

17-35587, 17-35588

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

VHT, INC., a Delaware corporation,
Plaintiff-Appellee/Cross-Appellant,

—v.—

ZILLOW GROUP, INC., a Washington corporation, and
ZILLOW, INC., a Washington corporation,
Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR WESTERN WASHINGTON, SEATTLE
JAMES L. ROBART, SENIOR DISTRICT JUDGE

**BRIEF FOR AMICI CURIAE INTERNET ASSOCIATION AND
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN
SUPPORT OF APPELLANTS/CROSS-APPELLEES**

Brian M. Willen
WILSON SONSINI GOODRICH & ROSATI,
Professional Corporation
1301 Avenue of the Americas
40th Floor
New York, NY 10019
Tel: (212) 999-5800
Fax: (212) 999-5899
bwillen@wsgr.com

Ryan T. O'Hollaren
WILSON SONSINI GOODRICH & ROSATI,
Professional Corporation
650 Page Mill Road,
Palo Alto, CA 94304
Tel: (650) 493-9300
Fax: (650) 493-6811
rohollaren@wsgr.com

Attorneys for Amici Curiae

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INTEREST OF AMICI

The Internet Association (IA) and the Computer & Communications Industry Association (CCIA) together represent the interests of over 60 leading internet companies, which have revolutionized the ways that consumers meet, communicate, travel, shop, and learn. IA and CCIA are dedicated to advancing public policy solutions that strengthen and protect internet freedom, foster innovation and economic growth, and empower users. Amici's values of innovation and service quality are served by legal clarity and a principled framework for addressing claims of copyright infringement. This case raises important questions about the standards for direct and secondary infringement, which directly affect amici and their members.

In particular, IA and CCIA are concerned that certain arguments made by VHT and its amici about the volitional-conduct requirement for direct infringement claims depart from established law in ways that would muddle and unduly expand copyright liability. The result would be to deter online service providers, including IA and CCIA members, from engaging in all manner of valuable content regulation and moderation, thereby diminishing the quality of online services and threatening responsible providers with unreasonable liability.¹

¹ All parties have consented to the filing of this brief. No counsel for either party authored this brief in whole or in part; no party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than amici, its members, or counsel made such a contribution. Although Zillow is a member of IA, neither Zillow nor its attorneys were involved in any way in the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The volitional-conduct requirement has long been a cornerstone of direct copyright infringement claims—one that is especially critical for properly applying copyright law to the Internet and to the online service providers that make it work. The volition requirement allows service providers to let their users store, display, and share content without being held liable as direct infringers. It provides that, as long as third-party users select the content at issue, the responses of a service provider’s computer systems to such user requests are not themselves acts of direct infringement. Without this protection, providers would face unreasonably broad liability for engaging in a wide range of intermediary activities essential for the operation of the modern Internet.

Hewing to this Court’s cases and the national consensus that has developed on this issue, the District Court correctly applied the volition requirement to reject the core of VHT’s direct infringement claims against Zillow. Now, however, VHT and its amici seek to erode the important protections that this requirement provides. They argue that any service provider that seeks to moderate user-submitted content or impose limits on the material that users can post may be on the hook for direct infringement. And they seek to import into the volition analysis broad common-law causation rules, which could trigger direct liability whenever it might be “foreseeable” that users might engage in infringing acts through a provider’s system.

This approach should be rejected. It would narrow and confuse the volitional-conduct requirement in ways that are at odds with established law. And

it would have profoundly harmful consequences for the everyday operations of online service providers and for the public at large. Nearly all responsible service providers have rules governing the kinds of material that users may transmit and post on their systems. These policies protect users from objectionable, offensive, and unwanted content—and they help online services foster communities where good content can be found and users can find what they are seeking. Efforts that online intermediaries undertake to regulate, moderate, and organize user-submitted material have never created a basis for direct infringement, and they should not do so here. This Court should affirm the District Court’s ruling on direct infringement.

ARGUMENT

I. THE VOLITIONAL-CONDUCT REQUIREMENT BARS DIRECT INFRINGEMENT CLAIMS AGAINST ONLINE SERVICE PROVIDERS BASED ON CONTENT SELECTED BY USERS

The volitional-conduct requirement provides that a “defendant may be held directly liable only if it has engaged in volitional conduct that violates the [Copyright] Act.” *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2512 (2014) (Scalia, J., dissenting). This requirement has particular application to online service providers and other entities that operate computer systems that interact with material selected by third parties. It applies here to bar VHT’s claims for direct infringement based on photographs posted on Zillow’s service by its users.

A. The Volitional-Conduct Requirement Is An Established Protection Against Overbroad Claims of Direct Infringement

The volitional-conduct requirement was first articulated in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp.

1361 (N.D. Cal. 1995), a case involving an early online “bulletin board” on which users could display material of their choosing for other people to access through networked computers. The plaintiff argued that the operator of the bulletin board and the ISP that provided the board with access to the Internet were liable for direct infringement because their systems copied and displayed plaintiff’s copyrighted works in response to users’ requests. The court rejected the plaintiff’s expansive theory.

In doing so, the court pointed to the concept of “volitional conduct” as a means of limiting the reach of direct infringement claims in cases where online systems react to actions taken by their users: “Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.” *Id.* at 1369-70. As the court observed:

Netcom did not take any affirmative action that directly resulted in copying plaintiffs’ works other than by installing and maintaining a system whereby software automatically forwards messages received from subscribers onto the Usenet, and temporarily stores copies on its system. Netcom’s actions, to the extent that they created a copy of plaintiffs’ works, were necessary to having a working system for transmitting Usenet postings to and from the Internet.

Id. at 1368. This was sufficient to show that the users of the bulletin board, rather than the service provider defendants, were the direct cause of the allegedly infringing acts at issue. Because those users had engaged in the relevant volitional conduct—selecting the copyrighted material and instructing the bulletin board to post it—*Netcom* held that the service providers whose systems had implemented

those users' requests could not, as a matter of law, be held liable for direct infringement. *Id.* at 1373, 1381-82.

Since *Netcom*, courts have consistently applied the volition requirement. “Every Court of Appeals to have considered an automated-service provider’s direct liability for copyright infringement has adopted that rule.” *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting)²; *see, e.g., Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008) (“volitional conduct is an important element of direct liability”); *Leonard v. Stemtech Int’l Inc.*, 834 F.3d 376, 387 (3d Cir. 2016) (explaining that “volitional conduct” is an element of direct infringement); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004) (“Agreeing with the analysis in *Netcom*, we hold that the automatic copying, storage, and transmission of copyrighted materials, when instigated by others, does not render an ISP strictly liable for copyright infringement”); *BWP Media USA, Inc. v. T&S Software Assocs., Inc.*, 852 F.3d 436, 444 (5th Cir. 2017) (“We adopt the volitional-conduct requirement in direct-copyright-infringement cases.”). This Court has fully embraced the requirement, including most recently in *Giganews*. *See Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017) (“[D]irect infringement requires the plaintiff to show causation (also referred to as ‘volitional conduct’) by the defendant.”), *cert. denied*, 138 S. Ct. 504 (2017); *Fox Broad. Co.*

² In *Giganews* and *BWP*, this Court and the Fifth Circuit stated the usefulness of Justice Scalia’s *Aereo* dissent in elucidating the volition rule. *Giganews*, 847 F.3d at 666-667 (noting that the *Aereo* majority “did it directly dispute or comment on Justice Scalia’s explanation of the doctrine”); *BWP*, 852 F.3d at 440-42 (“We find the dissent to be helpful in understanding the decision.”).

v. Dish Network, LLC, 747 F.3d 1060, 1067 (9th Cir. 2014) (infringement requires “‘copying by the defendant,’ which comprises a requirement that the defendant cause the copying” (citation omitted)).

The volition requirement has found special force in cases like *Netcom*, where websites and other online services have been targeted with direct infringement claims arising from the actions of their users. In such cases, court after court has rejected direct liability against the service provider. *See, e.g., CoStar*, 373 F.3d at 556 (online real estate listing service not liable for displaying photographs uploaded by users); *BWP*, 852 F.3d at 444 (website not liable for photographs posted by users); *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 743 (S.D.N.Y. 2008) (photo-sharing website not liable for reproducing and displaying photographs in response to user requests), *aff’d sub nom. Wolk v. Photobucket.com, Inc.*, 569 F. App’x 51 (2d Cir. 2014); *Disney Enters., Inc. v. Hotfile Corp.*, 798 F. Supp. 2d 1303, 1308-09 (S.D. Fla. 2011) (website that allowed users to upload and download material not liable for direct infringement, even in the face of allegations that its owners encouraged user to infringe).

This Court’s own decisions illustrate the breadth of this protection. In *Fox*, the Court upheld a finding that copyright-owner plaintiffs were unlikely to succeed on a direct-infringement claim against Dish Network in connection with a DVR service (called “PrimeTime Anytime”) that allowed users to record and playback primetime television programs. 747 F.3d at 1066-72. Dish provided the DVR and determined its features, but users decided whether to engage the system to record particular shows. *Id.* at 1064-65. Even though Dish exercised significant control

over the operation of the DVR, this Court explained that it was not liable as a direct infringer:

[O]perating a system used to make copies at the user's command does not mean that the system operator, rather than the user, caused copies to be made. Here, *Dish's program creates the copy only in response to the user's command*. Therefore, the district court did not err in concluding that the user, not Dish, makes the copy.

Id. (emphasis added).

Giganews reaffirmed the importance of the volitional-conduct requirement, specifically for online service providers. This Court first rejected any argument that the volition rule had somehow been abrogated by the Supreme Court's decision in *Aereo*. See *Giganews*, 847 F.3d at 667 (“Because *Aereo* did not expressly address the volitional-conduct requirement and the Court's analysis can be reconciled with it, we conclude that the requirement was left intact and that the district court did not err in requiring Perfect 10 to satisfy it.”). Applying the rule as developed in *Netcom*—and elaborated in subsequent cases—this Court held that service providers operating USENET boards—on which users post and share content—could not be liable for direct infringement. *Id.* at 670.

The key to the Court's analysis was that users, not service providers, made the ultimate decision about what material to store, copy, display, and distribute on the USENET service: “Perfect 10 provides no evidence showing *Giganews* exercised control (other than by general operation of a Usenet service); selected any material for upload, download, transmission, or storage; or instigated any copying, storage, or distribution.” *Id.*; see also *id.* at 669 (“Perfect 10's evidence shows only that users uploaded infringing content onto *Giganews* servers, not that

Giganews played any sort of active role in causing the distribution.”). *Giganews* thus confirms that the automated actions of a service provider’s system in response to users’ requests are not sufficiently “volitional” to give rise to direct liability. In that scenario, the user—not the service provider—is the “direct cause” of any infringement that resulted.

In short, over more than two decades, courts have consistently applied the volitional-conduct requirement to shield online service providers from direct infringement claims based on material that their users caused to be copied, stored, publicly displayed, or distributed on their systems. The resulting rule is clear: an “ISP who owns an electronic facility that responds automatically to users’ input is not a direct infringer.” *CoStar*, 373 F.3d at 550; *accord Netcom*, 907 F. Supp. at 1370 (volition “is lacking where a defendant’s system is merely used to create a copy by a third party”).

B. By Distinguishing Direct From Secondary Liability, The Volition Requirement Provides Vital Protection To Online Services

The volitional-conduct requirement is not an immunity: it is a channeling device that reflects the important difference between direct and secondary infringement. Nevertheless, by creating a clear rule for separating those distinct forms of liability, the volition doctrine provides a vital protection to online service providers, who routinely interact with an enormous array of user-selected content.

1. Volition Preserves The Key Differences Between Direct And Secondary Liability For Copyright Infringement

Direct and secondary liability cover different behavior and have different standards. Direct liability “applies when an actor personally engages in infringing

conduct. Secondary liability, by contrast, is a means of holding defendants responsible for infringement by third parties, even when the defendants ‘have not themselves engaged in the infringing activity.’” *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984)).

Moreover, direct infringement is close to a strict liability regime: it does not require knowledge of infringement or intent to infringe. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Secondary infringement, however, requires some degree of fault, whether knowledge of particular infringing act (contributory infringement), intent to bring about infringement (inducement), or supervision over the infringement coupled with a direct financial incentive to allow it to happen (vicarious infringement). *See Giganews*, 847 F.3d at 671-73.

Given the potential breadth of direct liability, it is essential to reserve its application to the proper class of defendants: those directly responsible for bringing about the relevant instance of infringement. That is where the volition requirement comes in. As Justice Scalia explained:

The distinction between direct and secondary liability would collapse if there were not a clear rule for determining whether *the defendant* committed the infringing act. The volitional-conduct requirement supplies that rule; its purpose is not to excuse defendants from accountability, but to channel the claims against them into the correct analytical track.

Aereo, 134 S. Ct. at 2514 (Scalia, J., dissenting) (citation omitted); *see also, e.g., Cartoon Network*, 536 F.3d at 132 (“[T]he purpose of any causation-based liability doctrine is to identify the actor (or actors) whose ‘conduct has been so significant

and important a cause that [he or she] should be legally responsible.” (second alteration in original) (quoting W. Page Keeton et al., *Prosser and Keeton on Torts* § 42, at 273 (5th ed. 1984))).

To perform this sorting function, courts ask who is directly responsible for causing the relevant copying (or public display): the service provider or its users. *See Cartoon Network*, 536 F.3d at 130 (“The question is *who* made this copy.”); *Fox*, 747 F.3d at 1067 (“who made the copies of Fox programs using PrimeTime Anytime: Dish or its customers”). Various formulations have been used to capture this principle. *See, e.g., Giganews*, 847 F.3d at 666 (“conduct that can reasonably be described as the *direct cause* of the infringement” (citation omitted)); *Cartoon Network*, 536 F.3d at 131 (“the volitional conduct that causes the copy to be made”); *CoStar*, 373 F.3d at 549-50 (“actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner”). But the thrust of the inquiry remains: the “courts must determine ‘who is close enough to the [infringing] event to be considered the most important cause.’” *Giganews*, 847 F.3d at 666 (alteration in original) (quoting Dallas T. Bullard, Note, *The Revolution Was Not Televised: Examining Copyright Doctrine After Aereo*, 30 BERKELEY TECH. L.J. 899, 922-23 (2015))).

When deciding “who makes the copy,” the central issues—as this Court made clear in *Giganews*—are the *selection* of the copyrighted material at issue and the *instigation* of the process that leads to its copying or display. *See id.* at 670 (“[A]utomatic copying, storage, and transmission of copyrighted materials, *when*

instigated by others, does not render an [ISP] strictly liable for copyright infringement.” (emphasis added) (quoting *CoStar*, 373 F.3d at 555)); *accord Aereo*, 134 S. Ct. at 2513 (Scalia, J., dissenting) (“Most of the time that issue will come down to who selects the copyrighted content: the defendant or its customers.”). Where the user makes the ultimate selection of the material at issue and is responsible for initiating the process that leads the provider’s system to copy, display, or store that material, the user is the direct cause of any infringement. *Fox*, 747 F.3d at 1067 (“[O]perating a system used to make copies at the user’s command does not mean that the system operator, rather than the user, caused copies to made.”).

In this way, the volition requirement offers a straightforward mechanism for assigning potential liability for direct infringement as between service providers and their users. This does not, of course, foreclose all copyright liability against those providers. It simply directs claims arising from user-submitted into the framework of *secondary* infringement, which “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 449; *accord Cartoon Network*, 536 F.3d at 132 (“[T]o the extent that we may construe the boundaries of direct liability more narrowly, the doctrine of contributory liability stands ready to provide adequate protection to copyrighted works.”).³ This

³ Although this brief does not address secondary liability, amici agree with Zillow (and the District Court) about the rules that govern contributory

allows courts to make more careful and nuanced judgments about fault, purpose, and knowledge—evaluations not available using the blunter tool of direct liability. Channeling claims thus strikes a better balance “between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement.” *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005).

2. The Volition Requirement Protects Online Service Providers From The “Unreasonable Liability” They Would Face From Direct Infringement Claims Based On The Acts Of Their Users

This channeling function is “especially important when it is applied to cyberspace. “There are 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.” *CoStar*, 373 F.3d at 551. “Billions of bits of data flow through the Internet and are necessarily stored on servers throughout the network and it is thus practically impossible to screen out infringing bits from noninfringing bits.” *Netcom*, 907 F. Supp. at 1372-73.

Indeed, online service providers have become a vital part of daily life, allowing their billions of users to exchange information about an endless variety of topics. These services include not just the kinds of bulletin boards and ISPs addressed in *Netcom*, but a wide array of intermediaries: services that host user-submitted videos and photos (YouTube, Vimeo, Instagram); vast social networks

infringement in cases like these and with the application of those rules to Zillow’s activities. ER43-47.

(Facebook, Twitter); popular social-messaging services (Snap, WhatsApp); online dating apps (Tinder); collaboration platforms (Dropbox, Google Drive); cloud-hosting and infrastructure providers (Amazon Web Services); just to name a few. These services are constantly interacting with material supplied by their users for transmission, storage, or public display. While the vast majority of this user-submitted material is legitimate and lawful, there are some users who, through neglect, ignorance, or otherwise request the posting or dissemination of copyrighted material to which they do not have the necessary legal rights.

Given this reality, an overly broad application of direct liability to these service providers would have disastrous consequences. Without a clear and strong volition requirement, online intermediaries—the providers that make the Internet work and that have become increasingly important to creative, social, political, and commercial life—could all be treated as direct infringers, without regard to their knowledge, intent, or any of the other fault-based protections that cabin secondary liability claims. That “would lead to unreasonable liability.” *Netcom*, 907 F. Supp. at 1369-70. That is especially true given copyright law’s statutory damages regime, which applies on a per-work basis and can lead to massive monetary liability disproportionate to a copyright owner’s actual harm. *See* 17 U.S.C. § 504(c); *accord Arista Records LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 313, 317 (S.D.N.Y. 2011) (plaintiffs seeking statutory damages award that “could reach into the trillions”).

The volitional-conduct requirement tempers that worrisome prospect—and thereby creates breathing space for service providers that allow users to post and

share material. *Netcom*, 907 F. Supp. at 1372 (“The court does not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred.”); *accord Aereo*, 134 S. Ct. at 2513 (Scalia, J., dissenting) (volitional-conduct requirement “comes right to the fore when a direct-infringement claim is lodged against a defendant who does nothing more than operate an automated, user-controlled system”). The rule confirms that the action of a provider’s system in response to user requests “is not truly ‘copying’ as understood by the Act.” *CoStar*, 373 F.3d at 551. As *Netcom* explained:

Where the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet.

907 F. Supp. at 1372. “To conclude that these persons are copyright infringers simply because they are involved in the ownership, operation, or maintenance of a transmission facility that automatically records material—copyrighted or not—would miss the thrust of the protections afforded by the Copyright Act.” *CoStar*, 373 F.3d at 551.⁴

⁴ Since 1998, the safe-harbor provisions of the Digital Millennium Copyright Act (DMCA) have provided additional statutory protection to online service providers, shielding certain functions that they perform from damages claims for direct and secondary copyright infringement. 17 U.S.C. § 512 et seq.; *see UMG Recordings, Inc. v. Shelter Capital Partners, Ltd. Liab. Co.*, 718 F.3d 1006, 1014 (9th Cir. 2013). But the DMCA, by its terms, does not change the underlying principles of substantive copyright law, 17 U.S.C. § 512(l), and courts have repeatedly rejected calls to narrow the volitional-conduct rule in light of the DMCA safe harbors. *See CoStar*, 373 F.3d at 555 (explaining that the DMCA provides a “floor, not a ceiling of protection”); *BWP*, 852 F.3d at 443 & n.4 (same);

II. THE EFFORTS BY VHT AND ITS AMICI TO DILUTE THE VOLITION REQUIREMENT SHOULD BE REJECTED

This case presents a simple application of the volitional-conduct requirement. Like the real-estate listing service at issue in *CoStar*, Zillow “affords its subscribers an Internet-based facility on which to post materials, but the materials posted are of a type and kind selected by the subscriber and at a time initiated by the subscriber.” *CoStar*, 373 F.3d at 555. VHT seeks direct liability against Zillow based on the choices made by those third-party users to upload copyrighted material on Zillow’s systems. The volition doctrine does not allow that result. Zillow’s users are the actors directly responsible for bringing about the alleged infringements, and only they should face direct-infringement claims.

VHT and its amici try to resist this straightforward conclusion. They argue, among other things, that the volitional-conduct rule requires service providers to be indifferent to the nature of the content that their users are seeking to post. These arguments would throw into question the valuable efforts that leading service providers make to maintain safe, viable, and useful online communities. They are also contrary to established law, and would expand direct-infringement liability in ways that courts have correctly resisted.

A. The Effort By VHT And Its Amici To Weaken The Volition Requirement Would Deter Online Service Providers From Engaging In Valuable Content Moderation Efforts

VHT and its amici argue that only service providers that are entirely passive with respect to user-submitted content are protected from direct liability. Br. for

accord Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1158 n.4 (9th Cir. 2007).

Appellee/Cross-Appellant VHT (“VHT Br.”) at 17, ECF No. 25; Br. for Disney as Amicus Curiae (“Disney Amicus”) at 18, ECF No. 33. On this view, they suggest, any policy decisions that service providers make about whether to allow certain material to be posted or displayed (such as Zillow’s decisions regarding so-called “deciduous” images) or efforts they make to regulate or moderate user material (such as allowing only real-estate photos or removing images that are not a good fit for the service), might be enough to find volitional conduct.

That result would be disastrous—not just for online service providers, but for their users and the public at large. Responsible online services may choose to interact with material posted to their services in a variety of ways. These interactions help protect the services and their users from offensive, malicious, irrelevant, and other objectionable material—including obscenity, child pornography, hate speech, sexual harassment, graphic violence, threats, and spam. Efforts to remove such material benefits online services, their users, and the public at large. Videos depicting child abuse, sexual torture, or terrorist violence; postings that harass or bully others; messages aimed at defrauding members of the public; and spam that offers no legitimate contribution—such content can offend and upset users, and it may put them at risk of harm. It distracts from legitimate material that users post and undermines the community that online services seek to build and nurture.

Moderating user-submitted content also allows service providers to help users locate the material most relevant and interesting to them. Given the sheer quantity of content that online services host, many service providers find that they

must provide some order and organization for users to be able to locate what they are looking for. To that end, service providers may “tag” user postings so that users’ searches return responsive material. They may organize content by topic. Or they may sift through user postings to decide which should be included on what portions of the service or which might be of special value. These activities significantly improve the quality of online services for users.

VHT’s approach to the volition requirement directly threatens all of these valuable efforts. As discussed above, VHT and its amici seek to hold Zillow (and other service providers) liable as direct infringers based on exactly the kind of content-moderation and review activities that they use to protect their users from objectionable material and to help organize and moderate user-submitted items. The same activity that helps make online services useful, responsive, and safe would then put service providers at risk of direct infringement. This would create powerful incentives for service providers to stop engaging with user content—or to significantly limit the circumstances in which they do so. That is not good for anyone. It would allow highly offensive and even unlawful content to run unchecked, while leaving service providers far less able to make good content more easily available to users.

Among all the other reasons to reject that approach, it is contrary to the policies established by Congress, which has specifically recognized the importance of online service providers engaging in human review and moderation. S. Rep. No. 105-190, at 48-49 (1998) (explaining that the use of “human judgment and editorial discretion” in organizing content plays a “valuable role in assisting

Internet users to identify and locate the information they seek on the decentralized and dynamic networks of the Internet”). Just as Congress did not want those activities to cost service providers their safe-harbor under the DMCA, it would be improper to narrow the volitional-conduct requirement to subject providers to direct infringement claims merely because they engage in this socially beneficial activity. *Cf.* H.R. Rep. No. 105-796, at 73 (1998) (DMCA was “not intended to discourage the service provider from monitoring its service”).

The powerful federal interest in removing obstacles to voluntary content review and monitoring by online services is underscored by Section 230 of the Communications Decency Act. The statute expressly immunizes service providers for their efforts to keep objectionable content off their systems. 47 U.S.C. § 230(c)(2) (no online service “shall be held liable” on account of “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable”). Section 230 declares it the “policy of the United States” to “remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.” *Id.* § 230(b)(4). This reflects a clear congressional desire to avoid liability rules that would deter online services from reviewing, monitoring, and restricting content that those providers or their users might deem objectionable. But that is the result that VHT and its amici would bring about here. This Court should not undermine the efforts

of online services to engage in exactly the kind of content moderation that Congress endorsed.

B. Service Providers' Protection Under The Volition Requirement Does Not Require Complete Passivity Or Indifference To The Content That Users Select

The arguments that VHT and its amici make about the volitional-conduct requirement are also contrary to established law. To start, neither the day-to-day operational control that service providers maintain over their systems nor their efforts at promoting and enforcing content rules amount to volitional conduct in any legally relevant sense. This Court's ruling in *Fox v. Dish* makes that clear. There, the plaintiff argued that Dish should be held directly liable because "Dish participates in the operation of PrimeTime Anytime on a daily basis." *Fox*, 747 F.3d at 1067. Indeed, Dish pre-set the DVR so that, once it was enabled by the user, it would record, by default, primetime shows on all four networks each night of the week; Dish also determined the start and end time of each night's recordings and sometimes unilaterally altered those times to record programming outside the traditional primetime window. *Id.* at 1065-66. Yet this Court held that none of that was relevant: "these facts do not establish that Dish made the copies." *Id.* at 1067-68 (citation omitted). What mattered was that Dish's DVR only created copies "in response to the user's command." *Id.* at 1067.

So it is here. Adopting a policy that allows users to search or copy a given class of images (or changing that policy over time) does not make Zillow a direct infringer. Such policies do not alter the fundamental fact that any actual reproduction or display of those images happens as a result of Zillow's system

responding in an automated fashion to requests made by users in connection with images selected by those users. *Accord Cartoon Network*, 536 F.3d at 132 (service provider’s “unfettered discretion in selecting the programming that it would make available for recording” is not “sufficiently proximate to the copying to displace the customer as the person who ‘makes’ the copies when determining liability under the Copyright Act” (citation omitted)); *Aereo*, 134 S. Ct. at 2514 (Scalia, J., dissenting) (“Aereo’s operation of that system is a volitional act and a but-for cause of the resulting performances, but, as in the case of the copy shop, that degree of involvement is not enough for direct liability.”).⁵

The same is true for VHT’s claim that “where [a service provider’s] screening process is designed to promote the display of content favored by the host, sufficient volitional conduct exists.” VHT Br. at 32. That has never been the law. Indeed, as discussed, the service providers in both *Fox* and *Cartoon Network* had considerable control over what users were able to copy—in *Fox*, only primetime television programming in the window chosen by Dish; in *Cartoon Network*, only

⁵ VHT and its amici rely on *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp 2d 124, 148 (S.D.N.Y. 2009), which suggested that a file-sharing service could be liable for direct infringement because it had actual knowledge of specific acts of infringement and neglected to use available measures to stop that infringement. That decision—which offered almost no analysis of the volitional-conduct requirement—has been repeatedly criticized and rejected. *See e.g., Perfect 10, Inc. v. Giganews, Inc.*, No. CV11-07098 AHM (SHx), 2013 U.S. Dist. LEXIS 71349, at *25 (C.D. Cal. Mar. 8, 2013) (*Arista*’s “conclusion ignores the language of *Netcom* and other cases following *Netcom*” (citation omitted)); *Disney*, 798 F. Supp. 2d at 1309 (explaining that *Arista* was “wrongly decided” and “unconvincing”). In particular, *Arista* incorrectly focused on the defendant’s knowledge, ignoring the black-letter rule that for direct infringement “knowledge is irrelevant.” *Netcom*, 907 F. Supp. at 1372.

television programs made available to cable subscribers through Cablevision's system. Yet those providers were found not to be engaged in volitional conduct and thus not liable for direct infringement.

Squarely on point is *CoStar*, which involved a website (LoopNet) that “allow[ed] subscribers, generally real estate brokers, to post listings of commercial real estate on the Internet.” 373 F.3d at 547. Like Zillow, LoopNet was narrowly focused on a particular topic: subscribers were only allowed to post photographs that related to commercial real estate, and they were forbidden from posting certain images, such as ones that were copyright infringing. LoopNet enforced these policies by manually reviewing every photograph uploaded by users to determine if it showed commercial real estate and to check for copyright infringement. *Id.* If the image failed either criterion, LoopNet rejected it; if it passed, an employee “click[ed] an ‘accept’ button that prompt[ed] LoopNet’s system to associate the photograph with the web page for the property listing, making the photograph available for viewing.” *Id.* at 547, 556. Despite this manual screening process, the Fourth Circuit held that LoopNet did not “make” the relevant copies and thus could not be liable for direct infringement. *Id.* at 556. The court explained that “LoopNet does not attempt to search out or select photographs for duplication; it merely *prevents* users from duplicating certain photographs.” *Id.*

Likewise here, Zillow does not select the content that users post—and it certainly does not “route infringing content to its users.” *BWP*, 852 F.3d at 442. Zillow simply provides general ground rules for the kind of content that users should post—and makes modest efforts to enforce those rules. These policy

choices may be “volitional” in some sense, but not in the way that matters for direct infringement. *Cf. Giganews*, 847 F.3d at 666 (“We wish to emphasize that the word ‘volition’ in this context does not really mean an ‘act of willing or choosing’ or an ‘act of deciding’ ”). Zillow’s rules—and similar rules adopted by countless other online service providers—do not actually, much less *directly*, cause any unlawful copying to occur. It is still the user who makes the ultimate decision about what content to post. Where that is the case—where the “materials posted are of a type and kind selected by the subscriber and at a time initiated by the subscriber”—the responses of the provider’s system simply do not give rise to direct infringement. *CoStar*, 373 F.3d at 555. Under this rule, providers can limit their services to certain kinds of material—and enforce those rules by monitoring for, removing, or blocking objectionable or unsuitable content—without fear that doing so will make them direct infringers. *See generally* Robert C. Denicola, *Volition and Copyright Infringement*, 37 CARDOZO L. REV. 1259, 1276-84 (2016).

C. The Volitional-Conduct Rule Does Not Import All The Common Law Rules of Proximate Cause, Including Foreseeability

VHT and its amici also make much of this Court’s observation that the volitional-conduct requirement is ultimately a species of causation. *Giganews*, 847 F.3d at 666. They suggest that this commonplace observation somehow both significantly limits the doctrine and creates an opportunity for them to import into it every common law principle of proximate causation—especially foreseeability. Disney Amicus at 15-16. According to their approach, any time a service provider takes action from which copyright infringement may be “foreseeable,” the provider

may be directly liable. That is not the law, and nothing in *Giganews*, or any other case, supports that result.

No one disputes that volition is a species of causation; that has been recognized since *Netcom* itself. *See* 907 F. Supp. at 1370. But the nature of this causation requirement is particular—it is not to identify everyone who might have had some causal relationship with the alleged infringement and expose them to direct liability. Just the opposite: volition is a *limiting* principle, designed to narrow the class of possible direct infringers. As this Court has explained, the rule works to determine “the *direct*,” the “*active*,” or “the *most important*” cause. *Giganews*, 847 F.3d at 666-67 (emphases added); *accord CoStar*, 373 F.3d at 550 (volition requires “actual infringing conduct with a nexus sufficiently close and causal to the illegal copying”). By using that formulation, *Giganews* made clear that the volition rule continues to be a strict limit on direct liability, not a vehicle for expanding it.

In cases like this, therefore, volition’s purpose remains what it has always been: to identify which of two classes of actors—online service providers and their users—is most directly responsible for bringing about the alleged infringement at issue. *See Fox*, 747 F.3d at 1067 (“The user, then, and not Dish, is ‘the most significant and important cause’ of the copy.” (citations omitted)); *Aereo*, 134 S. Ct. at 2513 (Scalia, J., dissenting) (explaining that volition generally “come[s] down to who selects the copyrighted content: the defendant or its customers”). Once that primary actor is identified, there is no need to go further and hold others liable as direct infringers. *Netcom*, 907 F. Supp. at 1372 (“Only the subscriber should be

liable for causing the distribution of plaintiffs' work, as the contributing actions of the BBS provider are automatic and indiscriminate.”).

VHT and its amici seek to replace that clear understanding with an amorphous test, based on the tort doctrine of “foreseeability.” In their proposed regime, multiple distinct actors (including both service providers and their users) might routinely be held directly liable for the same allegedly infringing act. That is not the law, nor should it be. For one thing, this approach misunderstands proximate cause. “Proximate-cause analysis is controlled by the nature of the statutory cause of action.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). “Proximate cause is an infamously nebulous concept that the Court has explained is meant to serve as a generic label for “the judicial tools used to limit a person’s responsibility for the consequences of that person’s own acts.” *Fields v. Twitter, Inc.*, 881 F.3d 739, 747 (9th Cir. 2018) (citation omitted). In *Fields*, the Court rejected a proximate cause test based on “foreseeability” in favor of the far more stringent test that requires a “direct relationship” between the defendant’s conduct and the plaintiff’s injury. *Id.* at 744; *accord Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) (“foreseeability alone does not ensure the close connection that proximate cause requires”).

So too here, the kind of proximate cause required for direct copyright infringement has never been based on foreseeability. Indeed, the “direct” causation formulation that *Giganews* used to define the requirement, *see* 847 F.3d at 666, is flatly inconsistent with any such approach. *Cf. Fields*, 881 F.3d at 747-48

(distinguishing “direct relationship” from mere foreseeability). Unsurprisingly, therefore, the idea of foreseeability does not appear in any of the long line of volitional-conduct cases discussed above. Quite the contrary: it was foreseeable in all those cases that users might infringe copyrights through the systems that the service providers operated. The USENET service in *Giganews* and the bulletin-board service in *Netcom* could have foreseen that their users would upload unauthorized copyrighted material. (Indeed, in *Netcom*, the service providers were specifically warned about the alleged infringements at issue. 907 F. Supp. at 1370, 1372.) And in *Fox* and *Cartoon Network*, the purpose of the DVRs was to facilitate recording of copyrighted television programs. Yet in each case, the court rejected direct liability by finding that the provider was not the most direct cause of the infringement.

There is good reason for that. As discussed above, by clearly distinguishing direct from secondary infringement, the volition rule avoids the “unreasonable liability” that would result from creating “many separate acts of infringement.” *Netcom*, 907 F. Supp. at 1369. An approach based on foreseeability—rather than on who selects the content—would collapse that difference. It would create a nebulous new line that would leave service providers guessing about what activities might transform their operations into possible direct infringement. This would undermine the clarity of a rule that has allowed online services to predictably structure their operations for decades. And it would expand direct liability in just the ways that the volition rule has always resisted.

VHT and its amici are open about their goal of exposing service providers to greater liability—even for acts of infringement that were clearly caused by third-party users. *See, e.g.*, VHT Br. at 26-28; Disney Amicus at 18-22. But that “result is unnecessary as there is already a party directly liable for causing the copies to be made.” *Netcom*, 907 F. Supp. at 1372. That was true in 1994, and it remains true today. The Court should reject this unwarranted effort to dilute the volition requirement.

CONCLUSION

Internet Association and the Computer & Communications Industry Association respectfully urge this Court to affirm the District Court’s ruling that Zillow is not directly liable for infringing the VHT images uploaded to its service in response to submissions from third-party users.

Respectfully submitted,

Dated: March 2, 2018

By: s/ Brian M. Willen

Brian M. Willen
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
1201 Avenue of the Americas, 40th Floor
New York, NY 10019-6022
Telephone: (212) 999-5800

Ryan T. O’Hollaren
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304-1050
Telephone: (650) 493-9300

Counsel of Record for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 7000 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: March 2, 2018

By: s/ Brian M. Willen

Brian M. Willen
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
1201 Avenue of the Americas, 40th Floor
New York, NY 10019-6022
Telephone: (212) 999-5800
Facsimile: (212) 999-5899

Ryan T. O'Hollaren
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304-1050
Telephone: (650) 493-9300
Facsimile: (650) 493-6811

Counsel of Record for Amicus Curiae

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 2, 2018.

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By: s/ *Brian M. Willen*
Brian M. Willen