

No.

IN THE

Supreme Court of the United States

COX COMMUNICATIONS, INC. and COXCOM, LLC,
Petitioners,

v.

SONY MUSIC ENTERTAINMENT, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Edward Williams	E. Joshua Rosenkranz
James Anglin Flynn	<i>Counsel of Record</i>
Abigail Colella	Christopher J. Cariello
Kamilyn Y. Choi	ORRICK, HERRINGTON &
ORRICK, HERRINGTON &	SUTCLIFFE LLP
SUTCLIFFE LLP	51 West 52nd Street
2100 Pennsylvania Ave. NW	New York, NY 10019
Washington, DC 20037	(212) 506-5000
	jrosenkranz@orrick.com
Roman Martinez	
Peter E. Davis	
LATHAM & WATKINS LLP	
555 Eleventh Street, NW	
Washington, DC 20004	

Counsel for Petitioners

QUESTIONS PRESENTED

1. This Court has held that a business commits contributory copyright infringement when it “distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps to foster infringement.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005). The courts of appeals have split three ways over the scope of that ruling, developing differing standards for when it is appropriate to hold an online service provider secondarily liable for copyright infringement committed by users.

Did the Fourth Circuit err in holding that a service provider can be held liable for “materially contributing” to copyright infringement merely because it knew that people were using certain accounts to infringe and did not terminate access, without proof that the service provider affirmatively fostered infringement or otherwise intended to promote it?

2. Generally, a defendant cannot be held liable as a willful violator of the law—and subject to increased penalties—without proof that it knew or recklessly disregarded a high risk that its *own* conduct was illegal. In conflict with the Eighth Circuit, the Fourth Circuit upheld an instruction allowing the jury to find willfulness if Cox knew its *subscribers’* conduct was illegal—without proof Cox knew its own conduct in not terminating them was illegal.

Did the Fourth Circuit err in holding that mere knowledge of another’s direct infringement suffices to find willfulness under 17 U.S.C. § 504(c)?

PARTIES TO THE PROCEEDING BELOW

Petitioners were the Defendants-Appellants below. They are Cox Communications, Inc. and Cox-Com, LLC.

Respondents include the Plaintiffs-Appellees below. They are Sony Music Entertainment; Arista Music; Arista Records, LLC; LaFace Records LLC; Provident Label Group, LLC; Sony Music Entertainment US Latin LLC; Volcano Entertainment III, LLC; Zomba Recordings LLC; Sony/ATV Music Publishing LLC; EMI AI Gallico Music Corp.; EMI Algee Music Corp.; EMI April Music Inc.; EMI Blackwood Music Inc.; Colgems-EMI Music Inc.; EMI Consortium Music Publishing Inc., d/b/a EMI Full Keel Music; EMI Consortium Songs, Inc., d/b/a EMI Longitude Music; EMI Feist Catalog Inc.; EMI Miller Catalog Inc.; EMI Mills Music, Inc.; EMI Unart Catalog Inc.; EMI U Catalog Inc.; Jobete Music Co. Inc.; Stone Agate Music; Screen Gems-EMI Music Inc.; Stone Diamond Music Corp.; Atlantic Recording Corporation; Bad Boy Records LLC; Elektra Entertainment Group Inc.; Fueled By Ramen LLC; Roadrunner Records; Inc.; Warner-Tamerlane Publishing Corp.; WB Music Corp.; Unichappell Music Inc.; Rightsong Music Inc.; Cotillion Music, Inc.; Inter-song U.S.A., Inc.; UMG Recordings, Inc.; Capitol Records, LLC; Universal Music Corp.; Universal Music – MGB NA LLC; Universal Music Publishing Inc.; Universal Music Publishing AB; Universal Music Publishing Limited; Universal Music Publishing MGB Limited.; Universal Music – Z Tunes LLC; Universal/Island Music Limited; Universal/MCA Music Publishing Pty. Limited; Music Corporation of

America, Inc., d/b/a Universal Music Corp.; Polygram Publishing, Inc.; Songs of Universal, Inc.; Warner Records, Inc., f/k/a W.B.M. Music Corp.; Warner Chappell Music, Inc., f/k/a Warner/Chappell Music, Inc.; W.C.M. Music Corp., f/k/a W.B.M. Music Corp.

CORPORATE DISCLOSURE STATEMENT

Cox Communications, Incorporated, is the parent corporation of CoxCom, LLC. Cox Communications, Incorporated, is owned by Cox Enterprises, Inc. Neither Cox Communications, Incorporated, nor CoxCom, LLC, is a publicly held corporation, and no publicly held corporation owns 10% or more of either of them.

RELATED PROCEEDINGS

Sony Music Entertainment v. Cox Communications, Inc., No. 1:18-cv-950 (E.D. Va.) (judgment issued Jan. 12, 2021)

Sony Music Entertainment v. Cox Communications, Inc., No. 21-1168 (4th Cir.) (opinion and judgment issued Feb. 20, 2024)

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INTRODUCTION

This case is about who bears responsibility for copyright infringement on the internet. The Fourth Circuit gave a staggering answer: whoever provides the internet connection used to commit it. At the music industry's urging, the Fourth Circuit held that Petitioner Cox Communications—which provides internet service to millions of homes and businesses—must either terminate internet connections previously used for infringement or else face liability for any future infringement. In doing so, the court installed the most draconian secondary-liability regime in the country, one that departs from three other circuits, defies this Court's precedents, and threatens mass disruption across the internet. This Court's review is urgently needed.

According to the music industry's liability theory, once an online service provider has knowledge of at least two instances of infringement at a subscriber's IP address, the provider is secondarily liable for future infringement at that IP address unless it terminates the connection. The industry claims that failing to throw the home or business off the internet is a "material contribution" to likely future infringement. The service provider can be liable even if it did nothing to encourage infringement. Even if it gains nothing from infringement. Even if scores of other, entirely innocent people use the same connection. Even if the service is essential for a universe of legitimate uses. Even if the service provider went to great lengths to try to deter infringing conduct—and largely succeeded. A service provider's only reliable way of avoiding liability is to terminate service en-

tirely. If it does not, and that account is again used to infringe, the service provider is liable.

That is just what happened here. Cox’s millions of subscribers rely on the internet for everything from video conferences to banking, civic engagement to cat videos, robot vacuums to doorbell cams. Less than 1% of Cox’s subscribers have also used the service to swap infringing music files; and Cox’s anti-infringement measures got 95% of that less than 1% to stop. Cox derives no profit from infringement, as the Fourth Circuit held. Yet Cox was found liable for all the infringement anonymous users committed through 57,000 of its internet connections, just because the music companies had previously sent Cox automated notices alleging that these connections were used to infringe. The only way Cox could have avoided liability was by terminating those 57,000 internet connections. That means terminating entire households, coffee shops, hospitals, universities, and even regional internet service providers (ISPs)—the internet lifeline for tens of thousands of homes and businesses—merely because some unidentified person was previously alleged to have used the connection to infringe.

The Fourth Circuit’s rule misinterprets this Court’s decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), and creates a three-way circuit split on the proper threshold for material-contribution liability. Under *Grokster*, contributory liability requires “purposeful” misconduct, such as distributing a device “with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps ... to fos-

ter infringement.” 545 U.S. at 937. The Second and Tenth Circuits adhere to *Grokster* in requiring affirmative, culpable conduct. The Ninth adopts a middle-ground position demanding only that service providers take reasonable—not nuclear—measures to prevent infringement. Only the Fourth diverges entirely.

The Fourth Circuit compounded its error—and created another circuit split—with a ruling regarding the standard for willful infringement under 17 U.S.C. § 504(c). Departing from the Eighth Circuit and longstanding common-law principles, the Fourth Circuit held that a secondary infringer can be held willful—and subject to a five-fold enhancement of statutory damages—if it provided service with knowledge of the *direct* infringer’s wrongful conduct, even if it reasonably believed that its *own* conduct was entirely lawful. That ruling means that every contributory infringer by definition acts willfully, thereby automatically exposing accused contributory infringers to statutory damages of *\$150,000 per work* and rendering the statute’s two-tiered damages structure meaningless. Here, the Fourth Circuit’s rule means Cox is potentially liable for up to *\$1.5 billion* in damages even if Cox reasonably believed its anti-infringement efforts satisfied the law.

Each of the court’s errors independently merits review. Together, these errors form a regime that requires urgent rebuke. The stakes are immense. The music industry has advanced its terminate-or-else theory in ten cases against major ISPs, with no signs of relent, while other plaintiffs have adapted the theory to target all sorts of other service provid-

ers. The question of who is responsible for online copyright infringement carries immense public implications, affecting the interests of rightsowners, businesses, and users on a pervasive scale. This Court should grant certiorari to prevent these cases from creating confusion, disruption, and chaos on the internet. Innovation, privacy, and competition depend on it.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at 93 F.4th 222 and reproduced at Pet. App. 1a-38a.

The district court's memorandum opinion denying Defendants' Rule 50 and Rule 59 post-trial motions is published at 464 F. Supp. 3d 795 and reproduced at Pet. App. 40a-142a. The district court's memorandum opinion denying Defendants' motion for summary judgment and granting in part Plaintiffs' motion for summary judgment on the knowledge prong of contributory infringement is published at 426 F. Supp. 3d 217 and reproduced at Pet. App. 143a-178a.

JURISDICTION

The Court of Appeals entered judgment on February 20, 2024. A timely petition for rehearing was denied on March 19, 2024. Pet. App. 179a. On June 3, 2024, this Court extended the time to file a petition for a writ of certiorari to August 16, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

17 U.S.C. § 501 imposes liability for direct infringement of copyright. No provision of the Copyright Act expressly provides for secondary liability.

17 U.S.C. § 504(c)(1) provides that a “copyright owner may elect ... to recover, instead of actual damages and profits, an award of statutory damages ... in a sum of not less than \$750 or more than \$30,000 [per an infringed work].”

17 U.S.C. § 504(c)(2) states that “where ... infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000 [per an infringed work].”

STATEMENT OF THE CASE

This Court’s Previous Rulings On Secondary Infringement

Courts have developed two doctrines—vicarious and contributory liability—that impose liability for someone else’s copyright infringement. *Grokster*, 545 U.S. at 930-31. Vicarious infringement, “predicated upon the agency doctrine of respondeat superior,” provides that “one may be vicariously liable if he 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). Contributory copyright infringement, based on common-law aiding-and-abetting liability, applies to

“one who, with knowledge of the infringing activity, induces, causes, or materially contributes” to it. *Id.*

Every 20 years, it seems, this Court is called upon to apply these secondary-liability doctrines to modern technology that can be used to infringe copyrights. First was *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417, 442 (1984), a case about the Betamax videocassette recorder. Weighing the “difficult balance between the interests of authors” and “society’s competing interest in the free flow of ideas, information, and commerce,” this Court held that there can be no contributory copyright-infringement liability for selling a product that is “widely used for legitimate, unobjectionable purposes” but also can be used to infringe. *Id.* at 429, 442. *Sony* made the world safe for future technology, including digital video recorders, word processors, cloud computing, and many other multi-use devices and services.

Twenty years after *Sony*, this Court revisited contributory liability in the context of a nascent internet. At issue was *Grokster*, a file-transfer platform promoted specifically to encourage music piracy. *Grokster*, 545 U.S. at 919-20. The Court reaffirmed *Sony*’s noninfringing-use rule but explained that a defendant can nevertheless be held liable where it “distributes a device *with the object* of promoting its use to infringe copyright, as shown by *clear expression or other affirmative steps ... to foster infringement.*” *Id.* at 936-37 (emphasis added). The Court reaffirmed that “mere[] ... failure to take affirmative steps *to prevent infringement*” is insuffi-

cient to impose liability. *Id.* at 939 n.12 (emphasis added).

Now, 20 years later, courts are wrestling with another variation on the theme: secondary liability applied not to a file-transfer platform specifically marketed for piracy (as in *Grokster*) but rather to the internet itself. Specifically, this case concerns the appropriate standard for a “material contribution” claim—a label used in *Gershwin*’s canonical contributory-liability formulation quoted above, but not discussed in *Grokster*. This omission has led to debate over whether and how *Grokster*’s insistence on affirmative, culpable conduct applies to a material-contribution claim against a provider of general internet services.

The Music Industry Seeks To Hold ISPs Liable For Copyright Infringement By Users

The internet has become one of “the most important places” in modern American life. *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). It started in the 1990s as “a vast library” and “a sprawling mall offering goods and services.” *Reno v. ACLU*, 521 U.S. 844, 853 (1997). By the early 2000s, it was a center of civic engagement, where Americans could learn “about political candidates and issues,” *Citizens United v. FEC*, 558 U.S. 310, 364 (2010), “petition their elected representatives,” and connect “with their friends and neighbors,” *Packingham*, 582 U.S. at 104. Today, people go to school, earn their livelihoods, and manage nearly every detail of day-to-day life through the internet.

But the internet can also be used for ill. Copyright piracy is one example. As Congress recognized at the dawn of the internet age, the internet lets users “cop[y] and distribute[] [digital works] worldwide virtually instantaneously”—which makes infringement easy and enforcement hard. S. Rep. No. 105-190, at 8 (1998). Congress also appreciated the basic tort problems the internet would pose, with numerous technological intermediaries situated between a wrongdoer and an injured party. But it declined to resolve these questions, instead encouraging courts to adapt preexisting copyright doctrine to new factual configurations. *Id.* at 19. Congress’s only intervention was the Digital Millennium Copyright Act of 1998 (DMCA), *id.*, which afforded certain service providers a *safe harbor* from damages liability, 17 U.S.C. § 512(a)-(d), while expressly leaving any other “defense” to liability untouched, *id.* § 512(l).

For its part, the music industry experimented with legal strategies to confront piracy. In the early days, the industry went after individual infringing users. CA App. 299-300. But suing “students, ... children, and grandmothers” was unpopular and ineffective at scale. CA App. 300, 339. The industry also pursued online services that were specifically designed to facilitate piracy—an approach that came to a successful head when this Court decided *Grokster*. CA App. 305. But piracy platforms evolved, too, in ways that made them a less promising source of damages. CA App. 305, 316, 338-39.

So, around 2008, the industry shifted strategies. It decided to target the source of internet access itself: the ISPs that provide the cables, machinery,

and infrastructure needed to send and receive any data on the internet. The industry hires services that use bots to monitor file-sharing networks. CA App. 356. When a bot detects a copyrighted work, the service automatically sends notices to ISPs alleging that someone at a particular IP address infringed. *Id.* The music industry began deluging ISPs with millions of notices annually.

ISPs, however, are much like telephone companies: They have limited ability to police how customers use the communications infrastructure they provide. ISPs cannot block access to specific sites, prevent download of particular content, or monitor what their users are doing online—and, if they did, the privacy protests would be deafening. CA App. 422-23, 519-20, 530. They have no way of verifying whether a bot-generated notice is accurate. CA App. 535-38. And no one can reliably identify the actual individual who used a particular internet connection for an illegal download. The ISP could connect the IP address to a particular subscriber's account, but the subscriber in question might be a university or a conference center with thousands of individual users on its network, or a grandmother who unwittingly left her internet connection open to the public. Thus, the subscriber is often not the infringer and may not even know about the infringement.

Nevertheless, the music industry asserted that once an ISP receives allegations that a subscriber's connection has been used to infringe, it is "obligat[ed] to enforce the law" by terminating the subscriber's internet connection. CA App. 302, 1783-84, 1787.

BMG Sues Cox, And The Fourth Circuit Adopts Unprecedented Contributory-Liability And Willfulness Standards

Cox, which provides internet access to 6 million homes and businesses in 18 states, was the music industry's first target in its litigation campaign against numerous ISPs. Cox's subscribers include everything from individual households to regional ISPs (which rent Cox's infrastructure to provide internet access to an entire region, through a single Cox connection). Only 57,000 subscribers, or less than 1% of Cox's subscribers, are accused of infringement, CA App. 264; so over 99% of Cox subscribers use their broadband services exclusively for noninfringing purposes.

During the period involved in this case, 2013-2014, the industry buried Cox in over a million notices a year alleging infringement on Cox internet connections. CA App. 506. Each notice alleged that somebody accessing the internet through a particular IP address infringed a particular copyright.

To address these notices, Cox developed a "graduated response program." CA App. 437-38; *see* CA App. 430, 1064-65. For each robo-notice, Cox would email a warning to the subscriber. If notices persisted, Cox would escalate with temporary service suspensions requiring subscribers to speak with Cox investigators to restore service. CA App. 430, 437-38, 1064-65.

For 95% of the 1% of subscribers alleged to infringe—Cox's graduated-response system worked to

prevent further infringement. CA App. 660, 1735. The small minority of subscribers who continued to infringe would face possible termination—a step Cox deemed appropriate a few dozen times during the damages period, though there were no “hard-and-fast rules.” CA App. 434-35. In practice, the accounts that continued to rack up notices without termination were regional ISPs, universities, hotels, military housing, and other business accounts used by hundreds or thousands of individual users—situations where account termination would be highly impractical and carry disproportionately devastating consequences. CA App. 663-64, 1743.

Cox was first sued for alleged secondary copyright infringement in 2014 by music publisher BMG Rights Management. *BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 298 (4th Cir. 2018). The district court concluded as a threshold issue that Cox’s case-by-case approach to subscriber termination was not standardized or aggressive enough to immunize Cox under the DMCA’s safe-harbor provision for ISPs with a policy for “terminat[ing] ... repeat infringers.” *Id.* at 300 (quoting 17 U.S.C. § 512(i)(1)(A)). At trial, a jury rejected BMG’s vicarious-liability claim but found for BMG on its claim of willful, contributory liability. *Id.*

The Fourth Circuit overturned the verdict, faulting the district court for failing to instruct the jury that contributory infringement requires actual knowledge or willful blindness of a subscriber’s infringement, not mere negligence, and that the plaintiff must prove an ISP knew of the “specific instances

of infringement” for which it was being held secondarily liable. *Id.* at 311-12.

As to willfulness, however, the Fourth Circuit endorsed the district court’s approach. Cox challenged a jury instruction that tied willful secondary infringement to “Cox’s knowledge of its *subscribers*’ [infringement],’ rather than Cox’s knowledge that ‘*its actions* constitute an infringement.” *Id.* at 312 (quoting Cox) & n.7 (jury instruction). The Fourth Circuit upheld the instructions, offering the circular explanation that “[c]ontributorily (or vicariously) infringing with knowledge that one’s subscribers are infringing is consistent with at least reckless disregard for the copyright holder’s rights.” *Id.* at 313. The *BMG* parties settled before retrial or any petition to this Court.

Numerous Music Companies Sue Cox Under BMG’s Legal Standards And Win A \$1 Billion Verdict

In July 2018, a month before *BMG* settled, record labels and publishers representing 80% of the music industry filed this copycat suit against Cox. CA App. 189-216. Plaintiffs alleged that Cox is vicariously and contributorily liable (under the same “material contribution” theory) for subscribers’ infringement over four file-sharing networks between February 1, 2013, and November 26, 2014. CA App. 165, 183-87.

On summary judgment, the district court held that Plaintiffs “established the knowledge element of contributory liability” by merely showing that Cox

received automated notices alleging infringement. CA App. 248-50. At trial, Plaintiffs argued that Cox's failure to terminate internet access despite that knowledge established that Cox materially contributed to any later infringement on those accounts. The jury found Cox liable for both vicarious and contributory infringement. CA App. 822-23.

The jury also found that Cox acted willfully. CA App. 822-23. The instruction, drawn from *BMG*, directed the jury to find Cox willful if "Cox had knowledge that its subscribers' actions constituted infringement of plaintiffs' copyrights," CA App. 804—the same knowledge requirement used to establish contributory liability and which the court told the jury it had "no need to consider" because it was "already ... established" on summary judgment for liability purposes, CA App. 800-01. This willfulness finding raised the ceiling on available statutory damages from \$30,000 to \$150,000 per work. 17 U.S.C. § 504(c)(1)-(2); CA App. 803. Cox presented evidence that Plaintiffs' actual losses totaled just \$692,000. CA App. 764, 767-69. Plaintiffs nevertheless persuaded the jury to award \$1 billion—\$99,830 for each of the 10,017 works Plaintiffs claimed were infringed. CA App. 389, 823.

The Fourth Circuit Adopts An Unprecedented Material-Contribution Standard for Contributory Infringement

Cox appealed, challenging both the vicarious and contributory liability verdicts. (A challenge to the willfulness standard was foreclosed at the panel stage by *BMG*.)

The Fourth Circuit agreed with Cox on vicarious liability. It explained that Cox could not be held vicariously liable because Plaintiffs “failed, as a matter of law, to prove that Cox profits directly from its subscribers’ copyright infringement.” Pet. App. 12a. On the contrary, the evidence showed that “subscribers pa[id] [Cox] a flat monthly fee for their internet access ... no matter what they d[id] online,” and there was no indication that any subscriber chose Cox over a competitor for ease of infringement. *Id.*

As to contributory infringement, however, the Fourth Circuit upheld the jury’s liability verdict. Cox argued that Plaintiffs failed to show that Cox engaged in the sort of affirmative, culpable conduct required for contributory liability under *Grokster*. 545 U.S. at 919; Pet. App. 27a. Cox explained that such a showing would require evidence that Cox took affirmative steps to *encourage* infringement by its subscribers, not just that it failed to respond to infringement allegations as aggressively as rightsholders would prefer.

The Fourth Circuit acknowledged *Grokster*’s rule that “mere[] ... failure to take affirmative steps to prevent infringement’ does not establish contributory liability ‘in the absence of other evidence of intent.’” Pet. App. 27a (quoting *Grokster*, 545 U.S. 939 n.12). It also recognized that knowledge and material contribution were independent elements of contributory infringement. Pet. App. 20a-21a. Nonetheless, it concluded that Cox “materially contributed” to direct infringement on its network merely by continuing to provide internet service to

subscribers previously targeted by infringement notices. Pet. App. 25a-27a. In short, the Fourth Circuit held that continuing to “supply[] a product”—even a general-purpose service like the internet—“with knowledge that the recipient will use it to infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement.” Pet. App. 27a. Nevertheless, the Fourth Circuit ordered a new trial on damages, because there was no way to know whether the jury would have awarded lower damages without the vicarious-infringement finding. Pet. App. 29a-30a.

Cox unsuccessfully sought rehearing en banc as to both the panel’s holding on the material-contribution prong of the contributory-infringement analysis and the *BMG* willfulness standard Cox could not raise at the panel stage. Pet. App. 180a-183a.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit’s Material-Contribution Standard Warrants Review.

In *Grokster*, this Court held that contributory-infringement liability requires “purposeful, culpable expression and conduct.” 545 U.S. at 937; *see also id.* at 919 (requiring proof that defendant has “the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement”). Nevertheless, the Fourth Circuit held that merely continuing to supply internet service “with knowledge that the recipient will use it to infringe” was “sufficient for contributo-

ry infringement.” Pet. App. 27a. That theory not only vitiates *Grokster*’s culpability requirement, but also deepens a circuit split; conflicts with this Court’s other decisions addressing online liability; and threatens to require ISPs to terminate internet access en masse under penalty of crushing liability.

A. The courts of appeals have adopted three conflicting material-contribution standards.

This Court’s decision in *Grokster* generated confusion and a three-way circuit split over whether and under what circumstances an online service provider “materially contributes” to copyright infringement.

The circuits generally agree on *Gershwin*’s canonical formulation that “a ‘contributory’ infringer [is] ... ‘one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.’” 443 F.2d at 1162. But they part ways from there. Adhering to *Grokster*’s requirement of “purposeful, culpable expression and conduct” for secondary liability, 545 U.S. at 937, the Second and Tenth Circuits hold that mere knowledge of direct infringement is not enough; rather, the plaintiff must prove that the service provider took affirmative steps to foster infringement. In the Ninth Circuit, knowledge of infringement is also insufficient, but the plaintiff does not necessarily need to prove affirmative steps under *Grokster*; a service provider can also be held liable if it knew of infringement and failed to take available, simple measures to stop it. The Fourth Circuit alone holds that where a service provider is aware that a partic-

ular subscriber is likely to infringe, the service provider can be held liable merely for failing to terminate them. This disagreement reflects the widespread confusion among courts and commentators about the meaning of material contribution after *Grokster*.

1. The Second and Tenth Circuits do not impose contributory liability based only on proof that the service provider knows specific users are infringing yet failed to terminate them. Rather, when products have substantial noninfringing uses, secondary liability requires proof of affirmative, culpable conduct.

The Second Circuit’s rule is drawn straight from *Grokster*: Contributory liability flows from “distribut[ing] a device *with the object of promoting its use to infringe* copyright, as shown by clear expression or *other affirmative steps* taken to foster infringement.” *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 100 (2d Cir. 2016) (emphases added) (quoting *Grokster*, 545 U.S. at 919).

In *EMI*, copyright holders sued MP3tunes’ CEO for contributory infringement. *Id.* at 98-101. The CEO “personally encouraged his employees” to infringe, which, “in turn, aided and abetted infringement by ... users” of a website that facilitated and rewarded users for illegally downloading music. *Id.* at 100. Ultimately, the Second Circuit affirmed the CEO’s contributory liability because “the evidence showed that [he] acted in a manner intended to promote infringement.” *Id.*

The Second Circuit applied a rule requiring affirmative, culpable conduct even before *Grokster*. In *Matthew Bender & Co. v. West Publishing Co.*, the court rejected contributory liability because there was no evidence of conduct encouraging infringement and the products had “substantial, if not overwhelming, noninfringing uses.” 158 F.3d 693, 706-07 (2d Cir. 1998) (citing *Sony*, 464 U.S. at 438). The *Sony* rule, the court explained, aimed “to prevent copyright holders from leveraging the copyrights in their original work to control distribution of ... products that might be used *incidentally* for infringement.” *Id.* at 707 (emphasis added).

The Tenth Circuit similarly held that the “failure to take affirmative steps to *prevent* infringement” cannot constitute material contribution. *Greer v. Moon*, 83 F.4th 1283, 1295 (10th Cir. 2023) (quoting *Grokster*, 545 U.S. at 939 n.12). In *Greer*, the owner of the Kiwi Farms website orchestrated a harassment campaign against songwriter Russell Greer. *Id.* at 1288. In defense, Greer published a book and then a song, which website users “illegally put onto Kiwi Farms.” *Id.* Kiwi Farms’ owner then publicly mocked Greer’s requests to have his copyrighted works taken down. *Id.* at 1295. That spurred Kiwi Farms users to infringe even more of Greer’s works, and the infringement continued unabated. *Id.*

The Tenth Circuit identified three “flavors of secondary liability”: (i) vicarious liability; (ii) inducement liability; and (iii) “caus[ing] or materially contribut[ing] to another’s infringing activities.” *Id.* at 1287-88. Greer’s “material contribution” theory, it said, “requires more than ‘merely ‘permitting’ the in-

fringing material to remain on the website.” *Id.* at 1294-95 (citation omitted). And, unlike the Fourth Circuit, the Tenth Circuit requires more than a defendant’s mere knowledge of prior direct infringement. *Id.* at 1287. In *Greer*, that “something more” was the website owner’s “mocking refusal to remove” the copyrighted works, which “amounted to encouragement” of infringement. *Id.* at 1295. In so holding, *Greer* honored *Grokster*’s unmistakable command for affirmative, culpable conduct.

Cox would not be liable under the Second and Tenth Circuits’ “affirmative conduct” standard. The overwhelming uses of Cox’s internet service are non-infringing. Only a tiny proportion of Cox’s subscribers use internet service for infringement. And unlike the defendants in *EMI* and *Greer*, Cox did not take any affirmative steps to encourage use of its services to infringe—it *prohibited* infringement and took steps to stop it. Simply continuing to provide internet services to a subscriber, even with knowledge that the account would be used to infringe, therefore would not be considered culpable conduct in the Second and Tenth Circuits.

2. The Ninth Circuit agrees that online service providers cannot be held liable based on mere knowledge that a particular account infringes, but does not always require “affirmative conduct” promoting infringement. Rather, the Ninth Circuit has adopted a “simple measures” test, allowing culpable material contribution to be inferred from the failure to take easy, reasonable action to stop known infringement.

In *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), Perfect 10 sued Google and Amazon for infringing its copyrighted images of models. Perfect 10 claimed that Google’s search-engine results included Perfect 10’s copyrighted images as reduced-size “thumbnail” versions and linked to the full-size versions. *Id.* at 1155-57. Perfect 10 sued Amazon because Amazon and Google had an agreement through which Google’s search engine would display search results, including Perfect 10 images, to Amazon customers. *Id.* at 1157.

The Ninth Circuit held that a computer-system operator could be held contributorily liable if it (i) had “*actual* knowledge that *specific* infringing material” was available on its system and (ii) could “take simple measures to prevent further damage’ to copyrighted works” but failed to do so. *Id.* at 1172 (citing *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001); *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995)). It defined “simple measures” as “reasonable and feasible means.” *Id.* Because there were factual disputes over whether Google and Amazon could take simple measures to prevent infringement, the Ninth Circuit remanded. *Id.* at 1173, 1176-77.

The Ninth Circuit has since tried to clarify what qualifies as “simple measures.” For example, in *Perfect 10, Inc. v. Giganews, Inc.*, the court concluded that the test was not satisfied where the copyright owner’s proposed measures—which would “require 354,000 hours of manual work”—were too “onerous and unreasonably complicated.” 847 F.3d 657, 671

(9th Cir. 2017). In *VHT, Inc. v. Zillow Group, Inc.*, the Ninth Circuit concluded that Zillow was unable to take simple measures to remove infringing images unless the copyright owner provided specific URLs for each image. 918 F.3d 723, 745 (9th Cir. 2019).

Cox addressed the simple-measures test as an alternative to *Grokster*'s affirmative-conduct standard before the Fourth Circuit, explaining that Cox already implements onerous measures to stop infringement and that wholesale ejection of homes and businesses from the internet will rarely be a reasonable and feasible response to infringement notices. The court did not address the argument.

3. Instead, the Fourth Circuit staked out the most extreme position of all: Mere knowledge is enough to constitute material contribution. Pet. App. 27a.

The court started with lip service to *Grokster*, acknowledging that “mere[] ... failure to take affirmative steps to prevent infringement’ does not establish contributory liability” absent intent. *Id.* (citing *Grokster*, 545 U.S. at 939 n.12). Yet in the same breath, it said that continuing to supply internet service “with *knowledge* that the recipient will use it to infringe” constitutes “culpable” conduct. *Id.* (emphasis added). That approach collapsed the knowledge and material-contribution elements, concluding that Cox made a material contribution *only because* it knew that particular customers infringed. Waving away “Cox’s anti-infringement efforts and its claimed success at deterring repeat infringement,” the Fourth Circuit ascribed culpable intent to Cox

simply because it “chose to continue providing monthly internet access” to some repeat infringers. Pet. App. 28a. The result is to effectively require an ISP to terminate users at the first allegations of repeat infringement.

4. Judges and scholars alike have expressed deep confusion over what qualifies as material contribution after *Grokster*. Leading copyright treatises have commented that *Grokster* “deepened the conceptual morass created in *Sony* by referring to what may be a third category of secondary liability, inducement.” 6 *Patry on Copyright* § 21:41; see also 3 *Nimmer on Copyright* § 12.04[A][3] (2024) (noting “confusion” in lower courts interpreting *Grokster*). The “disarray caused by *Grokster*” is especially problematic where, as here, it impacts “those who wish to develop products and services that will have substantial noninfringing uses and that are not based on a piracy model.” *Id.* Law-review articles have likewise pointed out the uncertainty stemming from the material-contribution question, especially after *Grokster*. See, e.g., Mark Bartholomew & Patrick F. McArdle, *Causing Infringement*, 64 *Vand. L. Rev.* 675, 679-80 (2011) (noting the “confusing mishmash of contributory infringement decisions”); Alfred C. Yen, *Torts and the Construction of Inducement and Contributory Liability in Amazon and Visa*, 32 *Colum. J.L. & Arts* 513, 529-30 (2009).

Courts, too, have complained about this morass. Take *Flava Works, Inc. v. Gunter*, where Judge Posner wrote for a unanimous panel:

A typical, and typically unhelpful, definition of “contributory infringer” is “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another....” But ... what exactly does “materially contribute” mean? And how does one materially contribute to something without causing or inducing it? And how does “cause” differ from “induce”?

689 F.3d 754, 757 (7th Cir. 2012). These questions are at the very heart of post-*Grokster* contributory-infringement cases like this one. Only this Court can resolve the clear circuit split and confusion over “material contribution.”

B. The Fourth Circuit’s approach conflicts with *Grokster* and *Twitter*.

The Fourth Circuit’s approach is also wrong. As that court itself has acknowledged, contributory liability is a species of aiding-and-abetting liability. *BMG*, 881 F.3d at 309 (applying “law of aiding and abetting”).¹ *Grokster* referenced those same “rules of fault-based liability derived from the common law”

¹ See also *In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003) (“aiding and abetting [is] the criminal counterpart to contributory infringement”); *EMI*, 844 F.3d at 100 (defendant “aided and abetted infringement”); *Venegas-Hernández v. ACEMLA*, 424 F.3d 50, 57-58 (1st Cir. 2005) (*Gershwin* recognized “abettor liability”); cf. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 764 (2011) (same in patent context).

when it explained that “mere knowledge of infringing potential or of actual infringing uses would not be enough ... to subject a distributor to liability.” 545 U.S. at 934-35, 937. Recently, this Court similarly turned to “the common law of aiding and abetting” in *Twitter, Inc. v. Taamneh*, which rejected liability for online service providers based on their mere failure to terminate users they knew were engaging in wrongful conduct. 598 U.S. 471, 488-89 (2023). By permitting liability based on passive provision of internet services with knowledge of infringing conduct, the Fourth Circuit’s decision conflicts with both *Grokster*’s affirmative-conduct requirement and *Twitter*’s rejection of liability based on mere knowledge of wrongful conduct.

1. The Fourth Circuit’s decision is flatly inconsistent with the rule that distributing a multi-use product with “mere knowledge of infringing potential” does not “subject a distributor to liability,” without proof of “affirmative steps taken to foster infringement.” *Grokster*, 545 U.S. at 919, 937.

In *Sony*, this Court squarely rejected copyright owners’ claims that secondary infringement could arise from mere distribution of a multi-purpose product—in that case, videocassette recorders that were used to record television programs for later viewing. 464 U.S. at 419-21. Borrowing from patent law, the Court held that the mere sale of a staple article of commerce does not result in contributory-infringement liability if the product is “capable of substantial noninfringing uses.” *Id.* That rule “strike[s] a balance between a copyright holder’s legitimate demand for effective ... protection of the

statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce.” *Id.* at 442.

Grokster further clarified this key limitation on liability. *Grokster* distributed free file-sharing “software products.” 545 U.S. at 919. Users routinely used these products to share copyrighted music and video files, and a group of copyright holders sued *Grokster*. *Id.* at 920-21. Discovery revealed that *Grokster*’s “principal object was use of [its] software to download copyrighted works.” *Id.* at 926. For example, it deliberately positioned its products as replacements for Napster, a prominent music piracy network, which seemed to be on the verge of shutting down by court order. *Id.* at 937-38.

While *Grokster* recognized a contributory-infringement rule that would hold companies like *Grokster* liable, it did so only because they had engaged in “purposeful, culpable expression and conduct.” *Id.* The Court cautioned against “trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential.” *Id.* at 937. Accordingly, the Court—applying common-law principles—acknowledged that “mere knowledge of infringing potential or of actual infringing uses would not be enough.” *Id.* Instead, contributory-infringement liability requires something more. *Id.* In *Grokster*, that was “distribut[ing] a device with the object of promoting its use to infringe”—or, what the Court called “inducement” liability. *Id.* at 919, 935-37. But *Grokster*’s requirement of “purposeful, culpable expression and conduct” applies to *all* forms of contributory liability.

The Court was clear: “[A] court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses.” *Id.* at 939 n.12.

The Fourth Circuit flouted those principles in holding that “providing the means to infringe *is* culpable” when coupled with knowledge of likely misuse. Pet. App. 27a. Its ruling dispenses with the bottom line in both *Sony* and *Grokster* of “limit[ing] liability to instances of more acute fault than the mere understanding that some of one’s products will be misused.” *Grokster*, 545 U.S. at 932-33. It imposed this liability for a service with a universe of noninfringing uses. And it did so upon a passive service provider who has done nothing to encourage infringement and lacks even the slightest interest in infringement occurring.

The Fourth Circuit attempted to conjure “more than mere failure to prevent infringement” from the record; it noted evidence of “increasingly liberal policies and procedures for responding to reported infringement” and “internal Cox emails and chats” (between two mid-level employees) “displaying contempt for [the DMCA].” Pet. App. 28a. These are obvious makeweights. The former is a semantic trick to make *not* terminating existing service sound like active conduct. The latter was workplace griping that did nothing to change the fundamentally passive character of Cox’s conduct—for instance, an email from a mid-level employee saying, “F the dmca!!!” then proposing that the music industry either “limit [the deluge of robo-notices] or give us money to hire

people.” CA App. 1495. Colorful language aside, Cox’s only contribution to anonymous user infringement was continuing to provide internet to homes and businesses that already had it. That is not enough under *Grokster*.

2. The Fourth Circuit’s decision is inconsistent with this Court’s approach to aiding-and-abetting liability for online service providers outside the copyright realm, too.

In *Twitter*, the Court interpreted the phrase “aids and abets” under the Justice Against Sponsors of Terrorism Act (JASTA), which imposes secondary liability on those who “knowingly provid[ed] substantial assistance” to a person engaged in international terrorism. 598 U.S. at 495. Plaintiffs sought to hold several social-media platforms liable on the theory that the platforms knowingly allowed terrorist content to proliferate and profited from advertisements accompanying that content. *Id.* at 481-82.

Surveying the long history of aiding-and-abetting liability in American jurisprudence, *id.* at 489-94, *Twitter*—like *Grokster*—made clear that a defendant cannot be secondarily liable unless it engaged in “conscious, voluntary, and culpable participation in another’s wrongdoing,” *id.* at 493, 505. In fact, the Court concluded that merely continuing to provide “infrastructure” to someone engaged in wrongdoing is not an “affirmative act” demonstrating the requisite culpable participation; it is mere inaction that does not establish culpability absent breach of an independent “duty to act.” *Id.* at 489-90, 498-99.

Twitter also recognized the “common conceptual core” binding aiding-and-abetting liability under JASTA and the common law surrounding both civil and criminal secondary liability. 598 U.S. at 504. On secondary criminal liability, the Court recognized that a defendant ordinarily must “take some ‘affirmative act’ ‘with the intent of facilitating the offense’s commission,’” such that the defendant can be said to have given “knowing and substantial assistance” to the primary wrongdoer. *Id.* at 490-91 (citation omitted). Such a rule ensures that “ordinary merchants [do not] become liable for any misuse of their goods [or] services, no matter how attenuated their relationship with the wrongdoer.” *Id.* at 489; *see also id.* at 490 (discussing *Rosemond v. United States*, 572 U.S. 65 (2014), a criminal aiding-and-abetting case).

Twitter accords with longstanding limitations on liability for infrastructure providers. Take the Seventh Circuit’s decision in *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) (Easterbrook, J.) (cited approvingly in *Twitter*, 598 U.S. at 499). In *GTE*, the court observed that “[a] web host, like a delivery service or phone company, is an intermediary and normally is indifferent to the content of what it transmits.” *Id.* at 659. For example, “Verizon” is not secondarily liable when it “furnishes pagers and cell phones to drug dealers.” *Id.* “That web hosting services likewise may be used to carry out illegal activities does not justify condemning their provision whenever a given customer turns out to be crooked.” *Id.*

Likewise, Cox simply provides infrastructure that some users unfortunately choose to use for illicit purposes. But Cox has no interest in and does not

promote those illicit uses. The Fourth Circuit's rule disrupts the doctrinal consistency concerning secondary liability on the internet. If the Fourth Circuit had followed *Twitter's* teaching, it would have concluded that a provider of online services cannot be secondarily liable merely because it provides a general-use product or service despite knowing that a subscriber has a history of misusing that product or service.

II. The Fourth Circuit's Willfulness Standard Warrants Review.

Once a defendant has been found secondarily liable for infringement, what else must the plaintiff prove to show *willful* infringement and subject the defendant to increased statutory damages? The Fourth and Eighth Circuits have adopted irreconcilable answers. The Eighth Circuit applies a sensible rule pegged to whether the defendant understood that *its own* conduct was unlawful. By contrast, the Fourth Circuit holds that willfulness turns on whether the defendant knows that the *direct* infringer's conduct is unlawful—meaning that, under the Fourth Circuit's combined rulings, *all* contributory infringement is automatically *willful* contributory infringement. This question is a matter of extraordinary consequence for multiple reasons—most notably that a willfulness finding increases the available statutory damages 500%, from \$30,000 to \$150,000 per violation. 17 U.S.C. § 504(c)(1)-(2).

A. The Eighth and Fourth Circuits have adopted conflicting willfulness standards in secondary-infringement cases.

The courts of appeals conflict on whether a plaintiff must make some additional showing—beyond what is necessary to establish secondary infringement—to prove that such secondary infringement was willful.

1. In *RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, the Eighth Circuit addressed the vicarious liability of a tape-copying machine manufacturer, as well as the retailers who provided in-store access to those machines. 845 F.2d 773, 776-78 (8th Cir. 1988). The defendants knew that some customers used the machines to infringe protected recordings. *See id.* at 777. For example, when the plaintiffs’ investigators (disguised as customers) made infringing copies with the machines, some retail employees proactively told the investigator-customers that their copying was “against the law.” *Id.* at 779.

But the Eighth Circuit held that that did not render the retailers’ secondary infringement willful. Knowledge that the customers were directly infringing “does not show that the employees understood *their own actions* to be culpable.” *Id.* (emphasis added). And it is that understanding, about one’s own actions, that matters for willfulness. *Id.* at 779-80.

In so deciding, the Eighth Circuit relied on Professor Nimmer’s black-letter explanation that, for copyright purposes, “willfully” means with

knowledge that the defendant’s conduct constitutes copyright infringement.” *Id.* at 779 (quoting 3 *Nimmer on Copyright* § 14.04[B][3] (1987)). The courts of appeals agree with Nimmer’s definition. *See, e.g., Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 584 (6th Cir. 2007) (quoting Nimmer); *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 768 (11th Cir. 1996) (same). If a defendant “reasonably and in good faith believes to the contrary,” i.e., that *its* conduct does not constitute copyright infringement, then that conduct “is not ‘willful.’” *RCA*, 845 F.2d at 779 (quoting Nimmer).

2. The Fourth Circuit took the polar-opposite position in *BMG*: There, Cox relied on *RCA* to argue that the district court “incorrectly required ‘the jury to analyze Cox’s knowledge of its *subscribers’* actions,’ rather than Cox’s knowledge that *its actions* constitute an infringement.” 881 F.3d at 312.

Rejecting that view but ignoring *RCA* entirely, the Fourth Circuit held: “Contributorily (or vicariously) infringing with knowledge that one’s subscribers are infringing is consistent with at least reckless disregard for the copyright holder’s rights” and, therefore, “is willful.” *Id.* at 312-13.

At trial in this case, the same district court applied the same basic instruction against Cox, again lowering the bar from knowledge of one’s own culpability to knowledge of another actor’s underlying direct infringement. *See* CA App. 804. Facing the adverse *BMG* precedent, Cox preserved this issue before the Fourth Circuit panel, Cox CA4 Br. 55 n.3,

and unsuccessfully sought rehearing en banc to remedy *BMG*'s error, Cox CA4 Pet. for Reh'g 15-21.

B. The Fourth Circuit's willfulness standard is wrong.

In the Fourth Circuit, a secondary infringer is automatically a willful infringer: The knowledge that establishes liability for \$30,000-per-work damages simultaneously increases that cap to \$150,000. That approach defies the consistent and common-sense meaning of "willfulness," and it would dismantle the enhanced damages regime Congress constructed for copyright violations.

First, it is well established that willfulness inquiries address a defendant's understanding of its own conduct and culpability, and willfulness penalties are foreclosed by a defendant's good-faith, reasonable belief in the lawfulness of its own conduct. *See, e.g., Willful, Black's Law Dictionary* (12th ed. 2024) ("A voluntary act becomes willful, in law, only when it involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong."). As this Court has explained, "the traditional understanding of willfulness in the civil sphere" is that a defendant is knowingly or recklessly "falling down in *its duty*." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 59, 68 (2007) (emphasis added). By contrast, if a defendant "acts reasonably in determining *its legal obligation*, its action cannot be deemed willful." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988) (same).

This principle—that willfulness centers on knowledge of one’s own culpability—translates consistently across the legal spectrum, from willful crimes to willful employment discrimination. For federal criminal willfulness, for instance, this Court requires proof “that the defendant was aware *that his conduct* was unlawful.” *Wooden v. United States*, 595 U.S. 360, 378 (2022) (Kavanaugh, J., concurring) (emphasis added) (citations omitted). Interpreting the Age Discrimination in Employment Act, this Court agreed that the question is whether the employer “knew or showed reckless disregard for the matter of whether *its conduct* was prohibited.” *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985) (emphasis added) (quoting *Air Line Pilots Ass’n, Int’l v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983)). That view “is consistent with the manner in which this Court has interpreted the [‘willful’] term in other criminal and civil statutes,” including the Federal Power Act, Internal Revenue Code, Occupational Safety and Health Act, and Cruelty to Animals Act. *Id.* at 126-27 & n.20.

Second, the Copyright Act uses willfulness as a tool for imposing *enhanced* damages. But the Fourth Circuit’s approach would make those enhanced damages the default for secondary infringers, defeating the escalating regime Congress designed. Where contributory liability is established, the plaintiff has always already proved the defendant’s knowledge of the underlying direct infringement. 3 *Nimmer on Copyright* § 12.04[A][3] (2024) (citing *Gershwin*, 443 F.2d at 1162). By relying on that same knowledge, the Fourth Circuit’s willfulness inquiry adds nothing to the analysis; a contributory infringer will *always*

be a willful infringer, which overrides Congress's two-tiered damages regime in secondary-liability cases.

That is precisely what happened under the Fourth Circuit's *BMG* rule here: The district court first instructed the jury that Cox had the requisite knowledge for contributory infringement (as determined at summary judgment) and then instructed that such knowledge was sufficient to find willfulness, essentially directing a verdict on the issue. *See* CA App. 804. There is no reason to think that Congress intended such a topsy-turvy regime, where direct infringers face enhanced willfulness damages only where they have culpable knowledge about their own conduct—but where secondary infringers face enhanced damages regardless of their good-faith and reasonable beliefs.

III. The Questions Presented Are Important And Recurring.

A. This is an emergency. Without this Court's intervention, the Fourth Circuit's ruling threatens mass evictions from the internet, severing millions from an essential conduit to engagement with modern society.

In this billion-dollar case, Plaintiffs accused 57,000 Cox subscribers of infringement over roughly two years. CA App. 271. That raw number is staggering even though it represents less than 1% of Cox's subscriber base. And the number of accounts does not even begin to capture the number of affected individuals. Accused subscribers included small

businesses, like coffee shops with public Wi-Fi, plus bigger entities like hospitals, universities, and military housing. *See* CA App. 395, 425, 630-31, 1066-122, 1124-25, 1613. Also included were over a dozen regional ISPs—businesses that supply internet, using a single Cox connection, to “thousands or tens of thousands” of their own customers. CA App. 664. Thus, a massive universe of downstream users rely on Cox-provided internet connections to run businesses, pay bills, connect with friends, petition their representatives, and attend school—and the vast majority have no connection to any alleged infringement.

Imposing liability on providers merely because they continue providing service after receiving allegations of infringement at a given IP address will have dangerous and drastic consequences. Grandma will be thrown off the internet because Junior visited and illegally downloaded songs. An entire dorm or corporation will lose internet because a couple of residents or customers infringed. Even with respect to individuals who did, in fact, infringe, loss of internet access is very heavy punishment for illegally downloading two songs. A person without internet might lose their job or have to drop out of school. The consequence is particularly dire for rural subscribers who often have no other ISP option—leaving terminated customers irreparably cut off from society. Yet the Fourth Circuit would require service providers like Cox to mete out this disproportionate punishment to thousands of internet users on pain of \$150,000 per illegal download.

Appropriate guardrails on secondary liability are thus critical to ensure providers can continue providing important online services to hundreds of millions of people.

B. This is a national problem, not isolated to one circuit. This Court has recognized the Copyright Act’s “express objective of creating a national, uniform copyright law.” *Cmt’y. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (citing 17 U.S.C. § 301(a)). And inconsistent legal regimes across the country are especially disruptive to operation of the internet, “a decentralized, global medium.” *PSINet, Inc. v. Chapman*, 317 F.3d 413, 420 (4th Cir. 2003) (quoting district court).

Secondary-infringement defendants like Cox typically operate at regional or nationwide scales. They therefore need certainty about how these regimes operate, and the answer cannot depend on after-the-fact venue choice. Following *Sony* and *Grokster*, courts and commentators are struggling to reach consensus on the material-contribution question. The circuits’ conflicting rules upend the goal of uniformity in copyright law. That is especially troubling given the stakes: balancing artistic protection with technological innovation on a nationwide (if not global) scale.

Especially given the five-fold damages enhancement for willfulness, review is needed to restore a uniform, nationwide copyright damages regime. For secondary infringers, the maximum statutory damages increase 500% under the Fourth Circuit’s approach, from \$30,000 to \$150,000 per violation,

without a shred more evidence than what is necessary to prove liability, without regard to the reasonableness of the defendant's mental state. So here, for example, the jury was authorized to (and did) ratchet the statutory damages up to \$99,830 per violation, CA App. 823, despite evidence that the Fourth Circuit acknowledged shows "Cox's anti-infringement efforts and its claimed success at deterring repeat infringement," Pet. App. 28a, as well as that court's conclusion that "no reasonable jury could find that Cox received a direct financial benefit from its subscribers' infringement," Pet. App. 20a.

C. The issue also frequently recurs. Uncertainty around secondary-liability rules has generated a flurry of cases confronting the precise issues presented here. The Fifth Circuit is currently considering the same material-contribution question. *UMG Recordings, Inc. v. Grande Commc'ns Networks, L.L.C.*, No. 23-50162 (5th Cir. argued June 3, 2024). District courts around the country are likewise grappling with this issue. *E.g.*, *UMG Recordings, Inc. v. Verizon Commc'ns Inc.*, No. 24-cv-5285 (S.D.N.Y.); *Warner Records, Inc. v. Altice USA, Inc.*, No. 23-cv-576 (E.D. Tex.); *In re Frontier Commc'ns Corp.*, 658 B.R. 277 (Bankr. S.D.N.Y. 2024); *BMG Rights Mgmt. (US) LLC v. Altice USA, Inc.*, No. 22-cv-471, 2023 WL 3436089 (E.D. Tex. May 12, 2023); *Bodyguard Prods., Inc. v. RCN Telecom Servs., LLC*, No. 21-cv-15310, 2022 WL 6750322 (D.N.J. Oct. 11, 2022); *UMG Recordings, Inc. v. RCN Telecom Servs., LLC*, No. 19-cv-17272, 2020 WL 5204067 (D.N.J. Aug. 31, 2020).

Nor are these issues limited to lawsuits against conduit ISPs. Rightsholders also target downstream online service providers—from web-hosting companies to payment processors to search engines. *E.g.*, *ALS Scan, Inc. v. Steadfast Networks, LLC*, 819 F. App'x 522 (9th Cir. 2020); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 819 (9th Cir. 2007); *Parker v. Google, Inc.*, 242 F. App'x 833 (3d Cir. 2007). Other frequent defendants are websites that host third-party content, including social-media services. *E.g.*, *Hunley v. Instagram, LLC*, 73 F.4th 1060 (9th Cir. 2023) (social media); *VHT*, 918 F.3d 723 (real-estate aggregator); *Routt v. Amazon.com, Inc.*, 584 F. App'x 713 (9th Cir. 2014) (online marketplace); *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627 (S.D.N.Y. 2011) (music “storage locker”); *Capitol Records, LLC v. Vimeo, Inc.*, No. 21-2949 (2d Cir.) (video hosting). Most recently, rightsholders have brought contributory-infringement claims against companies that use generative artificial intelligence. *E.g.*, *N.Y. Times Co. v. Microsoft Corp.*, No. 23-cv-11195 (S.D.N.Y.); *Concord Music Grp., Inc. v Anthropic PBC*, No. 23-cv-01092 (M.D. Tenn.).

The material-contribution theory at issue here will affect secondary liability across these technological contexts. And the continued march of technological progress enhances the need for this Court to update secondary-liability rules for the modern internet era.

IV. This Case Is An Ideal Vehicle To Resolve The Questions Presented.

This case squarely presents both questions for this Court's resolution.

On secondary liability, the Fourth Circuit issued a clear rule for this Court's review: An online service provider may be held contributorily liable when it merely "suppl[ies] a product with knowledge that the recipient will use it to infringe copyrights." Pet. App. 27a. That rule was outcome-determinative on liability. And reversal of the Fourth Circuit's expansive liability holding would have immediate practical impact: Online service providers like Cox would not be required to quickly cut off internet service—a lifeline to many—to innocent and infringing users alike, based on unverifiable infringement notices. Moreover, the factual record regarding Cox's provision of internet access is well-developed and uncontested, allowing the Court to focus on the legal questions without factual ambiguities.

The willfulness issue is likewise primed for this Court's review. In *BMG*, which settled before any petition to this Court, the Fourth Circuit analyzed (and endorsed) the precise willfulness instruction at issue here. 881 F.3d at 312-13. Cox preserved its objections in this follow-on case. Cox CA4 Br. 55 n.3. While the Fourth Circuit did not revisit its prior willfulness holding, no further development was needed to clearly position the issue for this Court's review. Moreover, the impact of the erroneous willfulness instruction is even clearer here than it was in *BMG* because, here, the district court's summary-

judgment order established Cox's knowledge of its subscribers' infringement for purposes of contributory liability as a matter of law. Pet. App. 168a-169a. That finding gives this Court a particularly clean vehicle to assess this thorny issue.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

Edward Williams
James Anglin Flynn
Abigail Colella
Kamilyn Y. Choi
ORRICK, HERRINGTON &
SUTCLIFFE LLP
2100 Pennsylvania Ave.
NW
Washington, DC 20037

E. Joshua Rosenkranz
Counsel of Record
Christopher J. Cariello
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Roman Martinez
Peter E. Davis
LATHAM & WATKINS LLP
555 Eleventh Street,
NW
Washington, DC 20004

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