

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**

—◆—
BRIEF IN OPPOSITION

—◆—
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QUESTIONS PRESENTED

The petition for certiorari prompts the following questions:

1. Did the court below correctly rule, consistently with other courts, that Petitioner provided no evidence that Respondent Giganews stood in any type of relationship of financial interest with persons alleged to infringe Petitioner's copyrights that justifies vicarious liability without any culpable actions by Giganews or knowledge by Giganews of the alleged infringements?
2. Did the court below correctly rule, consistently with other courts, that the ordinary provision of general-purpose Usenet access services does not itself constitute direct copyright infringement?

RULE 29.6 STATEMENT

Respondents Giganews, Inc., and Livewire Services, Inc. have no parent corporations, and no publicly held company owns 10% or more of their stock.

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INTRODUCTION

This case does not deserve the Court's review. The court of appeals applied long established principles of direct copyright infringement and vicarious liability. The decision below was consistent with the decisions of this Court and other circuits. Petitioner here, which has not sought review of the decision below on its contributory infringement claim, seeks to distort direct infringement and vicarious liability doctrines to make up for its loss on the contributory infringement claim below. Petitioner has shown no reason to alter those direct infringement and vicarious liability doctrines to create a mutant species of contributory infringement. Nor is this case a proper vehicle to reconsider those doctrines in light of the peculiar facts and record of this case. The Court should deny the petition.



STATEMENT OF THE CASE

Petitioner, operator of a website featuring soft-core pornographic images, sued Respondents, two companies that provide access to Usenet, because it found Petitioner's images in Usenet newsgroups. Usenet is one of the oldest continuously operated parts of the Internet, going back to the early 1980s and predating the World Wide Web. Usenet, which uses a technical protocol ("network news transfer protocol" or NNTP) similar to that of email ("simple mail transfer protocol" or SMTP), consists of numerous interconnected servers that numerous different providers operate. It allows

persons using that protocol to send messages to, or retrieve messages from, particular “newsgroups” on those Usenet servers. As this Court previously recognized, “[n]ewsgroups also serve groups of regular participants, but these postings may be read by others as well. There are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls.” *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 851 (1997).

Major Usenet service providers, through a “peering” process, routinely and automatically connect with each other to forward and receive messages so that those on one provider’s Usenet servers reach the servers of other Usenet service providers for consistent availability of messages across the entire Usenet. To facilitate the handling of messages across the entire Usenet, every Usenet message has a unique identifier, a “Message-ID.”

Petitioner claims that persons have infringed its copyrights by posting messages that contain copyrighted images from its website to Usenet newsgroups. It complained to Respondent Giganeews about alleged infringements. Giganeews responded by asking Petitioner to identify messages with infringements by their Message-IDs. Giganeews removed millions of messages from its Usenet servers at the request of other copyright holders based upon the Message-IDs that those other holders and their agents consistently provide to Giganeews and other Usenet service providers.

Unlike other copyright holders, however, Petitioner refused to provide Message-IDs of offending messages to Respondent Giganews. Instead, Petitioner insisted on providing a variety of instructions for awkward, burdensome, and inaccurate ways by which Giganews could search for the messages Petitioner had in mind. For example, Petitioner would suggest search query and review strategies to look for the allegedly infringing messages, and it would provide screen shots showing how it constructed search queries and investigated the results. In doing so, Petitioner would occasionally and incidentally provide some Message-IDs to Giganews because they appeared in the screen shots. Every time Giganews received Message-IDs, Giganews deleted from its Usenet servers the corresponding messages. Giganews continued to ask Petitioner for notifications with Message-IDs, but Petitioner persistently refused to provide Message-IDs.

The district court observed that,

even after Perfect 10 admittedly learned of a method to produce a takedown notice in “15 minutes” that would result in almost immediate removal of “90 percent of the Perfect 10 content on Giganews’s servers,” Perfect 10 refused to do so. . . . Perfect 10 “[was] aware of and has used software that allows it to extract thousands of Message-IDs for messages it believes to be infringing in about 10 seconds.” When pressed as to why [Petitioner] *continued* to refuse to supply the sort of DMCA notice that Judge Collins had already concluded

was necessary in this action (i.e., one that included machine-readable Message-IDs), [Petitioner’s CEO] stated “that is simply helping [Respondents] actually remove the material.”

Perfect 10, Inc. v. Giganeews, Inc., No. CV 11-07098-AB, 2015 WL 1746484, at *10 (C.D. Cal. Mar. 24, 2015) (emphasis in original) (citations omitted).

When the parties reached a stalemate over Petitioner’s refusal to identify specific messages that it wanted removed, Petitioner sued Respondents for alleged copyright infringement, trademark infringement, trademark dilution, unfair competition, and violation of publicity rights it claimed to have acquired from the models in its images.

The district court (acting through three different judges owing to retirements) issued numerous substantive rulings against Petitioner. The district court first denied Petitioner’s motion for a preliminary injunction. The district court then dismissed the publicity and trademark claims and some of the copyright claims in the original complaint. Petitioner’s amended complaint asserted only copyright claims. The district court then dismissed the contributory infringement and vicarious liability claims against Respondent Livewire. It later denied Petitioner’s motion for summary judgment against Respondents on the safe harbor that limits remedies for infringement under 17 U.S.C. § 512. At the close of discovery, the district court granted summary judgment to Respondents on claims of direct and indirect copyright infringement

and denied summary judgment to Petitioner. The district court denied Petitioner's motion for reconsideration on the indirect infringement (contributory infringement and vicarious liability) claims.

The district court also awarded Respondents attorney's fees and costs of approximately \$5.6 million, observing "[t]here is ample evidence . . . that [Petitioner] pursued this litigation for reasons inconsistent with the purpose of the Copyright Act." 2015 WL 1746484, at *11. The district court added: "[a]ll of the evidence before the Court demonstrates that [Petitioner] is in the business of litigation, not protecting its copyrights or 'stimulat[ing] artistic creativity for the general public good.'" *Id.* at *9 (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994)). As that court further observed, "[Petitioner] has a long documented history of sending service providers inadequate takedown notices under the DMCA that fail to identify specific infringing material, and then bringing suit for the service providers' failure to respond to deficient DMCA takedown notices." *Id.* at *10. Petitioner "never attempted to submit a takedown notice in this action that Giganews could actually use." *Id.* "In addition to [Petitioner's] refusal to take any of the numerous steps available to it to protect its copyrights, [Petitioner] litigated this action in an unnecessarily litigious manner that was guaranteed (if not designed) to drive up the costs of litigation." *Id.* at *11 n.4.¹

¹ The district court also noted "extensive evidence showing [Petitioner's] unjustified discovery noncompliance, numerous

Petitioner appealed the direct and indirect infringement summary judgment, reconsideration, and attorney's fees rulings to the Ninth Circuit,² which affirmed the district court's decisions. Petitioner did not appeal the dismissal of the contributory infringement and vicarious liability claims against Livewire or the decisions of the district court that excluded Petitioner's inadmissible evidence regarding the prevalence of infringements on Usenet and user motivations for subscribing to Usenet services.

The court of appeals held that, on the direct infringement claims, Petitioner had not alleged or shown evidence of actions by Respondents that proximately caused infringements of Petitioner's copyrights but had alleged and shown instead only the passive

violations of this Court's orders, and pervasive failures by [Petitioner], its attorneys, and the [Petitioner]-affiliated witnesses." *Perfect 10, Inc. v. Giganeews, Inc.*, No. CV 11-07098-AB, 2015 WL 12699460, at *27 (C.D. Cal. Feb. 4, 2015) (mooted by decision awarding Respondents attorney's fees).

² Petitioner's notices of appeal pertained to the district court's summary judgment orders, *Perfect 10, Inc. v. Giganeews, Inc.*, No. CV 11-07098-AB, Dkt. 619, 620, 621 (Nov. 14, 2014); the order denying reconsideration, *id.* Dkt. 682 (March 6, 2015); and the order awarding attorney's fees, *id.*, Dkt. 686 (amended order March 24, 2015). *See id.*, Dkt. 687 (Notice of Appeal March 30, 2015), Dkt. 690 (Notice of Appeal April 6, 2015). The district court dismissed with prejudice claims of contributory infringement and vicarious liability against Respondent Livewire Services, Inc., *see id.*, Dkt. 129, but Petitioner did *not* include that order in its notices of appeal to the Ninth Circuit. The Ninth Circuit noted that Petitioner did not mention Livewire in the context of its vicarious liability claim, but out of caution it ruled that the district court had correctly dismissed that claim. Pet. App. 34a.

provision of online services and technology. Pet. App. 24a.

The court below held that Petitioner’s contributory infringement claim against Respondent Giganews failed because Petitioner had failed to show a triable issue of fact that Giganews had materially contributed to infringements of Petitioner’s copyrights or induced infringements under this Court’s standards in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). Pet. App. 26a.

The court of appeals held that the vicarious liability claim failed because Petitioner failed to show a direct financial benefit to Giganews from the infringement of *Petitioner’s* copyrights. Quoting the district court, the court of appeals stated “[t]his action is a specific lawsuit by a specific plaintiff against a specific defendant about specific copyrighted images; it is not a lawsuit against copyright infringement in general on the Usenet.” Pet. App. 31a (quoting *Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11-07098-AB, 2014 WL 8628031, at *4 (C.D. Cal. Nov. 14, 2014)). The court of appeals observed that Petitioner’s expansive view of vicarious liability, untethered to the specifics of its claim, was inconsistent with *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Pet. App. 32a-33a. Turning to the facts of the case, the court of appeals also noted “there was no evidence . . . that anyone subscribed to Giganews[’s Usenet service] because of infringing Perfect 10 material.” Pet. App. 33a. The court of appeals did not reach the question

of the right and ability to supervise the allegedly infringing conduct, on which point the district court had ruled that Petitioner had failed to raise a triable issue of fact against Respondent Giganews. Pet. App. 34a. Petitioner sought rehearing and rehearing en banc before the Ninth Circuit. The court of appeals panel unanimously denied the petition for panel rehearing and no judge requested a vote on an en banc rehearing.

Petitioner now seeks review of the Ninth Circuit's rulings only on the direct infringement and vicarious liability copyright claims. Petitioner does not seek to disturb the rulings for Respondents on contributory copyright infringement.

Petitioner's statement of the case substitutes invective or rhetoric for facts in the record. The district court on several occasions rejected efforts by Petitioner's CEO to cast himself as an expert on topics of infringement and Usenet, including the prevalence of infringing material on Usenet (*Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11-07098-AB (C.D. Cal. Oct. 31, 2014) (order granting motion to exclude Zada expert testimony), Dkt. 582); the district court also excluded evidence that another witness had recycled from a different case involving different issues as well as many inadmissible assertions by Petitioner and its CEO (*id.* (order granting motion to exclude Waterman expert testimony), Dkt. 581). The "evidence" that Petitioner cites at the top of page 8 of the petition, regarding prevalence of infringement on Usenet from an anonymous poster, was part of the inadmissible "expert" evidence that the district court excluded. *See id.*

(Nov. 14, 2014) (order granting motion for partial summary judgment), Dkt. 620 at 9 (citing Dkt. 580-583). Petitioner has not sought review of the rulings correctly excluding the evidence to which it now refers. In the statement Petitioner analogizes Usenet, which is an open network that provides a mere platform for a vast variety of communications, to the closed entertainment streaming services Hulu, Netflix, and Spotify. Usenet is in fact far more similar to email and uses protocols and message-based communications like those of email; it does not involve streaming. The fact that Usenet service providers, like other Internet service providers such as AT&T, Verizon, or Comcast, have a subscription model for access does not affect any proper analysis. If the Court were to review the decision below, the record support for a number of Petitioner's extravagant assertions and recharacterizations of facts would prove illusory, and upon examination the case would be a candidate for dismissal of certiorari as improvidently granted.

Moreover, Petitioner's statement of the case provides a caricature of the decision below by reducing key analyses and discussions to isolated fragments. On the direct infringement claims, the court of appeals did not reduce the question purely to "automation": it emphasized the distinction between initiation of conduct and active conduct on the one hand and provision of technology or a system and a passive role on the other hand. Pet. App. 18a-24a. On the vicarious liability claims, Petitioner omitted discussion of the Ninth Circuit's focus on causation and standing to assert

copyright claims where a plaintiff must tie the elements of the claim (including the direct financial interest element) to the infringement of the *plaintiff's own* copyrights rather than basing a claim upon unsupported assertions about *non-parties'* copyrights.



REASONS FOR DENYING THE WRIT

Petitioner seeks review of the decision below with respect to only two of the three types of copyright claims it asserted. It omits from its petition the rulings below on contributory infringement. Under this Court's decision in *Grokster*, 545 U.S. 913, contributory infringement turns upon "purposeful, culpable expression and conduct," *id.* at 937, or other culpable behavior, *id.* at 942 (Ginsburg, J., concurring).

While describing Respondents in a way that suggests culpable behavior and hinting at contributory infringement, Petitioner seeks by this petition to distort other doctrines into becoming substitutes for the doctrine of contributory infringement. While the lines among direct infringement, contributory infringement, and vicarious liability may not always be clearly drawn, *see Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 n.17 (1984), a failure to respect the distinct bases and characteristics of the different doctrines may lead to errors and confusion in the application of the law. For that reason, and the other reasons Respondents explain below, the Court should deny the writ.

I. THE NINTH CIRCUIT’S VICARIOUS LIABILITY RULING IS BOTH CORRECT AND CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. The Ruling Does Not Conflict with *Grokster* or Any Other Decision of This Court.

Petitioner argues that the Ninth Circuit’s vicarious liability ruling conflicts with this Court’s decision in *Grokster*. As a threshold matter, *Grokster* had no vicarious liability holding: “Because we resolve the case based on an inducement theory, there is no need to analyze separately MGM’s vicarious liability theory.” *Grokster*, 545 U.S. at 930 n.9. In *Grokster*, the Court noted in passing that “[o]ne . . . infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.” *Id.* at 930 (citing *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963)). It further explained that vicarious liability for copyright infringement “allows imposition of liability when the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer, even if the defendant initially lacks knowledge of the infringement.” 545 U.S. at 930 n.9 (citing *Shapiro, Bernstein*).

Petitioner is wrong that the Ninth Circuit’s decision conflicts with the Court’s summary of vicarious liability in *Grokster*. There is no evidence in this case that Respondents “profit[ed] from direct infringement while declining to exercise a right to stop or limit it.” *Id.* at 930. As the courts below observed, there was no

evidence at all that customers were drawn to Respondent Giganews's services, or that Giganews gained any customers, because of infringements of Petitioner's copyrights. Pet. App. 33a. Nor was there any evidence that Giganews declined to exercise a right to stop or limit infringement of Petitioner's works: to the contrary, Petitioner neglects to mention that the core of the dispute is its own refusal to supply Giganews with information necessary to remove Petitioner's materials from its services. As both of the courts below noted, Giganews sought the information necessary to identify the specific materials about which Petitioner complained, but Petitioner refused to provide it. Whenever Giganews happened to get Message-IDs for particular messages, it removed those messages from its servers. Pet. App. 11a, 27a.

Petitioner reads into *Grokster* a free-floating, generalized basis for vicarious liability claims by any copyright holder resulting from a defendant's alleged financial interest in infringement of other holders' copyrights. As the courts below observed, such a rule would be at odds with this Court's decisions in *Spokeo*, 136 S. Ct. 1540, and *Lujan*, 504 U.S. 555. Regardless of whether there is a standing issue, however, there is simply no basis for vicarious liability where a plaintiff has not tied both elements of vicarious liability to the alleged infringements of its own copyrights.

Petitioner's proposed rule would also set up service providers for liability, based solely upon alleged infringements of non-parties' copyrights, when plaintiffs refuse to cooperate with service providers in

helping stop or limit infringement of the plaintiffs' own copyrights. The rule would incentivize three bad practices, all present in this case: (1) noncooperation by copyright holders with regard to specifying infringements; (2) proposed liabilities that may turn exclusively upon alleged infringements of non-parties' copyrights, with problems of accuracy and proof arising from the absence of those parties from the lawsuit; and (3) unprincipled bounty hunting for statutory damages windfalls based on non-parties' interests.³

Petitioner's view also ignores the literal sense of this Court's brief articulation of vicarious liability: "one . . . *infringes vicariously* by profiting from *direct infringement* while declining to exercise a right to stop or limit *it*." *Grokster*, 545 U.S. at 930 (emphasis added). Infringement is not an abstract activity: it involves violation of a specific right of a specific person. It specifically involves the violation of Section 106 of the Copyright Act, 17 U.S.C. § 106, which defines the rights of a copyright holder. The salient provision is Section 106(1), which identifies the exclusive right of an owner of copyright "to reproduce *the copyrighted work* in copies or phonorecords." 17 U.S.C. § 106(1) (emphasis added). Combining this Court's exposition with the statute, the question then becomes, "was there evidence that Respondent Giganews profited

³ While Petitioner is justifiably shy in making explicit its monetary demands, its claim for maximum statutory damages of \$150,000 per work, together with its claim of an ever-rising number of allegedly infringed images (including images Petitioner has purchased) now totaling 61,000 images, means that Petitioner effectively claims damages of over nine *billion* dollars.

from direct infringement of Petitioner’s copyrighted works while declining to exercise a right to stop or limit infringement of Petitioner’s copyrighted works?” The clear answer in the record, as the courts below recognized, is “no.” The evidence before the district court amply showed Giganews’s diligence in weeding out messages from its Usenet servers, and its ready willingness to do so, whenever it received specific notifications of claimed infringement.

Finally, Petitioner’s view ignores, and strays far from, the fundamental principles of vicarious liability that underlay the Court’s summary in *Grokster* and the discussion of vicarious liability principles and cases in *Sony*, 464 U.S. at 435.

In *Sony*, this Court explained that “vicarious liability is imposed in virtually all areas of the law” and addresses the “problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.” *Id.* As examples, the Court identified a series of cases, several of which involved dance halls, in which courts imposed vicarious liability upon the defendants for the acts of others. In every one of those cases finding liability, the defendants either retained the direct infringers to engage in infringements or managed the infringing performances of others. *See id.* at 437 n.18.

The Court in *Sony* focused especially upon the Second Circuit’s decision in *Shapiro, Bernstein*, a case in which the owner of 23 chain stores retained the direct infringer to run its record departments and structured the relationship as a licensing arrangement. *Sony*, 464

U.S. at 437 n.18. The Second Circuit had articulated the characteristics of an employer-employee relationship, in the traditional *respondeat superior* model, in order to analyze when a different relationship may equally justify vicarious liability. In that case, the relationship between the department store owner and the employees of a concessionaire operating a department within the store justified vicarious liability of the store owner. The court of appeals stated:

When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired—the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.

See Shapiro, Bernstein, 316 F.2d at 307 (citations omitted).

In *Shapiro, Bernstein* and other cases involving vicarious liability, courts focus upon the nature of the *relationship* between a defendant and the alleged direct infringer. Simply put, the correct question here is whether the relationship between Respondent Giganews and any supposed direct infringers in this case is a type of relationship that justifies imposition of vicarious liability. That answer is “no.” There has been no evidence in this case that any supposed direct infringer acted as an agent, or anything like an agent, of Giganews. In fact, there was no competent evidence in this case about any particular alleged direct infringer;

although Petitioner obtained identifying information about a number of Giganews's customers whom it suspected of infringing its works, it never presented any evidence about them.

B. The Ruling Is Also Consistent with Those of All Other Circuits That Have Addressed Vicarious Liability for Copyright Infringement.

Petitioner argues that the Ninth Circuit's decision on vicarious liability departs from the decisions of the Second, Sixth, Seventh, and Eighth Circuits. Petitioner is wrong: those decisions would not call for a different outcome in this case. Petitioner also fails to acknowledge agreement of the Third Circuit and Tenth Circuit with the Ninth Circuit's historical vicarious liability standard, which it applied consistently in this case.

Ninth Circuit jurisprudence of vicarious copyright liability is well established and has consistently accorded with that of other circuits. *See Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262-64 (9th Cir. 1996) (applying *Shapiro, Bernstein* and allowing vicarious liability claim to proceed against operator of swap meet); *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004) (no vicarious liability for provider Usenet service); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 803-06 (9th Cir. 2007) (no vicarious liability for payment processors of online transactions for merchant account holders alleged to be infringers); *Perfect*

10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1172-75 (9th Cir. 2007) (no vicarious liability for Google search engine based on the indexing of websites that contained allegedly infringing materials); *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1070, 1072 (9th Cir. 2013) (no vicarious liability against operator of mobile Multimedia Messaging Service networks for MMS messages of customers); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1032-33 (9th Cir. 2013) (no vicarious liability of investors in video-sharing website based on conduct of allegedly infringing users); *cf. Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1155 (9th Cir. 2012) (vicarious liability for company and person who controlled and derived financial benefit from performances at restaurant and lounge).

The Ninth Circuit's most influential decision on vicarious copyright liability has been *Ellison*, which affirmed a judgment of no vicarious liability for a Usenet operator like Giganews here. The decision below relied chiefly upon *Ellison*; in particular, it grounded the causation requirement for direct financial benefit upon *Ellison*'s explicit language. *See* Pet. App. 31a-32a. In *Ellison* the standard was whether the plaintiff could show that the defendant "received a direct financial benefit from *the infringement in this case.*" *See* Pet. App. at 31a (quoting *Ellison*, 357 F.3d at 1079 n.10) (emphasis added). Numerous decisions of other circuits have cited *Ellison*, as the decision below did.

Second Circuit. Petitioner relies heavily on the Second Circuit's landmark statement of the vicarious

liability standard in *Shapiro, Bernstein*, 316 F.2d 304, 307. Respondents discussed that case in the context of *Grokster* and *Sony* above. No case in the Second Circuit has altered the *Shapiro, Bernstein* standard, and that standard is consistent with the Ninth Circuit's decision in this case.

Unlike this case, the defendant in *Shapiro, Bernstein* had a special relationship with the direct infringer that warranted the imposition of vicarious liability. While the defendant there did not actively participate in the sale of infringing records, it set up the infringer as the phonograph record department of its store; it retained the right to control the employees operating on its premises and had the right to terminate those employees; it paid the employees' salaries out of proceeds it received and withheld taxes from those employee salaries; it issued receipts for the sale of counterfeit records in its name and received 10-12% of the sales of the infringing materials; and it had the "power to police carefully the conduct of its concessionaire." 316 F.2d at 308. There is no analogue between that type of close business relationship, where the concessionaire's employees functioned very much like the store owner's employees, and the attenuated relationship that Respondent Giganews has with its customers (not to mention persons that use Usenet services of other providers whose messages reside, owing to the peering process, on Giganews's general-purpose Usenet service).

In *Softel, Inc. v. Dragon Medical & Scientific Communications, Inc.*, 118 F.3d 955, 971 (2d Cir. 1997), the

Second Circuit emphasized the requirement under *Shapiro, Bernstein*, 316 F.2d at 307-08, that a defendant have an “obvious and direct financial interest in the exploitation of copyrighted materials.” The fact that the defendant was president and a shareholder of an infringing company did not suffice to establish vicarious liability for the infringement of the plaintiff’s work. There was no suggestion that a court should consider the defendant’s responsibility for infringement of materials of other copyright holders than the plaintiff; to the contrary, the court’s reference to *Shapiro, Bernstein* made clear that a financial interest in the infringements at issue in the case was the touchstone. *Softel*, 118 F.3d at 971-72 (citing *Shapiro, Bernstein*, 316 F.2d at 308).

Similarly, in *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693 (2d Cir. 1998), the Second Circuit stated that “[the declaratory relief] plaintiffs cannot be subject to liability for vicarious infringement because they cannot control the conduct of *the direct infringer*.” *Id.* at 707 n.22 (emphasis added) (citing *Shapiro, Bernstein*, 316 F.2d at 307). Reference to *the direct infringer* cannot have meant *any* infringer of *anyone’s* copyrights; it must have meant the direct infringer of the rights at issue before the court.

In *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, 844 F.3d 79, 99 (2d Cir. 2016), *cert. denied sub nom. Robertson v. EMI Christian Music Grp., Inc.*, 137 S. Ct. 2269 (2017), the Second Circuit affirmed liability of a defendant’s executive, noting that the trial court had properly instructed the jury on the *Shapiro*,

Bernstein standard. In that case the executive was *personally involved* in offering a service that provided infringements to attract customers to another service; the court of appeals concluded that the facts were sufficient to meet the *Shapiro, Bernstein* standard. The jury instructions in that case apparently drew upon the Ninth Circuit's discussion of direct financial interest in *Ellison*, 357 F.3d at 1078-79, although the Second Circuit's opinion does not cite the source of the language. *Cf. EMI*, 844 F.3d at 99. The decision of the court below in this case was consistent with, and drew heavily upon, *Ellison*. See Pet. App. 31a-34a. Thus the Second Circuit in *EMI* showed no variance from the Ninth Circuit on vicarious liability.

The final Second Circuit decision that Petitioner invoked, *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159 (2d Cir. 1971), shows how clearly the Second Circuit studied the specific nature of the relationship between the defendant and the alleged direct infringers. In *Gershwin*, the defendant managed the infringing artists; organized, nurtured, and maintained hundreds of community organizations that sponsored appearances of the defendant's infringing artists; helped to plan membership campaigns of those organizations; obtained lists of the musical works to be performed; and printed programs under its name for sale on the concert tour. It received percentage commissions on the infringing artists' fees. The court ruled that defendants' pervasive participation in the formation and direction of an organization and its infringing programming amply supported the district court's finding of both contributory infringement and

vicarious liability. *Gershwin*, 443 F.2d at 1160-63. The decision below in this case involved very different facts and would not have had a different outcome under *Gershwin* in the Second Circuit.

Sixth Circuit. The decision in *Broadcast Music, Inc. v. Meadowlake, Ltd.*, 754 F.3d 353 (6th Cir. 2014), which Petitioner relies on heavily, is also consistent with the decision in this case. There, the defendant was the owner of a restaurant that played live and recorded music without permission. That defendant did “not dispute that, as the company’s chief (95%) owner and the restaurant’s ultimate decisionmaker, he had the right and ability to supervise the infringing performances” or that “he had a financial interest in the infringing performances, which drew more customers to his restaurant.” *Id.* at 354. (The references to *the* infringing performances meant the infringements of the plaintiff’s rights, not infringements in general.) As the Sixth Circuit noted, because of these admissions, that case fell “within the heartland of vicarious liability. In the canonical illustration of the doctrine, the owner of a dance hall became vicariously liable when an orchestra hired to play music for the customers performed a copyrighted work. Substitute ‘restaurant that offers dancing’ for ‘dance hall,’ and you have this case.” *Id.* at 354-55 (citation omitted). That relationship is absent here. One simply cannot substitute “Usenet,” or “the Internet,” both open systems, for enclosed and controlled premises like restaurants or dance halls.

Other Sixth Circuit cases also demonstrate that the key to vicarious liability is the relationship between the direct infringer and the defendant. “A defendant can be held vicariously liable if he enjoys a direct financial benefit from the infringing activity and ‘has the right and ability to supervise’ the infringing activity.” *Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 621 (6th Cir. 2004) (quoting *Ellison*, 357 F.3d at 1076). “Bridgeport’s claim of vicarious liability is based solely on the allegation that UPIP granted a mechanical license to the record label and had the right (through the contracts with Marrow) to administer the composition. The record fails to demonstrate UPIP’s connection to, much less the ability to supervise or control, the infringing activity.” *Id.* at 623. Notably the Sixth Circuit in *Bridgeport* relied upon the same Ninth Circuit precedent, *Ellison*, which the Ninth Circuit relied upon in the decision below. There is no divergence between the jurisprudence of the Ninth and Sixth Circuits, and the outcome below would not have differed in the Sixth Circuit.

Seventh Circuit. Petitioner relies heavily upon a Seventh Circuit decision in a dance-hall case, *Dreamland Ball Room v. Shapiro, Bernstein & Co.*, 36 F.2d 354, 355 (7th Cir. 1929). This Court in *Sony* described *Dreamland* as a case in which a “dance hall hired orchestra to supply music to paying customers.” *Sony*, 464 U.S. at 437 n.18. Again, a dance hall is an environment that lay within the singular control of its

operator, and the musicians performing for the entertainment of the audience are akin to agents of the operator.

The Seventh Circuit later explained that vicarious liability involves a relationship between a defendant and a direct infringer “analogous to the relation of a principal to an agent” and said “[t]he canonical illustration is the owner of a dance hall who hires dance bands that sometimes play copyrighted music without authorization.” *In re Aimster Copyright Litig.*, 334 F.3d 643, 654 (7th Cir. 2003). While not reaching the merits of that claim on appeal from a preliminary injunction, the Seventh Circuit expressed skepticism about vicarious liability in that case. *Id.* In this case, no facts suggested that any infringing users of Respondent Giganews’s Usenet services were acting like agents of Giganews.

Eighth Circuit. In *RCA/Ariola Int’l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 781 (8th Cir. 1988), a defendant made its money manufacturing and selling blank audiotapes with a special notch in their design. It also manufactured machines for duplicating sound recordings onto those tapes. Only tapes with the special notches would work in the machines, so use of the machines drove sales of the special tapes. The manufacturer lent the machines for free to various retailers (also defendants), who in turn helped customers use the machines to make infringing recordings with the special tapes they had purchased. The court of appeals affirmed vicarious liability of the manufacturer and

distributor of the machines and tapes. The manufacturer “retained control over the retailers’ use of the machines by providing instructions for use” and assured a recording industry group that it “‘policed’ the use of the machines.” The court of appeals ruled that the manufacturer’s “financial interest in the use of the machines to copy protected materials is obvious in light of the fact that [it] profited from sales of the tapes used in the machines.” *Id.* Petitioner cherry-picks other language of the decision, “for infringing purposes,” to suggest that the Eighth Circuit allowed a recovery based upon financial interest in generalized infringing activity, not in infringements of a plaintiff’s works. Pet. 15. Petitioner’s argument is misleading. All infringements at issue in that case required the use of the manufacturer’s special tapes. Each infringement of the plaintiffs’ works brought the manufacturer a profit on the special tape used for that infringement. Thus the Eighth Circuit’s decision was entirely consistent with the decision of the Ninth Circuit in this case.

Two other circuits that Petitioner failed to discuss deserve discussion.

Third Circuit. The Third Circuit cited the Ninth Circuit’s *Ellison* decision for the standard for vicarious liability: “We agree with the District Court that Parker failed to state a vicarious copyright infringement claim. Parker failed to allege that Google had a direct financial interest in the purported infringing activity.” *Parker v. Google, Inc.*, 242 F. App’x 833, 837 (3d Cir. 2007) (applying *Ellison*, 357 F.3d at 1078). The

reference to “the purported infringing activity” made clear that the standard pertained to the infringements of the *plaintiff’s* works in that case.

Tenth Circuit. The Tenth Circuit also approved the Ninth Circuit standard in *Ellison* that the decision below relied upon. See *La Resolana Architects, PA v. Reno, Inc.*, 555 F.3d 1171, 1181 (10th Cir. 2009) (quoting *Ellison* statement of vicarious liability standard approvingly). The court of appeals treated contributory infringement and vicarious liability as both resting upon direct infringement of the plaintiff’s copyright. The court affirmed a ruling of no contributory infringement and no vicarious liability because the plaintiff failed to show an underlying direct infringement of its copyright. *Id.*

In sum, no circuit varies from the jurisprudence of vicarious liability that the Ninth Circuit articulated in *Ellison* (another Usenet case) and applied to this case. The decision below would have been no different in any other circuit. For that reason, the decision on vicarious liability does not merit the Court’s review.

C. The Factual Record Makes This Case Unsuitable for Review.

In any event, this case is a poor vehicle for the Court to examine the appropriate factual bases for vicarious liability for copyright infringement. Leaving aside whether Petitioner could prove that Respondent Giganews had a direct financial interest in infringements of *Petitioner’s* copyrighted material, Petitioner provided no competent evidence at all of Giganews’s

obvious and direct financial interest in *any* infringements. In the district court Petitioner did not provide competent evidence about any particular customer of Giganews to show that *any* infringements, much less infringements of Petitioner's copyrights, attracted the customer to the service, even though Petitioner had obtained in discovery identities of persons it had suspected of infringing its copyrights. Instead, Petitioner relied solely upon self-serving "expert" testimony of Petitioner's CEO and a declaration of a proffered expert who recycled a report from another case involving entirely different parties and focusing on different facts. Petitioner withdrew part of the recycled expert's evidence, and the district court excluded all expert testimony of both that expert and Petitioner's CEO. Petitioner did not appeal those decisions to the Ninth Circuit, and it has not preserved any basis to make assertions about alleged direct infringers here.

Petitioner's failure to establish a nexus between *any* infringements and a financial interest of Giganews would independently doom this petition, because the question Petitioner seeks to raise rests on a faulty premise. *See Boyer v. Louisiana*, 569 U.S. 238, 241 (2013) (Alito, J., concurring) ("Having taken up this case on the basis of a mistaken factual premise, I agree with the Court's decision to dismiss the writ as improvidently granted."); *Mitchell v. Or. Frozen Foods Co.*, 361 U.S. 231 (1960) (per curiam) ("In view of ambiguities in the record as to the issues sought to be tendered, made apparent in oral argument and the memoranda of counsel subsequently filed at the Court's request,

the writ of certiorari is dismissed as improvidently granted.”).

II. THE NINTH CIRCUIT’S DIRECT INFRINGE- MENT RULING IS BOTH CORRECT AND CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. Courts of Appeals Have Universally Rec- ognized Proximate Causation, Often Call- ing It “Volitional Conduct,” as a Bedrock Requirement for Direct Infringement Liability.

An early landmark case ruled that an operator of a Usenet service, just like Respondents here, was not a direct copyright infringer for operating the service and associated Usenet servers. *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1369-70 (N.D. Cal. 1995). That decision has been perhaps the most influential district court decision in the nation on copyright law as it applies to online services.

Like Respondents in this case, the Usenet service provider in *Netcom* did “not create or control the content of the information available to its subscribers” or “monitor messages as they are posted.” *Id.* at 1368. There, as here, the defendant “did not take any affirmative action that directly resulted in copying plaintiffs’ works other than by installing and maintaining a system whereby software automatically forwards messages received from subscribers onto the Usenet, and

temporarily stores copies on its system.” *Id.* As the *Netcom* defendant did “no more than operate or implement a system that is essential if Usenet messages are to be widely distributed,” the district court refused to impose direct liability on the service provider. *Id.* at 1369-70.

Courts of appeals across the country have uniformly adopted this requirement of volition or causation as a necessary element of direct infringement. Citing the decision below, the Fifth Circuit recently stated:

[E]very circuit to address this issue has adopted some version of *Netcom*’s reasoning and the volitional-conduct requirement. *See, e.g., Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666-67 (9th Cir. 2017); *Leonard v. Stemtech Int’l Inc.*, 834 F.3d 376, 387 (3d Cir. 2016); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008).

BWP Media USA v. T&S Software Assocs., Inc., 852 F.3d 436, 440 (5th Cir. 2017), *cert. denied*, No. 17-122, 2017 WL 3130790 (U.S. Oct. 2, 2017).

As the Second Circuit stated:

While the *Netcom* court was plainly concerned with a theory of direct liability that would effectively “hold the entire Internet liable” for the conduct of a single user, its reasoning and conclusions, consistent with precedents of this court and the Supreme Court, and with the

text of the Copyright Act, transcend the Internet. . . . [V]olitional conduct is an important element of direct liability. . . .

Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 131 (2d Cir. 2008) (citation omitted) (no direct infringement liability for cable system allowing customers to record programming onto equipment that the cable system operated).

The Third Circuit considered a case in which a plaintiff sued Google for the archiving of Usenet messages. The district court found that plaintiff failed to allege “any volitional conduct on the part of Google in archiving USENET posts”; the Third Circuit affirmed, ruling that, “to state a direct copyright infringement claim, a plaintiff must allege volitional conduct on the part of the defendant.” *Parker*, 242 F. App’x at 836 (citing *Netcom* and *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004)).

The Fourth Circuit analyzed the question extensively and also followed *Netcom*:

[T]o establish direct liability under §§ 501 and 106 of the Act, something more must be shown than mere ownership of a machine used by others to make illegal copies. There must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner. The

Netcom court described this nexus as requiring some aspect of volition or causation.

CoStar Grp., 373 F.3d at 550.

B. This Court’s *Aereo* Decision Did Not Eliminate or Modify the Requirement of Proximate Causation or Volitional Conduct.

In *Aereo*, the Court considered whether a “service that allows [users] to watch television programs over the Internet at about the same time as the programs are broadcast over the air” infringed exclusive public performance rights under the Copyright Act. *Am. Broad. Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2503 (2014). There, the Court found that, given “the many similarities between *Aereo* and cable companies,” the defendant service provider was “not just an equipment supplier.” *Id.* at 2507. Instead, the Court held that “[a]n entity that engages in activities like *Aereo*’s performs” within the meaning of the Transmit Clause of the Copyright Act. *Id.* at 2504.

Justice Scalia, in dissent, invoked the requirement of volitional conduct for direct infringement liability. He observed: “Every Court of Appeals to have considered an automated-service provider’s direct liability for copyright infringement has adopted that [volitional conduct] rule.” 134 S. Ct. at 2512 (Scalia, J., dissenting) (collecting cases).

The majority in *Aereo* did not disagree with Justice Scalia’s characterization of the volitional conduct

requirement. It neither addressed the causation requirement for direct copyright infringement nor overruled it by implication. The Court rested its decision upon the strong resemblance of Aereo to a traditional cable broadcaster; it expressly distinguished Aereo's conduct from merely the provision of a system or technology that users can operate; and it emphasized the narrow and fact-specific character of its ruling. "In other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act." *Id.* at 2507.

In this case, the court of appeals thoughtfully examined *Aereo* and correctly found that there was no conflict between *Aereo* and the volitional conduct requirement: "Because *Aereo* did not expressly address the volitional-conduct requirement and the Court's analysis can be reconciled with it, we conclude that the requirement was left intact and that the district court did not err in requiring [Petitioner] to satisfy it." Pet. App. 17a-18a.

The Fifth Circuit, after carefully analyzing an argument similar to the one Petitioner makes here, also agreed that the "volitional-conduct requirement is consistent with the *Aereo* majority opinion." *BWP Media USA*, 852 F.3d at 442 (citation omitted).

The court of appeals decisions in the Fifth Circuit and in this case join a consensus of district courts

across the country that have observed that *Aereo* did not eliminate the requirement to show causation for direct copyright infringement. See *Smith v. BarnesandNoble.com, LLC*, 143 F. Supp. 3d 115, 121 n.3 (S.D.N.Y. 2015), *aff'd on other grounds*, 839 F.3d 163 (2d Cir. 2016); *Fox Television Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1, 31 (D.D.C. 2015).

Nor does *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), suggest a different result here. *Tasini* did not address the liability of a system operator for material uploaded *by users*. Its holding therefore does not establish that providing general access to the Usenet constitutes a direct infringement. As the decision below noted, the question here is, assuming a “distribution” even occurred, “whether the *Defendants* can be regarded as having committed the distribution, as opposed to, or in addition to, the third party users who actually uploaded the infringing content onto USENET.” Pet. App. 23a (emphasis in original). *Tasini* did not rule on that question and therefore does not conflict with the decision below. As Justice Scalia noted: “*Tasini* is clearly inapposite; it dealt with the question whether the defendants’ copying was permissible, not whether the defendants were the ones who made the copies.” *Aereo*, 134 S. Ct. at 2513 n.1.

There was no evidence that Respondents took any action that amounted to direct infringement or that they were the proximate cause of direct infringement of Petitioner’s works. The decision below correctly recognized that fact. The decision was consistent with

over two decades of decisions, starting with a landmark Usenet decision in *Netcom*, and with the decisions of every court of appeals to consider similar facts.

◆

CONCLUSION

This Court's intervention is unwarranted. The decision of the court of appeals was correct; it did not depart from settled law, including well respected decisions on direct infringement and vicarious liability involving similar Usenet services; and there is no conflict among the circuits. The Court should deny the petition.

Respectfully submitted,

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