

No. 24-171

IN THE
Supreme Court of the United States

COX COMMUNICATIONS, INC. AND COXCOM, LLC,

Petitioners,

v.

SONY MUSIC ENTERTAINMENT, ET AL.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

**BRIEF OF *AMICUS CURIAE* THE MOTION PICTURE
ASSOCIATION, INC. IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS CURIAE¹

The Motion Picture Association, Inc. (“MPA”) is a not-for-profit trade association founded in 1922. The MPA serves as the voice and advocate of the motion picture and television industry, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and bringing entertainment and inspiration to audiences worldwide. The MPA has a particular interest in the proper interpretation of the Copyright Act. A fair, balanced, and predictable system of copyright rights and remedies is essential to MPA’s mission and to its members’ ability to finance, produce, and distribute compelling filmed entertainment. The MPA regularly participates as *amicus* in copyright cases of national and international importance.

The MPA’s member companies are Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Universal City Studios LLC; Walt Disney Studios Motion Pictures; Warner Bros. Entertainment Inc.; and Amazon Studios LLC.² The MPA’s members and their affiliates are the leading producers and distributors in the theatrical,

¹ Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no entity or person other than *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Sony Pictures Entertainment Inc. is a member of *amicus* MPA and a corporate affiliate of respondent Sony Music Entertainment and other Sony Music affiliate respondents. To be clear, none of those respondents made any monetary contribution intended to fund the preparation or submission of this brief.

² MPA member Amazon Studios LLC did not participate in the preparation or submission of this brief.

television, and home-entertainment markets in the United States and abroad.

The MPA has a strong interest in the proper interpretation of the rights and remedies of copyright owners under the Copyright Act. Copyright theft undermines sales, profitability, and competitiveness in this very important part of the U.S. economy. Preventing online theft is essential to promoting the robust availability to consumers of diverse and high-quality filmed content.

In particular, secondary liability doctrines, including contributory infringement, are critically important to protecting and vindicating the rights of copyright owners. Due to the practical impossibility of “enforc[ing] rights * * * effectively against all direct infringers,” secondary liability often provides copyright owners “the only practical alternative” to redress and deter widespread infringement of their works, particularly on the internet. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

INTRODUCTION AND SUMMARY OF ARGUMENT

Cox asks the Court to make a tectonic change to the long-settled standard for contributory copyright infringement. Cox’s request is unsupported by this Court’s cases, runs contrary to Congress’s intent, and threatens profoundly destabilizing consequences for cooperative efforts by copyright owners and service providers to address the scourge of online copyright infringement. It is particularly striking that Cox asks for such a dramatic overhaul, with such negative consequences for the copyright system, in *this* case. Cox

has no one but itself to blame for having made the intentional choice not to take even minimal steps to address its customers' repeat infringement.

The Fourth Circuit broke no new ground in this case. That court applied the contributory infringement rule that courts have applied for more than a century. Under that rule, "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 Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); see also, *e.g.*, *Harper v. Shoppell*, 28 F. 613, 615 (S.D.N.Y. 1886) (early application of same rule). The contributory infringement doctrine, like other secondary liability doctrines in copyright, allows copyright owners to vindicate their rights when confronted with mass piracy and thus supports the creation and lawful dissemination of copyrighted works. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

Congress, which is vested with the constitutional responsibility for ensuring copyright protection, see U.S. Const. art. I, § 8, cl. 8, has known of and approved of the courts' common-law development of contributory infringement and other secondary liability doctrines in copyright. Congress embraced those doctrines when it enacted the current Copyright Act in 1976. And Congress preserved those doctrines and provided service providers with important incentives to respect those doctrines when it enacted the Digital Millenium Copyright Act ("DMCA") in 1998.

The well-established rule for contributory copyright infringement, built on decades of precedent, has fostered critical cooperation among copyright owners and multiple service providers whose technologies fuel the internet ecosystem. That system of cooperation has helped to mitigate the vast harms that online piracy inflicts on copyright creators and the public, which is the ultimate beneficiary of the rights that copyright protects. That cooperative system is not the result of mere happenstance or good intentions. The system developed against the backdrop of well-established legal rules that allocate the rights and responsibilities of various commercial actors in the online ecosystem. Those background rules include the contributory infringement standard that the Fourth Circuit and numerous other courts have applied.

Given the contributory infringement doctrine's deep roots and salutary effects, Cox's request that the Court upend all of this is extraordinary. Cox asks this Court to hold that liability for contributory copyright infringement requires not only (as it always has) that the defendant knowingly facilitate infringement, but that in all cases the defendant must intentionally induce or encourage direct infringement. Cox Br. 23. But liability for intentionally inducing copyright infringement is not coterminous with the entirety of contributory infringement liability. Cox's contrary argument rests on profound misreadings of this Court's precedents, including *Grokster*, *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), and *Smith & Wesson Brands v. Mexico*, 605 U.S. 280 (2025), none of which support Cox's proposed rule.

Moreover, Cox's proposed rule would render superfluous the incentive structure that Congress hard-

wired into the DMCA. Under that statute, a service provider, to be eligible for a “safe harbor” from monetary liability for copyright infringement, must “adopt[] and reasonably implement[]” a policy for dealing with customers who repeatedly use the provider’s service to infringe. 17 U.S.C. 512(i)(1)(A). If Cox were right that the law imposes no potential liability on Cox for any customer’s infringement—no matter how repetitive or unrepentant—so long as Cox refrains from inducing that infringement, then there was no reason for Congress to create the safe-harbor incentive that it did. Congress did not intend such a result, and there is no reason for the Court to rewrite the contributory infringement standard so as to vitiate Congress’s incentive structure.

Cox’s brief is strewn with doom-and-gloom predictions that, absent the rule it seeks, Cox will be forced to an intolerable choice: indiscriminately terminate internet access for grandparents and military barracks, on the one hand; or risk crushing liability, on the other. That is a false dichotomy. Cox could have taken many steps short of terminating internet service as part of a graduated system for addressing known instances of repeat infringement by its customers. The evidence at trial established that Cox deliberately decided not to follow the graduated policy that Cox itself voluntarily enacted or otherwise take steps to limit Cox’s knowing assistance to the rampant, ongoing infringements perpetrated by Cox’s paying subscribers. The evidence further established that Cox made this choice for the purpose of retaining the revenues it received from those infringing customers.

While Cox may regret sacrificing its eligibility for safe-harbor protection, that regret is no reason to change the law that numerous other service providers have structured their operations around with no demonstrable negative consequences. The MPA respectfully submits that the Court should reject Cox’s request to dramatically change the law of contributory copyright infringement.

ARGUMENT

I. THE LONG-ESTABLISHED RULE FOR CONTRIBUTORY INFRINGEMENT UNDERGIRDS A CRITICAL SYSTEM OF COOPERATION BETWEEN COPYRIGHT OWNERS AND SERVICE PROVIDERS

A. Online Piracy Remains A Major Problem And Drain On The Economy

The potential for the online environment to be a haven for mass piracy has been apparent from the advent of the internet’s commercial deployment. Policy makers and market participants alike understood that the ability to transfer a virtually unlimited number of “near-perfect digital copies of copyrighted works” rapidly and seamlessly would mean that copyright infringement would inevitably increase at a previously unimaginable rate. See U.S. Copyright Office, *Section 512 of Title 17*, at 14 (May 2020) (“Section 512 Report”). Indeed, as this Court observed in 2005, infringement was occurring online on a “staggering,” “gigantic scale.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 923, 940 (2005).

Online piracy remains rampant today. The “exponential[]” growth of internet use over the past two decades has had many salutary effects, including enabling “copyright owners to distribute content directly to consumers’ living rooms via streaming services.” Section 512 Report at 30-31. At the same time, advances in internet technology have “enable[d] new forms of piracy,” including “streaming of unlicensed content and stream-ripping”—*i.e.*, unlicensed copying of streamed media. *Id.* at 29-31. Cloud computing similarly “presents new challenges for combating piracy,” as copyrighted content may be disseminated in ways that may be difficult or impossible to monitor. *Id.* at 31. And the development and deployment of large-scale artificial-intelligence systems are opening up ever-broader frontiers of mass-scale infringement. See 5 Nimmer on Copyright § 20.05[C] (2025).

The technology at issue in this case—modern peer-to-peer (“P2P”) copying—continues to be a popular tool for infringement. In 2005, this Court described the “probable scope of copyright infringement” on P2P services as “staggering.” *Grokster*, 545 U.S. at 923. In 2011, between 89% and 97% of files shared on P2P networks were infringing. Paul A. Watters, et al., *How much material on BitTorrent is infringing content?*, 16 Info. Sec. Tech. Rpt. 79 §§ 3.4, 3.6 (2011). And in 2023, there were roughly 18.9 billion downloads of pirated movies and television shows worldwide using P2P software. All. for Creativity & Ent., *What Do We Know About 2023 Movie & TV Piracy Trends Worldwide*, <https://www.alliance4creativity.com/wp-content/uploads/2025/01/WDWK-About-Movie-TV-Global-Piracy-Trends-092724.pdf> (last visited Oct. 20, 2025).

The extraordinary scope of online piracy imposes massive costs on the film and television industries. One study estimated that in 2024, there were roughly 121 billion visits to film and television piracy sites worldwide. MUSO, *2024 Piracy Trends and Insights 2* (May 2025). Other studies have found that piracy on that scale results in at least \$29.2 billion in lost revenue for the U.S. economy—and hundreds of thousands of lost jobs—every year. See David Blackburn et al., Glob. Innovation Pol’y Ctr., *Impacts of Digital Video Piracy on the U.S. Economy* ii (June 2019).

The volume of infringing conduct makes effective enforcement against direct infringers a practical impossibility. As this Court explained in *Grokster*, “[w]hen a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers.” 545 U.S. at 929-930. “[C]hasing individual consumers is time consuming and is a teaspoon solution to an ocean problem.” *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) (quoting Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 Antitrust Bull. 423, 442 (2002)). Stated otherwise, litigation against direct infringers simply “is not a scalable mechanism for dealing with the high volume of copyright disputes” arising from internet piracy. Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 Vand. J. of Ent. & Tech. L. 695, 724 (2011).

**B. Cooperative Agreements Premised
On Meaningful Secondary Liability
Are Critical To Mitigating The
Harms Of Online Piracy**

Notwithstanding the scale of online infringement, in the current enforcement ecosystem, there are ways of mitigating the problems posed by piracy through the cooperative efforts of copyright holders and service providers. Such service providers include not only the providers of internet access, like Cox in this case, but also the many intermediaries who play a part in the complex infrastructure that supports internet distribution. Since the DMCA's enactment, copyright holders and service providers have “developed a range of voluntary initiatives to address online infringement, from best practices to formal, binding agreements.” Section 512 Report at 35.

Such “cooperative” arrangements can arise only when (in the words of one association representing a host of internet companies and service providers) “all stakeholders are incentivized into good faith participation.” Comments of The Internet Association 17-18, 29, *In re Request for Comments on U.S. Copyright Office Section 512 Study*, Dkt. No. USCO-2015-7 (Apr. 1, 2016). And that system of incentives “has proven foundational to economic growth in the digital age” by promoting both the “protection of exclusive rights” and “legal and operational certainty for Internet platforms.” *Ibid.*

Under the current legal regime—and the current allocation of incentives—rightsholders and service providers for decades have entered into various cooperative arrangements. Such cooperation has evolved

in response to consistently changing strategies for infringing copyrighted works on a broad scale. In 2015, for example, rightsholders, service providers, and members of the telecommunications industry developed the Brand Integrity Program Against Piracy, which helped advertisers avoid placing advertisements on websites and other media properties that facilitate piracy. Section 512 Report at 38 & n.180. In 2016, Facebook developed a video-matching tool that allowed rights owners to create a reference library of videos and control how those videos may be shared on Facebook and Instagram. *Id.* at 45-46. And in 2020, the cloud-storage platform Dropbox began using hash-matching technology to prevent materials subject to DMCA takedown notices from being shared on its system. *Id.* at 46.

The MPA, in particular, has been involved in many such efforts. For example, in 2011, the MPA and other rightsholders signed a voluntary memorandum of understanding with internet service providers (“ISPs”) to create a graduated response system. Under that system, participating ISPs who received notice of alleged infringement from copyright owners would send escalating alerts to subscribers and—after at least six such alerts—would impose mitigation measures ranging from temporary reductions in internet speed to suspension of service, all subject to subscribers’ right to independent review. Section 512 Report at 40.

The MPA also has worked extensively with online search engines, including parties that have lauded “voluntary collaboration” with copyright owners. Comments of Google Inc. 3, *In re Request for Comments on U.S. Copyright Office Section 512 Study*,

Dkt. No. USCO-2015-7 (Apr. 1, 2016). In addition to demoting search results from sites that receive “a high number of valid removal notices” from rightsholders, *ibid.*, search engines have removed search results pointing to piracy websites in response to foreign judicial orders directed at ISPs, Press Release, Charles H. Rivkin, *Working Toward a Safer, Stronger Internet*, Motion Picture Association (Mar. 21, 2022), <https://www.motionpictures.org/press/working-toward-a-safer-stronger-internet/>. That targeted effort has been exceedingly effective, resulting in sharp declines in traffic to delisted pirate site domains. *Ibid.*

A particularly well-known initiative is YouTube’s Content ID program, which scans videos uploaded to YouTube against a database of files submitted by copyright owners participating in the program. YouTube Help, *How Content ID works*, <https://support.google.com/youtube/answer/2797370?hl=en>; see Section 512 Report at 42. When a match is made, the owner is notified and may choose whether to prevent the video from being viewed, monetize the video by running advertisements against it, or merely track the video’s viewership statistics. *Ibid.* Meanwhile, users who wish to dispute the claim of interference with copyright may do so while the video remains temporarily available. *Id.* at 42-43.

The cooperative efforts described above are not matters of pure altruism. Major commercial actors structure and conduct their operations against the background legal rules. Here, one significant rule is the potential for copyright liability in the event a service provider’s conduct crosses the line for secondary liability. Indeed, Congress has recognized as much,

explaining that “providing creators with viable remedies against online infringement” is essential to ensuring “strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” Section 512 Report at 21 (quoting H.R. Rep. No. 105-796, at 72 (1998)). And as explained in the following section, that system of incentives, backstopped with potential liability for service providers, reflects a legal regime that has developed over more than a century—which Cox now asks this Court to destroy.

II. COX SEEKS TO UPEND SETTLED COPYRIGHT LAW

Cox asks for a sea change in copyright law. Over the last half-century, Congress and the courts have worked in tandem to ensure a functional system of secondary liability. Cox would jettison that system, but offers no persuasive justification for doing so under either this Court’s precedent or the facts of this case. And Cox’s dismantling of contributory liability for intermediaries would have far-reaching results Congress plainly did not intend—including by disincentivizing the cooperative arrangements that hold back a tidal wave of online infringement.

A. Copyright Law Has Long Imposed Liability On Those Who Knowingly Facilitate Infringement, Regardless Of Whether They Intend To Induce Or Encourage Infringement

Copyright law embraces various doctrines of secondary liability, including contributory infringement and vicarious infringement. This Court in *Grokster*

applied a particular strain of secondary liability known as “inducement,” which “premises liability on purposeful, culpable expression and conduct,” with the “object of promoting” infringement. 545 U.S. at 936-937. But as the Court has recognized, inducement is just one species of secondary liability, which incorporates various “common law principles.” *Id.* at 930; see *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984) (“*Sony-Betamax*”).

Cox insists repeatedly that intentional inducement or encouragement of infringement is the sine qua non of contributory copyright liability. *E.g.*, Cox Br. 2, 17, 23, 24. But the rule for contributory infringement has long been understood and applied more broadly. In the Second Circuit’s canonical framing—cited in *Grokster*, see 545 U.S. at 930—contributory infringement is infringement by “one who, with knowledge of the infringing activity, induces, causes *or* materially contributes to the infringing conduct of another.” *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1161-1162 (2d Cir. 1971) (citation modified); accord Brief for the United States as Amicus Curiae Supporting Petitioners at 8, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (“[T]he doctrine of contributory infringement is premised on the defendant’s own conduct that induces *or contributes* to the primary infringement.” (emphasis added) (citing *Gershwin*)). And the “essence” of contributory infringement is “knowledge of the infringing conduct and facilitating the means by which the direct infringement is accomplished.” 6 Patry on Copyright § 21.41 (Mar. 2025); accord 3 Nimmer on Copyright § 12.04[A][3][a] (2025) (explaining that contributory liability is available if a

defendant “acts with knowledge and his activities aid the primary infringer in accomplishing his illegitimate activity”).

1. Federal courts have long held that knowing facilitation may give rise to contributory liability without an additional requirement that the defendant intend to induce or encourage infringement.

In *Gershwin*, for example, the Second Circuit observed that various entities could be held contributorily liable in connection with the sale of infringing records. These included a “packaging agent” that “shipp[ed] the infringing records,” 443 F.2d at 1162 (citing *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966)), even without evidence the packaging agent had the objective of promoting infringement.

The contributory copyright infringement rule has a long pedigree, deriving 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.” *Gershwin*, 443 F.2d at 1162 (quoting *Screen Gems*, 256 F. Supp. at 403); accord, e.g., *Harper v. Shoppell*, 28 F. 613, 615 (S.D.N.Y. 1886) (defendant who sold copyrighted materials “knowing at the time of selling” that the purchaser would infringe is liable for contributory infringement). And that rule persists today. The Second Circuit continues to apply the rule that a defendant “materially contributes to the infringing conduct of another if the defendant engages in personal conduct that is part of, encourages, or assists the infringement.” *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 100 (2d Cir. 2016) (emphasis

added) (citation modified). Thus, after *Grokster*, the Second Circuit does not limit contributory copyright infringement to those cases where the defendant induces infringement.

The Ninth Circuit likewise has found contributory infringement without a requirement of inducement. In *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996), that court held that the operator of a flea market where vendors sold infringing records materially contributed to that infringement because “it would be difficult for the infringing activity to take place in the massive quantities alleged without the support services provided by” the operator, including “the provision of space, utilities, parking, advertising, plumbing, and customers.” *Id.* at 264. The court reached that conclusion notwithstanding the operator’s argument that its conduct was purely “passive,” as the operator “actively str[ove] to provide the environment and the market for counterfeit recording sales to thrive.” *Ibid.*

Similarly, in *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), the Ninth Circuit held that Google (which was a defendant along with Amazon.com) could be contributorily liable for facilitating access to infringing images online even if it “did not undertake any substantial promotional or advertising efforts to encourage visits to infringing websites” or “provide a significant revenue stream to the infringing websites.” *Id.* at 1172. Regardless of whether it intended to promote infringement, Google “substantially assist[ed] [the infringing] websites” in “distribut[ing] their infringing copies to a worldwide market and assist[ed] a worldwide audience of users” in “access[ing] infringing materials.” *Ibid.*

The Seventh Circuit, too, has recognized that knowing facilitation can give rise to contributory infringement liability, and it has done so without respect to whether the defendant induced copyright infringement. In *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), the Seventh Circuit upheld a preliminary injunction against a file-sharing service on contributory infringement grounds, explaining that the service knew that its users were making “substantial” infringing uses of the service’s software and failed to show that “it would have been disproportionately costly for [the service] to eliminate or at least reduce substantially the infringing uses.” *Id.* at 650, 653.

Finally, the Fifth Circuit has squarely held that a service provider can meaningfully contribute to infringement by knowingly providing infringing customers with a necessary tool for infringement. In *UMG Recordings, Inc. v. Grande Communications Networks, LLC*, 118 F.4th 697 (5th Cir. 2024), *petition for cert. pending*, No. 24-967 (docketed Mar. 10, 2025), that court addressed circumstances materially identical to those here, cited the Fourth Circuit’s decision approvingly, and held that “supplying a product with knowledge that the recipient will use it to infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement.” *Id.* at 717-718 (citation modified).

2. Congress has been fully aware of the longstanding rule of contributory copyright infringement, and has not decreed that an intent to induce infringement is a *per se* requirement for secondary liability.

In the Copyright Act of 1976, Congress gave copyright owners the rights not only to reproduce, adapt, publish, perform, and display their works, but also to “authorize” those activities. 17 U.S.C. 106 (emphasis added). The authoritative House Report underlying the Act confirms that, by hard-wiring the authorization right into the statute, Congress “intended to avoid any questions as to the liability of contributory infringers” under existing law. H.R. Rep. No. 94-1476, at 61 (1976).

Two decades later, Congress revisited the issue of contributory copyright infringement when it enacted the DMCA. Having reviewed the existing secondary liability scheme as it developed under the 1976 Act and through decades of case law, Congress deliberately chose to “leave current law” as it was. S. Rep. No. 105-190, at 19 (1998). Congress thus enacted the DMCA on the assumption that, absent congressional action, service providers (including ISPs) could be held liable for their knowing facilitation of infringement. See *ibid.*

Recognizing that the internet created unprecedented opportunities for infringement, Congress drafted the DMCA to strike a balance between the interests of copyright holders and service providers. Congress recognized that the “U.S. creative industries”—among America’s “largest and fastest growing economic assets”—would “hesitate to make their works readily available on the Internet without reasonable assurance that they [would] be protected against massive piracy.” S. Rep. No. 105-190, at 8-10. And Congress well knew that ISPs were the entities most essential to “stemming the tide of copyright infringement.” *UMG*, 118 F.4th at 703. At the same

time, Congress recognized that under existing secondary liability doctrines—which Congress specifically declined to disturb—ISPs could be exposed to substantial liability and therefore needed incentives to ensure that they would make the “necessary investment in the expansion of the speed and capacity of the Internet.” S. Rep. No. 105-190, at 8, 19.

Congress aimed to balance those interests through “a series of ‘safe harbors’” that would limit the monetary liability of service providers whose subscribers use their services to infringe, provided that the service providers met certain eligibility requirements. S. Rep. No. 105-190, at 19. Where a service provider’s liability might otherwise arise “by reason of” several different types of uses of their service, one of the safe-harbor eligibility requirements is to respond expeditiously to notices of infringement provided by copyright owners. See generally 17 U.S.C. 512. Where notice-and-takedown rules are deemed to apply, copyright owners bear the costs of giving service providers notice of infringing material or activity, and service providers bear the costs of responding expeditiously to remove or limit access to the infringing material or activity. See Section 512 Report at 25. And to be eligible for any of the DMCA’s safe harbors, service providers must, among other things, “adopt[] and reasonably implement[] * * * a policy that provides for the termination in appropriate circumstances of subscribers * * * who are repeat infringers.” 17 U.S.C. 512(i)(1)(A).

Those requirements make sense only on the assumption that, absent safe-harbor protection, service providers may face secondary copyright liability for knowingly providing services that facilitate infringe-

ment. See S. Rep. No. 105-190, at 19; H.R. Rep. No. 105-551, pt. 2, at 64 (1998). If, as Cox suggests, a service provider can be held liable only when it actively promotes infringement by users who have demonstrated their intent to continue infringing, and therefore can escape liability by simply ignoring known infringing conduct that the provider facilitates, it is impossible to see why Congress would have required providers to adopt and reasonably implement repeat-infringer policies in order to avoid liability. Rather, the DMCA reflects that Congress adopted existing principles of secondary liability, such that service providers may be held liable “based on the doctrines of direct, vicarious or contributory liability for infringement as * * * articulated in the Copyright Act and in the court decisions interpreting and applying that statute.” S. Rep. No. 105-190, at 55.

**B. Cox Seeks To Upend Settled Law
And Replace It With Broad Service-
Provider Immunity**

In prior litigation, Cox was found to have spurned the DMCA’s safe harbor by choosing not to implement its stated policy for addressing the actions of demonstrated repeat infringers. Although it does not challenge that finding here, Cox now asks this Court to grant service providers an immunity from secondary liability that is even broader than the DMCA’s limitation on monetary liability. In particular, Cox asks the Court to hold that, unless a service provider takes an “affirmative act with the intent of facilitating” infringement, the service provider may not be held contributorily liable. Cox Br. 23 (citation modified). But that theory cannot be reconciled with precedent. It would render the DMCA safe harbor superfluous.

And, with no corresponding benefit, Cox’s proposed rule would upend the existing law’s incentive structure for service providers to cooperate in combatting the tide of online piracy.

1. As Respondents have explained, see Sony Br. 28-44, the legal arguments supporting Cox’s theory are uniformly unpersuasive. Cox principally argues that this Court in *Grokster* overturned decades of settled law to hold that a plaintiff alleging contributory liability must prove not only a defendant’s knowledge and facilitation of another’s wrongdoing but also an intent to promote infringement. See Cox Br. 23; U.S. Br. 12-13. But *Grokster* did no such thing. The Court in that case addressed only “the inducement rule”—a theory of liability adapted from patent law that treats a defendant as liable for a third party’s infringing acts if he “distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement.” 545 U.S. at 936-937. The Court did not purport to treat inducement as the sole species of contributory liability; to the contrary, the Court favorably cited *Gershwin* and acknowledged the broader importance of secondary liability in the online-piracy context, where “the only practical alternative” to suing every direct infringer is to “go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.” *Id.* at 930.

Cox’s counterargument rests largely on a footnote in *Grokster* stating that a defendant’s mere “failure to take affirmative steps to prevent infringement” would not support contributory liability absent “other evidence of intent.” 545 U.S. at 939 n.12; see Cox Br. 2,

26, 36, 41. But that footnote—which even the government does not cite—addresses only the impermissibility of inferring a service provider’s mental state solely from the fact of the provider’s failure to develop “mechanisms to diminish the infringing activity using their software.” *Grokster*, 545 U.S. at 939. The Court was not asked to decide, and did not purport to hold, that continuing to provide infringement-facilitating services with knowledge of the uses to which they would be put was insufficient to establish the *material contribution* element of contributory infringement (the question Cox presents). Nor did the Court hold, or even suggest, that plaintiffs proceeding under any theory of contributory liability must prove not only the defendant’s knowledge of the infringing activity but also, by virtue of the material-contribution element, an intent to induce infringement. The footnote thus provides no support for Cox’s effort to import a heightened mental-state requirement into the material-contribution element of contributory infringement liability.

The government, for its part, relies principally on the fact that the Court in *Sony-Betamax* and *Grokster* did not hold that “knowledge that particular customers will commit direct infringement [is] a sufficient basis for imposing secondary liability.” U.S. Br. 11; see *id.* at 11-13. But as the government appears to recognize, see *id.* at 22, the Court in those cases did not purport to define the outer bounds of liability for contributory copyright infringement. To the contrary, the Court in both cases favorably cited *Gershwin* and alternative theories of secondary liability before analyzing how those theories applied in each case. See *Sony-Betamax*, 464 U.S. at 437-438 & n.18; *Grokster*,

545 U.S. at 930. Neither decision “displace[d] other theories of secondary liability.” *Grokster*, 545 U.S. at 934 (addressing *Sony-Betamax*).

Cox and the government fare no better with their reliance on *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), and *Smith & Wesson Brands v. Mexico*, 605 U.S. 280 (2025). See Cox Br. 26-28; U.S. Br. 17-21. Those cases, litigated under the Justice Against Sponsors of Terrorism Act and the Protection of Lawful Commerce in Arms Act, respectively, said nothing about contributory liability under the Copyright Act. In neither case did the Court purport to establish a test for all forms of secondary liability, much less for circumstances (like those here) where the evidence shows that a defendant knew of specific repeat-offender subscribers *and* knew those subscribers likely would use the defendant’s services to infringe again. Contra *Twitter*, 598 U.S. at 498-500 & n.13; *Smith & Wesson*, 605 U.S. at 295-296. To the contrary, those cases arose in particular “context[s]” and address particular “common-law tradition[s].” *Twitter*, 598 U.S. at 485. In *Twitter*, Congress had specifically provided that the relevant “framework” for assessing the liability of those who “aid[] and abet[]” international terrorism was set forth in a 1983 decision of the D.C. Circuit. *Id.* at 484-485 & n.6 (citing *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983)). And in *Smith & Wesson*, the Court emphasized that “principles of aiding and abetting from the criminal law” provided the relevant framework for assessing the liability of those who “aid[] and abet[]” a firearms offense. 605 U.S. at 286-287.

But as the Court recognized in *Twitter*, common-law principles are “not identical” across different legal

domains. 598 U.S. at 493. Thus, even granting that “common law principles” inform secondary liability in the copyright context, *Grokster*, 545 U.S. at 930, there is no basis for assuming that aiding-and-abetting principles drawn from other contexts apply in pari materia where, as here, the operation of the common law has resulted in a distinct set of principles under a distinct statutory scheme, all in service of a distinct purpose (namely, “stimulat[ing] artistic creativity for the general public good”), *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

Rather, the common thread tying the strands of secondary copyright liability together is not intent or “affirmative steps” but, as even Cox recognizes, “culpability.” Cox Br. 33; see *id.* at 22, 27-28, 32, 40; accord U.S. Br. 25. And there is no shortage of culpability here. As the court of appeals explained, Cox knew of its subscribers’ past infringing activity, and the company forfeited any argument that notices of past infringement failed to establish its knowledge that those subscribers were substantially certain to infringe again. Pet. App. 9a, 23a-25a; contra Cox Br. 35 (relitigating Cox’s knowledge); U.S. Br. 22 (same). Armed with *that* knowledge, “providing the means to infringe *is* culpable pursuant to the common law rule that a person is presumed to intend the substantially certain results of his acts.” Pet. App. 27a.

In addition, Cox adopted a sham policy to address repeat infringement. Cox capped the number of notices it would accept and the number of accounts it would terminate. Pet. App. 9a. Upon reactivation, Cox treated users previously terminated for infringing activity as if they had never infringed. See *ibid.* And contrary to Cox’s protestations concerning the

consequences of termination, see, *e.g.*, Cox Br. 44-45, during just one brief stretch, Cox terminated over 600,000 subscribers for nonpayment, while terminating only 32 subscribers for violating its Acceptable Use Policy. Pet. App. 9a.³

Moreover, although Cox repeatedly suggests that the possibility of liability here would require “throwing innocent users off the internet en masse,” Cox. Br. 11, termination was not the only remedy available to Cox. Other companies have developed—and actually implemented—graduated responses to notices of infringement, including escalating alerts, training, throttling of benefits, and temporary suspensions. See Section 512 Report at 40. Such policies are consistent with the DMCA safe harbor, which requires termination only in “appropriate circumstances,” 17 U.S.C. 512(i)(1)(A), and therefore does not require a “strict ‘two strikes and you’re out’ policy” for, say, “an educational board whose young users sometimes inadvertently upload infringing content,” Section 512 Report at 105. Cox, however, decided that it would be better to “avoid losing revenue” than to meaningfully restrict infringement by all manner of repeat infringers. Pet. App. 28a. Where, as here, a company knows that particular customers are repeatedly using its service to commit infringement, yet the company adopts

³ Although Cox also professes concern about terminating access for “individuals who did, in fact, infringe,” Cox. Br. 44, Congress considered that concern and found it insubstantial for repeat infringers: “those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access,” S. Rep. No. 105-190, at 52; H.R. Rep. No. 105-551, pt. 2, at 61.

only a sham policy and otherwise fails to take steps to address the harms its service facilitates for those customers, no common-law rule bars liability.

2. Cox’s theory also cannot be squared with the DMCA. Cox asks this Court to hold that, unless a service provider actively induces or promotes infringement, the provider may not be held contributorily liable. Under that theory, a service provider that provides the means to infringe and knows with certainty that particular customers will use the service to do so cannot be held liable so long as the provider does not actively encourage the customers’ infringement. See Cox Br. 23. But that unprecedented rule would render superfluous Congress’s incentive for service providers to adopt reasonable policies for the termination of repeat infringers. If liability could be avoided altogether simply by ignoring ongoing infringement by known subscribers, service providers would have no incentive to adopt and implement a reasonable repeat-infringer policy, see 17 U.S.C. 512(i)(1)(A).

It is true, as Cox asserts, that a service provider’s failure to qualify for the safe harbor does not mean, ipso facto, that the provider is liable for infringement. See 17 U.S.C. 512(l). But one of the main purposes of the safe-harbor framework is to provide incentives for service providers who claim not to be interested in facilitating infringement to demonstrate their bona fides when presented with evidence that their users are infringing. See S. Rep. No. 105-190 at 19; H.R. Rep. No. 105-551, pt. 2, at 64. If Cox were correct that knowledge and facilitation of infringement are insufficient for liability, those incentives would evaporate, as service providers who simply avoided affirmatively *inducing* infringement could thereby also avoid the

costs of adopting and reasonably implementing a repeat-infringer policy. That is not the scheme Congress intended when it enacted the DMCA to protect “service providers” who, “[i]n the ordinary course of their operations, * * * must engage in all kinds of acts that expose them to potential copyright infringement liability.” S. Rep. No. 105-190, at 8.

3. Cox’s arguments, if accepted, would not only excuse Cox from the predictable consequences of its own culpable conduct, but also severely threaten the creative industries that depend on meaningful copyright enforcement.

The “ultimate aim” of copyright law is to promote the market for, and the creation of, new works of authorship. *Aiken*, 422 U.S. at 156. But under Cox’s theory, there is no meaningful assurance that the law will “secure a fair return” for artists’ “creative labor.” *Ibid.* Rather, if this Court were to embrace Cox’s theory, the existing safeguards against ubiquitous piracy could crumble. To take one example, if Cox were correct, online video-streaming platforms might allow users to post whatever videos they like—including copyrighted films and television shows—for free public consumption without copyright owners’ consent. The service providers could avoid any “affirmative, purposeful conduct intended to further” infringement by refusing to advertise the potential for infringement or otherwise encourage such use. Cox Br. 23. And because the platforms are so often used in noninfringing ways, it might be impossible to prove that the companies profit directly from the infringement itself (such that vicarious liability might attach). If that world came to be, it would erase virtually every “incentive” to “stimulate artistic creativity” in the

creation of video content “for the general public good.” *Aiken*, 422 U.S. at 156.

At minimum, a decision for Cox here would wipe away the incentive structure that encourages voluntary agreements between rightsholders and service providers. Cox adopted its “thirteen-strike policy,” purportedly designed to “reduc[e] future infringement,” because it felt financial pressure to avail itself of the DMCA safe harbor. Pet. App. 22a. But if Cox wins here, it would have no need even for that sham policy. Thus, the Court would place at risk the cooperative agreements rightsholders have reached with similar service providers to stamp out piracy. See pp. 9-12, *supra*; Comments of Google Inc. 3, *In re Request for Comments on U.S. Copyright Office Section 512 Study*, Dkt. No. USCO-2015-7 (Apr. 1, 2016) (explaining that the DMCA—and the promise of a safe harbor from liability—has “succeeded in fostering voluntary collaboration”). A corresponding increase in piracy would then further diminish revenues that make it possible for the creators of motion pictures and other works to create new works. And that, in turn, would undermine copyright law’s core function of “encourag[ing] the production of original literary, artistic, and musical expression for the good of the public.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994).

There is no reason for the Court to risk that outcome. The Court has already recognized the “practical” imperative of suits against intermediary service providers “for secondary liability.” *Grokster*, 545 U.S. at 914. Indeed, “enforcement against the ‘middlemen’ who encourage, facilitate and benefit from infringement has long served an important role in providing meaningful and efficient copyright protection.”

Intentional Inducement of Copyright Infringements Act of 2004: Hearing on S.2560 Before the S. Comm. on the Judiciary, 108th Cong. (2004) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office). Having failed to take even simple steps to avail itself of the safe harbor, and having demonstrated its culpability, Cox offers no good reason to discard that tradition.

CONCLUSION

The Court should reject Petitioners' efforts to upend existing rules of contributory copyright infringement.

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