Copyright Shakedown

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- Copyright protections are important to protecting the rights of authors and musicians.
- When someone downloads copyrighted material, who is liable?
- Sony is suing Cox Communications, not because they didn't shut off alleged copyright infringers, but because they didn't shut off enough of them.

Copyrights and patents are important protections for inventors, authors, and all sorts of creators. In the case Cox Communications v. Sony Music Entertainment, I'm reminded of the response Willie Sutton gave when asked why he robbed banks: "Because that's where the money is." This case seems more like a shakedown than the protection of copyrights.

Copyright

As an author, I am familiar with the idea of copyright, my legal authority to control what I've created. Let's start by defining where the power of copyrights comes from.

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

U.S. Constitution, Article I, Section 8, Clause 8

Congress has the power to promote science and useful arts. Not by funding them, but by giving the creators exclusive rights

to their creation, for a limited time, of course.

This case started in 2018 when members of the music industry, collectedly referred to as plaintiffs or "Sony," sued Cox Communications.

Their claims are for vicarious liability and contributory infringement arising out of alleged copyright infringement by Defendants' subscribers.

Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Apendix C to Petition for Certiorari

What is this "vicarious liability" Cox is accused of?

"[V]icarious liability holds a defendant accountable for third-party infringement if he '(1) possessed the right and ability to supervise the infringing activity; and (2) possessed an obvious and direct financial interest in the exploited copyrighted materials.'"

Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Apendix C to Petition for Certiorari

So the courts say that you can be held liable for someone else's infringement if you were able to supervise their activity and had a financial interest in the exploit of the copyrighted materials. Remember this, as it will become important during the arguments.

The District Court found that Cox's method of terminating their user accounts on a case by case basis wasn't "standardized or aggressive enough to immunize Cox." While the District Court found Cox liable, the Fourth Circuit split the decision, claiming that Cox was not vicariously liable, but directly culpable because they continue to supply internet access while knowing people will use it to infringe on copyright. Which brings us to the Supreme Court.

1. JOSHUA ROSENKRANZ, ESQ. On behalf of the Petitioners

2. ROSENKRANZ: Thank you, Mr. Chief Justice, and may it please the Court:

The Fourth Circuit held that a provider of basic communications infrastructure to millions of homes and businesses can be held liable because it did not kick enough accused infringers off the Internet. No notion of tort or copyright law ever conceived can support that theory.

Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments

This is a fundamental issue of liability. Sony does not claim that Cox did nothing to help them protect their copyrights, only that they didn't do enough.

This Court explicitly rejected the theory in Twitter, where it said, "Plaintiffs have identified no duty that would require communication-providing services to terminate customers after discovering that the customers were using the service for illegal ends." This Court said in Grokster that liability cannot be predicated on "mere failure to take affirmative steps to prevent infringement."

Reaffirming those basic principles resolves this case. No case has suggested that knowledge alone can create the necessary culpability to – to find someone liable for infringement.

Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments

Mr. Rosenkranz claims that simply knowing that illegal things are going on is not enough to create liability. Again, another point to keep in mind as we go forward.

The case – the consequences of Plaintiffs' position are cataclysmic. There is no sure-fire way for an ISP to avoid liability, and the only way it can is to cut off the Internet not just for the accused infringer but for anyone else who

happens to use the same connection. That could be entire towns, universities, or hospitals.

Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments

Imagine having your internet connection turned off merely because someone in your home has been accused of copyright infringement? Not convicted, not adjudicated, but merely accused of copyright violations. Does that sound like justice?

Turning Internet providers into Internet police for all torts perpetrated on the Internet will wreak havoc with the essential medium through which modern public engages in commerce and speech. This Court should reverse.

I welcome the Court's questions.

Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments

Obviously, since Mr. Rosenkranz is representing Cox Communications, he believes the court should reverse the decision of the Fourth Circuit.

AUL D. CLEMENT, ESQ. On behalf of the Respondents

Next up, we have Mr. Clement on behalf of Sony.

1. CLEMENT: Mr. Chief Justice, and may it please the Court:

This Court's cases recognize that liability for copyright infringement is not limited to direct infringers but extends to those who induce, cause, or materially contribute to the infringement of others. And a classic form of material contribution is to provide the means of infringement to a specific known infringer, knowing that infringement is substantially certain to follow. That combination of knowledge of a specific consumer and an ongoing relationship is critical to distinguish culpable conduct from simply engaging in a one-

and-done sale of an item that can be used in a way to infringe but is generally used lawfully.

Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments

Quite a bold statement. If you assist a specific known infringer to infringe, you are considered liable. But is that what happened here? Did Cox assist a specific user in order to establish culpability? Or did they merely not turn off a service used by the alleged copyright infringer, an accusation not proven in court?

Now, on this record, there – it is beyond dispute that Cox provided the service to known infringers with substantial knowledge that what they themselves called habitual abusers would continue to infringe. That reality, along with a record chockful of Cox's admissions that it held the copyright laws and the DMCA in contempt, is what requires Cox to insist on the extreme position that they can continue to provide service to habitual abusers in perpetuity without consequences.

Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments

Another bold accusation, claiming that Cox Communication held both copyright law and the Digital Millennium Copyright Act (DMCA) in contempt. I wonder if he has the evidence to prove that? Because the only people who seem to know that these individuals are infringers is Sony, an accusation they have not proven.

That rule has nothing to recommend it and was admitted today would render the DMCA and the cooperation it is intended to foster a dead letter. Why bother with a safe harbor? Why limit lie – why worry about a limitation on liability, which is the express text of the DMCA, if there's no liability to limit? Why bother cooperating with copyright holders? Why bother having a reasonable and appropriate system for taking down

repeat infringers if you're allowed to behave entirely unreasonably?

So, in all of this, you see that the position that's being advocated by Cox is a product of the record in this case. If Cox is right on the law, then Cox could take tens of thousands of copyright notices and throw them in the trash, and they could have its employees say "F the DMCA." That is, in fact, what the record says, which is why they're asking you for an extreme rule.

I welcome the Court's questions.

Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments

Many bold, and colorful, claims, but do they hold up during questioning?

Malfeasance or Nonfeasance

Much of the questioning revolved around what Cox Communications had or had not done in response to these copyright notices.

JUSTICE KAGAN: That's true sometimes. It's not true other times. And it – it – it – there's no evidence that it's true here. In other words, there are plenty of times where you're getting – you know, that there's a link to a specific individual and – and you know who that individual is, you would not have to cut off anybody else, and – and you know that that individual has infringed.

1. ROSENKRANZ: Your Honor, I beg to differ. There is literally not a single place in this record where a specific individual was identified. If you – let's take the smallest unit, a household. You still don't know who the individual is.

Cox Communications, Inc., et al. v. Sony Music Entertainment,

[et al. – Oral Arguments]

Part of the problem is identifying who is actually committing the alleged copyright infringement. The smallest unit for an account is a household, which may include many members, one of which may be committing copyright infringement. Yet Sony appears to want the entire household disconnected from the Internet because of this. If there was good reasoning about that, what about a hotel, university, or entire ISP? Should they lose their internet access because of allegations against one of their users? Justice Sotomayor thinks there are things that could have been done.

There are things you could have done to respond to those infringers and the end result might have been cutting off their connections, but you stopped doing anything for many of them. You didn't – you didn't try to work with universities and ask them to start – to look at an anti-infringement notice to their students. You could have worked with a multi-family dwelling and asked the people in charge of that dwelling to send out a notice or to do something about it.

You did nothing. And, in fact, counselor, your clients' sort of laissez faire attitude towards the Respondents is probably what got the jury upset, meaning you're talking something very different than Twitter, where it's not even clear the – that their websites were being used for the specific attack at issue.

Here, you know that a particular location is infringing, and most of the time you're doing nothing. Why aren't you contributing to that infringement?

[Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments]

Another example of accusation without any evidence from Justice Sotomayor, as Mr. Rosenkrantz pointed out.

The notion that Cox did nothing is absurd. I will mention just three facts that are undisputed. First, Cox invested its own resources to create the first-of-its-kind anti-infringement program. There was no precedent for that.

Second, under that program, Cox sent out hundreds of warnings a day. To your point, Your Honor, that we didn't work with universities, we most certainly did. The first several steps, the 13 steps, are all about contacting them, cutting them off, that is, suspending their accounts, which we did 67 times – 67,000 times in the course of this period. That's thousands every month – month.

And, third, the program stopped infringement by 98 percent of the people who were accused of infringement.

That is not nothing, Your Honor.

Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments

Another consideration for culpability is whether or not the accused has a financial incentive to assist in committing the crime.

JUSTICE ALITO: Is there evidence in the record that you have a financial incentive not to terminate infringers?

1. ROSENKRANZ: We – we have a financial incentive, like any business does, to keep our customers. But the Fourth Circuit found – and this was a basis for rejecting vicarious liability – that we did not have a financial incentive to increase infringement.

Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments

Justice Sotomayor seems to think that if one person is accused of committing a crime, everyone should lose their internet access to stop the one accused.

JUSTICE SOTOMAYOR: Meaning, if you know that a particular location and someone in it is committing a crime and you're supplying to that person and perhaps others, it doesn't matter what the others are doing, but you know some person in that home is infringing, why aren't you participating by giving them the tool to infringe?

1. ROSENKRANZ: Well, because, Your Honor, it needs to be an act that unequivocally demonstrates –

JUSTICE SOTOMAYOR: Why?

1. ROSENKRANZ: – a purpose.

[Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments]

Justice Jackson pursued a similar line of questioning. According to Justice Jackson's and Sotomayor's logic, your city is liable because they build and maintain roads even when they know people are going to drive drunk on those roads. At least your city does have law enforcement powers, but ISPs do not.

Technological Illiteracy

I tend to be concerned when I see multiple justices trying to regulate an industry when they obviously have no clue how it actually works. Let's start with Justice Jackson.

JUSTICE JACKSON: And your argument is knowledge plus providing the service, the providing the service, Internet service, is not an affirmative act, is that – do I have that right?

1. ROSENKRANZ: That is correct. We are providing the Internet service and declining to terminate. That's what we were held liable –

JUSTICE JACKSON: To individual customers or ISP addresses, which makes it, some would say, different than Twitter because

Twitter was just – they were putting up a platform that people were using.

But you've got contracts with individual people that you're providing Internet service to, correct?

[Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments]

Apparently Justice Jackson thinks every individual has their own internet account with their own "ISP address." (She probably means IP address, but we'll let that go.) Justice Jackson goes on.

JUSTICE JACKSON: But I mean known, known, in ways that you can isolate the I – ISP address and the places where the infringement is coming from.

1. ROSENKRANZ: We know the IP address. If it's a regional ISP –

JUSTICE JACKSON: Mm-hmm.

1. ROSENKRANZ: – there are 10,000 possible homes or businesses who could be infringing, and, as I was saying earlier, that's the first that will have to get cut off under this liability scheme.

[Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments]

Depending on the network and its connection to Cox Communications, the customer could be anyone from a single home, to businesses and even entire Internet Service Providers. Should the justices of the Supreme Court have their internet access in the courthouse disabled because someone on their network is accused of downloading copyrighted material? Justice Alito tried to tease that out during his questioning of Mr. Clement.

JUSTICE ALITO: Well, what's – what is an ISP supposed to do with a university account that has, let's say, 70,000 users? What is the university supposed to do in your view?

1. CLEMENT: The – the university is supposed to – under those circumstances, the ISP is supposed to sort of have a conversation with the – with the university.

Now the ISP's policy to the university says you can't have – you can't use this service or allow your service to be used for copyright infringement. So that's –

Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments

So a university can have thousands of devices connected through their internet account. What is the ISP supposed to do? Legally what can they do? Can they terminate a contractual arrangement because of a single bad actor?

JUSTICE ALITO: How does it work in practice?

1. CLEMENT: Well, the way it works in practice is with, let's say – let me – let me take something that I know a little bit better like a hotel. And so, like, a hotel has lots of guests.

So the hotel is provided Internet service and the hotel then can do things starting with terms of use, but a lot of hotels actually don't provide their guests – at least in a normal way don't provide their guests with services at a speed that are sufficient to do peer-to-peer downloading precisely because they don't want to be in the position of having guests that are staying there largely so they can sort of upload and download copyrighted works.

Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments

Except peer-to-peer downloading long predates the high speed

internet access most of us have become used to. In fact many protocols used for peer-to-peer sharing were designed with slow and unreliable internet connections in mind. Meaning slowing down a guest's speed just means the download takes longer; it doesn't prevent the sharing. And what about those who are legally sharing information this way? Should they be restricted because of other bad actors?

Because That's Where the Money is

So if the problem is in households, hotels, and universities, why is Sony suing Cox Communications?

JUSTICE BARRETT: If you lose, what is the effect on your copyright holders? Like, let's – you – you know because you monitor and then send the ISPs the accounts that are downloading the copyrighted material, right? So you could still try to protect your copyright, but it wouldn't be as deep a pocket and it would be a lot worse, right, if you had to go after the individual users themselves, but you wouldn't be without recourse?

1. CLEMENT: We would – we would be without scalable functional recourse. And if you look at the Seventh Circuit's Aimster decision, like even back then, Judge Posner had a nice phrase for what direct infringement is, which is it's a teaspoon solution to an ocean problem. So, if my clients are limited to direct infringement actions, they are in very, very dire straits.

[Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments]

In other words, it would be too hard to actually sue those violating copyright laws, so Sony decided to go after the deeper pockets. Just like Willy Sutton, Sony is suing Cox because that's where the money is. And just what does that say about Sony and their lawsuit? But there's more.

the copyright holder notifies the ISP that this particular account has – over the course of six months has violated the copyright 50 times And the ISP does nothing in response to that notification, and then, after the 50th notice, it begins to send out just a very tepid warning, what you're doing is really not very nice. But 50 more occur over the course of the next six months.

Cox Communications, Inc., et al. v. Sony Music Entertainment, et al. – Oral Arguments

Did you notice that? Sony expects ISPs to terminate service based solely on their "notification" that someone using that ISP has allegedly violated copyright. What happened to innocent until proven guilty? There appears to be no evidence provided that someone using the ISP has actually violated copyright law. I get dozens of fake copyright infringement notices. These happen to be from scammers, but should my ISP turn off my service just for that? Shouldn't Sony at least present their case before punishing not only the suspect, but anyone else using their service? After all, if Sony sends me a cease and desist letter regarding some copyright infringement, I'm not punished until they prove their case in court.

Conclusion

I understand Sony's concerns. After all, copyright is the only thing protecting musician's and author's right to control their creations. That is not an excuse to blame an innocent party for not punishing innocent parties for the alleged bad actions of a few.

And since when has an unauthenticated accusation been sufficient to violate someone's contract, not to mention their rights? After all, Cox users, from the single household to entire ISPs, have a contract with Cox. Should Cox violate that contract to make Sony happy? While we're at it, why are so many justices on the court looking for ways to tell Cox to

violate these contracts?

Once again I am dismayed by this demonstration of the utter ignorance of the basic foundational principles of the law by these attorneys and justices. You would think the supposed greatest law minds in the nation would know better. Claiming a notice from a private actor is somehow supposed to be legally binding is ridiculous. What next, you go to jail for ignoring the note from your neighbor that your party was too loud? Maybe should just forget courts and allow third-party accusation to be the law of the land.

Let’s face it, this lawsuit is nothing but a shakedown by Sony and other copyright holders because they don’t want to take the time, effort, and expense to sue those actually committing copyright infringement. I mean, why follow the law when you can get courts to bully companies for you?

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