

No. 23-50162

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

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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,*

*versus*

GRANDE COMMUNICATIONS NETWORKS, LLC,

*Defendant—Appellant/Cross-Appellee.*

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

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**REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE**

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**STATEMENT OF THE ISSUES ON CROSS-APPEAL**

1. In instructing the jury on the Labels’ contributory copyright infringement claim, did the district court—aligning itself with the weight of authority—correctly refuse to instruct the jury that a copyright owner’s exclusive right “to distribute copies . . . of the copyrighted work to the public” under 17 U.S.C. § 106(3) is violated by a mere attempt to distribute?
2. Do the Labels have standing to challenge a jury instruction on a liability question the jury answered—and on which the district court rendered judgment—in their favor?

## STATEMENT OF THE CASE

Grande briefly responds to several inaccuracies in the Labels' Statement of the Case.<sup>1</sup>

First, the Labels' Statement of the Case includes a sprawling discussion of the law that purports to describe the relationship between the Digital Millennium Copyright Act ("DMCA") safe harbor for conduit internet service providers ("ISPs"), 17 U.S.C. § 512(a), and copyright infringement liability. Label Br. 8-11. There, they assert that "ISPs can avoid infringement claims like those Plaintiffs assert here, but *only if* they" qualify for the safe harbor. Label Br. 11 (emphasis added). In the Labels' view, an ISP has two options: qualify for the safe harbor or be found liable for copyright infringement. *See also* Opening Br. 48-50 (discussing the Labels' presentation of this argument at trial). Their Statement of the Case even goes so far as to assert that Grande "understood" but "consciously ignored" its "legal obligations" under the DMCA. Label Br. 11.

The Labels' legal discussion is completely off base. Implementing a DMCA safe harbor policy is optional. *See generally* 17 U.S.C. § 512. Section 512(l) of the DMCA expressly provides that an ISP's failure to qualify for the safe harbor "shall

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<sup>1</sup> Grande addresses only the most glaring issues with the Labels' Statement of the Case. Grande otherwise relies on its own Statement of the Case. Opening Br. 4-12.

not bear adversely upon the consideration of a defense” by the ISP that its conduct “is not infringing . . . or any other defense.” Worse, the Labels’ direct leap from safe harbor to liability ignores their burden of proof. The DMCA safe harbor does not come into play until the plaintiff has proved its copyright infringement claim. *See BWP Media USA, Inc. v. T & S Software Assocs., Inc.*, 852 F.3d 436, 443-44 (5th Cir. 2017). Here, the district court granted summary judgment on Grande’s DMCA safe harbor defense, so the safe harbor should have been irrelevant. *See* Opening Br. 7-8, 10-11, 48-50. It is certainly irrelevant to this appeal. *See infra* Section II.C.

Second, through their discussion of the trial evidence, the Labels again suggest that Grande is liable because it did not qualify for the section 512(a) safe harbor. They place particular emphasis on one 2013 email from a Grande employee. Label Br. 14-15. The Labels assert that the employee “questioned the legality of Grande’s conduct” and was worried Grande was not “complying with the law,” but in fact he was questioning whether Grande was eligible for the DMCA safe harbor.<sup>2</sup> ROA.341599. The employee—an IT professional—had been asked to examine, on a technical level, Grande’s system that processed copyright complaints received by email and associated them with subscriber accounts. ROA.12637-39. Based on

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<sup>2</sup> The Labels imply that Grande removed this employee from the project in response to this email. Label Br. 15. There was no evidence of that. The project was outsourced because Grande changed billing systems. ROA.12680.

internet research, the employee mistakenly believed that the DMCA imposes affirmative requirements on internet service providers. ROA.12637-38, 12647-48, 341599.

Third, the Labels exaggerate the evidence by equating Rightscorp's copyright infringement complaints ("notices") with acts of infringement by Grande's subscribers.<sup>3</sup> See Label Br. 13-14. This is inaccurate. Rightscorp could not detect when a BitTorrent user shared a copyrighted work with another user. ROA.11850-53. Thus, the number of complaints did not represent the volume or frequency of any distribution of copyrighted content, but rather reflected how often Rightscorp scanned peer-to-peer activity. ROA.11908-09. In other words, Rightscorp had control over the number of notices it sent. ROA.11915-16, 11852-53. Rightscorp had an incentive to send as many notices as possible because it made money from settlements with accused infringers. ROA.11853, 341608-09 (showing that Rightscorp was responsible for a substantial portion of the copyright complaints Grande received).

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<sup>3</sup> There was evidence that Rightscorp separately downloaded music files from a small subset of accused infringers. ROA.13265. But these downloads were not the basis of any of the complaints Rightscorp emailed to Grande; Rightscorp would attempt a download (if at all) *only after* sending a complaint. ROA.11752. Rightscorp did not keep records of these download attempts, including how often they failed. ROA.11875-76.

Fourth, to suggest a wrongful motive, the Labels assert that Grande made a “conscious decision to maximize its profits by continuing to provide internet services” to copyright infringers. Label Br. 6. The Labels cite no evidence to support this statement, because there was none. In fact, there was uncontroverted testimony that Grande’s decisions about how to respond to copyright complaints were never influenced by considerations related to customer retention. *See, e.g.*, ROA.12932-34. There was no evidence that any of Grande’s conduct related to subscriber copyright issues was motivated by money. *See also* Opening Br. 11 n.5.

Finally, the Labels imply that Grande simply ignored copyright infringement complaints. *See, e.g.*, Label Br. 12-16. That is not true. Grande did not terminate service to accused copyright infringers, because Grande had no legal duty to do so. Grande did, however, notify subscribers of copyright infringement complaints through letters that described the nature of the complaint and possible causes—and specifically advised that any infringing conduct is unlawful and should cease. ROA.12405, 12488-89, 12753-54, 341608-13 (internal email attaching template letters). Those letters included a call-in number, and Grande had a tech support team that would field those calls, explain the reason for the letter, and help the subscriber troubleshoot how to secure their internet connection. ROA.13078-83.

The evidence ultimately showed that Grande did nothing more than provide internet service to accused copyright infringers.

## SUMMARY OF THE ARGUMENT

The central contributory copyright infringement issue before the Court is whether providing internet service to a direct copyright infringer, standing alone, is sufficient to support contributory liability. The Supreme Court recently made clear that it is not. It would “run roughshod over the typical limits on tort liability” to “effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them.” *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 503 (2023).

Instead, the Supreme Court’s precedents require proof that the defendant engaged in affirmative conduct showing culpable intent, either (1) by distributing a product “good for nothing else but infringement” or (2) through “active steps taken to encourage direct infringement, such as advertising an infringing use or instructing how to engage in an infringing use.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 932, 936-37 (2005) (cleaned up); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 441-42 (1984). The Labels do not attempt to argue that they made either showing. Thus, upholding the jury’s verdict would require the Court to disregard controlling Supreme Court precedent. The Court should decline that invitation. Instead, the Court should reverse and render judgment for Grande.

The Labels' argument about direct copyright infringement likewise requires the Court to disregard controlling precedent. Proving copyright infringement requires evidence of the work that was infringed, which the Labels failed to present. This Court has expressly rejected the Labels' argument that evidence of direct copying is a substitute for evidence permitting a side-by-side comparison of the copyrighted work and the alleged copy. *Bridgmon v. Array Sys. Corp.*, 325 F.3d 572, 576-77 (5th Cir. 2003). The Labels' position is not only contrary to controlling authority but also is not supported by a single court decision, from any jurisdiction, at any level. This is a separate basis for rendering judgment in Grande's favor.

As for damages, Grande asks the Court to follow 17 U.S.C. § 504(c) as written and authorize only one award of statutory damages for each work in suit. The Labels' recovery of multiple awards for albums registered as compilations violates section 504(c)'s Congressional mandate.

Finally, the Labels' conditional cross-appeal fares no better. The district court correctly instructed the jury that direct infringement of the Labels' distribution rights requires an actual distribution of a copy of a copyrighted sound recording, consistent with the plain language of 17 U.S.C. § 106(3). Besides, the Labels are not aggrieved by the judgment, so their attempted conditional cross-appeal is improper. In the event the Court reaches the cross-appeal, the Labels deserve no relief.



### **STANDARD OF REVIEW FOR CROSS-APPEAL**

The Labels' conditional cross-appeal challenges a jury instruction. The Labels agree with the review standard for jury instructions set out in Grande's opening brief, Opening Br. 18-19, with the clarification that an erroneous jury instruction is reversible only if it "affected the outcome of the case." Label Br. 23-24; *see also Mid-Continent Cas. Co. v. Petroleum Sols., Inc.*, 917 F.3d 352, 357 (5th Cir. 2019). Although the instruction in question could not have affected the outcome of the judgment (and verdict) in their favor, Grande agrees that the clarification accurately describes the rule that this Court reverses only those errors that are harmful.

## ARGUMENT

### **I. The Labels are asking the Court to authorize a dramatic expansion of secondary copyright infringement liability.**

This appeal presents the Court with a choice: (1) follow the Supreme Court’s precedents on the proper scope of secondary liability for copyright infringement (as Grande argues) or (2) deem those precedents inapplicable and instead expand contributory liability (as the district court did) by adopting the Ninth Circuit’s “simple measures” standard.<sup>4</sup> *See, e.g.*, Label Br. 44, 53-54.

By asking the Court to disregard *Grokster* and approve a lower, easier-to-satisfy standard for contributory liability, it is the Labels, not Grande, who seek to “radically rewrite” copyright law. The Labels are effectively asking the Court to mothball *Grokster*. Their attempts to escape *Grokster* by distinguishing it are also unpersuasive. *Grokster* involved defendants who, like Grande, had ongoing relationships with their customers, and *Grokster* applies to defendants who provide services just as it does to those who sell products.

The law is clear that contributory liability requires affirmative, purposeful conduct—not mere inaction, as the district court instructed the jury. Because the evidence cannot sustain a verdict against Grande under the correct legal standard,

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<sup>4</sup> As Grande has noted (Opening Br. 30 n.8), the district court changed “simple measures” to “basic measures” in the jury instruction. ROA.9925.

the Court should reverse the judgment entered on the jury's verdict and render judgment for Grande.

**A. Instructing the jury that Grande is contributorily liable if it provided internet access to copyright infringers was error in view of *Twitter*'s secondary liability principles.**

The district court misstated the law in instructing the jury that Grande is contributorily liable if it “materially contributed” to direct infringement by failing to take “basic measures to prevent” infringement. ROA.9925. This instruction is directly contrary to the secondary liability principles set forth in *Twitter*, 598 U.S. 471, which the Supreme Court issued shortly after the district court's JMOL order.

The parties agree that common law principles of secondary liability dictate whether Grande may be contributorily liable. *See, e.g.*, Label Br. 34, 38-39, 40. But the parties disagree on the proper source of those principles. The Labels would have the Court rely on the Ninth Circuit's expansive approach to contributory liability, which no other circuit has endorsed or adopted. *See, e.g.*, Label Br. 57-58. Grande, on the other hand, has directed the Court to *Twitter*, in which the Supreme Court recently rejected the Ninth Circuit's similarly expansive approach to aiding and abetting liability.

Because aiding and abetting liability and contributory copyright infringement liability share the same common law foundation, *Twitter* is highly relevant here. *See,*

*e.g.*, *Grokster*, 545 U.S. at 935-36 (citing cases holding a defendant contributorily liable because the defendant aided and abetted another’s direct infringement); *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 100 (2d Cir. 2016) (affirming contributory liability of defendant who “aided and abetted infringement”); *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 755 (7th Cir. 2012) (“[T]he law allows a copyright holder to sue a contributor to the infringement . . . in effect as an aider and abettor.”); *Venegas-Hernandez v. Asociación de Compositores*, 424 F.3d 50, 58 (1st Cir. 2005) (contributory liability is “a kind of abettor liability”); *In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003) (describing “the law of aiding and abetting” as “the criminal counterpart to contributory infringement”).

In both common law contexts, the underlying question is whether the defendant’s conduct was purposeful and culpable enough to impose secondary liability. *Twitter*, 598 U.S. at 493 (the “conceptual core that has animated aiding-and-abetting liability for centuries” is “that the defendant consciously and culpably participated in a wrongful act so as to help make it succeed” (cleaned up)); *Grokster*, 545 U.S. at 937 (“The inducement rule . . . premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.”). Indeed, in other pending litigation, the Labels have agreed that “*Twitter* . . . by its own terms roots itself in the

same common-law principles that underlay *Grokster* and *Sony*.” See Record Co. Claimants’ Mem. of Law Opp’n to Frontier’s Mot. J. on the Pleadings 15, *In re Frontier Commc’ns Corp.*, No. 7:20-bk-22476 (Bankr. S.D.N.Y. Jan. 5, 2024), ECF No. 2249 (citations omitted).

Nevertheless, the Labels ignore the most important part of *Twitter*: the Supreme Court’s discussion of whether online providers incur liability when they fail to stop the misuse of legitimate services.<sup>5</sup> *Twitter* categorically rejected that notion, concluding that it would “run roughshod over the typical limits on tort liability” to “effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them.” 598 U.S. at 503.

This is because failing to stop another’s wrongful conduct is “mere passive nonfeasance,” not “affirmative misconduct.” *Twitter*, 598 U.S. at 500. This conclusion applies here. And it confirms that the district court erred in instructing the jury that Grande could be contributorily liable based solely on Grande’s provision of internet service to direct copyright infringers. See ROA.9925. The Labels are therefore wrong to suggest that “if this Court determines that material contribution

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<sup>5</sup> The Labels’ argument that *Twitter* is distinguishable, because of the alleged “nexus” between Grande’s conduct and the acts of direct infringement, goes to the sufficiency of the evidence that we address *infra* in Section II.

remained a viable theory of secondary copyright infringement after *Grokster*, nothing in *Twitter* should alter that conclusion.” Label Br. 48.

*Twitter* emphasized that the defendants could not be liable based on mere inaction because there is no “independent duty in tort . . . that would require defendants or other communication-providing services to terminate customers after discovering that the customers were using the service for illicit ends.” 598 U.S. at 501 (citation omitted); *see also id.* at n.14 (when legislatures want to impose such duties, they do so by statute).

Here, the Labels do not argue that Grande had any such duty.<sup>6</sup> Thus, the district court erred in instructing the jury that Grande was contributorily liable unless it used “basic measures to prevent further damages to copyrighted works.” ROA.9925. Because Grande had no affirmative duty to terminate the internet service of accused copyright infringers, the jury instruction misstates the law.

Still more, *Twitter* rejects the Labels’ “theory of liability” premised on “Grande’s knowledge of its subscribers’ actual infringements based on its ongoing relationships with those subscribers.” Label Br. 44. In *Twitter*, the defendants’ relationship with their customers shared key features with Grande’s relationship

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<sup>6</sup> As discussed below, the Labels cannot rely on the DMCA’s provisions regarding termination of repeat infringers because the DMCA does not impose any affirmative obligations on ISPs. *See* 17 U.S.C. § 512(a), (i), (l).

with its subscribers. Both relationships involved the ongoing provision of a service, and in both situations the defendant had the unquestioned power to terminate their customers' access to that service. 598 U.S. at 480-82.

In fact, the *Twitter* defendants' relationship with the primary bad actors was far closer than Grande's. Twitter, Facebook, and Google knowingly allowed ISIS members to upload videos and other content to their respective websites, and they recommended ISIS members' content to other users. *Id.* at 481-82. Google even "reviewed and approved at least some ISIS videos" under its YouTube revenue-sharing program, "thereby sharing some amount of revenue with ISIS." *Id.* at 482.

Yet even these customer relationships did not make the *Twitter* defendants culpable. That is because they were "the same as their relationship with their billion-plus other users: arm's length, passive, and largely indifferent." *Id.* at 500. The same is true here. As Grande has explained, there is no evidence that Grande treated accused infringers differently than other subscribers. *See* Opening Br. 38. The Labels do not dispute that point.

Ultimately, *Twitter* stands for the proposition that providing online platforms or services for the exchange of information, even if the provider knows of misuse, is not sufficiently culpable to support secondary liability for that misuse. 598 U.S. at 498-99. As *Twitter* explains, providing "infrastructure" for communication in a way

that is “agnostic as to the nature of the content” is not “active, substantial assistance.” *Id.* at 499. In this way, *Twitter*’s holding dovetails with *Grokster*’s recognition that “mere knowledge of . . . actual infringing uses” is not enough to support contributory liability for copyright infringement. 545 U.S. at 937; *see also id.* at 932-33 (*Sony* prohibits “presuming or imputing intent” from the “equivocal conduct of selling an item” with “the mere understanding that some of one’s products will be misused”).

The district court erred in instructing the jury that Grande is contributorily liable if it provided internet access to copyright infringers. ROA.9925. This instruction cannot be squared with *Twitter*’s recognition that common law secondary tort liability cannot be based on “mere passive nonfeasance.” 598 U.S. at 500. Because the jury instruction authorized liability based on passive nonfeasance, and because the Labels do not claim they proved that Grande intentionally encouraged or induced copyright infringement, the Court should reverse and render judgment in favor of Grande. *See also infra* Section I.E.

**B. *Grokster* is controlling.**

Like *Twitter*, *Grokster* holds that secondary liability requires proof of culpable intent. A plaintiff can prove the defendant intended to contribute to infringement either by showing (1) the defendant distributed a product “good for nothing else but



infringement,” 545 U.S. at 932; or (2) “active steps taken to encourage direct infringement, such as advertising an infringing use or instructing how to engage in an infringing use,” *id.* at 936-37 (cleaned up). The district court’s contributory infringement jury instruction was reversible error because it allowed the jury to find Grande liable without proof satisfying either standard. ROA.9925; *Koon v. United States*, 518 U.S. 81, 100 (1996) (“A district court by definition abuses its discretion when it makes an error of law.”).

In response, the Labels openly argue that *Grokster* and *Sony* “have no limiting effect on the theory of liability on which Plaintiffs here based their claim.” Label Br. 44. In doing so, the Labels contend that the Court may disregard the Supreme Court’s contributory infringement precedent, as the district court did, in favor of Ninth Circuit case law.

1. The Labels offer no legitimate basis for disregarding *Grokster* and *Sony*.

The Labels argue that contributory liability based on “material contribution” is a viable alternative theory, *Grokster* notwithstanding. They assert that “no court has ever held that *Grokster* eliminated secondary liability based on material contribution.” Label Br. 45. True enough, but *Grokster* did not need to eliminate material contribution because the Supreme Court has never recognized it. *Grokster*, 545 U.S. at 942 (Ginsburg, J., concurring) (“Liability under our jurisprudence may

be predicated on activity encouraging (or inducing) infringement through specific acts (as the Court’s opinion develops) or on distributing a product distributees use to infringe copyrights, if the product is not capable of ‘substantial’ or ‘commercially significant’ noninfringing uses.”); *see also id.* at 930.

The district court’s instruction does more than stray from *Grokster* and *Sony*; it writes them out of the law. *See* Opening Br. 28-29. No copyright plaintiff would ever need to satisfy *Grokster*’s inducement rule *or* overcome *Sony*’s staple-article rule if they could just meet a lower “material contribution” standard instead, based on the defendant’s failure to take “basic measures” to prevent infringement. *See id.* Whether the liability theory is called inducement, material contribution, or something else, contributory liability requires proof of affirmative, culpable misconduct—not mere “passive nonfeasance.” *See supra* Section I.A.

This is a critically important point. Yet the Labels bury their response to it in a footnote, vaguely asserting that material contribution and inducement “are built for different purposes.” Label Br. 45 n.15. What are those purposes? How can district courts know when it is appropriate to instruct on which theory? And if the theories serve different purposes, then why was the district court entitled to instruct the jury on inducement *and* material contribution? The Labels do not attempt to answer these questions.

Instead, the Labels assert that *Grokster* is distinguishable—insisting that its liability standards do not apply here—because, we are told, the *Grokster* “defendant’s relationships with its customers ended at the moment of sale and the defendant lacked knowledge of how its customers used its product in the future.” Label Br. 42. This is just not true.

In fact, *Grokster* was an “ongoing relationship” case like the one here (and like *Twitter*). The *Grokster* defendants made money by “stream[ing] . . . advertising to Grokster and Morpheus<sup>7</sup> users while they [we]re employing the [defendants’ file sharing] programs.” 545 U.S. at 926. Grokster stayed in contact with its users through “a newsletter promoting its ability to provide particular, popular copyrighted materials” and by sending “e-mails warning users about infringing content when it received threatening notice from the copyright holders.” *Id.* at 926. Along with receiving these notices from copyright owners, both companies “learned about their users’ infringement directly, as from users who have sent e-mail to each company with questions about playing copyrighted movies they had downloaded, to whom the companies have responded with guidance.” *Id.* at 923. For these reasons, Grande’s continuing relationship with its subscribers is no basis for distinguishing *Grokster*.

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<sup>7</sup> Grokster and Morpheus were the names of the defendants’ file sharing software.

The Labels similarly claim that *Sony* by its terms does not apply to cases in which the defendant has an “ongoing relationship” with its customers. Label Br. 41. In other words, the Labels suggest that the *Sony* rule—barring liability based on the provision of a product or service with substantial noninfringing uses—does not apply if there is such an “ongoing relationship.” *See id.* *Sony* says no such thing. In the passage the Labels rely on, *Sony* was characterizing a collection of cases in which the *Sony* rule would not have applied in any event. 464 U.S. at 437 & n.18. One example is the “dance hall cases” in which establishments were found contributorily liable because they hired performers to perform infringing works. *See id.*

*Sony* went on to describe those cases as involving situations in which “the ‘contributory’ infringer was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner.” *Id.* at 437. That characterization—which *Sony* acknowledges is more like the fact pattern for vicarious liability, *see id.*<sup>8</sup>—does not apply here. Grande neither

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<sup>8</sup> In general, the Labels’ contributory liability theory—based on Grande’s relationship with its subscribers—sounds in vicarious liability. *Grokster*, 545 U.S. at 930 n.9 (“[A] vicarious liability theory . . . allows imposition of liability when the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer.”). But vicarious liability is not at issue because the district court correctly dismissed the Labels’ vicarious infringement claim for failure to plausibly allege that Grande directly profited from any infringement (ROA.944-45, 984-86), and the Labels do not challenge that ruling.

controlled its subscribers' use of the internet nor authorized any act of file sharing. Thus, the *Sony* rule shields Grande from liability *unless* the Labels proved that Grande took "active steps to encourage infringement, such as advertising an infringing use or instructing how to engage in an infringing use." *Grokster*, 545 U.S. at 936 (cleaned up). There was no such proof at trial.

Notably, *Sony* also recognizes "the so-called landlord-tenant cases, in which landlords who leased premises to a direct infringer for a fixed rental and did not participate directly in any infringing activity were found not to be liable for contributory infringement." 464 U.S. at 937 n.18. Grande is even more removed from any act of direct infringement than these landlords, who likewise had "ongoing relationships" with the direct infringers. *See id.*; *see also infra* Section II.A.

In a final attempt to distinguish *Grokster* and *Sony*, the Labels contend that their holdings apply only to sellers of products and not to service providers. *See, e.g.*, Label Br. 44-45 & n.15. But *Grokster* referred generally to accused secondary infringers who distribute "a widely shared *service or product* . . . used to commit infringement." 545 U.S. at 929-30 (emphasis added). And so courts have applied *Grokster* and *Sony* in cases where the defendant's alleged "contribution" to infringement was the ongoing provision of a service—including internet access. *See, e.g., Cobbler Nevada, LLC v. Gonzales*, 901 F.3d 1142, 1149 (9th Cir. 2018)

(“Providing internet access can hardly be said to be distributing a product or service that is not capable of substantial or commercially significant noninfringing uses.” (cleaned up)); *Columbia Pictures Indus. v. Fung*, 710 F.3d 1020, 1033 (9th Cir. 2013) (*Grokster*’s “inducement copyright doctrine . . . applies to services available on the Internet as well as to devices or products”); *Aimster*, 334 F.3d at 652 (accused contributory infringer that operated file sharing service could succeed on the merits by “demonstrat[ing] that its service has substantial noninfringing uses”); *Smith v. BarnesandNoble.com, LLC*, 143 F. Supp. 3d 115, 126 (S.D.N.Y. 2015) (claims against provider of digital locker service were barred because “the service clearly is capable of noninfringing uses” (cleaned up)).

In sum, none of the Labels’ justifications for disregarding *Grokster* and *Sony* are convincing. The Labels admit that their “theory of liability in this case” hinges on “Grande’s knowledge of its subscribers’ actual infringements based on its ongoing relationship with those subscribers.” Label Br. 44. This “theory”—embodied in the district court’s jury instruction that Grande is liable if it did not take “basic measures” to prevent infringement—is impossible to reconcile with *Grokster*. “[A]ctive steps taken to encourage direct infringement” are necessary to “overcome the law’s reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use.” 545 U.S. at 936 (cleaned up).

2. The Court has never recognized or endorsed the district court’s contributory liability theory.

The Labels contend that this Court has “expressly embraced” the district court’s contributory liability standard, citing *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772 (5th Cir. 1999). *See* Label Br. 34, 38-39. But *Alcatel* was an inducement case. *Alcatel* says that “[a] party is liable for contributory infringement when it, with knowledge of the infringing activity, induces, causes or materially contributed to infringing conduct of another.” *Id.* at 790 (quotations omitted). *Alcatel* did not address *Grokster* or consider whether material contribution is a separate basis for liability. *See generally id.* And nothing in *Alcatel* suggests that contributory liability may be imposed—as the district court instructed—when a defendant fails to take “basic measures to prevent” direct infringement. *See* ROA.9925.

To Grande’s knowledge, there is no Fifth Circuit precedent that supports the district court’s liability instruction. *Alcatel* was a textbook inducement case, like *Grokster*. In *Alcatel*, the defendant sold microprocessor cards used to expand the capacity of long-distance telephone switches, and when those cards were installed, they automatically downloaded the plaintiff DSC’s copyrighted operating system. 166 F.3d at 778-79. Thus, the Court found that “[b]y selling its DMP-2800 card, . . . [the defendant] knowingly induces and causes its customers—i.e., DSC

switch owners—to violate DSC’s exclusive right to reproduce its software.” *Id.* at 791. The result in *Alcatel* therefore aligns with contributory liability under *Grokster* (“clear expression or other affirmative steps taken to foster infringement,” 545 U.S. at 936-37) or *Sony* (distributing a product with no “substantial noninfringing uses,” 464 U.S. at 442). If material contribution is a viable theory, then it must require culpable, active malfeasance, and *Alcatel* does not suggest otherwise.

**C. The “basic measures” jury instruction misstated the law and caused a verdict based on legally insufficient evidence.**

The Labels argue that the “basic measures” jury instruction favored Grande because it set forth “an additional step” the Labels needed to satisfy to prove liability. *See, e.g.*, Label Br. 57-66; ROA.9925. The Labels even argue that if the instruction was erroneous, then *they* are entitled to judgment as a matter of law. Label Br. 63.

The instruction itself refutes the Labels’ argument. The jury instruction made clear that it was not articulating another requirement for liability, but was explaining what “induced, caused, or materially contributed” means:

Whether Grande induced, caused, or materially contributed to the infringing activity. *This standard is met when* a defendant can take basic measures to prevent further damages to copyrighted works, yet intentionally continues to provide access to infringing sound recordings.



ROA.9925 (emphasis added). Under any reasonable reading, the first and second sentences do not articulate separate elements the Labels had to prove. Instead, this instruction impermissibly *lowered* the bar by permitting liability based on “passive nonfeasance.” *See supra* Section I.A.

No matter how one characterizes the instruction, it misstated the law. The Labels do not dispute that the only circuit to have adopted this standard is the Ninth Circuit. And the instruction breaks rank with *Grokster*’s requirement of “clear expression or other affirmative steps taken to foster infringement.” 545 U.S. at 936-37. Indeed, the Labels do not attempt to argue that the jury instruction conforms to *Grokster*; instead, they contend that this Court should *disregard Grokster*. Label Br. 44.

The Labels also do not dispute that—even in the Ninth Circuit—the “simple measures” standard has been applied only to defendants who directly control online content, unlike Grande which merely provides access to the internet as a whole. *See* Opening Br. 31-32. No appellate court has ever applied this standard to an internet service provider or other similarly situated defendant accused of contributory copyright infringement. *See also* Opening Br. 31-34. In fact, the Ninth Circuit in *Cobbler Nevada* instead applied *Grokster* in holding that a defendant could not be

contributorily liable merely for providing internet access to direct infringers. 901 F.3d at 1147-49.

The generalized notion that the Ninth Circuit “designed this [simple measures] test broadly for ‘the context of cyberspace’” (Label Br. 62)—in 2001, when the internet was still in its relative infancy—is not enough to warrant the district court’s unprecedented application. In *Napster*, which the parties agree is the source of this standard, the defendant operated a centralized online network for sharing digital music files, and it distributed software used to search for and download infringing content. *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011-12 (9th Cir. 2001). The Ninth Circuit therefore formulated the “simple measures” test as applying to “a computer system operator [who] learns of specific infringing material available on his system.” *Id.* at 1021. Nothing in *Napster* suggests that the court intended the standard to apply to an internet service provider that neither hosts nor controls access to infringing content.

Finally, the Labels assert that “multiple courts that have considered this basis for liability against ISPs have held that it continues to exist after *Grokster* just as it did before,” but that oversells the state of the law. Label Br. 45. None of the cited cases approved a jury instruction like the district court gave here, under which the ISP is contributorily liable if it failed to prevent infringement. *See id.*; ROA.9925.

Plus, the two unreviewed district court opinions that discussed the “simple measures” standard—including a 2023 opinion from Judge Gilstrap—relied on and replicated the district court’s erroneous rulings here, which this Court is now able to correct. *See BMG Rts. Mgmt. (US) LLC v. Altice USA, Inc.*, No. 2:22-cv-471-JRG, 2023 WL 3436089, at \*12 (E.D. Tex. May 12, 2023); *UMG Recordings, Inc. v. RCN Telecom Servs., LLC*, No. 3:19-cv-17272, 2020 WL 5204067, at \*9 n.4 (D.N.J. Aug. 31, 2020).

**D. There is no reason to create new law in this field.**

A newcomer to copyright law could reasonably conclude that the law on contributory liability is a mess. The case law is muddied by an array of judicially created concepts—“material contribution,” “simple measures,” providing the “site and facilities” for infringement—that have no clear basis in the common law and are difficult if not impossible to reconcile with one another. None of these concepts would be necessary—and the law would be much easier to comprehend, follow, and apply—if courts simply applied *Grokster*’s bases for contributory liability: (1) distributing a product or service good for nothing else but infringement; and (2) intentionally inducing infringement, as shown by clear expression or other affirmative steps to foster infringement. 545 U.S. at 932-33, 936-37.

The Labels are wrong to suggest that they are merely asking the Court to follow “established principles” of contributory liability. What they are asking the Court to do is take the inadvisable step of ignoring on-point, controlling Supreme Court precedent. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

Contrary to the Labels’ claims, the scope of ISPs’ secondary liability for copyright infringement remains unsettled in every circuit. While the Labels identify other contributory infringement cases against ISPs, none of those cases resulted in a final judgment of liability. The first case (*Cox I*), which spawned the rest, involved a plaintiff’s jury verdict that the Fourth Circuit reversed on appeal, and the case settled before re-trial. *BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293 (4th Cir. 2018); Stip. of Dismissal with Prej., *BMG Rts. Mgmt. (US) LLC v. Cox Enters.*, No. 1:14-cv-1611 (E.D. Va. Aug. 24, 2018), ECF No. 1021.<sup>9</sup> The other two

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<sup>9</sup> In *Cox I*, the defendant did not raise the same issues Grande is pursuing in this appeal. *Cox I* also confused the issues it did address. For example, the *Cox I* court acknowledged that *Grokster* requires proof of intent (881 F.3d at 306-07), but then it conflated intent with knowledge, even though they are separate elements of a contributory infringement claim. *See id.* at 308 (“It is well-established that one

ISP cases cited by the Labels—BMG’s case against Altice (No. 2:22-cv-471-JRG in the Eastern District of Texas) and the Labels’ case against RCN (No. 3:19-cv-17272 in the District of New Jersey)—are still pending at the district court level. Additionally, contributory infringement is before the Fourth Circuit again in *Cox II*, in which Cox Communications is appealing from a \$1 billion verdict for the Labels. See ECF No. 86 (oral argument held March 9, 2022), *Sony Music Ent. v. Cox Commc’ns, Inc.*, No. 21-1168 (4th Cir.). Under the circumstances, the Labels can hardly claim that any of the issues before the Court are settled.

The Court should also reject the Labels’ appeal to “equity,” where they contend that the Court should uphold the verdict because Grande “is the only party capable of matching infringing IP addresses to its individual subscribers.” Label Br. 36. The Labels are not left without a remedy. They can file a John Doe lawsuit against an alleged infringer known only by IP address and then serve a subpoena on the ISP to obtain their identity. See, e.g., *Hunter Killer Prods., Inc. v. Boylan*, No. 3:20-cv-306, 2021 WL 2878558, at \*1-2 (W.D. Tex. Jan. 28, 2021). While the Labels say that filing such lawsuits is “completely impractical” (Label Br. 38 n.13), it is

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mental state slightly less demanding than actual knowledge—willful blindness—can establish the requisite intent for contributory copyright infringement.”). This analysis is impossible to square with *Grokster*. 545 U.S. at 937.

public knowledge that the Labels have filed thousands of suits against file sharers.<sup>10</sup> The Labels can also pursue claims against people who actually induce and encourage BitTorrent file sharing, like the creators and distributors of BitTorrent software and the operators of BitTorrent websites. That it may be *easier* for the Labels to sue Grande is not a legitimate basis for expanding the scope of common law contributory liability.

In a footnote, the Labels suggest that obtaining the identities of direct infringers by subpoena is unworkable because Grande does not comply with subpoenas. Label Br. 38 n.13. In fact, Grande does respond to valid subpoenas seeking subscriber information, and the Labels identify no evidence to the contrary. The Labels do not claim that Grande has ever refused to respond to a subpoena from any of the Labels.

Instead, the Labels imply that they would expect Grande to be uncooperative because Grande moved to quash a subpoena from Rightscorp over nine years ago. *See id.* What the Labels fail to mention, however, is that Rightscorp voluntarily withdrew its subpoena. *See Grande's Advisory to the Ct., In Re Subpoena Issued to Grande Commc'ns Networks LLC*, No. 1:14-mc-848-LY (W.D. Tex. Sept. 10, 2014),

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<sup>10</sup> *See, e.g.*, Jeff Leeds, *Labels Win Suit Against Song Sharer*, N.Y. Times, Oct. 5, 2007, available at <https://www.nytimes.com/2007/10/05/business/media/05music.html> (last visited Jan. 30, 2024).

ECF No. 3. Rightscorp’s subpoena—which sought subscriber information for over 30,000 IP addresses—was invalid. It was not issued by a court in connection with pending litigation, but was issued pursuant to 17 U.S.C. § 512(h), which does not authorize subpoenas to conduit internet service providers like Grande. *See, e.g., In re Charter Commc’ns, Inc. Subpoena Enf’t Matter*, 393 F.3d 771, 776-77 (8th Cir. 2005); Attach. 1 to Grande’s Mot. to Quash, *In Re Subpoena Issued to Grande Commc’ns Networks LLC*, No. 1:14-mc-848-LY (W.D. Tex. Sept. 5, 2014), ECF No. 1-1.

Ultimately, the Court should reject the notion that “equity” is a legitimate consideration in determining the scope of contributory liability. *See, e.g., Rogers v. Tennessee*, 532 U.S. 451, 472 (2001) (Scalia, J., dissenting) (criticizing decision abrogating Tennessee’s common law “year and a day rule” as inconsistent with the foundational “model of common-law decisionmaking,” under which “the judge’s office is . . . to interpret law, and not to make law, or give law” (quotations omitted)). With that said, there is nothing inequitable about applying the common law of contributory infringement consistent with the Supreme Court’s decisions in *Grokster*, *Sony*, and *Twitter*. ISPs that actively encourage infringement—for example, by instructing customers on how to engage in piracy—would be contributorily liable. ISPs that merely provide content-neutral internet access to

their subscribers would not. And whatever the ISP's liability, copyright owners can pursue claims against those who engage in unlawful file sharing and those who play an active role in that infringement.

The mere fact that an ISP like Grande is a more inviting litigation target is not a basis for writing *Grokster* and *Sony* out of the law or for disregarding *Twitter*.

**E. The Labels effectively concede that judgment for Grande is warranted if the jury charge was error.**

As discussed, the Labels do not argue that the district court's liability instruction is faithful to *Grokster*. Instead, to accept their argument and conclude that the jury was correctly instructed on the law, the Court must agree with the Labels that *Grokster* has "no limiting effect on [the Labels'] theory of liability." Label Br. 44.

The Labels do not attempt to argue that they proved contributory infringement under *Grokster*. They never contended that Grande intentionally induced its subscribers' infringement or that Grande's internet service has no substantial noninfringing uses. See Label Br. 65-66. As Grande has explained, there was no evidence at trial that Grande engaged in affirmative, culpable conduct to foster copyright infringement. Opening Br. 39-40. Accordingly, if the Court agrees



that the district court should have instructed the jury on contributory liability as in *Grokster*, the Court should render judgment for Grande.<sup>11</sup>

**II. The Labels did not prove that Grande materially contributed to infringement.**

The Labels do not attempt to argue that they proved at trial that Grande induced or encouraged direct copyright infringement under *Grokster*, 545 U.S. at 936-37. Instead, in arguing that there was legally sufficient evidence of contributory infringement, the Labels rely solely on their separate material contribution theory, based on Grande's provision of internet service to direct infringers. *See* Label Br. 52-66.

To begin with, the Labels appear to misapprehend the issue before the Court. They contend that “[b]ecause Grande does not dispute any of the evidence on which Plaintiffs actually relied to prove material contribution, there is no basis to conclude that the jury lacked sufficient evidence to reach that conclusion.” Label Br. 66. Grande does not ask the Court to substitute its opinion for that of the jury. But we

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<sup>11</sup> The Labels suggest that reversing and remanding for a new trial would not be appropriate because Grande cannot show that the district court's erroneous instruction “affected the outcome of the case.” Label Br. 24 (citation omitted). They are wrong. The erroneous jury instruction permitted a verdict of contributory liability based on evidence that Grande merely provided internet service to accused infringers. As a matter of law, that is not a proper basis for liability. *See* Opening Br. 26-29, 40-42. So the Court should reverse and render, or alternatively reverse and remand for a new trial.

do challenge whether the evidence is legally sufficient—a challenge this Court reviews de novo. *Janvey v. Dillon Gage, Inc. of Dallas*, 856 F.3d 377, 384-85 (5th Cir. 2017).

Here, the Labels’ evidence was legally insufficient because it did not show that Grande culpably or materially contributed to any act of direct infringement. As a matter of law, providing content-neutral internet access to accused copyright infringers cannot support secondary liability. As the Supreme Court recently observed in *Twitter*, it would “run roughshod over the typical limits on tort liability” to “effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them.” 598 U.S. at 503.

**A. Grande’s conduct was far removed from any act of file sharing.**

Because Grande had no direct involvement in any BitTorrent file sharing, the Labels are forced to describe Grande’s conduct with amorphous terms like “facilitating” infringement (Label Br. 19, 38 n.13, 45, 49, 51 n.18) and providing “tools” for infringement (*id.* at 11, 19, 36, 50, 53, 54, 56, 57, 64, 65).

Grande neither “facilitated” nor “provided tools for” copyright infringement, however one might understand those terms. The *only* affirmative thing Grande did was provide content-neutral internet service to all its customers,

who could then do any of the myriad things possible with an internet-connected phone, tablet, or computer. *See, e.g.*, Opening Br. 32, 46-47, 48; ROA.12854, 12868-69. The Labels concede that fact. *See* Label Br. 52-53, 65.

As discussed in Section I, this “equivocal conduct” does not support secondary liability. The touchstone for secondary liability is affirmative, culpable conduct. *Grokster*, 545 U.S. at 936-37; *Twitter*, 598 U.S. at 493. But here, there was none. An “arm’s length, passive, and largely indifferent” relationship with a customer base of internet users is not culpable conduct, even if the defendant is aware of specific bad actors. *Twitter*, 598 U.S. at 500-01; *see also id.* at 504 (criticizing the Ninth Circuit for not “giv[ing] greater weight to defendants’ arm’s-length relationship” with the primary bad actors). It is undisputed that Grande does not have an “independent duty in tort . . . that would require [Grande] to terminate customers after discovering that the customers were using the service for illicit ends.” *Id.* at 501.

To prove liability then, the Labels “would need some other very good reason to think that [Grande was] consciously trying to help or otherwise ‘participate in’” piracy of the Labels’ sound recordings, such as an “act of encouraging, soliciting, or advising the commission of” direct copyright infringement. *See id.* at 500. There was no such evidence at trial; again, the Labels acknowledge that their claims are

based on Grande’s provision of content-neutral internet service to direct infringers. As a matter of law, this is not enough. *See id.* at 499 (social media platforms’ “provision of the infrastructure which provides material support,” in a way that was “agnostic as to the nature of the content,” was not culpable conduct).

The Labels ignore culpability and instead attempt to distinguish *Twitter* by arguing there was a “direct nexus” between Grande’s conduct and the file sharing at issue. Label Br. 50. The Labels’ argument does not include a single citation to the record. *See id.* at 47-52.

In fact, there was no such nexus, which further shows that the district court erred in not granting JMOL for Grande. Grande provides its customers with content-neutral access to the internet as a whole. Against that backdrop, consider all the actors whose conduct, unlike Grande’s, directly enables BitTorrent file sharing:

- Bram Cohen and BitTorrent, Inc., who created and released the BitTorrent file sharing technology to the public (ROA.12037, 12039);
- Creators and distributors of BitTorrent software (or “clients”), which is necessary to use BitTorrent (ROA.11745–46, 12040, 12051);
- Websites that offer BitTorrent software for download (ROA.12040-41);

- Websites such as Pirate Bay that distribute \*.torrent files for particular music or movies, which a BitTorrent user has to obtain before they can download that content (ROA.11754, 12041);
- “Tracker” or “announcer” servers, which maintain lists of BitTorrent users sharing particular files and interface with \*.torrent files to connect a user who wants a file with other users who have the file (ROA.11746-47, 11863, 12045, 13226); and
- Companies that operate the foregoing websites and servers, providing the infrastructure that enable BitTorrent to function.

Each of these actors plays a direct role in the sharing of copyrighted music files over BitTorrent. Grande, in contrast, stands far removed from the infringing conduct.

And Grande is even more removed than other “peripherally-involved third parties” like search engines (which connect people to BitTorrent software and websites), online advertisers (who monetize the popularity of BitTorrent and thereby motivate the creation and maintenance of BitTorrent websites), and the makers of phone, tablet, and computer operating systems and hardware (which permit the installation and ongoing use of BitTorrent software). *See Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 800 (9th Cir. 2007) (rejecting material contribution theory that would encompass “a number of peripherally-involved third

parties, such as computer display companies, storage device companies, and software companies . . . and even utility companies that provide electricity to the Internet”).

If Grande’s provision of internet access creates a “direct nexus” with acts of BitTorrent file sharing, then there is a “direct nexus” between Grande and virtually every unlawful or tortious act committed on the internet. The list is nearly endless: drug distribution, human trafficking, identity theft, credit card fraud, murder for hire, money laundering, distribution of child sexual abuse material, hacking, use of botnets and other cyberattacks, trafficking in stolen goods, theft of trade secrets, corporate espionage, and even acts of patent or trademark infringement. All these bad acts, in one form or another, require an internet connection. Yet no one would argue that Grande and other ISPs “provide the tools for” or “facilitate” them. *See Twitter*, 598 U.S. at 499 (“[W]e generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large.”). The Labels’ liability theory fails for lack of a viable limiting principle.

Because Grande merely provided internet access, and the infringing BitTorrent conduct required a series of intervening acts and actors, Grande did not *materially* contribute to any direct infringement. Conceptually, “material contribution . . . invokes common law notions of remoteness that limit efforts to

impose liability for speculative imaginings of possible causal consequences.” *Flava Works*, 689 F.3d at 759. In statutes “with common-law foundations,” there must be “some direct relation between the injury asserted and the injurious conduct alleged.” *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 202-03 (2017) (quotations omitted). Under this standard, “foreseeability alone does not ensure the close connection that proximate cause requires.” *Id.* at 202. And for good reason. There is particular “concern about remoteness” when, as here, there is no evidence that the defendant’s conduct had an “effect on the amount of infringement” of the plaintiff’s works. *Flava Works*, 689 F.3d at 759.

In sum, Grande’s conduct was not culpable as a matter of law. There was no direct nexus between Grande’s provision of internet service and the BitTorrent file sharing at issue. Mere foreseeability is not enough, so Grande’s conduct could not be the proximate cause of any direct infringement. The district court’s denial of Grande’s motion for JMOL was therefore error.

**B. There is no “established principle” that ISPs incur contributory liability by providing internet access to infringers.**

The Labels argue that there is an “established principle that ISPs provide a material contribution to infringements by their subscribers when they knowingly provide infringing customers with the necessary tools to infringe—in particular, a

high-speed connection to the internet.” Label Br. 52. The Labels’ entire argument appears to rely on two cases, neither of which supports the Labels’ assertion.

To begin, however, the Labels’ argument departs from *Cobbler Nevada*, as Grande has already explained. Opening Br. 32-33, 43-44. *Cobbler Nevada* held that the defendant foster home operator could not be contributorily liable simply because he provided internet access to direct infringers. 901 F.3d at 1148-49. Although it is a Ninth Circuit case, *Cobbler Nevada* did not even mention the possibility of a material contribution or “simple measures” standard. *See id.*

The Labels respond to this important authority in a footnote, suggesting that *Cobbler Nevada* is distinguishable because the defendant did not know the identities of the direct infringers. Label Br. 57 n.21. That response misses the mark. First, the Labels offer no authority indicating that this fact determines what standard a court applies to determine contributory liability. *See id.* The alleged infringing conduct in *Cobbler Nevada* was the provision of internet access—conduct that the Ninth Circuit held insufficient as a matter of law to support contributory liability. 901 F.3d at 1148-49.

And second, the Labels’ assertion that “Grande knew exactly who its infringing subscribers were,” Label Br. 57 n.21, is wrong. Copyright complaints identify an IP address—i.e., an internet connection—allegedly associated with



infringing activity, and Grande can then determine which subscriber was assigned that IP address at that time. ROA.12405-06. But the infringer could be any user of the subscriber's internet connection: a roommate, a child, a spouse, a visiting grandchild, or some unidentified person accessing an unsecured WiFi connection. ROA.11905-07. Grande had no way to know. ROA.12856-58. Thus, assuming it matters whether the alleged contributory infringer knows the identity of the direct infringer, that fact is not material here.

Turning to the cases the Labels do rely on, they appear to misunderstand the facts in *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936 (9th Cir. 2011). *Louis Vuitton* cannot be read to suggest that providing internet service materially contributes to infringement. The defendants were not internet service providers; they “were in the ‘web hosting’ business”—that is, they hosted websites for third parties, including by providing server space that stored infringing content. *Id.* at 940. Thus, unlike Grande, the defendants “operate[d] the servers on which the infringing images resided.” *Id.* at 943-44 (cleaned up). For that reason, the Ninth Circuit expressly contrasted its decision in *Visa*, in which credit card companies did *not* materially contribute to infringement because—like Grande—they did not host or store the infringing content. *See id.*; Opening Br. 46-47 (discussing *Visa*).

The other case the Labels rely on is *Cox I*, in which the Fourth Circuit *reversed* a jury verdict of contributory liability against an internet service provider. 881 F.3d at 311-12. The verdict was reversed because the jury was incorrectly instructed on the claim’s knowledge element. *See id.* *Cox I* did not involve a liability instruction comparable to the one here, and the defendant did not challenge the sufficiency of the evidence, as Grande does. *See generally id.* Nor did *Cox I* consider whether material contribution is a separate basis for contributory liability, or if so, what evidence would be necessary. *See id.* *Cox I* provides no guidance for resolving this case.<sup>12</sup>

**C. The Labels’ evidence of material contribution was legally insufficient.**

To prove that Grande failed to take “basic measures” to prevent copyright infringement under Ninth Circuit law, the Labels had to show that there were “reasonable and feasible means for [Grande] to refrain from providing access to infringing” sound recordings. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172-73, 1176 (9th Cir. 2007). The Labels claim that their “proof was sufficient for

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<sup>12</sup> As noted, *Cox II* is now before the Fourth Circuit, and the court may reach new or different conclusions about contributory liability with the benefit of *Twitter*. *See* ECF Nos. 87 & 88 (supplemental briefing re: *Twitter*), *Sony Music Ent. v. Cox Commc’ns, Inc.*, No. 21-1168 (4th Cir.).

two independent reasons,” both of which the Court should reject. *See* Label Br. 59-61.

First, the Labels contend that Grande’s failure to terminate the internet service of accused copyright infringers is sufficient because of the “federal copyright policy,” reflected in the DMCA safe harbors, that “termination of repeat infringers [is] a core element of preventing infringement on online services.” Label Br. 59-60. This argument is unpersuasive. The DMCA safe harbors (1) are optional (*see generally* 17 U.S.C. § 512) and (2) expressly provide that they are irrelevant to copyright infringement liability (§ 512(l)). *See also BWP*, 852 F.3d at 443 (describing the safe harbors as “a second step to assessing infringement liability for ISPs,” after copyright infringement has been proved). The Labels’ policy argument also neglects to mention the strong countervailing policy of promoting the internet’s development and ensuring that all Americans have high-speed broadband access. *See* Br. for USTelecom and CTIA as Amici Curiae Supporting Grande 3-4, 15-17, ECF No. 63.

Second, the Labels contend they sufficiently proved that Grande failed to use “simple measures” to stop infringement. That is so because, they say, the evidence showed that Grande had previously terminated the internet service of accused copyright infringers. Label Br. 60-61. On this point, the Labels selectively cite the trial testimony of a Grande employee who testified that Grande’s receipt of

copyright complaints in the early 2000s “led to account termination.” ROA.12331-32. But they omit that the same witness later testified that he did not know if those terminations were temporary or permanent. ROA.12341; *see also* Opening Br. 11 n.5 (citing record evidence that this was an ad hoc policy of temporary suspensions).

In any event, Grande agrees that it is not *difficult* for Grande to turn off a subscriber’s internet service, but that is not the issue. The point is that permanently terminating a subscriber’s internet service is not a “reasonable,” proportionate response to third-party copyright infringement complaints. *See Amazon.com*, 508 F.3d at 1172-73. On this front, the Labels’ discussion of Grande’s nonpayment policy is noteworthy, but not for the reason the Labels suggest. *See* Label Br. 61. Of course Grande turns off internet service to subscribers who do not pay their bills. But it does not do so permanently; if a subscriber brings their account current, service is restored. Grande also has direct knowledge of whether a subscriber has paid their bill, while copyright complaints are sent by third parties and cannot be verified after the fact. ROA.12754-55.

Boiled down, the Labels’ position is that Grande should *permanently terminate all internet service* to an entire household or business upon receiving two third-party copyright infringement complaints. That would be a draconian overreaction. *See also* Br. for USTelecom and CTIA as Amici Curiae Supporting Appellant at 17-18.

As a matter of law, doing so is not a “reasonable and feasible” measure for preventing copyright infringement. *Amazon.com*, 508 F.3d at 1172-73. The Labels cite no authority to the contrary, and as Grande has explained, the Ninth Circuit cases applying this standard show that the evidence against Grande was legally insufficient. *See* Opening Br. 43-48.

Because there was no legally sufficient evidence that Grande materially contributed to the direct infringement at issue, the Court should reverse the district court’s denial of JMOL and render judgment in Grande’s favor.

**III. The Court should reject the Labels’ invitation to upend Fifth Circuit law on direct copyright infringement.**

The Labels do not identify a single case, in any court, at any level, in which a plaintiff proved copyright infringement without introducing evidence of the copyrighted work that was infringed. The Labels are prolific copyright infringement litigants. They are multi-billion-dollar corporations with armies of in-house and outside counsel with extensive copyright infringement litigation experience. They have been parties in thousands of copyright infringement lawsuits just since 2000. This is an appeal of a \$50 million judgment in their favor. And yet they could not turn up *one case* that supports their position.

This Court has directly held that proving copyright infringement requires evidence of the work that was infringed. *Bridgmon*, 325 F.3d at 576-77; *King v. Ames*,

179 F.3d 370, 375-76 (5th Cir. 1999). As the Labels’ inability to find contrary authority shows, this is not an outlier position. *See Airframe Sys., Inc. v. L-3 Commc’ns Corp.*, 658 F.3d 100, 106 (1st Cir. 2011) (“[B]efore the foregoing comparison [between copyrighted work and alleged copy] can take place, the plaintiff must necessarily establish the content of the copyrighted work that it contends was infringed.” (cleaned up)).

The Labels try to distinguish *Bridgmon* and *King*, but their reasoning is circular. Without any citation to authority, they suggest that evidence of a plaintiff’s copyrighted work is necessary only when the parties “genuinely disputed whether the defendants’ alleged copies were substantially similar to the plaintiffs’ alleged works.” Label Br. 33. Grande had no opportunity to make that comparison because the copyrighted works were not in evidence. The same was true in *Bridgmon* and *King*, yet those decisions had no trouble keeping the burden of proof where it belongs—on the party claiming infringement. *See Bridgmon*, 325 F.3d at 576-77; *King*, 179 F.3d at 375-76.

Because there was no evidence of the Labels’ copyrighted sound recordings, the Labels failed to offer legally sufficient evidence of direct infringement. To conclude otherwise would require the Court to overrule *Bridgmon* and *King*. As Grande has explained, *Bridgmon* considered and rejected the precise argument the

Labels are making now: that “evidence of direct copying” is a viable substitute for evidence permitting a side-by-side comparison of the works. Opening Br. 54.

While the absence of this evidence is dispositive, another point deserves mention. The Labels overstates the Audible Magic evidence. They suggest that Audible Magic “confirmed” that “Rightscorp’s downloads” were copies of the Labels’ “authentic recordings.” Label Br. 31. Not so. There was never any evidence of what Audible Magic compared Rightscorp’s downloads to. In other words, the Labels did not offer evidence that Audible Magic compared Rightscorp’s downloads to true copies of *the sound recordings in suit*—those recordings which the Labels deposited with the Copyright Office.

Again, however, the Audible Magic evidence is irrelevant because this Court’s precedent holds that evidence that the accused infringer copied the copyrighted work is no substitute for evidence permitting a comparison between the copyrighted work and the alleged copy. *Bridgmon*, 325 F.3d at 577. Nor do the Labels identify any authority, from any court, holding that Audible Magic evidence permits a plaintiff to bypass this requirement or exempts a plaintiff from its burden of proof.

On this score, the Court should disregard the Labels’ purported evidence that their employees “listen[ed] to a random sample of 50 Rightscorp downloads” and confirmed they “were owned by their respective companies.” Label Br. 30-31. The

Labels' witnesses did not identify more than a handful of the songs they supposedly listened to. ROA.11634, 12550-51, 12790-92. More to the point, *Bridgmon* and *King* prohibit using witness testimony to avoid the necessary comparison evidence. 325 F.3d at 577 (“[C]opying is an issue to be determined by comparison of works, not credibility.”).

The Court should also reject the Labels' assertion that Grande was obligated to seek out the Labels' sound recordings to perform this comparison. Label Br. 32-33. The Labels bore the burden of proving that “users of Grande's internet service distributed [the Labels'] copyrighted works at issue” (ROA.9920, 9924), yet they never provided evidence of their copyrighted works. The Labels' argument turns the burden of proof on its head.

Finally, Grande notes that the Labels have abandoned their argument—which the district court relied on in denying Grande's motion for JMOL—that introducing evidence of all the sound recordings in suit would have been “impractical.” ROA.11022. The Labels never explain why they failed to introduce this evidence. Considering that the Labels own the recordings and their business depends on monetizing them, their decision is mystifying.

At bottom, however, it does not matter why the Labels failed to produce the copyrighted songs in suit in discovery or introduce them into evidence at trial. The



absence of this evidence means there was no legally sufficient evidence of direct infringement, so the Court should reverse the district court's denial of JMOL and render judgment in Grande's favor.

**IV. The Court should follow 17 U.S.C. § 504(c) as written and vacate the statutory damages award.**

Contrary to the Labels' argument, the issue is *not* "how many statutory damages awards are appropriate when a sound recording is exploited both individually and as part of an album." Label Br. 68. The statute leaves no room for such escapades.

The issue is whether the district court erred by applying a rule that contradicts the statute. The Labels admit that an album meets the statutory definition of "compilation." Label Br. 67-68. All that remains is to apply the mandate: "For purposes of [§ 504(c)], *all the parts of a compilation . . . constitute one work.*" 17 U.S.C. § 504(c) (emphasis added). Even if this Court found the statutory language ambiguous, the relevant legislative history unequivocally confirms that the constituents of a compilation are treated as one work:

Where the suit involves infringement of more than one separate and independent work, minimum statutory damages *for each work* must be awarded. . . . Subsection (c)(1) makes clear, however, that, *although they are regarded as independent works for other purposes*, "all the parts of a compilation or derivative work constitute one work" for this purpose.

H.R. Rep. No. 94-1476, at 162 (1976) (emphasis added) (“House Report”).<sup>13</sup> Congress intended a compilation to receive a single statutory damage award, *even though* the constituent works may be independent works “for other purposes.”

The Labels seek to outflank the statutory mandate by inventing a “definitional gap”—that section 504 “does not define what a ‘work’ is.” Label Br. 68. There is no “gap.” The “work” is the “one work” that was infringed, and in the case of a compilation, all the parts of the compilation “constitute one work.” 17 U.S.C. § 504(c). Albums are compilations, so however the individual songs may be regarded for other purposes, they “constitute one work” when awarding statutory damages.

The “definitional gap” is a pretext for avoiding the statutory language. The cases the Labels rely on illustrate the danger of wandering from the statutory mandate. *See* Label Br. 69.<sup>14</sup> Those courts espouse varying approaches, but they all

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<sup>13</sup> This Court has previously relied on the same part of the House Report in construing Section 504(c). *See Broad. Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 236 (5th Cir. 1988).

<sup>14</sup> The Labels accuse Grande of “misleading” the Court by citing *Bryant v. Media Right Products, Inc.*, 603 F.3d 135 (2d Cir. 2010), as embodying the Second Circuit’s approach. *See* Label Br. 69 n.26. But the Seventh Circuit said *exactly* the same thing in *Sullivan v. Flora*: “The Second Circuit’s approach—*embodied, as we see it, in its most recent decision in Bryant*—gives controlling weight to the last sentence of § 504(c)(1) . . . .” 936 F.3d 562, 570 (7th Cir. 2019) (emphasis added).

proceed from the same flawed premise: Congress must have meant something other than what it wrote in the statute (and emphasized in the House Report).

These short-sighted approaches undermine the statutory scheme that Congress implemented to encourage a robust copyright register. When it overhauled the Copyright Act, Congress recognized that “[c]opyright registration . . . is useful and important to users and the public at large . . . and should therefore be induced in some practical way.” *See* House Report at 158. Congress therefore enacted section 412, titled “Registration as prerequisite to certain remedies for infringement,” “to encourage early registration, thus allowing potential infringers to determine whether a work is protected.” *S. Credentialing Support Servs., L.L.C. v. Hammond Surgical Hosp., L.L.C.*, 946 F.3d 780, 786 (5th Cir. 2020).<sup>15</sup> To be eligible for statutory damages for infringement of “any one work” under section 504, the owner must

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<sup>15</sup> *See also* *Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 700 (9th Cir. 2008) (section 412 “provide[s] copyright owners with an incentive to register their copyrights promptly” and “encourages potential infringers to check the Copyright Office’s database”); *Bouchat v. Bon-Ton Dep’t Stores, Inc.*, 506 F.3d 315, 330-331 (4th Cir. 2007) (“Registration . . . creates a permanent record of the protected work, putting the world on constructive notice of the copyright owner’s claim.”); *Latin Am. Music Co. v. The Archdiocese of San Juan of Roman Cath. & Apostolic Church*, 499 F.3d 32, 40 (1st Cir. 2007) (“Under federal copyright law, remedies for infringement are tied to copyright registration, which provides incentive to owners to register copyrights and ‘also provides potential infringers with an incentive to check the federal register.’” (quotations omitted)).

have registered “the work” within the time required by section 412. *See* 17 U.S.C. §§ 412, 504(c).

This Court has “emphasized the need for [section 412] to be read consistently with [section 504(c)].” *S. Credentialing*, 946 F.3d at 787; *see also Bouchat*, 506 F.3d at 330-31. With that imperative in mind, “the work” in section 412 must necessarily be the “one work” of section 504. *See Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 144 (5th Cir. 1992) (“We look to section 504 for assistance in understanding section 412 because section 412 bars an award of statutory damages ‘as provided by section 504.’”).

It is telling, then, that the Labels do not complain of a “definitional gap” in section 412, even though that section also lacks a definition of “work.” This is because the Labels chose to register nearly all their works as collective works (compilations) instead of individual songs, so they want the “work” to be the *compilation* for purposes of section 412 and the *song* for purposes of section 504.

Notably, many of the Labels’ registrations merely identify the compilation (album) without identifying individual songs. *See, e.g.*, ROA.339735-36 (St. Vincent’s album “St. Vincent”). This is permissible: if an owner chooses to register an album as a collective work, the owner is only required to provide the title of the

compilation and “a brief, general statement of the additional material covered by the copyright claim being registered.” *See* 17 U.S.C. § 409(6)-(9).

But while an owner is free to register an album as a collective work without identifying the constituent songs, the unidentified constituent songs should not be eligible for individual statutory damage awards—that would undermine the notice function Congress intended. *See* House Report at 158 (a copyright owner “should not be given special statutory remedies unless the owner has, by registration, made a public record of his copyright claim”).<sup>16</sup> Yet that is exactly what happened here. For example, the Labels received five separate damage awards for five individual songs on the St. Vincent album cited above (“Bring Me Your Loves,” “Huey Newton,” “Psychopath,” “Rattlesnake,” and “Regret”), even though none of those songs were identified in the collective work registration the Labels relied on to satisfy section 412. *See* ROA.339121. If a copyright owner wants to maximize their ability to seek statutory damages, the owner may file individual registrations for its works

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<sup>16</sup> The Copyright Office cautions applicants that “[a] collective work is considered a single work for purposes of calculating statutory damages; therefore, registering a collective work together with the individual works contained in it may have important consequences in an infringement action . . . .” *See* U.S. Copyright Office, Circular 34: Multiple Works, *available at* <http://www.copyright.gov/circs/circ34.pdf>.

or use the group registration option, either of which provides the public notice Congress intended.<sup>17</sup> *See* 37 C.F.R. § 202.4.

Further, under the Labels’ approach, a work that is part of a compilation (like a song on an album) might become a “work” for purposes of section 504(c) at some unknown time after the compilation is registered. An author could register the compilation without identifying the constituent works, and then later “exploit” one or more of the works, thereby gaining the extraordinary remedy of statutory damages—without providing any further notice to the public. Congress cannot have intended the statutory scheme of sections 412 and 504(c) to require complicated inquiries into when a work was “exploited” or began to live “its own copyright life.” *See* Label Br. 67-68. Applying the plain language of the statute avoids all these complications and contingencies.

Even leaving aside all these issues, the Labels fail under their own proposed rule. The Labels urge a rule that focuses on whether a song was individually exploited “on the date of infringement.” Label Br. 70; *see also id.* at 71 (“how the

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<sup>17</sup> *Amici* mistakenly conflate registration of compilations with group registration. *See* Br. for Copyright Alliance as Amicus Curiae Supporting the Labels 22-24, ECF No. 77. None of the works at issue here were registered using group registration. *Amici* also argue (correctly) that registering a collective work suffices to register the constituent works. *Id.* at 20-21. Grande does not contend that the constituent works are not *registered*; it contends that they are not eligible for separate statutory damage awards.

registered works were exploited . . . *at the time of infringement*” (emphasis added)). The problem for the Labels is they offered no evidence of whether songs had been individually “exploited” by the date of infringement—they offered only blanket statements that they exploited the songs at some unspecified time “during the relevant time period,” which spanned several years. *Id.* Even under the Labels’ proposed rule, a fact-finder must compare “exploitation” dates with infringement dates. No such comparison occurred here. The Labels fail their own flawed test.

Finally, contrary to the Labels’ characterization, Grande does not argue that copyright registrations are always “conclusive proof that their recordings were parts of compilations.” Label Br. 71. Instead, Grande correctly asserts that under 17 U.S.C. § 410, the Labels’ registrations are *prima facie* evidence of the facts stated therein—including that the works are compilations. The Labels offered nothing to rebut that evidence.

In sum, the Labels rely on a made-up “definitional gap” to urge this Court to adopt a rule that violates a clear statutory mandate. Even under that misguided rule, the Labels did not demonstrate that each of their songs is eligible for an individual award of statutory damages. The Court should therefore reverse the district court’s denial of JMOL and modify the statutory damages award to \$22,066,446 based on 662 copyrighted works (or remand so that the district court may do so).

**V. The Labels are not entitled to any relief on their cross-appeal.**

**A. The district court correctly rejected the Labels’ “making-available” direct infringement theory.**

In their cross-appeal, the Labels raise a single issue. They contend that the district court erred in not instructing the jury that a copyright owner’s exclusive right “to distribute copies . . . of the copyrighted work to the public” under 17 U.S.C. § 106(3) is violated by an attempt to distribute.<sup>18</sup> This is commonly referred to as a “making available” direct infringement theory.

The Labels’ cross-appeal issue should be rejected. Under the majority view, consistent with the plain language of section 106(3), infringement of the distribution right requires an actual distribution of a copy. The challenged jury instruction therefore stated the law correctly. ROA.9924. What is more, the instruction expressly permitted the jury to consider circumstantial evidence of actual distribution, which necessarily included evidence that a work was “made available” for distribution. *See id.*

The decision in *Howell* discusses this issue in a detailed, well-reasoned opinion. *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981-85 (D. Ariz. 2008). *Howell* surveys the case law and concludes that “the general rule, supported by the

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<sup>18</sup> The Labels suggest that the district court issued conflicting rulings on this issue. Label Br. 72. Grande disagrees, but the existence or lack of conflicting rulings has no bearing on the Labels’ cross-appeal.



great weight of authority, is that infringement of the distribution right requires an actual dissemination of either copies or phonorecords.” *Id.* at 981 (cleaned up); *see also id.* at 983 (collecting cases). This conclusion follows directly from the rule that there is no attempt liability in copyright law. *Id.* at 984. Since *Howell*, other courts have reached the same conclusion, including the district court in *Cox I* and *Cox II*. *See Brittney Gobble Photography, LLC v. Sinclair Broad. Grp.*, No. 1:18-cv-03384, 2021 WL 5359671, at \*19–20 (D. Md. Nov. 17, 2021); *Sony Music Ent. v. Cox Commc’ns, Inc. (Cox II)*, 464 F. Supp. 3d 795, 810-11 (E.D. Va. 2020); *BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc. (Cox I)*, 149 F. Supp. 3d 634, 666-70 (E.D. Va. 2015), *aff’d in part, rev’d in part*, 881 F.3d 293 (4th Cir. 2018).

In contrast, the Labels rely on distinguishable, outlier authority that relates specifically to libraries. Label Br. 73 (citing *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997); *Diversey v. Schmidly*, 738 F.3d 1196, 1201-03 & n.7 (10th Cir. 2013)). Neither case purports to address online file sharing. Indeed, *Diversey* recognizes that “*Howell* does reflect some dissensus, particularly among district courts, about the applicability of *Hotaling*’s holding to cases of Internet file-sharing,” but declined to consider the issue further. 738 F.3d at 1202 n.7; *see also Howell*, 554 F. Supp. 2d at 983 (“The majority of district courts

have rejected the record companies' 'making available' theory because *Hotaling* is inconsistent with the Copyright Act." (collecting cases)).

The district court's decision in *Warner Brothers Records, Inc. v. Payne* is likewise distinguishable. *Payne* was decided under Federal Rule of Civil Procedure 12. No. 6:06-cv-51-WSS, 2006 WL 2844415 (W.D. Tex. July 17, 2006). The court analyzed the distribution issue so that it could decide whether the case would proceed and did not opine on whether the court would ultimately permit the plaintiff to pursue a "making available" theory. *Id.* at \*4.

For these reasons, the district court did not err or abuse its discretion in instructing the jury that infringement of the Labels' distribution right requires an actual distribution of a copyrighted work. The district court's instruction was faithful to section 106(3)'s plain language.

**B. The Labels have no standing to complain about a jury instruction on a question answered in their favor.**

The Labels are not aggrieved by the judgment. Instead, "[t]he judgment is a total victory for [cross-appellant]." *Cooper Indus., Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 876 F.3d 119, 126-27 (5th Cir. 2017). While we appreciate the role of conditional cross-appeals, under this Circuit's precedent, it appears the Labels lack standing to complain about a jury instruction on a claim they prevailed on. *See id.*

As this Court recently explained, “[t]he focus [in a cross-appeal] is on whether the party is seeking a change in the decree, or what we today call the judgment.” *Domain Prot., L.L.C. v. Sea Wasp, L.L.C.*, 23 F.4th 529, 539 (5th Cir. 2022). “Thus a cross-appeal is generally not proper to challenge a subsidiary finding or conclusion when the ultimate judgment is favorable to the party cross-appealing.” *Id.* (cleaned up); *see also Cooper Indus.*, 876 F.2d at 126-27 (dismissing the prevailing party’s conditional cross-appeal because “there [was] no adverse judgment against [cross-appellant], such that it might need to protect its rights—just some adverse reasoning”).

So even if the Court reverses and remands for a new trial, the Labels have no right to any relief on their cross-appeal.

### CONCLUSION

The Court should reverse the district court’s judgment and render judgment that the Labels take nothing. In the alternative, the Court should reverse the district court’s judgment and remand for a new trial framed by a proper jury charge. In the further alternative, the Court should modify the statutory damages award to \$22,066,446 based on 662 copyrighted works (or alternatively remand so that the district court may do so). Grande requests other appropriate relief to which it is entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on January 30, 2024, a copy of the foregoing document was filed and served electronically through the Court’s Electronic Case Filing System on lead counsel of record for Plaintiffs—Appellees/Cross-Appellants:

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**CERTIFICATE OF COMPLIANCE**

1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), this document contains 12,989 words.

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*/s/ Dana Livingston* \_\_\_\_\_

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