



holding that not all secondary liability is the same, the fourth circuit vacates \$1 billion copyright infringement judgment

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Last week, the U.S. Court of Appeals for the Fourth Circuit reversed a \$1 billion judgment in favor of record companies against Cox Communications, Inc. *Sony Music Entertainment v. Cox Communications*, Case No. 2-1168 (4th Cir. Feb. 20, 2024). The opinion addressed the liability of Internet Service providers ("ISPs") for copyright infringement committed by their subscribers. The case stemmed from allegations by music publishers and record companies that Cox Communications, an ISP, failed to take appropriate action against subscribers who engaged in illegal downloading and sharing of copyrighted music. The plaintiffs sent numerous infringement notices to Cox Communications, alleging that its subscribers were illegally sharing copyrighted music through Cox's internet services. Despite receiving these notices, Cox Communications allegedly failed to implement an effective policy for dealing with repeat infringers among its subscribers, as required to take advantage of safe harbor provisions in the Digital Millennium Copyright Act ("DMCA"). The plaintiffs argued that Cox's failure to take action against repeat infringers constituted contributory copyright and vicarious infringement. A jury agreed with plaintiffs and awarded \$1 billion in statutory damages.

On appeal, the Fourth Circuit upheld the contributory liability verdict but reversed the vicarious liability verdict. Under a theory of contributory infringement, one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another is liable for the infringement. As to knowledge, the Court of Appeals noted that the parties had assumed below that notices of a subscriber's past infringement established knowledge that that subscriber would infringe again. Cox Communications had therefore waived the argument that notice of past infringement failed to establish knowledge that the same subscriber was "substantially certain" to infringe again. The Fourth Circuit also affirmed the lower court's holding that by



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continuing to provide internet access, Cox Communications had materially contributed to the infringement.

However, the Fourth Circuit reversed the judgment as to vicarious copyright infringement, which arises when a defendant has the right and ability to supervise the infringing activity, and has a direct financial interest in such activities. Specifically, the Court held that no reasonable jury could have found that Cox received a direct financial benefit from its subscribers' infringement because users' monthly internet fees did not qualify as "a financial benefit directly derived from the copyright infringement itself." Since Plaintiffs had not demonstrated that Cox directly profited from its users' infringement but rather had provided broader internet access services, the Fourth Circuit ruled that Cox could not be held vicariously responsible for subscribers downloading and distributing copyrighted material. In finding the absence of financial benefit, the Court did address whether there was a right and ability to supervise for liability for vicarious infringement.

Although affirming the judgment as to one theory of liability, the Court of Appeals vacated the damages award. Noting that the \$1 billion statutory damages was a global award in which the jury could weigh various factors—*e.g.*, profits earned from the infringement, expenses that Cox saved, the circumstances of the infringement, and the need to punish—the Court concluded that the vicarious infringement verdict might have impacted the amount of damages that the jury awarded. The Court therefore remanded for a new trial on damages.

In the meantime, as always, ISPs should review current policies and procedures relating to copyright infringement and DMCA compliance. This may involve implementing and enforcing policies to address copyright infringement by users or subscribers of the ISP's services or platforms, including implementing and enforcing a repeat infringer policy to address instances of copyright infringement by subscribers.