

No. 16-1972

United States Court of Appeals for the Fourth Circuit

BMG RIGHTS MANAGEMENT (US) LLC,
PLAINTIFF-APPELLEE

AND

ROUND HILL MUSIC LP
PLAINTIFF

v.

COX COMMUNICATIONS, INCORPORATED, AND COXCOM, LLC,
DEFENDANTS-APPELLANTS

AND

COX ENTERPRISES, INCORPORATED, COXCOM, INC., AND JOHN DOE 2, DEFENDANTS, AND
RIGHTSCORP, INC., PARTY-IN-INTEREST

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, NO. 14-CV-01611
HON. LIAM O'GRADY, PRESIDING*

BRIEF FOR DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Cox Communications, Incorporated, is the parent corporation of Coxcom, LLC. Cox Communications, Incorporated, is owned by Cox DNS, Inc. and Cox Enterprises, Inc. No Defendant-Appellant is a publicly held corporation, and no publicly held corporation owns 10% or more of either Defendant-Appellant.

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INTRODUCTION

This case involves an unprecedented attempt to impose liability on an Internet service provider (ISP) for its subscribers' alleged copyright infringement. It is undisputed that the ISP does not store any allegedly infringing content on its servers, cannot discern what is on its subscribers' computers, and is incapable of removing such content, limiting its transfer, or even *observing* what subscribers are transferring. The Supreme Court has repeatedly held that contributory liability for others' copyright infringement, which is not expressly authorized by the Copyright Act, must be narrowly construed. And the courts and Congress have tightly circumscribed contributory liability for providing technology, such as Internet service, that has “an untold number of legal uses” (JA-2790) and has become virtually indispensable to functioning in the modern world.

The district court acknowledged that extending “traditional contributory infringement” liability to an ISP “magnifies the uncertainties in this area” and “raises the specter of undesirable consequences.” JA-2799. Yet the court sanctioned a novel expansion of contributory liability to ISPs—based not on evidence that the ISP actually knew of specific infringing acts or took affirmative steps to foster infringement, but on the ISP's constructive knowledge of the existence of infringing activity on its network. That judgment should be reversed, and the case remanded for entry of judgment in Cox's favor—or at the very least a new trial.

Defendants-Appellants (“Cox”) are leading providers of cable and Internet services—critical services that “help people purchase products, search for jobs, interact with government agencies,” “find information” on “their health,” and access education, “banking, shopping, entertainment, social networking and communication.” FCC, *National Broadband Plan* 16 (2010), <http://bit.ly/1JHqKMN>. Plaintiff-Appellee (“BMG”) owns various music copyrights. BMG enlisted Rightscorp, a “copyright monetization” business, to monitor online peer-to-peer file sharing sites for sources of potentially infringing content. Rightscorp’s software automatically sends ISPs millions of infringement accusations related to IP addresses that ISPs assign to subscribers. Rightscorp demands that ISPs forward the accusations to subscribers. The notices claim, often inaccurately, that infringement occurred, and threaten subscribers with termination of Internet access unless they pay Rightscorp for each time it observed an allegedly infringing work.

Pursuant to its policy prohibiting such extortionate settlement demands, Cox declined to forward to its subscribers Rightscorp’s millions of notices. Cox repeatedly told Rightscorp that it would forward the notices if Rightscorp removed the settlement language. Rightscorp refused, and this lawsuit followed.

In allowing Cox to be held liable, the district court committed several reversible errors. First, it misread binding Supreme Court authority barring contributory copyright liability where the defendant’s technology is “capable of substantial

noninfringing uses.” *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 442 (1984); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 932-33 (2005). Cox’s Internet service has endless legal uses, and BMG failed to prove either that Cox actually knew of specific infringing acts by specific subscribers or that it took active steps to promote infringement. Yet the court below held that Cox could be held liable if it “knew *or should have known* of” infringing activity on its network (JA-2077 (emphasis added))—not only refusing to provide the jury with *any* instruction on Sony’s “substantial noninfringing use” rule, but allowing it to impose liability based on mere constructive knowledge, which Sony explicitly prohibits.

Second, the district court eviscerated the safe harbor for ISPs that Congress provided in the Digital Millennium Copyright Act (DMCA), which limits liability for conduit service providers. 17 U.S.C. § 512(a). On the classic jury question of whether Cox “reasonably implemented” its copyright policy by terminating “repeat infringers” in “appropriate circumstances,” the court granted summary judgment to BMG—even though BMG could not show that Cox had failed to terminate a *single* “repeat infringer.” And although § 512(i)’s reference to “repeat infringers” can only refer to *adjudicated* infringers—since other parts of § 512 repeatedly speak of “claimed” or “alleged” infringement—the court held that users were “repeat infringers” based solely on Rightscorp’s accusations of infringement.

Finally, the court incorrectly instructed the jury on statutory damages, telling it that Cox's alleged contributory infringement was "willful" if Cox knew its *subscribers* (not Cox) were infringing—thus compelling the jury to find willfulness if it only found Cox contributorily liable. The court also refused to tell the jury that damages are reduced if Cox "was not aware and had no reason to believe" that it infringed. 17 U.S.C. § 504(c)(2). The result was an inflated \$25 million judgment.

If allowed to stand, that judgment would force ISPs to terminate subscribers' Internet access—and with it access to critical information, e-commerce, and entertainment—based on the say-so of third parties. This Court should reverse.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a) and entered final judgment on August 9, 2016 (JA-2831). Defendants-Appellants timely noticed this appeal on August 19, 2016. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

- I. Whether an ISP may be held contributorily liable for alleged copyright infringement by users of its service, where that service is capable of substantial noninfringing use, the ISP lacked actual knowledge of specific infringing acts, and there is no evidence that the ISP had the object of promoting the service's use to infringe copyright, in the form of the ISP's clear expression or affirmative steps to foster infringement.
- II. Whether the district court erred in granting BMG summary judgment on Cox's DMCA safe harbor defense.
- III. Whether the district court erred in instructing the jury on damages.

STATEMENT OF THE CASE

Cox, a communications company with roots tracing to the late 1800s, is an ISP that provides some 4.5 million U.S. customers with Internet connections. BMG owns and administers music copyrights. In 2014, BMG sued Cox, ultimately alleging vicarious and contributory infringement of 1,397 copyrights based on alleged distribution of the works over Cox's network. Cox cannot remove infringing content, or even determine whether such content is crossing its network. Yet the district court held Cox liable based on its subscribers' use of BitTorrent to upload and download music.

A. The parties, relevant entities, and relevant technology

1. BitTorrent

BitTorrent is a peer-to-peer (P2P) “protocol that allows individual computers, called ‘peers,’ to communicate and transfer information directly using an internet connection.” JA-2796. “An individual can visit a website ... and search a directory of .torrent files,” but “[t]he .torrent file does not contain the work”—“[i]t contains information about what is available to be distributed.” *Id.* A file referenced by a .torrent file is called the “torrent payload.” JA-681.

“If a .torrent file appears to represent the desired work, the user downloads ... and opens it while running the BitTorrent client,” which connects the user to “peers and begins requesting pieces of the [payload] file.” JA-2770. “BitTorrent allows users to download different pieces of a single file from multiple users” and

“reassemble[] them.” *Id.* “P2P protocols” like BitTorrent “have many benefits and non-infringing uses,” but “have also been harnessed for less meritorious purposes.” JA-680.

2. Rightscorp and BMG

Rightscorp is a self-proclaimed “copyright monetization” business that monitors BitTorrent for exchanges of infringing content. JA-4540-43. Rightscorp’s business model is to accuse ISP subscribers of infringement, threatening lost Internet access unless they pay. And when Cox refused to join in Rightscorp’s “extortiate” scheme (JA-2777), based on its policy barring settlement demands in infringement accusations, Rightscorp engineered this suit against Cox.

Rightscorp’s software searches websites to identify .torrent files that appear to represent copyrighted works. “If Rightscorp contacts a peer and determines that the peer has the torrent payload” referenced by the .torrent file, Rightscorp records “the date, time, ... IP address,” and other details. JA-680-81.

Rightscorp does not and could not know whether Cox’s subscriber is the one who actually committed the alleged infringement—much less that it was infringement under the law. JA-2883, JA-2891, JA-2931-32, JA-2937-41. Subscribers are “assigned a modem with an IP address, but commonly” they “open that connection to others,” and if “not password-protected, it can be accessed” widely. JA-2783.

Further, Rightscorp does not even “download a copy of a work every time it generates a notice.” JA-2781.

After recording the torrent information, Rightscorp sends a notice of infringement to the ISP that assigned the IP address, demanding that the ISP forward the notice to the subscriber. “The notices contain the name of the copyright owner, the name of the copyrighted work, the subscriber’s IP address and port, the hash value, a time stamp, and a statement under penalty of perjury that Rightscorp is an authorized agent and that the information in the notice is true and accurate.” JA-2776. The notices here stated:

Your ISP account has been used to download, upload or offer for upload copyrighted content in a manner that infringes on the rights of the copyright owner.

JA-5313.

This statement is false. As the district court held, “offer[s] for upload” are not infringement. JA-734. On their face, therefore, Rightscorp’s notices were indefinite as to whether subscribers were even engaging in infringing conduct.

Further, the notices are unreliable and generate numerous false positives. In hundreds of cases, “Rightscorp purported to download a BMG work that was in fact something else”—for example, “a Grateful Dead song that was in actuality an article about a Grateful Dead performance.” JA-2782. “[T]housands” of notices were “duplicative,” and Rightscorp may have been “generating notices when a

peer was detected to be offering anything above 10% of the torrent payload” without verifying that the peer actually offered or transmitted each work. JA-2782, JA-2826. BMG ultimately dropped 106 works from the case. *Compare* JA-127-75 with JA-2645-95. Moreover, *every* notice that Rightscorp sent on Plaintiff Round Hill’s behalf was false, as Round Hill did not own the asserted rights. JA-704.

The main point of Rightscorp’s notices was their settlement demands, which asserted that the copyright owner “is entitled to monetary damages,” but that “Rightscorp is authorized to ‘offer a settlement solution.’” JA-2776 (quoting JA-5315)) (ellipses omitted). If the ISP forwards the notice, “[t]he subscriber can access the settlement offer by clicking on an embedded link and can then pay \$20 or \$30,” for each observation of a work, for a release from liability. *Id.* Unless the subscriber settles, the notices threaten, “[y]our ISP service could be suspended,” and “[y]ou could be liable for up to \$150,000 per infringement.” JA-5314.

3. Cox

Cox is a leading provider of cable and Internet service. It is undisputed that the Internet “has an untold number of legal uses” (JA-2790) and provides subscribers and society with vast benefits, such as access to information, education, entertainment, government, and commerce. As an ISP, Cox simply provides a pipeline to the Internet; it cannot restrict the content that its subscribers access or share.

“Cox does not create or distribute peer-to-peer software,” or “host any of the websites that index .torrent files.” JA-2773 n.4. Cox also “does not store infringing content on servers, nor can it control what customers store,” and it “has no ability to remove or take down infringing content.” *Id.* Cox can analyze “the volume of BitTorrent use on its network or by an individual user, but Cox does not know the particulars of the data being shared.” *Id.*

B. Cox’s terms of use and copyright policies

Cox’s Internet service is governed by its Acceptable Use Policy (“AUP”), which reserves Cox’s right to suspend or terminate customers who “use the Service to post, copy, transmit, or disseminate any content that infringes the patents, copyrights, trade secrets, trademark, moral rights, or proprietary rights of any party.” JA-262. Cox’s subscriber agreement and its website terms incorporate the AUP. JA-3936, JA-247-59, JA-160-83, JA-284-09.

Cox has an employee group, called the Abuse Group, dedicated to “addressing [AUP] violations.” JA-2773. Cox “provides an email address, <abuse@cox.net>, to copyright holders and their authorized agents for the receipt of notifications of alleged infringement,” which must contain, among other things, an “identification of the copyrighted work and a statement that the complaining party has a good faith belief that the use of the material is unauthorized.” *Id.*

To process notifications, “Cox created an automated system—CATS (Cox Abuse Tracking System)”—that converts notifications into “tickets” that “enter Cox’s graduated response system.” JA-2774. CATS tracks the number of complaints received, if any, per subscriber. Cox responds with steps that escalate “from warnings to suspensions and ultimately, the possibility of termination.” JA-683.

To keep complaints “manageable” and “prevent a single complainant from overwhelming the company,” Cox sets a “default limit” of “200 complaints per complainant per day” that “receive customer-facing action.” JA-682. Cox works with complainants “to set a reasonable number,” however, and informs them if “the daily limit has been reached.” *Id.* Further, “when Cox receives multiple complaints in one day for a single account, the tickets are ‘rolled’” into one ticket. *Id.* Finally, “if no complaints are received within six months from the last complaint, the cycle restarts.” JA-682-83.

“As a policy, Cox does not accept or process infringement notices that contain settlement offers.” JA-684. This policy was set after “Cox’s in-house privacy counsel ... conclude[d] that such notices are improper and fall outside the ‘spirit’ of the DMCA.” *Id.* Thus, “[w]hen Cox receives a complaint with a settlement offer, it asks the complainant to conform the notice.” JA-685. “Until a complainant complies, Cox ‘blacklists’ all complaints received from that complainant by configuring CATS to auto-delete [that complainant’s email] messages.” *Id.*

C. The underlying dispute and procedural history

In 2011, Cox received its first Rightscorp notice alleging infringement. Pursuant to its policy, Cox asked Rightscorp to remove its settlement demands. Rightscorp refused and kept sending notices. JA-685. Cox thus blacklisted Rightscorp, meaning it “auto-deleted Rightscorp’s emails and never retrieved the information from” them. *Id.*

“Rightscorp also provided Cox a username and password that would give Cox access to its ‘dashboard’—a real-time compilation” of its notices corresponding to Cox IP addresses. JA-2777. But there is no evidence that anyone from Cox ever accessed this dashboard. JA-2868, JA-2879, JA-2882, JA-2890. Rightscorp then “‘started inundating’ [Cox’s] inbox, sending as many as 24,000 notices in one day.” JA-685. The effect was equivalent to a denial-of-service attack, overloading Cox’s system and “crippl[ing] [its] ability to” process “valid complaints.” JA-3985. Accordingly, Cox blocked Rightscorp’s notices from “enter[ing] Cox’s inbox.” JA-685.

Rightscorp is the only complainant that Cox has had to block at the server level. JA-3985. “Rightscorp signed BMG as a client in December 2011—after the blacklisting”—so “for the approximately 1.8 million notices Rightscorp sent to Cox on BMG’s behalf during the period relevant to this lawsuit, Cox received exactly zero.” JA-2778.

“As peer-to-peer file sharing has evolved and removed the need for distribution intermediaries—a Napster, for example—rights holders have shifted their focus to a new type of defendant.” JA-2771. “The music industry did undertake a highly publicized effort to hold individual users liable for direct infringement,” but that “presented an obvious public relations problem.” JA-2771 n.2. Here, therefore, BMG is “attempting to expand the universe of culpable characters to include intermediaries” that do not distribute or control the copyrighted works. *Id.*

In 2014, after “wait[ing] years” (JA-2829), plaintiffs sued Cox, alleging contributory and vicarious copyright infringement between 2012 and 2014 and seeking statutory damages, among other relief. Cox asserted numerous defenses, including its eligibility for a DMCA safe harbor (17 U.S.C. § 512(a)) that explicitly limits ISPs’ copyright liability. After discovery, the parties cross-moved for summary judgment. The court held that plaintiff Round Hill lacked standing, and that Cox was ineligible for the safe harbor. JA-2779.

Section 512(a) protects ISPs that are merely conduits for transmission. To qualify, ISPs must “adopt[] and reasonably implement[] ... a policy that provides for the termination in appropriate circumstances of subscribers ... who are repeat infringers.” 17 U.S.C. § 512(i)(1)(A). Despite § 512’s repeated references to “claimed” or “alleged” infringement—and its use in § 512(i) of “repeat infringer[]” without such a qualifier—the district court held that “repeat infringers” are *not* lim-

ited to adjudicated infringers. Instead, it held that “an account holder must be considered an infringer ... when the service provider has actual knowledge that the account holder is using its services for infringing purposes.” JA-718. The court held that Cox had such knowledge, even though it is *incapable* of knowing what content its subscribers transfer, and Rightscorp’s notices are at best allegations.

The court then considered whether a “reasonable juror could find that” Cox “terminate[d] access of repeat infringers under appropriate circumstances.” JA-708, JA-714. Before fall 2012, the court held, “Cox did not implement its repeat infringer policy,” because “Cox employees followed an unwritten policy” whereby “accounts used to repeatedly infringe copyrights would be nominally terminated, only to be reactivated upon request.” JA-709. For the post-fall 2012 period, the court set aside evidence that Cox actually terminated users that it believed were repeat infringers, ignored evidence that Cox’s policy was more stringent than other ISPs’ policies, and announced that there was no “genuine issue of material fact as to whether” Cox reasonably implemented its policy. JA-720. BMG’s secondary infringement claims thus proceeded to trial, and the jury found Cox liable for willful contributory infringement, but not vicarious infringement. JA-2779.

Traditionally, contributory infringement covers “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th

Cir. 2004) (quotations omitted). BMG did not “pursue[] an inducement claim”; it sought to show a “material contribution.” JA-2793 n.18. And in *Sony* and *Grokster*, the Supreme Court held that supplying a service capable of substantial noninfringing use is not, without more, a material contribution to infringement. For example, where the defendant’s technology is “capable of substantial noninfringing uses,” contributory liability cannot rest on “constructive knowledge of the fact that [others] may use that [technology]” to infringe. *Sony*, 464 U.S. at 439, 442.

While acknowledging that Cox’s Internet service has “an untold number of legal uses” (JA-2790), the district court refused to instruct the jury on *Sony*’s “substantial noninfringing use” rule or the meaning of “material contribution.” Even when, during deliberations, the jury asked the court to “[p]lease define materially contributed,” it refused. JA-2197-2204. Further, the court instructed the jury that Cox could be liable if it “knew *or should have known* of,” or was “willful[ly] blind[]” to, “infringement of BMG’s copyrighted works by users of Cox’s Internet service.” JA-2077-78 (emphasis added).

The jury found Cox liable for contributory infringement, awarding \$25 million in damages. JA-2779. Both parties sought renewed judgment as a matter of law; Cox alternatively sought a new trial; and BMG sought a permanent injunction. The court denied the motions. JA-2830. In denying an injunction, the court stressed that Cox raised a “multitude” of “well-founded” questions, such as: “If

the injunction requires termination of ‘repeat’ infringing subscribers in appropriate circumstances, when is a subscriber a ‘repeat’ infringer and what are the ‘appropriate circumstances’ for termination?” JA-2825-26.

STANDARD OF REVIEW

This Court reviews *de novo* “a district court’s denial of ... judgment as a matter of law” (*Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 259 (4th Cir. 2001)), “grant of summary judgment” (*Ray Commc’ns v. Clear Channel Commc’ns*, 673 F.3d 294, 299 (4th Cir. 2012)), and “error[s] of law” in “jury instructions” (*In re C.R. Bard, Inc.*, 810 F.3d 913, 929 (4th Cir. 2016)). Other instructional issues are “reviewed for abuse of discretion.” *Id.*

SUMMARY OF ARGUMENT

The district court’s judgment should be reversed, and the case remanded for entry of judgment for Cox, or at the very least a new trial.

I. In *Sony* and *Grokster*, the Supreme Court limited contributory liability for copyright infringement where the defendant’s technology is, like Internet service, capable of substantial noninfringing use. Not only did the district court refuse to instruct the jury on this principle, but under any plausible reading of those decisions, BMG failed to establish liability here.

I.A. At a bare minimum, where a defendant’s service has substantial non-infringing use, *Sony* bars contributory liability based on the defendant’s “construc-

tive knowledge of the fact that [others] may use that [service]” in infringing ways. 464 U.S. at 439, 442. Yet the district court refused to instruct the jury concerning *Sony*’s rule on substantial noninfringing uses or its significance to the material contribution requirement—even when the jury specifically asked for such guidance. Instead, the court told the jury that Cox was contributorily liable if it “should have known” of infringing activity over its network. But “should have known” means “had constructive knowledge” (*Starnes v. Comm’r of Internal Revenue*, 680 F.3d 417, 434 (4th Cir. 2012)), and *Sony* held that “no precedent” supports “imposition of [contributory] liability on such a theory” (464 U.S. at 439). The court’s instruction on liability for “willful blindness” of generalized infringement suffers from similar flaws, and the admission of Rightscorp’s notices, irrelevant DMCA testimony, and two biased hearsay studies with generalized Internet infringement statistics compounded the court’s errors.

I.B. Under *Grokster*, the defendant’s *intent* and *active conduct* are central: Absent “[e]vidence of active steps taken to encourage direct infringement,” “culpable intent” and thus contributory liability cannot rest on “the design or distribution of a [service] capable of substantial lawful use.” 545 U.S. at 933-34, 936. BMG presented no evidence that Cox took active steps to encourage infringement, or other evidence of culpable intent. Thus, under *Sony* and *Grokster*, Cox cannot be held liable for providing Internet service regardless of any “knowledge” it had.

This rule is unaffected by Cox’s ability to terminate subscribers, as that does not give Cox direct control over *infringing* content, and *Grokster* prohibits requiring defendants to take “affirmative steps to prevent infringement.” *Id.* at 939 n.12.

Any other reading of *Grokster* would expand contributory copyright liability, which is *implied* under the Copyright Act, beyond that imposed under the Patent Act—which the Supreme Court “look[s] to ... for guidance in determining the standard” for “contributory copyright infringement,” and which *expressly* conditions contributory liability on the defendant taking affirmative steps contributing to infringement. *See Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 763 (2011). Further, “it would be anomalous” to “expand ... a judicially implied cause of action beyond the bounds [that Congress] delineated for comparable express causes of action.” *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180 (1994) (quotations omitted).

II. The district court also erred in granting summary judgment to BMG on Cox’s DMCA safe harbor defense. The DMCA bars liability for an ISP that has “reasonably implemented ... a policy that provides for the termination in appropriate circumstances of subscribers ... who are repeat infringers.” 17 U.S.C. § 512(i)(1)(A). Cox showed that its policy is stricter than the industry norm and leads to subscriber terminations, and BMG lacked evidence of even one “repeat infringer” whom Cox failed to terminate. Viewed in Cox’s favor, this evidence easi-

ly creates factual disputes on such classic jury questions as the “reasonableness” of Cox’s implementation and whether its policy provides for termination “in appropriate circumstances.”

In concluding otherwise, the district court misread the statute. In the court’s view, “repeat infringer” could cover someone who has not been legally determined to be an infringer—even though the DMCA elsewhere, but not here, *repeatedly* refers to “claimed” or “alleged” infringement. The court also presumed that “appropriate circumstances” for “termination” *always* exist for “repeat infringers”—thus reading the “appropriate circumstances” limitation out of the statute.

III. Alternatively, at least a new damages trial is required. First, the district court told the jury that it could find Cox’s contributory infringement “willful” if Cox had knowledge that its *subscribers* were infringing, rather than knowledge that Cox *itself* was contributing to infringement, erroneously collapsing the standard for willful infringement into that for ordinary contributory infringement. Second, the court refused to instruct the jury that the law provides for reduced damages “where the infringer ... was not aware and had no reason to believe that [its] acts constituted an infringement of copyright.” 17 U.S.C. § 504(c)(2).

ARGUMENT

I. Because its Internet service is capable of substantial noninfringing use, Cox cannot be held contributorily liable without proof of (A) actual knowledge of specific infringing acts or (B) affirmative steps to encourage infringement.

“Although the Copyright Act does not expressly render anyone liable for infringement committed by another,” two common-law secondary liability doctrines, contributory and vicarious infringement, “are well established.” *Grokster*, 545 U.S. at 930 (quotations, brackets omitted). Nevertheless, courts “must be circumspect in construing the scope of [these] rights” and “reluctan[t] to expand the[ir] protections ... without explicit legislative guidance.” *Sony*, 464 U.S. at 431.

The jury rejected vicarious infringement, so only contributory infringement is relevant here. And under the Supreme Court’s seminal decisions in *Sony* and *Grokster*, absent “[e]vidence of active steps taken to encourage direct infringement,” contributory liability cannot be based on “the design or distribution of a [service] capable of substantial lawful use” (*Grokster*, 545 U.S. at 933, 936) or a defendant’s “constructive knowledge of the fact that [its] customers may use” such service to access or share “copyrighted material” (*Sony*, 464 U.S. at 439).

“There can be no dispute, and the evidence at trial established, that the internet has an untold number of legal uses” (JA-2790)—and thus that Cox’s Internet service has substantial noninfringing uses. Yet the district court refused to hold that Cox was protected under *Sony* and *Grokster*. Indeed, the court refused to give

the jury *any* instruction on the significance of the substantial noninfringing uses of Cox's service, and it invited the jury to find contributory infringement based on *constructive* knowledge. The trial was thus tainted by a host of errors.

We begin by explaining why these errors require judgment for Cox, even under the narrowest possible reading of *Sony* and *Grokster*. Even BMG's counsel acknowledged below that the "key issue" is whether Cox had "actual specific knowledge" of "actual infringing activities"—"[n]ot just general knowledge ... that [Cox's services] could be misused." JA-2200. Such evidence is lacking here. And the failure to give *any Sony* instruction concerning the noninfringing uses of Cox's Internet service itself requires at least a new trial. *Infra* at 21-35.

We then turn to the district court's more fundamental legal error, which independently requires judgment for Cox. Because Cox's service has substantial noninfringing uses, neither constructive nor actual knowledge of infringement suffices to hold an ISP contributorily liable absent "the object of promoting [the service's] use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement." *Grokster*, 545 U.S. at 936-37. Again, such evidence is absent here. *Infra* at 35-44.

In sum, under any reading of *Sony* and *Grokster*, the Court should reverse.

A. The district court erred in refusing to give any *Sony* instruction concerning the substantial noninfringing uses of Cox’s Internet service and in instructing the jury that constructive knowledge could support contributory liability.

Traditionally, contributory infringement has rendered liable “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); see *CoStar*, 373 F.3d at 550. This formulation requires *both* “knowledge of the infringing activity” *and* either an inducement of or material contribution “to the infringing conduct.” And since “BMG has not pursued an inducement claim,” only material contribution is relevant here. JA-2793.

Sony involved “a claim that secondary liability for infringement can arise from the very distribution of a commercial product” that “supplie[s] the means used to infringe.” *Grokster*, 545 U.S. at 931. But the Court held that, where the defendant’s service is “capable of substantial noninfringing uses,” liability for material contribution cannot rest on “constructive knowledge of the fact that [others] may use that [service]” in infringing ways. *Sony*, 464 U.S. at 439, 442. The Court thus “limit[ed] liability to instances of more acute fault than the mere understanding that some of one’s products will be misused.” *Grokster*, 545 U.S. at 932-33.

Sony’s “staple article of commerce” analysis applies to Internet services. *CoStar*, 373 F.3d at 552 (quoting *Sony*, 464 U.S. at 442). Were the law otherwise,

“thousands of owners, contractors, servers, and users involved in the Internet whose role involves the storage and transmission of data in the establishment and maintenance of an Internet facility” could become liable for acts of “would-be copiers.” *Id.* at 551. “To conclude that these persons are copyright infringers simply because they are involved in the ownership, operation, or maintenance of a transmission facility that” transmits “material—copyrighted or not—would miss the thrust of the [statutory] protections.” *Id.*

Here, however, the district court refused to instruct the jury on *Sony*’s “substantial noninfringing use” rule, or to explain what “material contribution” means. Instead, it charged the jury that, “[w]ith certain exceptions, a person is liable for copyright infringement by another if the person knows *or should have known* of the infringing activity and induces, causes, or *materially contributes* to the activity.” JA-2077 (emphases added). On its face, this instruction violates *Sony*’s prohibition of basing contributory liability on “constructive knowledge ... that [Cox’s] customers may use [its services] to make unauthorized [use] of copyrighted material.” 464 U.S. at 439. It is also confusing, as one searches the instructions in vain for any description of the “certain exceptions” to liability.

The model instructions that the court otherwise followed—which were the origin of the “certain exceptions” language—themselves state that “[i]f the case involves the issue as to whether the defendant’s product or service is capable of sub-

stantial noninfringing uses, the jury may need additional instructions.” 3B O’Malley et al., *Fed. Jury Practice & Instructions* § 160:29 n.4 (6th ed. 2015). That “something more” may be an instruction—like Cox’s first proposed instruction below—stating that if “[Defendant’s] [product; service] has substantial noninfringing uses, you may not hold Defendant liable unless Defendant promoted [the direct infringer’s] use of its [product; service] in a way that infringed Plaintiff’s copyrights.” *Id.*¹ Alternatively, that “something more” might be an instruction—like Cox’s fallback instruction below—stating that “[i]t is not a material contribution to provide a product or service that is capable of substantial noninfringing uses.” JA-1905.

Whatever instruction is given, there is no excuse for refusing to give the jury *any* guidance on the significance of “substantial noninfringing uses,” the meaning of material contribution, or *Sony*’s “exceptions” to liability. Yet the court below refused to provide any “additional instructions” explaining *Sony*’s rule. It even refused to answer the jury’s request: “Please define materially contributed.” JA-2197-2204, JA-2207-08. As explained below, because *Sony* requires at least evi-

¹ JA-659 (requesting an instruction that BMG must show either “that Cox provides its service with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps to foster infringement,” or “that Cox’s service is not capable of substantial or commercially significant noninfringing uses”); *see infra* at 35-41 (explaining why *Grokster* requires as much).

dence of Cox's *actual* knowledge of *specific* infringing acts, and BMG presented no such evidence, judgment should be granted to Cox. Alternatively, because the facially deficient jury instruction prejudiced Cox, at least a new trial is required.²

1. Constructive knowledge does not suffice where the service is capable of substantial noninfringing use.

Even courts that read *Sony* narrowly limit the contributory liability of “a computer system operator” to one that has (1) “*actual* knowledge that *specific* infringing material is available using its system,” and (2) “can take simple measures to prevent further damage to copyrighted works, yet continues to provide access to infringing works.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007) (quotations omitted). Yet the district court told the jury that Cox was liable if it “kn[ew] *or should have known* of the infringing activity.” JA-2077. Worse, the court instructed that “the infringing activity” was generalized “direct infringement of BMG’s copyrighted works by users of Cox’s internet service” (*id.*)—rather than specific infringing acts. Thus, the court’s instruction was doubly flawed. And BMG did not show that Cox could have taken “simple measures” that would have reasonably limited access to infringing works.

² Cox repeatedly argued that, at a bare minimum, actual knowledge was required. *E.g.*, JA-578 (“virtually all cases require actual, specific knowledge of specific infringements”), JA-585; Dkt. 734 at 2 (“*Sony* forecloses contributory liability” based on “constructive knowledge”), 6; Dkt. 781 at 5 (discussing cases).

a. At a minimum, where the defendant's service has substantial noninfringing uses, there is no contributory liability under *Sony* unless the defendant *actually knew* of *specific* infringements. "There is no precedent in the law of copyright for the imposition of [secondary] liability on ... a theory" that the defendants "sold equipment with constructive knowledge of the fact that their customers may use that equipment to make unauthorized copies." *Sony*, 464 U.S. at 439. The Court in *Sony* refused to impose secondary liability where "the product is widely used for legitimate, unobjectionable purposes." *Id.* at 442.

As the district court noted, the Ninth Circuit applies an "actual knowledge" standard in material contribution cases involving online conduct. JA-2794. Believing other courts use "a broader, objective standard" (*id.*), however, the court told the jury that Cox was liable if it "should have known" of the alleged infringement. That is the "constructive knowledge" standard that *Sony* rejected. *Starnes*, 680 F.3d at 434 ("should have known" means "had constructive knowledge").

Moreover, other circuits have *not* endorsed a "constructive knowledge" rule in any case involving services capable of substantial noninfringing uses. The district court cited a Second Circuit decision (*Arista Records*) stating that "contributory infringement liability is imposed on persons who 'know or have reason to know' of the direct infringement." JA-2795. But not only was that statement pure dictum, it quoted a Ninth Circuit case (*Napster*) that rejected that precise standard.

Arista Records, LLC v. Doe 3, 604 F.3d 110, 118 (2d Cir. 2010) (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001)).

After quoting *Sony*'s holding that constructive knowledge is not enough, *Napster* held that “evidence of actual knowledge of specific acts of infringement is required.” 239 F.3d at 1021. The Ninth Circuit has since reiterated this point, even *italicizing* it: “[A] computer system operator can be held contributorily liable if it has *actual* knowledge that *specific* infringing material is available using its system, and can take simple measures to prevent further damage to copyrighted works, yet continues to provide access to infringing works.” *Amazon.com*, 508 F.3d at 1172 (quotations, citation omitted); *accord*, e.g., *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1072 (9th Cir. 2013).

Gershwin, a Second Circuit pre-*Sony* decision (JA-2794), stated that “a person who has promoted or induced the infringing acts of the performer has been held ... liable as a ‘vicarious’ infringer, even though he has no actual knowledge that copyright monopoly is being impaired.” 443 F.2d at 1162. But that language focused on vicarious and induced infringement; the jury rejected vicarious liability and BMG has conceded that there is no inducement here. JA-2793 n.18. Further, *Gershwin* “emphasized that the contributory infringer had actual knowledge that the artists it was managing were performing copyrighted works,” and in discussing

Gershwin the Court in *Sony* rejected a constructive knowledge standard. 464 U.S. at 438 & n.18.

b. The district court not only erred in giving a constructive knowledge instruction, but set the bar for *what* Cox “knew or should have known” too low. BMG had to prove only “that Cox knew or should have known of” “direct infringement of BMG’s copyrighted works by users of Cox’s internet service.” JA-2077. But generalized knowledge—that infringement was occurring somewhere on its network—is exactly what falls short under *Sony*.

For example, it was insufficient that Sony sold “VCRs to consumers with knowledge that some would use them to infringe” or “kn[ew] [its VCRs were] in fact used for infringement.” *Grokster*, 545 U.S. at 931, 933. And even a narrow reading of *Sony* requires “actual knowledge of *specific acts of infringement*”—“more than a generalized knowledge ... of the possibility of infringement.” *Luvdarts*, 710 F.3d at 1072-73 (emphasis added) (quotations omitted).

c. The district court held that “there was sufficient evidence that Cox ... *had reason to know* that its users were infringing BMG’s works” and “[significant] evidence of Cox’s *general knowledge of infringement* on its network.” JA-2796, JA-2798. But this falls short of actual knowledge, much less “of specific acts of infringement.” *Napster*, 239 F.3d at 1021. Thus, the court’s instruction warrants reversal—twice over.

Here, “it is undisputed” that Cox (1) “never received Rightscorp’s notices related to BMG’s copyrights during the period covered by the Complaint” (JA-737, JA-2778); and (2) had no way of knowing “the particulars of the data being shared” by subscribers (JA-2773 n.4). *Cf. Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs.*, 907 F. Supp. 1361, 1374 (N.D. Cal. 1995) (“[w]here a[n] ... operator cannot reasonably verify a claim,” a “lack of knowledge will be found reasonable and there will be no liability”). Further, the notices contain only accusations, and the closely related Patent Act, where contributory liability is *express*, “requires more” than “kn[owledge] the acts *might* infringe”; it “requires proof the defendant *knew* the acts were infringing.” *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1928 (2015) (emphasis added). BMG provided no such proof.

None of Rightscorp’s notices identified specific infringing acts: All recited boilerplate allegations that works were “being downloaded, uploaded, and/or offered for upload on or through [Cox’s] network.” JA-230. One of these acts, an offer to upload, is not even infringement, making the notices facially indefinite. Further, Rightscorp typically sent the notices without verifying actual transmissions of copyrighted material from Cox users—which is why it would, for example, identify an *article* about the Grateful Dead as an infringing *song*. JA-1498 (Rightscorp detected only transmissions to itself); Sabec Video JA-1703 (Rightscorp cannot identify the persons(s) it accuses of infringement); JA-1498

(same). And before trial, BMG itself dropped 106 infringement claims that it had alleged in earlier notices. *Compare* JA-127-75 with JA-2645-95. The court below thus erred in suggesting that “[t]he jury could reasonably conclude that Rightscorp captured infringing activity on Cox’s network, and that had Cox received the notices they would have satisfied the knowledge requirement.” JA-2797.

d. Finally, BMG did not show “reasonable and feasible means for [Cox] to refrain from providing access to infringing [works].” *Amazon.com*, 508 F.3d at 1172-73. In cases such as *Amazon.com*, the works were “stored [o]n [the defendant’s] servers,” making them easy to remove. *Id.* at 1155-56; *see Perfect 10, Inc. v. Giganews, Inc.*, 2013 WL 2109963, *2 (C.D. Cal. Mar. 8, 2013); *China Cent. Television v. Create New Tech. (HK) Ltd.*, 2015 WL 3649187, *3 (C.D. Cal. June 11, 2015). Here, by contrast, Cox “does not store infringing content on servers” and “has no ability to remove or take down infringing content.” JA-2773 n.4. Cox’s only option is entirely terminating subscribers who could be using the Internet for “an untold number of legal uses.” JA-2790. Given the importance of Internet access, that is not a “reasonable” measure.

In sum, because BMG failed to prove that Cox actually knew of specific acts of infringement, the Court may “direct the entry of judgment as a matter of law for” Cox. *Weisgram v. Marley Co.*, 528 U.S. 440, 451-52 (2000). Alternatively, because the district court’s knowledge instruction did not “adequately inform[] the

jury of the controlling legal principles” and likely “misl[ed] or confus[ed] the jury to [Cox’s] prejudice,” at least a new trial is required. *Bunn v. Oldendorff Carriers GmbH & Co. KG*, 723 F.3d 454, 468 (4th Cir. 2013).

2. The “willful blindness” instruction was likewise erroneously based on mere constructive knowledge.

The district court’s “willful blindness” instruction was similarly flawed. Over Cox’s objection (JA-2057; Dkt. 734 at 6-7), that instruction stated: “In copyright law, willful blindness is considered to be knowledge. Cox acted with willful blindness if it was aware of a high probability that Cox users were infringing BMG’s copyrights but consciously avoided confirming that fact.” JA-2077-78. This instruction misstated the law, prejudicing Cox.

Whether “Cox users were infringing BMG’s copyrights” is precisely the sort of knowledge of *generalized* infringement that cannot sustain contributory liability. At a minimum, *Sony* requires “[w]illful blindness of specific facts” showing that specific users were actually infringing specific BMG copyrights on specific occasions. *Luvdarts*, 710 F.3d at 1073.

BMG provided no such evidence. Instead, it emphasized “Cox’s decision to continuously ignore and take no action in response to the 1.8 million notices, weekly letters, and dashboard from Rightscorp.” JA-2796. Yet Rightscorp’s notices and communications *alleged* rather than proved infringement—in ways that were grossly inaccurate and indefinite. *Supra* at 28-29. “Willful blindness” to

mere allegations is no substitute for actual knowledge of specific infringement. *Global-Tech*, 563 U.S. at 770, 754 (willful blindness requires “active efforts ... to avoid” “clear evidence of critical facts”). And Cox had no obligation to take the “affirmative step[]” of visiting Rightscorp’s dashboard. *Grokster*, 545 U.S. at 939 n.12.

In sum, any “willful blindness” resting on failures to accept notices cannot go beyond whatever actual knowledge the notices could convey. And as for BMG’s other proof—“industry reports that the overwhelming majority of traffic on BitTorrent was infringing,” “traffic analysis [showing] that subscribers were using BitTorrent,” and the like—the court itself held that such “generalized knowledge of infringement occurring on [Cox’s] network is not sufficient.” JA-2796.

Because the jury instruction permitted liability based on “willful blindness” to mere allegations and generalized knowledge, this Court should reverse.

3. Compounding its failure to properly instruct the jury, the district court erroneously admitted (a) Rightscorp’s notices and DMCA testimony, and (b) two hearsay studies.

a. The district court further erred in allowing BMG to use Rightscorp’s notices and DMCA testimony as proof of infringement. For starters, Rightscorp’s notices are hearsay, barred under Federal Rules of Evidence 801 and 802. The district court asserted that the notices “[are] computer generated and, therefore, not subject to the hearsay exception” (JA-957), but the notices contain the statements

and signature of a person (Christopher Sabec) and an oath under penalty of perjury. *See, e.g.*, JA-4297-4333. Computers cannot make such affirmations, and the fact that a message accusing someone of infringement is written by a lawyer and then computer-generated does not transform it into reliable, non-hearsay evidence.

Moreover, the notices were not competent evidence of the legal question of infringement, and were highly prejudicial. Cox requested “a limiting instruction that the notices should not be equated with infringement,” but the district court “rejected” it. JA-2818; *see* JA-946, JA-953-54, JA-956-58. The jury was therefore left to conclude that BMG did not otherwise need to prove infringement. This evidence should have been excluded. Fed. R. Evid. 403.

Worse, the district court allowed BMG’s witnesses and attorneys to use the term “infringement” pervasively when referring to Rightscorp’s automated observations. JA-827, JA-836, JA-846, JA-892-93, JA-1109-11, JA-1258, JA-1260-61, JA-1327, JA-1330, JA-1532. For instance, the court allowed Rightscorp’s president to read from a letter that “if Cox has no safe harbor under the DMCA, then it is liable.” JA-1340 (quoting JA-2452). Further, the court admitted a document stating: “The DMCA states that you are required to terminate these repeat infringers.” JA-5250.

“[T]he DMCA,” however, “is irrelevant to determining what constitutes a prima facie case of copyright infringement.” *CoStar*, 373 F.3d at 555. Congress

mandated that “[t]he failure of a service provider’s conduct to qualify for limitation of liability under this section *shall not bear adversely upon*” any claim “that the service provider’s conduct is not infringing.” 17 U.S.C. § 512(l) (emphasis added). Yet the court refused to instruct the jury that “[t]he DMCA’s safe harbor provisions are optional,” “not at issue,” and “irrelevant to determining whether Cox is liable,” as Cox requested. JA-1907. Instead, it instructed that “[t]he DMCA is *not a defense* in this case and must be disregarded.” JA-2074 (emphasis added).

That was a markedly different instruction. It failed to explain that the DMCA is irrelevant to whether Cox is liable, and implied fault on Cox’s part, making it more likely that the jury would assume liability. The combination of the notices, DMCA testimony, and incomplete instruction suggested that Cox’s alleged failure to qualify for the DMCA defense made it liable for infringement.

b. Making matters worse, the district court admitted two studies “over Cox’s hearsay objections as compilations generally relied on by persons in particular occupations pursuant to Rule 803(17).” JA-2819, JA-1638. These studies concluded “that nearly all content transferred using BitTorrent was infringing.” JA-2819. But they did not satisfy Rule 803(17) and improperly invited the jury to find contributory liability based on generalized knowledge of infringement.

“Rule 803(17), titled ‘Market Reports and Similar Commercial Publications,’ creates [a hearsay exception] for ‘market quotations, lists, directories, or

other compilations that are generally relied on by the public or by persons in particular occupations.” *C.R. Bard*, 810 F.3d at 923-24. Such lists must “recite established factual information” (*id.* at 924)—“relatively straightforward objective facts.” 2 McCormick on Evid. § 321 (7th ed.).

The studies here, however, present “an opinion,” and “bear[] no resemblance to [such] factual, list-type documents.” *C.R. Bard*, 810 F.3d at 924. They were “commissioned by NBC Universal”; their goal was “to analyse bandwidth usage across the internet with the specific aim of assessing how much of that usage infringed” (JA-2395); and they go far beyond compiling data. They undertake “critical analysis” and “attempt to show what proportion of internet traffic represents unauthorised distribution.” JA-2395, JA-2514.

The study itself states: “These estimates must, obviously, be issued with numerous caveats, both about the quality and accuracy of the data” that “estimate overall internet usage and about the ability to precisely quantify the proportion of infringing content.” JA-2449. Indeed, “[m]ethodological issues abound in both areas.” *Id.* These studies are simply not “factual, list-type documents” under Rule 803(17)—which covers, for example, a “company catalog” or an “industry guide used to provide estimated weight.” 2 McCormick on Evid. § 321 n.23.

Nor do the studies bear the indicia of reliability required by Rule 803(17). “‘The basis of trustworthiness’ for evidence admitted under the exception should

be “the motivation of the compiler to foster reliance by being accurate.” *C.R. Bard*, 810 F.3d at 924 (quoting Rule 803(17), advisory comm. note (1972)). But these studies were commissioned by an industry member with a definite motivation besides accuracy. JA-2395, JA-2514.

The studies were admitted as proof that merely using BitTorrent amounts to copyright infringement, and multiple experts so testified. JA-675 (denying Cox’s motion in limine (Dkt. 535)); JA-1204-11, JA-1245-47, JA-1635-39, JA-1930-32. Given the breadth of these improper uses and the court’s improper jury instruction on constructive knowledge, their admission confirms that, at a minimum, a new trial is warranted.

B. Under *Grokster*, Cox’s provision of a service with substantial non-infringing use precludes contributory liability in these circumstances.

1. *Grokster* limits contributory liability for a service with substantial noninfringing use to cases involving inducement or affirmative acts of contributory infringement—and there is no such evidence here.

Beyond its erroneous knowledge instruction, the district court made an even more fundamental error in refusing to enter judgment for Cox. Where an Internet service has “an untold number of legal uses” (JA-2790) and the ISP does not control, encourage, or induce the alleged infringement, “mere knowledge of infringing potential *or of actual infringing uses* would not be enough here to subject [the ISP] to [contributory] liability.” *Grokster*, 545 U.S. at 937 (emphasis added).

Even before *Grokster*, this Court explained that “extensions of [contributory] liability would require a showing of additional elements such as knowledge *coupled with inducement* or supervision coupled with a financial interest in the illegal copying.” *CoStar*, 373 F.3d at 549 (emphasis added). *Grokster* confirmed that contributory liability cannot be “based on *presuming or imputing intent* to cause infringement solely from the design or distribution of a product capable of substantial lawful use”—even if “the distributor *knows* [the service] is in fact used for infringement.” 545 U.S. at 933 (emphasis added).

Rather, “one who distributes a device with the *object* of promoting its use to infringe copyright, *as shown by clear expression or other affirmative steps taken to foster infringement*, is liable.” *Id.* at 936-37 (emphases added). Thus, for contributory “liability to follow under either *Sony* or *Grokster*, there must be intent.” 3 Nimmer on Copyright § 12.04[A][4][b] n.315 (2015). And where the defendant’s service has substantial noninfringing uses, intent cannot be inferred solely from knowledge of actual infringement.³

³ *Accord Cable/Home Commc’n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 846 (11th Cir. 1990) (“Contributory infringement will not be found if the product in question is capable of ‘substantial noninfringing uses’”); *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 658 (S.D.N.Y. 2013) (“[E]ven where a defendant’s contribution is material, it may evade liability if its product is ‘capable of substantial noninfringing uses.’”); *Arista Records LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 398, 432 (S.D.N.Y. 2011) (same).

Grokster focused on *Sony*, where copyright holders “claim[ed] [Sony] was contributorily liable ... because it supplied the means used to infringe” (a VCR), though “[t]here was no evidence that Sony had expressed an *object* of bringing about taping in violation of copyright or had taken *active steps* to increase its profits from unlawful taping.” 545 U.S. at 931 (emphases added). Absent “evidence of stated or indicated intent to promote infringing uses, the only conceivable basis for imposing liability” was “[Sony’s] sale of VCRs to consumers with knowledge that some would use them to infringe.” *Id.* Yet *Sony* held that the defendant “could not be faulted solely on the basis of its distribution” of a product “capable of commercially significant noninfringing uses,” thus “limit[ing] liability to instances of more acute fault than the mere understanding that some of one’s products will be misused.” *Id.* at 931-32, 933.

After *Grokster*, BMG had two ways to show that Cox was liable for its subscribers’ alleged infringement. As Justice Ginsburg observed, concurring: “[Liability] may be predicated on” (1) “actively encouraging (or inducing) infringement through specific acts” or (2) “distributing a product distributees use to infringe copyrights, if the product is not capable of ‘substantial’ or ‘commercially significant’ noninfringing uses.” *Id.* at 942. Similarly, the model jury instructions provide: “If [Cox’s] [service] has substantial non-infringing uses, you may not hold

[Cox] liable unless [Cox] promoted [the direct infringer's] use of its [service] in a way that infringed [BMG's] copyrights.” 3B O'Malley, *supra*, § 160:29.

Here, BMG “has not pursued an inducement claim.” JA-2793 n.18; *accord* Dkt. 386 at (v). Thus, the only basis for contributory liability is Cox's provision of Internet service. But since “the internet has an untold number of legal uses” (JA-2790), labeling Cox a contributory infringer contravenes *Sony's* teaching that “[selling] articles of commerce[] does not constitute contributory infringement if [they are] widely used for legitimate, unobjectionable purposes,” or are “merely ... capable of substantial noninfringing uses.” 464 U.S. at 442. Because “web hosting services are put to lawful use by the great majority of ... customers,” “ISPs are not liable as contributory infringers for serving persons who may use the bandwidth to download or distribute copyrighted music.” *Doe v. GTE Corp.*, 347 F.3d 655, 661 (7th Cir. 2003).

Further, the Supreme Court has “caution[ed] against [the] expansion” of liability rules “that Congress did not enact in the text of the relevant statutes” (*Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 164-65 (2008)), and *Sony* explicitly warns that courts “must be circumspect in construing the scope” of secondary copyright liability—a judicially-created doctrine found nowhere in the statute (464 U.S. at 431). The court below disregarded that warning, expanding contributory liability to an ISP while “magnif[y]ing the uncertainties in this area of the

law and rais[ing] the specter of undesirable consequences.” JA-2799. Indeed, the court expanded contributory liability beyond that *expressly* imposed under “the law of contributory patent infringement”—which the Supreme Court “look[s] to ... for guidance in determining the standard” for “contributory copyright infringement.” *Global-Tech*, 563 U.S. at 763.

Citing “the historic kinship between patent law and copyright law,” the Court in *Sony* extensively relied on patent cases. 464 U.S. at 439-42. And in patent cases, there is no contributory liability “if there are substantial non-infringing uses of the defendant[’s] products and there is no evidence of active and willful inducement.” *Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 F.3d 1263, 1276 (Fed. Cir. 2004) (discussing 35 U.S.C. § 271(b) and (c)); *Global-Tech*, 563 U.S. at 765 (discussing “§ 271(c)’s intent requirement”). That is the rule that *Grokster* and *Sony* require. And “it would be anomalous to impute to Congress an intention to expand ... a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action.” *Cent. Bank*, 511 U.S. at 180.

Moreover, imposing liability here upsets the balance between protection and innovation. By “limit[ing] liability to instances of more acute fault than the mere understanding that some of one’s products will be misused,” *Sony* “leaves breathing room for innovation.” *Grokster*, 545 U.S. at 932-33. Similarly, *Grokster* emphasized “the need to keep from ... discouraging the development of technologies

with lawful and unlawful potential.” *Id.* at 937. Thus, *Sony*’s “rule deliberately makes it difficult for courts to find secondary liability where new technology is at issue.” *Id.* at 957 (Breyer, J., concurring).

Nowhere is the need for caution greater than with the Internet. It is U.S. policy: “(1) to promote the continued development of the Internet” and “(2) to preserve the vibrant and competitive free market that presently exists for the Internet, ... unfettered by Federal or State regulation.” 47 U.S.C. § 230(b). The Internet is “a unique ... medium of worldwide human communication.” *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 850 (1997). It allows “millions of people to communicate with one another and to access vast amounts of information from around the world” (*id.*)—whether for “commerce,” “information-gathering,” education, or entertainment (*United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005)). Not surprisingly, “Internet access ha[s] become virtually indispensable in the modern world.” *United States v. Peterson*, 248 F.3d 79, 83 (2d Cir. 2001).

The district court, however, upended federal policy protecting a leading driver of the modern economy. The judgment here threatens to “create social losses by suppressing valuable noninfringing behavior”—specifically, depriving a host of individuals and businesses “the use of the Internet and its benefits.” Yen, *Third-Party Copyright Liability After Grokster*, 91 Minn. L. Rev. 184, 214 (2006).

Under *Sony* and *Grokster*, the judgment below should be reversed, and the case remanded for entry of judgment for Cox.

2. The *Sony/Grokster* rule does not turn on whether a service provider has an ongoing relationship with its subscribers.

As discussed, Cox's service has substantial noninfringing uses, and BMG made no showing that Cox *intended* that it be used for infringing purposes. Nonetheless, the district court distinguished *Sony* on the basis that "Cox maintains an ongoing relationship with users." JA-2792. That view is untenable.

First, precedent forecloses an "ongoing relationship" exception to *Sony*, and certainly here. The district court noted that *Sony* "distinguished prior contributory copyright infringement cases that had involved 'an ongoing relationship between the direct infringer and the contributory infringer at the time the infringing conduct occurred.'" JA-2787-88. But as *Sony*'s next sentence explained, the Court was referring only to cases where "the 'contributory' infringer was in a position to control the use of copyrighted works by others and had authorized the use without permission." 464 U.S. at 437. After noting that "the lines between direct infringement, contributory infringement, and vicarious liability" had not always been "clearly drawn," the Court clarified that "the label 'contributory infringement'" had often been used where, due to the defendant's "control" over others' infringing activity, it was "vicarious liability" that applied. *Id.* & n.17.

The Court went on to contrast two lines of cases that illustrate the distinction between vicarious liability (in which an ongoing relationship may support liability) and contributory liability (in which it does not). The first—“dance hall cases”—involve situations such as a “dance hall [that] hired [an] orchestra to supply music to paying customers,” a “racetrack [that] retained [the direct] infringer to supply music to paying customers,” or a “cocktail lounge [that] hired musicians to supply music to paying customers.” *Id.* at 437 n.18. The second line is “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.” *Id.* In the “dance hall” cases, the parties’ ongoing relationship may support *vicarious* liability; in the “landlord-tenant” cases, it supports neither *vicarious* nor *contributory* liability. *Id.*

This case squarely involves a landlord-tenant type of “ongoing relationship,” “in which the ISP receives a flat monthly fee for Internet service.” Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 Geo. L.J. 1833, 1847 (2000). Cox never “authorized the use [of copyrighted works] without permission from the copyright owner,” and could not “control the[ir] use ... by others.” *Sony*, 464 U.S. at 437. Cox “does not store infringing content,” cannot “control what customers store,” “has no ability to remove or take down infringing content,” and “does not know the

particulars of the data being shared”—“[i]t is Cox users, not Cox, who initiate transfers of copyrighted works over Cox’s network.” JA-2773 n.4.

Cox’s only “control” is akin to landlords’ ability to “evict” tenants. As in *Sony*, “no employee of [Cox] had ... direct involvement with the allegedly infringing activity” or “influenced or encouraged” infringement. 464 U.S. at 438. Thus, any “ongoing relationship” between Cox and its subscribers—collecting fixed fees—cannot support liability.

Any other outcome would impermissibly conflate contributory and vicarious liability. “Vicarious liability” turns “on [the defendant’s] relationship to the direct *infringer*”—namely, “a financial interest in and an ability to control the direct infringer’s conduct.” Goldstein on Copyright § 8.0, 8.5-6 (2016) (emphasis added). By contrast, “‘control’ is irrelevant to contributory infringement analysis.” *Casella v. Morris*, 820 F.2d 362, 367 n.4 (11th Cir. 1987); *accord UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1032 (9th Cir. 2013). Contributory liability turns on “personal conduct that encourages or assists the infringement.” *Napster*, 239 F.3d at 1020 (citation omitted).

The district court nevertheless held that contributory liability was “possible” because Cox’s “ongoing relationship” with its customers enabled it to “suspend or terminate [them].” JA-2791-92. But contributory liability cannot be “merely based on a failure to take affirmative steps to prevent infringement, if the device

otherwise was capable of substantial noninfringing uses.” *Grokster*, 545 U.S. at 939 n.12. “Such a holding would tread too close to the *Sony* safe harbor.” *Id.*

Second, the district court’s “ongoing relationship” exception is illogical. The distributor in *Sony* sold VCRs with substantial noninfringing uses, while “kn[owing] [they were] in fact used for infringement.” *Id.* at 933. If that could not support liability, the same should hold for Cox’s monthly delivery of substantially noninfringing service. The “potential for culpability” (JA-2792) in each case is the same. Cox’s customers may or may not use the Internet to infringe. Cox did not encourage or induce such infringement. “Cox does not know the particulars of the data being shared,” or whether a particular subscriber will later choose to infringe. JA-2773 n.4. One cannot fairly suggest that, had Sony *leased* its VCRs, it would have been liable. Thus, it makes no logical sense to reach a different result here.

Because *Sony* and *Grokster* bar holding Cox contributorily liable, judgment should be entered for Cox. The district court acknowledged that its holding “magnifies the uncertainties in this area” and threatens “undesirable consequences.” JA-2799. Further, the court recognized that “adopting Cox’s reading of *Sony* and *Grokster* would greatly simplify this area.” JA-2793. This Court should reverse.

II. The district court erred in granting BMG summary judgment on Cox's safe harbor defense.

Reversal is independently warranted because the district court granted BMG summary judgment on Cox's DMCA safe harbor defense. “[C]onstru[ing] the evidence in the light most favorable to [Cox],” numerous “genuine dispute[s]” of “material fact[s]” preclude judgment for BMG. *FDIC v. Cashion*, 720 F.3d 169, 173 (4th Cir. 2013) (quotations omitted).

Title II of the DMCA, entitled the Online Copyright Infringement Liability Limitation Act (OCILLA), was enacted to limit “the potentially enormous liability that ISPs faced for the materials being transmitted over their networks.” JA-704. OCILLA preserved existing copyright law (17 U.S.C. § 512(l)), and “a noninfringer doesn't need a safe harbor” (*Flava Works, Inc. v. Gunter*, 689 F.3d 754, 758 (7th Cir. 2012)), so the Court need not reach this issue if it agrees that Cox does not contributorily infringe. *Supra* at 21-44. But the DMCA safe harbor for ISPs (17 U.S.C. § 512(a)) likewise protects Cox in these circumstances.

Section 512(a) states that ISPs “shall not be liable” for “transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting,” provided the ISP does not select, direct, or modify the material. Congress thus “limit[ed] the liability of an ISP when it merely acts as a conduit for infringing material without

storing, caching, or providing links to copyrighted material.” *In re Charter Commc’ns*, 393 F.3d 771, 776 (8th Cir. 2005). Cox is such an ISP.

To qualify for the § 512(a) safe harbor, OCILLA includes certain threshold requirements. Just one is contested: the requirement that Cox have “adopted and reasonably implemented, and inform[] subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.” 17 U.S.C. § 512(i)(1)(A).

All agree that Cox “adopted” and “inform[ed]” subscribers of its “Acceptable Use Policy,” which prohibits using Cox’s service “to post, copy, transmit, or disseminate any content that infringes the ... copyrights ... of any party,” on penalty of “immediate suspension or termination.” JA-681-82, JA-3936, JA-247-309. The issue is whether a reasonable jury could have found that Cox “*reasonably implemented*” “a policy that provides for the *termination in appropriate circumstances* of subscribers and account holders of the service provider’s system or network *who are repeat infringers*.” JA-705; 17 U.S.C. § 512(i)(1)(A) (emphases added).

The evidence here is rife with genuine factual disputes on these provisions, particularly as to the post-fall 2012 period. *First*, “repeat infringers” means *adjudicated* infringers; BMG did not show that Cox failed to terminate any such infringer, either pre- or post-fall 2012; and even if “repeat infringers” were a broader

group, it is disputed that Cox had actual knowledge of “repeat infringers.” *Second*, whether Cox “reasonably implemented” its policy by terminating subscribers “in appropriate circumstances” after fall 2012 presents classic jury questions. Indeed, in denying injunctive relief, the district court cited Cox’s “well-founded” questions concerning “when is a subscriber a ‘repeat’ infringer and what are the ‘appropriate circumstances’ for termination?” JA-2825-26.

A. The district court misinterpreted § 512(i)’s reference to “repeat infringers,” and even under its interpretation, genuine issues of material fact exist.

The first question is “when a service provider should consider a subscriber ... to be a repeat infringer.” JA-706. The district court said a “repeat infringer” “could be” (1) “an adjudicated copyright infringer”; (2) “someone against whom an unadjudicated charge of infringement has been pr[o]ffered”; or (3) “someone against whom an unadjudicated charge has been made, but the service provider has actual knowledge of ... infringement.” *Id.* (quotations omitted). The court chose option three, “disagree[ing] that a repeat infringer policy applies only to those who have been held liable.” JA-718. It then declared it undisputed that “Cox had actual knowledge of particular account holders who blatantly or repeatedly infringed.” *Id.* Both holdings were error.

1. Section 512(a)'s plain text limits "repeat infringers" to adjudicated repeat infringers.

Although § 512 does not expressly define "repeat infringers," it shows that "Congress carefully delineated the difference between *allegation* and *proof*" of infringement. 4 Nimmer, *supra*, § 12B.10[B][2][a] (2016). Further, it is black-letter law that Congress "acts intentionally when it omits language included elsewhere" in a statute—and that this rule "applies with particular force" where Congress uses the disparate terms "repeatedly" and "in close proximity." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015).

Where § 512 requires ISPs to respond to *alleged* or *claimed* infringement, it uses that language. Some twenty times, § 512 refers to "claimed infringement," "allegedly infringed," "alleged infringer," "material or activity claimed to be infringing," or like terms.⁴ In eighteen other places, including § 512(i)(1)(A)'s reference to "repeat infringers," the DMCA "refers to 'infringers' (or a cognate term) without the qualification of 'claimed' or 'alleged.'" 4 Nimmer, *supra*, § 12B.10[B][2][c].⁵ "[T]he salient feature about each of these instances is that they refer to proven infringement, not to an allegation about which future disposition remains unclear." *Id.*

⁴ *E.g.*, 17 U.S.C. § 512(b)(2)(E), (c)(1)(C), (c)(2), (c)(3)(A), (c)(3)(A)(i), (c)(3)(A)(v), (d)(3), (e)(1)(B), (f), (g)(1), (h)(1), (h)(2)(C).

⁵ *E.g.*, 17 U.S.C. § 512(a), (b)(1), (c)(1), (d), (e)(1), (g)(4), (j)(1)(A)(iii), (j)(2)(B).

For instance, § 512(c)(1) distinguishes “material ... [that] is infringing” from “material that is claimed to be infringing” (17 U.S.C. § 512(c)(1)(A), (c)(1)(C)), and Congress likewise distinguished between infringement and “apparent” infringement (*id.* § 512(c)(1)(A)(ii)-(iii)). “Those two aspects of the ... statute make Congress’s choice to use the narrower word ... seem quite deliberate.” *MacLean*, 135 S. Ct. at 919. Where Congress did not add “claimed,” “alleged,” or “apparent,” the term “infringement” naturally refers to *proven* infringement. And the only way “[t]o establish copyright infringement”—a legal term denoting a Copyright Act violation—is via judicial adjudication. “[T]he holder of the copyright must prove both valid ownership of the copyright and infringement.” *Entm’t Research Grp. v. Genesis Creative Grp.*, 122 F.3d 1211, 1217 (9th Cir. 1997).⁶

ISPs cannot adjudicate individuals to be infringers, much less repeat infringers. A plaintiff may “ha[ve] a good faith belief that [its] work is being infringed” but “still be wrong.” *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1105 (W.D. Wash. 2004). Perhaps a user has “a legitimate fair use defense, or can otherwise invoke any of the myriad other factors that go into evaluating a copyright infringement claim.” *Id.* (quotations omitted).

⁶ In *EMI Christian Music Grp. v. MP3tunes, LLC*, 2016 WL 6211836, *5 (2d Cir. Oct. 25, 2016), the Second Circuit analyzed neither the statute’s repeated distinctions between “claimed,” “alleged,” and “apparent” infringement and “infringement” nor whether “repeat infringer” means adjudicated infringer.

Congress “[did] not intend [§ 512(i)] to ... suggest[] that a provider must investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing.” H.R. Rep. No. 105-551, pt.2, at 61 (1998). Thus, one cannot be a “repeat infringer[]” without being an *adjudicated* infringer. And since BMG did not show that Cox failed to terminate any adjudicated infringers, it could not show that Cox failed to “reasonably implement” its “repeat infringers” policy—meaning the court below not only erred in granting summary judgment to BMG, but should have entered judgment for Cox.

2. Even under the district court’s “actual knowledge” standard, genuine factual disputes preclude summary judgment.

Notwithstanding Congress’s repeated distinction between alleged and proven infringement, the district court held that “an account holder must be considered an infringer ... when the service provider has actual knowledge that the account holder is using its services for infringing purposes.” JA-718. But Cox cannot “actual[ly] know[]” how its service is being used. The point of the § 512(a) safe harbor is to protect ISPs like Cox that, in the court’s own words, have “no ability to remove or take down infringing content” and “[do] not know the particulars of the data being shared.” JA-2773 nn.4, 6, JA-719 n.19; *see Charter*, 393 F.3d at 776.

Regardless, even applying the “actual knowledge” standard, the district court wrongly deemed it undisputed that Cox actually knew it had subscribers who were repeatedly using its service to infringe. The court viewed third-party notices as

“powerful evidence of [Cox’s] knowledge.” JA-719. But these notices do not remotely establish that Cox’s knowledge was undisputed. And while the emails cited by the court may contain some unrestrained language, they likewise fail to show that Cox indisputably knew of repeat infringers.

First, any notices would have given Cox only a third-party *claim* of potential infringement, not “actual knowledge” that a subscriber was a “repeat infringer.” Further, these notices are littered with flaws—as exemplified by Rightscorp’s notices, which alleged only that works were “being downloaded, uploaded, *and/or offered for upload* on or through [Cox’s] network.” JA-230 (emphasis added). Because “offer[ing] for upload” is not infringement (JA-734), *not one* Rightscorp notice even alleges that infringement necessarily occurred.⁷ Nor could any notices have led to knowledge of infringement, for not only is Cox incapable of “know[ing] the particulars of the data being shared” (JA-2773 n.4), but the DMCA flatly *prohibits* “condition[ing] the applicability of” its safe harbors on “a service provider monitoring its service or affirmatively seeking facts indicating infringing activity.” 17 U.S.C. § 512(m).

Second, Congress *barred* using such third-party notices to show a § 512(a) ISP’s actual knowledge. Under the DMCA, “a notification ... that fails to comply

⁷ Indeed, the Rightscorp notice cited above refers to a work that the district court determined Plaintiffs did not even own. JA-704.

substantially with the provisions of [§ 512(c)(3)(A)] shall not be considered ... in determining whether a service provider has actual knowledge” of “infringing activity.” 17 U.S.C. § 512(c)(3)(B)(i). And “any notice to an ISP concerning its activity as a mere conduit does not satisfy the condition[s] of § 512(c)(3)(A)[] and is therefore ineffective.” *Recording Indus. Ass’n of Am. v. Verizon Internet Servs.*, 351 F.3d 1229, 1236 (D.C. Cir. 2003); *accord Charter*, 393 F.3d at 777.

The reason is that “statutory notification under 17 U.S.C. § 512(c)(3)(A)[iii] ... requires the ISP to be able to both locate and remove the allegedly infringing material” (*id.*), and “[n]o matter what information the copyright owner may provide, the ISP can neither ‘remove’ nor ‘disable access to’ the infringing material because that material is not stored on the ISP’s servers.” *Verizon*, 351 F.3d at 1235. Thus, any notice to Cox as a conduit ISP is “ineffective” and cannot be considered in showing actual knowledge. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007) (“[s]ince [the copyright owner] did not provide effective notice, knowledge of infringement may not be imputed to [the defendant]”).

Nor did Cox’s emails establish knowledge that certain subscribers “were using Cox’s service to repeatedly infringe.” JA-715. After “divid[ing] Cox’s practices into two time periods: before the fall of 2012 and after” (JA-709), the district court relied heavily on emails from each period to find actual knowledge. But notwithstanding some intemperate remarks, those emails all derived from DMCA

notices that were fatally deficient and incapable of providing knowledge. *Supra* at 28-29. And the emails themselves certainly do not prove actual knowledge, much less as a matter of law.

a. For the pre-fall 2012 period, Cox's supposed "actual knowledge" of its subscribers' infringement was based solely on its receipt of allegations. *E.g.*, 710-12 (citing JA-3489-92, JA-3496-98, JA-3505-07 (each referencing "complaint[s]")). Indeed, several emails confirm that Cox's supposed "knowledge" was simply speculation. *E.g.*, JA-712 (citing JA-3506 ("I just know it (*I can feel it*)"), and JA-3696 ("a customer *that I consider* an habitual abuser") (emphases added)). Another focused on a subscriber who "insist[ed] nothing is coming from [his IP address] despite multiple tickets." JA-711. Given the unreliability of DMCA notices and the evidence of numerous false positives, a reasonable jury could have found that Cox's treatment of its subscribers was reasonable.

b. The post-fall 2012 emails are even weaker. In the first exchange (JA-715-16), Cox believed a possible cause of multiple notifications about the subscriber was "a BitTorrent client ... on one of their computers or perhaps a guest's computer (someone who comes to visit them once a month, because that seems to be the frequency of their complaints)." *Id.*; JA-4528. Cox thus suspended the user, giving him one last chance before termination. *Id.* BMG presented no evidence

that Cox actually knew that the user was infringing, much less repeatedly, or that he was accused of infringement after being suspended.

In the second exchange, Cox employees stated that the “customer was advised to remove file sharing program” and “knows ‘it’s his fault.’” JA-717, JA-3705. Cox told the user that “one more complaint will result in a 6 month Termination.” *Id.* There is no evidence of *what* the user’s “fault” was, what notification triggered this review, how Cox could have *known* infringement was occurring, or whether further complaints resulted.

The third exchange involved a customer given “one more chan[c]e” after “a final suspension.” JA-717. Again, it is unclear what this proves—certainly not actual knowledge of repeat infringement, or that termination was required. Cox’s actions were particularly reasonable given the confusion as to which complaint ticket numbers applied to that user. JA-3546.

The final exchange states that a user was “upset that ‘after years of doing this’ he is now getting caught.” JA-717 (quoting JA-3701). The record does not reveal what “this” referred to, much less that Cox actually knew of repeat infringement. At a minimum, it is disputed whether Cox actually knew that the user was a repeat infringer, and whether it was “appropriate” in these “circumstances” to give him a “final suspension & reactivation.” *Id.*

Given these genuine disputes as to whether Cox had “actual knowledge” of “repeat infringers” on its network, summary judgment was inappropriate.

B. At a minimum, a jury could find that Cox reasonably implemented its policy after fall 2012 by terminating subscribers “in appropriate circumstances.”

As discussed, even before fall 2012 there is no evidence of “repeat infringers” on Cox’s network, let alone Cox’s knowledge thereof. But if the Court holds otherwise, whether Cox “reasonably implemented” its policy by terminating users “in appropriate circumstances” *after* fall 2012 still should have gone to the jury.

After October 2012, Cox’s policy provided for “complete termination,” and Cox actually terminated users. JA-714-15. Nevertheless, citing *four* email exchanges (over nearly two years) “documenting specific instances in which Cox personnel did not terminate account holders despite having knowledge that the account holder was repeatedly infringing” (as the district court defined that concept), the court held that Cox’s implementation of its policy was unreasonable as a matter of law. JA-714. This was error.

1. The district court nullified the statutory language that termination occur only “in appropriate circumstances.”

Section 512(i)(1)(A) requires that the ISP’s policy “provide[] for the termination *in appropriate circumstances* of ... repeat infringers” (emphasis added). Section 512 explicitly prohibits this standard from “be[ing] applied in such a way as to impose an affirmative duty on service providers to monitor for infringement.”

JA-707; *see* 17 U.S.C. § 512(m)(1). Yet the district court held that “[a]ppropriate circumstances arise when an account holder is repeatedly or flagrantly infringing copyrights.” JA-718. This interpretation reads “in appropriate circumstances” out of the statute.

Under the district court’s reading, “[a]ppropriate circumstances” are *necessarily* present “when an account holder is repeatedly ... infringing.” That interpretation violates “the cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute.” *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (quotations omitted). If every word in § 512(i)(1)(A) is given effect, there must be *some* circumstances when it is *inappropriate* to terminate repeat infringers. Yet the court read § 512(i)(1)(A) as though it required the ISP to “provide[] for the mandatory termination ~~in appropriate circumstances~~ of ... repeat infringers.” As the court stated: “To implement the repeat infringer policy contemplated by § 512(i), the penalty imposed by service providers must be termination.” JA-713. But that is not what the statute says.

As discussed, third-party notices are plagued with problems—they are allegations, not proof; they are inaccurate and often do not even allege infringement;

and ISPs cannot realistically investigate them.⁸ It is thus a factual question whether responding to such notices by terminating a subscriber's Internet access—which is critical to functioning in our modern world—would be “appropriate.”

Indeed, what “circumstances” make it “appropriate” to terminate an account is a quintessential jury question. *United States v. Harless*, 76 F.2d 317, 319 (4th Cir. 1935) (“what is reasonable under [the] circumstances is a question for the jury”); *Conkel v. Van Pelt*, 854 F.2d 1316 (4th Cir. 1988) (unpublished) (“The determination of reasonableness under the circumstances of a particular case is a classic question of fact” for “the jury.”). What is “appropriate” is a subjective and fact-bound question of judgment, propriety, and fit.

Here, Cox's evidence showed that termination is *not* the industry norm in such circumstances. The Copyright Alert System (CAS), an agreement between a consortium of copyright owners and five large U.S.-based ISPs, “implements a broad, cross-industry consensus set of best practices for detecting and acting on incidents of alleged online copyright infringement.” JA-4404-08. “Cox's graduated response process is more stringent than the CAS process,” as it “both contem-

⁸ Recent studies underscore notices' significant error rates. *E.g.*, Urban et al., *Notice and Takedown in Everyday Practice*, at 2-3 (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628 (“[n]early 30% of [automated] takedown requests were of questionable validity”; and for certain categories of claims, “[s]eventy percent of the requests raised serious questions about their validity”).

plate[s] and lead[s] to actual terminations of ISP accounts, while CAS's do not." JA-4407, 4420. And unlike CAS, Cox's process "calls for no grace period before taking an action that affects the user's Internet access, instead of a two-week grace period; and it takes each subscriber-facing action based on one day's worth of complaints instead of a week's worth." JA-4420.

Ignoring this evidence, and the undisputed flaws in Rightscorp's notices, the district court ruled, as a matter of law, that "appropriate circumstances" for termination necessarily existed post-fall 2012. That decision nullifies the "appropriate circumstances" requirement, and was reversible error.

2. Whether Cox "reasonably implemented" its policy should have gone to the jury.

Whether Cox "reasonably implemented" its policy after fall 2012 is likewise a classic jury issue. For starters, the fact that Cox did not terminate subscribers in just four cases, based on their particular facts, does not show that Cox, as a matter of law, unreasonably implemented its policy *system-wide*. "The DMCA requires only that the policy be 'reasonably'—not 'perfectly'—implemented, and thus occasional lapses are not fatal to the service provider's immunity." *Ventura Content, Ltd. v. Motherless, Inc.*, 2013 WL 11237204, *14 (C.D. Cal. July 3, 2013) (quotations omitted).

Further, none of these cases involved proof of how many notices Cox purportedly received, or of the required "additional evidence available to the service

provider to buttress the claim of infringement.” *Corbis*, 351 F. Supp. 2d at 1106. As discussed, the emails do not remotely *prove* actual knowledge of repeat infringement, let alone “appropriate circumstances” for termination—and certainly not that Cox unreasonably implemented its policy system-wide. Because a jury easily could have found that Cox reasonably implemented its repeat infringer policy, the district court erred in granting BMG summary judgment.

III. The district court’s erroneous jury instructions warrant a new trial on damages.

Beyond liability, the district court’s failure to give two damages instructions prejudiced Cox, requiring a new damages trial.

A. The district court erred in instructing the jury on willfulness.

First, although willfulness requires that the defendant be aware that *its own* actions infringe, the court instructed the jury to analyze Cox’s knowledge of its *subscribers’* actions:

Cox’s contributory or vicarious infringement is considered willful if BMG proves by a preponderance of evidence that Cox had knowledge *that its subscribers’ actions* constituted infringement of BMG’s copyrights, acted with reckless disregard for the infringement of BMG’s copyrights, or was willfully blind to the infringement of BMG’s copyrights.

JA-2080 (emphasis added); JA-2058 (objection).

Infringement is willful, however, only if the defendant “has knowledge, either actual or constructive, that *its actions* constitute an infringement, or recklessly disregards a copyright holder’s rights.” *Lyons P’ship, L.P. v. Morris Costumes*,

Inc., 243 F.3d 789, 799 (4th Cir. 2001) (emphasis added). As hornbook law confirms, “‘willfully’ means with knowledge that *the defendant’s conduct* constitutes copyright infringement.” 4 Nimmer, *supra*, § 14.04[B][3][a] (emphasis added; collecting cases); see *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 278 (6th Cir 2009) (“willful copyright infringement requires evidence that a defendant has knowingly or recklessly infringed on the copyright”).

Similarly, the jury could not find willfulness merely by concluding that Cox “acted with reckless disregard for” or “was willfully blind to the” alleged “infringement of BMG’s copyrights” by “its subscribers.” JA-2080. Taken together with the court’s instruction that Cox was liable if it “knew or should have known of,” or was “willful[ly] blind[]” to, “infringement of BMG’s copyrighted works by users of Cox’s Internet service” (JA-2077-78), these willfulness instructions *compelled* the jury to find willfulness if it found Cox contributorily liable.

Had the jury assessed Cox’s knowledge of *its* actions, it could have declined to find willfulness. For example, infringement is not “willful when a party ... reasonably and in good faith believes that its conduct is innocent”—even “despite warnings to the contrary.” *NAS Import. Corp. v. Chenson Enters.*, 968 F.2d 250, 252 (2d Cir. 1992) (quotations omitted); see 4 Nimmer, *supra*, § 14.04[B][3][a].

This is so even if the defendant had notice of others’ direct infringement. In *RCA/Ariola Int’l v. Thomas & Grayston Co.*, 845 F.2d 773 (8th Cir. 1988), where

the defendants were held vicariously liable for infringement, the defendants' conduct was not willful even though "[customer] copying continued after [the Recording Industry Association of America] had notified [defendants] that it considered their actions infringement." *Id.* at 779. The defendants reasonably believed "there would be no liability for occasional copying of protected materials by customers unassisted by the retailers," and even "remarks by [the defendants'] employees that [customers'] activities were 'against the law' ... [did] not show that the employees understood *their own* actions to be culpable." *Id.* So too here.

It is immaterial that the jury ultimately awarded damages in an amount that would have been available for non-willful infringement. Other courts have vacated similar awards, explaining that the factfinder "relied, at least in part, on an erroneous [willfulness finding]." *Island Software & Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 265 (2d Cir. 2005). The court instructed the jury that "[i]n determining the appropriate amount to award, you may consider ... [w]hether Cox acted willfully." JA-2079-80. The willfulness instruction misstated the law to Cox's prejudice, requiring vacatur of the damages award.

B. The district court erred in failing to give an innocent infringement instruction.

For similar reasons, the district court erroneously refused to instruct the jury on innocent infringement, despite Cox's proposed instruction (JA-669). By statute, "where the infringer ... was not aware and had no reason to believe that *his or her*

acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.” 17 U.S.C. § 504(c)(2) (emphasis added).

There is no evidence that Cox believed that its *own* actions infringed. Yet the district court erroneously removed this issue from the jury’s consideration, resulting in exorbitant damages.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the case remanded for entry of judgment for Cox or a new trial.

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NOVEMBER 7, 2016

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Steffen N. Johnson, an attorney, certify that I have complied with the above-referenced rule, and that according to the word processor used to prepare this brief, Microsoft Word, this brief contains 13,916 words and therefore complies with the type-volume limitation of Rule 32(a)(7)(B) and (C).

Dated: NOVEMBER 7, 2016

/s Steffen N. Johnson
Steffen N. Johnson

CERTIFICATE OF SERVICE

I, Steffen N. Johnson, an attorney, certify that on this day the foregoing Brief for Defendants-Appellants was served electronically on all parties via CM/ECF.

Dated: November 7, 2016

s/ Steffen N. Johnson
Steffen N. Johnson

ADDENDUM

STATUTORY PROVISIONS

17 U.S.C. § 504

(a) In General.—Except as otherwise provided by this title, an infringer of copyright is liable for either—

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) Actual Damages and Profits.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c)(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment

who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in section 118(f)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

(3)(A) In a case of infringement, it shall be a rebuttable presumption that the infringement was committed willfully for purposes of determining relief if the violator, or a person acting in concert with the violator, knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the infringement.

(B) Nothing in this paragraph limits what may be considered willful infringement under this subsection.

(C) For purposes of this paragraph, the term “domain name” has the meaning given that term in section 45 of the Act entitled “An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes” approved July 5, 1946 (commonly referred to as the “Trademark Act of 1946”; 15 U.S.C. 1127).

(d) Additional Damages in Certain Cases.—In any case in which the court finds that a defendant proprietor of an establishment who claims as a defense that its activities were exempt under section 110(5) did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.

17 U.S.C. § 512

(a) Transitory Digital Network Communications.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

(b) System Caching.—

(1) Limitation on liability.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which—

(A) the material is made available online by a person other than the service provider;

(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and

(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A),

if the conditions set forth in paragraph (2) are met.

(2) Conditions.—The conditions referred to in paragraph (1) are that—

(A) the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person described in paragraph (1)(A);

(B) the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;

(C) the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology—

(i) does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;

(ii) is consistent with generally accepted industry standard communications protocols; and

(iii) does not extract information from the provider's system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

(D) if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and

(E) if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if—

(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

(c) Information Residing on Systems or Networks At Direction of Users.—

(1) In general.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a

user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) Designated agent.—The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) Elements of notification.—

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B)(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

(d) Information Location Tools.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider—

(1)(A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

(e) Limitation on Liability of Nonprofit Educational Institutions.—

(1) When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of subsections (a) and (b) such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution, if—

(A) such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;

(B) the institution has not, within the preceding 3-year period, received more than two notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and

(C) the institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.

(2) For the purposes of this subsection, the limitations on injunctive relief contained in subsections (j)(2) and (j)(3), but not those in (j)(1), shall apply.

(f) Misrepresentations.—Any person who knowingly materially misrepresents under this section—

(1) that material or activity is infringing, or

(2) that material or activity was removed or disabled by mistake or misidentification,

shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

(g) Replacement of Removed or Disabled Material and Limitation on Other Liability.—

(1) No liability for taking down generally.—Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

(2) Exception.—Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider—

(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

(B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

(3) Contents of counter notification.—To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following:

(A) A physical or electronic signature of the subscriber.

(B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.

(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

(D) The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

(4) Limitation on other liability.—A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).

(h) Subpoena To Identify Infringer.—

(1) Request.—A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.

(2) Contents of request.—The request may be made by filing with the clerk—

(A) a copy of a notification described in subsection (c)(3)(A);

(B) a proposed subpoena; and

(C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.

(3) Contents of subpoena.—The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material de-

scribed in the notification to the extent such information is available to the service provider.

(4) Basis for granting subpoena.—If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.

(5) Actions of service provider receiving subpoena.—Upon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service provider shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.

(6) Rules applicable to subpoena.—Unless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum.

(i) Conditions for Eligibility.—

(1) Accommodation of technology.—The limitations on liability established by this section shall apply to a service provider only if the service provider—

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.

(2) Definition.—As used in this subsection, the term “standard technical measures” means technical measures that are used by copyright owners to identify or protect copyrighted works and—

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

(j) Injunctions.—The following rules shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies under this section:

(1) Scope of relief.—

(A) With respect to conduct other than that which qualifies for the limitation on remedies set forth in subsection (a), the court may grant injunctive relief with respect to a service provider only in one or more of the following forms:

(i) An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider's system or network.

(ii) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(iii) Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.

(B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms:

(i) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is using the provider's service to engage in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(ii) An order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States.

(2) Considerations.—The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider—

(A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;

(B) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;

(C) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations; and

(D) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

(3) Notice and ex parte orders.—Injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to appear are provided, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network.

(k) Definitions.—

(1) Service provider.—

(A) As used in subsection (a), the term “service provider” means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.

(B) As used in this section, other than subsection (a), the term “service provider” means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

(2) Monetary relief.—As used in this section, the term “monetary relief” means damages, costs, attorneys’ fees, and any other form of monetary payment.

(l) Other Defenses Not Affected.—The failure of a service provider’s conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider’s conduct is not infringing under this title or any other defense.

(m) Protection of Privacy.—Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on—

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or

(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

(n) Construction.—Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.

35 U.S.C. § 271(a)–(c)

(a) Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(c) Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

...

47 U.S.C. §230(b)(1)–(2)

...

(b) Policy - It is the policy of the United States—

- (1)** to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2)** to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation...

...