

No. 23-50162

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

UMG Recordings, Incorporated; Capitol Records, L.L.C.; Warner Bros. Records, Incorporated; Sony Music Entertainment; Arista Records, L.L.C.; Arista Music; Atlantic Recording Corporation; Capitol Christian Music Group, Incorporated; Elektra Entertainment Group, Incorporated; Fonovisa, Incorporated; Fueled by Ramen, L.L.C.; LaFace Records, L.L.C.; Nonesuch Records, Incorporated; Rhino Entertainment Company; Roadrunner Records, Incorporated; Roc-A-Fella Records, L.L.C.; Tooth & Nail, L.L.C.; Zomba Recording, L.L.C.,

Plaintiffs—Appellees/Cross-Appellants,

v.

Grande Communications Networks, LLC,

Defendant—Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-000365-DAE

**BRIEF FOR *AMICUS CURIAE* THE COPYRIGHT ALLIANCE
IN SUPPORT OF PLAINTIFFS-APPELLEES/
CROSS-APPELLANTS**

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INTEREST OF *AMICUS CURIAE*¹

The Supreme Court of the United States recognizes that “the Framers intended copyright itself to be the engine of free expression.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985). Consistent with that crucial societal objective, *amicus curiae* The Copyright Alliance (“*Amicus*”) is dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. The Alliance is a nonprofit, nonpartisan 501(c)(4) public interest and educational organization and represents the copyright interests of over two million individual creators and over 15,000 organizations across the entire spectrum of creative industries, including authors, songwriters, musical composers and recording artists, graphic and visual artists, photographers, journalists, documentarians, screen, television and filmmakers, and software developers. The Copyright Alliance’s membership comprises these individual creators and innovators, creative union workers, and small businesses in the creative industry, as well as the organizations and corporations that support and invest in them. The livelihoods of this diverse array of creators and companies depend on the commercialization of the exclusive intellectual property rights

¹ All parties have consented to the filing of this brief. While Appellees herein are members of the Copyright Alliance, no counsel for a party authored this brief in whole or in part. No party, counsel to any party, or any person other than *Amicus* contributed money to fund preparation or submission of this brief.

guaranteed by copyright law. This, in turn, incentivizes the creation and dissemination of new works and promotes the progress of the arts.

Amicus submits this brief in support of Plaintiffs/Appellees UMG Recordings, Inc. *et al.* (“UMG”) because overturning the jury’s verdict and reversing the district court’s judgment would upend decades of well-established law governing contributory copyright infringement. Doing so would permit bad actors like Defendant-Appellant Grande Communications (“Grande”) to facilitate massive digital theft, all to the grave detriment of the copyright holders, consumers of expressive works, and the creative economy. As a result, reversal would damage the very incentives for creation of expression for which the Framers took care to provide in the Constitution.

SUMMARY OF ARGUMENT

The ability of copyright owners to hold accountable those who knowingly facilitate infringement serves a crucial purpose in protecting their intellectual property rights. The critical need to hold those who facilitate copyright infringement secondarily liable for the illegal conduct of a vast number of individuals could hardly be starker in this case, in which pursuing individual lawsuits against anonymous direct infringers is clearly impracticable and likely impossible. Exonerating Grande and wrongdoers like it would undermine the foundations of our laws.

While Grande attempts to cast itself as a mere innocent equipment provider, it in fact knowingly and materially contributed to copyright infringement on a massive scale. To evade liability, Grande argues that only those who induce copyright infringement or who distribute a product capable solely of infringing uses may be found liable for contributory infringement. Under this view, contributory infringement does not include knowing and material contribution to infringing conduct.

In making this argument, Grande ignores longstanding and unbroken case law, which recognizes that secondary liability comprises three distinct doctrines, namely contributory infringement, vicarious liability, and inducement of copyright infringement. Neither does Grande acknowledge the clear legislative history and

relevant statutory language of the Copyright Act of 1976 and the Digital Millennium Copyright Act of 1998.

The concept that one who knowingly and materially contributes to infringement is liable for that infringement has its roots in cases decided in the early part of the twentieth century. In 1971, the Second Circuit held in a widely followed opinion that, “one who, with knowledge of the infringing activity, induces, causes *or* materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (emphasis added). Notably, *Gershwin* used the word “or,” in describing this type of liability, meaning that material contribution and inducement are separate types of secondary liability.

Five years after *Gershwin*, Congress enacted the current Copyright Act of 1976. Section 106 of the Act gives the copyright owners “the exclusive rights to do and to *authorize*” the enumerated rights listed in the statute. The legislative history of the statute makes clear that Congress intended to preserve the common law governing secondary liability—and that such common law included *Gershwin*’s then-recent formulation of contributory infringement.

In the ensuing years, numerous courts, including the Supreme Court in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (“*Sony-*

Betamax”), reaffirmed the principle that one who, with knowledge, materially contributes to copyright infringement is liable as a contributory infringer. Contrary to Grande’s contention, *Sony-Betamax* cannot possibly be construed as rejecting knowing, material contribution to copyright infringement as a basis for imposing secondary liability. Moreover, the Supreme Court in that case considered an entirely different factual scenario from the one presented here.

In 1998, Congress enacted the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512, which provides a safe harbor for internet service providers that, among other conditions, adopt and implement a policy that provides for the termination of repeat copyright infringers. The legislative history of section 512 emphasizes that Congress intended to preserve existing law governing contributory infringement—and that existing law included liability for knowingly and materially assisting primary infringement. In 2005, the Supreme Court in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), once again reaffirmed *Gershwin*’s formulation of contributory infringement.

Grande, along with *amici* the Broadband Association (“USTelecom”) and CTIA—The Wireless Association (“CTIA”) (hereinafter “Broadband”), argue that the Supreme Court’s holding in *Twitter v. Taamneh*, 598 U.S. 471 (2023), precludes liability here, because Grande is purportedly a passive internet provider. In light of the common law governing contributory copyright infringement,

however, *Twitter* is inapposite.

Grande also challenges the jury's verdict awarding statutory damages to Appellees for each individual infringing sound recording as opposed to each album compilation, arguing that Plaintiffs registered with the U.S. Copyright Office only album compilations and not individual sound recordings. The district court's decision to permit recovery of statutory damages for each sound recording is grounded in the statutory text and furthers a significant policy essential to the ability of many creators of copyrighted content to earn a living. As most courts have held, individual works like sound recordings, songs, photographs, journalistic articles, short stories, poems, fashion designs, and software frequently have independent economic value apart from the value of the compilation in which they appear. This is true despite whether, as a technical matter, the works were registered according to an administrative process permitting, *inter alia*, registration of multiple works in a single application. A registration system intended to permit efficient, inexpensive registration to preserve a creator's livelihood should not have the effect of permitting pirates to steal hundreds, or even thousands, of independently copyrighted works and pay only a single statutory damage award to copyright owners whose livelihoods often depends on monetizing their individual works. Practically speaking, Grande's attempt to limit the statutory damage award is anathema to the property-based incentives that the Copyright Act provides to

encourage the creation and distribution of new expressive works.

Amicus urges the Court to affirm the district court’s judgment.

ARGUMENT

I. ESSENTIAL TO STOPPING MASSIVE COPYRIGHT INFRINGEMENT IS THE LONG-ESTABLISHED PRINCIPLE THAT ONE WHO KNOWINGLY AND MATERIALLY CONTRIBUTES TO INFRINGEMENT IS SECONDARILY LIABLE

A recent study concluded that the copyright industries contributed over \$2.9 trillion to the U.S. economy in 2021. Robert Stoner and Jéssica Dutra, Secretariat Economists, Prepared for the International Intellectual Property Alliance (IIPA), *Copyright Industries In The U.S. Economy: The 2022 Report*, at 13 (Dec. 2022), https://www.iipa.org/files/uploads/2022/12/IIPA-Report-2022_Interactive_12-12-2022-1.pdf. Another study concluded that global online piracy of motion pictures alone costs the U.S. economy at least \$29.2 billion in lost revenue each year. U.S. Chamber Of Commerce, *Impacts Of Digital Piracy On the U.S. Economy*, at ii (June 2019), <https://www.theglobalipcenter.com/wp-load/2019/06/Digital-Video-Piracy.pdf>.

Copyright law guarantees a property right with a view toward “suppl[ying] the economic incentive to create and disseminate ideas.” *Harper & Row*, 471 U.S. at 558, *citing Mazer v. Stein*, 347 U.S. 201, 210 (1954). In this digital age, “[w]hen 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...” *Grokster*, 545 U.S. at 929-30. Under such circumstances, the only practical alternative is to go against those who are secondarily liable.

The law recognizes three forms of secondary liability: contributory infringement, vicarious liability, and inducement of copyright infringement.² At issue in this case is the contributory infringement variant of secondary liability, a doctrine that plays a crucial role in protecting property rights and furthering copyright’s objectives.

Grande argues that it can escape liability based on several Supreme Court cases. The common law, legislative history, relevant statutes, and the very Supreme Court opinions that Grande cites mandate otherwise.

A. *The Case Law and Legislative History of the Copyright Act Establish that a Knowing, Material Contribution to Copyright Infringement Gives Rise to Secondary Liability*

“[D]octrines of secondary liability emerged from common law principles and are well established in the law.” *Grokster*, 545 U.S. at 930-31, *citing Sony-Betamax*, 464 U.S. at 486 (Blackmun, J., dissenting). That common law has a long history. In *BMG Rights Management*, 881 F.3d 293, 307 (4th Cir. 2018)—a case highly analogous to the one at bar—the Fourth Circuit cited *Henry v. A.B. Dick*

² Vicarious infringement occurs when a defendant “profits directly from the infringement and has a right and ability to supervise the direct infringer, even if the defendant initially lacks knowledge of the infringement.” *Grokster*, 545 U.S. at 930 n.9. Inducement occurs where a person “intentionally induc[ed] or encourag[ed] direct infringement.” *Id.* at 930.

Co., 224 U.S. 1 (1912) (overruled on other grounds, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917)), for the proposition that a seller of a product that has lawful uses will nevertheless be liable as a contributory infringer when that seller knows that the buyer will in fact use the product for infringing uses. 881 F.3d at 307, *citing Henry*, 224 U.S. at 48-49.³

In 1971, the Second Circuit decided *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, in which the court held that “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” *Id.* at 1162. As an example of contributory infringement, the court cited *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966), noting:

[T]he district court held that an advertising agency which placed non-infringing advertisements for the sale of infringing records, a radio station which broadcast such advertisements and a packaging agent which shipped the infringing records could each 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. Their potential

³ The Supreme Court cited *Henry* in *Grokster*, 545 U.S. at 932–33, and *Sony-Betamax*, 464 U.S. at 441–42.

liability was predicated upon the common law doctrine that one who knowingly participates or furthers a tortious act is jointly and severally liable with the prime tortfeasor.

(Cleaned up). In this scenario, the advertising agency, the radio station that broadcast the advertisements, and the shipper were all liable because they knowingly and materially contributed to the infringement.

In 1971, Congress was in the throes of the Copyright Law revision process that ultimately resulted in the 1976 Act. Congress enacted the current Copyright Act about five years after *Gershwin*. Section 106 of the Act, which enumerates a copyright owner's exclusive rights, provides: "[T]he owner of copyright under this title has the exclusive rights to do *and to authorize* any of the following: [listing rights]." (Emphasis added). According to the House Report of the Committee on the Judiciary accompanying the 1976 Copyright Law revision:

Use of the phrase "to authorize" is intended to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.

H.R. Rep. No. 94-1476, at 61 (1976). Congress thus clearly reaffirmed the existing

common law—which included *Gershwin*'s material contribution prong.⁴ In the years following the Copyright Act's passage, numerous courts adopted the *Gershwin* formulation. See *BMG Rights Management v. Cox Communications*, 881 F.3d at 309-310 (noting that *Gershwin* is widely cited). Indeed, this Court adopted the *Gershwin* test in *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 790 (5th Cir. 1999).

In 1984, the Supreme Court decided *Sony-Betamax*, 464 U.S. 417. There, the Court considered whether the manufacturer of the Betamax videocassette recorder was liable for contributory infringement because consumers could use the recorder to copy copyrighted television programming. In answering the question in the negative, the Court stressed that the only contact between the defendant and its customers occurred at the moment of sale and ended thereafter. *Id.* at 437-38. Because the Betamax was a “staple article of commerce” capable of substantial noninfringing uses, the Court believed that a finding of contributory infringement would have required the defendant to stop *all* sales of the Betamax, or at least pay a royalty to the copyright holder. On the facts before it, the Court expressed concern that if the manufacturer of the Betamax were deemed a contributory

⁴ Grande's knowing refusal to take any action to stop rampant infringement falls within the dictionary definition of “authorize,” namely “to give power or permission to (someone or something).” <https://www.britannica.com/dictionary/authorize>.

infringer, the copyright owner could impede legitimate uses of products—an improper extension of the copyright owner’s rights, according to the majority. *Id.* at 440-41.

Nowhere does *Sony-Betamax* explicitly or implicitly repudiate the knowing-and-material-contribution prong as articulated in *Gershwin*. On the contrary, the Court cited *Henry v. A.B. Dick*, discussed above, from which the material-contribution prong developed. *Id.* at 441. More explicitly, the Court stated:

[T]he label “contributory infringement” has been applied in a number of lower court copyright cases involving *an ongoing relationship* between the direct infringer and the contributory infringer at the time the infringing conduct occurred.

Id. at 437 (emphasis added).

Unlike the defendant in *Sony-Betamax*—which sold discrete products—Grande’s relationship with its customers is ongoing. So, unlike the manufacturer of the Betamax, Grande could have terminated dishonest customers while at the same time allowing honest customers to continue using its service. The explicit policy justifications underlying the *Sony-Betamax* decision are therefore entirely absent here.⁵

⁵ In addition, Grande’s invocation of the words “staple article of commerce” is inapposite. *Sony-Betamax*’s reference to articles of commerce and substantial noninfringing uses “came in a discussion of the proof-of-knowledge prong, not the

After *Sony-Betamax*, the courts continued to follow *Gershwin*'s formulation of contributory infringement, including in three significant opinions that predated the effective date of the DMCA. In 1996, the Ninth Circuit decided *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996), in which the court, after stating that the classic statement of the contributory infringement doctrine is found in *Gershwin*, concluded that “providing the site and facilities for known infringing activity is sufficient to establish contributory liability.” Around the same time, two district court cases also addressed the question whether an online service provider could be liable as a contributory infringer, and both relied on *Gershwin*. See *Sega Enterprises Ltd. v. MAPHIA*, 948 F. Supp. 923, 932 (N.D. Cal. 1996) (analyzing the secondary liability of online services provider); *Religious Technology Ctr. v. Netcom On-Line Communication Serv., Inc.*, 907 F. Supp. 1361, 1372 (N.D. Cal. 1995) (same). So, by the mid-1990s, and after *Sony-Betamax*, knowing, material contribution to infringement continued to give rise to secondary liability.

proof of material contribution prong.” 6 *Patry on Copyright* § 21:48 (2023). That is, *Sony-Betamax* merely held that where product has substantial noninfringing uses, a court will not automatically assume *constructive* knowledge of infringement occurring after a sale. Because Grande had *actual* knowledge of infringement, liability attaches despite the existence of non-infringing uses. See *BMG Rights Management v. Cox Communications* 881 F.3d at 307, citing *Henry*, 224 U.S. 1 (where a defendant has knowledge of specific infringements and lends material assistance, that defendant is liable as a contributory infringer).

In 1998, Section 512 of the DMCA took effect. That statute exempts internet service providers (“ISPs”) like Grande from liability for users’ infringements through “safe harbors,” so long as the ISP meets certain requirements. According to the legislative history of section 512, the liability of an ISP that failed to take advantage of the safe harbor provisions “would be adjudicated based on 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, which are unchanged by new Section 512.*” H.R. Rep. No. 105-551, pt. 2, at 64 (1998) (emphasis added). Congress thus reaffirmed that existing law, which broadly applied the *Gershwin* formulation of contributory infringement, remained in effect after section 512’s enactment.

In 2005, the Supreme Court in *Grokster*, 545 U.S. 913, yet again reaffirmed the established law. In that case, the Court considered whether purveyors of software that allowed users to infringe copyrighted works were secondarily liable as contributory infringers. At the outset, the *Grokster* opinion cited Justice Blackmun’s dissent in *Sony* as accurately characterizing doctrines of secondary liability that “are well established in the law.” *Id.* at 930-31, citing *Sony-Betamax*, 464 U.S. at 486 (Blackmun, J., dissenting). In turn, Justice Blackmun favorably quoted *Gershwin* for the proposition that “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing

conduct of another, may be held liable as a ‘contributory’ infringer.” 464 U.S. at 487, quoting *Gershwin*, 443 F.2d at 1162.⁶ So, in arguing that *Grokster* repudiated *Gershwin*’s material-contribution prong, Grande misreads the opinion and attempts to import factors into a secondary liability analysis for which there is no precedent.

In fact, *Grokster* had no occasion to consider material contribution at all. Rather, “[t]he issue of material contribution was not reached by the Supreme Court in vacating and remanding this decision since the Court found liability based on inducement.” 6 *Patry on Copyright* § 21:48. Inducement is a stand-alone, separate form of secondary liability, along with contributory infringement and vicarious liability. See *Grokster, supra*; *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1032 (9th Cir. 2013). See also 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, §12.04[A][5][a] at 12-166.6 (noting that *Grokster* created an additional branch of secondary liability, *i.e.*, inducement). Inducement theory as articulated in *Grokster* is neither a necessary element of contributory infringement nor a repudiation of the knowing-and-material contribution prong.⁷

⁶ Like *Sony-Betamax*, *Grokster* cited *Henry v. A.B. Dick* as good law. See 545 U.S. at 935.

⁷ Moreover, as in *Sony-Betamax*, the *Grokster* defendants’ relationships with the uses of their software ended at the point of distribution, such that the *Grokster* defendants allegedly had neither actual knowledge of, nor ability to control, subsequent infringements. For the reasons discussed, the facts of this case are precisely the opposite.

In summary, Grande asks this Court to disregard longstanding common law, the legislative history of the Copyright Act and the DMCA, and the unequivocal language of the salient Supreme Court cases—all of which reaffirm that when a party that, like Grande, provides an ongoing service and lends knowing and material assistance to another’s copyright infringement, that party is a contributory infringer. To adopt Grande’s unsupported argument would result in grave harm to copyright owners like Appellees, whose only practical recourse in a case like this is to pursue the secondary infringer.

B. *Twitter v. Taamneh Confirms That Grande Engaged in Contributory Infringement*

Grande and its *amici* Broadband maintain that the Supreme Court’s recent *Twitter*, 598 U.S. 471 opinion absolves Grande from liability. On the contrary, *Twitter* did not involve a copyright dispute and is in any event inapplicable given the starkly different facts of that case.

In *Twitter*, relatives of victims who died in a terrorist attack sued Twitter, Facebook, and Google under 18 U.S.C. § 2333—an Antiterrorism Act (“ATA”) provision that permits U.S. nationals who have been “injured . . . by reason of an act of international terrorism” to file a civil suit for damages—for aiding and abetting a terrorist act by allowing ISIS to recruit and propagandize on social media. Specifically, the plaintiffs alleged that Twitter and other social media companies aided and abetted the terrorist attack by knowingly allowing ISIS and

its supporters to use their platforms and “recommendation” algorithms as tools for recruiting, fundraising, and spreading propaganda.

The central question in *Twitter* was “whether defendants’ conduct constitute[d] aiding and abetting by knowingly providing substantial assistance” to the terrorists. *Twitter*, 598 U.S.at 484 (cleaned up). The Court held that the defendants before it were not liable because “[P]laintiffs never allege that ISIS used defendants’ platforms to plan or coordinate the Reina attack; in fact, they do not allege that [the terrorist] himself ever used Facebook, YouTube, or Twitter.” *Id.* at 498.

Grande and its amici Broadband fail to appreciate that, as discussed above, the Copyright Act’s legislative history and subsequent case law specifically adopt the law of contributory infringement as applied by the district court below, and the Act contains specific language condemning “authorization” of any act that would constitute infringement. Moreover, *Twitter* is distinguishable on its facts. There, the defendants had no knowledge of the specific planned terrorist attack. Neither were the defendants’ services used to commit the attack. Rather, the attacker apparently never even used social media in furtherance of the terrorist attack.

In contrast, there is no dispute that the infringers used Grande’s service to commit copyright infringement. Grande had actual knowledge of such infringement yet provided services necessary for it to occur. This case presents

exactly the type of fact pattern that falls squarely within longstanding principles of secondary liability under copyright law.

*

Section 512 of the DMCA has operated for a quarter-century to provide a safe-harbor to internet service providers who become aware of repeat infringers. By their arguments, Grande and its friends would render this statute and the many cases interpreting it superfluous. Quite simply, no ISP would need to avail of itself of the DMCA safe harbors, and copyright infringement—not addressable by filing lawsuits against tens of millions of direct infringers or by DMCA notices—could run rampant, thereby depriving copyright holders of their valuable property rights and consumers of a marketplace of expressive works. Neither the legislative history nor any Supreme Court case countenances such an absurd result.

II. TO DEPRIVE THE COPYRIGHT OWNER OF SEPARATE STATUTORY DAMAGE AWARDS SIMPLY BECAUSE WORKS WERE REGISTERED TOGETHER WOULD THREATEN THE LIVELIHOOD OF SOME COPYRIGHT OWNERS

Section 504(c)(1) of the Copyright Act limits the recovery of statutory damages to “one work” and further provides that for the purposes of that subsection, all parts of a compilation constitute one work. Plainly, individual sound recordings are copyrightable as individual “works” of authorship, even though those works may be registered together. Following the great weight of precedent, the district court correctly found that because each individual sound recording has

economic value independent of the value of the compilation, each such sound recording is a separate work under section 504(c)(1). The jury properly awarded statutory damages on that basis.

Disregarding the plain language of the Copyright Act, Grande argues that notwithstanding each sound recording's independent economic value, because the Appellees registered individual sound recordings with the Copyright Office as part of album compilations, recovery of statutory damages is automatically limited to each album compilation—even though individual sound recordings from the album were infringed. This argument flies in the face of the well-reasoned weight of authority and sound policy.

While Section 504(c)(1) of the Act provides that all parts of a compilation constitute one work, it does *not* say that individual works in a compilation cannot also exist as separate, independent works. *See VHT, Inc. v. Zillow Group, Inc.*, 69 F.4th 983, 990 (9th Cir. 2023), *quoting Arista Recs. LLC v. Lime Grp. LLC*, No. 06 CV 5936 KMW, 2011 WL 1311771, at *3 (S.D.N.Y. Apr. 4, 2011). Indeed, in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), the Supreme Court recognized otherwise. In that case, various newspapers and magazines who owned the copyright in compilations relicensed collections of freelance authors' articles to electronic databases, which in turn sold copies of the individual articles to consumers. The authors sued for copyright infringement. The

publishers argued that because they owned copyrights in the collective works and had licensed the collective works to the database companies, they had not infringed.

The Supreme Court held that the Copyright Act recognizes that copyright inheres both in the individual works that make up a collective work, *and* in the copyright in the collective work as a whole. *Id.* at 493-94. However, copyright in the collective work does not extend to the preexisting material. *Id.* The Court stressed that the clear purpose of the 1976 revision of the Copyright Act was to ensure that while the selection and placement of images and articles in a collective work such as a magazine, newspaper, or database, is a copyrightable collection, the individual works in the collection have independent protectable value. *Id.* at 495 (noting that the changes under the 1976 Copyright Act were intended by Congress to “clarify and improve [this] confused and frequently unfair legal situation with respect to rights in contributions.”) (citing H.R. Rep. No. 94-1476, at 122 (1976)).

Thus, inclusion of a work in a collection, compilation, group registration, or database does not rob the individual work of any of its protections, including the right to recover statutory damages in an infringement suit for each individual work. Indeed, the Copyright Office has made clear that registration of an album affords copyright protection both to the album as a collective work and to the

individual sound recordings where, as here, each individual work contains a sufficient amount of authorship, is owned by the same party, has not been previously published or registered, and is not in the public domain. *See* Group Registration of Works on an Album (GRAM), U.S. COPYRIGHT OFFICE, CIRCULAR 58, available at <https://www.copyright.gov/circs/circ58.pdf> and the relevant FAQ, available at <https://www.copyright.gov/help/faq/faq-gram.html#racw-faq3>.

Not surprisingly, then, courts have held that “the number of copyright registrations is not the unit of reference for determining the number of awards of statutory damages.” *VHT, Inc.*, 69 F.4th at 989, *quoting Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1117 n.8 (1st Cir. 1993) and citing cases. Because a copyright interest frequently inheres in both a compilation and in its constituent works, numerous courts considering how to award statutory damages where multiple works are part of one registration focus on whether the individual works have *independent economic value*. *See, e.g., VHT, Inc.*, 69 F.4th at 988 (noting that “the independent economic value of the photos ‘informs our analysis’” of whether statutory damages may be awarded for individual works) (quoting *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 747 (9th Cir. 2019)); *Sullivan v. Flora, Inc.*, 936 F.3d 562, 572 (7th Cir. 2019) (“The inquiry and fact finding demanded by § 504(c)(1) is more functional than formal, taking account

of the economic value, if any, of a protected work more than the fact that the protection came about by an artist registering multiple works in a single application.”); *Gamma Audio & Video, Inc.*, 11 F.3d at 1116-17 (citing *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990)) (adopting “independent economic value” test to determine if each episode of series had copyright value unto itself and was therefore an independent work for purposes of awarding statutory damages).

The individual sound recordings at issue in this case have independent economic value. In this digital era, consumers stream or download individual recordings, each of which has its own independent economic value separate and apart from the album in which they appear and from other recordings in the album. As early as 2000, the Register of Copyrights recognized this trend away from album sales and towards a consumer focus on single sound recordings available in digital form. *See Sound Recordings as Works Made for Hire before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary, 106th Congress, 2nd Session* (May 25, 2000) (statement of Marybeth Peters, Register of Copyrights), <https://www.copyright.gov/docs/regstat52500.html>. That trend has come to fruition. *See Bobby Owsinski, The Music Album Is Dead, But Not Everyone’s Accepted It Yet*, *Forbes* (March 10, 2018),

<https://www.forbes.com/sites/bobbyowsinski/2018/03/10/album->

[dead/?sh=2bf1facf6986](https://www.forbes.com/sites/bobbyowsinski/2018/03/10/album-dead/?sh=2bf1facf6986) (observing that albums are relics of the past and noting a significant drop in album sales in recent years). The Copyright Office acknowledged this reality in 2018 by implementing GRAM.

Thus, for example, Apple's iTunes recommends to listeners individual recordings first; its service permits streaming and downloading of an entire album compilation, or alternatively, of individual recordings from that album. Streaming services compile playlists of individual recordings by distinct artists based on a listener's habits. Indeed, we live in a culture in which choices of content are broad, and attentions spans are often narrow. Consumers watch short videos on social media platforms like TikTok, YouTube, and X (formerly Twitter), and listen to music on platforms like iTunes, Pandora, and Spotify. Moreover, no longer do media of expression require linear exposure to sound recordings on an album. That is, to listen to a sound recording, the user need not first listen to other songs on a vinyl record or even click a button to skip a song on a CD. Likewise, while photographs, serials (used by STM publishers), newspaper articles, software, and fabric designs might be registered as part of a compilation or a group, they have independent economic value as original works and are often marketed or licensed individually.

Adopting Grande's legally unsupported argument would not only improperly limit recovery of statutory damages in cases involving sound recordings but would also deprive copyright owners in these other industries of fair recompense for massive copyright infringement. Copyright registration can be costly, especially for copyright owners with limited financial means. *See* <https://www.copyright.gov/about/fees.html> (fees for registering an individual work range from \$45 to \$125). Some owners—*e.g.*, photographers, graphic designers, songwriters, poets, software developers—create scores, hundreds, or even tens of thousands, of copyrighted works. Many photographers, by way of example, could not afford to register their works even at a cost of five dollars per photograph. Registration of multiple works as a compilation recognizes the discrete original contributions of both the compiler *and* the creators of each individual work. To require separate registrations for both each individual work and the compilation or group in which they appear would promote inefficiency and duplicative efforts; would increase costs for both copyright owners and the Copyright Office; and would reward massive infringement at little cost to wrongdoers like Grande. To paraphrase the Ninth Circuit, if a copyright holder could receive only one statutory damage award for infringements of multiple works that have independent value, then the attempt to save the copyright owner expenses and foster efficiency via registration of a compilation, collective work,

or group registration would be “at best an empty gesture and at worst a cruel joke.” *VHT, Inc.*, 69 F.4th at 992.

CONCLUSION

The longstanding common law and subsequent legislative enactments reaffirm that where a party like Grande Communications Networks, LLC knowingly and materially contributes to copyright infringement, that party is liable for contributory infringement. Rather than rejecting that long-established principle of copyright law, as Grande and its *amici* disingenuously argue, the salient Supreme Court authority confirms it. In attempting to rewrite the law governing secondary liability and statutory damages, Grande would deprive the Appellees of their property, because there is no practicable (indeed, there is likely no possible) way to sue the vast number of individual infringers and obtain meaningful recompense for the significant harm that copyright infringement works not on just the copyright owner but on the U.S. economy. *Amicus* urges that the district court’s judgment be affirmed.

DATED: December 8, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify as follows:

1. This Brief for *Amicus Curiae* The Copyright Alliance in Support of Defendants-Appellees complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), Fed. R. App. P. 29(a)(5), and Fifth Circuit Rule 32.2. because this brief contains 5,372 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and,

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, the word processing system used to prepare the brief, in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on this 8th day of December, 2023, I electronically filed the foregoing Brief of *Amicus Curiae* using the Court's CM/ECF system which will send notification of such filing to all parties of record.

DATED: December 8, 2023

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