

Copy That: An Open Letter to the Supreme Court (And No, It's Not Just About Cox)



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DEAR JUSTICES,

You may recognize my name as counsel of record from *Unicolors v. H&M*¹ or the *amicus* briefs I have filed in other copyright cases before you, but I wouldn't be surprised if you do not. Regardless, I write regarding an important doctrine that undergirds many of your copyright rulings that you seem reticent to discuss: preemption, codified at 17 U.S.C. § 301.

The failure to address preemption properly and head-on is causing needless uncertainty and undermining the Act's goals of promoting science and the useful arts. I hope this letter will shine a light on that and start a conversation towards greater clarity and consistency in understanding and applying copyright law.

17 U.S.C. § 301 provides that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright...and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title." That is, when the Copyright Act speaks to some right or defense, then it is the exclusive source of that right or defense and preempts any contrary or different principles or rules. Conversely, where the Act does not speak to a right or defense, then we look to the common law. Thus, preemption allows us to determine when the Act forecloses a discrete claim (e.g., right of publicity, contract, etc.) **and** understand when common law principles apply in interpreting copyright law. Yet the latter has drawn short shrift.

Correct me if I'm wrong, but the last copyright case in which you even referenced Section 301 was nearly 40 years ago in *Community*

for *Creative Non-Violence v. Reid* when you recognized that the goal of preemption was to create "national, uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation." You then went on to explain that where the Act did not expressly define a term or was unclear, the principle or term "should be understood in light of the general common law."²

It thus seems that Section 301 requires the following interpretive framework for copyright law:

- ▶▶ if the Act speaks to something with sufficient clarity, then contrary or different common law principles are irrelevant;
- ▶▶ if the Act speaks to something but is ambiguous, common law principles may help to clarify that ambiguity; and
- ▶▶ if the Act does not speak to something, common law principles are fully applicable.

Yet since 1989, you have not even mentioned Section 301 or preemption in any of the cases where it was plainly relevant. For example, in 2014 you decided *Petrella v. Metro-Goldwyn-Mayer, Inc.*, holding that the equitable defense of *laches* is not available to copyright defendants in claims for damages because the Copyright Act sets a 3-year look-back period.³ Wasn't that a preemption analysis?

Unfortunately, lower courts have followed your lead in ignoring preemption when interpreting the Copyright Act. Just last year in *Rearden, LLC v. Walt Disney Pictures*⁴ the Ninth Circuit acknowledged that other courts have found that the language 17 U.S.C. § 504(b) creates a right to a jury trial on profit disgorgement claims but reached the contrary conclusion because the remedy has historically been understood as equitable in other contexts. Thus, the Ninth Circuit again did what you reversed it for doing in *Petrella* by relying on common law principles when the Act otherwise spoke to the claim, defense, or remedy at issue.

So why am I writing to you about this now? Because your March 25, 2026 holding in *Cox Communications, Inc. v. Sony Music Entertainment*⁵ addressed when contributory liability applies to copyright claims after acknowledging that the Copyright Act does not speak to secondary liability. You had a perfect opportunity to discuss the doctrine of preemption and the interpretive framework it requires. But instead of applying common law contributory liability principles you looked only to your prior holdings in copyright cases to conclude that contributory liability claims are limited to those where an Internet Service Provider either "induced the infringement or the provided service is tailored to that infringement." Respectfully, that limitation seems artificial and inconsistent with your own precedent.

As Justice Sotomayor's concurrence explained, "the majority,

without any meaningful explanation, unnecessarily limits secondary liability even though this Court's precedents have left open the possibility that other common-law theories of such liability, like aiding and abetting, could apply in the copyright context." Justice Sotomayor is right. It is precisely because the Act does *not* speak to secondary liability that common law theories are fully applicable. Because the Act does not speak to secondary liability, there is no copyright-specific rule for secondary liability and no basis to categorically limit it as you did. Yet none of you—neither the majority nor the concurrence—even mentioned Section 301. That was a missed opportunity to provide meaningful guidance in statutory interpretation. And it has led to a troubling holding.

To be clear, I'm not saying that Sony should have prevailed. As you correctly explained in *Metro-Goldwyn-Mayer Studios Inv. v. Grokster, Ltd.*, "mere knowledge of infringing potential or of actual infringing uses" does not generate culpability.⁶ The mere potential of infringement cannot satisfy the scienter requirement for contributory liability. Nor can knowledge of actual infringing activity if the defendant has no practical ability to do anything about it. Thus, there is a significant difference between an internet provider like Cox, which cannot really stop its own involvement in known infringement, and service providers such as online marketplaces and social media platforms, who host that infringement and can. But your holding in favor of the former appears to also insulate the latter by creating a rule inconsistent with the common law and your precedent.

In *Twitter, Inc. v. Taamneh* you explained that to impose liability under common law aiding and abetting principles, courts have required "that the defendant have given knowing and substantial assistance to the primary *tortfeasor*...notably, courts often viewed those twin requirements as working in tandem, with a lesser showing of one demanding a greater showing of the other.... In other words, less substantial assistance required more scienter before a court could infer conscious and culpable assistance."⁷ You also explained that this "deep-rooted common law basis...should not be taken as inflexible codes; rather, they should be understood in light of the common law and applied as a framework designed to hold defendants liable when they consciously and culpably 'participate[d] in' a tortious act in such a way as to help 'make it succeed.'"⁸

Using that standard, you found that Twitter, which "appear[s] to transmit most content without inspecting it," could not be held liable for aiding and abetting tortious or criminal activity facilitated through its platform because its alleged actions (or inaction) and the Reina terrorist attack were highly attenuated "given the lack of allegations connecting the Reina attack with ISIS' use of these platforms," such that "plaintiffs would need some other very good reason to think that defendants were consciously trying to help or otherwise 'participate in' the Reina attack"—yet they offered no such reason.⁹

Following that sound reasoning, courts have understood that hosting infringing content can be culpable "substantial assistance" to copyright infringement where the platform has actual knowledge

and allows that infringement to continue by failing to take simple measures to stop it. Indeed, decades of nationally uniform jurisprudence have grown out of that understanding.

Knowing that, Cox's brief to you stressed the efforts it has taken to comply with the DMCA and address infringement. Yet many, including Justice Sotomayor, have interpreted your holding as essentially telling OSPs: "You don't need to do that anymore, there's no path to liability for your failure to take any action to remove infringing content on your platform." I hope that's not really what you were saying.

Fortunately, there are some judges who don't read your holding that way. For example, not even one week after that opinion issued, one district court denied a motion for judgment on the pleadings in a contributory copyright infringement case against Twitter with a footnote distinguishing Cox factually.¹⁰ That court was certainly correct that there is a difference between an internet service provider that merely provides an internet connection and an online platform that hosts infringing content.

The point, though, is that your holdings have sown some confusion. Why does copyright law, which does not speak to secondary liability, have more limited aiding and abetting theories available to it than are generally available at common law? You had a simple interpretive framework available to you—look to the Act to see if it speaks to the issue (and thus preempts common law understanding) and if not then apply common law principles just as you did a few years ago in *Taamneh*—but you declined to use it. Why?

I know Josh Rosencranz and his team did a fantastic job briefing and arguing Cox. I worked with them to brief and argue *Unicolors v. H&M* and know firsthand how great they are. But they were advocating on behalf of a company with a billion-dollar interest in advancing the most restrictive scope of secondary liability possible. In doing so, they advocated for a position that treated contributory liability differently in copyright cases than anywhere else at common law.

But I digress. This letter isn't really about Cox. It's about Section 301 and its application. Cox is just the latest example of courts discussing what is and isn't in the Act without expressly acknowledging the interpretive frameworks required by the answer to that question. But you are the Supreme Court and it's your job to provide clarity and uphold the letter and intent of federal laws like the Copyright Act. To facilitate that job, please consider giving Section 301 a bit more consideration moving forward. ◀◀

Respectfully,
Stephen Doniger

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What Is At Stake

A ruling that AI training is categorically infringing would require the entire generative AI industry to either obtain licenses at scale or fundamentally restructure its training methodology. A ruling that training is categorically fair use would effectively foreclose compensation for every creator whose work was used to build these systems. The Ninth Circuit is about to issue very important opinions that shape the future of AI law. The cases before it will determine whether generative AI as an industry can operate without licensing the creative works that made it possible. ◀◀

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Endnotes

1. *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 595 U.S. 178 (2022).
2. 490 U.S. 730, 740–741 (1989).
3. 572 U.S. 663 (2014).
4. 152 F.4th 1058 (9th Cir. 2025).
5. 607 U.S. ____ (2026).
6. 545 U.S. 913, 937 (2005).
7. 598 U.S. 471, 496 (2023) (citations omitted).
8. *Id.* at *493, 497 (citation omitted).
9. *Id.* at *499–500.
10. *Michael Grecco Productions, Inc., v. Twitter*, 2:24-cv-04878-MEMF (ECF 70, 3/31/26).

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its own configuration still left plenty of options for other pancake purveyors to plate. The Board agreed with the Examining Attorney that as a general matter, alternative designs need not be considered if the other evidence of record establishes functionality. Because the Board found the other evidence of record established that Applicant’s pancake was functional, it did not need to consider evidence of alternative designs. Nonetheless, “for completeness” the Board did consider the Applicant’s evidence of alternative designs and rejected it. Applicant itself touted a benefit of its configuration in allowing consumption while seated, standing or walking, *sans* utensils or plate. This flexibility would not be possible with a stack of pancakes. As to the availability to competitors of fewer or greater than eight slices, the record showed evidence that the eight-slice configuration is commonly used with pizzas, pies, and cakes. This evidence, while unnecessary, supported the conclusion of functionality.

As to the fourth *Morton-Norwich* factor, whether the design results in a comparatively simple or cheap method of manufacture, the Board found “nothing in the record to support a finding that the comparative cost or complexity of a design that involves cutting a round pancake into eight equal slices is a probative factor on the question of functionality here.”

The Board was satisfied that factors two and three precluded registration to the pancake as functional and affirmed the refusal to register it. Because it found the configuration functional, it did not reach the additional refusal, which was made on the ground that the proposed mark was a generic product design, and failed to function as a trademark for the identified goods.

In re Misty Everson and Christine Maynard, Ser. No. 91704306 (March 31, 2026). ◀◀

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