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 FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. This Court has held that a business commits contributory copyright infringement only when it "distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps to foster infringement." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005). Did the Fourth Circuit err in holding that an internet service provider (ISP) can be held liable for "materially contributing" to copyright infringement merely because the ISP knew that people were using certain accounts to infringe but did not terminate access, without proof that the ISP engaged in affirmative conduct with the purpose of furthering infringement?

2. Generally, a defendant cannot be held liable as a willful violator of the law—and subject to increased penalties—without proof that the defendant knew or recklessly disregarded a high risk that its *own* conduct was illegal. Did the Fourth Circuit err in holding that mere knowledge that a customer was engaged in illegal conduct suffices to find an ISP's conduct willful under 17 U.S.C. § 504(c), without proof that the ISP knew its own conduct in not terminating the customer was illegal?

PARTIES TO THE PROCEEDING BELOW

Petitioners were the Defendants-Appellants below. They are Cox Communications, Inc. and CoxCom, LLC.

Respondents were the Plaintiffs-Appellees below. They are Sony Music Entertainment; Arista Music; Arista Records, LLC; LaFace Records LLC; Provident Label Group, LLC; Sony Music Entertainment US Latin LLC; Volcano Entertainment III, LLC; Zomba Recordings LLC; Sony/ATV Music Publishing LLC; EMI AI Gallico Music Corp.; EMI Algee Music Corp.; EMI April Music Inc.; EMI Blackwood Music Inc.; Colgems-EMI Music Inc.; EMI Consortium Music Publishing Inc., d/b/a EMI Full Keel Music; EMI Consortium Songs, Inc., d/b/a EMI Longitude Music; EMI Feist Catalog Inc.; EMI Miller Catalog Inc.; EMI Mills Music, Inc.; EMI Unart Catalog Inc.; EMI U Catalog Inc.; Jobete Music Co. Inc.; Stone Agate Music; Screen Gems-EMI Music Inc.; Stone Diamond Music Corp.; Atlantic Recording Corporation; Bad Boy Records LLC; Elektra Entertainment Group Inc.; Fueled By Ramen LLC; Roadrunner Records, Inc.; Warner Bros. Records, Inc.; Warner/Chappell Music, Inc; Warner-Tamerlane Publishing Corp.; WB Music Corp.; W.B.M. Music Corp.; Unichappell Music Inc.; Rightsong Music Inc.; Cotillion Music, Inc.; Intersong U.S.A., Inc.; UMG Recordings, Inc.; Capitol Records, LLC; Universal Music Corp.; Universal Music – MGB NA LLC; Universal Music Publishing Inc.; Universal Music Publishing AB; Universal Music Publishing Limited; Universal Music Publishing MGB Limited; Universal Music – Z Tunes LLC; Universal/Island Music Limited; Universal/MCA Music Publishing

Pty. Limited; Music Corporation of America, Inc., d/b/a Universal Music Corp.; Polygram Publishing, Inc.; and Songs of Universal, Inc.

RULE 29.6 STATEMENT

Cox Communications, Incorporated, is the parent corporation of CoxCom, LLC. Cox Communications, Incorporated, is owned by Cox Enterprises, Inc. Neither Cox Communications, Incorporated, nor CoxCom, LLC, is a publicly held corporation, and no publicly held corporation owns 10% or more of either of them.

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INTRODUCTION

This case is about who is responsible for copyright infringement on the internet. The Fourth Circuit gave a staggering answer: It held that an internet service provider (ISP) that merely supplies the internet connection used to commit copyright infringement must either sever the accused infringer's connection or face crushing liability—here, $1 billion—for its customers' subsequent infractions.

Petitioner Cox Communications does not want its internet customers to infringe. And none of the following is disputed:

- Cox did not encourage anyone to infringe. It provided no file-sharing software, infringing content, or instructions on how to infringe.

- Cox's terms of service prohibit infringement. And Cox voluntarily invested in an anti-infringement program that dramatically reduced infringement.

- Cox's internet service is not specially designed for, or adapted to, infringement.

- Nor is its business model built on infringement. Cox makes not a penny more when its customers choose to infringe.

In short, Cox did not engage in a single affirmative act with the purpose of furthering infringement—and gained nothing from users' infringing conduct. Cox simply provided communications infrastructure to the general public on uniform terms. Imposing

contributory liability in these circumstances flouts a century of this Court's case law in the copyright context and in analogous cases where plaintiffs sought to hold defendants liable for another's wrongs.

Contributory infringement is aiding-and-abetting liability. The standard requires a rightsholder to prove that the defendant *both* (1) knew of another's infringement *and* (2) engaged in "purposeful, culpable" conduct intended to further infringement. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937, 939 n.12 (2005). "[F]ailure to take affirmative steps to prevent infringement" is not enough. *Id.* at 939 n.12. Aiding and abetting has always required purposeful *misfeasance*—an "'affirmative act' 'with the intent of facilitating the offense's commission.'" *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 490 (2023). That is why this Court recently observed that "we generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large." *Id.* at 499.

Yet Plaintiffs (Respondents here) persuaded the Fourth Circuit to renounce this axiom and hold that ISPs are liable merely for continuing service after receiving automated notices accusing an unknown user at a home or business of infringing. That defies common law and common sense. An aider-and-abettor is someone who "participate[s] in" the wrongdoing "as in something that he wishes to bring about." *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 291 (2025) (internal quotation marks omitted). Your ISP does not purposefully participate in, or try to bring about, what you do online—any more than your phone company or FedEx do in

communications they transmit. Deluging the ISP with accusations does not change that. This Court should reject the Fourth Circuit's rule and hold that Cox is not a contributory infringer as a matter of law.

The Court should also reject the Fourth Circuit's erroneous willfulness standard. Under that standard, not only is every ISP *liable* based on knowledge of a customer's alleged infringement; that same knowledge also makes the ISP's conduct *willful*, quintupling potential statutory damages to $150,000 per work. That standard is wrong. Willfulness must be based on a finding that the defendant knew, or recklessly disregarded, that *its own conduct* was illegal. Cox was not a willful infringer if there was a sound basis for believing it was not legally required to kick customers off the internet for alleged infringement. Cox's legal position easily clears that bar: No court had recognized any such duty at the time, and the Government supports Cox's position to this day.

If allowed to stand, the Fourth Circuit's one-two punch will yield mass evictions from the internet. ISPs confronting steep penalties will have no choice but to terminate the connections of homes, barracks, hospitals, and hotels, upon bare accusation. The ramifications extend beyond copyright infringement: Under the Fourth Circuit's reasoning, once an aggrieved party sends an ISP a notice asserting any manner of customer wrongdoing, the ISP is a willful accomplice for every subsequent customer misdeed. That notion turns internet providers into internet police and jeopardizes internet access for millions of users.

This Court should reverse.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at 93 F.4th 222 and reproduced at Pet.App.1a-38a. The order denying rehearing en banc (Pet.App.179a-182a) is unpublished.

The district court's memorandum opinion denying Cox's Rule 50 and Rule 59 post-trial motions is published at 464 F. Supp. 3d 795 and reproduced at Pet.App.40a-142a. The district court's memorandum opinion denying Cox's motion for summary judgment and granting in part Plaintiffs' motion for summary judgment on the knowledge prong of contributory infringement is published at 426 F. Supp. 3d 217 and reproduced at Pet.App.143a-178a.

JURISDICTION

The Fourth Circuit entered judgment on February 20, 2024. A timely petition for rehearing was denied on March 19, 2024. Pet.App.179a. On June 3, 2024, this Court extended the time to file a petition for a writ of certiorari to August 16, 2024. The petition was filed on August 15, 2024 and granted on June 30, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced as an Addendum to this brief. All statutory references are to Title 17 of the U.S. Code unless otherwise indicated.

STATEMENT OF THE CASE

Copyright Secondary-Liability Doctrine Balances Copyright Protection With Access To Technology

The Copyright Act of 1976 grants authors exclusive rights to reproduce and distribute copyrighted works. § 106. "Anyone who violates" those rights is liable "as an infringer," often called a "direct" or "primary" infringer. § 501(a). The Act "does not expressly render anyone liable for infringement committed by another." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984). Secondary copyright liability instead "emerged from common law principles." *Grokster*, 545 U.S. at 930.

Courts have recognized two strains of secondary copyright liability. One is vicarious liability, founded on agency law: A defendant "infringes vicariously by profiting from direct infringement while declining to exercise [a] right to stop or limit it." *Id.*; *see* Pet.App.13a. The other, at issue here, is contributory liability, founded on aiding-and-abetting principles—in essence, "accomplice" liability, *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62 (1911).

Rightsholders have frequently invoked contributory liability seeking to hold companies liable for selling technologies that their customers can use to infringe. This Court addressed such a challenge in *Sony Corp. of America v. Universal City Studios, Inc.*, in which movie studios argued that Sony was liable for selling the Betamax VCR, which customers could use to record their favorite movies or shows. This

Court rejected the studios' contributory-liability theory. It reasoned that secondary-liability "doctrine absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one's products will be misused." *Grokster*, 545 U.S. at 932-33 (citing *Sony*, 464 U.S. at 442).

Twenty years later, with the internet era in full swing, this Court returned to contributory liability in *Metro-Goldwyn-Mayer Studios v. Grokster*. Grokster was a platform designed and marketed to promote music piracy. 545 U.S. at 922-24, 926. Observing that Grokster's very "business model[]" depended on user infringement, the Court found contributory liability appropriate based on "rules of fault-based liability derived from the common law." *Id.* at 926, 934-35. It held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement [of] third parties." *Id.* at 936-37.

Grokster recognized that in technology cases, contributory liability strives for equilibrium. The doctrine aims to strike a "sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement." *Id.* at 928 (citing *Sony*, 464 U.S. at 442).

Congress was also careful to respect that balance. Foreseeing that the various new internet-era

technologies could be used for infringement, it enacted the Digital Millenium Copyright Act of 1998 (DMCA). To insulate these technologies, the DMCA created voluntary safe harbors from damages liability for various categories of online "service providers"—from basic internet conduits to content hosts to search engines. § 512(a)-(d). Congress, however, declined to prescribe secondary-liability standards. It explicitly pronounced that "the failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing." § 512(*l*); *see* S. Rep. No. 105-190, at 19 (1998) ("[T]he Committee decided to leave current [contributory- and vicarious-liability] law in its evolving state.").

The Music Industry Deluges ISPs With Automated Infringement Accusations Against Customers

Internet service is so integral to our daily lives and business that it is hard to imagine life without it. But, as *Grokster* illustrates, for all the internet's benefits, it can also be put to improper or illegal uses, including illegal downloading of copyrighted music. Though the music industry's success in *Grokster* killed the Groksters and Napsters of the world, "dramatically reduc[ing] piracy," J.A.122, more elusive "peer-to-peer networks" emerged, J.A.131, 342-343. Rather than relying on a centralized server, these networks run on decentralized protocols available in free software across the web. J.A.131-132, 187-188. The protocols allow users to connect to files being shared by "swarm[s]" of other users, or "peers." J.A.192-197,

343-345. Because these networks are not run by "an actual company," there is "no central company to sue." J.A.131-132, 163.

With no company to sue, the music industry naturally targeted the direct infringers, "the individuals who were actually the ones copying." J.A.157. They threatened massive statutory-damages awards (up to $150,000 per work). Respondent Sony, for example, persuaded a jury to award $675,000 against a college student for downloading 30 songs. *Sony BMG Music Ent. v. Tenenbaum*, 660 F.3d 487, 490 (1st Cir. 2011); *see Capitol Recs., Inc. v. Thomas-Rasset*, 692 F.3d 899, 904 (8th Cir. 2012) ($1.5 million verdict). But suing "students, … children, and grandmothers" made the industry unpopular. J.A.116. And it was not especially lucrative.

So the music industry looked upstream—all the way upstream—to the ISPs. It claimed that ISPs are "obligat[ed] to enforce the law" against their users. J.A.118. The industry hired vendors to send bots crawling across peer-to-peer networks in search of users with copyrighted works. J.A.105, 164. When a bot detected a copyrighted work, it identified the user's account by an Internet Protocol (IP) address, an identifier that the ISP assigns to a home or business. The service then sent an automated infringement accusation to the ISP associated with the IP address. J.A.158, 175-176, 278-279; *see* J.A.415-420 (sample notice); *infra* 9-10 (discussing notice inaccuracies). By 2008, the music industry was flooding ISPs with millions of notices a year. J.A.264.

Cox Pioneers A Highly Effective Anti-Infringement Program

Cox provides basic communications infrastructure—internet, telephone, and cable television services—to over 6 million homes and businesses in 18 states. J.A.527-528. Cox's customers run the gamut, from single-family homes to military barracks, and small businesses to hotels and universities. Cox also serves regional ISPs, which connect thousands, or tens of thousands, of local customers. J.A.331.

Cox requires every customer to sign an agreement forbidding them from using its service to infringe copyrighted works, on threat of "the immediate suspension or termination" of service. J.A.402-408. The overwhelming majority of customers abide by those terms. Only about 1% of the homes or businesses in Cox's customer base are accused in this case. J.A.103. And within that home or business, one user may infringe while many others do not.

While 1% is a small percentage, the absolute numbers add up quickly (here, to 57,000) across a customer base of millions. But there is only so much an ISP like Cox can do to prevent infringement. Cox cannot (and should not) control what users do online. It is undisputed that Cox cannot monitor its users' online activity through a customer's internet connection in real-time or after the fact. J.A.289-291.

So when Cox receives an automated accusation that someone somewhere has used a particular customer's internet connection to infringe, it has no way to verify the accusation. J.A.295. That is a problem,

because these notices are notoriously unreliable. Some infringement allegations are false. J.A.298; *see* C.A.App.2062-2067, 2070. Others concern infringements that the customer was unaware of or disputed. J.A.80-82, 233-234. Even if Cox presumes an accusation is accurate, it cannot know *which user* did it.

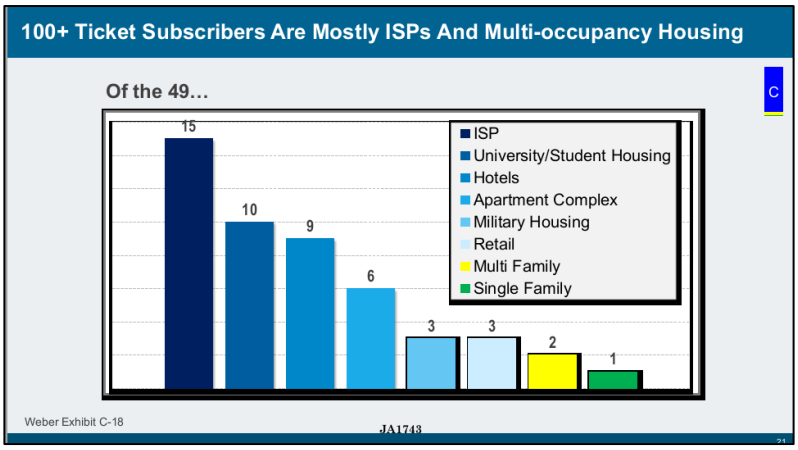
Cox nevertheless devoted extensive resources as "the first ISP to build a system to handle copyright infringement complaints." J.A.230; *see* J.A.223-224, 228, 291-292. That was no simple task. During the relevant period, Cox received over a million allegations of infringement annually. J.A.275. The Cox Abuse Tracking System, a "graduated response program," took increasingly assertive measures with each infringement accusation. J.A.295-296.

This graduated approach was extraordinarily effective. In phase 1, covering the first several accusations, Cox issued warnings along with educational resources on infringement. J.A.232; *see* J.A.413-420 (sample email). Nearly half the customers who received such an email were never again accused; more than three-quarters of customers never got past three warnings; and 87% stopped after five. J.A.325-327, 533; *see* J.A.533-535.

When email warnings were not enough, Cox escalated to phase 2: automatic suspension of internet service. J.A.232-233, 411-412. Cox suspended thousands of customers in the claim period. J.A.517-519. Cox would not restore service until the customer promised to stop infringing—first on an online form, and then (if infringement continued) in conversation with a Cox

representative. J.A.232-233. Phase 2 brought the success rate up to 98%. J.A.326-327, 533; *see* J.A.533-535.

For the final 2%—that is, 2% of the 1% of customers accused of infringement (or 0.02% of all customers)—Cox considered termination, cutting off an entire internet connection and all of its users' access. J.A. 83-84, 411-412. But Cox resorted to that step only a few dozen times over the relevant period. J.A.282-284. Often, termination would have been unconscionable. For example, all but one of the 49 accounts most frequently accused of infringement were entities like regional ISPs, university housing, military barracks, and multi-unit dwellings, so that termination would have meant throwing innocent users off the internet en masse. J.A.240-241, 330-332, 536-537.



J.A.537.

Cox's system reduced piracy on its network to rates considerably lower than the internet average. J.A.306-307, 310. Plaintiffs themselves tacitly acknowledged Cox's success by using Cox's system as

a model when they negotiated an infringement-response program with several other major ISPs. J.A.139-140, 336-338, 399-401, 530. Notably, the program they agreed to *never* required termination. J.A.140.

The Music Industry Launches A Litigation War Against ISPs

In 2014, the music industry declared war on the internet with a massive litigation campaign seeking billions of dollars. Industry plaintiffs have brought lawsuits seeking to hold numerous ISPs liable for user infringement under the novel material-contribution theory at issue here. *See* Pet. 37 (collecting cases). Ironically, the industry chose Cox and its pioneering anti-infringement program as its first target. The Cox litigation unfolded across two successive cases.

BMG v. Cox. In the first case, BMG Rights Management sued Cox alleging contributory and vicarious infringement for user conduct. *BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 300 (4th Cir. 2018).

At the outset, Cox asserted that its anti-infringement program satisfied the "safe harbor" defense under § 512(a) of the DMCA. BMG attacked that defense by collecting stray messages between a handful of Cox employees; some expressed frustration with mass notices, one described an "unwritten semi-policy" of reactivating service for customers terminated for infringements, and others described reactivation "to collect a few extra weeks of payments for their account. ;-)." *Id.* at 303 (internal quotation marks

omitted). The district court held that this evidence showed that Cox had not "reasonably implemented" a "policy that provides for the termination in appropriate circumstances of … repeat infringer[s]," as required under § 512(i). *Id.* Because Cox had not terminated the outlier customers with the most accusations, the court stripped Cox of the safe harbor entirely—for every single act of infringement by anyone on any account.

At trial, the jury rejected BMG's vicarious-liability claim but found for BMG on its claim of contributory infringement. *Id.* at 300. It also found that Cox was a willful infringer under a jury instruction (challenged here) that permitted the jury to find Cox willful if it knew a customer's internet connection was used for infringement. *See id.* at 312 n.7 (jury instruction). Cox protested that it was improper to base willfulness on "'Cox's knowledge of its *subscribers*' [infringement],' rather than Cox's knowledge that '*its* [*own*] *actions*' constitute an infringement." *Id.* at 312.

The Fourth Circuit affirmed the district court's rejection of Cox's § 512(a) defense and its willfulness instruction. *Id.* at 303-05, 312-13. It overturned the contributory-infringement verdict, however, ruling that contributory infringement at a minimum required an ISP to have actual knowledge of, or be willfully blind to, "*specific* instances of infringement." *Id.* at 306-12. The parties settled after remand.

Sony v. Cox. In July 2018, shortly before *BMG* settled, record labels and publishers representing 80% of the music industry filed this copycat suit. J.A.40-77. Leveraging *BMG*'s safe-harbor ruling,

Plaintiffs aimed at a 22-month period in 2013-14 within *BMG*'s claim period. J.A.8-9. They predicated their claims on approximately 163,000 notices concerning 57,000 customer accounts involving over 10,000 copyrighted works. J.A.103, 208, 314, 390.

Plaintiffs advanced the same contributory- and vicarious-liability theories raised in *BMG*. Unlike in *Grokster*, Plaintiffs did not argue that Cox "induced" infringement. Rather, in keeping with one oft-quoted formulation, they argued only that Cox "materially contribute[d] to the infringing conduct of" its customers, *Gershwin Publ'g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159, 1162 (2d Cir. 1971), by continuing to provide general internet access to customers previously accused of infringement.

Specifically, Plaintiffs' theory was based on two automated infringement accusations: Once Cox received two accusations as to a particular customer's internet connection, it knew that someone at this connection was certain to infringe again. After that point, Cox would be liable for all subsequent infringement using that connection—it must either terminate the connection or be subject to liability. Pet.App.145a-146a; Pet.App.10a. On summary judgment, the district court gave that strategy a boost, holding that notices alleging infringement "established the knowledge element of contributory liability" as a matter of law for *any* customer. Pet.App.169a-172a; *see* Pet.App.165a.

A jury found Cox liable for both contributory and vicarious infringement. J.A.91-92. It accepted the two-notices-and-terminate theory across the board—

without regard to whether the customer was a single-person household, a family of five, or a massive corporation, university, or military barracks. It also found willfulness under the *BMG*-approved instruction that Cox was willful if it "had knowledge that its subscribers' actions constituted infringement." J.A.395.

The jury awarded an even $1 billion. The award was more than 1,400 times Plaintiffs' unrebutted actual losses of $692,000. J.A.371, 373-76. The per-work award—$99,830 in statutory damages for each of the 10,017 asserted works—was nearly 100,000 times the $1 value of any infringing download, J.A.373-374, 376-377, 380-381. The judgment was also 20 times Grokster's reported settlement. *Details of Grokster Settlement Emerge*, *Law.com* (Nov. 9, 2005), https://tinyurl.com/25f4pxvj.

The Fourth Circuit Vacates The Verdict, But Endorses Plaintiffs' Material-Contribution Theory For Retrial

On appeal, Cox challenged the vicarious- and contributory-infringement verdicts, while preserving for further review its challenge to *BMG*'s binding willfulness ruling. J.A.96-97 n.3. The Fourth Circuit reversed the vicarious-infringement verdict, because, "as a matter of law," Cox does not "profit[] directly from its subscribers' copyright infringement," a necessary element. Pet.App.12a. "Cox would receive the same monthly fees even if all of its subscribers stopped infringing." Pet.App.18a. The court then vacated the $1 billion judgment on that basis. Pet.App.29a-30a.

The Fourth Circuit affirmed the contributory-infringement verdict, however. The court acknowledged that Cox's users, even those who might infringe, put the internet to countless noninfringing uses. Pet.App.19a-20a. It also noted that Plaintiffs advanced no inducement claim, Pet.App.26a n.4, and presented no evidence that infringement is a significant aspect of Cox's business model or that Cox offered the internet to infringing users on different terms than to the general public.

The court nevertheless endorsed contributory liability based on Plaintiffs' mass-notice campaign. It held that "intent to cause infringement may be shown … by knowledge that infringement was substantially certain to result from the sale of internet service to a customer." Pet.App.21a (citation modified). It affirmed the district court's summary judgment ruling that Cox had such "substantial certainty" based on notices. Pet.App.21a-25a. And it found that this manufactured knowledge was enough: "[S]upplying a product with knowledge that the recipient will use it to infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement." Pet.App.27a.

The Fourth Circuit denied rehearing en banc. Pet.App.179a-182a.

SUMMARY OF THE ARGUMENT

I. An ISP is not a contributory infringer merely because it continues to provide communications infrastructure in the form of a general-purpose internet

connection to a home or business knowing that someone will use that connection to infringe.

A. Contributory liability is the copyright equivalent of common-law aiding-and-abetting liability. It requires proof that the defendant both (1) knew of the direct infringer's conduct and (2) "intentionally induc[ed] or encourag[ed] direct infringement." *Grokster*, 545 U.S. at 930. There is no contributory liability absent "purposeful, culpable … conduct" "with the object of promoting … infringement," *id.* at 936-37—some "affirmative act with the intent of facilitating the offense's commission," *Twitter*, 598 U.S. at 490 (internal quotation marks omitted).

In its seminal copyright decisions, *Sony* and *Grokster*, and its recent aiding-and-abetting cases, *Twitter* and *Smith & Wesson*, this Court has articulated three driving principles that resolve this case. First, liability requires *affirmative conduct* intended to further infringement—mere nonfeasance, like failing to prevent infringement, does not suffice. Second, providing general-use technology to the public at arm's length, on equal terms, is not culpable participation in misuse. And third, mere knowledge that someone will misuse technology does not give rise to secondary liability.

B. These principles resolve the case. The internet service Cox provides is a paradigmatic multi-use technology that homes and businesses rely upon for countless purposes—most of them noninfringing. It provides that communications infrastructure for its diffuse customer base on equal terms. It has engaged in none of the affirmative acts this Court has

recognized as purposeful misfeasance giving rise to liability. It has never encouraged infringement or adapted its products or business to infringement. Just the opposite, it developed an anti-infringement program that ultimately caused all but a tiny fraction of users to stop infringing.

Plaintiffs' theory seeks to hold Cox liable not for contributing to infringement, but for failing to stop it by expelling homes and businesses from the internet. But this Court has emphatically rejected that notion, declaring that "we generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large." *Twitter*, 598 U.S. at 499.

C. The Fourth Circuit erred in holding that Cox's mere knowledge that a user would infringe makes Cox a culpable participant in all infringement. Its ruling ignores this Court's decisions in *Sony*, *Grokster*, *Twitter*, and *Smith & Wesson*, which demand affirmative conduct with the purpose of aiding infringement. And the Fourth Circuit's holding improperly creates the sort of duty to terminate those who misuse communications technology that this Court rejected in *Twitter*.

The Fourth Circuit cannot fill the culpability void with what it called Cox's "increasingly liberal policies" in responding to infringement, Pet.App.28a, or with internal Cox emails expressing frustration with the deluge of Plaintiffs' automated notices. None of this remotely qualifies as active conduct intended to aid, foster, encourage, or facilitate infringement.

D. The Ninth Circuit's alternative test—which finds liability where a defendant fails to take "simple measures" to prevent infringement—is also wrong. Though less draconian than the Fourth Circuit's duty to terminate, a judge-made duty to take "simple measures" to stop infringement violates this Court's explicit statement that "failure to take affirmative steps to prevent infringement" does not give rise to liability. *Grokster*, 545 U.S. at 939 n.12. But even if the simple-measures test did apply, Cox satisfied that test as a matter of law. Its highly effective anti-infringement program far exceeded any conceivable notion of "simple measures."

E. Only Congress is empowered to create a duty to terminate internet service that carries such profound implications for members of the public and the nation's economy. Under the Fourth Circuit's theory, Cox could avoid liability only by throwing entire homes, coffee shops, hotels, military barracks, and regional ISPs off of the internet. Innocent users and infringers alike would be severed from service that is integral to nearly every aspect of modern life. The decision to impose a duty to terminate upon allegation of infringement is too consequential to leave to courts and lay juries. It threatens to disrupt the careful balance between copyright protection and access to communications technology.

II. The judgment below should be reversed for the independent reason that the Fourth Circuit's willfulness standard improperly permitted the jury to find Cox willful if it found merely that Cox had knowledge of *customer* infringement. Under § 504(c), willfulness requires proof that the *defendant*—whether a direct

infringer or a secondary infringer—was aware of (or at least reckless as to) the illegality of *its own* conduct. A properly instructed jury could readily have found that Cox was not willful under that standard given Cox's extensive anti-infringement efforts and the absence of any authority supporting the Fourth Circuit's understanding of contributory liability.

Across a variety of legal contexts, this Court has held that a willful violator is one who acts with knowledge (or reckless disregard) that it is committing a wrong. It has also explained that someone who reasonably believes they are not violating the law cannot be willful. These principles comport with analogous provisions that, like § 504(c), impose enhanced or punitive damages based on a finding of willfulness. Such damages are justified only where the defendant has acted in bad faith.

The text and structure of § 504(c) confirm that willfulness is based on the defendant's understanding of its own conduct, regardless of whether the defendant is a direct or secondary infringer. The provision authorizes damages against "infringers"—with no distinction between direct or secondary infringers. Its tiered statutory-damages structure sets a baseline range for damages, then uses states of mind to ratchet the range up or down, confirming that willful damages are a punitive sanction akin to enhanced-damages provisions in other bodies of law. At a very minimum, the district court's erroneous willfulness instruction requires a new trial.

ARGUMENT

I. An ISP Does Not Materially Contribute To Its Users' Copyright Infringement Just By Providing Communications Infrastructure To The General Public.

The provider of a multi-use technology is not contributorily liable for its customers' infringing uses unless the provider "distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps to foster infringement." *Grokster*, 545 U.S. at 936-37. The Fourth Circuit held that this standard is satisfied, and that an ISP materially contributes to customer infringement, any time an ISP knows a specified account will be used to infringe but fails to terminate the connection. It maintains that this alone makes the ISP liable for any subsequent misuse—no matter how vast the universe of uses to which the internet can be put, how incidental the contribution the ISP provides, or how indifferent the ISP is to how the connection is used.

That is not the law. Contributory liability requires proof that the defendant engaged in affirmative conduct that purposely aids, fosters, encourages, or facilitates infringement; providing general-purpose products or services to the public on equal terms does not suffice, even where the defendant knows specified customers will misuse the technology. § I.A. Those principles foreclose liability against Cox for supplying basic communications infrastructure to all customers on equal terms. § I.B. The Fourth Circuit's rationale for condoning contributory liability was legally

erroneous. § I.C. So is the Ninth Circuit's test, which imposes a duty to take "simple measures" to stop infringement—though Cox prevails as a matter of law even under that test. § I.D. Only Congress can impose on ISPs a new duty with such staggering consequences. § I.E.

A. Contributory infringement requires affirmative, culpable conduct with the purpose of fostering infringement.

Contributory copyright infringement is "accomplice" liability, *Kalem*, 222 U.S. at 62, which courts (and the parties here) uniformly agree is equivalent to aiding and abetting.[1] It rests on "rules of fault-based liability." *Grokster*, 545 U.S. at 934. While this Court has expressed those rules in multiple ways, they all boil down to a century-old standard: A defendant is not liable unless he both (1) knew of another's wrong and (2) "'participate[d] in'" that wrong "'as in something that he wishes to bring about' and 'seek[s] by his action to make … succeed.'" *Smith & Wesson*, 605 U.S. at 291 (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)).

In copyright, that second element—the conduct element—requires proof that a defendant

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[1] *See BMG*, 881 F.3d at 309 (applying "law of aiding and abetting"); *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 100 (2d Cir. 2016) (defendant "aided and abetted" direct infringement); *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 755 (7th Cir. 2012) (contributory infringer is "in effect … an aider and abettor"); *Venegas-Hernández v. ACEMLA*, 424 F.3d 50, 57-58 (1st Cir. 2005) (recognizing "abettor liability"); *see also* Sony Cert. Opp. 22; Pet.App.27a.

"intentionally induc[ed] or encourag[ed] direct infringement." *Grokster*, 545 U.S. at 930 (citing *Gershwin*, 443 F.2d at 1162). Courts have recognized claims alleging either that the defendant "induced" infringement or (as asserted here) "materially contributed" to it. Under civil aiding-and-abetting doctrine, the conduct element requires proof that the defendant provided "substantial assistance to the primary" actor. *Twitter*, 598 U.S. at 491. Whatever the context, formulation, or label, that element requires "purposeful, culpable … conduct" "with the object of promoting … infringement," *Grokster*, 545 U.S. at 936-37—some "affirmative act with the intent of facilitating the offense's commission," *Twitter*, 598 U.S. at 490 (internal quotation marks omitted).

Across its seminal copyright cases (*Sony* and *Grokster*) and two recent aiding-and-abetting cases (*Twitter* and *Smith & Wesson*), this Court has articulated several driving principles distinguishing the sort of affirmative, purposeful conduct intended to further the misuse—and therefore triggering liability—from the merely passive or incidental conduct that falls short. Three of these principles resolve this case.

First, because the defendant must engage in *affirmative* (i.e., *active*) conduct with the purpose of bringing about the wrong, mere nonfeasance—i.e., failure to prevent the wrong or failure to terminate a customer—is insufficient. Second, merely providing general-use technology to the public at arm's length, on equal terms, does not constitute a culpable contribution to customers' misuse of that technology. Third, mere knowledge that a specified customer will misuse

a general-use technology is insufficient to impose contributory liability.

1. *Liability requires affirmative conduct with the purpose of furthering infringement—nonfeasance is not enough.* For more than a century, this Court has recognized that "accomplice" liability in the copyright context requires more than "indifferent supposition" or even "knowledge" of another's unlawful acts. *Kalem*, 222 U.S. at 62. Decades after that pronouncement in *Kalem*, this Court's decisions in *Sony* and *Grokster* confirmed that a technology provider is not liable absent affirmative conduct that purposely facilitates infringement.

In *Sony*, as discussed (at 5-6), the studios attempted to impose secondary liability on VCR manufacturers for "supplying the 'means' to accomplish an infringing activity." 464 U.S. at 436. This Court rejected that overreach, declaring that "no precedent in the law of copyright" supported imposing liability based merely on selling something that some customers inevitably use to infringe. *Id.* at 439. Particularly instructive were "the so-called landlord-tenant cases, in which landlords who leased premises to a direct infringer for a fixed rental and did not *participate directly* in any infringing activity were found not to be liable." *Id.* at 437 & n.18 (emphasis added).

The outcome might be different, *Sony* explained, for "item[s] … 'especially' made" to infringe. *Id.* at 436. Developing and selling such an item would be active conduct purposely facilitating infringement. This Court also noted that some "lower court copyright cases" recognized liability where the defendant

expressly "authorized the [infringing] use" by another as part of a symbiotic, "ongoing relationship," such as a dance hall and its band playing infringing music. *Id.* at 437 & n.18. But Sony had not authorized, participated directly in, or encouraged any infringing use. It had just "suppl[ied] a piece of equipment that is generally capable of copying," both lawfully and unlawfully, "the entire range of programs that may be televised." *Id.* at 436.

Next came *Grokster*, which embraced the central requirement of affirmative conduct purposely furthering infringement. As discussed (at 6), the defendants were file-sharing services explicitly marketed as "the next Napster." 545 U.S. at 924. The defendants promoted infringing use, even prompting users to download specific copyrighted songs, and developed a business model that revolved around offering copyrighted material for free. *Id.* at 924, 926. Yet the Ninth Circuit blessed all this. It overread "*Sony*'s limitation to mean that whenever" a product can be put to noninfringing use, "the producer can *never* be held contributorily liable … even when an actual purpose to cause infringing use is shown by evidence independent of design and distribution of the product." *Id.* at 934 (emphasis added).

This Court rejected that absolutism for ignoring contributory liability's conceptual core. It noted that *Sony* itself was just an application of that same core of "fault-based liability derived from the common law." *Id.* at 934-35. The purpose of *Sony*'s rule was "to identify instances in which it may be presumed from distribution of an article in commerce that the distributor *intended* the article to be used to infringe … , and

so may justly be held liable for that infringement." *Id.* at 932 (emphasis added). Where a technology is "'good for nothing else' … there is no injustice in presuming or imputing an intent to infringe." *Id.* Where, however, the product has many noninfringing uses, the act of selling that product is "equivocal" at worst, *id.*—or, as *Kalem* put it, "indifferent."

Grokster stressed the requirement of *affirmative*—not merely passive—conduct. It clarified that "a court would be unable to find contributory … liability merely based on a failure to take affirmative steps to *prevent infringement*, if the device otherwise was capable of substantial noninfringing use[]." *Id.* at 937, 939 n.12 (emphasis added). Nonfeasance is not enough. Hence the rule quoted above: There is no contributory liability unless the defendant "distribute[d] 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." *Id.* at 936-37.

This Court's recent decisions in *Twitter* and *Smith & Wesson* also emphasize the requirement of culpable, affirmative conduct with the purpose of furthering the wrong. Both cases applied the same common-law rules to aiding-and-abetting provisions of other federal statutes, adopting the same principle in the very same terms as *Sony* and *Grokster*.

Twitter addressed misconduct on social media, which this Court aptly described as "world-spanning internet platforms." 598 U.S. at 488. The case arose under the Justice Against Sponsors of Terrorism Act, which imposes liability for "knowingly providing

substantial assistance" to someone who commits an act of international terrorism. *Id.* at 495. The plaintiffs sued several social-media platforms—the petitioner Twitter, as well as Facebook and YouTube—seeking to hold them liable on the theory that the platforms continued to provide service to specific customers even though the "defendants … knew" that those customers were using the platforms to promote terrorism. *Id.* at 481-82, 498.

This theory required the Court to evaluate "the common law, which has long held aiders-and-abettors secondarily liable for the wrongful acts of others." *Id.* at 484. Using terminology almost identical to *Gonzalez*'s, this Court held there can be no liability unless the "defendant has … take[n] some 'affirmative act' 'with the intent of facilitating the offense's commission.'" *Id.* at 490. Inaction is not enough: "[O]ur legal system generally does not impose liability for mere omissions, inactions, or nonfeasance" absent "some independent duty to act." *Id.* at 489. This requirement of affirmative conduct "cabin[s] aiding-and-abetting liability to cases of truly culpable conduct," the "conceptual core that has animated aiding-and-abetting liability for centuries." *Id.* at 489, 493.

Last Term, *Smith & Wesson* made the same points. Mexico sued gun manufacturers, alleging they aided and abetted crimes under the Protection of Lawful Commerce in Arms Act by "supply[ing] firearms to retail dealers whom they know illegally sell to Mexican gun traffickers." 605 U.S. at 288. "By choosing not to cut off the flow of firearms to the known rogue dealers, the complaint assert[ed], the manufacturers become 'culpable and intentional

participant[s]' in the dealers' federal 'statutory violations.'" *Id.* at 289.

No again. This complaint also failed because it did not allege "the kind of 'conscious … and culpable participation in another's wrongdoing' needed to make out an aiding-and-abetting charge." *Id.* at 291 (quoting *Twitter*, 598 U.S. at 493). It was not enough "that the manufacturers elect[ed] to sell guns to, among others, known rogue dealers," *id.* at 294, nor that the defendants failed to "cut off the flow of firearms," *id.* at 289. Rather, "aiding and abetting usually requires misfeasance rather than nonfeasance." *Id.* at 292. The complaint failed because it fell short of alleging that the "manufacturers 'participate in' [unlawful] sales 'as in something [they] wish[] to bring about,' and 'seek by [their] action to make' succeed." *Id.* at 294 (quoting *Peoni*, 100 F.2d at 402).

2. *Providing general-use technologies to the public is not culpable conduct.* There is a corollary to the requirement of affirmative, purposeful conduct intended to further misuse: "[R]outine and general activity that happens on occasion to assist … a [wrong] … is unlikely to count as aiding and abetting." *Id.* at 292. Indeed, *Twitter* anticipated this very case by declaring that "we generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large." 598 U.S. at 499.

Sony is the foundational copyright precedent espousing this principle. In rejecting liability there, this Court borrowed patent law's staple-article doctrine—a common-law principle specifically calibrated to

balance the interests of rightsholders against those of technology providers and the general public. 464 U.S. at 442. Under that doctrine, if a technology is "almost … uniquely suited" for infringement, the provider is liable. *Id.* at 441; *see* 35 U.S.C. § 271(c) (imposing patent liability for providing technology that is "not a staple article or commodity of commerce suitable for substantial noninfringing use" while "knowing" the product is "especially made or especially adapted for use in an infringement of [a] patent"). But if the technology is "capable of substantial noninfringing uses," the provider is not a contributory infringer. 464 U.S. at 442.

This rule rests on two rationales. The first, discussed above (at 24-25), is that a provider of technology with noninfringing uses has, at worst, "mere indifferent supposition or knowledge" of misuse, *Kalem*, 222 U.S. at 62—it has not culpably participated in that misuse in a way that demonstrates a desire to bring it about. *See Grokster*, 545 U.S. at 934 ("*Sony*'s rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product."). The second rationale, which this Court emphasized in *Sony*, is the "public interest in access" to technology that is "widely used for legitimate, unobjectionable purposes." 464 U.S. at 439-40, 442. The public's weighty interest—at its peak with innovation-driving and world-changing technologies—takes primacy even though some users misuse the technology. *Sony* rooted this in a century of case law rejecting rightsholders' efforts to misuse contributory-infringement claims to "block the wheels of commerce." *Id.* at 441 (quoting *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912)).

Again, this Court's recent aiding-and-abetting precedents reinforce the same common-law principle applied in the copyright context. In *Twitter*, it did not matter that the platforms knew that specific customers were using their services to promote ISIS's terrorist activities: The platforms merely provided the users access to communications services in the same manner as "the internet-using public"—on "arm's length, passive, and largely indifferent" terms. 598 U.S. at 498, 500. In *Smith & Wesson*, too, there was no aiding and abetting where the defendants sold their product "to everyone, and on equivalent terms." 605 U.S. at 295.

"[A] contrary holding would effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them." *Twitter*, 598 U.S. at 503. This would "run roughshod over the typical limits on tort liability." *Id.*; *see, e.g.*, *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (cited approvingly in *Twitter*, 598 U.S. at 499) ("That web hosting services likewise may be used to carry out illegal activities does not justify condemning their provision whenever a given customer turns out to be crooked."). "The fact that some bad actors [take] advantage" of such infrastructure has never implicated the provider as an accomplice in the misuse. *Twitter*, 598 U.S. at 503.

3. *Knowing that specified customers will misuse a technology does not give rise to secondary liability for failing to terminate.* The first two principles compel this third principle, which this Court has repeatedly embraced.

Twitter recognized that there is "no duty that would require defendants or other communication-providing services to terminate customers after discovering that the customers were using the service for illicit ends." 598 U.S. at 501; *see Doe*, 347 F.3d at 661 (confirming no duty in "state law" for communications providers to "act as Good Samaritans" if they "learn" of misuse). *Grokster* similarly held that "mere knowledge of infringing potential or of *actual infringing uses*" does not generate culpability. 545 U.S. at 937 (emphasis added). This principle traces back to *Kalem*, which posited that liability is improper not only in instances of "mere indifferent supposition" of wrongdoing, but also when the defendant has "knowledge" of the wrongdoing. 222 U.S. at 62-63; *see Graves v. Johnson*, 179 Mass. 53, 58 (1901) (Holmes, J.) (cited by *Kalem*) ("[A] sale otherwise lawful is not connected with subsequent unlawful conduct by the mere fact that the seller correctly divines the buyer's unlawful intent.").

That has long been the law: More than half a century ago, this Court observed there would be no secondary liability absent "stimulation or active incitement" of illegal activity even when a business makes a "continuous course of sales" to users "with knowledge" of their wrongful use. *Direct Sales Co. v. United States,* 319 U.S. 703, 712 n.8 (1943). "[N]o amount of knowledge on the defendant's part can compensate" where the defendant has "not provided" the requisite assistance specifically directed at achieving the illegal act. Restatement (Third) of Torts: Liab. for Econ. Harm § 28 cmt. d (2020).

These authorities confirm that liability depends on proving that the defendant did *something* affirmative to purposely further the misuse, beyond knowing of a user's illegal conduct. That something may take many forms, in copyright as in any context. A defendant could induce infringement by "promoting" infringing use or "broadcast[ing] a message designed to stimulate others to commit violations." *Grokster*, 545 U.S. at 936-37; *cf.* 35 U.S.C. § 271(b) (in patent law, "[w]hoever actively induces infringement of a patent shall be liable as an infringer"). Or a defendant could materially contribute to an infringement by, for instance, selling a product that is good for only infringing uses. *Supra* 25-26. Or culpable conduct may entail deliberately adapting a product to infringing use. *See Henry*, 224 U.S. at 48-49; *Rupp & Wittgenfeld Co. v. Elliott*, 131 F. 730, 732 (6th Cir. 1904) ("It is the sale of wire adapted to the infringing use, with the intent and purpose that it shall be so used, which constitutes contributory infringement."). Or, as the Government posited in *Grokster*, "buil[ding] [a] business" where "'the very success of the … venture depends on the counterfeiting activity'" may suffice. Brief for the U.S. as Amicus Curiae at *14-16, *Grokster,* 545 U.S. 913 (No. 04-480), 2005 WL 154148 (*Grokster* U.S. Amicus) (internal quotation marks and citation omitted).

All these scenarios are just ways of "captur[ing] different *culpable* behavior," *Grokster*, 545 U.S. at 942 (Ginsburg, J., concurring) (emphasis added). In each, the defendant satisfies the requirement of purposeful, culpable conduct by doing or saying something that affirmatively demonstrates the intent to advance the direct infringement. Without that, there is no purpose, no participation, no culpability—and therefore

no liability. And knowledge of a customer's wrongdoing does not convert a defendant who is at worst "indifferent" to infringing conduct into one who "'wishes to bring [it] about' and 'seek[s] by his action to make it succeed.'" *Smith & Wesson*, 605 U.S. at 291 (quoting *Peoni*, 100 F.2d at 402).

B. Cox does not culpably contribute to known infringement by providing basic communications infrastructure in the form of a general-use internet connection.

These basic principles resolve this case. Cox provides its customers—infringing or not—with nothing but basic communications infrastructure in the form of an internet connection, the mother of all multi-use technology. It does so for all members of the public on equal terms—just as AT&T provides phone service and FedEx provides mail service. Cox has "taken" no "affirmative steps … to foster infringement," *Grokster*, 545 U.S. at 936-37. Nor is it an active participant in customer infringement (or any other online conduct) as in something it "'wishes to bring about'" and "'make … succeed.'" *Smith & Wesson*, 605 U.S. at 291 (quoting *Peoni*, 100 F.2d at 402). At most, it has knowledge of specified customers' infringing use, and that is not enough.

"No one disputes that Cox's subscribers need the internet for countless reasons, whether or not they can infringe." Pet.App.19a. Cox sells internet service "to everyone, … on equivalent terms," *Smith & Wesson*, 605 U.S. at 295, and users put it to overwhelmingly noninfringing uses. *See Grokster* U.S. Amicus at

*14 ("*Sony* makes clear that when a product's 'primary' use is noninfringing, the 'commercially significant noninfringing use' standard is easily satisfied."). Cox has no shared interest with a customer who downloads a song any more than it shares the customer's interest in checking the weather, binging the latest drama, or cursing out the manager for not going to the southpaw in the eighth inning. Again, Cox does not participate in or wish to bring about any of that.

Nor did Cox do any of the things this Court has recognized as affirmative conduct. It did not specially adapt its business or services to facilitate infringement. It did not profit from infringement: "Cox would receive the same monthly fees even if all of its subscribers stopped infringing." Pet.App.18a. Plaintiffs advance no inducement theory, Pet.App.26a n.4, because Cox has never encouraged, advertised, or advised infringement, or otherwise prompted anyone to infringe. It has done the opposite. Under a legal rule where "indifferen[ce]" to infringement would defeat liability, *Kalem*, 222 U.S. at 62, Cox expressly *prohibited* infringement and constructed a robust—and highly effective—program to thwart it. *Supra* 9-12. Where 99% of Cox's customers obey that admonition, and Cox's pioneering program ultimately stopped all but 0.02% of customers from infringing, *supra* 11, there is no sense in which Cox's conduct exhibits the purpose to assist infringement.

Relatedly, Cox's relationship with its 6 million customers is so diffuse and distant as to give new meaning to "arm's length." Cox has limited interaction with customers, and no visibility into who the actual users are or what they do. Remember, for all

Plaintiffs' touting of "specific knowledge," Plaintiffs' notices did no more than accuse an IP address that links to an entire home, business, barracks, or region—not a particular identified user. *Supra* 8. Plaintiffs themselves have always pressed this lawsuit entirely in gross; the record has no mention of any actual people or the circumstances under which Cox purportedly assisted an individual's conduct. *Supra* 13-15.

Cox also has no technical ability to control or monitor user behavior. *Supra* 9. It provides a cable to the internet, and sometimes the basic electronic equipment (modem, router, etc.) to transmit between a user and an infinite number of other points. Cox has no way to guarantee users obey their contractual commitment to abstain from wrongdoing. Just as a gun manufacturer cannot guarantee guns do not find their way to drug cartels. Just as an electric company cannot ensure its wattage does not power an infringer or a cyberattack. Just as a landlord cannot guarantee its tenants do not sell contraband. *See Sony*, 464 U.S. at 437 & n.18.

Plaintiffs' theory is thus precisely what *Twitter* rejected: that, with a few robo-notices, an infrastructure provider becomes a purposeful participant in wrongdoing accomplished through a passive communications medium in cyberspace. If that theory does not work for Twitter—which hosts its customers' content on its own servers and can see every message they write—then it certainly does not work for Cox, whose infrastructure is simply a conduit to everything on the internet. Plaintiffs seek to hold Cox liable not for some *action* to purposely foster infringement,

but for inaction, in *not* throwing thousands of homes and businesses off the internet. Just as in *Twitter*, "plaintiffs identify no duty that would require defendants or other communication-providing services to terminate customers after discovering that the customers were using the service for illicit ends." 598 U.S. at 501. Sending tidal waves of automated infringement accusations cannot impose on Cox a duty to terminate where none exists—any more than serving accusations on AT&T or FedEx would require them to cut off customers. Knowledge of wrongdoing does not change nonfeasance into affirmative and purposeful conduct.

This Court should reject liability predicated on providing internet service.

C. The Fourth Circuit misapplied the law.

1. The Fourth Circuit paid lip service to the rule that "'mere[] … failure to take affirmative steps to prevent infringement' does not establish contributory liability." Pet.App.27a (citing *Grokster*, 545 U.S. at 939 n.12). Yet its central legal premise was that "supplying a product with knowledge that the recipient will use it to infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement." *Id.*

Under this view, Cox's passive provision of internet infrastructure morphed into active, "culpable conduct" after Cox received automated accusations of infringement. Pet.App.27a-28a. And because the only way Cox could prevent subsequent infringing acts was by terminating the connection entirely, the

Fourth Circuit's rule effectively operates as a duty to do that—57,000 times (to each of the homes, businesses, barracks, and regional ISPs in this case).

This holding would mean that ISPs can be held responsible for literally everything bad that happens on the internet—bullying, harassment, libel, racketeering, unlawful gun sales … everything. The aggrieved party (or some interloper) need only send the ISP an accusation to establish "knowledge that the [customer] will use" the connection to continue the improper conduct. Pet.App.27a. Then, according to the Fourth Circuit, if the provider does not terminate service, that "is exactly the sort of culpable conduct sufficient for contributory" liability as an accomplice for any future conduct. *Id.* And if the theory works against Cox, then it works against any provider of basic communications infrastructure.

For reasons discussed above, this central legal premise is wrong. Plaintiffs cannot convert inaction into purposeful conduct by sending a stack of accusations. The Fourth Circuit did not even mention *Twitter*, where this Court saw no "independent duty" "that would require … communication-providing services to terminate customers after discovering that the customers were using the service for illicit ends." 598 U.S. at 501. Nor did the court try to reconcile its view with *Grokster*'s admonition that "mere knowledge of infringing potential or of actual infringing uses" does not generate culpability. 545 U.S. at 937.

In place of this controlling precedent, the Fourth Circuit relied on a Second Restatement comment that a person who "knows that the consequences are

certain, or substantially certain, to result from his act, and still goes ahead, … is treated by the law as if he had in fact desired to produce the result." Restatement (Second) of Torts § 8A, cmt. b (1965); *see* Pet.App.27a (citing *BMG*, 881 F.3d at 308). But *Twitter* scrutinized the Second Restatement and concluded that the "conceptual core" of secondary liability is not that a defendant was merely aware of consequences; rather, the key is whether the defendant "consciously and culpably 'participate[d]' in a wrongful act so as to help 'make it succeed.'" 598 U.S. at 493 (citation omitted). That understanding governs here.

Tellingly, the Third Restatement rejects the Fourth Circuit's overreading of the "substantial-certainty definition," emphasizing its "limits" and noting that "in many situations a defendant's knowledge of substantially certain harms is entirely consistent with the absence of any liability in tort." Restatement (Third) of Torts: Phys. & Emot. Harm § 1 cmts. a & e (2010). "There are obvious differences between the actor who acts with the desire to cause harm and the actor who engages in conduct knowing that harm is substantially certain to happen." *Id.* cmt. a. The "test loses its persuasiveness" where the "causal sequence" is more attenuated; the "potential victims" more diffuse and "vague[]"; or the "time frame involving the actor's conduct expands." *Id.* cmt. e. Hence the need to consult traditional principles governing aiding-and-abetting liability, as this Court has continually done, to identify the "truly culpable conduct" necessary for secondary liability. *Twitter*, 598 U.S. at 489.

2. The Fourth Circuit cited a few other facts, but none of them suffices to prove affirmative, culpable conduct with the purpose of furthering infringement. The court faulted Cox for what it described as "increasingly liberal policies and procedures for responding to reported infringement." Pet.App.28a. But that is just a semantic trick to depict inaction—*not terminating* existing service—as some active conduct. The same goes for the evidence Plaintiffs tend to emphasize (though the Fourth Circuit did not mention) that Cox had an "unwritten semi-policy" reinstating some unspecified number of accounts after terminating them. *Supra* 12. That is just another way of capturing a failure to take the most punitive action against the miniscule portion of accused accounts that reached the end of its anti-infringement program. Again, that is not affirmative, purposeful participation at all—and certainly not in the acts of the 98% of the 57,000 subscribers who stopped before reaching the end of the program.

All of this is a world away from the Fourth Circuit's example of "[l]ending a friend a hammer" knowing they will use it imminently to "break into a credit union ATM," drawn from a case where the "friend" was an active accomplice to the break-in. Pet.App.27a. So too from classic aiding-and-abetting fact patterns like "particularized" "aid given to a single named offender in violating a specified narcotics law," *Smith & Wesson*, 605 U.S. at 294-95, or playing the role of "confederate" in a drug deal gone wrong, *Rosemond v. United States*, 572 U.S. 65, 67-68 (2014).

The court also mentioned purely "internal … emails and chats" between Cox employees

"displaying contempt for laws intended to curb online infringement." Pet.App.28a. The "law[]" in question is the DMCA. Frustrated by the deluge of infringement accusations, one Cox employee wrote, "WE NEED TO CAP THESE SUCKERS"—that is, limit the number of notices Cox would process. Pet.App.48a. In other emails discussing notices from Digital Rightscorp (DRC), notorious for sending laypeople extortionate settlement demands, members of Cox's Abuse Team wrote, "F the DRC!" and "F the dmca!!!" J.A.501-502.

These unfortunate emails do not reflect Cox's views as a company. *See, e.g.*, J.A.322, 405. But more importantly, they do not satisfy the culpable *conduct* necessary for secondary liability. Internal gripes never even shared with customers are not affirmative acts, nor substantial assistance, nor inducement to infringement. Frustration with an entirely voluntary safe harbor—which Congress declared has no effect on liability, *supra* 6-7—is not even close to a desire that customers actually infringe. But even if it were, that still would not be enough because inchoate thoughts, however colorfully expressed, are not affirmative *acts* with the purpose of fostering infringement.

D. The Ninth Circuit's "simple measures" approach is wrong, but also would require reversal.

The Ninth Circuit developed a narrow exception to the rule that a technology provider cannot be contributorily liable unless it takes affirmative acts to advance the infringement. It holds that some online service providers can be liable if they have "specific"

knowledge of infringement and can "take simple measures to prevent further damage to copyrighted works, yet continue[] to provide access to infringing works." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007) (citation modified). The Ninth Circuit has defined the required "simple measures" as steps that are "reasonable and feasible" to prevent a user from infringing. *Id.*; *see UMG Recordings, Inc. v. Grande Commc'ns Networks, LLC*, 118 F.4th 697, 716 (5th Cir. 2024) (adopting rule), *cert. pet. filed*, No. 24-967 (Mar. 10, 2025).

The simple-measures rule might be less extreme than the Fourth Circuit's approach, which imposes an absolute duty to terminate service regardless of how unreasonable it would be to do so. But the simple-measures rule also plainly contradicts this Court's rulings, in *Grokster*, *Twitter*, and *Smith & Wesson*: It flouts this Court's prior rulings that liability cannot be based on "failure to take affirmative steps to prevent infringement." *Grokster*, 545 U.S. at 939 n.12. For all the reasons already explained, knowledge alone cannot transform nonfeasance into culpable conduct. And there is no exception to this rule just because a court or jury deems the affirmative steps "simple."

That said, liability would still be improper on this record even under the simple-measures test. The Ninth Circuit has never applied the simple-measures rule to a provider of communications infrastructure, but instead only in the limited context where a platform or website knows that its own servers provide ready access to a specific infringing work (e.g., a copyrighted photo) and it is easy to just remove that

specific material. *See, e.g.*, *VHT, Inc. v. Zillow Grp.*, 918 F.3d 723, 745-46 (9th Cir. 2019). In such circumstances, the service provider has complete control over and visibility into content that it is storing. Moreover, the act of removing or disabling access to the particular work is costless, technologically basic, and exactly proportional to the infringing act that resulted in the unlawful copy or distribution of the work. Though the Fifth Circuit has extended the rule to apply beyond content hosts to all online providers, even it acknowledged that the rule does not require a business to develop capabilities that it does not already have. *Grande*, 118 F.4th at 716; *see VHT*, 918 F.3d at 745.

By no stretch could that test justify imposing liability on Cox for failing to take the nuclear option of terminating the internet connections of entire homes, businesses, or barracks for infringements worth on average $1 each. *Supra* 15. That draconian measure is hardly "reasonable and feasible," *Perfect 10,* 508 F.3d at 1172—and certainly it is not uniformly so for each of the 57,000 customers whose infringement was the basis of Cox's liability. After all, they received an average of only 2.8 infringement notices each. J.A.208. And the verdict the Fourth Circuit affirmed imposed liability on Cox for failing to terminate any customer who garnered two accusations. It is not reasonable to terminate the internet connection of an entire household, business, or barracks based on two accusations of infringement against an unidentified infringer.

Moreover, the steps Cox took to try to stop infringement far exceeded any definition of "simple

measures." *See Grande*, 118 F.4th at 718 (recognizing "Cox … implemented a 'graduated response system'" that counts favorably in the "basic measures" analysis). If simple measures were required, Cox met the requirement as a matter of law by voluntarily building a system from scratch—with warnings, suspensions, and sometimes even terminations—that dramatically reduced infringement and protected Plaintiffs and other rightsholders. *Supra* 10-12.

E. Only Congress can impose a new duty with such staggering consequences on internet services.

The liability theory the Fourth Circuit condoned will have a dramatic and widespread impact on the nation and its economy. The absolute number of accused customers in this case (57,000) is staggering even though it represents less than 1% of Cox's customer base. And that number of accounts does not capture the number of individuals in homes and businesses who rely on those internet connections. That is a massive universe of downstream users—the vast majority of whom had nothing to do with infringement.

Imposing liability on ISPs—on pain of $150,000 (or even only $30,000) per work—merely because they continue providing service after receiving accusations of infringement will have dangerous and drastic consequences. There is no legal framework to guide termination decisions or set the bounds of liability. Nothing to dictate how many notices are enough to cut the cord, over what period of time, with what frequency—let alone for accounts shared by an entire

family, business, or thousands of customers on a regional ISP. Nothing to govern when notices can be excused, how customers might object to them, or whether they carry the same weight when triggered by a hack, unauthorized guest, or child who now knows better. ISPs will have no choice but to err in favor of termination rather than face the crapshoot of trial by a jury deciding what was "reasonable."

Grandma will be thrown off the internet because Junior illegally downloaded a few songs on a visit. An entire barracks or corporation will lose internet because a couple of residents or visitors infringed. Even regional ISPs that supply internet, using a single Cox connection, to "thousands or tens of thousands" of their own customers, J.A.331, would be cut off—that is the only way Cox could have avoided liability for the dozen such ISPs accused in this case. Even with respect to individuals who did, in fact, infringe, loss of internet access is a heavy punishment for a few illegal downloads worth, on average, $1 each. *Supra* 15. Severing internet service could make the customers lose their jobs or force them to drop out of school. The consequence is particularly dire for rural customers with no other internet option—leaving terminated customers irreparably cut off from society. In short, ISPs would have to deny service that is integral to commerce, communication, and almost every aspect of daily life. *See* FCC, *The Affordable Connectivity Program* (Feb. 29, 2024), https://tinyurl.com/4x79nbpy (internet access "is not nice-to-have, it's need-to-have").

These sorts of policy determinations should not be delegated to lay juries, without the slightest

suggestion from Congress that it endorsed such a mass eviction. The DMCA certainly is no such endorsement: It provides a *safe harbor* for ISPs and myriad other services providers, § 512(a)-(d), while expressly declaring that these safe harbors *do not* set the bounds of infringing or noninfringing conduct, § 512(*l*); *supra* 6-7. None of this suggests that Congress assumed ISPs would be liable in this specific context, as Plaintiffs suggest. Supp. Br. 7-8. Congress drafted the DMCA at the dawn of the digital age. Congress had no way to know how the internet would develop, what technologies ISPs might add to basic internet offerings, how they might interact with customers decades hence, or how copyright doctrine might evolve. Supplying a safe harbor showed at most that Congress expected *litigation*, not that it assumed liability. And again, § 512(*l*) directs courts *not* to assume liability based on "failure … to qualify for limitation of liability." Reading the DMCA to endorse contributory liability for modern ISPs does not effectuate Congress's intent—it defies it.

The consequences of liability upon notice extend far beyond the copyright realm. Because these common-law principles of secondary liability are not copyright-specific, ruling for Plaintiffs here will expose ISPs to tort liability for all manner of bad acts that occur on the internet. Just send the ISP a couple of accusations and they must either evict the accused or assume their liability.

Any such duty represents a serious threat to access and innovation, and it "enlarge[s] the scope of [Plaintiffs'] statutory monopolies to encompass control over" the internet itself. *Sony*, 464 U.S. at 421; *see*

Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 Stan. L. Rev. 1345, 1349, 1390 (2004) ("Suing facilitators reduces technological innovation."). Whether and under what circumstances to saddle every ISP across the country with such a drastic obligation—despite more than a century of common law—is not a question that should be entrusted to juries. It is a question of immense significance that only Congress is empowered to decide.

Courts faced with these kinds of momentous questions should adhere to "[t]he judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance." *Sony*, 464 U.S. at 431. If Congress had "wanted to impose a duty," it would have "done so by statute." *Twitter*, 598 U.S. at 501 n.14. Until Congress intervenes to expand and carefully define the scope of ISP liability, this Court should apply its longstanding precedent and reverse.

II. Cox's Response To Its Customers' Infringement Was Not Willful Unless Cox Knew (Or Recklessly Disregarded) That Its Own Actions Were Infringing.

The Fourth Circuit's unique willfulness standard provides an independent basis for reversing the judgment below. Under the Fourth Circuit's willfulness test, a plaintiff need prove only that the defendant knew *the direct* infringer's conduct was infringing—here, that Cox "had knowledge that *its subscribers' actions* constituted infringement of plaintiffs' copyrights." J.A.395 (emphasis added). The Fourth Circuit therefore allows a finding of willful secondary

infringement based on the very same knowledge of direct infringement it thought sufficient to establish liability, even if the accused infringer reasonably believed that its own conduct was perfectly legal. This automatically makes every contributory infringer a willful infringer subject to a fivefold increase in statutory damages.

That is wrong. A defendant's conduct is not willful unless it knew (or, at a minimum, recklessly disregarded a high risk) that *its own conduct* was wrongful.[2] That rule applies to secondary infringers the same as it does direct infringers. The district court's willfulness jury instruction was therefore wrong as a matter of law, and this Court should reverse and remand for a new trial before a properly instructed jury.

A. Because the Copyright Act does not define the word "willfully," the analysis proceeds "under the general rule that a common law term in a statute comes with a common law meaning." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 58 (2007). Willfulness has always turned on the defendant's understanding of the legality of its own conduct, as lower courts and secondary authorities unanimously recognize.

At common law, "willful" describes "the attitude of a [defendant], who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." *United States v. Ill. Cent. R.R. Co.,* 303 U.S. 239, 243 (1938) (cattle-herding statute). Conduct is willful where the actor "'*knew*

[2] Whether recklessness is sufficient is debatable, but not disputed here. This Court need not resolve that issue.

or showed reckless disregard for the matter of whether *its conduct* was prohibited.'" *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985) (emphasis added) (Age Discrimination in Employment Act). A defendant must knowingly or recklessly "fall[] down in its duty." *Safeco*, 551 U.S. at 68 (Fair Credit Reporting Act). This is the rule in criminal law, too: A defendant is considered willful if he acted "with *knowledge* that *his conduct* was unlawful." *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) (emphasis added).

Copyright authorities identifying the standard for willfulness generally—that is, without regard to whether the defendant is a direct or secondary infringer—are in accord. *See Goldstein on Copyright* § 14.2.1 (willfulness requires that the "defendant knew, or recklessly disregarded the fact, that its conduct constituted copyright infringement"); 5 *Nimmer on Copyright* § 14.04 ("'[W]illfully' means with knowledge that the defendant's conduct constitutes copyright infringement."); 6 *Patry on Copyright* § 22:180 (courts have developed two approaches to willfulness, which require knowledge of "the actual consequences of one's conduct" or "reckless disregard for the possibility that the conduct is infringing").

Conversely, "[i]f [a defendant] acts reasonably in determining *its legal obligation*," "its action cannot be deemed willful." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988) (emphasis added); *see id.* at 135 ("a finding of willfulness" cannot "be based … on a completely good-faith but incorrect assumption"). Even if the defendant "acts unreasonably, but not recklessly, in determining its legal

obligation, … it should not be … considered" willful. *Id.* at 135 n.13.

Simply put, a violation is a wrong, while a *willful* violation is a wrong committed with knowledge (or reckless disregard of a high risk) that it is a wrong. Someone who reasonably believes they are not violating the law therefore cannot be willful. *See Willful*, *Black's Law Dictionary* (12th ed. 2024) ("A [1] voluntary act becomes willful, in law, only when it involves [2] conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong.").

B. This standard comports with the "purpose" for which the law typically (and § 504(c), specifically) employs the "word 'willfully'": to impose some "element of mens rea" that separates instances of "bad faith" from situations involving "difference of opinion or innocent errors made despite the exercise of reasonable care." *United States v. Bishop*, 412 U.S. 346, 360-61 (1973) (citation modified).

For example, the closely related standards governing "eligibility for punitive awards" likewise turn on "a defendant's motive or intent." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 538 (1999); *see* J.A.395 (authorizing jury to base award on punishment). A punitive award is inappropriate unless the defendant acted with "wrongful purpose or intent," and has no place when the defendant reasonably believes its conduct fulfills its legal duties. Restatement (Second) of Torts § 908 cmt. b (1979).

The principle applies with equal force to defendants, like Cox, found secondarily liable. *Kolstad*, for instance, involved an employer who was secondarily liable for an employee's civil-rights violation. This Court held it was improper to impose punitive damages on the employer where the employer made "good faith efforts to comply" with its legal obligations. 527 U.S. at 544. This is because "[w]here an employer has undertaken such good faith efforts at … compliance, it demonstrat[es] that [the employer]"—in contrast to the primary violator—"never acted in reckless disregard of federally protected rights." *Id.* (citation modified).

Similarly, in the patent context, this Court has recognized that enhanced damages are properly keyed to a defendant's "culpability"—meaning its contemporaneous understanding of whether *its own* conduct constitutes infringement. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 105 (2016). Enhanced damages are inappropriate unless the infringer's state of mind was "willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate." *Id.* at 103-04. Where, however, the defendant had "reason to suppose his conduct is arguably defensible," enhanced damages are not appropriate. *Id.* at 105; *see id.* at 97-98 (explaining longstanding history of rejecting enhanced damages when a defendant "'acted in ignorance or good faith'" or "'did not intend any infringement'") (quoting *Seymour v. McCormick*, 57 U.S. (16 How.) 480, 488 (1854), and *Hogg v. Emerson*, 52 U.S. (11 How.) 587, 607 (1850)).

C. The text and structure of § 504(c) confirm that willfulness works the same way in the copyright context as in each of these other contexts—including with regard to secondary infringers. Section 504 sets out "[d]amages and profits" available against "infringer[s] of copyright," with no distinction between direct and secondary infringers. Subsection (c)(2) then premises the potential for enhanced damages on proof that "*the infringement was committed* willfully." That is, the availability of enhanced damages depends on the willful quality of "the infringement" that the "infringer" "committed." Whether the infringer and infringement are direct or secondary, the focus is the infringer's state of mind with respect to its own violation. *Cf. Ratzlaf*, 510 U.S. at 146-47 (concluding that statutory phrase "'willfully violating' … signal[ed] [Congress's] intent to require" a plaintiff to prove the defendant knew that his actions violated his own legal duty).

That makes sense in light of § 504(c)'s tiered damages structure and the role of "willfulness" in that framework. The statute sets a baseline statutory-damages range of $750 to $30,000 per work. § 504(c)(1). It then uses states of mind (attached to differing burdens of proof) to ratchet the range up or down. Where the defendant takes on the burden to prove "that such infringer was not aware and ha[s] no reason to believe that *his or her acts* constituted an infringement," the lower end of the range drops to $200 per work. § 504(c)(2) (emphasis added). Where the plaintiff proves that "the infringement was committed willfully," the upper end of the range rises to $150,000. *Id.* It stands to reason that this, too, turns on the defendant's understanding that "his or her acts" are unlawful. The tiered framework, moreover,

reflects that willfulness is an enhanced-damages provision akin to ones discussed above (at 49-51). *See* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439, 461-62 (2009) (enhanced "statutory damage awards are … punitive in character"); 6 *Patry on Copyright* § 22:151.

The Copyright Act's nearby criminal provision, § 506, further reinforces the point. It imposes criminal liability only on those who "willfully infringe[] a copyright." When the word "willful" is used criminally, there is no question that "something more is required than the doing of the act proscribed by the statute. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime." *Screws v. United States*, 325 U.S. 91, 101 (1945) (citations omitted). Congress "presumably intended the term [willfulness] to approximate the state of mind … [for] criminal copyright infringement," which was already in the statute when Congress added § 504. *Goldstein on Copyright* § 14.2.1. "[I]dentical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007).

D. The Fourth Circuit did not address any of the controlling authorities on willfulness, nor the statutory text or structure. The sole rationale it offered was that "knowledge that one's subscribers are infringing is consistent with at least reckless disregard for the copyright holder's rights." *BMG*, 881 F.3d at 313. The court posited that a defendant who knows the direct infringer was infringing might well also be reckless.

But that is not necessarily so—and there is definitely no such equivalence where case law has not yet defined the secondary actor's duties.

Moreover, the Fourth Circuit's formulation—"reckless disregard for the copyright holder's rights," *BMG*, 881 F.3d at 313—was borrowed from direct-infringement cases, where it is sometimes used as shorthand to describe the willfulness inquiry. *E.g.*, *Island Software & Comput. Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005). A direct infringer who knows (or recklessly disregards the likelihood) that he, himself, is infringing necessarily "'disregard[s]' … the copyright holder's rights." But the shorthand does not necessarily hold for secondary infringers. And there is no freestanding concept of "disregarding the copyright holder's rights" that somehow obviates the need to show that the defendant was willful with respect to "the infringement" that the defendant itself committed. § 504(c).

E. Cox's proposed willfulness instruction stated the proper legal standard. Under it, Plaintiffs would have had to prove "either" that "Cox knew that its actions constituted contributory or vicarious infringement" or that "Cox acted with reckless disregard for its contributory or vicarious infringement." J.A.89. A properly instructed jury could certainly have rejected willfulness on this record, for reasons discussed above (at 9-12). Under Cox's pioneering anti-infringement program, just a few of Cox's warnings caused infringement to stop on 87% of accused accounts, and ultimately all but 2% (of the 1% of accused accounts) stopped infringing. *Supra* 10-11. It was entirely reasonable for Cox to conclude that its efforts were legal,

and that it could continue to provide internet service without violating the law.

This is especially so because, at the time, no case supported the notion that an ISP is required to terminate whole homes and businesses from the internet based on automated infringement accusations. *See Safeco*, 551 U.S. at 70 (recognizing lack of appellate court guidance as relevant to willfulness). Cox and an army of amici, including the United States, continue to believe that the Fourth Circuit's unprecedented view is not the law. *See, e.g.*, U.S. Cert. Br. 8-14. This Court should protect the nation's critical infrastructure by holding that Cox (and the United States) are right. But at a minimum, a jury could have found Cox's position reasonable.

CONCLUSION

This Court should reverse the liability verdict or, at a minimum, remand for retrial under the proper willfulness standard.

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Statutory Addendum

17 U.S.C. § 106 ..... 1a

17 U.S.C. § 501 ..... 2a

17 U.S.C. § 504 ..... 4a

17 U.S.C. § 512 ..... 7a

17 U.S.C. § 106

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

* * * * *

17 U.S.C. § 501

§ 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall

permit the intervention, of any person having or claiming an interest in the copyright.

(c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

(d) For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to section 111(c)(3), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs.

(e) With respect to any secondary transmission that is made by a satellite carrier of a performance or display of a work embodied in a primary transmission and is actionable as an act of infringement under section 119(a)(3), a network station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that station.

(f)(1) With respect to any secondary transmission that is made by a satellite carrier of a performance or

display of a work embodied in a primary transmission and is actionable as an act of infringement under section 122, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local market of that station.

(2) A television broadcast station may file a civil action against any satellite carrier that has refused to carry television broadcast signals, as required under section 122(a)(2), to enforce that television broadcast station's rights under section 338(a) of the Communications Act of 1934.

* * * * *

17 U.S.C. § 504

§ 504. Remedies for infringement: Damages and profits

(a) In General.—Except as otherwise provided by this title, an infringer of copyright is liable for either—

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) Actual Damages and Profits.—The copyright owner is entitled to recover the actual damages

suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) Statutory Damages.—

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its

discretion may reduce the award of statutory damages to a sum of not less than $200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in section 118(f)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

(3)(A) In a case of infringement, it shall be a rebuttable presumption that the infringement was committed willfully for purposes of determining relief if the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the infringement.

(B) Nothing in this paragraph limits what may be considered willful infringement under this subsection.

(C) For purposes of this paragraph, the term "domain name" has the meaning given that term in section 45 of the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes" approved July 5, 1946 (commonly referred to as the "Trademark Act of 1946"; 15 U.S.C. 1127).

(d) Additional Damages in Certain Cases.—In any case in which the court finds that a defendant proprietor of an establishment who claims as a defense that its activities were exempt under section 110(5) did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.

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17 U.S.C. § 512

§ 512. Limitations on liability relating to material online

(a) Transitory Digital Network Communications.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system

or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

(b) System Caching.—

(1) Limitation on liability.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which—

(A) the material is made available online by a person other than the service provider;

(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and

(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A),

if the conditions set forth in paragraph (2) are met.

(2) Conditions.—The conditions referred to in paragraph (1) are that—

(A) the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person described in paragraph (1)(A);

(B) the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;

(C) the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology—

(i) does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;

(ii) is consistent with generally accepted industry standard communications protocols; and

(iii) does not extract information from the provider's system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

(D) if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and

(E) if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if—

(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

(c) Information Residing on Systems or Networks At Direction of Users.—

(1) In general.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) Designated agent.—The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) Elements of notification.—

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B)(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in

determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

(d) Information Location Tools.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider—

(1)(A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

(e) Limitation on Liability of Nonprofit Educational Institutions.—(1) When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of subsections (a) and (b) such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution, if—

(A) such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the

preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;

(B) the institution has not, within the preceding 3-year period, received more than two notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and

(C) the institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.

(2) For the purposes of this subsection, the limitations on injunctive relief contained in subsections (j)(2) and (j)(3), but not those in (j)(1), shall apply.

(f) Misrepresentations.—Any person who knowingly materially misrepresents under this section—

(1) that material or activity is infringing, or

(2) that material or activity was removed or disabled by mistake or misidentification,

shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity

claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

(g) Replacement of Removed or Disabled Material and Limitation on Other Liability.—

(1) No liability for taking down generally.—Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

(2) Exception.—Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider—

(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

(B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed

material or cease disabling access to it in 10 business days; and

(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

(3) Contents of counter notification.—To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following:

(A) A physical or electronic signature of the subscriber.

(B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.

(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

(D) The subscriber's name, address, and telephone number, and a statement that the subscriber

consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

(4) Limitation on other liability.—A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).

(h) Subpoena to Identify Infringer.—

(1) Request.—A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.

(2) Contents of request.—The request may be made by filing with the clerk—

(A) a copy of a notification described in subsection (c)(3)(A);

(B) a proposed subpoena; and

(C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such

information will only be used for the purpose of protecting rights under this title.

(3) Contents of subpoena.—The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider.

(4) Basis for granting subpoena.—If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.

(5) Actions of service provider receiving subpoena.—Upon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service provider shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.

(6) Rules applicable to subpoena.—Unless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance

with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum.

(i) Conditions for Eligibility.—

(1) Accommodation of technology.—The limitations on liability established by this section shall apply to a service provider only if the service provider—

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.

(2) Definition.—As used in this subsection, the term "standard technical measures" means technical measures that are used by copyright owners to identify or protect copyrighted works and—

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

(j) Injunctions.—The following rules shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies under this section:

(1) Scope of relief.—

(A) With respect to conduct other than that which qualifies for the limitation on remedies set forth in subsection (a), the court may grant injunctive relief with respect to a service provider only in one or more of the following forms:

(i) An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider's system or network.

(ii) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(iii) Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service

provider among the forms of relief comparably effective for that purpose.

(B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms:

(i) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is using the provider's service to engage in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(ii) An order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States.

(2) Considerations.—The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider—

(A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;

(B) the magnitude of the harm likely to be suffered by the copyright owner in the digital network

environment if steps are not taken to prevent or restrain the infringement;

(C) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations; and

(D) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

(3) Notice and ex parte orders.—Injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to appear are provided, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network.

(k) Definitions.—

(1) Service provider.—

(A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term "service provider" means a provider

of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

(2) Monetary relief.—As used in this section, the term "monetary relief" means damages, costs, attorneys' fees, and any other form of monetary payment.

(l) Other Defenses Not Affected.—The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense.

(m) Protection of Privacy.—Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on—

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or

(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

(n) Construction.—Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a

determination of whether that service provider qualifies for the limitations on liability under any other such subsection.