

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 *AMICI CURIAE*
FORMER MEMBERS OF CONGRESS AND
REGISTERS AND GENERAL COUNSELS
OF THE U.S. COPYRIGHT OFFICE
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

Amici, listed below, are former Members of Congress and Registers and General Counsels of the U.S. Copyright Office responsible for crafting, adopting and/or administering the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.*, as amended, including the Digital Millennium Copyright Act of 1998, Pub. L. 105-304, 112 Stat. 2860 (1998) (“DMCA”), and related aspects of U.S. copyright law, during their government tenures. Drawing on this experience, *amici* seek to ensure that the copyright laws of the United States are correctly interpreted and applied to encourage the creation of original works of authorship—and a flourishing online marketplace for those works—as envisioned by Congress.

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¹ Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. The Copyright Alliance, a nonprofit, nonpartisan 501(c)(4) public interest and educational organization dedicated to promoting and preserving the value of copyright, is the sole person or entity to contribute funding for the preparation and submission of this brief.

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SUMMARY OF ARGUMENT

Petitioners Cox Communications, Inc. and CoxCom, LLC, along and their supporting *amici* (collectively, “Cox”), ask this Court to sweep aside a century of copyright precedent recognizing that one who knowingly contributes to another’s copyright infringement can be held liable and replace it with a new “aiding and abetting” standard requiring proof of “purposeful, culpable conduct intended to further infringement” before secondary liability can attach. Pet. Br. at 2. Cox’s novel standard has never been the law, would negate Congress’s purpose in enacting the DMCA, and would eviscerate the ability of copyright owners to address online infringement of their works.

In the copyright sphere, it has long been the rule that “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another” can be held liable for the infringement. *Gershwin Publ’g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (“*Gershwin*”). Congress specifically recognized traditional principles of secondary liability in adopting the 1976 Copyright Act and again in 1998 in enacting the DMCA. In crafting the DMCA, rather than write new rules of liability for the internet age, Congress chose to establish a series of safe harbors to shield online providers from monetary damages if their services were used to infringe. Under the DMCA, in exchange for adhering to certain practices to curb infringement—including implementation of a repeat infringer policy—providers are protected against damages for the transmission or hosting of infringing material. S. Rep. No. 105-190, at 8, 19–20,

40–42 (1998); *see also* 17 U.S.C. § 512 (safe harbors as codified).

In practical terms, the change in law Cox asks this Court to impose would effectively eliminate service provider exposure to liability for the vast majority of online infringements. Copyright owners would be hard-pressed to satisfy Cox’s intent-based aiding and abetting standard with respect to the deluge of infringements that occur on provider platforms each day, including for the obvious reason that copyright owners are not privy to the intentions or inner workings of online providers.

The elimination of a critical touchstone of secondary liability would upend the careful balance established by Congress in the DMCA, as platforms would no longer be incentivized by a meaningful possibility of liability to address repeat infringers or remove infringing content. According to Cox, for example, the heightened standard for which it advocates would eliminate its liability in this case, thus vindicating its failure to take action against infringing subscribers despite receiving over 160,000 notices from copyright owners. Pet. Br. at 32–33; Pet. Cert. App. at 9a. If other service providers were to follow Cox’s lead and decline to participate in the safe harbor system, the real-world consequences for copyright owners would be swift and devastating.

Amici respectfully submit that this Court should not abrogate a deeply rooted rule of secondary copyright liability that serves as a foundational principle of the Copyright Act and DMCA.

ARGUMENT

I. Contributory Liability Is a Long-Established Principle of Copyright Law That Serves as an Essential Backdrop to the 1976 Copyright Act and DMCA

The principle that someone who contributes to another’s infringement can be held secondarily liable for that infringement, recognized by this Court over a hundred years ago, is deeply embedded in U.S. copyright law. *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63 (1911); *see also Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930–31 (2005) (“*Grokster*”) (observing that copyright doctrines of secondary liability “emerged from common law principles and are well established in the law”). As illustrated by a plethora of cases in the decades leading up to the enactment of the 1976 Copyright Act and DMCA in 1998, and beyond, courts have long recognized that persons with knowledge of infringement who facilitate that infringement face liability.²

² *E.g.*, *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 197 n.4, 198–99 (1931); *UMG Recordings, Inc. v. Grande Commc’ns Networks, LLC*, 118 F.4th 697, 711–15 (5th Cir. 2024); *Greer v. Moon*, 83 F.4th 1283, 1287 (10th Cir. 2023); *Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 831–32 (9th Cir. 2019); *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 99–101 (2d Cir. 2016); *Leonard v. Stemtech Int’l Inc.*, 834 F.3d 376, 387–88 (3d Cir. 2016); *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019–22 (9th Cir. 2001); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996); *Cable/Home Commc’n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845 (11th Cir. 1990); *Gershwin*, 443 F.2d at 1162; *De Acosta v. Brown*, 146 F.2d 408, 411–12 (2d Cir.

**A. The Material Contribution Branch of
Contributory Liability Has Never
Required a Showing of Culpable
Affirmative Conduct**

As articulated in the Second Circuit’s paradigmatic decision in *Gershwin*—issued a few years before adoption of the 1976 Copyright Act—a defendant is liable for contributory infringement if it has “knowledge of the infringing activity [and] induces, causes or materially contributes to the infringing conduct of another.” 443 F.2d at 1162; see also *Grokster*, 545 U.S. at 930–31 (citing *Gershwin* as a source of the contributory liability standard). The “material contribution” branch of contributory liability does not require a plaintiff to prove culpable affirmative conduct to further infringement, only knowledge of and material contribution to the infringement. As this Court explained in an early contributory infringement case, “[i]ntention to infringe is not essential” to establish liability. *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198 (1931); accord *De Acosta v. Brown*, 146 F.2d 408, 411 (2d Cir. 1944) (citing *Buck*); *ABKCO Music, Inc. v. Harrison Songs, Ltd.*, 722 F.2d 988, 998–99 (2d Cir. 1983) (same); see also 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13E.09 (2025) (infringement does not require showing of intent).

1944); *Splunk Inc. v. Cribl, Inc.*, 662 F. Supp. 3d 1029, 1051–52 (N.D. Cal. 2023); *Ticketmaster LLC v. Prestige Ent. W., Inc.*, 315 F. Supp. 3d 1147, 1165–66 (C.D. Cal. 2018); *Arista Recs. LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 154–56 (S.D.N.Y. 2009); *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1373–75 (N.D. Cal. 1995); *Encyc. Britannica Educ. Corp. v. Crooks*, 558 F. Supp. 1247, 1256 (W.D.N.Y. 1983).

Congress expressly embraced the doctrine of contributory liability in enacting the 1976 Copyright Act, explaining that its inclusion of the phrase “to authorize” in the list of exclusive rights of the copyright owner in section 106 of the Act “is intended to avoid any questions as to the liability of contributory infringers.” H.R. Rep. No. 94-1476, at 61 (1976); *see also* S. Rep. No. 94-473, at 57 (1975).

A second species of secondary liability, vicarious, has a similarly long provenance in U.S. copyright law. The doctrine of vicarious liability recognizes that one “with the right and ability to supervise” an infringing activity and a “direct financial interest” in that activity can be held liable for the infringement. *Gershwin*, 443 F.2d at 1162 (citing *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963)).

Vicarious liability does not include a knowledge element. *Id.* This doctrine has limited applicability in the online context, however, as courts—including the Fourth Circuit below in this case—have held that continued receipt of subscription revenue from an infringing subscriber does not in itself qualify as a financial benefit. Pet. Cert. App. at 17a; *see also Perfect 10, Inc. v. Giganeews, Inc.*, 847 F.3d 657, 674 (9th Cir. 2017); *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004). Courts’ narrow interpretation of the financial benefit prong of vicarious liability means that in many cases involving subscriber-based platforms, vicarious infringement is not successful as an alternative theory of liability. The material contribution branch of contributory liability is

therefore a critical avenue for copyright owners seeking to combat online piracy of their works.³

B. In Crafting the DMCA Congress Relied on the Rules of Secondary Liability to Incentivize Service Providers to Cooperate with Copyright Owners

In the early days of the internet, online service providers became aware that their day-to-day activities of transmitting and hosting user content could expose them to liability as secondary infringers. A 1995 case, *Religious Technology Center v. Netcom On-Line Communication Services, Inc.* 907 F. Supp 1361 (N.D. Cal. 1995) (“*Netcom*”), for instance, held that a computer bulletin board service that had been notified of infringing material could be held contributorily liable for failing to take it down. *Id.* at 1382. In enacting the DMCA in 1998, Congress sought to balance service providers’ concern about liability for activities conducted in the “ordinary course of operations” with copyright owners’ need to protect against “massive piracy.” S. Rep. No. 105-190, at 8. Explicitly rejecting an approach that would alter the existing rules of secondary liability—including the contributory liability standard applied in *Netcom*—Congress chose instead to maintain those rules and

³ As this Court has explained, “[w]hen a widely used service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.” *Grokster*, 545 U.S. at 929-30.

create a series of statutory safe harbors to shield service providers from monetary liability so long as they adhered to certain protective measures, including reasonable implementation of a repeat infringer policy. *See* S. Rep. No. 105-190, at 8, 19, 40–41; *see also* 17 U.S.C. § 512 (setting forth safe harbors).

Well aware of the critical role service providers would play in the future online environment, Congress made clear its intent to “preserve[]” the background rules of secondary liability in order to provide “strong incentives” for service providers to “cooperate to detect and deal with copyright infringements.” S. Rep. No. 105-190, at 40. A service provider that failed to abide by the requirements of the safe harbors set forth in section 512 of the Copyright Act would thus face potential infringement liability “under existing principles of law”—including the doctrine of contributory liability—which remained “unchanged by section 512.” *Id.* at 40, 55.

The DMCA safe harbor framework would make no sense if service providers could only be held liable for purposeful conduct to further infringement, as Cox contends. As delineated in section 512, the safe harbors are plainly designed to shield services from liability stemming from passive, not culpable, behavior. Section 512(a), for instance—the safe harbor provision that applies to internet service providers like Cox—protects against liability only if a transmission is not initiated by the service provider; occurs through an “automatic technical process” without selection of the material or recipients by the service provider; is not copied by the service provider

except to facilitate delivery to anticipated recipients; and is not modified by the service provider. 17 U.S.C. § 512(a) (“Transitory Digital Network Communications”); *see also id.* § 512(b) (“System Caching”) (specifying similar criteria). In other words, Congress was focused on shielding the ordinary technological activities of service providers who complied with the safe harbor requirements—including by terminating repeat infringers—from claims that they facilitated infringement merely by transmitting or hosting infringing material.

There would have been no need to include a DMCA safe harbor for internet providers like Cox if Cox’s view of contributory liability were correct.

II. This Court Did Not Abandon Material Contribution Liability in Articulating *Grokster*’s Inducement Rule

Despite Cox’s suggestion, this Court did not eliminate the material contribution branch of contributory liability in deciding *Grokster*.

Grokster’s peer-to-peer file-sharing technology was manifestly aimed at users seeking to download music files illegally. *Grokster*, 545 U.S. at 922–24, 939–40. Due to Grokster’s decentralized system, however, it did not track—and thus lacked specific knowledge of—the infringements it facilitated, so its conduct did not satisfy the knowledge element of the material contribution standard. *Id.* at 922–23, 927–28. The battleground in *Grokster* was thus this Court’s earlier decision in *Sony Corporation of*

America v. Universal City Studios, 464 U.S. 417 (1984) (“*Sony*”).

In *Sony*, the Court considered whether Sony’s sale of Betamax videotape recorders, which consumers used to tape copyrighted television programs at home, constituted contributory infringement. *Id.* at 417. The Court held that it did not because the video recorders were widely used for “legitimate, unobjectionable purposes” and thus “capable of substantial noninfringing uses.” *Id.* at 442.

Given Grokster’s indisputable purpose of facilitating illegal file-sharing, the Court rejected Grokster’s *Sony* defense. *Grokster*, 545 U.S. at 941. In so doing, the Court focused on the inducement branch of contributory liability to hold Grokster liable, borrowing from patent law to flesh out inducement in the copyright context: “[O]ne 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.

There is no suggestion in the *Grokster* opinion that the newly articulated inducement rule was intended to supplant the material contribution formulation of contributory liability; rather, the Court repeatedly referred to the new standard as the “inducement rule” or “inducement theory,” thus distinguishing it from other types of secondary liability. *Id.* at 936–37, 940. The Court additionally clarified that its earlier ruling in *Sony* had not

“displace[d] other theories of liability.” *Id.* at 934. As confirmed by numerous post-*Grokster* decisions, traditional material contribution liability remains a vital part of copyright law. *See, e.g., UMG Recordings, Inc. v. Grande Commc’ns Networks, LLC*, 118 F.4th 697, 711–15 (5th Cir. 2024) (“*UMG*”) (*Grokster* did not eliminate material contribution liability); *Greer v. Moon*, 83 F.4th 1283, 1287 (10th Cir. 2023) (distinguishing material contribution from inducement theory of liability); *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 794-95 (9th Cir. 2007) (recognizing material contribution and inducement as different types of contributory liability).

Unlike material contribution liability, inducement liability does not require knowledge of specific acts of infringement—only general awareness that a device is being used to infringe. *Grokster*, 545 U.S. at 922 (*Grokster* “d[id] not ... know when particular files [were] copied”); *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 768-69 (2011) (*Grokster*’s liability arose from its awareness that its file-sharing software was being used to infringe). The focus of inducement is thus a defendant’s general intent to foster infringement rather than its contribution to specific acts of infringement. Apart from other concerns, Cox’s contention, relying on *Grokster*, that contributory infringement requires both “kn[owledge] of another’s infringement” *and* “purposeful, culpable conduct to further” the infringement wrongly conflates two different types of contributory liability to assert a more demanding standard than either one standing alone. Pet. Br. at 2. This amalgamation is nowhere to be found in *Grokster*. Nor would it have made any

sense in that context given Grokster’s lack of specific knowledge of user infringements.

The inducement rule is not a substitute for the traditional knowledge-based material contribution test, but rather an alternative formulation of contributory liability to hold unscrupulous actors like Grokster responsible for purposely capitalizing on infringement. *Grokster* did not limit, but instead expanded, the doctrine of contributory infringement. *UMG*, 188 F.4th at 713.

III. The Quasi-Criminal Aiding and Abetting Standard of *Twitter* and *Smith & Wesson* Was Statutorily Driven and Is Inappropriate in the Civil Copyright Context

Cox points to this Court’s recent decisions in *Twitter v. Taamneh*, 598 U.S. 471 (2023), and *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025) (“*Smith & Wesson*”), as a basis to substitute an aiding and abetting (or “accomplice”) standard for the traditional material contribution branch of contributory liability. Pet. Br. at 22-23. The civil aiding and abetting standard articulated in *Twitter*—closely tied to criminal law—is focused on culpable misconduct, that is, an affirmative act “with the intent of facilitating the offense’s commission.” *Twitter*, 598 U.S. at 490 (quoting *Rosemond v. United States*, 572 U.S. 65, 71 (2014)). This quasi-criminal standard—a blunt instrument as compared to the nuanced body of law addressed to contributory infringement—has never been the test for material contribution liability in civil copyright cases. The

radical transplant of such a test into the civil copyright realm would upend decades of copyright-specific jurisprudence.

Although it involves an online platform, *Twitter* was not a copyright case, but a suit brought by family members of the victim of an ISIS attack in Turkey under the Justice Against Sponsors of Terrorism Act, 18 U.S.C. § 2333(d)(2) (“JASTA”). 598 U.S. at 482–84. JASTA permits U.S. nationals to sue “any person who aids and abets” an act of international terrorism. 18 U.S.C. § 2333(d)(2). Unlike the Copyright Act, that statute reflects Congress’s specific decision to authorize civil aiding and abetting liability. So, too, in *Smith & Wesson*, a case brought by the Mexican government to recover damages for gun sales to Mexican drug cartels. The relevant statutory provisions in that case similarly expressly authorize suits against persons who “aid and abet” criminal gun transactions. *Smith & Wesson*, 605 U.S. at 286 (citing 15 U.S.C. § 7903(5)(A)(iii)(I)–(II) and 18 U.S.C. § 2(a)).

Although *Twitter* and *Smith & Wesson* were civil actions, in both cases the underlying acts giving rise to the plaintiffs’ claims were criminal. It is not surprising that Congress chose to include a criminally oriented standard for purposes of establishing secondary liability for acts of international terrorism and illegal gun sales. In articulating a rule of liability, this Court did not simply pluck a standard from an unrelated realm, as Cox is asking it to do here, but was following Congress’s express directive.

Finally, the facts of *Twitter* and *Smith & Wesson* are not remotely comparable to the case at

hand—or any typical copyright case, for that matter. Apart from involving grave criminal acts, *Twitter* and *Smith & Wesson* are readily distinguishable because the criminal acts at issue were never in fact tied to the defendants. In *Twitter*, the plaintiffs failed to establish that ISIS made use of its platform to plan or execute the attack in Turkey. 598 U.S. at 498. Similarly, in *Smith & Wesson*, Mexico failed to allege any specific criminal acts facilitated by the gun manufacturer defendants. 605 U.S. at 294. Here, by contrast, plaintiffs identified specific instances of ongoing infringement by users of Cox’s service that Cox declined to terminate despite plaintiffs’ notifications, thus establishing a clear nexus between the underlying illegal conduct and Cox’s continuing provision of the means to carry it out.

CONCLUSION

For the reasons set forth above, *amici* respectfully urge this Court to decline Cox's invitation to extinguish a century-old rule of copyright that serves as the bedrock of the DMCA and affirm the judgment below.

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