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* NATIONAL MUSIC PUBLISHERS' ASSOCIATION, RECORDING INDUSTRY ASSOCIATION OF AMERICA, NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL AND SONGWRITERS OF NORTH AMERICA IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are the National Music Publishers' Association ("NMPA"), the Recording Industry Association of America ("RIAA"), the Nashville Songwriters Association International ("NSAI"), and Songwriters of North America ("SONA").[1]

The NMPA is the principal trade association representing the United States music publishing and songwriting industry. Over the last one hundred years, NMPA has served as the leading voice representing American music publishers before Congress, in the courts, within the music, entertainment, and technology industries, and to the public. NMPA's membership includes "major" music publishers affiliated with large entertainment companies as well as independently owned and operated music publishers of all sizes representing musical works of all genres. Taken together, compositions owned or controlled by NMPA's hundreds of members account for the vast majority of musical compositions licensed for commercial use in the United States.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no such counsel nor any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than *amici curiae* made a monetary contribution intended to fund the brief's preparation or submission. Certain of the respondents are among the members (or affiliates of such members) of *amici* the National Music Publishers' Association and the Recording Industry Association of America, each of whom also represents the interests of hundreds of other companies in the music industry.

The RIAA is a 501(c)(6) nonprofit trade organization that supports and promotes the creative and financial vitality of recorded music and the people and companies that create it in the United States. RIAA's several hundred members—ranging from small artist-owned labels and businesses to global music businesses—make up this country's most vibrant and innovative music community. RIAA members create, manufacture, and/or distribute sound recordings representing the majority of all legitimate recorded music consumption in the United States. They also own copyrights and/or other exclusive rights in sound recordings embodying the performances of some of the most popular and successful recording artists of all time. In support of its members, the RIAA works to protect the intellectual property rights of artists and music labels.

The Nashville Songwriters Association International is the world's largest not-for profit trade association for songwriters. NSAI was founded in 1967 by 42 songwriters including Eddie Miller, Marijohn Wilkin, Kris Kristofferson, Felice and Boudleaux Bryant, and Liz and Casey Anderson as an advocacy organization for songwriters and composers. NSAI has around 4,000 members and 100 chapters in the United States and abroad. NSAI is dedicated to protecting the rights of songwriters in all genres of music and addressing needs unique to the songwriting profession. The organization has participated in Copyright Royalty Board trials resulting in historically higher mechanical royalty rates for American songwriters, was instrumental in the drafting and adoption of the Music Modernization Act, and created the first "group" copyright infringement

insurance policy for songwriters. Governed by a Board of Directors composed entirely of professional songwriters, NSAI features a number of programs and services designed to provide education and career opportunities for songwriters at every level.

Songwriters of North America is a membership-based advocacy organization formed by songwriting partners Michelle Lewis and Kay Hanley along with music attorney Dina LaPolt in 2015. SONA is run by and for professional songwriters. The organization advocates on behalf of songwriters' interests before legislative bodies, administrative agencies, and the courts. SONA is an open and diverse community that unites enthusiastic music creators and thoughtful business leaders to create a unified voice to protect artistic expression, compensation, and the rights of songwriters in North America.

The questions presented in this case are exceptionally important to *amici curiae*, their respective members, and the songwriters and recording artists they serve. All of *amici*'s members suffer from the type of rampant and known infringement that Cox's lax policies facilitate. Many of their members are solo creators or small business owners—like songwriters, artist-owned labels, and small publishers—who lack the resources needed to protect their rights through often costly and time-consuming litigation. Member companies thus depend upon *amici*'s advocacy on their behalf to protect their creative work and livelihoods and to help hold the copyright enforcement line against rampant online piracy.

The dawn of the internet enabled unprecedented mass infringement through the virtually unlimited

distribution of unauthorized, perfect digital copies of copyrighted works. Internet service providers quickly became the instrument of that mass infringement by providing the public with the ready means to unlawfully download and share protected works.

To address concerns arising from infringing uses over the internet, Congress enacted the Digital Millennium Copyright Act ("DMCA"), which created special rules for internet service providers. Operating from the backdrop of "well established" doctrines of secondary liability that "emerged from common law principles," *see MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005), the DMCA offered internet service providers a safe harbor from monetary liability, including secondary liability. That safe harbor is available only if, among other things, such service providers take reasonable steps to forestall infringement that only they are able to police and thus are in the best position to address.

Cox does not qualify for the DCMA's safe harbor. As the Fourth Circuit previously held in a related appeal, Cox disqualified itself from the DMCA's safe harbor by refusing to adopt reasonable measures to curb known infringement over its service. *Sony Music Ent. v. Cox Commc'ns, Inc.*, 93 F.4th 222, 228 (4th Cir. 2024) ("[t]he claim period in this case coincides with the period during which Cox was ineligible for the safe harbor" in *BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc.,* 881 F.3d 293, 301–05 (4th Cir. 2018)). Thus lacking the protection of the DMCA, the question in this case is whether Cox can be held liable under established common law secondary liability principles.

Amici curiae file this brief to assist the Court's understanding of the history of secondary liability as a critical enforcement mechanism for the music industry, the context of this case as a continuation of that history, and the particularly egregious facts evidencing Cox's willful infringement.

SUMMARY OF ARGUMENT

For over a century, copyright owners have relied on secondary liability to hold those who enable infringement responsible for the harm caused by the infringement. Secondary liability is technology-neutral: whether the intermediary is a dance hall, a swap meet, or an internet service provider ("ISP"), courts have consistently held that knowingly facilitating infringement triggers liability. Preserving secondary liability is essential to protect creators and the industries that sustain them.

For more than a century, courts have held that proprietors who benefit from infringing performances at their premises cannot escape liability by claiming ignorance or lack of direct control. When infringement can be stopped most effectively by an intermediary, the law has long held that intermediary responsible. These early cases primarily emerged in the framework of vicarious liability, though courts also acknowledged that the facts fit the framework of contributory liability as well. Indeed, a related line of lower court decisions confirms that entities that knowingly facilitate infringement—whether by booking performers or supplying advertising or licensing space—face liability for materially contributing to infringement. Applying that standard, courts have extended the theory of liability to the failure to take "simple measures" to prevent

known infringements. Assigning liability to those who provide essential tools to facilitate infringement—including where a defendant with the ability to stop third-party infringement continues to provide the means to do so despite specific knowledge that the infringement will occur—incentivizes them to act and avoids forcing rightsholders to undertake the wasteful and often futile step of chasing countless—and often anonymous—direct infringers.

The advent of the internet brought with it the ability to infringe copyrighted works on a massive scale. The digitization of musical assets (and other valuable intellectual property) made duplication and distribution of pirated music and other copyrighted works incredibly simple. As online music piracy flourished, music industry revenues collapsed and new artist investment suffered, threatening the viability of the industry as a whole. At the same time, the "intermediaries" facilitating infringement shifted from brick-and-mortar dance halls and flea markets to ISPs—providers of the online services and tools that pirates use to steal music on a mass scale. Thus, the law and framework for secondary liability became a critically important tool for the music industry to enforce against the devastating effects of music piracy.

Content owners, intermediaries and Congress all foresaw how the maturation of the internet and its online tools would make intellectual property theft both easy and increasingly damaging. Congress thus enacted the DMCA, preserving common-law principles of secondary liability while offering ISPs a safe harbor from the monetary impact of that liability—but only if they adopted and enforced real

anti-piracy measures to terminate repeat infringers. Courts, in turn, confirmed that long-standing principles of secondary liability applied with equal force in the digital age.

Shortly after the DMCA was enacted, file sharing innovations continued and peer-to-peer ("P2P") networks began to proliferate. P2P networks turbo-charged online infringement and gave individual users the means to both copy and distribute perfect digital copies of pirated works on a massive scale—and to do so quickly. These improved infringement tools resulted in music companies losing the ability to control the copying and distribution of their valuable musical assets. It was nearly impossible for them to compete with the free and unlimited distribution of their copyrighted work.

Given the decentralized nature of P2P networks, ISPs became a critical part of the piracy equation. ISPs were very much "gatekeepers;" effectively erecting a wall between copyright owners and the ISP subscribers engaged in piracy. Though technological tools emerged for rightsholders to identify IP addresses associated with infringement, ISPs were the *only* entities who could know the identity of the subscribers using those IP addresses. That is because only the ISP that controls an IP address can correlate it to an account holder, and ISPs hawkishly guard those identities from disclosure.

Since ISPs were gatekeeping the identities of the direct infringers, music companies (and others) started sending detailed notices of infringement to the ISPs. Music companies expected ISPs to act against those known infringers. The music industry tried multiple ways to secure cooperation from ISPs to

address their concerns. For years, the music industry pursued cooperative solutions—such as educational campaigns, notice programs, and even a formal, cooperative agreement governing a process intended to curb piracy through escalating responses. But all of those efforts fell short. When voluntary measures failed and piracy persisted on a broad scale, the music industry turned to litigation against ISPs only as a last resort to protect property rights and livelihoods.

Cox initially participated in cross-industry discussions regarding handling infringement, but it ultimately withdrew and went its own way. Cox's approach demonstrates its knowing *and* willful contribution to its users' infringement, as the jury found and the Fourth Circuit affirmed. Cox's personnel responsible for handling copyright abuse actively disparaged the DMCA and directed employees to promptly reactivate infringers' accounts in the interest of preserving subscription revenue over promoting compliance. Cox was not found liable for merely knowing that its customers engaged in infringement. It was subjected to enhanced statutory damages because it knowingly engaged in a campaign to flout its legal obligations in the interest of preserving revenue. Accordingly, the Fourth Circuit was correct to affirm the jury's finding that Cox's conduct was willful, and this Court should affirm.

ARGUMENT

I. THE MUSIC INDUSTRY HAS LONG RELIED ON SECONDARY LIABILITY TO ENFORCE COPYRIGHTS AGAINST THE ENTITIES BEST POSITIONED TO PREVENT INFRINGEMENT

Secondary liability has long been a critical tool for musicians, songwriters, and the companies that represent their interests to prevent the unlicensed mass distribution and public performance of their creative works and to secure compensation for the resulting harm when those works are infringed. Application of the longstanding common law rules of secondary liability to music copyrights has ensured that those in the best position to prevent infringement play some role in doing so—rather than forcing creators to undertake the tedious and often futile effort of pursuing countless individual infringers directly. In this case, Cox is a gatekeeper. Only Cox knows the identity of those subscribers who are using its service to infringe. Cox unquestionably has the ability to act against those subscribers or ultimately stop providing service to them.

As the predominant mode of infringement shifted to the internet, Congress enacted a statutory framework that preserved and clarified how the principles of secondary liability translated into cyberspace. At the same time, this Court has reaffirmed the vitality of common law principles of secondary liability in the digital world. This Court should now preserve this cornerstone of copyright law, which has long protected the American music industry, the creative community, and copyright property rights.

A. Secondary Liability for Music Copyright Infringement Traces Back to Early 20th Century Dance-Hall Cases

Early in the 20th century, this Court confirmed in *Herbert v. Shanley Co.*, that the owners of venues could face liability for infringement hosted at their premises. 242 U.S. 591, 594–95 (1917). There, the defendants operated a hotel and restaurant that hired orchestras to perform in their dining rooms. *Id.* Even though the guests paid no specific fees for the unlicensed, infringing performance, this Court held the hotel operator nevertheless received a benefit from the performance and so faced liability for permitting it. *Id.*

Herbert served as the foundation for decades of decisions holding proprietors liable for infringing performances hosted at their premises. The archetypical example was the "dance hall" that hosted unlicensed musical performances for customers who came to dance and socialize. *See, e.g.*, *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929); *M. Witmark & Sons v. Tremont Soc. & Athletic Club*, 188 F. Supp. 787 (D. Mass. 1960); *Buck v. Pettijohn*, 34 F. Supp. 968 (E.D. Tenn. 1940); *Buck v. Crescent Gardens Operating Co.*, 28 F. Supp. 576 (D. Mass. 1939); *Buck v. Russo*, 25 F. Supp. 317 (D. Mass. 1938); *Irving Berlin, Inc. v. Daigle*, 26 F.2d 149, *rev'd on other grounds*, 31 F.2d 832 (5th Cir. 1929). Secondary liability principle has also been applied to movie theaters that hosted unlicensed orchestral performances alongside screenings, *see*, *e.g.*, *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470 (E.D.S.C. 1924), *aff'd sub nom.*, *Pastime Amusement Co v. M. Witmark & Sons*, 2 F.2d 1020

(4th Cir. 1924); *Harms v. Cohen*, 279 F. 276 (E.D. Pa. 1922), and hotels that offered unlicensed performances or broadcasts for their guests. *See Remick Music Corp. v. Interstate Hotel Co.*, 58 F. Supp. 523 (D. Neb. 1944), *aff'd*, 157 F.2d 744 (8th Cir. 1946); *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198–99 (1931).

In *Harms v. Cohen*, for example, the court held that a proprietor of a theater could not escape liability by delegating authority to a musician to decide what to play at the theater. 279 F. 276, 278 (E.D. Pa. 1922). By giving the musician unfettered authority to infringe at his premises and making no "inquiry as to what she intends to play," the proprietor "must be deemed to have taken part" in the resulting infringement. *Id.*

These dance-hall cases recognized that, where infringement "can be prevented most effectively by actions taken by a third party, it makes sense to have a legal mechanism for placing liability for the consequences of the breach on him as well as on the party that" infringed. *In re Aimster Copyright Litig.*, 334 F.3d 643, 646 (7th Cir. 2003) (collecting and summarizing cases). Thus, where the "the dance hall . . . fails to make reasonable efforts" to that effect, it faces secondary liability. *Id.* at 654. Secondary liability arises in these situations because "it may be impossible as a practical matter for the copyright holders to identify and obtain a legal remedy against the infringing bands yet quite feasible for the dance hall to prevent or at least limit infringing performances." *Id.* Secondary liability steps in because "chasing individual [infringers] is time consuming and is a teaspoon solution to an ocean

problem." *Id.* at 645 (quoting Randal C. Picker, "Copyright as Entry Policy: The Case of Digital Distribution," 47 *Antitrust Bull.* 423, 442 (2002)).

B. *Gershwin* and its Progeny Extend Secondary Liability to Those Who Knowingly and Materially Contribute to Infringement

While the early dance-hall cases sound, in part, in vicarious liability—which assigns liability to those who have directly profited from infringement—the cases also invoked principles of *contributory* liability. As the Seventh Circuit has explained in discussing *Dreamland Ball Room*, "the dance hall could perhaps be described as a contributory infringer." *In re Aimster*, 334 F.3d at 654. "Recognizing the impracticability or futility of a copyright owner's suing a multitude of individual infringers . . . the law allows a copyright holder to sue a contributor to the infringement instead . . . ." *Id.* at 645–46.

As courts applying these related strains of secondary liability recognize, vicarious and contributory liability largely overlap. *See, e.g.*, *In re Aimster*, 334 F.3d at 654 (noting this Court had "treat[ed] vicarious and contributory infringement interchangeably"). In other words, those related strains of liability developed as a continuum of secondary liability, rather than as analytically distinct theories.

Thus, consistent with the dance-hall cases, a parallel line of cases emerged, holding that those who *provided critical support* for infringement while knowing of such infringement could also face liability. The seminal decision is *Gershwin Pub. Corp. v.*

Columbia Artists Mgmt., Inc., 443 F.2d 1159 (2d Cir. 1971). There, the defendant was an agency that booked musicians for public performances and created local associations to generate interest in those performances, including by printing and distributing programs listing the songs to be performed. *Id.* at 1160–61. The agency knew the performers planned to perform copyrighted songs and would not secure a license to do so. *Id.* at 1162–63. Yet the agency continued to supply its services (*e.g.*, drafting and printing programs) to the local association that promoted the shows anyway. *Id.* Even though the agency could not "control" the performers or the associations, it still faced liability as "one who, with knowledge of the infringing activity, induce[d], cause[d], or materially contribute[d] to the infringing conduct" because the associations "depended on" the agency's inputs and because the agency failed to "police" the infringing conduct of the performers. *Id.* at 1162–63. The Second Circuit affirmed that the defendant was "properly . . . held liable as a 'vicarious' and a 'contributory' infringer." *Id.* at 1162–63.

Gershwin also confirmed that contributory liability could apply to (1) "an advertising agency which placed non-infringing advertisements for the sale of infringing records," (2) "a radio station which broadcast such advertisements," and (3) "a packaging agent which shipped the infringing records," if each had "knowledge, or reason to know, of the infringing nature of the records" and yet "fail[ed] to police the conduct of the primary infringer." *Id.* at 1162 (citing *Screen Gems-Columbia Music, Inc. v. Mark Fi Records, Inc.*, 256 F. Supp. 399 (S.D.N.Y. 1966)).

Gershwin also drew on the reasoning of *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963), which was decided just a few years earlier. *See Gershwin*, 443 F.2d at 1162. In *Shapiro*, the Second Circuit held that an owner of department stores could be liable for licensing store space to a vendor of bootleg records. *Shapiro v. H.L. Green*, 316 F.2d at 309. Just as in the dance-hall cases, this conclusion flowed from the principle that assigning liability to one who "has the power to police carefully the conduct of" direct infringers would "simply encourage it to do so, thus placing responsibility where it can and should be effectively exercised." *Id.* at 308. Indeed, the imposition of secondary liability also encourages *others* to take steps to prevent infringement they might otherwise enable.

Courts have extended contributory liability principles to reach a venue operator's failure to take readily available measures to prevent infringing performances of copyrighted music from continuing. In *Casella v. Morris*, 820 F.2d 362 (11th Cir. 1987), the original owner of a pizza and entertainment restaurant franchise hired the plaintiff to compose several songs to be performed as a "fundamental part" of the franchise. *Id.* at 363, 366. After a payment dispute, the songwriter terminated the license and informed the owner of the termination. *Id.* at 364. Following the termination, the owner sold the franchise rights to a third party, and the third party continued, as contemplated by the parties to the transaction, to host performances of the plaintiff's songs. *Id.* Because the *initial* owner failed to inform the buyer of the license termination and "did nothing" to stop the sale of the franchise anyway, he faced secondary liability. *Id.* at 365. The franchise owner's

failure to take readily available measures to prevent an infringement contemplated as part of the franchise transaction, where he knew that the franchisee expected to use the music as part of its purchase, was enough to support contributory liability.

Similarly, borrowing from the music infringement cases, lower courts have also found that the operator of an online bulletin board service could face contributory liability for infringing posts on the bulletin board, where the operator "is able to take simple measures to prevent further" infringement, "has knowledge" of the ongoing infringement, and "yet continues to aid in the accomplishment of" that ongoing infringement. *Religious Technology Ctr. v. Netcom Online Communication Serv.* ("*Netcom*"), 907 F. Supp. 1361, 1374–75 (N.D. Cal. 1995) (defendant's "failure to simply cancel [the] infringing message and thereby stop an infringing copy from being distributed worldwide constitutes substantial participation" in that infringement).

One who "provide[s] the site and facilities for known infringing activity" faces contributory liability as well. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996). There, the defendant operated a "swap meet" where vendors sold a variety of merchandise, including counterfeit copies of music recordings owned by the plaintiff. *Id.* at 262. The Court had "little difficulty" finding the defendant's "provision of space, utilities, parking, advertising, plumbing, and customers," sufficient to show "material contribution to the infringing activity" under the standard set out in *Gershwin*. *Id.* at 264; *see also A & M Recs., Inc. v. Abdallah*, 948 F. Supp. 1449, 1455 (C.D. Cal. 1996), *as amended* (Nov. 21,

1996) (contributory liability for a seller of blank tapes with "actual knowledge" of his customer's infringement who "continued to supply" them anyway).

C. Against this Common Law Background, Congress Responds to New Threats of Widespread Piracy in the Digital Age

The advent of the internet transformed the scope and availability of music copyright infringement. Instead of the few hundred patrons of a hotel or a dance hall, the internet made it possible for any individual to become a global distributor of pirated music. Dist. Ct. Doc. 629, Trial Tr. at 277:7–10. And instead of the low-quality copies available on bootleg tapes, such as in *A & M Records v. Abdallah*, the internet facilitated the dissemination of perfect digital copies. *Id*. at 277:11–22. And the perpetrators of this piracy could do so anonymously from the comfort of their own homes, using software tools that made massive infringement easy. *See id*. at 278:8–16, 280:19.

This stay-at-home, high-quality infringement mechanism emerged in the 1990s with the emergence of digital peer-to-peer filesharing. Forced to "compet[e] with free," but pirated, music available through these services, industry revenues "fell off a cliff" and continued to decline for years. *Id*. at 278:17–24, 280:21–22; *see also* Ash Johnson, *22 Years After the DMCA, Online Piracy Is Still a Widespread Problem*, Info. Tech. & Innovation Found. (Feb. 7, 2020), https://tinyurl.com/57u5zkk8. The industry suffered huge layoffs, slashed artist rosters, and diminished investment in new and developing artists. Dist. Ct. Doc. 629, Trial Tr. at 279:8–18. Industry

organizations like NMPA and RIAA needed to overhaul their anti-piracy apparatuses to detect this new breed of piracy in a new environment. *Id.* at 278:25–279:7, 279:19–280:6.

Recognizing that "[t]he liability of . . . [i]nternet access providers for copyright infringements that take place in the online environment has been a controversial issue," Congress enacted the DMCA, which "preserve[d] strong incentives for service providers and copyright owners to cooperate and deal with" the infringement that ISPs, among others, enabled. "The Digitial Millenium Copyright Act of 1998," S. Rep. 105-190, at 40 (1998); *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 637 (S.D.N.Y. 2011) (The DMCA is "essential to maintain[ing] the strong incentives for service providers to prevent their services from becoming safe havens or conduits for known repeat copyright infringers.") (citation omitted); *see also In re Aimster*, 334 F.3d at 646 ("it makes sense to have a legal mechanism for placing liability" on the party best positioned to prevent it); *Shapiro*, 316 F.2d at 308 (a party's exposure to secondary liability "simply encourage[s]" that party to prevent the infringement). Contrary to Cox's position now, that statutory framework plainly contemplated that a transient conduit of infringing content like Cox—and not just platforms that hosted infringing content—could face liability. 17 U.S.C. §§ 512(a) ("Transitory Digital Network Communications"), 512(b) ("System Caching"), 512(c) ("Information Residing on Systems or Networks At Direction of Users").

Even as the technology changed, the basic common law principles of secondary liability for copyright

infringement did not. Thus, when Congress enacted the DMCA, it did so against the background of prior jurisprudence imposing secondary liability on those who supplied critical tools for infringement while knowing they would be used for that purpose. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013) ("'[W]hen a statute covers an issue previously governed by the common law,' we must presume that 'Congress intended to retain the substance of the common law.'") (citation omitted). Congress thus operated in light of cases like *Fonovisa*, which was decided only two years earlier and held that providing the "site and facilities for known infringement" can constitute a material contribution to infringement, and in light of similar cases holding that the failure to take "simple measures" to curtail known infringement could result in contributory liability. *Fonovisa*, 76 F.3d at 264; *Netcom*, 907 F. Supp. at 1375; *see Casella*, 820 F.2d at 366.

With the DMCA, Congress defined a class of measures that an ISP could undertake to avoid liability. 17 U.S.C. § 512(i). While the DMCA's safe harbor provides a clear path to avoiding secondary liability, an ISP must adopt real measures to satisfy its standards. But, as the Fourth Circuit held in a prior case, also applicable to this case, Cox's meager anti-piracy measures did not satisfy the DMCA's safe harbor provision. *Sony Music v. Cox*, 93 F.4th at 228.

D. Courts Extended Common-Law Secondary Infringement to Online Piracy with Full Force

Unsurprisingly, courts resoundingly held that peer-to-peer services could face secondary liability when they supplied the tools that made infringement

possible. The Ninth Circuit affirmed a decision to enjoin Napster—the first wide-scale peer-to-peer music-sharing network—due to its contributory and vicarious liability. *A&M Recs., Inc. v. Napster, Inc.* ("*Napster*"), 239 F.3d 1004 (9th Cir. 2001), *as amended* (Apr. 3, 2001). Napster knew of the extent of infringement made available through its service; indeed, RIAA informed Napster of more than 12,000 infringing files. *Id.* at 1020 n.5. And Napster provided the "site and facilities" for direct infringement by providing a service that facilitated infringement, but failed to stop it, despite notice. *Napster*, 239 F.3d at 1022 (citations omitted). The Seventh Circuit likewise held that, where a service "blinded itself" to music piracy committed using its software, it faced contributory liability. *In re Aimster*, 334 F.3d at 653.

The question of secondary liability for a service used for infringement reached this Court in *Grokster*. The question there was whether the distribution of software used for infringement could give rise to secondary liability, where the software was capable of non-infringing uses and the defendant had no actual knowledge of specific instances of infringement. *Grokster*, 545 U.S. at 927. This Court unanimously held that the software distributor could face secondary liability because it *induced* its users to infringe and affirmatively fostered that purpose. *Id.* at 936–37.

The Court's prior decision in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), was not to the contrary. That decision held only that the "intent to cause infringement" could not be inferred "*solely* from the design or distribution of a product

capable of substantial lawful use." *Grokster*, 545 U.S. at 933 (citing *Sony Corp.*, 464 U.S. 417) (emphasis added).

But, as the *Grokster* Court explained, *Sony* "was never meant to foreclose rules of fault-based liability derived from the common law." *Grokster*, 545 U.S. at 915 (citing *Sony*, 464 U.S. at 439). *Sony* did not "displace other theories of secondary liability" apart from the intentional inducement at issue there. *Grokster*, 545 U.S. at 934. Indeed, it cited lower court cases applying common law secondary liability principles. *See*, *e.g.*, *id.* at 545 U.S. at 941 n.13 (citing, *e.g.*, *Abdallah*, 948 F. Supp. at 1456).

In any case, the facts of this case are quite distinct from *Sony*. In *Sony*, the defendants sold a device into the commerce stream, had no way to detect specific instances of infringement by the consumers who purchased it, and had no ongoing relationship with those consumers beyond the point of sale. *Sony Corp.*, 464 U.S. at 442. Here, by contrast, third-party vendors have developed technologies that can identify specific details of infringement including the IP address of the direct infringers using Cox's service to infringe, as well as the date and time of infringement, among other details—an option not available for the Betamax at issue in *Sony*. And unlike in *Sony*, Cox maintains an *ongoing* relationship with those direct infringers and also carefully tracks and monetizes their usage of Cox's services. Cox continued to provide them with its services (and continued to derive revenues from those services)—even when it knew its services were used to infringe. *See id.* at 437 (distinguishing early contributory liability cases "involving an ongoing relationship between the direct

infringer and the contributory infringer at the time the infringing conduct occurred").

Apart from the fact that Cox has none of the defenses that Sony had, Cox's actions here were far more calculated. For example, Cox developed an entire false front to give the impression that actions were being taken against known repeat infringers, when, in fact, Cox did virtually nothing. Cox's disdain for the law is on full display in the "F the DMCA" email of Jason Zabek—the longtime head of Cox's "Abuse" team. *See* Brief for Respondent Sony at 15. The "fake" terminations, "unwritten semi-policies" and so much more make abundantly clear that Cox's entire goal was to construct a "record" of addressing infringement when in reality it did nothing, despite being given countless specific and detailed notices of infringement. *See* Section IIIII, *infra*. The record here shows that Cox was engaged in an *active campaign* to look the other way and permit known and repeat infringing uses and users to continue on its platform.

Grokster did not address—and certainly did not displace—lower court decisions finding liability where a defendant materially contributed to infringement. Indeed, *Grokster* cited *Gershwin* as supplying the applicable standard, after clarifying that the "materially contribute" prong was not at issue in that particular case. *Grokster*, 545 U.S. at 928, 930–31. Lower courts applying *Grokster* have read the decision not to touch on "material contribution" secondary liability. "[T]he Supreme Court in *Grokster* did not suggest that a court must find inducement in order to impose contributory liability under common law

principles." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 n.11 (9th Cir. 2007).

In short, *Grokster* left in place decades of jurisprudence that found secondary liability could flow from, among other things, knowingly providing known, repeat infringers with the means to infringe and failing to act to prevent their inevitable further infringement. Consistent with an unbroken line of lower court decisions dating back more than a century, the Court should follow that course and affirm Cox's secondary liability.

II. LITIGATION AGAINST ISPS WAS A LAST RESORT AFTER COOPERATIVE MEASURES FAILED

Even when faced with an existential threat, the music industry did not immediately resort to litigation. When Napster emerged, RIAA, among others, first contacted the company to express concern over the widespread infringement it enabled. Dist. Ct. Doc. 629, Trial Tr. at 280:12–18. Napster refused to change its practices. *Id*. at 280:23–24. Only then did record labels resort to legal remedies to curb the massive infringement enabled by Napster. *Id*. at 280:23–281:5. As discussed above, the courts resoundingly found Napster liable for the infringement it enabled, which led to its shutdown. *Id*. at 281:6–13; *see also A & M Records v. Napster*, 239 F.3d at 1021 ("We nevertheless conclude that sufficient knowledge exists to impose contributory liability when linked to demonstrated infringing use of the Napster system.").

Many more services emerged from Napster's ruins. Dist. Ct. Doc. 629, Trial Tr. at 281:6–13. Many of

these new services followed a different model from Napster's—they were "decentralized," meaning they had no central server where all of the pirated music available via that service could be found and interdicted. *Id*. at 281:10–282:7. Rather, the services merely facilitated the connection between peers who could share the desired pirated music. *Id.* The decentralized nature of these services made it easier for them to evade liability and litigation (though not always impossible, as *Grokster* demonstrated). *See id.* at 281:14–283:18.

Beginning in 2004, the music industry launched a campaign to deter individual perpetrators of online music piracy. *Id.* at 283:19–284:8. Rightsholders contacted thousands of individuals who had committed prolific infringement, most of whom settled before any lawsuits were filed. *Id.* at 286:4–11. At the same time, industry organizations like NMPA and RIAA created a robust education program to educate the public that music was not free and there could be consequences for infringement. *Id.*; *see also* RIAA "About Piracy," https://www.riaa.com/resources-learning/about-piracy/.

Critically, rightsholders could not independently identify the individual perpetrators of online piracy. Dist. Ct. Doc. 629, Trial Tr. at 284:12–23. Rather, using advanced software tools, they could identify the IP address of the network connection used to commit the infringement. *Id.* at 284:24–285:5. But only the internet service provider associated with that IP address could further correlate it to an individual account holder, and ISPs like Cox are unwilling to share that information with the victims of piracy. *Id.*; *see also id.* at 285:12–22 (noting that Cox was

unwilling to voluntarily disclose the infringer's identity despite proof of ongoing infringement). By shielding the identity of its infringing subscribers from music companies and other copyright holders, Cox placed itself between copyright holders and the direct infringers who use Cox's services to infringe.

By 2008, the industry's public education campaign had reached a point of diminishing returns. Public awareness about the illegality of online piracy had increased from 25–30% to 70%. *Id.* at 286:12–287:14. But the industry simply could not act against every individual infringer, so rampant infringement continued despite increased public awareness. *Id.* at 287:15–288:1.

The industry thus took a new approach. In lieu of pursuing remedies against countless individuals, the industry started a "notice program" that informed internet service providers of specific instances of infringement committed by their subscribers, as contemplated by the DMCA. Dist. Ct. Doc. 630, Trial Tr. at 296:14–23. Those service providers were uniquely positioned both to identify the individuals and to take measures to curb their infringement. *See* Dist. Ct. Doc. 629, Trial Tr. at 284:24–285:5, 296:24–10. Technology companies like MarkMonitor conducted investigations that identified and documented specific instances of online infringement and informed internet service providers of instances that occurred using their respective services. Dist. Ct. Doc. 630, Trial Tr. at 300:16–301:1, 302:8–19; *see also id.* at 343:2–348:2 (describing independent evaluations of the reliability of MarkMonitor's methodologies). That way, ISPs could take appropriate action.

Although Cox, among others, accepted some of these notices, it unilaterally set limits on the number of notices it would accept, without regard to the volume of infringement that exceeded that limit. Dist. Ct. Doc. 630, Trial Tr. at 309:20–310:4. Cox initially set a limit of 200 notices per day from RIAA, even though the volume of infringement occurring by Cox's subscribers far exceeded that arbitrary threshold. *Id.* at 310:5–14. Cox eventually increased its thresholds to 400 and 600 notices per day, but that still left thousands of specific instances of infringement *per day* entirely unaddressed. *Id.* at 313:21–315:24, 316:9–17; *see also id.* at 311:9–313:4 (discussing Cox's resistance to accepting more notices or processing notices for repeat infringers).

The music industry (together with other creative industries) then sought to combat online piracy through a more formal partnership with internet service providers. In 2011, after years of negotiation, participants in both industries entered a Memorandum of Understanding (MoU) to establish a framework to deter infringement and direct consumers to lawful sources for music, movies, and other works. *Id.* at 322:15–323:14. But even there, Cox ultimately declined to participate in the agreed-upon framework.

The MOU's goal was to operationalize certain of the measures that internet service providers could take to prevent pervasive infringement. *Id.* at 324:5–326:17. The result was the Copyright Alert System, a new framework for sending and processing notices of specific instances of online piracy, to be administered by an organization comprising representatives of both

copyright owners and internet service providers. *Id.* at 327:9–19.

The Copyright Alert System laid out a gradual response program whereby users faced a series of alerts that carried increasingly severe consequences as the user persisted in their infringement. *Id.* at 328:24–329:6. The alerts proceeded through three phases: (1) education, (2) acknowledgement, and (3) mitigation. *Id.* The goal of the education stage was to inform the infringing user of the detected infringement and promote legitimate alternative sources. *Id.* at 329:7–12. The acknowledgement stage required users who continued infringing after the education stage to affirmatively acknowledge that they had been informed of their misconduct. *Id.* at 320:12–24. The mitigation stage imposed penalties on subscribers who continued infringing after the first two stages, such as temporary suspension of internet service, reducing internet speeds, or preventing access to certain popular sites. *Id.* at 329:25–331:16. Each stage comprised two alerts (each corresponding to one successive notice of specific instances of infringement), for a total of six alerts. The Copyright Alert System did not dictate a specific penalty for users who continued infringing after the sixth alert, leaving that decision to the individual ISPs. *Id.* at 363:5–25. Nevertheless, RIAA continued to inform internet service providers of specific instances of infringement beyond the sixth per user. *Id.* at 341:20–22.

Critically, while the Copyright Alert System was an experimental, negotiated effort to address the issue of widespread internet piracy, it was never intended to replace the law, which, as discussed in

Section I, *supra*, required the providers of the tools used to infringe to take measures to prevent known infringement. *Id.* at 333:9–23. Nor did it replace the DMCA, which granted safe harbor to those same providers, but only if they "adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders . . . who are repeat infringers[.]" 17 U.S.C. § 512(i)(1)(A); *see also* Dist. Ct. Doc. 630, Trial Tr. at 334:8–337:12; Copyright Alert System Memorandum of Understanding at 9 n.1 (DX-63), https://info.publicintelligence.net/CCI-MOU.pdf ("The Parties [to the Copyright Alert System MoU] acknowledge and agree that the limitations on ISP liability under the DMCA are conditioned on an ISP's adoption and reasonable implementation of a policy that provides for the termination in appropriate circumstances of subscribers and account holders who are repeat infringers[.]").

Cox participated in initial negotiations that led to this solution, but it withdrew before any agreement was reached. Dist. Ct. Doc. 630, Trial Tr. at 326:18–25.

The voluntary Copyright Alert System ultimately proved ineffective. *Id.* at 341:23–342:13. After its first four-year term, RIAA's members in the music industry reviewed data that showed the Copyright Alert System had not sufficiently curbed infringement and determined their investments were better directed to other antipiracy and enforcement measures. *Id.* In 2015, the music industry withdrew from the Copyright Alert System, and the movie industry followed soon after. *Id.*

The first litigation against an internet service provider—also Cox—asserting the instant theory of contributory liability coincided with the end of the Copyright Alert System. *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, No. 1:14-cv-1611 (E.D.V.A. filed Nov. 26, 2014). Litigation like the instant case arose only after the music industry exhausted numerous alternatives that sought to partner with the internet service providers best positioned to prevent the devastating infringement committed using their services.

III. COX'S CONDUCT WAS WILLFUL UNDER ANY CONSTRUCTION

The Fourth Circuit's holding that a contributory copyright infringer can be found to "willfully" violate the Copyright Act under 17 U.S.C. § 504(c)(2)—and thus be subject to enhanced statutory damages—when it acts with knowledge that the direct infringer's actions are unlawful is correct. Given the long common law tradition of secondary liability, Cox's deliberate and reckless campaign to look the other way, even as it *knew* its subscribers repeatedly violated the law using its services amply shows that Cox was aware that its own conduct was unlawful. It is not Cox's mere knowledge that others are using its services to violate the law that gives rise to willfulness—it is such knowledge plus *deliberate and active indifference* to repeat, unlawful activity that supports the jury's finding of willfulness in this case.

Even if more were required to prove that the defendant acted with knowledge that its own conduct was illegal, as Cox now contends, that "more" is present here. Cox's assertion that it lacked knowledge that its own conduct was unlawful is belied by the

voluminous trial record to the contrary. That record shows that Cox contributed to its users' ongoing infringement not out of ignorance of its legal obligations, but out of deliberate disregard for copyright law and rightsholders.

When asked whether Cox's artificial cap on infringement notices sufficiently preserved Cox's legal defenses, Jason Zabek, the manager of Cox's copyright-abuse team, responded with *contempt* for the applicable statute: "F the DMCA!!!" Dist. Ct. Doc. 650, Trial Tr. at 1303:1–1305:18. And no one at Cox objected to this callous disregard for the law and copyright owners' interests. Cox's only concern was *optics*—if Cox inevitably had to defend its conduct, "those emails [we]re discoverable and would not look good in court." Dist. Ct. Doc. 653, Trial Tr. at 1561:17–1566:20. These are not the statements of a company believing itself to be on the right side of the law. Cox knew its notice-processing system was inadequate to avoid liability, and Zabek's email laid that knowledge bare.

Although Cox nominally terminated repeat infringers' accounts, it maintained an "unwritten semi-policy" to *immediately* reactivate their accounts and wipe the slate clean, as if no violation had occurred. Dist. Ct. Doc. 649, Trial Tr. at 1275:25–1276:16. In 2009, while other internet service providers were working with rightsholders to implement a cooperative solution to online piracy, Zabek instructed his team that in order "to hold on to every subscriber we can," the abuse team should keep "in mind, if a customer is terminated for DMCA . . . , you are able to reactivate them after you give them a stern warning." Dist. Ct. Doc. 649, Trial Tr. at

1275:19–1276:3. After this reactivation, Cox gave repeat infringers "[a] clean slate" so it could "collect a few extra weeks of payments for their account." Dist. Ct. Doc. 654, Trial Tr. at 1650:20–25; *id.* at 1674:24–1675:3; *see also id.* at 1671:25–1672:3 (declining to terminate repeat infringer because "[he] pays us over $400 per month"); Dist. Ct. Doc. 649, Trial Tr. at 1272:12–15 (acknowledging repeat infringer "will likely fail again" but "giv[ing] him one more chan[c]e" because "[h]e pays 317.63 a month").

Cox knew its continued provision of service to known repeat infringers materially contributed to that infringement. According to Zabek, "[o]nce the customer has been terminated for DMCA, [Cox has] fulfilled the obligation of the DMCA safe harbor and can start over." Dist. Ct. Doc. 650, Trial Tr. at 1381:17–20. But given Zabek's "F the DMCA!!!" attitude, the jury could readily conclude that Cox's mere lip-service to compliance was not based on a good-faith interpretation of the DMCA's safe harbor provisions. Others at Cox made the point more explicitly: often a "termination" for copyright infringement was really "a suspension that is called a termination with the likelihood of reactivation." Dist. Ct. Doc. 654, Trial Tr. at 1675:1–3.

Cox fostered disdain for the law in its customers as well. When Cox informed one user that he had been detected infringing using Cox's internet services, the user bluntly responded, "This is b***s*** . . . if that's illegal, then kiss my a**." Dist. Ct. Doc. 649, Trial Tr. at 1178:18–1181:6. Rather than take any measure to correct the user's understanding or curb his infringement, Cox allowed the customer's infringement to proceed unabated, continuing to

provide the user with the tools necessary to infringe, and collecting subscription fees along the way.

In short, no matter the appropriate standard—whether knowledge of a customer's illegal conduct is enough when coupled with deliberate indifference or whether willfulness requires proof that the ISP knew its conduct was unlawful—there is every reason to conclude here that Cox acted willfully. The Court should not disturb the jury's amply supported willfulness finding here.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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