

No. 24-171

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In The  
**Supreme Court of the United States**

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COX COMMUNICATIONS, INC., et al.,  
PETITIONERS,  
v.

SONY MUSIC ENTERTAINMENT, et al.,  
RESPONDENTS.

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

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**BRIEF OF ENGINE ADVOCACY ET AL.  
AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONERS**

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici curiae* are a diverse group of policy, research, and advocacy organizations dedicated to representing and advancing the interests of developers, creators, startups, and other businesses working in new technologies and creative industries. *Amici curiae* include the following:

Engine Advocacy (“Engine”) is a 501(c)(4) non-profit technology policy, research, and advocacy organization dedicated to bridging the gap between startups and policymakers. Engine works with government officials and a community of thousands of high-technology, growth-oriented startups across the nation to support innovation and entrepreneurship through research, policy analysis, and advocacy. Engine and its community of entrepreneurs, supporters, and donors seek to protect the opportunities that exist for startups and their users.

The American Innovators Network (“AIN”) is a member-driven advocacy organization dedicated to furthering the interests of startups, creators, and entrepreneurs. AIN’s mission is to foster an environment that nurtures emerging businesses and bolsters American innovation and competitiveness.

Developers Alliance is an advocate for software developers, the companies they lead, and the industries that depend on them. Developers Alliance

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<sup>1</sup> Pursuant to this Court’s Rule 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part. None of the parties or their counsel, nor any other person or entity other than *amici curiae*, made a financial contribution intended to fund the preparation or submission of this brief.

works with policymakers to share the needs and perspectives of developers. Developers Alliance advocates for a legal and regulatory environment that supports developers in creating and advancing new technologies that benefit the public and business alike.

TechNet is a national, bipartisan network of technology CEOs and senior executives that supports and advocates for the growth of the U.S. innovation economy. TechNet’s diverse membership includes more than 100 dynamic American companies ranging from startups to the most iconic companies on the planet. Those companies represent more than five million employees and countless customers in the fields of information technology, artificial intelligence (“AI”), e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance. TechNet champions policies at the local, state, and federal level that foster a climate of innovation and competition, particularly for potentially transformative new technologies.

AI Salon connects and convenes more than 3,000 AI optimists — novices, experts, and everyone in between — who meet online and in person to learn and collaborate on opportunities ranging from whimsical to very serious, including community support and starting and building businesses. AI Salon and its members engage in policy advocacy in Washington, D.C., and state capitals to ensure that policymakers understand the value of AI and the contributions of AI-powered startups and small enterprises.

The Organization for Transformative Works is a 501(c)(3) nonprofit dedicated to protecting and preserving noncommercial fanworks: works created

by fans based on existing works, including popular television shows, books, and movies. OTW's nonprofit website, the Archive of Our Own ("AO3"), has over nine million registered users and hosts over 15 million unique works. Although it is a Library of Congress heritage site, AO3 operates on a budget of roughly \$500,000 annually, and the OTW has no paid employees, only volunteers.

Internet Works is a 501(c)(6) not-for-profit trade association of 24 diverse "Middle Tech" companies working together to right-size regulatory technology policy to foster trust and promote safety online so that the internet remains a place of limitless possibility and innovation. Since its founding in 2023, Internet Works has advocated for member companies and their online communities to have a seat at the table for vital policy conversations. Millions of Americans rely on Internet Works platforms to grow small businesses, find new jobs, book vacations, connect with neighbors, discover local restaurants, shop online, get answers to questions, and play games. Internet Works encourages policymakers to advance policies that drive economic growth and preserve what we all love about the internet by promoting innovation, protecting user safety and free expression, and expanding consumer choice.

*Amici* submit this brief to explain how this case is likely to impact access to the internet and other online services. The Court's decision may have significant effects on the accessibility and reliability of the internet and other online services for individuals, for businesses, and for organizations and institutions. Those working in new technologies or creative industries, or otherwise making transformative use of existing works for commercial

or noncommercial purposes, are particularly likely to be affected by the resolution of this case. The Fourth Circuit's opinion exposes service providers to broad infringement liability based on the alleged conduct of their users. The likely result is a significant deterioration in internet access and online services for those who may be targets of infringement allegations, however unmerited. For the same reasons, innovation and creativity are likely to face significant chilling effects under the Fourth Circuit's opinion, stunting economic activity and free expression.

*Amici* submit this brief to urge the Court to reverse the Fourth Circuit's opinion and maintain a standard for contributory infringement requiring an affirmative material contribution beyond the distribution of a product with substantial noninfringing uses.

## SUMMARY OF ARGUMENT

The Fourth Circuit has adopted an anomalous standard for contributory copyright infringement that threatens to render service providers liable for the actions of their users simply on receipt of an infringement notice — an untested and often robo-generated accusation of infringement that service providers have no ability to adjudicate. The likely result of this expansion in copyright liability is a wave of account terminations by service providers desperate to escape liability they cannot otherwise control. This includes internet service providers (“ISPs”) in particular, such as Petitioners here, who

may be forced to shut off the internet entirely in response to accusations of infringement.<sup>2</sup>

The harms that may follow from the Fourth Circuit’s opinion are sweeping. First, in treating notice of alleged infringement as proof of liability, the Fourth Circuit’s opinion is overreactive, encouraging ISPs to remove individuals, families, businesses, and institutions from the internet — perhaps completely — with neither process nor meaningful oversight. Second, the opinion is dangerously overbroad, encouraging terminations that reach far beyond genuine infringement, sweeping up both innocent users and lawful creative conduct simply because it happens to be associated with an allegedly infringing account.

In the modern world, where the internet functions in many ways as a practical necessity for businesses and individuals, this outcome is unacceptable. Retailers rely on the internet to access customers. Workers rely on the internet to do their jobs. Students rely on the internet to learn. Almost every American relies on the internet, in some form, to obtain news and information or to communicate with family and friends. The Fourth Circuit’s opinion puts this essential element of modern life in jeopardy based on the contents of uninvestigated, often robo-

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<sup>2</sup> As used herein, “ISP” refers specifically to the subset of service providers, such as Petitioners, whose business is delivering access to the internet. Other service providers will also provide internet-*related* services such as cloud computing, web security services, or access to online platforms. These other service providers, addressed in greater detail at section I.E, *infra*, are not “ISPs” as defined here, although they are also exposed to the Fourth Circuit’s contributory liability ruling.



generated infringement notices that may have nothing to do with the user or use in question.

Further, the Fourth Circuit’s unprecedented expansion of secondary copyright liability poses a particular threat to innovation and creativity. Incorporating existing works, building on them, and adapting them to new purposes is at the foundation of technological progress, economic growth, and creative expression. It is also an easy target for aggressive or even bad-faith assertions of infringement. The Fourth Circuit’s approach to liability invites abuse by creating a powerful legal weapon that market leaders can use to choke off smaller innovative companies and creators from making their products and services available online. Far from giving proper effect to copyright law, the Fourth Circuit’s opinion undermines its aims by threatening to chill the progress of science and the useful arts.

## ARGUMENT

The Fourth Circuit’s opinion is mistaken in at least two respects. *First*, the Fourth Circuit held that a party may be liable for contributory infringement without engaging in any affirmative action of its own, but simply for failing to terminate services in response to notice of a supposed third-party copyright violation.<sup>3</sup> In so doing, the Fourth Circuit broke from longstanding Supreme Court precedent, the guidance of other circuits, and basic principles of secondary liability precluding a claim founded in nonfeasance. *Second*, the Fourth Circuit compounded its error by

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<sup>3</sup> *Sony Music Ent. v. Cox Commc’ns, Inc.* (“Cox”), 93 F.4th 222, 236 (4th Cir. 2024).

treating the same notice of supposed third-party infringement as proof of willfulness.<sup>4</sup> In other words, not only is a service provider liable for copyright infringement based on its *lack* of affirmative conduct; the service provider is treated the same as the most culpable type of direct infringer and is subject to escalated damages.<sup>5</sup>

This approach to the Copyright Act is inconsistent with the statute, with the case law, and with bedrock aiding-and-abetting principles imposing reasoned limits on indirect liability.<sup>6</sup> Importantly for *amici*, the Fourth Circuit’s approach also threatens profound disruptions in access to online services — including access to the internet itself — with potentially grave consequences for innovation, for creative enterprise, and for the health of the knowledge economy in the United States. The opinion threatens a stark new direction for the internet and for online services in this country — less reliable, less dynamic, reordered by the chilling effects of a vast expansion in copyright liability beyond traditional notions of fault. The Court has rejected similar proposals in the past. It should do so again here.

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<sup>4</sup> *BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc.* (“*BMG*”), 881 F.3d 293, 312 (4th Cir. 2018).

<sup>5</sup> 17 U.S.C. § 504(c)(2).

<sup>6</sup> See *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 490 (2023) (“[T]he defendant has to take some affirmative act with the intent of facilitating the offense’s commission.” (citations omitted)).

- I. The Fourth Circuit’s unprecedented approach to contributory infringement will have devastating consequences for innovation and creative expression.**
  - A. Expanding liability for contributory infringement is irreconcilable with this Court’s past efforts to protect the dissemination of technology with substantial lawful uses.**

This Court’s seminal cases on contributory liability for copyright infringement are *Sony Corporation of America v. Universal City Studios, Inc.* (“*Sony*”), 464 U.S. 417 (1984), and *MGM Studios Inc. v. Grokster, Ltd.* (“*Grokster*”), 545 U.S. 913 (2005).

In *Sony*, the Court considered whether the manufacturers of the VCR — a nascent technology at the time — could be liable for contributory infringement given VCR owners’ known practice of recording copyright-protected content for later viewing or sharing.<sup>7</sup> Sony was responsible for disseminating the instrumentality of infringement, without which infringement could not take place. As the argument went, Sony was therefore liable for the infringing consequences.

This Court disagreed. Borrowing from the longstanding application of secondary liability principles to patent law, this Court held that where a product is capable of “substantial noninfringing uses,”

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<sup>7</sup> See *Sony*, 464 U.S. at 421.

its production and dissemination is not, in itself, an act of contributory infringement.<sup>8</sup>

Importantly, the Court also noted the economic and social consequences of a contrary rule. In the familiar patent context, “a finding of contributory infringement is normally the functional equivalent of holding the disputed article is within the monopoly granted to the patentee.”<sup>9</sup> “For that reason, ... the Court has always recognized the critical importance of not allowing the patentee to extend his monopoly beyond the limits of his specific grant.”<sup>10</sup>

So, too, in the copyright context, which enjoys a “historic kinship” with patent law.<sup>11</sup> Courts may be asked “in both areas” to apply contributory infringement to “products or activities that make [infringement] possible.”<sup>12</sup> But the contributory infringement doctrine must balance the interests of rightsholders — interests limited by the boundaries of the “statutory monopoly” — against “the rights of others freely to engage in substantially unrelated areas of commerce.”<sup>13</sup> Courts must therefore ensure the patent and copyright monopolies are not abused to prevent the creation, dissemination, and use of products “which though adapted to an infringing use

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<sup>8</sup> *Id.* at 442, 456.

<sup>9</sup> *Id.* at 441.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 439.

<sup>12</sup> *Id.* at 442.

<sup>13</sup> *Id.*

[are] also adapted to other and lawful uses.”<sup>14</sup> Any other rule would “block the wheels of commerce.”<sup>15</sup>

The Court’s warning in *Sony* proved prescient. Although the Court could have put an end to videocassette technology, *Sony* instead opened the door to the widespread adoption of home video. In the years since, home video has evolved from the VCR to digital video recording to modern streaming services — innovative responses to consumer demand that have also proven a benefit to new content producers.<sup>16</sup>

Some twenty years later, the Court elaborated on its view of indirect copyright infringement in *Grokster*. There, the Court considered whether the distributors of peer-to-peer software, which facilitates file-sharing, could be deemed indirectly liable for copyright infringement on an inducement theory.<sup>17</sup> The Court concluded that they could, specifically distinguishing *Sony* on the basis of the *Grokster* defendants’ “affirmative steps taken to foster infringement.”<sup>18</sup> The defendants in *Grokster* not only “voiced the objective that recipients use [their products] to download copyrighted works”; they “each took active steps to encourage infringement.”<sup>19</sup> They

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<sup>14</sup> *Id.* at 441-42 (quoting *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912), *overruled on other grounds*, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917)).

<sup>15</sup> *Id.* at 441.

<sup>16</sup> Edward Lee, *Technological Fair Use*, 83 S. Cal. L. Rev. 797, 798 (2010).

<sup>17</sup> *See Grokster*, 545 U.S. at 928-29.

<sup>18</sup> *Id.* at 919.

<sup>19</sup> *Id.* at 924.

were therefore liable for inducing infringement, even if their products were otherwise capable of noninfringing uses.<sup>20</sup>

At the same time it stated a rule for induced infringement, the *Grokster* Court also reiterated its foundational holding in *Sony*. As the Court noted, “*Sony* dealt with a claim of liability based solely on distributing a product with alternative lawful and unlawful uses, *with knowledge that some users would follow the unlawful course*.”<sup>21</sup> *Sony* “struck a balance between the interests of protection and innovation by holding that the product’s capability of substantial lawful employment should bar the imputation of fault and consequent secondary liability for the unlawful acts of others.”<sup>22</sup> In other words, distribution of a product with infringing uses cannot support fault in and of itself — even where the defendant knows “of infringing potential” or even “*actual infringing uses*.”<sup>23</sup> To show indirect infringement, some other “material contribution” to the infringement is necessary.<sup>24</sup>

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<sup>20</sup> *Id.* at 937-40.

<sup>21</sup> *Id.* at 941 (emphasis added).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 937 (emphasis added).

<sup>24</sup> The Court has occasionally referred to the various forms of secondary liability interchangeably. In the patent context, from which the copyright case law often borrows, vicarious infringement, induced infringement, and contributory infringement are distinct but partially overlapping concepts. Induced infringement and contributory infringement are different types of indirect infringement. The Fourth Circuit here described its analysis as a contributory infringement analysis. *Cox*, 93 F.4th at 233-34.

As the Court noted, this outcome is also consistent with the “common law principles” underpinning secondary liability for copyright infringement.<sup>25</sup> These traditional “rules of fault-based liability” draw the same distinction between action in furtherance of infringement and inaction despite an awareness of it.<sup>26</sup> Whereas liability does not lie for inaction, it would lie where, for example, the defendant “not only expected but *invoked*” infringement.<sup>27</sup>

Against this backdrop, the Fourth Circuit’s decision is an extraordinary outlier. Here, there is no question that Petitioners provide a product capable of substantial noninfringing uses. Cox is an ISP. Its product is *access to the internet itself* — a product no more tailored to infringement than access to any other basic utility necessary to modern life. This Court has repeatedly made clear that distributing a product of this kind is not culpable conduct, even with knowledge of “actual infringing uses.”<sup>28</sup> Yet the Fourth Circuit concluded just the opposite, holding that “supplying a product[,] with knowledge that the recipient will use it to infringe[,] is exactly the sort of culpable conduct sufficient for contributory infringement.”<sup>29</sup>

The Fourth Circuit’s opinion is irreconcilable with this Court’s precedent and the principles on

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<sup>25</sup> *Grokster*, 545 U.S. at 930.

<sup>26</sup> *Id.* 934-35.

<sup>27</sup> *Id.* at 935 (emphasis added).

<sup>28</sup> *Id.* at 937.

<sup>29</sup> *Cox*, 93 F.4th at 236.

which it rests. It would impose liability on an ISP simply for delivering the internet, without the ISP making any material contribution of its own to the third-party infringement that might follow. Wide-ranging liability of this kind is exactly what the *Sony* Court warned against as a “block” to commerce and innovation.<sup>30</sup> This Court should reject the invitation to “upset[] [the] sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new ... technologies by limiting the incidence of liability for copyright infringement.”<sup>31</sup> The Court should reverse.

**B. If exposed to copyright liability based on imputed knowledge, ISPs will be forced to make sweeping cuts to internet access, shutting out many from the internet entirely.**

The most immediate consequence of the Fourth Circuit’s looser standard of contributory infringement is to destabilize internet access for individuals, families, businesses, and institutions well beyond any verifiable connection to copyright infringement, and with no guarantee of recourse. This outcome follows directly from any regime in which ISP liability is dependent on the ISP’s “knowledge” as the Fourth Circuit construed it.

ISPs are not in a position to investigate and adjudicate infringement. ISPs may be relatively small, local providers with limited resources to devote

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<sup>30</sup> *Sony*, 464 U.S. at 441.

<sup>31</sup> *Grokster*, 545 U.S. at 928.



to services other than their primary mission — delivering internet to subscribers. Or they may serve millions of customers whose day-to-day use of the internet cannot possibly be tracked and analyzed. Regardless, ISPs are not in the business — and users do not *want* them to be in the business — of monitoring and reviewing the minutiae of users’ online behavior. Even if they were, ISPs could not possibly assess that behavior for signs that it violated the rights of third-party copyright holders.<sup>32</sup>

Existing copyright law already recognizes this dynamic. Congress enacted the Digital Millennium Copyright Act (“DMCA”) with the understanding that service providers — including ISPs — cannot police the internet for copyright violations and have no affirmative obligation to do so.<sup>33</sup> ISPs and other service providers have no duty to search for or investigate copyright infringement.<sup>34</sup> This principle is consistent not only with service providers’ practical capabilities, but also with the reasonable privacy expectations of their users, who do not wish to see their online behavior tracked.

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<sup>32</sup> John Blevins, *Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms*, 34 Cardozo L. Rev. 1821, 1873-75 (2013).

<sup>33</sup> See S. Rep. 105-190 at 49 (1998) (“The common-sense result of this ... test is that on-line editors and catalogers would not be required to make discriminating judgments about potential copyright infringement.”); H.R. Rep. 105-551(II) at 58 (1998) (same).

<sup>34</sup> See 17 U.S.C. § 512(m) (“Nothing in this section shall be construed to condition [the DMCA safe harbor] on a service provider monitoring its service or affirmatively seeking facts indicating infringing activity ....”).

At the same time, to incentivize efforts to prevent copyright infringement, Congress created the DMCA notice and takedown process. Congress also incentivized service providers to participate by offering a blanket “safe harbor” from liability. This safe harbor is available where service providers enforce a process for, among other things, terminating repeat infringers.<sup>35</sup> Importantly, though, the safe harbor operates as a blanket *affirmative defense* to copyright liability. It does nothing to alter the basic principles of copyright liability or the rightsholder’s threshold obligation to establish the defendant’s infringing conduct.<sup>36</sup>

The Fourth Circuit’s opinion turns this framework on its head. Like any affirmative defense, the DMCA safe harbor eliminates liability in a case where the basic elements of infringement have already been established. But the Fourth Circuit would do the opposite. It would *impose* liability where the service provider fails to shut off service to an accused infringer.

Under this model, the service provider’s most practical option is to terminate accused infringers without further inquiry. No service provider has the

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<sup>35</sup> 17 U.S.C. § 512(c).

<sup>36</sup> 17 U.S.C. § 512(l) (“The failure of a service provider’s conduct to qualify for limitation of liability under [the DMCA safe harbor] shall not bear adversely upon the consideration of a defense by the service provider that [its] conduct is not infringing ....”); H.R. Conf. Rep. 105-796 at 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. Rather, the limitations of liability apply if the provider is found to be liable under existing principles of law.”).

resources or ability to evaluate the merits of each notice it receives. Indeed, ISPs may receive thousands of such notices each month, each week, or even each day.<sup>37</sup> Adjudicating merits-based reviews of copyright claims on this scale would be beyond the capacity of the federal judicial system. It is hardly within the domain of a regional internet provider. Further, an ISP's exposure at scale is considerable. The Copyright Act provides for statutory damages up to \$30,000 per work infringed, or up to \$150,000 once escalated for "willfulness." 17 U.S.C. § 504(c). Large rightsholders, such as Respondents here, can easily generate a mass of infringement notices that, if ignored, would pose an existential threat even to larger ISPs. The most rational response to this risk is, in most cases, to neutralize it by terminating the accounts in question.

Although a termination may have little marginal effect on the ISP, it may have profound effects on the user. In many markets in the United States, there is no effective competition for broadband. Even at the *minimum* broadband speeds as defined by the Federal Communications Commission — speeds inadequate for many users, and particularly startups and other businesses<sup>38</sup> — more than 25% of households have just one ISP

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<sup>37</sup> Alan J. Gocha, *A Modern System for Resolving Online Copyright Infringement Disputes*, 58 IDEA: J. Franklin Pierce for Intell. Prop 131, 143-44 (2018).

<sup>38</sup> Engine Advocacy, *Interview with Amanda Chocko: Supporting regional startups from concept to commercialization* (Apr. 2, 2021), <https://www.engine.is/news/startupseverywhere-zeeland-mich-lakeshore-advantage>.

option. Another 50% have just two.<sup>39</sup> This lack of competition is particularly acute in rural areas. For these millions of Americans, losing access to a single ISP may well mean losing effective access to the internet — a technology on which much of modern business, work, learning, and social interaction depends.<sup>40</sup>

### **C. ISPs cannot limit terminations to actual infringers.**

The consequences of termination are not just severe. They are also scattershot. In practice, there is no effective means of ensuring that the users terminated as a result will have any connection to copyright infringement.

*First*, the DMCA notice and takedown process is notoriously prone to error and abuse. There is no guarantee that the information in an infringement notice is accurate, or even that it was fully investigated by the purported rightsholder before the notice was sent.<sup>41</sup> In one empirical study, at least *a third* of all manually reviewed infringement notices

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<sup>39</sup> Lyndon Seitz, *U.S. ISP Competition Snapshot: Key Insights*, Broadband Search (Apr. 18, 2024), <https://www.broadbandsearch.net/blog/internet-ISP-competition-across-America>.

<sup>40</sup> In the words of one regional startup founder, “[a]ttracting more companies to the region, bringing in the talent of the future, and educating our students and tomorrow’s startup founders is all reliant on access to high-speed Internet.” Engine Advocacy, *Interview with Amanda Chocko*, *supra* note 38.

<sup>41</sup> See Daniel Seng, *Copyrighting Copywrongs: An Empirical Analysis of Errors with Automated DMCA Takedown Notices*, 37 Santa Clara High Tech. L.J. 119, 166-71 (2021).

were found to be substantively defective.<sup>42</sup> It has also become common for rightsholders to rely on automated services and algorithms to generate takedown notices, without meaningful internal oversight.<sup>43</sup> These robo-generated notices, which are now increasingly generated by AI automation, are unsurprisingly error-ridden as well.<sup>44</sup>

Further, although the DMCA provides that purported rightsholders may not “knowingly materially misrepresent[]” that infringement occurred, 17 U.S.C. § 512(f)(1), ISPs are in no position to push back on overly aggressive or even abusive copyright notices except in the most extreme situations. They have neither the resources nor the information necessary to do so, and they cannot reasonably assume the risk of liability for their

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<sup>42</sup> Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 Santa Clara Computer & High Tech. L.J. 621, 667 (2006).

<sup>43</sup> Lydia Pallas Loren, *Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously*, 46 Wake Forest L. Rev. 745, 747 (2011) (“In addition to the takedown notices that appear designed to censor particular speech that copyright owners find objectionable, takedown notices are also sent automatically and without verification that the entity being sent the notice in fact has engaged in any kind of activity that could remotely be considered infringement.”).

<sup>44</sup> See Zoe Carpou, *Robots, Pirates, and the Rise of the Automated Takedown Regime: Using the DMCA to Fight Piracy and Protect End-Users*, 39 Colum. J.L. & Arts 551, 566 (2016); Jonathan Bailey, *What Happens When AI Files Bad DMCA Takedowns*, Plagiarism Today (Dec. 3, 2024), <https://www.plagiarismtoday.com/2024/12/03/what-happens-when-ai-files-bad-dmca-takedowns>.

individual users' actions.<sup>45</sup> It is also well-documented that users themselves are unlikely to challenge the infringement assertions against them, potentially due to the burden involved and confusion as to how to do so and why it matters.<sup>46</sup> The end result is a largely automated and uncontested process, known to produce errors but too onerous to review and correct for them.

*Second*, even where a notice is otherwise accurate, the account identified to an ISP will often represent multiple individuals, almost all of whom had no connection to alleged infringement. A coworking space, for example, may serve hundreds of individuals under a single ISP account. Hundreds of individuals, as well as the coworking business itself, are then at risk of being cut off from the internet because of allegations against a single person, about whom they have no knowledge and over whom they have no control.

This problem is widespread. An ISP that provides internet access in a public space with many transient users, such as an airport, could be forced to shut down the entire airport wifi system because of a single user's alleged infringement. It makes no difference that neither the ISP nor the airport knows

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<sup>45</sup> See Gocha, *supra* note 37, at 153 ("ISPs are likely to resolve takedown disputes on the basis of their economic interests as opposed to traditional notions of truth or fairness."); Loren, *supra* note 43, at 759 (noting the service provider's incentive to act on an infringement notice "because doing so provides immunity from copyright infringement liability which can be significant," whereas the provider generally has no stake in a user's conduct).

<sup>46</sup> Carpou, *supra* note 44, at 566.

anything about that transient user. Likewise, many businesses offer internet access to customers. Hotels offer internet access to guests. Schools offer internet access to students. Individuals offer internet access to their visiting friends and family. Governments, including local municipalities, offer internet access through libraries, other public buildings, or hotspots located in some public spaces.

Indeed, this problem arises *in this case*, where almost all of the most frequently flagged accounts were for known multiparty users such as schools, retail businesses, military housing, and multifamily dwellings. C.A.App.1743. Terminating accounts of this kind inevitably means terminating innocent users that make up the vast majority of the affected population.

Furthermore, an ISP's users may also include *other ISPs*.<sup>47</sup> A higher-tier ISP may therefore receive infringement notices based on the activity of a lower-tier ISP's individual users. In that scenario, the entire lower-tier ISP and all of its users may then be threatened with termination because of the actions of a handful of individuals. This scenario is hardly hypothetical — again, it arises *in this case*, where a number of the most frequently flagged accounts were those of lower-tier ISPs. C.A.App.1743. Terminating access for such ISPs would disrupt connectivity for

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<sup>47</sup> It is not uncommon for smaller ISPs with more limited infrastructure to lease bandwidth from their larger counterparts. These smaller ISPs, known as “lower-tier” ISPs, are often essential to delivering internet to individual consumers. Lower-tier ISPs tend to be particularly active outside major urban centers, where higher-tier ISPs may not find it economical to provide service directly.

huge numbers of innocent users, and could even disconnect entire communities in one fell swoop. It could also severely harm competition in a typically competition-starved sector, indirectly imperiling affordable access to the internet even in the communities where alternative providers exist.

*Third*, the notice process does not easily account for the legitimate use of existing, copyright-protected works for innovative or creative purposes. For example, the doctrine of fair use “permits and requires courts to avoid rigid application of the copyright statute when ... it would stifle the very creativity which [it] is designed to foster.”<sup>48</sup> In this sense, fair use operates as a “built-in First Amendment accommodation[]” in copyright law, protecting free expression from the harmful impacts of an overbroad copyright monopoly.<sup>49</sup> The fair use doctrine limits copyright liability based a loose set of factors that includes, for example, the transformative nature of the new work and its effect (or lack of effect) on the market for the original.<sup>50</sup>

These factors have proven difficult to apply even for judges and litigators familiar with them. They are all but impossible for ISPs to apply to infringement notices with any consistency or predictability — particularly when such notices are generated automatically, without human oversight. Faced with a flexible legal test, rightsholders have

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<sup>48</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (alterations omitted)).

<sup>49</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003).

<sup>50</sup> 17 U.S.C. § 107.



every incentive to approach fair use in the narrowest possible terms, erring in favor of infringement, and sweeping up even clear instances of transformative use into their infringement allegation dragnet.<sup>51</sup> ISPs receiving infringement notices are ill-equipped to identify, evaluate, and resolve fair use issues. The likeliest outcome is that ISPs will simply neutralize their risk by terminating challenged users without meaningful inquiry. Never mind what the fair use doctrine might have said about the user's activity, the vindication of First Amendment interests, or the importance of using copyright law as a tool to foster creative enterprise.

**D. Startups and creative industries face a particular risk of unjust termination, with harmful and chilling effects on innovation and creative expression.**

The consequences of a lesser standard for contributory infringement are particularly dire for those working in novel and transformative uses of existing works. Developers, entrepreneurs, and creatives frequently draw on existing works, improve and build upon them, and apply them to new and innovative ends. Activities of this kind are particularly susceptible to challenge by aggressive rightsholders, even when the challenged activity falls

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<sup>51</sup> See Amanda Reid, *Considering Fair Use: DMCA's Take Down & Repeat Infringers Policies*, 24 Comm. L. & Pol'y 101, 132 (2019) ("When fairly debatable, deferring to a copyright holder's narrow view of fair use effectively expands the scope of copyright. This is essentially another form of copyright accretion.").

outside the copyright monopoly or within the protection of fair use. Armed with the Fourth Circuit’s opinion, these rightsholders could have devastating impacts on economic activity and creative expression. And the chilling effects of extending liability to ISPs could discourage a wide array of otherwise lawful conduct before it even begins.

Software development, for example, often relies on the creative reuse of existing code in entirely new applications. This entails certain infringement risks. The boundaries of copyrightable material are not always well-defined in the software context.<sup>52</sup> Nor is the impact of the fair use doctrine, which can also “play an important role in determining the lawful scope of a computer program copyright.”<sup>53</sup> Developers thus assume some risk in building on what came before.

Under the Fourth Circuit’s approach, however, these gray areas of copyright liability invariably favor the purported rightsholder, the removal of content, and termination of the user. A developer may be willing to bear the infringement risk associated with his or her own work. A developer familiar with the work may also have good reason to discount the risk on its merits. But an ISP is unlikely to feel similarly invested or well-informed.<sup>54</sup> And absent some harm to its reputation with customers, no ISP will risk

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<sup>52</sup> See *Google LLC v. Oracle Am., Inc.* (“Google”), 593 U.S. 1, 22 (2021).

<sup>53</sup> *Id.*

<sup>54</sup> See Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 Harv. J.L. & Tech. 171, 182 (2010).

liability to defend an individual user’s conduct. Even if it did, no ISP is equipped to assess the scope of copyright and the applicability of fair use. The safest course is typically termination.

As a matter of substantive copyright law, however, this default in favor of termination will often be wrong. The purpose of copyright is to “suppl[y] the economic incentive to create and disseminate ideas.”<sup>55</sup> Accomplishing that purpose does not always mean finding infringement; it also means *limiting* and *narrowing* the scope of infringement where circumstances warrant. This is particularly true in the software development context, where courts will often avoid finding infringement by stressing the functional and non-copyrightable elements of a computer program.<sup>56</sup> By limiting the copyright monopoly in this way, courts “preserve[] public access to the ideas and functional elements” necessary to continued development.<sup>57</sup> Courts may apply the fair use doctrine flexibly to similar ends.<sup>58</sup> Put differently, courts are subject to default pressures running in the opposite direction of an ISP’s. Although an ISP motivated by risk aversion is likely to favor termination, that choice will often be contrary to the aims of copyright law.

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<sup>55</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

<sup>56</sup> Pamela Samuelson & Clark D. Asay, *Saving Software’s Fair Use Future*, 31 Harv. J.L. & Tech. 535, 558-59 (2018).

<sup>57</sup> *Sony Comput. Ent., Inc. v. Connectix Corp.*, 203 F.3d 596, 603 (9th Cir. 2000).

<sup>58</sup> See Samuelson & Asay, *supra* note 56, at 559.

This Court’s *Google* decision offers a useful example. In *Google*, the Court considered whether software developers were infringing copyrights by making use of a common application programming interface (“API”) — a shared language allowing different programs to communicate with one another.<sup>59</sup> The Court concluded that API use is fair use and therefore noninfringing.<sup>60</sup> As the Court noted, a contrary ruling would sweep APIs into the copyright monopoly, making them “a lock limiting the future creativity of new programs.”<sup>61</sup> Doing so would “interfere with ... copyright’s basic creativity objectives” and “risk harm to the public.”<sup>62</sup>

But if the Fourth Circuit’s approach had reigned at the time, APIs would *already* have operated as a lock on creativity. The mere existence of infringement risk would be enough to trigger terminations. Oracle would have no need to assert infringement in court to disrupt conduct it disapproved of. Oracle could simply automate takedown notices targeting those using Google’s allegedly infringing product. By raising infringement allegations with an ISP rather than with the legal system, a supposed rightsholder can effectively exercise a veto over creative activities, limited by the risk tolerance of the ISP rather than the merits of the underlying claim.

Other examples abound. Developers and startups working in artificial intelligence (“AI”) may

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<sup>59</sup> *Google*, 593 U.S. at 8-10.

<sup>60</sup> *Id.* at 40.

<sup>61</sup> *Id.* at 39.

<sup>62</sup> *Id.*

rely on publicly accessible, copyright-protected material to train their models. The copyright implications of this practice are currently the subject of intensive litigation. As one court recently concluded, “using copyrighted works to train [AI] to generate new text [is] quintessentially transformative” and therefore noninfringing.<sup>63</sup> However, a debate in the courts is ongoing.<sup>64</sup> And as the fair use analysis is flexible and case-specific, courts may arrive at different outcomes on similar facts.<sup>65</sup>

Under the Fourth Circuit’s approach, this legal uncertainty, whether merited or not, opens the door to terminations across the nascent AI sector. Rightsholders have no obligation to state and support their claims in court. All they need are boilerplate infringement notices — and for the ISPs receiving them to prioritize the risk of infringement (and the cost of litigating it) over the marginal benefit of retaining a specific user. In the context of AI developers, for example, mere allegations of infringement could force ISPs to shut off internet access for the world’s fastest-growing and most innovative companies, cutting off their progress and offering them no recourse to bring their businesses back online. There is no practical option for ISPs to apply the fair use doctrine to AI. And even assuming an ISP were able to adjudicate infringement claims,

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<sup>63</sup> *Bartz v. Anthropic PBC*, 2025 WL 1741691, at \*8 (N.D. Cal. June 23, 2025).

<sup>64</sup> *See Kadrey v. Meta Platforms, Inc.*, 2025 WL 1752484, at \*1 (N.D. Cal. June 25, 2025).

<sup>65</sup> *Campbell*, 510 U.S. at 577.

many startups lack the resources to respond effectively to sweeping claims of infringement.<sup>66</sup> In practice, simply asserting the copyright ends the debate.

The threat of termination also promises chilling effects as developers shy away from areas of added risk. Treading into AI could trigger an infringement notice that, even with little or nothing behind it, jeopardizes an entire startup's access to the open internet. In this scenario, why would a startup choose to contribute to a potentially transformative new industry — or indeed any industry that leverages and builds upon contributions from existing works?

The reach of these chilling effects is considerable. Even looking just at the growing AI sector, AI technology has a wide array of applications in industries old and new. A startup that helps businesses track environmental impact and improve performance.<sup>67</sup> A startup that helps seniors manage medications and medical appointments.<sup>68</sup> A platform that connects job seekers with new careers.<sup>69</sup> A

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<sup>66</sup> Engine Advocacy, *Interview with Chandler Malone: Creating accessible education through AI* (Jan. 10, 2025), <https://www.engine.is/news/startupseverywhere-new-york-path-ai>.

<sup>67</sup> Engine Advocacy, *Interview with George Lee: Revolutionizing the use of Environmental, Social, and Governance Data through innovative AI systems* (Jan. 13, 2023), <https://www.engine.is/news/startupseverywhere-sanfrancisco-ca-hydrus-ai>.

<sup>68</sup> Engine Advocacy, *Interview with Renee Dua: Improving access to quality caregiving with a Digital Health Assistant* (Dec. 2, 2022), <https://www.engine.is/news/startupseverywhere-losangeles-ca-renee>.

<sup>69</sup> Engine Advocacy, *Interview with Laura Truncellito: Developing AI systems to ease job searches and maximize career*

startup that helps with planning and booking travel.<sup>70</sup> A platform for educational games for children.<sup>71</sup> Many of these startups use large language models as key building blocks, and those models are often the subject of infringement allegations. The robust development and adoption of new technology is highly unlikely where the mere allegation of infringement may trigger termination by an ISP.<sup>72</sup>

The same dynamic applies in the arts. For example, an individual or organization that hosts transformative artistic content like fan fiction would be an easy target for infringement notices. “Fan fiction” is a modern term for an old practice — creating new fictional works inspired by more famous originals. These works are often subject to fair use protection because of their transformative nature, akin to parody or criticism.<sup>73</sup> In addition, modern fan

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*happiness* (Apr. 22, 2022), <https://www.engine.is/news/startupseverywhere-tysons-va-employable>.

<sup>70</sup> Engine Advocacy, *Interview with James Silva: Enabling a more pleasant travel experience through AI* (Aug. 6, 2021), <https://www.engine.is/news/startupseverywhere-sanfrancisco-ca-conciergebot>.

<sup>71</sup> Engine Advocacy, *Interview with Jeff Wigh: Making STEM-focus games more approachable* (Feb. 4, 2022), <https://www.engine.is/news/startupseverywhere-overlandpark-ks-bryghtlabs>.

<sup>72</sup> See Blevins, *supra* note 32, at 1873-74.

<sup>73</sup> See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1268-76 (11th Cir. 2001); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and A New Common Law*, 17 Loy. L.A. Ent. L.J. 651, 664-77 (1997).

fiction is often noncommercial and has no impact, or has a positive impact, on the market for the original.<sup>74</sup>

Again, under the Fourth Circuit's approach, this gray area of copyright law means risk to providers offering services to fan fiction sites and thus an increased likelihood of precautionary termination.<sup>75</sup> Furthermore, individuals writing fan fiction generally lack the resources to respond to infringement notices, even assuming the service provider would listen.<sup>76</sup> Any business or nonprofit hosting user-supplied content is likely to face the same pressures, as an errant user could trigger an infringement notice that takes down internet access entirely.<sup>77</sup> The likeliest outcome is that a wide array of lawful expressive content is removed, never posted, or discouraged from creation in the first place.

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<sup>74</sup> See Tushnet, *supra* note 73, at 663, 669.

<sup>75</sup> In the case of fan fiction, the greatest risk likely comes from critical service providers other than ISPs, such as providers of web security services. These service providers are subject to the same pressure to terminate services in light of the Fourth Circuit's opinion. See *infra* section I.E. They are also further removed from the allegedly infringing content than the ISPs hosting it, and are therefore even less likely to push back on overly aggressive infringement notices.

<sup>76</sup> See, e.g., Archive of Our Own, <https://archiveofourown.org>.

<sup>77</sup> Engine Advocacy, *Interview with Prince Mlaudzi: Creating a space for collaborative, digital communities* (May 14, 2021), <https://www.engine.is/news/startupseverywhere-portland-or-nombolo>.



**E. The Fourth Circuit’s standard will affect other service providers in the same way, forcing user terminations that disrupt connectivity and encourage abuses of copyright law.**

Although the Fourth Circuit’s decision deals with an ISP, its holding applies equally to any other service provider in receipt of an infringement notice.<sup>78</sup> These other service providers are subject to the same risk of liability for alleged third-party infringement and the same pressure to terminate the users supposedly responsible. These service providers, which may include websites and internet-based platforms and applications, are no better equipped than ISPs to investigate and adjudicate third-party infringement. They are therefore likely to respond to their new risk of copyright liability in the same way, by terminating access to their services without further inquiry.

Indeed, many of these other service providers are likely *worse*-equipped than an ISP to review and assess infringement notices. Startups cannot afford to investigate third-party infringement allegations — and certainly lack the resources to defend conduct the startup has no stake in. Startup founders readily confirm as much: Particularly at the early funding stages, accruing unnecessary legal expenses is unwise, and scrutinizing users’ activity is generally impractical.<sup>79</sup> Instead, startups must rely on users’

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<sup>78</sup> See *Cox*, 93 F.4th at 227-28, 233-34.

<sup>79</sup> Engine Advocacy, *Interview with Brandon Winfield: Creating space to share accessibility challenges, plan travel confidently*

compliance with comprehensive terms of service.<sup>80</sup> Where issues arise, the simplest course of action is termination.

Termination by service providers other than ISPs may also have disastrous effects. Some of these service providers may offer products essential for modern online businesses. For example, relatively few startups and small businesses have the need or resources to maintain their own physical hardware or data centers. They will instead rely on cloud-based computing services of some kind — services that offer on-demand, pay-as-you-go data storage, infrastructure, and software. But under the Fourth Circuit’s approach to contributory infringement, these computing services are now at risk. Cloud computing companies may receive the same infringement notices as ISPs, and may choose to neutralize their exposure to copyright damages by cutting off services to those who depend on them.

The same dynamic plays out elsewhere. For example, web security services are critical to the safe

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(Apr. 29, 2022), <https://www.engine.is/news/startupseverywhere-atlanta-ga-iaccesslife>; Engine Advocacy, *Interview with Chris Madden: Platforming candidates for local office* (July 11, 2025), <https://www.engine.is/news/startupseverywhere-sommerville-mass>.

<sup>80</sup> Engine Advocacy, *Interview with Andrew Prystai: Reimagining the online event management experience* (Oct. 29, 2021), <https://www.engine.is/news/startupseverywhere-omaha-ne-eventvesta>; Engine Advocacy, *Interview with Paul Ehlinger: Transforming marketing for multi-location brands* (Feb. 7, 2025), <https://www.engine.is/news/startupseverywhere-covington-ky-flamel-ai>.

and reliable functioning of online businesses.<sup>81</sup> The market for web security services is also relatively concentrated.<sup>82</sup> Under the Fourth Circuit’s approach, these services are now at risk. Where an infringement notice fails to take down internet access or cloud computing services, it may still take down the security infrastructure that keeps a business or platform operating reliably.

Even where service providers operate further from critical online infrastructure, expanding copyright liability and incentivizing termination poses significant risk. Any business that can be accused of making infringement possible is open to liability and a potential target for an infringement notice. Rightsholders, in turn, have every incentive to disseminate notices as broadly as possible in order to disrupt the content they object to and punish those responsible<sup>83</sup> — however questionable the merits of the underlying copyright assertion.

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<sup>81</sup> Nick Merrill & Tejas N. Narechania, *Inside the Internet*, 73 Duke L.J. Online 35, 41 (2023).

<sup>82</sup> *Id.* at 49.

<sup>83</sup> See also Carpou, *supra* note 44, at 583 (“[T]here is limited recourse for copyright holders that send overbroad requests, and thus little incentive for copyright holders to try to optimize their procedures in a way that limits the possibility of erroneous takedown requests.”).

**II. The Fourth Circuit compounded its error by equating contributory infringement with willful infringement, exposing service providers to escalated damages for purely third-party conduct.**

The Fourth Circuit’s second error compounded its first. “Willful” infringement is infringement performed with actual knowledge or reckless disregard.<sup>84</sup> But in concluding that knowledge of infringement suffices for contributory liability, the Fourth Circuit makes willfulness a given.<sup>85</sup> In the Fourth Circuit’s view, the same knowledge — the same infringement notice — that shows contributory infringement also shows it to be willful.

The practical result here is to considerably drive up the threat of copyright liability and the likelihood that service providers will respond to it with immediate terminations. As the Fourth Circuit would have it, contributory infringement, at least where premised on a notice, is *necessarily* willful. It is therefore *necessarily* subject to a fivefold increase in statutory damages, up to \$150,000 per work.

Damages at this scale are untenable. For the average early-stage startup, a single instance of infringement could cost three months of reserves.<sup>86</sup>

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<sup>84</sup> *Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 832 (9th Cir. 2019); *Island Software & Comput. Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005); *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1020 (7th Cir. 1991).

<sup>85</sup> *BMG*, 881 F.3d at 312.

<sup>86</sup> Engine Advocacy, *The State of the Startup Ecosystem* 17 (Apr. 22, 2021), <https://static1.squarespace.com/static/571681753c44d>

Even for larger, established businesses, it takes very little for damages at this scale to become an existential threat.

Faced with this threat, service providers that might otherwise have accepted the risk of liability are far less likely to. Service providers that might otherwise have pushed back on the merits of excessive or abusive copyright assertions are far less likely to. And service providers that might otherwise have left room for their users to create and innovate within the flexible doctrines of copyright law are far less likely to. With an automatic escalation in copyright damages, the impact of expanded contributory liability on service providers is even starker. And the chilling effects on invention and expression — the ends copyright law exists to serve — are even more severe.

## CONCLUSION

For the reasons set forth above, *amici* respectfully urge the Court to reverse the decision of the Fourth Circuit, and to maintain a standard for contributory copyright infringement that requires affirmative material contribution beyond the distribution of a product with substantial noninfringing uses.

Respectfully submitted,

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