

No. 24-171

IN THE
Supreme Court of the United States

COX COMMUNICATIONS, INC. AND COXCOM, LLC,
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*
ASSOCIATION OF AMERICAN PUBLISHERS, INC.
& NEWS/MEDIA ALLIANCE
IN SUPPORT OF RESPONDENTS**

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October 22, 2025

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INTEREST OF *AMICI CURIAE*

The Association of American Publishers, Inc. (“AAP”) is a not-for-profit organization that represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. AAP’s membership includes approximately 115 individual members who range from major commercial book and journal publishers to small, nonprofit, university, and scholarly presses, as well as leading publishers of educational materials and digital learning platforms. AAP’s members have a direct and compelling interest in the efficacy, administration, and enforcement of federal copyright laws. AAP seeks to promote effective and enforceable legal frameworks that enable publishers to create and disseminate a wide array of original works of authorship to the public on behalf of their authors and in furtherance of informed speech and public progress.

The News/Media Alliance (“N/MA”) is a nonprofit organization representing over 2,200 publishers in the United States, ranging from the largest news and magazine publishers to hyperlocal newspapers, and from digital-only outlets to papers who have printed news since the nation’s founding. Covering all subject matter and political viewpoints, the N/MA’s membership accounts for nearly 90

percent of the daily newspaper circulation in the United States, over 500 individual magazine brands, and dozens of digital-only properties. Their business models and continued ability to invest in high-quality journalism and content production rely on the resolute enforcement of their intellectual property rights, particularly copyright. For that reason, N/MA is deeply invested in assuring the courts properly articulate and apply the law of copyright.

The ability of AAP and N/MA's members to meaningfully protect their intellectual property, including by holding accountable actors who knowingly and materially contribute to others' direct infringement, is a matter of significant importance to AAP and N/MA (*"Amici"*) and their members. AAP and N/MA respectfully submit this brief in support of Respondents and limited to question 1: whether Cox is liable for contributory infringement because it materially contributed to its subscribers' copyright infringement. Although this case arises under a specific set of facts, the legal doctrines at issue apply broadly, and *Amici* submit this brief to provide the broader context regarding the foundations, history, and application of the material contribution doctrine. *Amici* urge the Court to uphold the longstanding doctrine that one who knowingly and materially

contributes to copyright infringement is liable as a contributory infringer.¹

SUMMARY OF ARGUMENT

Copyright law forms the economic backbone of the news, media, journal, education, and book publishing industries. Guaranteeing publishers a marketable right for the use of their high-quality, expressive works, copyright generates the resources needed to produce the works that inform and entertain the public, educate students, advance science and culture, and help people understand the world. But the continued sustainability of the publishing industries is imperiled in today's digital age, where publishers' works are increasingly being pirated online, often at a massive scale, by direct infringers who hide their identities or reside in countries where they cannot be sued. Publishers depend on the longstanding doctrine of contributory infringement to ensure that the world's largest technology companies have the right incentives to not facilitate infringers who would steal publishers' works, usurp their business models, and deprive them of the fair compensation needed for their continued viability and growth.

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

The doctrine of contributory copyright infringement by material contribution is firmly rooted in bedrock common-law principles, has been long recognized in federal precedent, and is reflected in the federal copyright statutes. For decades, federal law has appropriately recognized that actors who knowingly and materially contribute to infringement—thus satisfying the twin requirements of knowledge and substantial assistance found in common law—are liable for contributory copyright infringement. And the doctrine has become increasingly important in today’s online environment, where online service providers of all types are often in the best position to halt infringement on their platforms, whether by removing infringing content, suspending direct infringers, or terminating repeat infringers.

This doctrine is also a cornerstone underpinning the safe harbor/notice-and-takedown regime enacted in the Digital Millennium Copyright Act (“DMCA”). That regime incentivizes online service providers to cooperate with rightsholders to remove infringing content from their platforms and services so they may avoid liability for contributory copyright infringement—often based on material contribution. While the DMCA is not perfect, its contours have shaped the development of the modern internet, creating a structure for copyright owners to obtain recourse from social media platforms, website hosts, and others who would otherwise profit from

providing third-party infringing content to the public. But an online service provider who no longer faces secondary liability for materially contributing to infringement would have no reason to avail itself of the DMCA's safe harbor provisions. Eliminating or narrowing material contribution as a basis for contributory infringement liability would eviscerate the Congressionally-crafted safe harbor protections and further upset the balance Congress sought to strike between the rights of copyright owners and online service providers.

Eliminating or narrowing the material contribution doctrine would also have implications far beyond internet service providers and their obligations to terminate repeat infringers. Online platforms, including social media apps and e-commerce marketplaces, would be emboldened to abandon their efforts to comply with the DMCA's safe harbor regime, honor takedown requests, and halt rampant infringement to which they are contributing.

In short, without liability for contributory infringement, publishers' rights would be gutted in the digital space, burdening rightsholders with endless, cost-prohibitive, and ineffective direct enforcement actions against elusive foreign infringers, further tilting the marketplace against responsible publishers. The Court should reaffirm the well-established precedent that one who

knowingly and materially contributes to infringement is liable as a contributory infringer.

ARGUMENT

I. Copyright Law Fuels the Publishing Industries' Significant Contributions to the U.S. Economy and Society

This country's vibrant news, media, journal, education, and book publishing industries are a core part of the creative economy. They advance scholarship and lifelong learning, promote free expression, and foster the democratic exchange of ideas. They do so through organizations, authors, journalists, scientists, and educators who produce expressive works that define our culture, support our democracy, educate our children, drive advancement in science and medicine, and enhance our daily lives, informing and inspiring the communities they serve.

In addition to their creative and civic contributions, these publishing industries are also essential participants in and contributors to local markets and the national economy. Newspaper and magazine publishers have estimated annual revenues amounting to approximately \$45 billion.²

² See *Newspapers Fact Sheet*, PEW RSCH. CTR. (Nov. 10, 2023), <http://www.journalism.org/fact-sheet/newspapers/>; Amy Watson, *Estimated Aggregate Revenue of U.S. Periodical Publishers from 2005 to 2021*, STATISTA (June. 25, 2021), <https://www.statista.com/statistics/184055/estimated-revenue-of-us-periodical-publishers-since-2005/>; Adam Grundy, *Service*

The U.S. publishing industry for books and course materials, meanwhile, generated an estimated \$32.5 billion last year in aggregate revenue.³

Copyright enables these significant contributions. “By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985). It is thus the “engine of free expression.” *Id.* Publishers’ ability to continue contributing to our nation’s creativity, civil discourse, and economy depends on their ability to receive fair compensation for the high quality original expressive content they have developed—at high cost⁴—

Annual Survey Shows Continuing Decline in Print Publishing Revenue, U.S. CENSUS BUREAU, (June 7, 2022), <https://www.census.gov/library/stories/2022/06/internet-crushes-traditional-media.html>.

³ *AAP StatShot Annual Report: Publishing Revenues Totaled \$32.5 Billion for Calendar Year 2024*, Association of American Publishers (Aug. 26, 2025), <https://publishers.org/news/aap-statshot-annual-report-publishing-revenues-totaled-32-5-billion-for-calendar-year-2024/>.

⁴ Generally, publishers in any sector face high fixed costs that are incurred prior to publication. See, e.g., Peter Osnos, *These Journalists Spent Two Years and \$750,000 Covering One Story*, THE ATLANTIC (Oct. 2, 2013), <https://www.theatlantic.com/national/archive/2013/10/these-journalists-spent-two-years-and-750-000-covering-one-story/280151/> (“We conservatively estimate the cost of this coverage at \$750,000; it could be more. This covers the reporters, news applications and web developers, editors, video

including the ability to halt the piracy of their works. Without meaningful tools to stop such infringement, including through the long-recognized material contribution prong of contributory infringement, the essential role of copyright as the “engine of free expression” will be undermined. *Harper & Row Publishers*, 471 U.S. at 558.

II. Preserving Contributory Liability Is Essential to Protecting Intellectual Property in Publishing Industries

Because of the unique scale and dynamics of online infringement, preserving contributory liability based on material contribution is essential to

production, social media and PR, travel, legal review, half of the public opinion poll etc.); Melissa De Witte, *Stanford Scholars Are Helping Journalists Do Investigative Journalism through Data*, STANFORD REPORT (Oct. 15, 2018), <https://news.stanford.edu/stories/2018/10/helping-journalists-use-data-investigative-reporting> (“[I]t can cost newsrooms up to \$300,000 and six months of a reporter’s time to do a deep dive into public interest issues like crime and corruption. In one case, it cost a newsroom \$487,000 to produce an investigative series on local police shootings.”); *The Cost of a Journalism Story*, MYNEWSDESK BLOG (Sep. 6, 2018), <https://www.mynewsdesk.com/en/blog/the-cost-of-a-journalism-story/> (estimating the cost of a newsmaker story at \$400-\$12,000, news stories at \$100-\$4,500, and filler stories at \$50-\$300 each); Nancy L. Maron et al., *The Costs of Publishing Monographs: Toward a Transparent Methodology*, ITHAKA S+R (Feb. 5, 2016), <https://sr.ithaka.org/publications/the-costs-of-publishing-monographs/> (finding that the publishing costs per academic monograph across 20 university presses ranged “from a low of \$15,140 to a high of \$129,909”).

ensuring rightsholders' ability to meaningfully combat online piracy. This is particularly true for *Amici's* members in the news, media, journal, education, and book publishing industries, whose works are increasingly being pirated online, often at massive scale, by direct infringers who are difficult to identify or sue. *Amici's* members have regularly relied on the contributory infringement by material contribution standard to secure needed protection from a wide variety of OSPs against rampant online piracy, including through formal litigation and sending notice-and-takedown letters under Section 512 of the DMCA. They will be left essentially without any meaningful remedy should the Court extinguish or significantly limit the material contribution theory of contributory copyright infringement.

A. In the digital world, pursuing claims for contributory infringement by material contribution is often the only practical way to halt rampant infringement

Given the scale of online infringements and the actors involved, it is exceedingly difficult, if not impossible, for rightsholders to combat online infringement solely through claims against direct infringers. Digital technology facilitates the instantaneous copying and distribution of content at a massive scale, across borders, and at infinitesimally low cost. Thus, as the Court

recognized in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, “[w]hen a widely shared 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.” 545 U.S. 913, 929-30 (2005). One commenter has noted, “Internet intermediaries, such as Internet Service Providers (ISPs), peer-to-peer networks, user-generated content platforms and technology providers enable copyright infringement on such a large scale that lawsuits against individuals for direct infringement is impracticable.” Richard G. Kunkel, *Indifference and Secondary Liability for Copyright Infringement*, 33 SANTA CLARA HIGH TECH. L.J. 1, 2-3 (2016).

This is especially true for the publishing industry, which has seen a dramatic surge in digital piracy. According to the 2022 Publishing Industry Piracy Report, in 2022 alone, there were over 59 billion visits to websites providing pirated published works—a 37% increase over the prior year. The report also documents a 201% increase in piracy demand since 2017, with publishing piracy now surpassing film piracy in global web traffic volume. See MUSO, *The Publishing Industry Piracy Report 2022* (Mar. 2023), <https://activelex.com/wp->

content/uploads/2024/02/MUSO-2022-Publishing-Piracy-Report.pdf.

Scale is not the only challenge making direct infringement actions impracticable. Many direct infringers operate anonymously online, are in jurisdictions where enforcement is difficult or impossible, or are judgment-proof. As former Register of Copyrights Marybeth Peters explained: “It is quite difficult for copyright owners to identify, locate, and bring enforcement actions against the vast number of individuals who might be infringing their works. And even if the owners could bring such actions, it is unlikely that such individuals would be able to pay for the damage their actions have caused.” Marybeth Peters, *The Challenge of Copyright in the Digital Age*, 9 REV. PROP. INMATERIAL 1, 59, 65 (2006).

In this environment, imposing liability for contributory copyright infringement by material contribution is a critical deterrent and remedy. Rightsholders often do the difficult work of monitoring for online infringement of their works and identifying those instances of infringement for online service providers, who are well-positioned to take action against the identified infringements. Failure to do so by continuing to supply services used for the infringement with knowledge of that infringement should be sufficient for secondary liability; rightsholders should not be precluded from

seeking relief simply because other theories of liability exist that turn on other types of proof.⁵ Without accountability for digital platforms, networks, and services that knowingly facilitate access to or distribution of infringing content, rightsholders would face insurmountable hurdles to enforcement and would be effectively deprived of the protection and economic incentives copyright is meant to guarantee.

B. Copyright owners of textual works have long relied on the doctrine of contributory copyright infringement by material contribution to halt infringement of their works

Rightsholders such as *Amici*'s members regularly rely on the doctrine of contributory copyright infringement by material contribution to combat online infringement of textual content. If the doctrine were extinguished or diminished, rightsholders would lose a critical means of holding rampant infringers accountable. Publishers and authors have used the doctrine to pursue

⁵ Vicarious liability requires evidence of the defendant "profiting from direct infringement while declining to exercise a right to stop or limit it," *Grokster*, 545 U.S. at 930, whereas liability under an inducement theory requires evidence of the defendant taking "active steps . . . to encourage direct infringement," *id.* at 936.

infringement claims against a wide variety of online service providers in the following cases:

- *Greer v. Moon*, 83 F.4th 1283, 1294-96 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 2521 (2024): Reversing dismissal of a contributory infringement claim against the owner of a website whose users copied and shared the plaintiff's book on the site. Despite repeated requests to remove the infringing material, the website owner "not only expressly refused to remove the materials," but "mockingly posted the [takedown request] correspondence" to the site. *Id.* at 1295. The court concluded that "reposting of the takedown notice, combined with the refusal to take down the infringing material" amounted to "encourage[ment] [of] and material[] contribut[ion] to" the direct infringement. *Id.*
- *Ellison v. Robertson*, 357 F.3d 1072, 1077-78 (9th Cir. 2004): Affirming denial of summary judgment for a peer-to-peer file sharing network that made the plaintiff's short story accessible on its network via a user's upload. The court held that "a reasonable trier of fact could conclude that [the network] materially contributed to the copyright infringement by storing infringing copies of [the] works" and "providing . . . users with access to those copies." *Id.* at 1078.

- *Concord Music Group, Inc. v. Anthropic PBC*, No. 24-cv-03811-EKL, ECF 461 (N.D. Cal 2025): Sustaining claim for contributory infringement by material contribution that alleged that defendant trained its generative artificial intelligence model on copyrighted song lyrics, resulting in the unauthorized output of those lyrics to third-party users. The court noted that “[i]n the context of online platforms,” liability may ultimately lie where the system operator “has actual knowledge that *specific* infringing material is available using its system” yet “continues to provide access to infringing works.” *Id.* at 4 (internal quotation marks and citations omitted).
- *American Chemical Society v. ResearchGate GmbH*, No. 8:18-cv-03019-GJH, ECF 127 (D. Md. 2023): Publishers secured a consent final order and permanent injunction barring a file-sharing network for researchers from “encouraging, assisting, or soliciting” the unauthorized copying and posting of scholarly journal articles.
- *Bedford, Freeman & Worth Publishing Group v. Shopify*, No. 1:21-cv-01340-CMH-JFA, ECF 1 ¶ 1, 78, 84 (E.D. Va. 2022); *see id.* ECF 186 (E.D. Va. 2022): Stipulation reporting that

education publishers resolved suit alleging that Shopify knowingly hosted and enabled sellers of pirated textbooks and other educational materials, including by offering known infringers “storefront building, webhosting, product fulfillment, marketing customer support, business expertise, business analytics, capital investment, and payment processing” services.

- *Energy Intelligence Group, Inc. v. Jefferies, LLC*, 101 F. Supp.3d 332, 341 (S.D.N.Y. 2015): Denying a motion to dismiss a contributory infringement claim alleging that a defendant “materially contributed” to the infringement by distributing a username and password to unauthorized users who accessed the work.
- *Williams v. Scribd, Inc.*, No. 09CV1836-LAB-WMC, 2010 WL 10090006, at *7 (S.D. Cal. June 23, 2010): Denying a motion to dismiss a contributory infringement claim against a “social publishing” website that made accessible the plaintiff’s copyrighted books via user uploads. Allegations that the website provided the “site and facilities” for direct infringement and failed to remove the infringing content were sufficient to state a claim for contributory infringement by material contribution. *Id.*

- *Religious Technology Center v. Netcom On-line Communication Services*, 907 F. Supp. 1361, 1374–75 (N.D. Cal. 1995): Holding that an operator of computer bulletin board service and internet access provider could be held contributorily liable for allowing “infringing messages to remain on [provider’s] system” and for “refus[ing] to stop receiving, copying, transmitting and publishing the postings,” respectively. *Id.* at 1375, 1382; *see also infra* § III(A).

Amici’s members also regularly rely on the doctrine of contributory copyright infringement by material contribution to request the takedown of infringing materials from a host of online platforms, social media sites, search engines, and other online service providers, including under Section 512 of the DMCA. Publishers engage in substantial efforts to send takedown notices, and some hire antipiracy vendors to monitor the internet for infringement and to ensure notices are accurate and compliant.⁶ While the DMCA’s notice-and-takedown procedure relies on the background deterrent of litigation (*see infra* § IV), in practice, pre-litigation cooperative

⁶ *See* Association of American Publishers, Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015, Notice of Inquiry, at 35-37 (Feb. 21, 2017), https://downloads.regulations.gov/COLC-2015-0013-92453/attachment_1.pdf.

enforcement is the most effective tool available to rightsholders.

For example, the *New York Times*, *Boston Globe*, and *Los Angeles Times* have each successfully utilized takedown requests to get verbatim infringing articles, video content, and pirated “mirror” sites (or links thereto) removed from the internet and online platforms including Google, Github, Facebook and Reddit.⁷ Through this mechanism, valuable journalism ranging from prize-winning investigative reporting to full-mirror sites of the *Los Angeles Times*, to scores of individual articles

⁷ See, e.g., *DMCA (Copyright) Complaint to Google*, LUMEN (Mar. 3, 2025), <https://lumendatabase.org/notices/49622376>; *DMCA (Copyright) Complaint to Google*, LUMEN, (Dec. 13, 2024), <https://lumendatabase.org/notices/47163588>; *DMCA (Copyright) Complaint to Google*, LUMEN (Nov. 25, 2024), <https://lumendatabase.org/notices/46625560>; *DMCA (Copyright) Complaint to Google*, LUMEN (Oct. 16, 2024), <https://lumendatabase.org/notices/45455143>; *DMCA (Copyright) Complaint to Google*, LUMEN (Mar. 12, 2024), <https://lumendatabase.org/notices/40097522>; *DMCA (Copyright) Complaint to Google*, LUMEN (MAR. 11, 2024), <https://lumendatabase.org/notices/40054913>; GOOGLE TRANSPARENCY REPORT, https://transparencyreport.google.com/copyright/domains/dnyuz.com?hl=en_GB&request_by_org=size:10;domain:dnyuz.com;p:Mjpkbnl1ei5jb206MTA6MDoxMA&lu=request_by_org; *DMCA (Copyright) Complaint to Google*, LUMEN (Mar. 9, 2022), <https://lumendatabase.org/notices/26963031>; E-mail from Facebook to Lucas Uhl (Apr. 4, 2025) (on file with the author); E-mail from Reddit Support to Lucas Uhl (Feb. 20, 2025) (on file with the author); *DMCA (Copyright) Complaint to Github*, LUMEN (JULY 30, 2020), <https://lumendatabase.org/notices/46087831>.

that make up the core of local and global news coverage alike, has been protected. Recently, the *Boston Globe* used DMCA takedown notices to request that Facebook remove content that infringed podcast episodes of the latest Spotlight series, Snitch City, revealing police abuse of confidential informants in Massachusetts.⁸ The works of the Spotlight team—which have won three Pulitzer prizes for revealing scandals in Somerville politics, MBTA, and the Catholic Church⁹—is just one example of the kind of high-quality, resource-intensive journalism that generates significant interest, leads to real change, and has a vital role to play in American society, but is threatened by unauthorized uses of publisher content. Without this tool, given the sheer number of individual infringements and anonymous or unreachable bad actors engaged in infringement, at times operating from an effectively judgment-proof country, enforcement would virtually be out of reach.

⁸ E-mail from Facebook to Lucas Uhl (Apr. 4, 2025) (on file with the author).

⁹ See Brian McGrory, *Spotlight: 50 years of groundbreaking investigative journalism*, THE BOSTON GLOBE, <https://www.bostonglobe.com/spotlight-50th-anniversary/>.

III. The Longstanding Doctrine of Contributory Infringement Through Material Contribution Is a Key Component of Copyright Law

The doctrine of contributory infringement by material contribution is deeply rooted in the common law and firmly established in decades of precedent. It has been long applied in both the digital and physical spaces. This basis of liability is also woven into the federal copyright statutes. It has, in short, been a cornerstone of copyright upon which rightsholders have relied in a variety of settings over many decades. It should not be disrupted.

A. Contributory infringement liability based on material contribution is rooted in bedrock common-law principles and well-established precedent

The doctrine of contributory liability “originates in tort law and stems from the notion that one who directly contributes to another’s infringement should be held accountable.” *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984)). The Second Circuit case *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.* provides the seminal statement of the doctrine: “[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of

another, may be held liable as a ‘contributory’ infringer.” 443 F.2d 1159, 1162 (2d Cir. 1971); *see also Fonovisa*, 76 F.3d at 264 (characterizing *Gershwin* as the “classic statement of the doctrine”). The *Gershwin* standard has been widely adopted over many decades. *See Sony Ent. v. Cox Commc’ns, Inc.*, 93 F.4th 222, 233 (4th Cir. 2024) (adopting *Gershwin*’s formulation), *cert. granted*, 145 S. Ct. 2841 (2025); *Leonard v. Stemtech Int’l Inc.*, 834 F.3d 376, 387 (3d Cir. 2016) (same); *Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 621 (6th Cir. 2004) (same); *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 790 (5th Cir. 1999) (same); *Fonovisa*, 76 F.3d at 264 (same); *Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987) (same).

Under the *Gershwin* standard, knowingly making a material contribution to infringement is an independent basis for secondary liability, distinct from inducing or causing infringement. 443 F.2d at 1162. This is not a “novel” theory. *Cf.* Cox Br. at 12. Rather, the doctrines of secondary liability in copyright law “emerged” from “common law principles and are well established in the law.” *Grokster, Ltd.*, 545 U.S. at 930. The material contribution basis for imposing contributory liability, in particular, tracks the common law principle “that one who knowingly participates or furthers a tortious act is jointly and severally liable with the prime tortfeasor.” *Gershwin*, 443 F.2d at 1162; *see also Screen Gems-Columbia Music, Inc. v. Mark Fi*

Records, Inc., 256 F. Supp. 399, 403 n.9 (S.D.N.Y. 1966) (cited by *Gershwin* and collecting cases standing for this common law proposition).

For decades, courts have recognized secondary liability for material contribution with knowledge of infringement in a variety of settings, both physical and digital, including for products and services that also provide commercially significant non-infringing uses. For example, in *Gershwin*, the Second Circuit held that a concert promoter was liable for “creating” the “audience as a market” for artists who committed direct infringement. 443 F.2d at 1162-63. In *Fonovisa, Inc. v. Cherry Auction, Inc.*, the Ninth Circuit held that the operator of a swap meet—a physical flea market for the exchange of goods—could be contributorily liable for the sale of infringing recordings by third-party vendors where the operator materially contributed to the infringement by providing “space, utilities, parking, advertising, plumbing, and customers” for “known infringing activity.” 76 F.3d at 264. In other words, the operator provided the “environment and the market for counterfeit recording sales to thrive.” *Id.* These cases built upon a longstanding lineage of caselaw holding parties liable for materially contributing to direct infringers. *See, e.g. RCA Records v. All-Fast Sys., Inc.*, 594 F. Supp. 335, 339 (S.D.N.Y. 1984) (operator of duplication facility could be held liable for selling blank cassettes to customers whom operator knew engaged in unlawful

duplication); *Screen Gems-Columbia Music*, 256 F. Supp. at 403-05 (radio station that allowed its equipment to be used to broadcast advertisements for infringing records may be held liable for contributory copyright infringement because it “contributed essential services in effecting and furthering the sale of the infringing albums”).

The courts have applied this same principle to online infringement, starting with the advent of widespread internet use in the 1990s. In *Religious Tech. Ctr. v. Netcom On-line Commc’n Servs., Inc.*, a federal district court held that an operator of a computer bulletin board service, and the internet service provider that facilitated its operations, could be held contributorily liable for a subscriber’s posting of copyrighted Scientology works. 907 F. Supp. at 1374–75, 1382. Although the plaintiff had specifically notified these defendants of the infringement, the internet service provider had “allow[ed] [the] infringing messages to remain” on its systems and to be “further distributed to other . . . servers worldwide.” *Id.* at 1375. Similarly, the bulletin board service had “refused to stop receiving, copying, transmitting and publishing the postings.” *Id.* at 1382. By these actions, the court held, the defendants had “substantial[ly] participat[ed]” in the direct infringement and “aid[ed] in the accomplishment” of the infringer’s “purpose of publicly distributing the [infringing] postings.” *Id.* at 1375, 1382. Similarly, in *A&M Records, Inc. v.*

Napster, Inc., the Ninth Circuit upheld an injunction against a peer-to-peer file sharing network whose users engaged in the unauthorized reproduction and distribution of copyrighted works. 239 F.3d 1004, 1019 (9th Cir. 2001). As in *Fonovisa*, the defendant could be held liable for providing “the site and facilities” for known direct infringement because, “[w]ithout the support services defendant provides, Napster users could not find and download the music they want.” *Id.* at 1022; *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007) (holding that a search engine could be contributorily liable for knowingly including links to sites containing infringing images in its search results because it thereby “substantially assist[ed] websites to distribute their infringing copies to a worldwide market and assist[ed] a worldwide audience of users to access infringing materials”).

In each of these cases, secondary liability was found despite the capability of the defendant’s products or services to be used for non-infringing uses, and without requiring the plaintiff to prove that the defendant actively encouraged or urged infringement. For example, in *Fonovisa*, while the swap meet operator hosted a variety of vendors, not just counterfeiters, the operator materially contributed to infringement by providing its “support services” to the direct infringer, without which, “it would be difficult for the infringing activity to take place.” 76 F.3d 259, 264. Once the swap meet

operator was on notice of infringement, its ongoing complicity in hosting counterfeit wares was not excused simply because it equally provided these support services to legitimate vendors as well. *See also Netcom*, 907 F. Supp. at 1375 (finding standard for contributory infringement met when Netcom failed to take “simple measures” to prevent infringement, even though Netcom’s online service also hosted an array of non-infringing conduct and plaintiff had not alleged that Netcom urged, encouraged, or actively induced infringing posts); *Napster*, 239 F.3d at 1021 (finding contributory infringement by material contribution “[r]egardless of the number of Napster’s infringing versus noninfringing uses”); *Perfect 10*, 508 F.3d at 1170 n.11, 1172 (rejecting inducement claim but reversing denial of injunction against Google based on a theory of material contribution liability and noting that the effect of Google’s search engine results “on copyright owners” could not be “discount[ed],” “even though Google’s assistance [was] available to all websites, not just infringing ones”).

B. The Court’s precedents support “material contribution” as a basis for secondary liability

The Court’s precedents confirm the common-law theories of contributory liability that inform the holdings and reasoning of *Gershwin* and its progeny. *Grokster* directs courts to analyze contributory

liability in light of “rules of fault-based liability derived from the common law.” 545 U.S. at 934-35. Its reasoning is thus “consistent” with the “rule set forth in *Gershwin*.” *Perfect 10*, 508 F.3d at 1171. In *Sony*, the Court similarly explained that “the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.” 464 U.S. at 435. Most recently, in *Twitter, Inc. v. Taamneh*, the Court affirmed that secondary liability is appropriate where an actor has “given knowing and substantial assistance to the primary tortfeasor” and “consciously and culpably ‘participate[d]’ in a wrongful act so as to help ‘make it succeed.’” 598 U.S. 471, 491, 493 (2023) (quoting *Nye & Nissan v. United States*, 336 U.S. 613, 619 (1949)). These common-law principles animate *Gershwin*’s recognition of knowing material contribution to infringement as a basis for liability: that secondary copyright infringement liability flows from “knowing[] particiat[ion]” in a primary violation. *See Gershwin*, 443 F.2d at 1162; *Screen Gems-Columbia Music*, 256 F. Supp at 403 & n.9.

Taamneh did not “change[] [these] fundamental principles of copyright liability without saying so in a case that was not about copyrights.” *UMG Recordings Inc. v. Grande Commc’ns Networks, LLC*, 118 F.4th 697, 714 (5th Cir. 1963). *Taamneh* addressed the meaning of “aid[ing] and abet[ting]” as

it appears in the Justice Against Sponsors of Terrorism Act (“JASTA”), 18 U.S.C. § 2333(a). *Taamneh*, 598 U.S. at 493-94. *Taamneh*’s finding that Twitter’s provision of a social media platform did not constitute aiding and abetting of terrorism should not be overlaid on the well-established, wholly separate, body of law governing secondary liability for copyright infringement. Because JASTA specifically adopted the phrasing and common law principle of aiding and abetting when it established liability for assisting the criminal act of terrorism, the Court looked to aiding and abetting jurisprudence to construe JASTA’s aid-and-abet standard. In enacting the Copyright Act of 1976, Congress made no mention of aiding and abetting, and instead incorporated and affirmed the then-existing standards for secondary liability under copyright law, *see infra* § III(C).

In any event, upholding the doctrine of contributory copyright infringement by material contribution in this case is consistent with *Taamneh*. There was no allegation in *Taamneh* that the terrorist organization had used Twitter’s services to carry out its terrorist attack (which occurred off-platform) and thus no “concrete nexus between [Twitter’s] services and the . . . attack.” *Id.* at 501. Nor was there any allegation that Twitter knew of the planned terrorist attack at issue. That is in contrast to this case, and the many ways publishers rely on the application of contributory liability where

there is knowledge of specific infringing activity being conducted through continued provision of services, and where a “direct nexus,” *Id.* at 506, therefore exists between the service provider’s activities and the underlying tort.

Taamneh does not require weakening the standards for imposing liability for contributory infringement by material contribution where an actor has been notified of specific instances of infringement and continues to allow and facilitate that infringement. Such liability tracks the “twin requirements” of knowledge and substantial assistance that *Taamneh* identifies as supporting aiding and abetting liability. *Id.* at 491. Under this framework, where online service providers have been notified of infringement, continuing to provide the “support services” necessary to complete the infringement is sufficient to meet the assistance threshold. *Fonovisa*, 76 F.3d at 264. *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025), is even less relevant here, as the Court found there was a failure to link the gun manufacturer’s conduct to specific rogue dealers (i.e., lack of knowledge) and the manufacturer was not engaged in a direct and ongoing service in aid of the crime (i.e., lack of material contribution).

C. Statutory copyright law confirms the
viability of contributory infringement
liability by material contribution

Both the Copyright Act of 1976 and the Digital Millennium Copyright Act reflect Congress's recognition of the material contribution theory of contributory infringement and its intent to impose liability for that tort.

When Congress passed the Copyright Act of 1976, it included language affirming that contributory infringers were liable for copyright infringement. Congress defined "[t]he exclusive rights accorded to a copyright owner" to include both "do[ing]" and "authoriz[ing]" such acts, 17 U.S.C. § 106, specifically "to avoid any questions as to the liability of contributory infringers," H.R. Rep. No. 94-1476, at 61 (1976). By that time, *Gershwin* already had definitively articulated the "material contribution" basis of contributory infringement, and Congress is "generally presume[d]" to be "knowledgeable about existing law pertinent to the legislation it enacts," *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 176 (1988). *Gershwin*'s issuance in 1971, five years before passage of the Copyright Act, compels the conclusion that Congress's codification of contributory infringement liability in federal law extends to the material contribution theory of that doctrine as developed by case law.

Two decades later, Congress again recognized liability for contributory infringement by material contribution, when it enacted the safe harbor provisions of the DMCA. 17 U.S.C. § 512. Under these provisions, internet service providers may avoid liability for copyright infringement conducted by their end-users so long as they address and help halt that misconduct once they have actual or constructive knowledge of the infringement. *Id.* § 512(c). To avail themselves of a safe harbor, online service providers must “expeditiously . . . remove . . . material that is claimed to be infringing” or disable access to it, upon receiving notice of the infringement or otherwise becoming aware of the infringement or circumstances making the infringement apparent. *Id.* § 512(c)(1)(C).

To encourage online service providers to help combat underlying direct infringement, Congress enacted the safe harbor provisions to protect “innocent” service providers from “liability for ‘passive,’ ‘automatic’ actions” on a provider’s system that may be “initiated by another without the [prior] knowledge of the service provider,” *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (quoting H.R. Rep. No. 105-796, at 72 (1998), while helping mitigate the “threat of rampant, lower-barrier infringement by the users of good-faith OSPs.” U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17, A REPORT OF THE REGISTER OF COPYRIGHTS 21 (2020) (“Office Report”),

<https://www.copyright.gov/policy/section512/section-512-full-report.pdf>. In doing so, the bill balanced the interests of platforms and the public in creating a stable environment for the development of a robust digital ecosystem. *See infra* § IV. By “clarif[ying] the liability faced by service providers who transmit potentially infringing material over their networks,” the bill “ensure[d] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand.” S. Rep. No. 105-190, at 2 (1998).

In short, the DMCA safe harbors apply most readily to online service providers operating in good faith who, but for the safe harbor, could face liability for contributory infringement by material contribution for failing to remove infringing content or access to such content. The safe harbors are not directed at the bad-faith providers described by Petitioner who induce, specifically encourage, or focus on infringement. *Cf.* Cox Br. at 32. This emphasis further demonstrates Congress’s understanding of the existence, scope, and reach of contributory infringement by material contribution.

The balance Congress struck in the DMCA between protecting good-faith OSPs and safeguarding intellectual property in the digital age depends on preserving a robust contributory infringement doctrine that includes material contribution so that online service providers are

incentivized to cooperate in removing infringing material. *See infra* § IV. This framework would be undermined if the longstanding doctrine of contributory infringement by material contribution—which Congress understood and relied on when enacting the DMCA—were upset or substantially altered.

IV. Dismantling Contributory Copyright Infringement by Material Contribution Would Gut Online Service Providers’ Incentives to Remove Infringement

In enacting the safe harbor provisions of the DMCA, Congress expressly intended to strike a balance between creating a stable and predictable environment for online service providers and protecting rightsholders from online infringement. Under this balance, “in return for the obligation to take down infringing works promptly on receipt of notice of infringement from the owner,” OSPs are “relieved of liability for user-posted infringements of which they were unaware, as well as of the obligation to scour matter posted on their services to ensure against copyright infringement.” *Capitol Recs., LLC v. Vimeo, LLC*, 826 F.3d 78, 89-90 (2d Cir. 2016). Thus, the Act provides “strong incentives for service providers . . . to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” H.R. Rep. No. 105-551, pt. 2 at 49-50 (1998); H.R. Rep. No. 105-796, at

72 (1998), because “[e]ven if a provider satisfies the common-law elements of [i.e., is otherwise liable for] contributory infringement,” it will be “exempt” from liability if it meets the safe harbor eligibility requirements, S. Rep. No. 105-190, at 40 (1998); H.R. Rep. No. 105-551, pt. 2, at 50 (1998).

This careful balance only works if online service providers need the safe harbors to avoid liability for contributory copyright infringement. Avoiding that liability is the “strong incentive” for OSPs to “cooperate” with rightsholders to police infringement on their platforms. If a central element of contributory liability exposure is eroded, the balance will break down and the incentive for online service providers to cooperate in removing infringing content will correspondingly diminish, while rightsholders would be stripped of an essential tool provided by Congress to combat infringement.

The results of this breakdown would be intensely and widely felt by publishers because it would impede their ability to enforce their rights across numerous online platforms, including web hosts, search engines, user-content platforms, and others, not just internet service providers. Most of these online service providers do not provide basic infrastructure—*i.e.*, the “pipes”—of the internet. Rather, the online service providers covered by the DMCA offer a spectrum of services, including curated services tailored to specific forms of content

and commerce, such as digital marketplaces (e.g., eBay) or video-sharing and social media platforms (e.g., YouTube, Facebook). *See* Blake E. Reid, Uncommon Carriage, 76 STAN L. REV. 89, 138 (2024) (describing how “application-layer internet platforms” “vary widely in terms of their functionality and relationship to discrimination” among users and content).

In this way, many online service providers are analogous to the operators of physical venues that have been held liable for contributory infringement deriving from the conduct of their attendees. *See, e.g., Fonovisa*, 76 F.3d at 264 (operator contributorily liable where it facilitated interactions among customers and sellers of infringing goods at a particular location and events). These online service providers should continue to be incentivized to reduce infringements on their sites to avoid liability for materially contributing to copyright infringement.

Petitioner and its *amici* argue that preserving the well-settled principles of contributory infringement by material contribution and applying them in this case could result in internet service disruption. Cox. Br. 45; *see also* U.S. Br. at 29-30. But the doctrine of contributory infringement by material contribution has been also applied to, and animates the DMCA safe harbors for, online service providers of all types including web hosts, search

engines, user-content platforms, and others that publishers regularly interact and engage with—not just ISPs. Maintaining that status quo, in which online service providers of many types (not just ISPs) may be liable for contributory infringement by material contribution, is entirely workable and, indeed, as applied to non-ISP online service providers, will not result in anyone losing internet service because those providers remove infringing material or even terminate repeat infringers.

Forcing publishers to sue individual infringers rather than this wide range of online intermediaries that knowingly exploit their infringements would upset the balance Congress struck in the DMCA, which is already under pressure. As the Copyright Office has observed, the system is already “askew,” having “shifted [o]ver the decades” in ways that have placed “an increasing burden on rightsholders to adequately monitor and enforce their rights online, while providing enhanced protections for OSPs in circumstances beyond those originally anticipated by Congress.” Office Report, at 84, 197.

A ruling that extinguishes or diminishes contributory liability by material contribution would tip the balance even further and encourage infringement by shifting copyright enforcement obligations almost solely to publishers. It would hamstring publishers’ ability to combat rampant online infringement through actions or takedown

notices sent to internet service providers, thus limiting their remedy to actions for direct infringement brought against hard-to-identify, hard-to-find, and hard-to-sue individual direct infringers.

That would further undermine the balance of responsibilities in the digital age and create significant hardship for beleaguered publishing industries, including local news sources already under pressure.¹⁰ Publishers who create and distribute their own content, in contrast to platforms that commercialize content created by others, already shoulder the overhead associated with editorial, copyright clearance, and fact-checking processes that contribute to the production of quality writing. Meanwhile, they compete with social media platforms and other online service providers monetizing third-party content, free of the typical burdens that come with content production and distribution, due to the “sweeping immunity” conferred by Section 230 of the Communications and Decency Act. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 18 (2020) (statement of Thomas, J., respecting denial of certiorari); see also *Reviving Competition, Part 2: Saving the Free and Diverse Press Before the Subcomm. on Antitrust, Commercial, and Administrative Law of the H.*

¹⁰ See, e.g., Zach Metzger, *The State of Local News: The 2024 Report*, NORTHWESTERN UNIV., <https://localnewsinitiative.northwestern.edu/projects/state-of-local-news/2024/report/>.

Comm. on the Judiciary, 117th Cong. 112 (2021) (statement of Del. Ken Buck, Member, H. Comm. on the Judiciary) (“Big Tech doesn’t have a bunch of reporters out there covering news stories or opinion writers writing the news stories. All they do is they take someone else’s product, and they use that product for more and more profit for them and less and less profit—or revenue for the other side[.]”).

A ruling that shifts copyright enforcement obligations almost solely to publishers would amount to a policy decision that would seriously affect digital publishers already operating in an asymmetrical environment. Such a result could accelerate existing challenges to publisher business models, reducing the amount of new, original, quality content made available online to the public without cost. *See Harper & Row Publishers*, 417 U.S. at 558 (“In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression.”). In enacting the DMCA, Congress engaged in careful analysis and adopted a balanced approach towards incentives in the digital environment that this Court should decline to upend.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court affirm that material contribution to known infringement can give rise to secondary copyright liability.

Respectfully submitted,

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October 22, 2025