No. 24-171

IN THE

Supreme Court of the United States

COX COMMUNICATIONS, INC., *et al.*,

Petitioners,

v.

SONY MUSIC ENTERTAINMENT, *et al.*,

Respondents.

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

BRIEF FOR JOSHUA MOON AND THE UNITED STATES INTERNET PRESERVATION SOCIETY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Joshua Moon ("Moon") is an American entrepreneur who owns and operates an Internet discussion forum known as Kiwi Farms. Kiwi Farms is a website of some notoriety earned from an increasingly rare and unprofitable practice - championing but not exceeding the boundaries of First Amendment speech. Kiwi Farms provides a forum dedicated to discussing eccentric people who voluntarily make fools of themselves. In short, it hosts the sometimes-harsh parody and criticism of others and or their artistic expression. Moon, together with Kiwi Farms were also the petitioners *Moon v. Greer*, 144 S. Ct. 2521, (2024) (*cert. denied*).[2] Moon's interest in this case arise from his personal experiences as the owner and administrator of Kiwi Farms in the face of an avalanche of choking Digital Millenium Copyright Act, 17 U.S.C. § 512, ("DMCA") takedown notices and subsequent litigation, a case that began nearly five years ago and

1. Pursuant to Supreme Court Rule 37.6, counsel for amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of the brief; and no person other than amici, its members, or its counsel contributed money intended to fund the preparation or submission of the brief.

2. The *Greer* case continues to be litigated in the U.S. District Court in Utah, now on its third case number after a brief transfer to the Northern District of Florida. After over five years of litigation, including a stop in the Tenth Circuit where it generated a decision that expanded copyright liability in an unprecedented fashion, the *Greer* case is no closer to a final adjudication today than it was when it began. This underscores the paralyzing collision between free speech and modern copyright laws.

continues to this day (including the ongoing subject of his prior petition to this Court). Mr. Moon's case also embodied most of the same exact issues as the case at bar and foreshadowed the disastrous outcomes that this Court must now consider and remedy. Both parties in the instant case cites to Moon's earlier case and the Tenth Circuit's expansive theories relating to contributory copyright liability in pre-Certiorari briefing, but the *Greer* case appears nowhere in the opening brief on the merits in this appeal. This is perhaps unsurprising, because the *Greer* case represents the consequences of the lower courts as they struggle to apply ill-defined elements to a cause of action that was judicially-created rather than codified through the ordinary legislative process.

The United States Internet Preservation Society ("USIPS") is a nonprofit organization, founded by Moon and others, whose mission is to restore the Internet's position as a vibrant marketplace for the free flow of ideas.

Mr. Moon and USIPS file this Amicus Brief in support of neither party, for the purpose of illustrating just how far adrift the law of contributory copyright infringement has become from the text of the Copyright Act, and how the lower courts continue to build upon this Court's own innovation in imposing liability where Congress did not.

INTRODUCTION AND SUMMARY OF ARGUMENTS

Notwithstanding this Court's admonitions against the creation of law by the judiciary,[3] it seems somehow less inclined to invalidate such creations once they have been created.[4] Modern Contributory Copyright Infringement is such judge-made law, and arguably it should not exist.[5] It is not a cause of action found in the text of any statute passed by Congress, but is instead thought to trace its origins to *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911) ("*Kalem*"). In fact, its origins (or

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3. *See e.g., Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be "implied" by the mere existence of a statutory or constitutional prohibition."); *Alexander v. Sandoval*, 532 U.S. 275, 276 (2001) ("[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress."); *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020) ("[b]ut when a court recognizes an implied claim for damages on the ground that doing so furthers the "purpose" of the law, the court risks arrogating legislative power."); *United States v. Santos-Portillo*, 997 F.3d 159, 163 (4th Cir. 2021) ("[a]bsent unusual situations, the power to craft remedies for statutory violations lies with Congress, which after all enacted the statute, not the federal courts."); *Doe v. GTE Corp.*, 347 F.3d 655, 658 (7th Cir. 2003) ("[n]ormally federal courts refrain from creating secondary liability that is not specified by statute").

4. *See e.g., Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 215 (2022) (taking nearly fifty years to recognize that "[t]he Constitution makes no express reference to a right to obtain an abortion").

5. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("copyright is the creature of the federal statute passed in the exercise of the power vested in the Congress").

absence thereof) are better traced to *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908) ("*White-Smith*"). In *White-Smith* this Court dealt with the question of whether a technological innovation of its day, "piano rolls," that allowed for the automatic playing of musical compositions on mechanical pianos were "copies" or not. This Court showed admirable restraint and perhaps an appreciation for the overarching goal of Article I, § 8 of the U.S. Constitution, *i.e.*, the promotion of science and useful arts, in holding that "[i]t may be true that the use of these perforated rolls, in the absence of statutory protection, enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value. But such considerations properly address themselves to the legislative, and not to the judicial, branch of the government." *White-Smith*, 209 U.S. 1 at 18. In a self-styled "concurring opinion" Justice Holmes expressed what would be a recurring but incorrect sympathy for the artists themselves stating that "[o]n principle anything that mechanically reproduces that collocation of sounds ought to be held a copy, or, if the statute is too narrow, ought to be made so by a further act…" *Id at* 28. Justice Holmes had tipped his hand.

The *White-Smith* Court was correct and Justice Holmes wrong. "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings ...but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings." *Sony Corp. of Am. v. Universal City Studios, Inc.,* 464 U.S. 417,

429 (1984) ("*Sony*"). Indeed, this is further underscored by the longstanding disfavored status of monopolies in American culture and law.[6] Yet this Court has created – and consistently expanded – theories of liability which Congress never enacted.

In 1909 Congress reacted to piano rolls and other incipient technology and amended the Copyright Act to cover the mechanical reproductions at issue in *White-Smith*. Nevertheless in 1911, Justice Holmes went further. In a two-page decision that raised far more questions than it answered, this Court held a moving picture company secondarily liable to copyright holders for producing a moving pictures adaptation of General Lew Wallace's book *Ben Hur*. In doing so, Holmes created both the modern-day contributory copyright infringement claim and at the same time the very Achilles heel of its application – the stated but not defined "knowledge" standard. "[I]t has been held that mere indifferent supposition or *knowledge* on the part of the seller that the buyer of spirituous liquor in contemplating such unlawful use is not enough to connect him with the possible unlawful consequences. …But no such niceties are involved here." *Kalem*, 222 U.S. 55 at 62 (*emphasis added*). In retrospect it appears that Justice Holmes statement of "knowledge" but failure to define it started the train rolling to where it is today.

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6. As James Madison noted in 1791 while discussing the pervasive evils of monopolies in English history, the specific grant of Congressional authority under the Constitution to regulate patent and copyrights was intended as a check to the expansion of monopolistic power rather than to expand such monopolistic power. *See* James Madison, *Public Opinion*, National Gazette (December 19, 1791).

In the years since *Kalem*, contributory copyright infringement has often collided with incipient technologies, free speech and artistic expression. Over the past fifty years such collisions have usually resulted in the expansion of copyright holders' monopoly. This is not the intended result of Article I, § 8 or the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq. This Court should therefore, and at minimum, provide a narrower and more precise definition of the "actual knowledge" standard it enunciated but failed to carefully define in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) ("*Grokster*") and further relegate contributory copyright infringement actions to the most egregious and culpable conduct through an additional scienter requirement.

ARGUMENTS

1. The "knowledge" standard articulated in *Grokster* was neither clear nor faithfully followed by lower courts.

While *Kalem* established the modern contributory copyright infringement claim, the current version of the claim's elements emerged in *Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159 (2d Cir. 1971) ("*Gershwin*"). There the Second Circuit described the elements as follows: "one who, with *knowledge* of the infringing activity, *induces*, *causes* or *materially contributes*[8] to the infringing conduct of another, may be held liable as a 'contributory' infringer. *(Id* at 1162, *emphasis added).* Knowledge was not defined but likely

the *Gershwin* Court "presume[d] that such common-law terms 'brin[g] the old soil' with them." *Twitter, Inc. v. Taamneh,* 598 U.S. 471, 484 (2023) ("*Twitter*").

Whatever the reasoning behind the ill-defined knowledge element, what followed was a mess. Few courts attempted to define or discuss knowledge and rather, like mud on an old shoe, brought the "old soil with them". *Id* at 484-485. As late as 1984 this very Court stated that "[t]he doctrine of contributory copyright infringement, however, is not well-defined." *Sony*, 464 U.S. 417 at 487 (dissent). Indeed, the *Sony* Court mostly did not even address the elements directly choosing instead, to focus on the fact that the technology was transformative and thus "fair use" under 17 U.S.C. § 107. This is the trouble with creating causes of action in court rather than allowing Congress to take the reins – elements are ill-defined and shifting, and the contours of liability are known only *post-hoc* when cases are litigated.

Numerous courts have tried to define the knowledge element since *Sony*. Most have failed miserably. In 2005, this Court allegedly addressed the knowledge element stating that "evidence of the distributors' words and deeds going beyond distribution as such shows a purpose to cause and profit from third-party acts of copyright infringement." *Grokster*, 545 U.S. 913 at 941. Other courts have interpreted this statement to imply an "actual knowledge" standard but simultaneously acknowledge that they themselves alternate between either an "actual knowledge" or "willful blindness" standard or a "know or have reason to know" standard.

Erickson Prods., Inc. v. Kast, 921 F.3d 822, 832 (9th Cir. 2019) (explaining that a "should have known" jury instruction was not plain error since the Ninth Circuit Court of Appeals itself had recently, and without overruling either definition, vacillated between requiring "know or have reason to know" or "actual knowledge of specific acts of infringement ….[and/or] willful blindness of specific facts"). The Fourth Circuit has produced a typically convoluted definition of the knowledge necessary for contributory infringement stating that "It is well-established that one mental state slightly less demanding than actual knowledge—willful blindness—can establish the requisite intent for contributory copyright infringement. …Whether other mental states—such as negligence (where a defendant "should have known" of infringement)—can suffice to prove contributory copyright infringement presents a more difficult question." *BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 308 (4th Cir. 2018). *See also Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936, 942 (9th Cir. 2011) (applying a know or reason to know standard); *Luvdarts, LLC v. AT & T Mobility, LLC*, 710 F.3d 1068, 1072–73 (9th Cir. 2013) (applying an actual knowledge of specific acts of infringement or willful blindness of specific facts standard); *Arista Recs., LLC v. Doe 3*, 604 F.3d 110, 118 (2d Cir. 2010) (applying a know or have reason to know standard); *BMG Rts. Mgmt. (US) LLC v. Altice USA, Inc.*, No. 2:22-CV-00471-JRG, 2023 WL 3436089, at *11 (E.D. Tex. May 12, 2023) (seeming to apply an explicit notice equals knowledge standard by stating that "multiple courts

have determined that allegations of knowledge of infringement based on infringement notices sent to ISPs were sufficient to support a contributory infringement claim"); *In re Frontier Commc'ns Corp.*, 658 B.R. 277, 289–90 (Bankr. S.D.N.Y. 2024) (collecting and compiling cases employing a notice equals knowledge standard); *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1021–22 (9th Cir. 2013) (applying a standard of a "specific knowledge of particular infringing activity"); *Elsevier Ltd. v. Chitika, Inc.*, 826 F. Supp. 2d 398, 404 (D. Mass. 2011) (applying a "reason to know" standard); *Perfect 10, Inc. v. Google, Inc.*, No. CV 04-9484 AHM SHX, 2010 WL 9479060, at *4 (C.D. Cal. July 30, 2010), *aff'd,* 653 F.3d 976 (9th Cir. 2011) (applying an "actual knowledge" standard coupled with ability to "take simple measures to prevent further damage"); *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 609 (9th Cir. 2018) (in DMCA context defining knowledge as "actual knowledge [which] means actual, not merely a possible inference from ambiguous circumstances.").

Since this Court created contributory liability for copyright infringement out of thin air, it is perhaps unsurprising that there is no clear standard for imposing such liability. But this Court is therefore required to step in and clean up the mess, making clear what sort of "knowledge" gives rise to contributory liability.

2. Given the failure of courts to provide working definitions of "knowledge" it is unsurprising that Congress was forced to step in with the Digital Millenium Copyright Act of 1998.

One of the few Courts of Appeal that attempted to thoughtfully and carefully address the knowledge element in the context of facts specific to internet service providers was *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) ("*Netcom*"). In *Netcom*, an internet bulletin board server (precursor to modern day chat rooms) had been sued for contributory infringement based on the allegedly infringing activities of the bulletin board's users. Defendant, Netcom, the bulletin board server, argued that for it to be held liable, its knowledge of infringement had to be unequivocal. The Court rejected that but held that "[w]here a BBS operator cannot reasonably verify a claim of infringement, either because of a possible fair use defense, the lack of copyright notices on the copies, or the copyright holder's failure to provide the necessary documentation to show that there is a likely infringement, the operator's lack of knowledge will be found reasonable and there will be no liability for contributory infringement for allowing the continued distribution of the works on its system." *Netcom*, 907 F. Supp. 1361 at 1374. Three years later Congress codified the *Netcom* holding in the DMCA. *See also CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 548 (4th Cir. 2004). While the DMCA does not displace traditional defenses to contributory copyright infringement, it does provide a safe harbor for those meeting its notice and takedown requirements.

3. The DMCA has become the default means of dealing with potential secondary copyright infringement, but this has come at high costs to fair use and otherwise impinges on U.S. policy including the very policy behind the DMCA.

Given the well acknowledged absence[7] of a homogonous, predictable and usable framework for identifying contributory copyright infringement, and the detailed "fact intensive"[8] nature of any "fair use" defense, it is perhaps unsurprising that the DMCA is now the first and increasingly only[9] line of defense against claims of copyright infringement. The DMCA can perhaps be

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7. *See e.g., Capitol Recs., LLC v. Vimeo, LLC,* 826 F.3d 78, 96–97 (2d Cir. 2016) ("[f]urthermore, employees of service providers cannot be assumed to have expertise in the laws of copyright. Even assuming awareness that a user posting contains copyrighted music, the service provider's employee cannot be expected to know how to distinguish, for example, between infringements and parodies that may qualify as fair use. Nor can every employee of a service provider be automatically expected to know how likely or unlikely it may be that the user who posted the material had authorization to use the copyrighted music. Even an employee who was a copyright expert cannot be expected to know when use of a copyrighted song has been licensed. Additionally, the service provider is under no legal obligation to have its employees investigate to determine the answers to these questions.

8. *Am. Soc'y for Testing & Materials v. Public.Resource. Org, Inc.*, 82 F.4th 1262, 1267 (D.C. Cir. 2023) ("Fair -use analysis is highly fact-intensive, and the four enumerated factors are not exclusive.").

9. *See e.g., In re Frontier Commc'ns Corp.*, 658 B.R. 277, 289–90 (Bankr. S.D.N.Y. 2024) (collecting and compiling cases employing a notice equals knowledge standard).

understood as the legislature's very imperfect response to Justice Holmes' original act of judicial hubris in creating the contributory copyright infringement claim in the first place. Like most halfway measures it has had some unfortunate results. It has spawned robo-takedowns and robotic responses thereto. The loser is transformative fair use under 17 U.S.C. § 107 and overarching U.S. policy to maintain and encourage continued development of the internet and free markets on or through it.[10,11]

The DMCA in relevant part states that a "service provider shall not be liable for monetary relief …if the service provider …upon obtaining such knowledge or awareness [by way of receipt of a compliant takedown notice], acts expeditiously to remove, or disable access to, the material". 17 U.S.C. § 512(c)(I). Not surprisingly whole industries sprung up in the wake of the DMCA comprising

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10. *See e.g., Perfect 10, Inc. v. Visa Int'l Serv. Ass'n,* 494 F.3d 788, 794 (9th Cir. 2007) ("[w]e evaluate Perfect 10's claims with an awareness that credit cards serve as the primary engine of electronic commerce and that Congress has determined it to be the "policy of the United States—(1) to promote the continued development of the Internet and other interactive computer services and other interactive media [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

11. *See e.g., Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 794 (9th Cir. 2007) ("Congress expressed similar sentiments when it enacted the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512, one of the stated purposes of which was to 'facilitate the robust development and worldwide expansion of electronic commerce, communications, research, development, and education in the digital age.' S. Rep. 105–190, at 1–2 (1998).").

robotic issuance and review of DMCA takedown notices. Legal scholar Zoe Carpou had already noted over ten years ago that the whole process of DMCA takedown notice issuance and processing had been made largely automatic.[12] In 2019, Legal scholar Jonathan W. Penney noted this too as well as the fact that the automatic nature of the regime, in particular the use of "bots" to both send and process takedown notices had been causing exponential annual growth in the number of DMCA takedown notices issued.[13] Courts are fully aware of this and have been for some time.[14,15] The number of such

12. Zoe Carpou, *Robots, Pirates, and the Rise of the Automated Takedown Regime: Using the DMCA to Fight Piracy and Protect End Users*, 38 Colum. J. L. & Arts 551, 559 (2015).

13. Jonathan W. Penney, *Privacy and Legal Automation: The DMCA as a Case Study*, 22 Stanford Tech L. Rev. 412, 426 (2019) ("In the last decade, however, the number of DMCA notices sent to OSPs has increased exponentially, largely due to 'bots' and automated processes powered by machine learning and algorithms that constantly scan the internet and for infringing content and send on removal requests on detection. Google, for example, deals with approximately 2 million DMCA takedown requests per day and in 2016, removed 900 million links.").

14. *See e.g. Enttech Media Grp. LLC v. Okularity, Inc.*, No. 220CV06298RGKEX, 2020 WL 6888722, at *1 (C.D. Cal. Oct. 2, 2020) ("Defendant Okularity represents BackGrid, Splash, and Xposure, among other clients, with respect to their copyright claims. Specifically, Okularity uses a software that scans the internet for images that infringe on its clients' work, then automatically generates and files DMCA take-down notices against purported infringers.").

15. *See e.g., Perfect 10, Inc. v. Giganews, Inc.,* No. CV 11-07098-AB SHX, 2014 WL 8628031, at *10 (C.D. Cal. Nov. 14, 2014), *aff'd* at 847 F.3d 657 (9th Cir. 2017) (showing the use of automatic or robotic processing of takedown notices over ten years ago).

takedown notices are staggering and the sheer volume further underscores the fact that there cannot be any meaningful review of material subject to a takedown notice to check for such niceties as "fair use" or prior authorization. Yet somehow, lower courts have decided the mere receipt of a DMCA takedown notice nevertheless gives rise to contributory copyright liability. *Greer v. Moon*, 83 F.4th 1283 (10th Cir. 2023), *cert. denied,* 144 S. Ct. 2521, (2024).

To illustrate the magnitude of the issue of robotic takedown notice, Google reports a running tally of all such notices in its Transparency Report[16] and as of August 18, 2025, Google reports that it had received 12,385,209,103 such notices. That same report also admits the typical response stating that "[i]f the notice is complete, and we find no other issues, we delist the URL from Search results." *Id.* Note that the explanation of how Google's takedown review process works makes no mention of review for authorization or "fair use." In short, though a DMCA notice is in theory only a *claim* of infringement[17] ample data and case law confirms the fact that usually the receipt of a takedown notice by an internet or online service provider is the end of the story[18] irrespective of

16. Google, *Transparency Report*, August 18, 2025, available electronically at https://transparencyreport.google.com/copyright/overview (last accessed on Aug. 18, 2025).

17. *Schneider v. YouTube, LLC*, 674 F. Supp. 3d 704, 720 (N.D. Cal. 2023) (explaining that a DMCA takedown notice is "only a *claim* of infringement" rather than notice of an actual infringement).

18. *See e.g.,* Emily Zarinst, *Notice Versus Knowledge Under the Digital Millennium Copyright Act's Safe Harbors*, 92 California Law Review 257 (2004) (noting that where courts find a DMCA

whether that notice represents and conveys an instance of actual infringement or not.[19] Industry experts further confirm this state of affairs[20] as do large online and internet service providers themselves. Legal scholars do too. Jennifer Urban has estimated 4.2% of DMCA takedown notices targeted content that did not actually and clearly match the identified infringed work, and that a further 7.3% of takedown notices involved potential lawful expression.[21] Large Internet service providers including

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evidence of knowledge of infringement the incentive to remove potentially infringing material without further investigation becomes almost a foregone conclusion).

19. *Schneider v. YouTube, LLC*, 674 F. Supp. 3d 704, 721 (N.D. Cal. 2023) (that court noted that YouTube receives millions of DMCA takedown notices annually and that it relies on a fully automated process to screen such notices and that in essence so long as the DMCA notice contains the proper representations – the material is removed. YouTube further provided evidence that while it receives millions of DMCA notices per year, it was "estimating [only] approximately 50 to 100 monthly contacts with legal counsel about fair use").

20. "It's a numbers game. When you're the size of Google, it's impossible to **vet every takedown demand**. The easiest thing to do is comply immediately and, if need be, reinstate content when these demands are contested." Tim Cushing, *Fake Entities Are Still Abusing The DMCA Takedown Process To Hide Facts They Don't Like*, Tech Dirt, Feb. 22, 2024. Reproduced electronically at https://www.techdirt.com/2024/02/22/fake-entities-are-still-abusing-the-dmca-takedown-process-to-hide-facts-they-dont-like/ (last accessed on Aug. 17. 2025).

21. See Urban, Jennifer M. and Karaganis, Joe and Schofield, Brianna, *Notice and Takedown in Everyday Practice* (March 22, 2017). UC Berkeley Public Law Research Paper No. 2755628, Available at SSRN: https://ssrn.com/abstract=2755628 or http://

Google, Twitter and Tumblr confirmed similar estimates in their Amicus Brief in *Lenz v. Universal Music Corp.*, 137 S. Ct. 416 (2016) (*Cert. Denied*). In fact takedown notices are increasingly being used for purely abusive purposes[22,23] to remove political advertisement, satire, performance art and online information important to virtually all aspects of modern life.[24] Yet the Tenth Circuit has not only held that mere receipt of a takedown notice might give rise to liability, it has also held that simply re-posting a takedown notice itself is evidence of contributory infringement liability. *Greer*, 83 F.4th 1283 at 1295.

If robotic processing of DMCA takedown notices were not enough to kill "fair use," recent appellate decisions have arguably finished the job by applying

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dx.doi.org/10.2139/ssrn.2755628 (last electronically accessed on Aug. 18, 2025).

22. *See also* Shreya Tewari, *Over thirty thousand DMCA notices reveal an organized attempt to abuse copyright law*, Medium, April 22, 2022. Reproduced electronically at https://lumendatabase-org.medium.com/over-thirty-thousand-dmca-notices-reveal-an-organized-attempt-to-abuse-copyright-law-9aa7c07a2ccc (last accessed on Aug. 17. 2025).

23. *See also* Electronic Frontier Foundations, "Takedown Hall of Shame" a regularly updated website cataloguing the most egregious and recent example of improper issuance of DMCA takedown notices. Available electronically at https://www.eff.org/takedowns (last accessed on Aug. 17. 2025).

24. Corynne McSherry, *Notice and Takedown Mechanisms: Risks for Freedom of Expression Online*, Electronic Frontier Foundation (2020), available at www.eff.org/files/2020/09/04/mcsherry_statement_re_copyright_9.7.2020-final.pdf. (last electronically accessed on Aug. 18, 2025).

a loose knowledge standard in combination with similarly loose "material contribution" standards. More specifically, these decisions have damaged "fair use" by holding that the mere receipt of a claim of infringement[25] (by way of a DMCA takedown notice) satisfies the knowledge element for contributory copyright infringement. For instance, in *Greer*, 83 F.4th 1283 at 1295, the Tenth Circuit held that Amici's receipt of a DMCA takedown notice satisfied the amorphous knowledge requirement and that his re-posting and criticism (arguably a quintessential[26] "fair use") of that takedown notice then comprised material contribution to direct infringement. Similarly, the lower court in this action found that notices of infringement or rather DMCA "claims"[27] of infringement along with the simple measures it could have taken in response (i.e., removing material or subscribers from its systems) were adequate to show "actual knowledge" of infringement. *Sony Music Ent.*, 464 F. Supp. 3d at 815. The court went on to further use such notices as grounds to justify a subsequent jury verdict of 1.5 billion dollars. *Id.* at 845.

It is hard to imagine that a judicially created cause of action with an amorphous and unpredictable standard of liability resulting in almost universal embrace of a

25. *Schneider v. YouTube, LLC*, 674 F. Supp. 3d 704, 720 (N.D. Cal. 2023).

26. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) ("We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use").

27. *Schneider v. YouTube, LLC*, 674 F. Supp. 3d 704, 720 (N.D. Cal. 2023).

robotic notice-and-takedown scheme, often abusive, and limiting of "fair use," somehow and nevertheless furthers the creativity and public good that is the very foundation of the Copyright Act itself. *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) ("[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public"). It is further hard to interpret the modern notice-and-takedown scheme as not expanding the copyright monopoly at the expense of the public – something the Copyright Act never envisioned and in fact ostensibly prohibits. *United States v. Paramount Pictures*, 334 U.S. 131 at 158 ("[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration."). Considering modern realities of notice and takedown it is furthermore increasingly difficult to square decisions by this Court that assert that copyright protections do not now conflict with First Amendment principles. *See Eldred v. Ashcroft*, 537 U.S. 186, 186–87 (2003) ("appeals court reasoned that copyright does not impermissibly restrict free speech …and it allows for 'fair use' even of the expression itself."); *see also Golan v. Holder*, 565 U.S. 302, 328 (2012) (same). The problem with such arguments is that while they were accepted at face value twenty years ago, they arguably are no longer valid in a notice-and-takedown world that often renders "fair use" a dead letter in practice and in which automated or robotic DMCA takedown notices are the norm rather than the exception.

In addition to the above concerns are concerns related to secondary monopoly or oligopoly expansion that have arguably been catalyzed by the DMCA. This is because DMCA compliance is not free. In fact, internet service

providers like YouTube and Google had already spent tens of millions of dollars on DMCA compliance software nearly a decade ago raising serious concerns about monopolistic impulses already well entrenched in the tech industry being exacerbated by the DMCA takedown regime.[28,29]

4. Reformation of the knowledge standard is essential and fair.

Reformation of the "knowledge" standard in contributory copyright infringement is essential. Reformation would reduce uncertainty and the wasteful litigation that uncertainty produces. Reformation would also hopefully allow internet service providers to enact less draconian DMCA notice-and-takedown policies thus increasing "fair use" since the legal exposure outside of the DMCA safe harbor would be more quantifiable. Providing a clearer knowledge standard would also better align the moral concepts behind tort law with its application to copyright. For instance, this Court has recently explored the nature of tort liability and stated

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28. Paul Sawers, *YouTube: We've invested $100 million in Content ID and paid over $3 billion to rightsholders*, VentureBeat (Nov. 7, 2018), available at https://venturebeat.com/mobile/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders (last electronically accessed Aug. 19, 2025).

29. Chris Sprigman & Mark Lemley, *Why Notice-and-Takedown is a bit of Copyright Law Worth Saving*, LA Times (Jun. 21, 2016) (The authors note that in order for Google to launch its own content filtering system the company has incurred a cost of $50 million), available electronically at https://www.latimes.com/opinion/op-ed/la-oe-sprigman-lemley-notice-and-takedown-dmca-20160621-snap-story.html (last electronically accessed Aug. 19, 2025).

that "both criminal and tort law typically sanction only 'wrongful conduct,' bad acts, and misfeasance. …Some level of blameworthiness is therefore ordinarily required." *Twitter,* 598 U.S. 471 at 488–89. Notwithstanding this Court's recent pronouncements on the culpability of non-feasance versus misfeasance, the current knowledge standard in contributory copyright infringement often assigns the meaning, if not the label, of "malfeasance" to activity which is more fairly described as "non-feasance". For instance, in both *Greer* and *Sony Music Ent.*, 464 F. Supp. 3d at 795 those courts used the receipt of DMCA takedown notices as evidence of knowledge of infringement. This occurred notwithstanding the fact that such a notice is the assertion of a claim of infringement rather than a statement of fact that infringement has occurred. *Schneider v. YouTube, LLC*, 674 F. Supp. 3d 704, 720 (N.D. Cal. 2023).[30]

What is in practice a constructive knowledge or "notice equals knowledge" standard has produced perverse results by the standards of *Twitter*. For instance, in *Greer* one of the elements of contributory infringement was allegedly satisfied by the arguably First Amendment (and anyway related "fair use") right to post and then criticize or parody a takedown notice. 83 F.4th at 1294. Similarly in *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011),

30. *See also* Laura A. Heymann, *Knowing How to Know: Secondary Liability for Speech in Copyright Law*, 55 Wake Forest Law Review 333, 357 (2020) (pointing out that receipt of a notice of infringement under the DMCA or otherwise is only "knowledge" in a legal sense of the word and further explaining that it is a prediction of legal status that is largely unknowable with any certainty before adjudication).

judgment rev'd in part, vacated in part, 714 F.3d 694 (2d Cir. 2013) the lower court had found a gallery showing works of a known "appropriation artist" Patrick Cariou liable for contributory copyright infringement based on the fact that as an "appropriation artist" the gallery had "constructive knowledge" of direct infringement even though on appeal the copying was ultimately deemed "fair use." *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), *holding modified by Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99 (2d Cir. 2021), and *holding modified by Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021).

5. At a minimum, this Court should implement the "actual knowledge" standard as recently defined in *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178 (2020).

As described *supra* the "knowledge" element of contributory copyright infringement has been problematic almost since its first appearance in 1911.[31] This has resulted in unfairness, e.g., potentially using the mere acknowledgement[32] of a takedown notice as evidence of knowledge when either prior authorization or fair use may render copying or reproduction completely lawful and even societally desirable.

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31. *Kalem*, 222 U.S. 55 at 62 (first introducing the knowledge element of secondary copyright infringement).

32. *See Greer*, 83 F.4th 1283 at 1295 (petitioner was found liable by virtue of the "knowledge" allegedly obtained when he received a DMCA takedown notice and then asserted fair use to criticize and parody same).

The "knowledge" element has sometimes been defined as "know" or "reason to know,"[33] other times "actual knowledge,"[34] and still other times a variation of each or something amorphous.[35] These loose standards coupled with the crippling liability[36] invite an obvious response – that any takedown notice will be complied with immediately whether justified or not. Even aside from fairness concerns, such a definition inhibits the fair use and transformation of copyrighted works and is inconsistent with the well-established U.S. policy of promoting internet vibrancy.[37] The over-censorship

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33. *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936, 943 (9th Cir. 2011).

34. *Luvdarts, LLC v. AT & T Mobility, LLC*, 710 F.3d 1068, 1072–73 (9th Cir. 2013).

35. *See e.g., BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 308 (4th Cir. 2018) ("Whether other mental states—such as negligence (where a defendant "should have known" of infringement)—can suffice to prove contributory copyright infringement presents a more difficult question.").

36. *See e.g., Sony Music Ent. v. Cox Commc'ns, Inc.,* 464 F. Supp. 3d 795, 847 (E.D. Va. 2020)*, aff'd in part, vacated in part, rev'd in part,* 93 F.4th 222 (4th Cir. 2024) (jury verdict for damages of 1.5 billion dollars for contributory infringement).

37. "It is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. §§ 230(b)(1); *see also Perfect 10, Inc. v. Visa Int'l Serv. Ass'n,* 494 F.3d 788, 794 (9th Cir. 2007) ("Congress has determined it to be the "policy of the United States—(1) to promote the continued development of the Internet and other interactive computer services and other interactive media [and] (2) to preserve the vibrant and competitive free

that it inadvertently produces also raise legitimate First Amendment concerns.[38] For these reasons this Court should finally and unequivocally endorse an "actual knowledge standard" for contributory copyright infringement. Given the aforementioned policy reasons as well as the traditionally low importance (or even disdain) for monopoly rights, it should furthermore explicitly give "actual" knowledge the restrictive meaning it recently embraced in *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178, 184-185 ("the word 'actual' meant what it means today: 'existing in fact or reality.' …The addition of 'actual' in § 1113(2) signals that the plaintiff's knowledge must be more than 'potential, possible, virtual, conceivable, theoretical, hypothetical, or nominal.'").

While such a clear definition of "actual knowledge" might upset rightsholders (and their lawyers), it should not be forgotten that "[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *United States v. Paramount Pictures*, 334 U.S. 131 at 158. Alternatively, the Court should go a

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market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation. … Congress expressed similar sentiments when it enacted the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512, one of the stated purposes of which was to 'facilitate the robust development and worldwide expansion of electronic commerce, communications, research, development, and education in the digital age.' S. Rep. 105–190, at 1–2 (1998).").

38. *See e.g., Bikram's Yoga Coll. of India, L.P. v. Evolation Yoga, LLC*, 803 F.3d 1032, 1037 (9th Cir. 2015) ("Copyright law incorporates First Amendment goals by ensuring that copyright protection extends only to the forms in which ideas and information are expressed and not to the ideas and information themselves.").

step further and eliminate the contributory infringement cause of action which it imprudently created and which has been unwieldy to apply.

6 At a minimum, this Court should introduce a firm scienter requirement as defined in *Twitter*.

Contributory copyright infringement is analogous to its criminal counterpart of "aiding and abetting." *In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003). This Court recently explored such civil tort liability in *Twitter*. In doing so it drew extensively from the framework in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). Specifically, this Court applied *Halberstam's* relative analysis of culpable conduct whereby the culpability elements are measured relative to one another. *Twitter* 598 U.S. 471 at 503–04. More specifically "that framework generally required …that the defendant have given knowing and substantial assistance to the primary tortfeasor. Notably, courts often viewed those twin requirements as working in tandem, [to establish a conscious, culpable participation in the tort] with a lesser showing of one demanding a greater showing of the other." *Twitter,* 598 U.S. 471 at 491-492 (cleaned up). This Court should implement the *Twitter/Halberstam* framework to contributory copyright infringement elements. This would better allow a party with a colorable fair use argument to be judged differently than a party with scienter as it is classically defined, i.e., as having "a mental state consisting in an intent to deceive, manipulate or defraud."[39] This would further likely weed out passive

39. *See Dekalb Cnty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 407 (2d Cir. 2016), *as amended* (Apr. 29, 2016) (*"Black's*

conduits of information such as those described in *Netcom*, 907 F. Supp. at 1374 (N.D. Cal. 1995) or *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 548 (4th Cir. 2004), while also leaving open the possibility that new technologies could be deemed "transformative" enough (at least in the absence of classic scienter) to allow for them to continue without liability. Such transformative technologies have begun to include the large language models needed for artificial intelligence making reformation of the secondary infringement concepts of the essence to national security.[40,41]

CONCLUSION

Contributory Copyright Infringement is a judicially created tort that adds to rightsholder protections present in the Copyright Act without any statutory basis. It suffers from Constitutional infirmities related to its genesis - the abrogation of legislative powers by the judiciary. The tort also results in the improper expansion of a copyright holders' monopoly and does so at the expense of the progress of science and useful arts, for instance transformative "fair use" – the very Constitutional basis for the Copyright Act. Because of this and further because

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Law Dictionary (10th ed. 2014) defining "scienter" in part as '[a] mental state consisting in an intent to deceive, manipulate, or defraud'").

40. *See e.g., New York Times Co. v. Microsoft Corp.*, 777 F. Supp. 3d 283 (S.D.N.Y. 2025) (holding that the New York Times plausibly alleged contributory infringement at the pleadings stage where Microsoft large language models used imports from news organization plaintiffs).

41. Exec. Order No. 14179, 90 C.F.R. 8741 (2025).

of fundamental issues of fairness or moral correctness, this Court should at very least reform the "knowledge" element of this tort and add a scienter element. Or, the Court should scrap this judicial innovation in its entirety and allow Congress rather than the courts to decide the ambit of contributory liability.

Respectfully submitted this 5th day of September 2025,

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