

No Safe Harbor: SCOTUS Scuttles the DMCA

Overview

The title of this article is based upon the view that, in its unanimous *Cox v Sony* decision, the Supreme Court gutted the safe harbor defense provision of the Digital Millennium Copyright Act (DMCA) and stripped it of all practical effect.

Post-Cox, an online service provider (OSP) subject to DMCA need make little effort to qualify for that defense to alleged copyright infringement, because SCOTUS has provided a new and much broader non-inducement safe harbor – to avoid liability, the provider of a product or service capable substantial noninfringing uses need merely avoid inducing its customers to commit direct infringement, or building in features that facilitate infringement. In other words, just do nothing.

The DMCA Safe Harbor required some OSP action to qualify for the defense. The SCOTUS safe harbor merely requires refraining from inducement or facilitation of a customer's infringement.

As the article developed, the thought occurred that another title might have been "Copyright Fought the Internet, and the Internet Won", a riff on the 1966 Top Ten hit by the Bobby Fuller Four, "I Fought the Law" [And the Law Won]. Rock on.

Wikipedia has this to say about jury nullification: "Jury nullification, also known as jury equity or as a perverse verdict, is a decision by the jury in a criminal trial resulting in a verdict of not guilty even though they think a defendant has broken the law. **The jury's reasons may include the belief that the law itself is unjust**, that the prosecutor has misapplied the law in the defendant's case, **that the punishment for breaking the law is too harsh**, or general frustrations with the criminal justice system."

The Cox decision represents a rare example of SCOTUS nullification. Everyone is familiar with the fact that the Supreme Court can strike down a law on Constitutional grounds. But it is much rarer for the Court to neuter an enacted law for reasons unrelated to Constitutional violation, and in Cox the result seems based upon the fact that upholding the Fourth Circuit decision would allow rights holders to have an enormous litigation club in the form of massive statutory damages, and that the overall consequence would have been termination of Internet access to large numbers of non-infringing users. The Court has here exercised not just its legal but its equitable powers.

Unlike jury nullification, which only pertains to a single case. SCOTUS nullification of the DMCA safe harbor will affect all future secondary liability cases brought under the DMCA (if there are any more, after this decisive ruling). In Cox, while the Court called

balls and strikes, it also changed the rules of the game – or at last exploited a Congressional provided loophole.

The following article consists of:

- A brief discussion of the SCOTUS holding, the simple declaration that, ““The provider of a service is contributorily liable for a user’s infringement *only* if it intended that the provided service be used for infringement, which can be shown *only* if the party induced the infringement or the provided service is tailored to that infringement.”
- A short history of the DMCA, especially its notice-and-takedown requirements (which now result in billions of notices and responsive takedowns annually), and the safe harbor provision just rendered meaningless.
- The facts and litigation history of the case. Of particular note is the decision of the Trump Administration to have the Solicitor General (SG) weigh in on behalf of Cox by urging SCOTUS denial of Sony’s appeal, and by urging it to reverse the Fourth Circuit decision to impose \$1billion in damages on Cox. In this and other matters, copyright protection does not appear to be a high priority for the Trump Administration.
- A detailed review of the oral arguments, which heard arguments from Cox, the SG, and Sony. The back-and-forth reveals multiple justices seeking some assurance that their likely decision to reverse would not entirely strip the DMCA’s safe harbor provision of all practical meaning. Despite lukewarm responses providing little to buttress that hope, they went ahead and did so anyway – clearly understanding the consequences.

One clear theme that emerged in that dialogue was that the 1998 DMCA, enacted at a time when the public Internet was primitive and its evolution unknown, now applies to a public Telecommunications resource deemed essential. Deputy SG Malcolm Stewart argued that the lower court decision was simply too harsh given the centrality of the Internet, **“The...approach of terminating all access to the Internet based on infringement, it seems extremely overbroad given the centrality of the Internet to modern life and given the First Amendment.”**

Justice Alito echoed this same sentiment when he admonished counsel for Sony, “Mr. Clement, the United States tells us that the decision of the Fourth Circuit in your opinion --**your position would threaten universal Internet access and emphasizes the problems that would be –that are encountered when that decision in your position are applied to a university account shared by thousands of students, maybe 50,000 students and tens of thousands of**

staff members or regional ISP. And I really don't see how your position works in that context but maybe you can explain how it could."

What is most remarkable about the unanimous decision is there is no enumerated right to Internet access in the U.S. Constitution, yet SCOTUS has just determined that the potential denial of Internet access would be so inequitable that it justifies scuttling the DMCA safe harbor and adopting a narrow and absolute inducement standard for OSPs.

Another theme in the dialogue is that, if Congress is unhappy with the Court's Cox decision, it can revisit the DMCA and insert its own standard for secondary liability (given current partisan gridlock, this is most unlikely). In effect, SCOTUS is saying that this is a "major question" that only Congress can resolve – while simultaneously promulgating its own "only inducement" answer that undoes the balance Congress sought to weave into the DMCA.

As the oral arguments wrapped up, Justice Sotomayor, clearly recognizing that this was a hard case that could make bad (or at least unsettling) law, expressed her discomfort to Clement, "We are being put to two extremes here... How do we announce a rule that deals with those two extremes?"

Alas, the unanimous verdict demonstrated that there was no way to square that circle. The extreme of requiring Cox to terminate Internet access to tens of thousands was avoided in exchange for rendering the DMCA's safe harbor a pointless irrelevance.

- In the unanimous verdict authored by Justice Clarence Thomas, SCOTUS reversed the Fourth Circuit's \$1 billion contributory copyright infringement judgment against Cox and held, "**The provider of a service is contributorily liable for a user's infringement only if it intended that the provided service be used for infringement, which can be shown only if the party induced the infringement or the provided service is tailored to that infringement (emphasis added);** Cox neither induced its users' infringement nor provided a service tailored to infringement; accordingly, Cox is not contributorily liable for the infringement of Sony's copyrights."

As further detailed, additional observations in the opinion made clear that the wreckage of the DMCA was irretrievable. Of particular note was the declaration that, "Although our precedents have recognized specific forms of secondary copyright liability that predated the Copyright Act, **we are loath to expand such liability beyond those precedents.**" If Congress is chagrined by the scuttling of

the safe harbor provision, the ball is in its court to require OSPs to terminate Internet access to multitudes served by a single IP address.

Justice Sotomayor, while concurring, still expressed concern in a separate opinion that the Court's decision was too extreme, stating, "The majority holds that Cox is not liable solely because its conduct does not within the two theories of secondary liability previously applied by this Court. In so doing, **the majority, without any meaningful explanation, unnecessarily limits secondary liability even though this Court's precedents have left open the possibility that other common-law theories of such liability, like aiding and abetting, could apply in the copyright context. By ignoring those past decisions, the majority also upends the statutory incentive structure that Congress created.... The majority's new rule completely upends that balance and consigns the safe harbor provision to obsolescence...** After today, however, ISPs no longer face any realistic probability of secondary liability for copyright infringement, regardless of whether they take steps to address infringement on their networks and regardless of what they know about their users' activity... **The majority's decision thus permits ISPs to sell an internet connection to every single infringer who wants one without fear of liability and without lifting a finger to prevent infringement. It also means that Cox is free to abandon its current policy of responding to copyright infringement. As Cox's counsel conceded at oral argument, under the rule the majority adopts today, the safe harbor provision will not "d[o] anything at all" going forward. Congress did not enact the safe harbor just so that this Court could eviscerate it."**

However, rather than stopping there, Sotomayor continues and explains why Cox, despite its lax and somewhat contemptuous treatment of the safe harbor requirements, could not have been found guilty of secondary infringement under an aiding and abetting theory. She thus undermined her own argument, and confirmed that the Court has eviscerated the DMCA safe harbor completely and permanently.

- The conclusion of the article speculates on the future of the DMCA, and copyright law generally.

With the current Congress incapable of funding airport security, the prospects of a policy response to Cox in an election year are close to zero (in truth, less than zero).

That's likely good, as the DMCA was a flawed attempt to address Internet content distribution in the Web's earliest days. It should not dictate actions taken after almost thirty years of technical and business developments.

Should Congress ever decide to consider a new approach to online secondary copyright infringement, the issue of applicable statutory damages should be addressed up front. While potential penalties of up to \$150,000 per copy were intended to be a punitive deterrent, these amounts are at wide variance with current economic reality when the content world has transitioned from distribution of physical copies to providing subscription streaming services as its primary business model. A single music file can be downloaded in the U.S. for no more than 99 cents, and an artist earns just a fraction of a penny for a streamed song; new movies can be rented for \$4 a viewing by an entire family.

Such massive potential penalties have arguably become counterproductive in the courtroom. While it should make no difference from a legal perspective, one wonders what SCOTUS would have decided in Cox had the ISP faced a few \$million in monetary penalties rather than \$1 billion – that is, a penalty that stung but did not represent an existential threat to it and other ISPs? The certainty of massive statutory damages against Cox if the lower court was upheld, and the resulting broad denials of essential Internet access by ISPs and other intermediaries, clearly had a major impact on the Court's ultimate decision.

A major market change that may bode well for a revised approach to digital copyright policy is that in the past three decades the tech and content/copyright sectors have converged, dissolving the barrier between a content industry establishment and disruptive Internet upstarts that existed when the DMCA was enacted. Netflix, Amazon, Alphabet, Apple, Microsoft, Meta, and others – including Sony –all straddle the space between creation and distribution, and thus may be positioned to coalesce around a more balanced approach to protecting copyright in a world where the marginal cost of delivering a given piece of content approaches zero. Perhaps the CEOs of these companies should order their content and distribution lawyers to be locked in a room until they emerge with something that better accords with digital and economic realities. (Of course, the public interest should be carefully considered as well before any new law is enacted.)

Finally, as AI becomes ubiquitous, the most important copyright policy matter to be addressed is not online protection, but whether copyright protection should remain restricted to human authors and inventors. The mega-corporations that create and distribute mass content will never utilize AI-produced works if they cannot utilize copyright to protect their investment.

Article I, Section 8, Clause 8 of the US Constitution is the IP clause, and it states:

*[The Congress shall have Power . . .] 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.*

Can Chat GPT, Open AI, Claude, or another language model – or a company prompting it to generate desired content- ever be an author or inventor? Whatever the future response to the DMCA’s SCOTUS scuttling, the applicability of copyright to works employing high levels of AI assistance will be the central question for copyright policy in the coming years of this digital millennium.

In its January 2025 report, “Copyright and Artificial Intelligence Part 2: Copyrightability”, the U.S. Copyright Office opined that human creative involvement remained paramount, but that the extent required could not be generalized. It said in part:

- **Copyright does not extend to purely AI-generated material, or material where there is insufficient human control over the expressive elements.**
- **Whether human contributions to AI-generated outputs are sufficient to constitute authorship must be analyzed on a case-by-case basis.**
- **Based on the functioning of current generally available technology, prompts do not alone provide sufficient control.**

That approach is worthwhile but less than fully satisfying. A case-by-case analytical approach may be prudent in the early stages of AI development and use, but at some point Congress may wish to enact a bright line test that narrows the basis for litigation. Further, regarding the use of prompts to generate content, the CO’s reference to “the functioning of current generally available technology” is a reminder that Moore’s law dictates a speed of technological development that far outpaces the slow march of legislation and jurisprudence. Generally available AI technology will look very different within a few years, and either the CO, Congress, or the courts may decide that AI content produced with minimum prompting may qualify for copyright. The ultimate resolution will greatly influence the degree to which humans participate in the digital entertainment sector.

The DMCA safe harbor is gone, replaced by a far more extensive “inducement and facilitation only” SCOTUS safe harbor.

Long live copyright as incentive for the progress of science and the useful arts.

Introduction

On March 25, 2026, the Supreme Court of the United States (SCOTUS) issued a unanimous decision in Cox Communications, Inc. vs. Sony Music Entertainment, the most important Internet copyright infringement liability case in two decades.

SCOTUS reversed the Fourth Circuit's \$1 billion contributory copyright infringement judgment against Cox and held, "***The provider of a service is contributorily liable for a user's infringement only if it intended that the provided service be used for infringement, which can be shown only if the party induced the infringement or the provided service is tailored to that infringement (emphasis added);*** Cox neither induced its users' infringement nor provided a service tailored to infringement; accordingly, Cox is not contributorily liable for the infringement of Sony's copyrights."

Had SCOTUS upheld the prior judgment, that ruling would have sent an immediate chilling effect across not just Internet Service Providers (ISPs) like Cox, but a host of other Internet intermediary parties whose neutral infrastructure services facilitate the connection between users and content. The potential for crippling copyright damages would have likely caused the internal adoption of harsh standards regarding service denial for users alleged to have engaged in direct copyright infringement through unauthorized downloads and similar activities.

But in forestalling that potential harm, SCOTUS eviscerated the safe harbor provision of the Digital Millennium Copyright Act (DMCA) and rendered it a vestigial appendix lacking any practical function or remaining utility. And implicit in the Court's holding is that, 28 years after the DMCA was enacted for the newly emerged public Internet, public access to the Internet has become a right powerful enough to overcome any ambiguity in copyright law.

The DMCA Framework

The DMCA was signed into law by President Bill Clinton on October 28, 1998, after unanimous passage in the US Senate. It amended Title 17 of the United States Code to

extend the reach of copyright on the Internet, while limiting the liability of ISPs and other providers of online services for copyright infringement by their users.

While the DMCA also addresses the circumvention of digital rights management technology, its relevant provisions for this discussion are contained in its Title II, the Online Copyright Infringement Liability Limitation Act ("OCILLA"). It creates a safe harbor defense for online service providers (OSPs, including ISPs) against copyright infringement liability, provided they meet specific requirements. These include promptly blocking access to alleged infringing material, or removing such material from their systems, when they receive notification of an infringement claim from a copyright holder or its agent, in what is known as a "notice and takedown" process.

That process has turned into a giant game of whack-a-mole. In 2025, Google alone processed more than 3.5 billion DMCA takedown notices, removing about 10 million pieces of content every calendar day. The total received by all OSPs is surely billions more, given that the Internet is essentially a globally distributed digital copying machine. Claimed infringements are noticed to intermediaries, content is removed, and then the same content quickly reappears elsewhere. Whether this massive volume of activity evidences policy success or failure is debatable.

The related safe harbor provisions, shielding OSPs from liability for users' copyright infringement, are codified at 17 U.S.C. § 512, and were designed to encourage cooperation between OSPs and copyright holders. They cover four OSP activities:

1. Transmitting, routing, or providing connections for infringing material
2. Caching or temporarily storing infringing material
3. Storing infringing material at users' direction
4. Linking or referring to infringing material

The safe harbor is intended to be a specific, statutory defense to allegations of contributory copyright liability against an OSP. To qualify, the OSP must lack actual knowledge of infringing material on its system (or remove it expeditiously upon notice); **adopt and implement a policy of terminating repeat infringers**; and establish a system for the intake of DMCA notices from rights holders.

However, under SCOTUS' Cox decision, a spotty record of repeat infringement termination does not result in a judgment of secondary contributory infringement, as the new SCOTUS standard provides a judicial safe harbor that negates any need for the statutory one. A finding of contributory liability and the significant monetary penalties that accompany it can only be found where the service provider intended that infringement to occur, which in turn can only be evidenced if it induced the direct infringement or tailored its service to facilitate such infringement.

The Cox Case

Cox is an ISP serving about 6 million subscribers, each of whom is contractually prohibited from using their Internet connection to post, copy, transmit, or disseminate content that infringes copyrights. Sony Music Entertainment¹ and other record labels hired the MarkMonitor IP protection firm to seek and provide notice of infringing works on Cox's system; during a roughly two-year period at issue, MarkMonitor sent Cox 163,148 notices identifying IP addresses of Cox subscribers allegedly associated with infringement.

Sony sued Cox in Federal District Court, advancing two theories of secondary copyright liability – contributory and vicarious. The Fourth Circuit jury found in favor of Sony on both theories, found Cox's infringement willful, and awarded \$1 billion in statutory damages. The Court of Appeals reversed as to vicarious liability but left the \$1 billion judgment in place.

Tellingly, the Trump Administration, through the Solicitor General (SG), urged SCOTUS to hear Cox's appeal and reject Sony's – and the Court did just that. The SG also filed a brief in which it took the position that, *“Taken together, Sony and Grokster make clear that contributory liability for copyright infringement requires more than knowledge that others have put the defendant's products to infringing uses. Instead, it requires “culpable intent” to cause infringement.”*, and that the DMCA safe harbor, *“provision limits ISPs' exposure to secondary liability for copyright infringement by creating an*

¹ Sony, via different operating entities, has been involved with all three of SCOTUS' landmark Internet copyright cases:

1. Sony's device business was defendant in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), narrowly decided by a 5-4 vote. The Court held that the manufacturer of a technology capable of commercially significant noninfringing uses could not be held liable for third party use for infringement. Ironically, the Betamax video recorder exonerated by the case was defeated in the marketplace by competing VHS technology.
2. Sony Music was a co-petitioner in *METRO-GOLDWYN-MAYER STUDIOS INC. ET AL. v. GROKSTER, LTD., ET AL.*, decided unanimously on June 27, 2005. The Court held, “One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses.” This decision narrowed the Betamax standard, which could not save a beneficial technology employed in an infringing business model.
3. Sony was the losing named party in the Cox decision, in which the Court clarified that active inducement of infringement was required to establish secondary online copyright liability, and that lax compliance with the DMCA safe harbor provisions was insufficient to evidence intent to profit from it.

additional defense. The provision does not imply, however, that conduct falling outside the safe harbor renders an ISP liable. To the contrary, Section 512(l) states that a service provider's failure to qualify for the safe harbor "shall not bear adversely" on any argument "that the service provider's conduct is not infringing under this title or any other defense."

The SG also made oral arguments before SCOTUS on Cox's behalf. Any Congressional review of the Cox decision must consider the political reality that the current Administration places technology goals above copyright protection, as best evidenced by its out-of-hand rejection of licensing schemes for copyrighted materials used to train Large language Model (LLM) Artificial Intelligence (AI) systems. Indeed, the Administration attempt was made to fire the Register of Copyrights for issuing an unfinished report suggesting that such an approach be considered.

The Oral Argument

Oral arguments were presented on December 1, 2025. Appearing on behalf of Cox was its counsel, E. Joshua Rosenkranz. Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D.C.; argued for the United States, as amicus curiae, supporting the Petitioners (Cox). Sony was represented by Paul D. Clement, who served as Solicitor General from 2005-2008 during the second term of President George W. Bush.

Of particular note during the oral argument was the observation that the DMCA, and US copyright law generally, has no provision establishing a clear standard for secondary (vicarious or contributory) infringement, which raises the questions of whether it can be found and in what circumstances. This in turn sparked some discussion of whether relevant provisions of patent and trademark law, as well as common law concepts such as aiding and abetting unlawful acts, should be looked to for guidance by the Court.

Rosenkranz began with this declaration on behalf of Cox:

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.

He then asserted that Cox's rather lax DMCA compliance was insufficient to trigger secondary liability:

...contributory liability requires malfeasance with the purpose of fostering the bad act, that there's no liability for passive non-feasance

Justice Sotomayor took some issue with that stance:

*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 did nothing. And, in fact, counselor, your client's sort of laissez faire attitude towards the Respondents is probably what got the jury upset...**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?***

Rosenkranz put the best face on the actions Cox did take, asserting:

the program stopped infringement by 98 percent of the people who were accused of infringement. That is not nothing.

Justice Barrett inquired whether reversal would essentially gut the DMCA:

What incentive would you have to do anything if you won? If you - if you win and mere knowledge isn't enough, why would you bother to send out any notices in the future? What would your obligation be?

Rosenkranz' response conceded that the legal requirement for taking action would have been eliminated:

Your Honor, for the simple reason that Cox is a good corporate citizen that cares a lot about what happens on its system. We do all sorts of things that the law does not require us to do.

Barrett parried with this:

You would have no liability risk, right, if you win going forward?

And Rosenkranz conceded:

That is correct.

But he also described the harm that could come from overzealous pursuit of the remaining two percent of infringers:

In order to capture that fringe case, we would have to create a world in which ISPs are going after everyone who infringes, including ...the regional ISPs and the hospitals and the universities, because that is a world in which at \$150,000 per pop, the ISP has a huge financial incentive to cut off the accused infringer at the word "go."

As the dialogue continued, Justice Kagan focused on the effect or lower court reversal on the usefulness of the safe harbor provision:

But why would anybody care about getting into the safe harbor if there's no liability in the first place?

Rosenkranz's response characterized the safe harbor provision as little more than a temporary place marker to be filled in by later judicial clarification:

Right. So --so Congress can adopt a safe harbor for all sorts of reasons. Here, Congress did it to assure service providers at a point in time at which the law was really unknown.

Kagan responded:

Right, but --right. I --I take your point about how Congress may have thought this was a good thing to do because we don't know what the liability rule is. But, once the liability rule becomes what you think the liability ought to be, do you agree that then the --the safe harbor provision is not going to be doing anything at all?

Rosenkranz conceded the point:

Correct. Yes, I agree.

As dialogue continued, Justice Jackson also expressed concern about the impact of reversal on the efficacy of the safe harbor provision:

*What concerns me a bit is your **encouraging us to adopt a common law rule that would essentially eliminate liability in this situation...** Congress told us in the legislative history what the safe harbor was about...And so, **even though there isn't secondary liability in the statute, it appears as though Congress sought to use the liability risk that exists in the common law to incentivize this cooperation.***

As Jackson expressed further concern about undermining Congressional intent, Rosenkranz's final riposte emphasized the primitive state of the Internet at the time DMCA was enacted:

*Congress had no idea what the liability would allow...**I will also underscore there was no such thing as a conduit ISP. That was a creature of 512(a). The AOLs of the world were hosting content...**one cannot impute to Congress any view and certainly not any unified view about what the liability rules would be in the absence of the DMCA.*

Indeed, according to the Pew research Center, in 1998 only 41% of U.S. adults had Internet access. Connection was generally through a slow dial-up modem to a walled garden system like AOL, with simple webpages taking agonizingly long to fully load. Google was created that year, while FaceBook's launch was 6 years in the future, and the iPhone was 9 years from introduction. The Congress of the late 90s was engaged in trying to create a cohesive and supportive legal framework for a world just being born, its future shape and direction largely unknown. What's remarkable is not that they couldn't fully envision the rapid transformations ahead, but that the framework remains at all relevant.

Next up was Malcolm Stewart, advancing the U.S. government position that, "both in copyright law and more generally, **this form of secondary liability is reserved for persons who act for the purpose of facilitating violations of law**. Because Cox simply provided the same generic Internet services to infringers and non-infringers alike, there is no basis for inferring such a purpose here." In the course of argument he also stated the fact that determined the case's ultimate outcome – "**The...approach of terminating all access to the Internet based on infringement, it seems extremely overbroad given the centrality of the Internet to modern life and given the First Amendment.**" Putting it simply, since the DMCA's enactment, Internet access has become a necessity for participation in civic and general life activities, and barring such access would be a cruel and unusual punishment intruding on fundamental rights. Whether or not that's sound legal principle, it's reality in 2026.

If the questioning during the first two oral arguments indicated a search for some reassurance that the reversal of the power court would not entirely gut the DMCA's structure and efficacy, the final speaker warned that such a result would be inevitable. Paul Clement drilled that argument home relentlessly:

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... 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.

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 liability --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? 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.

Notwithstanding that argument's passion, subsequent questioning by several justices indicated that they remained unconvinced that knowledge of infringement combined with lack of responsive action was sufficient to satisfy the common law's requirement of intent.

Further, on a more practical level, Justice Alito posed a question indicating a view that Internet access had become a fundamental necessity since the law's 1998 enactment that preserving it took precedence over copyright enforcement:

Mr. Clement, the United States tells us that the decision of the Fourth Circuit in your opinion --your position would threaten universal Internet access and emphasizes the problems that would be --that are encountered when that decision in your position are applied to a university account shared by thousands of students, maybe 50,000 students and tens of thousands of staff members or regional ISP.

And I really don't see how your position works in that context but maybe you can explain how it could.

Clement's responses to that query ranged from the ISP conversing with the university, to the university throttling Internet speed to slow or thwart rapid downloading of audiovisual files. But none of that negated the truth that affirming a \$1 billion damages judgment would compel ISPs and other intermediaries to terminate services to schools, hospitals, hotels, and other venues where public Internet access could facilitate multiple copyright infringements by unidentifiable persons, even though the majority of users were not infringing.

Justice Barrett inquired, "If you lose, what is the effects on your copyright holders?" In response, Clement made a dire prediction:

We would --we would be without scalable functional recourse.... if my clients are limited to direct infringement actions, they are in very, very dire straits. But it's worse than that, because the key thing about the safe harbor is the safe harbor is not only what gives the --the ISPs an incentive to behave responsibly, it's

also what gives them incentive to come to the table and have negotiations with the content community.

Tacitly conceding that the DMCA might be gutted, Justice Kavanaugh suggested that the burden was on Congress to address that circumstance:

*Can I ask a question, a separation-of-powers question here... But, to go back to Justice Thomas's question, Congress has not enacted a statute here for secondary liability... **Why shouldn't that be a kind of tiebreaker here of letting Congress solve the issues that you're raising?***

Justice Gorsuch seized upon the same point:

Congress still hasn't defined the contours of what secondary liability should look like. Here, we are debating them, right? So shouldn't that be a flag of caution for us in expanding it too broadly?

No doubt aware that Congress over the past three decades has become a far less effective and responsive entity, substituting hyper-partisan invective for pragmatic policymaking, Clement did his best to reject the notion that the Congress rather than the Court should clarify the bounds of secondary copyright liability, and to bolster his argument for implying intent to Cox's response to DMCA notices..

The legal adage, "Hard cases make bad law", came to mind often during the Court's oral arguments.

Justice Sotomayor summed up the dilemma faced by the Court in determining whether the \$1 billion liability against Cox should stand, with all that implied for future Internet access:

We are being put to two extremes here. The other side says there's no liability because we're just putting out into the stream of commerce a good that can be used for good or bad and we're not responsible for the infringers' decision. We have the other side... --Petitioners' and the SG's position that the only way you can have aiding and abetting in this field is if you have purpose, all right, and you're saying we don't have to prove purpose. We have to prove only intent, correct? That's the other extreme...and some of this is that the Internet is so amorphous and what it can or cannot do I'm not sure about, we're being told that ISPs only know who their customer is, and their customer could be a region...How do we announce a rule that deals with those two extremes?

The verdict ultimately rendered by the Court chose the extreme of vitiating the DMCA safe harbor rather than risk massive terminations of Internet access based upon infringement allegations by rights holders. A statute intended to set the stage for a digital millennium has been rendered largely irrelevant after less than three decades.

The prospects for a response by Congress are uncertain at best, and not encouraging given its pervasive partisan gridlock.

The Unanimous Decision

As noted in the opening of this article, on March 25th SCOTUS unanimously reversed the Fourth Circuit, holding that contributory infringement exists only if the service provider intended that its system be used for infringement, with such intent demonstrated where it induced the infringement or tailored its service to facilitate it.

With this decision, the Court provided Internet intermediaries with a safe harbor far broader than the one contained in the DMCA; a safe harbor that requires no response upon allegations of infringement, only self-restraint to avoid inducing infringement or actively facilitating it. Absent such clear intent, liability falls upon the infringing service user, not the service provider.

The holding summary issued by SCOTUS continued:

- *The Fourth Circuit's holding went beyond the two forms of liability recognized in Grokster and Sony by holding that "supplying a product with knowledge that the recipient will use it to infringe copyrights is . . . sufficient for contributory infringement... **Under this Court's precedents, the intent required for contributory liability can be shown only if the party induced the infringement or the provided service is tailored to that infringement.***
- *The DMCA does not expressly impose liability for Internet service providers who serve known infringers; it merely creates new defenses from liability for such providers. **The DMCA itself made clear that failure to comply with the safe-harbor rules "shall not bear adversely upon . . . a defense by the service provider," as here, "that the service provider's conduct is not infringing."***

In the full decision authored by Justice Clarence Thomas, additional observations made clear that the wreckage of the DMCA was irretrievable:

- ***Under our precedents, a company is not liable as a copyright infringer for merely providing a service to the general public with knowledge that it will be used by some to infringe copyrights. Accordingly, we reverse.***
- ***"The Copyright Act does not expressly render anyone liable for infringement committed by another..." Although our precedents have recognized specific forms of secondary copyright liability that predated the***

Copyright Act, we are loath to expand such liability beyond those precedents.

- *A service is tailored to infringement if it is “not capable of ‘substantial’ or ‘commercially significant’ noninfringing uses.”*
- *Cox is not contributorily liable for the infringement of Sony’s copyrights. Cox provided Internet service to its subscribers, but it did not intend for that service to be used to commit copyright infringement. Holding Cox liable merely for failing to terminate Internet service to infringing accounts would expand secondary copyright liability beyond our precedents.*
- *Sony overreads the DMCA... The DMCA merely creates new defenses from liability for such providers. And, the DMCA made clear that failure to comply with the safe-harbor rules “shall not bear adversely upon . . . a defense by the service provider that the service provider’s conduct is not infringing.”*

Justice Sotomayor, in a concurrence joined by Justice Jackson, reiterated her oral argument angst that the Court had been compelled to choose between two extreme positions:

The majority holds that Cox is not liable solely because its conduct does not within the two theories of secondary liability previously applied by this Court. In so doing, the majority, without any meaningful explanation, unnecessarily limits secondary liability even though this Court’s precedents have left open the possibility that other common-law theories of such liability, like aiding and abetting, could apply in the copyright context. By ignoring those past decisions, the majority also upends the statutory incentive structure that Congress created.

Yet Justice Sotomayor continued, and opined that Cox lacked the requisite intent to be found liable for aiding and abetting infringement, and failed to cite any other applicable common law basis for liability. Her concurring uneasiness is based less on the totality of the Court’s holding than on its effective negation of the DMCA safe harbor provision:

The majority’s limiting of secondary liability here dismantles the statutory incentive structure that Congress created. Congress passed the Digital Millennium Copyright Act (DMCA) in 1998, 14 years after this Court held in Sony that the Copyright Act impliedly provided for secondary liability. At the time, the internet was exploding in popularity. Without knowing more about the outer bounds of secondary liability for copyright infringement, and faced with a rapidly changing technological landscape, Congress included in the DMCA a safe harbor that shields internet service providers (ISPs) like Cox from secondary liability for copyright infringement. To gain that protection, they must “adop[t] and reasonably implemen[t] . . . a policy that provides for the

termination in appropriate circumstances” of subscribers who repeatedly infringe copyrights using the ISP’s network. Importantly, Congress did not provide that ISPs could never be secondarily liable for copyright infringement. Instead, it struck a balance by creating incentives for ISPs to take reasonable steps to prevent copyright infringement on their networks, while also assuring ISPs that they do not need to take on the impossible task of responding to every instance of infringement on their networks.

The majority’s new rule completely upends that balance and consigns the safe harbor provision to obsolescence... After today, however, ISPs no longer face any realistic probability of secondary liability for copyright infringement, regardless of whether they take steps to address infringement on their networks and regardless of what they know about their users’ activity... The majority’s decision thus permits ISPs to sell an internet connection to every single infringer who wants one without fear of liability and without lifting a finger to prevent infringement. It also means that Cox is free to abandon its current policy of responding to copyright infringement. As Cox’s counsel conceded at oral argument, under the rule the majority adopts today, the safe harbor provision will not “d[o] anything at all” going forward. Congress did not enact the safe harbor just so that this Court could eviscerate it.

The DMCA After Cox

Following the Cox decision, the DMCA remains in the US Code. But it is now a walking dead statute, a Zombie law devoid of the soul of effective meaning.

The anti-circumvention provisions remain in effect, but they contribute little to anti-infringement efforts in the present day.

Notice of alleged infringements and responsive takedown activity in the billions of files annually will likely continue, as lawyers advise clients to keep up the appearance of being a good corporate citizen, especially as takedown activity has been largely automated. but whether that has any meaningful effect on the overall level of Internet copyright infringements or their economic impact on rights holders is highly debatable.

As for the DMCA safe harbor, service providers have now been provided by SCOTUS with a far broader shelter. So long as they are not reckless enough to induce direct infringements by customers, or design their systems to abet it, they no longer have any

potential liability for failing to engage in broad or targeted takedown or service denial activity.

The prospects for any response to Cox in the current Congress are slim to none. Legislators prefer enacting new laws accompanied by self-laudatory press releases rather than the more grueling job of repairing battered old laws and have proven unequal to their task.

Cox may also influence current Congressional consideration of Domain blocking legislation, modeled on EU and other foreign laws requiring real time blocking of unauthorized Internet content, especially live feeds of sports and entertainment events. Unlike the DMCA, such proposals require neutral intermediaries to block access to specific websites, rather than to specific users. Current drafts under discussion require a court order, assumedly backed by standard court enforcement measures. Post-Cox, Internet intermediaries already opposed to such proposals will likely demand strong assurance that their handling of such orders cannot trigger ruinous secondary liability penalties.

Should Congress ever decide to salvage the DMCA by considering a new approach to online copyright infringement, the issue of applicable statutory damages should be addressed. The Copyright Act provides for statutory damages between \$750 and \$30,000 per work, as determined by the court -- up to \$150,000 per work if the infringement is found to be intentional. While intended to be a punitive deterrent, these amounts are at wide variance with economic valuation reality. A single music file can be downloaded in the U.S. for no more than 99 cents, and an artist earns just a fraction of a penny for a streamed song. While copyright holders have enjoyed wielding the weapon of potentially bankrupting damages, these outsized sums arguably have become counterproductive in the courtroom.

While from a legal perspective it should make no difference, one wonders what SCOTUS would have decided in Cox had the ISP faced a few \$million in monetary penalties rather than \$1 billion. The certainty of massive statutory damages if the Appeals Court had been affirmed, and the resulting broad denials of essential Internet access by ISPs and other intermediaries, clearly had a major impact on the Court's ultimate decision.

There has been one major market change that may bode well for a revised DMCA. That is the reality that in the past three decades the tech and content/copyright sectors have converged. Netflix, Amazon, Alphabet, Apple, Microsoft, Meta, and others – including Sony – all straddle the divide between creation and distribution, and thus may be better positioned to agree upon a balanced approach to protecting copyright in a world where the marginal cost of delivering a given piece of content approaches zero.

Finally, as AI becomes ubiquitous, the most important copyright policy matter may not be online protection but whether copyright protection remains restricted to works requiring substantial human input, and unavailable to works entirely generated by prompted AI. The mega-corporations that create and distribute mass content will never utilize AI-produced works if they cannot protect their investment.

Article I, Section 8, Clause 8 of the US Constitution is the IP clause, and it states:

*[The Congress shall have Power . . .] 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.*

Can Chat GPT, Open AI, Claude, or another language model – or a company prompting it to generate desired content- ever be considered to be an author or inventor? In its January 2025 report, “Copyright and Artificial Intelligence Part 2: Copyrightability”, the U.S. Copyright Office opined:

- Questions of copyrightability and AI can be resolved pursuant to existing law, without the need for legislative change.
- The use of AI tools to assist rather than stand in for human creativity does not affect the availability of copyright protection for the output.
- Copyright protects the original expression in a work created by a human author, even if the work also includes AI-generated material.
- **Copyright does not extend to purely AI-generated material, or material where there is insufficient human control over the expressive elements.**
- **Whether human contributions to AI-generated outputs are sufficient to constitute authorship must be analyzed on a case-by-case basis.**
 - **Based on the functioning of current generally available technology, prompts do not alone provide sufficient control.**
- Human authors are entitled to copyright in their works of authorship that are perceptible in AI-generated outputs, as well as the creative selection, coordination, or arrangement of material in the outputs, or creative modifications of the outputs.
 - The case has not been made for additional copyright or sui generis protection for AI generated content.

The purpose of the copyright power is to provide material incentives for the progress of science and useful arts. As AI technology rapidly evolves, there will be multiple cases coming before the courts, with the resultant decisions setting the boundaries of what

degree of human contribution is sufficient to secure copyright protection. Whatever the future response to the DMCA's SCOTUS scuttling, the applicability of copyright to works employing AI assistance will be the central question for copyright policy in the coming years of this digital millennium.