

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 *AMICUS CURIAE*
THE COPYRIGHT ALLIANCE
IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
STATEMENT OF IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	6
I. COPYRIGHT PROMOTES FREE EXPRESSION.....	6
II. ROBUST COPYRIGHT PROTECTION FUELS ECONOMIC GROWTH.	7
III. THE LONG-ESTABLISHED PRINCIPLE THAT ONE WHO KNOWINGLY AND MATERIALLY CONTRIBUTES TO COPYRIGHT INFRINGEMENT IS LIABLE AS A CONTRIBUTORY INFRINGER IS ESSENTIAL TO STOPPING MASSIVE COPYRIGHT INFRINGEMENT.	9
A. Decades of Case Law and the Copyright Act's Legislative History Establish That Knowingly Providing the Site And Facilities for Copyright Infringement Gives Rise to Secondary Liability.	10
B. When Enacting the DMCA, Congress Confirmed the Applicability of Cases Holding that Knowingly Providing the Means for Primary Infringement Constitutes Contributory Infringement.	15

C.	The Court’s <i>Grokster</i> Opinion Yet Again Confirmed Established Law. .	16
IV.	COX ACTED WILLFULLY—A CONCLUSION ESSENTIAL TO PROMOTING COPYRIGHT’S OBJECTIVES.	19
	CONCLUSION	20

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Columbia Pictures Indus., Inc. v. Fung</i> , 710 F.3d 1020 (9th Cir. 2013)	17
<i>Columbia Pictures Industries, Inc. v. Aveco, Inc.</i> , 800 F.2d 59 (3d Cir. 1986)	15, 16
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003)	6
<i>Fonovisa, Inc. v. Cherry Auction, Inc.</i> , 76 F.3d 259 (9th Cir. 1996)	14, 16
<i>Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.</i> , 443 F.2d 1159 (2d Cir. 1971)	4, 11, 12, 13, 17
<i>Harper & Row Publishers, Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985)	1, 6
<i>Henry v. A.B. Dick Co.</i> , 224 U.S. 1 (1912)	4, 10, 11, 13
<i>In re Aimster Copyright Litigation</i> , 334 F.3d 643 (7th Cir. 2003)	9
<i>Kalem Co. v. Harper Bros.</i> , 222 U.S. 55 (1911)	4
<i>Mazer v. Stein</i> , 347 U.S. 201 (1954)	6, 7
<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005)	5, 9, 10, 11, 16, 17

<i>Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.</i> , 256 F. Supp. 399 (S.D.N.Y. 1966)	11, 12
<i>Smith & Wesson, Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos</i> , 605 U.S. 280 (2025)	5, 18, 19
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984) ...	4, 10, 11, 13, 14, 15, 16, 17
<i>Twentieth Century Music Corp. v. Aiken</i> , 422 U.S. 151 (1975)	6
<i>Twitter v. Taamneh</i> , 598 U.S. 471 (2023)	5, 18, 19
<i>UMG Recordings, Incorporated v. Grande Communications Networks, L.L.C.</i> , 118 F.4th 697 (5th Cir. 2024)	18
Constitutional Provision	
U.S. Const., Art. I, § 8, cl. 8	2
Statutes	
17 U.S.C. § 106	4, 12, 18
17 U.S.C. § 512	4, 5, 15, 16, 18
17 U.S.C. § 512(a)	21
Legislative Material	
H.R. Rep. No. 94-1476 (1976)	12
H.R. Rep. No. 105-551, pt. 2 (1998)	16
S. Rep. 105-190 (1998)	15

Other Authorities

- 3 Melville B. Nimmer & David Nimmer,
Nimmer on Copyright (2025)..... 12, 17
- 6 William F. Patry, *Patry on Copyright*
 (Sept. 2025)..... 14, 17, 18
- Randal C. Picker, *Copyright as Entry Policy: The
 Case of Digital Distribution*, 47 Antitrust Bull.
 423 (2002) 9
- Robert Stoner and J  ssica Dutra, *Copyright
 Industries In The U.S. Economy: The 2024
 Report* (Feb. 2025)..... 8
- U.S. Chamber Of Commerce, *Impacts of Digital
 Piracy on the U.S. Economy* (June 2019)..... 9
- U.S. Chamber of Commerce, *Unlocking Creativity:
 A Study of the Socioeconomic Benefits of
 Copyright* (June 24, 2025) 7, 8, 9, 20

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

This Court has repeatedly recognized that the Framers of the Constitution intended copyright to be the engine of free expression. *See, e.g., Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985). Consistent with that crucial societal objective, *amicus curiae* The Copyright Alliance (“*Amicus*”) is dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. The Alliance is a nonprofit, nonpartisan 501(c)(4) public interest and educational organization and represents the copyright interests of over two million individual creators and over 15,000 organizations across the entire spectrum of creative industries, including authors, songwriters, musical composers and recording artists, graphic and visual artists, photographers, journalists, documentarians, television and filmmakers, and software developers—and the small businesses that are affected by the unauthorized use of their works. The Copyright Alliance’s membership comprises these individual creators and innovators, creative union workers, and small businesses in the creative industry, as well as the organizations and

¹ Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* affirms 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 *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Respondent Universal Music Group is a member of the Copyright Alliance. Other Copyright Alliance members may join other *amicus* briefs submitted in this case.

corporations that support and invest in them. The livelihoods of this diverse array of creators and companies depend on the commercialization of the exclusive intellectual property rights guaranteed by copyright law. This, in turn, incentivizes the creation and dissemination of new works and promotes the progress of science and the useful arts.

Amicus submits this brief in support of Plaintiffs/Respondents Sony Music Entertainment *et al.* (“Sony”) because reversing the Fourth Circuit’s holding would upend decades of well-established law governing contributory copyright infringement. Doing so would permit bad actors to facilitate massive digital theft, all to the grave detriment of the copyright holders, consumers of expressive works, and the U.S. economy. As a result, reversal would damage the very incentives for creation of expression that the Framers took care to protect in the Constitution.

SUMMARY OF ARGUMENT

The Copyright Clause, Art. I, § 8, cl. 8, exists to foster the creation and dissemination of original works for the general public welfare. Working in tandem with the First Amendment, copyright serves as an engine of free expression. This salutary purpose depends on ensuring that copyright holders receive a fair return for exploiting their copyrighted works. That has become increasingly challenging in the digital age, when a single pirated, perfect copy of a copyrighted work can find its way onto the internet and where billions of people can not only access it, but also duplicate and further disseminate it, all without cost.

When calibrated appropriately, the incentives to create expressive works have a significant positive effect on our nation's economy. A recent study found that copyright industries contribute nearly eight percent of the United States' gross domestic product, which translates to \$1.8 trillion per year.

The ability of copyright owners to hold accountable those who knowingly facilitate infringement serves a crucial purpose in protecting the creation and dissemination of expressive works in the online environment, generating revenues that greatly contribute to economic growth and stability. The importance of preserving the critical right to hold those who facilitate copyright infringement secondarily liable for the illegal conduct of a vast number of individuals could hardly be clearer in this case, in which pursuing individual lawsuits against anonymous direct infringers would have been clearly impracticable and likely impossible. Exonerating Cox would undermine the foundations of our laws and have a deleterious effect on free speech and economic growth.

Attempting to cast itself as a mere "passive" and innocent equipment provider rather than a party that knowingly and materially contributed to copyright infringement on a massive scale, Cox ignores the relevant statutory language and legislative history of the Copyright Act of 1976 and the Digital Millennium Copyright Act of 1998, as well as a long line of case law establishing that one who materially contributes to copyright infringement by knowingly providing a site, facility,

or means to infringe is secondarily liable as a contributory infringer.

The law governing secondary liability—including the principle that one who knowingly and materially contributes to infringement is liable for that infringement—derived from the early cases *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911) and *Henry v. A.B. Dick Co.*, 224 U.S. 1 (1912) (overruled on other grounds, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917)). Later, in a widely followed opinion, the Second Circuit held that “one who, with knowledge of the infringing activity, induces, causes *or* materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (emphasis added). Five years after *Gershwin*, Congress enacted the current Copyright Act of 1976. Section 106 of the Act gives the copyright owners “the exclusive rights to do and *to authorize*” the enumerated rights listed in the statute. The legislative history of the statute makes clear that Congress intended to preserve the common law governing secondary liability, including *Gershwin*’s then-recent formulation of contributory infringement. In the ensuing years, numerous courts, including the Supreme Court in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (“*Sony-Betamax*”), reaffirmed the principle that one who, with actual knowledge, materially contributes to copyright infringement is liable as a contributory infringer.

In 1998, Congress enacted the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. §

512, which in appropriate circumstances provides a safe harbor for internet service providers that, among other conditions, adopt and implement a policy that provides for the termination of repeat copyright infringers. The legislative history of section 512 emphasizes that Congress intended to preserve existing law governing contributory infringement—and that existing law included liability for knowingly providing the means, site, and facilities for primary infringement, as Cox did in this case. In 2005, the Supreme Court in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (“*Grokster*”), once again reaffirmed the core principle that one who knowingly and materially assists a primary infringer is contributorily liable.

Cox, along with its supporting *amici*, asserts that this Court’s holdings in *Twitter v. Taamneh*, 598 U.S. 471 (2023), and *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025), preclude liability here, because Cox is purportedly a “passive” internet service provider. In light of the constitutional underpinnings of copyright as an engine of free expression and the long-established law governing contributory copyright infringement, these cases are inapposite and, in any event, factually distinguishable.

The Fourth Circuit’s holding that Cox was a willful infringer for the purpose of applying statutory damages should also be affirmed. Under any standard of willfulness, Cox was a willful infringer. Given the massive damage that online privacy causes, robust remedies against infringers are essential. Affirming the Court of Appeals’ correct

ruling on this issue is necessary to preserve copyright's salutary objective of encouraging the dissemination of expressive works.

Amicus urges the Court to affirm.

ARGUMENT

I. COPYRIGHT PROMOTES FREE EXPRESSION.

“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.” *Harper & Row*, 471 U.S. at 558 (citing *Mazer v. Stein*, 347 U.S. 201, 219 (1954)). As this Court observed in *Mazer*, copyright posits that “encouragement of individual effort by personal gain is the best way to advance public welfare....” 347 U.S. at 219. *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (The ultimate aim of copyright is “to stimulate artistic creativity for the general public good.”).

The copyright laws and the First Amendment work in tandem to promote free expression:

The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers’ view, copyright’s limited monopolies are compatible with free speech principles. Indeed, copyright’s purpose is to promote the creation and publication of free expression.

Eldred v. Ashcroft, 537 U.S. 186, 219 (2003); *Harper & Row*, 471 U.S. at 558 (Copyright law guarantees a property right with a view toward “suppl[ying] the

economic incentive to create and disseminate ideas.”) (citing *Mazer*, 347 U.S. at 219 and *Aiken*, 422 U.S. at 156).

Cox and certain *amici* in support of Petitioner conjecture that the Fourth Circuit’s opinion impinges upon the First Amendment by potentially cutting off access to certain institutional users. *See, e.g.*, Brief of *Amici Curiae* American Civil Liberties Union, *et al.*; Brief of *Amicus Curiae* Floor64, Inc. d/b/a The Copia Institute. Aside from raising speculative scenarios that are not before the Court, these *amici* completely ignore copyright’s unique role in encouraging creation and dissemination of expressive works. Given the enormous harm that piracy causes, the damage to free speech rights from a reversal would dwarf any conjectural scenarios that Cox’s supporting *amici* have raised.

II. ROBUST COPYRIGHT PROTECTION FUELS ECONOMIC GROWTH.

A broad body of empirical research suggests that strong copyright protections have historically encouraged the creation of original works, leading not only to the dissemination of expressive works but also to significant economic benefits to the nation. *See* U.S. Chamber of Commerce, *Unlocking Creativity: A Study of the Socioeconomic Benefits of Copyright* (June 24, 2025) (“*Unlocking Creativity*”) at 22, <https://www.uschamber.com/intellectual-property/unlocking-creativity-copyright-report>. According to the Chamber of Commerce:

Creative works enhance the welfare of society and are associated with significant economic activity. For example, Oxford Economics estimated that in 2019, concerts

and the live entertainment industry in the United States had a total economic impact of \$132.6 billion, supported 913,000 total jobs, and was associated with labor income of approximately \$42.2 billion.

Id. at 8. It is estimated that in 2021, “the core copyright industries directly contributed approximately \$1.8 trillion to [U.S.] GDP, accounting for 7.8% of GDP and 8.1% of employment.” *Id.* at 13, 15. And “[d]igitally traded services, including copyright-reliant products, play a key role in U.S. trade.” *Id.* at 17 (citing authority suggesting that the U.S. digital trade surplus has grown by 408% since 1999). According to the International Intellectual Property Alliance (“IIPA”), based on government statistics, “the core copyright industries contributed approximately 56% of the [U.S.] digital economy in 2021, while the total copyright industries [contributed] approximately 65%.” *Id.* (citing IIPA, *Copyright Industries in the U.S. Economy: 2022 Report* (2022)). Finally, the most recent IIPA study concluded that in 2023, the copyright industries contributed over \$2 trillion to the U.S. economy as a whole. Robert Stoner and Jéssica Dutra, *Copyright Industries in the U.S. Economy: The 2024 Report*, at 8 (Feb. 2025), https://www.iipa.org/files/uploads/2025/02/IIPA-Copyright-Industries-in-the-U.S.-Economy-Report-2024_ONLINE_FINAL.pdf. Without question, a robust system of copyright is a critical precondition for a thriving U.S. economy.

Conversely, digital piracy has a demonstrably harmful effect both on the dissemination of expressive works and on the economy. Inadequate

copyright protection, which facilitates piracy, can lower investment in risky creative production. *Unlocking Creativity* at 23. A number of years ago, one study concluded that global online piracy of motion pictures and television alone “costs the U.S. economy at least \$29.2 billion in lost revenue each year.” U.S. Chamber Of Commerce, *Impacts of Digital Piracy on the U.S. Economy*, at forward, ii, 12 (June 2019), https://www.uschamber.com/assets/documents/Digital_Video_Piracy_June_2019.pdf. There can be no doubt that massive infringement of the type at issue in this case inhibits free expression and adversely affects the nation’s economy.

III. THE LONG-ESTABLISHED PRINCIPLE THAT ONE WHO KNOWINGLY AND MATERIALLY CONTRIBUTES TO COPYRIGHT INFRINGEMENT IS LIABLE AS A CONTRIBUTORY INFRINGER IS ESSENTIAL TO STOPPING MASSIVE COPYRIGHT INFRINGEMENT.

In this digital age, where, as here, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative is to sue secondary infringers. *See Grokster*, 545 U.S. at 929-30 (citing *In re Aimster Copyright Litigation*, 334 F.3d 643, 645-646 (7th Cir. 2003)). As one commentator put it, “chasing individual consumers is time consuming and is a teaspoon solution to an ocean problem,” Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 Antitrust Bull. 423, 442 (2002). Secondary liability exists to address this problem. Reversing the Fourth Circuit’s ruling would conflict with established precedent and clear statutory mandates and likely usher in a new flood of digital piracy by stripping copyright owners of one

of the only tools available to them to combat online infringement.

A. Decades of Case Law and the Copyright Act's Legislative History Establish That Knowingly Providing the Site and Facilities for Copyright Infringement Gives Rise to Secondary Liability.

“[D]octrines of secondary liability emerged from common law principles and are well established in the law.” *Grokster*, 545 U.S. at 930-31 (citing *Sony-Betamax*, 464 U.S. at 486 (Blackmun, J., dissenting)). Over a century ago, in *Henry v. A.B. Dick Co.*, this Court recognized in a patent infringement suit that a seller of a product that has lawful uses will nevertheless be liable as a contributory infringer when that seller knows that the buyer will in fact use the product for infringing uses. *Henry*, 224 U.S. at 48-49.

In *Henry*, the plaintiff sued for patent infringement in connection with a mimeograph machine. The defendants sold ink suitable for use on the infringing machine—and also noninfringing machines—with knowledge that the buyer would use the ink to infringe. In holding that the defendant could be liable as a contributory infringer, the Court said:

These defendants are, in the facts certified, stated to have made a direct sale to the user of the patented article, with knowledge that under the license from the patentee she could not use the ink, sold by them directly to her, in connection with the licensed machine, without infringement of the monopoly of the patent. It is not open to

them to say that it might be used in a non-infringing way, for the certified fact is that they made the sale, with the expectation that it would be used in connection with said mimeograph.

224 U.S. at 49 (cleaned up). In other words, even though the defendant's product had substantial noninfringing uses, actual knowledge and material contribution—including providing the *means* to infringe—gave rise to secondary liability. In both *Grokster*, 545 U.S. at 932–33, and *Sony-Betamax*, 464 U.S. at 441–42, the Court cited *Henry* as relevant to copyright infringement cases.

In 1971, the Second Circuit decided *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, in which the court held that “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” *Id.* at 1162. As an example of contributory infringement, the court cited *Screen Gems-Columbia Music, Inc. v. Mark Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966), noting:

[T]he district court held that an advertising agency which placed non-infringing advertisements for the sale of infringing records, a radio station which broadcast such advertisements and a packaging agent which shipped the infringing records could each be held liable as a “contributory” infringer if it were shown to have had knowledge, or reason to know, of the infringing nature of the records. Their

potential liability was predicated upon the common law doctrine that one who knowingly participates or furthers a tortious act is jointly and severally liable with the prime tortfeasor.

Id. (cleaned up).

In 1971, Congress was in the throes of the Copyright Law revision process that ultimately resulted in the 1976 Act. Congress enacted the current Copyright Act about five years after *Gershwin*. Section 106 of the Act, which enumerates a copyright owner's exclusive rights, provides: "[T]he owner of copyright under this title has the exclusive rights to do **and to authorize** any of the following: [listing rights]." (Emphasis added.) According to the House Report of the Committee on the Judiciary accompanying the 1976 Copyright Law revision:

Use of the phrase "to authorize" is intended to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.

H.R. Rep. No. 94-1476, at 61 (1976). As Nimmer notes, "Congress' use of the phrase 'to authorize' establishes the liability of one who does no more than cause or permit another to engage in an infringing act." 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.04[A] (2025). According to Nimmer, the pre-1976 cases holding secondary infringers liable support the conclusion

that the principles set forth in those cases remained good law after the current Act's passage. *Id.*

In 1984, the Supreme Court decided *Sony-Betamax*, 464 U.S. 417. There, the Court considered whether the manufacturer of the Betamax videocassette recorder was liable for contributory infringement because consumers could use the recorder to videotape copyrighted television programming. In answering the question in the negative, the Court stressed that the only contact between the defendant and its customers occurred at the moment of sale and ended thereafter. *Id.* at 437-38. Because the Betamax was a “staple article of commerce” capable of substantial noninfringing uses, the Court believed that a finding of contributory infringement would have required the defendant to stop *all* sales of the Betamax, or at least pay a royalty to the copyright holder. On the facts before it, the Court expressed concern that if the manufacturer of the Betamax were deemed a contributory infringer, the copyright owner could impede legitimate uses of products—an improper extension of the copyright owner's rights, according to the majority. *Id.* at 440-42.

Nowhere does *Sony-Betamax* explicitly or implicitly repudiate the knowing-and-material-contribution prong as articulated in *Gershwin*. On the contrary, the Court cited *Henry v. A.B. Dick*, discussed above, from which the material-contribution prong developed. *Id.* at 441. The Court stated:

[T]he label “contributory infringement” has been applied in a number of lower court copyright cases involving *an ongoing*

relationship between the direct infringer and the contributory infringer at the time the infringing conduct occurred.

Id. at 437 (emphasis added). Unlike the defendant in *Sony-Betamax*—which sold discrete products—Cox’s relationship with its customers is ongoing at the time the infringing conduct occurs. Indeed, Cox collects periodic subscription fees as a prerequisite to continuing this ongoing service. So, unlike the manufacturer of the Betamax, Cox could have terminated dishonest customers—*i.e.*, known repeat infringers—while at the same time allowing other customers to continue using its service. The explicit policy justifications underlying the *Sony-Betamax* decision are therefore entirely absent here. Indeed, the Court’s reference to an ongoing relationship at the time of infringement *supports* liability in this case.²

After *Sony-Betamax*, the courts continued to follow *Gershwin*’s formulation of contributory infringement. In 1996, the Ninth Circuit decided *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259

² Because Cox has an ongoing relationship with its customers at the time of infringement, the staple-article-of-commerce discussion in *Sony-Betamax* is inapposite. *Amicus* notes, however, that the Court’s reference to staple articles of commerce and substantial noninfringing uses “came in a discussion of the proof-of-knowledge prong, not the proof of material contribution prong.” 6 William F. Patry, *Patry on Copyright* § 21:48 (Sept. 2025). That is, *Sony-Betamax* merely held that where a product has substantial noninfringing uses, a court will not automatically assume *constructive* knowledge of infringement occurring after a sale. Cox had *actual* knowledge of infringement (which it does not dispute), such that liability would attach despite the existence of non-infringing uses.

(9th Cir. 1996), in which a swap-meet owner, with knowledge of the infringing sales of counterfeit sound recordings, provided the site and facilities to third parties who sold the infringing works. Rejecting the lower court’s ruling that the defendant could be liable only for inducement or concealment of the primary infringer’s identity, the court held that providing the site and facilities for known infringing activity is sufficient to establish contributory liability. *Id.* at 264 (citing *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59, 62 (3d Cir. 1986)) (a person who knowingly makes available other requisites of infringement is a contributory infringer). So, as of the mid-1990s, and after *Sony-Betamax*, knowing, material contribution—in the form of providing the site and facilities for infringement—continued to give rise to secondary liability.

B. When Enacting the DMCA, Congress Confirmed the Applicability of Cases Holding that Knowingly Providing the Means for Primary Infringement Constitutes Contributory Infringement.

In 1998, Section 512 of the DMCA took effect. That statute exempts internet service providers (“ISPs”) like Cox from monetary damages for users’ infringements through qualified “safe harbors,” so long as the ISP meets certain requirements. The section “preserve[d] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” S. Rep. No. 105-190, at 20 (1998).

According to the legislative history of section 512, the liability of an ISP that (like Cox here) failed

to take advantage of the safe harbor provisions “would be adjudicated based on the doctrines of direct, vicarious or contributory liability for infringement as they are articulated in the Copyright Act ***and in the court decisions interpreting and applying that statute, which are unchanged by new Section 512.***” H.R. Rep. No. 105-551, pt. 2, at 64 (1998) (emphasis added). Congress thus reaffirmed the vitality of the existing law, which included the holdings in *Fonovisa* and *Aveco* that one who knowingly supplies the site and facilities for copyright infringement is liable as a contributory infringer.

By their arguments, Cox and its friends would render this statute superfluous. Quite simply, no ISP would need to avail of itself of the DMCA safe harbors, and copyright infringement—not addressable by filing lawsuits against tens of millions of direct infringers—could run rampant, thereby depriving copyright holders of their valuable property rights, depriving consumers of a marketplace of expressive works, and working significant harm on the U.S. economy.

C. ***The Court’s Grokster Opinion Yet Again Confirmed Established Law.***

In 2005, the Supreme Court in *Grokster*, 545 U.S. 913, reaffirmed the principle that material contribution with knowledge of the infringement gives rise to secondary liability. There, the Court considered whether purveyors of software that allowed users to infringe copyrighted works were secondarily liable as contributory infringers. At the outset, the *Grokster* opinion cited Justice Blackmun’s dissent in *Sony-Betamax* as accurately

characterizing doctrines of secondary liability that “are well established in the law.” *Id.* at 930-31 (citing *Sony-Betamax*, 464 U.S. at 486 (Blackmun, J., dissenting)). In turn, Justice Blackmun favorably quoted *Gershwin* for the proposition that “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” 464 U.S. at 487 (quoting *Gershwin*, 443 F.2d at 1162). So, to the extent that Cox and some of its supporting *amici* argue that *Grokster* repudiated or limited the applicability of *Gershwin*’s material-contribution prong, they misread the opinion and attempt to import factors into a secondary liability analysis for which there is no precedent.

In fact, *Grokster* had no occasion to consider material contribution at all. Rather, “[t]he issue of material contribution was not reached by the Supreme Court in vacating and remanding this decision since the Court found liability based on inducement.” 6 *Patry on Copyright* § 21:48. Inducement is a stand-alone, separate form of secondary liability, along with contributory infringement and vicarious liability. *See Grokster, supra; Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1032 (9th Cir. 2013). *See also* 3 *Nimmer on Copyright* § 12.04[A][5][a] (noting that *Grokster* “created an additional branch [of secondary liability], *i.e.*, inducement”). Inducement theory as articulated in *Grokster* is neither a necessary element of contributory infringement nor a repudiation of the knowing-and-material contribution variant of contributory infringement.

Although Cox and certain supporting *amici* characterize its role in the infringing conduct as “passive,” there is nothing passive about knowingly providing known copyright infringers with the very means, site, and facilities they need to continue infringing. As one commentator has said in discussing *UMG Recordings, Incorporated v. Grande Communications Networks, L.L.C.*, 118 F.4th 697 (5th Cir. 2024), a case factually on all fours with this one in which the court found contributory infringement, “[t]his result is correct and was easy to reach, given defendant’s decision to offer its services to serial infringers.” 6 *Patry on Copyright* § 21:48.

Finally, nothing in *Twitter v. Taamneh*, 598 U.S. 471, nor *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, is to the contrary. Cox first tries to leverage these opinions in arguing that, by analogy, if Congress wanted to impose contributory infringement in a case like this, it would have done so by statute. Opening Br. 46. The analogy is false. Cox and its amici fail to appreciate that, for the reasons discussed above, Congress *has* spoken and has imposed such a duty by virtue of the “to authorize” language in section 106 of the Copyright Act and section 512 of the DMCA; the legislative history of those statutes; and long-settled case law.

Moreover, both *Twitter* and *Smith & Wesson* are distinguishable. Most importantly, neither implicated copyright law’s free speech underpinnings, which require a broad application of contributory infringement to ensure the creation

and dissemination of expressive works to the consuming public.

Both cases are also factually distinguishable. Unlike Cox, the defendants in *Twitter* and *Smith & Wesson* did not directly provide the actual wrongdoer with the means, sites, or facilities used to commit the ultimate wrong. In *Twitter*, the defendant had no knowledge of the specific planned terrorist attack. And the attack bore no direct relationship to the allegedly unlawful posts. In *Smith & Wesson*, the relationship of the perpetrators and Smith & Wesson ended at the point of sale; the plaintiff identified no specific act or wrongdoing caused by Smith & Wesson's conduct; and Smith & Wesson sold to distributors, not the retailers who supposedly sold guns to drug cartels, much less to the cartels themselves. In other words, the chain of causation was tenuous and speculative at best.

Here, in contrast, Cox directly provides the direct infringers the means to infringe. And Cox has an ongoing relationship with those infringers at the time of the infringement.

IV. COX ACTED WILLFULLY—A CONCLUSION ESSENTIAL TO PROMOTING COPYRIGHT'S OBJECTIVES.

As discussed in Respondent Sony's brief and elsewhere, by any standard, Cox is a willful infringer. *See, e.g.*, Resp. Br. 44-50; Brief of *Amicus Curiae* AIPLA, 13-15. Cox knew that it was facilitating massive copyright infringement yet continued to provide its service to the infringers. Under the well-established law governing secondary

liability, Cox clearly knew that its conduct constituted copyright infringement.

An award of statutory damages that considers Cox’s willfulness is particularly important to further copyright’s important social and economic goals. For example, one study notes that “[u]nlicensed access to music is still widespread, with a 2021 IFPI survey reporting that 30% of respondents used copyright infringing, or pirated, methods to listen to or obtain music.” *Unlocking Creativity* at 22 (citing IFPI, *Engaging with Music: 2021* (2021)). Moreover, the U.S. Chamber of Commerce and NERA “have estimated reductions in revenues to [U.S.] content producers through digital video piracy to be between \$29 billion and \$71 billion per year, with job losses of around 230,000 to 560,000 jobs and annual GDP costs of between \$48 billion and \$115 billion.” *Unlocking Creativity* at 22 (citing David Blackburn, Jeffery Eisenach, and David Harrison, *Impacts of Digital Video Piracy on the U.S. Economy*, NERA Economic Consulting and the U.S. Chamber of Commerce (2019)). In light of the staggering adverse impact that copyright infringement has on creators and distributors of copyrighted works like *Amicus’s* members—and ultimately on the consuming public—a consideration of Cox’s willfulness in assessing statutory damages manifestly serves the purpose of copyright.

CONCLUSION

The longstanding common law and subsequent legislative enactments reaffirm that where a party like Cox Communications knowingly and materially contributes to copyright infringement, that party is secondarily liable. To hold otherwise would not only

render section 512(a) of the DMCA superfluous—as Sony and other *amici* establish—but would also severely hinder the creation and dissemination of expressive works, all to the detriment of the consuming public and the nation’s economy. *Amicus* urges that the Court of Appeals’ judgment be affirmed.

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