

No. 16-1972

**IN THE 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

On Appeal from the United States District Court
For the Eastern District of Virginia
The Honorable Liam O'Grady, District Judge
Case No. 1:141-cv-1611

**BRIEF *AMICUS CURIAE* OF
CONSUMER TECHNOLOGY ASSOCIATION AND
COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION
IN SUPPORT OF DEFENDANTS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT
(Federal Rule of Appellate Procedure 26.1)

The undersigned counsel for Consumer Technology Association and Computer & Communications Industry Association states that neither of these associations has any parent corporation, and no publicly held corporation owns stock in the associations.

DATE: November 14, 2016 CONSTANTINE CANNON LLP

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	v
INTEREST OF <i>AMICI</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. The District Court Allowed The Jury To Find Contributory Liability Based Entirely On A Failure To Take Affirmative Steps To Police Internet User Conduct, Ignoring Supreme Court Guidance That Secondary Liability Must Be Based On A Closer Business Relationship To The User And More Actively Culpable Conduct	6
A. Passive Conduct Alone, in Failing to Threaten or Disconnect a Purportedly Infringing User, Is Not Sufficient to Prove Contributory Infringement	13
B. The District Court Incorrectly Held That Cox’s “Continuing Relationship” With Its Customers Made <i>Sony</i> and <i>Grokster</i> Irrelevant	16
C. The District Court Needed to Provide <i>Grokster</i> -Based Guidance as Cited by Counsel	19
D. The District Court Erroneously Instructed the Jury on “Willful Blindness,” Which Requires Awareness of Specific Acts of Infringement and Deliberate Conduct to Avoid Confirming That Infringement Exists	21
II. The District Court Effectively Failed To Recognize This Circuit’s <i>CoStar</i> Holding That DMCA Section 512 Immunity Does Not	

Supplant The Requirement To Find Culpable Conduct In Violation
of Copyright Law 24

III. Policy Choices to Limit Liability of Intermediaries Should Be
Respected..... 27

CONCLUSION..... 29

CERTIFICATE OF COMPLIANCE..... 30

CERTIFICATE OF SERVICE..... 31

TABLE OF AUTHORITIES

Cases

<i>Authors Guild, Inc. v. Google Inc.</i> , 804 F.3d 202 (2d Cir. 2015)	11
<i>Authors Guild, Inc. v. HathiTrust</i> , 755 F.3d 87 (2d Cir. 2014)	11
<i>A.V. ex rel. Vanderhuy v. iParadigms, LLC</i> , 562 F.3d 630 (4th Cir. 2009)	11
<i>BMG Rights Management (US) LLC v. Cox Commc'ns</i> , 2016 WL 4224964 (E.D. Va. Aug. 8, 2016)	17, 25
<i>Capitol Records, LLC v. Vimeo, LLC</i> , 826 F.3d 78 (2d Cir. 2016)	29
<i>Cartoon Network v. CSC Holdings, Inc.</i> , 536 F.3d 121 (2d Cir. 2008)	11
<i>CoStar Grp., Inc. v. LoopNet, Inc.</i> , 373 F.3d 544 (4th Cir. 2004)	4, 5, 16, 23, 24, 26, 28
<i>Field v. Google Inc.</i> , 412 F. Supp. 2d 1106 (D. Nev. 2006)	11
<i>Fonovisa, Inc. v. Cherry Auction, Inc.</i> , 76 F.3d 259 (9th Cir. 1996)	9, 18
<i>Fox Broadcasting v. Dish Network</i> , 723 F.3d 1067 (9th Cir. 2013)	11
<i>Gershwin Publishing Corp. v. Columbia Artists Man., Inc.</i> , 443 F.2d 1159 (2d Cir. 1971)	9
<i>Global-Tech Appliances, Inc. v. SEB, SA</i> , 563 U.S. 754 (2011)	22, 23

<i>Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey</i> , 497 F. Supp. 2d 627 (E.D. Pa. 2007).....	11
<i>Luvdarts, LLC v. AT&T Mobility, LLC</i> , 710 F.3d 1068 (9th Cir. 2013).....	22
<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005)	3, 8, 12, 13
<i>Perfect 10 v. Amazon.com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007).....	11, 26
<i>Recording Industry Ass’n of Am. v. Diamond Multimedia</i> , 180 F.3d 1072 (9th Cir. 1999).....	11
<i>Sony Corp. of America v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984)	3, 10, 11, 16, 22
<i>UMG Recordings, Inc. v. Shelter Capital Partners</i> , 718 F.3d 1006 (9th Cir. 2013).....	18, 27, 28
<i>Viacom Int’l Inc. v. YouTube, Inc.</i> , 940 F. Supp. 2d 110 (S.D.N.Y. 2013).....	28
Statutes	
17 U.S.C. § 512(a)	4, 25
17 U.S.C. § 512(i)(1)(A).....	25
17 U.S.C. § 512(l).....	26
17 U.S.C. § 512(m)(1)	28
Other Authorities	
H.R. Rep. No. 105-551, pt. 2 (1998)	28
H.R. Rep. No. 105-796 (1998)	28

Joe Mullin, <i>Rewinding to Betamax: The path to consumers’ “right to record”</i> , <i>Ars Technica</i> , Jan. 17, 2014	11
Pam Samuelson, <i>The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens</i> , 74 <i>Fordham L. Rev.</i> 1831 (2006)	6
S. Rep. No. 105-190 (1998)	28
Thomas Rogers & Andrew Szamosszegi, <i>Fair Use in the U.S. Economy: The Economic Contribution of Industries Relying Upon Fair Use</i> (CCIA 2011)	6, 27
U.S. Copyright Office, <i>Directory of OSP Designated Agents</i>	28

INTEREST OF *AMICI*¹

Consumer Technology Association (“CTA”) is the preeminent technology trade association, promoting growth in the \$285 billion U.S. consumer technology industry through market research, education and public policy representation. CTA members lead the consumer technology industry in the development, manufacturing and distribution of audio, video, mobile electronics, communications, information technology, multimedia, and accessory products, as well as related services sold to consumers.²

Computer & Communications Industry Association (“CCIA”) represents more than twenty large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services—companies that collectively generate more than \$465 billion in annual revenues.³

¹ No counsel for any party authored this brief in whole or part; no party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amici* made such a contribution. Counsel for both parties consented to the filing of this brief.

² A complete list of the Consumer Technology Association’s members is available at <http://cta.tech/Membership/Membership-Directory.aspx>.

³ A complete list of CCIA members is available at <https://www.ccianet.org/members>.

This brief focuses on the district court’s fundamental omissions and errors in rulings and instructions regarding the law of contributory infringement for providing a service critical to modern society—access to the Internet. Innovation in devices and online services has depended on the precedents of the Supreme Court and of this Court, in requiring a business interest in and intent to support infringement before imposing contributory liability on a provider of a staple device or service, such as a connection to the Internet. While CTA and CCIA believe that the district court also erred in not affording to the defendant its rightful immunities under the DMCA, we understand these arguments will be addressed at greater length by other *amici*. CTA and CCIA urge this Court to correct the district court’s erroneous interpretation of Supreme Court and Fourth Circuit precedent pertaining to when contributory copyright liability may be imposed on providers of staple services and devices.

SUMMARY OF ARGUMENT

An Internet service provider does not infringe copyrights merely by providing households access to the Internet. Yet the district court allowed such a case to go to the jury, and asked the jury only whether Cox “materially contributed” to infringement in any of the millions of households to which Cox offered Internet access. Although Cox repeatedly asked the

district court to instruct the jury as to the applicable law from the Supreme Court and this Court—which limits contributory infringement for providers of products or services with substantial noninfringing uses—the district court refused and declared those cases “irrelevant.”

The Supreme Court precepts that the district court held “irrelevant” were in fact necessary to any legal or factual determination in this case. In *Grokster*⁴ the Supreme Court was asked by copyright holders (including a record label owned by plaintiff-appellee BMG) to impose an affirmative duty on vendors of staple goods or services to guard against infringement by their consumers. The Supreme Court explicitly declined to do so. It explained in a note supported by all nine Justices that any such holding would “tread too close to the *Sony* safe harbor.”⁵ By failing to recognize the plain relevance of *Sony* and *Grokster* to this case, the district court led the jury precisely where the Supreme Court in *Grokster* said courts should not tread. Even after the jury, evidently uncomfortable with the ambiguity of “materially contributed,” asked the district court for a definition, the district court rejected Cox’s proposed instruction (one approved by the Seventh

⁴ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁵ *Id.* at 939, n.12 (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)).

Circuit) that accounted for *Sony*, *Grokster*, and *CoStar*,⁶ and decided not to give the jury further assistance. The court thus effectively guided the jury to do what the Supreme Court cautioned against: to find contributory infringement based entirely on a *failure* to take active steps to avert the infringement of another.

Compounding this error, the district court instructed that the jury could find “willful blindness” from general awareness of potential infringement, rather than following Supreme Court precedent requiring deliberate actions to avoid confirming specific infringing conduct. These were grievous errors because, in this case, applying the same law should have prevented the case from going to jury at all, or at least required instructions on contributory infringement that should have led to a finding for Cox.

The district court instructed that “the DMCA” was not a “defense,” yet allowed the jury to hear, and to base its verdict upon, facts pertaining to whether Cox had satisfied its “safe harbor” immunity from damages under Digital Millennium Copyright Act (“DMCA”) Section 512(a).⁷ Lacking guidance from *Sony* and *Grokster*, the jury was essentially invited to draw

⁶ *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004).

⁷ 17 U.S.C. § 512(a). The Court ruled that Cox failed to comply with the conditions laid out in Section 512(i).

inferences of liability entirely from Cox’s failures to cut off subscribers alleged by BMG’s agent to be copyright infringers—*not* from whether Cox employees or management took any volitional acts to encourage copyright violations by users of Cox’s Internet service. The jury thus arrived at a conclusion that a unanimous Supreme Court said was insupportable, and that was contrary to this Court’s guidance in *CoStar*.

Affirming this result would damage *both* the law of contributory infringement *and* the statutory scheme that offers protection to conduit Internet service providers (“ISPs”) and content hosts under Section 512 generally. It would chill both innovators and those who provide staple services and devices for mass consumption. It also effectively turns a passive failure to comply with voluntary safeguards offered by the DMCA into affirmative copyright liability. Even before *Grokster*, this Court in *CoStar* considered and conclusively rejected the notion that the DMCA was meant to supersede the requirement of proving copyright liability.⁸

The district court’s holding is also contrary to sound public policy. By disturbing the *Sony* safe harbor, and by undermining Congress’s clearly stated intent in enacting Section 512 of the DMCA, the district court’s decision will deter investment and innovation in valuable products and

⁸ *Id.*, 373 F.3d at 552-56.

services with substantial noninfringing uses. The *Sony* safe harbor that was disregarded by the district court is the “‘Magna Carta’ of the information technology industry.”⁹ Today, a large segment of the economy benefits from copyright safe harbors like *Sony*.¹⁰ Unsettling this legal foundation would have a profoundly negative impact upon investment in new technology.

ARGUMENT

I. The District Court Allowed The Jury To Find Contributory Liability Based Entirely On A Failure To Take Affirmative Steps To Police Internet User Conduct, Ignoring Supreme Court Guidance That Secondary Liability Must Be Based On A Closer Business Relationship To The User And More Actively Culpable Conduct.

Under Supreme Court precedent, this case regarding the provision of a critical household service in modern society should never have reached a jury. Upon allowing it to reach a jury, the court improperly instructed that jury. The verdict here was based entirely on Cox’s (1) supplying a connection to the Internet, and (2) not taking affirmative action to disconnect subscribers from their critical service, based on unsubstantiated assertions of infringement. In a case devoid of evidence that Cox affirmatively

⁹ Pam Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 *Fordham L. Rev.* 1831, 1850 (2006).

¹⁰ Thomas Rogers & Andrew Szamoszegi, *Fair Use in the U.S. Economy: The Economic Contribution of Industries Relying Upon Fair Use* (CCIA 2011), available at <http://www.ccianet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf>.

contributed to infringement, the jury was instead allowed to impose liability while relying on evidence material only to Cox's DMCA compliance. This result cannot be reconciled with *Sony*, *Grokster*, or *CoStar*.

Cox's consumer Internet access provides the backbone for critical societal functions. The liability standards under which a service provider should be compelled to sever a household's connection for employment, education, finance, and health and safety must be far higher than that which was applied by the district court. To impose secondary liability upon a provider of a staple or essential service such as broadband access, a court or jury must consider the service provider's business interest in, proximity to, and knowledge of, infringing user conduct. This did not occur here.

This result thus does not reflect the core justifications for penalizing a non-infringer for the infringement of another. Both the Supreme Court and this Court have said that careful balancing is necessary to find contributory infringement, balancing that is particularly relevant regarding a product as crucial as basic Internet access. The district court failed to weigh the limits of Cox's business interest in its subscribers' conduct. The Supreme Court cases that the district court declared "irrelevant" had, in fact, required the court to consider these factors on summary judgment and then, if any triable issue remained, to instruct the jury on them.

Secondary liability for the conduct of another can arise in two ways. A defendant may be liable for vicarious infringement, based on direct profit from and right and ability to control the infringement of another, or contributory infringement, which must involve ordinary knowledge of and some affirmative and material contribution to such infringement. One particular way defendants may incur contributory infringement liability is active inducement, by actively and purposefully encouraging the infringing conduct.¹¹ Cox was not charged with inducement, and the jury held that Cox did not supervise or profit vicariously from an infringement. The remaining issue was whether Cox could (a) be deemed to know of infringement of BMG copyrights by a few of its millions of subscribers, and (b) “materially contributed” to that alleged infringement by failing to threaten or disconnect those users.

As an Internet service provider Cox has no business interest in, or need to surveil, how each subscriber uses his or her Internet connection.¹² So

¹¹ *Grokster* at 930. Imposing secondary liability requires a finding of direct infringement by some other actor. *Id.* For purposes of legal discussion in this subsection, CTA and CCIA assume without agreement that acts of infringement by Cox Internet service subscribers existed and that Cox employees became aware of them.

¹² Indeed, to the extent Cox may provide its subscribers with other services such as licensed video programming distribution, Cox has an interest in *discouraging* competing and infringing viewing of unlicensed content.

it was not surprising that the only facts presented to the jury were about whether Cox employees *failed* to threaten or cut off subscribers who purportedly had infringed the plaintiff's content. Any such failure might have been significant for purposes of determining whether Cox qualified for statutory immunity from contributory infringement liability under the DMCA (an issue the district court already had decided against Cox before trial).¹³ But failing to qualify for an optional provision granting immunity does not automatically constitute contributory infringement, nor is it *evidence* of infringement.

Contributory infringement is not defined in the Copyright Act. Mass production and innovation in electronics necessitated the careful and limited importation of this patent law doctrine into copyright.¹⁴ In 1984, in *Sony*, the Supreme Court was faced with the novel case of the sale of a new-technology product capable of both infringing and noninfringing uses into the hands of consumers in millions of homes. The *Betamax* consumer video

¹³ The facts pertained to whether Cox employees took sufficient affirmative actions to qualify Cox for statutory immunity from damages under the DMCA in the event there was sufficient evidence of Cox's contribution to infringement.

¹⁴ Earlier cases, such as *Gershwin Publishing Corp. v. Columbia Artists Man., Inc.*, 443 F.2d 1159 (2d Cir. 1971) and *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996) were primarily about vicarious liability.

cassette recorder (“VCR”) could be used for private copying with or without authorization, or for recording with a camera. Much of the copying from TV broadcasts was authorized or fair use (“time-shifting”), but much of it could infringe.

Faced with a staple product likely to infringe in the hands of some, the Supreme Court looked to patent law’s treatment of staple articles of commerce. Even though they are likely used to infringe, the sale of such products is lawful if they have commercially significant noninfringing uses.¹⁵ After two oral arguments, a majority of the Court concluded that where an innovative technology is offered on a mass basis, the interest of the public in obtaining it had to be balanced against the inevitability that some would use it to infringe copyright. The majority concluded that to hold Sony liable for selling VCRs would effectively deprive Sony of its rights to its invention, and thus would “block the wheels of commerce.”¹⁶ The Court thus held Sony was not contributorily liable for its users’ copyright infringement so long as its product, the VCR, had substantial or commercially significant noninfringing uses. *Sony*, 464 U.S. at 445.

¹⁵ *Sony* at 443.

¹⁶ *Id.* at 441 (citations omitted).

Numerous products and services “capable of substantial noninfringing uses” have since come to market because of *Sony*’s assurance that innovators need not fear liability for misconduct by a few consumers.¹⁷ Courts have repeatedly vindicated new technologies relying upon *Sony*,¹⁸ including consumer electronics like portable music MP3 players¹⁹ and digital video recorders (“DVRs”).²⁰

Even in cases where plaintiffs prevailed, *Sony* has guided courts. In *Grokster*, the defendant mass-distributed a software service to run on staple

¹⁷ See, e.g., *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1165-68 (9th Cir. 2007); *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1118-19 (D. Nev. 2006) (protecting Internet search); *Authors Guild, Inc. v. Google Inc.*, 804 F.3d 202, 209; (2d Cir. 2015) (protecting book search); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (same); see also *A.V. ex rel. Vanderhuyse v. iParadigms, LLC*, 562 F.3d 630, 636 (4th Cir. 2009) (citing *Sony* in ruling copyright by online plagiarism detection service to be fair use); cf. *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 638-39 (E.D. Pa. 2007) (copying of plaintiff’s website from Internet Archive Wayback Machine for litigation reference was fair use).

¹⁸ Joe Mullin, *Rewinding to Betamax: The path to consumers’ “right to record”*, *Ars Technica*, Jan. 17, 2014, <http://arstechnica.com/tech-policy/2014/01/rewinding-to-betamax-the-path-to-consumers-right-to-record/>.

¹⁹ *Recording Industry Ass’n of Am. v. Diamond Multimedia*, 180 F.3d 1072, 1079 (9th Cir. 1999) (MP3 player’s primary function was “paradigmatic noncommercial personal use.”).

²⁰ *Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121, 132-33 (2d Cir. 2008) (remotely accessed DVR protected under *Sony*); *Fox Broadcasting v. Dish Network*, 723 F.3d 1067, 1074-75 (9th Cir. 2013) (bulk home-recording, commercial-skipping, and library-building of lawfully accessed content by DVR consumers was fair use).

computer devices. It was widely used for “peer-to-peer” exchanges of infringing content but also had substantial noninfringing uses. The Ninth Circuit strictly and simply applied the *Sony* “noninfringing use” test, despite evidence that Grokster’s business relied on actively encouraging specific infringing conduct by its users.²¹ The Supreme Court, because it found elements not present in *Sony*, held Grokster liable for *inducing* infringement. Guided by but distinguishing the result in *Sony*, the Court in *Grokster* reversed and remanded on these bases:

- The *Sony* “noninfringing use test” should be understood as a tool for finding *imputed intent based on actively culpable conduct*.
- The Court found three indicia of such culpable intent by defendants:
 - (1) Specifically aiming to satisfy a known demand for infringement;
 - (2) Declining to develop “filtering” tools related to their software product; and
 - (3) Affirmatively encouraging high-volume infringing use, to drive its own ad revenue.

The Court held these factors *together* were sufficient to support a finding of secondary liability by active inducement. Unlike the case of *Sony*’s VCR, the record in *Grokster* showed a proximate and ordinary

²¹ *Grokster* at 941.

commercial interest in users' infringement, and an "unmistakable" commercial objective to foster infringement by users, through its *active inducement*. *Id.* at 939-40.

A. Passive Conduct Alone, in Failing to Threaten or Disconnect a Purportedly Infringing User, Is Not Sufficient to Prove Contributory Infringement.

Having spelled out its bases for applying but distinguishing *Sony*, the Supreme Court in *Grokster* immediately and unanimously took pains to note the limitations of its holding. To its "filtering tools" metric, the Court cautioned that failing to find or thwart infringement would not constitute *contributory infringement generally*:

Of course, in the absence of other evidence of intent, a court would be *unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement*, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the *Sony* safe harbor.²²

This remains the law of contributory infringement. Yet here the district court declared both *Sony* and *Grokster* "irrelevant" when it denied summary judgment to Cox and let the case go to the jury. Then, when instructing the jury, the court refused to give any instruction based on *Sony*

²² *Grokster* at 939, n.12 (emphasis added).

and *Grokster*, even when the jury asked for a definition of “materially contributed.”

The district court presented to the jury a case built entirely on facts about whether Cox employees *failed* to take particular actions that were unrelated to Cox’s ordinary business. These actions pertained to whether Cox might qualify, *after the fact*, for statutory immunity under the DMCA. They could not pertain, under *Sony* and *Grokster*, to contributory liability of Cox or its employees for infringement by Cox Internet subscribers.

If there was no evidence that Cox employees took some affirmative action to contribute to infringement by Cox Internet subscribers, the case should not have reached the jury at all. If a material fact issue remained, the jury needed to receive and understand the Supreme Court’s guidance.

Instead, the court erred by:

- Ruling that both *Sony* and *Grokster* were irrelevant to the case;
- Failing to instruct the jury to consider whether Cox, in providing a staple Internet connection, had any appreciable commercial interest in promoting user infringement, or any ordinary business reason to be aware of what its users chose to view or share;

- Rejecting proffered instructions that would have explained to the jury that where a staple product or service is involved, contributory infringement must be based on some active commercial knowledge of, and interest in, infringement by users; and
- Refusing the jury’s request for an explanation or definition of the phrase “materially contributed,” which was the only pertinent language in the court’s instructions. Despite counsel’s suggestion of a standard Seventh Circuit instruction on point, the court decided to give no further instruction.

The district court’s decisions were contrary to this Circuit’s guidance as well. In *CoStar* (a case involving allegations of direct infringement), a year before the Supreme Court decided *Grokster*, this Court was also obliged to discuss *Sony* and contributory infringement in the context of a widely-provided service:

[T]he Copyright Act ... requires *conduct* by a person who causes in some meaningful way an infringement. Were this not so, the Supreme Court could not have held, as it did in *Sony*, that a manufacturer of copy machines, possessing constructive knowledge that purchasers of its machine may be using them to engage in copyright infringement, is not strictly liable for infringement. 464 U.S. at 439-42. This, of course, does not mean that a manufacturer or owner of machines used for copyright violations could not have some *indirect* liability, such as contributory or vicarious liability. *But such extensions*

*of 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.*²³

Thus, in addition to rejecting the relevance of *Sony* and *Grokster*, the district court ignored this on-point *dictum* of the Fourth Circuit that to find contributory infringement there must be *additional affirmative conduct* beyond the provision of the goods or service.

B. The District Court Incorrectly Held That Cox’s “Continuing Relationship” With Its Customers Made *Sony* and *Grokster* Irrelevant.

The district court rejected the relevance of *Sony* and *Grokster* on the basis that Cox, in selling a staple Internet connection to subscribers, established a “continuing relationship” with its customers. The court based this decision on precedent in which the *Sony* and *Grokster* guidance was in fact considered relevant and applied, but did not result in summary judgment for a defendant.²⁴ The court relied on these cases as precedent for *not considering the guidance of Sony and Grokster at all*. This was the heart of the court’s error. Had the court appreciated the need to account for whether the defendant had any ordinary business or financial interest or active

²³ *CoStar* at 549 (emphasis added to last sentence).

²⁴ *BMG Rights Management (US) LLC v. Cox Commc’ns*, 2016 WL 4224964, at *12 (E.D. Va. Aug. 8, 2016).

participation to facilitate infringement, it would have applied this guidance rather than declare it irrelevant.

The Supreme Court and Fourth Circuit guidance that the district court rejected was necessary to the resolution of this case, because Cox has only a passive relationship as a conduit provider of a staple Internet connection to millions of individual users. This is precisely the sort of case at which the *Sony*, *Grokster*, and *CoStar* guidance was aimed. The defendants in *CoStar* and *Grokster* had far closer business interests in the conduct of their users than Cox has with its Internet service customers. If *Sony* was germane in *Grokster*, it must surely be germane in a case where the business interest is as attenuated as Cox's interest is here.

In the cases in which a "continuing relationship" actually has been found significant when a court applied the *Sony* and *Grokster* guidance, there has been an *active business or financial interest* that pertains much more specifically to whether or not the user is using the subscribed service to infringe. As the Ninth Circuit observed, the relationship is significant where

the service provider “*actively* strives to provide the environment *and the market*” for the infringement to occur.²⁵

Most consumers today have ongoing relationships with the providers of technology they purchase, if only to receive security updates. To interpret *Sony* to penalize this activity would discourage improvements, patches, and updates that affirmatively protect consumers. Thus, for a continuing relationship to be significant, the steps to facilitate infringement must be “active.” No showing of a *relevant* continuing relationship supports any such holding against Cox. The district court turned things backwards in holding that, because of the “continued relationship” of providing Internet service, the *Sony*, *Grokster*, and *CoStar* guidance did not apply.

All of the evidence against Cox was passive with respect to copyright infringement. It related entirely to Cox’s employees’ conduct and whether it was sufficient to meet the requirements of Section 512(i). The result was to hang Cox’s copyright liability entirely on evidence that showed, at most, a failure to qualify for DMCA “safe harbor” immunity. To get to this result the district court made four reversible errors:

²⁵ *UMG Recordings Inc. v. Shelter Capital Partners*, 718 F.3d 1006, 1032-33 (9th Cir. 2013) (quoting *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (emphasis added)).

- (1) submitting the copyright liability issue to the jury in the absence of any active or ordinary business conduct supporting infringement;
- (2) allowing the jury to hear evidence adduced about DMCA immunity qualification even though the court had decided the issue and ruled that the DMCA was not a part of their deliberations;
- (3) failing to instruct the jury why it was hearing the DMCA-related conduct and whether this evidence should be considered as to liability; and,
- (4) failing to instruct the jury about contributory infringement proof as required by *Sony*, *Grokster*, and *CoStar*.

C. The District Court Needed to Provide *Grokster*-Based Guidance as Cited by Counsel.

The court’s instruction on contributory liability was grossly inadequate and plainly erroneous—particularly in light of the proper instructions proposed by Cox’s counsel.

On November 24, 2015, Cox’s counsel submitted instructions that cautioned, citing *Sony*, *Grokster*, and *CoStar*, that “Simple acts of providing service, including offering customers technical support or product updates,

do not support liability in themselves.”²⁶ After the district court’s December 1, 2015, Memorandum Opinion ruling that *Sony* and *Grokster* were “irrelevant” to the case, Cox’s counsel was obliged to submit a different set of proposed instructions that omitted this legally-correct, cautionary language.²⁷

Without the benefit of *any* language derived from *Sony*, *Grokster*, or *CoStar*, the jury was left effectively with an ambiguous single-sentence instruction on contributory infringement: “With 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.”²⁸ The jury knew that Cox was not charged with inducement, and, based on more elaborate instructions on vicarious liability, held that Cox had not infringed vicariously.

As to contributory infringement, the jury was left at sea without explication of those “certain exceptions,” and consequently, and sensibly, asked the court to better define “materially contributes.”²⁹ Based on

²⁶ Cox’s Proposed Jury Instructions, filed 11/24/15, at 25 – 26, Defendant’s Proposed Jury Instruction No. 16.

²⁷ Cox’s Proposed Jury Instructions, filed 12/14/15, at 25 – 26, Defendant’s Proposed Jury Instruction No. 16.

²⁸ JA-2077.

²⁹ *Id.*

precedent, Cox’s counsel proposed that the court rely on a Seventh Circuit Model Instruction 12.6.2, which includes this comment:

If the case involves the issue as to whether the defendant’s product or service is capable of substantial noninfringing uses, the jury may need additional instructions based on *Grokster*. If defendant’s service has substantial noninfringing uses, you may not hold the defendant liable unless the defendant promoted the use of its service in a way that infringed plaintiff’s copyrights.

Heedless of precedent and the Seventh Circuit’s prescient warning, the district court ultimately decided to leave the jury alone to decipher the court’s erroneous instruction.

D. The District Court Erroneously Instructed the Jury on “Willful Blindness,” Which Requires Awareness of Specific Acts of Infringement and Deliberate Conduct to Avoid Confirming That Infringement Exists.

Compounding the insufficiency of the instruction on contributory infringement, the district court added an instruction on “willful blindness” that was legally incorrect and factually inappropriate and could only have been misleading to the jury. According to this instruction, willful blindness would be shown if Cox (a) was aware of a high probability that unnamed “Cox users” were infringing unspecified BMG’s copyrights at unspecified times and in unspecified ways, and (b) “consciously avoided confirming that fact.” (Tr. 2147:25-2148:3)

This instruction suffers from two fundamental errors. Under Supreme Court precedent, proof of “willful blindness” should require that Cox both was aware of a high probability that *specific subscribers* engage in *particular infringing acts*, and took *deliberate conduct* to avoid acquiring knowledge of those acts. “(1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.”³⁰

First, where a service is capable of substantial noninfringing uses, constructive knowledge of alleged infringement is insufficient to meet the knowledge prong for contributory liability. *Sony*, 434 U.S. at 439.

Accordingly, courts require a demonstration of willful blindness to *specific facts*, not just general probabilities or possibilities, for culpable knowledge.³¹

The Supreme Court’s most recent application of “willful blindness,” to inducement of patent infringement, emphasized this need for particularity. In *Global-Tech*, the Court faulted the court of appeals for applying too lax a standard—permitting imputation of knowledge from a “known risk,” rather than from a subjective belief in a high probability that “a fact” exists, and

³⁰ *Global-Tech Appliances, Inc. v. SEB, SA*, 563 U.S. 754, 769 (2011) (footnote and citations omitted).

³¹ See *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1073 (9th Cir. 2013) (“Willful blindness of specific facts would establish knowledge for contributory liability.”).

deliberate actions by the defendant to avoid learning of “that fact.”³² Thus, it is not enough if Cox believed that *some* or even *substantial* infringement occurred on its network.

Second, the district court erroneously instructed the jury that willful blindness could be based on mere conscious avoidance which, without further context or explication, is tantamount to the “deliberate indifference” standard *reversed* by *Global-Tech*. Instead, the Supreme Court held, willful blindness requires “deliberate actions” and “active efforts” to avoid knowledge. *Id.* at 769-71 (intentionally copying another company’s product and deliberately withholding that information from a patent attorney retained to provide a right-to-use analysis, sufficient to establish willful blindness).

Moreover, the district court instruction cannot be squared with the application of the Copyright Act and the DMCA to Internet access providers like Cox. As this Court observed in *CoStar*, an allegation of direct infringement by an ISP engaged in “passive ownership and management of an electronic internet facility” must be based on volitional conduct. 373 F.3d at 550-51. Showing affirmative, volitional conduct is equally necessary to impute knowledge to mere conduits, like Cox, who have no affirmative legal obligation to monitor or search for infringing activity by users of their

³² *Global-Tech v. SEB*, 563 U.S. at 769.

network service. “Conscious avoidance” is a state of mind, not volitional conduct; and it does not rise to the level of “deliberate action” and “active effort” Supreme Court precedent requires.

II. The District Court Effectively Failed To Recognize This Circuit’s *CoStar* Holding That DMCA Section 512 Immunity Does Not Supplant The Requirement To Find Culpable Conduct In Violation of Copyright Law.

In *CoStar* this Court said that the test for a DMCA safe harbor does not eliminate the need for affirmative proof of copyright liability.³³ Yet in its admission of evidence material only to DMCA conduct, and by inviting a liability verdict based only on such evidence, the court erroneously did supplant the test for liability with the test for DMCA compliance.

Had the district court instructed in accordance with *Sony*, *Grokster*, and *CoStar*, the jury could not have relied only on evidence pertaining to a failure to undertake affirmative steps to qualify for a DMCA safe harbor. The district court, however, allowed the jury to hear this evidence and to base its liability determination *entirely* on it. These facts—about how Cox handled the information sent to Cox by plaintiff’s agent RightsCorp, and whether Cox and its employees reacted adequately under Section 512(i) to punish repeat infringers—were the *only* facts the jury heard that colorably

³³ *CoStar* at 552.

could have been the basis for any finding that Cox “materially contributed” to infringement. Yet these facts pertained only to a separate question: whether, apart from copyright liability, Cox qualified for immunity under an optional provision of copyright law, DMCA Section 512(a), which requires, *inter alia*, punishing “repeat infringers.”³⁴ Rather than exclude this evidence because it had already determined the DMCA issue, the court admitted it as material to copyright liability. The court then, having determined that “the DMCA was an inextricable part of the course of dealing ... in which this case arose ...,” instructed the jury that the DMCA was a “defense to liability for contributory or vicarious copyright infringement” but that “[t]he DMCA is not a defense in this case and must be disregarded.”³⁵

In *CoStar* the plaintiff argued that the Section 512 safe harbor test subsumes the standard for or necessity of proving copyright liability. This Court emphatically disagreed:

³⁴ Section 512 provides service providers with conditional immunity from liability for damages and some other relief, irrespective of whether they are liable for copyright infringement. Conduit service providers like Cox, which provide only Internet connections, are made immune by Section 512(a) *provided* they meet certain affirmative conduct conditions set out in Section 512(i). In the case of Cox, this would involve warning, and potentially denying service to, customers who are “repeat infringers.” 17 U.S.C. § 512(i)(1)(A).

³⁵ *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 2016 WL 4224964, at *20 (E.D. Va. Aug. 8, 2016).

Even though the DMCA was designed to provide ISPs with a safe harbor from copyright liability, nothing in the language of § 512 indicates that the limitation on liability described therein is exclusive. Indeed, another section of the DMCA provides explicitly that the DMCA is *not* exclusive:

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. *Id.* § 512(1).³⁶

The Court went on to emphasize the statutory “intent not to ‘bear adversely upon’ any of the ISP’s defenses under law, including the defense that the plaintiff has not made out a prima facie case for infringement” *Id.* Thus the Court required that plaintiff to prove liability for copyright infringement, independently of whether the defendant had qualified for a DMCA safe harbor.

In this case the district court did the opposite. It allowed the plaintiff to present its case *entirely* based on conduct that pertained to whether Cox could have qualified for a DMCA safe harbor. Then, having declared the guiding cases on contributory liability “irrelevant,” and a DMCA “defense”

³⁶ *CoStar* at 552; *accord Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F. 3d 1146, 1158 n.4 (9th Cir. 2007) (“We have noted that the DMCA does not change copyright law; rather, Congress provided that [the DMCA’s] limitations of liability apply if the provider is found to be liable under existing principles of law.”) (internal quotations omitted).

unavailable to Cox, the district court told the jury to consider this evidence as if it went to liability, and refused to give it any further guidance.

Effectively, the jury was told, contrary to *CoStar*, that failure to qualify for a DMCA safe harbor is tantamount to contributory infringement.

III. Policy Choices to Limit Liability of Intermediaries Should Be Respected.

The Supreme Court's *Sony* decision is not the only limitation on copyright liability.³⁷ In particular, Congress chose to limit copyright liability with respect to online service providers. At the dawn of the Internet economy, it was "loath to permit the specter of liability to chill innovation that could also serve substantial socially beneficial functions," *UMG Recordings v. Shelter Capital Partners*, 718 F.3d at 1014, and thus enacted another copyright limitation to protect them from liability for users' infringement.³⁸ Tens of thousands of online services have complied with the formalities necessary to qualify for this protection.³⁹

³⁷ Today, industries that benefit from copyright limitations like *Sony* contribute over \$2 trillion to the U.S. economy, roughly 17% of total U.S. GDP, and employ some 17 million people. Thomas Rogers & Andrew Szamoszegi, *Fair Use in the U.S. Economy: The Economic Contribution of Industries Relying Upon Fair Use* (CCIA 2011), available at <http://www.cciainet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf>.

³⁸ Congress repeatedly emphasized the intended breadth of these protections, explaining that they should "protect qualifying service providers

Under the DMCA, intermediaries have no affirmative burden to prevent user misconduct. Section 512(m) states unequivocally that service providers have no obligation to monitor users' communications for possible infringements. *See* 17 U.S.C. § 512(m)(1); *see also CoStar*, 373 F.3d at 549 (stating that *Sony* held “that a manufacturer of copy machines, possessing constructive knowledge that purchasers of its machine may be using them to engage in copyright infringement, is not strictly liable for infringement”).

The outcome here reallocates the burden to monitor from rights-holders and their agents, whom Congress concluded were *best* situated to *initiate* action, to intermediaries, who Congress concluded were better situated to *respond* to complaints. In some contexts, rights-holders complain about this framework, alleging that Congress “overestimated the value to copyright owners of the notice-and-takedown provisions of the statute.”⁴⁰

from liability for all monetary relief for direct, vicarious and contributory infringement.” H.R. Rep. No. 105-796, at 73 (1998); S. Rep. No. 105-190, at 20, 40 (1998); H.R. Rep. No. 105-551, pt. 2, at 50 (1998).

³⁹ *See* U.S. Copyright Office, Directory of OSP Designated Agents, http://www.copyright.gov/onlinesp/list/a_agents.html. Technologies that consumers use daily have been held insulated from potentially crippling liability in part because of the Section 512 immunity. *See, e.g., UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F.3d 1006 (9th Cir. 2013); *Viacom Int'l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013).

⁴⁰ *See Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016) (characterizing rights-holders' complaint).

Amici CTA and CCIA dispute this, but even if it were so, “the need for remediation is a question for Congress.” *Id.*

CONCLUSION

The judgment should be reversed and the case should be remanded for entry of judgment in favor of Cox or a new trial.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(a)(7)(C)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief *amici curiae* is proportionately spaced, has a typeface of 14 points and contains 6078 words.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2016, I electronically filed the foregoing Brief *Amici Curiae* of Consumer Technology Association and Computer & Communications Industry Association, in Support of Defendants-Appellants, with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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