

Nos. 16-1972[L], 17-1352, & 17-1353

**United States Court of Appeals
for the Fourth Circuit**

BMG RIGHTS MANAGEMENT (US) LLC,

Plaintiff – Appellee/Cross-Appellant,

and

ROUND HILL MUSIC LP,

Plaintiff – Appellee,

v.

COX COMMUNICATIONS, INCORPORATED, and COXCOM, LLC,

Defendants – Appellants/Cross-Appellees,

and

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

Defendants.

On Appeal from the United States District Court

for the Eastern District of Virginia,

No. 1:14-cv-01611 (Hon. Liam O’Grady)

**APPELLEE/CROSS-APPELLANT BMG’S PETITION
FOR REHEARING AND REHEARING EN BANC**

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TABLE OF CONTENTS

	<i>Page</i>
Table of Authorities	ii
FRAP 35(b)(1) Statement	1
Statement of Facts	3
Reasons for Granting the Petition	6
I. The panel’s decision departs from the accepted standard of constructive knowledge for contributory infringement by material contribution and places this circuit in conflict with every other court on this issue.....	6
A. The panel erred by basing its requirement of willful blindness on the <i>Grokster</i> “inducement rule,” which was intended for a particular context not presented here.	7
B. Contributory infringement by ongoing material contribution requires only constructive knowledge of specific infringements.	9
II. In the alternative, the Court should affirm the jury’s verdict because any instructional error was harmless.	14
Conclusion	17
Certificate of Compliance	19
Certificate of Service	20

TABLE OF AUTHORITIES

	<i>Page</i>
CASES	
<i>A&M Records v. Napster</i> , 239 F.3d 1004 (9th Cir. 2001)	11
<i>Arista Records v. Doe 3</i> , 604 F.3d 110 (2d Cir. 2010)	11
<i>Bruneau v. S. Kortright Cent. Sch. Dist.</i> , 163 F.3d 749 (2d Cir. 1998)	15
<i>Burger v. Kemp</i> , 483 U.S. 776 (1987).....	17
<i>Coach v. Sapatias</i> , 27 F. Supp. 3d 239 (D.N.H. 2014).....	12
<i>Coach v. Swap Shop</i> , No. 12-60400-CIV, 2012 WL 12887010 (S.D. Fla. Sept. 21, 2012)	12
<i>Commc'n Corp. v. Network Prods.</i> , 902 F.2d 829 (11th Cir. 1990)	11
<i>CoStar Grp. v. LoopNet</i> , 373 F.3d 544 (4th Cir. 2004)	7, 10
<i>Ellison v. Robertson</i> , 357 F.3d 1072 (9th Cir. 2004)	11
<i>Faulkner v. Nat'l Geographic Soc'y</i> , 211 F. Supp. 2d 450 (S.D.N.Y. 2002)	12
<i>Flava Works v. Gunter</i> , 689 F.3d 754 (7th Cir. 2012)	11
<i>Fonovisa v. Cherry Auction</i> , 76 F.3d 259 (9th Cir. 1996)	12-13
<i>Global-Tech Appliances v. SEB</i> , 563 U.S. 754 (2011).....	12

<i>Hard Rock Licensing Corp. v. Concession Servs.</i> , 955 F.2d 1143 (7th 1992)	12-13
<i>Hedgpeth v. Pulido</i> , 555 U.S. 57 (2008).....	15
<i>In re Aimster Copyright Litig.</i> , 334 F.3d 643 (7th Cir. 2003)	3, 13
<i>Levi v. Twentieth Century Fox Film Corp.</i> , No. 3:16cv129, 2017 WL 1227933 (E.D. Va. Mar. 31, 2017).....	11
<i>Live Face on Web v. Emerson Cleaners</i> , 66 F. Supp. 3d 551 (D.N.J. 2014).....	12
<i>Luvdarts v. AT & T Mobility</i> , 710 F.3d 1068 (9th Cir. 2013)	12
<i>Matthew Bender & Co. v. West Publ’g Co.</i> , 158 F.3d 693 (2d Cir. 1998)	11
<i>Metro-Goldwyn-Mayer Studios v. Grokster</i> , 545 U.S. 913 (2005).....	6-12
<i>Negron v. Rivera</i> , 433 F. Supp. 2d 204 (D.P.R. 2006)	12
<i>Perfect 10 v. Giganews</i> , No. CV 11-07098-AB SHX, 2014 WL 8628031 (C.D. Cal. Nov. 14, 2014), <i>aff’d</i> , 847 F.3d 657 (9th Cir. 2017)	11
<i>Perfect 10 v. Amazon.com</i> , 508 F.3d 1146 (9th Cir. 2007)	9
<i>Pressley v. Haeger</i> , 977 F.2d 295 (7th Cir. 1992)	15-16
<i>Sony Corp. v. Universal City Studios</i> , 464 U.S. 417 (1984).....	7-9
<i>Starnes v. Commissioner</i> , 680 F.3d 417 (4th Cir. 2012)	10

Swinton v. Potomac Corp.,
270 F.3d 794 (9th Cir. 2001) 16

United States v. Perez-Tosta,
36 F.3d 1552 (11th Cir. 1994) 16

Wellington v. Daniels,
717 F.2d 932 (4th Cir. 1983) 15

CONSTITUTIONS, STATUTES, REGULATIONS, AND RULES

35 U.S.C. § 271(b) 12

OTHER AUTHORITIES

Eleventh Circuit Civil Pattern Jury Instructions 9.20 (2013) 10

Federal Civil Jury Instructions of the Seventh Circuit 12.6.2 (2017
rev.) 10

Ninth Circuit Manual of Model Civil Jury Instructions 17.21 (rev.
Mar. 2017)..... 10

Restatement (Second) of Torts § 8A (1979)..... 14

Restatement (Second) of Torts § 876(b) (1979) 14

Restatement (Second) of Torts § 877 (1979)..... 12-14

FRAP 35(b)(1) STATEMENT

Plaintiff-appellee BMG Rights Management (US) petitions for rehearing by the panel and, absent that, rehearing by the Court en banc. BMG obtained a jury verdict that defendants Cox Communications and Coxcom (together, “Cox”), an internet service provider (“ISP”), contributorily infringed BMG’s copyrights in 1,397 songs by materially contributing to its subscribers’ illicit copying. With the goal of maximizing its subscription revenues, Cox set up a system that allowed its subscribers to infringe copyrights with impunity. As part of that system, Cox turned a blind eye to the evidence BMG provided it of over a million specific instances of infringement.

1. Although the panel recognized “powerful evidence ... that Cox willfully blinded itself to specific instances of infringement by its subscribers,” slip op. 33, the panel reversed the verdict and remanded for a new trial because the instruction did not explicitly require BMG to prove Cox’s willful blindness to the infringements, but allowed the jury to find liability if Cox “should have known” of them. In doing so, the panel mistakenly applied legal principles relevant to an “inducement” theory of liability applicable to defendants with generalized knowledge of infringement, when BMG instead proceeded on a theory of “material contribution” to specific instances of infringement. The panel’s unprecedented application of a heightened knowledge standard creates a conflict with decisions

and pattern jury instructions from other circuits as well as with the common-law rules underlying contributory infringement. All of those recognize that BMG's material-contribution theory requires only constructive knowledge.

2. Even if the standard were "willful blindness" rather than "should have known," the panel nevertheless should have affirmed the jury's verdict instead of remanding for a new trial. BMG's case was based on a theory of actual knowledge or willful blindness. BMG proved that Cox was told of over a million specific acts of infringement by its subscribers, but it intentionally closed its eyes to those infringements by, among other things, configuring its computer systems to block BMG's detailed notifications. The instruction's use of a "should have known" standard was, at most, harmless error of the most benign kind.

For these reasons, BMG requests panel rehearing of both issues and rehearing en banc of the first issue. This appeal is the appropriate vehicle for resolving the knowledge standard for contributory infringement. The issues are presented on a rich and robust trial record, and the panel's departures from prevailing law were outcome-determinative: Under any other circuit's standard, the jury's determination that Cox committed contributory infringement would have been upheld. This is a valuable opportunity for the Court to correct the panel's error and restore national uniformity in the application of the copyright laws. When computers and the internet make everyone a potential mass copier, "chasing

individual consumers is time consuming and is a teaspoon solution to an ocean problem.” *In re Aimster Copyright Litig.*, 334 F.3d 643, 645-46 (7th Cir. 2003) (quotation omitted). The copyright law therefore permits a copyright holder to sue an intermediary like an ISP for materially contributing to infringement. The knowledge standard for contributory infringement is a matter of exceptional importance.

STATEMENT OF FACTS

Cox provides high-speed internet access to its subscribers in exchange for a monthly fee. Many subscribers exchanged copyrighted music files using BitTorrent computer protocols, which permit peer-to-peer sharing without a central server. Slip op. 6-7.

BMG is a music publishing company that owns copyrights in many musical compositions. It hired Rightscorp to monitor and detect online infringement of its works. As BMG’s agent, Rightscorp sent Cox over one million notices detailing infringements by Cox subscribers; the notices identified the copyright owner’s name, the work’s title, the alleged infringer’s IP address, a time stamp, and a statement under penalty of perjury that the notice was accurate. Cox, as the ISP gatekeeper, was asked to forward the notices to its subscribers. Rightscorp also notified Cox about the infringement of BMG’s works through email, phone conversations, and certified mail. JA-1286:19-1350:15. Rightscorp sent Cox

weekly summaries of egregious infringers and set up for Cox an online “dashboard” database of all Cox subscriber infringements, including the subscribers’ infringement histories and song files they had downloaded. *Id.*; JA-1032, 1271, 1482, 1768, 1776-77, 2781, 5243-45.

Cox knew it was being told of specific infringements, but, as Cox’s abuse-unit chief wrote, “It’s not that I don’t know ... It’s that I don’t want to know.” JA-4211. Rather than address the infringements, it “blacklisted” Rightscorp, blocking BMG’s notices from even entering its mail server. Slip op. 9; JA1769:1-1777:1, 1783:18-24. Cox ignored the weekly summaries, and it refused to log into Rightscorp’s dashboard. JA-1768, 1776-77.

In those instances where Cox did learn that a subscriber was a repeat infringer, it pretended to terminate the account but actually reactivated the subscriber with a “clean slate” so they could continue to infringe. As the panel observed, Cox “very clearly determined *not* to terminate subscribers who in fact repeatedly” infringed, and “Cox *always* reactivated subscribers after termination, regardless of its knowledge of the subscriber’s infringement.” Slip op. 16, 17. Moreover, “the evidence shows that Cox’s decisions ... were based on one goal: not losing revenue from pay subscribers.” Slip op. 20.

BMG sued to hold Cox contributorily liable for its subscribers’ infringements because Cox deliberately blinded itself to BMG’s many notices of

specific infringements and “materially contributed” to the infringements. The district court granted, and the panel upheld, summary judgment for BMG that Cox did not adopt and reasonably implement a policy for terminating repeat infringers and therefore was not entitled to the ISP safe harbor under the Digital Millennium Copyright Act (“DMCA”). At trial, the jury found Cox liable for willful contributory infringement and awarded BMG \$25 million in statutory damages. The district court entered judgment on the verdict and later awarded BMG over \$8 million in attorneys’ fees and costs. Slip op. 11 & n.1.

On appeal, the panel reversed the jury verdict and remanded for a new trial. The panel held the jury instruction on contributory infringement was erroneous because it permitted the jury to impose liability if it found “Cox knew or should have known of such infringing activity.” Slip op. 10. The panel reasoned that “proving contributory infringement requires proof of at least willful blindness; negligence is insufficient.” Slip op. 28. Since the “should have known” language sounded in negligence, the panel held it improper and remanded for a new trial. Slip op. 25-26, 37.

REASONS FOR GRANTING THE PETITION

I. The panel’s decision departs from the accepted standard of constructive knowledge for contributory infringement by material contribution and places this circuit in conflict with every other court on this issue.

The panel reversed the jury’s verdict because the instruction on contributory copyright infringement read “knew or should have known” instead of “knew or was willfully blind.” The panel concluded that contributory infringement requires the defendant’s actual knowledge, which “willful blindness” satisfies but negligence-based “should have known” does not. Slip op. 27. This is not the law of material-contribution liability, and the panel’s decision creates a conflict between the law in this circuit and the law prevailing nationally. Under decisions and pattern jury instructions from other circuits and common-law principles, “should have known” constructive knowledge of and material contribution to specific, identifiable acts of copying constitute contributory copyright infringement.

The panel got off on the wrong foot by observing at the beginning of its analysis, “*Grokster* teaches that “[o]ne infringes contributorily by *intentionally* inducing or encouraging direct infringement.” Slip op. 23 (quoting *Metro-Goldwyn-Mayer Studios v. Grokster*, 545 U.S. 913, 930 (2005)). The panel erroneously collapsed all of the common-law principles of contributory copyright infringement into *Grokster*’s intentional-inducement scenario. But contributory infringement recognizes multiple, alternative theories, reaching one who “induces,

causes *or* materially contributes” to direct infringements. *CoStar Grp. v. LoopNet*, 373 F.3d 544, 550 (4th Cir. 2004) (emphasis added) (quotation omitted). As part A explains, *Grokster* intended to address liability in a particular situation not presented here, not to supplant all other bases of contributory infringement.

Given the facts here, BMG did not need to rely on *Grokster*’s intentional-inducement rule. Instead, it pursued the alternative theory of “material contribution” to and actual or constructive knowledge of specific acts of infringements. As part B explains, material contribution is a separate theory from *Grokster*-type intentional inducement. It is well recognized by other circuits that material contribution requires only constructive knowledge, not actual knowledge or willful blindness. Thus, the district court’s “should have known” instruction was correct.

A. The panel erred by basing its requirement of willful blindness on the *Grokster* “inducement rule,” which was intended for a particular context not presented here.

Grokster developed its intentional-inducement rule to address what may be called “fire and forget” situations presented there and in *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984). In that kind of case, the defendant places a staple article into the stream of commerce with only generalized knowledge that the product or service *could be* used to infringe, and the defendant has no continuing relationship with the direct infringer or ability to detect or prevent the

unlawful use of the item. In *Sony*, the product was a videocassette recorder that had a substantial noninfringing use (time-shifting). Looking to patent law’s traditional and now-codified “staple article of commerce” doctrine, the Court held there was no liability based on generalized knowledge alone that some unidentified customers would infringe some unidentified copyrights. *Id.* at 442. In *Grokster*, the product was software that allowed users to exchange files directly—with no central server and no way for Grokster to learn about or address specific acts of infringement. To narrow the hole in liability left by *Sony*, the *Grokster* Court held a defendant with only generalized knowledge of the potential for infringement could be held liable in such situations if it *intended* to induce infringement. 545 U.S. at 936-37.

But that never was, and is not now, the rule outside of the context of merely placing staple articles into the stream of commerce. As explained in part B, under the common law and all of the precedent before the panel’s decision, a defendant may be held liable for contributory infringement if it materially contributes to the infringement on a continuing basis and has actual *or* constructive knowledge of *specific* acts of direct infringement. Thus, *Sony* recognized that traditional circumstances for contributory copyright liability, though not present there, involve an “ongoing relationship between the direct infringer and the contributory infringer at the time the infringing conduct occurred.” 464 U.S. at 422. *Grokster* confirmed

that the Supreme Court has “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. Thus, whether or not the defendant’s activities “meet the ‘inducement’ test explained in *Grokster*” is not dispositive because “the Supreme Court in *Grokster* did not suggest that a court must find inducement in order to impose contributory liability under common law principles.” *Perfect 10 v. Amazon.com*, 508 F.3d 1146, 1171 n.11 (9th Cir. 2007).

This is not the kind of fire-and-forget, place-staple-articles-in-commerce case for which the *Grokster* Court crafted its intentional-inducement rule. This is the classic kind of contributory infringement to which courts apply common-law “rules of fault-based liability,” including constructive knowledge.

B. Contributory infringement by ongoing material contribution requires only constructive knowledge of specific infringements.

BMG pursued a traditional “material contribution” claim based on Cox’s actual or constructive knowledge of specific acts of infringement, and it did not need to invoke the *Grokster* intentional-inducement rule. Cox materially contributed to the infringements by *continuing* to provide internet service to specific direct infringers of whose specific acts of infringement Cox knew or should have known. Where, as here, there is actual or constructive knowledge of specific acts of infringement, common-law rules of contributory liability apply.

Under those rules, the jury was correctly instructed on a “should have known” standard. In giving the “should have known” instruction, the district court relied on pattern jury instructions from Seventh, Ninth, and Eleventh Circuits, all of which cite *Grokster* and recognize that, under the established case law, material-contribution claims require proof only of constructive knowledge, not of actual knowledge or willful blindness.¹ Indeed, this Court has held in another secondary liability context that those who “should have known (i.e., had constructive knowledge) ... are charged with the knowledge.” *Starnes v. Commissioner*, 680 F.3d 417, 434 (4th Cir. 2012) (shareholder-transferee tax liability).

The standard for material contribution is different because material contribution and inducement are separate theories of contributory liability. As this Court has recognized, a defendant who, with the requisite knowledge, “‘induces, causes *or* materially contributes to the infringing conduct of another’ is liable for the infringement, too.” *CoStar*, 373 F.3d at 550 (emphasis added) (quotation omitted). The inducement and material-contribution “tests are alternative.” *Perfect*

¹ Ninth Circuit Civil Jury Instructions 17.21 (rev. Mar. 2017) (requiring “defendant knew or had reason to know of the infringing activity” and discussing *Grokster*’s “inducement rule” for specific situations); Seventh Circuit Civil Jury Instructions 12.6.2 (2017 rev.) (“Defendant [knew of the infringing activity] [strongly suspected or should have known of the infringing activity but took steps to avoid knowing about the infringing activity]”); Eleventh Circuit Civil Jury Instructions 9.20 (2013) (“‘Knowledge’ means the alleged contributory infringer actually knew, or had reason to know, of the infringement.”).

10 v. Giganews, No. 11-cv-07098, 2014 WL 8628031, at *6 (C.D. Cal. Nov. 14, 2014) (collecting citations), *aff'd*, 847 F.3d 657 (9th Cir. 2017). Inducement is an “alternate theory of contributory infringement liability” under *Grokster*. *Perfect 10*, 847 F.3d at 672.² As Cox argued, “only material contribution is relevant here.” Opening Br. 21.

The district court gave the correct “should have known” instruction for BMG’s material-contribution claim, which was based on Cox’s actual or constructive knowledge of specific acts of infringement. Both before and after the 2005 *Grokster* decision, other circuits have imposed liability for material contribution under a “knew or should have known” standard. *E.g.*, *Arista Records v. Doe 3*, 604 F.3d 110, 118 (2d Cir. 2010); *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004); *A&M Records v. Napster*, 239 F.3d 1004, 1020-22 (9th Cir. 2001); *Cable/Home Commc’n Corp. v. Network Prods.*, 902 F.2d 829, 846-47 (11th Cir. 1990). Indeed, a 2017 decision from a district court *in this circuit* did the same. *Levi v. Twentieth Century Fox Film Corp.*, No. 3:16cv129, 2017 WL

² Other courts have used a different formulation of the same distinction: “Two types of activities that lead to contributory liability are: (i) personal conduct that encourages or assists the infringement; and (ii) provision of machinery or goods that facilitate the infringement.” *Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 693, 706 (2d Cir. 1998), *followed in Flava Works v. Gunter*, 689 F.3d 754, 757 (7th Cir. 2012).

1227933, at *9 (E.D. Va. Mar. 31, 2017) (citing *Cable/Home*).³ The panel’s opinion is the only one to apply a willful-blindness requirement to a material-contribution claim.⁴

The panel’s opinion also does not accord with the common-law principles that govern contributory copyright infringement. *Grokster*, 545 U.S. at 930. Other circuits have looked for such common-law principles to Restatement (Second) of Torts § 877(c) (1979). See *Fonovisa v. Cherry Auction*, 76 F.3d 259, 264 (9th Cir. 1996) (quoting *Hard Rock Licensing Corp. v. Concession Servs.*, 955 F.2d 1143, 1149 (7th 1992) (quoting § 877(c))); accord *Coach v. Sapatiss*, 27 F. Supp. 3d 239, 244 (D.N.H. 2014) (citing § 877(c)).⁵

³ Other district courts have done likewise. Accord *Live Face on Web v. Emerson Cleaners*, 66 F. Supp. 3d 551, 558 (D.N.J. 2014); *Coach v. Swap Shop*, No. 12-60400-CIV, 2012 WL 12887010, at *7 (S.D. Fla. Sept. 21, 2012) (citing *Cable/Home*); *Negron v. Rivera*, 433 F. Supp. 2d 204, 219 (D.P.R. 2006); *Faulkner v. Nat’l Geographic Soc’y*, 211 F. Supp. 2d 450, 474 (S.D.N.Y. 2002).

⁴ In *Luvdarts v. AT & T Mobility*, 710 F.3d 1068, 1072-73 & n.2 (9th Cir. 2013), cited by the panel, slip op. 29, the court did not address “should have known” constructive knowledge and found “no cause to decide” material-contribution liability. Moreover, the court noted that the notices of infringement—unlike BMG’s—did “not identify which of these titles were infringed, who infringed them, or when the infringement occurred,” and the plaintiff did not allege that the defendants “took deliberate actions to avoid learning about the infringement.” *Id.*

⁵ This remains true after *Global-Tech Appliances v. SEB*, 563 U.S. 754 (2011), which construed the patent laws’ statutory provision making liable “[w]hoever actively induces infringement of a patent,” 35 U.S.C. § 271(b), and did

Under § 877(c), a defendant is liable for the conduct of third parties when the defendant, for example, “(a) orders or induces the conduct” or “(c) permits the other to act upon its premises or *with his instrumentalities*.” Restatement (Second) § 877 (emphasis added). The latter clause (c) corresponds neatly with “material contribution,” particularly where, as in this case, the defendant supplied the “instrumentality” by which the direct infringer carried out the unlawful conduct. Clause (c) imposes liability where the defendant acts while “knowing or *having reason to know* that the other is acting or will act tortiously.” *Id.* § 877(c) (emphasis added); *see Fonovisa*, 76 F.3d at 264 (quoting *Hard Rock*, 955 F.2d at 1149, and § 877(c) for “knowing or having reason to know” standard).

The panel rejected a standard of constructive knowledge—“should have known” or “had reason to know”—because it equated it with negligence. Slip op. 25-26. But material contribution, unlike inducement, is rooted in negligence principles. The Restatement notes that contributory liability through provision of “instrumentalities” under clause (c) is “subject to the general rules of negligence.” *Id.* § 877 cmt. b (referring to “[t]he rules stated in Clauses (b), (c) and (d)”). But

not address the “common law tort and agency principles” governing contributory *copyright* infringement.

those “general rules of negligence” do not apply to one who “induces the conduct” under clause (a). *Id.*⁶

Here, the panel departed from all available precedent by applying a heightened standard of knowledge to what has always been a negligence-derived claim for material contribution based on actual or constructive knowledge of specific acts of infringement. The district court properly instructed the jury, and its verdict should be affirmed.

II. In the alternative, the Court should affirm the jury’s verdict because any instructional error was harmless.

In any event, in this case, including the words “should have known” in the jury instruction was no more than harmless error. The trial below was never about negligence. Instead, BMG’s case was built on a willful-blindness theory, and that theory went to the jury: BMG’s evidence overwhelmingly focused on Cox’s intentionally devising a system to ignore notices of its subscribers’ infringements in order to keep profitable infringing subscribers with a “clean slate.” Cox’s management explained that Cox used a “magic form letter” to blacklist senders

⁶ The panel did not consider § 877(c), but instead found “most relevant” comment b to Restatement (Second) § 8A, which states that if a person “knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.” Slip op. 8. (quoting § 8A cmt. b). But that provision does not address the knowledge element for contributory liability. Moreover, the panel mistakenly relied on § 876(b). That section concerns liability of persons acting in concert, which is not an element of contributory infringement.

such as BMG and thereby “ignore the bulk of DMCA notices.” JA-3531,4799, 5185. As the panel observed, there was “powerful evidence ... that Cox willfully blinded itself to specific instances of infringement by its subscribers.” Slip op. 33.

No legitimate basis therefore exists for concluding that the jury relied on a negligence standard to find Cox liable. Under harmless-error analysis, “an error in jury instructions will mandate reversal of a judgment only if the error is determined to have been prejudicial, based on a review of the record as a whole.” *Wellington v. Daniels*, 717 F.2d 932, 937 (4th Cir. 1983). “Absolute certainty” that the jury relied on a valid theory of liability—here, willful blindness—is not required. *Hedgpeth v. Pulido*, 555 U.S. 57, 59-61 (2008). Any error in instructing on an alternative theory does not justify disturbing the verdict where, as here, in the light of the entire record, the court is “sufficiently confident” the jury would have returned the same verdict had the instructions not contained any error. *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 759-60 (2d Cir. 1998).

For example, it was held harmless error to give a constructive-knowledge instruction on the intent element of a discrimination charge because “[m]ost of the evidence and argument concerned [defendant’s] intent,” and, “[u]nder the circumstances, the risk that the constructive-knowledge instruction would have led the jury to find ‘constructive intent’ is small.” *Pressley v. Haeger*, 977 F.2d 295, 297-98 (7th Cir. 1992). The court explained, “Jurors consider the evidence and trial

as a whole; appellate judges must guard against the error of assuming that jurors dissect instructions as if the sentences were frogs.” *Id.* at 298; *see Swinton v. Potomac Corp.*, 270 F.3d 794, 806 (9th Cir. 2001) (vicarious-liability instruction was harmless error because, “given the overwhelming evidence ... it is much more likely than not” plaintiff would have prevailed anyway); *United States v. Perez-Tosta*, 36 F.3d 1552, 1565 (11th Cir. 1994) (deliberate-ignorance instruction was harmless error because evidence “very strongly supported a finding” of actual knowledge the “jury could easily have” made).

Here, the evidence was overwhelming that Cox willfully blinded itself to notices of infringement. Cox knew—having seen examples—that BMG’s notices contained detailed information identifying specific instances of infringement by subscriber, date, time, and work. JA-1260-63, 1287-89, 1479. Cox then decided to configure its mail server so that it would not even download those notices. JA-2318. Indeed, “there was a directive to limit the number of DMCA notices that Cox handled” and Cox’s “system was configured to deliberately” ignore notices. JA-5291, 2034. Cox’s purposeful decisions about how to handle infringement notices cannot be considered negligent or reckless.

Accordingly, BMG presented a willful-blindness case to the jury. BMG’s expert testified that Cox “deliberately” chose to ignore notices, never that Cox “should have known.” JA-2034. That testimony was uncontradicted. In its closing,

BMG never characterized Cox's conduct as negligent, but instead explained that "Cox knew or should have known of infringement" *because* "Cox was willfully blind." JA-2115:12-16, 2083-95.

Moreover, Cox's willful blinding of itself to BMG's notices was a key piece of the undisputed evidence that caused the district court to grant, and the panel to affirm, summary judgment on Cox's DMCA defense. The panel found no genuine dispute as to "Cox's decision to categorically disregard all notices from Rightscorp" and that "Cox's decisions ... were based on one goal: not losing revenue from paying subscribers." Slip. op. 18, 20.

This overwhelming evidence of willful blindness leaves no doubt the jury would have found contributory infringement had the instructions omitted any reference to "should have known." Because the evidence of willful blindness in this case was "so dispositive" of the knowledge requirement for contributory infringement liability, a new trial is unnecessary. *Burger v. Kemp*, 483 U.S. 776, 782 n.5 (1987).

CONCLUSION

The panel should grant rehearing or, failing that, the Court should grant rehearing en banc.

Dated: February 15, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 40(b)(1) because it contains 3,893 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.

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CERTIFICATE OF SERVICE

I certify that I filed the foregoing petition 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 February 15, 2018.

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