

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 OF *AMICI CURIAE* INTELLECTUAL
PROPERTY LAW SCHOLARS IN SUPPORT
OF PETITIONERS**

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QUESTIONS PRESENTED

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

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

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, *Amici* Intellectual Property Law Scholars respectfully submit this brief *amicus curiae* in support of Petitioners.¹ *Amici* teach and write about intellectual property at law schools across the United States. They have published extensive scholarship approaching copyright law from diverse perspectives. Appendix A lists the names and institutional affiliations (for identification purposes only) of all *amici*.

Amici's sole interest in this case is the orderly and logical development of the law for the benefit of society, particularly the proper use of common law tort principles in the construction and interpretation of contributory copyright liability. Accordingly, *amici* shall focus their brief on this issue and how it affects the question of liability.

SUMMARY OF ARGUMENT

This Court has before it an important opportunity to correct a significant error by the Fourth Circuit while bringing clarity to the law of secondary copyright liability.

1. Pursuant to Supreme Court Rule 37.6, *Amici Curiae* affirm that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. *Amici* further disclose that Boston College Law School has funded the printing, filing, and service costs associated with this brief through a supplementary grant supporting the *pro bono* work of Professor Alfred C. Yen, counsel of record for *amici*.

As *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* implied, secondary copyright liability should rest primarily on “rules of fault-based liability derived from the common law.” 545 U.S. 913, 934–35 (2005). This means that secondary copyright liability should adopt as its primary cause of action contributory infringement requiring intent or negligence, leaving a limited role for strict liability via vicarious infringement.

The Fourth Circuit failed to follow these principles by paying insufficient attention to the relationship between contributory copyright liability and its foundation in the common law of torts. In particular, the court imposed intentional tort liability on Petitioners without establishing the existence of intent within the meaning of tort law. This distorts the law of secondary copyright liability and risks the imposition of tort liability on future defendants without any finding of fault. *Amici* urge this Court to remedy these problems by reversing and clarifying the law as follows.

First, the Court should reinforce that secondary copyright liability causes of action must generally follow the “rules of fault-based liability derived from the common law” referred to in *Grokster*. *Id.* This begins with the observation that, of the two doctrinal variants of secondary copyright liability (vicarious liability and contributory liability), vicarious liability is a form of strict liability, while contributory liability represents fault-based liability. This makes contributory liability the primary form of secondary copyright liability, with vicarious liability applicable only in limited circumstances akin to *respondeat superior*.

Second, the Court should clarify the relationship between the doctrinal formulation of contributory

copyright liability and the common law of tort. Because the common law establishes two kinds of fault-based liability, contributory liability should follow the principles of intentional torts, negligence, or both. *See* Mark A. Geistfeld, *Conceptualizing the Intentional Torts*, 10 J. TORT L. (SYMPOSIUM ISSUE) 1, 2 (2017) (“Tort law is conventionally categorized in terms of the intentional torts, negligence-based rules, and strict liability.”); Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1257 (2001) (referring to Holmes’ division of tort law into three parts: “intentional, negligence-based, [and] strict liability”).

Third, this Court must correct the confusion and error that have resulted because the widely accepted formulation of contributory liability does not truly correspond to the common law of tort. This formulation, from the Second Circuit’s decision in *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.* (the “*Gershwin* formulation”), imposes liability on “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted). The formulation clearly adopts a fault rationale, but it fails to capture all of the requirements necessary for intentional tort or negligence liability. Rote application of the *Gershwin* formulation therefore leads to error.

To the extent that contributory liability adopts intentional tort principles, the formulation lacks a clear requirement of intent. This matters because intent is a prerequisite for intentional tort liability. Thus, if courts consider only whether the defendant is “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of

another,” they risk concluding that the defendant is an intentional tortfeasor without proof that the defendant acted with intent.

To the extent that contributory liability adopts negligence principles, the formulation does not require courts to consider whether the contributory defendant had a duty of care to the plaintiff or the reasonableness of the defendant’s behavior in light of the full circumstances in which the defendant acted. These omissions are critical because negligence depends on those circumstances. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 3 (A.L.I. 2010) (basic negligence rests on failure to exercise reasonable care under “all the circumstances”); Restatement (Second) of Torts § 283 (A.L.I. 1965) (referring to behavior of a “reasonable man under like circumstances” as the standard of conduct for negligence). Accordingly, to the extent that courts use contributory liability to establish negligence, they often rush to conclusions of liability before completing a proper negligence analysis.

The analytical errors caused by poor doctrinal formulation explain how and why the Fourth Circuit erred in this case. Like many courts, it tried to determine Petitioners’ potential liability by asking whether Petitioners knew about certain subscribers’ past infringement and materially contributed to future infringement by failing to terminate internet service. The court answered these questions affirmatively and imposed liability, concluding that Petitioners were intentional tortfeasors. In so deciding, however, the court failed to properly apply basic common law principles of intent, making its opinion superficially persuasive but wrong.

Unfortunately, the Fourth Circuit is not alone in its failure to analyze contributory copyright liability clearly. Many lower courts impose such liability without clearly identifying whether they are ruling on the basis of intentional tort or negligence. Accordingly, *amici* urge this Court not only to reverse the Fourth Circuit but also to clarify the law of contributory copyright liability so that future courts will not make similar mistakes.

ARGUMENT

I. CONTRIBUTORY COPYRIGHT LIABILITY SHOULD FOLLOW COMMON LAW RULES OF INTENTIONAL TORTS OR NEGLIGENCE

Copyright law contains two distinct forms of secondary copyright liability: vicarious liability and contributory liability. Although only contributory liability is before the Court, one must understand the relationship between these doctrines and common law rules of fault-based liability to properly resolve this case.

Describing this relationship begins with the observation that two general forms of common law tort liability exist: fault-based liability and strict liability. Fault-based liability may itself be further separated into intentional torts and negligence. *See* Geistfeld, *supra*, at 2 (“Tort law is conventionally categorized in terms of the intentional torts, negligence-based rules, and strict liability.”); Grey, *supra*, at 1257 (referring to Holmes’ division of tort law into three parts: “intentional, negligence-based, [and] strict liability”). This observation makes it possible to see how vicarious and contributory copyright liability fit into the framework of common law torts.

Vicarious liability exists when a defendant has the right and ability to supervise another's infringing behavior and a direct financial interest in that behavior. *See Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963) (stating that liability exists “[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials”); *see also Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996) (same); *Greer v. Moon*, 83 F.4th 1283, 1287 (10th Cir. 2023) (same). Note that vicarious liability turns on the nature of the relationship between the primary infringer and the secondarily liable defendant. Liability does not depend on what the secondarily liable defendant knows about the infringement or the defendant's state of mind. This makes vicarious liability a form of strict liability. *Cf. Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968) (stating that vicarious liability reflects “a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities,” not fault); Restatement (Third) of Torts: Apportionment of Liab. § 13 cmt. b (A.L.I. 2010) (offering rationales for vicarious liability, none of which require the defendant's fault).

Contributory liability exists when “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” *Gershwin*, 443 F.2d at 1162 (footnote omitted); *see also EMI Christian Music Grp., Inc. v. MP3Tunes, LLC*, 844 F.3d 79, 99–100 (2d Cir. 2016); *Cobbler Nev., LLC v. Gonzales*, 901 F.3d 1142, 1147 (9th Cir. 2018). Note that contributory liability depends on what the defendant

knew before acting to support another’s infringement. This is a clear invocation of fault. If the defendant has the appropriate knowledge, it can be held culpably responsible for another’s infringement. If the defendant did not have that knowledge, there can be no liability even if the defendant’s behavior supported the infringement. *See* Alfred C. Yen, *Third-Party Copyright Liability After Grokster*, 91 MINN. L. REV. 184, 215–16 (2006) [hereinafter Yen, *After Grokster*] (explaining contributory liability as a fault-based cause of action).

The differing theoretical bases for vicarious and contributory liability matter because the leading case of *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* referred to “rules of fault-based liability derived from the common law” to explain its interpretation of secondary copyright liability. 545 U.S. at 934–35. In that case, the Ninth Circuit affirmed the Central District of California’s grant of partial summary judgment in favor of the defendants, who distributed software that enabled the sharing of files over peer-to-peer networks and was used mostly to share copyrighted music and video files without authorization. *Id.* at 919–20, 927. In so ruling, the Ninth Circuit considered and rejected claims of vicarious liability and contributory liability. *Id.* at 927–28. This Court vacated the Ninth Circuit’s judgment, concluding instead that there was substantial evidence of contributory infringement. *Id.* at 941.

The *Grokster* Court used common law principles of tort to fashion an “inducement rule” for copyright law, holding that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps

to foster infringement, is liable for the resulting acts of infringement by third parties.” *Id.* at 936–37. Because substantial evidence of defendants’ intent to cause infringement by others existed, this Court remanded the case for reconsideration of contributory liability. *Id.* at 937–38 (noting behavior of the defendants “designed to stimulate others to commit violations”). This reasoning is critically important because it identifies fault as the principal justification for secondary copyright liability. *See* Yen, *After Grokster*, *supra*, at 227–29 (explaining how *Grokster* established fault as the primary basis for third-party copyright liability).

With that framework, both vicarious liability and contributory liability can be more easily understood. As an initial matter, because vicarious liability as expressed in *Shapiro* is a strict liability doctrine, courts should limit its application. Indeed, the common law of tort applies vicarious liability primarily in the context of employers of individuals behaving tortiously within the scope of their employment. This implies that courts should limit the application of vicarious copyright liability to analogous situations. *See* Dan B. Dobbs, Paul T. Hayden, & Ellen M. Bublick, *THE LAW OF TORTS* § 425 (2d ed. 2025) (stating that the most common kind of vicarious liability involves the negligence of employees acting within the scope of their employment); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 *Geo. L.J.* 1833, 1856–65 (2000) (explaining why courts should limit vicarious third-party copyright liability to situations involving employees acting within the scope of their employment, thereby excluding its application to internet service providers); Yen, *After Grokster*, *supra*, at 22–30 (same).

This leaves contributory liability as the primary form of secondary copyright liability. Because “rules of fault-based liability derived from the common law” create two kinds of tort liability (intentional torts and negligence), contributory copyright liability should likewise follow principles of intentional torts and negligence. This has meaningful implications for contributory liability’s intellectual architecture.

For contributory liability modeled on intentional torts, liability should require a showing of intent. The wrongfulness, in other words, lies in acting with the purpose of causing harm, because intentionally causing harm to another is simply wrong. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 1 cmt. a (A.L.I. 2010) (“There is a clear element of wrongfulness in conduct whose very purpose is to cause harm.”).² This understanding of contributory liability aligns with *Grokster*’s statement that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps to foster infringement, is liable for the resulting acts of infringement by third parties.” *Grokster*, 545 U.S. at 936–37.

For contributory liability modeled on negligence, liability no longer depends on intent. Instead, liability

2. The common law recognizes that intent also exists when a defendant acts with knowledge that a particular consequence is substantially certain to result. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 1 (A.L.I. 2010). However, this form of intent applies only to a narrow range of cases. *See id.* cmts. a, e (noting reasons to limit intent on the basis of knowledge that harm is substantially certain to result). *Amici* discuss the application of such intent to this case in Part III *infra*.

should turn on whether the defendant's behavior (such as continuing to provide internet service) was reasonable under the circumstances, assuming that the defendant owes a duty of care to the plaintiff in any individual case. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 3 (A.L.I. 2010) (basic negligence rests on failure to exercise reasonable care under "all the circumstances"); Restatement (Second) of Torts § 283 (A.L.I. 1965) (referring to behavior of a "reasonable man under like circumstances" as standard of conduct for negligence). Because negligence determinations frequently depend on the relative costs and benefits of precautions against risk, contributory liability determinations that rely on a negligence theory have no need to consider the defendant's state of mind; rather, the analysis should focus on risk and the burdens of prevention.

II. THE CURRENT DOCTRINAL FORMULATION OF CONTRIBUTORY LIABILITY DOES NOT ACCURATELY EXPRESS ITS COMMON LAW FOUNDATIONS

The contrasting fault-based foundations for contributory liability make it difficult, if not impossible, for a single doctrinal formulation to direct judicial attention to the correct prerequisites for liability. This should come as no surprise. The doctrinal formulation for battery differs considerably from that of negligence, so it makes sense to express those formulations separately. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 5 (A.L.I. 2010) (doctrinal formulation for intentional torts including battery); Restatement (Second) of Torts § 13 (A.L.I. 1965) (specific doctrinal formulation of battery); Restatement (Third) of Torts:

Liab. for Physical & Emotional Harm § 6 (A.L.I. 2010) (general cause of action for negligence); Restatement (Second) of Torts § 281 (A.L.I. 1965) (specific doctrinal formulation for negligence).

Nevertheless, courts have historically relied on a single formulation for contributory copyright liability that imposes liability on “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” *Gershwin*, 443 F.2d at 1162 (footnote omitted); *EMI*, 844 F.3d at 99–100; *Cobbler Nevada*, 901 F.2d at 1147. Despite its longevity, this formulation has never adequately captured the principles of intentional tort or negligence.

If the intentional tort were the foundation of contributory liability, one would expect to see a requirement of intent in its formulation. But the elements of knowledge and inducement, causation, or material contribution capture intent imperfectly at best. Even with the *Grokster* Court’s explicit recognition of intent as a requirement for inducement, there is plenty of room for a court to impose contributory liability by deeming the knowledge and causation or material contribution elements satisfied without ever properly establishing intent. Granted, a defendant could be deemed to have intent if it knows that infringement is substantially certain to result and nevertheless provides a material contribution to the infringement. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 1 (A.L.I. 2010) (a person acts to produce a consequence if he acts “knowing that the consequence is substantially certain to result”). But it is also true that one can knowingly and materially contribute to infringement without intending for it to happen. For

example, the electric power company knows that its provision of electricity will enable customers to commit copyright infringement, but the electric company does not intend for those customers to infringe. Accordingly, it is clear that the *Gershwin* formulation of contributory liability does not truly require the consideration of intent.

Similarly, if negligence were the foundation of contributory liability, one would expect the formulation to analyze the nature of the defendant's duty to the plaintiff and to test the reasonableness of the defendant's behavior in light of the circumstances in which the defendant acted. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 3 (A.L.I. 2010) (defining negligence as failure to exercise reasonable care under all the circumstances); Restatement (Second) of Torts § 283 (A.L.I. 1965) (referring to behavior of a "reasonable man under like circumstances" as standard of conduct for negligence). Yet, again, the *Gershwin* formulation fails to embody the necessary analysis. True, a defendant could be found negligent for knowing that there is a risk of infringement and failing to take reasonable precautions relating to its own contribution to that infringement, but that conclusion is not inevitable. To return to the previous example, the electric company may become aware of the risk that a customer will infringe, but the electric company is not negligently responsible for that infringement by failing to cut off electrical service.

The disconnect between contributory liability's formulation and the common law has brought confusion to the law. Courts applying the stated elements of contributory liability have reached conclusions without considering elements required by the common law. And,

even when they have referred to common law principles, they have sometimes used negligence principles to justify intentional tort conclusions. Two examples will illustrate.

In *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, the defendants operated a computer bulletin board service (“BBS”) where users could upload and download files, including image files. 982 F. Supp. 503, 505–06 (N.D. Ohio 1997). The plaintiff discovered that some of its copyrighted images were available on the BBS and sued, claiming, among other things, that the defendant was contributorily liable for infringement committed by users. *Id.* at 508. The court found for the plaintiffs on summary judgment. *Id.* at 515. The facts of the case were equivocal on the issue of intent. The defendants did encourage users to upload files, but they also had an employee review uploaded files for possible infringement. *Id.* at 506. Accordingly, it is doubtful that the defendants intended their users to infringe. In explaining its decision to grant summary judgment, the court quoted the *Gershwin* formulation. *Id.* at 514. It then provided a cursory analysis that mixed intentional tort and negligence in a manner that failed to establish either cause of action.

The court began by noting the defendants’ admission that they encouraged subscribers to upload information. *Id.* This appears to be an assertion that the defendants intentionally supported infringement. However, the court did not explain how encouraging subscribers to upload files (as opposed to *infringing* files) established an intent to cause infringement. Instead of directing its analysis toward whether defendants knew that subscribers were infringing, the court turned instead to the defendants’ awareness of risk. *Id.* (referring to

defendants’ “constructive knowledge that infringing activity was *likely* to be occurring” (emphasis added)). This implies that the defendants were liable because they failed to take precautions against a risk of infringement, which clearly sounds in negligence. The result is a decision that failed to properly consider either intentional torts or negligence. With respect to intentional tort, the court never fully explained how defendants intended to cause infringement. With respect to negligence, the court never explained how circumstances rendered the defendants’ behavior unreasonable. And even worse, the court granted summary judgment despite its flawed and incomplete analysis.

Similarly, in *Perfect 10 v. Amazon, Inc.*, the Ninth Circuit considered a contributory liability claim against a search engine operator. 508 F.3d 1146, 1168–73 (9th Cir. 2007). In deciding to remand the case to the district court for further fact finding, the court started from *Grokster*’s adoption of intentional tort liability. *Id.* at 1170–71. The court correctly noted that the law sometimes imputes intent to a defendant who acts knowing that tortious injury is substantially certain to result. *Id.* Next, the court declared that its contributory liability jurisprudence rested on intentional tort principles consistent with *Grokster*, citing the *Gershwin* formulation as the governing rule. *Id.* at 1172. The court then used the *Gershwin* formulation to fashion a rule that contributory liability applies to a computer system operator who has actual knowledge of specific infringement and fails to take “simple measures” to prevent infringement. *Id.*

This simple measures test may be sensible, but it is completely inconsistent with intentional tort principles.

The Ninth Circuit may have thought that knowledge and failure to take simple measures establishes a defendant's intent, but it failed to explain how these elements established a defendant's purpose to cause infringement or acting with knowledge that infringement was substantially certain to occur. Indeed, the test seems to follow the logic of negligence because negligence cases frequently analyze the reasonableness of precaution in the face of risk. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 3 cmt. e (A.L.I. 2010) (describing a risk-benefit test for negligence, "where the 'risk' is the overall level of the foreseeable risk created by the actor's conduct and the 'benefit' is the advantages that the actor or others gain if the actor refrains from taking precautions"). In short, the *Gershwin* formulation of contributory liability led the Ninth Circuit to confuse the imputation of fault under negligence principles with the imputation of fault under intentional torts. This is no trifling matter because negligence does not establish intent. The simple measures test therefore opened the door to imposing intentional tort liability on defendants who were merely negligent; it is impossible to understand the test as properly applying the doctrine of intentional torts.

Not surprisingly, many cases exhibit the confusion and error found in *Playboy Enterprises* and *Perfect 10*.³ Judges

3. Other cases exhibiting similar problems include: *In re Aimster Copyright Litigation*, 334 F.3d 643, 645–46, 653 (7th Cir. 2003) (analogizing contributory liability to intentional torts and later stating that "to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses"); *UMG Recordings, Inc. v.*

follow doctrine when analyzing cases, and following the *Gershwin* formulation practically guarantees mistakes. Indeed, this is exactly what happened in the case at hand.

III. THE FOURTH CIRCUIT’S DECISION VIOLATED COMMON LAW RULES OF FAULT DEFINING INTENTIONAL TORTS

The Fourth Circuit’s opinion replicates the mistakes caused by the problematic formulation of contributory copyright liability. In affirming a jury verdict that imposed contributory liability on Petitioners, the court adopted the *Gershwin* formulation, finding that liability existed because Petitioners had knowledge of its subscribers’ future infringement (based on the MarkMonitor notices it received) and materially contributed to that infringement. *Sony Music Ent. v. Cox Commc’ns, Inc.*, 93 F.4th 222, 233 (4th Cir. 2024) (quoting formulation of contributory liability from *Gershwin*). The court also characterized Petitioners as intentional tortfeasors, finding them liable for willful contributory infringement and citing *Grokster* for the proposition that “what matters is ... whether the product is distributed with the *intent* to cause copyright infringement.” *Id.* at 236 (internal quotations omitted, emphasis original). The court further explained that “supplying a product with knowledge that the recipient will use it to infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement.” *Id.*

Grande Communications Networks, L.L.C., 118 F.4th 697, 719–20 (5th Cir. 2024), *petition for cert. filed*, Sup. Ct. No. 24-967 (Mar. 6, 2025) (combining analysis of willful contributory infringement with simple measures test); and *Fonovisa*, 76 F.3d at 264 (applying the *Gershwin* formulation without explaining whether intent or negligence was at issue).

The Fourth Circuit understandably followed the elements of the *Gershwin* formulation and assumed that those elements established the intentional tort liability called for in *Grokster*. However, the common law definition of intent shows that this assumption was wrong.

The Restatement (Third) of Torts expresses the common law definition of intent:

A person acts with the intent to produce a consequence if:

- (a) the person acts with the purpose of producing that consequence; or
- (b) the person acts knowing that the consequence is substantially certain to result.

Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 1 (A.L.I. 2010). This dual definition establishes two distinct versions of intent. Part (a) corresponds to culpability arising when the defendant acts for the purpose of causing infringement, while Part (b) corresponds to culpability that exists when a defendant lacks the purpose of producing a consequence but acts knowing that his actions make the consequence substantially certain to occur.

Culpability exists when a defendant acts with the goal of causing tortious injury because it is wrong to act for the purpose of injuring another. *See id.* § 1 cmt. a (“There is a clear element of wrongfulness in conduct whose very purpose is to cause harm.”). When a defendant

acts knowing that injury is substantially certain to follow, culpability exists because the defendant's behavior has only one consequence—namely, tortious injury. Accordingly, when such a defendant deliberately acts, he becomes culpably responsible for the consequences at a level comparable to someone who acted for the purpose of causing the consequence. The common law therefore treats him as an intentional tortfeasor. For example, in the iconic case of *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955), the Washington Supreme Court held that the defendant (a minor child) could be liable for battery if he pulled a chair away from the plaintiff who was in the process of sitting down, even if the defendant claimed he did not want the plaintiff to fall or suffer injury. Gravity meant that the plaintiff's fall was the substantially certain consequence of pulling away the chair, making the defendant responsible as an intentional tortfeasor. *Id.* at 1094.

The extension of intentional tort liability through knowledge that the consequence is substantially certain to result implies that courts must be careful to ensure that such liability exists only when a defendant's knowledge renders it as culpable as an actor who wanted tortious injury to occur. This is why the Restatement (Third) of Torts states that “[t]he substantial-certainty definition of intent requires an appreciation of its limits.” Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 1 cmt. e (A.L.I. 2010). Two limits are particularly germane to this case.

First, substantial certainty means that the defendant has no reason to doubt that its behavior would cause tortious injury. Awareness of a high probability that injury could occur is not enough. When one pulls a chair

away from a person who is sitting down, that person is substantially certain to fall down.⁴ Other outcomes may be imagined, but they require disregard for the laws of physics. *See Garratt*, 279 P.2d at 1093–94 (awareness of “very grave risk” insufficient to establish substantial certainty); Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 1 cmt. c (A.L.I. 2010) (“[I]t is not sufficient that harm will probably result from the actor’s conduct; the outcome must be substantially certain to occur.”); *In re Taneff*, 190 B.R. 501, 508 (W.D.N.Y. 1996) (distinguishing recklessness from knowledge with substantial certainty).

Second, and relatedly, “substantially certain to result” does not encompass certainty that arises because the defendant’s behavior creates repeated instances of risk. Operating a railroad carries a repeated risk of injury. Those who operate railroads have general knowledge that some future injury will occur as a result of their activities, given the law of large numbers. Gun manufacturers know that that someone will eventually suffer a gunshot wound from one of the guns they sell. Tort law does not treat any of these actors as intending the injuries that result and therefore does not consider each injury to be a battery. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 1 cmt. e (A.L.I. 2010) (explaining narrow understanding of knowledge with substantial certainty); *Shaw v. Brown & Williamson Tobacco Corp.*, 973 F. Supp. 539, 541–42 (D. Md. 1997)

4. Note that physical injury is not required as the consequence because the tort of battery recognizes injury for offensive contact, which would occur upon falling to the ground. *See* Restatement (Second) of Torts § 18 (A.L.I. 1965) (recognizing cause of action for battery on the basis of offensive contact).

(rejecting plaintiff’s claim that cigarette manufacturers committed battery because they knew with substantial certainty that cigarette smoke would affect non-smokers). Rather, “substantially certain to result” means that the defendant cannot disclaim responsibility for the inevitable consequence of a single instance of risk so high that injury becomes certain. Only then does tort doctrine consider the defendant an intentional tortfeasor.

The foregoing shows that the proper application of contributory liability requires close attention to forms of intent defined by both Part (a) and Part (b). When, as described in *Grokster*, a defendant acts for the purpose of causing infringement, the defendant becomes an intentional tortfeasor within the meaning of Part (a). *Grokster*, 545 U.S. at 936–37 (establishing liability when a defendant acts for the purpose of causing infringement by others). Similarly, if a defendant knows that infringement is substantially certain to result from its behavior—giving “substantially certain” the “practically inevitable” meaning described above—it becomes an intentional tortfeasor within the meaning of Part (b). Unfortunately, the Fourth Circuit imposed intentional tort liability on Petitioners without properly analyzing either of these possibilities.

As an initial matter, there is no evidence that Petitioners acted with intent under Part (a). Petitioners did not communicate any messages persuading their subscribers to infringe or provide internet service with the goal that their subscribers would infringe. Petitioners may have understood that subscribers might infringe, or even that some subscribers were likely to infringe, but that does not mean that Petitioners intended for them

to infringe. Indeed, Petitioners took steps to decrease subscriber infringement and prevent repeat infringement. *Sony Music Ent.*, 93 F.4th at 237 (acknowledging anti-infringement efforts of Petitioners in the record). Accordingly, the Fourth Circuit could not have properly concluded that Petitioners acted for the purpose of causing subscribers to infringe.

Additionally, although the court referenced the Part (b) definition of intent, it did not establish that Petitioners acted with that form of intent. The Fourth Circuit found that notices from MarkMonitor established Petitioners' knowledge that infringement was "substantially certain to result" as a matter of law. *Id.* at 234 (accepting district court's conclusion that MarkMonitor notices established the knowledge element of contributory liability "as a matter of law"). At first inspection, this reasoning may be appealing. After all, Respondents might argue, if Petitioners received numerous notices that certain subscribers had uploaded or downloaded copyrighted files, Petitioners arguably would have knowledge that those subscribers would be substantially certain to infringe again if they continued to get internet service.

But to see the error in this reasoning, remember that Petitioners could have Part (b) intent only if they knew that continued provision of internet service would be substantially certain—not merely substantially likely—to cause a MarkMonitor-identified subscriber to infringe again. The facts of this case show that the Fourth Circuit had no plausible basis for reaching such a conclusion.

As an initial matter, the most that MarkMonitor notices could establish is that particular accounts were

used to commit infringement in the past, and even this is debatable. *See* Laura A. Heymann, *Knowing How to Know: Secondary Liability for Speech in Copyright Law*, 55 WAKE FOREST L. REV. 333, 356–57, 364–67 (2020) (explaining that a defendant does not know that infringement has occurred simply because defendant has received a notice alleging infringement); *cf.* 17 U.S.C. §§ 512(c)(1), (g) (establishing safe harbor from liability for service providers and distinguishing receipt of notice of claimed infringement from actual knowledge of infringement). Regardless, the use of an account for infringement does not establish that the account is substantially certain to be used that way in the future. All the notice can do is provide a basis upon which one might infer an elevated *risk* of future infringement when compared to an account not associated with prior infringement. That risk may be very high, but that is not enough to establish substantial certainty.

Even if one believed that the risk of future infringement on accounts identified by MarkMonitor was so high that infringement was substantially certain to occur, that inference would be appropriate only if no other evidence affected the strength of the prediction. In this case, the Fourth Circuit acknowledged that the record reflected anti-infringement efforts by Petitioners that Petitioners considered successful. *Sony Music Ent.*, 93 F.4th at 237. At the very least, these efforts suggest that infringement was not substantially certain to occur within the meaning of intentional tort doctrine because Petitioners' anti-infringement efforts reduced the likelihood that any particular account would be used for infringement again. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 1 cmt. c (A.L.I. 2010) (stating that

defendant must know that harm is substantially certain to occur).

Finally, any argument that substantial certainty existed because Petitioners knew that some fraction of the identified accounts would be used for future infringement also fails because substantial certainty of a future act's occurrence cannot be established by aggregating individual instances of less-than-certain risks. Such aggregation would create effective strict liability for those conducting socially valuable activities that create the risk of injury, like the operation of railroads or the provision of electricity. This would be completely at odds with the common law rules of fault that govern secondary copyright liability and with Supreme Court precedent.

IV. THIS COURT SHOULD REVERSE THE FOURTH CIRCUIT AND PROVIDE DOCTRINAL CLARIFICATION SO THAT FUTURE COURTS MAY AVOID ERROR

The Fourth Circuit committed clear error by failing to adequately square its decision with “rules of fault-based liability derived from the common law.” Moreover, its mistake was not unique to this case; multiple lower courts have analyzed contributory liability without discussing fault. This Court must therefore reverse the Fourth Circuit and provide doctrinal guidance that steers lower courts away from future error.

These errors happen because the *Gershwin* formulation for contributory liability leads courts astray. As noted earlier, this formulation, despite having been adopted by dozens of courts, ultimately fails because it is probably

impossible to define intentional tort and negligence causes of action in a single rule. Accordingly, it would make sense to abandon the single definition of contributory liability in favor of separate formulations based on intentional torts and negligence.

For contributory liability based on intentional tort (potentially labeled “intentional contributory infringement”), this Court should modify the *Gershwin* formulation to include a clear requirement of intent. For example, an appropriate rule could impose liability on “one who acts with the purpose of inducing or causing infringement, or who acts knowing that another’s infringement is substantially certain to result.” The use of language reflecting the Restatement’s definition of intent, along with *Grokster* and additional guidance from this Court, will ensure that future courts make determinations of intent when deciding contributory copyright liability cases. Any reference to the defendant’s material contribution can be omitted because intentional tort liability depends only on purpose or knowledge of substantially certain consequences.

For contributory liability based on negligence (potentially labeled “negligent contributory infringement”), this Court should set forth a new test that imposes liability on “one who has a duty to take reasonable care, fails to take reasonable precautions under the circumstances, and proximately causes the infringing conduct of another.” This test improves the *Gershwin* formulation by substituting negligence and proximate causation for knowledge and material contribution.

The explicit use of “reasonable precautions under the circumstances” allows the law of contributory liability

to benefit from the accumulated common law wisdom of ordinary negligence cases. In particular, it eschews liability based on wooden elements like knowledge and material contribution in favor of liability based on whether the defendant's behavior was reasonable in light of all the circumstances in which the defendant acted. This is important because knowledge and material contribution alone may not reliably identify if a defendant has been negligent. For example, in the case at hand, one could hypothetically concede that Petitioners knew of certain subscribers' past infringement and materially contributed by providing internet service while still finding that Petitioners did not behave negligently under the circumstances. The reason for this is twofold.

First, Petitioners did not continue internet service without taking precautions against future infringement by subscribers. As the Fourth Circuit acknowledged, the record reflects that Petitioners implemented anti-infringement efforts that they considered successful. *Sony Music Ent.*, 93 F.4th at 237. These efforts change the circumstances in which Petitioners acted because they lowered the risk of infringement associated with continued internet service. If they lowered the risk enough, continued provision of internet service would become reasonable.

Second, the application of *Gershwin's* inflexible logic did not account for the consequences of terminating internet service and therefore whether such an action would constitute a *reasonable* precaution. In today's society, people rely on the internet to conduct important life activities. Individuals use the internet to facilitate banking, to engage in work, to sell goods and service, to access medical care, and to communicate with loved

ones. Hospitals use the internet to provide lifesaving care. Banks use it to access data vital to the world economy. Even courts conduct crucial business over it. This matters because it shows that discontinuing internet service is not cost-free, and negligence determinations depend on a balancing test that compares the risk created by the actor's conduct (i.e., the allegedly negligent act) to the benefits that arise if the actor refrains from taking precaution (i.e., benefits that exist because of the allegedly negligent act). *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 3 cmt. e (A.L.I. 2010) (describing a risk-benefit test for negligence, "where the 'risk' is the overall level of the foreseeable risk created by the actor's conduct and the 'benefit' is the advantages that the actor or others gain if the actor refrains from taking precautions"). Accordingly, under negligence law, the decreased copyright infringement associated with discontinuing internet service must be balanced against the losses caused by discontinuation. *Cf. Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (absolving defendant of contributory copyright liability because of non-infringing uses associated with defendant's technology).⁵ These consequences could be quite grave.

If the subscriber was a person whose child used the service to infringe, the entire household would be deprived

5. *Grokster*'s admonition for courts to be mindful of the "*Sony* safe harbor" illustrates the importance of thoroughly analyzing the circumstances of the defendant's behavior. As the Court elaborated, a defendant's mere failure to prevent infringement does not establish fault if technology distributed by the defendant is capable of substantial noninfringing uses. *Grokster*, 545 U.S. at 939 n.12. Those noninfringing uses are circumstances that affect whether fault exists. If those circumstances were not considered, a different result might be reached.

of necessary services, and a family member might lose her job for failing to complete a work assignment. If the subscriber was a hospital whose network was used by a patient to infringe, a surgeon at the hospital might not find out that a heart had just become available for transplant. If the subscriber was a bank whose network was used by an employee to infringe, the entire financial institution might face losses until its internet access could be restored. As serious as copyright infringement is, a jury or court might conclude that losses of the sort described here are worse, particularly given the very common scenario in which multiple users have access to a single internet service account. At the very least, the common law requires consideration of this possibility before a conclusion about negligence can be reached as a matter of law.

To be clear, *amici* do not take a position on the ultimate question of negligent contributory infringement liability in this case, given that the record was not developed with the appropriate framework in mind. It is evident, however, that future courts will repeat the Fourth Circuit's error unless it is clear that negligent contributory liability cannot exist without full consideration of the relevant circumstances.⁶

6. The varying contexts in which secondary copyright liability cases arise underscore the importance of emphasizing the particular circumstances of the defendant's behavior. For example, where the defendant's activity is not the provision of internet service but, rather, the hosting of third-party content, the costs associated with an identified precaution—such as taking down clearly infringing material—might well be less serious than those of terminating internet service. Of course, in either scenario, the analysis of the relevant circumstances would only be necessary if the defendant failed to qualify for the safe harbor provided by 17 U.S.C. § 512.

Proximate cause is also important to include because proximate cause is a fundamental limit to the reach of negligence liability.⁷ A defendant's failure to take reasonable care will often combine with the acts of other individuals, random events, and unforeseeable circumstances to cause injury to a plaintiff. Proximate cause requires courts to examine whether the plaintiff's injury truly resulted from foreseeable, rather than remote, risks of a tortfeasor's behavior before imposing liability. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 29 (A.L.I. 2010). This includes relieving defendants from liability caused by independent acts. *Id.* § 34. *Cf. Perfect 10, Inc. v. Visa Int'l Serv., Ass'n*, 494 F.3d 788, 800 (9th Cir. 2007) (rejecting, under *Gershwin*, the argument that payment processors materially contributed to infringement because "the infringement stems from the failure to obtain a license to distribute, not the processing of payments").

CONCLUSION

The Fourth Circuit's decision below represents a grave threat to the proper development of the law of secondary copyright liability. By rushing to characterize Petitioners as intentional tortfeasors, the court fashioned an opinion at odds with the "rules of fault-based liability derived from the common law" that this Court has chosen

7. Courts may also, over time, develop other limits to the reach of negligent contributory liability just as they have done in ordinary negligence law. For example, courts may limit or even eliminate duties of care when public policy considerations so dictate. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 7(b) (A.L.I. 2010) (expressing the principle that, in "exceptional cases," courts may eliminate or limit duties of care for reasons of public policy).

to guide the law. This has opened the door to overbroad litigation against defendants without requiring plaintiffs to meet their burden of proof.

According to the Fourth Circuit, anyone who provides meaningful support to infringers becomes liable as an intentional tortfeasor upon receiving complaints about the infringing activity. By endorsing the proposition that MarkMonitor notices alone established knowledge that future infringement was substantially certain to occur, the court effectively held that copyright holders can make the provider of any material service liable for infringement simply by sending enough notices alleging infringement. Mere continuation of service would turn any provider into an intentional tortfeasor.

Affirming the decision below would have troubling consequences. Many entities provide support to those who commit copyright infringement. The electric company supported every one of Petitioners' infringing subscribers. Some of those infringers likely stored infringing files on servers provided by cloud storage companies. Infringers may have committed infringement in rented apartments, in hotels, or in coffee shops that provide internet service. It would be startling for a court to hold that each of these businesses was contributorily liable for infringement because it failed to terminate an infringing customer's access to their services upon being informed of infringement. Nevertheless, the Fourth Circuit's logic opens all these potential defendants to litigation because the court failed to take due account of fault.

The Fourth Circuit and numerous other courts have and will continue to make errors like this because the *Gershwin* formulation for contributory liability does not

properly correspond to “rules of fault-based liability derived from the common law.” It is therefore imperative that this Court reverse the decision below and clarify the law to avoid future error.

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Respectfully submitted,

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APPENDIX

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