

No. 24-171

In the Supreme Court of the United States

COX COMMUNICATIONS, INC., ET AL.,
PETITIONERS

v.

SONY MUSIC ENTERTAINMENT, ET AL.

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

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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QUESTIONS PRESENTED

The Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, grants copyright holders the exclusive rights to perform, display, reproduce, and distribute their protected works. 17 U.S.C. 106. Any person who violates those rights is liable for actual or statutory damages, 17 U.S.C. 501 (2018 & Supp. V 2023); 17 U.S.C. 504(b) and (c), with a higher statutory-damages cap when the “infringement was committed willfully,” 17 U.S.C. 504(c)(2). Although the Copyright Act does not expressly provide for secondary liability, this Court has long recognized secondary copyright liability based on “common law principles,” including for one who “infringes contributorily by intentionally inducing or encouraging direct infringement.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). The questions presented are as follows:

1. Whether an internet service provider that continues to provide internet access to particular subscribers, after being notified that those subscribers’ accounts have been used to commit copyright infringement, is contributorily liable for future infringement on those accounts.
2. Whether a contributory copyright infringer “willfully” violates the Copyright Act when it acts with knowledge that the direct infringer’s actions are unlawful but reasonably and in good faith believes that its own conduct is lawful.

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INTEREST OF THE UNITED STATES

This case concerns the circumstances under which an internet service provider (ISP) may be held contributorily liable for acts of copyright infringement committed through use of its subscribers' accounts. The United States has a substantial interest in the effective protection of intellectual property, which represents a significant portion of the Nation's economy. At the same time, the United States has a substantial interest in fostering technological developments and beneficial uses of digital technologies and in ensuring the broad availability of critical communications services like the internet. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

INTRODUCTION

Although the Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, does not expressly provide for secondary liability, this Court has long recognized that, in some circumstances, providers of goods or services may be held liable for acts of direct infringement committed by their customers. Imposition of secondary liability is appropriate only when the provider acts with “culpable intent” to facilitate infringement. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 934 (2005). A presumption of such intent arises when a provider sells an article that lacks a commercially significant non-infringing use. See *id.* at 932. And when particular goods are suitable for both infringing and non-infringing uses, the seller’s “unlawful purpose” may be established by evidence that the seller urged or encouraged its customers to commit infringement. *Id.* at 935.

The court of appeals in this case did not suggest that either of those rationales for secondary liability was applicable here. Rather, the court held that culpable intent to facilitate infringement may be inferred when a seller continues to provide lawful services to specific customers that the seller knows will use those services to commit direct infringement. On that basis, the court sustained a jury verdict holding petitioner Cox Communications, Inc. liable for continuing to provide internet access to specific accounts that Cox knew had been used to commit repeated acts of infringement.

That expansive view of contributory copyright infringement cannot be reconciled with this Court’s precedent. In both copyright and patent cases, “mere knowledge * * * of actual infringing uses” is an insufficient basis for imposing secondary liability on the seller of goods or services that are used to commit in-

fringement. *Grokster*, 545 U.S. at 937; see *id.* at 935-936. And under the common law of aiding and abetting more generally, an ordinary merchant's knowledge that a specific customer plans to misuse its product, standing alone, does not demonstrate culpable intent to participate in that misuse. In this case, the evidence demonstrated at most that Cox was indifferent to its subscribers' infringement, not that Cox intended to participate in that infringement or wished to bring it about. The court of appeals' judgment upholding Cox's liability therefore should be reversed.

The court of appeals further erred by approving an instruction that allowed the jury to find that Cox had "willfully" infringed (and thus faced higher statutory damages) if it knew about its subscribers' infringement. 17 U.S.C. 504(c)(2). Willfulness in the civil context generally requires knowledge or reckless disregard of the fact that one's *own* conduct is unlawful. The instruction here instead permitted enhanced damages based on Cox's knowledge of its *customers'* unlawful conduct, even if Cox reasonably and in good faith believed that its own continued provision of internet services was lawful. That instruction is incompatible with the ordinary understanding of willfulness, and it risks making enhanced damages the norm in contributory-copyright-infringement suits.

STATEMENT

A. Statutory Background

1. The Copyright Act grants copyright owners the "exclusive rights" to perform, display, reproduce, and distribute their copyrighted works, and to prepare derivative works based upon those works. 17 U.S.C. 106. Any person who violates those rights is a copyright infringer and is liable for actual damages or statutory

damages of up to \$30,000 per infringed work. 17 U.S.C. 501 (2018 & Supp. V 2023); 17 U.S.C. 504(b) and (c)(1). Where the “infringement was committed willfully,” a court may award statutory damages of up to \$150,000 per work. 17 U.S.C. 504(c)(2).

Although “[t]he Copyright Act does not expressly render anyone liable for infringement committed by another,” this Court has long recognized doctrines of secondary copyright liability. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984)) (brackets in original); see *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911). Secondary liability for copyright infringement is “a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.” *Sony*, 464 U.S. at 435. Contributory infringement “emerged from common law principles,” *Grokster*, 545 U.S. at 930, and “forms an outgrowth of the tort concept of enterprise liability,” 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.04[A][3] (LexisNexis 2025) (Nimmer).

2. In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860, to “bring[] U.S. copyright law squarely into the digital age.” S. Rep. No. 190, 105th Cong., 2d Sess. 2 (1998). The DMCA was intended to promote the distribution of copyrighted works online by providing “reasonable assurance” that copyright owners would be protected “against massive piracy.” *Id.* at 8. But the Act also established a safe harbor for online service providers who might otherwise “hesitate to make the necessary investment in the expansion of the speed and capacity” of the then-nascent internet. *Ibid.* That safe

harbor immunizes service providers against certain copyright-infringement claims to “ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.” *Ibid.*

The DMCA’s safe-harbor defense precludes the imposition of monetary liability for copyright infringement on service providers who, *inter alia*, “adopt[] and reasonably implement[] * * * a policy that provides for the termination in appropriate circumstances of subscribers * * * who are repeat infringers.” 17 U.S.C. 512(i)(1)(A); see 17 U.S.C. 512(a). A service provider’s failure to qualify for the safe harbor “shall not bear adversely” upon any other defense the provider may assert, including that its “conduct is not infringing.” 17 U.S.C. 512(l).

B. Procedural History

1. Petitioner Cox Communications, Inc. provides internet and other services to six million American homes and businesses for a flat monthly fee. Pet. App. 6a, 8a. Respondents Sony Music Entertainment and 52 other record companies and music publishers (collectively, Sony) hold the copyrights to numerous musical works. *Id.* at 6a, 42a. An industry association that includes respondents hired an anti-piracy firm to alert ISPs like Cox when one of their subscribers downloads or distributes a copyrighted work using peer-to-peer file-sharing tools like BitTorrent. *Id.* at 8a-9a. During a 22-month period, Cox received a “tidal wave” of 163,148 notices. *Id.* at 9a, 43a, 45a. Cox’s responses to such notices varied depending on how many previous warnings Cox had given a particular subscriber. *Id.* at 9a. Cox took no action against first-time infringers but sent escalating

warnings to repeat offenders and, in rare cases, terminated internet service. *Ibid.*

2. Sony sued Cox in the United States District Court for the Eastern District of Virginia, alleging that Cox was vicariously and contributorily liable for infringement committed on its subscribers' accounts. Pet. App. 9a-10a. Sony limited its case to infringement committed in 2013 and 2014 on the accounts of Cox subscribers who had received three or more infringement notices. *Id.* at 10a, 43a. The Fourth Circuit had previously determined that Cox did not qualify for the DMCA safe harbor during that period, see *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 301-305 (2018), so the case proceeded without that defense.

On cross-motions for summary judgment, the district court treated contributory copyright infringement as having two elements: (1) "knowledge of another's infringement" and (2) either a material contribution to or an inducement of that infringement. Pet. App. 163a (quoting *Perfect 10, Inc. v. Visa Int'l Serv., Ass'n*, 494 F.3d 788, 795 (9th Cir. 2007), cert. denied, 553 U.S. 1079 (2008)). The court held that the infringement notices established knowledge as a matter of law, but it left the material-contribution-or-inducement element for the jury. *Id.* at 21a, 172a. The jury found Cox liable for vicarious and contributory infringement. *Id.* at 10a.

Under the Copyright Act, the maximum statutory damages award is increased to \$150,000 (rather than \$30,000) per infringed work if the "infringement was committed willfully." 17 U.S.C. 504(c)(2). The district court in this case instructed the jury that Cox's infringement was willful if "Cox had knowledge that its subscribers' actions constituted infringement of plaintiffs' copyrights, acted with reckless disregard for the

infringement of plaintiffs’ copyrights, or was willfully blind to the infringement of plaintiffs’ copyrights.” C.A. App. 804. Cox objected to the instruction but acknowledged that its objection was foreclosed by circuit precedent. *Id.* at 704, 744-745; see *BMG*, 881 F.3d at 312-313 & n.7.

The jury found that Cox had acted willfully and awarded statutory damages of \$99,830.29 per infringed work, for a total of \$1 billion. Pet. App. 10a-11a. The district court denied in relevant part Cox’s motion for judgment as a matter of law. *Id.* at 68a, 111a.

3. The court of appeals reversed on vicarious liability but upheld the jury’s verdict on contributory liability. Pet. App. 1a-38a.*

With respect to contributory liability, the court of appeals affirmed the district court’s conclusion on summary judgment that Cox knew “that subscribers were substantially certain to infringe in the future,” holding that Cox had forfeited any argument to the contrary. Pet. App. 22a; see *id.* at 22a-25a. The court of appeals also upheld the jury’s finding that Cox had materially contributed to its subscribers’ direct infringement. *Id.* at 25a-28a. The court held that the jury’s verdict was adequately supported by evidence that Cox’s internet service was “indispensable” to the infringement and that Cox had failed to address the infringement despite specific knowledge that it was occurring. *Id.* at 26a (citation omitted); see *id.* at 28a. In the court’s view, “supplying a product with knowledge that the recipient will use it to infringe copyrights” is the sort of “culpable conduct” that is “equivalent to aiding and abetting the

* Sony filed a petition for a writ of certiorari seeking review of the court of appeals’ vicarious-liability holding, but this Court denied the petition. See No. 24-181, 2025 WL 1787722 (June 30, 2025).

infringement.’” *Id.* at 27a (quoting Pet. C.A. Br. 43). The court also asserted that “providing the means to infringe” to a known infringer “is culpable pursuant to the common law rule that a person is presumed to intend the substantially certain results of his acts.” *Ibid.* (emphasis omitted).

On appeal, Cox had preserved its objection to the district court’s willfulness instruction, while acknowledging that circuit precedent foreclosed the argument. Pet. C.A. Br. 55 n.3. The court of appeals affirmed the jury’s contributory-infringement finding without addressing willfulness. Pet. App. 10a, 28a.

SUMMARY OF ARGUMENT

I. An ISP does not commit contributory copyright infringement simply by failing to terminate subscriber accounts that it is substantially certain will be used to commit direct infringement.

A. Contributory copyright infringement requires culpable intent to facilitate direct infringement. This Court has identified two ways in which a seller of goods or services may be shown to have culpably intended that those goods or services be used to commit infringement. The seller may evince such intent directly by urging or encouraging another to infringe. Or the seller’s intent may be inferred from its sale of goods or services that lack commercially significant non-infringing uses. Neither of those rationales for secondary liability applies here.

B. This Court has repeatedly looked to patent law to define the contours of contributory copyright infringement. In patent law too, a defendant can face secondary liability for actively inducing another’s infringement or for selling a good that lacks a substantial non-infringing use. But mere knowledge that a specific customer plans

to misuse an otherwise lawful good does not support liability. There is no reason to apply a different rule here.

C. This Court's recent decisions elucidating common-law aiding-and-abetting principles confirm that a merchant's knowledge of a customer's planned illegal activity is ordinarily an insufficient basis for imposing secondary liability. Instead, the defendant must consciously and culpably participate in the wrongful act as something that he wishes to bring about.

D. The court of appeals erred in affirming the imposition of contributory liability here. Cox's internet services have substantial non-infringing uses; Cox sold those services on the same terms to all customers; and Cox did not encourage any customer to use those services to commit infringement.

Cox's knowledge that particular accounts would be used to infringe does not support an inference of culpable intent. At worst, Cox was indifferent to infringement, supplying internet access to all customers on equal terms. Sony and the court of appeals have identified no evidence that Cox intended for infringement to occur or wished to bring it about. And an ordinary merchant's awareness of a customer's unlawful plans, standing alone, does not demonstrate the desire that those plans succeed.

E. Affirmance of the ruling below would create a substantial disincentive to ISPs' provision of universal internet service. Terminations of service would adversely affect not only actual infringers, but also the potentially numerous non-infringing users of terminated accounts. Particularly given the centrality of the internet to modern life, this Court should not expand the scope of common-law contributory liability beyond its established bounds.

II. The district court’s jury instruction on willfulness was also erroneous. In civil cases, willfulness generally requires knowledge or reckless disregard of the fact that one’s *own* conduct is unlawful. By permitting enhanced statutory damages based on Cox’s knowledge that its *customers’* conduct was unlawful, the court of appeals deviated from that background understanding and risked making enhanced damages the norm for contributory copyright infringement.

ARGUMENT

I. AN INTERNET SERVICE PROVIDER IS NOT LIABLE FOR CONTRIBUTORY COPYRIGHT INFRINGEMENT FOR FAILING TO TERMINATE SPECIFIC SUBSCRIBER ACCOUNTS THAT IT IS SUBSTANTIALLY CERTAIN WILL BE USED TO COMMIT DIRECT INFRINGEMENT

The Copyright Act does not explicitly authorize the imposition of secondary infringement liability or define the circumstances in which such liability may be imposed. But this Court has long recognized that such liability may appropriately be premised on “common law principles.” *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 545 U.S. 913, 930 (2005). Contributory copyright infringement requires “culpable intent,” *id.* at 934—*i.e.*, the affirmative desire that direct infringement occur, not mere knowledge that a customer plans to infringe. That requirement aligns copyright law with patent law and with the background principles that govern common-law aiding-and-abetting liability. Cox’s continued provision of internet access to known infringers, on the same terms that Cox provides service to other accounts, does not demonstrate culpable, intentional participation in any resulting direct infringement.

A. Contributory Liability For Copyright Infringement Requires Culpable Intent To Facilitate Infringement

This Court’s two modern decisions addressing contributory copyright infringement, *Grokster* and *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), identify two ways in which a seller of goods or services can be shown to have acted with the requisite culpable intent to infringe. First, a plaintiff can offer “direct evidence of unlawful purpose,” such as by showing that the defendant urged or encouraged another to use the defendant’s goods or services to commit copyright infringement. *Grokster*, 545 U.S. at 935. Second, a plaintiff can establish an inference of culpable intent by showing that the defendant sold a product that is not “capable of commercially significant noninfringing uses.” *Sony*, 464 U.S. at 442. Neither rationale treats the vendor’s knowledge that particular customers will commit direct infringement as a sufficient basis for imposing secondary liability.

1. The *Grokster* Court held that contributory-copyright-infringement liability could properly be imposed on two companies that had distributed peer-to-peer file-sharing software. 545 U.S. at 919-920, 923-924. That software had enabled a “staggering” amount of infringement, with one defendant’s network apparently containing 90% copyrighted works. *Id.* at 923; see *id.* at 922-924. The defendants knew that millions of specific copyrighted works were available on their networks and that specific users—who had emailed questions about their illegal downloads—were engaged in direct infringement. *Id.* at 923.

In *Grokster*, this Court did not treat that “mere knowledge * * * of actual infringing uses” as sufficient for liability. 545 U.S. at 937. Instead, the Court distin-

guished such “passive” *awareness* of infringement from the *Grokster* defendants’ “active steps to encourage infringement” with “the objective that” users infringe. *Id.* at 923-924. For example, one defendant had advertised its ability to provide popular copyrighted music. *Id.* at 938. And both defendants had advertised themselves as replacements for Napster—a file-sharing service that was “notorious” for facilitating copyright infringement. *Id.* at 924; see *id.* at 924-926, 937-939. Those “active steps,” rather than the defendants’ mere awareness of specific users’ infringement, demonstrated the required “purpose of bringing about infringing acts.” *Id.* at 938.

Grokster makes clear that the touchstone of contributory copyright infringement is the “intentional facilitation of * * * infringement.” 545 U.S. at 939; accord *id.* at 931 (“intent to promote infringing uses”); *id.* at 932 (“an intent to infringe”); *id.* at 933 (“intent to cause infringement”); *id.* at 934 (“culpable intent”); *id.* at 935, 938 (“unlawful purpose”); *id.* at 938 (“the purpose of bringing about infringing acts”); *ibid.* (“a purpose to cause copyright violations”); *id.* at 939 (“evidence of intent”); *ibid.* (“intent * * * to bring about infringement”); *id.* at 939-940 (“unlawful objective”); *id.* at 940 (“unlawful intent”); *ibid.* (“intent to bring about infringement”); *id.* at 940 n.13 (the defendant “intended and encouraged the product to be used to infringe”); *id.* at 941 (“a purpose to cause and profit from third-party acts of copyright infringement”); *ibid.* (“a patently illegal objective”). Where a defendant “distributes 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,” the defendant “is liable for the resulting acts of infringement by third

parties.” *Id.* at 936-937. But the “mere knowledge of infringing potential or of actual infringing uses” is not enough. *Id.* at 937.

2. A plaintiff can also demonstrate the requisite culpable intent indirectly, by showing that the defendant sold a product that was not “capable of commercially significant noninfringing uses.” *Sony*, 464 U.S. at 442. In such cases, courts may “presum[e] or input[e] intent to cause infringement,” even without evidence that the defendant specifically urged its customers to infringe. *Grokster*, 545 U.S. at 933.

The Court in *Sony* discussed that principle. The defendant there sold a product—home videotape recorders—that could be used to infringe but that was also “capable of substantial noninfringing uses,” such as recording programs for later viewing. 464 U.S. at 442. The Court concluded that the “sale of such equipment to the general public does not constitute contributory infringement of [the plaintiffs’] copyrights.” *Id.* at 456; see *id.* at 442-456. Even when the defendant “knows [its product] is in fact used for infringement,” liability does not apply to the mere sale of “a product capable of substantial lawful use.” *Grokster*, 545 U.S. at 933. By contrast, the Court later explained, selling a product that *lacks* substantial non-infringing uses *does* justify liability. See *id.* at 932 (“[W]here an article is ‘good for nothing else’ but infringement, * * * there is no injustice in presuming or imputing an intent to infringe.”) (citation omitted).

3. *Grokster* and *Sony* echo this Court’s first contributory-copyright-infringement decision, *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911). There, the producer of an unauthorized film dramatization of the novel *Ben Hur* had sold the film to distributors, who had pub-

licly exhibited the work. *Id.* at 62-63. Although the producer itself did not exhibit the film, the Court held that it was subject to secondary liability for the distributors' infringement. *Ibid.*

The *Kalem* Court acknowledged a prior state-court decision holding that "mere indifferent supposition or knowledge" of a customer's unlawful plans is not enough to make the seller "an accomplice in a subsequent illegal use." 222 U.S. at 62 (discussing *Graves v. Johnson*, 60 N.E. 383 (Mass. 1901) (Holmes, C.J.)). The Court explained, however, that the *Kalem* defendant had "not only expected but invoked by advertisement the use of its films for dramatic reproduction of the story," *id.* at 62-63, *i.e.*, that the defendant had induced the direct infringement. The Court further explained that the infringing exhibition was "the most conspicuous purpose for which [the films] could be used, and the one for which especially they were made," *id.* at 63, *i.e.*, that the films lacked commercially significant non-infringing uses. The *Kalem* Court's reasons for holding the defendant liable thus prefigured *Grokster* and *Sony*.

B. The Culpable-Intent Requirement Aligns Copyright With Patent Law

In articulating the principles that govern contributory liability for copyright infringement, this Court has looked to patent law, which shares a "historic kinship" with copyright. *Sony*, 464 U.S. at 439; see *Grokster*, 545 U.S. at 935-936; *Kalem*, 222 U.S. at 63 (citing patent cases). Contributory liability for patent infringement requires culpable intent, not mere knowledge of a customer's planned infringement.

As relevant here, the Patent Act of 1952, 35 U.S.C. 1 *et seq.*, imposes secondary liability in two scenarios. First, a person who "actively induces infringement of a

patent shall be liable as an infringer.” 35 U.S.C. 271(b). Second, liability attaches for selling a component of a patented article, “knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use.” 35 U.S.C. 271(c); see *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 761 (2011).

Those Patent Act provisions correspond to the rationales for secondary liability that the Court identified in *Grokster* and *Sony*. Active inducement under Section 271(b) requires “an affirmative intent that the product be used to infringe,” which can be shown through direct evidence “such as advertising an infringing use or instructing how to engage in an infringing use.” *Grokster*, 545 U.S. at 936 (citing, *inter alia*, *Water Techs. Corp. v. Calco, Ltd.*, 850 F.2d 660, 668 (Fed. Cir.), cert. denied, 488 U.S. 968 (1988)). And when a defendant sells a good especially adapted for patent infringement, in violation of Section 271(c), “it may be presumed from distribution of an article in commerce that the distributor intended the article to be used to infringe.” *Id.* at 932; accord *Ricoh Co. v. Quanta Computer Inc.*, 550 F.3d 1325, 1338 (Fed. Cir. 2008) (per curiam), cert. denied, 557 U.S. 936 (2009). The Court in *Grokster* and *Sony* “adopt[ed]” those rules as principles of copyright law. *Grokster*, 545 U.S. at 936; see *Sony*, 464 U.S. at 442.

Those rules predate the modern Patent Act, which “codif[ied] certain aspects of the doctrine[] of contributory infringement * * * that previously had been developed by the judiciary.” *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 179 (1980). That pre-Act doctrine required the “intent and purpose” to infringe. *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912), overruled

on other grounds by *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917). A “presumption” of intent arose “when the article so sold [was] only adapted to an infringing use,” or when that use was the “most conspicuous” one and was “invoked by advertisement.” *Id.* at 48-49. But selling goods that were suitable for both infringing and non-infringing uses did not suffice. *Id.* at 48.

Early lower-court decisions embraced the same rule. As then-Judge Taft explained: “It is well settled that where one makes and sells one element of a combination covered by a patent with the intention and for the purpose of bringing about its use in such a combination he is guilty of contributory infringement.” *Thomson-Houston Elec. Co. v. Ohio Brass Co.*, 80 F. 712, 721 (6th Cir. 1897). Where “the parts sold can only be used in the combinations patented,” courts drew the “certain inference” that the defendant intended the infringing use. *Id.* at 723. But where the product had other, non-infringing uses, “such an inference could not be drawn.” *Ibid.*

A court thus imposed contributory liability on defendants who sold a burner that was “utterly useless” without a glass chimney that would, in combination with the burner, infringe the plaintiffs’ patent. *Wallace v. Holmes*, 29 F. Cas. 74, 79-80 (C.C.D. Conn. 1871) (No. 17,100); see *Dawson*, 448 U.S. at 188 (calling *Wallace* a “classic example” of contributory patent infringement and explaining that “the contributory infringement doctrine * * * exists to protect patent rights from subversion by those who, without directly infringing the patent themselves, engage in acts designed to facilitate infringement by others”). By selling a good that could only be used to infringe, the defendants became “active parties to the whole infringement, consenting and act-

ing to that end, manufacturing and selling for that purpose.” *Wallace*, 29 F. Cas. at 80. Likewise, liability attached when a defendant sold “wire adapted to the infringing use, with the intent and purpose that it shall be so used.” *Rupp & Wittgenfeld Co. v. Elliott*, 131 F. 730, 732 (6th Cir. 1904). But the sale of wire that is capable of both infringing and non-infringing uses “would by no means constitute” infringement, since it is “the intent and purpose to aid and assist in bringing about an infringement which is the essence of the tort.” *Ibid.*

Unless a vendor affirmatively encourages infringing uses of its products, the foregoing principles do not permit the vendor to be held secondarily liable for patent infringement based on its sale of a good with substantial non-infringing uses—in patent parlance, a “staple article” of commerce. 35 U.S.C. 271(c). That is true “even where the seller knew of the buyer’s infringing use.” 5 Donald S. Chisum, *Chisum on Patents* § 17.03[3] (LexisNexis 2025).

C. The General Common-Law Principles That Govern Liability For Aiding And Abetting Confirm The Need For Culpable Intent Here

Contributory copyright infringement is “a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.” *Sony*, 464 U.S. at 435. The “rules of fault-based liability derived from the common law” accordingly help to clarify the contours of contributory copyright infringement. *Grokster*, 545 U.S. at 934-935. This Court recently elucidated those common-law principles in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), and *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025). Those decisions confirm that ordinary merchants who provide goods or services

on standard terms are not secondarily liable for their customers’ misuse of those goods or services, absent evidence that the merchant consciously and culpably participated in the misuse.

1. The Court in *Taamneh* held that victims of an ISIS terrorist attack failed to state a claim against social-media platforms under the Antiterrorism Act of 1990, Pub. L. No. 101-519, § 132, 104 Stat. 2250. 598 U.S. at 484-485, 488. The *Taamneh* plaintiffs alleged that the defendants “kn[ew] [ISIS] was using those platforms” to recruit new adherents and to raise funds, *id.* at 505, and that the defendants had knowingly allowed ISIS-affiliated users to post content and had provided algorithms that “matched ISIS-related content to users most likely to be interested in that content,” *id.* at 498; see *id.* at 478-482. The plaintiffs further alleged that the platforms had “permitted ISIS-affiliated accounts to remain active” even after receiving complaints about specific accounts. *Gonzalez v. Google LLC*, 2 F.4th 871, 883 (9th Cir. 2021) (quoting *Taamneh* complaint), rev’d *sub nom. Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023).

This Court held that the plaintiffs’ allegations did not state a claim for aiding-and-abetting liability. *Taamneh*, 598 U.S. at 505-506. The Court explained that, at common law, the “conceptual core” of aiding-and-abetting liability was that “the defendant consciously and culpably ‘participate[d]’ in a wrongful act so as to help ‘make it succeed.’” *Id.* at 493 (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)) (brackets in original). The Court observed that such liability “normally” requires some form of active participation like “encouraging, soliciting, or advising the” tortious conduct. *Id.* at 500. Were it otherwise, “mostly passive

actors like banks [would] become liable for all of their customers' [wrongdoing] by virtue of carrying out routine transactions," and "those who merely deliver mail or transmit emails could be liable for the tortious messages contained therein." *Id.* at 489, 491.

The Court further held that the defendants' "alleged failure to stop ISIS from using these platforms" did not demonstrate the required conscious and culpable participation. *Taamneh*, 598 U.S. at 500. The platforms' relationship with ISIS was "the same as their relationship with their billion-plus other users: arm's length, passive, and largely indifferent." *Ibid.*; see *ibid.* (noting that the plaintiffs had made "no allegations that defendants treated ISIS any differently from anyone else"). That "passive" supply of social-media "infrastructure" on generally applicable terms did not demonstrate "active abetting." *Id.* at 499. *Taamneh* reflects this Court's understanding that, where a company provides a lawful service on standard terms to all customers, the common law generally does not impose aiding-and-abetting liability merely for failing to terminate particular customers that the company knows are misusing its service.

2. This Court reaffirmed those common-law principles last Term in *Smith & Wesson*, *supra*. Mexico sought to hold American gun manufacturers liable for gun violence in Mexico, alleging that the manufacturers had negligently allowed their firearms to be trafficked to Mexican cartels. *Smith & Wesson*, 605 U.S. at 287-288. The Protection of Lawful Commerce in Arms Act, 15 U.S.C. 7901 *et seq.*, generally bars such suits, but Mexico sought to overcome that bar by alleging that the manufacturers had aided and abetted retailers' unlawful sales to gun traffickers, who in turn had supplied the cartels. *Smith & Wesson*, 605 U.S. at 285-289.

The Court found those allegations insufficient because they failed to show the manufacturers’ “conscious . . . and culpable participation in another’s wrongdoing.” *Smith & Wesson*, 605 U.S. at 291 (quoting *Taamneh*, 598 U.S. at 493). The Court explained that an “‘ordinary merchant’” can be held secondarily liable for the misuse of its goods “only if, beyond providing the good on the open market, he takes steps to ‘promote’ the resulting crime and ‘make it his own.’” *Id.* at 292 (first quoting *Taamneh*, 598 U.S. at 489; then quoting *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.) (L. Hand, J.), *aff’d*, 311 U.S. 205 (1940)) (brackets omitted). “Mexico’s lead claim” was “that the manufacturers elect to sell guns to, among others, known rogue dealers” who made subsequent illegal sales to traffickers. *Id.* at 294. This Court found it “far from clear that such behavior, without more, could ever count as aiding and abetting under [the Court’s] precedents.” *Ibid.*

In explaining that skepticism, the *Smith & Wesson* Court discussed *Direct Sales Co. v. United States*, 319 U.S. 703 (1943), as a quintessential example of aiding-and-abetting liability imposed on the seller of a legal good, and the Court contrasted the facts of *Direct Sales* with the allegations in *Smith & Wesson* itself. See 605 U.S. at 292-295. The defendant morphine distributor in *Direct Sales* had “‘actively stimulated’” a small-town doctor’s industrial-scale morphine purchases “by giving him special discounts for his most massive orders and using ‘high-pressure sales methods.’” *Id.* at 292 (quoting *Direct Sales*, 319 U.S. at 705, 711). The distributor “‘not only knew of and acquiesced’ in” the doctor’s illegal morphine distribution “but ‘joined both mind and hand with him to make its accomplishment possible.’” *Id.* at 293 (quoting *Direct Sales*, 319 U.S. at 713) (brack-

ets omitted). The complaint in *Smith & Wesson*, by contrast, “repeatedly state[d] that the manufacturers treat rogue dealers just the same as they do law-abiding ones—selling to everyone, and on equivalent terms.” *Id.* at 295. The Court observed that, even if Mexico had adequately alleged that the defendant manufacturers had sold to *identified* rogue dealers, treating such sales as sufficient for aiding-and-abetting liability “would stretch the bounds of [the Court’s] caselaw.” *Ibid.*

The Court in *Smith & Wesson* found it unnecessary to resolve that question definitively because Mexico’s failure to link the manufacturers to specific rogue dealers independently doomed its claim. 605 U.S. at 295-296. The Court held that, although Mexico’s complaint plausibly alleged that (a) the defendant manufacturers knew that *some* of their dealers had “routinely violate[d] the law,” and (b) the manufacturers could have done more to identify those “rogue dealers” and terminate sales to them, the complaint did not plausibly allege that (c) the manufacturers actually knew who the “bad-apple dealers” were. *Ibid.* But the Court’s discussion of *Direct Sales* supports the understanding that, even when a seller of lawful goods knows that particular identified customers will use the goods illegally, the seller’s continued sales to those customers on the same terms that it sells to others does not give rise to secondary liability for the customers’ misconduct.

D. The Court Of Appeals Erred In Holding Cox Contributorily Liable For Its Subscribers’ Infringement

1. Under the foregoing principles, the court of appeals erred in upholding the jury’s verdict against Cox. Cox did not “encourag[e], solicit[], or advis[e] the commission of” any user’s direct infringement as “would normally support an aiding-and-abetting claim.” *Taam-*

neh, 598 U.S. at 500. Cox did not, for example, explicitly or implicitly market its services as particularly well suited for infringement. Cf. *Grokster*, 545 U.S. at 937-938; see Br. in Opp. 9 (acknowledging that inducement is not at issue). Nor can culpable intent be inferred from the nature of the services that Cox provides, since internet access has myriad non-infringing uses. Cf. *Sony*, 464 U.S. at 442.

To be sure, the ways of demonstrating culpable intent that the Court identified in *Grokster* and *Sony* are not necessarily exclusive. But while this Court has left open the possibility that particular plaintiffs might find alternative ways of proving a defendant's intent to bring about violations of law, the Court has made clear that such intent is required for common-law contributory liability. Here, neither Sony nor the court of appeals has identified any *other* sound basis for inferring that Cox "participate[d] in" infringing conduct "so as to help make it succeed." *Taamneh*, 598 U.S. at 493 (citation and internal quotation marks omitted). The court of appeals thought that Cox's intent to promote infringement could be inferred from Cox's continued provision of services with "knowledge that the recipient," *i.e.*, a "specific user[]," would "use [the service] to infringe copyrights." Pet. App. 27a-28a; accord Br. in Opp. 19; Sony Supp. Br. 4. That analysis is misconceived.

As an initial matter, the court of appeals overstated the specificity of Cox's knowledge. The "notices of past infringement" (Pet. App. 23a) that Cox received made Cox aware of infringement on particular *accounts*; they did not identify the specific infringing *users* of Cox's services. See C.A. App. 509-510. The accounts that triggered the most infringement notices generally belonged to hotels, hospitals, apartment buildings, universities, and regional ISPs serving hundreds, thousands,

or even tens of thousands of individual users. *Id.* at 663-664.

Even if Cox had known about specific users' plans, a seller's knowledge that a particular buyer plans to misuse a product with substantial legitimate uses, without more, does not support an inference of the seller's culpable intent. As Sony emphasizes (Supp. Br. 4), Cox may have retained those users despite their infringing activity because Cox derived income from those users on the same terms that it derives income from non-infringing accounts. Pet. App. 20a. In those circumstances, the continued provision of services at most shows Cox's "indifferen[ce]" to infringement, *Smith & Wesson*, 605 U.S. at 297 (citation omitted; brackets in original); it does not show that Cox culpably intended to participate in infringement or wished to bring it about.

The Court in *Grokster* did not treat the defendants' "mere knowledge * * * of actual infringing uses" as sufficient for liability, but instead emphasized the defendants' demonstrated "intent to promote infringing uses." 545 U.S. at 931, 937. And the court of appeals' theory mirrors the one this Court rejected in *Taamneh*. There too, the defendants continued to provide communications services to specific users who were allegedly known to misuse the services. Yet the defendants' "alleged failure to stop ISIS from using the[ir] platforms" fell "far short of plausibly alleging" aiding and abetting. *Taamneh*, 598 U.S. at 500, 505. Cox's continued provision of internet access while failing to terminate identified infringing accounts likewise does not demonstrate the culpable intent that is required for contributory liability.

The *Taamneh* plaintiffs identified no common-law authority for imposing liability on a company "for

merely failing to block * * * criminals despite knowing that they used the company's services." 598 U.S. at 501 n.14. Sony identifies no such authority either. If Cox's indifference to infringement were sufficient to trigger contributory liability, all service providers—from electric utilities to phone companies—might face liability for declining to terminate service after receiving notice that a specific customer was engaged in illegal activity.

Sony dismisses (Supp. Br. 6; see Br. in Opp. 21-22) *Taamneh* as "a non-copyright case." But contributory copyright infringement is "a species of the broader problem" of secondary liability, *Sony*, 464 U.S. at 435, and this Court has long looked to "common law principles" in similar cases, *Grokster*, 545 U.S. at 930; see *Kalem*, 222 U.S. at 62-63. Indeed, because the Copyright Act does not explicitly address contributory liability, the rules that govern such liability in copyright cases can *only* be drawn from common-law principles. It would be anomalous to hold that communications-service providers have a *greater* duty to prevent use of their services to commit copyright infringement than to prevent use of their services to facilitate terrorist acts, at least absent legislative direction to that effect.

Sony also asserts (Supp. Br. 6) that *Taamneh* did not involve allegations that the social-media platforms "continu[ed] to serve specific users that they *knew* were using their services to facilitate terrorism." On the contrary, *Taamneh* involved precisely such allegations, *Gonzalez*, 2 F.4th at 883; p. 18, *supra*, which the plaintiffs highlighted before this Court, *Taamneh* Br. at 5-6, *Taamneh*, *supra* (No. 21-1496). And the *Taamneh* Court emphasized the plaintiffs' failure to identify any common-law principle "that would require * * * communication-providing services to terminate custom-

ers after discovering that the customers were using the service for illicit ends.” 598 U.S. at 501.

Nothing in *Taamneh* supports Sony’s assertion (Supp. Br. 6) that knowledge of *which* users had promoted ISIS, coupled with an internal email criticizing the Antiterrorism Act, would have “almost certainly” changed the outcome. The *Taamneh* Court rejected secondary liability because providing social-media “infrastructure” to known bad actors on generally applicable, content-“agnostic” terms did not constitute culpable participation in a terrorist attack as something that the platforms “‘wishe[d] to bring about.” 598 U.S. at 498-499 (citation omitted; brackets in original). Cox’s provision of internet services on equal terms to all subscribers, including those whose accounts were linked to known infringement, likewise does not demonstrate culpable intent to participate in users’ wrongdoing.

2. Citing *United States v. Thompson*, 539 Fed. Appx. 778 (9th Cir. 2013), the court of appeals stated that “[l]ending a friend a hammer * * * with knowledge that the friend will use it to break into a credit union ATM” is criminal aiding and abetting. Pet. App. 27a. But the defendant in *Thompson* did not merely lend a friend a hammer. Rather, he joined a criminal conspiracy to commit bank larceny and delivered the hammer to a Denny’s parking lot at 1 a.m. while the offense was in progress. U.S. Br. at 59, *Thompson, supra* (No. 10-5381). In any event, an individual who loans a hammer for a friend’s known criminal activity evinces significantly greater culpability than a store that sells hammers to all comers without excluding known thieves—the more apt analogy here.

Sony cites (Br. in Opp. 17; Supp. Br. 3) this Court’s contributory-patent-infringement decision in *Henry*,

supra. There, the Court permitted the plaintiff to maintain a suit against defendants who had sold “ink suitable for use upon [a patented] mimeograph with knowledge” that the buyer (Skou) planned to use the ink in derogation of a patent-license condition requiring that Skou operate the mimeograph with ink made by the patentee. 224 U.S. at 11. The Court held that the license condition was valid and that Skou’s use of the defendants’ ink to operate the mimeograph would infringe the plaintiff’s patent. *Id.* at 31-32, 49. It further held that, assuming the facts certified by the lower court, the defendants could be held contributorily liable for that infringement. *Id.* at 48-49. Sony reads *Henry* to support liability whenever a defendant seller knows that a particular buyer will use a product to infringe because the product there—“ink—also had noninfringing uses.” Br. in Opp. 17 (citation omitted).

By its terms, however, *Henry* requires proof of “intent and purpose” to infringe as a prerequisite to secondary liability. 224 U.S. at 48. The Court reserved a “presumption” of intent for circumstances where goods were “only adapted to an infringing use,” or where that use was the “most conspicuous” one and the defendant had advertised it. *Ibid.* The Court found that the requisite “purpose and intent” existed in *Henry* because the defendant knew that the buyer would *only* use the ink in an infringing way. *Id.* at 49. Here, by contrast, even the known infringers among Cox’s subscribers presumably use Cox’s internet service for lawful purposes as well.

In any event, *Henry* represents a “high-water mark” in this Court’s development of contributory-patent-infringement doctrine. *Dawson*, 448 U.S. at 190. Current patent law makes clear that knowledge of a buyer’s

plans standing alone does not support liability. See pp. 14-17, *supra*. And the rationale on which the *Henry* Court found potential *direct* infringement—*i.e.*, that the manufacturer of the patented mimeograph could require its licensees to use ink purchased from the patentee, see 224 U.S. at 31-32—was later “overruled” by *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 518 (1917); see *Dawson*, 448 U.S. at 190-192; *Carbice Corp. of Am. v. American Patents Dev. Corp.*, 283 U.S. 27, 30-33 (1931).

The court of appeals also invoked the tort-law principle that one “is presumed to intend the substantially certain results of his acts.” Pet. App. 27a; accord Br. in Opp. 16 & n.3, 19. That approach, however, has logical implications that extend well beyond the legal rule that Sony advocates. When particular goods or services can be used in both lawful and unlawful ways, a high-volume seller may often be “substantially certain” that *some* of its customers will use the goods or services to commit illegal acts. *E.g.*, *Sony*, 464 U.S. at 439. But the Court has made clear that this sort of knowledge is an insufficient basis for holding the seller contributorily liable for its customers’ unlawful conduct. See *Taamneh*, 598 U.S. at 506; *Smith & Wesson*, 605 U.S. at 296-297.

Sony argues (Supp. Br. 4) that this case is different because Cox had knowledge not simply that some unspecified subscribers would infringe, but that infringement would occur on *particular* identified accounts. But that line cannot reasonably be derived from the principle that a person “is presumed to intend the substantially certain results of his acts,” Pet. App. 27a, and it is not the line this Court has drawn. Instead, the Court has held that, when a business sells goods or services that can be used in both lawful and unlawful ways, the

business can be held secondarily liable for its customers' misconduct only if it has "take[n] steps to 'promote' the resulting [violation] and 'make it [its] own.'" *Smith & Wesson*, 605 U.S. at 292 (citation omitted).

Sony's only proffered direct evidence of intent consists of internal Cox documents that could be read "as displaying contempt for laws intended to curb online infringement." Pet. App. 28a; see Sony Supp. Br. 4. In appropriate circumstances, "internal communications" may demonstrate an "unlawful purpose" to infringe. *Grokster*, 545 U.S. at 938. But Sony cannot make that showing here. In context, the central email—which references the DMCA in crude terms—reflects an employee's frustration with receiving a deluge of automated copyright infringement notices. C.A. App. 1495. And even if a subordinate Cox employee mistakenly believed that the relevant DMCA provision establishes legal requirements rather than simply providing a safe harbor (see pp. 28-29, *infra*), that belief would not establish the culpable intent required for contributory liability. Sony cites no evidence that Cox employees preferred that customers infringe, let alone that they encouraged customers to do so.

Sony alludes (Supp. Br. 7-8) to the DMCA's safe harbor for "service provider[s]" that, *inter alia*, "adopt[] and reasonably implement[] * * * a policy that provides for the termination in appropriate circumstances of subscribers * * * who are repeat infringers." 17 U.S.C. 512(a) and (i)(1)(A). That provision does not support liability here. Congress made clear that the failure to satisfy the safe harbor "shall not bear adversely" on "any other defense," including "that the service provider's conduct is not infringing." 17 U.S.C. 512(l); see H.R. Rep. No. 796, 105th Cong., 2d Sess. 73 (1998)

(“Section 512 is not intended to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify.”).

Sony asserts (Supp. Br. 8) that rejecting liability here would “render the safe-harbor a nullity.” But Congress enacted Section 512 to ensure that conduct falling within the safe harbor would not give rise to damages liability for contributory copyright infringement, regardless of how common-law liability principles might develop in the future. The safe harbor continues to serve that purpose. To the extent Sony would treat Section 512 as evidence of what those common-law rules are or should be, it asks the Court to draw the very inference that Section 512(*l*) disapproves.

The DMCA was enacted in 1998, when the internet was in its infancy. Congress accordingly proceeded cautiously, including by expressly disavowing any implication that conduct falling outside the safe harbor is infringing. Where (as here) a service provider declines to invoke the safe harbor, Section 512 is simply irrelevant to a court’s determination about contributory liability under common-law principles.

E. The Court Of Appeals’ Decision Threatens Universal Internet Access

The court of appeals’ sweeping view of contributory copyright infringement could carry serious adverse consequences. Under the decision below, so long as an ISP knows that a specific account is “substantially certain to infringe,” the ISP is liable for all direct infringement committed on that account. Pet. App. 22a; see *id.* at 27a. That approach would give ISPs a powerful incentive to err on the side of termination after receiving a notice of infringement for a particular account. While

Sony suggests (Supp. Br. 7) that the DMCA’s safe harbor mitigates those risks, the scope of that provision is unsettled. 4 Nimmer § 12B.10. Given the size of the potential damages, the safe harbor does not fully ameliorate concerns over universal internet access.

Terminations of internet service do not only affect infringers. The decision below does not distinguish between a single user’s account, a family account with multiple members, a university account shared by thousands of students, or a regional ISP that uses Cox’s services to provide internet access to tens of thousands on a single account. See C.A. App. 664. The decision below creates a particular disincentive to ISPs’ continued provision of internet service to large customers, given the near inevitability that at least one user will infringe.

Losing internet access is a serious consequence. The internet is “the modern public square,” *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017), and has become “inescapable” in today’s society, *Moody v. NetChoice, LLC*, 603 U.S. 707, 716 (2024). This Court has cautioned against unduly “expand[ing] the protections afforded by the copyright” when faced with “major technological innovations.” *Sony*, 464 U.S. at 431. That concern reinforces the conclusion that, in defining the scope of ISPs’ obligations to police their customers, the Court should not expand common-law contributory copyright liability in a way that would “stretch the bounds of [the Court’s] caselaw.” *Smith & Wesson*, 605 U.S. at 295.

**II. PROOF THAT AN INTERNET SERVICE PROVIDER
KNEW OF ITS CUSTOMERS' COPYRIGHT INFRINGE-
MENT DOES NOT ESTABLISH THAT THE PROVIDER
ACTED WILLFULLY IN CONTINUING TO PROVIDE
SERVICE**

The court of appeals also erred in upholding an instruction that permitted the jury to award enhanced damages for willful infringement based on Cox's knowledge of its subscribers' infringement.

A. The Copyright Act authorizes enhanced statutory damages of up to \$150,000 (rather than \$30,000) per infringed work where a violation was committed "willfully." 17 U.S.C. 504(c)(2); see 17 U.S.C. 504(c)(1). Here, the jury was instructed that Cox's conduct was willful if "Cox had knowledge that its subscribers' actions constituted infringement of plaintiffs' copyrights, acted with reckless disregard for the infringement of plaintiffs' copyrights, or was willfully blind to the infringement of plaintiffs' copyrights." C.A. App. 804.

That instruction was erroneous. In civil cases, willfulness generally requires either knowledge or reckless disregard of the fact that one's conduct is unlawful. *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 57 (2007); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-126 (1985). Where the defendant's "reading of the statute, albeit erroneous, was not objectively unreasonable," the violation is not willful. *Safeco*, 551 U.S. at 69.

That inquiry focuses on the defendant's awareness of its *own* legal violation. Willfulness requires that the defendant "knew or showed reckless disregard for the matter of whether *its* conduct was prohibited" by law. *Trans World Airlines*, 469 U.S. at 126 (emphasis added; citation omitted). "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); accord 5 Nimmer § 14.04[B][3][a] (“[O]ne who has been notified that his conduct constitutes copyright infringement, but who reasonably and in good faith believes the contrary, is not ‘willful’ for these purposes.”) (citation and footnote omitted).

That distinction is especially salient where, as here, a defendant is held secondarily liable for violations committed by another. Sony did not allege or prove that Cox had directly infringed Sony’s copyrights. The challenged instruction nevertheless allowed the jury to find that Cox had committed willful violations, based on Cox’s knowledge that its *subscribers’* actions were unlawful, even if Cox reasonably and in good faith believed that it could lawfully continue to serve those subscribers. That result is incompatible with the willfulness inquiry’s ordinary focus on the defendant’s understanding of its own conduct.

Sony argues (Br. in Opp. 29) that recklessness is a form of willfulness, and that “materially contribut[ing] to conduct that the defendant *knew* was against the law * * * is the definition of recklessness.” Accord *BMG Rights Mgmt. (US) LLC v. Cox Comme’ns, Inc.*, 881 F.3d 293, 313 (4th Cir. 2018). That contention is mistaken. An alleged contributory infringer could hold a reasonable, good-faith belief that *its own* conduct is lawful, even if it knows that the direct infringer’s conduct is not. Here, for example, Cox could have reasonably (and, in the United States’ view, correctly) believed that failing to terminate known copyright infringers does not constitute contributory copyright infringement, so long as Cox’s services had substantial lawful uses and Cox did not encourage infringing conduct. If Cox held that belief in good faith, its continued provision of ser-

vice to identified infringing accounts would not reflect recklessness as to the legality of Cox’s own conduct. The jury instruction elides that distinction.

B. The jury instruction also “virtually obliterates any distinction between willful and nonwillful violations” in contributory-infringement cases. *McLaughlin*, 486 U.S. at 132-133. A willfulness finding quintuples the statutory-damages cap from \$30,000 to \$150,000 per infringed work. 17 U.S.C. 504(c)(1) and (2). As this Court has observed in the patent context, a willfulness standard reserves enhanced damages for “egregious cases.” *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 106 (2016). Willfulness is also the standard for criminal copyright infringement, 17 U.S.C. 506(a)(1), with the civil and criminal standards sometimes said “to approximate” one another. Paul Goldstein, *Goldstein on Copyright* § 14.2.1.2.a (Westlaw 2025). Congress reserved enhanced damages for the most culpable infringers.

The jury instruction here would make willfulness the rule, not the exception, in contributory-infringement cases. In the patent context, liability for contributory infringement requires knowledge that the primary conduct “constitute[s] patent infringement.” *Global-Tech*, 563 U.S. at 766. In that context, the instruction that was given here would allow a jury to find willfulness in *every* case of contributory liability.

Sony contends that contributory *copyright* infringement requires only “knowledge of the infringing *activity*,” while willfulness requires knowledge that those “actions *constituted infringement*,” so the instruction here would not cause the two standards to collapse. Br. in Opp. 30 (citations omitted); accord Sony Supp. Br. 8. But service providers who are aware of infringing activ-

ity using their services (*e.g.*, subscribers sharing the latest hit music online) will typically know that the activity is infringing.

Elsewhere, moreover, Sony appears to recognize that contributory copyright infringement requires not just knowledge of infringing activity, but “an intent to infringe.” Br. in Opp. 17 (quoting *Grokster*, 545 U.S. at 932). Here, in upholding the jury verdict on contributory liability, the court of appeals imputed culpable intent to Cox based on Cox’s “knowledge” that particular subscribers would use its service “to infringe copyrights.” Pet. App. 27a. On that understanding, contributory liability *does* require knowledge that the primary conduct constitutes infringement, so that every instance of contributory infringement would be willful under the jury instruction here. That result is incompatible with Congress’s two-tiered statutory-damages scheme.

CONCLUSION

The court of appeals’ judgment should be reversed.

Respectfully submitted.

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