

No. 16-1972

# United States Court of Appeals for the Fourth Circuit

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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)

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**BRIEF OF RECORDING INDUSTRY ASSOCIATION OF AMERICA,  
INC. AND NATIONAL MUSIC PUBLISHERS’ ASSOCIATION AS *AMICI  
CURIAE* IN SUPPORT OF PETITION FOR REHEARING AND  
REHEARING EN BANC**

---

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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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,

Recording Industry Association of America, Inc. ("RIAA")

(name of party/amicus)

who is amicus, makes the following disclosure:  
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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/ Scott A. Zebrak

Date: February 22, 2018

Counsel for: RIAA

### **CERTIFICATE OF SERVICE**

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I certify that on February 22, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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February 22, 2018  
(date)

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,

National Music Publishers' Association ("NMPA")

(name of party/amicus)

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

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO  
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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Scott A. Zebrak

Date: February 22, 2018

Counsel for: NMPA

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/s/ Scott A. Zebrak  
(signature)

February 22, 2018  
(date)

**RULE 29(a)(4)(E) STATEMENT**

Pursuant to Fed. R. App. P. 29(a)(4)(E) amici curiae Recording Industry Association of America, Inc. (“RIAA”) and National Music Publishers’ Association (“NMPA”) state that no party’s counsel authored this brief in whole or in part and no one other than amici and its members contributed money that was intended to fund preparing or submitting this brief.

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1(b), amici curiae state as follows: Neither the RIAA nor NMPA have parent companies. No publicly held corporation or other publicly held entity owns 10% or more of the stock of the RIAA or NMPA. Per Local Rule 26.1(a)(2)(B), RIAA and NMPA do not know of any other publicly held corporation or entity that has a direct financial interest in the outcome of this litigation, other than that identified by the parties.

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Amici curiae the RIAA and NMPA respectfully submit this brief in support of Plaintiff-Appellee BMG's Petition for Rehearing and Rehearing en banc (the "Petition"). This brief is submitted upon the consent of BMG. Nor does Defendant-Appellant Cox object.

### **INTEREST OF AMICI CURIAE**

Amici curiae are leading trade associations representing the interests of the United States music industry. They submit this brief in support of Plaintiff-Appellee BMG's Petition because the panel's decision represents an abrupt departure from settled standards of contributory liability and threatens the ability of U.S. music industry stakeholders to enforce their copyright interests.

By way of background, the RIAA is a nonprofit trade organization representing the American recording industry. RIAA members create, manufacture, and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. The RIAA works to protect the intellectual property and First Amendment rights of artists and music labels and promotes the ability of the record industry to invest in new artists and new music, and in the digital arena, to collaborate with online services to promote the continued expansion of legitimate markets for music.

The NMPA is the principal trade association representing the U.S. music publishing and songwriting industry. Over the last one hundred years, NMPA has

served as a leading voice representing American music publishers before Congress, in the courts, within the music, entertainment, and technology industries, and to the listening public. NMPA's membership includes "major" music publishers affiliated with record labels and large entertainment companies as well as independently owned and operated music publishers of all catalog and revenue sizes. Compositions owned or controlled by NMPA's hundreds of members account for the vast majority of musical works licensed for commercial use in the United States.

Wide-scale infringement of the kind demonstrated by Cox in this case inhibits the growth of a legitimate online music marketplace. It deprives members of the RIAA and NMPA, and arguably all copyright holders, of valuable sources of revenue and unfairly disadvantages online service providers that do cooperate to limit infringement. The principle of contributory liability has played a crucial role in the ability of the RIAA's and NMPA's members to enforce their copyrights, especially in this era defined by the mass dissemination of their works on a previously unimaginable scale. Accordingly, a clear, consistent delineation of the scope of contributory liability impacts all artists, songwriters, and the record labels and music publishers that invest in them. For these reasons, the RIAA and NMPA have a substantial interest in the issues implicated by this Petition, and respectfully request that the Court consider the views expressed herein.

### **PRELIMINARY STATEMENT**

The panel erroneously concluded that, where actual knowledge is not shown, a plaintiff must meet a heightened “willful blindness” standard in order to make a claim of contributory infringement. Numerous federal circuit and district courts have held that constructive knowledge is sufficient to establish contributory copyright infringement in this context. Amici support BMG’s Petition because the panel’s ruling misreads the law and undermines a critical protection that creators have depended on for many years. As explained below, the panel’s decision departs from the roots of contributory infringement law and from many decades of precedent.

If allowed to stand, the panel’s decision would remove an important deterrent to negligent and reckless behavior and undermine the incentives and ability of artists, songwriters, and others to create valuable works and distribute them to the public. The panel’s concerns that the constructive knowledge standard would unduly burden technological development are unfounded and at odds with settled law.

## **ARGUMENT**

### **I. Constructive Knowledge Is Ingrained In Established Principles Of Contributory Liability**

The panel’s decision conflicts with the overwhelming weight of authority that constructive knowledge is sufficient to establish contributory liability for infringement. Numerous other circuit courts have concluded that the standard is “knew or should have known.” *See, e.g., Cable/Home Commc’n. Corp. v. Network Prods.*, 902 F.2d 829, 846 (11th Cir. 1990) (“[A]ctual knowledge is not required. All that must be shown is that [defendant] had reason to know.”); *Arista Records LLC v. Doe*, 604 F.3d 110, 118 (2d Cir. 2010) (“The knowledge standard is an objective one; contributory infringement liability is imposed on persons who ‘know or have reason to know’ of the direct infringement.”) (citation omitted) (emphasis in original); *NCR Corp. v. Korala Assocs.*, 512 F.3d 807, 816 (6th Cir. 2008) (“[W]ith respect to the element of knowledge, contributory liability requires that the secondary infringer ‘know or have reason to know’ of the direct infringement.”) (citation omitted); *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003) (citing to Eleventh Circuit for proposition that “should have known” can be sufficient); *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001) (“Contributory liability requires that the secondary infringer ‘know or have reason to know’ of the direct infringement.”) (citing *Cable/Home*, 902 F.2d at 845).

A multitude of district court cases, including in the Fourth Circuit, also recognize that knowledge can be actual or constructive. *See, e.g. Levi v. Twentieth Century Fox Film Corp.*, No. 3:16cv129, 2017 U.S. Dist. LEXIS 49773, at \*22 (E.D. Va. Mar. 31, 2017); *Goldstein v. Metro Reg'l Info. Sys.*, No. TDC-15-2400, 2016 U.S. Dist. LEXIS 106735, at \*13 (D. Md. Aug. 11, 2016); *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 658 (S.D.N.Y. 2013); *Elsevier Ltd. v. Chitika, Inc.*, 826 F. Supp. 2d 398, 404 (D. Mass. 2011); *Arista Records, Inc. v. Flea World, Inc.*, No. 03-2670 (JBS), 2006 WL 842883, 2006 U.S. Dist. LEXIS 14988, at \*46-47 (D.N.J. Mar. 31, 2006); *Religious Tech. Ctr. v. Netcom On-line Commc'n Servs. Inc.*, 907 F. Supp. 1361, 1374 (N.D. Cal. 1995).

In concluding that contributory infringement must rest on either actual knowledge or willful blindness, the panel rewrote decades of well-settled law. The panel recognized that “rules of fault-based liability derived from common law,” *see* Opinion, at 23, but mistakenly applied the legal principles relevant to a theory of inducement, as set forth in *MGM Studios Inc. v. Grokster*, 545 U.S. 913 (2005), which arose from the separate context of patent law. The panel should have instead applied the legal principles relevant to a theory of material contribution, which is the theory BMG presented at trial. *See* Petition, at 7 (explaining that, given the facts presented, BMG did not need to rely on *Grokster*’s intentional inducement rule). Traditional material contribution theory has *never* required that

contributory infringement be established only through a showing of actual knowledge or willful blindness.

As the law developed, several seminal cases defined the bounds of contributory liability based on a “should have known” standard. In *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records*, the court considered the liability of certain parties that facilitated record piracy—an advertising agency that placed advertising for the sale of infringing records, two radio stations broadcasting the advertising, and a packager shipping the infringing records. 256 F. Supp. 399, 401-02 (S.D.N.Y. 1966). Though evidence of their knowledge of the underlying infringement varied, and though they were not in a position to control the infringement, the court held that each could be held liable if they possessed either actual or constructive knowledge, i.e. that they “should have known.” *See id.* at 404-05.

The *Screen Gems* analysis was central to the Second Circuit’s holding in *Gershwin Publ. Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159 (2d Cir. 1971), which is often cited with approval by the Supreme Court and others as the standard bearer for the contributory infringement doctrine. *See, e.g., Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 437 n.18 (1984); *Grokster*, 545 U.S. at 930. In holding that liability attaches to “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of



another,” the Second Circuit relied heavily on *Screen Gems*’ holding that each defendant could be held “liable as a ‘contributory’ infringer if it were shown to have had knowledge, *or reason to know*, of the infringing nature of the records.” *Gershwin*, 443 F.2d at 1162 (emphasis added).

*Sony* did not upset the fundamental principle that contributory liability can rest on constructive knowledge. Instead, *Sony* reinforced that “the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.” 464 U.S. at 435. While the Supreme Court in *Sony* cautioned against imposing liability for selling a product capable of substantial non-infringing uses based solely on constructive knowledge that some *may* use its product to infringe, at no point did the Court suggest that contributory liability cannot be grounded in constructive knowledge as to specific, actual infringements. *See id.* 439-42.

To the contrary, in its discussion of comparative laws under patent and trademark, the *Sony* Court explicitly recognized that contributory trademark infringement is a more demanding standard than contributory copyright infringement. *See id.* at 439 n.19. Yet even contributory trademark liability applies a “knew or should have known” standard. *See Inwood Labs. v. Ives Labs.*, 456 U.S. 844, 854 (1982) (recognizing that a manufacturer or distributor is

contributorily liable if it “continues to supply its product to one whom it knows *or has reason to know* is engaging in trademark infringement”) (emphasis added); *see also Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 108 & n.11 (2d Cir. 2010) (noting that “reason to know” denotes constructive knowledge, and that *Sony*’s omission of “reason to know” was not intended to alter the test *Inwood* articulates). Thus, a finding of contributory copyright infringement, which is a *less* demanding standard, “has never depended on actual knowledge.” *Sony*, 464 U.S. at 487 (Blackmun, J., dissenting).

## **II. The Panel’s Departure From A Constructive Knowledge Standard Stems From A Misreading Of The Case Law**

In its decision, the panel misapplied certain cases that, when properly understood, actually counsel against its holding. First, while acknowledging that *Screen Gems* used the phrase “knew or should have known,” the panel concluded that because the factual allegations in *Screen Gems* were sufficient in its view to establish willful blindness, it was “unnecessary to permit the imposition of liability based on a lesser negligence standard.” *See* Opinion, at 29-30.

However, the court in *Screen Gems* explained that, with respect to the defendant closest to the direct infringement, the facts demonstrated that the defendant must have “deliberately closed its eyes *or was recklessly indifferent thereto*”—thus confirming that willful blindness does not represent the lower limit of knowledge necessary to establish liability. *See Screen Gems*, 256 F. Supp. at

404 (emphasis added). Further, *Screen Gems* held that other defendants, even farther removed from the direct infringement, could be liable based on constructive knowledge, without making similar factual findings. Indeed, *Screen Gems* found that one defendant, who professed no particular familiarity with the entertainment industry and the record piracy problem in the case, could still be held liable if it “should have been alerted to the illicit operation.” *See id.* at 405.<sup>1</sup>

Second, the panel erred by applying the intent requirements for an inducement theory, as set forth in *Grokster*, to a material contribution claim. Inducement and material contribution are separate theories of contributory infringement. The Supreme Court has expressly recognized there are multiple ways of proving contributory liability, and one way of doing so does not displace another. *See Grokster*, 545 U.S. at 932-33 (adopting inducement as one way to establish contributory liability, noting that “*Sony* did not displace other theories of secondary liability”).<sup>2</sup>

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<sup>1</sup> The panel’s reading also conflicts with *Gershwin* and the recognition therein that “reason to know” suffices for proving the knowledge prong of contributory infringement. *See supra* at 6-7.

<sup>2</sup> Because the *Grokster* Court held the Ninth Circuit’s knowledge requirement was too burdensome, and because the record was replete with evidence of active inducement, it was not necessary for the Court to define the lower limits of knowledge required for contributory copyright infringement.

In applying the inducement requirements to a claim for material contribution, the panel extended the holding of *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011) far beyond its scope. *Global-Tech* focused exclusively on the level of knowledge required to impose liability under a *statutory* claim for *induced patent infringement* under 35 U.S.C. § 271(b). The *Global-Tech* decision did not discuss principles of *copyright infringement* under the *common law*. Imposing *Global-Tech*'s statutory interpretation under the Patent Act onto the doctrine of secondary copyright liability outside the narrow confines of a *Grokster*-like inducement claim creates significant tension with the “rules of fault-based liability derived from the common law.” *See Grokster*, 545 U.S. at 934-35. It further ignores that patent and copyright law are “not identical twins,” and the Supreme Court’s caution about “applying doctrine formulated in one area to the other.” *Sony*, 464 U.S. at 439 n.19.

Third, the panel mistakenly determined the Ninth Circuit supports its holding that “actual knowledge of specific acts of infringement” or “[w]illful blindness of specific facts” is required for any finding of contributory liability. Opinion, at 29 (citing to *Ludvarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1072-73 (9th Cir. 2013)). To the contrary, the Ninth Circuit has long recognized that “should have known” is sufficient. *See, e.g. Napster*, 239 F.3d at 1020; *Ellison v. Robertson*, 357 F.3d 1072, 1077 (9th Cir. 2004); *Netcom*, 907 F. Supp. at

1374; *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1169 (C.D. Cal. 2002).<sup>3</sup>

### **III. The Panel’s Policy-Driven Analysis Fails To Account For The Balance Struck By The DMCA**

The panel believed that adopting the *Global-Tech* rule in the copyright context was the “sensible” approach to “target[ing] culpable conduct without unduly burdening technological development.” Opinion, at 27. But that analysis overlooked the fact that Congress already addressed this concern when it enacted the Digital Millennium Copyright Act (“DMCA”). The DMCA “strikes a balance between the interests of copyright holders in benefitting from their labor” and “entrepreneurs in having the latitude to invent new technologies without fear of being held liable if their innovations are used by others in unintended infringing ways.” *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045, 1051 (9th Cir. 2017) (citation omitted). Under the DMCA, a service provider is already protected from liability if it complies with the statute. With full knowledge of

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<sup>3</sup> *Ludvarts* had no reason to address the “should have known” standard. Courts in the Ninth Circuit post-*Ludvarts* have continued to ground contributory liability in either actual or constructive knowledge. See, e.g., *Tresona Multimedia, LLC v. Burbank High Sch. Vocal Music Ass’n*, No. CV 16-04781-SVW-FFM, 2017 U.S. Dist. LEXIS 115235, at \*8 (C.D. Cal. Feb. 22, 2017); *VBConversions LLC v. Gulf Coast Ventures, Inc.*, No. CV 12-8265 JGB (AGRx), 2016 U.S. Dist. LEXIS 105760, at \*14 (C.D. Cal. Aug. 10, 2016); *Fahmy v. Live Nation Entm’t, Inc.*, No. 2:15-cv-01158-CAS (PJWx), 2015 WL 3617040, 2015 U.S. Dist. LEXIS 75347, at \*14 (C.D. Cal. June 8, 2015).

contributory infringement case law, Congress chose to enact the DMCA while leaving the body of affirmative liability principles untouched. There is thus no reason to weaken the already well-developed doctrine of contributory liability to serve objectives that Congress already considered and balanced. Nor is there any sound reason to grant impunity to the negligent or reckless. The scope of online copyright infringement is “staggering,” *Grokster*, 545 U.S. at 923, and demands more protection, not less.

### **CONCLUSION**

Accordingly, amici curiae the RIAA and NMPA respectfully request that the Fourth Circuit grant Plaintiff-Appellee BMG’s Petition for Rehearing and Rehearing en banc.

Dated: February 22, 2018

Respectfully submitted,

*/s/ Scott A. Zebrak*

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
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**Type-Volume Limit for Briefs:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

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(s) Scott A. Zebrak

Party Name RIAA and NMPA

Dated: 2/22/2018



**CERTIFICATE OF SERVICE**

I, Scott A. Zebrak, certify that on February 22, 2017, I caused the foregoing Brief of Recording Industry Association of America, Inc. and National Music Publishers' Association as *Amici Curiae* In Support of Petition for Rehearing And Rehearing En Banc to be filed with the Court electronically using the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Scott A. Zebrak

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
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COUNSEL FOR: Recording Industry Association of America, Inc. and National Music Publishers'  
Association

as the

(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☒ amicus curiae ☐ intervenor(s) ☐ movant(s)

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I certify that on February 22, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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