

## APPENDIX

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**APPENDIX A**

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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No. 23-50162

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UMG RECORDINGS, INCORPORATED; CAPITOL  
RECORDS, L.L.C.; WARNER BROS. RECORDS,  
INCORPORATED; SONY MUSIC  
ENTERTAINMENT; ARISTA RECORDS, L.L.C.;  
ARISTA MUSIC; ATLANTIC RECORDING  
CORPORATION; CAPITOL CHRISTIAN MUSIC  
GROUP, INCORPORATED; ELEKTRA  
ENTERTAINMENT GROUP, INCORPORATED;  
FONOVISA, INCORPORATED; FUELED BY  
RAMEN, L.L.C.; LAFACE RECORDS, L.L.C.;  
NONESUCH RECORDS, INCORPORATED;  
RHINO ENTERTAINMENT COMPANY;  
ROADRUNNER RECORDS, INCORPORATED;  
ROC-A-FELLA RECORDS, L.L.C.; TOOTH &  
NAIL, L.L.C.; ZOMBA RECORDING, L.L.C.,  
Plaintiffs-Appellees/Cross-Appellants,

v.

GRANDE COMMUNICATIONS NETWORKS,  
L.L.C.,  
Defendant-Appellant/Cross-Appellee.

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Filed: October 9, 2024

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:17-CV-365

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Before HIGGINBOTHAM, STEWART, and  
HIGGINSON, Circuit Judges.

**OPINION**

STEPHEN A. HIGGINSON, Circuit Judge:

This appeal arises from an action filed by Plaintiffs-Appellees/Cross-Appellants, a group of major record labels (collectively “Plaintiffs”), against Defendant-Appellant/Cross-Appellee Grande Communications Networks, LLC (“Grande”), a large internet service provider (“ISP”) in Texas, for contributory copyright infringement. Judgment was entered below in Plaintiffs’ favor following a three-week jury trial, in which ten jurors unanimously found Grande liable for willful contributory copyright infringement. The jury awarded Plaintiffs \$46,766,200 in statutory damages pursuant to the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* (“the Copyright Act”). During trial, Grande moved orally for judgment as a matter of law (“JMOL”) on the issue of its liability, which the district court denied. Grande renewed its motion for JMOL and, alternatively, a new trial on the issue of statutory damages, which the court again denied.

On appeal, Grande challenges the district court’s rulings reflected in (1) the order denying Grande’s renewed motion for JMOL or a new trial, including its reference back to legal questions previously resolved at summary

judgment; (2) the jury instructions; and (3) the final judgment. Plaintiffs' conditional cross-appeal challenges one ruling made by the district court in its jury instructions.

We hold that the district court did not err in concluding the jury's verdict finding Grande liable for contributory copyright infringement was supported both as a matter of law and by sufficient evidence, so we do not reach Plaintiffs' conditional cross-appeal. However, the district court erred in granting JMOL that each of the 1,403 songs in suit was eligible for a separate award of statutory damages. Accordingly, we AFFIRM the jury's verdict finding Grande liable for contributory copyright infringement; VACATE the jury's damages award and REMAND for a new trial on damages; and DISMISS Plaintiffs' conditional cross-appeal as moot.

## I.

### A.

This appeal follows a judgment entered in Plaintiffs' favor following a three-week jury trial. After hearing all the evidence, ten jurors unanimously found Grande liable for willful contributory copyright infringement. The jury awarded Plaintiffs \$46,766,200 in statutory damages pursuant to the Copyright Act. That award was based on Plaintiffs' presentation of the facts below, which we must "credit" just as the jury did. *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 620 (5th Cir. 2013) (citation omitted).

#### 1.

Peer-to-peer ("P2P") file-sharing networks have existed for decades and enable internet users to copy and

distribute digital files directly to each other. Notable examples over the years include Napster, Grokster, KaZaA, and LimeWire. P2P networks have been used to facilitate the unauthorized distribution of copies of copyrighted works. Each of the P2P networks mentioned above was sued by copyright owners for secondary copyright infringement, adjudicated to be liable, and shut down as a result.

P2P networks have evolved over time, making them increasingly difficult for copyright owners to police. Plaintiffs argued at trial that the P2P network BitTorrent substantially limits the ability of copyright owners to protect their rights in two important ways. First, BitTorrent is decentralized, meaning that no single company or entity manages the distribution of its software. Thus, there is no “BitTorrent” entity that can be sued like Napster or Grokster were. Second, BitTorrent is “anonymous,” meaning that its users cannot be identified by their names or physical addresses. Rather, BitTorrent identifies users only by their “IP addresses,” which are unique strings of characters identifying particular devices connected to networks run by various ISPs. Only the ISPs operating those networks possess the records necessary to match specific IP addresses to specific internet users.

To crack down on copyright infringement, third-party companies have developed technologies to infiltrate BitTorrent and identify infringing users by their IP addresses. One such company is Rightscorp, Inc. (“Rightscorp”). Rightscorp’s proprietary technology:

- Interacts with BitTorrent users and obtains their agreement to distribute unauthorized copies of copyrighted works

- Records the relevant available details of that agreement, such as the user's IP address and what the infringed content is;
- Cross-references the user's IP address against publicly available databases to identify which ISP is affiliated with that IP address;
- Generates and sends infringement notices to the relevant ISPs so that they can identify their infringing subscribers and take appropriate action; and
- Frequently reconnects with the identified infringing IP addresses and downloads copies of the copyrighted works at issue directly from those users

In other words, Rightscorp identifies infringing conduct on BitTorrent by engaging with BitTorrent users, documents that conduct, and uses the information available to it to notify ISPs of its findings so that the ISP can take appropriate action.<sup>1</sup>

## 2.

The efficacy of Rightscorp's technology is dependent on the participation of the ISP. Only the ISPs possess the records necessary to match specific IP addresses to specific individual subscribers. Thus, when Rightscorp sends its notices to ISPs informing them of the IP addresses of their subscribers engaging in specific infringing conduct, the ISPs are the only parties capable of identifying the infringing subscribers and addressing their misconduct.

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<sup>1</sup> Grande disputes Plaintiffs' characterization of Rightscorp as innocuously seeking to help ISPs reduce infringement by their subscribers, pointing to Rightscorp's profit motive as driving the high volume of notices it sent to Grande.

Because ISP involvement is critical to stemming the tide of copyright infringement, copyright law incentivizes ISPs to participate in addressing the conduct of their infringing subscribers. Specifically, 17 U.S.C. § 512, enacted as part of the Digital Millennium Copyright Act (“DMCA”), gives ISPs a complete defense (a “safe harbor”) to claims seeking damages for copyright infringement based on the activities of their users. That safe-harbor defense is available to ISPs only if they meet certain threshold requirements, including that they have “adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers . . . who are repeat infringers.” 17 U.S.C. § 512(i)(1)(A). However, § 512 also provides that an ISP’s failure to qualify for the safe harbor “shall not bear adversely upon the consideration of a defense by the [ISP] that [its] conduct is not infringing under this title or any other defense.” *Id.* § 512(l); see *BWP Media USA, Inc. v. T & S Software Assocs., Inc.*, 852 F.3d 436, 443-44 (5th Cir. 2017) (explaining that “the DMCA’s safe harbor for ISPs is a floor, not a ceiling, of protection” (cleaned up)). Section 512 thus balances the interests of copyright owners (who need the help of ISPs to stop mass infringements by subscribers of their networks) and ISPs (who are immunized from infringement claims seeking damages if they take steps to address their infringing subscribers).

### 3.

In the early 2000s, Grande began addressing copyright infringement by its subscribers through an “abuse process,” which the company employed to address illicit activity conducted on its network. At that time, when Grande received an infringement notice about one of its



subscribers, Grande disconnected that subscriber's service. Grande then informed the subscriber and applied "punitive measures" if the conduct continued. One of Grande's trial witnesses agreed that subsequent infringements by the same subscriber "led to account termination."<sup>2</sup>

However, in 2009, the private equity firm ABRY Partners purchased Grande and installed a different company to manage Grande's operations. In October 2010, that company changed Grande's policy. Under Grande's new policy, Grande no longer terminated subscribers for copyright infringement, no matter how many infringement notices Grande received. As Grande's corporate representative at trial admitted, Grande "could have received a thousand notices about a customer, and it would not have terminated that customer for copyright infringement." Further, under Grande's new policy, Grande did not take other remedial action to address infringing subscribers, such as suspending their accounts or requiring them to contact Grande to maintain their services. Instead, Grande would notify subscribers of copyright infringement complaints through letters that described the nature of the complaint and possible causes and advised that any infringing conduct is unlawful and should cease.

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<sup>2</sup> At trial, Grande disputed whether account terminations occurred during this time period, and it maintains on appeal that the trial evidence showed that before 2010, it only "occasionally suspended" subscribers' service "on an ad hoc basis" in response to infringement notices. But Grande's corporate representative testified at his deposition that Grande "did terminate subscribers for copyright infringement" during this period. At trial, that witness testified that Grande did not "permanently terminate" subscribers' accounts during that period, but as Plaintiffs note, the jury was entitled to rely on his prior statement, as well as the similar trial testimony of a colleague.

Grande maintained that policy for nearly seven years, until May 2017.

In 2011, Rightscorp began sending notices via email to Grande (and other ISPs), pursuant to an agreement it had with certain music publishing companies. Between 2011 and when Plaintiffs filed this lawsuit in April 2017, Rightscorp sent more than 1.3 million infringement notices to Grande, approximately 317,000 of which concerned works in this suit. Each notice documented a specific instance of a Grande subscriber agreeing to distribute a copy of a copyrighted work without authorization. These emails asked the ISP to forward the notice to the relevant subscriber and included a link for the subscriber to contact Rightscorp and settle the claim for a small sum (e.g., \$30). Rightscorp also sent periodic “roll-up reports” to Grande, each of which summarized the infringement notices that Rightscorp had previously sent to Grande. The jury learned that in one year alone, Grande had been advised that more than forty of its subscribers had infringed over 1,000 times and that one subscriber had infringed nearly 14,000 times.

During the period when Grande was receiving Rightscorp’s notices but had a policy not to terminate subscribers’ accounts for copyright infringement, one of Grande’s employees wrote an email to his colleagues explaining that Grande’s policy had “no limits” and that some of Grande’s subscribers were “up to their 54th notice” with “no process for remedy in place.” That employee testified at trial that, in April 2013, he “was concerned” that Grande was not in compliance with the law. But Grande did not change its policy.

Nor did Grande change its policy after learning in December 2015 that a different ISP, Cox Communications

(“Cox”), had been found liable for secondary copyright infringement based on its continued provision of internet services to subscribers it knew were infringing based upon its receipt of Rightscorp’s notices. *See BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 149 F. Supp. 3d 634 (E.D. Va. 2015), *aff’d in part, rev’d in part*, 881 F.3d 293 (4th Cir. 2018).

Shortly thereafter, Grande undertook an internal investigation to determine how many Rightscorp notices it had received over the years and had internal discussions about a letter Rightscorp sent to Grande a year earlier seeking a meeting to discuss how they could work collaboratively to address infringements by Grande’s subscribers. Yet Grande chose not to change its policy or meet with Rightscorp. It was not until after Plaintiffs initiated this lawsuit that Grande resumed terminating subscribers for copyright infringement.

Grande’s policy during the nearly seven years at issue in this case not to terminate subscribers for copyright infringement contrasted with its policy during the same time period regarding subscribers who did not pay Grande’s monthly fees. The trial record established that Grande consistently terminated the accounts of all subscribers who stopped paying Grande’s fees during that period. One of Grande’s witnesses admitted that Grande terminated non-paying subscribers 100% of the time and that, during the time period relevant to this case, Grande terminated “thousands” of subscribers for nonpayment.

**B.****1.**

In April 2017, Plaintiffs filed suit against Grande, alleging claims for both contributory and vicarious copyright infringement under the Copyright Act. The district court dismissed the vicarious-infringement claim at the pleading stage and Plaintiffs do not dispute its dismissal on appeal.

After discovery, the parties cross-moved for summary judgment. Grande asserted that it qualified for the DMCA safe-harbor defense, but the district court held that Grande was not entitled to that defense as a matter of law. Grande does not dispute that ruling on appeal.

The district court otherwise denied the parties' cross-motions on liability, concluding that fact issues precluded the resolution of Plaintiffs' contributory-infringement claim as a matter of law. Accordingly, that claim went to trial.

**2.**

A jury of ten jurors was impaneled in Austin, Texas in October 2022. Trial was held from October 12, 2022, through November 1, 2022.

During trial, Grande moved orally for JMOL on the issue of its liability, which the district court denied. After deliberating for a day and a half, the jury returned a verdict, finding that Grande was liable for contributory copyright infringement of 1,403 of Plaintiffs' sound recordings. The jury also found that Grande's infringement was

willful.<sup>3</sup> The jury awarded \$46,766,200 total in statutory damages, or \$33,333 per song. *See* 17 U.S.C. § 504(c)(1-2) (setting statutory damages at up to \$30,000 per work, or up to \$150,000 per work if the infringement was willful).

The district court entered a final judgment in January 2023. In February 2023, Grande renewed its motion for JMOL and, alternatively, a new trial. Grande filed a notice of appeal a few days later, and Plaintiffs filed their notice of conditional cross-appeal shortly thereafter. After the district court denied Grande’s post-judgment motion in May 2023, Grande amended its notice of appeal in June 2023 to add that ruling.

### 3.

Grande’s appeal challenges the district court’s rulings reflected in (1) the order denying Grande’s renewed motion for JMOL or a new trial, including its reference back to legal questions previously resolved at summary judgment; (2) the jury instructions; and (3) the final judgment. Plaintiffs’ cross-appeal, which is conditional on a determination that this case must be remanded to the district court for a new trial, challenges one ruling made by the district court in its jury instructions.

## II.

We have jurisdiction over Grande’s appeal from a final judgment under 28 U.S.C. § 1291. We also have jurisdiction over Plaintiffs’ conditional cross-appeal, which is

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<sup>3</sup> Grande has abandoned any challenge to the jury’s finding that its infringement was willful by failing to brief it. *See Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021).

timely.<sup>4</sup> *See Art Midwest Inc. v. Atl. Ltd. P'ship XII*, 742 F.3d 206, 211 (5th Cir. 2014) (holding that “a party who prevails in the district court is permitted to conditionally raise issues in a cross-appeal” in furtherance of “the important value of procedural efficiency” (internal quotation marks and citations omitted)); Fed. R. App. P. 4(a)(3) (providing that “[i]f one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed”).

The district court’s legal rulings are reviewed de novo.<sup>5</sup> *Janvey v. Dillon Gage, Inc. of Dallas*, 856 F.3d 377, 384 (5th Cir. 2017).

“We review a district court’s denial of a motion for judgment as a matter of law de novo, applying the same standards as the district court.” *Id.* “Under Rule 50, a court should render judgment as a matter of law when ‘a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.’” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000) (quoting Fed. R. Civ. P. 50(a)). When a party challenges the denial of a motion for JMOL following a jury trial, our review is “especially deferential” to the jury’s verdict. *Olibas v. Barclay*, 838 F.3d 442, 448 (5th Cir. 2016) (citation omitted). We must “credit the non-moving party’s evidence and disregard all evidence favorable to the moving party that the jury is not required to believe.” *Abraham*, 708

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<sup>4</sup> Although we have jurisdiction over Plaintiffs’ cross-appeal, we do not reach it for the reasons explained *infra* n.15.

<sup>5</sup> As the district court correctly observed, Grande preserved its challenges to the district court’s legal conclusions.

F.3d at 620 (cleaned up). That is because “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” *Reeves*, 530 U.S. at 150 (citation omitted).

Our court has not decided the standard for reviewing what constitutes a “work” for statutory damages purposes, but other circuits treat it as a mixed question of fact and law subject to de novo review. *See, e.g., VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 739 (9th Cir. 2019); *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255, 1277 (11th Cir. 2015); *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140 (2d Cir. 2010). Where, as here, legal questions (such as statutory interpretation) predominate, we review mixed questions of fact and law de novo. *See Beech v. Hercules Drilling Co.*, 691 F.3d 566, 569 (5th Cir. 2012).

“Jury instructions are reviewed for abuse of discretion.” *Janvey*, 856 F.3d at 388. While the scope of review requires us to consider the charge as a whole, *Mid-Continent Cas. Co. v. Petroleum Sols., Inc.*, 917 F.3d 352, 357 (5th Cir. 2019), “[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions,” *Koon v. United States*, 518 U.S. 81, 100 (1996). “A district court by definition abuses its discretion when it makes an error of law.” *Id.* Thus, when a challenged jury instruction hinges on a question of law, review is de novo. *GE Cap. Com., Inc. v. Worthington Nat’l Bank*, 754 F.3d 297, 302 (5th Cir. 2014). However, an erroneous jury instruction is reversible only if it “affected the outcome of the case.” *Mid-Continent*, 917 F.3d at 357 (citation omitted).

### III.

Pursuant to longstanding principles of secondary copyright liability, Plaintiffs' claim against Grande for contributory copyright infringement had four elements. In order to prove direct infringement by Grande's subscribers, Plaintiffs had to show (1) that Plaintiffs own or have exclusive control over valid copyrights and (2) that those copyrights were directly infringed by Grande's subscribers. *See BWP Media USA*, 852 F.3d at 439. To further prove that Grande was secondarily liable for its subscribers' conduct, Plaintiffs had to demonstrate (3) that Grande had knowledge of its subscribers' infringing activity and (4) that Grande induced, caused, or materially contributed to that activity. *See Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 790 (5th Cir. 1999). The district court did not err in upholding the jury's unanimous liability verdict because Plaintiffs satisfied each element legally and factually. The court correctly interpreted the law and instructed the jury on the relevant legal standards in light of the factual issues disputed by the parties, and Plaintiffs introduced ample evidence from which a reasonable jury could find in Plaintiffs' favor. We discuss each of those four elements in turn.

#### A.

To establish ownership, a "plaintiff must prove that the material is original, that it can be copyrighted, and that he has complied with statutory formalities." *Lakedreams v. Taylor*, 932 F.2d 1103, 1108 (5th Cir. 1991). The requisite statutory formalities are receipt of the application for registration, fee, and deposit by the copyright office. *Id.*



At summary judgment, Plaintiffs submitted declarations establishing the chains of title by which they came to own or exclusively control the copyrights in each work in suit. Grande did not dispute the validity of this evidence on the merits. Accordingly, the district court reasoned that Plaintiffs' unrebutted evidence was "sufficient to prove ownership" as a matter of law and did not include ownership as an issue of fact remaining to be resolved in the case.

The district court reaffirmed this ruling multiple times. In its ruling on the parties' motions *in limine* before trial, the district court confirmed that it had "already ruled on ownership" and held that "[o]wnership is not a remaining issue for trial." In its jury instructions, the district court instructed that the "issue [of ownership] has already been resolved, and you do not need to decide it." The district court also indicated at the jury-charge conference that there was "no question" that Plaintiffs own or control the works in suit. And when addressing Grande's oral motion for JMOL, the district court reaffirmed these prior rulings, determining that "there's not been one shred of evidence anywhere that . . . plaintiffs in this case don't own those copyrights."

Grande did not challenge any of these rulings on the merits below, nor does it challenge them on appeal. Rather, Grande complains about the process by which the district court ruled on this issue in its procedural-history section. Grande has therefore forfeited any argument that Plaintiffs failed to establish ownership over the works in suit, *see Smith v. Sch. Bd. of Concordia Par.*, 88 F.4th 588, 594-96 (5th Cir. 2023), and the district court properly concluded that Plaintiffs satisfied the first element.

**B.**

To prove the second element—that the defendant copied constituent elements of the plaintiff’s work that are original—a plaintiff must establish “(1) factual copying and (2) substantial similarity.” *Baisden v. I’m Ready Prods., Inc.*, 693 F.3d 491, 499 (5th Cir. 2012) (citation omitted). Factual copying can be proven by either direct or circumstantial evidence. *Armour v. Knowles*, 512 F.3d 147, 152 (5th Cir. 2007) (per curiam). Substantial similarity requires proof that “the copyrighted expressions in the two works are sufficiently alike that the copyright to the original work has been infringed.” *Id.*

The district court instructed the jury that, to prove direct infringement, Plaintiffs needed to establish that each work in suit was “infringed by distributing any part of the copyrighted work without Plaintiffs’ authorization.” To find an unauthorized distribution, the jury could consider “direct or circumstantial evidence,” including “evidence that copyrighted content was offered or distributed to a third party who is investigating or monitoring infringing activity.”

Plaintiffs provided substantial evidence that Grande’s subscribers committed direct infringement. For each work in suit, Plaintiffs introduced testimony and documentary evidence that (1) Rightscorp reached an agreement with a Grande subscriber to distribute the work; (2) Rightscorp sent Grande a notice of infringement documenting that agreement; (3) Rightscorp re-approached Grande users who had previously agreed to distribute the work and obtained at least one (and usually more than

one) complete copy of the work from those Grande subscribers;<sup>6</sup> (4) Plaintiffs’ trade association, the Recording Industry Association of America, Inc. (“RIAA”), used an industry-standard software program called Audible Magic—which forensically analyzes the contents of digital audio files to determine if those files match the contents of files in a database that contains authorized authentic copies of Plaintiffs’ sound recordings—to verify that Rightscorp in fact downloaded each work at issue;<sup>7</sup>

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<sup>6</sup> The jury also heard testimony that data contained within the files Rightscorp downloaded from Grande’s subscribers verified the accuracy of Rightscorp’s notices. The processes by which Rightscorp generated notices and obtained downloads were both based on searching for the same underlying “hash value” by which the works in suit could be identified on BitTorrent. As one of Plaintiffs’ experts, Barbara Frederiksen-Cross, explained: A “hash value” is a unique “long string of letters and numbers” that is “generated mathematically based on the contents” of a particular digital file. Frederiksen-Cross testified that the chances that two files with the same hash value are in fact two different files is so “infinitesimally small” that it is “one followed by 26 to 50 different zeros.”

<sup>7</sup> An RIAA employee testified that over the course of his career, he has used Audible Magic “millions of times” to determine whether digital files downloaded from many different sources online are actual copies of Plaintiffs’ sound recordings in Audible Magic’s database. In all that use, Audible Magic never made a mistake in identifying the contents of a digital file. Indeed, one of Plaintiffs’ experts offered un rebutted testimony that Audible Magic’s error rate in identifying the contents of digital audio files is approximately one in three billion. And as the district court recognized, Plaintiffs’ use of Audible Magic to confirm that the digital files at issue were copies of their copyrighted works is a well-established practice in large-scale copyright infringement cases such as this one. *See, e.g., UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1012 (9th Cir. 2013); *Capitol Recs., LLC v. Escape Media Grp., Inc.*, No. 12-CV-6646, 2015 WL 1402049, at \*23 (S.D.N.Y. Mar. 25, 2015) (collecting cases); *UMG*

and (5) each Plaintiff had an employee personally familiar with Plaintiffs' sound recordings listen to a random sample of fifty Rightscorp downloads, and those employees testified that the files they listened to were in fact copies of the sound recordings that Audible Magic identified and were owned by their respective companies.

Grande's key defense at trial was that Plaintiffs' evidence of direct infringement was unreliable. On appeal, Grande does not challenge any of the evidence of direct infringement that Plaintiffs offered. Grande instead asserts that because Plaintiffs did not introduce the copyrighted songs at issue into evidence, the jury could not conduct a side-by-side comparison of the works, and thus could not find that the allegedly infringing works were substantially similar to the works owned by Plaintiffs.

To support its argument, Grande relies principally on this court's decisions in *Bridgmon v. Array Systems Corp.*, 325 F.3d 572 (5th Cir. 2003) and *King v. Ames*, 179 F.3d 370 (5th Cir. 1999).

*King* involved a copyright-infringement claim in which the plaintiff "failed to produce the copies of the sound recordings she deposited with the United States Copyright Office." *King ex rel. King v. Ames*, No. 3:95-CV-3180, 1997 WL 327019, at \*5 (N.D. Tex. June 4, 1997). On appeal, this court explained that "[t]o determine whether an instance of copying is legally actionable, a side-by-side comparison must be made between the original and the copy to assess whether the two works are substantially similar." *King*, 179 F.3d at 376. Because

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*Recording, Inc. v. Escape Media Grp., Inc.*, No. 11 Civ. 8407, 2014 WL 5089743, at \*17 (S.D.N.Y. Sept. 29, 2014) (collecting cases).

“copying is an issue to be determined by comparison of works, not credibility,” and the plaintiff failed “to adduce evidence for such a comparison,” her claim was “viti-ate[d].” *Id.*

This court applied *King* in *Bridgmon*. There, the plaintiff brought a copyright-infringement claim against a corporation for its use and sale of a computer program known as ICUS, which he alleged infringed his copyright in another computer program called ADS, of which he was the author. *Bridgmon*, 325 F.3d at 575. However, the plaintiff was “unable to produce a copy of the ADS software; the only evidence of its content consisted of his oral testimony.” *Id.* at 576. This court rejected the plaintiff’s contention “that he need not produce evidence of substantial similarity between the copyrighted [ADS] software and the [ICUS] software . . . because there is evidence of direct copying.” *Id.* at 577. That’s because “the law of this circuit prohibits finding copyright infringement without a side-by-side comparison of the two works.” *Id.* Therefore, the plaintiff’s “failure to adduce evidence to allow a comparison between the ADS and the allegedly infringing program vitiate[d] his claim.” *Id.*

It’s true that *King* and *Bridgmon* contemplate “side-by-side comparison” of the works at issue. 179 F.3d. at 376; 325 F.3d at 577. But in those cases, the parties meaningfully disputed whether the defendants’ alleged copies were substantially similar to the plaintiffs’ alleged works, and the only evidence about the contents of the plaintiffs’ works was the oral testimony of the plaintiffs themselves. *See King ex rel. King*, 1997 WL 327019, at \*5-6; *Bridgmon*, 325 F.3d at 576. As a result, the plaintiffs could not satisfy their burdens to prove that the defendants’ alleged copies were substantially similar to the plaintiffs’

alleged works merely by asking the jury to credit the plaintiffs' oral testimony. *See King*, 179 F.3d at 375-76; *Bridgmon*, 325 F.3d at 576. Those circumstances differ markedly from the record here, where Plaintiffs introduced extensive, forensically reliable evidence proving that the files Rightscorp downloaded were exact copies of Plaintiffs' sound recordings. The jury was entitled to rely on the records generated by Audible Magic, which themselves evinced a "side-by-side comparison" between Plaintiffs' copyrighted sound recordings and Rightscorp's BitTorrent downloads, *see King*, 179 F.3d at 376; *Bridgmon*, 325 F.3d at 577, as well as the unrebutted testimony offered by Plaintiffs that Audible Magic's error rate is approximately one in three billion. Particularly in light of evolving technology—and the side-by-side comparison now permitted by software programs like Audible Magic in cases involving BitTorrent downloads identified by hash values—Grande's rigid reading of *King* and *Bridgmon* is inapposite. Accordingly, a new trial is not warranted on this ground.

### C.

As to the third element, the district court applied the correct legal standard and Plaintiffs presented sufficient evidence to show that Grande had knowledge of, or was willfully blind to, its subscribers' infringing activity.

Pursuant to the district court's jury instruction, Plaintiffs were required to demonstrate that Grande "knew of specific instances of infringement or was willfully blind to such instances of infringement," where willful blindness

meant that Grande “believe[d] there [was] a high probability of a fact but deliberately [took] steps to avoid learning it.”<sup>8</sup>

The district court also correctly concluded that the jury had a legally sufficient basis to find knowledge or willful blindness. Grande does not challenge the sufficiency of evidence supporting the jury’s finding that Grande had knowledge of, or was willfully blind to, its subscribers’ infringing activity. Grande has therefore abandoned any argument concerning the insufficiency of its knowledge or willful blindness. *See Rollins*, 8 F.4th at 397.

#### D.

Grande’s challenge to the district court’s application of material-contribution liability—the fourth element—is the crux of its appellate challenge to the judgment below. Although Grande makes several strong arguments, they are ultimately unavailing for the reasons we explain.

##### 1.

First, we conclude that the district court applied the correct legal standard by determining that Grande could be secondarily liable if it induced, caused, or materially contributed to its subscribers’ infringing activity.

The district court explained at summary judgment and again post-judgment that “the purveyor of a technology capable of both infringing and non-infringing uses cannot hide behind the technology’s non-infringing uses

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<sup>8</sup> Grande does not challenge the district court’s instruction concerning “willful blindness” on appeal and has therefore abandoned any argument against that instruction. *See Rollins*, 8 F.4th at 397.

to shield itself from liability when the purveyor has induced, caused, or materially contributed to the infringer's activity."

Grande contends the district court's reasoning was erroneous because "[t]he Supreme Court has recognized two—and only two—types of contributory copyright infringement": (1) where "the defendant distribute[s] a product or service without any commercially significant, non-infringing use," and (2) where there is "clear expression or other affirmative steps taken to foster infringement" by the defendant. Plaintiffs respond that this court "has expressly embraced [the material-contribution] theory of liability" and the three Supreme Court opinions cited by Grande "did not write material contribution out of the law."

In 1999, our court recognized the validity of material-contribution claims for contributory copyright infringement. *See Alcatel*, 166 F.3d at 790. In doing so, we adopted the elements of the contributory-copyright claim from the Second Circuit's seminal decision in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir. 1971). *See id.* at 790 n.71. *Gershwin* recognized that contributory-infringement claims stem from "the common law doctrine that one who knowingly participates [in] or furthers a tortious act is jointly and severally liable with the prime tortfeasor." 443 F.2d at 1162 (citation omitted). The court in *Gershwin* synthesized that common-law principle into a rule that "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." *Id.*; *see Alcatel*, 166 F.3d at 790 & n.71.



Grande contends that material contribution is not a valid basis for contributory copyright liability, based on its reading of three United States Supreme Court opinions: *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), and *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023). However, none of those decisions holds that knowingly providing material contribution to infringement is an inadequate basis for a finding of contributory copyright liability. *See United States v. Lipscomb*, 299 F.3d 303, 313 n.34 (5th Cir. 2002). We consider each case in turn.

**a.**

As an initial matter, in both *Sony* and *Grokster*, the Court expressly embraced the common-law standards for contributory infringement and acknowledged more generally that cases based on different factual circumstances would require different applications of those standards.

In *Sony*, the Court addressed the issue of when the manufacturer and distributor of a product (there, the Betamax video tape recorder) could be held secondarily liable for subsequent copyright infringements committed by users of that product. *See* 464 U.S. at 420. The question presented to the Court was whether selling a product that facilitated infringement, standing alone, was sufficient to impose contributory copyright liability. The Court held it was not, so long as the product was “capable of substantial noninfringing uses.” *Id.* at 442. This mirrors the standard for contributory liability under patent law, which “is confined to the knowing sale of a component especially made for use in connection with a particular patent.” *Id.* at 440.

The Court’s analysis in *Sony* focused on the fact that the case involved the sale of a product, because in such a case, the defendant’s contact with its customers ended at the “moment of sale” and the defendant did not know what its customers did with the product thereafter. *Id.* at 437-38. Accordingly, any liability had to be premised solely on the defendant’s “constructive knowledge” of how its customers might use the product in the future. *Id.* at 439. *Sony* did not limit—or even address—the scope of contributory liability generally or criticize or limit the controlling principles derived from common law. To the contrary, the Court expressly contrasted the type of case before it (i.e., one involving the sale of a product) with one in which the defendant might have an “ongoing relationship” with its infringing customers beyond the moment of sale. *Id.* at 437; *see id.* at 437 n.18 (citing *Gershwin* as one such case involving an ongoing relationship). *Sony* therefore stands only for the narrow proposition that a defendant’s mere sale of a product capable of infringement is not sufficient to establish the defendant’s knowledge of its customers’ future infringing activity when the product is also capable of non-infringing uses.

**b.**

Like *Sony*, *Grokster* dealt with a defendant that distributed a product which facilitated infringement—specifically, software that enabled users to share digital files through a P2P network.<sup>9</sup> *See* 545 U.S. at 919-20. Purport-

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<sup>9</sup> BitTorrent lacks a centralized corporate entity that could be sued as *Grokster* was. Even so, Grande has identified at least six actors that “play[] a direct role in the sharing of copyrighted music files over BitTorrent.”

ing to apply *Sony*, the Ninth Circuit had held that the defendant was entitled to summary judgment because the software was capable of non-infringing uses. *See id.* at 932-34.

The Supreme Court reversed, holding that while *Sony* prohibited “imputing culpable intent” from the distribution of the product alone, it “did not displace other theories of secondary liability” or require courts to ignore other evidence of the defendant’s intent. *Id.* at 934. Because the record in *Grokster* contained evidence that the defendant distributed the software “with the object of promoting its use to infringe copyright” (i.e., to “induce” its customers’ infringements), summary judgment in the defendant’s favor was not warranted. *Id.* at 936-37.

By holding that the distributor of a product that facilitates infringement can be liable when it induces future infringements after the moment of sale, *Grokster* expanded the doctrine of contributory infringement. Before *Grokster*, the distributor of a product could not be liable for future infringements so long as the product was capable of “substantial non-infringing uses.” *Sony*, 464 U.S. at 442. But after *Grokster*, an inducement claim could succeed against the distributor of a product if the distributor affirmatively induced future infringements, even if the product was capable of substantial non-infringing uses. *See Grokster*, 545 U.S. at 936-37; *see also BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293, 306 (4th Cir. 2018) (“In fact, providing a product with ‘substantial non-infringing uses’ *can* constitute a material contribution to copyright infringement.”).

Here, Grande provides its subscribers with internet services on a continuous basis in exchange for regular

monthly subscription fees. Those actions create an “ongoing relationship” between Grande and its infringing subscribers that extends beyond a single moment of sale. *Sony*, 464 U.S. at 437. Accordingly, Plaintiffs’ theory of liability in this case is not based on Grande’s knowledge about its subscribers’ likely future activities after the moment of sale, but rather on Grande’s knowledge of its subscribers’ actual infringements based on its ongoing relationship with those subscribers. Because *Sony* and *Grokster* expressly addressed records where such a continuing relationship did not exist, their holdings do not foreclose the theory of liability on which Plaintiffs here based their claim. *See, e.g., Sony Music Ent. v. Cox Commc’ns, Inc.*, 93 F.4th 222, 235-36 (4th Cir. 2024); *BMG*, 881 F.3d at 305-07.

It’s true, as Grande points out, that *Grokster* omitted any mention of material contribution when it cited *Gershwin*, instead referring solely to liability based on “intentionally inducing or encouraging direct infringement.” 545 U.S. at 930. However, nothing required the Court to list every possible basis for relief, rather than the grounds directly relevant to the dispute at hand. *See* 6 Patry on Copyright § 21:48 (“The issue of material contribution was not reached by the Supreme Court in vacating and remanding this decision since the Court found liability based on inducement.”). Moreover, *Grokster* endorsed the broader common-law theories of contributory liability articulated in *Gershwin* and other authorities; it didn’t constrict them. *See* 545 U.S. at 934-35 (explaining that “nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence, and the case was never meant to foreclose rules of fault-based liability derived from the common law”).

Grande further argues that if a party can be contributorily liable for copyright infringement simply by “materially contributing” to the conduct—without any purposeful, culpable conduct of its own—then *Grokster* and *Sony* are “meaningless.” Grande contends that no copyright plaintiff would ever need to prove inducement of infringement as in *Grokster*—requiring “clear expression or other affirmative steps taken to foster infringement,” 545 U.S. at 936-67—if they could simply show material contribution instead. Plaintiffs respond that the distinction between the material-contribution and inducement standards of liability is evident in *David v. CBS Interactive Inc.*, where a district court considered a claim against a website that merely distributed P2P software and let the plaintiffs’ inducement claim proceed to discovery while dismissing the plaintiffs’ material-contribution claim. *See* No. 11-cv-9437, 2012 WL 12884914, at \*3-5 (C.D. Cal. July 13, 2012). While we agree with Grande that material-contribution claims would appear to be more broadly attractive to plaintiffs than inducement claims, that’s a policy argument that runs into *Alcatel*.

c.

As to *Twitter*, we note at the outset that it was litigated pursuant to the Justice Against Sponsors of Terrorism Act and does not mention copyright law. *See* 598 U.S. at 482-84. Thus, because material contribution remained a viable theory of secondary copyright infringement after *Grokster*, *Twitter* cannot furnish clear, contrary Supreme Court authority displacing *Alcatel* and its incorporation of *Gershwin*. To conclude otherwise would require us to decide that the Supreme Court changed fundamental principles of copyright liability without saying so in a case that was not about copyrights. *See Burge v.*

*Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999) (“It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel’s decision.”).

*Twitter* underscores the general importance, in all cases of secondary liability, of demonstrating a direct nexus between the defendant’s conduct and the underlying tort at issue. While that nexus was absent in *Twitter*, it is present here as Grande’s conduct directly enabled and facilitated continued copyright infringement by its subscribers.

In *Twitter*, family members of a victim of an ISIS terrorist attack in Istanbul, Turkey sued three U.S. social media companies, alleging that the companies aided and abetted ISIS by permitting its members to use the platforms for “recruiting, fundraising, and spreading their propaganda.” 598 U.S. at 479, 481. The Court held that aiding-and-abetting liability (which also derives from common-law principles of secondary liability) requires courts to focus on the defendant’s “assistance to the tort for which plaintiffs seek to impose liability.” *Id.* at 506. In *Twitter*, the relevant underlying tort was the Istanbul terrorist attack. Because the defendants did not knowingly provide ISIS any assistance relating to the commission of that attack, they could not be liable on an aiding-and-abetting theory. *Id.* at 506-07.

The Court concluded that aiding-and-abetting claims are strongest when there is a “direct nexus” between the defendant’s conduct and the underlying tort. *Id.* at 506. When such a “direct nexus” exists, courts and juries alike can “more easily infer” that the defendant’s conduct—es-

pecially if done with knowledge of the tort—was “culpable.” *Id.* By contrast, when no direct nexus exists, plaintiffs alleging aiding-and-abetting claims must instead show “participation through intentional aid” in order to generate the same inference of culpability. *Id.* The Court rejected the notion that “defendants’ ‘recommendation’ algorithms go beyond passive aid and constitute active, substantial assistance.” *Id.* at 499. Instead, the defendant’s public social-media platforms are simply “infrastructure,” and “[o]nce the platform and sorting-tool algorithms were up and running, defendants at most allegedly stood back and watched.” *Id.* Because the plaintiffs in *Twitter* could not allege a direct nexus between the social media companies’ services and the particular terrorist attack for which they sought relief, their claim could not survive absent evidence the companies intentionally supported ISIS, which they did not.

In contrast to *Twitter*, the nexus between Grande’s conduct and the tort for which Plaintiffs seek redress is direct. The underlying tort at issue here is copyright infringement—specifically, the unauthorized distribution of Plaintiffs’ copyrighted sound recordings by Grande’s subscribers. Grande provided those subscribers with the tools necessary to conduct those infringements (i.e., high-speed internet access) and continued doing so after learning that those subscribers were repeatedly using those tools to infringe, in furtherance of a policy never to terminate subscribers for copyright infringement (i.e., not “mere passive nonfeasance”).<sup>10</sup> *Id.* at 500. Unlike in *Twitter*—where ISIS did not use the social media companies’

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<sup>10</sup> These facts distinguish this case from *Twitter*’s reference to “the internet generally” because, as the Court in *Twitter* explained, “we

services to carry out its terrorist attack—this case involves tortfeasors that directly relied on and used Grande’s services to carry out their torts. Thus, the liability verdict here is consistent with the Court’s holding in *Twitter*; the direct nexus between Grande’s conduct and the tort at issue permits an inference that Grande’s knowing provision of internet services to infringing subscribers was actionable.

## 2.

Next, we consider the district court’s jury instruction on material contribution. The district court instructed the jury that Grande is contributorily liable if it “induced, caused, or materially contributed to the infringing activity,” and that “[t]his standard is met” if Grande could have “take[n] basic measures to prevent further damages to copyrighted works, yet intentionally continue[d] to provide access to infringing sound recordings.” Grande challenges that instruction on two principal grounds.

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*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 (emphasis added). Although aiding-and-abetting liability also derives from common-law principles, it does not map one-to-one onto contributory copyright infringement, meaning that *Twitter*’s broader language—concluding that it would “run roughshod over the typical limits on tort liability” to “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,” 598 U.S. at 503—cannot in itself be read to uproot material-contribution liability.



**a.**

First, Grande takes issue with the court’s instruction based on its adoption of the “simple measures” standard.<sup>11</sup> In several cases involving online infringements with new technologies, the Ninth Circuit has imposed an additional step before allowing a finding of contributory copyright liability. In these cases, even when the defendant provides the tools necessary for infringement, the court also inquires whether the defendant “can take simple measures to prevent further damage to copyrighted works.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007) (internal quotation marks and citation omitted). If such measures are available and the defendant does not take them, liability is appropriate. *See id.* at 1172-73; *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021-22 (9th Cir. 2001). Conversely, if such measures are unavailable to the defendant, liability is inappropriate. *See VHT*, 918 F.3d at 745; *Perfect 10, Inc. v. Giganeews, Inc.*, 847 F.3d 657, 671-72 (9th Cir. 2017).

Grande contends that the line of “simple measures” cases is inapposite because it applies only to defendants “who directly control content online” because only such defendants “can readily remove or disable access to specific infringing content.” However, the Ninth Circuit in *Amazon.com* clarified that it designed this test broadly for “the context of cyberspace” and for any defendant that provides “Internet access or services.” 508 F.3d at 1171. That breadth was reflected in the test itself, which does not ask narrowly whether the defendant can remove

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<sup>11</sup> Ninth Circuit cases uniformly use the term “simple measures.” *See, e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007). The district court used “basic measures” instead.

access to the infringing content online, but more generally whether the defendant possesses “reasonable and feasible means” to “prevent further damage to copyrighted works.” *Id.* at 1172 (internal quotation marks and citation omitted). Thus, Grande urges an unduly limited reading of these authorities that is belied by the plain language of the cases themselves.

More importantly, as Plaintiffs correctly note, this standard favors *defendants* over copyright plaintiffs by offering defendants a way out if they have no “simple” (or “basic”) means of avoiding secondary liability.<sup>12</sup> That’s why in *Giganeews*, the court ruled for the defendant—not because it failed to provide the tools necessary to infringe or lacked knowledge of infringing conduct—but because it found that plaintiff’s proposed method by which the defendant could have prevented further damage to copyrighted works was “onerous and unreasonably complicated.” 847 F.3d at 671. Similarly, the defendant in *VHT* prevailed not because it failed to provide tools for or lacked knowledge of direct infringement, but because while the plaintiff made three different proposals as to how the defendant could have prevented further damage to copyrighted works, the court found them all insufficiently practical. *See* 918 F.3d at 745-46.

The district court’s “basic measures” instruction thus did not “lower[] the bar” of liability, as Grande contends; the instruction made clear that Grande was liable if it “intentionally continue[d] to provide access to infringing

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<sup>12</sup> Indeed, Cox favorably “addressed the simple-measures test as an alternative to *Grokster*’s affirmative-conduct standard before the Fourth Circuit.” Petition for Writ of Certiorari at 21, *Cox Commc’ns, Inc. v. Sony Music Ent.*, No. 24-171 (U.S. Aug. 15, 2024).

sound recordings,” *unless* Grande was incapable of “taking basic measures to prevent further damages to copyrighted works.” *See Amazon.com*, 508 F.3d at 1172. And here, Grande had available to it at least one basic measure: it could have terminated high-speed internet services to known, repeat infringers, as it did when subscribers failed to pay Grande’s monthly fees. In short, the “basic measures” instruction stood to benefit, not harm, Grande. *See Mid-Continent*, 917 F.3d at 357.

**b.**

Second, Grande disputes whether the district court’s instruction—that “intentionally continu[ing] to provide access to infringing sound recordings” constitutes material contribution—was correct as a matter of law. Grande contends that this instruction flouts *Grokster* and *Twitter* and was therefore erroneous because “[u]nder the district court’s view, reflected in its jury instruction, a jury could permissibly find liability even in the absence of affirmative, culpable conduct.” Plaintiffs respond by citing what they call “the established principle that ISPs provide a material contribution to infringements by their subscribers when they knowingly provide infringing customers with the necessary tools to infringe—in particular, a high-speed connection to the internet.” We acknowledge this is a closer question, but we nonetheless conclude the instruction was not erroneous.

The closest on-point authorities considering the application of a material-contribution theory to ISPs are the Fourth Circuit’s decisions in *BMG* (2018) and *Cox* (2024).

In *BMG*,<sup>13</sup> the court considered a contributory-infringement claim essentially on all fours with this one, arising out of Cox’s continued provision of internet services to known infringing subscribers. *See* 881 F.3d at 298-300. The Fourth Circuit held that in a case involving “subscription services” like those provided by an ISP, liability could be imposed if the service provider learns that its customers are using its services to infringe and “nonetheless renews the lease to those infringing customers.” *Id.* at 308. Under such circumstances, the continued provision of services “is substantially certain to result in infringement, and so an intent to cause infringement may be presumed.” *Id.*; *see also Grokster*, 545 U.S. at 932 (noting that a person “will be presumed to intend the natural consequences of his acts” (citation omitted)); Restatement (Second) of Torts § 8A cmt. b (1965) (acknowledging that if a person “knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result”).

In *Cox*, as here, the Fourth Circuit affirmed a jury’s finding that Cox was willfully liable for contributory copyright infringement because it intentionally continued to provide its internet services to infringing subscribers. In so doing, the Fourth Circuit squarely rejected the primary liability arguments made by Grande in this appeal. Specifically, the court applied the principle established in *BMG* that material contribution is an appropriate basis for a finding of contributory copyright liability. *See Cox*,

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<sup>13</sup> *BMG* is the appeal that followed from the 2015 trial against Cox premised on its receipt of Rightscorp’s notices, of which Grande was contemporaneously aware.

93 F.4th at 235-37. The court concluded that where, as here, an ISP knew of specific instances of repeated infringement by specific users and “chose to continue” providing services to them, a jury is entitled to find material contribution because the ISP’s conduct exceeds “mere failure to prevent infringement.” *Id.* at 236. That reasoning is incompatible with Grande’s primary arguments that material contribution is insufficient to prove contributory infringement and that Grande did not materially contribute as a matter of law. Moreover, the court had the benefit of letter briefing on *Twitter* before it reached its decision. *See* Cox’s 28(j) Letter, *Sony*, No. 21-1168 (4th Cir. May 23, 2023), ECF No. 87; Plaintiffs’ Response to Cox’s 28(j) Letter, *Sony*, No. 21-1168 (4th Cir. May 30, 2023), ECF No. 88. Although the court ultimately didn’t cite *Twitter* in its decision, it held that imposing contributory liability on ISPs on the facts at issue there (which closely resemble those in this case) comports with the traditional principles of aiding-and-abetting liability that *Twitter* addressed. *See Cox*, 93 F.4th at 236.

Grande maintains that those decisions—like the jury instruction here—stray from the principles set forth in *Grokster* and *Twitter*. Specifically, Grande points to language in *Grokster* providing that “in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses.” 545 U.S. at 939 n.12. *Grokster* held that “mere knowledge of infringing potential or of actual infringing uses” is not enough for liability. *Id.* at 937. And *Twitter* explained that a “communication provider” cannot be liable under an aiding-and-abetting theory “merely for

knowing that [] wrongdoers were using its services and failing to stop them.” 598 U.S. at 503.

These are not weak arguments. But the Fourth Circuit heard these same arguments about *Grokster* in *BMG* and about *Twitter* in *Sony*. Applying the “rules of fault-based liability derived from the common law” explicitly endorsed by *Grokster*, 545 U.S. at 934-35, the court in *BMG* found the requisite intent in the ISP’s continued provision of services that were “substantially certain to result in infringement,” 881 F.3d at 308. *Cox*, too, recognized *Grokster*’s rule that “mere[] . . . failure to take affirmative steps to prevent infringement” does not establish contributory liability “in the absence of other evidence of intent,” 545 U.S. at 939 n.12, but nonetheless concluded 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,” *Cox*, 93 F.4th at 236. That’s because such conduct “accords with principles of aiding and abetting liability in the criminal law.” *Id.*; *see id.* (“Lending a friend a hammer is innocent conduct; doing so with knowledge that the friend will use it to break into a credit union ATM supports a conviction for aiding and abetting bank larceny.”).

Moreover, for the reasons explained above, *Twitter* does not control because it was litigated pursuant to the Justice Against Sponsors of Terrorism Act, not the Copyright Act. And *Grokster* must be read in light of the fact that it dealt with inducement liability, with no occasion to reach the issue of material contribution. *See* 6 Patry on Copyright § 21:48. Further, the component parts of the district court’s jury instruction cannot be read in isolation: The instruction permitted a finding of liability only

if the jury found Grande “intentionally continue[d] to provide access to infringing sound recordings” while *refusing* to “take basic measures to prevent further damages to copyrighted works.” And Plaintiffs established at trial that, unlike Cox—which implemented a “graduated response system,” *Sony Music Ent. v. Cox Commc’ns, Inc.*, 464 F. Supp. 3d 795, 816 (E.D. Va. 2020), *aff’d in part, vacated in part, rev’d in part*, 93 F.4th 222 (4th Cir. 2024)—Grande took *no* action in response to its subscribers’ repeated infringements. So, Grande necessarily did not avail itself of any “basic measures” to prevent infringement.

Applying the same material-contribution standard, the court’s instruction was proper in light of the factual disputes in this case. *See Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 944 (9th Cir. 2011) (holding the district court did not err “by narrowing the instruction on material contribution to the only genuine question as to that element”). At summary judgment, the district court determined that Grande’s material contribution—its provision of the tools necessary for its subscribers to infringe—was “clear” and that the real “question” was whether Grande provided its services knowing that its customers were using them to infringe. There was therefore no factual dispute on that issue for the jury to resolve. The only issue left was whether Grande could have taken simple measures to prevent further damages to copyrighted works, but failed to take them. That’s precisely what the district court instructed the jury to determine. We see no error in the district court’s decision to model its jury instruction after those upheld by the Fourth Circuit.

## 3.

The evidence at trial demonstrated that Grande provided its subscribers with the tools necessary to infringe (i.e., high-speed internet access) and that Grande’s subscribers used those tools to infringe Plaintiffs’ copyrights.<sup>14</sup> *See BMG*, 881 F.3d at 306-08. Based on the consistency of the trial evidence, the district court determined that there was “no question that [Grande] intentionally continued to provide Internet service” to its infringing subscribers.

Grande’s affirmative choice to continue providing its services to known infringing subscribers—rather than taking simple measures to prevent infringement—distinguishes this case from *Cobbler Nevada, LLC v. Gonzales*, 901 F.3d 1142 (9th Cir. 2018), on which Grande relies. There, the Ninth Circuit considered a claim alleging that

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<sup>14</sup> We note that, at times, Plaintiffs’ briefing appears to “direct[ly] leap from safe harbor to liability,” implying that “an ISP has two options: qualify for the safe harbor or be found liable for copyright infringement.” As the district court’s jury instructions properly recognized, § 512(l) forecloses that argument by providing that an ISP’s failure to qualify for the safe harbor “shall not bear adversely upon the consideration of a defense by the [ISP] that [its] conduct is not infringing under this title or any other defense.” 17 U.S.C. § 512(l). However, Grande does not contend on appeal that the district court erred in admitting any evidence pertaining to the safe harbor. And the district court did not prevent Grande from contesting its liability on grounds other than the safe harbor: namely, by attempting to refute Plaintiffs’ evidence supporting any of the four elements that Plaintiffs were required to prove (e.g., by demonstrating that Rightscorp’s notices did not trigger any duty by Grande because they were unreliable). That’s precisely what Grande attempted to do at trial—the jury just didn’t find Grande’s defense persuasive.



a subscriber of internet services who received infringement notices failed to “secure, police and protect” his account from third parties who used his internet access to infringe. *Cobbler*, 901 F.3d at 1145-46. The direct infringers were never identified. *See id.* at 1145 n.1. Because the pleading premised liability exclusively on the subscriber’s failure to take action against unknown third-party infringers, it was insufficient to state a claim. *See id.* at 1147-49. Here, Plaintiffs proved at trial that Grande knew (or was willfully blind to) the identities of its infringing subscribers based on Rightscorp’s notices, which informed Grande of specific IP addresses of subscribers engaging in infringing conduct. But Grande made the choice to continue providing services to them anyway, rather than taking simple measures to prevent infringement. Additionally, *Cobbler* addressed only inducement liability under *Grokster*; it did not opine on the evidence required for establishing material contribution. *See id.* The court in *Cobbler* rejected the plaintiff’s invitation to create “an affirmative duty for private internet subscribers to actively monitor their internet service for infringement,” *id.* at 1149; it did not absolve ISPs like Grande that continue providing services to known infringing subscribers.

The evidence at trial demonstrated that Grande had a simple measure available to it to prevent further damages to copyrighted works (i.e., terminating repeat infringing subscribers), but that Grande never took it. On appeal, Grande and its amici make a policy argument—that terminating internet services is not a simple measure, but instead a “draconian overreaction” that is a “drastic and overbroad remedy”—but a reasonable jury could, and did, find that Grande had basic measures, including termination, available to it. *See Amazon.com*, 508 F.3d at

1172. And because Grande does not dispute any of the evidence on which Plaintiffs relied to prove material contribution, there is no basis to conclude a reasonable jury lacked sufficient evidence to reach that conclusion.

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In sum, because (1) intentionally providing material contribution to infringement is a valid basis for contributory liability; (2) an ISP's continued provision of internet services to known infringing subscribers, without taking simple measures to prevent infringement, constitutes material contribution; and (3) the evidence at trial was sufficient to show that Grande engaged in precisely that conduct, there is no basis to reverse the jury's verdict that Grande is liable for contributory infringement.<sup>15</sup>

#### IV.

Next, we consider Grande's damages argument, which presents a question of first impression in this circuit.<sup>16</sup> The district court determined that each of Plaintiffs' 1,403 sound recordings that was infringed entitled Plaintiffs to an individual statutory damages award.

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<sup>15</sup> Because we affirm the jury's liability verdict, we do not reach Plaintiffs' cross-appeal challenging the district court's jury instruction concerning proof of actual distribution.

<sup>16</sup> The only Fifth Circuit case to have addressed this question did so in an unpublished opinion, in which the court similarly concluded "that the district court did not abuse its discretion in treating the photographs"—which the plaintiff had registered "under a single copyright registration number" and which he "himself refer[red] to . . . in the record on appeal as a 'collection'"—"as a compilation instead of individual works for purposes of calculating damages." *Cullum v. Diamond A Hunting, Inc.*, 484 F. App'x 1000, 1002 (5th Cir. 2012) (per curiam).

Grande contends that the text of the Copyright Act requires a different result: Whenever more than one of those recordings appeared on the same album, Plaintiffs are entitled to only one statutory damages award for that album, regardless of how many individual recordings from the album were infringed. Grande has the better reading of the text of the statute.

Under § 504 of the Copyright Act, a copyright owner may elect to recover

an award of statutory damages for all infringements involved in the action, with respect to *any one work*, . . . 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*.

17 U.S.C. § 504(c)(1) (emphases added). The Copyright Act defines a “compilation” as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” *Id.* § 101. The term “compilation” includes “collective works,” which are defined as works “in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.” *Id.* To be eligible for statutory damages for infringement of “any one work” under § 504, the copyright owner must have registered “the work” within the time required by § 412, which is titled “Registration as prerequisite to certain remedies for infringement.” *See* 17 U.S.C. §§ 412, 504(c); *see also* *S. Credentialing Support Servs., L.L.C. v. Hammond Surgical Hosp., L.L.C.*, 946 F.3d 780, 785 (5th Cir. 2020) (emphasizing “the need for the limit on statutory damages to be read consistently

with the provision [§ 412] authorizing those damages in the first place”).

The Supreme Court has “ma[d]e clear that the starting point for our analysis is the statutory text.” *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003). “And where, as here, the words of the statute are unambiguous, the ‘judicial inquiry is complete.’” *Id.* (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992)). The plain language of the Copyright Act mandates the conclusion that each registered compilation is eligible for only one award of statutory damages. As the Supreme Court has “stated time and again,” “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Conn. Nat’l Bank*, 503 U.S. at 253-54.

In concluding otherwise, the district court “found that the majority of case law holds that when individual sound recordings are available as individual works, a plaintiff can recover one statutory damages award per recording.” The district court’s assessment of existing circuit case law was accurate: As Plaintiffs contend, the majority of the seven circuits to have considered this question apply a “functional” test that looks to “where the market assigns value,” deciding whether the parts of a compilation are individually eligible for statutory damages by determining whether the parts have “independent economic value.” *Sullivan v. Flora, Inc.*, 936 F.3d 562, 572 (7th Cir. 2019). In addition to the Seventh Circuit, the D.C., First, Ninth, and Eleventh<sup>17</sup> Circuits also take this approach.

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<sup>17</sup> Notably, since its decision in *Feltner* adopting the independent-economic-value test, the Eleventh Circuit appears to have narrowed its application of that test. See *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255, 1279 (11th Cir. 2015) (“Although this Court held that

See, e.g., *Walt Disney Co. v. Powell*, 897 F.2d 565, 570 (D.C. Cir. 1990); *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1117-18 (1st Cir. 1993); *VHT, Inc. v. Zillow Grp., Inc.*, 69 F.4th 983, 990 (9th Cir. 2023); *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 769 (11th Cir. 1996).

Contrary to Plaintiffs’ assertion, the Second Circuit has not adopted this functional test, although it has awarded statutory damages for individual songs on albums. In *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, the Second Circuit acknowledged that “[m]aterials that are sold as part of a compilation, such as songs on an album, ordinarily are not deemed separate works for the purpose of determining statutory damages.” 844 F.3d 79, 101 (2d Cir. 2016) (citing *Bryant*, 603 F.3d at 141). Notwithstanding its decision in *Bryant*, in which the Second Circuit held that “[a]n album falls within the [Copyright] Act’s expansive definition of [a] compilation,” *Bryant*, 603 F.3d at 140, the court in *MP3tunes* concluded that “when a copyright holder or publisher issues material on an independent basis, the law permits a statutory damages award for each individual work,” *MP3tunes*, 844 F.3d at 101. That was so, the court in *MP3tunes* reasoned, even though *Bryant* had held that “[b]ased on a plain reading of the statute, . . . infringement of an album should result in only one statutory damage award,” and “[t]he fact that each song may

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the particular television episodes in *Feltner* were separate works because they could each ‘live their own copyright life,’ we certainly do not read the *Feltner* decision as foreclosing the application of 17 U.S.C. § 504(c)(1)’s directive that ‘all parts of a compilation . . . constitute one work’ for all cases.” (internal citation omitted)).

have received a separate copyright”—and that the infringer “sold the songs individually”—“is irrelevant to this analysis.” *Bryant*, 603 F.3d at 140-41. The court in *MP3tunes* reached that conclusion because the “focus is on whether the plaintiff—the copyright holder—issued its works separately, or together as a unit,” not on how the infringer distributed the works. 844 F.3d at 101. So, the district court “properly allowed separate statutory damages awards for songs that the plaintiffs issued as singles, even if those songs were also made available on albums.” *Id.*

The Fourth Circuit’s approach also has uncertainty. Its answer to the question presented in *Xoom, Inc. v. Imageline, Inc.* followed the Second Circuit’s approach in *Bryant* but suggested that different facts might require a different construction of § 504(c)(1). 323 F.3d 279, 285 (4th Cir. 2003), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). In *Xoom*, the court determined that two collections of several thousand digital images, protected under two copyright registrations, were compilations and thus only eligible for two statutory damages awards under § 504(c)(1). *See id.* at 285 n.8 (explaining that “Imageline is entitled to one award of statutory damages per work infringed because SuperBundle and Master Gallery are *compilations or derivative works* in which Imageline holds copyrights”). At another point in its opinion, however, the Fourth Circuit appeared to agree that “the Copyright Act does not bar multiple awards for statutory damages when one registration includes multiple works.” *Id.* at 285. As the Seventh Circuit in *Sullivan* recognized, “[t]his qualification is substantial and seems to suggest the Fourth Circuit may chart a different course—perhaps the one followed

by most other circuits—on different facts.” 936 F.3d at 571; *cf. Cox*, 93 F.4th at 240 (assuming *arguendo* Cox’s contention “that Plaintiffs were not entitled to separate statutory damages awards for songs that were contained on the same album,” but “not decid[ing] whether Cox’s legal premise [was] sound” because “Cox [did] not identify evidence from which the jury could have determined which songs were released on albums together”).

Plaintiffs urge this court to adopt the majority approach and affirm the district court’s ruling that because each song “has its own independent economic value in the marketplace at the time it is infringed, it constitutes a separate work for the purpose of determining eligibility for statutory damages.” But their position—which, admittedly, is a position shared by five other circuit courts—cannot be squared with the statutory text.

Nothing in the statute permits Plaintiffs to recover damages for each individual song because the song was “exploited . . . individually,” or began to live its “own copyright life.” *Gamma Audio & Video*, 11 F.3d at 1116 (citation omitted). Instead, because—as Plaintiffs concede—each album constitutes a compilation, the statutory text constrains Plaintiffs’ eligible award to statutory damages for each *album*, rather than each *song* in suit.

Record evidence supports this conclusion. The works’ certificates of registration—which are “prima facie evidence . . . of the facts stated” therein, 17 U.S.C. § 410(c)—bear numerous hallmarks of compilations. Many of the certificates feature express notations like “Basis for registration: collective work,” “Compilation of sound recordings,” and “Sound recordings registered as a collective work.” Those same certificates and many others identify the album title as the “Title of Work.” Additionally, many

of the certificates identify preexisting material to be excluded from the registration, as required “in the case of a compilation or derivative work.” 17 U.S.C. § 409(9). And nearly all the registrations are designated as “works made for hire.” “Work made for hire” status is available only for certain types of works. 17 U.S.C. § 101. Here, because the artists were not Plaintiffs’ employees, the only two possible bases for “work made for hire” registration are that the work is a “compilation” or a “collective work,” which is a species of compilation. *See id.*

The amicus supporting plaintiffs, the Copyright Alliance, separately contends that “[w]hile Section 504(c)(1) of the Act provides that all parts of a compilation constitute one work, it does *not* say that individual works in a compilation cannot also exist as separate, independent works.” *See VHT*, 69 F.4th at 990. But with all due respect, that is not what the statute says. True, parts of a compilation can constitute separate works for other purposes,<sup>18</sup> but “[f]or the purposes of [§ 504(c)], all the parts of a compilation or derivative work constitute one work.” 17 U.S.C. § 504(c)(1). “One work” means *one* work: If parts of a compilation are counted independently of the compilation and as additive *to* the compilation, they—mathematically and axiomatically—no longer constitute “one work.” So, in fact, § 504 *does* “say that individual

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<sup>18</sup> Relevant legislative history confirms that

[w]here the suit involves infringement of more than one separate and independent work, minimum statutory damages *for each work* must be awarded. . . . Subsection (c)(1) makes clear, however, that, *although they are regarded as independent works for other purposes*, “all the parts of a compilation or derivative work constitute one work” for this purpose.

H.R. Rep. No. 94-1476, at 162 (1976) (emphases added).



works in a compilation cannot also exist as separate, independent works”—at least when determining eligibility for “an award of statutory damages for all infringements involved in the action.” *Id.*

The Copyright Alliance also marshals policy arguments against this interpretation of the statutory text. The Copyright Alliance complains that the result of Grande’s reading is harsh and will “threaten the livelihood of some copyright owners.” Paraphrasing the Ninth Circuit, the Copyright Alliance argues that if a copyright holder could receive only one statutory damage award for infringements of multiple works that have independent value, then the attempt to save the copyright owner expenses and foster efficiency via registration of a compilation, collective work, or group registration<sup>19</sup> would be “at best an empty gesture and at worst a cruel joke.” *VHT*, 69 F.4th at 992. But “to award statutory damages on a per-song basis would make a total mockery of Congress’[s] express mandate that all parts of a compilation must be treated as a single ‘work’ for purposes of computing statutory damages.” *Bryant*, 603 F.3d at 142 (internal quotation marks and citation omitted). And between policy arguments and the statutory text—no matter how sympathetic the plight of the copyright owners—the text must prevail. *See Desert Palace*, 539 U.S. at 98. So, the strong policy arguments made by Plaintiffs and their amicus are best directed at Congress.

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<sup>19</sup> Importantly, “[n]one of the works at issue here were registered using group registration,” which—along with individual registration of each work—Grande acknowledges would “provide[] the public notice Congress intended.” *See* 37 C.F.R. § 202.4.

In sum, the record evidence indicates that many of the works in suit are compilations (albums) comprising individual works (songs). The statute unambiguously instructs that a compilation is eligible for only one statutory damage award, whether or not its constituent works are separately copyrightable. Thus, the district court erred in holding that each individual song in a compilation was eligible for a statutory damage award.

\* \* \*

All that remains is the appropriate remedy. For the first time on appeal, Grande asks this court to “reverse the district court’s denial of JMOL and modify the statutory damages award to \$22,066,446 based on 662 copyrighted works.” In its renewed motion for JMOL or a new trial, Grande requested only that the district court “order a new trial on the issue of statutory damages.” Nowhere in its briefing at summary judgment or post-judgment did Grande assert that only 662 copyrighted works in evidence were eligible for statutory damages. In Grande’s own words below, “[n]o factfinder has considered these issues and determined from the record evidence which of the 1,403 sound recordings at issue are entitled to and eligible for a separate award of statutory damages under sections 504(c) and 412.” Accordingly, we vacate the statutory-damages award and remand for a new trial on damages with the proper jury instruction. *See Sullivan*, 936 F.3d at 572 (vacating where “[t]he district court did not ask (or put to the jury) the questions . . . necessary for resolving the statutory damages question”).

## V.

For the foregoing reasons, we AFFIRM the jury’s verdict finding Grande liable for contributory copyright

infringement; VACATE the jury's damages award and REMAND for a new trial on damages; and DISMISS Plaintiffs' conditional cross-appeal as moot.

**APPENDIX B**

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

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NO. 1:17-CV-365

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UMG RECORDINGS, INC., et al.,  
Plaintiffs,

v.

GRANDE COMMUNICATIONS  
NETWORKS, LLC,  
Defendant.

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Filed: May 11, 2023

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**ORDER DENYING GRANDE’S RENEWED  
MOTION FOR JUDGMENT AS A MATTER OF  
LAW OR A NEW TRIAL**

Before DAVID ALAN EZRA, Senior United States District Judge.

Before the Court is Defendant Grande Communications Networks, LLC’s (“Grande”) Renewed Motion for Judgment as a Matter of Law or a New Trial, filed February 27, 2023. (Dkt. # 487.) Plaintiffs UMG Records, Inc., et al., (“UMG” or “Plaintiffs”) filed a Memorandum of Law in Opposition on March 20, 2023. (Dkt. # 497.) Grande filed a Reply on April 3, 2023. (Dkt. # 505.) Under Local Rule 7(h), the Court finds this matter suitable for

disposition without a hearing. For the reasons that follow, the Court **DENIES** Grande's Renewed Motion for Judgment as a Matter of Law or a New Trial. (Dkt. # 487.)

### BACKGROUND

On April 13, 2017, Plaintiffs—a group of major record labels—commenced this action against Grande—the largest internet service provider in Texas—for secondary copyright infringement. (Dkt. # 1.) Plaintiffs claimed Grande allowed its users to illegally distribute Plaintiffs' copyrighted sound recordings on BitTorrent with impunity. (*Id.*) A jury was empaneled October 7, 2022, and a trial on the merits began on October 12, 2022. (Dkt. # 416.) On November 3, 2022, the jury returned a unanimous verdict finding the following:

1. Plaintiffs proved by a preponderance of the evidence that Grande is contributorily liable for copyright infringement.
2. The number of copyrighted works for which plaintiffs proved that Grande is liable for statutory damages is 1,403.
3. Plaintiffs proved by a preponderance of the evidence that Grande's contributory infringement was willful.
4. The total amount of statutory damages awarded to Plaintiffs is \$46,766,200.00.

(Dkt. # 458) (corresponding numbering to verdict form). After briefing from both parties on the content of the order memorializing the jury's verdict, this Court entered judgment on January 30, 2023. (Dkt. # 481.)

## LEGAL STANDARD

### I. Renewed Motion for Judgment as a Matter of Law

If a party makes a motion for judgment as a matter of law during trial, but the court does not grant the motion, the moving party may renew its motion no later than twenty-eight days after the entry of judgment. Fed. R. Civ. P. 50(b). Judgment as a matter of law may be granted when “a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” Fed. R. Civ. P. 50(a)(1); see also Guile v. United States, 422 F.3d 221, 225 (5th Cir. 2005) (noting that the jury’s verdict “can be overturned only if there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did”). A court must be “especially deferential” to the jury’s findings in considering whether to grant a motion for judgment as a matter of law following a jury verdict. See Flowers v. S. Reg’l Physician Servs. Inc., 247 F.3d 229, 235 (5th Cir. 2001).

In reviewing the evidence, the court draws “all reasonable inferences in favor of the nonmoving party” and “may not make credibility determinations or weigh the evidence.” Taylor-Travis v. Jackson State Univ., 984 F.3d 1007, 1112 (5th Cir. 2021), cert. denied, 142 S. Ct. 101 (2021) (quoting Industrias Magromer Cueros y Pielas S.A. v. Louisiana Bayou Furs Inc., 293 F.3d 912, 918 (5th Cir. 2002), decision clarified on denial of reh’g, 310 F.3d 786 (5th Cir. 2002)). Therefore, judgment as a matter of law should be granted only if “the facts and inferences point ‘so strongly and overwhelmingly in the movant’s favor that reasonable jurors could not reach a contrary conclusion.’” One Beacon Ins. Co. v. T. Wade Welch & Assocs., 841 F.3d 669, 675 (5th Cir. 2016) (quoting Baisden v. I’m Ready Prods., Inc., 693 F.3d 491, 498 (5th Cir.

2012)). “Courts in this district have considered post-trial motions relating to purely legal issues as motions for reconsideration.” Intellectual Ventures II LLC v. FedEx Corp., No. 2:16-CV-00980-JRG, 2019 WL 2297048, at \*12 (E.D. Tex. Mar. 29, 2019); see also OPTi, Inc. v. VIA Techs., Inc., 65 F. Supp. 3d 465, 475–76 (E.D. Tex. 2014) (treating a post-trial motion purportedly pursuant to Rule 50 and relating to the legal issue of indefiniteness as a motion for reconsideration).

## II. Motion for a New Trial

Rule 50 also provides that a party “may include an alternative or joint request for a new trial under Rule 59.” Fed. R. Civ. P. 50(b); Long v. Shultz Cattle Co., 881 F.2d 129, 132 (5th Cir. 1989) (An alternative motion for a new trial “may be granted even if the moving party is not entitled to judgment as a matter of law.”). “A new trial may be granted if the trial court finds that ‘the verdict is against the weight of evidence . . . the trial was unfair, or prejudicial error was committed.’” Seidman v. Am. Airlines, Inc., 923 F.2d 1134, 1140 (5th Cir. 1991) (quoting Smith v. Transworld Drilling Co., 773 F.2d 610, 613 (5th Cir. 1985)). The decision to grant or deny a motion for a new trial, including the determination of whether a verdict is against the great weight of the evidence, is a question committed to the court’s sound discretion. Six Dimensions, Inc. v. Perficient, Inc., 969 F.3d 219, 230 (5th Cir. 2020). A motion for a new trial “must clearly establish either a manifest error of law or fact or must present newly disclosed evidence.” Simon v. United States, 891 F.2d 1154, 1159 (5th Cir. 1990) (quoting Fed. Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986)). The party seeking a new trial based on an erroneous eviden-

tiary ruling has the burden of proving that the error prejudiced a substantial right of that party. See Munn v. Algee, 924 F.2d 568, 571 (5th Cir. 1991); Fed. R. Civ. P. 61.

### DISCUSSION

To prove their claim of contributory copyright infringement, Plaintiffs were required to establish that: (1) Plaintiffs own valid copyright registrations in the 1,403 sound recordings at issue in the case; (2) users of Grande's internet service utilized that service to infringe Plaintiffs' right to distribute its copyrighted works; (3) Grande knew of specific instances of infringement or was willfully blind to such instances of infringement; and (4) Grande induced, caused, or materially contributed to the infringing activity. (Dkt. # 449 at 18-19.)

"Any argument made in a renewed motion for judgment as a matter of law under Rule 50(b) must have been previously made in a motion for judgment as a matter of law under Rule 50(a)." One Beacon, 841 F.3d at 676 (citations omitted). At the close of evidence, Grande moved for judgment as a matter of law under Rule 50(a). (Dkt. # 475 at 2008-2012.) The court denied the motion and submitted the case to the jury. (Id. at 2016.) Grande renews its motion for judgment as a matter of law, reiterating its argument at trial that Plaintiffs failed to present sufficient evidence of each element of their copyright claim. Grande argues that Plaintiffs presented insufficient evidence of: (1) Grande's users committing direct infringement; (2) Grande's knowledge of or willful blindness to specific instances of direct infringement; (3) Grande inducing, causing, or materially contributing to the direct infringement; (4) the willfulness of Grande's contributory infringement; (5) each of the 1,403 sound recordings' eligibility for a separate award of statutory damages; and (6) ownership for



the 1,403 sound recordings. (Dkt. # 487.) Because these arguments were raised in Grande's previous motion for judgment as a matter of law ("JMOL"), Grande is entitled to renew its motion.

Grande also re-urges several legal arguments that it raised at trial. While legal arguments are generally improper in a Rule 50(a) motion, the Court liberally construes them as arguments for a new trial. See Fed. R. Civ. P. 50(a)(1) (providing relief only when a jury has not been presented "a legally sufficient evidentiary basis" to find in a party's favor on an issue). Thus, the Court evaluates whether the legal arguments and evidentiary objections that Grande re-raises are "a manifest error of law or fact," given that Grande does not "present newly disclosed evidence." Simon, 891 F.2d at 1159 (quoting Fed. Deposit Ins. Corp., 781 F.2d at 1268); see also Montgomery Ward & Co. v. Duncan, 311 US 243, 251 (1940) ("The motion for a new trial involves more discretion from the district court [than a renewed motion for judgment as a matter of law], as it may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."). Finally, Grande contends that the court made several errors in admitting evidence warranting a new trial. The Court addresses each argument in turn.

#### I. Direct Infringement

The Court instructed the jury that, to prove direct infringement, Plaintiffs had to establish that each work in suit was "infringed by distributing any part of the copyrighted work without Plaintiffs' authorization." (Dkt. # 449 at 18; see also dkt. # 268 at 31.) To find an unauthorized distribution, the jury could consider "direct or

circumstantial evidence,” including “evidence that copyrighted content was offered or distributed to a third party who is investigating or monitoring infringing activity.” (Id.)

A. Evidentiary Sufficiency for Direct Infringement

Plaintiffs provided sufficient evidence for the jury to find that Grande’s users committed direct infringement. For each work in suit, Plaintiffs introduced testimony and documentary evidence that (1) Rightscorp detected a Grande user offering to share the work; (2) Rightscorp sent Grande a notice of infringement documenting that activity; (3) Rightscorp re-approached Grande users who had previously offered the work for copying and downloaded at least one (and usually more than one) complete copy of the work; and (4) Audible Magic verified that Rightscorp in fact downloaded each work at issue. (PX 1-5, 13-16; Dkt. # 465 at 274:21-294:25; Dkt. # 464 at 209:5-210:2.)

Grande argues that because Plaintiffs did not introduce “copies of the original copyrighted sound recordings,” the jury could not conduct a side-by-side comparison of the works, and thus could not find that the allegedly infringing works were substantially similar to the works owned by Plaintiffs. (Dkt. # 487 at 3.) The Court rejected this argument at summary judgment. The Court held that the cases cited by Grande “do not appear to stand for the proposition that a side-by-side comparison of the original and allegedly infringing works must be made in front of the jury, something that would prove beyond impractical in a case of this sort.” (Dkt. # 468 at 26.) Instead, Plaintiffs needed to produce “evidence, beyond mere oral testimony, resulting from such a comparison

that would permit a layman to view the two works as substantially similar.” (*Id.* at 26-27.) Plaintiffs presented voluminous evidence at trial for the proposition that the sound recordings detected by Rightscorp were copies of Plaintiffs’ copyrighted sound recordings.

A Rightscorp witness confirmed that Rightscorp “provided a hard drive of download files” in this case. (Dkt. # 465 at 420:18-19.) Plaintiffs introduced testimony from Recording Industry Association of America (“RIAA”) witness Jeremy Landis that he ran the files on the Rightscorp hard drive through Audible Magic software and confirmed matches “for each of the sound recordings” to the works in question. (Dkt. # 464 at 209.) Plaintiffs put on exhaustive testimony about Audible Magic’s ability to identify and match files to copyrighted content, principally through expert Barbara Frederiksen-Cross, who noted that Audible Magic’s error rate is in the vicinity of one in three *billion*. (Dkt. # 473 at 1715:8-1716:4.) As the Court noted in its motion for summary judgment, Audible Magic has been “widely recognized” by courts for its reliable identification and matching of files to copyrighted content in other peer-to-peer infringement cases. (Dkt. # 468 at 26); see also Capitol Records, LLC v. Escape Media Grp., Inc., No. 12-CV-6646 (AJN), 2015 WL 1402049, at \*23 (S.D.N.Y. Mar. 25, 2015) (collecting copyright infringement cases using Audible Magic’s fingerprinting software).

Plaintiffs also elicited testimony that the processes Rightscorp used to generate notices and obtain downloads were both based on searching for the same underlying “hash value” by which the works in suit could be identified on BitTorrent. (Dkt. # 465 at 268:9-281:16.) Another witness explained to the jury that the chances two

files with the same hash value are in fact two different files is “one followed by 26 to 50 different zeros.” (Dkt. # 466 at 573:11-18.) The jury was provided with PX 16, which summarized the metadata Rightscorp downloaded alongside the data provided by Audible Magic identifying the Rightscorp downloads as particular sound recordings. (See *id.* at 211:18-212:9; Dkt. # 465 at 365:21-367:2.) The jury was entitled to rely on PX 16 to conclude that the files the RIAA determined included copies of the works in suit were the same files that Rightscorp downloaded from Grande users and provided in this case. Finally, employee witnesses from each Plaintiff listened to a random sample of 50 Rightscorp downloads and confirmed to the jury that those files were in fact copies of works owned by their respective companies. (See, e.g., Dkts. ## 471 at 1315:11-1316:5 (A. McMullan for Universal); 464 at 159:2-19 (J. Walker for Sony); 469 at 1074:7-18 (T. Parry for Warner).) While Grande argues that Plaintiffs’ reliance on hash value and download evidence was “unreliable and subject to error,” such a determination was entirely up to the jury. (Dkt. # 505 at 4.) A reasonable jury could have found that the allegedly infringing files offered by users of Grande’s network matched Plaintiffs’ copyrighted sound recordings in light of the extremely small Audible Magic error rate and the infinitesimal chance of two hashes matching without comprising the same sound recording.<sup>1</sup>

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<sup>1</sup> Grande mentions that 18,000 files downloaded by Rightscorp could not be matched to anything in Audible Magic’s database. (Dkt. # 505 at 4.) But this could have bolstered the jury’s confidence that Plaintiffs were only seeking remuneration for sound recordings that were *verifiable* matches; leaving out those that did not find a match would seem to be good practice.

Grande next argues that Plaintiffs failed to show that any of the direct infringers were actually Grande subscribers, as opposed to unauthorized users of Grande's network. Plaintiffs provided sufficient evidence for the jury to conclude that the direct infringers were Grande subscribers: Plaintiffs introduced evidence showing that Rightscorp could identify infringers by their IP addresses and match those IP addresses to their internet service providers ("ISPs"), like Grande. (Dkt. # 465 at 272:2-273:10, 320:19-321:1-12.) Grande's employees admitted that Grande could match the IP addresses in the Rightscorp notices to Grande subscribers. (Dkt. # 468 at 851:16-854:1 (admitting that the program Grande developed to handle the notices extracted the IP address of the Grande subscriber who was the subject of that notice and then matched up the name of the subscriber), see also 931:4-20 (admitting that Grande's systems had the information required to match up the IP address and time stamp to who the subscriber was).)

Moreover, Grande undermined its theory about unauthorized users conducting infringement by admitting at trial that it holds its subscribers fully responsible for all conduct occurring on their accounts, whether they are authorized users or not. (Dkt. # 471 at 1409:8-1410:3; PX 53 ("At all times it is the subscriber's responsibility to ensure that their account is not being used to conduct infringing activity."), 103.) The jury was entitled to rely on the unrebutted evidence of the Grande IP addresses associated with the allegedly infringing activity to find that the infringement detected on a Grande IP address was in fact committed by the Grande subscribers who owned the IP address. Accordingly, judgment as a matter of law is not proper on this ground.

### B. Legal Arguments on Direct Infringement

Grande argues that “the evidence must show an actual upload, not a mere offer to upload,” to state a distribution claim. (Dkt. # 487 at 4.) Construing this argument liberally, it takes issue with the Court’s jury instructions, which allowed jurors to rely on “evidence that copyrighted content was *offered or* distributed to a third party who is investigating or monitoring infringing activity.” (Dkt. # 449 at 18.) The Court’s resolution of Grande’s legal argument on this point, codified in the jury instructions, was not a “a manifest error of law,” and thus does not support a new trial. Simon, 891 F.2d at 1159 (quoting Fed. Deposit Ins. Corp., 781 F.2d at 1268).

At summary judgment, the Court found that “the great weight of the case law” dictates that “actual dissemination” of the work is not required for direct infringement on a distribution theory: “offering to share under a ‘making available’ theory” suffices. (Dkt. # 268 at 31-34.) But even if actual dissemination were required, offers to upload would nonetheless “constitute circumstantial evidence of dissemination.” (Id. at 34.) Plaintiffs provided ample evidence of Grande’s users offering to share each sound recording at issue: in particular, testimony about the Rightscorp protocol, which (1) identifies users on BitTorrent offering to share the copyrighted sound recording, (2) confirms that the song is what the protocol believes it to be via AcoustID or Audible Magic fingerprinting and the exact match of the hash code, (3) goes out to those users and conducts a hard handshake indicating that they have and are willing to share the file, and (4) documents this match in notices. (Dkt. # 465 at 268:9-281:16; PX 1 (hard drive containing all notices).) The

jury's reliance on the offers to upload was entirely consistent with the Court's legally sound instruction that "Plaintiffs are entitled to rely on, and you [jurors] are permitted to consider, evidence that copyrighted content was offered or distributed to a third party who is investigating or monitoring infringing activity" in deciding whether Grande's users distributed Plaintiffs' copyrighted works without authorization. (Dkt. # 449 at 18.)

Beyond the evidence of offers to upload, Plaintiffs provided evidence of actual uploads by Grande users, and downloads by Rightscorp: Rightscorp re-approached Grande users who had previously offered the work for copying and downloaded at least one complete copy of the work. (See Dkt. # 465 at 338-61 (Rightscorp was able to successfully obtain full copies of the works from Grande subscribers).) This information was stored not only in the notices that went out, but also in the drive of downloaded files. (Dkt. # 465 at 358 (testifying that PX 3 is a drive containing the downloaded files from the Rightscorp system), PX 3.) Accordingly, a new trial is not warranted on this ground.

## II. Knowledge and Willful Blindness

Plaintiffs also had to demonstrate that Grande "knew of specific instances of infringement or was willfully blind to such instances of infringement," where willful blindness meant that Grande "believe[d] there [was] a high probability of a fact but deliberately [took] steps to avoid learning it." (Dkt. # 449 at 19.) The jury had a legally sufficient basis to find either knowledge or willful blindness.

A reasonable jury could have found that by receiving Rightscorp’s notices,<sup>2</sup> Grande knew of specific instances of infringement. As the Fourth Circuit explained, “the proper standard requires a defendant to have specific enough knowledge of infringement that the defendant could *do* something about it.” BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc., 881 F.3d 293, 311-12 (4th Cir. 2018). The jury was entitled to credit the Rightscorp notices as accurate reports of specific instances of infringement committed by Grande’s users; therefore, a reasonable jury had sufficient basis to find that by receiving these 1.3 million notices, Grande had actual knowledge that specific users of its network were distributing copies of Plaintiffs’ sound recordings without authorization. See UMG Recording v. Sinnott, 300 F. Supp. 2d 993, 999 (E. D. Cal. 2004) (concluding that the defendant had actual knowledge of his vendors’ sales of infringing CDs and cassettes because RIAA investigators “identified themselves to Sinnott, and explained that three MFM vendors were selling infringing CDs or cassettes . . .”); Monotype Imaging, Inc. v. Bitstream, Inc., 376 F. Supp. 2d 877, 886 (N.D. Ill. 2005) (“The knowledge element for contributory copyright infringement is met in those cases where a party has been notified of specific infringing uses of its technology and fails to act to prevent future such infringing uses, or willfully blinds itself to such infringing uses.”).

Grande argues that these notices did not confer knowledge because “Grande had no way of knowing whether Rightscorp’s accusations were true.” (Dkt. # 487

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<sup>2</sup> Grande seems to concede these notices constitute circumstantial evidence of unauthorized file sharing. (Dkt. # 487 at 5.)



at 5.) But “a perfect knowledge standard[] is not required” for ISP liability as a contributory copyright infringer. BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc., 199 F. Supp. 3d 958, 979 (E.D. Va. 2016), aff’d in part, rev’d in part, 881 F.3d 293 (4th Cir. 2018). Moreover, Plaintiffs showed the jury several ways Grande could have verified Rightscorp’s allegations: (1) Rightscorp offered to meet and discuss the infringement on Grande’s network in January 2015 (Dkt. # 238 at 935); (2) provided detailed individual notices;<sup>3</sup> (3) created a customized dashboard for Grande to look at the alleged infringement on its network (Dkt. # 465 at 331); and (4) sent weekly “roll-up” emails documenting repeat infringers. (*Id.* at 335; PX 11-12). Most tellingly, Grande’s corporate representative admitted that it was “correct” that if the jury found “that infringements reflected in a notice actually occurred, then Grande was continuing to provide Internet service to users who were in fact guilty of infringement of which [Grande] had received copyright notices.” (Dkt. # 471 at 1418:12-18.) Grande’s argument boils down to a disagreement with the jury’s decision to credit the Rightscorp notices as legitimate statements of infringement. But a reasonable jury could find this overwhelming circumstantial evidence sufficient to confer actual knowledge upon Grande of its users’ infringement, and

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<sup>3</sup> Though Grande contends that the notices did not indicate the song and the copyright holder of the song at issue, Plaintiff’s Exhibit 40 tells a different story, showing the name of the mp3 file allegedly infringing and clearly identifying BMG (in this case) as the owner of the copyright. (PX 40.) Additionally, the dashboard allowed Grande to “drill down by clicking on the IP addresses and see what songs we had notified them for.” (Dkt. # 465 at 3313:15-17.)

thus find that Grande knew of the specific instances of infringement documented in those notices.

A reasonable jury could likewise conclude that Grande was willfully blind, believing there was a high probability that its users were committing the specific instances of infringement contained in the notices sent by Rightscorp, but deliberately taking steps to avoid learning the truth. (See Dkt. # 449 at 19.) Plaintiffs put on evidence that in late 2009, one of Grande's primary goals was to reduce churn, meaning the number of customers no longer using Grande's service. (Dkt. # 468 at 926:21-927:2.) And in October 2010, Grande established a policy never to terminate any subscribers for copyright infringement, regardless of how many notices it received about them. (Dkts. ## 468 at 924:6-15; 469 at 982:6-983:8, 1020:22-1021:14.) Plaintiffs provided evidence that Grande did not decline to process Rightscorp notices because it thought they had been spoofed, nor because Grande had any factual basis to believe that the Rightscorp system was inaccurate. (Dkts. ## 469 at 1021:21-1022:1-3; 468 at 972-973, 984-985.) Thus, the jury was entitled to conclude that Grande believed it highly probable that Rightscorp's notices were accurate, but avoided learning that fact.

Grande portrays its practice of not forwarding Rightscorp notices to users as *ispo facto* evidence that it did not believe the notices to be legitimate. But Plaintiffs presented evidence that from March 2016 until February 2017, Grande did, in fact, forward Rightscorp notices to its customers. (Dkts. ## 468 at 962:4-17; 471 at 1410:4-16 (testifying that Grande forwarded Rightscorp notices to its customers from roughly March of 2016 until the imple-

mentation of the February 2017 policy); PX 1-2.) Plaintiffs provided evidence that this change was not attributable to any intervening scrutiny into Rightscorp’s reliability or accuracy, since Grande admitted at trial that it made no effort to investigate Rightscorp’s infringement detection system before the instant lawsuit was filed. (Dkt. # 468 at 972:19-973:19.) Furthermore, Grande’s interest in the outcome of the BMG v. Cox litigation indicates that Grande recognized Rightscorp as potentially credible. (Dkt. # 468 at 932; PX 166, 216.) A reasonable jury was entitled to rely on Grande’s behavior as circumstantial evidence of its belief that the Rightscorp notices *were* accurate or had a high probability of being accurate—at the very least because Grande would not have bothered its customers with what it believed to be inaccurate notices. (See PX 169 (describing a notice from Rightscorp in terms of “downloading/sharing The Godfather: Part II,” and instructing user to “find out who on their network has downloaded the video and is sharing it and remove it.”); Dkt. # 468 at 860-861 (Q: And back in 2014, do you ever recall in response to questions from Mr. Murphy or Mr. Creel telling them that, “Believe me, they know they downloaded the referenced content each time”? A: I do remember that).) Accordingly, judgment as a matter of law is not proper on this ground.

### III. Material Contribution

To prove contributory liability, Plaintiffs had to prove that Grande “induced, caused, or materially contributed to the infringing activity.” (Dkt. # 449 at 19.) The Court specified that this standard “is met when a defendant can take basic measures to prevent further damages to copyrighted works, yet intentionally continues to provide access to infringing sound recordings.” (Id.)

### A. Evidentiary Sufficiency for Material Contribution

Plaintiffs provided un rebutted evidence at trial that Grande did not terminate a single user for copyright infringement from October 2010 to May 2017, regardless of the source, content, or volume of notices provided to Grande about the user’s infringing activity. (Dkt. # 468 at 981:10-983:13; 924:6-925:5.) Grande conceded it was “correct” that “Grande could have received a thousand notices about a customer, and it would not have terminated that customer for copyright infringement” during that period. (*Id.* at 925:1-5.) Grande also admitted that it had the capacity to terminate subscribers, given that it “would terminate [nonpaying users] 100% of the time.” (Dkts. ## 471 at 1263:21-1264:5; 468 at 972:11-17.) It is undisputed that cutting off a user’s internet service would disable that user from distributing Plaintiffs’ copyrighted works via Grande’s internet service.<sup>4</sup>

Grande challenges the sufficiency of this evidence to prove material contribution. But this is exactly the sort of evidence this Court invoked at summary judgment, finding that “Grande ha[d] at least one simple measure at its disposal—terminating the internet services of repeat infringers—to prevent further damages to copyrighted works.” (Dkt. # 268 at 42.) Other courts have also found that failing to terminate infringing subscribers is enough to constitute material contribution. See BMG Rights Mgmt. (US) LLC, 199 F. Supp. 3d at 979 (“There can be no question that the provision of high-speed internet ser-

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<sup>4</sup> The fact that the internet is available from more than one ISP has no bearing on this undisputed fact. See Sony Music Entm’t v. Cox Commc’ns, Inc., 464 F. Supp. 3d 795, 816 (E.D. Va. 2020).

vice materially contributes to infringement via BitTorrent and that Cox had the means to withhold that assistance upon learning of specific infringing activity.”) aff’d in part, rev’d on other grounds, 881 F.3d 293 (4th Cir. 2018); see also Sony Music Entm’t, 464 F. Supp. 3d at 816 (providing internet to repeat infringers despite notice of specific instances of infringement demonstrated that “Cox was indispensable to each instance of P2P infringement on its network,” and thus “substantially assisted widespread infringement with actual knowledge of the conduct on specific subscribers’ accounts.”).

Grande’s argument that Plaintiffs failed to provide evidence that Grande “was even aware of how, specifically, users of its network could use BitTorrent to obtain ‘access’ to the unauthorized copies of sound recordings at issue in this case,” misses the point. (Dkt. # 487 at 8.) The question in this case was one of distribution—the direct infringement consisted of Grande users uploading works to others via BitTorrent. Eliminating internet service disables a person from uploading sound recordings on BitTorrent, which requires an active internet connection. Thus, Plaintiffs had no need to demonstrate Grande’s understanding of how users could “access” the sound recordings—merely, how users used Grande internet to connect to BitTorrent and upload the sound recordings. (Dkt. # 465 at 342.) And Plaintiffs made this showing repeatedly. (See supra Section II (A).)

Plaintiffs provided sufficient evidence for a reasonable jury to find that Grande materially contributed to its users’ direct infringement by failing to terminate users after learning of their specific, often repeated, infringement. Accordingly, judgment as a matter of law is not proper on this point.

### B. Legal Arguments for Material Contribution

Grande next argues that the Court should not have included material contribution in its jury instructions on contributory infringement. (Dkt. # 487 at 7.) At summary judgment, the Court explained that ISPs like Grande “can be held contributorily liable if [they] ha[ve] *actual* knowledge that specific infringing material is available using its system, and can take simple measures to prevent further damages to copyrighted works, yet continue[] to provide access to infringing works.” (Dkt. # 268 at 41-42 (quoting Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1172 (9th Cir. 2007) (internal citation omitted)).) The Court’s jury instruction distills this understanding that “continuing provision of internet services to customers who engage in repeated copyright infringement substantially facilitates access to and the distribution of infringing materials,” and that “Grande has at least one simple measure at its disposal—terminating the internet services of repeat infringers—to prevent further damages to copyrighted works.” (Dkt. # 268 at 41-42.)

Grande points to Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005) to argue that contributory infringement must be premised on “clear expression or other affirmative steps taken to foster infringement.” (Dkt. # 487 at 7.) But the Court’s jury instruction is entirely consistent with Grokster. As the Court explained at summary judgment, Grokster did not abrogate the common law on contributory liability, which confers liability to “one who, with knowledge of the infringing activity, induces, causes or *materially contributes* to the infringing conduct of another.” Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc., 443 F. 2d 1159, 1162 (2d Cir. 1971) (emphasis added). Rather, Grokster

confirmed that the purveyor of a technology capable of both infringing and non-infringing uses cannot hide behind the technology's non-infringing uses to shield itself from liability when the purveyor has induced, caused, or materially contributed to the infringer's activity. 545 U.S. at 935. The Court's resolution of Grande's legal argument on this point, codified in the jury instructions, was not a "a manifest error of law," and thus does not support a new trial. Simon, 891 F.2d at 1159 (quoting Fed. Deposit Ins. Corp., 781 F.2d at 1268).

#### IV. Willfulness

The Court next instructed the jury that to find Grande's conduct was willful for the purposes of statutory damages, the evidence had to show that "Grande had knowledge that its subscribers' actions constituted infringement of Plaintiffs' copyrights or that Grande acted with reckless disregard for or willful blindness to the Plaintiffs' rights." (Dkt. # 449 at 25.)

##### A. Evidentiary Sufficiency for Willfulness

Plaintiffs provided sufficient evidence for a reasonable jury to find either knowledge or reckless disregard. Plaintiffs adduced evidence that Grande established a policy in October 2010 never to terminate a subscriber for copyright infringement and maintained that policy until 2017. (Dkts. ## 468 at 924:6-15; 469 at 982:6-983:8, 1020:22-1021:14.) Grande failed to forward Rightscorp notices to its users<sup>5</sup> or to investigate the validity of the Rightscorp system even after becoming aware that another ISP, Cox, had been held liable for contributory copyright infringement based on evidence from Rightscorp.

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<sup>5</sup> Until March of 2016. (Dkts. ## 468 at 962:4-17; 471 at 1410:4-16.)

(Dkt. # 468 at 924:6-925:5, 932:12-935:3, 982:6-983:8, 1020:22-1021:14.) A reasonable jury could infer that Grande knew that it would be liable for contributory copyright infringement based on its failure to forward any notices from Rightscorp, or to terminate any infringers for almost a decade.

A reasonable jury could likewise conclude that Grande acted with reckless disregard for or willful blindness to Plaintiffs' rights in their copyrighted work by (1) failing to forward Rightscorp notices; (2) failing to investigate Rightscorp via the custom dashboard, the offer to meet and review the system, or the roll-up notices; and (3) failing to terminate any subscribers for copyright infringement from 2010-2017.<sup>6</sup>

#### B. Legal Argument for Willfulness

Grande contends that the Court should not have included reckless disregard as a mental state for willfulness. At summary judgment, the Court recognized that under Fifth Circuit law, a jury could find Grande's infringement to be willful if Grande "acted with reckless

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<sup>6</sup> Grande states that "[t]here was no evidence at trial that Grande had any knowledge, before this lawsuit was filed, that Plaintiffs' copyrights were in anyway implicated by Rightscorp's copyright complaints," given that "none of [the Rightscorp notices] identified a Plaintiff or related entity as the copyright owner." (Dkt. # 487 at 12.) Grande provides no supporting law for the proposition that Plaintiffs needed to show Grande was aware of the effect of its conduct on *Plaintiffs* in particular (as opposed to other copyright owners). And as Plaintiffs point out, such a requirement would be illogical in this case, since Grande admitted to having a policy of ignoring the copyright infringement notices provided by *any* rights-noticing company, about *any* copyright holder's works, under its blanket policy of never terminating users for infringement.



disregard of Plaintiffs’ rights as copyright holders.” (Dkt. # 268 at 43.) Nevertheless, the Court heard arguments from Grande about this issue at the jury charge conference and directed the parties to brief the relevant law in support of their positions before deciding on a final jury instruction. (Dkt. # 474 at 1931:17-1940:17.)

Plaintiffs cited Fifth Circuit authority holding that the willfulness inquiry can be satisfied when a defendant’s infringing conduct is “reckless.” Grafer v. Mid-Continent Cas. Co., 756 F.3d 388, 395 (5th Cir. 2014). While the “Supreme Court has not directly addressed the definition of ‘willful’ under the Copyright Act,” both decisions throughout the Fifth Circuit and the “common law meaning” of the term indicate that willfulness under the Copyright Act “cover[s] situations where ‘the defendant *has recklessly* disregarded the plaintiff’s rights . . .” Id. (emphasis original). Plaintiffs also pointed to numerous circuit courts having reached the same conclusion.<sup>7</sup> (See Dkt. # 438 at 3 (collecting cases).) The Court finds no error in its decision to instruct the jury that “reckless disregard of Plaintiffs’ rights as copyright holders” satisfies the *mens rea* requirement of willfulness for statutory damages.<sup>8</sup>

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<sup>7</sup> Furthermore, “reckless disregard of a copyright holder’s rights” was approved as an appropriate instruction on the Fourth Circuit’s review in BMG, 881 F.3d at 312-13.

<sup>8</sup> While there is logical merit to Grande’s argument that including reckless disregard here means imposing a lower mental state requirement for increased statutory damages from “willfulness” than the mental state required to prove liability (willful blindness), the Court recognized that the first inquiry is liability, and the second is the aggravating damages factor of willfulness. Based on the jury form,

Grande also re-raises its objection at the jury charge conference that Plaintiffs should be required to prove that Grande “knew its own conduct constituted copyright infringement,” rather than knowing the same about the conduct of Grande’s users. (Dkt. # 487 at 11.) The Fourth Circuit expressly rejected this argument when raised by Cox in BMG, 881 F. 3d at 312. The Court agrees with the Fourth Circuit that contributorily infringing “with knowledge that *one’s subscribers* are infringing is consistent with at least reckless disregard for the copyright holder’s rights.” Id. (emphasis added); see also Sony v. Cox, No. 1:18-cv-950 (E.D. Va.) Dkt. # 671 (Jury Instruction # 29). Because the Court properly instructed the jury with respect to willfulness, the Court did not commit a “a manifest error of law,” and thus a new trial is not appropriate. Simon, 891 F.2d at 1159 (quoting Fed. Deposit Ins. Corp., 781 F.2d at 1268).

#### V. Evidence of Ownership

Grande argues that Plaintiffs provided insufficient evidence of its ownership of the 1,403 copyrighted works. Grande incorrectly claims that this Court never ruled on ownership, such that the Court improperly instructed the jury that “[t]his issue has already been resolved, and you do not need to decide it.” (Dkt. # 449 at 16.) In fact, the Court ruled on ownership in direct response to Grande’s first JMOL: “If I didn’t [make a ruling on ownership] before, I will now, because there’s not been one shred of evidence anywhere that the plaintiff in this case did not — plaintiffs in this case don’t own those copyrights.” (Dkt.

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there is no way the jury could have returned a *liability* finding based on “recklessness” alone. (See Dkt. # 449 at 18.)

# 475 at 2013:9-12.) The Court’s ruling on ownership remains correct in post-trial hindsight. Plaintiffs presented un rebutted evidence of ownership, including employee witness’ testimony that their respective companies owned or exclusively controlled the works in suit, and explanations of how their companies came to own or exclusive control each of the works in suit. (See Dkts. ## 464 at 178:8-22 (W. Leak for Sony); 469 at 1071:7-18 (T. Parry for Warner); 471 at 1310:15-1311:9 (A. McMullan for Universal).) This evidence supports the Court’s ruling on ownership. Thus, judgment as a matter of law is improper on this ground.

#### VI. Evidence of Eligibility for Statutory Damages

Grande also argues that the Court incorrectly found that 1,403 of Plaintiffs’ copyrighted sound recordings were eligible for statutory damages under 17 U.S.C. §§ 412, 504(c). (Dkt. # 487 at 12-13.) Section 412 requires consideration of the dates of (1) the infringement, (2) the first publication of the work, and (3) the effective registration of the work. *Id.* The Court rejects Grande’s summary argument that “Plaintiffs did not offer evidence sufficient to carry this burden.” (Dkt. # 487 at 13.) The Court found the 1,403 sound recordings eligible for statutory damages as a matter of law based on Plaintiffs’ un rebutted evidence that the dates aligned as required by Section 412.

For each of the 1,403 sound recordings, Plaintiffs produced, through fact witnesses for each record company, a copy of the copyright registration certificate or a printout from the Copyright Office website showing the relevant copyright publication and registration dates, as well as summary exhibits reflecting the same. (See PX 19-24; Dkts. ## 464 at 181:8-182:5 (W. Leak for Sony); 469 at

1072:9-1073:15 (T. Parry for Warner); 471 at 1312:24-1313:8 (A. McMullan for Universal.) Plaintiffs’ expert witness, Dr. Robert Bardwell, introduced the date ranges of infringement—in particular, the first date of infringement—for each sound recording, based on the 1.35 million Rightscorp notices at issue. (See PX 459; Dkt. # 471 at 1291:7-1292:11; 1294:10-1296:18.) This undisputed evidence rendered Section 412 eligibility of the 1,403 sound recordings “a straightforward matter of dates” that the Court appropriately ruled on as a matter of law. (Dkt. # 475 at 1958:13-1960:11.)

Grande also argues that “the Court erred in concluding that Plaintiffs could satisfy [S]ection 504(c)’s ‘one award per work’ rule based on evidence that the songs in suit had ‘independent economic value’ because Plaintiffs sold them separately (for example, through iTunes).” (Dkt. # 487 at 13.) This objection was raised at the jury charge conference, the Court indicated that it was “inclined to agree” with Plaintiffs, but allowed additional briefing before making its final decision. (See Dkt. # 474 at 1929:10-14.)

Following the additional briefing, the Court found that the majority of case law holds that when individual sound recordings are available as individual works, a plaintiff can recover one statutory damages award per recording consistent with 17 U.S.C. § 504. See Sony, 464 F. Supp. 3d at 824 (E.D. Va. 2020) (finding that there was no reason to modify the number of works based on “compilations” where defendant ISP did not put facts in evidence to recharacterize or rebut the individual characterization of these works which plaintiffs testified were available on a per-song basis); EMI Christian Music Group, Inc. v. MP3tunes, LLC, 844 F.3d 79, 101 (2d Cir. 2016)

(affirming jury verdict because “there was evidence at trial that all the songs in question were made available as singles on the date of infringement,” and “the focus is on whether the plaintiff—the copyright holder—issued its works separately, or together as a unit.”); BMG Rights Mgmt. (US) LLC, 199 F. Supp. 3d at 983, aff’d in part, rev’d in part, 881 F.3d 293 (4th Cir. 2018) (providing commentary on what constitutes a work for statutory damages in this context). Plaintiffs provided uncontroverted testimony that they made all the works in suit but four available to the public on an individual basis during the relevant time period of 2011 to 2017. (Dkts. ## 464 at 182:8-183:2 (W. Leak for Sony); 469 at 1073:16-1074:6 (T. Parry for Warner); 471 at 1313:9-24 (A. McMullan for Universal).)

The Court’s logic with respect to the eligibility of the 1,403 copyrighted sound recordings remains sound post-trial. The Court’s resolution of Grande’s legal arguments on this issue was not a “a manifest error of law,” and thus does not support a new trial. Simon, 891 F.2d at 1159 (quoting Fed. Deposit Ins. Corp., 781 F.2d at 1268).

## VII. Evidentiary Objections

Grande asserts a litany of errors in this Court’s admission of evidence. To begin with, Grande argues that the Court improperly admitted evidence: (1) that Cox was contributorily liable for copyright infringement based on evidence provided by Rightscorp; and (2) regarding the safe harbor provision of the Digital Millennium Copyright Act (“DMCA”) and Grande’s failure to qualify for that safe harbor was inadmissible. (Dkt. # 487 at 9.) Grande also offers a laundry list of seven other evidentiary issues. (Id. at 15-16.)

### A. The Cox Litigation

At trial, the Court held that evidence “that the defendants were aware of” the outcome of the Cox litigation was admissible because Grande’s knowledge of the Cox verdict informed actions that Grande took or failed to take with regard to Rightscorp during the relevant time period. (Dkt. # 467 at 583:7-586:8.) Those actions were relevant to, among other things, Grande’s motivation, knowledge, willfulness, and recklessness regarding the validity of Rightscorp’s notices. (*Id.* at 599:22-600:11.) The Court was clear that Plaintiffs should not mention the amount of the verdict or use the Cox verdict to insinuate that this case should come out the same way. This evidence was relevant for the purpose of proving that there was at least an issue of liability raised by the Rightscorp notices, but Grande chose to ignore that possibility and did not investigate the validity of the software. That goes directly to the issue of willful blindness. (Dkt. # 468 at 828:1-5 “I’m allowing you the opportunity to extract the testimony regarding the Cox case, to a point, over the objection of the defendants, because that does involve Rightscorp, and it does go directly to the issue of their willful blindness, if any.”) The validity of the Rightscorp software was to be elicited only by testimony at trial, not the jury’s decision in BMG v. Cox to credit the software.

The Court finds that the testimony on the Cox litigation was properly cabined to the issues of notice and knowledge: Grande’s employee testified that he was aware in November of 2014 that “a music company called BMG had sued Cox for copyright infringement,” that he had “discussed it with another employee,” and that the suit was “based on Rightscorp notices,” and that at the

same time, Grande was receiving Rightscorp notices, but “did not do any research into the Rightscorp system” even after “in December of 2015, a jury ruled in favor of BMG in its case against Cox.” (Dkt. # 468 at 932.) Plaintiffs also elicited testimony sufficient to introduce emails sent between Grande employees about the Cox litigation, including one email indicating that as a result of the Cox litigation, “[w]e may need to revisit this process at some point regarding copyright infringement.” (Dkt. # 468 at 934-935; PX 106.) These emails go directly to whether Grande willfully blinded itself to what it understood to be a high possibility that the notices reflected infringement. (See also Dkt. # 468 at 935:9-942:7 (discussing an email between about whether Grande should take Rightscorp up on its offer to meet with them and discuss their system two months after the Cox verdict); PX 108.) To address Grande’s arguments regarding prejudice, the Court also issued two limiting instructions to the jury related to this

evidence, once when it was first introduced<sup>9</sup> and again when the case was submitted to the jury.<sup>10</sup>

### B. The DMCA Safe Harbor

Grande next argues that the court erred in admitting evidence regarding the safe harbor provision of the DMCA and Grande's failure to qualify for that safe harbor. (Dkt. # 487 at 8-9.) Before trial, the Court denied Grande's motion *in limine* to exclude this evidence because it was relevant. (Dkt. # 347 at 16-17.) Grande then moved for reconsideration of that ruling, which the Court denied because Grande's motion was "unpersuasive," resting on Plaintiffs' representation that "they do not intend to argue at trial that Grande is liable because it failed to qualify for a DMCA safe harbor." (Dkt. # 358 at 8.) Grande raised this argument again during the pre-trial conference, at which point the Court determined it had

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<sup>9</sup> The first instruction was as follows: "Now, ladies and gentlemen, I'm going to give you what we call a limiting instruction, and it's important that you understand and follow this instruction. Now, you have heard evidence in another -- evidence that in another case, in another court, with different parties, there was a verdict reached in a copyright litigation against a different Internet provider. This evidence may be considered by you only for the purpose of evaluating the state of mind of Grande executives and employees at the time and nothing else. It is not to be considered by you as evidence because a different Internet service provider was found liable that Grande in this case is liable. Although the other case involved Rightscorp, it involved different parties, different lawyers, different facts, additional evidence and different instructions on the law. In other words, it was a totally different case with the exception of the involvement of Rightscorp. Further, this case went up on appeal and the final result of that case is not before you and is not relevant." (Dkt. # 468 at 978:8-979:1.)

<sup>10</sup> A nearly identical second instruction was given during jury instructions. (Dkt. # 475 at 2047:13-2048:5.)



“heard enough” on this issue and would affirm and rely on its prior written rulings. (Dkt. # 463 at 31:5-12.) The Court understood, and communicated to counsel, that it would be improper for Plaintiffs use testimony about the DMCA safe harbor to argue that because Grande did not qualify for the safe harbor, Plaintiffs had necessarily proved the underlying copyright infringement case. Plaintiffs’ counsel indicated that they would “never argue that the absence of the safe harbor means that they’re liable for contributory infringement.” (See id. at 29, 31.) The Court found that the DMCA safe harbor was potentially relevant to the willfulness of Grande’s behavior in adopting its 2010 policy to not terminate any infringers because it had a DMCA-compliant policy before and after that period. (Dkt. # 464 at 16:16-21.) Plaintiffs still had to prove their case, and could not use the fact that Grande did not qualify for the safe harbor as evidence of the elements of contributory infringement: that Grande users committed direct infringement, Grande knew of specific instances of infringement and was willfully blind to them, Grande materially contributed to its users’ infringement.

Grande points to only two instances in which the DMCA safe harbor was mentioned at trial. In its closing argument, Grande noted twice that its compliance with the safe harbor provision was “optional” and alluded to having made the choice to not “take advantage of that optional defense.” (Dkt. # 475 at 2136:9-19.) To rebut this argument, Plaintiffs accurately noted that Grande in fact sought the safe harbor as a defense in this action but “lost.”<sup>11</sup> (Id. at 2143:24.) And the one line of testimony that

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<sup>11</sup> Grande’s motion also takes the quoted passage out of context, which was clearly a transition to recapping each element needed to prove

Grande points to outside of that does not even mention the DMCA by name, stating only that the record services company expected ISPs to act when they became aware of infringement because they had “negotiated and lobbied for a safe harbor protection in the law.” (Dkt. # 471 at 1331.) The objection to this question was sustained. (Id.)

Grande raises 17 U.S.C. § 512(l), which provides that failure to qualify for the safe harbor “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.” But the Court issued a limiting instruction to the jury tracking this language exactly. (Dkt. # 449 at 13.) The limiting instruction also made clear that the DMCA safe harbor is only a “optional” defense for internet services providers to claims of secondary liability arising from infringement by users on its network, “not a legal requirement.” (Dkt. # 449 at 13.) And Plaintiffs, in opening, stated that its claim of contributory infringement “rises and falls depending on whether plaintiffs can prove the standards that you’ll hear from Judge Ezra, and the issue of whether Grande qualified for the safe harbor is not a factor in deciding whether plaintiffs have proven their case.” Plaintiffs explained to the jury that the DMCA safe harbor was only mentioned to eliminate the issue of fairness in deciding whether to hold Grande liable, because the DMCA “specifically addressed the issue of whether it’s fair to apply this doctrine of contributory infringement to ISPs.” (Dkt. # 464 at 57-59.) The Court’s admission of evidence re-

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the underlying case, not an imposition of liability because Grande did not meet the safe harbor. (See Dkt. # 475 at 2144.)

garding the DMCA safe harbor was not a prejudicial error and thus does not warrant the extraordinary relief of a new trial. See Seidman, 923 F.2d at 1140.

### C. Remaining Evidentiary Issues

Finally, Grande offers a laundry list of seven evidentiary issues for which it provides no factual argument or legal support. (Dkt. # 487 at 15-16.) Courts regularly deny motions under Rule 59 when the movant “cites no authority to support [its] argument” that evidentiary rulings were incorrect. Wilkerson v. Univ. of N. Texas, No. 15-cv-540, 2019 WL 2716779, at \*9 (E.D. Tex. June 28, 2019). Nonetheless, the Court discusses each evidentiary objection on the merits.

Grande contends that the Court admitted evidence regarding copyright complaints and alleged instances of copyright infringement not at issue in this case. (Dkt. # 487 at 9.) Grande does not cite any time in the record when this occurred. Assuming that Grande means the evidence demonstrating that Grande received notices of infringement from companies other than Rightscorp, the Court denied Grande’s motion *in limine* to exclude this evidence because it was relevant. (Dkt. # 347 at 14-16.) Then, as now, Grande’s handling of such notices directly bears on Grande’s willful blindness to *all* copyright infringement on its network, and undermines its claim that it did not pass on notices from Rightscorp because of some error inherent in its technology. At trial, the Court explained that Grande’s receipt of such notices “goes to whether [Grande] was aware that their service . . . was being used generally by individuals who were, in fact, allegedly violating copyright law.” (Dkt. # 468 at 821:14-

19.) The probative value of this evidence is not substantially outweighed by its prejudicial effect, and thus it was admissible. Fed. R. Evid. 403.

Grande next claims that the Court admitted “evidence regarding the Audible Magic software and outputs from the software for which no proper foundation was laid” is unsupported by the record. (*Id.* at 16.) Audible Magic was a critical part in Plaintiffs’ case about the reliability of the Rightscorp notices, and a proper foundation was laid through several experts for discussion of the software and its outputs. The Court admitted evidence from a seventeen-year employee of the RIAA that Audible Magic is “the industry standard” for analyzing audio files and comparing those files to a database of known recordings. (Dkt. # 464 at 196:1-8.) This witness testified to using the software “[l]iterally millions of times” including “almost on a daily basis” in his antipiracy role at RIAA. (*Id.* at 196:9-17.) A proper foundation for the output files from Audible Magic was presented through the RIAA witness, who personally ran the software on the files received from the Rightscorp hard drive and generated output files that the RIAA maintains in its regular course of business. (*Id.* at 204:9-208:17.)

Grande’s objection to the expert testimony of Barbara Frederiksen-Cross about the reliability of Audible Magic “that was not properly disclosed in discovery” is similarly off-base. (Dkt. # 487 at 16.) The Court assumes that this argument references the denial of Grande’s Motion to Exclude Certain Opinions of Barbara Frederiksen-Cross. (Dkt. # 417.) The Court’s basis for denying that motion was well-reasoned and stands up to post-trial scrutiny: to avoid any prejudice to Grande from Ms.

Frederiksen-Cross' testimony about Audible Magic's reliability that was first disclosed in her Second Rebuttal Report, the Court made a detailed ruling about how to proceed with her testimony. The Court allowed Ms. Frederiksen-Cross to testify at trial about Audible Magic, then required her to disclose (under a substantive protective order) the basis for her Audible Magic conclusions, then permitted Grande to depose her about the basis of that conclusion, and allowed Ms. Frederiksen-Cross to return to finish her testimony on Audible Magic. (Dkt. # 465 at 240-43.)

Next, Grande contends that the Court erred in admitting evidence regarding Grande's total profits, revenues, and overall value, as well evidence regarding the collective size and revenues of Grande and affiliated companies that are not defendants in this case. The probative value of this evidence outweighed its prejudicial effect. "[S]tatutory damages under § 504(c)" express "an intent to deter, not just compensate." Energy Intelligence Group, Inc. v. Kayne Anderson Capital Advisors, L.P., 948 F.3d 261, 276 (5th Cir. 2020). Accordingly, "[t]he overall size and wealth of the defendant is a valid consideration for a statutory damages award" because of its impact on the deterrence effect. Sony Music Entm't, 464 F. Supp. 3d at 842; see also Playboy Enterprises, Inc. v. Webbworld, Inc., 991 F. Supp. 543, 560 (N.D. Tex. 1997), aff'd, 168 F.3d 486 (5th Cir. 1999). see also Psihoyos v. John Wiley & Sons, Inc., 2012 WL 5506121 at \* 4 (S.D.N.Y. 2012) (allowing the jury to consider the fact that the defendant was a "\$300 million a year division of a \$1.7 billion company"). The probative value of this evidence is not substantially outweighed by its prejudicial effect, and thus it was admissible. Fed. R. Evid. 403.

Grande also objects to testimony from Dr. William Lehr about Grande's economic incentives for permitting infringement. (Dkt. # 487 at 16.) This testimony had probative value both for demonstrating Grande's motivations for its policy of never terminating subscribers from 2010-2017, and in evaluating statutory damages—principally, “[t]he profits Grande earned because of the infringement” and the “expenses Grande saved because of the infringement.” (Dkts. ## 449 at 22; 470 at 1121.) Again, the probative value of this evidence is not substantially outweighed by its prejudicial effect, and thus it was admissible. Fed. R. Evid. 403.

Next, Grande takes issue with the Court's admitting evidence from Rightscorp employee Gregory Boswell regarding the origin of music files Rightscorp downloaded from users of Grande's network—“evidence that was ostensibly based on underlying data not produced in discovery or offered into evidence at trial.” (Dkt. # 487 at 16.) The Court disagrees with this characterization of the Rightscorp downloads. Mr. Boswell agreed in testimony that PX 3 was a “drive containing . . . the download files that [he] provided to [Plaintiffs] from the Rightscorp system.” (Dkt. # 465 at 21-24.) He then described in detail how those files had been downloaded into the Rightscorp system from users of Grande's network. (*Id.* at 338-348, 360:1-361:5.) This was more than adequate foundation for the evidence to be admitted.

Lastly, Grande argues that the Court “admitt[ed] Rightscorp's copyright complaints without proper foundation and over Grande's hearsay and Fed. R. Evid. 1002 objections.” (Dkt. # 487 at 16.) The Court rejects this contention. The Court admitted the notices after a proper

foundation was laid to qualify the notices as business records. (Dkt. # 292-317.) As to the Rule 1002 objection, the Court properly ruled that given the fact that Rightscorp is not a party to this litigation, even if the “original” evidence was destroyed by Rightscorp, other evidence of content—the notices—is admissible unless the destruction was the result of “the proponent acting in bad faith.” (Dkt. # 268 at 29); Fed. R. Evid. 1004. In the absence of such evidence, the Court had no reason to reject the Rightscorp notices under Rule 1002.

#### CONCLUSION

Neither Grande’s legal nor evidentiary arguments warrant judgment as a matter of law or a new trial. Accordingly, the Court **DENIES** Grande’s Renewed Motion for Judgment as a Matter of Law or a New Trial. (Dkt. # 487.)

**IT IS SO ORDERED.**

**DATED:** Austin, Texas, May 11, 2023.

/s/ David Alan Ezra

David Alan Ezra

Senior United States District Judge

**APPENDIX C**

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

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NO. 1:17-CV-365-DAE

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UMG RECORDINGS, INC., CAPITOL RECORDS,  
LLC, WARNER BROS. RECORDS, INC., SONY  
MUSIC ENTERTAINMENT, ARISTA RECORDS,  
LLC, ARISTA MUSIC, ATLANTIC RECORDING  
CORPORATION, CAPITOL CHRISTIAN MUSIC  
GROUP, INC., ELECKTRA ENTERTAINMENT  
GROUP, INC., FONOVISA, INC., FUELED BY  
RAMEN, LLC, LAFACE RECORDS, LLC,  
NONESUCH RECORDS, INC., RHINO  
ENTERTAINMENT COMPANY, ROADRUNNER  
RECORDS, INC., ROC-A FELLA RECORDS, LLC,  
TOOTH & NAIL, LLC, and ZOMBA  
RECORDING, LLC,  
Plaintiffs,

v.

GRANDE COMMUNICATIONS  
NETWORKS, LLC,  
Defendant.

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Filed: March 15, 2019

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**ORDER: (1) ADOPTING REPORT AND  
RECOMMENDATIONS (DKTS. ## 240, 241);**



**(2) GRANTING PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO GRANDE’S DMCA SAFE HARBOR DEFENSE (DKT. # 127); (3) GRANTING IN PART AND DENYING IN PART GRANDE’S MOTION FOR SUMMARY JUDGMENT (DKT. # 140); (4) DENYING GRANDE’S MOTION FOR SANCTIONS (DKT. # 156); AND (5) DENYING PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY (DKT. # 172).**

Before DAVID ALAN EZRA, Senior United States District Judge.

Before the Court are two Report and Recommendations, both filed by Magistrate Judge Andrew W. Austin on December 12, 2018. (Dkts. ## 240, 241.) Pursuant to Local Rule CV-7(h), the Court finds this matter suitable for disposition without a hearing. After careful consideration and review, the Court—for the reasons that follow—(1) **ADOPTS** the Report and Recommendations (Dkts. ## 240, 241); (2) **GRANTS** Plaintiffs’ Motion for Partial Summary Judgment as to Grande’s DMCA safe harbor defense (Dkt. # 127); (3) **GRANTS IN PART AND DENIES IN PART** Grande’s Motion for Summary Judgment (Dkt. # 140); (4) **DENIES** Grande’s Motion for Sanctions (Dkt. # 156); and **DENIES** Plaintiff’s Motion for Summary Judgment as to Liability (Dkt. # 172).

#### BACKGROUND

Plaintiffs in this case are record companies that produce commercial sound recordings and distribute them throughout the United States. (Dkt. # 1 at 2.) Remaining Defendant Grande Communications Networks, LLC (“Grande”) is an internet service provider (“ISP”),

providing internet access to customers in Texas. (*Id.*) Former Defendant Patriot Media Consulting, LLC (“Patriot”) provided and continues to provide various management services to Grande. (*Id.* at 6.) Plaintiffs originally filed suit against both Grande and Patriot. (*Id.* at 1.) Plaintiffs asserted that Defendants received over one million notices of direct copyright infringement allegedly committed by Grande’s customers. (*Id.* at 2, 11–12.) Plaintiffs allege that these customers directly infringed on Plaintiffs’ copyrights through the use of various of file sharing applications, including BitTorrent. (*Id.* at 2, 8–12.) Plaintiffs’ complaint asserted claims for secondary copyright infringement under 17 U.S.C. § 101 et seq. against both defendants, alleging Defendants continued to provide infringing customers with internet access after receiving the notices of infringement. (*Id.* at 13, 15, 17.)

On April 19, 2017, Defendants filed separate motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). (Dkts. ## 28, 29.) On March 26, 2018, the Court adopted a Report and Recommendation from Magistrate Judge Austin recommending Patriot’s motion be granted in its entirety and Grande’s motion be granted as to Plaintiffs’ claims for vicarious secondary infringement.<sup>1</sup> (Dkts. ## 72 at 21; 77 at 3.) Patriot was thus dismissed as a de-

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<sup>1</sup> There are two recognized types of secondary infringement: contributory and vicarious. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005). Contributory copyright infringement occurs where a defendant “intentionally induc[ed] or encourag[ed] direct infringement.” *Id.* Vicarious infringement occurs when a defendant “profits directly from the infringement and has a right and ability to supervise the direct infringer, even if the defendant initially lacks knowledge of the infringement.” *Id.* at 931 n.9.

fendant from this action. (See id.) Therefore, the only remaining claim in this case is for contributory secondary copyright infringement against Grande.

On April 9, 2018, Grande filed their answer to the complaint. (Dkt. # 80.) Among other affirmative defense, Grande pled the safe harbor provision of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512(i). § 512(i) protects ISPs like Grande from liability for the copyright infringement of their customers if the ISP “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[.]” 17 U.S.C. § 512(i)(1)(A).

On August 8, 2018, Plaintiffs filed a motion for summary judgment as to Grande’s affirmative defense of the DMCA safe harbor provision. (Dkt. # 127.) On December 18, 2018, Judge Austin issued a Report and Recommendation (the “Safe Harbor Report”) recommending Plaintiffs’ motion be granted as to the safe harbor issue.<sup>2</sup> (Dkt. # 241.) On January 23, 2019, Grande filed written objections. (Dkt. # 251.) On January 23, 2019, Plaintiffs filed a response to Grande’s objections.

Additionally, on August 18, 2018, Grande filed a motion for summary judgment as to the issues of liability and damages. (Dkt. # 140.) On September 11, 2018, in their response in opposition to Grande’s motion for summary

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<sup>2</sup> On September 17, 2018, by order of the Court, the case was referred to Magistrate Judge Austin. (Dkt. # 183.) And on October 30, 2018, the case was reassigned to this Court by the Honorable Lee Yeakel. (Dkt. # 212.)

judgment, Plaintiffs cross moved for summary judgment as to liability. (Dkt. # 172.) On December 18, 2018, Judge Austin issued a Report and Recommendation (the “Liability Report”) recommending Grande’s motion for summary judgment be granted as to Grande’s alleged liability for infringing Plaintiffs’ reproduction rights under 17 U.S.C. § 106(1) and public performance rights under 17 U.S.C. § 106(6). (Dkt. # 240.) The Liability Report also recommends denying Grande’s motion in all other respects and denying Plaintiffs’ motion for summary judgment in its entirety. (*Id.*) Both Plaintiffs and Grande filed objections to the Liability Report on January 9, 2019. (Dkts. ## 250, 252.) Plaintiffs filed a response to Grande’s objections on January 23, 2019. (Dkt. # 257.) Grande filed a response to Plaintiffs’ objections on the same day. (Dkt. # 258.) On January 30, 2019, Plaintiffs filed a reply in support of their objections. (Dkt. # 259.)

The Safe Harbor Report and the Liability Report and the parties’ objections thereto are currently before the Court.

### LEGAL STANDARD

#### I. Review of the Magistrate Judge’s Report and Recommendations

Any party who desires to object to a Magistrate Judge’s findings and recommendations must serve and file written objections within 14 days after being served with a copy of the findings and recommendation. Fed. R. Civ. P. 72(b)(2). The Court conducts a de novo review of any of the Magistrate Judge’s conclusions to which a party has specifically objected. *See* 28 U.S.C. § 636(b)(1)(C) (“A judge of the court shall make a de novo determination of those portions of the report or specified

proposed findings or recommendations to which objection is made.”). Findings to which no specific objections are made do not require de novo review; instead, the Court need only determine whether the memorandum and recommendation is clearly erroneous or contrary to law. United States v. Wilson, 864 F.2d 1219, 1221 (5th Cir. 1989). As the parties have timely filed objections to the Magistrate Judges Report and Recommendations, the Court reviews de novo those portions of the reports to which objections have been raised.

## II. Summary Judgment

Summary judgment is proper if “there is no genuine dispute as to any material fact” and the moving party “is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); see also Meadaa v. K.A.P. Enters., L.L.C., 756 F.3d 875, 880 (5th Cir. 2014). A dispute is genuine only “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the nonmoving party must come forward with specific facts that establish the existence of a genuine issue for trial. Distribuidora Mari Jose, S.A. de C.V. v. Transmaritime, Inc., 738 F.3d 703, 706 (5th Cir. 2013) (quoting Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 621 (5th Cir. 2000)). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” Hillman v. Loga, 697 F.3d 299, 302 (5th Cir. 2012) (quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

In deciding whether a fact issue has been created, the court must draw all reasonable inferences in favor of the nonmoving party, and it “may not make credibility determinations or weigh the evidence.” Tiblier v. Dlabal, 743 F.3d 1004, 1007 (5th Cir. 2014) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000)). At the summary judgment stage, evidence need not be authenticated or otherwise presented in an admissible form. See Fed. R. Civ. P. 56(c); Lee v. Offshore Logistical & Transp., LLC, 859 F.3d 353, 355 (5th Cir. 2017). However, “[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment.” United States v. Renda Marine, Inc., 667 F.3d 651, 655 (5th Cir. 2012) (quoting Brown v. City of Hous., 337 F.3d 539, 541 (5th Cir. 2003)).

Finally, when, as here, “parties file cross-motions for summary judgment, [the court] review[s] each party’s motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party.” Green v. Life Ins. Co. of N. Am., 754 F.3d 324, 329 (5th Cir. 2014) (internal quotation marks omitted) (quoting Duval v. N. Assur. Co. of Am., 722 F.3d 300, 303 (5th Cir. 2013)).

## DISCUSSION

### I. Report and Recommendation Regarding Plaintiff ‘s Motion for Partial Summary Judgment as to Grande’s Statutory Safe Harbor Defense

In order to be entitled to the DMCA’s safe harbor protections, an ISP must “adopt[] and reasonably implement[] . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders . . . who are repeat infringers[.]” 17 U.S.C.

§ 512(i)(1)(A). The Safe Harbor Report recommends granting summary judgment to Plaintiffs because:

[t]he undisputed evidence shows that though Grande may have adopted a policy permitting it to terminate a customer's internet access for repeat infringement, Grande affirmatively decided in 2010 that it would not enforce the policy at all, and that it would not terminate any customer's account regardless of how many notices of infringement that customer accumulated, regardless of the source of the notices, and regardless of the content of a notice.

(Dkt. # 241 at 12.) Grande objects to this conclusion, asserting that "[t]here are fact issues for trial regarding whether Grande 'reasonably implemented' its repeat infringer termination policies" and "[t]here are triable issues of material fact regarding the existence of 'appropriate circumstances' warranting termination." (Dkt. # 251 at 3, 7.) Because of Grande's objections, the Court reviews this issue de novo. 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.").

As a party asserting the affirmative defense of the DMCA's safe harbor, Grande "bears the burden of raising entitlement to the safe harbor and of demonstrating that it has . . . taken the steps necessary for eligibility." Capitol Records, LLC v. Vimeo, LLC, 826 F.3d 78, 94 (2d Cir. 2016); see also Mavrix Photographs, LLC v. Livejournal, Inc., 873 F.3d 1045, 1052 (9th Cir. 2017) ("Because the [§ 512(i)] safe harbor is an affirmative defense, [a defendant] must establish 'beyond controversy every essential element,' and failure to do so will render

[a defendant] ineligible for the [§ 512(i)] safe harbor’s protection.”).

Grande argues that it has adopted an appropriate policy because since 2012 it has had a public-facing policy providing for the termination of infringing subscribers. (Dkt. # 251 at 4.) The evidence in the record indicates the opposite. Although Grande apparently stated publicly that its policy was to terminate infringing customers, Grande’s corporate representative testified that from 2010 through 2016, Grande did not have any specific policies or procedures providing for how it would actually go about terminating any such infringing customers. (Dkt. # 127-21, Ex. B at 8–9.) In internal emails, one Grande employee even stated that “we have users who are rack-ing up DMCA take down requests and no process for remedy in place.” (Dkt. # 127-22, Ex. D.)

Moreover, to be eligible for the DMCA safe harbor, an ISP must “reasonably implement” a termination policy, not just adopt one. 17 U.S.C. § 512(i)(1)(A). And “an ISP has not ‘reasonably implemented’ a repeat infringer policy if the ISP fails to enforce the terms of its policy in any meaningful fashion.” BMG Rights Mgmt. (U.S.) LLC v. Cox Commc’ns, Inc., 881 F.3d 293, 303 (4th Cir. 2018). Adopting a repeat infringer termination policy that is not “carried out is not an ‘implementation’ as required by § 512(i).” In re Aimster Copyright Litig., 252 F. Supp. 2d 634, 659 (N.D. Ill. 2002), *aff’d*, 334 F.3d 643 (7th Cir. 2003). “[T]he relevant question is whether [the ISP] actually terminates the uploading privileges of repeat infringers under appropriate circumstances.” Capitol Records, LLC v. Escape Media Grp., Inc., No. 12-CV-6646, 2015 WL 1402049, at \*12 (S.D.N.Y. Mar. 25, 2015).



Prior to 2010, Grande enforced “a policy of turning off all subscribers upon copyright violation notice, requiring the customer to then contact Grande to discuss the issue, understand what happened, inform the customer of why they’d been shut off, and take appropriate action from there.” (Dkt. # 127-3, Ex. C at 12.) However, beginning in October 2010, Grande’s practice of terminating customers ceased (*id.* at 12–13.), and Grande did not terminate a single infringing customer from October 2010 until May 2017 (Dkt. # 127-7, Ex. G at 6). Yet during that period Grande received over a million copyright infringement notices, it was tracking over 9,000 customers on its DMCA “Excessive Violations Report” by late 2016, and it specifically tracked users by the number of notices it received about them. (Dkts. ## 127-9, Ex. I at 5; 127-3, Ex. C at 9.)

In internal emails, Grande employees recognized that “we have some customers that are up to their 54th notice[,]” yet “there is no ‘three strikes’ law or anything that we follow like some ISPs.” (Dkt. # 127-22, Ex. D.) Grande’s corporate representative further admitted that until 2017 it would not terminate a user for infringement “regardless of the source of any notice,” regardless of the content of any notice,” and “regardless of the volume of notices . . . for a given customer.” (Dkt. # 127-7, Ex. G at 6–7.) It was not until June 2017, two months after the commencement of this litigation, that Grande terminated any customers, and even then, it only terminated eleven customers in all of 2017. (Dkt. # 127-24, Ex. H at 1–3.)

Such an utter failure to terminate any customers at all over a six-and-a-half-year period despite receiving over a million infringement notices and tracking thousands of customers as repeat infringers demonstrates that

Grande “made every effort to avoid reasonably implementing [its] policy” and “very clearly determined *not* to terminate subscribers who in fact repeatedly violated the policy.” BMG, 881 F.3d at 303 (emphasis in original). Comparing the facts in this case to the facts in BMG is instructive on this point.

In BMG, the defendant Cox Communications, Inc. (“Cox”) actually had formal procedures in place that would lead to a customer’s termination. The first copyright notice would result in no action. Id. at 299. The second through seventh copyright notices related to a specific customer would result in Cox sending a warning email to the customer. Id. After the eight and ninth notices, Cox would require the customer to click an acknowledgment on their web browser before being able to access websites. Id. After the tenth and eleventh notices, Cox suspended service, requiring the customer to call a technician, who would reactivate service only after advising the customer of the reason for suspension and advising removal of any infringing content. Id. After the twelfth notice, the account would again be suspended, requiring the customer to contact a specialized technician before service would be reactivated. Id. And finally, after a thirteenth notice, Cox would finally consider termination, though termination was not automatic. Id. Because this policy was laxly enforced and often circumvented, the Fourth Circuit affirmed the district court’s ruling that Cox failed to qualify for the DCMA safe harbor. Id. at 303.

Grande argues that BMG is inapposite in this case because in BMG Cox “failed to follow through on its own policy” because Cox internally concluded that a subscriber should be terminated, but then declined to do so to preserve a revenue stream. (Dkt. # 251 at 6 (quoting

BMG, 881 F.3d at 293).) In this case, in contrast, Grande argues, “there is no evidence that Grande ever internally concluded that a particular subscriber should be terminated pursuant to Grande’s public-facing policies, and then nevertheless declined to enforce that policy and terminate the subscriber’s account.” (Id. at 7.)

But in BMG, Cox at least had internal procedures that in theory could lead to the termination of a customer, even if they were laxly enforced and often circumvented. In this case, the evidence is clear that from at least 2011 until 2016 Grande had no internal policy or procedures whatsoever to enforce their forward-facing statement that they would terminate customers for repeat infringements. (Dkt. # 127-21, Ex. B at 8–9.) Grande admitted that until 2017 it would not terminate a user for infringement “regardless of the source of any notice,” regardless of the content of any notice,” and “regardless of the volume of notices . . . for a given customer.” (Dkt. # 127-7 at 6–7.) And in fact Grande did not terminate a single infringing customer from October 2010 until May 2017 (Dkt. # 127-7 at 6.) Unlike Cox, Grande did not even have a policy or procedures in the first place for them to laxly enforce or frequently circumvent.

Grande thus did even less than Cox to “reasonably implement” the kind of policy required for the protections of DMCA’s safe harbor. If lax enforcement and frequent circumvention of existent procedures disqualifies a defendant from the safe harbor’s protections, the complete nonexistence of such procedures surely must do likewise. Such a complete abdication of their responsibilities to implement and enforce a policy terminating repeat copyright infringers requires the Court to conclude that

Grande is not entitled, as a matter of law, to the safe harbor provisions of 17 U.S.C. § 512(i). See, e.g., Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1109 (9th Cir. 2007) (holding that implementation “requires that a service provider terminate users who are ‘repeat infringer,’” and an ISP must “terminate[] users who repeatedly or blatantly infringe copyright”); Escape Media Grp., Inc., 2015 WL 1402949 at \*10 (“[T]he relevant question is whether the [ISP] actually terminates the uploading privileges of repeat infringers under appropriate circumstances.”)

Grande raises two additional arguments as to why summary judgment should not be granted on this issue, each relating to alleged infirmities in some of the infringement notices it received. Grande argues that because these notices were “incapable of identifying or giving notice of actual copyright infringement, there are questions of fact as to whether it reasonably implemented a termination policy in spite of never terminating any customers from 2010 to 2016.” (Dkt. # 251 at 3–7.) Grande also argues, again because of the supposed flaws in these notices, that there are triable questions of fact whether appropriate circumstances existed warranting termination of any customers. (Id. at 7–8.)

However, these arguments are unpersuasive for several reasons. First, BMG also involved the same notices, generated by a company called Rightscorp, that Grande objects to in this case. Cox argued that these notices “do not necessarily *prove* actual knowledge of repeat infringement.” 881 F.3d at 304 (emphasis in original). But the Fourth Circuit held that “Cox’s decision to categorically disregard all notices from Rightscorp provides further evidence that Cox did not reasonably implement a repeat infringer policy.” Id. The Fourth Circuit explained

that Cox’s argument was misplaced because “Cox bears the burden of proof on the DCMA safe harbor defense; thus, Cox had to point to evidence showing that it reasonably implemented a repeat infringer policy.” Id. at 305. Grande is similarly unable to show such reasonable implementation, because the evidence is undisputed that it failed to terminate any customers from 2010 through 2016, despite receiving over a million infringement notices and tracking more than 9,000 customers as repeat infringers. (Dkts. ## 127-9 at 5; 127-3 at 9.)

Second, Grande’s argument that the Rightscorp notices failed to demonstrate appropriate circumstances justifying termination is similarly unpersuasive. This argument was also made by the defendant in BMG. 881 F.3d at 305. But just as Cox did in BMG, Grande has:

failed to provide evidence that a determination of “appropriate circumstances” played any role in its decisions to terminate (or not to terminate). [Grande] did not, for example, point to any criteria that its employees used to determine whether “appropriate circumstances” for termination existed. Instead, the evidence shows that [Grande’s] decisions not to terminate had nothing to do with “appropriate circumstances” . . . .

Id. Grande admitted that it had no procedure in place from 2010 through 2016 providing for how it would actually go about terminating infringing customers. (Dkt. # 127-21, Ex. B at 8–9.) Grande also admitted that until 2017 it would not terminate a user for infringement “regardless of the source of any notice,” regardless of the content of any notice,” and “regardless of the volume of notices . . . for a given customer.” (Dkt. # 127-7 at 6–7.)

And Grande did not terminate a single infringing customer from October 2010 until May 2017 (Dkt. # 127-7, Ex. G at 6.) This evidence indisputably shows that Grande's "decisions not to terminate had nothing to do with 'appropriate circumstances' . . . ." BMG, 881 F.3d at 305.

Third, Grande's own documents in the record reflect, contrary to the arguments it now advances, that it took the Rightscorp and other notice as affirmative evidence of infringement. In one April 2013 email exchange, a senior Grande official stated that "we have some customers who are up to their 54th notice . . . [yet] there is no 'three strikes' law or anything that we follow like some ISPs." (Dkt. # 127-22, Ex. D.) As a result, the same official then asked, in the same email: "Question – we have users who are racking up DMCA take down requests and no process for remedy in place. I don't know if I'm seeing a broken process or compliance with the letter of the law. Do you guys have insight or knowledge on this?" (Id.) In the ensuing conversation, another Grande manager reported the following:

Who is responsible for the DCMA notification process? Do we call customers?

Bartlett just answered my email, and, as you said, they contact the customer and let them know they will disconnect them if they continue to receive those notice.

If we do nothing more tha[n] emails (as I think you mentioned) we might lose our safe harbor status.

(Dkt. # 128-28, Ex. M at 2.) Other internal emails also demonstrate that Grande viewed the notices as evidence

that a customer had infringed a copyright. (See Dkts. ## 127-17, Ex. Q; 127-30, Ex. R; 127-31, Ex. S.)

Finally, Grande's arguments related to the Rightscorp notices ignores the hundreds of thousands, out of roughly 1.2 million notices of infringement Grande received between 2011 and 2016 (Dkt. # 127-7, Ex. G at 10), came from entities other than Rightscorp. In 2015, for example, out of 365,569 infringement notices received, 119,247, roughly one third, were received from other sources. (Dkt. # 172-18, Ex. R at 2.) Grande has presented no summary judgment evidence that these other notices are in any way unreliable.

Even if the Court were to accept Grande's arguments related to the Rightscorp notices, the summary judgment evidence shows that Grande failed to terminate a single customer despite the receipt of several hundred thousand other copyright infringement notices. Therefore, summary judgment in favor of Plaintiffs' on this issue is still be appropriate because, as the DMCA safe harbor is an affirmative defense, Grande carries the burden of demonstrating it is entitled to raising it. See Capitol Records, LLC v. Vimeo, LLC, 826 F.3d 78, 94 (2d Cir. 2016) (holding that defendant "bears the burden of raising entitlement to the safe harbor and of demonstrating that it has . . . taken the steps necessary for eligibility"). Even ignoring the Rightscorp notices, with no evidence undermining these hundreds of thousands of other notices, Grande has failed to carry this burden.

For these reasons, the Court **ADOPTS** the Safe Harbor Report. (Dkt. # 241.) Plaintiffs' Motion for Partial Summary Judgment as to the issue of Grande's entitlement to the affirmative defense of the DMCA safe harbor

provisions, 17 U.S.C. § 512(i), is therefore **GRANTED**. (Dkt. # 127.)

## II. Report and Recommendation Regarding Parties' Cross Motions for Summary Judgment as to Liability

### A. Grande's Motion for Summary Judgment

Grande moved for summary judgment as to liability based on six arguments: (1) Plaintiffs cannot prove direct infringement by Grande's customer of their distribution, reproduction, and public performance rights as copyright holders (Dkt. # 140 at 4); (2) Plaintiffs cannot prove contributory liability (*id.* at 11); (3) Plaintiffs cannot prove willful copyright infringement (*id.* at 18); (4) Plaintiffs cannot prove that the discovery rule expands the statutory damages period (*id.* at 18); (5) Plaintiffs cannot prove actual damages or Grande's profits from alleged infringement (*id.* at 19); and (6) Plaintiffs cannot prove they own many of the asserted copyrights (*id.*). In opposing Grande's motion, Plaintiffs also moved for summary judgment in their own favor on the issue of liability. (See Dkt. 172.)

The Magistrate Judge's Liability Report recommends granting Grande summary judgment as to whether Grande's customers violated Plaintiffs reproduction or public performance rights, and thus whether Grande could be held contributorily liable for such infringement. (Dkt. # 240 at 4 n.1.) In all other respects, the Liability Report recommends denying both parties' motions. (*Id.* at 20–21.) Grande objects on all six issues to the Liability Report's recommendations denying the motions. (Dkt. # 252.) Plaintiffs object to the Liability Report's recommendations denying their cross motion on di-



rect and contributory infringement. (Dkt. # 250.) Plaintiffs also object to the Liability Report’s recommendation to grant Grande summary judgment on their claim for Grande’s contributory liability for violating their reproduction rights. (*Id.*) The Court therefore reviews these issues de novo. See 28 U.S.C. § 636(b)(1)(C) (“A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.”) The Court will review each of these issues in turn.

### 1. Direct Infringement by Grande’s Customers

It is axiomatic that there can be no contributory copyright infringement without there first being direct copyright infringement. See, e.g., A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 n.2 (9th Cir. 2001) (“Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party.”). Therefore, in order to prevail on their claim against Grande for contributory infringement, Plaintiffs must prove direct infringement committed by Grande’s customers.

17 U.S.C. § 106 provides certain exclusive rights to the owners of copyrights. As issue in this case are: (1) the right “to reproduce the copyrighted work” under 17 U.S.C. § 106(1); (2) the right to “distribute copies . . . of the copyrighted work” under 17 U.S.C. § 106(3); and (3) the right to perform . . . copyright[ed sound recordings] publicly by means of a digital audio transmission” under § 106(6). (See Dkt. # 1 at 7.) “Anyone who violates any of the exclusive rights of the copyright owner as provided by section[] 106 . . . is an infringer of the copyright . . . .” 17 U.S.C. § 501(a).

To establish direct copyright infringement, a plaintiff must show that (1) he owns a valid copyright and (2) the defendant copied constituent elements of the plaintiff's work that are original. BWP Media USA, Inc. v. T & S Software Assocs., Inc., 852 F.3d 436, 439 (5th Cir. 2017). To prove the second element, copying, a plaintiff must prove (1) factual copying and (2) substantial similarity. Baisden v. I'm Ready Prods., Inc., 693 F.3d 491, 499 (5th Cir. 2012). Factual copying can be proved by either direct or circumstantial evidence. Armour v. Knowles, 512 F.3d 147, 152 (5th Cir. 2007). Substantial similarity requires proof that "the copyrighted expressions in the two works are sufficiently alike that the copyright to the original work has been infringed." Id.

Grande moved for summary judgment on the issue of direct infringement, arguing that Plaintiffs cannot prove: (1) substantial similarity; (2) that any Grande subscriber violated the reproduction right using Grande's network; (3) that any Grande subscriber violated the distribution right through Grande's network; (4) direct infringement with respect to each asserted copyright; and (5) that a Grande subscriber violated the public performance right using Grande's network. (Dkt. # 140 at 8–14.)

#### i. Public Performance and Reproduction

As a threshold matter, the Liability Report recommends granting summary judgment to Grande as to direct infringements by their customers of Plaintiffs' reproduction and public performance rights as set forth in 17 U.S.C. § 106(1) and 106(6) because Plaintiffs' failed to respond to Grande's summary judgment arguments on these issues. (Dkt. # 240 at 4 n.1.) No objection was raised by either party as to the Liability Report's recommendation of granting summary judgment as to the violation of

public performance rights. Therefore, the Court reviews this recommendation for clear error. United States v. Wilson, 864 F.2d 1219, 1221 (5th Cir. 1989). The Court concludes the Liability Report’s recommendation on this issue is not clearly erroneous. See ContiCommodity Servs. Inc., v. Ragan, 63 F.3d 438, 441 (5th Cir. 1995) (“In order to defeat a properly supported motion for summary judgment, the nonmoving party must direct the court’s attention to admissible evidence in the record which demonstrates that it can satisfy a ‘fair-minded jury’ that it is entitled to a verdict in its favor.”).

Moreover, “to perform or display a work ‘publicly’ means . . . to transmit or otherwise communicate a performance or display of the work to [a public place] or to the public . . .” 17 U.S.C. § 101. Performance through a digital audio transmission only occurs where “there is a playing of the song that is perceived simultaneously with the transmission.” United States v. ASCAP, 627 F.3d 64, 74 (2d Cir. 2010). Making a copyrighted work available for downloading, or actual downloading of a copyrighted work, is not itself a performance. See id. There is no evidence in record of any simultaneous perception and transmission of the copyrighted works at issue in this case.

However, Plaintiffs object to the Liability Report’s recommendation to grant summary judgment to Grande as to violation of the right of reproduction. Plaintiffs argue that they stated in their combined opposition and cross motion for summary judgment that their claims involve both uploading and downloading of copyrighted music, the latter of which would constitute an infringement of the reproduction right. (Dkt. # 250 at 3.) However, a review of Plaintiffs’ argument in which the referenced

language is found makes it clear that their argument is directed solely towards Grande's argument related to violations of the right of distribution. (See Dkt. # 172 at 16–23.) The language in the motion Plaintiffs now attempt to rely on is merely their introductory statement of the law and is then followed only by argument related to distribution. Plaintiffs' motion does not reference or respond to Grande's argument related to reproduction.

Further, Plaintiffs' objections fail to respond to the substance of Grande's summary judgment argument. In this context, violation of a copyright holder's right to reproduction involves downloading copyrighted material. See, e.g., Maverick Recording Co. v. Harper, 598 F.3d 193, 197 (5th Cir. 2010); Columbia Pictures Indus., Inc. v. Fung, 710 F.3d 1020, 1034 (9th Cir. 2013). But Plaintiffs' claims are based on notices and evidence that Grande subscribers made copyrighted material available for download by others. Plaintiffs have not presented any evidence, either on summary judgment or in their objections to the Liability Report, that Grande subscribers downloaded or otherwise acquired the copyrighted materials through Grande's network, as opposed to any other of a number of plausible—including some legal—means. There is no evidence at all concerning the origin of the songs at issue. Without evidence of the origin of the infringing music, there is no evidence the music was obtained in violation of Plaintiffs' right of reproduction, and

thus no evidence of direct infringement through illegal reproduction.<sup>3</sup>

ii. Substantial Similarity

Grande argues that proving a copyright infringement claim “requires a side-by-side comparison of the copyrighted work and the allegedly infringing work, so that the factfinder can assess whether they are ‘substantially similar.’” (Dkt. # 140 at 8.) The necessary implication of this argument is that to prove its case Plaintiffs would have to play every song at issue for the jury, alongside the allegedly identical copy or copies found on Grande’s customers’ computers. Grande relies for this premise on language found in various decisions of the Fifth Circuit. For instance, in Bridgmon v. Array Systems Corp., the court stated “the law of this circuit prohibits finding copyright infringement without a side-by-side comparison of the works.” 325 F.3d 572, 577 (5th Cir. 2003). In Creations Unlimited, Inc. v. McCain, the court stated “[t]o determine whether an instance of copying is *legally actionable*, a side-by-side comparison must be made between the original and the copy to determine whether a layman would view the two works as “substantially similar.” 112 F.3d 814, 816 (5th Cir. 1997) (emphasis in original). And in King v. Ames, the court stated “copying is an issue to be determined by comparison of works, not credibility.” 179 F.3d 370, 376 (5th Cir. 1999).

This Court believes Grande reads too much into this language and these decisions. First, the three cases relied

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<sup>3</sup> Because there is thus also no evidence subscribers obtained the infringing music through Grande’s network, there is no evidence sufficient to support contributory liability against Grande on the basis of infringement through reproduction.

on by Grande are factually distinct from the instant case. In Bridgmon and King, the only admitted evidence of substantial similarity asserted by the plaintiffs was their own oral testimony of similarity. See Bridgmon, 325 F.3d at 576; King, on Behalf of Estate of King v. Ames, 1997 WL 327019, at \*5–6 (N.D. Tex. June 4, 1997). This reliance purely on oral testimony is what King means by “copying is an issue to be determined by comparison of works, not credibility.” 179 F.3d at 376. Bridgmon also expressly quotes this language from King in explaining its conclusion. 325 F.3d at 577.

Creations Unlimited involved an allegation that the defendant sold t-shirts with images modelled off of a series of black and white drawings that the plaintiff held copyrights in. 112 F.3d at 815. In that case, the Fifth Circuit upheld a grant of summary judgment in favor of the defendant because a side-by-side comparison revealed the defendant’s “tee-shirts differed from [Plaintiff’s] line drawings in too many respects for a layman to conclude that the works were substantially similar.” Id. at 816. In this case, the allegation is not that Grande’s customers infringed Plaintiffs’ copyrights by creating substantially similar, but not identical, derivative works, which might raise a question of substantial similarity about which a side-by-side comparison might be probative. Instead, Plaintiffs are asserting Grande’s customers infringed their copyrights by distributing exact copies of works covered by Plaintiffs’ copyrights.

But perhaps more importantly, these cases do not appear to stand for the proposition that a side-by-side comparison of the original and allegedly infringing works must be made in front of the jury, something that would prove beyond impractical in a case of this sort. Nothing in

these cases state or imply a comparison must be made directly to a jury. Instead, there simply must be evidence, beyond mere oral testimony, resulting from such a comparison that would permit a layman to view the two works as substantially similar. See Bridgmon, 325 F.3d at 577 (“[T]he law of this circuit prohibits finding copyright infringement without a side-by-side comparison of the works.”); Creations Unlimited, Inc., 112 F.3d at 816 (“To determine whether an instance of copying is *legally actionable*, a side-by-side comparison must be made between the original and the copy to determine whether a layman would view the two works as “substantially similar.”)

In this case, Plaintiffs’ evidence of substantial similarity comes in the form of “audio fingerprinting” provided by a company called Audible Magic and a similar matching process performed by Rightscorp. Audible Magic:

scans the perceptual characteristics of a sound recording. The tool compares the characteristics of the sound recording to the content that has been registered in Audible Magic’s database (what Audible Magic calls its “Global Content Registry”). If the tool returns a “match” condition, that indicates that the sound recording contains copyrighted content that has been registered with Audible Magic. When Audible Magic returns a “match” condition, it includes information about the sound recording contained in the file, including the track title and artist name for the sound recording and the copyright owner of the matched content (as contained in its registry).

(Dkt. # 172-12 at 3.) And Rightscorp’s process:

receives a list of copyright works (including artist and title information) from its customers, obtains .torrent files matching those named works, forensically scrubs these torrent files to confirm a digital match (discarding any file that does not match), manually checks the digital match results, and only then monitors BitTorrent networks for infringement of these files.

(Dkt. # 173-79 at 3.)

The ability of the Audible Magic software in particular to identify and match files to copyrighted content has been widely recognized. See Capitol Records, LLC v. Escape Media Grp., Inc., No. 12-CV-6646(AJN), 2015 WL 1402049, at \*23 (S.D.N.Y. Mar. 25, 2015) (citing cases). Further, “Audible Magic is a vendor that has been repeatedly used in entertainment copyright cases and thus, its methods are well-known to those within the entertainment industry.” UMG Recording, Inc. v. Escape Media Grp., Inc., No. 11 Civ. 8407, 2014 WL 5089743, \*17 (S.D.N.Y. Sept. 29, 2014) (citing cases). “Audible Magic’s methods of analysis are not a secret and have been relied upon in various similar copyright litigations.” Id. In UMG, the court expressly stated that “plaintiffs established that the infringing . . . uploads correspond to plaintiffs’ copyrighted works” through a process that “included enlisting Audible Magic to use industry-recognized audio-fingerprinting technology to confirm that copies of certain files uploaded by defendants and their employees corresponded to plaintiffs’ copyrighted sound recordings.” Id. at 20.

Grande’s argument that the Audible Magic evidence is inadmissible as hearsay is unpersuasive. Because Mr. Landis’s “knowledge and analysis were derived from du-



ties he [has] held at [the RIAA], his opinions [a]re admissible as testimony based upon personal knowledge and experience gained while employed by [the RIAA].” United States v. Valencia, 600 F.3d 389, 416 (5th Cir. 2010) (lay witness with personal knowledge of databases was permitted to provide testimony about analysis using those databases). Further, the outputs from the Audible Magic database generated by Mr. Landis are likely admissible against hearsay objections as records of a regularly conducted business activity under Federal Rule of Evidence 803(6). See id.; see also U-Haul Intern., Inc. v. Lumbermens Mut. Cas. Co., 576 F.3d 1040, 1044–45 (9th Cir. 2009) (holding that a printout from a computer database was admissible as business records, even where sponsoring witness had not himself personally input the data into the database, where the person had knowledge of its content and the databases owners’ practices for compiling the data); Thanongsinh v. Bd. of Educ., 462 F.3d 762, 777 (7th Cir. 2006) (holding that the qualified witness “need only be familiar with the company’s record-keeping practices”).<sup>4</sup>

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<sup>4</sup> Grande argues that the Rightscorp evidence is precluded by the best evidence rule because “Rightscorp destroyed all records of its manual verification process, including any records of the alleged “original” songs that were used for comparison.” (Dkt. # 247 at 7; see also Dkt. # 252 at 29.) This argument is best suited for the trial context. All that is required at the summary judgment stage is that evidence be capable of presentation in an admissible form. See Fed. R. Civ. P. 56(c)(2). Moreover, even if the “original” evidence has been destroyed by the proponent, other evidence of content is admissible unless the destruction was the result of “the proponent acting in bad faith.” Fed. R. Evid. 1004. First, the alleged destruction was done by Rightscorp, which is not a party to this action, not the Plaintiffs, who are the proponents of the evidence at summary judgment and would be the proponents at trial. Second, Grande has presented no evidence

For these reasons, Plaintiffs' evidence—in particular the Audible Magic evidence—is sufficient to raise a genuine issue of material fact as to substantial similarity. Summary judgment in favor of Grande on this issue is therefore inappropriate.

Finally, Grande's argument that "Plaintiffs' cannot demonstrate that the [allegedly] disseminated material satisfies the 'substantially similar' requirement" because "BitTorrent operates by breaking a file into small pieces for transmission, and any Internet user who may download an allegedly copyrighted work would only take a small portion of any allegedly infringing work from a particular Grande subscriber" finds no support in the case law. "It makes no difference from a copyright perspective whether the infringing copy is created in a single wholesale file transfer using a peer-to-peer protocol; or in a swarm of fragmented transfers [using BitTorrent] that are eventually reassembled into the new infringing copy." Malibu Media, LLC v. Bui, No. 1:13-cv-162, 2014 WL 12469955, at \*1 (W.D. Mich. July 21, 2014); see also Fung, 710 F.3d at 1034 (affirming grant of summary judgment to plaintiff where defendant uploaded material to BitTorrent). Further, "it is enough if constituent parts of each work are similar; the plaintiff is not required to show the whole of the infringing work is similar to the whole of the copyrighted work." Busti v. Platinum Studios, Inc.,

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that Rightscorp destroyed these "originals" at the behest of Plaintiff. In fact, Grande's own motion for sanctions states that the RIAA, the trade group of Plaintiffs, "requires the BitTorrent monitoring company working on behalf of Plaintiffs to preserve all of this data as part of its copyright infringement evidence package." (Dkt. # 247 at 7.) Nor did Grande present any evidence or argument that the originals were destroyed in bad faith. (See id.)

No. A-11-CA-1029-SS, 2013 WL 12121116, at \*5 (W.D. Tex. Aug. 30, 2013); see also Mattel, Inc. v. Azrak-Hamway Int'l, Inc., 724 F.2d 357, 360 (2d Cir. 1983) (“[I]t is possible to infringe while copying only a part of a work. . .”).

iii. Distribution

Grande argues that summary judgment on distribution is proper because a mere offer to share an infringing file is not actual distribution. Grande relies primarily on Atlantic Recording Corp. v. Howell for the proposition that “[i]f the owner of the shared folder simply provides a member of the public with access to the work and the means to make an unauthorized copy, the owner is not liable as a primary infringer of the distribution right, but rather is potentially liable as a secondary infringer of the reproduction right.” 554 F. Supp. 2d 976, 986 (D. Ariz. 2008).

However, to the extent Grande relies on Atlantic Recording for the proposition that contributory infringement of the reproduction right is the only viable theory against a party who makes infringing material available to the public, that reliance is misplaced because Atlantic Recording appears to be contrary to the great weight of the case law, including decisions of other courts in this district. In Warner Bros. Records, Inc. v. Payne, the court held that:

the Supreme Court has equated the term with “publication,” which is defined under the Act. “Publication” includes “[t]he offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public

display.” Listing unauthorized copies of sound recordings using an online file-sharing system constitutes an offer to distribute those works, thereby violating a copyright owner’s exclusive right of distribution.

No. W-06-CA-051, 2006 WL 2844415, at \*3 (W.D. Tex. July 17, 2006). Similarly, in another peer-to-peer copyright infringement case, the court “reject[ed] Defendant’s argument that merely making copyrighted works available to the public is not enough evidence for summary judgment purposes to establish infringement.” Maverick Recording Co. v. Harper, No. 5:07-cv-026-XR, 2008 WL 11411855, at \*3 (W.D. Tex. Sept. 16, 2008), aff’d in part and rev’d in part, 598 F.3d 193 (5th Cir. 2010) (holding that district court erred by denying plaintiffs’ motion for summary judgment on defendants’ “innocent infringer” defense). Other district courts in other circuits have reached similar conclusions in analogous circumstances. See, e.g., Universal Studios Prod., LLLP v. Bigwood, 441 F. Supp. 2d 185, 190 (D. Me. 2006) (“[B]y using [a peer-to-peer network] to make copies of the [infringing materials] available to thousands of people over the internet, Defendant violated Plaintiffs’ exclusive right to distribute . . . .”); Motown Record Co., LP v. DePietro, No. 04-CV-2246, 2007 WL 576284, at \*3 (E.D. Pa. Feb. 16, 2007) (“A plaintiff claiming infringement of the exclusive-distribution right can establish infringement by proof of actual distribution or by proof of offers to distribute, that is, proof that the defendant ‘made available’ the copyrighted work.”)

Even the case most directly relied on by Grande, Atlantic Recording, recognized that multiple courts “have held that the terms publication and distribution are synonymous, so where a defendant’s act fulfills the definition

of ‘publication’ provided by the statute, it also constitutes a ‘distribution’ under § 106(3).” 554 F. Supp. 2d at 984 (citing cases).

Other courts have held that “[i]n order to establish ‘distribution’ of a copyrighted work, a party must show that an unlawful copy was disseminated ‘to the public.’” Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 203 (4th Cir.1997); see also National Car Rental System, Inc. v. Computer Assocs. Intern., Inc., 991 F.2d 426, 434 (8th Cir. 1993) (“[I]nfringement of the distribution right requires an actual dissemination of either copies or phonorecords.”). But even under such a requirement, “*direct* proof of actual dissemination is not required by the Copyright Act. Plaintiffs are free to employ circumstantial evidence to attempt to prove actual dissemination.” Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1225 (D. Minn. 2008) (emphasis in original).

Regardless of whether or not violation of the distribution right requires actual dissemination instead of a mere offer to disseminate, Plaintiffs have come forward with sufficient evidence to survive summary judgment. Plaintiffs have presented evidence of hundreds of thousands of notices sent to Grande of infringing material being made available by Grande’s customers for download and evidence that Rightscorp downloaded over 59,000 full infringing files shared by Grande customers.<sup>5</sup> (Dkts.

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<sup>5</sup> Grande again reiterates its best evidence rule argument related to Rightscorp song matching and downloading evidence. (See Dkt. # 252 at 34.) The Court has already addressed this argument and found it unpersuasive. See FN 4, supra.

## 173-78, Ex. H at 21; 173-79, Ex. I at 3–4; see also 172 at 13–14 (citing evidence).)

The infringement notices provide evidence of offering to share under a “making available” theory, and constitute circumstantial evidence of dissemination if actual dissemination is required. Further, the audio files Rightscorp downloaded from Grande subscribers are exactly the type of evidence that courts have used to establish direct infringement under an “actual dissemination” theory. See, e.g., BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc., 199 F. Supp. 3d 958, 972, (E.D. Va. 2016), rev’d in part on other grounds by BMG, 881 F.3d 293 (4th Cir. 2018) (“Courts have consistently relied upon evidence of downloads by a plaintiff’s investigator to establish both unauthorized copying and distribution of a plaintiff’s work.”) (citing Arista Records LLC v. Lime Grp. LLC, No. 06-cv-5936, 2011 WL 1641978, at \*8 (S.D.N.Y. Apr. 29, 2011) (citing cases)); Warner Bros. Records, Inc. v. Walker, 704 F. Supp. 2d 460, 467 (W.D. Pa. 2010) (“it is undisputed that MediaSentry [the copyright holder’s investigator] downloaded actual copies of nine of the Copyrighted Recordings from Defendant’s computer, establishing unauthorized distribution as to those nine recordings.”).

Finally, relying again on Atlantic Recording’s premise that making infringing files available only implicates contributory secondary liability against Grande’s customers, Grande argues any theory of liability against it invokes tertiary liability, a premise which is not recognized in the law. (Dkt. # 140 at 12.) However, for the reasons previously stated, the Court concludes a theory of direct liability properly applies to Grande’s customers, either through making infringing materials available, or

through actual dissemination of infringing materials. Therefore, by providing the services permitting their customers' alleged direct infringement, Grande is potentially liable as a secondary infringer.

iv. Evidence of Direct Infringement with Respect to Each Asserted Copyright

Grande argues that Plaintiffs cannot show direct infringement with respect to each asserted copyright. (Dkt. # 140 at 13.) However, as previously discussed, the court concludes the Rightscorp notices and analysis and the Audible Magic analysis constitute sufficient evidence to raise a genuine issue of material fact to survive summary judgment. The Rightscorp system receives a list of copyrighted works, obtains infringing files allegedly matching those works, forensically scrubs these torrent files to confirm a digital match, discards any non-matching allegedly infringing files, manually checks the match results, and then monitors BitTorrent Networks for infringement of these files. (Dkts. ## 173-78 at 19–33; 173-79 at 3.) Further, the Audible Magic digital fingerprinting technology “scans the perceptual characteristics of a sound recording[, . . .] compares the characteristics of the sound recording to the content that has been registered in Audible Magic’s database[, and i]f the tool returns a ‘match’ condition, that indicates that the sound recording contains copyrighted content that has been registered with Audible Magic.” (Dkt. # 172-12, Ex. L at 3.) Plaintiffs have also provided evidence that they “ran the mp3 audio files RIAA received from Rightscorp through Audible Magic[, and] Audible Magic returned a “match” condition for . . . the works . . . the Plaintiffs are suing over (the “works in suit”), attached as Exhibit A to Plaintiffs’ Complaint.” (Id. at 4 (attaching as an exhibit “a chart setting forth

each work in suit listed in Exhibit A to the Complaint, along with the corresponding .mp3 audio files that Rightscorp downloaded and the “match” output files from Audible Magic.”.)

For these reasons, Grande is entitled to summary judgment as to direct infringement by Grande’s customers of Plaintiffs’ rights to reproduction and public performance. But there remain genuine issues of material fact as to direct infringement by Grande’s Customers of Plaintiffs’ distribution right related to all of the asserted copyrights. Summary judgment on this issue is therefore inappropriate and denied.

## 2. Contributory Infringement

After the Supreme Court’s decision is MGM Studios Inc. v. Grokster, Ltd., liability for contributory infringement requires “intentionally inducing or encouraging direct infringement.” 545 U.S. 913, 930 (2005) (citing Gershwin Pub. Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)). Grande argues it is entitled to summary judgment on this issue because: (1) there is no evidence it induced the direct infringement committed by its customers; (2) there is no recognized independent contributory liability theory of “material contribution”; (3) that even if there is, there is no evidence Grande’s conduct materially contributed to direct infringement; and (4) there is no evidence Grande had actual knowledge of direct infringement by its customers. (Dkt. # 140 at 11–20.) However, for the following reasons, the Court disagrees with Grande’s arguments.

Within the general rule of contributory liability announced by Grokster, the Supreme Court has identified



two categories of contributory liability: “actively encouraging (or inducing) infringement through specific acts . . . or . . . distributing a product distributees use to infringe copyrights, if the product is not capable of ‘substantial’ or ‘commercially significant’ noninfringing uses.” 545 U.S. at 942 (Ginsberg, J., concurring). It is beyond dispute that the provision of internet services to customers is capable of substantial and commercially significant noninfringing uses. Contributory liability against Grande must therefore be predicated on “actively encouraging (or inducing) infringement through specific acts.” *Id.*

In expositing these principles of contributory liability, the *Grokster* Court expressly relied on those “doctrines of secondary liability [that] emerged from common law principles and are well established at law.” *Id.* at 930. The black letter expression of such contributory liability in the common law, directly cited by the *Grokster* Court in regard to this point, is that “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” *Gershwin Pub. Corp.*, 443 F.2d at 1162.

Grande’s assertion that a cause of action for “material contribution” to copyright infringement is not recognized in the law is thus misplaced. The *Grokster* Court was clear that liability for contributory infringement was still to be analyzed by reference to those “rules of fault-based liability derived from the common law.” 545 U.S. at 934–35. *Grokster*’s expression that “[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement” should not be taken as writing out of the law liability based on material contribution, but instead stands as a simple restatement of the same principles of

liability found in Gershwin and elsewhere. Federal courts are generally in accord on this conclusion that contributory liability for copyright infringement can be premised on material contribution. See, e.g., Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1171 (9th Cir. 2007); Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 790 (5th Cir. 1999). Moreover, whether labeled “material contribution” or “inducement” or anything else, Grokster recognized that “where evidence goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement,” liability is authorized. Grokster, 545 U.S. at 935.

Under this articulation, liability may “be imposed for intentionally encouraging infringement through specific acts.” Perfect 10, 508 F.3d at 1170. The specific act in question here is the continued provision of internet services to customers. Thus this is not a case of mere refusal to act. Grande acted affirmatively by continuing to sell internet services and continuing to provide internet access to infringing customers.<sup>6</sup>

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<sup>6</sup> In this way, Grande’s reliance on Cobbler Nevada LLC v. Gonzales, 901 F.3d 1142 (2018), is misplaced. Cobbler Nevada involved an individual subscriber who failed to prevent users of his internet subscription from infringing the plaintiff’s copyright. Id. at 1146. Cobbler Nevada focused on the fact that it was an individual internet subscriber at issue, who paid for internet services to an adult care home he operated, in contrast to the actual ISP defendant in this case. Id. at 1145, 1149. But more importantly, in Cobbler Nevada there were “[n]o allegations suggest[ing] the [defendant] made any clear expression or affirmative steps to foster infringement.” Id. at 1148. Instead, the defendant’s “only action was his failure to secure, police and protect the connection.” Id. Further, the evidence in Cobbler Nevada indicated that after the defendant learned of the infringement, he and his staff

However, “mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a [product] distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves.” Grokster, 545 U.S. at 937. But such “mere knowledge” of “actual infringing uses” is limited to when the seller only has generalized knowledge that some of its users are engaged in infringement. See BMG, 881 F.3d at 311. In contrast, “when a person sells a product that has lawful uses, but with the *knowledge* that the buyer *will in fact* use the product to infringe copyrights . . . the seller intends to cause infringement.” Id. at 307 (emphasis in original). This conclusion flows from the common law rule that if a person “knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he has in fact desired to produce the result.” Restatement (Second) of Torts § 8A cmt. b (1965); see also Grokster, 545 U.S. at 932 (holding that a person “will be presumed to intend the natural and consequences of his

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attempted to identify the infringer and instructed everyone living in home to stop infringing. Id. at 1145 n.1. But the infringer was never identified. Id. Cobbler Nevada, therefore, fits cleanly into the principle announced Grokster that “mere knowledge . . . of actual infringing uses would not be enough here to subject a [defendant] to liability.” 545 U.S. at 937. In this case in contrast, the allegation is that Grande took affirmative steps to foster infringement by continuing to provide internet service to specific customers about whom it had actual knowledge of repeated infringement. This case, therefore, fits more appropriately into a corollary principle announced in Grokster, that “where evidence goes beyond . . . the knowledge that [a product or service] may be put to infringing uses, and shows statements or actions directed to promoting infringement,” liability may attach. Id. at 935.

acts”). Finally, it is beyond debate that Grande’s continuing provision of internet services to customers who engage in repeated copyright infringement substantially facilitates access to and the distribution of infringing materials. See, e.g., Perfect 10, 508 F.3d at 1172.

Distilling these principles into a rule of liability, service providers like Grande “can be held contributorily liable if [they] ha[ve] *actual* knowledge<sup>7</sup> that *specific* infringing material is available using its system, and can take simple measures to prevent further damages to copyrighted works, yet continue[] to provide access to infringing works.” Id. at 1172 (emphasis in original) (internal citations and quotation marks omitted).

Turning to the summary judgment evidence, it is clear that Grande has at least one simple measure at its disposal—terminating the internet services of repeat infringers—to prevent further damages to copyrighted works. It is also clear that for the period in question, 2011 through 2016, Grande continued to provide access to the infringing works by continuing to provide internet service to such customers. (Dkt. # 127-7, Ex. G at 6.) The question therefore is whether Grande had actual knowledge of specific infringement on the part of specific customers.

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<sup>7</sup> Willful blindness can also satisfy the requirement of actual knowledge. Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 766 (2011) (“[P]ersons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts.”); see also In re Aimster Copyright Litig., 334 F.3d 643, 650 (7th Cir. 2003) (“Willful blindness is knowledge, in copyright law . . . as it is in the law generally.”)

The Court concludes that the summary judgment evidence is sufficient to raise a genuine issue of material fact on that question. Between 2011 and 2016, Grande received over a million copyright infringement notices, it was tracking over 9,000 customers on its DMCA “Excessive Violations Report” by late 2016, and it specifically tracked users by the number of notices it received about them. (Dkts. ## 127-9, Ex. I at 5; 127-3, Ex. C at 9.) Further, in internal emails, Grande employees recognized that “we have users who are racking up DMCA take down requests” and that “some customers . . . are up to their 54th notice” (Dkt. # 127-22, Ex D). Grande is therefore not entitled to summary judgment on the issue of contributory liability.

### 3. Willfulness

A showing of willfulness under the Copyright Act tracks the common law construction of the term. See Graper v. Mid-Continent Cas. Co., 756 F.3d 388, 395 & n. 7 (5th Cir. 2014) (citing Safeco Ins. Co. of America v. Burr, 551 U.S. 47, 58 (2007)). Willfulness thus requires a showing that Grande knew its conduct constituted contributory copyright infringement or acted with reckless disregard of Plaintiffs’ rights as copyright holders. Id. There is evidence in the record— previously discussed— that Grande: (1) was aware of subscriber’s infringing conduct; (2) decided not to cut of services to any customers, regardless of their conduct; (3) discussed this conscious decision in internal emails; and (4) profited from continuing to provide service to those subscribers. (See Dkt. # 172 at 33; see also Discussion Section I, supra.) This evidence is sufficient to raise a genuine issue of material fact

that Grande acted knowingly or recklessly, so as to constitute legally willful conduct. Summary judgment in favor of Grande is therefore not appropriate on this issue.

#### 4. Discovery Rule

Under 17 U.S.C. § 507(b), a three-year statute of limitations applies to claims of copyright infringement. Plaintiffs in this case seek to extend that limitations period by invocation of the discovery rule. (See Dkt. # 172 at 34.) “The discovery rule tolls the operation of a [statute of limitations] until the point in time in which the plaintiff learned or by reasonable diligence could have learned that it had a cause of action.” Edmark Industries SDN. BHD. v. South Asia International (H.K.) Ltd., 89 F. Supp 2d 840, 842–43 (E.D. Tex. 2000).

“[T]he discovery rule need not be specifically pleaded in federal court.” TIG Ins. Co. v. Aon Re, Inc., 521 F.3d 351, 357 (5th Cir. 2008). Instead, “[u]nder Rule 8 of the Federal Rules of Civil Procedure, it is enough that the plaintiff plead sufficient facts to put the defense on notice of the theories on which the complaint is based.” Id. In this case, the facts pleaded by Plaintiffs were sufficient to put Grande on notice. Among other facts, Plaintiffs pleaded that their claims were: (1) based on notices Grande received from Rightscorp; (2) Grande had been informed of more than one million infringements; and (3) Grande ignored the infringement notices and refused to take action—including termination of service—against users who repeated infringed Plaintiffs copyrights. (Dkt. # 1 at 11–13.)

The summary judgment evidence indicates that Grande received 1.2 million notices of infringement, including from Rightscorp, between 2011 and 2016 (Dkt.

# 127-7, Ex. G at 10) and that Grande refused to terminate any subscribers between October 2010 and May 2017 (Dkt. # 127-7, Ex. G at 6). Since Grande was aware of when it received such a volume of notices, and over what time period it failed or refused to terminate any subscribers or take any action based on such notices, Plaintiffs' pleading of such facts are sufficient to put Grande on notice that Plaintiffs were asserting claims based on conduct dating back to 2010 and thus that Plaintiffs' might assert that the discovery rule applied. See TIG Ins. Co., 521 F.3d at 357 ("Under Rule 8 of the Federal Rules of Civil Procedure, it is enough that the plaintiff plead sufficient facts to put the defense on notice of the theories on which the complaint is based.")

Further, Plaintiffs' produced evidence that they did not learn of Grande's infringements until January 2016, when Rightscorp approached the RIAA with evidence of Grande's customers' infringements. (Dkt. # 136 at 16.) In response, Grande presented evidence that Rightscorp marketed its services to Plaintiff Sony in 2012 and that Plaintiff UMG had meetings related to Rightscorp in late 2011. (Dkts. ## 201-5, 201-4.) However, the witness testimony on this issue is vague and does not indicate conclusively that Plaintiffs' were made aware of infringement on Grande's network through these meetings. (See id.) This evidence also says nothing about Plaintiffs' knowledge of Grande's policy of refusal to take action in the face of such infringement by its customers, which is central to Plaintiffs' contributory liability theory against Grande. The evidence before the Court thus raises a genuine issue of material fact as to when Plaintiffs became aware, or through reasonable diligence could have be-

come aware, of a cause of action against Grande for contributory liability. Therefore, Grande is not entitled to summary judgment on the issue of the application of the discovery rule.

### 5. Damages

17 U.S.C. § 504 provides in the alternative—as damages for copyright infringement—either the copyright owner’s actual damages and disgorgement of profits of the infringer attributable to the infringement, or statutory damages. 17 U.S.C. § 504(a)–(c). A copyright owner is permitted to elect, at any time before final judgment, which of these forms of damages it would prefer to recover. 17 U.S.C. § 504(c)(1). Grande moved for summary judgment as to actual damages and disgorgement. (Dkt. # 140 at 22.) Plaintiffs stated in their response that they do not intend to seek their lost profits as damages, moot-ing that issue as to Grande’s motion. (Dkt. # 172 at 35.)

In order to be entitled to disgorgement of profits under § 504(b), “a copyright holder must show more than an infringer’s total gross revenue from *all* of its profit streams.” MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc., 622 F.3d 361, 367 (5th Cir. 2010) (emphasis in original). Instead, the copyright holder must come forward with evidence of revenues “*reasonably related* to the infringement.” Id. (emphasis in original).

To prove disgorgement damages, Plaintiffs rely on two expert reports. (See Dkts. ## 173-74, 173-81.) The Bardwell report applies probability analysis to the infringement data collected by Rightscorp to determine the probability that sequential infringements—including of the copyrights asserted in this case—are attributable to individual Grande subscribers. (Dkt. # 173-81 at 6.) The



Lehr report estimates Grande's average monthly gross margin per customer, for all services a customer purchases from Grande, which can include voice and television services, in addition to high-speed internet. (Dkt. # 173-74 at 13–15.) The Lehr report also estimates the average tenure for a Grande subscriber. (Id. at 15.) Taking these two numbers together, and after accounting for net present value, the Lehr report arrives at an estimated lifetime net present value to Grande per subscriber. (Id. at 16.) The report also derives an alternative net present value amount per customer based on the price paid by TPG Capital to acquire Grande in 2017, and what it implies about the expected value per customer TPG had formed in paying that price. (Id.) The Court concludes this evidence is sufficient to raise a genuine issue of material fact about Grande's revenues reasonably related to infringing customers to defeat summary judgment on this issue.<sup>8</sup>

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<sup>8</sup> Grande's objections to the sufficiency of this evidence are not persuasive. (See Dkt. # 252 at 38.) "Gross revenue" under 17 U.S.C. § 504(b) "refers only to revenue reasonably related to the infringement." MGE UPS Sys., Inc., 622 F.3d at 367. While the calculations in the Lehr report are not limited to the specific customers who allegedly infringed the copyrights asserted in this case, requiring such an exacting and specified showing would go far beyond the requirement of merely showing a "reasonable relationship." The average value Grande receives from any given customer is certainly reasonably related to the value Grande received from a specific infringing customer. Grande receives more value from some customers and less value from others, and this includes infringing customers. Without some showing that infringing customers are somehow different or unique in their purchase patterns from noninfringing customers, an average value for all customers is certainly sufficient to reasonably demonstrate the average value received by Grande from infringing

## 6. Copyright Ownership

In order to prove copyright infringement, one of the things a plaintiff must prove is ownership of the asserted copyright. BWP Media USA, Inc., 852 F.3d at 439. To establish ownership, a “plaintiff must prove that the material is original, that it can be copyrighted, and that he has complied with statutory formalities.” Lakedreams v. Taylor, 932 F.2d 1103, 1108 (5th Cir. 1991). The requisite statutory formalities are receipt of the application for registration, fee, and deposit by the copyright office. Id.

Grande argued in its motion for summary judgment that of the 782 unique registered copyrights listed by Plaintiffs as at issue in this case, Plaintiffs’ evidence only demonstrated that they are the owners of 421 of the copyrights. (Dkt. # 140 at 23.) Grande thus argued it was entitled to partial summary judgment as to the remaining 361 unique copyrights at issue. (Id.) Plaintiffs responded

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customers. Further, the argument that Dr. Lehr’s calculations assume that every customer accused of infringement would have otherwise never become a customer in the first place misstates the question. Whether they would or would not have become a customer is beside the point. The fact is that they did become customers, and Grande received revenues from their being and continuing to be customers. Finally, that the lifetime value includes revenues from unrelated services like phones and cable TV is similarly beside the point. The fact is that Grande received that revenue from those allegedly infringing customers. That revenue would therefore be reasonably related to Grande’s asserted contributory liability in not terminating the service of such customers. If Grande had terminated the internet service of those customers, it is reasonable to conclude they would have found a new service provider, for all services purchased from Grande, and Grande would have lost all revenues from such customers, including those not directly derived from the provision of internet services.

with declarations from executives employed by each Plaintiff, with voluminous attachments, that they claim proves their ownership of these 361 copyrights. (See, e.g., Dkts. ## 173-2 to 173-47; 173-48 to 173-73; 180-1 to 180-31.) Such sworn affidavits—when uncontroverted—are generally sufficient to prove ownership. See, e.g., Sony BMG Music Entertainment v. Cuellar, No. CC-07-58, 2008 WL 11398942, at \*1 (S.D. Tex. July 24, 2008) (“[P]laintiffs have provided sworn affidavits from their respective in-house counsels confirming that they are owners or licensees of valid copyrights. Defendant has not provided evidence to contradict plaintiffs’ sworn statements, and accordingly the Court finds no issue of fact regarding plaintiffs’ ownership of the copyrights.”).

Grande did not challenge the validity of this evidence on the merits, but instead requested in a motion for sanctions that it should be excluded as untimely because it was produced after discovery. (See Dkt. # 156.) In the Liability Report, the Magistrate Judge denied Grande’s motion for sanctions pursuant to his authority under 28 U.S.C. § 636(b)(1)(A). Grande has objected to this decision of the Magistrate Judge. (Dkt. # 252 at 38–40.) The Court reviews such orders of the Magistrate Judge on non-dispositive pretrial matters for clear error. 28 U.S.C. § 636(b)(1)(A); see also Fed. R. Civ. P. 72(a). The clear error standard precludes modifying or setting aside the Magistrate Judge’s order unless this Court is “left with the definite and firm conviction that a mistake has been committed.” Jauch v. Nautical Services, Inc., 470 F.3d 207, 213 (5th Cir. 2006) (quoting Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985)).

Under Federal Rule of Civil Procedure 37(c)(1), failure to timely disclose evidence allows exclusion of that evidence “unless the failure was substantially justified or is harmless.” Plaintiffs’ presented arguments that these disclosures were not in fact untimely. (Dkt. # 179 at 6–7.) But in any event, even if they were, such untimeliness was harmless because: (1) the evidence is fundamental to Plaintiffs claim; (2) Grande will suffer no demonstrable prejudice from permitting it; (3) the trial date in this case has been vacated and a new trial date has not yet been set; and (4) there is no evidence of willful misconduct or bad faith. See Texas A & M Research Found. v. Magna Transp., Inc., 338 F.3d 394, 402 (5th Cir. 2003) (“In evaluating whether a violation of rule 26 is harmless, . . . [courts are to] look to four factors: (1) the importance of the evidence; (2) the prejudice to the opposing party of including the evidence; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation for the party’s failure to disclose.”) (See also Dkt. # 179 at 7–11.) Moreover, Rule 37(c) permits—but does not require—exclusion of evidence untimely disclosed. Fed. R. Civ. P. 37(c) (describing alternative sanctions that can be imposed “[i]n addition to or instead of” exclusion).

For these reasons, the Court is not “left with the definite and firm conviction that a mistake has been committed” by the Magistrate Judge in denying Grande’s motion for sanctions. The order was therefore not clearly erroneous and will not be modified or set aside.

Grande’s argument regarding ownership is dependent on the Court striking this supplemental evidence. (See Dkt. # 252 at 38–40.) If allowed—as the Court concludes it should be—such evidence is sufficient to prove ownership. See Sony BMG Music Entertainment, 2008

WL 11398942 at \*1. Therefore, Grande is not entitled to summary judgment on this issue.

Thus, the Court **ADOPTS** the Liability Report with respect to Grande's Motion for Summary Judgment (Dkt. # 140) and Motion for Sanctions (Dkt. # 156). Grande's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**. It is **GRANTED** as to infringement of the rights of reproduction and public performance, and **DENIED** in all other respects. (Dkt. # 140.) Grande's Motion for Sanctions is **DENIED**. (Dkt. # 156.)

B. Plaintiffs' Motion for Summary Judgment

Plaintiffs also moved for summary judgment as to liability for contributory infringement on essentially the same evidence discussed in relation to Grande's motion for summary Judgment. (Dkt. # 172). The Liability Report recommended denying this motion for the same reasons it recommended Grande's motion be denied on that issue. Plaintiffs object to this recommendation. (Dkt. # 250 at 6.) Because the Court has concluded that genuine issues of material fact exist as to Grande's customers' direct liability, (See Discussion Section II.A, supra) and contributory liability cannot exist in the absence of direct liability, A & M Records, Inc., 239 F.3d at 1013 n.2, Plaintiffs are not entitled to summary judgment as to Grande's liability for contributory infringement. Plaintiffs are also not entitled to summary judgment because genuine issues of material fact exist as to Grande's actual knowledge of specific instances of direct infringement committed by specific customers. (See Discussion Section II.B, supra.)

Therefore, the Court **ADOPTS** the Liability Report with respect to Plaintiffs' Motion for Summary Judgment. (Dkt. # 240.) Plaintiffs' motion is **DENIED**. (Dkt. # 172.)

#### CONCLUSION

For the reasons stated, the Court **ADOPTS** the Safe Harbor Report and the Liability Report. (Dkts. ## 240, 241.) Plaintiffs' Motion for Partial Summary Judgment as to Grande's DMCA safe harbor defense is **GRANTED**. (Dkt. # 127.) Grande's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**. (Dkt. # 140.) It is **GRANTED** as to infringement of the rights of reproduction and public performance and **DENIED** in all other respects. (*Id.*) Grande's Motion for Sanctions is **DENIED**. (Dkt. # 156.) Plaintiffs' Motion for Summary Judgment as to Liability is **DENIED**. (Dkt. # 172.)

**IT IS SO ORDERED.**

**DATED:** Austin, Texas, March 15, 2019.

/s/ David Alan Ezra

David Alan Ezra

Senior United States District Judge

**APPENDIX D**

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 23-50162

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UMG RECORDINGS, INCORPORATED; CAPITOL  
RECORDS, L.L.C.; WARNER BROS. RECORDS,  
INCORPORATED; SONY MUSIC  
ENTERTAINMENT; ARISTA RECORDS, L.L.C.;  
ARISTA MUSIC; ATLANTIC RECORDING  
CORPORATION; CAPITOL CHRISTIAN MUSIC  
GROUP, INCORPORATED; ELEKTRA  
ENTERTAINMENT GROUP, INCORPORATED;  
FONOVISA, INCORPORATED; FUELED BY  
RAMEN, L.L.C.; LAFACE RECORDS, L.L.C.;  
NONESUCH RECORDS, INCORPORATED;  
RHINO ENTERTAINMENT COMPANY;  
ROADRUNNER RECORDS, INCORPORATED;  
ROC-A-FELLA RECORDS, L.L.C.; TOOTH &  
NAIL, L.L.C.; ZOMBA RECORDING, L.L.C.,  
Plaintiffs-Appellees/Cross-Appellants,

v.

GRANDE COMMUNICATIONS NETWORKS,  
L.L.C.,  
Defendant-Appellant/Cross-Appellee.

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Filed: December 6, 2024

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:17-CV-365

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Before HIGGINBOTHAM, STEWART, and  
HIGGINSON, Circuit Judges.

**ON PETITION FOR REHEARING EN BANC**

PER CURIAM:

Treating the petitions for rehearing en banc as petitions for panel rehearing (5TH CIR. R. 35 I.O.P.), the petitions for panel rehearing are DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petitions for rehearing en banc are DENIED.