

No. 24-171

In the Supreme Court of the United States

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

v.

SONY MUSIC ENTERTAINMENT, ET AL.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

**BRIEF OF GOOGLE LLC, AMAZON.COM, INC.,
MICROSOFT CORPORATION, MOZILLA
CORPORATION, AND PINTEREST, INC., AS
AMICI CURIAE IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICI CURIAE*¹

The contributory infringement claim before the Court involves a cable company that provides internet service to subscribers who are alleged to have directly infringed respondents' copyrights.

But similar claims have been, and are being, asserted against companies that provide a wide variety of online services to internet users. *Amici curiae* are among the nation's leading online service providers, serving hundreds of millions of individuals and businesses across the country:

Google LLC is a diversified technology company whose mission is to organize the world's information and make it universally accessible and useful. Google offers a variety of web-based products and services, including Search, Gmail, Maps, and YouTube, that are used by people throughout the United States and around the world. Google also offers enterprise cloud services like Google Cloud Platform and Workspace. Google's services enable customers—from individuals to large enterprises—to communicate and collaborate in real-time; to work seamlessly from multiple devices; and to store and share emails, photographs, documents, and other data.

Amazon.com, Inc. seeks to be Earth's most customer-centric company. It serves customers through its online stores, where Amazon and more than 1.7 million small and medium businesses sell

¹ Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

millions of unique products. Amazon also provides industry-leading cloud-computing and artificial-intelligence services, and distributes film, television, literary, and audio works through Prime Video, Amazon Music, Kindle Direct Publishing, Audible, and Amazon MGM Studios, among other services. Customers access these offerings online through Amazon's websites, mobile apps, and through Alexa on Echo and other devices.

Microsoft Corporation is a global technology company that builds and operates general-purpose artificial intelligence and computing platforms used by billions. Its offerings include cloud-based Microsoft 365 apps such as OneDrive, Outlook, and Teams for productivity; Bing and Edge web services; Xbox gaming and streaming; and GitHub—the most widely adopted platform for hosting and developing software code, used by over 150 million developers and 90% of Fortune 100 companies. Enhanced by Microsoft's artificial intelligence technologies, including GitHub Copilot, these services help people connect, work, learn, and enable organizations to collaborate, innovate, and serve their communities.

Mozilla Corporation has a long history as a pioneer and advocate for the open web. It offers the world-famous Firefox browser, and operates several mid-size and small internet platforms which allow web developers and Firefox users to share information, software and tooling. Hundreds of millions of people worldwide use Firefox to discover and experience the web.

Pinterest is a visual search and discovery engine positioned at the intersection of search, social and commerce. People around the world go to Pinterest for inspiration to create a life they love. They can browse,

save and shop their visual ideas all on Pinterest's service, allowing them to imagine what their future could look like and go from inspiration to reality.

The expansive standards for contributory infringement liability and enhanced statutory damages for willful infringement adopted by the Fourth Circuit threaten all types of online service providers with potentially massive copyright liability and enhanced statutory damages, based on the alleged misdeeds of a tiny minority of their users.

Amici therefore have a strong interest in urging this Court to reject the Fourth Circuit's sweeping approach and to reverse the judgment below.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case brings before the Court two extremely important questions regarding the standards governing liability for copyright infringement. With respect to contributory infringement, the Court should hold that a plaintiff must prove conscious, culpable conduct by the alleged contributory infringer. With respect to enhanced damages for willful infringement, the Court should hold that the defendant must actually know that its conduct is unlawful.

I. The Court's decision in this case will have a significant impact on a broad range of internet companies that make it possible for Americans to find, create, and share information online.

All types of intermediary service providers are regularly targeted with contributory infringement claims. Instead of suing the individuals and businesses alleged to engage in direct infringement, copyright holders frequently target intermediaries with

pockets deeper than those of direct infringers. Like respondents here, these plaintiffs seek huge damages based on the broad offerings and large customer bases that are essential features of online services.

The Fourth Circuit’s overbroad standard for contributory infringement liability, if permitted to stand, will open the door to illegitimate lawsuits—like the claim here—that are based solely on providers’ failure to act. Such suits will significantly diminish the vitality of the internet economy.

In 1998, when the internet was in its infancy, Congress recognized the risk that copyright liability could strangle the tremendous potential benefits of nascent technology. To mitigate that risk, it included in the Digital Millennium Copyright Act (“DMCA”) additional protections against copyright liability for companies like *amici* that provide a range of online services. But Congress made clear in the statute that the DMCA’s “safe harbors” do not affect copyright liability standards, stating that they “shall not bear adversely upon the consideration of” a defendant’s arguments against infringement liability. 17 U.S.C. § 512(*l*).

The Fourth Circuit’s holding turns Congress’s directive on its head by transforming the safe harbors into a liability-creating mechanism. The lower court determined that the failure to act that made petitioners ineligible for safe harbor—non-termination of service for subscribers alleged in notices from respondents to be repeat infringers—was sufficient to establish contributory infringement.

That was error. This Court held in *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005), that

contributory liability requires proof that the defendant “intentionally induc[ed] or encourag[ed] direct infringement.” A mere failure to act is not sufficient.

Moreover, contributory infringement is a court-created cause of action rooted in common-law aiding and abetting. The Court’s recent explication of the common law aiding-and-abetting standard in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), is therefore directly relevant here. *Twitter* confirms that “conscious[]” and “culpabl[e]” conduct is required to meet that standard, *id.* at 493, and expressly rejects liability based on the failure to act, *id.* at 500.

II. The Copyright Act increases the maximum statutory damages five-fold, to \$150,000 per work, if the infringement “was committed willfully.” 17 U.S.C. § 504(c)(2). That multiplier opens the door to the risk of truly exorbitant damages, as demonstrated by the billion dollar verdict in this case and the gigantic claims that have been asserted against internet companies in many other cases.

The Fourth Circuit committed two errors in adopting an erroneously loose standard for willfulness damages, both of which should be corrected by this Court.

First, the lower court upheld a jury finding that based willfulness on petitioners’ knowledge of its customers’ infringing activity, not on petitioners’ own mental state regarding their own violation of the copyright law. That was plainly wrong: whether an actor’s conduct is “willful” turns on its own mental state, not the mental state of others.

Second, the Fourth Circuit erred by asserting that enhanced damages are available if the contributory infringer acts recklessly. What is required is proof

that the defendant knew that it was committing a copyright violation.

Enhanced damages for “willful[]” violations were added by Congress in the 1976 revision of the Copyright Act. At that time, the Patent Act provided for enhanced damages “up to three times the amount [of actual damages] found or assessed.” 35 U.S.C. § 284.

The Copyright Act’s enhanced damages provision neatly parallels the Patent Act. It provides for enhanced damages as a multiple of ordinarily-available damages. And it employs the term “willfully,” which this Court had held in *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 508 (1964), to be the governing standard under the Patent Act.

The Court should therefore interpret the Copyright Act’s enhanced damages provision to incorporate the same standard as the Patent Act’s, which is the approach the Court has taken in interpreting a variety of provisions common to these two laws.

That requires an “egregious case[] of culpable behavior.” *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 104 (2016).

ARGUMENT

I. Conscious, Culpable Conduct Substantially Assisting The Primary Wrongdoer Is Necessary To Prove Contributory Infringement.

The issue before this Court regarding the proper standard for contributory infringement will broadly affect all companies that provide internet-related products and services; it is not limited to cable providers. Congress’s decision in the DMCA to create safe

harbors for such companies does not affect the proper liability standard, as the DMCA expressly states. The proper standard, rooted in common-law aiding and abetting, was recognized by this Court in *Grokster* and reaffirmed most recently in *Twitter* and *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025): a plaintiff must prove that the alleged contributory infringer engaged in conscious, culpable conduct to help bring about the primary violator’s infringement.

A. The contributory infringement issue presented here arises in a variety of internet-related contexts.

The Copyright Act enables copyright holders to seek compensation—and up to \$150,000 in per-work statutory damages and attorneys’ fees—from parties that infringe their copyrights. See 17 U.S.C. §§ 501, 504.

This case involves a contributory infringement claim against a cable company that provides its customers with internet access. But similar issues regarding the scope of contributory infringement liability arise frequently in litigation involving companies, like *amici*, that provide services that make it possible for users to find, create, and share information. These services, many of them free and open to the public, are the foundation for the global digital economy. Even the digital infrastructure that underpins this global economy—open source software, which powers nearly all modern applications—is itself largely built and maintained by users on platforms like GitHub.²

² Open source software would cost an estimated \$8.8 trillion to replace, and is used in 97% of modern software projects. See

America, and indeed the whole world, has embraced the economic, cultural, and expressive opportunities that these services provide. The vast majority of Americans use YouTube; and tens of millions of Americans use platforms like GitHub and Pinterest, among others.³

The growth of the modern internet has resulted in an outpouring of creative expression in every medium. Platforms hosting original, user-generated content make it easy for creators to find and grow their audiences. The result is that more photographs, music, videos, software, and books are being created by more people than ever before.⁴

This phenomenon ultimately benefits not only consumers and amateur creators and performers, but professional content creators and copyright holders as well. Thanks to the internet, global revenues in the recording industry, movie industry, digital publishing industry, and video game industry have continued to

Frank Nagle, Matthew Hoffmann, & Xia (Eliza) Zhou, *The \$8.8 Trillion Value of Open-Source Software*, Harvard Business School Working Paper 24-053 (2023), <https://www.hbs.edu/faculty/Pages/item.aspx?num=65230>.

³ Pew Research Center, *Social Media Fact Sheet* (Nov. 13, 2024), <https://www.pewresearch.org/internet/fact-sheet/social-media/#who-uses-each-social-media-platform>.

⁴ Michael Masnick & Leigh Beadon, *The Sky is Rising 2024 Edition 4*, Computer & Communications Industry Association (Jan. 2024), <https://ccianet.org/research/reports/sky-is-rising-2024-edition/>.

rise in recent years.⁵ And new media formats like podcasting and e-books, which could not exist without the internet, have emerged and flourished.⁶

Despite these widely shared benefits, online service providers are increasingly being targeted with copyright infringement claims. Instead of suing individual direct infringers, copyright holders routinely assert secondary liability claims against corporate defendants, seeking huge damages based on those companies' broad offerings and large customer bases. For example, such infringement actions have been asserted against:

- video-sharing services;⁷
- social media platforms;⁸
- online marketplaces and auction sites;⁹
- real-estate listing aggregators and hosting platforms;¹⁰

⁵ *Ibid.*

⁶ *Id.* at 80.

⁷ See, e.g., *Capitol Recs., LLC v. Vimeo, Inc.*, 125 F.4th 409 (2d Cir. 2025); *UMG Recordings, Inc. v. Shelter Cap. Partners*, 718 F.3d 1006 (9th Cir. 2013).

⁸ See, e.g., *Hunley v. Instagram, LLC*, 73 F.4th 1060 (9th Cir. 2023).

⁹ See, e.g., *Routt v. Amazon.com, Inc.*, 584 F. App'x 713 (9th Cir. 2014); *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001).

¹⁰ See, e.g., *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723 (9th Cir. 2019); *Costar Grp. Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688 (D. Md. 2001).

- web-hosting companies;¹¹
- music streaming services;¹²
- photo-hosting services;¹³
- online payment processors;¹⁴
- website optimization and protection companies;¹⁵ and
- search engines.¹⁶

Proper resolution of the secondary liability issues in this case is critical to this broad range of internet companies. Overbroad and unpredictable liability rules, if not corrected by this Court, will significantly diminish the vitality of the internet economy.

¹¹ See, e.g., *ALS Scan, Inc. v. Steadfast Networks, LLC*, 819 F. App'x 522 (9th Cir. 2020).

¹² See, e.g., *EMI Christian Music Grp. v. MP3tunes, LLC*, 844 F.3d 79 (2d Cir. 2016).

¹³ See, e.g., *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724 (S.D.N.Y. 2012).

¹⁴ See, e.g., *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 819 (9th Cir. 2007).

¹⁵ See, e.g., *Mon Cheri Bridals, LLC v. Cloudflare, Inc.*, 2021 WL 4572015 (N.D. Cal. Oct. 6, 2021); *ALS Scan, Inc. v. Cloudflare, Inc.*, 2018 WL 11350606 (C.D. Cal. Mar. 13, 2018).

¹⁶ See, e.g., *Perfect 10 v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007); *Parker v. Google, Inc.*, 242 F. App'x 833 (3d Cir. 2007).

B. Congress enacted the DMCA safe harbors to provide an *additional* protection for online service providers; the safe harbors provide no basis for watering-down the contributory infringement standard.

1. When Congress enacted the DMCA in 1998, the internet was in its relative infancy. Google was founded in September of that year. Online services that are household names today did not yet exist. Nor did thousands of other online businesses, large and small.

Fewer than half of Americans were online at all.¹⁷ Today, by contrast, 96% of U.S. adults are online; nearly 80% of them have home broadband, and most of the rest have access to high-speed internet on smartphones.¹⁸

Congress in 1998 had no idea how the internet would ultimately develop. But Congress recognized both the internet’s enormous potential and the risk that copyright infringement claims could undermine that potential by subjecting online service providers to the threat of crushing liability. It observed that the “digital revolution has unleashed a wave of economic prosperity and job growth,” and also that “the development of new laws and regulations will have a profound impact on the growth of electronic commerce

¹⁷ See Susannah Fox, *The Internet Circa 1998*, Pew Research Center (June 21, 2007), <https://www.pewresearch.org/internet/2007/06/21/the-internet-circa-1998/>.

¹⁸ See Pew Research Center, *Internet, Broadband Fact Sheet* (Nov. 13, 2024), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>.

and the Internet.” H.R. Rep. No. 105-551(II), at 21 (1998).

Congress further recognized that, without some protections from copyright liability, “service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet.” S. Rep. No. 105-190, at 8 (1998). But Congress declined to “embark[] upon a wholesale clarification” of the doctrines of “contributory and vicarious liability,” leaving then-“current law in its evolving state.” *Id.* at 19.

Congress instead chose to include in the DMCA an *additional* protection from copyright liability in the form of safe harbors for different types of providers. See 17 U.S.C. § 512.¹⁹

To be eligible for the DMCA’s safe harbors, an online service provider must “adopt[] and reasonably implement[] * * * a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.” 17 U.S.C. § 512(i)(1)(A).

Most types of service providers (in particular, those covered by Sections 512(b)-(d)) must also comply with the DMCA’s notice-and-takedown process by acting expeditiously to remove or disable access to material claimed to be infringing upon receipt of

¹⁹ Generally speaking, Section 512(a) applies to internet access providers; Section 512(b) to providers of services that cache, or temporarily store, material that is being transmitted over the internet between third parties; Section 512(c) to providers of services that host user-generated material; and Section 512(d) to search engines. See also 17 U.S.C. § 512(k)(1) (broadly defining “service provider”).

proper notice from a copyright holder. 17 U.S.C. § 512(b)(1)(E).

2. Congress did not, and could not, given the nascent state of technology in 1998, know whether the safe harbors would be effective in preventing unjustified copyright liability or how they would work in practice. That is why Congress was explicit that it intended the safe harbors to provide only an additional protection from liability—and not to alter the existing standards for copyright liability, including those for secondary liability. Even with the safe harbors in place, a plaintiff copyright holder would still be required to carry its burden to prove infringement. And a defendant service provider would still have available to it all other defenses.

The text of the DMCA leaves no doubt about this design: “The failure of a service provider’s conduct to qualify for limitation of liability under this section *shall not bear adversely* upon the consideration of a defense by the service provider that the service provider’s conduct is not infringing under this title or any other defense.” 17 U.S.C. § 512(l) (emphasis added); see also U.S. Cert. Am. Br. 14.

The legislative history confirms that the DMCA provides an additional protection that does not affect the standards for copyright liability: “[S]ection 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 on liability or for conduct that fails to so qualify.” H.R. Rep. No. 105-551(II), at 50; S. Rep. No. 105-190, at 40. And Congress reiterated that “[e]ven if a service provider’s activities fall outside the limitations on liability specified in the bill, the service provider is not necessarily an infringer; liability in these circumstances would be

adjudicated based on the doctrines of direct, vicarious, or contributory liability for infringement * * * which are *unchanged* by new Section 512.” H.R. Rep. No. 105-551(II), at 71; S. Rep. No. 105-190, at 55 (emphasis added).

3. Section 512’s safe harbors—and the voluntary, extra-judicial cooperation they encourage between copyright holders and service providers—have been a success story in some ways.

But the experience of *amici* and others has shown that the DMCA’s notice process in particular is imperfect in ways that have sometimes influenced courts to deny safe harbor protection unfairly.

Infringement notices received by online companies are largely machine generated, and the volume of notices is staggering, at a scale far beyond what Congress could have envisioned when it enacted the DMCA.²⁰ DMCA-related notices to Google and Microsoft for search alone have grown over time to target billions of web pages annually.²¹

But a high volume of notices does not correspond to a high volume of infringement: courts have recognized that the automated processes used to generate most DMCA notices are “famously flawed.”

²⁰ See, e.g., Lumen Database Team, *Evolution of DMCA Notices: Trends and a Timeline*, Medium (July 2, 2021), <https://lumendatabase-org.medium.com/evolution-of-dmca-notices-trends-and-a-timeline-32636581af01>.

²¹ In 2024, Google received DMCA-related requests regarding 3,260,993,602 URLs. From January to June, 2024, Microsoft received requests relating to 261,521,428 URLs. See Microsoft Copyright Content Removal Requests, <https://www.microsoft.com/en-us/corporate-responsibility/copyright-removal-requests-report>.

Strike 3 Holdings, LLC v. Doe, 351 F. Supp. 3d 160, 161-62 (D.D.C. 2018), rev'd and remanded on other grounds, 964 F.3d 1203 (D.C. Cir. 2020).

Indeed, these notices can, and often do, target content that has nothing to do with the asserted copyrighted work. In one well-known example, an agent of Columbia Pictures sent takedown notices for numerous Vimeo uploads—including the earlier-produced short film that originally inspired Columbia's *Pixels* movie—simply for having the word “pixels” in their names.²²

Other similar examples abound.²³ But those are only the tip of the iceberg of what online service providers deal with on a daily basis: notices containing inaccurate or incomplete information, erroneous claims of infringement, or notices sent for abusive purposes, such as targeting a competitor or suppressing speech.²⁴

²² Michelle Starr, *Videos Taken Down From Vimeo For Using the Word 'Pixels'*, CNET (Aug. 9, 2015), <http://www.cnet.com/news/videos-taken-down-from-vimeo-for-using-the-word-pixels/>.

²³ See Br. of Automattic Inc. et al., *Lenz v. Universal Music Corp.*, No. 16-217, 2016 WL 5116913, at *6-12 (U.S. Sept. 15, 2016) (collecting examples). The Electronic Frontier Foundation also publishes a “Takedown Hall of Shame” containing what it describes as the “worst of the worst” takedown notices. See <https://www.eff.org/takedowns>.

²⁴ See, e.g., Jennifer Urban, Joe Karaganis, & Brianna Schofield, *Takedown in Two Worlds: An Empirical Analysis*, 64 J. Copyright Soc'y 483, 484 (2017) (finding that 31% of notices to Google Web Search from large copyright holders and 70% of notices to Google Image Search from individual and small business copyright holders raised questions related to accuracy and statutory compliance).

Companies receiving these notices thus face a series of difficult decisions based on incomplete and potentially inaccurate information. When has infringement actually been identified? Which users of a service are in fact repeat infringers? What steps will satisfy a court as reasonably implementing a policy to terminate accused infringers? See 17 U.S.C. § 512(i); U.S. Cert. Am. Br. 15; *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 303 (4th Cir. 2018) (holding that “the term ‘repeat infringers’ in § 512(i)” is not “limited to adjudicated infringers”).

Multiply these decisions by the millions of notices that a large company receives each month and the compliance burden becomes clear, as do the risks that a court scrutinizing the company’s procedures with 20-20 hindsight might find them insufficient.

In sum, although the DMCA safe harbors provide useful additional protection, Congress was prescient in recognizing that the safe harbor process should not affect courts’ determinations regarding the standards governing copyright infringement claims.

C. The Fourth Circuit’s ruling erroneously turns Congress’s DMCA safe harbors into a liability-creating mechanism.

As just explained, Congress made clear that it did not want the DMCA safe harbor process to affect copyright liability standards. But that is the practical effect of the Fourth Circuit’s contributory infringement test.

Take this case, in which a court determined, based on its assessment of the defendant’s process for terminating subscribers in response to infringement notices, that the defendant did not “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)).

The Fourth Circuit here concluded that continuing to “supply[] a product” or service “with knowledge that the recipient will use it to infringe” constitutes sufficiently “culpable” conduct to trigger copyright liability. Pet. App. 27a. Based on that determination, a defendant service provider’s failure to terminate a user who is an accused repeat infringer both eliminates eligibility for safe harbor protection and also triggers contributory infringement liability—because the allegations of repeat past infringement will at minimum create the risk that the provider will be deemed to have knowledge of likely future infringement.²⁵

In practice, then, the Fourth Circuit’s approach turns ineligibility for Congress’s additional *shield* against liability into a *sword* that produces liability. That result flies in the face of Congress’s instruction that the statutory safe harbors should not “bear adversely” on any of the service provider’s defenses. 17 U.S.C. § 512(l). And as we next discuss, it also finds no support in this Court’s precedents or the common law.

²⁵ As the case comes to this Court, there is no dispute that the knowledge prong of contributory copyright infringement is satisfied. But given the unreliability of many infringement notices (see pages 14-16, *supra*), the Court should not suggest that receipt of such notices constitutes dispositive evidence of either past infringement or likely future infringement.

D. This Court’s precedents make clear that conscious, culpable conduct is required to establish contributory infringement.

As Cox (Br. 21-46) and the government (Cert. Am. Br. 8-14) explain, the Fourth Circuit’s standard for contributory infringement is sharply inconsistent with this Court’s precedents, which require conscious, culpable conduct and make clear that a mere failure to act is insufficient to support liability.

1. The Copyright Act does not contain an express cause of action for secondary liability. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984). Contributory infringement under the Copyright Act therefore “emerge[s] from common law principles.” *Grokster*, 545 U.S. at 930.

Under those common-law principles, “[o]ne infringes contributorily by *intentionally inducing* or *encouraging* direct infringement.” *Grokster*, 545 U.S. at 930 (emphases added) (citing *Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). That standard requires more than “knowledge * * * of actual infringing uses” (*id.* at 937); in addition, a defendant must “intentionally induc[e] or encourag[e] direct infringement” (*id.* at 930).

This Court’s recent decision in *Twitter*, 598 U.S. 471, addressed secondary liability principles for online service providers in a different statutory context, and confirms the correctness of that standard.

Twitter looked to common-law principles to define the aiding-and-abetting cause of action created by the Justice Against Sponsors of Terrorism Act. 598 U.S. at 484-85, 493. That analysis is directly relevant, because—as the Fourth Circuit itself recognized—con-

tributory copyright infringement is “equivalent to aiding and abetting the infringement.” Pet. App. 27a; accord *In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003). In addition, this Court has recognized that the Patent Act’s contributory infringement cause of action is rooted in aiding and abetting, *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 764 (2011), and the Court has frequently construed copyright and patent provisions consistently, see page 28, *infra*.

Twitter identified the “conceptual core that has animated aiding-and-abetting liability for centuries”: the defendant must have “consciously and culpably participated in a wrongful act so as to help make it succeed.” 598 U.S. at 493 (quotation marks and alterations omitted). Requiring “conscious[]” and culpabl[e]” conduct (*ibid.*) is essential to avoid “boundless” secondary liability and protect “ordinary merchants” from “becom[ing] liable for any misuse of their goods and services.” *Id.* at 488-89.

In other words, conduct demonstrating “blameworthiness” is critical to aiding-and-abetting liability: “both criminal and tort law typically sanction only ‘wrongful conduct,’ bad acts, and misfeasance.” 598 U.S. at 489; see *id.* at 492 (“truly culpable conduct”). That is why this Court held in *Twitter* that the plaintiffs were required to show that the defendants “culpably ‘associate[d themselves] with’ [the principal statutory violation], ‘participate[d] in it as something that [they] wishe[d] to bring about,’ or sought ‘by [their] action to make it succeed.’” *Id.* at 498 (citation omitted).

The Court reaffirmed that standard in its recent decision in *Smith & Wesson*, 605 U.S. 280. Relying heavily on *Twitter*, the Court explained that a gun manufacturer “does not aid and abet” when it “merely

knows that ‘some bad actors’ are taking ‘advantage’ of its products”—“[a]nd that is so even if the company could adopt measures to reduce their users’ downstream crimes.” *Id.* at 293 (quoting *Twitter*, 598 U.S. at 503).

2. Because contributory infringement requires conscious, culpable conduct, much more than the failure of an online service provider to stop users’ infringement is required to trigger liability.

To be sure, there can be extreme cases; providing a product or service that is “good *for nothing else but infringement*” may itself be conduct from which the requisite culpability may be inferred. *Grokster*, 545 U.S. at 932 (emphasis added; quotation marks omitted).

But so long as the product or service is “capable of substantial noninfringing uses,” as the services offered by *amici* and the overwhelming majority of online service providers are, then a showing of “more acute fault” based on the provider’s words and actions is needed. *Grokster*, 545 U.S. at 932-33, 939 n.12; see also *Sony*, 464 U.S. at 442.

As *Twitter* put it, there must be “blameworth[y],” “conscious[] and culpabl[e] participat[ion] * * * so as to help make [the wrongful act] succeed.” 598 U.S. at 489, 493. It “would tread too close to the *Sony* safe harbor” to “find contributory infringement merely based on a failure to take affirmative steps to prevent infringement.” *Grokster*, 545 U.S. at 939 n.12; accord *Twitter*, 598 U.S. at 503 (rejecting aiding-and-abetting standard that “would effectively hold any sort of

communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them”).²⁶

In short, the Fourth Circuit’s approach cannot be squared with settled common-law standards or this Court’s precedents.

3. This Court should expressly reject other tests applied by lower courts that require online service providers to take affirmative steps to stop their users’ misconduct. Those tests, like the one adopted by the Fourth Circuit, are policy-based inventions wholly unrelated to the common-law standards that undergird contributory copyright infringement.

For example, under the “simple measures” test adopted by the Fifth and Ninth Circuits, an online service provider can be found liable if it has actual knowledge of specific infringing material on its service and fails to “take simple measures to prevent further damage to copyrighted works.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007); see also *UMG Recordings, Inc. v. Grande Commc’ns Networks, L.L.C.*, 118 F.4th 697, 715-20 (5th Cir. 2024) (endorsing the “simple measures” test).

That test has its origins in a 1995 district court opinion that predates *Grokster* and *Twitter* and that did not even attempt to reconcile creating a duty to act with the established common-law standards for aiding and abetting. See *Religious Tech. Ctr. v. Netcom On-*

²⁶ The reasoning in *Grokster* and *Sony* is not limited to discrete transactions like the distribution of software (*Grokster*) or a video tape recorder (*Sony*). The same common-law principles apply to a provider of an online service, such as the social media platform in *Twitter*, that its users utilize on an ongoing basis. See *Twitter*, 598 U.S. at 493.

Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1373 (N.D. Cal. 1995).

But as just discussed, common-law aiding-and-betting jurisprudence does not impose an affirmative duty to act in order to avoid liability—even when it would seem “responsible” to impose “constraints” on downstream users “to reduce the possibility of unlawful conduct.” *Smith & Wesson*, 605 U.S. at 282. Simply put, aiding-and-abetting liability requires more than “passive nonfeasance” in known misconduct by another. *Ibid.* (quoting *Twitter*, 598 U.S. at 500).

E. This standard properly subjects culpable actors to contributory infringement liability.

The requirement of conscious, culpable conduct is not just mandated by the common law and this Court’s precedents; it also draws the appropriate line between ensuring liability for bad actors while sparing legitimate service providers from the risk of unwarranted liability based on the misdeeds of a small portion of their users.

Sony held that a manufacturer that sold a consumer product (a video recorder) capable of both infringing and noninfringing uses could not be subject to contributory infringement liability based solely on its customers’ use of the product to infringe, even when the manufacturer had knowledge that its product would sometimes be used unlawfully. 464 U.S. at 442.

The defendant in *Grokster*, by contrast, did more than offer users a product capable of both infringing and noninfringing uses; it took “active steps to encourage infringement” by users of its peer-to-peer file

sharing software. 545 U.S. at 924; see also *id.* at 937-39.

In another illustrative example, the operator of a filesharing platform and its two founders were found liable for contributory copyright infringement when they affirmatively instructed employees to “seed” the platform with hundreds of thousands of copyright-protected files in order to attract users. *UMG Recording, Inc. v. Escape Media Grp.*, 2014 WL 5089743, at *2-3, *24-25 (S.D.N.Y. Sept. 29, 2014).

Or take *Columbia Pictures v. Fung*, in which a website operator was liable for contributory infringement when he actively encouraged users to upload files for “the 20 highest-grossing movies then playing in U.S. theaters.” 710 F.3d 1020, 1035-36 (9th Cir. 2013).

In sum, genuinely blameworthy actors—those who engage in conscious, culpable conduct that substantially assists a direct infringer—can and should be subject to secondary copyright liability. But there is a stark difference between such actors and those who merely fail to act in the face of known misconduct by others.

II. The Willfulness Enhancement For Statutory Damages Requires Proof That The Defendant Knew It Was Committing A Copyright Violation.

Copyright law allows a prevailing infringement plaintiff to forgo recovery of actual damages and instead obtain statutory damages. The law specifies a general range of “not less than \$750 or more than \$30,000” per work, “as the court considers just.” 17 U.S.C. § 504(c)(1).

But the law multiplies the maximum amount fivefold—to \$150,000 per work—if the copyright owner proves “that infringement was committed willfully.” *Id.* § 504(c)(2).

This willfulness multiplier opens the door to the risk of truly exorbitant damages, as the billion dollar verdict in this case demonstrates.

Moreover, this case is not at all unique. Particularly in the internet context, where companies operate at very large scale, complaints often allege infringement of tens of thousands, or even millions of works. Willfulness claims threaten truly gargantuan liability, as numerous cases demonstrate.²⁷

Not surprisingly, given the possible astronomical recoveries, willfulness claims have become commonplace: one study found that copyright plaintiffs claim enhanced damages in 80 percent of all disputes, even

²⁷ See, e.g., Complaint, *Costar Grp. v. Zillow Grp.*, No. 25-6248 (S.D.N.Y. July 30, 2025) (seeking enhanced damages for over 46,000 photographs used on real-estate listing website); Petition for Permission to Appeal Under Rule 23(f), *Bartz v. Anthropic PBC*, No. 25-4843 (9th Cir. July 31, 2025) (explaining threat of billions of dollars in enhanced damages); Proposed Second Amended Complaint, *UMG Recordings, Inc. v. Internet Archive*, No. 23-06522 (N.D. Cal. Mar. 26, 2025) (alleging infringement of thousands of sound recordings based on defendant’s digitization of physical records, with over \$700 million in potential liability); Fourth Amended Class Action Complaint, *Author’s Guild v. Google Inc.*, No. 05-cv-8136 (S.D.N.Y. Oct. 14, 2011) (alleging infringement as to millions of books that Google digitized, exposing Google to \$6 billion in enhanced damages liability); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 620 F. Supp. 2d 1081 (C.D. Cal. 2008) (video sharing startup faced more than \$150 million in potential liability for its users’ alleged infringement of thousands of sound recordings, driving the company to bankruptcy even though it ultimately prevailed in the litigation).

though courts have found willful infringement in just 2 percent of cases where plaintiffs obtain a favorable verdict. See Ben Depoorter, *Copyright Enforcement in the Digital Age: When the Remedy Is the Wrong*, 66 UCLA L. Rev. 400, 439 (2019).

The potential enormity of willfulness damages provides plaintiffs with very substantial leverage, regardless of the merits of the underlying willfulness claim. “Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); accord *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). And the reality is that many cases with huge claims do settle.²⁸

The bottom-line is that copyright holders are wielding the willfulness multiplier as a cudgel in a manner never intended by Congress.

The Fourth Circuit’s decision here enables just that result by adopting an erroneously loose standard for willfulness damages in two respects. First, the Fourth Circuit allowed Cox to be found liable for willful infringement based on knowledge of its *users’* unlawful conduct, rather than knowledge that its *own* conduct was unlawful. Second, the lower court erred in asserting that recklessness, rather than actual knowledge of a copyright violation, is sufficient to trigger enhanced willfulness damages.

²⁸ For example, the lawsuit against AI developer Anthropic seeking billions of dollars in willfulness damages on behalf of a putative class of book authors (note 27, *supra*) recently settled. Consent Motion, *Bartz, supra* (9th Cir. Aug. 26, 2025).

A. Willfulness turns on the defendant’s mental state regarding its *own* conduct.

As Cox (Br. 47-54), and the government (Cert. Am. Br. 17-18) explain, the Fourth Circuit plainly erred by upholding a finding of willful infringement based on the jury’s determination that Cox knew that its subscribers had infringed—without requiring the jury to determine whether Cox believed that *it* was acting unlawfully in continuing to provide internet access to those subscribers.

This Court has explained that “culpability is generally measured against *the knowledge of the actor* at the time of the challenged conduct.” *Halo*, 579 U.S. at 105 (explaining standard for enhanced damages under the Patent Act) (emphasis added). When there is a claim of secondary liability, the willfulness inquiry must focus on the secondary infringer’s mental state, not the mental state of the primary violator.

B. Willfulness requires actual knowledge; recklessness does not suffice.

The Fourth Circuit further erred in asserting that recklessness is sufficient to trigger willfulness damages. The Copyright Act, like the Patent Act, requires proof that the defendant knew it was committing a copyright violation.

1. *The 1976 Copyright Act’s addition of enhanced damages for willful infringement parallels the Patent Act’s preexisting enhanced damages provision.*

Prior to the 1976 revision, the Copyright Act did not provide for enhanced damages. The 1909 Act specified a statutory damages range of \$250 to \$5,000. See 17 U.S.C. § 101(b) (1976). The 1909 Act provided that

the \$5,000 limit did not apply “to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.” *Ibid.*

Congress in 1976 increased the range for ordinary statutory damages; eliminated the “actual notice” exception; and adopted a new enhanced statutory damages standard, providing for a five-fold increase in the maximum award if the defendant acted “willfully”—and the current maximum is \$150,000 per work.²⁹

By adding enhanced statutory damages for “willful” violations, Congress adopted a copyright law provision closely mirroring the Patent Act’s.

The Patent Act had long provided for enhanced damages; the version of the law in effect in 1976 (which was enacted in 1952) authorized a court to “increase the damages up to three times the amount found or assessed.” 35 U.S.C. § 284.

This Court in 1964 construed that provision to provide that “punitive or ‘increased’ damages” could be recovered “in a case of willful or bad-faith infringement.” *Aro*, 377 U.S. at 508. The Court has explained that *Aro*’s interpretation of the statute was “consistent” with its prior decisions holding enhanced patent damages permissible “where the injury is wan-

²⁹ Congress initially specified a range of \$250-\$10,000 for ordinary statutory damages and a maximum of \$50,000 for enhanced damages. Pub. L. No. 94-553, § 504(c), 90 Stat. 2541, 2585 (1976) (codified as amended at 17 U.S.C. § 504(c) (2006)). It subsequently increased those amounts to the current range of \$750-\$30,000 and \$150,000, respectively. 17 U.S.C. § 504(c) (2006).

ton or malicious,” and not “where [t]here is no pre-tence of any wanton and wilful breach.” *Halo*, 579 U.S. at 98 (citations omitted).

Congress’s design of the Copyright Act’s enhanced damages provision neatly parallels the Patent Act. It provides for enhanced damages as a multiple of ordinarily-available damages. And it employs the term “willfully,” which this Court had held in *Aro* to be the governing standard under the Patent Act.

Given that pedigree, the Court should interpret the Copyright Act’s enhanced damages provision to incorporate the same standard as the parallel Patent Act provision.

That result is fully consistent with the Court’s precedents that in a variety of contexts interpret parallel provisions in these two laws consistently. See, e.g., *Impression Prods., Inc. v. Lexmark Int’l, Inc.*, 581 U.S. 360 (2017) (harmonizing patent and copyright exhaustion principles); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328 (2017) (same for laches principles); *Sony*, 464 U.S. 417 (applying the patent law staple article doctrine to copyright law’s secondary liability framework).

It also is supported by the 1976 Act’s legislative history. The Copyright Office study that led to the revision recommended deletion of the “actual notice” exception to the \$5,000 cap on statutory damages and also recommended against the addition of an enhanced damages provision.

The study stated that the “actual notice” exception “was apparently based on the supposition that any infringement occurring after actual notice would necessarily be willful,” but explained, based on examples, that “this supposition is questionable.” *Report of the*

Register of Copyrights on the General Revision of the U.S. Copyright Law 105, House Comm. on the Judiciary, 87th Cong. (1961). It went on to observe that “[i]n the very few cases where statutory damages of more than \$5,000 were awarded, other factors such as willful infringement on a large scale were involved.” *Ibid.*

Congress rejected that approach, but explained that it intended enhanced willfulness damages to be available only in “exceptional cases.”³⁰ That conclusion is fully consistent with the standard applied under the Patent Act.

2. *This Court’s decision in Halo requires proof of actual knowledge to support a claim for enhanced statutory damages.*

The Court’s decision in *Halo* explains the standard for enhanced damages under Section 284 of the Patent Act—and therefore also provides the governing standard for enhanced copyright damages.

Enhanced damages “are not to be meted out in the typical infringement case,” the Court explained, “but are instead designed as a ‘punitive’ or ‘vindictive’ sanction for egregious infringement behavior.” *Halo*, 579 U.S. at 103-04; see also, *e.g.*, *id.* at 106 (“egregious cases typified by willful misconduct”). “The sort of conduct warranting enhanced damages has been variously described in our cases as willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant.” *Id.* at 103-04.

³⁰ See S. Rep. No. 94-473, at 144-45 (1975) (describing the increased maximum and decreased minimum awards in section 504(c)(2) as providing for “exceptional cases”); H.R. Rep. No. 94-1476, at 162 (1976) (same).

Reckless conduct does not qualify as “consciously wrongful.” *Halo*’s formulations limit enhanced damages to the worst offenders—infringers who act with actual knowledge that their conduct is unlawful.

Importantly, as the Court explained in *Halo*, the “careful balance” between protecting creators’ rights and fostering the continued innovation that ultimately benefits society as a whole “can indeed be disrupted if enhanced damages are awarded in garden-variety cases.” 579 U.S. at 109; see also *id.* at 114 (Breyer, J., joined by Alito, J., concurring) (calling for “careful application” of enhanced damages “to ensure that they only target cases of egregious misconduct”).

Those considerations apply at least equally—and more likely to a greater extent—in the copyright context. Copyright law includes a number of exceptions and limitations that make it difficult for a secondary actor to determine whether there has even been an act of infringement. “[T]he border between infringing and non-infringing conduct can be difficult to discern in advance. The Copyright Act’s fair use provision, for example, is framed as a flexible standard, rather than as a set of rules drawn with precision, and so in many cases it will not be clear whether particular copying is fair use or infringement until a court rules on the question.” Benjamin Brady, Roy Germano, and Christopher Jon Sprigman, *Statutory Damages Under the Copyright Act: An Empirical Study*, 2022 Mich. St. L. Rev. 1179, 1189. That uncertainty is heightened in cases involving new technologies that test the borders of copyright law’s exceptions and limitations.

Moreover, proper application of fair use principles is essential to prevent a collision between copyright law and the First Amendment. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560

(1985) (explaining that “First Amendment protections” are “embodied in” the “doctrine of fair use”). A loose standard for enhanced damages will force internet companies to take a more restrictive view of fair use and other copyright law exceptions, and thereby chill legitimate speech.

3. *Safeco does not support a different result.*

Many lower courts—like the Fourth Circuit here—have stated that reckless misconduct is sufficient to satisfy the “willful[]” standard for enhanced damages. Some have simply asserted the conclusion with little elaboration, and no discussion of the parallel Patent Act provision.³¹ Others have relied on this Court’s decision in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007).³²

But *Safeco* is inapposite here.

The *Safeco* Court explained that “‘willfully’ is a ‘word of many meanings whose construction is often dependent on the context in which it appears.’” 551 U.S. at 57 (quoting *Bryan v. United States*, 524 U.S. 184, 191 (1998)).

The Court there did observe that “where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well.” 551 U.S. at 57. But central to its holding that “willfully” in the

³¹ See *N.A.S. Import, Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 252 (2d Cir. 1992); *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1020-21 (7th Cir. 1991); *RCA/Ariola Int’l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 779 (8th Cir. 1988).

³² See *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255, 1271-72 (11th Cir. 2015); *Grafer v. Mid-Continent Cas. Co.*, 756 F.3d 388, 394-95 & n.7 (5th Cir. 2014).

Fair Credit Reporting Act encompassed reckless violations was that the statute specified a separate, heightened sanction for knowing violations, which would have been superfluous if “willfully” encompassed only knowing violations. *Id.* at 59-60 (citing 15 U.S.C. §§ 1681n(a), (a)(1)(B)).

Here, there is no such statutory indication that recklessness is sufficient. On the contrary, there are multiple reasons why an actual knowledge standard should apply.

To begin with, the standard governing enhanced damages under the Patent Act strongly supports an actual knowledge requirement in the copyright context. See pages 29-31, *supra*.

Second, when Congress in 1976 made enhanced damages available upon proof that copyright infringement was committed “willfully,” the statute already employed that very same term in defining the criminal violation. Section 104 of the 1909 Act imposed criminal sanctions on “[a]ny person who willfully and for profit shall infringe any copyright.” See Copyright Act of Mar. 4, 1909, § 28, 35 Stat. 1075, 1082 (codified as amended at 17 U.S.C. § 104 (1947)). By adopting the standard applied in the criminal context, which requires actual knowledge that the conduct violates the law, see *Bryan*, 524 U.S. at 198, Congress made clear that the same requirement applies to claims for enhanced damages under the 1976 Act.

Third, the 1976 Act also added a provision giving courts discretion to reduce statutory damages to \$200 if the infringer provided that it “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright.” 17 U.S.C. § 504(c)(2). Congress thus imposed a heavy burden on

defendants seeking to reduce the generally-applicable statutory damages range. That supports imposition of a similarly demanding burden on plaintiffs seeking to increase the awardable statutory damages.

Indeed, the five-fold increase in awardable damages here by itself distinguishes this case from *Safeco*, where a “willfulness” finding supported at most an award of actual damages of up to \$1000 and an indeterminate punitive damages award. 15 U.S.C. § 1681n(a)(1)(A).

These factors make clear that there is no basis for applying *Safeco*’s recklessness interpretation here.

Some lower courts have erred further by equating “willful blindness” with recklessness.³³ But this Court has made clear that “willful blindness” has “an appropriately limited scope that *surpasses* recklessness and negligence.” *Global-Tech.*, 563 U.S. at 769 (emphasis added).

In sum, a defendant cannot be subject to enhanced statutory damages unless the defendant has actual knowledge that its conduct is a copyright violation. Restoring the limited scope of enhanced copyright statutory damages furthers the text and structure of the Copyright Act, harmonizes copyright and patent law, and maintains the “careful balance” between protecting creators’ rights and fostering continued innovation that a loose enhanced damages standard would disrupt significantly. *Halo*, 579 U.S. at 109.

³³ See, e.g., *Erickson Prods. v. Kast*, 921 F.3d 822, 833 (9th Cir. 2019); *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 991 (9th Cir. 2017).

CONCLUSION

The judgment of the court of appeals should be reversed on both questions presented.

Respectfully submitted.

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