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 SOUNDEXCHANGE, INC., THE AMERICAN ASSOCIATION OF INDEPENDENT MUSIC, THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, AND SCREEN ACTORS GUILD-AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Established in 2003, SoundExchange, Inc. ("SoundExchange") is a Section 501(c)(6) nonprofit collective management organization that administers the statutory sound recording license set forth in 17 U.S.C. §§ 112 and 114. That license authorizes the public performance of sound recordings via non-interactive digital services, such as satellite radio providers, webcasters, and digital cable music providers. While SoundExchange offers a broad range of services for music creators, its core purpose is expressly authorized by the Copyright Act, which provides that a "nonprofit collective designated by the Copyright Royalty Judges" will collect and distribute royalties to recording artists and sound recording copyright owners pursuant to the § 112 and 114 license. *See* 17 U.S.C. § 114 (g). For more than two decades, SoundExchange has been the only collective organization designated by the Copyright Royalty Board to meet this critical statutory responsibility.

SoundExchange represents the interests of recording artists and sound recording copyright owners equally. Its Board of Directors includes recording artists and representatives from major and independent record companies, *amicus* The American Association of Independent Music, *amicus* The American Federation of Musicians, *amicus* Screen Actors Guild-American Federation of Television and Radio Artists, and many others. Consistent with its statutory charge in

1. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* made a monetary contribution to its preparation or submission.

17 U.S.C. §114(g)(2), SoundExchange distributes digital performance royalties at a rate of 45% to the featured artists on a recording, 5% to a fund for non-featured artists, and the remaining 50% to the copyright owner of the sound recording. It thus provides a vital source of income and support for recording artists and the companies that represent them in enriching our culture and legacy of world class recorded music. All told, SoundExchange administers the statutory license on behalf of more than 800,000 creators and has collected and distributed over 12 billion dollars in royalties.

The American Association of Independent Music ("A2IM") is a 501(c)(6) not-for-profit trade organization representing more than 600 independently owned American music labels and associated businesses across a wide spectrum of genres and regions. A2IM's members range from small startups to well-established labels, collectively representing a significant share of the commercial music market in the United States. A2IM advocates for a fair, diverse, and competitive music industry and works to ensure that the interests of independent music creators and rightsholders are protected in policy, legal, and commercial arenas.

The American Federation of Musicians of the United States and Canada ("AFM"), founded in 1896, is the largest labor union in the world representing the interests of professional musicians, including hundreds of session recording musicians. In the 1990s, AFM joined with the major record companies in lobbying Congress for a performance right in the public performance of sound recordings through non-interactive digital services. That advocacy led to the codification of the compulsory license

framework set forth in 17 U.S.C. § 114. The § 114 license has generated millions of dollars annually in remuneration for AFM musicians. It provides indispensable income, particularly as consumption patterns have trended away from physical products, such as compact discs. But that revenue source has been and continues to be compromised by the unauthorized reproduction and distribution of recorded music. Mass piracy online also threatens the public interest by dampening those flickers of inspiration that have yielded some of the world's most beloved musical treasures. For these reasons, AFM remains acutely interested in protecting musicians' legal right to fair remuneration for the digital proliferation of their creative works.

Screen Actors Guild-American Federation of Television and Radio Artists ("SAG-AFTRA") is the world's largest labor union representing working media artists. SAG-AFTRA represents more than 160,000 actors, announcers, broadcasters, journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists, influencers and other media professionals. SAG-AFTRA members are the faces and voices that entertain and inform America and the world. SAG-AFTRA exists to secure the strongest protections for media artists in the 21st century and beyond.

Because *amici* collectively serve the interests of both artists and copyright owners, they are deeply concerned with curtailing online infringement. Music piracy not only deprives these constituencies of critical compensation copyright law affords them but also undermines the artistic efforts and incentives of the creative communities

amici represent. *Amici* thus submit this brief in strong support of the ruling below, which appropriately holds Internet Service Providers ("ISPs") secondarily liable when they knowingly and materially contribute to the infringements of their users. Adopting Petitioners' unduly narrow standard for contributory infringement would violate a half century of case law and sound policy that is critical to maintaining the economic viability and artistic integrity of the artist and music community.

INTRODUCTION AND SUMMARY OF ARGUMENT

Copyright law affords authors incentives to produce "creative work," so that the public will benefit from the increased availability of "literature, music, and the other arts." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431-32 (1984) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)). Nothing imperils those purposes more than the unchecked, unauthorized copying and distribution of copyrighted works on the breathtaking scale illustrated by this case. Piracy of this scope strips authors of the financial and cultural incentives to produce creative works; degrades the institutions and economies that support and cultivate those artistic efforts; and ultimately inhibits the proliferation of "literature, music and the other arts" copyright law was designed to foster.

Music piracy is among the most pernicious and enduring forms of mass infringement. It has plagued the music industry from the time when music was consumed on physical media like vinyl records, cassettes, and CDs. But the advent of the internet increased the

stakes immeasurably, for now enterprising pirates were able to duplicate and distribute music over the internet instantaneously, in unlimited quantities, with perfect sonic fidelity to the copied files, and often without detection. The key stakeholders in the music community – musicians, composers and the companies that represent them – have adapted to changing technologies as best they can, but the sheer ease of online infringement makes copyright enforcement extraordinarily burdensome and incomplete, all to the detriment of doing what these groups are meant to do – share their artistic creativity for the general public good.

It is for this reason that rightsholders need robust tools to challenge online infringement in a comprehensive and manageable fashion. Congress and the Courts have consistently sought to develop such solutions in recognition of the corrosive reality of online infringement. The Digital Millenium Copyright Act ("DMCA") was in fact motivated by the need to stem internet copyright piracy and anticipates cooperation between copyright owners and internet service providers ("ISPs") to curtail online infringement. Unfortunately, the procedures of the DMCA have sometimes proven inadequate to the task of meeting massive infringement online, and content that is removed often resurfaces shortly thereafter. Certain ISPs, moreover, choose to avoid the DMCA's procedures in the hopes of avoiding administrative burdens and escaping responsibility entirely for infringement which they knowingly facilitate. Lawsuits against individual online pirates are another option, but they are only pragmatic when the pirate has infringed in sufficient quantity to justify the expense and disruption of litigation.

Given these limitations, the law recognizes multiple theories of secondary liability that permit copyright owners to charge those that facilitate the widespread infringement by others with liability in certain circumstances. Without broad and flexible principles of secondary liability, the music industry would have no practicable recourse for the kind of mass online infringement that companies like Petitioners knowingly facilitate.

This case is about one important species of secondary liability, contributory infringement. The canonical expression of this theory is 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." *See Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). Like hundreds of other courts before it, the Fourth Circuit invoked this standard to assess whether Petitioners are liable for contributory infringement. Despite receiving more than 160,000 notices of infringement of specific violations of Respondents' copyrights, Petitioners provided internet access to and collected revenue from subscribers who Petitioners knew were repeatedly infringing those copyrights. This case perfectly illustrates that the only meaningful remedy for widespread digital music piracy is to hold ISPs accountable when they knowingly provide the means and technologies to those they know have and will continue to infringe.

Despite these settled principles, Petitioners attempt to confine contributory infringement to the theory of "inducement" first explicated by this Court in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545

U.S. 913 (2005), and insist that they can only be only liable if they provided their services "with the object of promoting its use to infringe" as revealed by "affirmative steps to foster infringement." But *Grokster* did not supplant other forms of secondary liability or negate the traditional notions of "material contribution" applied by the Fourth Circuit. Indeed, court after court, the U.S. Copyright Office, and the leading treatise on copyright law understand "inducement" as a distinct theory of secondary liability that supplements rather than replaces well-established preexisting theories like those applied by the Fourth Circuit.

To adopt Petitioners' myopic view of contributory infringement would spell disaster for the music community, as it would deprive musicians and those who represent them of the only feasible means of challenging mass online infringement. It would also render the DMCA essentially useless, as ISPs would have no incentive to seek its safe harbors when they can infringe with impunity as long as they protest that their purpose was never affirmatively to "induce" infringement. To be clear, abiding by the existing material contribution standard does not threaten ISPs generally – there are no corresponding suits against most of the responsible providers who take reasonable steps to curtail infringement – but where an ISP thumbs its nose at copyrights, and continues to provide the very service that enables infringements to those it knows will use that service to infringe, it should be held contributorily liable regardless of whether it took affirmative steps with the express purpose of inducing infringement. The Court should thus affirm the holding below as good law reflecting good policy.

ARGUMENT

I. THE SCOURGE OF ONLINE MUSIC PIRACY

It is critical to assessing the merits of the question before this Court to place the accused conduct at issue – an ISP's knowing contribution to the infringing acts of its users – in the historical, legislative and judicial context in which it arose. The liability of an ISP for user infringements does not arise in a vacuum, but against a long history of music piracy and repeated pronouncements by Congress and the courts concerning secondary liability in the online environment. As set forth in Section II below, that context and history help explain why the exceedingly narrow theory of liability asserted by Petitioners is so fundamentally at odds with the law of contributory lability as established by Congress and the courts.

Music piracy is hardly a new phenomenon, and each technological era has confronted the widespread unauthorized exploitation of music. During the 1960s-80s, the once-ubiquitous cassette tape allowed consumers to copy music from radio broadcasts or tapes borrowed from others. In the 1990s, digital compact discs eclipsed cassettes as the primary media of music consumption and made it yet easier and faster to make and distribute identical replicas of popular sound recordings. But no technological shift accelerated music piracy more than the introduction of widespread internet access, followed by the birth of peer-to-peer file sharing networks that allowed users to copy and share sound recordings with limitless speed and accuracy. Those threats to creative authorship, in turn, ran headlong into the public's thirst for an effective and comprehensive internet experience. The subsections

that follow consider legislative and judicial efforts to contain online piracy while accommodating technological innovation and an assessment of their ultimate efficacy in the current climate.

A. The Digital Millenium Copyright Act

Congress recognized the extraordinary challenges of copyright infringement on the internet for both content owners and ISPs when it enacted the Digital Millenium Copyright Act ("DMCA") in 1998. As the Senate Report acknowledged, "[d]ue to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy." *See* S. Rept. 105-190 - THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, S.Rept.105-190, 105th Cong. (1997-987) ("DMCA Senate Report") at 8. *See also id.* at 2 ("The law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials"). It is no surprise that Congress expressed this concern when considering a pivotal amendment to the Copyright Act. Piracy's effect of suppressing authors' willingness "to make their works readily available on the Internet" defeats the "ultimate aim" of copyright law "to stimulate artistic creativity for the general public good" and ensure widespread availability of "literature, music, and the other arts." *See Sony*, 464 U.S. at 431, 32 (citation omitted).

By the same token, Congress also recognized that ISPs required "clarification of their liability" when their users infringe, absent which they "may hesitate to make

the necessary investment in the expansion of the speed and capacity of the Internet." DMCA Senate Report at 8. To reconcile these competing imperatives, the second title of the Digital Millennium Copyright Act, entitled the "Online Copyright Infringement Liability Limitation Act," struck a balance. In exchange for cooperating with copyright owners to address infringers in various ways, online service providers received a series of limitations on copyright liability, generally known as "safe harbors,'" that shield ISPs from monetary liability.

This anticipated cooperation between rightsholders and the operators of online networks was very much a lynchpin of the balanced system the DMCA attempted to construct:

> Title II preserves 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. At the same time, it provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.

DMCA Senate Report at 20, 40. *See also id.* at 45 (explaining that the "notice and takedown" procedures of 17 U.S.C. § 512(c)(1)(C) represent "a formalization and refinement of a cooperative process that has been employed to deal efficiently with network-based copyright infringement"). In other words, the broad purpose of the DMCA is to encourage copyright owners and ISPs to coordinate in containing online infringement, ensuring

that the former have tools to face down piracy while the latter have a roadmap for avoiding liability for the misconduct of their users.

The DMCA also set minimum requirements for ISPs to take advantage of this partial shield from liability. Among other requirements, an ISP can only be eligible for a § 512 safe harbor if it "has adopted and reasonably implemented … a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers." 17 U.S.C. § 512(i)(1). The Senate Report reveals the impetus behind this baseline requirement:

> … the service provider is expected to adopt and reasonably implement a policy for the termination in appropriate circumstances of the accounts of subscribers of the provider's service who are repeat online infringers of copyright. The Committee recognizes that there are different degrees of online copyright infringement, from the inadvertent to the noncommercial, to the willful and commercial … However, those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access.

DMCA Senate Report at 52. Thus, Congress (1) "expected" ISPs to "adopt and reasonably implement" a policy for terminating repeat infringers; (2) acknowledged the spectrum of what "repeat infringers" might mean, from

the more benign violators to the serial infringers; and (3) wanted those who "flagrantly" misuse their internet access to appreciate that doing so might end that access altogether.

Despite the incentives built into the DMCA, participating in its procedures is ultimately voluntary. The statute provides that failure to satisfy the requirements for safe harbors protection does not deprive ISPs of defenses that their conduct is otherwise non-infringing, *see* 17 U.S.C. § 512, and copyright owners must still prove the elements of the applicable liability. DMCA Senate Report at 55 ("Even if a service provider's activities fall outside the limitations on liability specified in the bill, the service provider is not necessarily an infringer; liability in these circumstances would be adjudicated based on the doctrines of direct, vicarious or contributory liability for infringement"). Nevertheless, Congress enacted the DMCA for the stated purpose of encouraging ISPs to work with rightsholders to contain piracy, in exchange for which ISPs would be shielded from liability that might otherwise attach.

B. Judicial Responses to Online Piracy

While the DMCA afforded copyright owners one means of challenging online piracy, shortly after its enactment, the emergence of peer-to-peer file sharing posed new challenges. Many of those services fell outside the DMCA's ambit, leaving the music industry to pursue lawsuits against them on theories of vicarious and contributory liability. The record industry first famously challenged Napster's file-sharing service, through which users could search for, copy, and transfer other users'

music files using Napster's software and network servers. *See A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001). In affirming a preliminary injunction, after first noting serious doubts about whether Napster could invoke DMCA protection, the Ninth Circuit held that Napster was likely guilty of contributory infringement under the *Gershwin* formulation, because it (a) had knowledge that specific infringing material was available on its system, and (2) materially contributed to its users' infringement by providing "the site and facilities for direct infringement." *See id.* at 1022 (citation omitted). As the Court concluded, "if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement." *Id.* at 1021.

Several years later, the Seventh Circuit affirmed a preliminary injunction against Aimster, another file-sharing service that allowed users to swap files while participating in AOL chat rooms. *See In Re Aimster Copyright Litigation,* 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004). Among other things, the Court observed that "the ability of a service provider to prevent its customers from infringing is a factor to be considered in determining whether the provider is a contributory infringer." *Id.* at 646. The Court determined that Aimster was a contributory infringer because, where the "infringing uses [of its service] are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses." *Id.* at 653. Aimster made no such showing, and again liability

hinged on the refusal to address large quantities of known infringing uses of the defendant's service.

Three years later, this Court confronted file-sharing in *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), concerning Respondents' distribution of software that allowed users to share files through decentralized peer-to-peer networks that required no central servers. The vast majority of downloads on the service were infringing, and Respondents were "aware that users employ their software primarily to download copyrighted files, even if the decentralized … networks fail to reveal which files are being copied, and when." *Id.* at 923. Moreover, the record was "replete with evidence" that Respondents "voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement." *Id.* at 923-24. Indeed, they marketed their service as a Napster successor, *id.* at 924-25, and made no effort "to filter copyrighted material from users' downloads or otherwise impede the sharing of copyrighted files." *Id.* at 926. Given this set of facts – where Respondents affirmatively urged users to infringe even if they were not aware of particular instances of infringement – the Court adopted "the inducement rule," under which "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." *Id.* at 936-37.

What *Grokster* did not do was supplant the preexisting standards for contributory infringement applied by *Napster*, the Fourth Circuit in this case, and so many other courts. As detailed in Section II below, in the

years that followed *Grokster*, those Courts to consider the issue (including the Fourth Circuit in this case) have logically applied the material contribution test, rather than the inducement rule, in determining that an ISP that continues to supply internet access to users it knows are infringing is contributorily liable. *See UMG Recordings, Inc. v. Grande Commc'ns Networks, L.L.C.*, 118 F.4th 697 (5th Cir. 2024); *BMG Rights Mgmt. (US) LLC v. Cox Communs., Inc.,* 881 F.3d 293, 301-305 (4th Cir. 2018).

C. The Toll of Online Piracy

Online piracy of the type facilitated by Petitioners takes a tremendous toll on recording artists, record companies and *amici*, who protect the interests of their creative constituencies. When infringers illegally download and distribute music files instead of accessing music from authorized services, they circumvent the licensed avenues of music consumption (including the statutory license administered by SoundExchange) and thus deprive recording artists and record labels of key income they are entitled to receive. These pirated downloads are permanent illegal copies that infringers can enjoy at any time, without ever needing to turn to authorized sources. Piracy also creates undue complications in royalty accounting generally for the music industry. Amidst a sea of illegal copies, which are nearly impossible track comprehensively, it becomes increasingly difficult to ensure that recording artists, composers, and record and music publishing companies are fairly and proportionally compensated. Piracy, whether in the form of illegal downloads or unauthorized streaming, also imposes tremendous operational burdens, as organizations devote significant staff and resources to chasing down pirates and unlicensed streaming services.

More broadly, piracy undermines the very purposes of copyright law, which operates on an incentive structure. Authors are rewarded for their creative efforts so that the public will ultimately benefit from the fruits of those creative labors. *See Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith,* 598 U.S. 508, 526 (2023) ("The Copyright Act encourages creativity by granting to the author of an original work 'a bundle of exclusive rights'") (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U. S. 539, 546 (1985)); *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) ("copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit"; citation omitted). Nothing defeats those incentives more directly than piracy, which saps the "profit motive" that undergirds copyright protection.

The file-sharing era of *Napster* and *Grokster* showed astonishing levels of piracy and corresponding reductions in music revenue. Some observed that the advent of free or low-cost streaming would reduce piracy to manageable levels, but online infringement remains an enormous economic and operational burden. As the Copyright Office noted in its 2020 assessment of § 512 of the DMCA, pirates continue to find ways to deploy evolving technologies:

> Internet piracy has evolved alongside these substantial gains in internet services, speed, and access. The technology that allows copyright owners to distribute content directly to consumers' living rooms via streaming services also enables new forms of piracy: streaming of unlicensed content and stream-ripping—that is, using software to make an

> unlicensed copy of streamed content that would otherwise be licensed. The cloud also presents new challenges for combating piracy. Cyberlockers, for instance, enable a user to upload content—with or without the copyright owner's permission—that they can then access remotely or share with others; cyberlockers, because they are not routinely indexed by search crawlers, can be much more difficult for copyright owners to monitor for infringing activity than publicly searchable P2P networks.

U.S. Copyright Office, *Section 512 of Title 17: A Report of the Register of Copyrights* (May 2020) ("Copyright Office DMCA Report") at 31-32. The reality of pirates so adeptly exploiting new technologies is one of the reasons that flexible rules of secondary liability are so crucial.

Data bears out the continued devastating impacts of music piracy. Earlier this year, the U.S. Chamber of Commerce reported that "[u]nlicensed access of 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. Such piracy holds a high cost for consumers, businesses, and the economy." U.S. Chamber of Commerce, *Unlocking Creativity: A Study of the Socioeconomic Benefits of Copyright* (June 2025), https://www.uschamber.com/intellectual-property/unlocking-creativity-copyright-report ("USCC Report"), at 22. These numbers appear to be growing as well. One study calculated more than 17 billion visits to music piracy websites worldwide during 2023, representing a 13% increase from 2022. *See, e.g.,* A. Watercutter, *Music Piracy Is Back in a Big Way—Especially From YouTube*,

Wired (Feb. 2024), https://www.wired.com/story/music-piracy-way-up/. Beyond the erosion of revenues, the U.S. Chamber of Commerce report cited a "broad body of empirical research suggest[ing] that strong copyright protections have historically encouraged the creation of original works," while a "lack of protection can lower investment in riskier creative production." USCC Report at 22, 23.

The undeniable scope and threat of online piracy makes having meaningful enforcement options an existentially critical issue for the music industry. The DMCA, while a useful tool, is not a sufficient answer. As the Copyright Office determined, the statutory safe harbors can be "overwhelmed by the sheer scale of notices of infringement being sent." Copyright Office DMCA Report at 32. For example, in 2013 Google received notices of approximately three million URLs containing infringing content, but by 2017, that number had risen to 882 million. *Id.* As another measure, from 2012 to the time of the Copyright Office DMCA report in 2020, the Recording Industry Association of America had noticed over 175 million instances of online piracy. *Id.* at 78. The result is both lost revenue and a misallocation of resources, where, for example, Universal Music Group (the world's largest group of music companies) has been forced to "shift significant resources that could otherwise be used to invest in the creation of new content (including the discovery and development of artists) toward the protection of existing content." *Id.* at 78-79. Moreover, beyond the enormous administrative burdens of issuing such notices, the entire system suffers from what is colloquially deemed the "whack-a-mole" dilemma, where the "the copyright holder may succeed in having the

infringing content removed from a website, only to have it reposted almost immediately on the same site by a different or even the same user." *Id.* at 81.

And finally, as evidenced by *Napster*, *Aimster*, *Grokster,* and now more recently *Grande* and the instant case, internet services plagued by the most rampant infringements sometimes do not participate in the DMCA system. The result is to stymie enforcement. With decentralized file-sharing services like BitTorrent, copyright owners can only identify users by IP addresses, and only the ISPs have the records necessary to match those addresses to individual subscriber accounts. In these circumstances, even if copyright owners wanted to chase down individual infringers, they would still need ISP cooperation to identify them. The only remaining option is then to pursue claims of secondary liability against irresponsible ISPs. Copyright law has always allowed that option, but Petitioners' insistence that the inducement rule replaces all other forms of contributory infringement would make this last option a practical impossibility.

II. ISPs CONTRIBUTORILY INFRINGE COPYRIGHTS WHEN THEY KNOWINGLY FACILITATE WIDESPREAD INFRINGEMENT

According to Petitioners, contributory copyright liability is confined in all circumstances to the *Grokster* inducement rule. Petitioners' first question presented states that "a business commits contributory infringement *only* when it 'distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps to foster

infringement." *See* Brief for the Petitioners ("Pet. Br.") at i (emphasis added). *See also id.* at 17 (contributory liability requires that defendant knew of direct infringement and "intentionally induced or encouraged" it). In this view, a plaintiff alleging contributory copyright infringement bears the burden of proving that the defendant has undertaken "affirmative acts" with the express purpose and intent of inducing others to infringe. *Id.*

Having restricted contributory liability this way, Petitioners then conjure up three component rules that allegedly govern contributory liability in technology cases. First, since affirmative acts designed to foment infringement are required, "mere nonfeasance, like failing to prevent infringement, does not suffice" to prove contributory infringement. *Id.* at 17, 23-24, 26, 27, 28, 36, 41. Second, providing "general-use technology to the public" can never be sufficiently culpable to warrant liability. *Id.* at 17, 24, 28, 33. And third, "mere knowledge that someone will misuse technology does not give rise to secondary liability." *Id.* at 17, 18, 24, 31.

Petitioners reimagination of contributory liability is fraught with error. It departs from decades of caselaw, both before and after *Grokster*, that there are other types of contributory infringement that *Grokster* never meant to replace. It whitewashes Petitioners' open contempt for copyright law and knowing facilitation of infringement as "mere knowledge" of infringement that could never support liability. It sets out rules that all but guarantee that "general purpose" ISPs will never be held contributorily liable, even though Congress thought the exact opposite when it enacted the DMCA, and deprives copyright owners of the only practical means of containing

massive online piracy that defeats the basic purposes of copyright law.

A. *Grokster* Did Not Disturb Traditional Rules for Contributory Liability

Grokster confronted a situation that called for a particularized application of secondary liability – the distribution of software with the purpose of encouraging infringement. As the Court explained, the inducement rule "premises liability on purposeful culpable expression and conduct," *Grokster*, 545 U.S. at 937, and was thus particularly suited to the respondents in that case, who set out to encourage others to infringe by advertising their software as the "next Napster," even if respondents did not have knowledge of particular acts of infringement. *See* 3 *Nimmer on Copyright* § 13E.05[D][2] (2025) ("If defendant is shown to have intended to cause direct infringement, then defendant's lack of knowledge as to specific acts of direct infringement is irrelevant" for inducement liability)

But *Grokster* did not displace other forms of secondary liability more naturally applied to different circumstances. Indeed, the Court noted that, while the Copyright Act does not expressly adopt secondary liability, the doctrines of contributory and vicarious infringement "emerged from common law principles and are well established in the law," citing, in addition to its own precedents, *Gershwin*. *Id*. at 930. Moreover, in reversing the Ninth Circuit's misapplication of *Sony*, the Court cautioned that *Sony* "was never meant to foreclose rules of fault-based liability derived from the common law." *Id.* at 935. The adoption

of one theory of secondary liability, in other words, does not replace preexisting theories that courts applied for decades. And of course, the *Gershwin* case itself identifies "inducement" as one among several types of contributory liability in its disjunctive formulation that one who knowingly "induces, causes *or* materially contributes to the infringing conduct of another" may be contributorily liable. *See Gershwin*, 443 F.2d at 1162 (emphasis added). A Lexis search reveals that this formulation has been quoted in full by 474 courts, including 374 times since *Grokster*. It is far from the abandoned relic Petitioners would suggest.

It is no surprise then that following *Grokster*, courts uniformly understood the inducement rule as supplementing, rather than supplanting, the traditional material contribution rule. Some courts treat inducement as one of several prongs of contributory liability, sitting alongside material contribution. *See, e.g., Leonard v. Stemtech Int'l, Inc.*, 834 F.3d 376, 387 (3d Cir. 2016) (contributory infringement requires, *inter alia*, that "defendant materially contributed to or induced the infringement"); *Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1146 (10th Cir. 2016) (same); *Perfect 10 v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 795 (9th Cir. 2007) (same). *See also Arista Records, LLC v. Doe 3*, 604 F.3d 110, 117-118 (2nd Cir. 2010) (one who knowingly "induces, causes or materially contributes to the infringing conduct of another may be held liable as a "contributory" infringer"); *Bridgeport Music, Inc. v. WB Music Corp.*, 508 F.3d 394, 398 (6th Cir. 2007) (same); *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 489 F.3d 1129, 1138 n.19 (11th Cir. 2007) (same). Others treat it as a third and independent branch of secondary liability. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 28 n.5 (2d Cir. 2012) ("Doctrines of secondary

copyright infringement include contributory, vicarious, and inducement liability"); *Greer v. Moon*, 83 F.4th 1283, 1287-88 (10th Cir. 2023) ("several flavors of secondary liability for copyright infringement" include vicarious liability, "the inducement rule," and "a third theory, contributory liability"). *See also* Copyright Office DMCA Report at 22 ("Generally, courts have relied upon three forms of secondary liability: contributory infringement, vicarious liability, and inducement of infringement"). But however categorized, the material contribution test subsists.

It is equally clear that, both before and after *Grokster*, the material contribution test has always hinged on different elements than theories of inducing infringement. For example, in *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996), after determining that the knowledge requirement was satisfied, the Court rejected the district court's view that the operator of a swap meet could only be contributorily liable if it "expressly promoted or encouraged the sale of counterfeit products," because "providing the site and facilities for known infringing activity is sufficient to establish contributory liability." *See also Nimmer* § 13E.03[B][2][a] (describing contributory liability of those who supply the "means to infringe," such as those who provide sound recording duplication facilities to those they know are making infringing copies).

Following *Grokster*, courts continued to observe the same distinction between inducement and material contribution. In *Grande*, during the relevant period, the defendant ISP received 1.3 million notices of infringement

but adopted a policy that it would not terminate subscribers for copyright infringement "no matter how many infringement notices" it received. 118 F.4th at 704. It failed to act even when it learned that 40 of its subscribers had infringed over 1,000 times. *Id.* at 705. And its failure to respond effectively thwarted any other options for the plaintiffs, because its decentralized peer-to-peer software only identified users by IP addresses, which only the ISP could match to specific users. *See Grande*, *id.* at 702 (modern peer-to-peer technologies are decentralized and identify users only by IP addresses, which only ISPs can match to specific users). Invoking *Grokster*, the ISP argued that the "material contribution test" was no longer valid and that it could not be held contributorily liable absent proof that it had taken "affirmative steps to foster infringement." *Id.* at 711-12. Determining that *Grokster* "expanded the doctrine of contributory liability" rather than replacing the material contribution test, *id.* at 713, the Court found that the ISP materially contributed to infringement by its "continued provision of internet services to known infringing subscribers, without taking simple measures to prevent infringement." *Id.* at 720.

And of course, the Fourth Circuit followed a similar tack in the instant case, where Petitioners argued that failing to prevent infringement does not qualify as sufficiently "culpable conduct equivalent to aiding and abetting the infringement." 93 F.4th at 236. Rather than predicate liability on inducement, the Court found that Petitioners materially contributed to infringement by virtue of (1) their knowledge of "specific instances of repeat copyright infringement occurring on its network"; (2) their continued supply of internet access to those repeat infringers "despite believing the online infringement

would continue because [they] wanted to avoid losing revenue"; and (3) their "contempt for laws intended to curb online infringement." *Id.* at 236-37. The point was not that Petitioners set out to encourage infringement but that the sum-total of their conduct amounted to material facilitation of and contribution to known infringing acts.

These cases thus illustrate that inducement and material contribution address different circumstances that warrant secondary liability for different reasons. The former is premised on the overt encouragement of infringement, regardless of whether the secondary infringer knows of specific acts of infringement. The seller of a technology designed to infringe and expressly marketed for that purpose would be the poster child for inducement liability. But that same seller might not be liable under the material contribution test absent knowledge of specific acts of infringement by downstream purchasers or providing ongoing services that continued to enable infringement.

In contrast, a general-purpose digital service that knows of specific, repeat infringers and continues to supply the technology that enables them to infringe may have materially contributed to those infringements, even if it did not have the express purpose of encouraging them. Where the facts differ, the appropriate theory of secondary liability may differ as well. For example, one court dismissed a material contribution claim because, *inter alia*, the defendant did not have knowledge of specific infringing activity, but allowed an inducement claim because the defendant distributed peer-to-peer software and posted videos showing users how to use it to search for and download copyrighted materials. *See*

David v. CBS Interactive, Inc., 2012 U.S. Dist. LEXIS 197280 (C.D. Cal. July 13, 2012).

B. The Material Contribution Test Comports With Congressional Intent and the Core Purposes of Copyright Law

The analysis applied by the Fourth Circuit is not only consonant with applicable case law but also with the purposes of the DMCA and copyright law generally. As noted above, the DMCA was designed to create "strong incentives" for ISPs to cooperate with copyright owners in curtailing infringement if they wish to benefit from the statue's safe harbors. *See* DMCA Senate Report at 20, 40. *See also Grande*, 118 F.4th at 703 (DMCA safe harbor protection "incentivizes ISPs to participate in addressing the conduct of their infringing subscribers"). The position advocated by Petitioners would destroy these incentive for general purpose ISPs. If inducement is the only means of proving contributory liability, ISPs will avoid the DMCA and whatever administrative work it requires, sure in the knowledge that as long as they do not "clearly" express a goal of fostering infringement or affirmatively advertise their services as a great way to violate the Copyright Act, they are immune from liability. Petitioners in this case appear to have taken that tack. Their bet will be proven right if the lower court is reversed.

Moreover, by their very nature, general purpose ISPs like Petitioners would virtually never satisfy the inducement standard. Unlike, for example, the distributor of software designed for the specific purpose of capitalizing on infringement, an ISP has no need to encourage infringement specifically, even if it is happy to

profit with total impunity from infringing subscribers' subscription fees. The practical result of Petitioners' theory is that general purpose ISPs will never be held liable at all, and yet Congress assumed ISPs can be liable in appropriate circumstances when it created safe harbors to clarify that liability.

Further, limiting the liability of ISPs to the inducement rule defeats the core purpose of copyright law to promote the widespread dissemination of creative works. Authors are less likely to distribute their creative works online if ISPs can so easily evade liability for providing the facilities and means of infringing those works to known violators. And without recourse to the ISPs, copyright owners have no meaningful alternative recourse. In addition to the known inefficiency of playing "whack a mole" with individual pirates, technology has evolved to the point where ISP participation is necessary even to identify infringing users. *See Grande*, 118 F.4th at 702 (modern peer-to-peer technologies are decentralized and identify users only by IP addresses, which only ISPs can match to specific users). Contributory liability cannot be so limited that it leaves copyright owners with no real remedy for online piracy of this scope.

Maintaining the material contribution standard also hardly threatens what Petitioners hyperbolically imagine, such as "crushing liability" for any ISP that "merely supplies the internet connection used to commit copyright infringement" or the threat that ISPs that fail terminate a single infringer will be "liable for any subsequent misuse -- no matter how vast the universe of uses to which the internet can be put, how incidental the contribution the ISP provides, or how indifferent the ISP

is to how the connection is used." Pet. Br. at 1, 21. Nor will sustaining a test that has worked for a half century yield "mass evictions from the internet," require that "Grandma will be thrown off the internet because Junior illegally downloaded a few songs," or worse yet, that "ISPs can be held responsible for literally everything bad that happens on the internet, *Id.* at 3, 37, 44.

The material contribution test does not work this way. It has two often demanding elements – knowledge of infringing activity and "material" contribution to that infringement – both of which require careful assessment in the context of a defendant's overall conduct. An ISP that learns that the grandson of one subscriber downloaded a few songs among 50 million other users is unlikely to be found to have "materially" contributed to infringement (much less provoke an expensive lawsuit). On the other hand, an ISP that knows that large proportions of its users are serial infringers of specifically identified music and that continues to take those infringers' money and provide them with unlimited internet access might be another story. *See Sony Music Ent. v. Cox Communications, Inc.*, 93 F.4th 222, 232 (4th Cir. 2024) (noting evidence that "roughly 13% of Cox's network traffic was attributable to peer-to-peer activity and over 99% of peer-to-peer usage was infringing"). *See also* DMCA Senate Report at 52 (in assessing what constitutes "reasonably implementing" a repeat infringer policy, Congress recognized that "there are different degrees of online copyright infringement, from the inadvertent to the noncommercial, to the willful and commercial"). Courts and juries are amply equipped to make these judgments,

using legal tests that have worked for 50 years, without rendering ISPs liable for "everything bad that happens on the internet."

The empirical experience reflects this reality. The music industry has not sued the ISP industry indiscriminately. This Court is not asked to consider the liability of every ISP here, because most ISPs undertake the basic measures that shield them from liability. It is only when ISPs like Petitioners or the *Grande* defendants show an open disregard for copyright law, refuse to cooperate in containing piracy, and continue to provide the means of infringement to those it knows are using those means to violate copyright law repeatedly, that the contribution becomes material and thus subject to liability.

Finally to the extent that Petitioners worry that the world will be deprived of internet access, they might consider Congress' admonition that "those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access." DMCA Senate Report at 52. The music community has no interest in stripping internet access from every household where a teenager downloads two files. But flagrant, habitual infringers deserve no such solicitude, and the only way to stop them when they collectively infringe *en masse* is to deploy the traditional standards of contributory liability against the large services that assist them. The Fourth Circuit applied the right standard to the very type of aggravated conduct contributory liability was meant to prohibit, and its judgment should be affirmed.

CONCLUSION

The Court should reject Petitioners' view that the inducement rule displaces the material contribution test applied by the Fourth Circuit and affirm the judgment below.

Respectfully Submitted,

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