

No. 16-1972

United States Court of Appeals for the Fourth Circuit

BMG RIGHTS MANAGEMENT (US) LLC,

Plaintiff – Appellee/Cross-Appellant,

and

ROUND HILL MUSIC LP,

Plaintiff – Appellee,

v.

COX COMMUNICATIONS, INCORPORATED, and COXCOM, LLC,

Defendants – Appellants/Cross-Appellees,

and

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

Defendants.

On Appeal from the United States District Court for
the Eastern District of Virginia,
No. 1:14-cv-01611 (Hon. Liam O’Grady)

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

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Amici curiae Recording Industry Association of America, Inc. (“RIAA”) and National Music Publishers’ Association (“NMPA”) respectfully move pursuant to Fed. R. App. P. 29(b) for leave to file a brief in support of Plaintiff-Appellee BMG’s petition for rehearing and rehearing en banc (the “Petition”) and, in support thereof, represent as follows:

1. The RIAA and NMPA represent the interests of the U.S. recording industry and music publishing and songwriter industry. Their members include hundreds of artists, songwriters, and music companies that invest enormous sums of money, time, and creative efforts to develop and market original sound recordings and musical works.

2. Amici seek permission to submit the accompanying brief to expand on the reasons why the Petition is warranted. The panel’s holding that liability based on a material contribution theory cannot rest on constructive knowledge (“should have known”) erroneously undermines a critical protection that creators depend on. The level of copyright infringement that takes place over the Internet is “staggering,” *MGM Studios Inc. v. Grokster Ltd.*, 545 U.S. 913, 923 (2005), and it is vital that copyright owners have effective mechanisms to address it. It is also critical that copyright owners can adequately address infringement that occurs in other contexts.

3. If the panel’s decision is not corrected, it would threaten the very incentives

of artists, songwriters, and others to create valuable works and distribute them to the public. Amici thus share a substantial interest in ensuring that the principles underlying secondary copyright liability, and their role in promoting the purpose of copyright, are properly recognized. Indeed, the RIAA and NMPA each submitted amicus curiae briefs during the Court's initial disposition precisely because of their vested interest in protecting and promoting the goals of copyright.

4. Amicus curiae briefs “often make useful contributions to litigation.” *Stuart v. Huff*, 706 F.3d 345, 355 (4th Cir. 2013). Leave to file an amicus curiae brief may be freely granted. *See Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.) (“[O]ur court would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29’s criteria as broadly interpreted. I believe that this is consistent with the predominant practice in the courts of appeals.”).

5. Indeed, the accompanying amicus brief includes material that is “desirable” and “relevant to the disposition of the case.” Fed. R. App. P. 29(a)(3). Amici do not merely restate the positions of BMG. Rather, the accompanying brief expands on why the panel’s rejection of “should have known” runs contrary to the underpinnings of contributory copyright liability and why resting liability solely on actual knowledge or willful blindness is legally erroneous and not the sensible rule the panel believes it to be.

6. Plaintiff-Appellee BMG has consented to the filing of this brief. Nor does Defendant-Appellant Cox object.

7. For the foregoing reasons, amici respectfully ask the Court to grant their motion for leave to file the accompanying brief.

Dated: February 22, 2018

Respectfully submitted,

/s/ Scott A. Zebrak

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CERTIFICATE OF SERVICE

I, Scott A. Zembrak, certify that, on February 22, 2017, I caused the foregoing be filed with the Court electronically using the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Scott A. Zembrak
