

Fourth Circuit Reverses \$1 Billion Award for Vicarious Liability Claim for More than 10,000 Works

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On January 12, 2021, the [U.S. District Court for the Eastern District of Virginia](#) awarded a group of music recording companies (the plaintiffs) a \$1 billion verdict against Cox Communications (Cox). The Virginia court's ruling found that Cox, an internet service provider (ISP), was contributorily and vicariously liable for copyright infringement committed by certain subscribers on its networks. The plaintiffs alleged that the ISP allowed the unauthorized downloading and distribution of more than 10,000 copyrighted works by Cox subscribers who had already received three or more notices of infringement. The district court in Virginia established that the "takedown" notices sent by the plaintiffs provided Cox with the requisite knowledge of its subscribers' repeated infringement to substantiate their claim that Cox was contributorily liable, suggesting that Cox had sufficient specific knowledge of infringement to have done something about it.

The plaintiffs' notice to Cox identified the IP address of the subscriber, as well as the time of infringement and the identification of the infringed work, which the plaintiffs argued was sufficiently specific knowledge for Cox to be able to identify the subscriber and to exercise its policy by suspending or terminating the infringing subscriber. This case proceeded to trial on two theories of secondary liability – vicarious and contributory copyright infringement. The plaintiffs argued that Cox failed to act on these known repeat infringers, and the jury found Cox liable for willful contributory infringement and vicarious infringement, ordering Cox to pay more than \$99,000 for each of the infringed-upon works. Cox appealed the jury verdict.

On appeal, before the [U.S. Court of Appeals for the Fourth Circuit](#), Cox raised several questions of law concerning the secondary liability for copyright infringement, as well as what constitutes a derivative work in the Internet Age.

Vicarious Infringement

The Fourth Circuit's analysis first considered whether the district court erred in denying plaintiffs' vicarious infringement claim. "A defendant may be held vicariously liable for a third party's copyright infringement [if the defendant] (1) profits directly from the infringement and (2) has a right and ability to supervise the direct infringer." See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 n.9 (2005) (internal citations omitted). The Fourth Circuit found that the plaintiffs failed to establish the first element as a matter of law and thus found that the plaintiffs failed to establish that Cox was vicariously liable.

In reaching this decision, the Fourth Circuit turned to the landmark decision in *Shapiro, Bernstein & Co.*, 316 F.2d 304 (2d Cir. 1963), a case on vicarious liability for infringing copyrighted music recordings. In *Shapiro*, a department store was sued for the selling of “bootleg” records by a concessionaire operating in its stores. The store had the right to supervise the concessionaire and employees, demonstrating its control over the infringement. There, the store received a certain percentage of every record sale, “whether ‘bootleg’ or legitimate,” giving it “a more definite financial interest” in the infringing sales.” Thus, the *Shapiro* court found that the financial gains were clearly spelled out from the bootleg sales and acts of infringement in *Shapiro*.

Next, the Fourth Circuit recognized that courts have found that a defendant may possess a financial interest in a third party’s infringement of copyrighted music, even absent a strict correlation between each act of infringement and an added penny of profits. See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996). In *Fonovisa*, the operator of a swap meet allowed vendors to sell infringing goods, and the operator collected “admission fees, concession stand sales, and parking fees” but no sales commission “from customers who want[ed] to buy the counterfeit recordings at bargain-basement prices.” The *Fonovisa* court found that the plaintiffs adequately showed a financial benefit from the swap meet owner and the sales of pirated recordings at the swap meet, which was a draw for customers. Thus, the infringing sales “enhance[d] the attractiveness of the venue of the potential customers, finding the swap meet operator had a financial interest in the infringement sufficient to state a claim for vicarious liability.”

The Fourth Circuit established that *Shapiro* and *Fonovisa* provided the steppingstones of the principles of copyright infringement to the internet and cyberspace and that Congress agreed that “receiving a one-time setup fee and flat periodic payment for service” from infringing and non-infringing users alike ordinarily “would not constitute a financial benefit directly attributable to the infringing activity.” *Ellison v. Robertson*, 357 F. 3d 1072, 1079 (9th Cir. 2004) (internal citations omitted). The Court also reviewed other court precedents, including *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), to show that increased pirated music drew in users as a direct financial interest for vicarious liability., but also notes that courts have found no evidence of a direct financial benefit between subscribers of *American Online* (AOL) and the availability of infringing content.” *Ellison*, 357 F.3d at 1079.

Against this backdrop, the Fourth Circuit held that to prove Cox was vicariously liable, the plaintiffs had to demonstrate that Cox profited from its subscribers’ infringing download and distribution of the plaintiffs’ copyrighted songs, which – given the evidence at trial – it did not. While the district court found it was enough that Cox repeatedly declined to cancel an ISP subscriber’s monthly subscription fee, the Fourth Circuit found this evidence to be insufficient. Instead, the Fourth Circuit found that the continued monthly payment fees for internet service, even by repeat infringers, was not a financial benefit flowing directly from the copyright infringement. Cox established that subscribers paid a flat fee even if all of its subscribers stopped infringing. Recognizing that an internet provider would necessarily lose money if it canceled subscriptions only demonstrates that service providers have a direct financial interest in providing subscribers with access to the internet only. Thus, the Fourth Circuit held that vicarious liability demands proof that the defendant profits directly from the acts of infringement for which it is being held accountable.

To rebut this, the plaintiffs claimed that the jury could infer that subscribers paid monthly membership fees based on the high volume of infringing content. The Fourth Circuit rejected this argument and found that the evidence was insufficient to prove that customers were drawn to Cox’s internet service or that they continued the service because they were specifically drawn to the opportunity to infringe the plaintiffs’ copyrights. The plaintiffs further asserted that subscribers were willing to pay more for

the opportunity to infringe based on Cox's tiered structure for internet access – but the plaintiffs fell short in proving this claim because no reasonable inference could be drawn that Cox subscribers paid more for faster internet to infringe on the copyrighted works. Ultimately, the Court found that the plaintiffs could not establish a causal connection between subscribers' copyright infringement and Cox's revenue for monthly subscriptions. Thus, the Fourth Circuit held that Cox was not liable for its subscribers' copyright infringement and reversed the district court's ruling on this theory. The court vacated the \$1 billion damages award and remanded the case for a new trial on damages, holding that the jury's finding of vicarious liability could have influenced its assessment of statutory damages.

Contributory Infringement

The Fourth Circuit then examined the remaining issue of contributory infringement. Under this theory, "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another is liable for the infringement, too." Cox argued that the district court erred by taking away the factual determination from the jury that notices of past infringement established Cox's knowledge that subscribers were substantially certain to infringe in the future. Cox had contracted with a third party to provide copyright violation notices to users and asserted that it used these notices as their safe harbor under the Digital Millennium Copyright Act to alert violators and to terminate access to users who were repeat infringers. Despite this, the Fourth Circuit ultimately agreed with the jury's finding that Cox materially contributed to copyright infringement occurring on its network and that its conduct was culpable.

Therefore, a three-judge panel found that Cox was liable for willful copyright infringement but reversed the vicarious liability verdict and remanded a new trial on damages. The Fourth Circuit held that because Cox did not profit from its subscribers' acts of infringement, a legal prerequisite for vicarious liability, Cox was not liable for damages under the vicarious liability theory.

The Impact

The Fourth Circuit's decision recognizes a new dawn breaking in copyright law, one that requires a causal connection between profit and/or financial gain and a defendant's acts of infringement to prove vicarious liability in a copyright infringement claim under the Copyright Act. The plaintiffs attempted to bridge the financial gap between acknowledging access to infringing content through a monthly internet subscription and high-volume infringing acts. However, the Fourth Circuit found that this leap in logic was a step too far and reversed the award for vicarious liability for lack of evidence to find this missing connection between Cox subscribers and infringing plaintiffs' content.

While this may be one route the courts may consider to reduce music piracy damages, it remains to be seen whether other courts will take this approach to determining that profit is the key element supporting other vicarious liability claims in cyberspace.

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