

No. 22-1053

IN THE

Supreme Court of the United States

ABKCO MUSIC, INC., ET AL.

Petitioners,

v.

WILLIAM SAGAN, ET AL.,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second
Circuit**

BRIEF OF *AMICUS CURIAE* THE MOTION PICTURE
ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

ROSE LEDA EHLER
LORRAINE L. ABDULAHAD*
MUNGER, TOLLES & OLSON
LLP
350 S. Grand Ave.
50th Floor
Los Angeles, CA 90035
rose.ehler@mto.com
(213) 683-9240

*Admitted in New York.

DONALD B. VERRILLI, JR.
Counsel of Record
MUNGER, TOLLES & OLSON
LLP
601 Massachusetts Ave.
NW
Ste 500 E
Washington, DC 20001
donald.verrilli@mto.com
(202) 220-1100

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

The Motion Picture Association, Inc. (“MPA”) is a not-for-profit trade association founded in 1922.¹ The MPA serves as the voice and advocate of the film and television industry, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and bringing entertainment and inspiration to audiences worldwide.

The MPA’s member companies are Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, Warner Bros. Entertainment Inc., and Netflix Studios, LLC. These entities and their affiliates are the leading producers and distributors of filmed entertainment in the United States through the theatrical and home entertainment market.

The MPA’s members make substantial creative and financial investments in their copyrighted works. They depend upon the protection afforded by the Copyright Act to safeguard their works from the threats posed by online piracy. The MPA accordingly has a strong interest in the proper application of the Copyright Act, including the standard for determining when a defendant may be liable for direct copyright infringement.

¹ Pursuant to this Court’s Rule 37.2, counsel of record for all parties received notice, at least 10 days prior to the due date, of *Amicus’s* intention to file this brief. Pursuant to Rule 37.6, *Amicus* confirms that no counsel for a party authored this brief in whole or in part, and no person other than *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the Second Circuit—which adjudicates many of the nation’s most important copyright cases—has dramatically narrowed the scope of actionable direct copyright infringement by holding that only those who commit infringement by their “own hand”—that is, only those who “who actually press[] the button,” Pet. App. 21a, 22a—may be held liable as direct infringers. In so doing, the court of appeals absolved from all direct liability the respondent, William Sagan, who owned and operated website businesses that engaged in massive infringement of copyrighted recordings of concert performances, personally selected the recordings that were uploaded to the website, and personally directed an employee (his brother-in-law) to “press the button” to upload the infringing content.

That ruling lacks any grounding in the text of the Copyright Act or this Court’s precedents, and it flouts well-established principles of tort and agency law that have long been understood by this Court and others to apply in copyright cases. It is no less true in copyright infringement cases than in other tort cases that “[o]ne who orders an act to be done is liable for its consequences as he would be for his own personal conduct[.]” Restatement (Second) of Torts § 877 cmt. a (1979). Likewise, in copyright infringement cases as in other tort cases, a “principal is subject to [direct] liability . . . when an agent acts with actual authority in committing a tort” and “the principal wishes the agent so to act.” Restatement (Third) of Agency § 7.03 cmt. b (2006). These principles govern direct liability in both civil and criminal contexts, including in patent law, which shares a kinship with copyright. By

engrafting a heightened “volitional conduct” requirement (*i.e.* actually pressing the button) onto the established test for causation in direct infringement cases, the Second Circuit has departed sharply from these bedrock tort and agency principles, and created a direct and intolerable conflict with the law of the First and Ninth Circuits. See *Soc’y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 57 (1st Cir. 2012); *Bell v. Wilmott Storage Servs., LLC*, 12 F.4th 1065, 1081 (9th Cir. 2021).

Most alarmingly from the MPA’s perspective, the ruling amounts to an open invitation to the burgeoning copyright piracy industry to exploit the Second Circuit’s “press the button” standard by structuring its behavior to make effective copyright enforcement even more difficult or impossible. The MPA’s members routinely bring direct infringement claims seeking preliminary injunctive relief to stop infringement and hold pirates accountable for their content theft. Until now, those cases have been decided without any serious dispute over whether the masterminds behind such pirate schemes can be held directly liable whether or not they actually “press the button.” If the Second Circuit’s ruling stands, however, defendants will have a ready means at hand to evade responsibility by obscuring evidence or pointing the finger at someone (or something) else. It is no answer that copyright owners could assert direct liability against the person who pressed the button. That person may be judgment-proof, may be outside the court’s jurisdiction, or may not be a person at all—*i.e.*, a robot. Such a rule would also not deter the mastermind behind the scheme. Nor are secondary liability theories the answer. Pirates already go to great lengths to obscure their responsibility for infringement and, if direct liability is not available,

will disclaim knowledge or hide financial benefits to frustrate imposition of any liability at all.

Review by this Court is both amply justified and urgently needed.

ARGUMENT

I. The Second Circuit's Rule Is Misconceived.

1. This should have been a straightforward case. There are only two elements of direct infringement: (1) ownership of a valid copyright, and (2) unauthorized copying, distributing, or exercise of another exclusive right. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Both elements are easily met here: (1) the copyright owners own the musical works; and (2) the musical works were digitized (i.e., copied), and made available for download online (i.e., distributed), without authorization from the copyright owners.

It is equally obvious that respondent Sagan is the individual liable for this direct infringement. Under well-established principles of tort and agency law—which are fully applicable in copyright infringement cases—someone who “orders an act to be done” or “directs[]” the acts of another is directly liable for the result. Restatement (Second) of Torts § 877 cmt. a; see also Restatement (Second) of Agency § 212 (1958) (“A person is subject to liability for the consequences of another’s conduct which results from his directions as he would be for his own personal conduct if, with knowledge of the conditions, he intends the conduct, or if he intends its consequences[.]”).

That is precisely what Sagan did. He established and served as President and CEO of an enterprise that commercialized copyrighted works he did not own.

Pet. App. 4a. He acquired physical copies of many concert recordings, including the archives of the famous concert promoter Bill Graham. *Id.* When he purchased the archives, Sagan was expressly advised by the sellers that he “may be buying the world[’s] greatest private collection [of recordings] that no one will ever hear” because no artist or other rightsholder had approved reproduction or distribution of the recordings. *Id.* at 2a, 4a. Undeterred, Sagan expanded his collection of recordings over the years, again without obtaining copyright owner authorizations. *Id.* at 4a-5a. Once he possessed the recordings, Sagan then set about making them available for streaming and download on numerous websites that he controlled. *Id.* at 5a. Sagan personally “plan[ned]” the digitizing (i.e., copying) of the works and personally “instructed” his employee as to “which concerts to make available for download” (i.e., distributing). *Id.* at 22a. His direct responsibility for the infringement could hardly be clearer.

2. The Second Circuit nonetheless absolved Sagan of direct liability because there was no evidence that the physical act of copying was done by Sagan’s “own hand.” *Id.* at 21a. By narrowing the scope of direct copyright infringement in this way, the Second Circuit broke sharply with established law. “American copyright law has never required that liability for direct infringement be imposed only on the individual who presses the ‘record’ button; anyone sufficiently implicated in the final result will be held to account.” P. Goldstein, *Goldstein on Copyright* § 7.0.2 (2023). And this Court has never endorsed such a requirement. To the contrary, it has found direct infringement without any suggestion that such a showing was necessary. See *Am. Broad. Companies, Inc. v. Aereo, Inc.*, 573 U.S. 431, 433, 436 (2014)

(holding that the defendant was directly liable for infringement by selling a service that allowed a subscriber to watch copyrighted television programs at nearly the same time as the live broadcast, even though the system remained “inert” until the subscriber selected the program for viewing); *New York Times Co. v. Tasini*, 533 U.S. 483, 503-04 (2001) (holding that a database system that stores and retrieves articles in response to users’ requests directly infringes “the Authors’ exclusive right to control the individual reproduction and distribution of each Article”).

The Second Circuit’s understanding of what constitutes direct responsibility is deeply anomalous. In addition to being irreconcilable with basic tort and agency law principles, see *supra* pp. 4-5, the Second Circuit’s rule is also inconsistent with patent law, which holds defendants directly liable for the obvious and direct consequences of their orders to a third party. See 5 D. Chisum, *Chisum on Patents* § 16.06 (2023) (explaining that “courts use standard principles of agency law” in determining when a principal is directly liable for “the infringing acts of an agent or servant”); *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1023 (Fed. Cir. 2015) (“[A]n actor is liable for infringement . . . if it acts through an agent (applying traditional agency principles)[.]”). Patent law’s treatment of direct liability is particularly informative, given “the historic kinship between patent law and copyright law.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984); cf. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 932 (2005) (explaining that this Court’s analysis of contributory liability in copyright law drew from analogous patent law principles). And it departs from established criminal law as well. See

United States v. Gooding, 25 U.S. 460, 469 (1827) (“[I]t is the known and familiar principle of criminal jurisprudence, that he who commands, or procures a crime to be done, if it is done, is guilty of the crime, and the act is his act.”); 18 U.S.C. § 2(b) (“Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.”).

3. The Second Circuit’s adoption of a heightened causation standard for direct infringement in this case can be traced to that court’s prior ruling in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, which involved a passive “system that automatically produce[d] copies on command.” 536 F.3d 121, 132 (2d Cir. 2008) (“*Cablevision*”). While the particular facts of *Cablevision* led that court to focus on “who actually presses the button,” *id.* at 131, in order to establish causation, it makes no sense to convert *Cablevision*’s context-specific inquiry into a heightened causation requirement that copyright plaintiffs must prove *in every case* to establish direct liability.

a. Most direct infringement cases are decided without any need to analyze causation because its existence is obvious. But with the advent of the internet, there emerged a small line of cases involving passive internet service providers that questioned the outer boundaries of direct liability. In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, the court addressed the then-novel question of how to apply copyright law’s strict liability regime to passive, automated systems that are used by third parties to make infringing digital copies of copyrighted works. 907 F. Supp. 1361, 1368-73 (N.D. Cal. 1995). The *Netcom* court, fearful of adopting a

causation standard that would “hold the entire Internet liable,”² *id.* at 1372, concluded that “there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party,” *id.* at 1370.

In *Cablevision*, the Second Circuit drew on *Netcom* in a direct infringement case involving a remote digital video recording (DVR) system that allowed cable subscribers to record television programs on equipment housed and maintained by the cable provider and watch them later at their convenience. *Cablevision*, 536 F.3d at 123-24, 130-31. Once the subscriber selected a program to record, Cablevision’s remote DVR system automatically created a copy of the program in response to the customer’s request. *Id.* at 130. The question in the case was whether Cablevision itself should be held liable for direct infringement in addition to a subscriber who used the system to make infringing copies of copyrighted works. In the view of the Second Circuit, Cablevision did not proximately cause the direct infringement merely by virtue of designing, operating, and making the automated system available to its subscribers. The *Cablevision* court therefore required additional volitional steps on the part of the company in causing the copies to be made to justify imposing liability for direct infringement. Because proof of such additional steps was not presented to the court’s satisfaction, the court held that the company was not liable as a direct infringer. *Id.* at 131-33.

² Congress ultimately addressed this concern through statute, adopting the “safe harbor” provisions of the Digital Millennium Copyright Act. *See* 17 U.S.C. § 512.

b. One can debate whether the *Cablevision* court was correct that additional evidence of “volitional conduct” beyond generally designing, operating, and making available an automated system should be required to establish proximate cause in the context of a passive, automated copying system. What matters for present purposes is that the need for specific proof of volitional conduct does not arise “in most direct-infringement cases.” *Aereo*, 573 U.S. at 454 (Scalia, J., dissenting) (explaining that, as applied by lower courts, the additional volitional-conduct inquiry becomes relevant only “when a direct-infringement claim is lodged against a defendant who does nothing more than operate an automated, user-controlled system”). That is why other courts applying a volitional conduct requirement have framed the inquiry as reflecting “the unremarkable proposition that proximate causation historically underlines copyright infringement liability no less than other torts.” *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 731 (9th Cir. 2019).

In most direct infringement cases—and certainly in this case—the existence of volitional conduct is so obvious that no additional analysis is needed to establish proximate cause. Volition, after all, simply reflects “the choice to do something.” W. Patry, *Patry on Copyright* § 9:5.50 (2023). To be sure, tort liability will not attach to, for example, an involuntary muscle contraction; rather, “some outward manifestation of the defendant’s will is necessary to the existence of an act which can subject him to liability.” Restatement (First) of Torts § 2 cmt. a (1934) (“There cannot be an act without volition.”). But where, as here, a defendant chooses what copyrighted works to infringe and specifically directs the making and distribution of infringing copies of those works, it is perfectly clear

that the defendant has proximately caused the infringement and should be held liable as a direct infringer. By uncritically transforming *Cablevision's* context-specific volitional conduct inquiry into a generally applicable requirement that direct infringement cannot be established without proof that the defendant “actually presses the button,” the Second Circuit’s decision threatens to seriously destabilize copyright law.

II. The Decision of the Second Circuit Conflicts with the Law of the First and Ninth Circuits.

The Second Circuit’s rule that *any* defendant who directs, controls, and actively participates in copyright infringement can escape liability for direct infringement as long as his hand did not physically press the button conflicts with the law of the First and Ninth Circuits, and exacerbates confusion in the lower courts.

1. As the Petition explains, the decision below puts the Second Circuit squarely in conflict with the First Circuit, which—when faced with indistinguishable facts—found an infringer directly liable even though he had ordered someone else to actually upload the copyrighted content to his website. See *Gregory*, 689 F.3d at 54-58. In *Gregory*, the Society of the Holy Transfiguration Monastery alleged that an archbishop of a different monastery had posted unauthorized copies of the Monastery’s religious texts to his website. The archbishop sought to avoid direct liability by arguing that “he himself did not volitionally copy or post the [copyrighted works]” to his website; rather, he had instructed a priest to post the works. 689 F.3d at 54. Relying on well-established agency principles, the First Circuit rejected that

argument and held that the archbishop had “engaged in sufficient acts of authority and control over the server and material actually posted that he may be held liable for direct infringement.” *Id.* at 57. Had the First Circuit’s analysis been applied to the facts here, respondent Sagan would certainly have been held liable as a direct infringer.

Of at least equal importance from the MPA’s perspective, the Second Circuit’s decision also conflicts with the law of the Ninth Circuit, which imposes no requirement that a defendant has “pressed the button” before finding direct infringement. To the contrary, the Ninth Circuit has recognized that “infringement by authorization is a form of direct infringement[.]” *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 970 (9th Cir. 1992). Consistent with this principle, the Ninth Circuit has squarely held that a website owner “who exercise[s] control or select[s] any material for upload, download, transmission, or storage” is subject to liability for direct infringement. *Bell*, 12 F.4th at 1081 (citation and internal quotation marks omitted). In *Bell*, the plaintiff sued for copyright infringement after finding a photograph he had taken of the Indianapolis skyline on Wilmott’s website. *Id.* at 1069-70. Wilmott had acquired the website from a third party, and the infringing photograph was likely present on the website at the time of acquisition. *Id.* at 1070. Because Wilmott did not even know the infringing photograph was on its website until the plaintiff contacted the company, he contended that he lacked the requisite volition to be a direct infringer. *Id.* at 1081. The Ninth Circuit rejected that argument, reasoning that Wilmott’s actions of “assuming responsibility for and maintaining the server” sufficed to impose direct liability for infringement, even though Wilmott did not

personally post the infringing photograph. *Id.* at 1081-82.

If the Ninth Circuit could find Wilmott—who did not “press[] the button” to post the infringing photograph—directly liable for infringement, it would have no trouble holding Sagan directly liable for ordering his employee to post copyrighted works that he personally selected with the full knowledge that he lacked the authorization to copy the works. See also *Zillow*, 918 F.3d at 731 (“[D]irect liability must be premised on conduct that can reasonably be described as the direct cause of the infringement.”) (emphasis removed); *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 667 (9th Cir. 2017) (“[T]he distinction between active and passive participation remains a central part of the analysis of an alleged infringement.”) (citation and internal quotation marks omitted).³

The conflict between the decision below and the First Circuit is bad enough, and provides ample reason for this Court to grant review. The conflict with the Ninth Circuit—which, like the Second Circuit, adjudicates a disproportionate share of the nation’s important copyright cases—makes the case for review

³ The Third Circuit has similarly held, in the context of a business that provided rooms with cassette players in which customers may view video cassettes made available by the business, that a defendant “may still be responsible as an infringer even though it does not actually operate the video cassette players.” *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 62 (3d Cir. 1986).

especially strong.⁴ It should not be the case that the exact same conduct would subject a defendant to liability in the Ninth Circuit (or the First Circuit) but not in the Second Circuit. This injustice is particularly acute in the context of digital piracy. An infringer’s residence and conduct in a particular location may limit where copyright owners can bring a lawsuit, *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201 (9th Cir. 2020), but because an unauthorized copy uploaded in one location is instantaneously accessible everywhere else, regardless of where the infringer is physically located, the harm to MPA’s members extends beyond jurisdictional borders.

2. Resolving the conflict created by the Second Circuit’s decision would also provide needed guidance as to what, if anything, the “requirement” of “volitional conduct” adds to established proximate cause analysis. See, e.g., Robert C. Denicola, *Volition and Copyright Infringement*, 37 *Cardozo L. Rev.* 1259, 1260-61 (2016) (“Several federal court decisions have expressed uncertainty about the existence of a volition requirement”); Rebecca Giblin & Jane C. Ginsburg, *We (Still) Need To Talk About Aereo: New Controversies and Unresolved Questions after the Supreme Court’s Decision*, 38 *Colum. J.L. & Arts* 109, 143 (2015) (“Whether or to what extent ‘volition’ is in fact a predicate to a finding of infringement . . . invites

⁴ The Judiciary Data and Analysis Office of the Administrative Office of the U.S. Courts reports that 22 percent of national copyright cases have been filed in California, followed by New York with 15 percent of the nation’s copyright cases. *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark*, U.S. Courts (Feb. 13, 2020), <https://www.uscourts.gov/news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark>.

debate.”). Indeed, the authors of the leading treatises on copyright law cannot even agree on what “volitional conduct” means. *Compare* M. Nimmer & D. Nimmer, Nimmer on Copyright § 13.08 (2023) (stating that volitional conduct “simply stands for the unremarkable proposition that proximate causation historically underlines copyright infringement liability no less than other torts”) *with* Patry on Copyright § 9:5.50 (arguing that the Nimmer treatise “misstates proximate cause as a tort concept, bungles the concept of volitional conduct, and collapses proximate cause with volitional conduct”).

Confusion as to the meaning of “volitional conduct” has led district courts to diverge on nearly identical fact patterns. For example, two courts reached different outcomes in cases involving virtually identical photo-personalization services through which users submit images for printing on products such as mugs. In *Wolk v. Kodak Imaging Network, Inc.*, even though Kodak indisputably made the products reproducing copyrighted images, the court nonetheless absolved Kodak from direct liability based on a lack of volitional conduct, reasoning that Kodak’s copying was “an automated process with no human intervention by any employee of [Kodak].” 840 F. Supp. 2d 724, 742 (S.D.N.Y. 2012), *aff’d sub nom. Wolk v. Photobucket.com, Inc.*, 569 F. App’x 51 (2d Cir. 2014). In another case involving an *identical* photo-personalization service, a California district court found that the defendant “engage[ed] in at least some volitional conduct,” because the defendant’s employees “operat[ed] the machinery” used to create the infringing items, and the defendant had failed to contend that its production process was “completely automated and thus devoid of human employees engaging in volitional conduct.” *Gardner v. CafePress*

Inc., No. 13-1108, 2014 WL 6890934, at *5 (S.D. Cal. Dec. 4, 2014). In both cases, the companies were making the infringing copies. The divergent analyses of volitional conduct effectively turned on whether a human was involved or if technology did the copying.⁵ Such a “robot exception” that treats digital intermediaries differently from human ones makes no sense. Properly understood, direct liability requires a more reasoned analysis. See, e.g., *Capitol Recs., LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 657 (S.D.N.Y. 2013), *aff’d*, 910 F.3d 649 (2d Cir. 2018) (rejecting arbitrary human-robot distinction and imposing direct liability where defendant’s “founders programmed their software to choose copyrighted content”).

III. The Second Circuit’s “Press the Button” Test for Direct Infringement Is a Serious Threat to the Motion Picture Industry.

The MPA’s members collectively invest billions of dollars annually to create and disseminate copyrighted movies and TV shows. Online piracy poses an increasingly grave threat to the value of that investment, and the Second Circuit’s “press the button” requirement hands copyright pirates an easily executed blueprint for structuring their operations to avoid direct liability, making it much more difficult to hold pirates to account for their theft and the resulting damage.

1. The MPA’s members create many of the world’s most popular and critically acclaimed motion

⁵ The courts are not even consistent on this point. The Fourth Circuit found an internet service provider not directly liable *even though* its employee was the last actor to literally “press the button” reproducing the copyrighted work. See *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 546-47 (4th Cir. 2004).

pictures and television programs. Beyond their inherent artistic and entertainment value, these copyrighted works contribute substantially to the U.S. economy. In 2019, copyright-intensive industries added \$1.3 trillion to the U.S. economy and directly employed over 6.6 million workers. Office of the U.S. Trade Representative, *2022 Review of Notorious Markets for Counterfeiting and Piracy* 5 (2022). The American film and television industry alone supports 2.4 million jobs and pays \$186 billion in total wages. Motion Picture Association, *The American Motion Picture and Television Industry: Creating Jobs, Trading Around the World* (2021).

Piracy poses a significant threat to the creative marketplace and to the U.S. economy. A recent Chamber of Commerce report estimates that global online piracy of copyrighted movies and TV shows cost the U.S. economy at least \$29.2 billion and as much as \$71 billion in lost revenue each year. David Blackburn et al., U.S. Chamber of Commerce, *Impacts of Digital Video Piracy on the U.S. Economy* 1 (2019). Unauthorized online streaming services—like the websites that Sagan operated—are, by far, the largest source of piracy today. *Id.* Pirate streaming services account for more than 80% of the approximately 26.6 billion unauthorized viewings of U.S.-produced movies and 126.7 billion unauthorized viewings of U.S.-produced TV episodes each year. *Id.* at 1, 5. The effects of this piracy reach far beyond the MPA's member companies; the many individuals who depend for their livelihoods on the creation and distribution of motion pictures and television programs are harmed in direct and tangible ways by the lost revenue that results from this illicit activity.

2. The MPA employs nearly a hundred investigators who work to identify and devise strategies to attack a complex underground web of bad actors engaged in online piracy. See, e.g., Bob Verini, *MPA Content-Protection Wing's War Against Piracy: 'We Will Find You and Shut Down Your Servers'*, *Variety* (Mar. 9, 2022), <https://variety.com/2022/biz/news/motion-picture-association-antipiracy-1235199141/>. Their targets include stream-rippers—the modern equivalent of bootleggers—who create perfect digital pirated copies of movies, TV shows, or illicit live streams of TV channels; black-market distributors who serve as kingpins, selling the illicit content; and downstream resellers who offer myriad forms of unauthorized access to often-unwitting consumers at prices that undercut the legitimate market and, in some cases, infect consumer devices with malware or steal consumer identities.

Sometimes—when lesser efforts like a cease-and-desist letter do not work—the MPA members must bring copyright infringement actions to stop ongoing harm that threatens to multiply at scale.⁶ In most

⁶ See, e.g., *Warner Bros. Ent. Inc. v. Tusa*, No. 21-05456, 2021 WL 4815947 (C.D. Cal. Aug. 16, 2021) (preliminary injunction); Preliminary Injunction, *Disney Enters., Inc. v. TTKN Enters., LLC*, No. 20-07274 (C.D. Cal. Sept. 8, 2020), ECF No. 27; *Columbia Pictures Indus., Inc. v. Galindo*, No. 20-03129, 2020 WL 3124347 (C.D. Cal. May 11, 2020) (preliminary injunction); Permanent Injunction, *Paramount Pictures Corp. v. Omniverse One World Television, Inc.*, No. 19-01156 (C.D. Cal. Nov. 14, 2019), ECF No. 60; *Amazon Content Servs., LLC v. Set Broad., LLC*, No. 18-03325, 2019 WL 3538973 (C.D. Cal. July 31, 2019) (granting default judgment and permanent injunction); Permanent Injunction, *Netflix Studios, LLC v. Dragon Media Inc.*, No. 18-00230 (C.D. Cal. Jan. 29, 2019), ECF No. 59; *Disney Enters., Inc. v. VidAngel Inc.*, No. 16-04109, 2019 WL 4565168 (footnote continued)

such cases, the copyright owners come to court with evidence sufficient to establish a clear case against the known individual(s) behind the infringing scheme and argue their likelihood of success to obtain the necessary preliminary injunction.

But that appears to no longer be enough in the Second Circuit, because the modus operandi of all but the most naïve pirates is to obscure their direct, physical involvement in infringing schemes, even if such actors do “press the button.” This significantly impedes the MPA’s efforts to stop piracy quickly and at its source, potentially rendering preliminary injunctive relief illusory in direct infringement cases. For example, a district court in the Second Circuit may deny preliminary injunctive relief to copyright plaintiffs for lack of proof where a copyright pirate offers infringing copies on a website (say, *piratemovies.com*), the individual defendant is the sole proprietor of the shell company used to register the website, but MPA members simply lack evidence that the defendant (rather than his brother-in-law, some third party, or some automated technology) “pressed the button” to rip the infringing copy of the movie or upload it for streaming.

Further, infringers who are aware of the rule—as sophisticated pirates will surely be—can evade responsibility merely by setting up their infringing scheme to avoid “pressing the button” themselves. Pirate enterprises could simply hire someone else to upload the stolen content. The individual behind an infringing scheme could argue that he is not liable for

(C.D. Cal. Sept. 5, 2019) (permanent injunction); Permanent Injunction, *Universal City Studios Prods. LLLP v. TickBox TV LLC*, No. 17-07496 (C.D. Cal. Sept. 12, 2018), ECF No. 72.

direct infringement because he designed technology that automatically—i.e., without the need for anyone to press a button—created infringing copies of any new movie or TV series added to a streaming service.

The Second Circuit did not just narrow the scope of direct liability. It created a set of cases in which, contrary to established principles of tort and agency law, a court could conclude that *no party* is liable for direct infringement. For example, if a mastermind of an infringing scheme living in the United States directs his associates who live overseas to “press the button,” a court could find copyright law’s rule against extraterritorial application renders no party liable for direct infringement. See *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088 (9th Cir. 1994). Likewise, infringing enterprises could build steps of automation into the technology they use and argue that the technology—not any human operators—supplies the “volition” and “cause” for the infringement. See *supra* pp. 14-15. At its worst, the Second Circuit’s rule lets the most culpable infringers get away with direct infringement, when no one can seriously dispute that they are responsible for the infringement.

3. The possibility of secondary liability under the doctrines of vicarious liability and contributory infringement is no answer to the problem created by the Second Circuit’s “press the button” test. In many cases, applying secondary, rather than direct, liability theories will distort the inquiry by focusing on the conduct of the wrong individual (i.e., the customer or user, rather than the commercial operator whose actions are most relevant to evaluating the infringing activity). They also have additional requirements that can be difficult to establish, particularly at the crucial

preliminary injunction phase, and that also invite gamesmanship.

a. As an initial matter, secondary liability requires proof of direct infringement by some third party. The focus of the direct liability inquiry may therefore shift from a centralized commercial player—like a massive piracy ring—responsible for copying and streaming entire libraries of works to specific individuals. This could be an employee or associate, but it could also be an individual user of the service, which potentially alters the fair use analysis. See Gibling & Ginsburg, *supra* at 144 (“[I]f the technology provider is found to be the one engaging in the relevant act, the likelihood that its conduct will be ruled ‘fair’ diminishes.”).

b. Secondary liability also requires proof of additional elements that serve as an invitation for sophisticated pirates to evade liability.

To establish vicarious liability, a copyright plaintiff must show that the defendant “infringes vicariously by *profiting from direct infringement* while declining to exercise a right to stop or limit it.” *Grokster*, 545 U.S. at 930 (emphasis added). The point of vicarious liability is to ensure a defendant cannot willfully blind himself to infringement and then reap its benefits. It therefore turns on the nature of the legal or contractual relationship between the parties, while direct liability is typically premised on the defendant’s active involvement and own wrongful conduct. Restatement (Third) of Agency § 7.03 cmt. b.

The Second Circuit dismissed the destabilizing effects of its “press the button” rule by explaining that “a corporate officer with an obvious and direct financial interest, and a power of supervision to effect an infringement, may be vicariously liable.” Pet. App.

21a. To be sure, Sagan may have been vicariously liable on the facts of this case. But that will not be true much of the time. Culpable actors can easily structure their behavior to avoid such a rule or hide financial benefits.

Moreover, many individuals and organizations engage in copyright infringement for ideological or other personal reasons, without any interest in financial gain. Consider a hypothetical online repository for movies, analogous to the notorious Pirate Bay website, purportedly set up as a non-profit to promote the objective of free entertainment for all, unconstrained by the requirements of copyright. Cf. *Hachette Book Grp., Inc. v. Internet Archive*, No. 20-4160, 2023 WL 2623787 (S.D.N.Y. Mar. 24, 2023) (non-profit running online library without authorization). If the founders who select the bootlegged and ripped movies to stream—and direct the outsourced copying and uploading—simply take no salary, they may not be vicariously liable. But whether their motives are pecuniary is beside the point. If bootlegged and ripped movies are circulating for free online, the harm to the motion picture industry is the same whether the pirate financially benefits or not. Even in run-of-the-mill piracy cases of the kind that the MPA’s members typically bring, establishing financial benefit to the individual can be an insurmountable factual hurdle at the critical preliminary injunction stage. Culpable parties use shell companies, overseas bank accounts, and cryptocurrency payments to hide their financial gains, all of which make proof of financial benefit exceedingly difficult without formal discovery.

Contributory infringement similarly requires the defendant to have *knowledge* of and act to *encourage* the infringement. *Grokster*, 545 U.S. at 930, 936

(secondary liability is “intentionally inducing or encouraging direct infringement”).

Looking to evade liability, sophisticated pirates have devised creative arguments to counter their alleged knowledge or encouragement of the infringement. For example, in *Aereo*, the defendant argued its use of “thousands of dime-sized antennas” rendered its unauthorized streaming service lawful because it engaged only in private (not public) performances. 573 U.S. at 436, 445. *Aereo* was directly liable; but had the claims been for contributory infringement, the focus would have been on the users and *Aereo* would have argued lack of knowledge based on a belief that its users’ private performances were non-infringing.

Less sophisticated pirates are still streetwise enough to deny knowledge or point the finger at someone else. Requiring the copyright owners to show knowledge and material contribution or inducement in every case frustrates their ability to protect their copyrighted works and is inconsistent with copyright infringement as a strict liability tort. See, e.g., Goldstein on Copyright § 9.4 at 162 (“[T]he standard rationale for excluding innocence as a defense to copyright infringement is that, as between the copyright owner and the infringer, the infringer is better placed to guard against mistake”).

* * *

This case thus presents an issue of critical importance to the content creation industry. Under the Second Circuit’s ruling, digital pirates may be able to shield themselves from direct liability merely by instructing someone else to perform the illicit copying rather than doing it themselves. These same bad actors will not hesitate to take additional steps that

make gathering the proof necessary for secondary infringement impossible. Such an outcome would not only run directly counter to the aims of copyright protection, but undermine an important segment of the U.S. economy.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ROSE LEDA EHLER
LORRAINE L. ABDULAHAD*
MUNGER, TOLLES & OLSON
LLP
350 S. Grand Ave.
50th Floor
Los Angeles, CA 90035
rose.ehler@mto.com
(213) 683-9240

DONALD B. VERRILLI, JR.
Counsel of Record
MUNGER, TOLLES & OLSON
LLP
601 Massachusetts Ave. NW
Suite 500 E
Washington, DC 20001
donald.verrilli@mto.com
(202) 220-1100

*Admitted in New York.

Counsel for Amicus Curiae

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