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 THE AUTHORS GUILD, INC.; SISTERS IN CRIME; ROMANCE WRITERS OF AMERICA, INC.; THE SONGWRITERS GUILD OF AMERICA; NOVELISTS, INC.; THE DRAMATISTS GUILD OF AMERICA; AND THE SOCIETY OF COMPOSERS AND LYRICISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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PRELIMINARY STATEMENT[1]

The Authors Guild, Inc.; Sisters in Crime; Romance Writers of America, Inc.; the Songwriters Guild of America; Novelists, Inc.; The Dramatists Guild of America; and the Society of Composers and Lyricists (collectively, "*Amici*") respectfully submit this Memorandum of Law in Support of Respondents.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The *Amici* are organizations that represent the professional interests of writers and other creators.

Founded in 1912, *amicus* The Authors Guild, Inc. (the "Guild") is a national non-profit association of over 17,000 professional, published writers of all genres including periodicals and other composite works. The Guild counts among its members the full spectrum of American authors, including novelists, historians, biographers, academicians, journalists, and other writers of nonfiction and fiction. The Guild works to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression, and fair pay. Many Guild members earn their livelihoods through their writing. Their work covers important issues in history, biography, science, politics, medicine, business, and other areas; they are frequent contributors to the most influential and well-respected publications in every field. The Guild's members

1. Neither the parties nor their counsel have authored this brief, and neither they nor any other person or entity other than counsel for *amici curiae* contributed money that was intended to fund preparing or submitting this brief.

are the creators on the front line, fighting for their constitutional rights under copyright to reap financial benefits from their labors.

Amicus Sisters in Crime (SinC) was founded in 1986 as an advocacy organization for women crime writers. Its mission, "to promote the ongoing advancement, recognition and professional development of women crime writers," has been expanded in recent years to include other marginalized writers. SinC supports its over 4,000 members by providing craft and business webinars, rich online resources, a robust online community, and advocacy for the entire genre. Its members include authors at all stages of their writing journey as well as other advocates for the community, such as librarians, booksellers, readers, and agents. SinC has more than 50 chapters worldwide.

Amicus Romance Writers of America, Inc. ("RWA"), founded in 1980, is a nonprofit trade association, with a membership of more than 4,000 romance writers and related industry professionals, whose mission is to advance the professional interests of career-focused romance writers through networking and advocacy. RWA works to support the efforts of its members to earn a living, to make a fulltime career out of writing romance – or a part-time one that supplements his/her main income.

Since 1931, *amicus* the Songwriters Guild of America has fought to protect songwriters, the music they create and their ability to earn a living for themselves and their families. The SGA carries out its mission in three ways: through its music advocacy on Capitol Hill and elsewhere throughout the world; through services to professional and developing songwriters; and through community outreach via the Songwriters Guild of America Foundation.

Founded in 1989, *amicus* Novelists, Inc. ("NINC") is a nonprofit organization focusing on networking, education, and advocacy for professional authors of book-length fiction. NINC members include traditionally-published novelists, indie or self-published authors, and writers whose careers combine both traditional and indie publication. Many NINC members also write professionally in other fields, such as journalism, screenwriting, comics, drama, short fiction, and nonfiction.

Amicus The Society of Composers and Lyricists ("SCL") is the primary organization for professional film, television, video game, and musical theatre composers and lyricists, and those working in the industry such as orchestrators, arrangers, music supervisors, music agents, music attorneys, music editors, copyists, recording engineers, and allied professions, with a distinguished 80-year history in the fine art of creating music for visual media. Current SCL members include the foremost professionals in their fields whose experience, expertise and advocacy are focused on the many artistic, technological, legislative, legal, newsworthy and other issues as they relate to media music creators.

Amicus The Dramatists Guild of America is the only professional organization promoting the interests of playwrights, composers, lyricists, and librettists writing for the stage. Established over 100 years ago for the purpose of aiding dramatists in protecting both the artistic and economic integrity of their work, The Dramatists Guild of America continues to educate, and advocate on behalf of, its over 8,000 members. The Dramatists Guild of America believes a vibrant, vital theater is an essential element of this country's ongoing

cultural debate, and seeks to protect those individuals who write for the theater to ensure its continued success.

SUMMARY OF ARGUMENT

The ruling of the Fourth Circuit should be affirmed. This Court's precedent consistently recognizes the importance of contributory infringement liability, which ensures that the rights of copyright owners receive meaningful protection even when infringement occurs through the interaction of individual infringers and technology that enables or facilitates their infringing conduct. This Court has recognized that a technology with "substantial noninfringing uses" cannot give rise to liability based *solely* on its capacity for infringement, but it has also recognized that this principle does not immunize technology providers that intentionally encourage infringement. A robust application of the contributory infringement doctrine provides the proper balance between the rights of copyright holders and those of technology providers and their users.

The doctrine of contributory infringement is essential to overcome practical obstacles to copyright enforcement in the online context. Without it, service providers and online platforms could profit from mass infringement while disclaiming any responsibility for the harm they knowingly facilitate. In environments where millions of individual users can copy and distribute copyrighted works quickly, anonymously, and across borders, direct enforcement against each end-user is a practical impossibility.

If secondary liability were unavailable, or if it offered purely symbolic protection in the online realm, the parties

best situated to detect, deter, and disrupt large-scale infringement would have little legal incentive to do so. Contributory liability therefore serves a crucial deterrent and remedial function: it provides intermediaries in control of infrastructure with an incentive to act when they have actual or constructive knowledge of pervasive infringement and the practical ability to address it. The Fourth Circuit's approach sensibly balances the competing equities: it does not convert all ISPs into no-fault insurers against user misconduct, but it recognizes that when an ISP is presented with reliable, account-specific evidence of repeated infringement – and the ISP willfully refuses to take available corrective steps – a jury may properly hold that ISP accountable for materially contributing to ongoing infringement.

Cox's deliberate decisions to protect the revenue it received from infringing subscribers, while ignoring infringement claims, constitute "affirmative steps" demonstrating intent to foster and profit from infringement. Thus, even if Cox's internet service is capable of substantial noninfringing use, that fact does not shield it from liability.

This Court's caselaw regarding secondary copyright liability strikes an essential balance between protecting technological innovation and preventing willful facilitation of piracy. Holding Cox liable advances both aims: it deters calculated indifference to infringement, ensures fair competition among law-abiding providers, and reinforces the principle that technological progress cannot come at the expense of the copyright owners. The Fourth Circuit correctly recognized, as this Court has recognized, that Cox's ongoing service relationships with its subscribers support contributory liability even where mere one-time product sales do not.

Cox appears to argue that because some of its accounts serve multiple individuals in institutional contexts such as hospitals, military barracks, or dormitories, it should face no liability for *any* of its conduct with respect to *any* of its accounts. This issue is not referenced, or fairly included within, the statement of the Questions Presented in Cox's merits brief at page i, and should therefore be deemed abandoned. Even if the issue were not abandoned, however, the jury found, and the Fourth Circuit correctly affirmed, that Cox had actual knowledge of specific repeat infringements through specific IP addresses, and the ability to terminate the accounts associated with those addresses, demonstrating both awareness and control over ongoing infringement, regardless of whether multiple users shared a given account.

Finally, the non-copyright precedent relied on by Cox is factually distinguishable and legally irrelevant, because it arose under common-law and statutory frameworks for aiding and abetting criminal activity. Those standards are conceptually distinct from the contributory infringement standard in copyright law. Given the disparate legal frameworks and clear factual differences between the case at bar and Cox's cited aiding-and-abetting authorities, those authorities are neither controlling nor persuasive authority and should be disregarded.

ARGUMENT

I. THE DOCTRINE OF CONTRIBUTORY INFRINGEMENT IS VITAL FOR EFFECTIVE COPYRIGHT ENFORCEMENT.

A. Precedent Recognizes the Importance of Contributory Infringement Liability.

The doctrine of contributory infringement ensures that the rights of copyright owners receive meaningful protection even when infringement occurs through the interaction of individual infringers and technology that enables or facilitates their infringing conduct. This Court in *MGM Studios Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005) ("*Grokster*") recognized that there is a "powerful" argument for imposing secondary liability in circumstances like those presented in this case:

> When a widely shared product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, so that *the only practical alternative* is to go against the device's distributor for secondary liability on a theory of contributory or vicarious infringement.

Id. at 930 (emphasis added).

Similarly, in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), ("*Sony v. Universal*") this Court had previously held that "adequate protection" of copyright "may require courts to look beyond actual duplication of a device or publication to the products or

activities that make such duplication possible." *Id.* at 442. Only by doing so – by looking to the "products or activities" that make infringement possible – can the Court strike the proper balance between "the copyright holder's *legitimate demand for effective – not merely symbolic – protection* . . . and the rights of others freely to engage in substantially unrelated areas of commerce." *Id.* (emphasis added).

Grokster clarified that while *Sony v. Universal* recognized that a technology with "substantial noninfringing uses" cannot give rise to liability based *solely* on its capacity for infringement, that precedent does not immunize technology providers that intentionally encourage infringement. *Id.* at 936-37.

In *Grokster*, this Court thus held that distributors of peer-to-peer file-sharing software could be found liable for contributory infringement where there was "evidence of active steps…taken to encourage direct infringement, such as advertising an infringing use or instructing how to engage in an infringing use." *Id.* at 936. The Court emphasized that the law "premises liability on purposeful, culpable expression and conduct," ensuring that contributory infringement targets those who seek to profit from the infringement of others. *Id.* at 937. Accordingly, *Grokster* reaffirmed that liability attaches not only where direct control is exercised over infringers, but where a defendant knowingly facilitates and benefits from infringing activity.

The Ninth Circuit's decision in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) ("*Napster*"), had applied a similar analysis in the online peer-to-peer

context, finding contributory infringement where a service provider knowingly encouraged and "materially contributed to" the widespread unauthorized sharing of copyrighted music. *Id.* at 1022. The court rejected Napster's argument that its service was merely a passive conduit, because "[t]he record supports the district court's finding that Napster has *actual* knowledge that *specific* infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material." *Id.* (emphasis original). The *Napster* court thus confirmed that knowledge combined with material contribution – such as providing the means to infringe or refusing to remove known infringing material – suffices for contributory liability.

Together, *Napster* and *Grokster* confirm that a robust application of the contributory infringement doctrine provides the proper balance between the rights of copyright holders and those of technology providers and their users. Courts have consistently applied these cases to impose liability on online intermediaries who repeatedly "turned a blind eye" to infringement while profiting from it. *See, e.g.*, *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293 (4th Cir. 2018) ("*BMG Rights Management*")(finding sufficient evidence for contributory infringement where an ISP continued to provide service to repeat infringers):

> [I]f a person "knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." *See* Restatement (Second) of Torts

> § 8A cmt. b (1965); *Grokster*, 545 U.S. at 932, 125 S.Ct. 2764 (a person "will be presumed to intend the natural consequences of his acts" (internal quotation marks and citation omitted)). Under this principle, "when an article is good for nothing else but infringement ... there is no injustice in presuming or imputing an intent to infringe" based on its sale. *Grokster*, 545 U.S. at 932, 125 S.Ct. 2764 (internal quotation marks and citation omitted). Assuming the seller is aware of the nature of his product – that its only use is infringing – he knows that infringement is substantially certain to result from his sale of that product and he may therefore be presumed to intend that result.
>
> A similar result follows when a person sells a product that has lawful uses, but with the *knowledge* that the buyer *will in fact* use the product to infringe copyrights. In that circumstance, the seller knows that infringement is substantially certain to result from the sale; consequently, the seller intends to cause infringement just as much as a seller who provides a product that has exclusively unlawful uses.

Id. at 307 (emphasis original).

B. The Doctrine of Contributory Infringement Is Essential to Overcome Practical Obstacles to Copyright Enforcement in the Online Context.

Policy considerations strongly support imposing contributory infringement liability in cases such as this

one. Without it, service providers and online platforms could profit from mass infringement while disclaiming any responsibility for the harm they knowingly facilitate. As the *Grokster* Court recognized, imposing liability for intentional inducement is necessary to prevent infringement-enabling technology from becoming a haven for copyright piracy. 545 U.S. at 930 (secondary liability is the "only practical alternative").

In the digital era – where intermediaries possess the technical ability to prevent infringement but may lack the incentive to do so – the prospect of contributory infringement liability serves as a vital deterrent. It ensures that those who knowingly exploit infringing activity for gain cannot hide behind the acts of their users, and thereby preserves the balance Congress intended between technological innovation and the fundamental protections of the Copyright Act.

The doctrine of contributory infringement is a necessary adaptation of long-standing common-law principles to the realities of digital networks. For over half a century, the Courts have recognized that liability may attach to "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

In environments where millions of individual users can copy and distribute copyrighted works quickly, anonymously, and across borders, direct enforcement against each end-user is a practical impossibility. Peer-to-peer litigation recognized that these technologies make

large-scale detection and policing of individual infringers extremely difficult and therefore that secondary-liability doctrines are essential tools for rights-holders.

This Court in *Grokster* clarified how contributory (and inducement-based) liability applies to intermediaries that affirmatively foster infringement. The Court held that "[w]e hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." *Grokster, supra,* at 936-37 (2005). *Grokster* recognized that a mere possibility of noninfringing uses does not absolve a defendant who intentionally encourages or takes affirmative steps to promote infringement.

Equally important, courts have explained how the material-contribution element operates in the ISP context: a service that provides the site and facilities for infringement, that can trace infringement to particular accounts, and that has the ability to terminate access or otherwise act to curb the misuse is in a unique position to prevent large-scale wrongdoing. See *Napster*, 239 F.3d at 1019–23 (discussing Napster's indexing and ability to block access and concluding that Napster materially contributed and had a right and ability to supervise users).

If secondary liability were unavailable, or if it offered purely symbolic protection in the online realm, the parties best situated to detect, deter, and disrupt large-scale infringement would have little legal incentive to do so. Contributory liability therefore serves a crucial deterrent and remedial function: it provides intermediaries in

control of infrastructure with an incentive to act when they have actual or constructive knowledge of pervasive infringement and the practical ability to address it. *See, e.g.*, *Sony v. Universal*, *supra*, 464 U.S. at 442-45 (examining the policy backdrop against which contributory infringement is evaluated).

These doctrinal and practical considerations overwhelmingly support affirmance of the Fourth Circuit's ruling that Cox should be held liable for contributory infringement. The Fourth Circuit carefully applied the controlling legal standards and grounded its conclusion in record evidence showing (i) notice of specific infringing activity traceable to identified subscriber accounts and (ii) continued provision of service to those accounts despite internal indications that further infringing conduct was "substantially certain." 93 F.4th 222, 234-36 (4th Cir. 2024) (affirming contributory liability).

That holding is squarely supported by this Court's precedent. *Grokster* imposes liability where a defendant takes affirmative steps to foster infringement; it does not immunize an intermediary that, with knowledge of specific repeated infringements and the ability to act, chooses to continue servicing the infringing accounts. 545 U.S. at 936-37. Nor does the test applied by the Fourth Circuit impose liability on mere passive or theoretical facilitators: it requires both knowledge (including evidence that infringing conduct was "substantially certain" to recur) and material contribution through continuing the provision of service in a way that enabled further infringement. *See* 93 F.4th at 234-36.

Moreover, the Fourth Circuit's approach sensibly balances the competing equities: it does not convert all

ISPs into no-fault insurers against user misconduct, but it recognizes that when an ISP is presented with reliable, account-specific evidence of repeated infringement – and the ISP willfully refuses to take available corrective steps – a jury may properly hold that ISP accountable for materially contributing to ongoing infringement. Not because it is an ISP, but because it knowingly perpetuated identified acts of infringement. That approach preserves the protective scope of *Sony* for legitimate devices and services designed primarily for lawful uses while ensuring the contributory infringement doctrine remains available to address business models or practices that knowingly enable large-scale online piracy. *See Grokster*, 545 U.S. at 935-37; *Sony v. Universal*, 464 U.S. at 442-45.

Therefore, the Fourth Circuit's contributory-liability ruling – which required both knowledge that infringement was substantially certain to recur and continued provision of service despite that knowledge – is a necessary application of contributory infringement doctrine in light of the practical problems of copyright enforcement in the internet age.

II. THE JURY PROPERLY FOUND MATERIAL CONTRIBUTION BECAUSE COX CONTINUED TO PROVIDE ITS SERVICE TO SPECIFIC USERS WITH KNOWLEDGE THAT THOSE USERS WERE "SUBSTANTIALLY CERTAIN" TO INFRINGE.

A. The Fourth Circuit's Material Contribution Standard is Consistent With Supreme Court Copyright Precedent.

1. *Grokster* Permits Finding of Contributory Infringement For Products and Services Having Substantial Noninfringing Uses.

As noted above, this Court in *Grokster,* 545 U.S. 913 (2005), clarified that the existence of substantial noninfringing uses does not immunize a technology provider from contributory infringement liability where there is additional evidence of intent to foster infringement. In so doing, Court reaffirmed the *Sony v. Universal* principle that the mere "sale of copying equipment," without more, "does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes." *Sony v. Universal*, 464 U.S. 417, 442 (1984)). But *Grokster* held only that the *Sony* rule "limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product" – it does not hold that such intent can never be proven to a jury based on the totality of the evidence, as it was here. Instead, the *Grokster* Court made clear that liability may attach by reason of the contributory infringer's *conduct*, where "evidence goes beyond a product's characteristics or the knowledge that it may be

put to infringing uses, and shows statements or actions directed to promoting infringement." *Id.* at 935.

In *Grokster*, the Court found such intent where the defendants had "communicated an inducing message" to their users and took "active steps" to encourage infringement, *id.* at 937-38, including marketing themselves as replacements for the recently-shuttered Napster and designing software to make infringement easy. *Id.* at 939-40. The Court thus recognized that a party may be held liable if there is evidence of "clear expression or other affirmative steps taken to foster infringement." *Id.* at 936-37.

Subsequent courts have emphasized that *Grokster* allows liability even for technologies or services that have legitimate uses, so long as there is "other evidence of intent" beyond mere knowledge. See *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1043 (9th Cir. 2013) ("*Fung*")(finding liability where the defendant "actively encourage[d] infringement" through website design and communications with users); *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 151 (S.D.N.Y. 2009) (holding that defendants' business model, marketing, and technical decisions provided "overwhelming" evidence of intent to foster infringement despite potential noninfringing uses). As these courts have explained, *Grokster* does not immunize conduct where the provider invites, encourages, or profits from infringement. *See Fung*, 710 F.3d at 1035.

Here, Cox's conduct provides precisely the kind of "other evidence of intent" contemplated by *Grokster*. The record shows that Cox continued to provide high-speed

internet service to known repeat infringers despite receiving multiple specific infringement notices identifying those subscribers by IP address and timestamp. Internal Cox communications reveal that employees affirmatively and repeatedly decided not to terminate such users because their monthly subscription fees were too lucrative to lose.

Cox's deliberate decisions to protect the revenue it received from infringing subscribers, while ignoring infringement claims, constitute "affirmative steps" demonstrating intent to foster and profit from infringement. *Grokster*, 545 U.S. at 937. As in *Fung*, Cox's internal communications, business incentives, and deliberate failure to act, taken together, establish that it invited and tolerated infringement as a means of increasing its revenues. *See Fung*, 710 F.3d at 1035-36.

Thus, even if Cox's internet service is capable of substantial noninfringing use, that fact does not shield it from liability where, as here, there is compelling evidence of intent to induce or encourage infringement for profit. The record here provides ample evidence on which the jury properly concluded that Cox's deliberate adoption and implementation of a series of unreasonably lax repeat-infringer policies, coupled with its refusal to enforce even those inadequate policies, and its financial motivation to keep collecting monthly subscription fees from subscribers it knew to be repeat infringers, provides the "other evidence of intent" that *Grokster* requires.

This result is consistent with the policy rationale underlying *Grokster* and the doctrine of contributory infringement more generally. The *Grokster* standard

strikes an essential balance between protecting technological innovation and preventing willful facilitation of piracy. It permits the sale of neutral technologies capable of legitimate use, as *Sony v. Universal* requires, while ensuring that technology providers who intentionally encourage or profit from infringement face liability for their affirmative actions. Imposing liability here vindicates that balance by distinguishing between innocent service providers and those, like Cox, who choose repeatedly to ignore their obligations under the DMCA for the sake of their own bottom line. As this Court observed in *Grokster*, copyright law seeks to strike a "sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement." *Id.* at 928. The Fourth Circuit did so.

Holding Cox liable advances both aims: it deters calculated indifference to infringement, ensures fair competition among law-abiding providers, and reinforces the principle that technological progress cannot come at the expense of the copyright owners whose creations are Constitutionally protected to "Promote the Progress of Science and useful Arts." U.S. Const., Art. I, Sec. 8.

2. The Facts of *Sony v. Universal* Are Materially Distinguishable Because Sony Had No Ongoing Relationship with VCR Purchasers.

This Court's decision in *Sony v. Universal, supra,* 464 U.S. 417 (1984) held that the manufacturer of video cassette recorders could not be held liable for contributory

infringement because the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is "capable of substantial noninfringing uses." 464 U.S. at 442. The Court emphasized that Sony had no reason to expect that the purchasers of its equipment would use it to infringe copyrighted works and had no continuing relationship with the purchasers that would alert it to infringement. *Id.* at 437, 444.

By contrast, the facts here, as in the Fourth Circuit's 2018 ruling in *BMG Rights Management, supra,* 881 F.3d 293 (4th Cir. 2018), are materially different. Cox, as an ISP, maintains an ongoing contractual and operational relationship with its subscribers, through which it provides access to the internet. This ongoing relationship created the opportunity for Cox to curtail infringing activity that was repeatedly brought to Cox's attention by the thousands of infringement notices served on Cox by Respondents. On virtually identical facts, the Fourth Circuit in *BMG Rights Management* observed that Cox failed to implement the repeat-infringer policy required under 17 U.S.C. 512(i):

> Here, Cox formally adopted a repeat infringer "policy," but, both before and after September 2012, made every effort to avoid reasonably implementing that policy. Indeed, in carrying out its thirteen-strike process, Cox very clearly determined *not* to terminate subscribers who in fact repeatedly violated the policy.

881 F.3d at 303 (emphasis and internal quotation marks in original).

The same is true here, as the jury found, and the Fourth Circuit affirmed. Unlike the VCR manufacturer in *Sony v. Universal*, Cox was not simply selling a copyright-neutral device to an unknown consumer in a one-time transaction. Instead, Cox was providing an ongoing service directly used to infringe, with repeated notice of the ongoing infringements and clear ability to intervene.

This distinction is critical. The Supreme Court in *Sony v. Universal* explicitly noted that the absence of a continuing relationship between manufacturer and purchaser meant Sony could not have been in a position to control the use of copyrighted works by its customers. *See Sony v. Universal, supra*, at 439, n.19 (noting that Sony did not "supply its products to identified individuals known by it to be engaging in continuing infringement of respondents' copyrights"). Here, however, the jury found that the ongoing subscriber relationship established Cox's practical ability to prevent infringement by the very customers about whom Cox received notices of repeat infringement.

Accordingly, the reasoning of *Sony v. Universal* does not shield Cox from liability here; rather, the Fourth Circuit correctly recognized that Cox's ongoing service relationships with its subscribers support contributory liability even where mere product sales do not. The distinction in the factual contexts – ongoing ISP-subscriber relationships versus one-time VCR sales – requires a different legal outcome here than this Court reached in *Sony v. Universal*.

3. Cox's Offering of Multi-User Subscriptions Does Not Support Reversal.

In its *Petition for Certorari*, Cox appears to argue that because some of its accounts serve multiple individuals in institutional contexts such as hospitals, military barracks, or dormitories, it should face no liability for *any* of its conduct with respect to *any* of its accounts. *See Petition for Certiorari* at 34-35. Cox does not properly pursue the argument in its brief on the merits, however and thus it should be deemed abandoned, *see* Supreme Court Rule 24.1 (brief on the merits must contain questions presented for review). If a petitioner fails to include a question previously raised in the petition for *certiorari*, the Court can proceed with the assumption it is no longer being pursued.

Here, the multi-user subscription issue is not referenced, or fairly included within, the statement of the Questions Presented in Cox's merits brief at page i. The only mention of the issue in that merits brief is a glancing reference offered to support Cox's dubious moral judgment that enforcement of the Copyright Act on the facts of this case would be "unconscionable":

> Often, termination would have been unconscionable. For example, all but one of the 49 accounts most frequently accused of infringement were entities like regional ISPs, university housing, military barracks, and multi-unit dwellings, so that termination would have meant throwing innocent users off the internet en masse.

Id. at 11.

Even if the issue were not deemed abandoned, however, Cox's business decision to offer multi-user, institutional accounts cannot provide a get-out-of-jail-free card with respect to its contributory copyright liability. The mere fact that a Cox account may be accessible to more than one individual does not absolve the ISP of liability for repeated infringing activity conducted through that account.

Here, the jury found, and the Fourth Circuit affirmed, that Cox had actual knowledge of specific repeat infringements through specific IP addresses, and the ability to terminate the accounts associated with those addresses, demonstrating both awareness and control over ongoing infringement, regardless of whether multiple users shared a given account. *See also*, *BMG Rights Management, supra,* 881 F.3d 293, 308 (4th Cir. 2018).

Moreover, Cox's professed concern for the non-infringing users of such multi-user accounts is highly selective – the record does not reveal a single instance in which Cox declined to terminate a multi-user account when the bill for that account went unpaid. Cox raises the bogeyman of "throwing innocent users off the internet *en masse*," Cox Merits Brief at 11, but the record reflects no compunction by Cox to do just that when its own ox was being gored.

Because the existence of multi-user accounts does not diminish Cox's awareness of infringing activity or its corresponding ability to stop such infringement, it does not warrant reversal of the Fourth Circuit's decision.

B. Non-Copyright Precedent Is Factually Distinguishable and Legally Irrelevant.

1. *Smith & Wesson v. Estados Unidos Mexicanos* Is Inapposite.

This Court should reject any attempt to import the reasoning of *Smith & Wesson v. Estados Unidos Mexicanos* into this copyright action. That case arose under a common-law framework for aiding and abetting criminal activity, a standard fundamentally different from the copyright infringement and contributory liability principles at issue here. In *Smith & Wesson*, liability turned on whether a defendant had "knowledge of and actively participated in the criminal conduct of another," with a focus on direct assistance to an ongoing criminal act. *Smith & Wesson v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025)(holding that mere facilitation without knowledge of specific crimes is insufficient for aiding and abetting liability).

By contrast, copyright law establishes liability for contributory infringement based on knowledge of infringement and material contribution to it, without requiring a criminal nexus. As this Court emphasized in *Grokster*, 545 U.S. at 930, contributory liability attaches where a defendant materially contributes to an infringement, which is conceptually distinct from the criminal aiding-and-abetting standard. Similarly, in *Napster, supra*, 239 F.3d at 1020 (9th Cir. 2001), the Court imposed civil liability on a service provider who knowingly facilitated infringement, again underscoring that copyright law relies on affirmative knowledge and material contribution rather than on criminal intent.

Moreover, the context of this case – where the Petitioners are internet service providers with ongoing relationships with subscribers – differs sharply from the discrete criminal transactions addressed in *Smith & Wesson*. Unlike the aiding-and-abetting scenario in that case, Cox maintained continuing control over account access by its subscribers and had the capacity to implement meaningful preventative measures upon receiving infringement notices. The purely criminal-law context in *Smith & Wesson* thus provides no guidance for interpreting contributory liability under the Copyright Act.

Accordingly, any reliance on *Smith & Wesson* is misplaced. That case's common-law criminal standard does not bear on the statutory and equitable principles that govern contributory copyright liability, and it should play no part in this Court's assessment of the judgment of the Fourth Circuit here.

2. *Twitter v. Taamneh* Is Inapposite.

This Court's decision in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), is both legally and factually distinguishable from the present case, and therefore should have no bearing on this Court's analysis of Cox's liability under the Copyright Act.

Taamneh addressed the scope of aiding-and-abetting liability under the Anti-Terrorism Act (ATA), specifically 18 U.S.C. § 2333(d)(2), which permits civil suits against individuals or entities that knowingly provide substantial assistance to foreign terrorist organizations. The Court clarified that to establish aiding-and-abetting liability

under the ATA, plaintiffs must demonstrate that the defendant provided substantial assistance with the knowledge that their actions would facilitate the terrorist organization's illegal activities. The Court emphasized that mere knowledge of the organization's general activities is insufficient; plaintiffs must show that the defendant's assistance was directly linked to the particular terrorist act in question. *Taamneh*, 598 U.S. at 490-91.

In contrast, the present case involves allegations of contributory infringement under the Copyright Act. The legal standards governing contributory infringement in the copyright context are well-established and, as noted above, focus on whether the defendant had knowledge of and materially contributed to infringing activities. The analysis does not hinge on the defendant's intent to facilitate illegal activity, as required under the ATA.

In addition, there are material factual differences between this case and *Taamneh. Taamneh* involved social media platforms, where the plaintiffs alleged that the defendants knowingly provided substantial assistance to a terrorist organization by allowing the dissemination of content that facilitated the organization's activities. The Court's analysis centered on whether the platforms' actions met the specific requirements for aiding-and-abetting liability under the ATA.

In contrast, Cox Communications is an ISP found liable for contributory copyright infringement for failing to terminate repeat infringers' accounts. The factual context involves the ISP's role in providing internet access and its obligations under copyright law, which are distinct from the issues addressed in *Taamneh*.

Given the disparate legal frameworks and clear factual differences between the case at bar and this Court's decision in *Twitter v. Taamneh, Taamneh* provides no guidance for resolving the issues presented here. Therefore, *Taamneh* is neither controlling nor persuasive authority and should be disregarded.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Respondent's brief dated October 15, 2025, the judgment of the Fourth Circuit should be affirmed in all respects.

Dated: October 22, 2025

Respectfully Submitted,

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