

No. 21-1168

In The
United States Court of Appeals for the Fourth Circuit

SONY MUSIC ENTERTAINMENT, ET AL.
Plaintiffs-Appellees,

v.

COX COMMUNICATIONS, INC. AND COXCOM, LLC
Defendants-Appellants.

On Appeal from the United States District Court for the
Eastern District of Virginia
No. 1:18-cv-950 (LO/JFA)
Hon. Liam O'Grady

**FRONTIER COMMUNICATIONS PARENT, INC.'S
(PROPOSED) AMICUS BRIEF IN SUPPORT OF COX'S
PETITION FOR REHEARING EN BANC**

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March 11, 2024

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, Frontier Communications Parent, Inc. respectfully makes the following disclosure:

1. Is amicus a publicly held corporation? YES
2. Does amicus have any parent corporations: NO
3. Is 10% or more of the stock of amicus owned by a publicly held corporation or other publicly held entity? YES
If yes, identify all such owners: Ares Management LLC.
Ares Management LLC's parent, Ares Management Corporation, is a publicly held company.
4. Is there any other publicly held corporation or other public entity that has a direct financial interest in the outcome of the litigation? NO
5. N/A to amicus.
6. Does this case arise out of bankruptcy? NO
7. Is this a criminal case in which there was an organizational victim? NO

/s/ Paul R. Garcia

In-House Counsel for
Frontier Communications Parent, Inc.

March 11, 2024

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STATEMENT OF INTEREST*

Frontier Communications Parent, Inc., through its operating entities, connects people to the internet. Frontier has 2.9 million broadband customers in twenty-five states, including in this circuit. Frontier is a party to pending litigation brought by many of the same copyright owners as in this case. Frontier thus has a keen interest that the courts strike the proper balance between the rights of copyright owners, internet users, and internet service providers. Frontier respectfully offers its unique perspective on these exceptionally important issues and their nationwide impact on millions of consumers and on all providers of internet service.

Never before has Frontier has weighed in on a case at this stage of the proceedings, but given the extraordinary importance of the recurring issues the Petition raises—as well as the broad fallout of the Panel’s decision—Frontier feels compelled to do so here.

* No party’s counsel authored this brief in whole or in part. Neither any party nor any party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person other than Frontier and its counsel contributed money that was intended to fund the preparation or submission of this brief. Defendants-Appellants, by their counsel, have consented to the filing of Frontier’s brief. Plaintiffs-Appellees, by their counsel, advise that they “take no position” on Frontier’s request.

ARGUMENT

If ever there were a petition for rehearing en banc that should be granted, it is Cox's. The stakes for internet service providers and their customers could not be higher. This is not hyperbole, as the Panel's flawed decision threatens whether, how, and at what cost companies will be able to provide essential internet services to millions of customers. The logic of the Panel's holding, moreover, goes well beyond copyright infringement and drives a wrecking ball through the ordinary limits of secondary liability, in direct conflict with Supreme Court precedent. The important policy implications of the Panel's opinion for all online service providers and internet users cry out for the en banc Court's attention.

A. The Panel's Decision Conflicts With Supreme Court Precedent.

Petitioner ably explains the fundamental errors of the Panel's decision, and Frontier will not retread that ground here. Suffice it to say that a finding of contributory copyright infringement arising from a company's continued provision of internet service—even knowing of wrongdoing by specific customers—cannot be squared with *Twitter Inc. v. Taamneh*, [598 U.S. 471](#) (2023), *Metro-Goldwyn-Mayer Studios Inc. v.*

Grokster, Ltd., [545 U.S. 913](#) (2005), and *Sony Corp. of Am. v. Universal City Studios, Inc.*, [464 U.S. 417](#) (1984). *Twitter*, which was decided after briefing and argument in this appeal, is the Supreme Court's most recent application of the controlling principles of secondary liability to providers of online communication services—the same common law principles as for contributory copyright infringement. Whereas *Grokster* concerned the culpability of a distributor of software whose very purpose was to infringe copyrights over the internet, [545 U.S. at 923-24, 926, 940](#), *Twitter* more specifically addressed secondary liability for providers of online infrastructure to the public at large. [598 U.S. at 499-500](#). *Twitter*, combined with *Grokster* and *Sony*, forecloses the copyright owners' claims as a matter of law. Yet the Panel's decision does not discuss *Twitter*. Other federal courts, with the benefit of full briefing and argument, are poised in pending cases to consider and apply *Twitter* to the question at hand. If not addressed here and now, this Court's voice will not be heard in this extremely important and recurring context just as other courts begin to weigh in on the impact of *Twitter* in conjunction with *Grokster* and *Sony* as it relates to secondary liability specifically of online service providers.

B. Internet Service Providers Are Caught Between A Rock And A Hard Place.

Internet service providers like Frontier are caught between a rock and a hard place. Copyright owners rarely sue alleged direct infringers because pursuing individual internet users is wildly unpopular. Nor, most curiously, do copyright owners sue peer-to-peer file-sharing companies or piracy websites who are, if anyone is, the ones materially contributing to individuals' direct copyright infringement. This point merits heavy emphasis: Copyright owners conspicuously do not seek relief, be it injunctive or monetary, against the bittorrent companies or online piracy platforms that give consumers the tools to download and share works or that themselves are the means to do so. Instead, copyright owners demand that internet service providers police the internet for them. Copyright owners then demand tens of millions of dollars when we mere conduits to the internet do not do so to their satisfaction.

Copyright owners to this point have successfully painted a grossly inaccurate picture of what an internet service provider learns by virtue of notices of alleged infringement it receives. The fact of the matter is, those notices do not in any way, shape, or form alert, let alone prove,

that a copyrighted work has been shared with any third party, nor do they foretell whether a customer will in the future commit copyright infringement. No one can detect if a consumer has in fact shared a work with any third party over the internet, to whom it might have been shared, or when, or if it ever will be. The most a “notice of alleged infringement” indicates is that copyright owners have spotted, through their own use of peer-to-peer protocols, that a device connected to a specific IP address has the same bittorrent software running and has a particular song or movie saved in that program’s folder. Based on this, copyright owners send internet service providers a notice with a date and time a particular work was detected in the bittorrent program at a specific IP address, a tiny bit of which the copyright owners download *to themselves* to prove it’s there. An owner’s partial download to itself, however, does not indicate that any piece of a work was ever distributed “*to the public*” in violation of [17 U.S.C § 106\(3\)](#), or that it will be in the future.

What’s more—and this is critical—the copyright owners and their agents exclusively control how many notices are sent, their frequency, time, timing, everything about them. That is, a consumer who takes no

affirmative step to share a work, does not know it is being offered to share, and never shared it can still receive hundreds or even thousands of notices of alleged infringement. Relating to a single work. For the same account. And for engaging in no volitional act to share. Yet copyright owners send repeated notices for the same account and same work within short periods of time—often many in a single day—which significantly and artificially inflates the number of notices an internet service provider receives. Copyright owners then tout the inflated number of self-generated notices as a supposed indication of widespread wrongdoing and unilaterally declare them to be “proof of specific instances of repeat copyright infringement.” But they are far from it.

Moreover, even if someone purposefully downloads a song from a piracy website, most people do not have a clue that bittorrent file sharing software has surreptitiously installed on their computer or that it takes on a life of its own by, for example, secretly and automatically starting up every time the computer is powered on; covertly defaulting to “share” mode for all files saved in the program’s folder (which broadcasts to other users of that bittorrent program that a portion of the work is available to share); and not shutting down when the

program is seemingly clicked closed (so it continues to run hiddenly in the background). Bittorrent programs thus can act like malware that attaches to devices of unsuspecting internet users who have no intention of sharing music with anyone else. Copyright owners nonetheless insist that those users' internet service be permanently terminated, which is an excessively harsh result particularly for consumers who reside in hard-to-reach places or who have only one option for service.

Indeed, after advising customers that copyright owners have sent notices of alleged infringement concerning their accounts, Frontier routinely receives responses from confused consumers who explain that they were asleep at the time the notice was generated in the middle of the night, or out of the country, or at work, or that they're elderly and never heard of that song or artist, or that they have a streaming service that allows them already to listen to the "infringed" album and thus have no reason to download it, and so on. All the while, it may have been a neighbor who accessed their wi-fi without permission, but now the account holder is wrongly accused of repeat online piracy, and the internet service provider is charged with aiding and abetting her

“offense.” And if the service provider does not take the severe step of terminating these customers’ accounts based on copyright owners’ bare allegations, it is potentially on the hook for enormous judgments.

An internet service provider thus does not remotely provide a metaphorical hammer to customers knowing that they will use it other than to pound a nail, as the Panel posited. Slip Op. at 23. Adopting the Panel’s metaphor, an internet service provider simply shuttles passengers to the hardware store—which aisle a person strolls, what tool they acquire, or how they might use it cannot be fairly pinned on the transportation service if it doesn’t take the affirmative step of kicking her off the bus after being alerted that in the past she may have bought a hammer and broken a window with it.

C. The Natural Consequences Of The Panel’s Decision Are Far Reaching And Devastating.

The high stakes of the copyright owners’ unsound theory of contributory liability, and the Panel’s endorsement of it, cannot be overstated. Copyright owners seek astronomical amounts from internet service providers simply for providing lawful services to the public at large, a tiny fraction of whom may abuse their accounts. The staggering monetary awards are crushing even to the biggest of corporations and

threaten whether or at what cost law-abiding companies can continue to provide internet services in a post-Covid world where every family relies on the internet for school, work, virtual meetings, social interaction, entertainment, daily life. Faced with such grave economic risk, internet service providers may have to reevaluate where and whether they provide service or how much more to charge customers to pass along the costs of an unfair and imbalanced copyright enforcement scheme. The unavoidable effects of the Panel's decision are directly contrary to the public interest.

Worse still, the Panel's erroneous theory of secondary liability is not cabined to copyright infringement and could have unlimited and catastrophic consequences. According to the logic of the Panel's decision, online providers, if "put on notice," could be secondarily liable for any wrong a person might commit on the web using their internet connection. The Panel's holding has no natural limiting principle. And it runs head on into the Supreme Court's clear and unanimous admonition in *Twitter* that such a holding "would effectively hold any sort of communication provider liable for any sort of wrongdoing *merely for knowing that the wrongdoers were using its services and failing to*

stop them,” which “would run roughshod over the typical limits on tort liability.” [598 U.S. at 503](#) (emphasis added). Indeed, if the Panel’s holding were the governing regime for secondary liability stemming from the provision of online infrastructure, the result in *Twitter* itself would necessarily have been the opposite.

CONCLUSION

Frontier respectfully urges the Court to grant Cox’s petition for rehearing en banc.

March 11, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies under Federal Rule of Appellate Procedure 32(g)(1) that the foregoing Brief complies with the Court's type-volume limitation of Rule 29(a)(4) and (b)(4). According to the word processing system used to prepare the document, Frontier's Brief contains 1,848 words in Century Schoolbook 14-point font, excluding the items not counted under Rule 32(f).

/s/ Paul R. Garcia

Paul R. Garcia

CERTIFICATE OF SERVICE

The undersigned certifies that on March 11, 2024, the foregoing documents were served on all counsel of record via the Court's ECF system.

/s/ Paul R. Garcia

Paul R. Garcia