

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 ASSOCIATION OF
AMICUS COUNSEL AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS CURIAE

The Association of Amicus Counsel (“AAC”) respectfully submits this friend-of-the-Court brief in support of Respondents.¹ The AAC was founded prior to the present litigation as an independent group of lawyers having diverse affiliations and law practices and who are in good standing and actively practicing in the jurisdictions in which they are admitted. By training, experience, scholarship, and discernment in their respective areas of the law, members of the AAC have earned the judiciary’s respect and trust in their abilities and candor in appellate advocacy, and their proficiencies in preparing and submitting amicus briefs as may be useful to tribunals in deciding issues of contention that are presented by parties in cases of controversy.

Briefs of the AAC advocate correct and balanced decision-making in adjudications that illuminate and affect the public interest and the concerns of non-parties similarly situated. For these reasons, the AAC was conceived, established, and exists: to advance the science of jurisprudence through amicus briefs in support of positions and that advocate outcomes consistent with the rule of law. Toward that end, the AAC has participated in cases in other fora,² as well as in this Court.³

1. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than the Patrick Doerr LLP law firm, *amicus* The Association of Amicus Counsel, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

2. See, e.g., *NantKwest, Inc. v. Iancu*, 898 F.3d 1177 (Fed. Cir. 2018).

3. See, e.g., *Oil States Energy Servs. LLC v. Green’s Energy Grp., LLC*, 584 U.S. 325 (2018); *Peter v. NantKwest, Inc.*, 589 U.S.

The AAC has a significant, non-financial interest in the outcome of the present case. As part of the broader community of stakeholders in the US copyright and patent systems, the AAC, its members, and their clients, are motivated to advocate the proper application of copyright law to achieve just outcomes in the adjudication of disputes like the present one.

Amicus respectfully submits, based on its perspectives and expertise, that affirming the decision below is not only appropriate but indeed necessary so that this Court can provide guidance to judicial decision-makers and to litigants and potential litigants in future copyright infringement cases involving issues of contributory infringement on the part of internet service providers. Doing so would help foster the proper interpretation and deployment of copyright law in cases to promote a just and uniform appellate process.

INTRODUCTION AND SUMMARY OF ARGUMENT

This amicus curiae brief in the present matter is submitted in support of Respondent Sony Corporation. The purpose of this brief is two-fold: first, to assess the present case in light of the decision of the Fourth Circuit, with which amicus agrees; and second, to explain the broader implications of the case for both copyright and patent law. Amicus will highlight for the court the clear

23 (2019); *U.S. Pat. & Trademark Off. v. Booking.com B. V.*, 591 U.S. 549 (2020); *Am. Axle & Mfg., Inc. v. Neapco Holdings LLC*, 142 S. Ct. 2902 (2022); *Island Intell. Prop. LLC v. TD Ameritrade, Inc.*, 145 S. Ct. 1425 (2025); *ParkerVision v. TCL Indus. Holdings Co., Ltd.*, 145 S. Ct. 1887 (2025).

risks of using this case to advance broader application to all phases of intellectual property law, and will urge the Court to limit its findings to the facts of the case, or absent that, exclusively to copyright law. Amicus respectfully urges the Court to affirm the decision below in favor of Respondent Sony to maintain the predictability of result in this increasingly important aspect of copyright.

A. Background

Contributory infringement is a critical concept in intellectual property law, serving as a mechanism for holding parties liable who, while not directly infringing, facilitate or contribute to the infringement of another's rights. This doctrine is especially pertinent in the realms of copyright and patent law, each of which protect creative and inventive works but do so under distinct statutory frameworks and judicial precedents. Understanding contributory infringement in these two contexts is essential for creators, inventors, businesses, and legal professionals navigating the complex landscape of intellectual property rights.

Yet, the origins and parameters of contributory infringement in the copyright realm differ substantially from those in the area of patents. The former is based in common law; the latter is statutory. The former generally applies to services or platforms; the latter is directed to elements of a product or steps in a method. Contributory copyright infringement will usually be based on providing multiple copies of a work, whereas contributory patent infringement may be as focused as providing a specially made component of a claimed device.

Unfortunately, as a practical matter, the lay practitioner tends to use the same analytic filter for any instance of “contributory infringement,” whether it be of the copyright or patent variety. These users tend to ignore the divergence in the legal principles that have underpinned the evolution of the law on copyright infringement in the patent space as compared to the copyright space.

It is this divergence of principles which form the basis of the current brief. Amicus, the AAC, endeavors to point out to this Court the necessity of continuing to limit any holding in the present case to the copyright world, and to the world of copyright alone. Amicus will provide an examination of contributory infringement as it applies to copyright and patent law, explore the legal standards, and policy rationale behind contributory liability, including the critical differences that shape parties’ enforcement and defense strategies, with a mind toward the implications for stakeholders in the creative and technological sectors.

B. Patent Law

Liability for contributory patent infringement is governed by the patent statute. 35 U.S.C. § 271(c) provides as follows:

Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, *knowing the same to be especially made or especially adapted for use in an*

infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

35 U.S.C. § 271(c) (emphasis added).

As might be expected, an important focus of the caselaw is on the language from the statute highlighted above. Firstly, what is the “knowledge” necessary to cause an infringement, and how does one prove that the contributory patent infringer has especially adapted the component for use in the infringement of the patent? And secondarily, is there a substantial *noninfringing* use of the component which avoids contributory infringement altogether?

As to the first point raised in the foregoing paragraph, is it sufficient to “know” that the component is “especially made or adapted” for a particular use, and then learn that the overall product is deemed to be infringing? On the other hand, perhaps the contributory infringer also needs to know that the use for which the component is “especially made or adapted,” will actually infringe. Long ago this Court adopted the latter approach. That is, the Court required a showing that for knowledge under § 271(c), there must be “a showing that the alleged contributory infringer knew that the combination for which his component was especially designed was both patented and infringing.” *Aro Mfg. Co. v. Convertible Top Replacement Co. (Aro II)*, 377 U.S. 476, 488 (1964). The *Aro II* case has become foundational to the understanding of contributory patent infringement and the requisite mental state required for liability as a contributory infringer.

Other cases have refined the *Aro II* decision. For instance, in *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011), this Court addressed the knowledge requirement for inducement under 35 U.S.C. § 271(b). The Supreme Court used the standard for contributory infringement from *Aro II* to inform its analysis. The court rejected “deliberate indifference” and adopted a “willful blindness” standard, which requires both subjective belief of a high probability of infringement and a conscious effort to avoid confirming that fact. *Global-Tech Appliances*, 563 U.S. at 769. Thus, although not a § 271(c) case *per se*, *Global-Tech*’s adoption of the willful blindness standard has been interpreted by the circuit and district courts to apply equally to the knowledge element for contributory infringement, thereby clarifying how a defendant’s knowledge may be proven. *See, e.g., Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 832 (9th Cir. 2019) (“[W]e held that ‘actual knowledge of specific acts of infringement’ and ‘willful blindness of specific facts are the only two mental states that satisfy the ‘knowledge’ element of contributory infringement.”); *Warsaw Orthopedic, Inc. v. NuVasive, Inc.*, 824 F.3d 1344, 1347 (Fed. Cir. 2016) (“*Commil*, [*infra*] in reaffirming *Global-Tech*, also necessarily reaffirmed that willful blindness can satisfy the knowledge requirement for active inducement under § 271(b) (and for contributory infringement under § 271(c)), even in the absence of actual knowledge.”); *Motiva Pats., LLC v. Sony Corp.*, 408 F. Supp. 3d 819, 830 (E.D. Tex. 2019) (“As with induced infringement, willful blindness may satisfy the knowledge requirements for contributory infringement.”).

Subsequently, in *Commil USA, LLC v. Cisco Sys., Inc.*, 575 U.S. 632 (2015), the Court reaffirmed the importance of the existence of knowledge element for

indirect infringement. The Court reiterated that, like inducement liability, contributory infringement under § 271(c) requires knowledge of the patent in suit and knowledge of patent infringement. *Commil*, 575 U.S. at 639. *Commil* emphasized that a good-faith belief that a patent is invalid is not a defense to a claim of indirect infringement. *Id.* at 642.

Furthermore, an instructive example of how the Federal Circuit treats contributory patent infringement is *Waymark Corp. v. Porta Sys. Corp.*, 245 F.3d 1364 (Fed. Cir. 2001). In discussing the distinction between contributory infringement under § 271(c) and infringement related to component exports under § 271(f)(2), the Federal Circuit highlighted that § 271(c) requires the accused component be part of an act of *direct* infringement. *Waymark*, 245 F. 3d at 1368. Thus, *Waymark* provides a useful comparison, as the knowledge standard under § 271(f)(2) differs from that in § 271(c).

As to the second point, that of there being no substantial non-infringing use, there is less room for ambiguity, but the defense is no less litigated. Some of this Court's and the Federal Circuit's decisions are exemplary. *See, e.g., Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 186 (1980); *Vita-Mix Corp. v. Basic Holding Inc.*, 581 F.3d 1317, 1327 (Fed. Cir. 2009) (clarifying the concept stating that a substantial non-infringing use is one that is not "unusual, far-fetched, illusory, impractical, occasional, aberrant, or experimental"); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F. 3d 1301 (Fed. Cir. 2009) (reinforcing the importance of the safe harbor given to a staple article of commerce when evaluating contributory infringement).

C. Copyright Law

Liability for contributory infringement of copyright is not expressly subject to statute, but rather is the result of judicially created common law. The focus of liability stems from the contributory infringer's state of mind. "[O]ne 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." *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001) (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). The requisite knowledge cannot be general. Rather, the infringer must know of "specific infringing material." *Id.* at 1021. General awareness will not suffice.

There is a safe harbor from being found liable for contributory infringement, particularly for the sellers of platform technology, such as those used in digital media. If there is a sale or use "of copying equipment, like the sale of other articles of commerce, [it will] not constitute contributory infringement if the product is . . . capable of *substantial* noninfringing uses." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (emphasis added).

Also, copyright law recognizes liability for inducement. As this Court recognized "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." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930, 936–37 (2005). In order to contributorily infringe, there

must be “culpable intent” on the part of the infringer. *Id.* at 934–35. As such, the Court has assigned “fault-based liability derived from the common law.” *Id.* at 935.

As with copyright infringement in general, there is no statutory basis for secondary copyright infringement liability. However, there are certain safe harbors in the Digital Millennium Copyright Act, 17 U.S.C. § 501 *et seq.* For instance, 17 U.S.C. § 512 outlines the general parameters of the secondary liability framework. It draws from the *common law* in how it deals with contributory liability, primarily focusing on the defendant’s knowledge. Thus under Section 512(c) there is a safe harbor that applies to the internet service provider who: does not have actual knowledge that the material or activity using the material on the system or network is infringing; or in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or upon obtaining such knowledge or awareness, acts *expeditiously* to remove, or disable access to, the material. 17 U.S.C. § 512(c)(1)(A) (emphasis added).

With the foregoing background, Amicus acknowledges that there is indeed a certain amount of parallelism between findings of infringement in copyright as compared to patent infringement. For instance, the *Sony Corp.* court recognized the “historic kinship between patent law and copyright law.” *Sony Corp.*, 464 U.S. at 439. Similarly, *Grokster* used the staple article of commerce as outlined in *Sony Corp.* as the “model for [the] copyright safe-harbor rule.” *Grokster*, 545 U.S. at 936. However, these parallels should not be overstated. For instance, principles of vicarious liability are relatively uncommon in patent law. Yet, vicarious liability in copyright law is robust

and interestingly not based on a finding of knowledge or intent. *See, e.g., A&M Rec., Inc.*, 239 F. 3d. at 1022 (citing *Gershwin*, 443 F. 2d at 1162).⁴

ARGUMENT

A. The Fourth Circuit’s Decision is Correct

Amicus submits that the decision on appeal should not be disturbed. As recognized by the Fourth Circuit, a first objection made by Cox was that its internet service it provides is capable of “substantial lawful use” and not designed to promote infringement. *Sony Music Ent. v. Cox Commc’n, Inc.*, 93 F.4th 222, 236 (4th Cir. 2024). While this bare assertion may be supportable in a vacuum, Cox’s argument ignores a plethora of other facts established in *this* case that counsel against it. To that end, and most importantly, Cox set up a screening system so that *after* it had been notified of infringing posts by its subscribers, it nevertheless resulted in a mere thirty-two takedowns. *Sony Music*, 93 F.4th at 228. Over the same time, it was able to shut off over 600,000 subscribers who had failed to pay their bills. Cox had set up a system whereby it only dealt with a certain number of notices per day, effectively ignoring untold infringement. *Id.*

Cox’s activity belies its argument. Cox simply did not want to monitor or take down paying customers. Its system of preventing copyright infringement by users (and hence, its own contributory infringement) strains credulity. Cox did what it wanted to do and let the chips fall where they may. It should not benefit from what many

4. This overlap is well-outlined in Wu, *The Structure of Secondary Copyright Liability*, 61 Hous. L. Rev. 385, 388–91 (2023).

would classify as willful blindness to the facts. *See, e.g., In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (2003) (“[w]illful blindness is knowledge, in copyright law”).

The Fourth Circuit dismissed this argument out of pocket. First, citing *BMG Rights Mgmt. (US) LLC v. Cox Commc’n, Inc.*, 881 F.3d 293 (4th Cir. 2018), “‘substantial non-infringing uses’ *can* constitute a material contribution to copyright infringement.” *Sony Music*, 93 F.4th at 236 (quoting *Rights Mgmt. (US) LLC*, 881 F.3d at 306). It asserted that the *Grokster* decision “makes clear that what matters is not simply whether the product has some or even many non-infringing uses, but whether the product is distributed with the *intent* to cause copyright infringement.” *Id.* There could not be any “automatic” liability on its behalf, but rather liability would attach to the facts surrounding the underlying case. *Id.*

Second and similarly, the Fourth Circuit appropriately rejected Cox’s additional argument. According to Cox, the standard to be applied for contributory infringement liability should be the “equivalent to aiding and abetting,” infringement, or, on the flip side, “failing to prevent” its subscribers’ infringement is not enough to warrant such a finding. *Sony Music*, 93 F.4th at 236. The Fourth Circuit appropriately looked to the heart of the matter – the facts in evidence before the jury. As noted above, the hand-waving permissiveness exhibited by Cox was certainly not enough to dispense with a finding of liability:

“It is true that ‘mere . . . failure to take affirmative steps to prevent infringement’ does not establish contributory liability ‘in the absence of other evidence of intent.’ *Grokster*, 545 U.S. at 939 n.12. *But supplying a product with knowledge that the recipient will use it to*

infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement.” Sony Music, 93 F.4th at 236 (emphasis added).

Given the conduct exhibited by Cox, and using the standard enunciated in *Grokster*, there is no reason to disturb the Fourth Circuit’s contributory infringement finding.

B. Potential Impact on Patent Law

There is a further potential consequence if the Court were to adopt Cox’s expansive interpretation concerning its limitation of liability. That is, it is inevitable that the Court’s language will be adopted (or at least attempt to be adopted) by *patent* practitioners when analyzing contributory patent infringement. After all, the mere words “contributory infringement” tend to encourage copyright and patent practitioners to liberally borrow concepts from one branch of intellectual property law to the other.⁵

5. Amicus AAC has reviewed the Amicus brief of Professor Duan, wherein he urges liberal borrowing from patent law to copyright law concerning liability for inducement. Amicus AAC asserts that the position taken by Professor Duan is not contradictory to the present brief, as there is a clear distinction between indirect infringement for inducement and indirect infringement as a contributory infringer. *See Ricoh Co., Ltd. v. Quanta Comput. Inc.*, 550 F.3d 1325, 1340 (Fed. Cir. 2008) (“[T]he potential for induced infringement liability . . . is not a practical substitute for contributory infringement liability. Unlike contributory infringement, induced infringement liability under § 271(b) requires proof that ‘the inducer has an affirmative intent to cause direct infringement.’”). Respectfully, it should be noted that the present brief is focused solely on aspects of contributory infringement.

As cited above, the traditions of copyright law and patent law are different. The statutory patent law concerning contributory infringement should be first interpreted via the plain language meaning of the patent statute, 35 U.S.C. § 271(c). Not so for copyright law, which has no statutory basis. Nonetheless, the doctrines of contributory infringement in both areas share common roots, both requiring knowledge and a certain material contribution to the infringement. As such, even *identical words* bear the potential to be interpreted somewhat differently.

Thus, an expansive holding, particularly a change in the interpretation of the law on contributory infringement, bears the potential to reverberate beyond copyright law and insinuate itself into the patent context. A finding that substantially narrows liability of third-party intermediaries (such as Petitioners) for contributory copyright infringement could invite similar arguments in patent cases, potentially shielding suppliers of components and providers of services from responsibility for even *knowingly* facilitating patent infringement. This would erode the effectiveness of patent enforcement, encourage willful blindness to infringement, and disrupt the delicate balance between innovation and protection that underpins the United States patent law system. Amicus respectfully alerts this Court to be mindful of these cross-disciplinary effects, to avoid a ruling that inadvertently destabilizes the patent law jurisprudence of contributory patent infringement.

CONCLUSION

For the foregoing reasons and authorities, Amicus AAC respectfully urges the Court to affirm the decision in favor of Respondent Sony Corporation. Upholding Sony's position will maintain the proper balance of intermediary liability and safeguard the doctrines of contributory infringement in copyright (and any potential bleeding over into patent law). The stability and predictability of intellectual property law depend on a clear, consistent approach to intermediary liability, which this Court is uniquely positioned to preserve.

Respectfully submitted,

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