

No. _____

IN THE
Supreme Court of the United States

PERFECT 10, INC.,

Petitioner,

v.

GIGANEWS, INC., *et al.*,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Copyright Act grants copyright owners certain exclusive rights, including the rights to reproduce, distribute, and publicly display their copyrighted works. See 17 U.S.C. § 106. Direct copyright infringement occurs when a plaintiff proves ownership of the work at issue, and violation of at least one of the rights established by 17 U.S.C. § 106. 17 U.S.C. § 501(a). This Court has also recognized that a defendant may be vicariously liable for the direct infringement of another if that defendant “profit[s] from [such] direct infringement while declining to exercise a right to stop or limit it.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

This case presents two questions concerning liability under the Copyright Act:

1. Whether the Ninth Circuit correctly held—in conflict with the Second, Sixth, Seventh, and Eighth Circuits—that a defendant “profits from” direct infringement for purposes of vicarious copyright liability only if a plaintiff proves that its work, as opposed to the totality of the infringing content offered by defendants, was the reason customers were drawn to the defendant’s business.
2. Whether the Ninth Circuit correctly held—contrary to the decisions of this Court—that a defendant does not engage in direct copyright infringement when it displays, reproduces, or distributes infringing material, so long as that conduct is accomplished through an automated process.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following entity was a party to the proceeding before the United States Court of Appeals for the Ninth Circuit and may therefore be considered a respondent under this Court's Rule 12.6: Livewire Services, Inc.

RULE 29.6 STATEMENT

Petitioner Perfect 10, Inc., has no parent corporation, and no publicly held company that owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 847 F.3d 657.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2017. On July 14, Justice Kennedy granted Petitioner's application to extend the time to file this petition until August 30. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Copyright Act provides in pertinent part that:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106.

The Copyright Act further provides in pertinent part that:

Anyone who violates any of the exclusive rights of the copyright owner as provided by section[] 106 * * * is an infringer of the copyright.

17 U.S.C. § 501(a).

STATEMENT

Respondents' business model is simple: In exchange for a monthly subscription fee, Giganews and Livewire give their customers access to the largest black market for copyrighted works in human history. Respondents provide to their customers more than 25,000 *terabytes* of content stored on Giganews's servers, the vast majority of which is copyrighted movies, music, images, and software—including 61,000 images belonging to Petitioner Perfect 10.¹ To its customers, Respondents' services are similar to subscription-based content businesses

¹ For context, *a single* terabyte equates to approximately 200 full length movies; 17,000 hours of music; or 500,000 images.

such as Hulu, Netflix, and Spotify, insofar as they pay a fee to receive copyrighted works of their choice. But Respondents differ from those legitimate businesses in one critical respect: Neither Giganews nor Livewire is licensed or otherwise authorized to distribute, reproduce or display any of the material from which they so handsomely profit.

In the decision below, the Ninth Circuit effectively immunized Respondents' staggering misappropriation of the creative efforts of others. In so doing, it discarded sensible, long-established principles of secondary copyright infringement that govern in other courts of appeals, and shielded broad swaths of infringing activity from direct liability for reasons that cannot be reconciled with this Court's cases. Each of the two questions presented here is important and recurring. And if left uncorrected, the Ninth Circuit's flawed answers will insulate from liability the rampant online theft of copyrighted works created by artists of all stripes.

The first question presented concerns what a plaintiff must prove to establish that a defendant profits from the direct infringement of another—one of the elements of vicarious copyright infringement articulated by this Court in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). For nearly one hundred years, the uniform rule in the lower courts has been that a plaintiff satisfies this element if it demonstrates that customers are drawn to a defendant's business by infringing material *generally*, some of which includes plaintiff's works. In the decision below, however, the Ninth Circuit held this to be insufficient and instead required Petitioner to show that customers were drawn

to Respondents' platform *specifically to access Plaintiffs' works*. Not only does such a rule have no basis in law, it perversely renders vicarious liability most difficult to prove against defendants, such as Respondents, that profit from massive infringement of many different types of works.

The second question presented goes to the heart of direct copyright infringement in the digital age. According to the Ninth Circuit, any automated act—whether taken by a computer in response to a customer request or pursuant to the computer's pre-programmed routines—cannot be the proximate cause of a direct infringement. The upshot here is that Respondents could not be considered direct infringers notwithstanding their deliberate design of a system that—for their own commercial benefit—systematically reproduces, distributes, and displays copyrighted works without authorization. This holding is in direct conflict with this Court's decisions in *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), and *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), and has no basis in the text or policies of, or common law principles underlying, the Copyright Act.

Each of the Ninth Circuit's answers to the questions presented is wrong when taken separately. But they are particularly troubling when considered together: By cutting off challenges to Respondents' activities as either direct or secondary infringement, the Ninth Circuit has left copyright holders with little recourse against the world's most notorious copyright pirates.

The Court should grant certiorari and reverse.

A. Statutory Framework

The Copyright Act grants copyright owners certain exclusive rights, among them the rights to reproduce, distribute, and publicly display their copyrighted works, and to authorize others to do the same. See 17 U.S.C. § 106(1), (3), (5). As this Court has explained, “[a]nyone who violates any of the exclusive rights of the copyright owner,’ that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the * * * ways set forth in the statute, ‘is an infringer of the copyright.’” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (quoting 17 U.S.C. § 501(a)).

This Court has also recognized that a defendant may be indirectly, or secondarily, liable for the direct infringement of others. Relevant here, a defendant may be subject to vicarious liability when it “profit[s] from [another’s] direct infringement while declining to exercise a right to stop or limit it.” *Grokster*, 545 U.S. at 930 & n.9. As this Court observed in *Grokster*, “[t]he argument for imposing indirect liability” is especially powerful when “the number of infringing” acts is high, as it may otherwise “be impossible to enforce rights in the protected work effectively against all direct infringers.” *Id.* at 929-930. In such cases, “the only practical alternative [is] to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.” *Ibid.*

B. Factual Background

Petitioner Perfect 10, Inc., is a publisher of images of partly-clothed or unclothed women that, in the

words of the trial court, “consistently reflect professional, skillful, and sometimes tasteful artistry.” *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 849 n.15 (C.D. Cal. 2006), *partially reversed on other grounds*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007). Over the past two decades, Perfect 10 has invested more than \$50 million to create a library of approximately 70,000 such images. Because of massive and ongoing online copyright infringement, however, its annual sales revenue has plummeted from \$1.8 million in 2000 to less than \$40,000 in 2014. In 2007, Petitioner’s print magazine was forced to close. Petitioner continues to operate a website, where subscribers may view copyrighted images for a monthly fee.

Respondent Giganeews is a subscription-based Usenet operator, and Respondent Livewire is an affiliated company that provides its customers with access to content stored on Giganeews servers.² For a monthly fee, Respondents’ customers gain access to more than 25,000 terabytes of content stored on Giganeews’s servers—virtually all of which consists of copyrighted materials. See Excerpts of Record, Volume 6, at 1350, *Perfect 10, Inc. v. Giganeews, Inc.*, No. 15-55500 (9th Cir. 2015). It is undisputed that neither Giganeews nor Livewire are licensed or otherwise authorized to reproduce, distribute, or display any of this copyrighted material. It is likewise not

² The Usenet (or “USENET”) is “an international collection of organizations and individuals (known as ‘peers’) whose computers connect to one another and exchange messages posted by USENET users.” App., *infra*, 7a (quoting *Ellison v. Robertson*, 357 F.3d 1072, 1074.n1 (9th Cir. 2004)).

disputed that rampant infringement—including of Perfect 10’s images in particular—occurs through and on Respondents’ servers.

Giganews has managed to assemble its vast trove of pirated material through a combination of methods. Like Napster and Grokster before them, Giganews and Livewire enable customers to upload content, thus making those customers a major source of infringing content. But Giganews also collects infringing material on its own. It does so by selectively entering into “peering” arrangements with other infringing Usenet operators, pursuant to which Giganews copies some or all of those infringers’ works to its own servers and, in return, distributes its own infringing content to them. The circumstances under which Giganews enters into these peering arrangements with other infringers—and its decision to copy infringing material to and from them—are entirely under Giganews’s control; Respondents’ customers play no role in the process whatsoever. App., *infra*, 9a.

Using Giganews’s “Mimo” newsreader, Respondents’ customers can search through, download, and display any item stored in Giganews’s massive collection of unlicensed copyrighted movies, television shows, music, software, books, magazines, and images—which includes nearly the entirety of Petitioner’s catalog. In practice, Respondents have “create[d] a user experience that substantially mimics the user experience of applications used on peer-to-peer file-sharing networks such as Napster.” *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 130 (S.D.N.Y. 2009) (internal quotation marks omitted). Indeed, in the words of Respond-

ents' own users, "99.9999% of [Giganews material] is copyright infringing content," and "essentially all of [Giganews's] subscribers are pirates." Mem. in Opp'n to Giganews's Mot. for Partial Summ. J., Ex. 17 at 7, 27, *Perfect 10, Inc. v. Giganews, Inc.*, No. 11-cv-7098 (C.D. Cal. Oct. 6, 2014), ECF No. 508. Seemingly the only constraint on customers' piracy is the fee charged by Respondents. In order to download more material, customers must pay Respondents a higher monthly fee. More infringement thus means more profit for Respondents.

C. Proceedings Below

Petitioner filed this action for direct and indirect copyright infringement against both Respondents in 2011. Relevant here, Petitioner alleged that (1) Giganews violated its reproduction rights by copying unlicensed works to and from the computers of its subscribers and the servers of other Usenet operators; (2) Giganews and Livewire violated Petitioner's distribution rights by distributing such infringing copies to their customers and other Usenet operators; and (3) Giganews violated Petitioner's display rights by displaying copyrighted images through its proprietary Mimo reader. See Excerpts of Record, Volume 9, at 2119-2129 *Perfect 10, Inc. v. Giganews, Inc.*, No. 15-55500 (9th Cir. 2015). Perfect 10 further alleged that Giganews was vicariously liable for the infringement of its subscribers. See *id.* at 2132.³

³ Perfect 10 also brought a claim for contributory infringement, which the Ninth Circuit rejected for failure to prove material contribution or inducement. See App., *infra*, 25a-30a. While

The district court dismissed the direct infringement claims against Giganews at issue here on motions to dismiss. App., *infra*, 12a. Petitioner’s remaining claims—including the allegation that Livewire engaged in direct infringement and that Giganews was vicariously liable for the infringing acts of its customers—were dismissed on summary judgment. *Ibid.*

The Ninth Circuit affirmed in all respects. It held that Petitioner’s claims for direct infringement failed because any reproduction, distribution, or public display of copyrighted images occurred “automatically.” App., *infra*, 18a-24a. With respect to Petitioner’s claim that Giganews violated its exclusive distribution rights, for example, the Ninth Circuit reasoned that the automated nature of Respondents’ conduct fails the “volitional-conduct requirement,” which derives from the “basic requirement” that “*direct* liability * * * be premised on conduct that can reasonably be described as the *direct cause* of the infringement.” *Id.* at 15a.

The Ninth Circuit also rejected Petitioner’s vicarious liability claim for failure to satisfy the profit or “direct financial benefit” element of that claim. According to the Ninth Circuit, this element could be satisfied only by evidence that subscribers were “drawn” to Giganews “because of the infringing Perfect 10 material at issue.” App., *infra*, 33a-34a. In reaching that conclusion, the Ninth Circuit rejected the proposition that profit could be shown by “evidence that customers were ‘drawn’ to Giganews

Petitioner disagrees with that ruling as well, it is not at issue here.

to obtain access to infringing material in general.” *Id.* at 31a. So too did it hold insufficient evidence that customers “accessed copyrighted Perfect 10 material,” in particular, “as ‘an added benefit’ to a subscription.” *Id.* at 34a. In the Ninth Circuit’s view, relying on such evidence as proof of profit would be “in significant tension with Article III’s standing requirement.” *Id.* at 33a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit’s Requirements For Proving Vicarious Copyright Infringement Conflict With Those Of Other Circuits And Are Wrong

A defendant is vicariously liable for the copyright infringement of others if it (1) “profit[s] from [others] direct infringement” while at the same time (2) “declining to exercise a right to stop or limit it.” *Grokster*, 545 U.S. at 930. The Ninth Circuit’s decision creates a circuit split regarding the first of those prongs—the requirement that the defendant profit from the infringement, which is sometimes referred to as the “direct financial benefit” or “direct benefit” requirement.

In the decision below, the Ninth Circuit held that a copyright plaintiff can satisfy the direct benefit requirement only by proving that customers were drawn to the defendant’s business because of plaintiff’s work *in particular*. Under this restrictive rule, evidence that customers were drawn to the defendant’s business by infringing content *of which the plaintiff’s work is merely a part* is insufficient—even if, once engaged with the defendant, a customer infringes the plaintiff’s work. In this latter circum-

stance, held the Ninth Circuit, the infringement of the plaintiff's work is simply an "added benefit" to the customer, but not enough to give rise to vicarious liability. App., *infra*, 34a.

By contrast, in the Second, Sixth, Seventh, and Eighth Circuits, evidence showing that a defendant profits from infringement is entirely sufficient to establish vicarious liability. While a plaintiff must, of course, demonstrate that its work was among those infringed, it is not required to prove that its work was *the* reason a customer patronized the defendant in the first place. The divide between this rule and the one adopted by the Ninth Circuit is deep and consequential, particularly for copyright owners seeking to hold brazen pirates vicariously liable for their customers' infringement of millions of copyrighted works.

A. The Opinion Below Creates A Split Between The Ninth Circuit And Four Other Circuits

1. When this Court articulated the requirements for vicarious copyright liability in *Grokster*, it did so by reference to a canonical set of so-called "dance-hall cases." See 545 U.S. at 930 & n.9 (citing *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963), and *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354, 355 (7th Cir. 1929)). In those cases, courts confronted the question whether to hold dance-hall proprietors and restaurateurs liable for infringing musical performances conducted on their premises. A consensus soon emerged that proprietors could be held liable for such infringing performances so long as those activities "provide[d] the proprietor with a

source of customers and enhanced income.” *H.L. Green*, 316 F.2d at 307. Critically, courts held that such profit could be found even where the proprietor had no “knowledge of the compositions to be played or any control over their selection,” *ibid.*, and thus had no ability to draw customers based on any specific act of infringement.

In *Dreamland Ball Room*, for example, the Seventh Circuit readily concluded that dance-hall owners had profited from infringing performances in the absence of any showing that customers were drawn to the dance halls by the plaintiffs’ copyrighted works in particular. See 36 F.2d at 355. Nor could the court have made such a finding: As the Seventh Circuit observed, the dance-hall defendants did not “determine the musical selections to be rendered,” “direct the playing of any selection,” or even “know that any musical selection played by the orchestra was copyrighted” in the first place. *Ibid.* *Ipsa facto* neither could prospective customers deciding whether to patronize the dance halls know what specific music would be played.

Rather than require proof that customers were drawn to the establishment by the prospect of hearing plaintiffs’ copyrighted works in particular, courts in these cases “determined that profit could be *inferred* from the very fact of playing music in a profit-making establishment.” *Polygram Int’l Publ’g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1325, 1331-1332 (D. Mass. 1994). In *Herbert v. Shanley Co.*, 242 U.S. 591 (1917), for example, this Court found that a restaurant profited from infringing musical performances even in the absence of a cover charge. As the Court pointedly noted, if the perfor-

mances were not somehow profitable to the restaurant, they “would be given up.” *Id.* at 594-595.

The dance-hall cases remain good law, and contemporary courts confronting similar fact patterns have consistently sustained vicarious infringement claims where the evidence showed that customers were drawn to the defendant’s business by infringement *generally*. To our knowledge, until the Ninth’s Circuit’s detour below, no court had ever required the plaintiff to prove that customers were drawn specifically by the infringement of plaintiff’s work.

In *Broadcast Music, Inc. v. Meadowlake, Ltd.*, 754 F.3d 353 (2014) (Sutton, J.), for example, the Sixth Circuit considered whether the defendant, a restaurant owner, was vicariously liable for infringing musical performances at his restaurant. As the Sixth Circuit recognized, the case fell “within the heartland of vicarious liability”: “Substitute ‘restaurant that offers dancing’ for ‘dance hall,’ and you have this case.” *Id.* at 354-355. And as in the dance-hall cases, the Sixth Circuit readily concluded that the defendant had profited from the infringing performances on the ground that they generally “drew more customers to his restaurant.” *Id.* at 354. The Sixth Circuit did not require the plaintiff to prove that customers were drawn to the defendant’s business specifically by the infringement of the plaintiff’s songs. See *ibid.*

2. These principles are not confined to the public performance context. Rather, they have long been applied in vicarious infringement cases, just like this one, that involve the alleged violation of the reproduction, distribution, or public display rights by would-be pirates. See, e.g., *H.L. Green*, 316 F.2d at

307-308 (applying the principles developed in the dance-hall cases to hold a department store liable for infringing “bootleg” reproductions manufactured and sold by the “concessionaire” that operated its phonograph records department).

In *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, 844 F.3d 79 (2016), for example, the Second Circuit considered an appeal of a jury verdict holding the defendant, an online music services provider, vicariously liable for the infringement of its subscribers, who could pay the defendant in order to store infringing copies of copyrighted songs in online storage “lockers.” *Id.* at 99. In affirming the vicarious infringement verdict, the Second Circuit approved a jury instruction stating that a defendant profits from infringement “where infringing material acts as a ‘draw’ to attract subscribers to a defendant’s business, even if it is not the primary, or even a significant draw.” *Ibid.*

The Second Circuit reasoned that “[a]n increase in subscribers or customers due to copyright infringement qualifies as an ‘obvious and direct financial interest,’” *ibid.* (quoting *H.L. Green*, 316 F.2d at 307), without requiring the plaintiff to prove that such increase resulted from the infringement of the plaintiff’s copyrighted works *in particular*. As the Second Circuit had explained in an earlier case, “one may be vicariously liable if [one] has the right and ability to supervise the infringing activity and also has a direct financial interest in *such* activities.” *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (emphasis added); see also *Gordon v. Nextel Comm’cns & Mullen Advertising, Inc.*, 345 F.3d 922, 926 (6th Cir.

2006) (holding that defendant telephone company and advertising agency “[c]ertainly * * * had direct financial interests” in the infringement of the plaintiff’s medical illustrations in a television advertisement, without requiring any proof that customers were drawn to either business by those medical illustrations).

The Eighth Circuit took the same approach in *RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773 (1988). The court affirmed the district court’s conclusion that the defendant—the manufacturer of the “Rezound” machine, which reproduced audio recordings on proprietary tape cassettes—had profited from its customers’ unauthorized reproductions and was therefore vicariously liable for their infringement. See *id.* at 781-782. In reaching that conclusion, the Eighth Circuit found “the fact that some customers bought [defendant’s] tapes to use *for infringing purposes* who would not have bought them otherwise” sufficient to establish that defendant derived a financial benefit from the infringement; it did not additionally require the plaintiff to prove that customers had purchased the tapes specifically in order to infringe upon plaintiff’s copyrighted material. *Ibid.* (emphasis added).

3. In direct conflict with the Second, Sixth, Seventh and Eighth Circuits, the Ninth Circuit held in the decision below that a defendant does not profit from direct infringement unless plaintiff proves that defendant’s customers are drawn specifically by

plaintiff's work.⁴ See App., *infra*, 33a. Because Petitioner had failed to prove “that customers were drawn to Giganews’s services *because* of the infringing Perfect 10 material at issue” *Ibid.* (emphasis added), it could not sustain a claim for vicarious infringement.

In articulating this novel rule, the Ninth Circuit held that evidence that Giganews received payment in exchange for “access [to] infringing material generally” was insufficient to establish the requisite profit element. App., *infra*, 33a. The Ninth Circuit likewise rejected as inadequate evidence that Giganews customers in fact used their paid subscriptions in order to distribute, reproduce, and display Perfect 10 images, dismissively characterizing such infringement as a mere “added benefit” of the subscription. See *id.* at 34a. Rather, according to the Ninth Circuit, profit could be established only by evidence that Giganews customers purchased their subscriptions specifically to access Perfect 10 works. See *id.* at 33a-34a. This requirement is simply irreconcilable with the approach to vicarious liability taken in the other circuits.

B. The Ninth Circuit’s Rule Is Wrong

By construing the direct financial benefit element in this unprecedentedly narrow fashion, the Ninth Circuit has dramatically limited the availability of vicarious liability and contravened the very purpose of the doctrine. What is more, the costs of the court

⁴ Notwithstanding that many of these out-of-circuit cases were brought to the Ninth Circuit’s attention, that court did not even *mention* them in the opinion below.

of appeals' novel rule will fall most heavily on small copyright holders, who will have the hardest time showing that customers were drawn by *their work* in particular. Conversely (and perversely enough), the entities that will *benefit* the most from the Ninth Circuit's invention are those that profit from the most widespread and flagrant infringement.

1. While not expressly provided for by statute, "vicarious liability is imposed in virtually all areas of the law," *Sony*, 464 U.S. at 435, and has been a part of the copyright landscape for more than a century, see, e.g., *Herbert*, 242 U.S. at 594; see also 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 12.04 (2017) ("Nimmer"). The House Report accompanying the Copyright Act of 1976 states that the Act codified the preceding decades of case law developing the doctrine because "no justification exist[ed] for changing" it. H.R. Rep. 94-1476, pp. 159-160 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5775-5776. And when Congress revisited the statute in the Digital Millennium Copyright Act ("DMCA"), it emphasized that a defendant should be liable where, as here, "the value of [its] service lies in providing access to infringing material." S. Rep. 105-190, pp. 44-45 (1998).

It is well established that, in the copyright context, "vicarious liability exceeds the traditional scope of the master-servant theory" to encompass, for instance, a service-operator's duty to monitor the use of its services for infringement by others. 3 Nimmer § 12.04[A][2]. That is because the purpose of the doctrine is to shift responsibility for policing infringing conduct from innocent copyright holders, who "can seldom identify (let alone get relief from)"

individual infringers, to “those in a better position to police the infringing conduct”—*i.e.*, the businesses that provide a platform for infringement and profit from its occurrence. *Meadowlake*, 754 F.3d at 355. The imposition of vicarious liability is thus intended to “encourage” defendants to “police carefully” the conduct of those direct infringers, “thus placing responsibility where it can and should be effectively exercised.” *H.L. Green Co.*, 316 F.2d at 308; see also 6 W. Patry, *Patry on Copyright* § 21:62 (2017) (“A company that derives benefits from the unauthorized use of copyrighted works owned by others is fairly allocated the responsibility of identifying and insuring against possible liability from such uses, and is in a better position to do so than the copyright owner, who is blameless and may well be unaware of the infringement until some time after it occurs.”).

The Ninth Circuit rule turns this fundamental principle on its head. Rather than placing the burden where it belongs, the rule allocates to the plaintiff the herculean task of proving that *its* particular work (as opposed to the thousands of other pirated works offered by the defendant) is the reason customers were “drawn” to the defendant’s business in the first place. This eviscerates the ability of smaller copyright holders like Petitioner—who, after all, “can seldom identify (let alone get relief from)” individual infringers, *Meadowlake*, 754 F.3d at 355—to combat the widespread but diffuse infringement of their work by anonymous subscribers to platforms like those operated by Respondents. By thus enabling copyright defendants effectively to “avoid responsibility by requiring a specific showing of profits derived from” the copyright owner’s particular works, *Broadcast Music, Inc. v. Blumonday, Inc.*, No. CV-N-92-

676-ECR, 1994 WL 259253, at *2 (D. Nev. May 27, 1994), the Ninth Circuit rule flies in the face of the very purpose of vicarious copyright liability.

2. The Ninth Circuit rule has the paradoxical effect of encouraging pirates to infringe more to reduce their potential liability. That is because, under the logic of the Ninth Circuit rule, any *increase* in the amount of a defendant's infringing activity renders its service *less* vulnerable to vicarious liability: As the scale of the infringement grows, so does the difficulty of proving that any subscribers were drawn to the defendant's business for the specific purpose of enjoying the plaintiff's copyrighted work in particular.

In this case, for instance, the massive scale of infringing conduct occurring on Giganews's servers prevented Petitioner from showing that Respondents' subscribers were drawn to Giganews and Livewire specifically to access Petitioner's works, rather than the 25,000 other terabytes of infringing content available on Giganews's servers. But as this Court recognized in *Grokster*, the "argument for imposing indirect liability" should become more, not less, "powerful" as the scale of infringement increases, for "[w]hen a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers." 545 U.S. at 929-930. In this way, the Ninth Circuit rule perversely limits the availability of vicarious liability when it is needed the most.

3. There is nothing to the Ninth Circuit's suggestion, see App., *infra*, 32a-33a, that its rule is required by Article III. In order to establish Article III standing, a "plaintiff must have (1) suffered an injury in

fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). In a case like this one, the copyright plaintiff’s injury-in-fact—the infringement of its copyrighted work by the defendant’s users—is fairly traceable to the defendant’s failure to exercise its “right to stop or limit” that infringement, *Grokster*, 545 U.S. at 930, and is thus likely to be redressable by a favorable judicial decision ordering the defendant to exercise that right. Whether and to what extent the defendant’s customers are attracted by the infringement of the plaintiff’s copyright simply has no relevance to the standing inquiry.

II. The Ninth Circuit’s Cramped Understanding Of Direct Copyright Infringement Is At Odds With This Court’s Precedents And Is Wrong

In the decision below, the Ninth Circuit shielded Respondents’ commercially motivated and intentionally infringing acts of reproduction, distribution, and display from liability as direct infringement simply because the final steps involved in such infringement were automated, and therefore ostensibly not “volitional.” This holding cannot be reconciled with the Copyright Act or the decisions of this Court, which has repeatedly found entities directly liable for infringing acts that occur via automated processes that they have—volitionally—designed and implemented. Nor is there any textual or policy basis for adopting such a rule, which improperly shields broad swaths of infringing conduct from liability for direct infringement and (particularly in combination with a

narrow, potentially impossible-to-meet vicarious-liability rule) leaves copyright holders with little to no recourse for the widespread online piracy of their work.

A. The Ninth Circuit’s View That Automated Conduct Can Never Be Sufficiently Volitional To Constitute Direct Infringement Cannot Be Reconciled With *Aereo* or *Tasini*

The Ninth Circuit’s holding cannot be squared with this Court’s decisions in *American Broadcasting Companies, Inc. v. Aereo*, 134 S. Ct. 2498 (2014), or *New York Times Co. v. Tasini*, 533 U.S. 483 (2001). Indeed, the core premise of the Ninth Circuit’s holding—that pre-programmed automated conduct cannot be a proximate cause of infringement and thus cannot satisfy the volitional-conduct requirement (if there *is* such a requirement)—was rejected in both of those cases.

1. The Ninth Circuit held that a defendant does not engage in direct infringement as a matter of law when its conduct is automated, a rule it applied to dismiss all of Petitioner’s direct infringement claims. The Ninth Circuit held that Respondents’ reproduction and distribution of Petitioner’s works to customers, as well as their display of such works via the Mimo reader, were not acts of infringement because they occurred “automatically” in response to certain customer requests. App., *infra*, 18a-24a. It further held that Giganews’s reproduction and distribution of Petitioner’s works to and from other pirate Usenet servers did not constitute direct infringement because such acts were likewise accomplished automatically pursuant to the terms of Respondents’ peering

agreements, which the Ninth Circuit characterized as merely part of the “general operation of a Usenet service.” *Id.* at 24a.

The Ninth Circuit stated that its holding was mandated by a so-called volitional-conduct requirement, which is an element of a claim for direct infringement in that Circuit. App, *infra*, 14a-18a. Although the volitional-conduct rule has never been endorsed by this Court and has no basis in the text of the Copyright Act, the Ninth Circuit reaffirmed its validity, relying largely on Justice Scalia’s dissent in *Aereo*. See *id.* at 15a-16a. According to the Ninth Circuit, the volitional-conduct requirement is an outgrowth of the foundational tort requirement of proximate cause, which, it reasoned, requires that “*direct liability * * ** be premised on conduct that can reasonably be described as the *direct cause* of the infringement.” *Id.* at 15a. In the Ninth Circuit’s view, it follows that “[i]nfringement of the reproduction right requires copying *by* the defendant,” and not merely the defendant’s customers. *Ibid.* (quoting *Fox Broadcasting Co. v. Dish Network, LLC*, 747 F.3d 1060, 1067 (9th Cir. 2014)) (emphasis in original); see also *id.* at 19a (“[T]o the extent that Mimo is used to view infringing images, this is done by the user.”).

Applying this volitional-conduct rule, the Ninth Circuit concluded that when Giganews reproduced, distributed, or displayed Petitioner’s copyrighted images in an automated fashion in response to requests by a subscriber, only the subscriber—and not Giganews—engaged in volitional conduct. According to the Ninth Circuit, for example, Giganews did not engage in volitional conduct when customers

used its proprietary Mimo software to display infringing material hosted on its servers because “Mimo is just a reader, a piece of software that allows a user to view an image.” App., *infra*, 19a. “[T]herefore, to the extent that Mimo is used to view infringing images, this is done by the user.” *Ibid.* (internal quotation marks and alteration omitted).

The Ninth Circuit did not, however, confine its holding to circumstances in which the customer arguably played the most direct role in instigating the infringing conduct. For even when the customer undisputedly played *no* role in the conduct, the Ninth Circuit found that automated conduct precluded satisfaction of the volitional-conduct requirement. In particular, the Ninth Circuit concluded that Giganews did not engage in volitional conduct when it copied copyrighted images stored on the servers of other Usenet operators because there was “no evidence showing Giganews exercised control (other than by general operation of a Usenet service)” over the infringing reproductions, or that it “selected any [particular] material for upload, download, transmission, or storage.” App., *infra*, 24a. The fact that such en masse unauthorized copying occurred automatically was, under the Ninth Circuit’s holding, sufficient to render it non-volitional—even in the absence of any other volitional actor—precluding direct-infringement liability as a matter of law. See *ibid.*

2. The Ninth Circuit’s holding cannot be squared with this Court’s decisions in *Aereo* or *Tasini*. Indeed, the basis of the Ninth Circuit’s holding—that pre-programmed automated acts of reproduction, distribution, and display cannot be a proximate

cause of infringement—was rejected in both of those cases.

In *Aereo*, this Court considered whether a service that enabled customers to view copyrighted television broadcasts on web-connected devices *directly* infringed copyright holders' public display rights. As here, the defendant had deliberately designed and implemented a system to ensure that the challenged performances occurred "automatic[ally]" in response to requests by the respondent's subscribers. 134 S. Ct. at 2507. Notwithstanding the plainly automated nature of this conduct, this Court concluded that the defendant had directly infringed upon the copyright holders' public performance rights. See *id.* at 2508.

In explaining its holding, the Court expressly rejected the dissent's reasoning (upon which the Ninth Circuit relied, see App., *infra*, 15a-16a), which would have immunized Aereo from direct infringement because the infringing performances occurred via the "operat[ion of] an automated user-controlled system," without direct human intervention at the moment of transmission, 134 S. Ct. at 2513 (Scalia, J., dissenting). The dissent illustrated its point by reference to the proverbial "copy shop" that "rents out photocopiers on a per-use basis," and which "cannot be held directly liable" for a customer's decision to make infringing photocopies because "the photocopier does nothing except in response to the customer's commands." *Ibid.* According to the dissent, the same logic applied to Aereo's automated transmission: Because, in the dissent's view, "Aereo's automated system [did] not relay any program, copyrighted or not, until a subscriber select[ed] the program and [told] Aereo to relay it," Aereo should not be found to

engage in volitional conduct and therefore should be absolved of any direct liability for the infringing performances. *Id.* at 2514.

But in the words of the Court, the dissent’s automation-focused “copy shop argument * * * ma[de] too much out of too little,” placing too much emphasis on ultimately meaningless “technological difference[s]” between respondent’s service and cable television providers, and not enough on the experiences of Aereo’s subscribers and copyright holders alike. 134 S. Ct. at 2507. Put another way, the Court refused to accept the proposition that the automatic nature of the conduct, a “single difference, invisible to subscriber and broadcaster alike, could transform a system that [was] for all practical purposes a traditional cable system” into a copy shop immune from direct infringement liability. *Ibid.*

The Court also rejected the assumption, implicit in Justice Scalia’s dissent and the decision of the Ninth Circuit below, App., *infra*, 19a, that only one actor at a time—*either* the service provider *or* the customer—can engage in direct infringement. Rather, the Court made clear, under the Copyright Act multiple parties acting in concert can proximately cause—and be directly liable for—direct infringement.

The Court accordingly concluded that “*both* [a] broadcaster *and* [a] viewer of a television program ‘perform,’ because they both show the program’s images and make audible the program’s sounds.” *Aereo*, 134 S. Ct. at 2506 (emphases in original). It did so in reliance on the Transmit Clause, which provides that a work is publicly performed (as in *Aereo*) or displayed (as here) when it is “trans-

mit[ted] * * * to the public, by means of any device or process.” 17 U.S.C. § 101; see also *ibid.* (defining “[t]o ‘transmit’ a performance” to mean “to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent”). As the Court reasoned, this language makes it “clear that an entity * * * *itself performs*, even if when doing so, it simply enhances viewers’ ability to receive broadcast television signals.” *Aereo*, 134 S. Ct. at 2506 (emphasis added). For these purposes, Giganews’s acts of public display via the Giganews Mimo Reader are indistinguishable from Aereo’s performances. Just as Aereo itself engaged in the infringing public performances, so too does Giganews itself engage in infringing public displays.

The decision in *Aereo* thus stands for the proposition that automation does not shield otherwise intentional conduct from liability for direct infringement—particularly where, as here, the right at issue is governed by the Transmit Clause. To the contrary, the reasoning and holding of *Aereo* clearly demonstrate that an “automatic” process may result in liability for direct infringement—a conclusion that is plainly irreconcilable with the holding of the Ninth Circuit below.

3. Likewise, in *Tasini*, this Court readily concluded that electronic database provider LEXIS/NEXIS had directly infringed respondents’ copyrighted newspaper articles by “distribut[ing] copies” of those articles “to the public by sale.” 533 U.S. at 498 (quoting 17 U.S.C. § 106(3)). As in *Aereo* (and this case), the infringing conduct at issue in *Tasini* was fully automated. The infringing distribu-

tion occurred when LEXIS/NEXIS subscribers first “access[ed] the system through a computer,” “search[ed] for articles,” and “view[ed], print[ed], or download[ed] each of the articles yielded by the search.” *Id.* at 490. And again, as in *Aereo* (but unlike this case), this Court found it “clear” that LEXIS/NEXIS’s *own* conduct in automatically responding to users’ requests directly infringed the reproduction and distribution rights of the articles’ copyright holders, notwithstanding the automated nature of the service provider’s conduct, or the fact that it occurred in response to user requests. *Id.* at 498.

The Ninth Circuit’s suggestion that “[*Tasini*] dealt with the question whether the defendants’ copying was permissible, not whether the defendants were the ones who made the copies,” App., *infra*, 23a, is simply wrong. To the contrary, in reaching the conclusion that LEXIS/NEXIS’s acts constituted direct infringement, the Court in *Tasini* *rejected* the argument that LEXIS/NEXIS should be immunized from direct liability because any infringing conduct occurred only as a result of its subscribers’ actions. That argument was expressly advanced by the dissent, which would have held that “to the extent that the user’s decision to make a copy of a particular article violates the author’s copyright in that article, such infringing third-party behavior should not be attributed to the database.” 533 U.S. at 518 (Stevens, J., dissenting). But the Court did not agree: If it had, there could have been no judgment against LEXIS/NEXIS for direct infringement. The conflict between *Tasini* and the holding below is thus clear and stark.

B. The Ninth Circuit’s Rule Is Wrong

The rule enunciated by the Ninth Circuit is not only irreconcilable with the decisions of this Court, it is wrong. It has no basis in the text of the Copyright Act and makes little sense in the context of the DMCA, which provides a statutory safe harbor for a specifically enumerated subset of automated conduct. Nor can it be justified by reference to any kind of common-law volitional-conduct requirement, or as an extension of the foundational tort requirement of proximate cause. There is no legal or logical reason for intentional conduct to be immunized from liability for direct infringement simply because one or more elements is accomplished using a computer in an automated fashion.

1. The Ninth Circuit’s holding that “automatic” conduct cannot constitute direct infringement is irreconcilable with the Copyright Act. To begin with, there is simply no textual basis for the rule. Nor is there anything in the Copyright Act that provides for either the volitional-conduct requirement, or the Ninth Circuit’s construction of that requirement to bar the imposition of direct liability for automated conduct. To the contrary, the provision of safe harbors for certain enumerated *categories* of automatic conduct under the DMCA, where the specific conditions for eligibility have been met, strongly implies that automatic conduct is *not* otherwise immune from liability under the Copyright Act. See 17 U.S.C. § 512(a)-(d).

In the DMCA, for example, Congress enacted a safe harbor concerning so-called “system caching.” This safe harbor limits copyright liability for the “intermediate and temporary storage of material on

a system or network,” so long as such “storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network” and meets certain other statutory requirements, several of which are designed to protect the interests of copyright holders. *Id.* § 512(b). Among other things, a service provider is required to “respond[] expeditiously to remove, or disable access to, * * * material that is claimed to be infringing upon notification of claimed infringement,” *id.* § 512(b)(2)(E), “adopt[] and reasonably implement * * * a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers,” as well as “accommodate[] and * * * not interfere with standard technical measures” used by copyright holders to identify and protect copyrighted works, *id.* § 512(i).

If the Ninth Circuit rule is correct, however, this DMCA safe harbor is utterly superfluous. If automatic conduct can *never* constitute direct infringement in the first place, why would Congress have bothered to enact a provision like § 512(b), which limits liability for only a certain subset of storage activity occurring “through an automatic technical process”? This Court has often hesitated “to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law,” *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988))—but that is exactly what the Ninth Circuit’s ruling does.

The Ninth Circuit rule would, furthermore, effectively gut the prophylactic elements of the safe harbor provisions, such as the notice-and-takedown requirement, see 17 U.S.C. §§ 512(b)(2)(E), 512(c)(1)(C), 512(d)(3), and the requirement to police repeat infringers, see *id.* § 512(i). Such an outcome would serve only to further disadvantage copyright holders seeking to combat online piracy. There would be little reason for a web-based company to go to the time and expense of implementing a notice-and-takedown process if it were already immunized from liability by virtue of the fact that its conduct is accomplished automatically, according to pre-programmed digital routines.

2. This Court has never directly addressed or otherwise endorsed the volitional-conduct requirement that underlies the Ninth Circuit's holding. The closest this Court has come to doing so was Justice Scalia's dissent in *Aereo*, which argued that there *should* be a volitional-conduct requirement, and that *if such a requirement existed*, it would bar direct infringement liability for the operation of "an automated, user-controlled system" such as that operated by *Aereo*. 134 S. Ct. at 2512-2513 (Scalia, J., dissenting). But as previously discussed, *see supra*, the Court expressly declined to take that approach, which "ma[de] too much out of too little," and instead held *Aereo* directly liable for the public performances occurring on its automated, user-controlled system. *Id.* at 2507 (majority opinion).

Even assuming that the volitional-conduct rule does exist in some form, it does not follow that all conduct that includes an element of automation is therefore immune from liability. Conduct is "voli-

tional” if it involves the “act of making a choice or decision,” or “the power of choosing or determining.” Merriam-Webster Dictionary, www.merriam-webster.com; see also Black’s Law Dictionary (9th ed. 2009) (defining “volition” as “[t]he ability to make a choice or determine something”). The mere fact that a defendant *elects* to implement a process to ensure that any infringing acts occur by way of an automated process is a “distinction without a difference” that should not deprive the defendant’s conduct of its volitional character. *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 657 (S.D.N.Y. 2013).

For example, there is no basis in law or logic to distinguish between (1) a defendant that, upon receipt of a work from a customer, reproduces and then distributes copies of that work to others one-by-one, by hand, via the mail, and (2) a defendant who programs a computer to automatically engage in those very same acts of reproduction and distribution on his behalf. And yet the Ninth Circuit, in refusing to hold that Giganews’s “peering” arrangements constituted direct action, endorsed this very distinction. That such conduct may or may not be a part of the “general operation of a Usenet service,” App., *infra*, 24a, misses the point entirely. Giganews’s decision to copy unlicensed works from other infringers and to sell access to those unlicensed works was entirely volitional; Congress did not enact any general immunity for the “operation of a Usenet service”; and Giganews did not prove that it was entitled to any of the DMCA’s safe harbors.

In support of its rule, the Ninth Circuit also wrongly analogized Respondents’ services to those provided by a copy shop: Just as a copy shop is not

directly responsible for infringing copies made by its customers, the Ninth Circuit held, so is the operator of an automated, user-directed system ostensibly not directly responsible for infringing conduct by its users. See App., *infra*, 23a-24a; see also *Aereo*, 134 S. Ct. at 2513 (Scalia, J. dissenting) (“Because the [copy] shop plays no role in selecting the content [copied by its customers], it cannot be held directly liable when a customer makes an infringing copy.”).

But Respondents’ businesses are nothing like a copy shop. A copy shop passively makes *copying machines* available to its customers, who may use those machines to make copies of whatever materials the customers themselves bring to the shop. Respondents, by contrast, have actively assembled a *25,000-terabyte library of infringing content*, which they make available to their customers to copy for a fee. Absent this library, Respondents’ customers would have nothing to copy. And that massive library exists because Respondents have invited their subscribers to contribute content to it, negotiated and entered agreements with fellow pirates to share content across platforms, and programmed the software that makes those actions possible. All of this conduct is clearly “volitional” and calls for the imposition of direct liability.

3. Nor can the Ninth Circuit’s construction of a volitional-conduct rule properly be understood as an application of the foundational tort requirement of proximate causation. While it is true that “proximate causation historically underlies copyright infringement liability no less than other torts,” App., *infra*, 14a (quoting 4 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.08[C][1] (2016)), that

doctrine neither requires nor justifies the decision to shield all automated conduct from direct infringement liability. See Robert C. Denicola, *Volition and Copyright Infringement*, 37 *Cardozo L. Rev.* 1259, 1268 (2016).

“[T]he proximate-cause requirement generally bars suits for alleged harm that is ‘too remote’ from the defendant’s unlawful conduct.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). When conducting this analysis, courts look to a number of factors, including the foreseeability of the harm, and whether the harm proceeds directly from the defendant’s conduct. See *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 12 (2010). “Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant’s acts was generally said to stand at too remote a distance to recover.” *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268-269 (1992). Such concerns are utterly misplaced here: Under any conceivable formulation, Respondents’ actions in designing, implementing, and operating a for-profit piracy platform are a direct and proximate cause of the massive and ongoing infringement of Petitioner’s copyrighted work.

III. Both Questions Presented Are Recurring And Important

Whether and under what circumstances an internet-based subscription service can be held directly or secondarily liable for widespread piracy are matters of critical importance to copyright holders nationwide. As this Court recognized in the closely related context of peer-to-peer networks, the “probable scope” of copyright infringement on such platforms is

“staggering.” *Grokster*, 545 U.S. at 923. If the questions presented are not addressed by this Court, the impact of such infringement on copyright holders is likely to be enormous, particularly in light of the fact that the Ninth Circuit presides over the centers of both the entertainment and technology industries.

Indeed, the scale of infringement on Respondents’ own platforms alone is nothing short of staggering. Giganews boasts millions of subscribers in 180 countries around the world, all of whom pay a monthly fee in order to access the 25,000 terabytes of content stored on its servers. It is indisputable the vast majority of this content consists of copyrighted materials—in the words of its own paying customers, “99.999% * * * is copyright infringing content,” and “essentially all of [its] subscribers are pirates.” Mem. in Opp’n to Giganews’s Mot. for Partial Summ. J., Ex. 17 at 7, 27, *Perfect 10*, No. 11-cv-7098, ECF No. 508. When the nature of their content and the actions of their subscribers are considered in combination with the search, display, and download functions they offer, the conclusion that Respondents are essentially subscription-based versions of “peer-to-peer file-sharing networks such as Napster” is inescapable. *Arista Records*, 633 F. Supp. 2d at 130 (internal quotation marks omitted).

The value of copyrights—and the livelihoods of copyright holders—is thus gravely threatened by businesses like Respondents’, which profit by selling their customers access to vast quantities of infringing content without compensating creators and authorized distributors. According to one recent study, online movie piracy reduces legitimate box-office revenues by 15 percent, or over \$1.3 billion

annually. See Liye Ma, et al., *The Dual Impact of Movie Piracy on Box-Office Revenue: Cannibalization & Promotion* 2-3, 36 (Feb. 2016), <http://bit.ly/2sNgVfm>; see also David Price, *Sizing the piracy universe*, *NetNames* 3 (Sept. 2013), <http://bit.ly/2tKQwvO> (432 million unique users worldwide explicitly sought infringing content in one month alone).

Respondents' businesses pose a particular threat to content creators who rely on revenue from legitimate online content providers. Royalties and licensing fees for digital transmissions by entities like Netflix, Hulu, and Spotify represent an increasingly large source of income for content creators, and are threatened by businesses like Respondents in at least two ways. First, Respondents attract users who might otherwise be willing to pay to subscribe to legitimate services. Second, by using copyrighted content without paying any kind of licensing fee, Respondents place legitimate competitors, for whom licensing fees are a significant cost of doing business, at a disadvantage.

Smaller content creators and copyright holders, like Petitioner, suffer the most under the Ninth Circuit's regime of limited direct *and* vicarious liability for online piracy platforms. For one thing, they are less able to weather the losses in revenue due to widespread online piracy. For another, they are likely to struggle to satisfy the Ninth Circuit's overly narrow construction of the direct-financial-benefit prong of the test for vicarious liability. As previously discussed, see *supra* § I(B), the requirement that a copyright plaintiff prove that customers were drawn to the defendant's business by infringe-

ment of plaintiff's copyrighted works in particular has the paradoxical effect of making it more difficult to establish liability as the scale of the infringement increases. That is particularly true for smaller content creators and copyright holders, whose work is especially vulnerable to being subsumed within a large pool of infringing content.

Finally, the Ninth Circuit's holdings have the effect of improperly shielding a whole host of web-based businesses from both direct and secondary liability for copyright infringement. Just as Aereo attempted to sidestep liability for its infringement of television broadcasters' public performance rights through a "Rube Goldberg-like contrivance," specifically "over-engineered" to "take advantage of a perceived loophole" in the Copyright Act, *WNET, Thirteen v. Aereo*, 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting), the Ninth Circuit rule invites would-be internet pirates to evade direct liability by programming computers to engage in "automatic"—and therefore immune—copyright infringement for them. And if those pirates are successful enough to attract a large enough number of subscribers, and a deep enough pool of infringing content, they will effectively be insulated from vicarious liability, too. If the Ninth Circuit's answers to the questions presented are correct, copyright holders will thus be deprived of two major weapons against widespread and flagrant internet piracy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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