

No. 24-171

IN THE
Supreme Court of the United States

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

v.

SONY MUSIC ENTERTAINMENT, ET AL.,
Respondents.

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

**BRIEF OF *AMICUS CURIAE*
PROF. BRUCE E. BOYDEN
IN SUPPORT OF RESPONDENTS**

BRUCE E. BOYDEN
Counsel of Record
MARQUETTE UNIVERSITY LAW
SCHOOL
P.O. Box 1881
Milwaukee, WI 53201-1881
(414) 288-5492
bruce.boyden@marquette.edu

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INTEREST OF THE *AMICUS*

Amicus is a professor of law who teaches and writes about copyright law, including secondary liability. His sole interest is in the sound development of copyright law.¹

SUMMARY OF THE ARGUMENT

This case presents the Court with an opportunity to clarify a doctrine that has received only desultory formulation in the lower courts for more than a century. The lack of explication has become increasingly problematic as lower courts have struggled with the question of how to apply contributory liability precedents from the twentieth century to the fact patterns of today.

The answer is perhaps counterintuitive: secondary infringement doctrine needs to return to its roots in tort law. Courts have long recognized that copyright infringement is a species of tort and have thus borrowed from tort principles to define secondary liability. Elaboration of the influential *Gershwin* test for contributory infringement, which was applied below, should follow the well-developed framework of civil aiding and abetting liability in tort law. *See Gershwin*

¹ No counsel for a party authored this brief in whole or in part, and no person made a monetary contribution to the preparation or submission of this brief other than the *amicus*. *Amicus*'s university affiliation is provided for contact purposes only; neither Marquette University nor Marquette University Law School have adopted any position on this case.

Pub'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159 (2d Cir. 1971); Pet. App. 20a-21a; Restatement (Second) of Torts § 876(b) (A.L.I. 1979). The *Gershwin* test already closely parallels aiding and abetting in its basic outlines. Both require (1) knowledge of another's plan or pattern of tortious activity, and (2) material contribution to—or synonymously, substantial assistance for—that activity. What tort law can provide copyright is greater certainty as to the requisite mental state and a framework for determining when conduct does and does not provide “substantial assistance” (or “material contribution”).

First, tort law confirms the position taken in the majority of contributory copyright infringement cases, which is that knowledge is the required mental state for defendants, not intent. *See* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §13E.03[B][2][a] (Oct. 2025) (Nimmer). Although the cases are not uniform, tort law has settled on the same position for aiding and abetting. *See* Restatement (Second) of Torts § 876(b). A secondary actor may be contributorily liable for infringement or a tort when that actor knows that a particular third party's conduct constitutes wrongdoing. The defendant need not desire the infringing outcome or be substantially certain it will occur; knowledge of the infringer's pattern or plan is sufficient.

The knowledge standard is particularly appropriate for contributory liability because in both copyright

law and tort law it depends on the defendant's prediction of future third-party conduct based on the third party's past statements or actions. Thus courts in both realms have provided for liability based on the defendant's having knowledge or reason to know of the third party's imminent wrongdoing. In both copyright and tort, that knowledge must be based on either the fact that the defendant's assistance can *only* further wrongdoing, or on facts learned about a particular person's plan to engage in wrongdoing. Such knowledge can be supplied by notice to the defendant, but only if that notice is accompanied by other indicia of reliability, as was the case here.

Civil aiding and abetting law can do even more to help clarify the "material contribution" requirement of the *Gershwin* test. Rather than attempting to determine the existence of "direct connections" or "indispensability," courts should instead consider the factors from *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983): the nature of the encouraged act, the amount and kind of assistance, the defendant's presence, the relationship to the wrongdoer, the defendant's state of mind, and the duration of assistance. *Id.* at 483-84. This more nuanced inquiry can better draw lines between necessary but insubstantial contributions to wrongdoing and routine but significant contributions. Where a business knows little about particular acts of wrongdoing and supplies a product or service to the general public that is widely used for legitimate purposes, substantial assistance will not be found. But

where the business has more targeted knowledge of wrongdoing, and continues to supply a good or service that importantly aids in that wrongdoing, substantial assistance may exist.

The jury below received proper instructions on the *Gershwin* test and ample evidence on both elements of the test, even though knowledge had already been resolved on summary judgement. Indeed, both parties presented evidence to the jury that covered all of the *Halberstam* factors, some of it weighing in favor of substantial assistance and some against. After twelve days of trial, the jury sided with the plaintiffs. Its verdict of contributory liability should be affirmed, and the Court should guide lower courts to look more to common law tort principles in future contributory infringement cases.

ARGUMENT

I. **Contributory Infringement Liability in Copyright Law Should Be Guided by the Scope of Aiding and Abetting Liability in Tort Law**

As courts have held since the nineteenth century, copyright infringement is a species of tort. *See Ted Browne Music Co. v. Fowler*, 290 F. 751, 754 (2d Cir. 1923); *Lawrence v. Dana*, 15 F. Cas. 26, 61 (C.C.D. Mass. 1869) (No. 8,136); *see also Wallace v. Holmes*, 29 F. Cas. 74, 80 (C.C.D. Conn. 1871) (No. 17,100) (describing patent infringers as “tort-feasors”). Accordingly, courts deciding infringement cases have long borrowed from tort law to delineate secondary liability doctrines, including contributory infringement, even in the absence of express statutory provisions. In one early case, the court held that the seller of a printing plate who knew it would be used for copyright infringement was liable for “acting in concert” with the purchaser. *Harper v. Shoppell*, 28 F. 613, 615 (C.C.S.D.N.Y. 1886). A decade later, then-Judge Taft similarly justified contributory liability for patent infringement as akin to the rule “[f]rom the earliest times” of holding those who aid and abet a trespass jointly liable. *Thomson-Houston Elec. Co. v. Ohio Brass Co.*, 80 F. 712, 721 (6th Cir. 1897); *see also* Giles S. Rich, *Infringement under Section 271 of the Patent Act of 1952*, 21 Geo. Wash. L. Rev. 521, 525 (1953).

In copyright law, contributory infringement ultimately received its canonical formulation in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir. 1971). Invoking “the

common law doctrine that one who knowingly participates or furthers a tortious act is jointly and severally liable with the prime tortfeasor,” the *Gershwin* court identified two elements for contributory liability: (1) “knowledge of the infringing activity;” and (2) “induc[ing], caus[ing], or materially contribut[ing] to the infringing conduct of another.” *Id.* at 1162 (quoting *Screen Gems–Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966)). The court provided little further elaboration of these elements other than quoting this Court’s statement in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), that “mere quantitative contribution cannot be the proper test” for copyright liability; rather, the defendant’s role in the activity must be considered in context. *Id.* at 397.

Despite *Gershwin*’s reference to inducement and causation, lower courts quickly reduced the second element to “material contribution.” *See, e.g., Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996). This Court’s decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), ultimately clarified that inducement of infringement would also suffice for secondary liability. *Id.* at 930.² Inducement, like civil conspiracy, requires the defendant to intend the accomplishment of a shared goal, such as by agreement. *See* Restatement (Second) of Torts § 877 cmt. a (A.L.I. 1979) (inducement liability applies to intended result); *Twitter, Inc. v. Taamneh*,

² Knowingly “causing” a copyright infringement through an *immaterial* contribution has never been held to be sufficient for contributory liability.

598 U.S. 471, 489–90 (2023) (civil conspiracy requires agreement). The *Grokster* decision, however, did not abandon the *Gershwin* framework, as evidenced by the fact that *Gershwin* was cited approvingly in the very same sentence that defined inducement, *Grokster*, 545 U.S. at 930. *Grokster*, like *Sony* before it, “was never meant to foreclose rules of fault-based liability derived from the common law.” *Id.* at 934–35 (discussing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)).

In recent years, courts have struggled to apply *Gershwin*’s two elements to cases involving digital technology. See Mark Bartholomew & Patrick F. McArdle, *Causing Infringement*, 64 Vand. L. Rev. 675, 678 (2011) (*Gershwin* test “has fallen into analytic disrepair”). For example, some lower courts have looked for evidence of intent in *all* contributory infringement cases, not just those involving inducement. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1171 (9th Cir. 2007) (basing contributory liability on “intentionally encouraging direct infringement [by] knowingly tak[ing] steps that are substantially certain to result in such direct infringement”). Other courts have instead held that actual or constructive knowledge is sufficient. See 4 Nimmer § 13E.03[B][2][a] (Oct. 2025). The Fourth Circuit decision below at times cited intent as the required scienter, and other times “actual knowledge” of infringement. Compare Pet. App. 21a (referring to “the intent necessary to prove contributory infringement”) with *id.* at 26a (referring to “actual knowledge”).

With respect to material contribution, lower courts have reached varied conclusions on whether a causal factor in infringement is “material.” In a pair of cases in 2007, the Ninth Circuit struggled to explain why linking to an infringing website in search results could be a material contribution, but processing credit card payments for such sites was not. *Compare Amazon.com*, 508 F.3d at 1172 (search engine “substantially assists” infringing sites find a worldwide market) *with Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 796 (9th Cir. 2007) (payment processors “have no direct connection” to infringement). In the decision below, the Fourth Circuit cited the “indispensab[ility]” of Cox’s internet service and its failure to address infringement—the sort of “quantitative contribution” that *Fortnightly* (and *Gershwin*) discouraged. Pet. App. 26a; *see also* Alfred C. Yen, *Torts and the Construction of Inducement and Contributory Liability in Amazon and Visa*, 32 Colum. J.L. & Arts 513, 527 (2009) (noting that power companies also provide essential services to infringers).

The path out of this swamp is to follow the more detailed guide established for aiding and abetting liability in tort law. With roots extending back to the fourteenth century, *see United States v. Peoni*, 100 F.2d 401, 402–03 (2d Cir. 1938), civil aiding and abetting liability has been explicated through three editions of the Restatement of Torts and has been recognized in some fashion in at least thirty states. *See* Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 Bus. Law. 1135, 1139–40 (2006). The *Gershwin* formulation for contributory infringement is

strikingly similar to the elements of civil aiding and abetting as they developed over the course of the twentieth century.³ First, *Gershwin* requires knowledge of the infringing activity, just as aiding and abetting liability typically requires knowledge that a third party's conduct "constitutes a breach of duty." Restatement (Second) of Torts § 876(b) (A.L.I. 1979). Second, *Gershwin* requires material contribution to the infringing activity—"material" meaning "important" rather than "physical"—just as civil aiding and abetting liability requires "substantial assistance." See 4 Nimmer § 13E.03[B] ("[T]he contribution to the direct infringement must be *substantial*"). Courts have over time developed a set of factors to help guide the inquiry into whether a defendant has provided "substantial assistance," but as this Court has recently held, the critical determination is whether the defendant's "participation in another's wrongdoing ... is both significant and culpable enough to justify attributing the principal wrongdoing to the aider and abettor." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 504 (2023).

Contributory infringement liability would therefore benefit from borrowing the framework elaborated for aiding and abetting liability: a scienter of knowledge of a third party's infringing activity, and a set of factors to help determine if a defendant's

³ Contributory infringement has sometimes been described as emerging from the much more recent concept of enterprise liability, but that is an error. See 6 William F. Patry, *Patry on Copyright* § 21:44 (2025) (refuting the connection).

contribution was material enough to justify attributing the direct infringer's wrongdoing to the defendant.

II. The Requisite Mental State for Both Contributory Infringement and Civil Aiding and Abetting Is Knowledge

Primary torts are commonly classified as intentional, negligent, or strict liability. Secondary tort liability, however, does not have to fit into this same scheme. Some of it does; some secondary liability is intentional, *see* Restatement (Second) of Torts §§ 876(a) (civil conspiracy), *id.* § 877(a) (inducement); some is negligent, *see* Restatement (Second) of Torts §§ 302A, 302B (A.L.I. 1965) (negligent failure to take precautions against third-party torts); and some is strict liability, *see Rosenthal & Co. v. Commodity Futures Trading Comm'n*, 802 F.2d 963, 966 (7th Cir. 1986) (respondeat superior). But the fault underlying civil aiding and abetting liability involves knowing assistance, not intent as typically defined in tort law. *See* Restatement (Third) of Torts: Misc. Provisions § 4_0 reporters' note d (A.L.I., Tentative Draft No. 3, 2024) ("It is well-established that knowledge, but not intent, is required for civil aiding and abetting liability."); Restatement (Third) of Torts: Liab. for Econ. Harm § 28 cmt. c (A.L.I. 2020) ("[I]t need not be shown that the defendant desired the tortious outcome.").⁴ Nor does it

⁴ Criminal aiding and abetting may require a higher standard. *See Reilly v. Anderson*, 727 N.W.2d 102, 114 (Iowa 2006); *Failla v. City of Passaic*, 146 F.3d 149, 156-57 (3d Cir. 1998); Nathan

require the secondary actor's breach of a duty, which is the subject of other forms of liability. *See* Restatement (Second) of Torts §§ 302A, 302B, 876(c); *see also* Restatement (Third) of Torts: Misc. Provisions § 4_0 cmt. d (“[A]iding and abetting liability cannot be classified as either an intentional or negligence tort.”); Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *Dobbs’ Law of Torts* § 435 (2d ed. 2025) (distinguishing aiding and abetting from negligence-based liability).

Instead, as the Restatements and courts have made clear, knowledge is “the clue to liability.” *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 96 (5th Cir. 1975). Knowledge is a state of mind that applies to factual conditions, or what the Model Penal Code terms “circumstance” elements. Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 Ariz. L. Rev. 1061, 1093 n.110 (2006); Model Penal Code § 2.02(2)(b) (A.L.I. 1985). Intent, on the other hand, refers in tort law “to the consequences of an act, rather than the act itself.” Restatement (Second) of Torts § 8A cmt. a (A.L.I. 1965); *see also* Restatement (Third) of Torts: Phys. & Emot. Harm § 1 (A.L.I. 2010).

While knowingly providing assistance to a tortfeasor is “intentional” in the sense that the secondary actor intends its own actions, it need not be intentional

Isaac Combs, Note, *Civil Aiding and Abetting Liability*, 58 Vand. L. Rev. 241, 251 (2005). Even in criminal cases, the required state of mind has been variously stated. *See Rosemond v. United States*, 572 U.S. 65, 84-85 (2014) (Alito, J., concurring).

as to the consequences. For example, a passenger assisting a driver in taking a bong hit while driving is aiding and abetting a tort, even if the passenger does want the vehicle to crash and does not believe it will happen. *See Reilly v. Anderson*, 727 N.W.2d 102, 114-15 (Iowa 2006). Thus, the Fourth Circuit applied an unnecessarily demanding standard in requiring plaintiffs below to show Cox’s “substantial[] certain[ty]” that infringement would occur, which is a level of knowledge as to consequences that substitutes for intent. Pet. App. 21a-22a; *see* Restatement (Third) of Torts: Phys. & Emot. Harm § 1 cmt. c (belief insufficient for intentional torts). Knowledge, on the other hand, requires only “consciousness of the existence of a fact,” which can include a belief that the fact probably exists. Restatement (Second) of Torts § 290 cmt. b (A.L.I. 1965).

Knowledge of the tortfeasor’s plan, as opposed to substantial certainty of the result, is particularly appropriate for civil aiding and abetting and contributory infringement cases because, as the court below recognized, such cases require a prediction as to what a third party will do based on that person’s past statements and actions. *See* Pet. App. 22a; 4 Nimmer § 13E.03[B][3][a] (2025). In many cases, an aider and abetter will only have information “that the primary actor plans to commit [a tort] and that his or her own actions *might* contribute to that tort.” Restatement (Third) of Torts: Inten. Torts to Persons § 10 cmt. c (A.L.I., Tentative Draft No. 3, 2018). Such knowledge

is sufficient even if the secondary actor lacks detailed information about “the means by which the primary actor will accomplish the tort or even the nature of the eventual tort itself.” *Id.* reporter’s note cmt. c.

This Court has not directly considered the exact state of mind required to establish contributory copyright infringement outside of the inducement context. The “nice question[]” of whether “mere indifferent supposition or knowledge” would be sufficient was left open by this Court’s decision in *Kalem Co. v. Harper Brothers*, 222 U.S. 55, 62 (1911). But this Court has held that contributory *trademark* infringement lies when “a manufacturer or distributor ... continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement.” *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982). And the majority of lower courts have similarly held that for copyright, knowledge, whether actual or constructive, is enough. See 4 Nimmer § 13E.03[B][2][a] (standard “most frequently” stated as “knew or had reason to know”).

That knowledge must in some way be targeted at particular acts. To be contributorily liable, a defendant must know more than that, somewhere out there, someone is almost certainly using its product or service to infringe. *Cf.* Kenneth W. Simons, *Statistical Knowledge Deconstructed*, 92 B.U. L. Rev. 1, 24 (2012) (low-risk activities do not become high-risk when aggregated). Rather, either the defendant’s product or

service must be good for nothing *but* infringement, such that intent to assist infringement may be imputed, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 932 (2005), or the defendant must know of a specific actor's plan or pattern of infringement and contribute to it. See 4 Nimmer § 13E.03[C][1].

The latter form of knowledge will establish the necessary scienter for contributory liability even if the product or service being supplied is capable of noninfringing uses. For example, in perhaps the first contributory copyright infringement case, *Harper v. Shoppell*, the defendant was held liable for selling a printing plate that he knew would be used for infringement, 28 F. 613, 615 (C.C.S.D.N.Y. 1886), despite the fact that the plate was susceptible of noninfringing uses, see *Harper v. Shoppell*, 26 F. 519, 521 (C.C.S.D.N.Y. 1886). It was the same in early patent cases, prior to the adoption of 35 U.S.C. § 271(c) in 1952. In *Bowker v. Dows*, 3 F. Cas. 1070 (C.C.D. Mass. 1878) (No. 1,734), the defendant was held liable for selling saponin extract “to persons who intend to use it in the combination claimed in the patent,” even though selling the extract without such knowledge would not have been an infringement. *Id.* at 1071. In *Thomson-Houston Elec. Co. v. Ohio Brass Co.*, 80 F. 712 (6th Cir. 1897), then-Judge Taft similarly observed that where component parts are “adapted to other uses than in the patented combination” contributory infringement could still be proven by

“affirmatively” establishing “the intention to assist in infringement,” rather than by inferring it from infringing use. *Id.* at 723.

Notice of specific infringing acts can provide the requisite knowledge, but the mere fact of receiving such a notice from an alleged rightsholder is not by itself sufficient. The circumstances of the notice are important. A detailed notice from “an established and well-known copyright owner and/or representative” may be sufficient, *see* 4 Nimmer § 13E.03[B][3][b], whereas a notice from an unknown entity or a subscriber’s competitor may not. In this case, an online anti-piracy firm hired by dozens of the largest recording companies and music publishers sent detailed notices providing information concerning particular infringing sound recording files being distributed by specific Cox subscribers at precise dates and times. Pet. App. 167a. The district court found the notices sufficient to establish “knowledge of specific conduct which allegedly infringed all sound recordings and musical compositions identified in suit” and granted summary judgement on the knowledge element. Pet. App. 172a. Indeed, if the notices here were not sufficient, it is difficult to imagine what notices would be.

III. The Requirement of “Material Contribution” in Copyright Law Is Coextensive with “Substantial Assistance” in Tort Law

While the majority of lower courts have followed parallel courses in copyright law and civil aiding and

abetting law on the required state of mind, finding knowledge or reason to know of the tortfeasor's plan to be sufficient, that has not been the case for the *amount* of assistance. For “material contribution,” copyright courts have strained to determine whether a “direct connection” to the infringement is needed, and if so why payment processors, utility companies, or hardware manufacturers do not have it. *See Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 796, 800 (9th Cir. 2007). Other courts have suggested that providing the “sites and facilities” for infringement is sufficient, *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996), in which case any online service materially contributes to infringing activity on its site or network, *see* 4 Nimmer on Copyright § 13E.03[B][2][b][iii] (citing cases). Still others have found material contribution when the defendant’s product or service is “the sole instrumentality” or “indispensable” for the infringement. *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 648 (S.D.N.Y. 2011); Pet. App. 26a.

Civil aiding and abetting cases, on the other hand, have developed a rich set of factors for decisionmakers to consider in lieu of a bright-line test. First set out in the Restatement (First) of Torts § 876 cmt. b (A.L.I. 1939), and explicated further in the canonical case of *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), and this Court’s decision in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), the factors call for courts or juries to consider “the nature of the act encouraged; the

amount [and kind] of assistance given; the defendant's absence or presence at the time of the tort; his relation to the tortious actor; ... the defendant's state of mind; [and the] duration of the assistance provided." *Halberstam*, 705 F.2d at 483-84; Restatement (Second) of Torts § 876 cmt. d (A.L.I. 1979). This inquiry is not an atomized "sequence of disparate, unrelated considerations," but rather one intended to resolve the ultimate issue as to whether the defendant's "participation in another's wrongdoing ... is both significant and culpable enough to justify attributing the principal wrongdoing to the aider and abettor." *Twitter*, 598 U.S. at 504; Restatement (Third) of Torts: Inten. Torts to Persons § 10 reporters' note cmt. d (A.L.I., Tentative Draft No. 3, 2018). The outcome of that inquiry must be further balanced against the defendant's scienter: the greater the defendant's knowledge, the more significant smaller acts of assistance become, and vice versa. *Twitter*, 598 U.S. at 491; Restatement (Third) of Torts: Liab. for Econ. Harm § 28 cmt. d (A.L.I. 2020) ("[A] clear understanding of wrongdoing can make a small act of assistance more blameworthy").

It is this sort of nuanced inquiry that can distinguish cases in which a person's assistance, although in some sense necessary to the outcome, is nevertheless insubstantial, from cases in which even small or routine acts of assistance produce liability. An employee who is directed to deliver a message to co-workers ordering the commission of a tort provides insubstantial assistance to the tortious act, primarily

because of the employee's relationship to the tortious actor: a subservient one, with no authority to countermand the order. *See* Restatement (Second) of Torts § 876 cmt. d illus. 9; Restatement (Third) of Torts: Inten. Torts to Persons § 10 cmt. d illus. 15. The amount and kind of the assistance is also slight, namely mere delivery of a message; and the duration of the assistance is short, a single act.

By contrast, a person who hands an ordinary tool that would be useful in opening an ATM machine to a friend known to be planning a burglary *is* providing substantial assistance, even though lending tools to friends is usually perfectly innocent. *See United States v. Thompson*, 539 F. App'x 778, 779 (9th Cir. 2013). So too a broker who routinely processes trades from an investment advisor that the broker knows to be churning, thus earning the broker extra commissions, is substantially assisting the churning, Restatement (Third) of Torts: Liab. for Econ. Harm § 28 cmt. d illus. 6, even though providing routine financial services is typically free from liability, *see Mendelsohn v. Cap. Underwriters, Inc.*, 490 F. Supp. 1069, 1083–84 (N.D. Cal. 1979).

It is thus incorrect to argue, as Cox and others appear to, that providing general-use communications services to the public can never substantially assist a tort. *See* Pet. Br. 28. “Routine” and “normal everyday business practices” might require “a higher degree of knowledge” to constitute substantial assistance than

shady or unusual business practices, but once that knowledge is achieved, liability will attach to any further aid. *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991); *see also Casey v. U.S. Bank N.A.*, 127 Cal. App. 4th 1138, 1145 (2005) (“[C]ommon sense tells us that even ‘ordinary business transactions’” may be substantial assistance “if the bank actually knew those transactions were assisting the customer in committing a specific tort.”).

It is therefore true *both* that Cox can be held contributorily liable for knowingly providing substantial assistance to infringing users, *and* that mere delivery of communications will not suffice for aiding and abetting liability. Providing an undifferentiated service to unknown wrongdoers fails both the knowledge and the substantial assistance requirements. For example, in *Twitter*, the plaintiffs did not even allege that any ISIS member ever used the defendants’ platform to plan the attack that killed their family member. *Twitter*, 598 U.S. at 498. Without any actual communications connected to the attack, the platforms could not have known of them, nor could their services have substantially assisted the attack.

Instead, the claim in *Twitter* was that the platforms were liable for failing to find and remove terrorist groups that might be using their services for other things. *Id.* at 481-82. In other words, the plaintiffs were claiming liability for providing *any* services to someone who is known to be committing a crime or

tort, regardless of whether the services are at all connected to the wrongdoing. Aiding and abetting liability does not stretch that far. *See* Restatement (Third) of Torts: Liab. for Econ. Harm § 28 cmt. d illus. 3 (no liability for drafting lease for buyer known to be defrauding an employee).

Nor did aiding and abetting liability reach the complaint in *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025). There, Mexico’s complaint alleged only that “some, though unidentified, dealers” in the defendant’s arms “often engage in illegal transactions with Mexican traffickers.” *Id.* at 296. But without knowledge of which dealers were engaging in illegal transactions, Smith & Wesson’s sales of identical firearms to a broad array of distributors could not amount to aiding and abetting illegal transactions. *Id.* at 297-98.

Where the defendant has more specific knowledge, however, and provides more targeted assistance, aiding and abetting liability can arise. In *Direct Sales Co. v. United States*, 319 U.S. 703 (1943), a criminal conspiracy case, a drug manufacturer and distributor made it easy for physicians to order large quantities of narcotics. It sold them in large lots of 500 to 5,000 tablets, offered discounts on large volume sales, and suggested re-orders. *Id.* at 706-07. It continued these practices even after being warned by the Bureau of Narcotics that orders of more than 400 tablets per year were likely illegitimate. *Id.* at 707. This Court

held that Direct Sales’s “high-pressure” sales tactics for a controlled substance that resulted in a particular doctor ordering thousands of tablets amounted to a conspiracy to violate narcotics laws. *Id.* at 712-13. The volume of tablets the doctor was purchasing were essentially good for nothing but illegal sales.

The same logic applies to contributory infringement. Knowledge that some unidentified purchasers of a product will use it to infringe is insufficient to make sale of that product “material contribution” to their infringement, unless the product can *only* be used for infringement. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984). But assisting a particular known infringer may rise to the level of material contribution. Whether it does will involve a balancing of circumstances captured in the *Halberstam* factors.

Under that inquiry, the entities that troubled the Ninth Circuit—power companies, hardware manufacturers, and payment processors—will likely fall short of material contribution. *See Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 800 (9th Cir. 2007). Companies outside the content and communication industries are less able to assess the reliability and authority of the notices that they receive. Their connection to the infringing activity is remote. The goods and services they provide have enormous value, but their relationship with customers allows for little in the way of graduated response to infringement.

Providers *within* the content and communications industries, on the other hand, such as search engines, web hosts, and telecommunications services, are more likely to provide material contribution to infringement. They are more likely to have encountered well-known content companies or investigatory organizations. They are protected from copyright infringement liability by statutory immunities, provided they comply with preconditions requiring repeat infringer policies and responses to takedown notices. *See* 17 U.S.C. § 512. The assistance they provide directly impacts the copying and public distribution of copyrighted works, and their relation to the tortious actor may allow more targeted responses, such as removing material or slowing connections.

Cox and others argue that aiding and abetting liability, and therefore contributory infringement liability, cannot possibly attach to failures to take action against infringers. *See* Pet. Br. 32. But continuing to supply goods or services after gaining knowledge is an *act* of assistance, not an omission of ceasing to assist. It is substantial assistance to continue processing churning trades. *See Armstrong v. McAlpin*, 699 F.2d 79, 91 (2d Cir. 1983). It is substantial assistance to provide morphine to a physician after having been warned by the Bureau of Narcotics. *See Direct Sales*, 319 U.S. at 707. It is substantial assistance to continue handing erasers to negligent students in an eraser fight. *See Keel v. Hainline*, 331 P.2d 397 (Okla. 1958). It is substantial assistance to keep supplying goods to a person one knows will use them for

trademark infringement, *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854–55 (1982), even if one is operating under a contract for such goods. And it can be substantial assistance to keep supplying the same level of online services to a user known to be engaging in significant acts of copyright infringement. 4 Nimmer § 13E.03[B][2][b][iii].

IV. The Jury Was Presented with Ample Evidence to Conclude Cox Had Both Knowledge and Provided Substantial Assistance

The courts below were too demanding concerning the defendant’s mental state and vague in affirming the jury’s verdict on material contribution. *See* Pet. App. 21a, 26a. The jury itself, however, was clearly instructed, without objection on this ground from Cox, that the plaintiffs had to prove the *Gershwin* test for contributory liability: that “Cox knew of specific instances of infringement,” and that “Cox induced, caused, or materially contributed to the infringing activity.” *See* Jury Instrs. at 25, Dkt. No. 671 (Instr. No. 24); Cox’s Revised Proposed Jury Instrs. at 31, Dkt. No. 645 (Instr. No. 27). The jury received ample evidence and argument on each of these elements.

First, the parties litigated the issue of the basis of Cox’s knowledge of infringement and the reliability of the notices it received, even though summary judgment had been granted on the knowledge element. As this Court has observed, the knowledge of the secondary actor and the nature of its assistance are closely intertwined, making it difficult to consider one

without the other. *See Twitter, Inc. v. Taamneh*, 598 U.S. 471, 503-04 (2023); Restatement (Third) of Torts: Liab. for Econ. Harm § 28 cmt. d (A.L.I. 2020). There was considerable testimony by the plaintiffs’ and defendant’s experts concerning exactly what the notices established and how reliable they were, and Cox argued to the jury that it was justified in staying its hand as a result. *See* Tr. 2991:20–2992:8 (Cox testimony that in “most cases” subscriber was not person infringing).

Second, there was also considerable testimony and argument to jury that covered all six of the *Halberstam* factors. The jury instructions in this case did not elaborate on the meaning of “material contribution,” but that is not unusual. Jury instructions in contributory infringement cases typically leave additional factors “for argument by counsel.” *Federal Civil Jury Instructions of the Seventh Circuit* 12.62 at 343 (2017). Pattern jury instructions for civil aiding and abetting similarly do not tend to define “substantial assistance.” *See, e.g., 2 Judicial Council of California Civil Jury Instructions*, CACI No. 3610 at 710 (2024).

For the “nature of the act encouraged,” the plaintiffs presented evidence of millions of instances of infringement, much of it at the hands of repeat infringers. Resp. Br. 12. Lengthy testimony focused on the “amount and kind of assistance given,” such as what Cox did to assist infringement, what it did to prevent infringement, and the harm of suspension or

termination of service. Resp. Br. 15-17; Pet. Br. 10-12; Tr. 3015:15–19 (Cox closing statement). The duration of Cox’s alleged assistance was a period of two years.

In the online context, “the defendant’s absence or presence at the time of the tort” cannot be taken literally. But in real-world environments, the defendant’s presence at the scene of the tort gives the defendant much more of an ability to appreciate the gravity and imminence of the harm, and to take action to stop it. Cox presented evidence to the jury that it was unable to confirm whether its subscribers were infringing and unable to block them from using BitTorrent. Pet. Br. 9; Tr. 1022:12–25 (Cox testimony on inability to block). The plaintiffs presented evidence that Cox was making numerous decisions to waive its repeat infringer policy for particular subscribers in order to avoid ever terminating or suspending their accounts. *See* Tr. 2962:4-23 (Plaintiffs’ closing statement). As for Cox’s “relation to the tortious actor,” Cox is a large service provider with millions of subscribers, Pet. Br. 9; the plaintiffs presented evidence that the most important part of that relationship was the subscription fee, Resp. Br. 16.

Finally, both parties presented extensive evidence concerning “the defendant’s state of mind.” The plaintiffs introduced emails showing a lack of concern for copyright enforcement from Cox’s abuse and safety team, but also a corresponding lack of hesitancy to terminate subscribers for failure to pay their bills. Resp.

Br. 15-16, 18. Cox produced testimony that it was seeking to address the infringement problem through education and avoiding the drastic step of cutting off someone's internet connection. Pet. Br. 10-11; Tr. 1021:21–1022:4, 1025:24–1026:7 (Cox testimony that purpose of abuse group was education, with termination as last resort).

The jury thus heard evidence and argument pertaining to Cox's knowledge of infringing activity and whether, based on the *Halberstam* factors, it materially contributed to that activity. After hearing all of the evidence and deliberating, the jury returned a verdict in favor of the plaintiffs. There is no legal infirmity in that verdict.

CONCLUSION

Cox was given a fair trial before a jury of its peers that was properly instructed on the *Gershwin* test and had all of the evidence it needed to decide whether Cox knowingly and substantially assisted specific subscribers' infringing acts. The jury determined that Cox was liable. This Court should thus affirm the Fourth's Circuit's decision below on contributory liability, taking the opportunity to clarify the test for such liability in future cases.

Respectfully submitted,

BRUCE E. BOYDEN

Counsel of Record

MARQUETTE UNIVERSITY LAW
SCHOOL

P.O. Box 1881

Milwaukee, WI 53201-1881

(414) 288-5492

bruce.boyden@marquette.edu

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