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**Nos. 16-2825 & 16-2992**

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

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**BWP MEDIA USA INC., DBA PACIFIC COAST NEWS, PACIFIC COAST NEWS,  
NATIONAL PHOTO GROUP, LLC,  
*Plaintiffs/Appellants/Cross-Appellees,***

v.

**POLYVORE, INC.,  
*Defendant/Appellee/Cross-Appellant.***

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*On Appeal from the United States District Court for the Southern District of New  
York, Case No. 13-cv-7867  
The Honorable Ronnie Abrams, United States District Judge*

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**BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS  
*AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, *amicus curiae* Motion Picture Association of America, Inc. certifies that it has no parent or subsidiary corporations and that no publicly held company owns 10% or more of its stock.

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## INTERESTS OF *AMICUS CURIAE*

With the consent of both parties (Fed. R. App. P. 29(a)), *amicus curiae* Motion Picture Association of America, Inc. (“MPAA”) respectfully submits this brief in support of neither party.<sup>1</sup> Founded in 1922, the MPAA is the not-for-profit trade association that addresses issues of concern to the United States motion picture industry. The MPAA’s member companies are Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies 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. Like many other copyright owners, the members of the MPAA make extensive use of the internet and innovative technologies to distribute their works to consumers. Mass infringement of copyrighted works over the internet undercuts the development of a legitimate online market for their works.

The MPAA has a strong interest in the proper interpretation of the rights and remedies of copyright owners under the Copyright Act. The secondary liability

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1, *amicus* states that (i) no counsel for a party has written this brief in whole or in part and (ii) no person or entity other than the *amicus* and its members have made a monetary contribution that was intended to fund the preparation or submission of this brief.

doctrines—including contributory infringement—are particularly important means for protecting and vindicating the rights of copyright owners. As the Supreme Court has emphasized, because of the practical impossibility of “enforc[ing] rights ... effectively against all direct infringers,” secondary liability often provides copyright owners “the only practical alternative” to halt, redress and deter the widespread infringement of their works, particularly in the online context. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929-30 (2005) (“*Grokster*”).

### SUMMARY OF ARGUMENT

The MPAA takes no position on which party ultimately should win this appeal. Regardless of the result, however, the test for contributory infringement that the district court stated and applied was in error.

The test for contributory infringement has been well-established for decades. As most recently stated by this Court: “A contributory infringer is ‘one who with knowledge of [underlying] infringing activity, induces, causes or materially contributes to the infringing conduct of another.’” *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, Nos. 14-4369-cv(L) & 14-4509-cv(XAP), 2016 WL 6211836, at \*13 (2d Cir. Oct. 25, 2016) (“*MP3tunes*”) (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). The district court read *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417

(1984) (“*Sony-Betamax*”), to hold that an online service may not be a contributory infringer if it is capable of substantial noninfringing uses. Op. 15 (citing *Sony-Betamax*, 464 U.S. at 442).

This was wrong. *Sony-Betamax* held only that, where a defendant’s potential liability arises solely out of its distribution of a device to consumers—some of whom use the device to infringe after the defendant has parted with it—the plaintiff may not establish the element of knowledge just by showing that the defendant knew some consumers might use the device for infringement, provided that the device also is capable of substantial noninfringing uses. *Sony-Betamax* provides a lens through which to examine contributory liability claims that, unlike the claims in this case, seek to impute knowledge of infringing activity based on the mere distribution of a device that might be put to infringing use. But if the plaintiff shows knowledge through evidence that goes beyond just the design and distribution of a product capable of infringing use, *Sony-Betamax* does not immunize the defendant from liability for contributory infringement. By reading *Sony-Betamax* to create a bright-line immunity rule, the district court repeated the error of the Ninth Circuit that the Supreme Court corrected in *Grokster*, i.e., the court erroneously “convert[ed]” *Sony-Betamax* from a case “about liability resting on imputed intent to one about liability on any theory.” *Grokster*, 545 U.S. at 933-34; see also *MP3tunes*, 2016 WL 6211836 at \*13 (explaining that “where evidence

goes beyond a product's characteristics or the knowledge that it may be put to infringing use, and shows statements or actions directed to promoting infringement," *Sony-Betamax*'s holding does not apply (quoting *Grokster*, 545 U.S. at 935 (internal quotation marks omitted))).<sup>2</sup>

The district court's misreading of *Sony-Betamax*, if adopted widely, would bar contributory infringement claims against almost all defendants, especially online services. Almost any service may be capable of substantial noninfringing uses. If that mere capability absolves a service of liability, it is hard to imagine a service that would not be immune from a contributory infringement claim, even in a case where there is ample evidence to show that the service knows of and materially contributes to the claimed infringement. If that reading of *Sony-Betamax* were correct, then many of the "safe harbor" provisions of the Digital Millennium Copyright Act ("DMCA")—which presume that an online service would be used for both infringing and noninfringing purposes—would have been superfluous and unnecessary.

The district court's stated rule is particularly inappropriate with respect to defendants who operate online services and have continuing interactions with their users. Unlike the *device* distributor in *Sony-Betamax*, *services* that continue to

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<sup>2</sup> A rehearing petition was filed in *MP3tunes* on November 8, 2016, two weeks before this brief was filed. The petition does not challenge this Court's contributory infringement holding.

engage with their users are in a position to know whether their users are using their services to infringe, and to take steps to stop or prevent such conduct. Courts that have considered contributory infringement in the online context have eschewed bright-line rules, and instead applied the contributory infringement doctrine with sensitivity to the realities of the digital services at issue. *See, e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170-72 (9th Cir. 2007).

The district court was not presented with a fully developed evidentiary record and legal argument about the application of *Sony-Betamax* to the facts of this case. The district court noted that BWP failed to develop evidence in support of its claims, and BWP failed to address its secondary liability claims in supporting its own summary judgment motion or opposing Polyvore's cross-motion. Op. 2, 7. In addition, the district court did not have the benefit of this Court's *MP3tunes* decision. Be that as it may, the district court's reading of *Sony-Betamax* was in error, and the MPAA respectfully submits that this Court should not repeat or endorse that court's articulation of the contributory infringement standard on appeal. To affirm the district court's application of *Sony-Betamax* in this context would risk significantly undermining copyright holders' legitimate enforcement activities.<sup>3</sup>

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<sup>3</sup> In another section of its opinion, the district court held that Polyvore could not be liable for infringing BWP's exclusive right of reproduction because Polyvore did not act with the requisite "volition" to be a direct infringer. Op. 8-11 (discussing

## ARGUMENT

### I. The District Court Erroneously Read *Sony-Betamax* To Provide Blanket Immunity For Defendants Whose Products Or Services Are Capable Of Substantial Noninfringing Uses

Contributory infringement is a well-established and important doctrine for providing secondary liability for copyright infringement. *Sony-Betamax* arose in a particular context that set the bounds for limiting a plaintiff's ability to establish the knowledge element of the contributory infringement standard. Later Supreme Court and Second Circuit cases confirm the limited nature of *Sony-Betamax*.

#### A. Contributory Infringement Liability

For over a century, courts have recognized that parties may be held secondarily liable for copyright infringement. *See Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62-63 (1911) (recognizing secondary liability). Secondary liability is imposed in circumstances where a party played an important role in facilitating direct infringement even though it did not itself commit direct infringement. *See*

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*Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008) (“*Cablevision*”). Given the state of Circuit precedent on *Cablevision*'s volitional conduct holding, the MPAA does not separately brief that issue. The MPAA does note that, to the extent the district court's analysis could be read to suggest that a defendant must have the “purpose” to infringe in order to act volitionally, *see* Op. 9 (quotation omitted), that reading would be inconsistent with *Cablevision* and the cases it relied on. *See* 536 F.3d at 130 (explaining that “copyright is a strict liability statute,” but adding “there should still be some element of volition or causation” (quoting *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) (internal quotation marks omitted))); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004) (“[T]he Copyright Act does not require that the infringer know that he is infringing.”).

*Grokster*, 545 U.S. at 929-30. When a party distributes a service or product that is used for infringing activity on a massive scale, “it may be impossible to enforce rights in the protected work effectively against all direct infringers” and so “the only practical alternative” is “to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.” *Id.*; see also, e.g., Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 Harv. J.L. & Tech. 395, 396 (2003); see generally Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231 (1984). As the Register of Copyrights explained:

secondary liability doctrines are critical to the effective functioning of our copyright system, and even more so in the new digital environment. They allow copyright owners to focus their enforcement (or licensing) efforts on those entities that foster infringing activity and have the resources and wherewithal to either pay licensing fees or satisfy an infringement judgment, without bringing costly, time-consuming and usually futile actions against multiple, mostly judgment-proof individual defendants.

*The Intentional Inducement of Copyright Infringements Act of 2004: Hearing on S. 2560 Before the Senate Comm. on the Judiciary*, 108th Cong. (2004) (statement of Hon. Marybeth Peters, Register of Copyrights), available at <http://www.copyright.gov/docs/regstat072204.html> (visited Nov. 18. 2016).

The standard for contributory infringement has been established in this Circuit for decades. The plaintiff must show, in addition to an underlying direct infringement, that the defendant, “with knowledge of [underlying] infringing

activity ... materially contribute[d] to the infringing conduct of another.”

*Gershwin*, 443 F.2d at 1162. In contrast to an inducement claim, contributory infringement does not require the plaintiff to prove that the defendant intended to encourage direct infringement. *See, e.g., Grokster*, 545 U.S. at 942 (Ginsburg, J., concurring) (explaining that inducement and contributory infringement “capture different culpable behavior”).

Knowledge of infringing activity may be either actual or constructive. *See, e.g., Faulkner v. Nat’l Geographic Soc’y*, 211 F. Supp. 2d 450, 473-74 (S.D.N.Y. 2002), *aff’d*, 409 F.3d 26 (2d Cir. 2005). The standard “is an objective one; contributory infringement liability is imposed on persons who ‘know or have reason to know’ of the direct infringement.” *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 118 (2d Cir. 2010) (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001) (emphasis omitted)). “Evidence of actual and constructive knowledge [may be found in] cease-and-desist letters, officer and employee statements, promotional materials, and industry experience.” *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 658 (S.D.N.Y. 2013).



**B. *Sony-Betamax* Limits The Circumstances For Imputing Knowledge; It Is Not A Complete Defense To Liability For Contributory Infringement**

*Sony-Betamax* arose in the context of—and is limited to—one particular theory of proving constructive knowledge. Subsequent cases in both the Supreme Court and the Second Circuit confirm this understanding.

The defendant in *Sony-Betamax* was Sony Corp. of America, an electronics company that manufactured “Betamax” video tape recorders and marketed them through retail establishments. 464 U.S. at 422. The plaintiffs owned copyrights in programs broadcast over the air. The plaintiffs sued, alleging that purchasers of the Betamax used the device to make infringing copies of the plaintiffs’ programs. *Id.* at 419-22.

The question before the Supreme Court was whether the manufacturer could be held secondarily liable for the infringements committed by Betamax users based merely on the distribution of a device it knew would be used for such purposes. *Id.* at 434; *Grokster*, 545 U.S. at 931 (“Copyright holders sued Sony as the manufacturer, claiming it was contributorily liable for infringement that occurred when VCR owners taped copyrighted programs because it supplied the means used to infringe, and it had constructive knowledge that infringement would occur.”). The only type of knowledge at issue was constructive knowledge—and only a single theory of constructive knowledge. *Sony-Betamax*, 464 U.S. at 439. As the

Court explained, if the manufacturer was to be liable for contributory infringement, it could only be on the theory that it “sold equipment with *constructive knowledge* of the fact that [its] customers *may* use that equipment to make unauthorized copies of copyrighted material.” *Id.* (emphases added). The Court’s analysis of the knowledge issue was tied to this narrow context.

To resolve the question before it, the Court looked to “[t]he closest analogy”—patent law’s staple article of commerce doctrine. That doctrine is codified in the U.S. Code and provides that “[w]hoever offers to sell or sells within the United States” a patented machine or part under certain conditions “shall be liable as a contributory infringer” unless the product is a “staple article or commodity of commerce suitable for substantial noninfringing use.” 35 U.S.C. § 271(c). As the Supreme Court later explained, “[t]he doctrine was devised to identify instances in which it may be presumed from distribution of an article in commerce that the distributor intended the article to be used to infringe another’s patent, and so may justly be held liable for that infringement.” *Grokster*, 545 U.S. at 932. In the context that *Sony-Betamax* presented, the Court believed that the doctrine struck the proper balance between “a copyright holder’s legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce.” 464 U.S. at 442. The Court therefore held that the mere

distribution of a device capable of substantial noninfringing uses—without more—did not suffice to show the manufacturer’s constructive knowledge of its customers’ infringing activity. *Id.* at 456.

In *Grokster*, the Court confirmed the limits of *Sony-Betamax*’s holding. The *Grokster* defendants operated peer-to-peer networks that enabled users to upload and download digital files. 545 U.S. at 919-20. While the networks, in theory, supported the transfer of any type of digital file, the facts showed that users overwhelmingly used the networks to copy and distribute copyrighted music, movies and television shows. *Id.* at 922 (nearly 90% of files available for download on one defendant’s network contained copyrighted works); *accord Napster*, 239 F.3d at 1013 (as many as 87% of the files available through infamous Napster service contained copyrighted works). A group of copyright holders (including the MPAA’s members or their affiliates) sued the network operators for secondary copyright infringement. *Grokster*, 545 U.S. at 920-21.

Relying on *Sony-Betamax*, the Ninth Circuit held that the plaintiffs could not establish contributory infringement. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154, 1162 (9th Cir. 2004). In that court’s view, *Sony-Betamax* meant that the distributor of a product capable of substantial noninfringing uses could not be liable for contributory infringement unless the defendant had “specific knowledge of infringement at a time at which they

contributed to the infringement, and failed to act upon that information.” *Id.* (quoting *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1036 (C.D. Cal. 2003) (internal brackets omitted)). Like the district court in this case, the Ninth Circuit in *Grokster* held that the defendants could not be contributorily liable because their networks were capable of substantial noninfringing uses. *Id.* at 1163.

The Supreme Court squarely rejected this reading of *Sony-Betamax*. It explained that the Ninth Circuit “misapplied *Sony*, which it read as limiting secondary liability quite beyond the circumstances to which the case applied” and thus erroneously “convert[ed] the case from one about liability resting on imputed intent to one about liability on any theory.” 545 U.S. at 933-34. The Court made it clear that *Sony-Betamax* “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.” *Id.* (emphasis added). Thus, “*Sony*’s rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product.” *Id.*<sup>4</sup> *Sony-Betamax* “did not displace other theories

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<sup>4</sup> *Grokster* held that the defendants in that case could be held liable based on their intentional inducement of copyright infringement. Inducement liability is another doctrine of secondary liability, distinct from traditional “knowledge plus material contribution” contributory infringement. It does not displace the traditional contributory infringement test, which requires proof that the defendant knows of infringing activity and materially contributes to that infringement. *See Grokster*, 545 U.S. at 942 (Ginsburg, J., concurring); *see also BMG Rights Mgmt. (US) LLC*

of secondary liability” and left untouched “rules of fault-based liability derived from the common law.” *Id.* at 934-35.

This Court’s recent decision in *MP3tunes* again confirmed the limits of *Sony-Betamax*. The plaintiffs in *MP3tunes* were record companies and music publishers. 2016 WL 6211836 at \*1. They brought an infringement action against MP3tunes (an online music service) and its CEO (Michael Robertson) alleging that two of the defendants’ websites infringed copyrights in thousands of song recordings and musical compositions. *Id.*

At trial, the jury returned a verdict in favor of the record companies and music publishers finding, among other things, that MP3tunes was a contributory infringer. *Id.* at \*12-13. (MP3tunes itself filed for bankruptcy; Robertson was the only defendant who participated in the appeal. *Id.* at \*1 n.1) Relying on *Sony-*

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*v. Cox Commc’ns, Inc.*, 149 F. Supp. 3d 634, 671 (E.D. Va. 2015) (appeal pending) (“*Grokster* clarified the scope of inducement; it did not explicitly or implicitly reject a material contribution theory of liability.”); *id.* at n.24; *Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11-07098-AB SHX, 2014 WL 8628031, at \*6 (C.D. Cal. Nov. 14, 2014), *reconsideration denied*, No. CV 11-07098-AB SHX, 2015 WL 1746406 (C.D. Cal. Mar. 6, 2015) (appeal pending) (“Giganews contends that the inducement theory of contributory liability is the only theory of contributory liability in light of [*Grokster*] rather than an alternative to the ‘material contribution’ theory of contributory liability. However, the Ninth Circuit has repeatedly held that the two tests are alternative.” (citing *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1029 n.11 (9th Cir. 2013), *Perfect 10, Inc.*, 508 F.3d at 1171, and *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 795-96 (9th Cir. 2007))). Notably, the Supreme Court cited this Court’s decision in *Gershwin* as setting forth the standard for contributory infringement. *See Grokster*, 545 U.S. at 930.

*Betamax*, Robertson argued he could not be contributorily liable because the services could be used for substantial noninfringing uses. *Id.* at \*13. This Court rejected Robertson’s argument. *Id.* Relying on *Grokster*, the Court explained that *Sony-Betamax* bars one particular inference based solely on distributing a product capable of substantial noninfringing uses. *Id.* Because the jury verdict on contributory infringement was not based on such an inference, the Court affirmed that verdict.

Other cases are in accord on the limited reach of *Sony-Betamax*’s holding. *See, e.g., Perfect 10*, 508 F.3d at 1170 (explaining that the plaintiff has not based a “claim of infringement on the design of [the defendant’s] search engine” and *Sony-Betamax* “does not immunize [the defendant] from other sources of contributory liability”); *Napster*, 239 F.3d at 1020 (“The *Sony* Court declined to impute the requisite level of knowledge where the defendants made and sold equipment capable of both infringing and ‘substantial noninfringing uses.’” (quoting *Sony-Betamax*, 464 U.S. at 442)); *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003) (concluding that “[w]illfull blindness is knowledge, in copyright law (where indeed it may be enough that the defendant *should* have known of the direct infringement[]), as it is in the law generally,” despite defendant’s reliance on *Sony-Betamax* (citations omitted)); *see also, e.g.,* 1 E-Commerce and Internet Law 4.11[3][C] (2015) (“In cases where evidence of contributory infringement does not

rest *solely* on imputed knowledge or intent derived from the nature of the product itself, the *Sony* safe harbor defense will be inapplicable.” (emphasis added)).

The authority traced above illuminates the district court’s error in holding that Polyvore was not liable because, in its view, *Sony-Betamax* immunizes a defendant from contributory infringement liability when its service is “capable of substantial noninfringing use.” Op. 15 (quoting *Sony-Betamax*, 464 U.S. at 442). BWP may have inadvertently contributed to this erroneous holding, as it relied on *Sony-Betamax* in its complaint. See Dkt. #18 at 8. But in that same complaint, BWP alleged facts that should have made *Sony-Betamax* inapplicable. See, e.g., *id.* at 4. BWP alleged, among other things, that Polyvore gained knowledge of the infringement by employing agents who directly interacted with infringing photographs. *Id.* BWP’s theory of knowledge, then, did not rest solely on imputed knowledge based on the design and capabilities of Polyvore’s website, but instead alleges actual or constructive knowledge derived from other sources. Accordingly, *Sony-Betamax* was not the correct analytical framework for deciding this case and the district court erred in applying it.

## **II. The District Court Erroneously Extended *Sony-Betamax* From The Physical To The Digital Context And Without Sensitivity To The Realities Of Internet Services**

The district court also erred in extending *Sony-Betamax* to the online context, despite fundamental differences between physical products and online

services. Because of these differences, courts have not imported contributory infringement doctrine wholesale to the digital context but instead have found it important to further refine traditional doctrine to account for the realities of internet services. If the district court's ruling were to be widely adopted, it would do violence to the incentives to create and distribute high-quality content—something contrary to the fundamental principle underlying the Copyright Act.

**A. *Sony-Betamax* Has No Application Where The Defendant Has A Significant Ongoing Relationship With The Direct Infringer**

*Sony-Betamax* has no application where the defendant has a substantial ongoing relationship with the consumer. *See, e.g., Arista Records LLC v. Usenet.com*, 633 F. Supp. 2d 127, 155 (S.D.N.Y. 2009) (“*Usenet.com*”); *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 653 (N.D. Ill. 2002), *aff'd on other grounds*, 334 F.3d 643 (7th Cir. 2003); 1 E-Commerce and Internet Law 4.11[3][C] (2015) (“Courts in the Southern District of New York have ... ruled that the *Sony* safe harbor has no application where a defendant has an ongoing relationship with the product or its end user.”).

In *Sony-Betamax*, the only contact between manufacturer and consumer occurred at the point of sale. When the manufacturer sold the Betamax device, a tangible product, consumers took those devices to their own homes and used them for their own purposes, without any further interaction with the manufacturer. By contrast, in the online context, service providers generally have continuing



relationships with their users. Because of this continuing relationship, service providers can and do provide substantial assistance or maintain significant control over their users' activities. *Sony-Betamax* simply has no application in this far different context involving a far different balance between “a copyright holder’s legitimate demand for effective ... protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce.” *Sony-Betamax*, 464 U.S. at 442.

*Usenet.com* explains the applicability of *Sony-Betamax*’s rule where the defendant has an ongoing relationship with the consumer. *Usenet.com* involved the USENET network, “a global system of online bulletin boards on which users ... may post their own messages or read messages posted by others.” 633 F. Supp. 2d at 129-30. Various record companies brought suit against the company, alleging that USENET was used to infringe their copyrights in sound recordings. *Id.* at 129.

USENET argued that *Sony-Betamax* “creates a complete defense to contributory infringement liability where a product is ‘capable of substantial noninfringing uses.’” *Id.* at 155-56 (quoting *Sony-Betamax*, 464 U.S. at 442). The court emphatically rejected this contention. It explained that this “argument rides roughshod over a critical part of the Supreme Court’s reasoning in *Sony*.” *Id.* at 156. *Sony-Betamax*, the court explained, rested on the fact that the manufacturer’s

“last meaningful contact with the product or the purchaser was at the point of purchase, after which it had no ‘ongoing relationship’ with the product or its end-user.” *Id.* (quoting *Sony-Betamax*, 464 U.S. at 438 (“The only contact between Sony and the users of the Betamax ... occurred at the moment of sale ... . [Sony had no] direct involvement with the allegedly infringing activity or direct contact with purchasers of Betamax who recorded copyrighted works off-the-air.”)). And because the defendants’ service was “quite unlike *Sony*” the court held “that the noninfringing uses for Defendants’ service are immaterial, as *Sony*’s insulation from contributory liability is inapplicable in this case.” *Id.*; accord *Aimster*, 252 F. Supp. 2d at 653 (explaining that *Aimster* “is not [a] discrete product, like a Betamax VCR, to be sold to customers who thereafter use the machine as they see fit. Instead, *Aimster* is a *service* more closely akin to the swap meet in *Fonovisa*. ... Unlike the case in *Sony*, the instant case involves an ongoing relationship between the direct infringers (the users) and the contributory infringers (the Defendants).”).

Reading *Sony-Betamax* to provide a bright-line immunity rule to online services also is fundamentally inconsistent with the premises underlying the safe harbor provisions of the DMCA. 17 U.S.C. § 512. The safe harbors limit a qualifying service provider’s monetary liability for copyright infringement where that liability arises “by reason of” defined third-party uses of the provider’s online

service. If they apply, the safe harbors may limit a service provider's monetary liability for infringement occurring "by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider," and "by reason of the provider referring or linking users to an online location containing infringing material or infringing activity." *Id.* § 512(c), (d).

The safe harbors contemplate that, even if qualifying services are used for widespread and noninfringing uses, some will use those same services to infringe. Congress's recognition of the potential of dual use is reflected in, for example, the requirements that qualifying service providers must "adopt[] and reasonably implement[] ... polic[ies]" providing for the termination of repeat infringers, *id.* § 512(i)(1)(A), and (to qualify for § 512(c) or (d)) must take action to deal with known infringements under the standards set forth in those subsections. These safe harbors have been relied upon by a wide range of well-known service providers, from e-commerce platforms,<sup>5</sup> to user generated content sites,<sup>6</sup> to bulletin board

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<sup>5</sup> *See, e.g., Hendrickson v. Amazon.com, Inc.*, 298 F. Supp. 2d 914, 914-16 (C.D. Cal. 2003) (defendant Amazon.com relying on the DMCA's safe harbor rather than *Sony-Betamax*); *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1083-84 (C.D. Cal. 2001) (same for eBay, Inc.).

<sup>6</sup> *See, e.g., Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30-32 (2d Cir. 2012) (same for YouTube, Inc., YouTube, LLC, and Google, Inc.); *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 93-98 (2d Cir. 2016) (same for Vimeo, LLC); *UMG*

hosting providers,<sup>7</sup> to search engines,<sup>8</sup> all of which are capable of both infringing and noninfringing uses. If a service provider were immune from liability for its users' infringing conduct merely because its service also was capable of substantial noninfringing uses, these provisions would have been unnecessary. Likewise, the "notice-and-takedown" provisions in § 512(c) and (d) would be superfluous. If *Sony-Betamax* provided blanket immunity to a service that stored infringing and noninfringing material at the direction of its users (in the case of § 512(c)), or that linked to both infringing and noninfringing material (in the case of § 512(d)), there would have been no basis for a statutory safe harbor for such services<sup>9</sup> and no

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*Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1030-31 (9th Cir. 2013) (same for Veoh Networks).

<sup>7</sup> *Perfect 10, Inc. v. Giganews, Inc.*, 993 F. Supp. 2d 1192, 1193-94 (C.D. Cal. 2014) (same for Giganews, a USENET service provider that hosts online bulletin boards); *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 927-29 (N.D. Cal. 1996) (same for several individuals operating online bulletin boards).

<sup>8</sup> *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 978 (9th Cir. 2011) (same for Google, Inc.); *Perfect 10, Inc. v. Yandex N.V.*, 962 F. Supp. 2d 1146, 1150-51 (N.D. Cal. 2013) (same for a Russian operator of internet search engines).

<sup>9</sup> Under 17 U.S.C. § 512(c)(1)(a), safe harbor protection is available only if the service provider: "(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material ... ." These knowledge requirements track those of contributory infringement doctrine, as discussed above. Limiting the safe harbor to these circumstances would make little sense if *Sony-Betamax* already provided a far broader immunity, one that did not turn at all on knowledge when it came to products capable of substantial noninfringing uses.

service provider conduct that Congress would have incentivized with the notice-and-takedown requirements.<sup>10</sup> The services could simply rely on the unjustified immunity provided by an overly broad reading of *Sony-Betamax*. The fact that many well-known services have described the § 512 safe harbors as indispensable to the internet's growth confirms that the overbroad reading of *Sony-Betamax* is without merit.<sup>11</sup>

A rule granting blanket immunity for any service that might be used for non-infringing purposes would be inconsistent with other courts' interpretations of

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<sup>10</sup> Congress designed the DMCA's 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 v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (internal quotation marks omitted); see also *Shelter Capital Partners LLC*, 718 F.3d at 1021. As the House Report put it, at the moment the service provider becomes aware that a third party is using its system to infringe, the service provider becomes responsible for disabling the infringing matter, "preserv[ing] 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." H.R. Conf. Rep. No. 105-796, at 72 (1998).

<sup>11</sup> See, e.g., Brief of Amici Curiae Ebay Inc. et al. in Support of Appellee, *UMG Recordings, Inc. v. Veoh Networks, Inc.*, No. 09-56777, 2010 WL 3706523, at \*7 (9th Cir. July 26, 2010) (arguing that "[t]he ability of amici and other service providers to provide ... services ... depends on the protections afforded them by the DMCA safe harbors" and that "[t]he importance of the DMCA's safe harbors to the continued development of online services cannot be understated"); Brief for Amici Curiae Ebay Inc. et al. Supporting Defendants-Appellees, *Viacom Int'l, Inc. v. YouTube Inc.*, Nos. 10-3342-cv & 10-3270-cv, 2011 WL 1462234, at \*8 (2d Cir. Apr. 12, 2011) ("There can be no argument that many innovative Internet-based services, marketplaces, communities, and platforms, like those of Amici, have arisen or expanded due in substantial part to the [DMCA] safe harbor.").

*Sony-Betamax*. For example, the Ninth Circuit in *Perfect 10* did not adopt such a rule, but instead held that a service provider's ability to take measures to prevent or stop infringement was highly relevant to determining its potential liability for contributory infringement.

*Perfect 10* involved a copyright owner's (Perfect 10) efforts to stop an internet search engine, Google, from facilitating access to infringing images. 508 F.3d at 1154. Certain website publishers republished Perfect 10's images without authorization, and Google's "image search" automatically indexed the webpages containing these images and provided thumbnail versions of the images in response to user inquiries. *Id.* at 1155. When a user clicked on the thumbnail, the user's browser accessed the third-party webpage and the full-size image appeared, in its original context, in a portion of the window on the user's computer screen. *Id.* at 1155-56. Perfect 10 brought suit alleging, among other things, that Google should be liable for contributory infringement. *Id.* at 1155.

The Ninth Circuit held that, although image search was capable of substantial noninfringing uses, Google might nonetheless be liable for contributory infringement. *Id.* at 1172-73. The court began its analysis by confirming that *Sony-Betamax* means only that "Google cannot be held liable for contributory infringement *solely* because the design of its search engine facilitates" infringement. *Id.* at 1170. Accordingly, the case did not bar a finding of

contributory infringement where Perfect 10 offered other theories of liability. *Id.* The court noted that it had refined *Gershwin*'s articulation of the contributory infringement test "in the context of cyberspace." *Id.* at 1171 (citations omitted). In the online context, the Ninth Circuit held, "a computer system operator can be held contributorily liable if it 'has *actual* knowledge that *specific* infringing material is available using its system,' and can 'take simple measures to prevent further damage' to copyrighted works, yet continues to provide access to infringing works." *Id.* (quoting *Napster*, 239 F.3d at 1022 & *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995)). Under this standard, *Perfect 10* held that Google might face liability and remanded for further fact-finding. 508 F.3d at 1172.

Commentators likewise have recognized there is no basis for reading the *Sony-Betamax* holding to establish a bright-line rule of immunity in the online context in particular. *See, e.g.*, Jesse M. Feder, *Is Betamax Obsolete?: Sony Corp. of America v. Universal City Studios, Inc. in the Age of Napster*, 37 Creighton L. Rev. 859, 902-05 (2004) (urging courts to consider, inter alia, the "efficient and equitable allocation of the cost of infringing use," "incentives to minimize losses from infringement," and the "purpose or intent of the manufacturer" in the online context); John M. Moye, Comment, *How Sony Survived: Peer-to-Peer Software, Grokster, and Contributory Copyright Liability in the Twenty-First Century*, 84

N.C. L. Rev. 646, 659 (2006) (explaining that “the *Sony* majority was keenly aware of the” balance between rewarding content creators and allowing the free flow of commerce and that its holding “represented its attempt to strike a balance between copyright holders and the consuming public” based on the technology at issue).<sup>12</sup>

**B. Reading *Sony-Betamax* To Provide A Bright-Line Rule Of Immunity Undermines The Copyright Act’s Purposes**

Construing *Sony-Betamax* to provide a bright-line rule of immunity would be destructive of the larger purposes of copyright. Were the district court’s statement to become the law, service providers would be incentivized to turn a blind eye to infringing uses knowing that copyrighted content would act “as a draw for customers,” thereby increasing the site’s value to advertisers and investors. *Napster*, 239 F.3d at 1023 (internal quotations omitted). Indeed, the service provider could go further still and subtly structure its service or product to foster

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<sup>12</sup> See also, e.g., Lital Helman, *Pull Too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement*, 19 Tex. Intell. Prop. L.J. 111, 118 (2010) (“In fact, the secondary liability doctrines may have different implications when applied to technology providers. Technology, particularly digital technology, is disseminated to an unlimited and indefinite number of users globally.”); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. Chi. L. Rev. 263, 274, 300 (2002) (explaining that “[u]nbounded by the restraints of brick-and-mortar economics, anyone with a computer and Internet access is now a potential copier and distributor of music” and that “[o]nce a work is created, the marginal cost of making an unlimited number of digital copies and distributing them worldwide is zero”).



direct infringement. So long as the provider does not go too far and reveal an intent to foster direct infringement—which would subject the provider to liability on an inducement theory—it would be immunized from liability by the district court’s aggressive interpretation of *Sony-Betamax*. This could potentially siphon away significant amounts of capital that would otherwise go back toward content creators and disseminators. *See, e.g., Ku, supra*, at 297-98 (estimating that “Napster use resulted in \$10,000 in lost revenue [for legitimate copyright holders] *per second*” (emphasis added)); *id.* at 297 (discussing an industry estimate that infringing copyrights in sound recordings cost the industry about \$1 billion a year in sale); *id.* (discussing an MPAA estimate that its members lose \$3 billion each year to piracy).

An online service armed with a broad exemption from contributory liability would have a significant competitive advantage over services that license content and respect copyright. Content owners have authorized numerous services to deliver content online—including Hulu, Netflix, Amazon, Google Play, and Apple’s iTunes, to name a few. *See Graeme McMillan, Viewers Are Flocking to Streaming Video Content—And So Are Advertisers*, *Wired* (Mar. 1, 2013, 3:45 PM), *available at* <http://www.wired.com/2013/03/streaming-video-advertising/> (visited Nov. 18, 2016). Users can watch current-season programming on ad-supported services (such as Hulu) and subscription services (such as Hulu Plus and

Netflix), which also allow users to watch programming from past seasons. Other licensees (such as iTunes and Amazon) allow users to stream television programs and movies to watch on a computer or another internet-enabled device on demand. These services would face a major disadvantage from having to compete with services through which the same content could be obtained for free, and where those services were insulated from secondary liability by an expansive and erroneous interpretation of *Sony-Betamax*.

The result of such a broad interpretation of *Sony-Betamax*'s holding would be to reduce the incentive to create and disseminate high-quality content—a result contrary to the fundamental policy underlying the Copyright Act. *See, e.g.*, *Ku, supra*, at 293 (“In the United States, copyright protection is justified solely as an incentive for the creation and distribution of content. ... [C]opyright exists to ensure that content will not be underproduced as a result of the public-good characteristics of intellectual property.”). Indeed, a key motivator in enacting the DMCA was Congress’s recognition that, “[d]ue to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.” S. Rep. 105-190, at 20 (1998). Without the “only practical alternative” to deter and redress the mass infringement of their works over the Internet, copyright owners will be

reluctant to make their works available or raise prices to compensate for substantial additional risk. *Grokster*, 545 U.S. at 929-30.<sup>13</sup>

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<sup>13</sup> Because some physical products now share some of the critical characteristics as internet service providers *Sony-Betamax* might also be inapplicable to these products. The MPAA's argument that *Sony-Betamax* at a minimum does not apply in the digital context should not be taken to imply that the MPAA believes *Sony-Betamax* always applies to physical products.

## CONCLUSION

For the foregoing reasons, the MPAA respectfully submits that the district court's formulation of the contributory infringement standard should be not be adopted or repeated on appeal.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure Rules 29(c) and 32 (a)(7)(C), I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 6,578 words.

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### CERTIFICATE OF SERVICE

I hereby certify I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service of this brief will be accomplished by the appellate CM/ECF system.

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