willful. The Supreme Court’s decision on the knowledge required to establish willfulness may transform the potential damages available to plaintiffs moving forward.

As this case moves through the Supreme Court, we intend to monitor the developments and will provide updates on its progress.

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