No. 16-1972

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BMG RIGHTS MANAGEMENT (US) LLC,
Plaintiff-Appellee,

v.

COX COMMUNICATIONS, INC., AND COXCOM, LLC,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia

District Court No. 14-cv-1611

BRIEF OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC., AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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January 6, 2017

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 16-1972 Caption: BMG Rights Management (US) LLC v. Cox Communications

Pursuant to FRAP 26.1 and Local Rule 26.1,

Motion Picture Association of America, Inc.
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

09/29/2016 SCC

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ John C. Ulin Date: 1/6/2017

Counsel for: Motion Picture Association of America, Inc.

CERTIFICATE OF SERVICE

****

I certify that on 1/6/2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Motion Picture Association of America, Inc. (MPAA) is a not-for-profit trade association founded in 1922 to address issues of concern to the U.S. motion picture industry. Its members are: Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. The MPAA's members and their affiliates are the leading producers and distributors of audiovisual works in the theatrical, television, and home entertainment markets in all formats and all channels of distribution, including online distribution. They depend upon the protection afforded by the U.S. Copyright Act to ensure the continued creation and availability of their works.

The MPAA has a strong interest in the proper interpretation of the rights and remedies of copyright owners under the Copyright Act. Copyright theft undermines the sales, profitability, and competitiveness of this important part of the U.S. economy. Preventing online theft is essential to promoting the robust availability to consumers of diverse and high quality video content. Secondary liability doctrines, including contributory infringement, are critically important to

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[1] No party's counsel authored this brief in whole or in part. No party or a party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae* or its counsel made such a monetary contribution. MPAA submits this brief with the consent of all parties, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

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-Goldwin-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is straightforwardly resolved under customary principles of secondary liability, which apply to copyright infringement under well-established precedent, including the Supreme Court's decisions in *Grokster* and *Sony Corporation of America v. Universal City Studios*, 464 U.S. 417 (1984) ("*Sony-Betamax*"). The district court properly instructed the jury that it could find contributory infringement if Cox: (1) had knowledge of specific infringing activity by its users; and (2) materially contributed to that infringement. The jury so found based on overwhelming evidence satisfying both elements.

The jury's verdict is consistent with *Grokster* and *Sony-Betamax*. *Grokster* confirms that the longstanding principles of secondary liability for copyright infringement are rooted in the common law and incorporated in the broad language of the 1976 Copyright Act. *Grokster*, 545 U.S. at 930. Under common law principles, a service provider that knowingly and materially contributes to copyright infringement is contributorily liable. *Grokster* further affirms that *Sony-Betamax* was "never meant to foreclose rules of fault-based liability derived from the common law." *Id*. at 934–35. Rather, *Sony-Betamax* provides a narrow exception to the knowledge prong of contributory liability for copyright infringement when a defendant's knowledge is imputed *solely* from the design or distribution of a product that its customers may use to infringe. That is not this case. Cox's knowledge is not imputed from the design or distribution of a product to a group of users who *might* use that product to infringe. Rather, the jury found Cox liable on the egregious facts of this case because Cox provided ongoing material support to a number of its own long-term subscribers whom it *knew* were using Cox's service to infringe BMG's copyrights on a massive scale.

Cox and its *amici* want to change the subject and turn this case into a policy debate about the propriety of liability for conduit internet service providers (ISPs). But Congress already accommodated the relevant policy concerns through the safe harbor provisions of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512. Section 512(a) would have barred the monetary award against Cox if it had simply adopted and applied the statutorily required approach to responding to notices of infringement from content-creators like BMG. *Id.* § 512(a), (i). But unlike other ISPs, Cox failed to "hold up [its] end of the bargain." *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns*, Inc., --- F. Supp. 3d. ---, 2016 WL 4224964, at *4 (E.D. Va. Aug. 8, 2016). Cox now seeks to avoid its liability by asking this Court to restrict well-established copyright liability principles in a manner that is fundamentally inconsistent with the DMCA and would further encourage copyright infringement.

Accepting Cox's contention that *Grokster* and *Sony-Betamax* immunize ISPs from contributory liability would exacerbate the already extreme challenges of copyright enforcement in the digital age. Online piracy accounts for a full quarter of all internet traffic and costs the entertainment industry tens of billions of dollars per year. *See, e.g.*, NetNames, *Counting the Cost of Counterfeiting*, Oct. 2015, at 13.[2] As *Grokster* recognized, it is simply not feasible to combat the epidemic of online infringement unless copyright-holders have the legal tools to incentivize the cooperation of intermediaries like Cox and to hold them accountable when they knowingly facilitate widespread online infringement.

ARGUMENT

I. Copyright Holders Face Substantial Hurdles in Attempting To Curtail the Epidemic of Online Infringement

The same decentralized design that has facilitated the internet's rapid growth also has fueled copyright infringement on a "staggering" and "gigantic scale." *Grokster*, 545 U.S. at 923, 940. When internet users share content through peer-to-

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[2] Website addresses for online resources are included in the Table of Authorities.

peer (P2P) networking services, like the BitTorrent protocol at issue in this case, "most of the infrastructure necessary to distribute content—together with the content itself—is supplied by the participating individuals." REBECCA GIBLIN, CODE WARS: 10 YEARS OF P2P SOFTWARE LITIGATION 2 (2011). This architecture of P2P networks has been described as "perfectly adapted to massive infringement." Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 Vand. J. of Ent. & Tech. L. 695, 736 (2011). Critically, however, ISPs like Cox operate as indispensable conduits that can control users' access to infringing tools, and, in turn, their ability to infringe.

The epidemic of copyright infringement on the internet generally, and via P2P networks specifically, is well documented. *See* Comments of the Motion Picture Association of America, Inc. at 11–12, *In the Matter of Request for Comments on U.S. Copyright Office Section 512 Study*, Dkt. No. 2015-7, Apr. 1, 2016 ("MPAA Comments"). In *Grokster*, the Supreme Court credited evidence "that the vast majority of users' downloads are acts of infringement, and because well over 100 million copies of the [P2P] software in question are known to have been downloaded, and billions of files are shared across [existing P2P] networks each month, the probable scope of copyright infringement is staggering." 545 U.S. at 923; *see also Twentieth Century Fox Film Corp. v. Streeter*, 438 F. Supp. 2d

1065, 1073 (D. Ariz. 2006) (describing P2P technology as leaving the plaintiffs' works "vulnerable to massive, repeated, and worldwide infringement").

A comprehensive study published in 2013 found that, in a single month (January 2013), 432 million unique users worldwide explicitly sought infringing content though a variety of methods, including BitTorrent portals, P2P downloading sites, and direct downloads. David Price, *Sizing the Piracy Universe*, NetNames Envisional, Sept. 2013, at 3. In 2015, the MPAA's members sent notices pertaining to more than 104.2 million links to websites that enable users to download or stream full-length movies without authorization. MPAA Comments at 21. Collectively, the piracy of films, music, video games, and television programs makes up nearly 25% of total internet bandwidth. *Counting the Cost of Counterfeiting*, at 9.

P2P file-sharing traffic is almost invariably infringing. A 2010 study reviewed over one million torrents and found *no legal transfers* in the top three categories by volume—movies, TV shows, and music. ROBERT LAYTON & PAUL WATTERS, INVESTIGATION INTO THE EXTENT OF INFRINGING CONTENT ON BITTORRENT NETWORKS 1, 21 (2010). The most recent comprehensive report concluded, "98% of data transferred on peer-to-peer networks is copyrighted." *Counting the Cost of Counterfeiting*, at 9. Courts have reached the same conclusion. One district court, for example, accepted expert testimony that 98.8%

of the files requested for download on the LimeWire P2P system were "copyright protected and not authorized for free distribution." *Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 398, 424 (S.D.N.Y. 2011).

The economic losses associated with online copyright infringement are similarly staggering. "The global cost of digitally pirated music, films, and software is $80 billion per year." *Counting the Cost of Counterfeiting*, at 13. It has been estimated that "[p]iracy in entertainment industries currently costs the US economy 373,375 jobs and $16.3 billion in earnings per year." *Id*.

In light of the continuing growth of online piracy and the enormous losses it causes, the MPAA was surprised to read certain of Cox's *amici* suggesting that copyright owners can effectively address these problems by suing individual infringers. *See* Amicus Br. of U.S. Telecom at 20–21. The Supreme Court long ago recognized that, "[w]hen a widely shared service . . . is used to commit infringement," enforcement against all direct infringers may be "impossible" and pursuing a service provider for secondary liability may be "the only practical alternative." *Grokster*, 545 U.S. at 929–30. "Simply put, litigation [against direct infringers] is not a scalable mechanism for dealing with the high volume of copyright disputes that arise from P2P file sharing." Bridy, *Is Online Copyright Enforcement Scalable?*, at 722. That admonition applies with special force to this case, in which BMG's claims against Cox have the potential to affect literally thousands of repeat infringers who use Cox's internet service.

As a result, copyright owners have focused their enforcement efforts on services that knowingly facilitate widespread online infringement. "Recognizing the impracticability or futility of a copyright owner's suing a multitude of individual infringers . . ., the law allows a copyright holder to sue a contributor to the infringement instead, in effect as an aider and abettor." *In re Aimster Copyright Litig.*, 334 F.3d 643, 645–46 (7th Cir. 2003). Such secondary enforcement is well-established in the copyright context, where traditionally "copyright law achieved compliance through the imposition of liability on a limited number of intermediaries." Tim Wu, *When Code Isn't Law*, 89 Va. L. Rev. 679, 713 (2003).

In the internet era, those intermediaries include ISPs like Cox that can and should be held liable for contributory infringement when, with knowledge of underlying infringing activity, they materially contribute to the infringing conduct of another and refuse to take steps to fall within the DMCA's safe harbor provisions. As the Register of Copyrights has explained, "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). Cox's narrow view of contributory liability should be rejected because it would effectively eliminate this essential and well-established tool of copyright enforcement where it is needed most—in the battle against massive internet piracy.

II. Imposing Contributory Liability on Cox Is Consistent with *Sony-Betamax*, *Grokster*, and Established Principles of Copyright Law

Courts have applied traditional common law principles of secondary liability to copyright infringement for over a century. *See Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62–63 (1911). Under those principles, knowledge of infringement combined with material contribution establishes contributory infringement. Congress drafted the Copyright Act of 1976 to incorporate the common law doctrine of contributory liability within the scope of copyright protection. Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 Cal. L. Rev. 941, 995 (2007) ("The legislative history [of the 1976 Copyright Act] . . . support[s] the continuation of then-existing doctrines [of contributory and vicarious infringement] and their further refinement through judicial decisions."); *see also* H.R. Rep. No. 94-1476, at 61 (1976). *Grokster* and *Sony-Betamax* reaffirmed that intermediaries can be liable for infringement based on these common law principles. This Court should reject Cox's efforts to twist those cases to erect an unprecedented blanket immunity for ISPs that knowingly facilitate infringement.

A. *Grokster* Confirms That Knowledge Combined with Material Contribution Establishes Contributory Infringement

In *Grokster*, the Supreme Court held that two companies that distributed P2P file-sharing software could be liable for infringement by their users, based on evidence that the companies had induced the infringement. 545 U.S. at 938–41. *Grokster* recognized that application of traditional principles of contributory liability is essential in the copyright arena: "When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement." *Id*. at 929–30. Accordingly, *Grokster* held that a service or product provider could be liable for contributory infringement if it would be liable under ordinary, common law principles of secondary liability. *Grokster* emphasized that the contributory liability standards applicable in the copyright context "emerged from common law principles and are well established in the law," *id*. at 930, and that *Sony-Betamax* was "never meant to foreclose rules of fault-based liability derived from the common law." *Id.* at 934–35.

Grokster's instruction to analyze contributory copyright infringement under common law principles means two significant things for this case. First, *Grokster* itself refutes Cox's argument that "inducement" is the *only* permissible form of contributory liability in the copyright arena. Cox Br. 37. Traditional "knowledge-plus-material-contribution" liability is a standard form of secondary liability applicable at common law and in the copyright context. "Under a theory of contributory infringement, 'one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another' is liable for the infringement, too." *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004) (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2nd Cir. 1971)). Second, *Grokster* forecloses Cox's argument that only a restricted kind of "actual knowledge" is sufficient to create contributory liability. Under the common law and in copyright cases, both actual and constructive knowledge—including knowledge established through willful blindness—suffice to establish secondary liability. *Aimster*, 334 F.3d at 650 ("Willful blindness is knowledge, in copyright law . . . as it is in the law generally." (citations omitted)).

Cox contends that *Grokster* bars the imposition of secondary liability based on knowledge of infringing activity coupled with the material contribution of providing internet access, theorizing that providing a service with substantial non-infringing uses can never constitute an "active step[] taken to encourage direct infringement." *Grokster*, 545 U.S. at 933; *see* Cox Br. 19, 37–38. But that language from *Grokster* simply set forth the prerequisites to an inducement theory of contributory infringement; it did not foreclose other theories. Quite the contrary. *Grokster* expressly incorporated the definition of contributory infringement set forth in *Gershwin*. *See Grokster*, 545 U.S. at 930 (citing *Gershwin*, 443 F.2d at 1162). And *Gershwin* not only expressly embraced a "material contribution" theory of contributory infringement, 443 F.2d at 1162, it explained on the very page *Grokster* cited that a mere "shipper" of infringing records could be liable for contributory infringement if the shipper had "knowledge, or reason to know, of the infringing nature of the records." *Id.* Thus, under the seminal contributory infringement case relied upon by the Supreme Court in *Grokster*, merely *shipping* a product constituted material contribution and could constitute contributory infringement if paired with the requisite knowledge.

An ISP like Cox that provides data transmission services to specific users whom it knows are using the service for infringement is the 21st century equivalent of *Gershwin*'s shipper. Indeed, Cox does not seriously dispute that the provision of internet access that enables copyright infringement materially contributes to that infringement. Cox repeatedly cites (at 17, 31, 44) footnote 12 of *Grokster*, which observes that, if a product has substantial non-infringing uses, "a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement." 545 U.S. at 939 n.12. But that is not what the court or jury did here. Cox is not liable because it failed to take unspecified "affirmative steps" to prevent infringement. Rather, Cox is liable because even though it had repeatedly been told and *knew* that specific users were engaged in infringing activity using Cox's service, it continued to facilitate their infringement by providing that service. In other words, Cox's liability is premised on its own knowledge of infringement by specific users, to which Cox contributed materially by continuing to provide them with the internet service they used to infringe.

Not a single case in any court reads *Grokster* to abrogate traditional theories of contributory liability, including material contribution, as Cox suggests. "*Grokster* did not suggest that a court must find inducement in order to impose contributory liability under common law principles." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 n.7 (9th Cir. 2007). Indeed, the Ninth Circuit has "repeatedly held" that the inducement and material contribution "tests are alternative." *Perfect 10, Inc. v. Giganews, Inc.*, No. 11-cv-07098, 2014 WL 8628031, at *6 (C.D. Cal. Nov. 14, 2014) (appeal pending).

In *Perfect 10 v. Amazon*, the Ninth Circuit held that Google could be contributorily liable because its service assisted users in accessing copyrighted works, even though Google did not "undertake any substantial promotional or advertising efforts to encourage visits to infringing websites." 508 F.3d at 1172. If a service provider with knowledge of infringement "can 'take simple measures to prevent further damage' to copyrighted works, yet continues to provide access to infringing works," that service provider is liable. *Id.* at 1172 (quoting *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995)).[3] *Accord EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, No. 14-4369-CV(L), 2016 WL 7235371, at *7 (2d Cir. Oct. 25, 2016) (upholding jury verdict for contributory infringement based on material contribution instruction); *Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2004) (endorsing secondary liability on a material contribution theory where AOL provided users with access to specific infringing works); *Parker v. Google, Inc.*, 242 F. App'x 833, 837 (3d Cir. 2007) (approving material contribution theory of contributory copyright infringement, post-*Grokster*, though concluding that the defendant lacked knowledge of infringement).

Of particular note is the Northern District of California's decision in *Netcom*, which is often cited for its analysis of contributory infringement standards for ISPs. *See*, *e.g.*, *CoStar*, 373 F.3d at 551–53; *Napster*, 239 F.3d at 1021. Citing

[3] While ignoring *Perfect 10*'s holding regarding material contribution, Cox seizes on *Perfect 10*'s reference to "actual knowledge" of infringing activity. Cox Br. 24. But *Perfect 10* used that term because the case involved actual knowledge. The court did not implicitly reject theories of constructive knowledge. In fact, the very case that *Perfect 10* cited for the knowledge requirement, *Napster*, embraced a constructive knowledge theory of contributory infringement. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001).

Gershwin's knowledge-plus-material-contribution standard, the court in *Netcom* held that a service provider could be contributorily liable for providing the "storage and transmission of information necessary to facilitate" a particular user's known copyright infringement. 907 F. Supp. at 1373–74. The court explained that, "[i]f plaintiffs can prove the knowledge element, Netcom will be liable for contributory infringement since its failure to simply cancel Erlich's infringing message and thereby stop an infringing copy from being distributed worldwide constitutes substantial participation in Erlich's public distribution of the message." *Id.* at 1374. "[I]t is fair," the court concluded, "assuming Netcom is able to take simple measures to prevent further damage to plaintiffs' copyrighted works, to hold Netcom liable for contributory infringement where Netcom has knowledge of Erlich's infringing postings yet continues to aid in the accomplishment of Erlich's purpose of publicly distributing the postings." *Id*. at 1375. This Court has already held that "courts may—indeed should—continue to look to [*Netcom* and other common law copyright] cases for guidance." *CoStar*, 373 F.3d at 553.

Grokster's faithful adherence to the common law also reinforces what lower courts have repeatedly held: constructive knowledge and willful blindness suffice to establish knowledge of infringement for purposes of contributory copyright liability. *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 118 (2d Cir. 2010); *Aimster*, 334 F.3d at 650; *Napster*, 239 F.3d at 1020; *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 658 (S.D.N.Y. 2013); *Netcom*, 907 F. Supp. at 1374, 1381–82.

These holdings are consistent with the knowledge requirement for contributory liability more generally. "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . permits the other to act . . . with his instrumentalities, knowing *or having reason to know* that the other is acting or will act tortuously." Restatement (Second) of Torts § 877(c) (1979) (emphasis added). Secondary liability can be based on constructive knowledge or willful blindness to prove claims for trademark infringement, *Louis Vuitton S.A. v. Lee*, 875 F.2d 584, 590 (7th Cir. 1989), hostile work environment, *Nitsche v. CEO of Osago Valley Elec. Co-op*, 446 F.3d 841, 844–45 (8th Cir. 2006), securities fraud, *In re Nokia Oyaj Sec. Litig.*, 423 F. Supp. 2d 364, 403 (S.D.N.Y. 2006), and even intentional infliction of emotional distress, *Valentine v. LaBow*, 897 A.2d 624, 633 (Conn. App. Ct. 2006). Indeed, willful blindness is sufficient to establish knowledge even under heightened *criminal* standards. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011); *United States v. Lightly*, 616 F.3d 321, 377 (4th Cir. 2010) ("[a] willful blindness instruction allows the jury to impute the element of knowledge of an illegal activity to the defendant").

Cox does not seriously dispute that "[w]illful blindness is knowledge, in copyright law . . . as it is in the law generally." *Aimster*, 334 F.3d at 650. As the

Supreme Court has acknowledged in the patent context, defendants who are willfully blind are "just as culpable as those who have actual knowledge." *Global-Tech*, 563 U.S. at 766. Cox instead contends that willful blindness to BMG's infringement notices does not count because the notices were "mere allegations" and did not "prove[]" infringement. Cox Br. 30–31. But the notices reflected that specific Cox accounts had been used to infringe specific copyrighted works. Those notices provided Cox with at least constructive knowledge of its subscribers' misconduct, and Cox's failure even to open the notices constitutes willful blindness. *BMG*, 2016 WL 4224964, at *5; *see* Robert Kasunic, *Making Circumstantial Proof of Distribution Available*, 18 Fordham Intell. Prop. Media & Ent. L.J. 1145, 1155–57 & n.37 (2008). Cox offers no support—not a single case—for its argument that the notices themselves needed to "prove[]" infringement in some formal adjudicative sense. Cox Br. 30.[4]

Cox is forced to argue such an extraordinarily narrow conception of willful blindness and "actual knowledge" because it loses under any other articulation of the knowledge standard. The Court should not gut well-established copyright liability principles to protect a company that willfully blinded itself by throwing

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[4] The *amicus* brief filed by the Recording Industry Association of America (RIAA) addresses Cox's attempt to limit the meaning of "repeat infringer" under the DMCA. MPAA shares the RIAA's concern about Cox's position and will not burden this Court will duplicative briefing on this point.

1.8 million notices of specific infringement in the trash and declined to read the separate weekly summaries of specific infringement it received from BMG's agent. *BMG*, 2016 WL 4224964, at *5, *13.

B. *Sony-Betamax*'s Narrow Defense Does Not Encompass Actors Who Provide Their Service to Specific, Known Infringers

The Court should also reject Cox's attempt to expand the contributory-liability defense in *Sony-Betamax*, which is a limited doctrine and not applicable here. *Sony-Betamax* concerned Sony's sale of the Betamax, a VCR-predecessor device that had substantial lawful uses but also enabled copyright infringement. Copyright owners sued Sony on a theory of secondary liability that hinged on Sony's "constructive knowledge of the fact that [its] customers may use [the Betamax] to make unauthorized copies of copyrighted material." 464 U.S. at 439. As described by the Court in *Grokster*, "*Sony* barred secondary liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement." *Grokster*, 545 U.S. at 933.

Cox tries to distort this aspect of *Sony-Betamax* into a blanket immunity for any product or service that has substantial non-infringing uses, such as high-speed internet service, absent a finding of active inducement of infringement. And it is no surprise: Cox needs *Sony-Betamax* to provide such blanket immunity for contributory liability because Cox's conduct so clearly supports such liability.

Cox seeks a rule that, because the internet has obvious non-infringing uses, an ISP that does not advertise or otherwise actively encourage copyright infringement can *never* be liable, no matter the extent to which it facilitates its users' infringement, and no matter how much knowledge of specific infringement it possesses. *Sony-Betamax* held no such thing.

Cox concludes that, for products or services capable of substantial non-infringing uses, *Sony-Betamax* bars contributory liability based on constructive knowledge and material contribution, and faults the court for "refus[ing] to hold that Cox was protected under *Sony* and *Grokster*." Cox Br. 19; *see also id*. at 22. The district court correctly rejected Cox's argument, which contains numerous analytical missteps.

First, Cox suggests that *Sony-Betamax* held that the provision of a service that is capable of substantial non-infringing uses can never constitute material contribution, and that the jury should have been so instructed. *Id*. at 23. But *Sony-Betamax* was exclusively a case about the knowledge prong of contributory infringement and what circumstances permitted the imputation of knowledge (or intent); it said nothing about the material contribution prong. *CoStar*, 373 F.3d at 549–50. *Grokster* confirms the point. It chastised the Ninth Circuit for "read[ing] [*Sony-Betamax*] as limiting secondary liability quite beyond the circumstances to which the case applied," 545 U.S. at 933, and in particular for "converting the case from one about liability resting on imputed intent to one about liability on any theory," *id.* at 934. The Court cautioned that *Sony-Betamax* "did not displace other theories of secondary liability." *Id.* Yet that is exactly how Cox misreads *Sony-Betamax* here.

Second, Cox attempts to convert *Sony-Betamax*'s rule that one cannot impute constructive knowledge from the design or distribution of a device with substantial non-infringing uses into a much broader rule banning constructive knowledge under any circumstances. Cox Br. 19. Nothing in the case law supports Cox's extreme view. *Sony-Betamax* did not rewrite the rules of common law liability to eliminate the possibility that an intermediary might be contributorily liable based on constructive knowledge of specific infringement. The post-*Sony-Betamax* cases Cox cites that use the term "actual knowledge," *id*. at 25–26, did so for the unremarkable reason that actual knowledge was presented in those cases. Cox does not cite a single case where a court was presented with constructive knowledge of specific infringement yet held that such evidence was categorically insufficient.

In any event, the status of constructive knowledge in this case is academic because Cox concedes that *Sony-Betamax* does not eliminate willful blindness as a viable theory, *id*. at 30, and the jury found willful blindness here. BMG Br. 45. Cox claims that the willful blindness evidence simply showed "knowledge of generalized infringement," Cox Br. 30, but that is incorrect. The knowledge that *Sony-Betamax* found insufficient to establish contributory infringement was knowledge that some undefined subset of customers "may" infringe after purchase. 464 U.S. at 439. Here, by contrast, Cox discarded or ignored millions of notices reflecting specific acts of infringement by identified Cox accounts. Cox attempts to dismiss this evidence as pure "speculation" of infringing behavior, but the jury was entitled to consider the notices as evidence of actual infringement and Cox's receipt of them as conferring knowledge of the infringement on Cox.

Sony-Betamax's holding concerning the imputation of knowledge for purposes of contributory infringement analysis is, in the end, quite narrow. The Court held only that the sale of a product with substantial non-infringing uses to consumers, some of whom may use it to infringe, does not *alone* constitute the knowledge or intent sufficient to justify contributory liability. Many other bases for knowledge remain possible. For example, when the defendant and the consumer have an ongoing, post-sale relationship, knowledge might be established even when the underlying product or service has substantial non-infringing uses. Cox has continuing relationships with its subscribers, and BMG did not attempt to establish secondary liability based simply on the design or distribution of Cox's service. Rather, BMG proved that, after selling its service to particular account-holders, Cox learned that those account-holders repeatedly used Cox's service to infringe but continued providing them the service in return for money.

That behavior reflects the evidence of knowledge that the Supreme Court found wanting in *Sony-Betamax*. As the district court explained, "BMG's claim goes beyond design choice or the mere provision of a service and therefore it goes beyond *Sony*." *BMG*, 2016 WL 4224964, at *12. "Specifically, BMG claimed that Cox ignored specific notices of infringing activity and continued to provide material support to its users' infringement of BMG works despite its ability to suspend or terminate customers with the push of a button." *Id.* "Such a claim is possible here because, unlike in *Sony*, Cox maintains an ongoing relationship with users of its service." *Id.*; *see also CoStar Grp. Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688, 706 (D. Md. 2001) ("In the current case, unlike *Sony*, LoopNet maintained control over access to the site and could deny access or block materials after gaining knowledge of infringement."), *aff'd*, 373 F.3d 544 (4th Cir. 2004); *accord MP3tunes*, 2016 WL 7235371, at *13; *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 156 (S.D.N.Y. 2009).

Cox argues that an ongoing relationship is only relevant in the context of vicarious liability. Cox Br. 41–43. Cox again misreads *Sony-Betamax*. The Court's statement that an "ongoing relationship may support [vicarious] liability," *id*. at 42 (citing *Sony-Betamax*, 464 U.S. at 437 n.18), is not a rejection of the notion that an ongoing relationship may also support *contributory* liability. And while control over the infringer is what justifies vicarious liability, in this context the ongoing relationship enables the contributing entity to learn about specific infringement by specific users in time to control *its own actions* vis-à-vis a specific infringer, which in turn enable or disable the specific infringer's infringing acts. These features make the ongoing relationship relevant to contributory infringement.

Cox's landlord-tenant example is inapposite because it involves a "fixed rental." Cox Br. 42. If Cox's landlord learned of infringement and then *renewed* the lease, he or she might well be liable. *Cf. Deutsch v. Arnold*, 98 F.2d 686, 688 (2d Cir. 1938) (no contributory liability for landlord absent proof that he "knew that acts of infringement were proposed at the time when the lease was made"). Similarly, Cox doubts that *Sony-Betamax* would have come out differently if Sony "*leased* its VCRs." Cox Br. 44. But the right comparison is a company that learned that specific customers were using the VCRs to infringe and renewed the lease to those customers anyway. *Sony-Betamax* did not confront—and did not bar liability in—that situation.

Here, Cox retains the right to terminate or limit service at any point, but it chose to continue enabling infringement by specific users it *knew* were infringing (or to whose infringement it willfully blinded itself). The knowledge gleaned during this ongoing relationship between provider and infringer makes Cox more culpable than Sony. In other words, Cox is not liable simply because Cox knew that if it offered internet service, some users might engage in infringement. *Id*. Rather, because of its ongoing relationship and the notices it received, Cox knew that *specific* customers *were using* the internet, and Cox's service, to infringe. That Cox may "not know the particulars of the data being shared," *id*., is a smokescreen; it knew that the data was infringing. And Cox's claim that it doesn't know "whether a particular subscriber will later choose to infringe," *id*., is simply false; indeed, the whole basis for the jury's finding of liability was that Cox knew that particular subscribers were engaged in repeated acts of infringement.

As Cox correctly observes, *Sony-Betamax*'s formulation of the rule that knowledge may not be imputed from mere design or distribution drew extensively from patent cases. *Id*. at 39. But contrary to Cox's suggestion, that context only confirms that *Sony-Betamax* does not bar liability here. As *Grokster* explained, *Sony-Betamax* distinguished between products with substantial lawful uses and products with none because where a product has no substantial lawful uses, "there is no injustice in presuming or imputing an intent to infringe." 545 U.S. at 932. The distinction came from patent law, where a distributor of a non-staple article "may justly be held liable for th[e] infringement" that follows because "[o]ne who makes and sells articles which are only adapted to be used in a patented combination will be presumed to intend the natural consequences of his acts; he will be presumed to intend that they shall be used in the combination of the patent." *Id.* (internal quotation marks omitted).

With respect to the users it *knew* were infringing, Cox is more like the distributor of a non-staple article. Distribution of a product to a person whom the distributor *knows* is utilizing it to infringe is no different than distribution of a product with no substantial non-infringing uses, just on retail scale rather than a wholesale scale. The latter creates liability under the common law, and the former should, too. After all, it is not as if Cox was unaware that it was facilitating infringement by providing its services to these known infringers. Cox's manager of customer abuse operations informed his employees that they should reactivate the accounts of repeat infringers because Cox needed to "keep customers and gain more RGU's [revenue generating units]," and copyright infringement by customers "does not hurt the network." *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 149 F. Supp. 3d 634, 656 (E.D. Va. 2015). Other emails reflect Cox's unwillingness to terminate customers who were repeat infringers and who had been advised to remove their P2P file-sharing programs, but who "will likely fail again"—Cox's euphemism for infringing copyrights again. *Id.* at 660.

The very patent case on which the Supreme Court relied in *Grokster* and *Sony-Betamax* as setting the bounds of contributory liability for patent infringement, *Henry v. A.B. Dick Co.,* 224 U.S. 1 (1912) (cited at *Grokster*, 545

U.S. at 932–33, 935, and *Sony-Betamax*, 464 U.S. at 441), confirms that traditional knowledge-plus-material-contribution contributory infringement remains viable post-*Sony-Betamax* and *Grokster*, even for products with substantial non-infringing uses. *Henry* did not involve inducement, but the *Grokster* Court still endorsed its finding of contributory infringement. To be sure, *Henry* explained that the "intent and purpose" requisite to contributory infringement was satisfied when the infringing use was "invoked by advertisement," and observed that liability cannot be imputed simply from the sale of an article with non-infringing uses. *Id.* at 48. But it nevertheless *affirmed* a judgment for contributory infringement where the basis for liability was sale to a specific person with knowledge that the item would be used to infringe, even though the product—ink—had many non-infringing uses. *Id.* at 48–49. It sufficed for liability that the defendant sold the ink to a particular individual "with the expectation that it would be used" for infringement. *Id.* at 49. In other words, what Cox did—continuing to sell its service to particular individuals after learning that those individuals would use the service for infringement—is sufficient to establish liability.

III. Cox's Misreading of *Sony-Betamax* Would Undermine the DMCA Safe Harbors and Congress's Effort to Incentivize Cooperation Between ISPs and Copyright Owners to Prevent Infringment Online

The MPAA's members are committed to a robust online environment in which consumers have access to a wide array of entertainment content. More than one hundred legitimate online services presently offer television and film content in the United States alone. MPAA Comments at 9. The MPAA's members have worked hard to partner with legitimate providers to distribute content to customers in new and innovative ways, such as rental, licensed-download, subscriptions, and ad-supported viewing. *Id*. at 10. These options are now available across platforms, including computers, smart TVs, tablets, gaming systems, and smartphones. *Id*.

In facilitating access to the internet, ISPs provide a valuable service. No one contends or believes that ISPs should automatically bear responsibility for all the sins of their customers. Accordingly, when Congress enacted the DMCA in 1998, it struck a balance that differentiates between conscientious ISPs that cooperate with copyright holders to curtail online infringement and recalcitrant ISPs that refuse to take even basic measures to address known acts of infringement.

The DMCA created a series of "safe harbors" that, in defined circumstances, bar certain remedies against internet intermediaries for copyright infringement claims involving materials transmitted over, or stored on, their services. *ALS Scan v. RemarQ Cmtys.*, 239 F. 3d 619, 623 (4th Cir. 2001). The first of those safe harbors, and the one that Cox has relied upon in this case, appears at 17 U.S.C. § 512(a). That section shields access-provider ISPs from liability for "monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for . . . transmitting, routing, or providing connections for" infringement by its users, § 512(a), but only so long as the ISP "has adopted and reasonably implemented . . . 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," § 512(i).

Congress designed the safe harbors to "facilitate cooperation among Internet service providers and copyright owners to detect and deal with copyright infringements that take place in the digital networked environment." *Ellison*, 357 F.3d at 1076. Congress recognized that a service provider deserves no protection when it "loses its innocence, i.e., at the moment it becomes aware that a third party is using its system to infringe" but does nothing. *ALS*, 239 F.3d at 625. Accordingly, Congress calibrated the safe harbors to "preserv[e] the 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." *Id.* (quoting H.R. Conf. Rep. No. 105-796, at 72 (1998)). Many well-known service providers have relied on the safe harbors (as opposed to *Sony-Betamax*) to limit their liability, including e-commerce platforms,[5] user generated

[5] *See, e.g., Hendrickson v. Amazon.com, Inc.,* 298 F. Supp. 2d 914, 914–16 (C.D. Cal. 2003) (Amazon.com); *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1083–84 (C.D. Cal. 2001) (eBay).

content sites,[6] bulletin board hosting providers,[7] and search engines.[8] All of these services are capable of both infringing and non-infringing uses.

Reading *Sony-Betamax* and *Grokster* to provide a bright-line immunity to online service providers who do not actively "induce" copyright infringement, as Cox argues, is fundamentally inconsistent with the DMCA and would render its safe harbors superfluous. Online service providers would have no incentive to take down infringing content upon receipt of DMCA notices, 17 U.S.C. § 512 (c), (d), or adopt a termination policy, *id*. § 512(i)(1)(A), if they could avoid liability simply by failing to advertise or actively encourage infringement. As discussed above, Cox contends that *Sony-Betamax* and *Grokster* preclude liability absent "actual" knowledge of specific "proven" instances of infringement, and that even a company that is willfully blind to infringement notices is immune. If companies could avoid liability simply by ignoring or discarding notices of infringement,

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[6] *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30–32 (2d Cir. 2012) (YouTube and Google); *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 93–98 (2d Cir. 2016) (Vimeo); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1026–31 (9th Cir. 2013) (Veoh).

[7] *Perfect 10*, 993 F. Supp. 2d at 1193–94, 1202 (appeal pending); *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 927–29, 933 (N.D. Cal. 1996).

[8] *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 978 (9th Cir. 2011) (Google); *Perfect 10, Inc. v. Yandex N.V.*, 962 F. Supp. 2d 1146, 1150–51, 1158 (N.D. Cal. 2013) (Russian search engines).

what company would bother trying to comply with any of the safe harbor requirements?

The inevitable consequence of adopting Cox's view of the law would be to encourage infringement. As Cox's conduct and internal emails vividly show, copyright infringement by internet users was profitable for Cox and, without a threat of secondary liability, posed little risk. The reason Cox chose to enable the massive infringement on its network was financial: Cox needed to "keep customers and gain more [revenue generating units]," and Cox believed that copyright infringement "does not hurt the network." *BMG*, 149 F. Supp. 3d at 656.

The facts of this case show that the only way to incentivize an ISP like Cox to cooperate with copyright holders in combating infringement is to impose secondary liability when it knowingly facilitates infringement by its subscribers. Congress designed the DMCA to reinforce that incentive. Cox's reading of *Sony-Betamax* and *Grokster* would allow it to ignore the clear requirements of the statute without suffering any legal consequences. This Court should not undermine the congressional intent behind the DMCA by immunizing Cox from liability without regard for the safe harbor provisions, when its actions so clearly support contributory liability.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: January 6, 2017

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit via the Court's appellate Case Management/Electronic Case Files (CM/ECF) system. I certify that all parties are registered CM/ECF users and that they will be served by the CM/ECF system.

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