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 *AMICUS CURIAE* OF INTELLECTUAL PROPERTY LAW SCHOLARS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

Pursuant to Supreme Court Rule 37, *Amici* Intellectual Property Law Scholars respectfully submit this brief amicus curiae in support of Respondents.[1] *Amici* are professors and scholars who teach and have written extensively about copyright law and other intellectual property law subjects. Our sole interest in this case is in the proper application of copyright law in a way that serves the foundational goals of our copyright system, and that accurately reflects Congressional intent.

SUMMARY OF ARGUMENT

The ability of copyright owners to hold accountable those who knowingly and materially contribute to infringement is vital to the protection of valuable intellectual property rights. This case exemplifies why established secondary liability principles are indispensable for many reasons, not the least of which is that pursuing individual lawsuits against countless anonymous direct infringers is impractical and effectively impossible. Allowing Cox and similar actors to escape liability by distorting the established scope of secondary liability would fundamentally undermine copyright protection and render enforcement mechanisms largely ineffective.

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund the preparation or submission of the brief. *Amici* further disclose that no one other than the Intellectual Property Policy Institute (IPPI) made a monetary contribution to the preparation or submission of this brief.

Cox's argument that it cannot be held liable as a contributory infringer contradicts the statutory design of both the 1976 Copyright Act and the Digital Millennium Copyright Act ("DMCA"), both of which were enacted with the understanding that the then already longstanding *Gershwin* standard for contributory infringement would continue to apply. The legislative history of the DMCA makes clear that Congress intended to preserve existing secondary liability doctrines, including the principle that one who knowingly provides material assistance to infringement may be held liable as a contributory infringer. Cox's and its *amici's* attempt to replace this well-established standard with common law tort law principles drawn from contexts wholly distinct from copyright law—a theory rejected by the U.S. Copyright Office—would upend the careful balance Congress struck in the DMCA and leave copyright owners without meaningful recourse against massive online infringement.

Cox's policy arguments about the importance of internet access are similarly misplaced. Congress itself contemplated and endorsed the termination of internet access for repeat infringers in Section 512(i)(1)(A) of the DMCA, explicitly stating that those who "repeatedly or flagrantly abuse their access to the Internet" should face "a realistic threat of losing that access." Cox's suggestion that this statute is outdated is an argument for Congress, not this Court. Moreover, the evidence demonstrated that Cox's failure to terminate repeat infringers had nothing to do with concerns about the social importance of internet access and everything to do with profit maximization—Cox willingly terminated service to hundreds of thousands of subscribers for

non-payment while refusing to terminate even the most egregious repeat infringers because doing so would affect subscription revenue. Finally, Cox's conduct was clearly willful under the well-established standard that encompasses reckless disregard for copyright holders' rights. Cox made deliberate, profit-driven decisions to allow known repeat infringers continued access to its network despite recklessly disregarding whether they would continue to infringe, and it did so while openly expressing disdain for the DMCA's requirements. This Court should affirm the Fourth Circuit's well-reasoned decision, based on longstanding precedent, holding Cox liable for contributory and willful infringement.

ARGUMENT

I. The Statutory Design of the 1976 Act and Section 512 are Built with the *Gershwin* Understanding of Contributory Infringement Liability.

Cox and its *amici* advance a reading of secondary liability that is fundamentally at odds with the *Gershwin* standards that informed the Copyright Act of 1976 as well as the DMCA. In 1971, the Second Circuit decided *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, in which the court held that "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." Although *Gershwin* is the "modern formulation" of contributory infringement, the doctrine stretches back at least to this Court's decision over a hundred years ago in a case finding that the defendant infringed the copyright in the novel "Ben Hur" by distributing a film.

Kalem Co. v. Harper Bros., 222 U.S. 55 (1911); 4 Nimmer on Copyright § 13E.03, Secondary Liability in the Form of Contributory Liability (2025). Although *Kalem* did not use the term "contributory infringer" the term was in use by the 1930s for conduct similar to that in *Kalem. Metro-Goldwyn-Mayer Distrib. Corp. v. Bijou Theatre Co.*, 3 F. Supp. 66, 73 (D. Mass. 1933).

Section 106 of the Copyright Act of 1976, enacted five years after the *Gershwin* decision, grants copyright holders "the exclusive rights to do and *to authorize*" the specific rights enumerated in the law.[2] Legislative history demonstrates that lawmakers deliberately maintained existing common law principles regarding secondary liability, which encompassed the contributory infringement framework that had recently been established in *Gershwin.* According to the House Report of the Committee on the Judiciary accompanying the 1976 Copyright Law revision:

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

H.R. Rep. No. 94-1476, at 61 (1976).

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2. Except where otherwise noted herein, all emphases are supplied, and all internal citations and quotations are omitted.

In 1998, Congress passed the DMCA, codified at 17 U.S.C. § 512, which established a safe harbor for internet service providers ("ISPs") who meet certain requirements, including adopting and implementing a policy for terminating repeat copyright infringers. Though Cox was effectively precluded in this case (by its own decisions) from seeking safe harbor under the DMCA, the congressional record accompanying section 512 is instructive as it indicates that lawmakers sought to maintain the existing *Gershwin* legal framework for contributory infringement, which encompassed liability for knowingly providing material assistance to primary infringement. According to the legislative history of section 512, the liability of an ISP that failed to take advantage of the safe harbor provisions "would be adjudicated based on the doctrines of direct, vicarious or contributory liability for infringement as they are articulated in the Copyright Act ***and in the court decisions interpreting and applying that statute, which are unchanged by new Section 512***." H.R. Rep. No. 105-551, pt. 2, at 64 (1998).

Congress thereby confirmed that existing contributory infringement law—which broadly applied the *Gershwin* standard—remained intact after Section 512›s enactment, and that if section 512 does not apply as a safe harbor, then ISPs can still be liable for infringement as a contributory infringer. Indeed, by the passage of the DMCA in 1998, *Gershwin* had been adopted by a number of other circuits and had not been seriously questioned.[3] One

3. In addition to being cited favorably by this Court in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 438 (1984), *Gershwin* had been cited in four circuits including the Second where it originated. *Columbia Pictures Indus. v. Redd Horne, Inc.*, 749 F.2d 154 (3rd Cir. 1984); *Fonovisa, Inc. v. Cherry*

of the cases which was most directly an impetus for the DMCA was *RTC v. Netcom*, which following the standards from *Gershwin* held that an internet service provider could be liable for the infringements of its subscribers on a contributory basis so long as the knowledge requirement was met. *Religious Tech. Ctr. v. Netcom*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995) (providing a system for access to newsgroup postings on the early internet "goes well beyond renting a premises to an infringer"). While Congress recognized concerns about secondary liability's effect on the development of the internet, the conclusion reached was to build a liability shield over *Gershwin* and *Netcom*, while leaving the underlying contributory infringement doctrine intact should the liability shield not apply. Under Cox's read, Section 512(a) would provide a liability shield where there was never any liability in the first place.

Changes to contributory liability were at one point part of section 512 while it was being deliberated, whereby "[e]ven if a provider satisfies the common-law elements of contributory infringement" monetary damages would not be available for certain conduct which would constitute contributory infringement—namely automatic transmission initiated by another person over the provider's network. WIPO Copyright Treaties Implementation and OnLine Copyright Infringement Liability Limitation, H. Rep. No. 105-551, Pt. I at 11, 105th Cong., 2d Sess. (May 22, 1998). This provision was specifically intended to

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Auction, Inc., 76 F.3d 259 (9th Cir. 1996); *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publrs.*, 756 F.2d 801 (1985). The District of Minnesota also favorably cited *Gershwin* in an unpublished disposition. *Johnson v. Salomon*, No. CIV.A. 4-73.

overrule the holding of *Netcom* regarding contributory liability, but Congress chose not to include it in the final bill, leaving *Netcom's* contributory holding intact. Section 512(l) makes this clear, by establishing that contributory liability is unchanged by the DMCA. The DMCA was clearly drawn considering the then-existing precedents of contributory liability, including *Gershwin* and especially *RTC v. Netcom.*

II. By Seeking to Change Contributory Infringement Liability Standards, Including by Importing Common Law Tort Liability Principles, Cox and Its *Amici* Would Eliminate the Protections for Copyright Owners Under Section 512 and Render the Statute a Dead Letter.

A. The Balance Struck by the DMCA Would be Irreparably Subverted if Cox's Theory of Contributory Infringement Was Adopted.

As even Cox recognizes (*Brief of the Petitioners* ("Cox Br.") at 6-7), Congress sought in the DMCA to strike a balance between protecting copyright and promoting innovation on the internet. The primary way that it did so was to place the onerous burden of monitoring for infringement on internet networks on copyright owners rather than on the networks themselves. Thus, copyright owners (such as the respondents in this case) devote significant resources to identifying infringement and then notifying ISPs of such infringement. The notice procedure is fundamental to the DMCA and clearly benefits ISPs because it frees them from having to themselves monitor for infringement. The DMCA also allows them, if they comply with the few and easy to satisfy obligations

that the statute imposes upon them, to avoid secondary infringement liability.

Thus, under the DMCA, ISPs are not required to police their own platforms and are afforded the highly valuable benefit of a safe harbor from infringement liability should they comply with simple obligations. Unlike service providers that are subject to the notice and takedown provisions of 512(c), ISPs like Cox operate under 512(a), meaning that all they must do is implement a reasonable repeat infringer policy to avail themselves of the DMCA's safe harbors. But when ISPs fail to comply with that obligation, as Cox did, they can be held liable for infringement occurring on their networks under traditional secondary (including contributory) liability standards, which Congress expected would continue to apply. H.R. Rep. No. 105-551, pt. 2 at 3. In other words, exposure to secondary liability served as the incentive driving safe harbor compliance. The threshold requirements of the DMCA, including adopting and reasonably implementing a repeat infringer policy, rely on Section 512 working in tandem with established secondary liability principles—principles that Cox now seeks to reinvent.

If Cox's reasoning prevails, an ISP's incentive to comply with the DCMA disappears. Copyright owners will still have the burden to monitor ISPs networks for infringement. They will still need to send notices to the ISP if they want to satisfy the knowledge requirement of contributory liability (which was established in this case by such notices, and which Cox has not challenged). But they will never be able to establish material contribution because, under Cox's theory, even in the face of notices and knowledge of repeated, even flagrant abuses of an

ISP's network for copyright infringement, *see* H.R. Rep. No. 105-551, pt. 2, at 61 (1998), the ISP has no obligation to do anything. Adopting Cox's arguments will result in the unchecked proliferation of copyright infringement, as rights holders cannot realistically pursue litigation against tens of millions of individual infringers. Copyright owners will have all of the burdens of the DMCA but none of the benefits, and ISPs can choose whether to take the simple measures under the DMCA that give them complete immunity to infringement liability, or, as Cox did, in pursuit of additional profit, do nothing. ISPs can deem their repeat infringer policies optional or abandon their implementation outright, as Cox did. Why would an ISP implement a policy that might result in losing subscription fees, affecting its bottom line, when it could use Cox's behavior as a roadmap for avoiding liability while also not complying with the DMCA?

In sum, if adopted, Cox's theory of contributory liability would undermine the DMCA's core purposes (a primary one of which was to protect copyright owners from the type of massive infringement that can result in the digital age) and practical effectiveness, leaving creators and copyright owners with even less recourse when attempting to combat online infringement. That was hardly the balance struck in the DMCA, nor is it consistent with the longstanding principles of contributory liability on which the DMCA was based and which it preserved.

B. No Court Has Recognized the Application of Common Law Principles of Tort Liability to Standards of Material Contribution in Copyright Law, and *Taamneh* is Inapplicable.

While secondary copyright liability "emerged from common law principles," *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005), Cox and its *amici* misleadingly attempt to connect the analysis of material contribution in copyright law to analyses of proximate causation in tort law. (*Brief of American Civil Liberty Union, et al. as Amici Curiae in Support of Petitioners* ("ACLU Br."), at 12.) *Amici* argue that "[w]hen courts interpret secondary liability rules for copyright, they should use those background principles, rather than creating special copyright-specific rules not provided for in the statute." (ACLU Br. at 13.)

To support this argument, *amici* cite to the American Law Institute's ("ALI") recently completed Copyright Restatement project, which was led by the same professor whose law firm drafted the *amicus* brief. That project was highly controversial, so much so that a third of the participants resigned from the project in May 2025, just as the final sections of the Restatement were approved.[4]

4. The highly unusual resignations of over a third of the project's participants, including prominent law professors and former U.S. Copyright Office officials, were the final acts of many whose frustrations came to head after it became clear that the project's leaders and ALI leadership failed to address concerns that were repeatedly raised about the substance and procedure of the project. Those concerns were expressed in letters sent to the ALI over the course of project by members of Congress, the American Bar Association, Registers of Copyright, and the then-Director of the Patent and Trademark Office. *See* https://

Part of the controversy surrounding the project was the Restatement's treatment of secondary liability standards, which reflected the project leader's view of what the law should be, rather than anything supported by case law, statute, or legislative history.

Many of the Copyright Restatement participants sent letters and comments to the ALI raising concerns that the Restatement does not adequately explain that courts have not imported tort law concepts and that some courts have found even non-essential contributions to be sufficiently material. Specifically, the U.S. Copyright Office sent a letter in 2024 advising that the Restatement's section on secondary liability (among others) should be withheld for approval until revisions were made to address the Office's repeated concern that the Restatement inaccurately connects the analysis of "material contribution" in copyright law to analysis of proximate causation in tort law.[5] The letter explains that the importation of common law tort principles to copyright law's secondary liability standards is contradicted by several cases in which courts found that the defendants' contributions were "material" without requiring that these contributions be "essential" or the "but-for cause" of the direct infringement.[6]

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legalblogs.wolterskluwer.com/copyright-blog/mass-resignations-call-into-question-legitimacy-of-ali-copyright-restatement/.

5. *See* Letter from Suzanne Wilson, General Counsel and Associate Register of Copyrights, and Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy & Practice, to Hon. Diane P. Wood et al., American Law Institute (May 14, 2024) ("Re: Tentative Draft No. 5").

6. *See, e.g., Fonovisa v. Cherry Auctions*, 76 F.3d 259, 264 (9th Cir. 1996) (holding that providing "site and facilities" and the

Despite these concerns, revisions to the Restatement's treatment of secondary liability were never made, and now *amici* attempt to convince the Court that the mischaracterizations in the Copyright Restatement are an accurate reflection of the law. Antonin Scalia warned courts of using modern ALI Restatements as part of their reasoning, noting that they "are of questionable value and must be used with caution."[7] He explained that ***"over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be."***[8] Unfortunately, the problems Justice Scalia identified have endured, and they are nowhere more conspicuous than in the ALI's Copyright Restatement.

Cox and its *amici* also argue that the Court should look to the *Taamneh* case as the proper way to "align"

"environment and the market" for sales of infringing records constituted a material contribution); *Arista Records, Inc. v. Flea World, Inc.*, No. 03-cv-2670, 2006 WL 842883, at *14–16 (D.N.J. Mar. 31, 2006) (concluding that providing flea market vendors with "basic requirements such as wooden tables, and booth spaces, security, free parking, maintenance of the market grounds (including cleaning and repair), and restrooms" as well as "extensive advertising" and refund services was sufficiently material); *UMG Recordings, Inc. v. Sinnott*, 300 F. Supp. 2d 993, 1001 (E.D. Cal. 2004) (determining that "[o]perating a flea market or swap meet involves providing vendors with support services" and "[t]his is all that is required to satisfy the requirement of material contribution necessary to establish contributory liability").

7. *Kansas v. Nebraska*, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part).

8. *Id.*

copyright liability standards with common law tort principles and absolve Cox from liability, but *Taamneh* was not a copyright dispute and is inapplicable given the clearly distinguishable facts of the case. (ACLU Br. at 13.) In *Twitter v. Taamneh*, 598 U.S. 471 (2023), family members of terrorism victims sued Twitter, Facebook, and Google under the Antiterrorism Act, 18 U.S.C. § 2333. That statute authorizes U.S. nationals injured by international terrorism to pursue civil damages. The plaintiffs claimed these social media platforms aided and abetted terrorist activity by permitting ISIS to use their services for recruitment, fundraising, and propaganda dissemination. The lawsuit specifically alleged that the defendants knowingly allowed ISIS and its supporters to exploit both their platforms and recommendation algorithms for these purposes.

The Court addressed "whether defendants' conduct constitute[d] aiding and abetting by knowingly providing substantial assistance" to terrorists. *Twitter*, 598 U.S. at 484 (cleaned up). The Court ruled against liability, noting that "[P]laintiffs never allege that ISIS used defendants' platforms to plan or coordinate the Reina attack; in fact, they do not allege that [the terrorist] himself ever used Facebook, YouTube, or Twitter." *Id.* at 498.

Cox and its supporting *amici* fail to recognize several critical distinctions, including that the Copyright Act expressly prohibits "authorization" of infringing acts. Importantly, *Twitter* is factually distinguishable because the defendants lacked knowledge of the specific planned attack, their services were not used to execute it, and the attacker apparently never employed social media to further the terrorist act.

Here, by contrast, it is undisputed not only that subscribers use Cox's service to commit copyright infringement, but also that Cox had actual knowledge of these specific infringements yet continued providing its services to those same subscribers so that they could continue to infringe using such services. These circumstances precisely exemplify the factual scenario that secondary liability principles in copyright law were designed to address.

III. The Statute Contemplates Termination of Internet Access for Repeat Infringers, And Arguments About the Importance of Internet Access Are Properly Directed to Congress.

A recurrent theme in Cox's brief and the *amicus* briefs of the technology companies and their supporters is that internet access is "integral to nearly every aspect of modern life." (Cox Br. at 19; *Brief of Google et al. as Amici Curiae in Support of Petitioners* ("Google Br.") at 7-10; *Brief of Intellectual Property Scholars as Amici Curiae in Support of Petitioners* at 25-26; *Brief of Alfred C. Yen as Amicus Curiae in Support of Petitioners* at 11.) Because, the argument goes, the internet is sacrosanct, Cox should be allowed to let people who it knows are repeatedly abusing the internet service it provides to steal copyrighted material continue their theft unabated. (*See id.*) Cox says that it is not for the Courts but only for Congress to "create a duty to terminate internet service" (Cox Br. at 19), and that there is not "the slightest suggestion from Congress that it endorsed" the termination of internet service in the face of repeat infringement. (*Id.* at 44-45.)

But Congress "endorsed" just that in Section 512(i) of the DMCA, which expressly contemplates "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)(A). In fact, Congress expressly stated that "those who repeatedly or fragrantly ***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.***" S. Rep. No. 105-190, at 52 (1998); H.R. Rep. No. 105-551, pt. 2, at 61 (1998); *see also* U.S. Copyright Office, *Section 512 of Title 17* (May 2020), at 109 ("Congress intended for [ISP's] repeat infringer policies to serve as an important deterrent for infringing activity, by ultimately terminating the accounts or access of repeat infringers."). Thus, Professors Cotropia and Gibson are simply incorrect when they assert that Section 512(i)(1)(A) "does not contemplate termination of Internet access" because it "speaks of termination of 'subscribers and account holders,' not of subscriptions and accounts." (*Brief of Christopher Cotropia and James Gibson as Amici Curiae in Support of Petitioners* ("Cotropia Br.") at 20.)[9]

Cox argues that the DMCA is irrelevant to its contributory infringement liability because it is "voluntary." (Cox Br. at 7, 40.) This ignores the legislative balance that was struck in the DMCA, which places the

9. Moreover, the provision clearly refers to termination of a subscriber's or account holder's access to "the service provider's system or network," and the definition of "service provider" in section 512 (at 512(k)(l)) is and always has been broadly defined to include providers of internet access such as Cox. So, Congress clearly had in mind termination of access to the internet (the "system or network" provided by an ISP such as Cox).

burden of finding and notifying an ISP of infringement on its network on the copyright owner, and provides safe harbors for the ISP against secondary liability, provided the ISP takes action to discontinue that infringement, including by terminating repeat infringers.

Even Cox ultimately acknowledges the relevance of the DMCA but suggests it is outdated, arguing that it "was drafted at the dawn of the digital age," before knowing "how the internet would develop." (Cox Br. at 44-45.) Professors Cotropia and Gibson make a similar argument, asserting that termination of internet access as provided in 512(i)(1)(A) might have in 1998 been, but no longer is, "a proportionate response to repeated infringement." (Cotropia Br. at 20.) But these are arguments for ***amending*** Section 512(i)(1)(A) in light of technological changes, which only Congress can do. Certainly, there are many aspects of the DMCA that might be ripe for reconsideration by Congress, including the safe harbors themselves.[10] *See, e.g.,* U.S. Copyright Office, *Copyright and the Music Marketplace* (February 2015) at 79-80 (noting concerns raised with respect to safe harbors and limitations of notice and takedown regime); U.S. Copyright Office, *Section 512 of Title 17* (May 2020), at 84 (recognizing that the balance struck by Congress when it enacted the DMCA has tilted considerably in favor of

10. For example, it is anomalous in 2025 that companies (like *amicus* Google) that have the technological ability to easily identify infringing content on their platforms, and that are using such technologies to license and monetize the majority of content, should still be permitted to force those with whom they do not have a license to resort to the highly-ineffectual notice and take down provisions of Section 512. *See* U.S. Copyright Office, *Copyright and the Music Marketplace* (February 2015) at n. 391.

ISPs). But those are issues for Congress to address, not for the Court to decide under the guise of an argument that the Fourth Circuit misapplied what is clearly the law, or that there is a non-existent Circuit split as to the law of contributory copyright infringement liability as it has been uniformly applied for over a half century.

It is true that Congress did not provide the precise "appropriate circumstances" under which such Internet access should be terminated. It left it to the ISPs to "adopt[] and reasonably implement[]" policies that identify such circumstances, and for the courts to determine whether such policies in any case are reasonable in their terms and their implementation. The flexibility provided under 512(i) to reasonably implement a repeat infringer policy is a benefit to ISPs because it gives them the freedom to adopt policies that fit the circumstances of their service. And that is precisely why the parade of horribles arguments trotted out by Cox and its *amici* concerning termination of internet access—evoking dire consequences for military barracks, hospitals and universities (see Cox Br. at 3, 44)—are unavailing. There was no evidence that Cox refused to terminate internet access out of a concern for any of these consequences. If Cox had shown that it had a repeat infringer policy that provided for a tailored exception to termination for hospitals or for military barracks or the like, and it reasonably implemented that policy in choosing not to terminate those subscribers, it might not have been found liable for any infringements by patients using a computer in a hospital common area. But Cox had no such policy.

Instead, the jury heard evidence that Cox first implemented a patently unreasonable "thirteen-strike

policy," and then did not even follow that. (Opinion at 6.) It placed caps on the number of DMCA-compliant take-down notices that it would even consider, limited the number of account suspensions per day, and restarted the strike count for subscribers who were terminated and reinstated. (*Id.*) And even when it internally acknowledged that particular subscribers were likely to infringe again and again, it did not terminate for the express reason that it wanted to keep the subscription revenues flowing. (*See, e.g., id.* at 14.) Ultimately, the evidence showed that Cox "knew of specific instances of repeat copyright infringement occurring on its network," "traced those instances to specific users," yet "chose to continue providing monthly internet access to those users despite believing the online infringement would continue because it wanted to avoid losing revenue." (*Id.* at 23.) Cox's choices had nothing to do with the importance of internet access.

In fact, the jury heard evidence that Cox not only, for pecuniary reasons, made an affirmative choice ***not to terminate*** even the most egregious repeat infringers, it also made an affirmative choice, again for pecuniary reasons, ***to terminate*** internet access to hundreds of thousands of subscribers (both residential and commercial) who did not pay Cox's invoices. So, Cox's professed concern for "Grandma's" internet access (Cox Br. at 44) ring hollow. Grandma or her grandson "Junior" could infringe using Cox's network to their heart's content—because that infringement only hurts copyright owners and does not affect Cox's pocketbook—but if Grandma missed a few monthly payments to Cox, suddenly the concern that "Junior's" lack of internet access may require him to "drop out of school" (*see id.*) vanished.

IV. Cox's Course of Conduct Was Clearly Willful Under the Well-Established Legal Standard.

It is axiomatic that a defendant is liable for "willful" infringement when it "recklessly disregard[s] a copyright holder's rights." *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 799 (4th Cir. 2001). Cox's attempt to distort this well-settled standard is fundamentally flawed.

Cox argues that one cannot be found a willful contributory infringer unless it recklessly disregarded that ***its own conduct*** was unlawful. (Cox Br. at 47). This argument ignores decades of copyright infringement precedent holding that an infringer acts willfully when its conduct displays a reckless disregard for a copyright holder's rights.[11] *See* 5 Nimmer on Copyright § 14.04 ("But one who 'recklessly disregards' a copyright holder's

11. *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d at 799 (willfulness where defendant either has actual or constructive notice that its conduct constitutes infringement or "recklessly disregards a copyright holder's rights"); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 584-585 (6th Cir. 2017) (finding willfulness where defendant "exhibited a reckless disregard" for plaintiff's rights) *RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 778 (8th Cir. 1988) ("… reckless disregard of the copyright holder's rights (rather than actual knowledge of infringement) suffices to warrant award of the enhanced damages"); *N.A.S. Imp., Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 252–53 (2d Cir. 1992) (same); *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 992 (9th Cir. 2017) ("[T] o prove willfulness under the Copyright Act, the plaintiff must show (1) that the defendant was actually aware of the infringing activity, or (2) that the defendant's actions were the result of reckless disregard for, or willful blindness to, the copyright holder's rights.").

rights, even if lacking actual knowledge of infringement, may be subject to enhanced damages.").[12] Cox's argument that this standard is mere "shorthand" "borrowed from direct infringement cases" that "does not necessarily hold for secondary liability" (Cox Br. at 53) makes no sense considering that the standard has been applied by numerous courts in assessing contributory infringement liability.[13] And Cox concedes elsewhere in its brief that the reckless disregard standard "applies to secondary infringers the same as it does direct infringers." (Cox Br. at 47). Cox simply cannot escape the fact that its conduct fits squarely within the "reckless disregard" standard.

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12. Cox's belated attempts to challenge jury instructions concerning willfulness that it did no challenge at trial are not only procedurally improper, they are substantively wrong, as the district court instructed the jury that it could find willfulness if it found that the evidence showed that Cox had "reckless disregard for the infringement of plaintiffs' copyrights" (Sony Opp. Br. at 6), which was consistent with nationwide willfulness precedent.

13. *See, e.g., BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 312–13 (4th Cir. 2018); *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 944 (9th Cir. 2011) (affirming finding of contributory infringement); *UMG Recordings, Inc. v. Grande Commc'ns Networks, LLC*, 384 F. Supp. 3d 743, 768–69 (W.D. Tex. 2019), *aff'd in part, UMG Recordings, Inc. v. Grande Commc'ns Networks, L.L.C.*, 118 F.4th 697, 716–18 (5th Cir. 2024) (affirming finding of contributory infringement); *Elohim EPF USA, Inc. v. 162 D & Y Corp.*, 707 F. Supp. 3d 372, 400 (S.D.N.Y. 2023); *Atari Interactive, Inc. v. Redbubble, Inc.*, 515 F. Supp. 3d 1089, 1116–17 (N.D. Cal. 2021*), aff'd in part, appeal dismissed in part*, No. 21-17062, 2023 WL 4704891 (9th Cir. July 24, 2023*); Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distributors*, 983 F. Supp. 1167, 1179 (N.D. Ill. 1997).

The record is replete with instances of Cox's reckless disregard for copyright holders' rights. The record demonstrates that Cox made affirmative, intentional decisions to not terminate subscribers it knew had used its network repeatedly to infringe Plaintiffs' copyrights, and who it internally conceded were likely to continue to infringe Plaintiffs' copyrights. (See Opinion at 14, 18, 23, citing evidence.)[14] Cox recklessly disregarded the fact that if it did not terminate those repeat infringers' accounts then those infringing uses would continue to infringe the detriment of the copyright holders' rights, yet Cox made the affirmative decision to not terminate because it wanted continued subscription revenue. (*See id.*). Cox chose profit over the rights of copyright holders. Cox's conduct unquestionably meets the criteria for willfulness due to its reckless disregard for Plaintiffs' rights.

But even if Cox were correct (it is not) that a secondary infringer's conduct is willful only if it has knowledge of and/or recklessly disregards the risk that its own conduct is unlawful, Cox was certainly aware of and recklessly disregarded applicable law, stating "F the dmca!!!" (Cox Br. at 40, quoting internal "unfortunate" e-mails Cox now says "do not reflect Cox's views as a company")

14. Cox repeatedly calls its affirmative choice to recklessly disregard the rights of copyright owners in favor of continued subscription revenues merely "nonfeasance" which it says "is not enough" to impose liability. (Cox Br. at, e.g., 24.) Cox cites no cases that say that, and the dictionary definition of nonfeasance is "failure to act when a duty to act exists." (*See Nonfeasance, Black's Law Dictionary* (12th ed. 2024).) And the authorities make plain that Cox did have a duty to act under the circumstances. Moreover, Cox made affirmative decisions, *i.e.,* it ***did*** engage in "affirmative conduct" which Cox concedes would be sufficient (*id.* at 17).

and refusing to take that statute's simple and easy-to-comply with protective measures, including reasonably implementing a repeat infringer policy (which measures would have rendered it immune from liability).

Cox makes much ado about "good faith" and "innocent errors made despite the exercise of reasonable care" as it cites to non-copyright infringement cases in an effort to deflect from its conscious decisions to disregard the rights of copyright owners, but Cox's conduct certainly does not lend itself to "good faith efforts to comply," innocence, or reasonable actions under any measure. (Cox Br. at 48-52). Those cases either address far less egregious conduct than Cox's conduct here or find similarly egregious conduct willful.[15] Cox's deliberate actions—including, *inter alia*,

15. *United States v. Illinois Cent. R. Co.*, 303 U.S. 239, 243, 58 S. Ct. 533, 535, 82 L. Ed. 773 (1938) (finding willfulness where party "intentionally disregards" or is "plainly indifferent" to the law and its requirements); *see Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128–29, 105 S. Ct. 613, 625, 83 L. Ed. 2d 523 (1985) ("The record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA."); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69, 127 S. Ct. 2201, 2215, 167 L. Ed. 2d 1045 (2007) (declining to impose willfulness finding where party was "merely careless" and error was not "objectively unreasonable" reading of the law); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 128, 108 S. Ct. 1677, 1679, 100 L. Ed. 2d 115 (1988) (acknowledging the "general understanding that the word 'willful' refers to conduct that is 'voluntary,' 'deliberate,' or 'intentional'"); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544, 119 S. Ct. 2118, 2129, 144 L. Ed. 2d 494 (1999) (emphasizing impropriety of punitive damages where employer made "good faith efforts" to comply with law); *United States v. Bishop*, 412 U.S. 346, 360–61, 93 S. Ct. 2008, 2017, 36 L. Ed. 2d 941 (1973) (emphasizing difference in penalties

acknowledging and showing open disdain for the DMCA and recognizing that repeat infringers were going to repeatedly infringe, but deciding to allow them continued access to the network so they could do so anyway—were not negligent or confused, but reflected an absence of good faith and an intentional indifference to the law. And Cox itself admits that this kind of conduct calls for enhanced damages. (Cox. Br. at 50-51).

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for willfulness between "well-meaning, but easily confused" taxpayer versus the "purposeful tax violator"). Cox cherry-picks language from *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 97–98, 136 S. Ct. 1923, 1928, 195 L. Ed. 2d 278 (2016). In *Halo*, this Court discussed rejecting enhanced damages where a defendant "appeared in truth to be ignorant of the existence of the patent right, and did not intend any infringement[.]" Cox conveniently omits the first clause.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to affirm the judgment of the Court of Appeals for the Fourth Circuit as to contributory liability and willful infringement.

Respectfully submitted,

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APPENDIX

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