

No. 16-1972

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

BMG RIGHTS MANAGEMENT (US) LLC, *Plaintiff-Appellee*,
AND
ROUND HILL MUSIC LP, *Plaintiff*,

v.

COX COMMUNICATIONS, INC. and COXCOM, LLC,
Defendants-Appellants,
AND
COX ENTERPRISES, INC.; COXCOM, INC. AND JOHN DOE 2, *Defendants*
AND RIGHTSCORP, INC., *Party-in-Interest*.

Appeal From the United States District Court
for the Eastern District of Virginia, Case No. 14-CV-01611

**BRIEF OF *AMICUS CURIAE* THE COPYRIGHT ALLIANCE IN SUPPORT
OF PLAINTIFF-APPELLEE BMG RIGHTS MANAGEMENT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fourth Circuit Rule 26.1(b), the Copyright Alliance states that it has no parent corporation, no publicly held company holds more than 10% of its stock, and it does not have a direct financial interest in the outcome of this litigation.

DATED: January 6, 2017

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Amicus Curiae the Copyright Alliance respectfully submits this brief in support of Plaintiff-Appellee BMG Rights Management (US) LLC. This brief is submitted with consent of all parties.¹

INTERESTS OF AMICUS CURIAE

The Copyright Alliance is a nonprofit membership organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their creative work. The Copyright Alliance represents the copyright interests of over 1.8 million individual creators and over 13,000 organizations that support these creators and rely on the protections afforded by the copyright law. Those creators and organizations generate much of the content that has helped drive the incredible success of the internet over the last twenty years. The Copyright Alliance's members embrace the use of new technologies, including the internet, for the dissemination of their creative content. This is possible due to the protections of copyright and especially the Digital Millennium Copyright Act ("DMCA") to protect their works from online piracy.

The Copyright Alliance's interest in this case extends beyond the egregious contributory infringement by Defendants-Appellants Cox Communications, Incorporated and Coxcom, LLC (collectively, "Cox"). The Copyright Alliance has

¹ Pursuant to Fed. R. App. P. 29(c)(5), *amicus* states that counsel for the parties have not authored this brief in whole or in part. No one other than *amicus* and its members contributed money that was intended to fund preparing or submitting this brief.

a distinct interest in the continued viability of claims against internet service providers (“ISPs”) for contributory infringement. The obligation of ISPs, like Cox, to promptly respond to notifications of infringing material and activity by their subscribers is a core interest of the Copyright Alliance, as is the proper interpretation of the eligibility requirements for the DMCA’s safe harbor provisions.

This appeal squarely presents all of these issues, and the consequences of the Court’s decision will critically impact whether copyright owners can effectively protect their work from online piracy and continue to embrace the internet as a means of disseminating their creative works. The Copyright Alliance thus respectfully submits this brief to address the importance of effective copyright protection for all those engaged in the creation and distribution of creative works, and the need to preserve the balance Congress intended to strike in the DMCA between the rights of copyright owners and the liability of ISPs.

SUMMARY OF ARGUMENT

1. Copyright protection is enshrined in the Constitution and designed to spur creativity and innovation. While the internet has given creators a powerful method to reach new audiences and disseminate their works, it has also facilitated copyright infringement on a massive scale, which in turn has had a substantial chilling effect on content creation and dissemination. Because the availability of quality content is a primary reason for the internet's incredible popularity, a healthy internet depends on safeguarding the balance Congress intended to strike when it enacted the DMCA between the potential liability of ISPs like Cox and the rights of copyright owners like the Copyright Alliance's members.

2. The positions taken by Cox, if accepted, would undo that balance. Cox contends that conduit service providers can be liable for contributory copyright infringement only if they actively encourage or induce infringement through specific affirmative acts or, alternatively, if they have what amounts to essentially perfect knowledge of specific infringing acts. But adopting either of these extreme positions would effectively immunize conduit service providers like Cox from secondary liability, thereby removing any incentive to take measures to stop infringement and eviscerating the function of the safe harbor protections for conduit service providers under Section 512(a) of the DMCA.

3. Cox also incorrectly contends that the term “repeat infringers” in Section 512(i) of the DMCA refers only to subscribers who have already been *adjudicated* as infringers. Accepting Cox’s narrow definition of “repeat infringers” would destroy any incentive for service providers to cooperate in combating infringement, even when the providers have actual knowledge of infringing activity. By contrast, holding Cox liable for its failure reasonably to implement a repeat infringer policy does not alter the legal landscape or have major policy implications. Requiring a conduit service provider to implement a repeat infringer termination policy that gives subscribers the opportunity to stop their infringing conduct before their accounts are terminated is reasonable and what Congress intended when it enacted the DMCA.

ARGUMENT

I. Protecting the Rights of Creators is Crucial to the Success of the Internet

Article I, Section 8 of the United States Constitution grants Congress the authority “[t]o Promote the Progress of Science and [the] useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8, cl. 8. By granting this authority, the Founders signaled their belief that copyright protection is a significant governmental interest that benefits both the creator and society. *See* The Federalist

No. 43, at 220 (James Madison) (Ian Shapiro, ed., 2009) (noting that with copyright protection “[t]he public good fully coincides in both cases with the claims of individuals”).

Throughout American history, courts have repeatedly recognized copyright protection as a crucial component in promoting freedom of expression and driving creativity and innovation on a broader scale. *See Harper & Row, Inc. v. Nation Enter.*, 471 U.S. 539, 558 (1985) (“*Harper & Row*”) (“[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”) (internal quotation omitted); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind [the copyright law] is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”); *Grant v. Raymond*, 31 U.S. 218, 224 (1832) (“[t]o promote the progress of the useful arts is the interest and policy of every enlightened government”).

The importance of copyright protection in fostering the creation and distribution of new creative works is no less important in the digital age. The internet has given creators a new platform to disseminate their works to millions of people, many of whom would not have had access to such work in the pre-digital age. *See* Sean Pager, *Making Copyright Work for Creative Upstarts*, 22 *Geo. Mason L. Rev.* 1021, 1034 (2015) (noting that “digital technologies have democratized creativity”). In turn, copyright industries, including motion pictures, music and publishing, generate the content that has made the internet such an economic and cultural success. In 2012, for example, Pandora users listened to more than 13 billion hours of music—approximately one million songs from 100,000 artists. Sandra M. Aistars, *The Rise of Innovative Business Models: Content Delivery in the Digital Age*, Statement for the Record Before the Committee on the Judiciary Subcommittee on the Courts Intellectual Property and the Internet, p. 4. And as of 2013, subscribers to Netflix legitimately streamed an average of one billion hours of content per month. *Id.*

The explosive growth of creative content has contributed to the health of both the internet and the United States economy. In 2015, the total value added by copyright industries to United States GDP reached nearly \$2.1 trillion dollars, accounting for 11.69% of the economy. Stephen E. Siwek, *Copyright Industries in the U.S. Economy: the 2016 Report*, International Intellectual Property Alliance,

pp. 4-5. In total, copyright industries employed nearly 11.4 million United States workers in 2015. *Id.*, p. 9. Indeed, much of the internet's financial success depends on economic activity created by the copyright industries. For example, a recent study concluded that in 2014, digital revenues accounted for nearly three quarters of the recorded music market in the United States. International Federation of the Phonographic Industry (IFPI), *Digital Music Report 2015: Charting the Path to Sustainable Growth*, p. 9.

Without the existence of copyrighted works, the internet would be a bleak landscape. It is thus imperative that the rights of creators of copyrighted works be carefully balanced with the interests of those who provide access to the internet, such as Cox, so that the internet will continue to thrive and copyright protection will continue to play a unique and central role in spurring creativity and innovation.

A. *Massive Online Copyright Infringement Has a Devastating Impact on Creativity and Creators*

Creators have embraced online distribution models. Sandra M. Aistars, *The Rise of Innovative Business Models: Content Delivery in the Digital Age*, Statement for the Record Before the Committee on the Judiciary Subcommittee on the Courts Intellectual Property and the Internet, pp. 3-4. Copyright Alliance members are also themselves heavily involved in developing innovative

technologies that provide internet users with access to more and richer content.

See Sandra Aistars, Devlin Hartline and Mark Schultz, *Copyright Principles and Priorities to Foster a Creative Digital Marketplace*, Center for the Protection of Intellectual Property, Nov. 2015, pp. 4-5 (describing technology innovations by copyright owners).

On the one hand, “society is really witnessing ... an explosion of creative innovation across a range of fields.” Sean M. O’Connor, *Creators, Innovators, and Appropriation Mechanisms*, 22 Geo. Mason L. Rev. 973, 974 (2015). On the other hand, the unfortunate reality is that the internet has facilitated infringement, or piracy, of intellectual property on a massive scale:

- A 2013 study found that in just January 2013 alone, 432 million unique internet users worldwide sought infringing content. David Price, *Sizing the piracy universe*, NetNames, September 2013, pp. 3, 84-89.
- In the United States, Europe and Asia, which collectively make up 95% of all internet bandwidth consumed in the world, nearly a quarter of all internet traffic in 2013 was devoted to infringing content. *Id.*
- BitTorrent is the largest method used for online infringement. *Id.* at p. 18. Research has shown that the vast majority of internet users who employ BitTorrent portals do so to download pirated movies, television episodes, games, software, books and music. *Id.* For example, the 2014 film

“Expendables 3” was estimated to have been downloaded illegally on BitTorrent portals at least 40 million times in the year and half after its release. Nelson Granados, *How Piracy Is Still Hurting the Filmmakers and Artists You Admire*, Forbes, Dec. 3, 2015.

- It is estimated that in just one month in 2013, 96.2% of visitors to BitTorrent portals accessed infringing content, an increase of more than 26% over the previous fifteen months. Price, *Sizing the piracy universe*, at pp. 20-21.

The rampant and persistent nature of online infringement has had a detrimental effect on creators. “[T]here is general consensus among economists who study piracy that it negatively impacts sales. This is true across various forms of media including music, television, and film.” Brett Danaher, *et al.*, *Copyright Enforcement in the Digital Age: Empirical Economic Evidence and Conclusions*, World Intellectual Property Organization, Advisory Committee on Enforcement, Nov. 23-25, 2015, p. 2. This negative impact on sales of copyrighted works is particularly devastating for individual creators striving to protect their works, maintain a successful career, and earn a living. For example:

- Maria Schneider, a Grammy award-winning composer, testified before the House Judiciary Committee that she invested \$200,000 of her own money into a new album only to find that her song had been pirated all over the internet. *Section 512 of Title 17: Hearing Before the Subcommittee of*

Courts, Intell. Prop., and the Internet of the Comm. on the Judiciary (2014)

(statement of Maria Schneider, pp. 54-56). Schneider testified that the resulting loss of income “threatens her ability to continue creating her award-winning music.” *Id.*

- Kathy Wolfe, the owner of the independent film company Wolfe Video, lost \$3 million in revenue in 2012 from the excessive pirating of her top 15 films. Christopher S. Stewart, *As Pirates Run Rampant, TV Studios Dial Up*, Wall Street Journal, Mar. 3, 2013. Wolfe was forced to cut her marketing budget in half, cut employees’ pay and discontinue her own salary. *Id.*

As our CEO Keith Kupferschmid has stated, “Independent creators are striving to earn a livelihood and make a career. When they are pirated they lose essential income, they lose confidence, and the lost income prevents them from re-investing in their creative work.” Nelson Granados, *How Online Piracy Hurts Emerging Artists*, Forbes, Feb. 1, 2016.

The damage online infringement inflicts on creators has serious repercussions for society. If copyright is ineffective to combat the onslaught of online infringement, “it seems likely that few will invest significant time or resources into fully developing and implementing their ideas for a particular creative innovation.” Sean M. O’Connor, *Creators, Innovators and Appropriation*

Mechanisms, 22 Geo. Mason L. Rev. 973, 974 (2015). Such a result would destroy the goal of copyright protection to “stimulate artistic creativity for the general public good.” *Aiken*, 422 U.S. at 156.

B. Congress Intended the DMCA to Balance the Rights of Copyright Owners and Potential Liability of Internet Service Providers

Congress passed the DMCA nineteen years ago with the intention of balancing the rights of copyright owners with the needs of ISPs to operate without the threat of copyright liability for unknown infringements by their users. S. Rep. No. 105-190, at 69 (1998) (Sen. Leahy describing the DMCA as a “well-balanced package of proposals that address the needs of creators, consumers and commerce in the digital age and well into the next century”). The DMCA came about because Congress recognized the significant challenges copyright owners faced and would face in the future due to online infringement. As Congress observed, “[t]he digital environment now allows users of electronic media to send and retrieve perfect reproductions of copyrighted material easily and nearly instantaneously, to or from locations around the world.” H.R. Rep. No. 105-551, pt. 1, at 9 (1998). Congress recognized that, “[w]ith this evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted works.” H.R. Rep. No. 105-551, pt. 1, at 9.

Congress's intent in passing the DMCA was to encourage copyright owners and ISPs to work together to combat online infringement. Congress therefore crafted the statute to maintain a balance that "preserves 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." S. Rep. No. 105-190 at 20; H.R. Rep. No. 105-551, pt. 2, at 49 (1998). Congress likewise intended to maintain secondary liability in the online environment. S. Rep. No. 105-190, at 19 ("Rather than embarking on a wholesale clarification of these doctrines, the Committee decided to leave current law in its evolving state..."); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1039-40 (9th Cir. 2013) (noting that "the DMCA's legislative history confirms that Congress intended to provide protection for at least some vicarious and contributory infringement").

C. The Most Effective Way to Combat Online Infringement Is for Copyright Owners and ISPs to Work Together

An important feature of the DMCA is the sharing of the burden of combating infringement by both ISPs and copyright owners. The ISPs' portion of this burden requires them to take several steps if they want to immunize themselves from potential liability for the copyright infringing acts of their users. One of these steps is that they adopt and reasonably implement policies that

provide for the termination in appropriate circumstances of subscribers who are repeat copyright infringers. *See* 17 U.S.C. § 512(i)(1). While organizations may have the resources and tools to detect copyright infringement and notify those ISPs whose subscribers are engaging in online piracy, most individual creators lack such resources and tools and, therefore, must rely on the deterrent effect that the implementation of repeat infringer policies has on infringers.

Copyright owners, especially individual creators, face significant obstacles in their efforts to protect their works from online infringement. A recent survey of individual creators found that they often have little information about online infringement of their works and lack resources to identify infringers. Keith Kupferschmid, *Section 512 Study: Comments of the Copyright Alliance*, 2015, at 8 and Appendix A. Individual creators therefore are left to rely on “manual web searches, reverse image searches, Google alerts, or word of mouth to discovery infringements of their work.” *Id.* This laborious process costs creators time and money. *See id.*, Appendix A.

The high cost of pursuing litigation against infringers poses another obstacle for independent creators seeking to protect their work. *See* John Tehranian, *The Emperor Has No Copyright: Registration, Cultural Hierarchy, and the Myth of American Copyright Militancy*, 24 Berkeley Tech. L. J. 1399, 1410-11 (2009) (estimating the cost of litigating a “relatively small” copyright infringement case at

over \$300,000). Individual creators are thus particularly dependent on the protections afforded by the DMCA—and the cooperation of ISPs—because pursuing litigation against ISP subscribers who engage in infringement is cost-prohibitive. Sandra Aistars, Copyright Remedies, *Statement Before the House Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Internet*, July 24, 2014 (“it is rarely economically viable” for individual creators to pursue infringement claims because the costs involved “invariably exceed the expected licensing revenues and damages due to these authors” and thus “many legitimate claims are not pursued...”).

In this case, Cox argues that it may blind itself to notices of infringement by its subscribers and still avoid claims of contributory infringement and take advantage of safe harbor protection under the DMCA. Allowing Cox simply to ignore BMG’s notices would remove any incentive for Cox to take measures to eliminate even the most egregious infringers. This unjust result not only hurts institutional copyright owners, but leaves individual creators—who already face significant hurdles in policing their work—with virtually no protection whatsoever.

II. Cox's Interpretation of *Sony* and *Grokster* Is Inconsistent with the DMCA and Would Effectively Preclude Copyright Owners from Protecting Their Creative Work from P2P Infringement

A. *Conduit Service Providers Do Not Need to Actively Induce Online Piracy to Be Liable for Contributory Copyright Infringement*

Cox attempts to rely on *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984), to argue that, because the internet has “substantial noninfringing uses,” conduit service providers can only be liable for contributory copyright infringement if they *actively* encourage or induce infringement through specific affirmative acts. Br. for Defendants-Appellants (4th Cir. Nov. 7, 2016), Dkt. No. 25, at 37 (quoting *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (Ginsburg, J., concurring)). As the District Court correctly held, however, Cox’s position is based on a misconstruction of *Sony* and *Grokster*, and the jury thus properly held Cox liable for contributory infringement “based on evidence of its knowledge of specific infringing activity and continued material contribution to that infringement.” JA-2787.

Cox’s position is also contrary to the law of this Circuit, as this Court has held that a party with knowledge of infringing activity can be contributorily liable if it “induces, causes *or* materially contributes to the infringing conduct. . . .” *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 (2d Cir. 1971)) (emphasis added). *CoStar's* use of the disjunctive makes clear that a copyright holder can base a claim for contributory infringement against a conduit service provider on the provider's material contribution, and does not need also to allege or prove that the provider caused or actively induced the infringing activity.

Contrary to Cox's claim, Justice Ginsberg's concurrence in *Grokster* was not intended and should not be read to suggest that inducement is a necessary element of a claim for contributory infringement against a conduit service provider. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 n.11 (9th Cir. 2007) (“[T]he Supreme Court in *Grokster* did not suggest that a court must find inducement in order to impose contributory liability under common law principles”); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 796 n.5 (9th Cir. 2007) (“the *Grokster* court focused primarily on an ‘inducement’ theory rather than a ‘material contribution’ theory”).

The District Court's rejection of Cox's extremely narrow interpretation of contributory infringement is supported by a consideration of the practical implications of Cox's position. If Cox's view was the law, then as long as Cox was not *actively* inducing or promoting infringement, it could throw each and every infringement notice it received straight into the trash, and the “Abuse Group”

charged with addressing online piracy could knowingly permit active infringement without creating any risk of liability to Cox.

If they are not obligated to prevent known infringers from using their network to engage in online piracy, conduit service providers like Cox would have no reason to devote resources to combating online piracy, and would have no incentive to adopt and implement *effective* anti-piracy policies that require them to take action against known infringers. *Cf. Sony*, 464 U.S. at 442 (1984) (recognizing “a copyright holder’s legitimate demand for effective—not merely symbolic—protection”). Active inducement would be unnecessary for infringement to flourish, as infringing users would naturally flow to service providers that eschew any effort to enforce copyright protection, and a rapid race to the bottom would be all but inevitable. *See* Paul Goldstein, *Goldstein On Copyright*, § 8.1.3 (3rd ed. 2014) (“The problem with inducement as a theory of decision in copyright cases involving the supply of materials or equipment is that . . . the rule simply cautions suppliers to avoid liability by restraining their promotional impulses and relying on the activities of their customers and the wisdom of the grapevine to make the necessary connection between the materials or equipment being sold and the infringing uses for which they are capable.”).

B. Sony Does Not Compel the Actual Knowledge Standard Cox Advocates, Which Is Unrealistic and Would Effectively Immunize Conduit Service Providers from Liability

Cox argues in the alternative that, even if active inducement is not an essential element of contributory infringement claims against conduit service providers, copyright owners must at a minimum demonstrate that the provider had “actual knowledge of specific acts of infringement.” Br. for Defendants-Appellants, at 26 (quoting *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001)). Cox accordingly takes issue with the District Court’s instruction to the jury that BMG had to establish that Cox either knew *or should have known* of the infringing activity, and claims that *Sony* rejected the application of such a “constructive knowledge” standard. *Id.* at 26-27. Cox’s expansive interpretation of *Sony* is unwarranted, however, and the knowledge standard Cox puts forward would essentially make it impossible for copyright owners to get conduit service providers to cooperate as Congress intended when it passed the DMCA.

First, contrary to Cox’s claim, *Sony* did not categorically reject constructive knowledge as a basis for establishing contributory infringement in all circumstances. Rather, *Sony* held that manufacturers and distributors of the Betamax recorder, whose technology was capable of infringing uses but who had no direct relationship with specific infringers, were not liable for contributory

infringement simply because they had “constructive knowledge of the fact that their customers may use that [technology] to make unauthorized copies.” 464 U.S. 417, 439, 447 (1984) (emphasis added); *see also Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F.Supp. 429, 459-460 (C.D. Cal. 1979), *aff’d in part, rev’d in part*, 659 F.2d 963 (9th Cir. 1981), *rev’d*, 464 U.S. 417 (1984) (holding that the providers’ “knowledge was insufficient to make them contributory infringers,” and noting that no employee of Sony, Sonam or DDBI had “direct contact with purchasers of Betamax who recorded copyrighted works off-the-air”).

Cox, however, is not similarly removed from the infringing activity here. While *general* knowledge of *future* infringement might not support a finding that Cox was contributorily liable, Cox had *specific* knowledge that certain users *had* engaged in infringing activity. Unlike the Betamax providers in *Sony*, who had no possibility of recourse against specific infringers, Cox has a direct and ongoing relationship with these customers, and could have responded to notice of their repeated infringement by disabling their accounts. Cox’s level of knowledge and proximity to the direct infringement are clearly distinguishable from the facts in *Sony*, and the District Court merely—and properly—refused to *expand Sony’s* holding to immunize such flagrant contributory infringement.

Indeed, many courts have held post-*Sony* that constructive knowledge of actual infringement, when coupled with a failure to act on that knowledge, is

sufficient to impose contributory liability. *See, e.g., Arista Records, LLC v. Doe 3*, 604 F.3d 110, 118 (2d Cir. 2010) (“The knowledge standard is an objective one; contributory infringement liability is imposed on persons who ‘know *or have reason to know*’ of the direct infringement...”) (emphasis in original) (citation omitted); *CoStar Grp. Inc. v. LoopNet, Inc.*, 164 F.Supp.2d 688, 707 (D. Md. 2001), *aff’d*, 373 F.3d 544 (4th Cir. 2004) (“[T]o prove its claim [of contributory infringement], CoStar needs to establish that the notice it gave to LoopNet comprised *at least constructive knowledge* of specific infringing activity which LoopNet materially contributed to or induced by its alleged failure to halt the activity.”) (emphasis added); *In re: Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir. 2003) (“Willful blindness is knowledge...”).²

Second, the perfect knowledge standard advocated by Cox and supporting *amici* is not only unrealistic, but impossible to prove. Cox first argues that it could never have actual knowledge of specific infringing activity by its users because, as a conduit service provider, it “had no way of knowing the particulars of the data being shared by subscribers.” Br. for Defendants-Appellants, at 28 (internal quotation and citation omitted); *id.* at 13 (“The court held that Cox had [actual]

² As the District Court correctly observed, Cox’s blanket rejection of infringement notices sent on BMG’s behalf was evidence of willful blindness. JA-2798 (“In sum, there was sufficient evidence that Cox deliberately looked the other way and, at minimum, had reason to know that its users were infringing BMG’s works.”).

knowledge [that Cox's subscribers were using its services for infringing purposes] even though it is incapable of knowing what content its subscribers transfer..."). Cox's argument, if accepted, would mean that *no* conduit service provider could ever be liable for contributory infringement, because they could never have actual knowledge of specific infringing activity.

Cox also contends that the notices Rightscorp sent on BMG's behalf constituted mere allegations of infringement, and thus could not convey actual knowledge of specific infringement to Cox. *See id.* at 28-29. Cox downplays, however, the fact that the infringement notices it received bore substantial indicia of reliability.³ The Rightscorp notices disclosed a significant amount of verifiable information, including the name of the copyright owner, the name of the copyrighted work, the subscriber's IP address and port, the hash value of the copyrighted work, a time stamp, and a statement under penalty of perjury that Rightscorp is an authorized agent of BMG and that the information in the notices is true and accurate. JA-2776. To hold that these robust notices were nonetheless insufficient as a matter of law to support a jury determination that Cox had the requisite knowledge of infringing activity to be contributorily liable would impose

³ Cox also neglects to mention in its brief that the Rightscorp notices satisfied the six requirements for copyright infringement notices detailed on Cox's website, and that Cox publicly indicated on its website that it would act upon notices satisfying these requirements. (*See* JA-2233, JA-1744-45.)

a virtually insurmountable burden on any copyright holder who seeks to hold a conduit service provider responsible for infringing activity by its users.

C. The Existence of the Safe Harbor for Conduit Service Providers in Section 512(a) of the DMCA Presupposes That Those Providers Can Be Liable for Copyright Infringement

Congress and the courts agree that section 512(a) of the DMCA “applies to service providers who act only as ‘conduits’ for the transmission of information.” *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1041 (9th Cir 2013); *see also* H.R. Rep. 105–551, pt. 2, 63 (1998) (explaining that the § 512(a) safe harbor is limited to service providers performing “conduit-only functions”); *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 39 (2d Cir. 2012) (discussing “‘conduit only’ functions under § 512(a)”); *In re: Charter Commc’ns, Inc., Subpoena Enforcement Matter*, 393 F.3d 771, 775 (8th Cir. 2005) (Section 512(a) “limits the liability of [service providers] when they do nothing more than transmit, route, or provide connections for copyrighted material—that is, when the [provider] is a mere conduit for the transmission”). By enacting this “safe harbor” specifically for conduit service providers, Congress necessarily recognized that such providers could be liable for copyright infringement – otherwise, a safe harbor would not be necessary. *See BWP Media USA Inc. v. Polyvore, Inc.*, 2016 Corp. L. Dec. P. 30958 *4 (S.D.N.Y. July 15, 2016) (“[O]nly those service providers whom

antecedent law would hold liable must take refuge in one of [the DMCA's] safe harbors....”) (quoting Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12B.06[B][1] (2015)).

As explained in Sections II.A and II.B *supra*, Cox asks this Court to endorse a misconstruction of *Sony* and *Grokster* that would effectively eliminate contributory liability for conduit service providers, undoing decades of existing law and reading an entire subsection out of the DMCA. *See Donnelly v. F.A.A.*, 411 F.3d 267, 271 (D.C. Cir. 2005) (“We must strive to interpret a statute to give meaning to every clause and word, and certainly not to treat an entire subsection as mere surplusage.”). Indeed, interpreting *Sony* and *Grokster* in the manner Cox advocates would render the § 512(a) safe harbor meaningless by eliminating any potential liability by conduit service providers. *Cf. Institutional Inv’rs Group v. Avaya, Inc.*, 564 F.3d 242, 256 (3d Cir. 2009) (rejecting argument that the safe harbor provided under the PSLRA was inapplicable because “such a view would divest the Safe Harbor of any function, since there is no potential liability—and thus no need for Safe Harbor protection—where there is nothing false or misleading about a firm’s statements”).

The incompatibility of Cox’s overbroad reading of *Sony* and overly narrow reading of *Grokster* with the continuing viability of safe harbor protection under §

512(a) further confirms that the District Court’s rejection of Cox’s interpretation was correct.⁴

III. The District Court Correctly Determined That Cox Was Ineligible for the DMCA Safe Harbor Because It Failed to Reasonably Implement a Policy That Provided for the Termination of Repeat Infringers

A. Cox’s Interpretation of “Repeat Infringers” Would Eviscerate the DMCA’s Safe Harbor Eligibility Requirements

Cox challenges the District Court’s determination that Cox failed to implement a reasonable policy for the termination of repeat infringers—and thus was ineligible for safe harbor protection under the DMCA—by arguing that the term “repeat infringers” as used in Section 512(i) of the DMCA refers only to subscribers who have been found liable for infringement by a court or a jury on more than one occasion. For the reasons explained in BMG’s brief, Cox’s overly

⁴ Reliance on section 512(a)’s safe harbor protections as evidence that conduit services providers can be liable for contributory infringement is wholly consistent with this Court’s holding that “the DMCA is irrelevant to determining what constitutes a prima facie case of copyright infringement.” *Costar*, 373 F.3d at 555. In *Costar*, this Court found that the DMCA was not relevant to the question of whether a conduit ISP could be liable as a direct infringer or instead as a contributory infringer. *Id.* The *Costar* Court assumed, however, that there was at least *some* theory on which a copyright holder could hold a conduit ISP liable for infringement. Here, by contrast, Cox is advocating for an interpretation of secondary infringement that would effectively immunize conduit ISPs from any liability and, as a result, read an entire subsection of the DMCA out of existence.

narrow interpretation of “repeat infringers” is unsupported by precedent, and the District Court’s rejection of that interpretation was correct as a matter of law.

The District Court’s decision is also supported by a consideration of the purpose of the DMCA’s safe harbor eligibility requirements and the practical implications of Cox’s position relative to that purpose. The requirement that ISPs reasonably implement and notify subscribers of a policy that provides for the termination of repeat infringers is “a prerequisite for every DMCA safe harbor and is a fundamental safeguard for copyright owners.” *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F.Supp.2d 627, 637 (S.D.N.Y. 2011), *on reconsideration in part*, 2013 Copr. L. Dec. P. 30427 (S.D.N.Y. May 14, 2013). “The common element of [the DMCA’s] safe harbors is that the service provider must do what it can reasonably be asked to do to prevent use of its service by ‘repeat infringers.’” *In re: Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003) (Posner, J.). This requirement is essential to “maintain the ‘strong incentives’ for service providers to prevent their services from becoming safe havens or conduits for known repeat copyright infringers.” *Perfect 10, Inc. v. Cybernet Ventures*, 213 F.Supp.2d 1146, 1178 (C.D. Cal. 2002).

Defining “repeat infringers” to refer only to *adjudicated* infringers, as Cox advocates, would effectively eliminate any incentive for Cox and other conduit service providers to cooperate with efforts by copyright owners to prevent rampant

online piracy.⁵ As explained in Section I.C *supra*, litigation against ISP subscribers who engage in repeated copyright infringement has proven to be both cost prohibitive and ultimately ineffective in limiting online piracy. Requiring a copyright holder to obtain not one, but *multiple* judgments against a single subscriber before a conduit service provider such as Cox could have any obligation even to threaten the subscriber with termination of services would effectively eliminate any incentive for the provider to assist copyright owners in responding to piracy by the provider's subscribers, and would also pose a particularly unfair burden on individual creators, who already lack the means to police adequately their works in the first instance.

If Cox's position were accepted, a conduit service provider with actual knowledge of specific infringing acts by a specific subscriber could deliberately ignore notices of that infringement and intentionally permit the infringing activity to continue so long as those notices did not enclose evidence of multiple prior *judgments* against the particular subscriber. This result would have a devastating impact on the ability of artists to protect their creative work from online piracy, particularly individual creators who lack the means to pursue a single lawsuit

⁵ That the DMCA lacks any mention of adjudication as a prerequisite for the application of a repeat infringer policy, and provides no mechanism for the consideration of foreign judgments in determining whether a party is an adjudicated infringer, suggests that Cox's effort to limit its repeat infringer policy to adjudicated infringers is inconsistent with Congress's intent.

against infringers, to say nothing of multiple lawsuits. It is highly doubtful that Congress intended to create these types of DMCA second class citizens. Such an outcome would also undermine Congress's intention in passing the DMCA to "preserve[] 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." S. Rep. No. 105-190 at 20; H.R. Rep. No. 105-551, pt. 2, at 49 (1998).

B. The District Court's Narrow Ruling That Cox Failed to Reasonably Implement a Termination Policy Does Not Threaten Legitimate Use of the Internet

Several of the *amicus* briefs submitted in support of Cox's position use sensational and alarmist language to describe the purported consequences if this Court were to affirm the District Court's determination that Cox did not qualify for the safe harbor protections of the DMCA because it failed to reasonably implement a repeat infringer policy. *See, e.g.*, Brief of *Amicus Curiae* United States Telecom Association (4th Cir. Nov. 14, 2016), Dkt. No. 31-1, at 5 ("The district court's denial of DMCA safe harbor protection imposes massive burdens on ISPs and frustrates federal telecommunications policy designed to increase internet access"); Brief of *Amicus Curiae* American Cable Association (4th Cir. Nov. 14, 2016), Dkt. No. 32-1, at 4 (claiming that "the District Court's errors would result in depriving

individuals of the benefits of internet access because a self-interested company alleges infringement *without a shred of verifiable proof*") (emphasis in original); Brief of Amici Curiae Public Knowledge *et al.* (4th Cir. Nov. 14, 2016), Dkt. No. 34-1, at 3 (comparing the termination of a subscriber's access to the internet to cutting off a tenant's water). *Amici's* concerns are not only overblown, but also unfounded.

Because the District Court's decision was based on factual findings regarding Cox's specific conduct, affirmance would not have the "massive" impact on ISPs that some *amici* claim. The District Court did not hold, for example, that "the DMCA mandates a uniform repeat infringer policy," Brief of Amici Curiae American Council on Education *et al.* (4th Cir. Nov. 14, 2016), Dkt. No. 30-1, at 6, but instead found that Cox failed to implement a reasonable repeat infringer policy based on a detailed analysis of evidence demonstrating particularly egregious practices by Cox. This evidence established, *inter alia*, that (1) Cox made an affirmative decision to preemptively block all infringement notices sent on BMG's behalf (*see* JA-2778); (2) before the fall of 2012, Cox had an informal policy to reinstate repeat infringers within a day of terminating their access, thereby "render[ing] the [repeat infringer] policy an 'absolute mirage'" (JA-714 (quoting *In re: Aimster Copyright Litig.*, 252 F.Supp.2d 634, 659 n.18 (N.D. Ill. 2002), *aff'd*, 334 F.3d 643 (7th Cir. 2003))); and (3) after the fall of 2012, "Cox knew

accounts were being used repeatedly for infringing activity yet failed to terminate” (JA-717). Conduit service providers and others who adopt and implement reasonable repeat infringer policies accordingly have no reason to fear the District Court’s ruling.

Affirming the District Court’s decision denying Cox safe harbor protection under the DMCA also does not threaten the First Amendment rights of internet users, notwithstanding suggestions to the contrary by some *amici*. *See, e.g.*, Brief of *Amicus Curiae* United States Telecom Association, at 4-5 (arguing that implementation of a repeat infringer policy that does not require proof of multiple prior adjudications of infringement “is inconsistent with federal telecommunications policy and the First Amendment rights of consumers”). There is, of course, no constitutional right to engage in copyright infringement. *See Harper & Row*, 471 U.S. at 555-56; *Universal City*, 82 F.Supp.2d at 220 (the “Supreme Court ... has made it unmistakably clear that the First Amendment does not shield copyright infringement”). Here, BMG presented compelling evidence that the vast majority of the infringement notices sent on its behalf were based on actual infringing activity by Cox’s subscribers. As the District Court emphasized, while it is theoretically possible that a Cox subscriber could mistakenly be accused of infringement based on fair use or other non-infringing activity, “[b]y the time an account holder reaches the end of Cox’s [thirteen step] graduated response

procedure, the chance that the account holder is not a willful infringer has substantially lessened.” JA-720.

The First Amendment, moreover, does not obligate private companies like Cox to guarantee internet access without conditions. Just as Cox can terminate a subscriber’s access to the internet based on nonpayment of Cox’s bill without running afoul of the First Amendment, so too may Cox terminate internet access based on the application of a reasonably implemented repeat infringer policy. *See* 17 U.S.C. § 512(i) (conditioning eligibility for safe harbor protection under the DMCA on the reasonable implementation and publication of a policy for the termination in appropriate circumstances of subscribers who are repeat infringers).

Turning a blind eye towards specific infringing conduct in no way widens the stream of free speech. While the Copyright Alliance supports varied and robust channels of internet access, that access should not come at the expense of copyright owners. Cox is responsible for discontinuing service to known infringers with whom it has a direct and ongoing relationship in order to maintain safe harbor protection under the DMCA, and nothing in the First Amendment relieves Cox of that obligation.

CONCLUSION

For the reasons stated herein, the District Court's rulings on contributory infringement and Cox's failure reasonably to implement and enforce a repeat infringer policy should be affirmed.

DATED: January 6, 2017

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief contains 6,724 words according to the word count provided by Microsoft Word, as required by Federal Rule of Appellate Procedure 32.

DATED: January 6, 2017

CALDWELL LESLIE & PROCTOR, PC

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2017, the foregoing document was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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