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The Death of Digital Secondary Liability? The Fallout of Cox v Sony

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On March 25th, 2026, the US Supreme Court ruled in a 9-0 decision that an Internet service provider does not bear responsibility for the copyright infringement of its subscribers simply because it continues to provide Internet access to accounts flagged for piracy.[1] *The decision in Cox Communications, Inc v Sony Music Entertainment reverses the 4th Circuit's decision, which held Cox Communications liable for its users' illegal access to Sony's music through peer-to-peer technology, and transforms the intent bar that has been a standard of secondary copyright liability since the case of Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd. This article outlines the history of contributory and vicarious liability from Sony Corp of America v Universal City Studios Inc through Napster and Grokster, places the Digital Millennium Copyright Act's safe harbour protection in that context, and reconstructs the facts and legal proceedings in Cox v Sony. Then, it critiques the Court's reasoning and the new, narrower "material contribution plus intent" test that governs ISP liability, and discusses the implications and policy implications of the ruling in relation to copyright owners who can no longer rely on repeat-infringer notices as their sole means of pursuing their rights. It can be concluded from the article that although Cox v Sony lowers the possibility of secondary copyright infringement, it does not remove the whole of what's covered by secondary copyright infringement laws. The author suggests some amendments either in law or in practice, such as a new notification system and a new intentionality standard.*

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[1] *Cox Communications, Inc v Sony Music Entertainment* 607 US _ [2026]

Keywords: *secondary copyright liability, contributory infringement, vicarious liability, safe harbour, internet service providers.*

INTRODUCTION

Copyright holders have historically encountered a profound enforcement issue: infringers are abundant, dispersed, hard to identify, and usually financially incapable of fulfilling their damning punishment, and the intermediaries whose channels operate this infringing content are scarce, have sufficient funds, and can be easily recognised. In light of it, when it comes to peer-to-peer sharing established in the late 1990s, both the recording and movie industry start taking legal action not merely against direct violators but also against those providers of technology and operators of the network that allow mass infringement to be carried out.

The strategy culminated in Sony Music Entertainment v Cox Communications, Inc., where the jury in Virginia's Eastern District declared Cox Communications, one of the largest ISPs in the US, guilty of infringing thousands of sound recordings committed by its customers, inflicting damages in the region of $1 billion.[2] The Fourth Circuit confirmed that Cox had committed contributory infringement but overturned the vicariously liable finding and nullified the award for retrial. Later, the case was appealed to the Supreme Court, which only accepted the question of contributory liability but rejected the cross-appeal of Sony concerning the vicarious liability of Cox. Thus, it was stated in the opinion of Justice Thomas, joined by other Justices, that Cox's actions do not demonstrate the degree of intent necessary to find contributory liability.

This paper considers whether Cox v Sony signifies the end of digital secondary liability or only its recalibration. Section II examines the law of contributory and vicarious liability from the time of Sony Corp of America v Universal City Studios Inc. into the present. Section III discusses the safe harbour provisions of the Digital Millennium Copyright Act in the context of the previous standards provided for. Section IV summarises the facts of Cox v Sony, while Section V provides an analysis of the Court's reasoning. Section VI assesses the future of the "material contribution" test after the Cox case. Section VII discusses the underlying conflict between content industries and internet infrastructure in this context. Section VIII proposes a new regulatory framework and Section IX concludes.

[2] *Sony Music Entertainment v Cox Communications, Inc* [2024] 93 F4th 222 (4th Cir)

THE DOCTRINAL ARCHITECTURE OF SECONDARY COPYRIGHT LIABILITY

The Copyright Act does not explicitly impose liability on infringements made by one person against another; § 501(a) states only that 'anyone who violates any of the exclusive rights of the owner of copyright' will be liable. Thus, the doctrine of secondary liability is a creation of judicial interpretation based on principles of tort and agency law. The US Supreme Court has recognised two forms of secondary liability: contributory liability and vicarious liability. According to the classical definition of contributory infringement based on the law of the Second Circuit, contributory liability means that the person who, knowing that the other party infringed, contributed to or caused the infringement, is liable.[3] Vicarious liability, on the other hand, is a concept developed through the doctrine of respondeat superior.

The modern law starts with Sony Corp of America v Universal City Studios Inc, where the Court ruled that Sony Corporation cannot be liable for the illegal copying of consumers' films, as the technology being used "is capable of substantial noninfringing uses," and this cannot just establish liability based on knowledge.[4] After almost 20 years, the Ninth Circuit made the distinction with this case in A&M Records, Inc v Napster, Inc, when it ruled that the fact that Napster had a centralised index makes it have "actual, specific knowledge" of users infringing copyright, as well as the actual ability to control its domestic system, thus being liable both for contributory and vicarious infringement.[5] Hence, the case ruled out the uncertainty left in Sony: technology that can be used for noninfringing purposes does not incur liability under the constructive knowledge rule, while a user that knows for sure who violated the copyright will be liable.

The U.S. Supreme Court dealt with the doctrine of Sony Corp. v Universal City Studios in the Grokster case, where the defendant's peer-to-peer software was not identical to Napster's in terms of working as a central index, thus legally "capable" of non-infringing use according to the very same logic. Instead of pushing interpretation of the ruling in the Sony case further to protect Grokster from liability, the Court introduced a new doctrine of induced infringement, claiming, "One who distributes a device with the object of promoting its use to infringe upon a copyright, as shown by a clear expression or affirmative steps taken to promote infringement, is liable for

[3] *Gershwin Publishing Corp v Columbia Artists Management, Inc* [1971] 443 F2d 1159 (2d Cir)
[4] *Sony Corp of America v Universal City Studios Inc* [1984] 464 US 417
[5] *A&M Records, Inc v Napster, Inc* [2001] 239 F3d 1004 (9th Cir)

the infringement as a result."[6] Thus, having established that Grokster had, among other things, advertised the new technology to ex-users of Napster and designed its business model on the assumption that Grokster users would infringe copyright, the Supreme Court found grounds for imposing liability on that company without even looking for implications of the doctrine of vicarious liability.

This means that there were three main theoretical principles in effect right before the Cox v Sony verdict: the doctrine of liability due to knowledge, which was not actionable for technologies with no significant legal uses; the Napster model for specific-knowledge-and-contribution liability; and the Grokster model regarding responsibility of influence, topped by the theory of vicarious liability based on the independent test of financial advantage and control. All of these doctrines were developed with specific technologies whose purpose was file sharing. Cox v Sony had to be decided in a way that the Court would apply the technologies that are not related to file sharing in dealing with an ISP which provides access to a network instead of a file-sharing device.

It is important to point out what this method of dealing with the issue does not achieve. In contrast to the Patent Act, where the incitement is literally listed under the legal torts, the Copyright Act has no provisions or no cause for contributory or vicarious liability. The doctrines in question have been built by the courts and have survived based on case law; in the meantime, the text of the Copyright Act keeps silence about the issue. When it comes to Copyright, this lack of detail has also given a chance for this principle to be adapted to various situations, which meant that it has been able to follow several steps, such as being extended to reach the centralised index of Napster and to make claims against Grokster or to approach an Internet provider for not disconnecting.

THE DMCA SAFE HARBOUR REGIME

It makes more sense to understand Section 512 as a type of defence rather than a fifth way of establishing liability. An ISP may certainly face lawsuits under either the contributory or vicarious liability doctrines. However, if the ISP fulfils the conditions for Section 512, they will not owe any damages regardless of the outcome of the lawsuit. In practice, however, it is the repeat infringer requirement that has become the real battlefield of the law, and the copyright holders have simply sent ISPs mass notices about the IP addresses used by their subscribers to

[6] *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* [2005] 545 US 913

infringe copyright, arguing that continuous provision of the service to these subscribers disqualified them from the safe harbour provision while simultaneously providing them with the knowledge required for fiduciary liability. The Copyright Office conducted research on Section 512 in 2020 and found the notice and termination completely ineffective.[7] The law does not explain what implementation means concerning the repeat infringer provision, thus creating the loophole that Sony was trying to exploit and that Cox v Sony resolved.

The mechanics of the exploitation in question deserve explanation, as they have a role in the outcome of the litigation. More and more frequently, rights holders use the automated monitoring services offered by vendors to scan peer-to-peer networks and issue infringement notices linked to the IP address of the subscriber at specific times in bulk, typically reaching the hundreds of thousands of notices sent to ISPs in a year. Because of the lack of requirement for ISPs to take action upon receipt of a single notice under the provisions of § 512 and the fact that the verification of the issuance of a notice is very costly, ISPs use graduated response systems, namely warnings, then slowing down the Internet connection, then suspensions until the most serious offenders are terminated. The proceedings, meaning BMG versus Cox, were initiated at the intersection of the reality of the operation procedure described above and the expectations of the rights holders that the issuance of notices should lead to the termination of Internet accounts, which friction point has been resolved by the Supreme Court in favour of the Internet service providers in terms of contributory liability while keeping the repeat-infringer rule of § 512 intact.

COX V SONY: FACTS AND PROCEDURAL HISTORY

Cox had faced litigation before, having been involved in a case brought against it by BMG Rights Management in 2014 after it engaged in “blacklisting” monitoring agents hired by rights-holders and ceased forwarding infringement notices completely, whereby millions of such notices went unread. The jury awarded the plaintiffs USD 25 million, and the Fourth Circuit ruled that Cox’s graduated-response policy, which allowed unlimited reactivation of previously terminated accounts, was not “reasonably implemented” for the purposes of relying on DMCA safe-harbours, holding also in a separate opinion that contributory liability required knowledge or intentional blindness and not mere negligence.[8] This decision from 2018 offered a blueprint and

[7] *Section 512 of Title 17: A Report of the Register of Copyrights* (US Copyright Office, 2020)
[8] *BMG Rights Management (US) LLC v Cox Communications, Inc* [2018] 16-1972 (4th Cir)

wording for Sony's following case. Since Cox had previously lost its safe harbour and since the case established that intentional blindness was sufficient for establishing intent, Cox was thus facing it in a much harsher circumstance in that case, where Sony and its co-plaintiffs filed suit based on more than 10,000 works.

Sony Music Entertainment, along with a few other record labels, charged Cox in the United States District Court for the Eastern District of Virginia, asserting two theories of secondary liability, i.e., Cox committed contributory infringement by continuing to provide internet services to subscribers whose IP addresses had been linked to infringement notices repeatedly, and Cox was vicariously liable for receiving profits from the subscriptions of the infringing accounts. Cox's own account states that 98% of infringements had been reduced because of its internal graduated response policy or warning actions; however, the record labels claim that Cox's inaction made the policy ineffective.

The jury ruled against Cox based on two arguments, held the violation of more than 10,000 copyrights to be intentional, and awarded a large sum of USD 1 billion as compensation for the infringement, which is one of the highest awards in the history of copyright cases in the United States. The district court rejected Cox's request for the judgment. The Fourth Circuit Court, in its ruling, agreed with the decision of the jury regarding contributory infringement when it stated that "the act of providing a product to another person knowing that the same person will be using it for the purpose of violating copyright constitutes contributory infringement in itself,"[9] but held that the jury was wrong while deciding on vicarious infringement since there were no significant financial profits derived from the infringement, and reversed the damages order.

Cox filed a petition with the Supreme Court to grant a certiorari on the issue of contributory liability; meanwhile, Sony filed a cross-petition on vicarious liability. The Supreme Court chose to accept the petition filed by Cox and rejected the one from Sony. In legal terms, that was a critical decision because it was interpreted as the decision of the court only on contributory liability and not vicarious liability. The case was heard on 1 December, 2025, and the judgment was delivered on the 25th of March, 2026.

THE SUPREME COURT'S HOLDING AND REASONING

In his opinion, Justice Thomas stated that the concept of contributory liability "implies that one

[9] *Sony Music Entertainment v Cox Communications, Inc* [2024] 93 F4th 222 (4th Cir)

must show that the provider wanted its service used for infringement,"[10] which may be demonstrated either by proving direct encouragement in the Grokster manner or through other sufficiently irresponsible acts; however, in this case, Cox's behaviour did not meet that standard.

The key idea after this was that Cox's provision of broadband internet was treated in a different manner compared to the file-sharing technologies implicated in Napster and Grokster. In fact, Cox's internet, as opposed to the Napster directory or Grokster software, is not aimed at pirating; rather, it has many legitimate uses: mailing, banking, telecommuting, licensed content streaming, and surfing. The court emphasised that "a company cannot be regarded as a copyright infringer simply because it provides a service to society knowing that some of its clients may use it for violations." In this way, the fact that Cox had not blocked each of the accounts labelled for pirating is not enough to suggest that it had intended to use its services for copyright violation in law.

The Court made sure to limit its ruling in two significant ways. First, it dealt exclusively with contributory liability; whether to agree with the Fourth Circuit's position on vicarious liability was not a subject of this case and remains unsettled. Second, the Court created a limitation upon its ruling with regard to those defendants who, similarly to Cox, do not participate in the copying, hosting, distributing or making the infringing work available to the public but left the question whether the same reasoning would extend to those hosting services, cyberlockers or app stores having more direct involvement with the infringing works.

Justice Sotomayor, along with Justice Jackson, concurred only with the judgment, stating that "the majority's self-imposed limitation regarding secondary liability can't have either legal precedent or statutory support." It was warned that the ruling could allow ISPs to interpret the notices concerning repeated infringers as just noise instead of actual warnings. Other commentators pointed out that since the Supreme Court's ruling refuses to recognise any additional concepts of secondary liability, its ruling could prevent a copyright claimant from making a claim of common-law aiding and abetting against intermediaries and bring copyright theory to correspond with the recent restrictions made by the Court concerning secondary liability in a similar case under the Anti-Terrorism Act. On April 6, 2026, just two weeks after the ruling was made in Cox, the Court granted certiorari in another case from the Fifth Circuit,

[10] *Cox Communications, Inc v Sony Music Entertainment* 607 US _ [2026]

namely Grande Communications Networks LLC v UMG Recordings, Inc. and vacated the contributory infringement ruling against the second ISP for reconsideration. The ruling meant that the standard of intent should replace the instruction to the jury on the so-called "material contribution" criteria that had been applied to the ISP in both the Fourth and Fifth Circuits.

WHAT REMAINS OF "MATERIAL CONTRIBUTION" AFTER COX

The immediate doctrinal outcome of Cox v Sony is the separation of "generalised awareness" from the intent component of contributory infringement. Under Napster, a defendant with an accessible and centralised record of users' sharing could be held liable for "actual, specific knowledge" of each infringement act. An ISP that receives an infringement notice for an IP address will not be aware of which subscriber, via what device, committed what infringement act; it will simply know that an account was flagged at a certain point in time. Cox holds that this broader understanding of knowledge does not determine the intent of infringement. In this case, the rulings are not so much a rejection of Napster and Grokster law as it is a refusal to apply their specific-knowledge and inducement standards to a party whose relation to the actual infringement is far less direct.

The tangible outcome is that the litigation approach that was used against Cox- mass notice campaigns followed by litigation aimed at proving contributory intent through continuous service to "repeat infringers," is no longer implementable against ISPs acting merely as conduits. Now right holders must show something akin to inducement: marketing targeted toward infringing consumers, a business model based on piracy, or active conduct beyond passive access to a network. This is a much higher burden of proof that most residential and commercial ISPs are not able to achieve, as their income is based on flat subscription fees and not on the respective amount of infringing traffic.

Nevertheless, three qualifications place limits on any assertion that Cox effectively eliminates secondary liability. For starters, since the Court only examined contributory liability, a plaintiff who can provide enough direct financial benefit linked to the infringing act—the perfect example being a service plan with charges channelled to bandwidth-intensive piracy or a company that profited from advertisements corresponding with the infringing traffic—would still be able to make use of a vicarious theory, though this requires adherence to Fourth Circuit's separate control and financial-benefit test. Second, the decision only applies to defendants who do not engage in copying, hosting, or distributing the infringing material; any hosting provider, cloud storage or application marketplace that offers various means of infringing materials remains firmly within the realm of Napster's material contribution framework. Third, since the DMCA safe harbour analysis presented in Part III is left untouched, one that has no policy of repeating infringers as opposed to one that has a very inferior one remains subject to loss of immunity under § 512, regardless of the culpability under common law.

The case of Grande remand is an example of how litigation can change quickly. Prior to the decision of Cox, the Fifth Circuit had already supported a jury instruction allowing liability for an Internet service provider (ISP) that was "still providing access to infringing sound recordings" without taking "basic preventive actions" like shutting down.[11] Such phrasing was practically indistinguishable from the principle that was rejected by the Supreme Court in Cox. Following the directive of the Grande case, the Fifth Circuit will have to determine whether, in light of the instructions from Cox, a jury could nonetheless find liability based on the evidence presented at trial. Some commentators are sceptical of the probability of this happening, given that the arguments employed by the plaintiffs were based on the same principle whose use was prohibited by the Supreme Court. From a practical perspective, every pending lawsuit or lawsuit that is about to be filed against an ISP that makes use of repeat infringer notices will have to be repleaded and will need to be predicated either on a legal theory of the active encouragement of the exclusion from this case or the active encouragement of the ISP.

THE UNDERLYING TENSION: CONTENT OWNERS AND NETWORK INFRASTRUCTURE

Cox v Sony should be approached as one episode in the ongoing struggle between the two groups with opposing objectives: copyright owners, who need financially secure defendants who can afford to deter others from infringing their rights, and ISPs, who provide, as was emphasised in the Grokster case, the service, the infringing parts of which cannot be separated from the legitimate service it delivers. This reasoning was used to determine the liability of Napster and Grokster, as these services existed for the sole purpose of facilitating the infringement process. Cox is being treated differently, as its products were created for legitimate activities, while both the technology and telecommunications industries maintain that if ISPs were to be treated as guilty simply based on their practices of keeping records, they would be forced to disconnect

[11] *UMG Recordings, Inc v Grande Communications Networks LLC* [2024] No 23-50162 (5th Cir)

reliable clients across the country without being able to check whether the claims were true.

From the perspective of rights holders, the objection is not that ISPs should be held liable for the actions of their users, but rather that they are in many ways the only party with the means (subscriber account records linked to IP addresses) and the leverage (the threat of account termination) to implement a repeat infringer policy. Rights holders argue that if maintaining a service for a flagged account cannot be considered an indication of intention, then the requirement of a repeat infringer in § 512(i) becomes irrelevant, and it allows ISPs to satisfy this obligation while turning a blind eye to infringement as Sotomayor's opinion warns against.

POLICY PROPOSALS FOR A MODERNISED DIGITAL COPYRIGHT FRAMEWORK

Cox v Sony leaves the statutory text of § 512 unchanged, as it was written by Congress almost 20 years ago, which has caused the two-decade gap between the events and technological advances. In order to improve the statutory framework in terms of its correspondence to the reality after the Cox ruling, four reforms must be introduced.

The first part of the plan envisages the replacement of the vague “reasonably implemented” repeat offender definition with the advanced notice-triggered system in accordance with the practice of comparative regulatory systems such as Canada’s “notice-and-notice” approach, where the duties of ISPs in comparison with the notification system are clear from the number and timing of notifications received and do not need retrospective supervision of judicial authorities.

Secondly, among other steps, Copyright Office has the rule-making authority to give guidance regarding which type of “knowledge” includes any “actionable” knowledge for the access providers and show the difference between the type of aggregated notice which Sky works with in line with IP-address and action of special knowledge similar to the Napster incident that generated liabilities, giving both ISPs and copyright owners knowledge of compliance that they cannot achieve without years of trials.

Thirdly, Congress can create a law that will define the intent standard which is required by Cox just like it did with inducement liability in patent law. A statutory definition of contributory copyright infringement that will define inducement and tangible contribution can be used in lower instances instead of using data obtained from Sony, Napster, Grokster, and Cox.

Fourthly, since Cox leaves vicarious liability doctrine intact but fails to settle the financial-benefit issue, Congress or the Copyright Office needs to determine whether tiered-bandwidth pricing, which is common among modern ISPs, is a "direct financial benefit" caused by infringement - since this issue was never addressed in Cox v Sony due to certiorari being denied with respect to it, and will soon emerge in lower courts again as part of the Fourth Circuit test.

Fifthly, policymakers need to consider a limited, opt-in fee-based enforcement system, whereby right holders would pay ISPs regulated fees for processing and verification of massive notices based on strict requirements for evidence in return for the statutory presumption of a verified notice being deemed to have satisfied the intent element, provided it has not been dealt with after a set number of repetitions.

CONCLUSION

Although it doesn’t signal the demise of digital secondary liability, Cox v Sony represents a decisive restriction of one of its main branches. The court ruled that an ISP’s continuation of general internet access to accounts that received infringement notices is insufficient to demonstrate the required degree of intent, thereby shutting down the legal tactic that led to the billion-dollar verdict in Cox. However, vicarious liability, hosting provider liability and the DMCA safe harbour regime are still available for use in other cases. The ruling brought the situation back closer to the Sony Betamax public internet provider reference point and also entailed the loss of the effect that repeated infringement notices gave to the right holders against the third-party intermediaries best situated to act on the notices. Whether this compromise is not a mistake is a question of legislative nature and only Congress, but not the courts, can truly design a proper legislative and predictable legislative framework.