

No. 16-1972

**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, INCORPORATED, and COXCOM, LLC,
Defendants – Appellants,

and

COX ENTERPRISES, INC., COXCOM, INC., and JOHN DOE 2,
Defendants,

RIGHTSCORP, INC.,
Party-in-Interest.

On Appeal from the United States District Court
for the Eastern District of Virginia,
No. 1:14-cv-01611 (Hon. Liam O’Grady)

BRIEF FOR APPELLEE

MICHAEL J. ALLAN
WILLIAM G. PECAU
JOHN M. CARACAPPA
JEFFREY M. THEODORE
STEPTOE & JOHNSON, LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795
mallan@steptoe.com
(202) 429-6749

DECEMBER 30, 2016

Counsel for Appellee

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

BMG Rights Management (US) LLC
(name of party/amicus)

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

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

2. Does party/amicus have any parent corporations? YES NO

If yes, identify all parent corporations, including all generations of parent corporations:

A German partnership limited by shares, Bertelsmann SE & Co. KGaA, is the ultimate parent company of BMG Rights Management (US) LLC. Bertelsmann, Inc. is the US corporate parent of BMG Rights Management (US) LLC. Audigram Songs, Inc., Rise Records, Inc., and BMG Production Music, Inc. are each corporate members of BMG Rights Management (US) LLC.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO

If yes, identify all such owners:

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

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

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

Signature: /s/ Michael J. Allan

Date: 12.30.2016

Counsel for: Plaintiff-Appellee

CERTIFICATE OF SERVICE

I certify that on 12.30.2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Michael J. Allan
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INTRODUCTION

The jury found Cox liable under well-settled principles of contributory copyright infringement law. Rather than act when told of specific instances of infringement on its network – or when it found that infringing subscribers were “habitual abusers” who “just want to steal stuff” – Cox developed a sophisticated system to shield its infringing subscribers so that they could continue to upload and download music with impunity while Cox continued to receive the revenue associated with the infringing accounts. Using a series of measures designed to “ignore the bulk of DMCA notices,” Cox blocked more than 95% of the infringement notices sent to it by copyright owners – including every one of the 1.8 million BMG notices at issue in this case – from reaching its infringing subscribers and took no meaningful action on the remainder.

Cox knew that its conduct exposed it to contributory infringement liability. To claim a “safe harbor” defense under the DMCA, Cox implemented a sham policy of terminating repeat infringers. Cox pretended to terminate repeat copyright infringers to claim “compliance with [the] safe harbor” but then “reactivate[d]” the repeat infringers with a “clean slate” in order to “keep customers.”

The District Court granted summary judgment on Cox’s DMCA defense because the evidence “strip[ped] Cox of any innocence” and “ma[d]e clear that it

was Cox's policy to intentionally circumvent the DMCA." The jury, properly instructed in contributory infringement law, found Cox to be a willful contributory infringer.

In its Brief, Cox does not address the conduct for which it was found liable or the longstanding law of contributory copyright infringement. Instead, Cox proposes radical reinterpretations of both contributory infringement law and the DMCA that have never been accepted by any court and that would immunize Cox and its fellow conduit internet service providers from secondary liability for online copyright infringement.

But in the DMCA Congress, legislating against the background of traditional contributory infringement law, decided *not* to give conduit ISPs the blanket immunity Cox now seeks. Congress preserved existing doctrines of secondary copyright liability but sought to ameliorate the risk they pose to ISPs by creating a safe harbor defense premised on adoption and reasonable implementation of a policy for terminating repeat infringer in appropriate circumstances.

Having lost its safe harbor because its policy was *not* to terminate repeat infringers and because it failed to come forward with *any* evidence that it actually implemented a policy to terminate, Cox now argues that the DMCA provides blanket immunity unless it fails to terminate subscribers who have been *adjudicated* repeat infringers in court. No court has adopted this reading of the

DMCA, which is at odds with the plain language of the statute and would contravene Congress's express intention to preserve strong incentives for copyright holders and ISPs to work together to address online copyright infringement without litigation. Cox's approach would completely undermine secondary liability, which allows copyright holders to pursue those who facilitate infringement where suing a multitude of direct infringers is impracticable.

Cox also argues that *Sony* and *Grokster* preclude secondary liability where a service provider's product has a substantial non-infringing use. But *Grokster* expressly rejects this reading of *Sony*. While a court cannot hold a manufacturer liable simply because its product *may* be used to infringe, *Sony* does not foreclose imposition of liability against Cox, which was on notice of millions of specific and ongoing instances of infringement by its subscribers yet continued to provide them with the very internet service that allowed them to infringe and shield them from any consequences of infringement.

Indeed, the evidence overwhelmingly showed that Cox not only knew of and contributed to its subscribers' infringement but that its contribution was willful. Aware that its subscribers would continue to infringe copyrights, Cox chose to keep them online with a "clean slate" so that "we can collect a few extra weeks of payments for their account."

Without disputing the sufficiency of the evidence of its willfulness, Cox attempts to vacate the entire damages award by making a belated challenge to the language of the District Court's willfulness instruction, which was taken directly from appellate precedent. Cox failed to raise its objection before the District Court. It is now too late.

ISSUES PRESENTED

1. Whether Cox's sham termination policy for repeat infringers entitles it to a DMCA safe harbor defense.
2. Whether Cox may avoid contributory infringement liability by willfully blinding itself to repeated notices of specific instances of copyright infringement by particular subscribers using Cox's network.
3. Whether the jury's award of statutory damages was proper.

STATEMENT OF THE CASE

A. Infringement of BMG Copyrights via BitTorrent

BMG is a music publishing company that represents approximately 15,000 songwriters – the men and women who write the music and lyrics to songs enjoyed by hundreds of millions. JA-879, 885. Songwriters receive seventy-five to ninety-five percent of the copyright revenue that BMG collects. JA-894-95.

BMG, its songwriters, and the music industry face a significant challenge from online music piracy, which costs the industry billions of dollars in lost sales.

JA-1602. Historically, websites such as Napster allowed infringers to download a single work from a single location using a centralized database. However, a file-sharing protocol called BitTorrent has become the major channel for theft of copyrighted music and film. BitTorrent allows a host of individual users or “peers” to download and upload music files from and to multiple users simultaneously by breaking the files down into “pieces” that are transferred separately and then re-assembled.

This process exponentially increases the efficiency and volume of online piracy and thus “fosters a staggering amount of infringement.” JA-2770. A song on BitTorrent will “be replicated, uploaded, downloaded and shared millions upon millions of times” without any control by the rights holder. JA-1093-94. Recent studies have found that 99.97% of the content on BitTorrent is infringing and that 10.7 songs are transferred using BitTorrent for every song sold. JA-1602, 1635-36. As a BMG executive explained, “you can’t compete with free.” JA-1095.

The distributed nature of BitTorrent also avoids any need to rely on a single central repository that can be targeted or shut down. JA-1644. Peers share files directly with one another and can be identified only by their IP addresses, which are assigned by their ISPs and change over time. JA-960-965, 1432.

B. Cox Is the “Gatekeeper” for Infringement on Its Network

A copyright owner cannot identify an infringer other than by IP address or contact an infringer without going through Cox. JA-965. Only Cox knows the identity of the subscriber at a given IP address at a particular time. JA-965; JA-1433; JA-2773. As one of Cox’s senior representatives agreed, “Cox is really the gatekeeper” for infringing subscribers on its network. JA-1433; *see also* JA-965; JA-1642; JA-2773.

Cox requires its subscribers to abide by its Acceptable Use Policy (“AUP”). JA-1421; JA-2213. The AUP prohibits Cox subscribers from using a Cox service “to post, copy, transmit or disseminate any content that infringes ... copyrights.” JA-2773; JA-2214. Cox subscribers are “solely responsible for any information transmitted from [their] IP address[es].” JA-1423-24; JA-2213. Violators are subject to suspension of their access to the internet or immediate termination of their account. JA-681-82; JA-1422-23; JA-2213. Infringement was handled by Cox’s Abuse Department, which referred to copyright infringement as “DMCA.” JA-682; JA-3506.

Cox can monitor activity associated with a particular IP address, including “the amount of BitTorrent traffic that a specific subscriber uses on a particular day.” JA-1434; JA-1792. Cox can block a subscriber from accessing the internet,

can block access to certain kinds of sites, or can block specific data transfer protocols – such as BitTorrent. JA-1441-44; JA-249-50; JA-256-57.

C. BMG Detected Rampant Infringement on Cox’s Network and Notified Cox of Each Infringement

BMG retained Rightscorp, Inc., to detect infringement of its songs online and notify ISPs of the infringement. Rightscorp’s computerized system identifies the time and date of each infringement, the infringing file and torrent names, the IP address at which the infringement occurs, the ISP that issued the IP address, and the name of the work infringed. The Rightscorp system is “well over 99%” accurate. JA-1052; *see also* JA-2783-84.

Rightscorp identified millions of instances of infringement on Cox’s network and notified Cox of the infringement in three separate ways. First, Rightscorp sent notices of infringement to abuse@cox.net, just as Cox instructed copyright owners in its AUP. JA-2213. Between February 2012 and October 2014, Rightscorp sent Cox more than 1.8 million notices of infringement of the 1,397 copyrighted works at issue in this litigation. BMG’s expert Robert Bardwell confirmed that 1,640,416 of those infringements were attributable to 60,706 repeat infringing subscribers. JA-1548-49.

As Cox admitted, BMG’s notices satisfied the six requirements for copyright infringement notices listed in Cox’s Abuse Handling Procedures and detailed on Cox’s website. JA-4735; JA-2233; JA-1744-45; JA-3109-10; JA-3160. Each of

these notices was xml-formatted according to ACNS industry standards for infringement notices so that Cox could extract the information it desired electronically and automatically forward all or part of the notice to its subscribers. JA-1072-73; JA-1299; JA-1479.

BMG's notices offered subscribers the opportunity to settle the infringement for \$20-30. The goal of making a settlement demand was to shift the substantial cost of online copyright enforcement from songwriters to infringers while educating infringers that infringement "is real, it's serious, and there's consequences for it" with a payment that's "fair and reasonable, but meaningful." JA-1099.

In addition to the notices, Rightscorp sent Cox's abuse staff weekly "rollup" reports that summarized the infringement histories of the most egregious repeat infringers. The weekly emails listed repeat infringers by IP address and, for each, detailed the number of infringements and the period during which the subscriber infringed. JA-1349-50; JA-5196-5224.

Finally, Rightscorp made available to Cox an online "Dashboard" through which Cox abuse staff could access a sortable database of all infringements by Cox subscribers. Via the dashboard, Cox abuse staff could view and sort the full infringement histories of each subscriber, see how long a particular Cox subscriber had shared particular BMG songs, and even listen to thousands of infringing copies

of BMG songs that Rightscorp downloaded from Cox subscribers who were sharing them via BitTorrent. JA-1032; JA-1271, JA-1482; JA-2781; JA-5243-45.

Cox's own research confirmed that there was significant downloading of music for free on its network. One internal study found that one in six millennials acquired music through free methods, such as downloading for free, burning songs from friends, and "stealing" songs online. JA-1577. Another found that subscribers averaged 21 hours of P2P usage per month. JA-1583-84. Indeed, BitTorrent accounted for more than twenty percent of Cox's upstream traffic in certain markets. JA-4296. As Cox's manager of abuse operations observed, "Bittorrent is used for one thing only ... and I would know. ;-)". JA-4214.

D. Cox Devised a System to Ignore Notices of Copyright Infringement

The heavy infringement on Cox's network caused BMG and other copyright owners to send millions of infringement notices to Cox's designated abuse@cox.net email address. JA-3664-68. Rather than address the infringement, Cox implemented a system to "stem the flow" and "ignore the bulk of DMCA notices." JA-4799; JA-5185; *see also* JA-5291 ("there was a directive to limit the number of DMCA notices that Cox handled"); JA-2034 ("system was configured to deliberately" ignore notices).

Cox's head of abuse operations Jason Zabek explained in an email chain regarding "alleged illegal downloaders," "It's not that I don't know ... It's that I don't want to know." JA-4211 (ellipsis in original):

From the Desk of Chimp #6



"It's not that I don't know ... It's I don't want to know"

Through a series of mechanisms for filtering infringement notices, Cox managed to avoid taking any action on more than 95% of the infringement notices copyright owners sent.

As a first step, Cox had a "magic form letter" by which it rejected all notices with settlement offers – more than eighty percent of notices – and blacklisted the senders. JA-2320-21; JA-3123; JA-3531.¹ Cox could have electronically removed the settlement offers from the notices. JA-1073; JA-2022. Instead, Cox configured its mail server so that it would not even download messages from Rightscorp. JA-2318. As a result, Cox never processed or investigated any BMG

¹ Cox's "spirit of the DMCA" justification for rejecting settlement offers was entirely pretextual. Cox never formulated any competent legal analysis on this point and, before trial, denied that it sought to raise advice of counsel as a defense. JA-678; JA-801. Nor does anything in the DMCA or its "spirit" justify ignoring millions of otherwise valid infringement notices on this basis.

notice of copyright infringement.² JA-1782-83. Cox's Senior Lead Abuse Engineer explained, "So, yeah F the DRC!" (i.e., Rightscorp). JA-3539; JA-1387.

Notices from senders that were not blacklisted were entered into Cox's automated abuse tracking system ("CATS"). However, Cox placed a default "hard limit" of 200 notices per day per sender. JA-3679. Thus, if a copyright owner sent more than 200 notices per day, Cox would reject all notices exceeding the limit. JA-3612.³ When another ISP asked, "WOW, you're limiting such complainant email address to 200/day? Can we do that ...!?!?", Cox's head of abuse operations responded "F the dmca!!!" JA-5138-40.

Finally, Cox "rolls up" all notices directed at a single IP address in a single day into one complaint, no matter how many times or how many songs the subscriber has infringed that day. JA-1436; JA-2024; JA-3055.

Cox then employs a multi-step, "graduated response" procedure to act on the few notices that make it through its many filters. The action Cox takes depends on the number of times within the preceding six months that a subscriber has been

² Neither the weekly roll-up notices nor the sortable dashboard made settlement offers, but Cox's abuse staff declined to look at those as well. JA-1768; JA-1776-77.

³ If Rightscorp had not been blacklisted, the "hard limit" would have caused Cox to ignore more than 98% of its notices.

named in copyright infringement notices falling within a non-blacklisted sender's daily "hard limit." JA-3420-22; JA-859-60.

A subscriber's first copyright infringement notice within the previous six months is automatically closed and no further action is taken. JA-3611; JA-3421. If a second notice clears Cox's filters within six months, Cox sends the subscriber an email warning and forwards the notice. JA-3420-22. Cox takes the same action on the third, fourth, fifth, sixth, and seventh notices that fall within the daily "hard limit" of non-blacklisted senders. JA-3421.

If a customer receives an eighth or ninth filtrated notice within the same six-month period, Cox causes a warning notice to appear on the subscriber's screen, which the subscriber may click to access the internet. JA-1442-43. Cox calls this a "soft suspension," from which the subscriber can immediately "self-reactivate." JA-3421.

After the tenth, eleventh, twelfth, and thirteenth filtrated notices, Cox caused infringing subscribers to see additional warning notices, which required them to call customer service to go back online. JA-3421. Cox called this a "hard suspension." For the twelfth and thirteenth filtrated notices, a subscriber had to call Cox's technical operations center in Atlanta. JA-3421. There, Cox's most senior abuse representatives would automatically reactivate them with a warning that they would be terminated if they continued to infringe. If a subscriber is the

subject of fourteen filtrated notices within six months, the subscriber's "[a]ccount will be reviewed and *considered* for termination." JA-3421-22 (emphasis added).⁴

The combination of Cox's notice filtration procedures and its fourteen-step graduated response made it almost impossible for subscribers to face meaningful consequences for infringement. For example, one subscriber who was the subject of thirty-two notices from non-blacklisted senders never made it past the email warning stage even to a "suspension" because Cox ignored all complaints older than six months and all complaints that did not fall within the sender's hard limit. JA-1451-52; JA-5155-56.

In total, Cox issued warnings or suspensions in response to fewer than five percent of notices sent by copyright holders. Between September 2012, when Cox instituted its current graduated response mechanism, and November 2014, when BMG filed this suit, Cox was sent at least 15,857,167 notices of infringement from all copyright complainants but issued only 711,936 warnings and "suspensions" to subscribers. JA-3624-26; JA-3665-68; JA-236. Cox failed to come forward with evidence that even a *single* subscriber was terminated for repeat copyright infringement. JA-717; JA-720.

⁴ Until September 2012, Cox's graduated response had twelve steps.

E. Cox Does Not Terminate Repeat Infringers

Even when a subscriber made it through Cox's graduated response procedure to the termination stage, Cox still would not terminate. Until September 2012, Cox implemented a sham termination procedure under which "DMCA Terms are not really Terminations." JA-3712. Cox pretended to terminate repeat infringers but actually reactivated those subscribers with a "clean slate" so that they could continue to infringe. JA-3497-98. The Cox executive responsible for handling infringement on Cox's network instructed his team that "DMCA=reactivate." JA-3500; *see also* JA-3494 ("[I]n 99% of the cases we are going to turn the customer back on.").

The purpose of this "unwritten semi-policy" was to "to receive protection under the safe harbor" without losing profitable, infringing subscribers. JA-4996; JA-3698. Cox "terminate[d] [customers] in order" to claim "compliance with [DMCA] safe harbor" but then "reactivate[d]" them in order to "hold on to every subscriber we can." JA-3488. As Zabek explained to his team, "Once the customer has been terminated for DMCA, we have fulfilled the obligation of DMCA safe harbor and can start over." JA-3497-98. In many instances, Cox did not even "actually terminat[e] the service" but "just click[ed] Terminate and Update Ticket, which shows a Termination in the Customers Ticket History." JA-3698; *see also* JA-3931 ("call it a termination"). From the start of the period at

issue in this litigation through September 2012, no Cox subscriber was terminated for infringement and not reactivated. JA-713.

In September 2012, Cox revised its policy so that “now when we terminate customers, we REALLY terminate the customer (for 6 months).” JA-3503. At the same time, however, Cox really stopped terminating subscribers for repeat copyright infringement. Cox changed its policy so that subscribers who received fourteen filtrated notices within the daily hard limit of non-blacklisted senders in a six-month period were merely “considered” for termination. JA-3422. It then went from “terminating” 15.5 infringing subscribers a month (all reactivated) to terminating fewer than one a month, almost all (if not all) of whom were excessive bandwidth users or had failed to pay their bills on time. *See* JA-2268-70; JA-3959-60 ¶¶ 66, 68; JA-4499 ¶¶ 66, 68.

Cox stated in an interrogatory response that, from September 2012 to November 2014, twenty-one subscribers were terminated (out of 711,936 warnings and “suspensions”) but later admitted that at least seventeen of those twenty-one were excessive bandwidth users or had failed to pay their bills on time. JA-2268-70; JA-3959-60 ¶¶ 66, 68; JA-4499 ¶¶ 66, 68. As the District Court noted, “Cox has not come forward with any evidence that would raise a genuine issue of material fact as to whether it has” actually terminated any subscriber for copyright

infringement. JA-720; *see also* JA-717 (“Cox, of course, is careful never to assert that these customers were in fact terminated.”).

In other words, Cox continued its policy that “we didn’t want to lose the revenue ... but if the gross bandwidth abusers are costing us way more than we are making from them, it makes sense to terminate” – “that’s supposed to be the driver, that they cost more than we make from them.” JA-3246; *see also* JA-4530 (“This Customer pays us over \$400/month and if we terminate their internet service, they will likely cancel the rest of their services.”). Conversely, Cox did not terminate profitable infringers of whom its abuse staff observed: “well aware of his actions” and has had “years of doing this,” “knows ‘it’s his fault,’” and “will likely fail again.” JA-2467; JA-5188; JA-5153.

The effect of Cox’s system was to “shield customers from any concerns regarding copyright violations” and “give them the comfort that they [could] continue to violate [copyright] with impunity.” JA-2038-40. Each of Cox’s infringing subscribers is worth an average of \$98.23 *a month* in incremental profit margin. JA-1630. And Cox valued them accordingly. *See* JA-4530 (“every terminated customer becomes lost revenue and potential Detractor to our Net Promoter Score”).

Rather than terminate infringing subscribers, Cox encouraged its subscribers to buy its highest speed internet service and “download 100 tunes in 3 seconds,”

something that is only possible on BitTorrent. JA-1672, 1675-76, JA-2480. Cox told subscribers “Someone in your house may be sharing music or files which can drastically reduce your results. Increase your speed package to share files without sacrificing your speed experience.” JA-1678-79, JA-2483.

F. Proceedings Below

BMG and Round Hill Music LP sued Cox for its contributory and vicarious copyright infringement on November 26, 2014. After discovery, the parties cross-moved for summary judgment. The District Court granted BMG summary judgment that it had the rights to 1,397 copyrighted works. However, the court held that a different Round Hill entity had the right to assert the Round Hill copyrights at issue and dismissed Round Hill’s claims.

The court then addressed the DMCA safe harbor, which requires ISPs to adopt and reasonably implement a policy for the termination of repeat infringers in appropriate circumstances. 17 U.S.C. § 512(i). The court held that “[t]he record conclusively establishes that before the fall of 2012 Cox did not implement its repeat infringer policy,” instead “intentionally circumventing the DMCA’s requirements.” JA-709. After reviewing Cox’s practice of reactivating subscribers “terminated” for infringement, the court held that “The emails in the record strip Cox of any innocence. They make clear that it was Cox’s policy to intentionally circumvent the DMCA. Despite having a repeat-infringer policy on the books,

Cox's implementation rendered the policy an 'absolute mirage.' ... In sum, no reasonable juror could find that Cox implemented a repeat infringer policy before the fall of 2012." JA-713-14.

Turning to the September 2012-November 2014 timeframe, the court held that Cox did not terminate actual, known repeat infringers. Noting Cox's "care[] never to assert that these customers were in fact terminated," JA-717, the court held that Cox "has not come forward with any evidence that would raise a genuine issue of material fact as to whether it has" terminated subscribers that it knows to be flagrant, blatant repeat infringers. JA-720.

BMG proceeded to trial on its contributory infringement and vicarious liability claims. The court instructed the jury in accordance with traditional law of secondary copyright liability, as reflected in pattern jury instructions and decisions of this Court. After a two-week trial, the jury found that Cox was a willful contributory copyright infringer and awarded \$25 million in statutory damages. The jury found that Cox was not vicariously liable for its subscribers' infringement.

STANDARD OF REVIEW

This Court is "compelled to accord the utmost respect to jury verdicts and tread gingerly in reviewing them." *Lack v. Wal-Mart Stores*, 240 F.3d 255, 259 (4th Cir. 2001). It reviews denial of a motion for judgment as a matter of law *de*

novo to determine if, “viewing the facts in the light most favorable to the non-moving party, there is sufficient evidence” to support the verdict. *Id.*

A “trial court has broad discretion in framing its instructions to a jury.” *Gentry v. East West Partners Club Management*, 816 F.3d 228, 233 (4th Cir. 2016). This Court “review[s] challenges to jury instructions for abuse of discretion” but considers “*de novo* whether the district court’s instructions to the jury were correct statements of law.” *Id.* “Even if a jury was erroneously instructed, however, [the Court] will not set aside a resulting verdict unless the erroneous instruction seriously prejudiced the challenging party’s case.” *Id.*

Summary judgment is reviewed *de novo*. *PBM Products v. Mead Johnson Nutrition*, 639 F.3d 111, 119 (4th Cir. 2011). While the evidence is viewed in Cox’s favor, Cox “must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 256 (1986).

SUMMARY OF ARGUMENT

The District Court properly granted summary judgment to BMG on Cox’s DMCA safe harbor defense because Cox did not carry its burden to show that it “adopted and reasonably implemented” a policy for the “termination in appropriate circumstances of ... repeat infringers.” 17 U.S.C. § 512(i). The uncontradicted evidence showed that Cox’s actual policy was *not* to terminate for copyright infringement. Until September 2012, Cox pretended to terminate repeat infringers

but instead reactivated them so that they could continue to infringe. JA-3497-98.

Subsequently, Cox purported to “consider” repeat infringers for termination but did not terminate subscribers unless they were bandwidth abusers or failed to pay their bills on time. Cox submitted no evidence that it actually terminated a single subscriber for copyright infringement during the entire period at issue. JA-720.

As the District Court found, Cox did not implement a policy of terminating *at all* and its pretense to the contrary was an “absolute mirage.” JA-714.

The District Court also properly instructed the jury on contributory infringement in accordance with well-established standards originating in *Gershwin Publishing v. Columbia Artists Management*, 443 F.2d 1159, 1162 (2d Cir. 1971), and adopted by this Court. *See CoStar Group v. LoopNet*, 373 F.3d 544, 550 (4th Cir. 2004). Under *Gershwin* and *CoStar*, Cox is liable because it knew or should have known of millions of instances infringement on its network and chose to materially contribute to that infringement.

Sony Corp. of America v. Universal City Studios, 464 U.S. 417 (1984), and *MGM v. Grokster*, 545 U.S. 913 (2005), reaffirmed this rule. While “constructive knowledge of the fact that [post-sale] customers *may use*” a product to infringe is not enough, “liability is manifestly just” where the “‘contributory’ infringer” “knew or should have known” of specific instances of ongoing infringement within its control. *Sony*, 464 U.S. at 437-39 & n.18 (emphasis added). *Grokster*

explained that it was “error” to adopt Cox’s reading of *Sony* and reaffirmed *Gershwin*’s “doctrines of secondary liability” as “well established in the law.” 545 U.S. at 930, 934.

Here, Cox’s liability does not turn on constructive knowledge of the generalized possibility that its network may be used to infringe, the standard rejected in *Sony*. Instead, Cox was put on notice of – and willfully blinded itself to – millions of specific instances of unlawful sharing of BMG’s works by its subscribers, all of which BMG described in infringement notices, repeat infringer reports, and an online Dashboard. Cox attempts to blur these two scenarios under the rubric of “constructive knowledge.” But the distinction is the essence of the holding in *Sony*.

Finally, the District Court properly instructed the jury on damages. The court’s instruction was consistent with the standard set forth by the Second Circuit in *Island Software & Computer v. Microsoft*, 413 F.3d 257, 263 (2d Cir. 2005), and Cox did not raise its present objection below. There is no basis to overturn the jury’s statutory damages award, which was based on all of the facts and circumstances adduced over the course of a two week jury trial.

ARGUMENT

I. COX'S SHAM REPEAT INFRINGER POLICY DOES NOT ENTITLE IT TO A DMCA SAFE HARBOR DEFENSE

Congress enacted the DMCA in light of the “doctrines of direct, vicarious or contributory liability for infringement as they are articulated in the Copyright Act and in the court decisions interpreting and applying that statute” and the risk of “legal exposure for infringements” that these doctrines pose to conduit ISPs. H.R. Rep. 105–551(II) at 64. At the same time Congress sought to preserve “strong incentives for service providers” “to cooperate” with copyright owners to “deal with copyright infringements that take place in the digital networked environment.” S. Rep. 105-190, at 20; H.R. Rep. 105-551(II), at 49. Thus, as a “threshold condition[]” “[t]o be eligible for any of the four safe harbors” in the DMCA, an internet service provider must “adopt[] and reasonably implement[]” “a policy that provides for the termination in appropriate circumstances of subscribers ... who are repeat infringers.” 17 U.S.C. § 512(i); *Perfect 10 v. CCBill*, 488 F.3d 1102, 1109 (9th Cir. 2007).

Cox had the burden to demonstrate that it has adopted and reasonably implemented such a policy. *See Columbia Picture Industries v. Fung*, 710 F.3d 1020, 1039-40 (9th Cir. 2013) (“Because the DMCA safe harbors are affirmative defenses, [the service provider] has the burden of establishing that [it] meets the

statutory requirements.”); *Goodman v. Praxair*, 494 F.3d 458, 464 (4th Cir. 2007) (burden to establish an affirmative defense is on the defendant).

But Cox ignores its burden and points to no evidence that it adopted or implemented such a policy. Indeed, the undisputed evidence shows that Cox’s claim to terminate repeat infringers was an elaborate sham. Though the precise mechanism changed in the Fall of 2012, Cox’s actual policy throughout the entire time period covered by the complaint was *not* to terminate repeat infringers because “for DMCA – we don’t want to lo[se] the revenue.” JA-3242. As Cox’s senior lead abuse engineer explained, “if the gross bandwidth abusers are costing us way more than we are making from them, it makes sense to terminate” – “that’s supposed to be the driver, that they cost more than we make from them.” JA-3246.

Cox’s submissions below and its brief in this Court are devoid of any facts upon which a reasonable jury might find that it implemented a policy of terminating repeat infringers in appropriate circumstances. And Rule 56 “mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A. Cox Had the Burden to Show that It Adopted and Reasonably Implemented a Policy for the Termination of Repeat Infringers in Appropriate Circumstances, But the Undisputed Evidence Showed that Cox's Policy Was *Not* to Terminate

1. Cox's Pre-September 2012 "DMCA=Reactivate" Policy Does Not Qualify for a Safe Harbor

From 2010 until Fall 2012, Cox implemented a sham termination policy under which "DMCA Terms are not really Terminations." JA-3712. Cox's abuse department – with the concurrence of Cox's legal team – purported to terminate repeat infringers but in fact "reactivate[d]" them to "keep customers and gain more [revenue generating units]." JA-3490; JA-3093-94. Jason Zabek, Cox's abuse chief, instructed his employees: "DMCA=reactivate." JA-3500.

Cox attempts to dismiss these emails as "intemperate remarks," Br. 52, but reactivating repeat infringers was Cox's "unwritten" *policy*. JA-3488; JA-3494 ("[I]n 99% of the cases we are going to turn the customer back on."). From the start of the period at issue in this litigation through September 2012, *every single* subscriber "terminated" for repeat copyright infringement was reactivated. In many instances, Cox did not even "actually terminat[e] the service" but "just click[ed] Terminate and Update Ticket, which shows a Termination in the Customers Ticket History." JA-3698; *see also* JA-3931 ("because it's such a huge pain to re-add services once they've been removed, Jason [Zabek] gave us the go-ahead to just ... call it a termination.").

The explicit purpose of this scheme was “to receive protection under the safe harbor” without terminating subscribers. JA-3698. Well aware that it was allowing “habitual abuser[s]” to use its network to infringe, Cox “held on to every subscriber we can” but pretended to terminate repeat infringers so that, if sued, it could claim “to be in compliance with [the] safe harbor.” JA-3696; JA-3488. Zabek explained that by “terminat[ing] for DMCA, we have fulfilled the obligation of the DMCA safe harbor and can start [infringing subscribers] over” with a “clean slate.” JA-3497-98. Armed with his sham termination policy, Zabek described litigation as “a fight I want” and looked forward to “shoving it in [the copyright holder’s] face.” JA4718-19; JA-3509.

But there is no “authority for the proposition that something short of complete termination of a repeat infringer’s account satisfies Section 512(i). Rather, the case law indicates just the opposite.” *Capitol Records v. Escape Media Group*, No. 12-CV-6646, 2015 WL 1402049, at *11 (S.D.N.Y. Mar. 25, 2015). Cox cannot satisfy Section 512(i) by pretending to terminate repeat infringers while in fact continuing to provide them internet service.

Cox has almost nothing to say about its pre-October 2012 conduct. Cox neither contends that sham terminations are sufficient to satisfy Section 512(i) nor identifies a single subscriber who was terminated and not reactivated during this period. Instead, Cox argues that it never encountered appropriate circumstances to

terminate subscribers because it never had actual knowledge of repeat infringement. Br. 53. But Cox itself determined that there were appropriate circumstances to terminate dozens of repeat infringers during this period. Rather than terminate those repeat infringers, it reactivated them so that they could continue to infringe. As the District Court held, Cox's policy was an "absolute mirage" and "it was Cox's policy to intentionally circumvent the DMCA." JA-713-14.

2. Cox's Post-September 2012 Policy Was Also Not to Terminate

In the Fall of 2012, Cox changed its termination policy to mean that "when we terminate Customers, we REALLY terminate the Customer (for 6 months)." JA-3503. In fact, Cox just stopped terminating repeat infringers for copyright infringement.

Under Cox's new policy, repeat infringers were "*considered*" for termination after they were the subject of fourteen notices – not counting notices from blocked or blacklisted senders or notices in excess of an approved sender's 200-notice daily limit – within a six-month period. But, over and over, Cox declined to terminate flagrant repeat infringers. While Cox did terminate a handful of subscribers who exceeded their bandwidth limits or failed to pay their bills on time, this does not satisfy the DMCA. Keeping repeat infringers online while terminating unprofitable subscribers is not a policy of terminating *infringers*.

Cox admits that, upon repealing its policy of reactivating repeat infringers, it drastically reduced the number of “terminations” for repeat copyright infringement and that, in every or almost every subsequent situation where Cox has terminated, the subscriber was also guilty of failing to pay on time or of exceeding bandwidth allotments. JA-3959-60 ¶¶ 66, 68; JA-4499 ¶¶ 66, 68. Cox had fake “terminated” an average of 16 subscribers a month between January 2010 and August 2012. But of the 15,857,167 notices of infringement Cox received between September 2012 and November 2014 and the 711,936 warnings and “suspensions” it issued to subscribers during that period (each of whom had been the subject of at least one prior notice in the preceding six months), Cox produced a list of only twenty-one subscribers terminated – fewer than one a month. Cox JA-3624-26.

Nor did Cox provide any evidence that any of those twenty-one subscribers were terminated *because of repeat infringement*. From the incomplete records Cox produced in this litigation, BMG was able to show that at least 17 had been flagged for excessive bandwidth usage or late payment issues. JA-3745-3920. And Cox’s internal documents reflect that excessive bandwidth usage, which is subject to a “hard 3-strikes process,” is the key to its copyright termination decisions. JA-3416; JA-3703 (noting a “plethora” of “excessive bandwidth complaints”). According to abuse manager Joseph Sikes, whether “gross bandwidth abusers are

costing us way more than we are making from them” is “supposed to be the driver” of the decision “to terminate.” JA-3246.

By contrast, Cox repeatedly failed to terminate profitable subscribers that it regarded as flagrant, repeat infringers. As to one subscriber, who had already been advised three times to “remove all PTP programs,” Sikes instructed “This customer will likely fail again, but let’s give him one more chan[c]e. [H]e pays 317.63 a month.” JA-3546-47; *see also* JA-4530 (“This Customer pays us over \$400/month and if we terminate their internet service, they will likely cancel the rest of their services.”).

The “terminate next time” refrain was itself a sham. The same customers were told over and over that they would be terminated on the next complaint, but never were. Regarding another subscriber, who had “been told multiple times that he needs to secure his open wireless router”⁵ and that “the next complaint can result in termination of service,” Sikes stated “this is their absolute last chance to either secure their wireless routers and/or remove ALL P2P clients. Next

⁵ The “open wireless” pretext was something of an inside joke among Cox abuse staff. By the time repeat infringers were considered for termination, they had been told to secure their wireless router during at least four in-person calls with high-level customer service representatives. As Zabek wrote of one infringing subscriber who had been threatened with litigation (but was not terminated), “They can always claim ‘Open Wi-fi’ in court if they need to. That might work. ;-).” JA-4335; *see also* JA-4171 (“there is no one out there sitting in a van downloading movies.”).

complaint=6 months Termination.” JA-4533. When the subscriber continued to infringe, Cox did not terminate. Instead, it decided to “suspend this Customer, one LAST time.” JA-4528.

Over and over, Cox failed to terminate flagrant repeat infringers, including one who admitted to “years of doing this” and whom Cox abuse employees regarded as “well aware of his actions.” JA-3701. Cox argues that “the record does not reveal what ‘this’ referred to.” Br. 54. But the “Customer was advised to stop *sharing*, check his wireless and remove his *PTP* programs.” JA-3701 (emphasis added). Cox declined to terminate another customer who previously had been “advised to remove file sharing program” and “knows ‘it’s his fault.’” JA-3705. Cox now claims that “there is no evidence of *what* the user’s ‘fault’ was.” But the user was advised to “remove file sharing program” and admitted that the resulting infringement notices were “his fault.” JA-3705.

Cox’s unwillingness to address the plain meaning of its own emails echoes its own efforts to avoid knowledge of infringement. But courts consistently have held that a repeat infringer “policy [is] woefully inadequate” where an ISP has “regularly declined to ban” “particular users” it “learned ... were engaged in extensive repeat infringement.” *Datatech Enterprises v. FF Magnat*, No. C 12-04500 CRB, 2013 WL 1007360, at *6 (N.D. Cal. Mar. 13, 2013); *see also CCBill*, 488 F.3d at 1113 (“service provider failed to respond when it had knowledge of the

infringement”); *Disney Enterprises v. Hotfile Corp.*, No. 11-20427-CIV, 2013 WL 6336286, at *22 (S.D. Fla. Sept. 20, 2013) (granting summary judgment where “despite receiving over eight million notices for five million users, Hotfile only terminated 43 users ... for reasons that had no apparent relation to the notices Hotfile received”).

Moreover, *Cox* bears the burden to show that it implemented a repeat infringer policy. But it cannot point to any evidence that it *ever* terminated a repeat infringer for copyright infringement. JA-720. *Cox*’s generalized “assert[ions] that it has taken action against” infringers is simply not enough where it does not “stop providing its ... [high-speed internet] service to known infringers.” *Perfect 10 v. Cybernet Ventures*, 213 F. Supp. 2d 1146, 1178 (C.D. Cal. 2002).

Congress enacted Section 512(i) so that “those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access” – not to take internet access away from those who fail to pay their bills on time or exceed their bandwidth caps. H.R. Rep. 105-551(II), at 61; S. Rep. 105-190, at 62. Continuing to provide internet service to repeat infringers unless they exceed their bandwidth quotas or fail to pay their bills on time does not entitle *Cox* to protection under the DMCA.

B. Ignoring Notices and Refusing to Terminate Known Repeat Infringers Is Not Reasonable Implementation of a Termination Policy

Rather than address its actual policy and practice, Cox argues that it never faced appropriate circumstances to terminate because “repeat infringers” must have been adjudicated guilty of infringement, because notices of infringement cannot provide ISPs with adequate knowledge, and because a jury must assess the reasonableness of its termination decisions.

This argument fails at the threshold because, as described above, Cox never adopted or implemented a policy of terminating repeat infringers at all. Cox does not proffer any evidence that even a single subscriber was actually terminated for copyright infringement or that it actually implemented a termination policy in the first place. Failing that, there is no need to address Cox’s reasonableness.

Nor can Cox prevail on reasonableness. No court has adopted Cox’s arguments that “repeat infringers” refers only to adjudicated infringers or that notices are inadequate to provide knowledge of infringement. And no jury could have found that Cox reasonably implemented a termination policy on the record in this case.

1. “Repeat Infringers” Means Repeat Infringers, Not Adjudicated Infringers

By the DMCA’s plain terms, one may be a “repeat infringer” without the fact having been adjudicated in court. “Giv[ing] the term its ordinary meaning,”

the Second Circuit has observed that “all it [takes] to be a ‘repeat infringer’ [is] to repeatedly [share] copyrighted material.” *EMI Christian Music Group v. MP3tunes*, --- F.3d ----, 2016 WL 7235371, at *4 (2d Cir. Dec. 13, 2016). This Court has held that DMCA immunity applies only to “service providers who can prove they do not have actual or constructive knowledge of the infringement,” and that an ISP’s DMCA protection “disappears ... at the moment it becomes aware that a third party is using its system to infringe.” *ALS Scan v. RemarQ Communities*, 239 F.3d 619, 625 (4th Cir. 2001).

This is consistent with the opinion of every other court to address the issue, each of which has held that an ISP’s obligations under Section 512(i) are implicated where it has actual knowledge of infringement. *See, e.g., CCBill*, 488 F.3d at 1113 (policy is unreasonable “if the service provider failed to respond when it had knowledge of the infringement”); *Cybernet Ventures*, 213 F. Supp. 2d at 1177 (“appropriate circumstances ... cover, at a minimum, instances where a service provider is given sufficient evidence to create actual knowledge of blatant, repeat infringement by particular users”).

Unable to cite a single case adopting its view that “repeat infringers” means *adjudicated* repeat infringers, Cox argues that Section 512(i) must refer to adjudications because it omits terms such as “alleged” or “claimed” that appear elsewhere in the statute. Br. 48. But Section 512(i) also omits any reference to

adjudication, though Congress referred to court action elsewhere in the statute.

E.g., 17 U.S.C. § 512(b)(2)(E).

Cox's error is to assume that there is no space between allegations of infringement and adjudication. Just as it is possible to be alleged an infringer without actually having infringed, it is possible to actually infringe – and for an ISP to know of that infringement – without adjudication. The omission of any reference to allegations or to adjudications reflects that Congress intended Section 512(i) to cover repeat infringement, no more and no less. “Courts must construe statutes as written, and not add words to their own choosing.” *Ignacio v. United States*, 674 F.3d 252, 255 (4th Cir. 2011). Actual repeat infringement is what the plain text requires.⁶

Reading Section 512(i) to require adjudication would undermine Congress's intention to give “online service providers ... strong incentives to work with copyright holders” to prevent infringement in a “regulatory scheme in which courts are meant to play a secondary role to self-regulation.” *Cybernet Ventures*, 213 F. Supp. 2d at 1178; *see also* H.R. Rep. 105–551(II) at 49; S. Rep. 105–190 at 20.

It would also undermine secondary copyright infringement liability, which allows copyright holders to sue enablers of infringement without first litigating

⁶ Indeed, adjudication played no part in Cox's own policy. Cox determined that “we still must terminate [based on notices] in order for us to be in compliance with safe harbor.” JA-3488.

against thousands of individual infringers. “Recognizing the impracticability or futility of a copyright owner’s suing a multitude of individual infringers, ... the law allows a copyright holder to sue a contributor to the infringement instead.” *In re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003); *see also Grokster*, 545 U.S. at 929-30 (“When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being ... secondary liability on a theory of contributory or vicarious infringement.”). By giving every service provider a DMCA safe harbor from secondary liability unless it failed to terminate adjudicated infringers, Cox would eliminate secondary liability as an alternative to suits against individual subscribers.⁷

Congress intended to discourage infringement by ensuring that “those who repeatedly or flagrantly abuse their access to the Internet” by infringing copyright face “a realistic threat of losing that access.” H.R. Rep. 105–551(II), at 61; S. Rep. 105–190, at 52. Sanctioning infringers through termination would be superfluous if it applied only to repeat infringers already found liable in a court of law. Thus,

⁷ Cox argues that interpreting “repeat infringer” to mean anything other than adjudication would impose a monitoring requirement on ISPs that Congress did not authorize. Br. 50. But an actual knowledge standard “would not require [ISPs] to ‘monitor’ or ‘affirmatively seek facts’ about infringing activity . . . because it already had adequate information at its disposal.” *EMI Christian*, 2016 WL 7235371, at *6.

service providers cannot “turn a blind eye to the source of massive copyright infringement ... until a court orders the provider to terminate each individual account.” *Cybernet Ventures*, 213 F. Supp. 2d at 1177.

2. Cox Had Actual Knowledge of Repeat Infringement But Did Not Terminate

“[A]ctual notice of infringement from the copyright holder” is the “most powerful evidence of a service provider’s knowledge.” *UMG Recordings v. Shelter Capital Partners*, 718 F.3d 1006, 1020 (9th Cir. 2013). Thus, to take advantage of the safe harbor, an ISP must “ha[ve] a working notification system,” “a procedure for dealing with DMCA-compliant notifications,” and must “terminate[] users who repeatedly or blatantly infringe copyright.” *CCBill*, 488 F.3d at 1109-10. ISPs must not “allow[] notices of potential copyright infringement to fall into a vacuum and to go unheeded.” *Ellison v. Robertson*, 357 F.3d 1072, 1080 (9th Cir. 2004).

In its AUP, Cox instructed – and continues to instruct – copyright owners to send notices in the form specified by Section 512(c). JA-2213; JA-3624-26, JA-3665-68; <https://www.cox.com/aboutus/policies/procedure-for-making-copyright-infringement-claim.html>. Cox admitted at trial that BMG’s notices satisfied all of those requirements and that it would have accepted them if not for the settlement offers. JA-4735; JA-2233; JA-1744-45; JA-3109-10; JA-3160.

Yet, Cox now argues that “Congress barred using third-party notices to show a Section 512(a) ISP’s actual knowledge” when it enacted the take-down notice procedure Section 512(c)(3). Br. 51-52. Cox relies on language in Section 512(c)(3) providing that notices “shall not be considered *under paragraph (1)(A)* [of subsection (c)] in determining whether a service provider has actual knowledge” for purposes of the Section 512(c) safe harbor if they do not comply with six listed requirements. 17 U.S.C. § 512(c)(3)(B)(i) (emphasis added). Cox quotes the language with ellipses replacing “under paragraph (1)(A)” to suggest that infringement notices to conduit ISPs can have no effect on an ISP’s knowledge for *any* purpose. But BMG’s notices did satisfy all six requirements, and nothing in Section 512(c), which is not at issue in this case, prevents even non-compliant notices from establishing knowledge in other contexts.

Cox also mischaracterizes two appellate opinions. Br. 52. *CCBill*, 488 F.3d at 1113, held that proper notices *can* provide knowledge for purposes of Section 512(i). Meanwhile, *RIAA v. Verizon Internet Services*, 351 F.3d 1229, 1226 (D.C. Cir. 2003), considered whether conduit ISPs must respond to subpoenas under Section 512(h), which incorporates the requirements of Section 512(c). Because Section 512(c) applies only to hosting ISPs, the D.C. Circuit found Section 512(h) inapplicable to conduit ISPs as well. But the decision does not suggest that notices

from copyright holders are inadequate to give conduit ISPs knowledge for purposes of Section 512(i).

Cox claims that BMG's notices are "littered with flaws." Br. 51. But Cox was able to identify errors in a tiny handful of the 1.8 million BMG notices at issue. The evidence showed that Rightscorp's system was "well over 99%" accurate. JA-1052. Cox does not even appeal the jury's finding of direct infringement, which was based on the same data as the notices.

The only "flaw" Cox identifies is the Rightscorp notices' reference to "downloaded, uploaded, and/or offered for upload." Br. 51. Cox equates "offered for upload" to "making available" and thereby argues that the notices do not properly allege infringement. But "mak[ing] the work available to the ... public" infringes the distribution right. *Hotaling v. Church of Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997); JA-4339-40. And because BitTorrent automatically causes files to start uploading and downloading, "offering for upload" in this context involves actual dissemination, not just "making available." JA-981-82.⁸

⁸ Cox also cites to a "Rightscorp notice . . . refer[ring] to a work that the district court determined Plaintiffs did not even own." Br. 51 n.7. This is a Round Hill, not a BMG, notice. While the District Court found that Round Hill Music LLC, not Round Hill Music LP, should have brought this suit, the notice at issue (like all Round Hill notices) refers to "Round Hill Music *and its affiliated companies*" – and is therefore accurate. JA-228 (emphasis added).

Nor was Cox's knowledge based solely on individual notices. As a result of Cox's notice filtering, the same subscriber would have to be the subject of approximately 280 notices before reaching the termination stage of Cox's graduated response. By that point, Cox representatives would have spoken with each subscriber at least four times, where they learned that customers were "habitual abusers," had "years of doing this," and so forth.

Yet, Cox caused millions of notices to go "unheeded" and "fall into a vacuum." *Ellison*, 357 F.3d at 1080; *Hotfile*, 2013 WL 6336286, at *21 ("deliberate disregard" reflected in Cox's "practice to ignore [infringement notices] rather than act to terminate the users they were associated with" deprives it of a safe harbor). Based solely on the notices that made it through Cox's filtering procedures, Cox was aware of more than 700,000 instances of repeat infringement. "[T]hat hundreds or thousands of users were not stripped of their [] privileges after receiving notices of infringement" is "perhaps the strongest indicator of [Cox's] failure to terminate ... repeat infringers in appropriate circumstances." *Escape*, 2015 WL 1402049, at *13. Implementation of a repeat-infringer policy is "unreasonable when service providers fail[] to terminate users who 'repeatedly or blatantly infringe copyright.'" *Capitol Records v. Vimeo*, 972 F. Supp. 2d 500, 514 (S.D.N.Y. 2013) (quoting *CCBill*, 488 F.3d at 1109).

Nor is there any affirmative evidence in the record of Cox's reasonableness or of the propriety of its termination decisions. As the District Court observed, "Cox has not come forward with any evidence that would raise a genuine issue of material fact as to whether it has" reasonably implemented a repeat infringer policy. JA-720. And Cox points to none on appeal. Rule 56 "mandates the entry of summary judgment" because Cox "fail[ed] ... to establish" that it terminates repeat infringers in appropriate circumstances, an "element essential to [its] case and on which [it] will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

II. COX IS LIABLE FOR CONTRIBUTORY INFRINGEMENT

Having lost its safe harbor, Cox attempts to re-write the law of contributory copyright infringement to give itself and its fellow conduit ISPs the immunity that Congress denied them in the DMCA. But the jury was properly instructed in the long-standing law of contributory liability. It held Cox liable because Cox willfully blinded itself to more than 1.8 million specific instances of copyright infringement by its subscribers so that it could continue to profit by supplying them the means with which to infringe.

On appeal, Cox asks the Court to rule that, because their networks have substantial noninfringing uses, conduit ISPs cannot be liable for contributory infringement unless they actively induce infringement. Alternatively, Cox seeks to

impose an actual knowledge standard that, by enabling ISPs to willfully blind themselves to infringement, would have the same practical effect.

Neither standard is the law. While knowledge of infringement cannot be inferred from the fact that a product with substantial noninfringing uses *may* be used to infringe, *Sony*, 464 U.S. at 439, contributory liability will still arise if the defendant has knowledge of specific infringements by customers with whom it has an ongoing relationship. And the defendant need not have actual knowledge if it was willfully blind to or otherwise should have known of the infringement.

In proposing to depart from these standards in a manner that would immunize conduit ISPs, Cox asks this Court to alter the balance Congress struck in the DMCA. Legislating against the existing “doctrines of direct, vicarious or contributory liability for infringement as they are articulated in the Copyright Act and in the court decisions interpreting and applying that statute” and recognizing the risk of “legal exposure for infringements” that these doctrines pose to conduit ISPs, H.R. Rep. 105–551(II) at 64, Congress did not grant them immunity. Instead, to “preserve[] strong incentives for service providers and copyright owners to cooperate,” Congress left open the traditional avenue of contributory liability against conduit ISPs that fail to terminate repeat infringers in appropriate circumstances. *Id.* at 49-50. That is the basis on which Cox was held liable.

A. Cox's Knowledge of and Material Contribution to its Subscribers' Infringement Makes It a Contributory Infringer

1. Sony Does Not Exempt ISPs from Traditional Principles of Contributory Infringement

As Cox acknowledges, it has long been the law that “[u]nder a theory of contributory infringement, ‘one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another’ is liable for the infringement, too.” *CoStar Group v. LoopNet*, 373 F.3d 544, 550 (4th Cir. 2004). This formulation, requiring knowledge of and material contribution to infringement, originated in *Gershwin*, 443 F.2d at 1162, and has become the controlling test for contributory infringement. In *Grokster*, the Supreme Court endorsed *Gershwin*'s “doctrines of secondary liability” as “well established in the law.” 545 U.S. at 930.

The District Court's instructions accurately captured this standard and were consistent with the pattern instructions issued by the Seventh, Ninth, and Eleventh Circuits. JA-2077. Cox, however, argues that the District Court erred by failing to instruct the jury that Cox could not be liable if its internet service has a substantial non-infringing use. Br. 22-23. Such a rule would immunize conduit internet service providers against secondary liability for copyright infringement – exactly what Congress chose *not* to do when it enacted the DMCA.

Sony, on which Cox relies, is a case about *imputed intent* and does not support Cox's proposed rule. *Sony* involved a product, the home videotape recorder, that was placed into the stream of commerce and subsequently might be used by purchasers to infringe. *See* 464 U.S. at 438. The manufacturer, Sony, had no knowledge of specific infringements and no ongoing relationship with any infringers at the time the infringement occurred. *Id.* Thus, liability could rest only "on the fact that [Sony] ha[d] sold equipment with constructive knowledge of the fact that its customers *may use* that equipment" to infringe. *Id.* at 439.

Analogizing to the patent law's staple article of commerce doctrine, the Supreme Court held that a manufacturer's generalized knowledge of the possibility that a product with substantial noninfringing uses could be used to infringe was not a basis on which to find contributory liability. *Id.* at 439-42. A contrary rule would give the intellectual property owner control over the defendant's product, notwithstanding its substantial noninfringing uses, simply because the product *could* be used to infringe. *Id.* at 441. Thus, "Sony barred secondary liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement." *Grokster*, 545 U.S. at 933.

However, "*Sony* did not displace other theories of secondary liability," and concluding that contributory infringement is *never* available so long as the product

at issue has a substantial noninfringing use would “convert[] the case from one about liability resting on imputed intent to one about liability on any theory.” *Grokster*, 545 U.S. at 934. Indeed, *Sony* expressly distinguished cases such as *Gershwin* “involving an ongoing relationship between the direct infringer and the contributory infringer at the time the infringing conduct occurred.” *Id.* at 437. Traditional rules of contributory infringement continue to apply, and *Sony*’s “holding [is] of limited assistance” to a defendant that has “actual, specific knowledge of direct infringement.” *A&M Records v. Napster*, 239 F.3d 1004, 1020 (9th Cir. 2001).

Thus, *Sony* is no bar to liability premised on knowledge of specific instances of infringement on Cox’s network by subscribers with whom it has an ongoing relationship. In *Sony*, basing imputed knowledge of infringement “entirely on the sale of an article of commerce” that could be used to infringe threatened to drive the videotape recorder out of the market entirely and give the copyright owner “effective control over [its] sale.” 464 U.S. at 440-41. By contrast, holding Cox liable for tolerating specific instances of infringement on its network does not pose any such risk. Because Cox is a service provider, it need not deprive the market of its cable service; it need only deny its service to specific customers who, with its knowledge, continually and habitually use its service to infringe.

2. Cox Conflates Constructive Knowledge of Specific Infringements with Generalized Knowledge that Infringement May Occur

Acknowledging that *Sony* does not immunize all defendants whose products have substantial non-infringing uses, Cox attempts to limit liability to circumstances where “the defendant actually knew of specific infringements” so that constructive knowledge and willful blindness are not enough. Br. 25. Such a rule would encourage ISPs to evade liability by blinding themselves to notices of infringement and would have the practical effect of immunizing them against contributory liability. This is why constructive knowledge is treated as knowledge throughout the law.

Cox relies on *Sony*'s holding that “constructive knowledge of the fact that [] customers *may use*” an article of commerce to infringe to argue that constructive knowledge does not suffice to make out a claim of contributory infringement. Br. 25; *Sony*, 464 U.S. at 439 (emphasis added). But a seller's constructive knowledge of the general possibility that an article may be used to infringe is very different from constructive knowledge of actual ongoing infringement on one's systems. Just because constructive knowledge that customers *may use* an item to infringe does not mean that constructive knowledge can never suffice. On the contrary, *Sony* itself described a case where the defendant “knew *or should have known*” of

the infringement as a “situation[] in which the imposition of [contributory] liability is manifestly just.” 464 U.S. at 437-38 and n.18 (emphasis added).

Courts thus “interpret[] the knowledge requirement for contributory copyright infringement to include both those with actual knowledge and those who have reason to know of direct infringement.” *Ellison*, 357 F.3d at 1076. This rule is consistent with general principles of knowledge across the law. As Cox’s own case holds, those who “should have known (i.e., had constructive knowledge) ... are charged with the knowledge.” *Starnes v. Commissioner of Internal Revenue*, 680 F.3d 417, 434 (4th Cir. 2012).

Cox argues that the Ninth Circuit in *Napster* required actual rather than constructive knowledge. Br. 26, 27. But the decision holds just the opposite: that a secondary infringer must “know or have reason to know of direct infringement.” *Napster*, 239 F.3d at 1020 (citations omitted); *id.* at 21 (“knew or had reason to know of its users’ infringement of plaintiffs’ copyrights”).⁹

Even if constructive knowledge were inadequate, the jury’s willfulness verdict shows that it found (at a minimum) willful blindness, not just that Cox “should have known” of the infringement. JA-2080. That makes Cox’s constructive knowledge argument irrelevant. “[W]illful blindness is knowledge, in

⁹ Cox also cites *Gershwin*, 443 F.2d at 1162, and *Perfect 10 v. Amazon.com*, 508 F.3d 1146, 1172 (9th Cir. 2013). Those decisions relied on actual knowledge and did not address whether constructive knowledge suffices.

copyright law ... as it is in the law generally.” *Aimster*, 334 F.3d at 650; *see also* *Viacom International v. YouTube*, 676 F.3d 19, 35 (2d Cir. 2012) (“willful blindness ... demonstrate[s] knowledge or awareness of specific instances of infringement”). Cox’s willful blindness to infringement amounts to knowledge.

3. The Evidence Showed, the Instructions Required, and the Jury Found that Cox Knew of and Contributed to Specific Instances of Infringement

Applying these principles of secondary infringement law, the jury properly found Cox guilty of contributory infringement. The evidence showed that BMG’s agent Rightscorp sent Cox 1.8 million notices for the BMG songs at issue in this litigation. Each of those notices was sworn under penalty of perjury and identified the date, time, IP address, file name, and song for a specific act of infringement on Cox’s network. Rightscorp also provided the information to Cox in weekly repeat infringer reports and through an automated, searchable, and sortable online Dashboard by which Cox could view the entire history of infringement of BMG’s works on its network. JA-931, JA-1270-73, JA-1349-50, JA-5197-224; JA-5337-41; JA-2726; JA-2468-70; JA-5016-19; JA-5020-22; JA-5309-11; JA-1260-63, JA-1479; JA-1789-90.

But Cox blinded itself to this notice of infringement as part of its policy to “ignore the bulk of DMCA notices.” JA-5185. After sending Rightscorp the “magic form letter” by which Cox rejected all notices with settlement offers, JA-

3531, Cox configured its mail server so that it would not even download Rightscorp's notices. JA-3662; JA-3527. Meanwhile, Cox's abuse staff ignored the weekly repeat infringer emails and the Dashboard. JA-1768; JA-1776-77.

Cox argues that BMG's notices cannot give rise to knowledge of infringement because they are mere allegations. But courts unanimously hold that infringement notices are sufficient to establish knowledge in the copyright infringement context. *See Cybernet Ventures*, 213 F. Supp. 2d at 1168-69 (emails notifying the defendant of copyright infringement on its system established actual knowledge of infringement); *Escape*, 2015 WL 1402049, at *43 (“[T]he evidence demonstrates that Escape had knowledge of the infringing activity” based on “DMCA takedown notices of infringement it received.”).

As in the DMCA context, Cox's assertion that these notices constitute “only accusations,” Br. 28, would undermine the entire purpose of secondary liability to allow[] a copyright holder to sue a contributor to the infringement instead” of a “multitude of individual infringers.” *Aimster*, 334 F.3d at 645; *see also Grokster*, 545 U.S. at 929-30. The evidence at trial indicated that the notices were overwhelmingly accurate, and Cox does not even challenge the jury's direct infringement verdict, which was based on the same system that generated the notices.

Cox also argues that the jury instructions allowed the jury to find contributory infringement without identifying specific acts of infringement. Br. 27. Nothing could be further from the truth. The court required BMG to show that “users of Cox’s Internet service uploaded or downloaded BMG’s copyrighted works” and that Cox “knows or should have known of *the* infringing activity” – i.e., the same uploads and downloads that it identified as direct infringements. JA-2207 (emphasis added). The court also told the jury that “Plaintiff has the burden of proving ... that there was direct infringement of BMG’s copyrighted works by users of Cox’s Internet service” and “that Cox knew or should have known of *such* infringing activity.” *Id.* The court’s instructions specifically linked Cox’s knowledge to the infringing acts at issue, particularly in the context of the evidence in the case, all of which focused on 1.8 million specific acts of infringement and the separate notices directed to each.¹⁰

Without addressing the abuse of discretion standard applicable to jury instructions that do not mis-state the law, Cox baldly asserts that these instructions “likely misled or confused the jury.” Br. 30. But there is no evidence of any such confusion. And there was no abuse of discretion. The court’s contributory infringement instruction was consistent with the legal standard set out in *CoStar*,

¹⁰ Cox also complains that the “certain exceptions” language may have confused the jury. Br. 22. But this appeared in the prefatory summation, not in the operative instruction itself. JA-2077-78.

and with the Seventh, Ninth, and Eleventh Circuit pattern instructions. Indeed, Cox's proposed instruction below employed the same "knew or had reason to know of such direct infringement" formulation that appeared in the court's instruction. It differed only in its request for additional language requiring the jury to find no substantial noninfringing use or inducement. JA-1905. Nowhere in the record below did Cox raise its concern that the wording of the court's instruction did not focus the jury on specific acts of infringement, and Cox has waived any such complaint.

Cox has also waived its objection to the language of the willful blindness instruction. While Cox told the District Court that no willful blindness instruction was appropriate, it argued that "if the Court chooses to instruct on willful blindness, Cox believes the instruction should follow the standard articulated in *Viacom*" that willful blindness occurs where the defendant "was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." Dkt. 734 at 7 (quoting *Viacom*, 676 F.3d at 35). That is exactly the instruction the court issued. JA-2078. Rather than propose alternative language, Cox said "We appreciate the fact ... that the Court accepted this language. We do object to this altogether. We don't think that a willful blindness instruction is appropriate. And we object to even this formulation." JA-2057.

Nor did the willful blindness instruction allow the jury to rely on generalized knowledge. The willful blindness instruction simply defined the meaning of knowledge for purposes of the contributory infringement instruction, which tied knowledge to specific acts of direct infringement. And the notices, Dashboard, and repeat infringer reports would have given Cox knowledge of specific acts of infringement. The overwhelming evidence showed that Cox affirmatively blocked BMG's notices so that it would not learn of infringement, and the jury properly found willful blindness on that basis.

4. Cox Materially Contributed to Infringement

The evidence also shows that Cox materially contributed to infringement on its network. “[P]roviding the site and facilities for known infringing activity is sufficient to establish contributory liability.” *Fonovisa v. Cherry Auction*, 76 F.3d 259, 264 (9th Cir. 1996); *see also Napster*, 239 F.3d at 1022 (same); *Ellison*, 357 F.3d at 1078 (holding that AOL materially contributed to infringement by providing the means of access to Usenet groups through which its subscribers share infringing content).

Here, Cox not only provided the site and facilities for its subscribers' infringement but instituted a sophisticated scheme to shield them from any notices or warnings about their infringement by copyright holders. Cox affirmatively “shield[ed] customers from any concerns regarding copyright violations” and

“g[a]ve them the comfort that they [could] continue to violate [copyright] with impunity.” JA-2038-40. Indeed, Cox reactivated subscribers who had been “terminated” for copyright infringement and gave them a “clean slate” so that they could continue to infringe. JA-3497-98.

Citing *Amazon*, 508 F.3d at 1172-73, Cox argues that, for it to be held liable, there must be “reasonable and feasible means to refrain from providing access to infringing works” and that no such means exist because it does not store infringing content on servers from which it can be taken down. Br. 29. This is just another way to argue that conduit ISPs should be immune to contributory infringement liability and misconstrues the law. *Amazon* held that Google could be liable because it “substantially assists websites to distribute their infringing copies to a worldwide market and assists a worldwide audience of users to access infringing materials” – exactly what Cox does here. 508 F.3d at 1172. The Ninth Circuit did not impose a novel requirement – found in no other case – that contributory infringement is limited to 512(c) hosting ISPs. Moreover, Cox can prevent access to infringing works by terminating subscribers or by less aggressive measures such as blocking the BitTorrent traffic of known infringers. *See* In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28, FCC 15-24 ¶¶ 113, 132, 304-305 (2015) (https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf) (A “broadband provider [may] refus[e] to transmit unlawful

material, such as copyright-infringing materials” and make “reasonable efforts ... to address copyright infringement”).

Cox also argues that the court should have given the jury a substantial non-infringing use instruction when it asked for clarification of the term “material contribution.” Br. 23. But *Sony* – as Cox argues elsewhere in its brief – relates to the knowledge standard for contributory infringement, not material contribution. And Cox’s requested non-infringing use instruction is wrong on the law. *See* above at 39-50. The court, which also rejected BMG’s proposed “site and facilities” clarification, was well within its rights to leave it to the jury to determine whether Cox materially contributed to copyright infringement in light of the evidence presented. *See Gentry*, 816 F.3d at 238-39 (discretion to determine whether more detailed instruction was warranted under the circumstances of the case).

B. *Grokster* Does Not Limit Contributory Liability to Inducement

Cox also argues that the Supreme Court’s decision in *Grokster* restricts contributory liability for products with substantial noninfringing uses to situations in which there is inducement of direct infringement by the defendant. Br. 35-38. While *Grokster* found liability on the basis of inducement, it did not limit liability to those circumstances, and Cox is unable to identify a single case that supports its reading of *Grokster*.

In *Grokster*, the Supreme Court made clear that *Sony* was a case about “imputation” of knowledge: there could be no such imputation “solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement.” 545 U.S. at 933. In *Sony*, the “only conceivable basis for imposing liability” was the “knowledge that some would use them to infringe,” but where a defendant had more information available, “*Sony* did not displace other theories of secondary liability” and “was never meant to foreclose rules of fault-based liability derived from the common law.” *Id.* at 931, 934-35.

Grokster, which also involved no knowledge of specific infringements, went on to find liability based on *one* of those “theories,” *id.* at 935-37 (emphasis added), but this does not mean – as Cox would have it – that the *Grokster* Court intended to foreclose all of the others. “[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.” *Amazon.com*, 508 F.3d at 1171 n.11. On the contrary, *Grokster* re-affirmed *Gerswhin*’s “doctrines of secondary liability,” which predicate contributory infringement on “induce[ment] ... *or* material contribut[ion],” as “well established in the law. 464 U.S. at 930; 443 F.2d at 1162 (emphasis added).

Rather than limit contributory infringement to inducement, *Grokster* elaborates on one prong of contributory infringement doctrine – inducement. Thus, post-*Grokster* cases continue to impose contributory infringement liability where a defendant knows of and materially contributes to infringement. *See* 3 Nimmer on Copyright § 12.04(A)(4)(b), (5)(a) (collecting cases).

Cox suggests that this Court’s decision in *CoStar* requires inducement. Br. 36. Not so. The quoted language from *CoStar* indicates that, in comparison to direct infringement, contributory infringement requires “additional elements *such as* knowledge coupled with inducement.” 373 F.3d at 549 (emphasis added). The decision subsequently makes clear that contributory liability applies to one who “induces, causes *or* materially contributes to the infringing conduct of another.” *Id.* at 550 (emphasis added).

Cox also argues by analogy to the Patent Act’s contributory infringement language, 35 U.S.C. § 271, that contributory liability should be limited to situations involving inducement or products without substantial non-infringing uses. Br. 38-39. But *Sony* recognized that “there are substantial differences between the patent and copyright laws.” 464 U.S. at 422. It turned to patent law only after finding that the traditional circumstances for contributory copyright liability did not apply because there was no “ongoing relationship between the direct infringer and the contributory infringer at the time the infringing conduct occurred,” leaving as the

only basis for liability Sony's generalized knowledge that a product sold into the stream of commerce might be used to infringe. *Id.* at 438-39.¹¹ That created a scenario analogous to the patent law's staple article of commerce doctrine, and so the Court looked to patent law as a relevant analogy. But copyright – due to its differences with patent law – has its own common law contributory infringement doctrines. And *Grokster* makes clear that *Sony's* reference to the patent laws “was never meant to foreclose rules of fault-based liability derived from the common law,” which are “well established” in copyright law. 545 U.S. at 930, 934-35.

C. The Court's Evidentiary Rulings Were Proper

Again without addressing the applicable abuse of discretion and prejudice standards, Cox challenges evidentiary rulings below. Cox argues that the infringement notices are hearsay and should not have come into evidence without a limiting instruction. Br. 31-32. This argument suffers from several flaws.

First, the notices are not hearsay. They are computer generated business records. And “nothing ‘said’ by a machine ... is hearsay.” *United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007). The purpose of the hearsay rule – to ensure the opportunity for cross-examination – “ha[s] no application to the

¹¹ Cox discusses the types of relationships that do or do not give rise to vicarious liability and suggests that, because an ongoing relationship is a factor for vicarious, it can have no role in the contributory infringement analysis. Br. 41-44. But as *Sony* expressly states, the existence of an “ongoing relationship” impacts the knowledge element of “contributory infringement.” 464 U.S. at 437-38.

computer generated record.” *Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534, 565 (D. Md. 2007). Cox argues that the notices are signed by Rightscorp’s CEO. But the relevant information is the computer-generated infringement data, and where the “data [a]re the only basis” for witness’s statement, there is no hearsay. *Washington*, 498 F.3d at 229-30.

Because the notices reflected the same information contained in Rightscorp’s databases, Cox’s proposed instruction that “the notices should not be equated with infringement” would have suggested that Rightscorp was unable to identify infringements and severely prejudiced BMG. At trial, the parties extensively explored the significance and reliability of the Rightscorp system. JA-2780-86. The court rightly declined to put its foot on the scale in the manner requested by Cox.

Nor is the matter relevant to Cox’s appeal. Cox argued below that a limiting instruction was necessary to inform the jury that the notices could not be relied upon as evidence of infringement. JA-249. But Cox does not challenge the direct infringement verdict. And hearsay notices are admissible to show notice to Cox, the only question at issue on appeal. *See Benedi v. McNeil-P.P.C.*, 66 F.3d 1378, 1386 (4th Cir. 1995) (admitting hearsay because “the reports were highly probative on the issue of notice”).

Next, Cox argues that the court improperly allowed BMG witnesses to use the term “infringement” in relationship to the Rightscorp data. Br. 32. But this was entirely appropriate: BMG’s position was that Rightscorp recorded instances of infringement, while Cox argued otherwise. The issues were fully aired before the jury, and the court repeatedly instructed the jury that it was the sole arbiter of infringement. *E.g.*, JA-1034. There was no error and no prejudice to Cox.

Cox argues that the court improperly permitted references to the DMCA and failed to issue a proper instruction. Br. 32-33. But the evidence in the case was replete with references to the DMCA because Cox used “DMCA” as a shorthand for copyright infringement. JA-1427; JA-3497; JA-3500; JA-5138-5140. And because the parties acted against the background of the DMCA, it was referenced repeatedly in Cox’s exchanges with Rightscorp. Cox focused extensively on these communications in an effort to paint Rightscorp as a villain and justify its rejection of Rightscorp’s notices. JA-774-811.

If anything, the court’s instruction that the DMCA “must be disregarded” was overly favorable to Cox, whose extraordinary efforts to obtain DMCA immunity through a sham termination scheme were highly relevant to the willfulness of its infringement. Cox’s request that the court instruct the jury that the DMCA is “irrelevant” or “not an issue,” when it was the background for much of the parties’ conduct and the linchpin of Cox’s scheme to tolerate infringement

on its network while shielding itself from liability, would have been highly inappropriate.

Cox hypothesizes that the jury may have believed that the failure to qualify for a DMCA defense made Cox liable for infringement. Br. 33. But the jury's failure to find vicarious liability demonstrates that it was not operating under any such misimpression. The District Court explained the elements of contributory and vicarious liability and told the jury that BMG had the burden of proving each. JA-2077-78. The compromise DMCA instruction was well within its discretion and did not prejudice Cox.

Finally, Cox complains that the court admitted two studies under Rule 803(17) that were not compilations of objective facts. Bt. 33-34. This is incorrect. The studies each compiled data from thousands of torrents and were "the most substantial published publicly available studies analyzing what's actually in BitTorrent traffic." JA-1635. Cox does not even attempt to argue that it was an abuse of discretion to determine that these studies fall within Rule 803(17).

Cox claims prejudice because the studies "were admitted as proof that merely using BitTorrent amounts to copyright infringement, and multiple experts so testified." Br. 34. But the very expert who sponsored the studies freely conceded that not "all BitTorrent traffic is infringing." JA-1648. By contrast,

Cox's own abuse chief stated, "Bittorrent is used for one thing only . . . and I would know. ;-)". JA-4214.

Even if the studies themselves were not admissible, Cox does not dispute that they are "publication[s] [] established as a reliable authority by the expert's admission or testimony" that may be "read into evidence but not received into evidence." Rule 803(18). Cox does not explain how it was prejudiced by admitting rather than reading the studies.

III. THE WILLFULNESS INSTRUCTION WAS PROPER AND DID NOT IMPACT THE STATUTORY DAMAGES AWARD

1. The court's willfulness instruction was taken from the Second Circuit's *Island Software* decision and properly states the law. Cox attempts to invalidate the jury's damages verdict by raising an objection it did not raise below: that the District Court's instruction failed to require that Cox be aware its own actions, rather than its subscribers', were infringing. Br. 59-60.

Cox relies on *Lyons Partnership v. Morris Costumes*, 243 F.3d 789, 799 (4th Cir. 2001), for the proposition that the secondary infringer must know that "*its actions* constitute an infringement or recklessly disregards [BMG's] rights." Br. 59 (emphasis by Cox). But *Lyons* was a direct infringement case and cannot address the question of whose actions are at issue in a secondary liability case. By contrast, *Island Software* makes clear that the test is whether "the defendant was actually aware of *the infringing activity*." 413 F.3d at 263 (emphasis added).

Moreover, Cox draws a false distinction for purposes of this case. There is no question that Cox was aware of its own conduct – of its policies for handling notices of infringement and its provision of the network that would allow its subscribers to infringe. The disputed issue was Cox’s state of mind with regard to whether particular subscribers were, in fact, making use of its network to infringe. Thus, whether Cox knew that “*its actions* constitute an infringement or recklessly disregards [BMG’s] rights,” Br. 59, depends on whether Cox knew that subscribers were using its network to infringe.

The evidence was overwhelming that Cox knew that its actions were contributing to the infringement of copyright. Zabek explained his decision to reactivate “terminated” repeat infringers with a “clean slate” – i.e., at step zero of the graduated response rather than with their infringement histories intact – so that “[t]his way we can collect a few extra weeks of payments for their account” while they inevitably worked their way back up the infringement ladder. JA-5003. The explicit purpose of Cox’s sham termination policy was to tolerate infringers and facilitate infringement on the Cox network while establishing a safe harbor defense to liability. With “all our ducks in a row on DMCA,” Zabek described litigation as “a fight I want” and looked forward to “shoving it in [the copyright holder’s] face” and “destroying the DMCA.” JA-3509.

2. In any event, Cox has waived this objection, which it now attempts to conflate with a *different* objection that it made below. In the District Court, Cox argued that the willfulness instruction's reference to "willful blindness" duplicated the contributory infringement instruction's constructive knowledge test (on the contrary, the former omits the "should have known" option). JA-2058. Cox never even mentioned the "its subscribers' actions" language of which it now complains. *Id.* Cox also failed to offer its desired "its actions" language. JA-1915; *see Gentry*, 816 F.3d at 241-42 (refusing to overturn damages verdict where the appellant had been entitled to but did not submit its proposed language below).

Under Rule 51, "a party who objects to an instruction" must "state distinctly ... the grounds for the objection." *Belk v. Meyer Corp.*, U.S., 679 F.3d 146, 154 n.6 (4th Cir. 2012). Counsel "is required to point out specifically the nature of the objection." *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 112 (4th Cir. 1991) (finding waiver where counsel "went on to note three objections, but he did not again refer to the net worth issue" advanced on appeal). Cox cannot permit the supposed error "to stand" and then "on appeal advance the issue for the first time as a ground for reversal" of the entire damages award. *Id.*

Regardless, the jury's award of statutory damages survives independent of its willfulness finding. "A judgment will be reversed for error in jury instructions only if the error is determined to have been prejudicial, based on a review of the

record as a whole.” *Abraham v. County of Greenville, SC*, 237 F.3d 386, 393 (4th Cir. 2001); *see also Bunn v. Oldendorff Carriers GmbH & Co.*, 723 F.3d 454, 468 (4th Cir. 2013) (“[W]e will not set aside a resulting verdict unless the erroneous instruction seriously prejudiced the challenging party’s case.”). The court instructed the jury to award an amount “you find to be fair under the circumstances,” JA-2079, after hearing all the evidence in a two-week trial, and the jury award substantially less than the maximum for *non*-willful infringement. As in *County of Greenville*, where the jury had “a factual basis to award \$460,100 in statutory damages” but awarded \$276,660, “the combination of these factors show that the district court’s instruction did not prejudice” Cox. 237 F.3d at 393.

3. Finally, Cox complains that the court declined to instruct the jury on innocence. But, Cox bears the burden of proof on innocence, and there was no evidence in the record to support such an instruction, which it was well within the District Court’s discretion to withhold. Reduced damages for “innocent” infringement are not available where defendants have “reason to think” that works alleged to have been infringed are copyrighted. *See M. Kramer Manufacturing v. Andrews*, 783 F.2d 421, 447 (4th Cir. 1986). Because Cox knew the BMG works alleged to have been infringed are copyrighted, an innocent infringer instruction could not issue. *See Lauer v. Schewel Furniture Co.*, 84 F. App’x 323, 329 n.*

(4th Cir. 2004) (no abuse of discretion to withhold damages instruction not supported by evidence).

Moreover, an innocent infringer instruction would have been moot given that the jury found that Cox's infringement was willful and the award exceeded the \$750 per work statutory floor, abrogation of which is the sole import of innocent infringement. The jury clearly did not consider Cox's behavior to be innocent. Knowing that it was facilitating infringement on its network, Cox attempted to set up a sham safe harbor defense so that it could continue to earn money by allowing its subscribers to infringe.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

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Respectfully Submitted,

/s/ Michael J. Allan
Michael J. Allan
William G. Pecau
John M. Caracappa
Jeffrey M. Theodore
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, D.C. 20036
Tel: (202) 429-3000
Fax: (202) 429-3902

Attorneys for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,962 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced type face using Word 2010 in Times New Roman 14 point font.

/s/ Michael J. Allan
Michael J. Allan
Steptoe & Johnson LLP

Attorney for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I certify that I filed the foregoing brief with the Clerk of the United States Court of Appeals for the Fourth Circuit via the CM/ECF system, thereby electronically serving all counsel of record, on December 30, 2016.

/s/ Michael J. Allan
Michael J. Allan
Steptoe & Johnson LLP

Attorney for Plaintiff-Appellee