No. 22-1053

In the
Supreme Court of the United States

ABKCO MUSIC, INC., et al.,

Petitioners,

v.

WILLIAM SAGAN, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The Second Circuit's decision below explicitly holds that direct liability for copyright infringement extends only to "the person who actually presses the button" to make the infringing copies. Pet.App.21. That impossibly narrow understanding of direct infringement contravenes the text of the Copyright Act, this Court's precedent, settled common-law principles, and decisions from several other courts of appeals. And as multiple amici have underscored, the decision below will have serious negative consequences, threatening to leave wide swathes of classic infringement behavior unremedied in one of the Nation's most important forums for copyright litigation. This Court's review is plainly warranted.

Sagan's opposition brief is a study in misdirection. Rather than explain how the Second Circuit's refusal to find direct infringement here can be reconciled with text, precedent, common law or common sense, Sagan characterizes the decision as an application of the Second Circuit's "well-established 'volitional-conduct' requirement." BIO.1. That is nonsense. This is not a case where the defendant supplied a machine but otherwise refrained from volitional conduct. Volitional conduct abounds here. The only question is whether Sagan's volitional conduct in authorizing the uploading of copyrighted works is direct infringement where he delegated the volitional conduct of pushing the copying button to an underling. The Second Circuit alone holds that Sagan's wholly volitional conduct does not constitute direct infringement.

Sagan's other principal effort at misdirection—alleging that this case is nothing more than an

unforced pleading error—is entirely question-begging. If the Second Circuit's novel holding is correct, and one who directly violates the copyright holder's exclusive right to authorize copying is only indirectly liable for the copying of the button-pusher, then petitioners erred in limiting their claim against Sagan to direct infringement. But if the First, Third and Ninth Circuits are correct that Sagan's authorization of illicit copying and distribution was direct infringement even if an underling pushed the copying button, then there was no pleading error at all. That the complaint alleged only direct infringement just underscores that this case cleanly presents the question presented. This Court should grant certiorari to resolve that question and reverse the Second Circuit's novel and atextual holding.

ARGUMENT

I. The Decision Below Contravenes The Statutory Text And Settled Law.

The decision below is egregiously wrong under the text of the Copyright Act and settled law. By its express terms, the Copyright Act gives a copyright owner the "exclusive rights" not only to copy and distribute the copyrighted work, but also "to authorize" such copying and distribution. 17 U.S.C. §106. In equally clear terms, the statute declares anyone who violates "any of the exclusive rights of the copyright owner" to be "an infringer of the copyright." *Id.* §501. The import of that text is straightforward: Anyone who "authorize[s]" someone else to make or distribute copies directly infringes the copyright owner's "exclusive rights," even if the person

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