

No. 24-171

In the
Supreme Court of the United States

COX COMMUNICATIONS, INC., *et al.*,
Petitioners,

v.

SONY MUSIC ENTERTAINMENT, *et al.*,
Respondents.

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

**BRIEF OF *AMICI CURIAE*
CHRISTOPHER COTROPIA & JAMES GIBSON
IN SUPPORT OF REVERSAL ON QUESTION ONE**

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INTEREST OF THE *AMICI CURIAE*¹

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As legal scholars with expertise in copyright law, *amici's* sole interest in this case is the proper application of the statutory and case law of copyright for the benefit of society, particularly the correct interpretation and application of contributory copyright liability in the context of conduit service providers. *Amici's* university affiliations are for identification purposes only; *amici* present these

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

² See, e.g., Christopher Cotropia & James Gibson, *Convergence and Conflation in Online Copyright*, 105 Iowa L. Rev. 1027 (2020) [hereinafter *Convergence & Conflation*]; Christopher Cotropia & James Gibson, *Copyright's Topography: An Empirical Study of Copyright Litigation*, 92 Tex. L. Rev. 1981 (2013).

arguments on their own behalf, not that of their respective universities.

SUMMARY OF ARGUMENT

Pursuant to Supreme Court Rule 37, Christopher Cotropia and James Gibson respectfully submit this *amici curiae* brief in support of reversal on Question One.

The Fourth Circuit’s decision to impose contributory liability on Petitioners Cox Communications, Inc. and CoxCom, LLC (together, “Cox”) rests on a fundamental misapprehension of Cox’s role as a “conduit” Internet Service Provider (“ISP”). Conduits merely transmit data between endpoints; unlike content-hosting platforms like YouTube or search engines like Google, conduits do not store, curate, or control user content. They merely transmit data on behalf of third parties, and they have no ability to monitor the data they transmit. By treating Cox’s passive provision of Internet access and data transmission as a knowing, material contribution to infringement, the Fourth Circuit collapsed the crucial legal distinction between conduits and hosts, extending contributory liability into an area where no court or legislature has ever placed it. *See Convergence & Conflation*, *supra* note 2, at 1041-46.

This unprecedented step disregards decades of precedent that establishes only two bases for contributory liability. First, traditional contributory liability involves ongoing infringement, and it turns

on a defendant's actual ability to prevent or remediate the infringement while it is occurring. Second, inducement liability involves future infringement, and it turns on the defendant's active inducement of such infringement. Neither applies here.

The Fourth Circuit compounded this error by conflating certain requirements of the safe harbors from the DMCA with the elements of contributory liability. The DMCA's safe harbor regime sets conditions for immunity, but it does not define the baseline scope of liability. By treating Cox's alleged failure to meet DMCA conditions—such as terminating repeat infringers—as substantive evidence of contributory infringement, the Fourth Circuit improperly converted a limitation on statutory immunity into a standard for fault. That reasoning erases the distinction between the availability of a statutory defense and the existence of underlying liability, effectively imposing obligations on conduits that Congress chose not to impose. See *Convergence & Conflation*, *supra* note 2, at 1070-74.

Finally, the Fourth Circuit's approach risks destabilizing copyright law by vastly expanding secondary liability without clear doctrinal or practical limits. *Id.* at 1073-74. If simply providing Internet access with knowledge of past infringement leads to contributory liability, then every conduit—including broadband providers, cell phone carriers, and even electric or utility companies that facilitate network use—could face liability whenever users misappropriate copyrighted works. That result is incompatible with this Court's clear requirement that

contributory liability rest on affirmative steps to foster such infringement, not on mere failure to terminate service. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005).

Accordingly, this Court should reverse on Question One and reaffirm that conduits do not contribute to infringement merely by providing Internet access, absent inducement or other affirmative conduct.

ARGUMENT

This case turns on the Fourth Circuit’s failure to recognize and account for Cox’s role as a conduit. “Conduit” is the term that courts, legislators, and commentators have used for decades to describe a service provider, such as an ISP, that merely transmits data between third parties and that does not host, store, control, or have the ability to monitor that content as it passes through its network.³ Yet in

³ *E.g.*, *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1372 (N.D. Cal. 1995) (“It would be especially inappropriate to hold liable a service that acts more like a conduit, in other words, one that does not itself keep an archive of files for more than a short duration.”); H.R. Rep. No. 105-551, pt. 2, at 51 (1998) (noting that proposed DMCA section 512(a) would “limit the range of activities that qualify under this subsection to ones in which a service provider plays the role of a “conduit” for the communications of others.”); Erika Pang, *Who’s on the Hook for Digital Piracy?*, 95 S. CAL. L. REV. 1273, 1304 (2022) (“ISPs are ‘mere[] conduits’ . . . akin to telephone or power companies.”). Although the DMCA does not apply here, its “Transitory Digital Network Communications” safe harbor provides a good definition of conduits—those engaged solely in transmitting, routing, or providing connections for material

this case neither the district court nor the Fourth Circuit even mentioned the word “conduit.” This disregard of such a critical concept led them to impose a novel and unjustified form of contributory liability on ISPs. In doing so, the court conflated the statutory requirements of the DMCA safe harbors—particularly the repeat infringer termination policy—with the separate, case law standard for contributory liability. *See Convergence & Conflation*, *supra* note 2, at 1071-74. That misstep transformed Congress’s limited safe harbor conditions into affirmative liability rules, thereby radically expanding the boundaries of copyright law beyond its historical limits.

Amici do not defend Cox’s internal practices, which at times “display[ed] contempt for laws intended to curb online [copyright] infringement.” *See Sony Music Ent. v. Cox Commc’ns, Inc.*, 93 F.4th 222, 236-327 (4th Cir. 2024). But contempt is not culpability, and the central error here is the Fourth

without storing, caching, or selecting content, and where the transmission occurs through an automatic technical process without provider discretion. 17 U.S.C. § 512(a). Courts have accordingly used the term to describe this safe harbor as well. *E.g., Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1237 (D.C. Cir. 2003) (“[The DMCA] does not authorize the issuance of a subpoena to an ISP acting as a mere conduit for the transmission of information sent by others.”); *Io Grp., Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1147 (N.D. Cal. 2008) (“The statute itself is structured in a way that distinguishes between so-called ‘conduit only’ functions under Section 512(a) and those functions addressed by Section 512(c) . . .”).

Circuit’s categorical misapplication of contributory liability to a conduit.

I. Holding a Conduit Contributorily Liable Is an Historically Unprecedented Expansion of Copyright Law

Contributory liability in copyright law traditionally occurs when a party knows of infringing activity and materially contributes to it. *See CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004); *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). The first element describes a mental state and the second an overt act.

Key to this form of liability is that the mental state and the act coincide. The idea is to impose liability only on a party possessing the requisite knowledge *while the party’s overt acts are ongoing*, thus creating an incentive for the party to cease its actions. We know this is the goal because liability does not attach immediately upon acquiring the knowledge. Rather, the law then gives the party an opportunity to cease its contributory acts. For example, if a copyright owner notifies YouTube of a particular infringing video that it is hosting on its platform, YouTube is not immediately liable, even though at that point it both knows of the infringement and is facilitating it. Instead, YouTube is liable only if it fails to take the video down—i.e., to no longer display and transmit the video—in a timely manner.⁴

⁴ *See, e.g., Capitol Recs., LLC v. Vimeo, LLC*, 826 F.3d 78, 94-99 (2d Cir. 2016); *UMG Recordings, Inc. v. Shelter Cap. Partners*

Establishing the knowledge element for contributory liability can be a difficult issue, especially when the defendant operates a digitally networked system that processes or hosts a high volume of user-generated material. Federal courts have accordingly coalesced around a standard that requires knowledge of *specific* infringing material, rather than *generalized* knowledge that infringement is taking place on the system. See *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 26, 30-32, 41 (2d Cir. 2012) (holding that liability requires knowledge of “specific and identifiable infringements of particular individual items”); *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001) (“[A]bsent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement”). And in *BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293, 311-12 (4th Cir. 2018), a case in which the Fourth Circuit got a lot wrong, it got this much right: “[T]he proper standard requires a defendant to have specific enough knowledge of infringement that the defendant could *do* something about it.” (emphasis in original). The specificity requirement thus serves the goal of incentivizing parties to stop facilitating infringement.

LLC, 718 F.3d 1006, 1020-22 (9th Cir. 2013). The relevant DMCA safe harbor for hosts like YouTube converges with this case law standard, granting protection as long as the platform “acts expeditiously to remove, or disable access to, the material.” 17 U.S.C. § 512(c)(1)(A)(iii).

Such a standard works well when the defendant's own system hosts material for users, as YouTube does, or directs users to material located elsewhere online, as Google's search engine does. If YouTube learns that it is hosting specific infringing material, it can remove it from its system, making it no longer viewable by users. *See, e.g., Viacom*, 676 F.3d at 31-35; *Capitol Recs.*, 826 F.3d at 84-85. If Google learns that one of its search results provides a link to specific infringing material, it can remove the link by not including it in future search results.⁵ In both examples, the knowledge of specific infringement exists while the defendant's material contribution is ongoing, which justifies imposing copyright liability if the defendant fails to act despite its ability to do so.

This “notice-and-takedown” approach to contributory infringement by hosts and search engines emerged from the famous 1995 case *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1369-73 (N.D. Cal. 1995) (“*Netcom*”). Other case law from the same period would have imposed liability without such specificity

⁵ This explains why, despite their possible non-infringing uses, indexing systems like Napster are subject to contributory liability. Such systems are not mere conduits, whose involvement with any given act of infringement is fleeting and invisible to them. Rather, liability is premised on their maintenance of indexes of infringing works for users who they know are actively infringing in real time. *Napster*, 239 F.3d at 1021. Significantly, even for this kind of defendant, the courts require specificity of knowledge, *id.*—and such defendants have their own DMCA safe harbor, with a notice-and-takedown requirement, *see* 17 U.S.C. § 512(d).

of knowledge, *see Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993), an approach endorsed by the Clinton Administration’s so-called White Paper, *see Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: Report of the Working Group on Intellectual Property Rights* 122 (1995) [hereinafter *White Paper*]. But courts have followed *Netcom*, and Congress has as well, ultimately incorporating its approach into the DMCA. *See Convergence & Conflation*, *supra* note 2, at 1036-43.

Until the litigation against Cox, however, no judge or legislator so much as considered imposing liability on a conduit.⁶ While some early case law called for strict liability, they did so only with regard to hosts, not conduits. *See, e.g., Playboy Enters.*, 839 F. Supp. at 1558-59. The *White Paper*, which also proposed doing away with a knowledge requirement, nevertheless conceded that “[i]f an entity provided only the wires and conduits . . . , it would have a good argument for an exemption” *White Paper*, *supra*,

⁶ The only possible exception is *Ellison v. Robertson*, 357 F.3d 1072, 1081 (9th Cir. 2004), in which the Ninth Circuit discussed whether the defendant “functioned as a conduit service provider.” But that defendant “stor[ed] infringing copies of [plaintiff’s] works on its USENET groups and provid[ed] the groups’ users with access to those copies” for two weeks, *id.* at 1078, clearly making it a host rather than a conduit. In any event, the court did not impose liability and the case settled on remand. Stipulation & Order of Dismissal, *Ellison v. Robertson*, No. 2:00-CV-04321 (C.D. Cal. July 7, 2004). Since the Fourth Circuit issued its decision in this case, one other appellate court has held a conduit liable for contributory infringement, relying in part on the Fourth Circuit decision. *See UMG Recordings v. Grande Commc’ns Network*, 118 F. 4th 697, 713 (5th Cir. 2024).

at 122. And *Netcom*, whose knowledge-based approach ultimately became the prevailing standard, explicitly stated that conduits should not be liable. 907 F. Supp. 1361 at 1372 (“It would be especially inappropriate to hold liable a service that acts more like a conduit,” and “[n]o purpose would be served by holding liable those who have no ability to control the information to which their subscribers have access, even though they might be in some sense helping” infringement occur).

Other areas of law similarly distinguish between those who merely transmit content and those whose involvement is more long-lasting. Hosting libelous material online may or may not lead to liability, *compare Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991) (no liability), *with Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *4-5 (N.Y. Sup. Ct. May 24, 1995) (strict liability),⁷ but no court has ever held a conduit liable for its fleeting transmission of such material.⁸ When a slander occurs over the phone, the telephone company is not liable. *Restatement (Second) of Torts* §§ 581 cmt. b, 612 cmt. g (Am. Law

⁷ The Communications Decency Act later rendered this issue academic. *See* 47 U.S.C. § 230; *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332-33 (4th Cir. 1997).

⁸ The one case involving this issue ended in a win for the conduit. *See Lunney v. Prodigy Servs. Co.*, 723 N.E.2d 539, 542 (N.Y. 1999) (finding no liability for transmitting defamatory email because “[defendant’s] role in transmitting e-mail is akin to that of a telephone company”).

Inst. 1977).⁹ And in privacy law, Congress has enacted very different approaches to protecting communications, depending on whether they are intercepted mid-transmission or are accessed from digital storage. *See* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848.

In short, imposing liability on a company for providing Internet connectivity (i.e., functioning as a conduit), even to known infringers, is an unprecedented departure from decades of case law. As explained below, this expansion of copyright's reach has come about because the Fourth Circuit confused and conflated substantive legal standards from case law with statutory provisions that have no bearing on this case.

II. The Lower Courts' Theory of Liability Wrongly Conflates Elements from Disparate Cases and Statutes

If conduit liability was never a possibility prior to the litigation against Cox, why did the Fourth Circuit take the unprecedented step of imposing such liability? The answer is that the court conflated elements from a mishmash of sources, resulting in an inconsistent

⁹ Indeed, the definition in the DMCA safe harbor that protects conduits, 17 U.S.C. § 512(a), is based on the Communications Act of 1934, 47 U.S.C. § 153(48). H.R. Rep. No. 105-551, pt. 2, at 63 (1998) ("This free-standing definition is derived from the definition of 'telecommunications' found in the Communications Act of 1934 . . . in recognition of the fact that the functions covered by new subsection (a) are essentially conduit-only functions.").

and incoherent theory of liability. *See Convergence & Conflation*, *supra* note 2, at 1068-74.

The first element in the mishmash is the role of notices of infringement in establishing traditional contributory liability. As explained above, knowledge of infringement plays a useful role only if it arrives while the defendant is contributing to the infringement. For a host of online content, then, notices of infringement are useful because they provide the host with knowledge specific to the infringing material while the material can still be found on the host's platform and is thus capable of being removed. This is why the DMCA creates a notice-and-takedown process for providers of online hosting and storage services. *See* 17 U.S.C. § 512(c)(3)(A)(iii) (requiring takedown upon receiving notice "of the material that is claimed to be infringing or to be the subject of infringing activity . . . and information reasonably sufficient to permit the service provider to locate the material").

In this case, Cox received many notices, and the lower courts viewed them as pivotal to its liability. The district court here found as a matter of law that these notices established the requisite knowledge on Cox's part. *Sony v. Cox*, 93 F.4th at 227; *see also Sony Music Ent. v. Cox Commc'ns, Inc.*, 426 F. Supp. 3d 217, 232-33 (E.D. Va. 2019). This was the same court that heard *BMG v. Cox*, where it made the same finding, characterizing the notices as "DMCA-compliant." *BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 149 F. Supp. 3d 634, 662 (E.D. Va. 2015), *aff'd in part, rev'd in part*, 881 F.3d 293 (4th Cir. 2018). The Fourth

Circuit later pushed back against some aspects of the district court’s handling of the knowledge element, but it left intact the part about the notices, which it acknowledged as “the primary theory for [Cox’s] liability.” *BMG Rts. Mgmt.*, 881 F.3d at 312.

But when the defendant functions as a conduit, the significance of notices of infringement is completely different. First, there is no such thing as “DMCA-compliant” notices for conduits, because the applicable safe harbor does not provide for a notice-and-takedown protocol.¹⁰ To find otherwise, as the district court did, conflates the role of host with that of conduit. *See Convergence & Conflation*, *supra* note 2, at 1070-74. Second, as discussed above, and as the Eighth and D.C. Circuits have recognized, notices to a conduit arrive too late for it to do anything about the infringement, as the transmission of infringing material would have already ended.¹¹ Finally, notices to a conduit lack an important safeguard that is present in notices to a host: namely, a host can

¹⁰ 17 U.S.C. § 512(a). In contrast, all three safe harbors that govern services whose involvement with the infringing materials is more lasting provide for notice and takedown. *Id.* § 512(b)-(d).

¹¹ *In re Charter Commc’ns, Inc., Subpoena Enft Matter*, 393 F.3d 771, 776 (8th Cir. 2005) (“The absence of the remove-or-disable-access provision (and the concomitant notification provision) makes sense where an ISP merely acts as a conduit for infringing material . . . because the ISP has no ability to remove the infringing material from its system or disable access to the infringing material.”); *Recording Indus. Ass’n of Am.*, 351 F.3d at 1235 (“No matter what information the copyright owner may provide, the ISP can neither ‘remove’ nor ‘disable access to’ the infringing material because that material is not stored on the ISP’s servers.”).

interrogate a notice’s veracity by checking whether the copyrighted material exists on its system. A conduit like Cox cannot verify the material itself because the material has already passed through its system, which means it must take the copyright owner’s word for it.

If the “DMCA-complaint” notices sent to Cox were in fact not DMCA notices at all, and did not convey the same useful information as notices sent to a host, what role did they play in this case? They did not enable Cox to locate and take down specific infringing material (an impossibility for a conduit, whether the DMCA applies or not). Rather, the Fourth Circuit here held that the notices should have prompted Cox to *predict* that the Internet accounts identified in the notices would be used to infringe again in the future. *See Sony v. Cox*, 93 F.4th at 234 (“[I]n this scenario, knowledge . . . is a predictive question.”) (drawing on *BMG Rts. Mgmt. v. Cox*, 881 F.3d at 308).

Here the second element of the mishmash emerges. The foundational case law makes clear that there are only two circumstances in which a prediction of future infringement can lead to contributory liability for a party that provides a technology. First, under *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984), if the technology has no substantial non-infringing uses, its distribution alone is a knowing contribution to the future infringement in which users will engage. *See also, e.g., In re Aimster Copyright Litig.*, 334 F.3d 643, 653 (7th Cir. 2003) (assuming for purposes of evaluating preliminary injunction that no evidence of non-infringing use

exists). Second, under *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005), even when the technology is capable of substantial non-infringing uses, it contributes to infringement if the technology provider also induces future acts of infringement.¹²

The lower courts here did not rely on *Sony v. Universal*, for obvious reasons; the Internet access that Cox provides is clearly capable of substantial non-infringing uses. But their opinions in the instant case and in *BMG v. Cox* repeatedly cite *Grokster* for the incorrect proposition that contributory infringement exists when the defendant provides a technology knowing that its users might infringe in the future.¹³

¹² There are also some older, low-tech cases where infringement takes place at a physical location and that seemingly involve predictions of future infringement. *E.g.*, *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (swap meet). Assuming that such cases survive *Grokster* and are not best characterized as involving vicarious liability, they are inapposite here, as any future infringement would be observable by the defendants and could be shut down in real time—even if the impetus for doing so was based on knowledge of past infringement.

¹³ See *Grokster*, 545 U.S. at 936-37 (holding that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps . . ., is liable for the resulting acts of infringement by third parties”); see also *Sony v. Cox*, 93 F.4th at 236-38 (“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,” citing their court’s reasoning in *BMG v. Cox*, 881 F.3d at 308).

It is true, in theory, that a conduit ISP could be contributorily liable if it *induced* its customers to use the Internet to infringe copyright (although as previously discussed, no court had ever imposed such liability). In *Grokster*, however, this Court made it clear that inducement involves much more than the mere knowledge that such a thing might happen. It requires “clear expression” or “affirmative steps” on the defendant’s part that indicate that the defendant’s “object” was to “foster” infringement. *Grokster*, 545 U.S. at 935-37. Subsequent case law has correctly recognized that these standards require “a high degree of proof of the improper object,” *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1034-1036 (9th Cir. 2013) (finding such proof where defendant “active[ly] encourage[ed] . . . the uploading of torrent files concerning copyrighted content,” “posted numerous messages . . . requesting that users upload torrents for specific copyrighted films” and “provided links to torrent files”).

Respondents made no serious attempt to show that Cox intended to promote infringement, let alone that it took affirmative steps toward such a goal. And for some reason, the lower courts here did not require them to do so. Instead, the courts borrowed from *Grokster* the notion of liability for future infringement (ignoring the case’s actual requirements for such liability), added in the role of notices in addressing existing infringement (ignoring their inapplicability to conduits), and adjudged Cox a contributory infringer.

III. The Mismatch of Liability and Remedy Confirms the Inadvisability of Expanding Liability to Conduits

Three aspects of the remedy in this case demonstrate that extending liability to conduits is unwise and unwarranted.

First, the Fourth Circuit's approach implicitly (and correctly) acknowledges that a conduit can do nothing about past acts of infringement. Rather, notices of specific instances of past infringement are used as evidence that the conduit should do something about the prospect of unspecified infringement going forward. Yet the damages below were based, at least in part, on the past infringement of Cox subscribers. *See Sony v. Cox*, 93 F. 4th at 237-38. A coherent approach to copyright law cannot predicate liability on a prediction of unspecified future infringement but then award damages based on the past infringement of specific materials, of which the defendant had no timely notice.

Second, the difficulty in crafting an appropriate injunction here illustrates the flaws in the underlying theory of liability. The first case against Cox resulted in a \$25 million verdict for willful contributory infringement, but the district court nonetheless denied the plaintiffs' request for a permanent injunction. In doing so, the court cited a long list of questions that Cox would need to answer to avoid violating an injunction:

Is Cox required to suspend accused infringers, or simply terminate them upon one notice, or after the second notice? What if BMG sends ten notices for one IP address in one hour, or one minute? If the injunction requires termination of “repeat” infringing subscribers in appropriate circumstances, when is a subscriber a “repeat” infringer, and what are the “appropriate circumstances” for termination? Does the order permit or require suspension before termination? Can Cox warn the account holder first? Is Cox permitted to give customers an opportunity to respond to the accusations against them, or is it required to terminate accused infringers and provide them no redress? If the subscriber denies the accusation, what process will exist to adjudicate the accusation by BMG? Can Cox implement a counter-notice process such as the DMCA provides for storage providers? What if, for example, the subscriber’s computer was infected with malware, the user’s network password was stolen, or a neighbor or guest accessed the user’s account?

BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc., 199 F. Supp. 3d 958, 995 (E.D. Va. 2015), *aff’d in part, rev’d in part*, 881 F.3d 293 (4th Cir. 2018). As the court stated, these questions are “well-founded.” *Id.* But if they were too hard for Cox to answer after it had the benefit of the court’s ruling, how could it have known the answers five years earlier when it began receiving the notices that established its liability? Liability here is premised on responsibility for future

infringement, but even the court that imposed that liability could not articulate standards for future implementation.

Third, and most important, from the perspective of conduits, the “remedy” here is to terminate Internet access for accounts that have been repeatedly used to infringe copyright. Copyright remedies have traditionally targeted infringing *works*. Recall that both the case law and the DMCA focus on responding to specific acts of infringement. *See* 17 U.S.C. § 512(c), (g); *Viacom*, 676 F.3d at 31-36 (item-specific knowledge required; general awareness insufficient). Under the Fourth Circuit standard, however, conduits are incentivized to target individuals, not acts of infringement. In fact, the incentives are worse than that, because cutting off Internet access inevitably and unavoidably punishes entire households, or even entire buildings, all of which routinely share a single Internet account—simply because one individual used the account to infringe.

This represents one final conflation of disparate legal standards. Failure to terminate connectivity after repeat infringements has never been and should not be a substantive basis for copyright liability. *See Convergence & Conflation*, *supra* note 2, at 1073-74. Instead, it only determines whether the DMCA’s safe harbors are available.¹⁴ Yet the Fourth Circuit

¹⁴ *See* 17 U.S.C. § 512(i)(1)(A) (repeat-infringer policy as a condition of eligibility); *id.* 512(a) (conduit safe harbor); *id.* § 512(m)(1) (no duty to monitor); *id.* § 512(n) (safe harbors are “separate and distinct”); *Sony v. Cox*, 93 F.4th at 234, 236-38 (knowledge “is a predictive question” tied to future infringement

effectively converts it into a governing liability standard. *Id.*

Moreover, by its own terms the DMCA does not contemplate termination of *Internet access*. It speaks of termination of “subscribers and account holders,” not of subscriptions and accounts. *See* 17 U.S.C. § 512(i)(1)(A) (requiring “a policy that provides for the termination in appropriate circumstances of subscribers and account holders . . . who are repeat infringers”). And termination of any sort occurs only “in appropriate circumstances.” *See* 17 U.S.C. § 512(i)(1)(A). Perhaps when the DMCA was enacted in 1998, denying a household Internet access might have been considered a proportionate response to repeated infringement. *See* H.R. Rep. No. 105-551, pt. 2, at 61 (1998) (contemplating loss of Internet access); S. Rep. No. 105-190, at 52 (1998) (same). Today, when such access is essential to remote employment and schooling, paying bills, and communicating with loved ones, it is difficult to think of a more inappropriate measure.¹⁵

Finally, if repeated infringement by a single individual justifies terminating an entire household’s or building’s Internet access, what are the limits of

by particular subscribers); *BMG v. Cox*, 881 F.3d at 311-12 (contributory liability requires knowledge of specific instances or willful blindness; general knowledge is insufficient).

¹⁵ This illustrates another important difference between an online conduit and a “swap meet.” *See, e.g., Fonovisa*, 76 F.3d at 264. Losing access to a swap meet does not rob a defendant of fundamental means of functioning in modern society.

this theory of liability? Others have reasonably pointed out that the same approach could impose liability on an electric utility or credit card company,¹⁶ but an even easier target would be a cellular phone service provider. In the Fourth Circuit’s view, if a media company detects the use of someone’s cell phone for watching multiple infringing videos or downloading multiple infringing songs, all it takes to cut off that person’s connectivity are a few notices to the cell phone company. The leap from “take down this video” to “cut off communication with society” illustrates why the plaintiffs’ theory is not merely an extension of existing law but a radical reconfiguration of liability with serious implications for society.

¹⁶ See § 512(a) (providing safe harbor for conduits engaged in transitory digital communications); *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 805-806, 806 n.17 (9th Cir. 2007) (warning that adopting a “practical ability” test for vicarious liability would sweep in neutral infrastructure providers, including “software operators, network technicians, or even utility companies”); *id.* at 821 (Kozinski, J., dissenting) (“[A] utility has no right to stop providing electricity or phone service because it learns that its electrons are being put to illegal use.”).

CONCLUSION

The Fourth Circuit's decision marks an unprecedented and unwarranted expansion of copyright liability by incorrectly treating a conduit as having knowingly and materially contributed to copyright infringement. By conflating the DMCA's safe harbor conditions with substantive copyright liability rules, the court distorted the statutory framework and overlooked the limits that copyright law has always imposed on secondary liability. The bluntness of the sanction imposed here—terminating entire households' Internet access—and the sweeping collateral consequences that follow underscore the infirmities of the Fourth Circuit's reasoning and the dangers of its approach. This Court should reaffirm that mere transmission of Internet service, without inducement or affirmative promotion of infringement, does not constitute material contribution to copyright infringement, and, in turn, reverse on Question One.

Respectfully Submitted,

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