

No. 24-171

IN THE
Supreme Court of the United States

COX COMMUNICATIONS, INC., *et al.*,

Petitioners,

v.

SONY MUSIC ENTERTAINMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF OF *AMICUS CURIAE* ALFRED C.
YEN IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

1. This Court has held that a business commits contributory copyright infringement when it “distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps to foster infringement.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005). The courts of appeals have split three ways over the scope of that ruling, developing differing standards for when it is appropriate to hold an online service provider secondarily liable for copyright infringement committed by users. Did the Fourth Circuit err in holding that a service provider can be held liable for “materially contributing” to copyright infringement merely because it knew that people were using certain accounts to infringe and did not terminate access, without proof that the service provider affirmatively fostered infringement or otherwise intended to promote it?

2. Generally, a defendant cannot be held liable as a willful violator of the law—and subject to increased penalties—without proof that it knew or recklessly disregarded a high risk that its *own* conduct was illegal. In conflict with the Eighth Circuit, the Fourth Circuit upheld an instruction allowing the jury to find willfulness if Cox knew its *subscribers’* conduct was illegal—without proof Cox knew its own conduct in not terminating them was illegal. Did the Fourth Circuit err in holding that mere knowledge of another’s direct infringement suffices to find willfulness under 17 U.S.C. § 504(c)?

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, Alfred C. Yen respectfully submits this brief *amicus curiae* in support of Petitioners Cox Communications, Inc. and CoxCom, LLC.¹

Amicus Curiae Alfred C. Yen is Professor of Law and Dean's Distinguished Scholar at Boston College Law School. Professor Yen is a co-author of the textbook Copyright Law: Essential Cases and Materials (4th Ed., West Publishing) and has written extensively on the subject of copyright law, including the proper understanding and construction of third-party liability.²

Professor Yen's sole interest in this case is the orderly and logical development of the law for the benefit of society, particularly the proper use of common law tort principles in the construction of contributory copyright liability.

1. Pursuant to Supreme Court Rule 37.2, Amicus Curiae affirms that all counsel of record have received timely notice of the intent to file this brief.

Pursuant to Supreme Court Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no person other than Amicus Curiae or his counsel made a monetary contribution intended to fund the preparation or submission of this brief.

2. See, e.g., Alfred C. Yen, *Torts and the Construction of Inducement and Contributory Liability in Amazon and Visa*, 32 Colum. J. L. & Arts 513 (2009); Alfred C. Yen, *Third Party Copyright Liability After Grokster*, 91 Minn. L. Rev. 184 (2006); Alfred C. Yen, *Sony, Tort Doctrines, and the Puzzle of Peer-to-Peer*, 55 Case W. Rsrv. L. Rev. 815 (2005); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833 (2000).

SUMMARY OF ARGUMENT

Internet service is a necessity of modern life. Individuals use the Internet to perform their jobs, get medical care, handle finances, educate themselves, communicate with loved ones, and enjoy entertainment. It is also true that individuals sometimes use the Internet to commit copyright infringement. In some cases, copyright law imposes contributory liability on those who provide internet service to infringers.³ However, the law clearly does not, and should not, impose liability on all who do so.

This Court should grant certiorari because the Fourth Circuit failed to follow the common law rules of fault-based liability that this Court has identified as controlling the law of contributory copyright liability. This error led the Fourth Circuit to impose liability on Petitioners without properly analyzing whether Petitioners were culpably at fault even though existing Supreme Court precedent requires culpable fault for the imposition of contributory copyright liability.

Furthermore, as Petitioners have already noted, the Fourth Circuit's interpretation of contributory liability conflicts with decisions from other circuits. Pet. for a Writ of Cert. 16-23, ECF No. 3. These courts may not

3. The doctrine of contributory copyright liability should be distinguished from vicarious copyright liability, which is a form of strict third-party copyright liability. See Yen, *Third Party Copyright Liability After Grokster*, *supra* note 2, at 193-211 (describing and distinguishing doctrines of third-party copyright liability). With respect to this case, the Fourth Circuit has ruled that Petitioners are not vicariously liable, and that decision is not the subject of the instant Petition for Certiorari.

have developed the law perfectly, but they have at least heeded this Court's decision to make fault a prerequisite to contributory copyright liability. Allowing the Fourth Circuit's decision to stand means that future courts will repeat its error, and the law of contributory copyright liability will break from its governing principles. It is therefore vitally important for this Court to correct the Fourth Circuit's error and provide appropriate guidance to future courts.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT INCORRECTLY CONCLUDED THAT PETITIONERS HAD CULPABLE INTENT

In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), this Court identified the principles that govern contributory copyright liability. *Grokster* considered and vacated lower court opinions granting partial summary judgment in favor of a defendant who provided file-sharing software to individuals who used it to commit copyright infringement. 545 U.S. at 919–21, 941. The Court could have reached this result by holding the defendant strictly liable for supplying file-sharing software, but the Court chose a much more limited and sensible rationale for its decision – namely fault.

Grokster rejected strict liability because “the administration of copyright law is an exercise in managing the tradeoff” between preventing copyright infringement and providing broad public access to the benefits of technology. *Id.* at 928. On the one hand, internet technology like file-sharing software posed the

risk of mass copyright infringement that might damage incentives to create. *Id.* at 929. On the other hand, strict copyright liability for providers of internet technology might stop infringement, but it could also chill the dissemination of internet technology and deprive the public of its benefits. *Id.*

Having recognized the importance of balance, *Grokster* then used “rules of fault-based liability derived from the common law” to explain when liability would be justified. *Id.* at 934–35. Because two kinds of fault-based tort liability exist (intentional torts and negligence), contributory liability would be proper only if a defendant intentionally or negligently caused others to infringe. See Mark A. Geistfeld, *Conceptualizing the Intentional Torts*, J. Tort L., Oct. 2017, at 1, 2 (“Tort law is conventionally categorized in terms of the intentional torts, negligence-based rules, and strict liability.”); Thomas C. Grey, *Accidental Torts*, 54 Vand. L. Rev. 1225, 1257 (2001) (referring to Holmes’ division of tort law into three parts: “intentional, negligence-based, and strict liability”). In *Grokster*, the defendant distributed its software “with the object of promoting its use to infringe copyright.” 545 U.S. at 936, 940 (adopting contributory liability for promotion and stating that defendants’ unlawful objective was “unmistakable”). The defendants were therefore intentional tortfeasors who deserved to be held liable for their unreasonable and culpable behavior, making summary judgment on their behalf wrong. *Id.* at 939–41.

Common law rules of fault-based liability expose the Fourth Circuit’s error. Fault-based rules of liability rest on the legal principle that one is not liable for causing harm to another unless the behavior causing the harm is

unreasonable. See Jules L. Coleman, *Legal Theory and Practice*, 83 Geo. L.J. 2579, 2591 (1995) (“To be at fault is to act in an unreasonable manner.”). Unreasonable behavior justifies liability because it establishes the defendant’s culpability. The unreasonable, culpable defendant has done something that a reasonable person would not do and therefore deserves to be held liable for the consequences of his behavior. See *Owens v. Bourns, Inc.*, 766 F.2d 145, 151 (4th Cir. 1985) (“In almost all instances, our tort law presumes that only those people who are at fault shall be held liable for harms to others.”); *Van Camp v. McAfoos*, 156 N.W.2d 878, 882 (Iowa 1968) (“Generally speaking, a tort is a wrong, and a tortious act is a wrongful act.”); Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 3 (Am. Law Inst. 2010) (defining negligence as failure to exercise reasonable care); Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 1 cmt. a (noting “clear element of wrongfulness in conduct whose very purpose is to cause harm” and that liability for harm caused by such behavior is “generally easy to justify”); Grey, *supra*, at 1228 (referring to the role of culpability in tort law).

Intentional torts and negligence express different forms of culpability. Intentional torts such as battery locate fault in a defendant’s purpose to inflict tortious injury upon another. Fault and culpability arise because it is wrong to act in hopes of injuring someone else. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 1 cmt. a (noting “clear element of wrongfulness in conduct whose very purpose is to cause harm”). In contrast, negligence finds fault in defendants who unreasonably expose potential victims to the risk of injury. Unlike an intentional tortfeasor, a negligent

defendant does not want to injure anyone. Nevertheless, the defendant is liable in tort because her actions are not reasonable under the circumstances, most likely because the risks associated with the conduct are too large given any associated beneficial consequences. *Id.* § 3 cmt. b (“A defendant is held liable for negligent conduct primarily because [his] conduct creates a risk of harm to a third party.”).

The Fourth Circuit erred by failing to analyze properly the Petitioners’ possible intent or negligence. In its opinion, the court explained that Petitioners were culpable because they provided internet service to subscribers while knowing that those subscribers would infringe. *Sony Music Ent. v. Cox Commc’ns, Inc.*, 93 F.4th 222, 236 (4th Cir. 2024). Because contributory copyright liability follows “rules of fault-based liability derived from the common law,” *Grokster*, 545 U.S. at 934–35, the Fourth Circuit can be correct only if it explained why Petitioners were intentional or negligent tortfeasors. The Fourth Circuit accomplished neither of these things because it misunderstood common law rules of fault-based liability, especially those governing intent.

A. The Fourth Circuit Adopted an Understanding of Intent Inconsistent with Common Law Rules of Fault

As a doctrinal matter, the Fourth Circuit considered the Petitioners intentional tortfeasors. In response to Petitioners’ argument that non-infringing uses associated with internet service obviated the possibility of liability, the court wrote, “[W]hat matters is not simply whether the product has some or even many non-infringing uses,

but whether the product is distributed with the *intent* to cause copyright infringement.” 93 F.4th at 236 (emphasis original). The court then stated that “supplying a product with knowledge that the recipient will use it to infringe is exactly the sort of culpable conduct sufficient for contributory infringement.” *Id.* This assertion rests on a clearly mistaken understanding of intent.

The Restatement (Third) of Torts captures the common law definition of intent:

A person acts with intent to produce a consequence if:

- (a) The person acts with the purpose of producing that consequence; or
- (b) The person acts knowing that the consequence is substantially certain to result.

Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 1.

Under subsection (a), a defendant becomes an intentional tortfeasor if he acts hoping to cause tortious injury to another. However, Petitioners did not provide internet service to their subscribers because they wanted to cause copyright infringement. Accordingly, the Fourth Circuit could properly ascribe intent to Petitioners only by finding under subsection (b) that Petitioners acted knowing that infringement was substantially certain to follow.

At first inspection, such a conclusion may seem plausible. The Fourth Circuit stated that “intent to cause infringement may be shown by ... ‘know[ledge] that infringement [was] substantially certain to result from the sale’ of internet service to a customer.” 93 F.4th at 234. The court then accepted the District Court’s finding “that the infringement notices from MarkMonitor were sufficiently detailed to notify Cox of specific instances of infringement.” *Id.* In other words, Petitioners acted with substantial certainty of infringement because Petitioners had received multiple notices of subscriber infringement. Unfortunately, the Fourth Circuit made two significant errors.

First, the court mistakenly treated the District Court’s ruling as settling the question of whether substantial certainty existed. The District Court ruled that the MarkMonitor notices sufficiently informed Petitioners about specific instances of infringement so that Petitioners could do something about them. *Sony Music Ent. v. Cox Commc’ns, Inc.*, 426 F.Supp.3d 217, 232–33 (E.D. Va. 2019) (“[T]he standard focuses on a defendant’s ability to act upon the information provided.”). Critically, the District Court did not find that Petitioners knew with substantial certainty that specific customers would infringe, nor could it do so under the facts of the case. As Petitioners note in their brief, a “graduated response program” applied to each subscriber identified by MarkMonitor, and this program apparently dissuaded 95% of those subscribers from infringing again. Pet. for a Writ of Cert. 10–11, ECF No. 3. Thus, Petitioners did not know with substantial certainty that individual subscribers identified by MarkMonitor would infringe again. At best, Petitioners knew that each such subscriber

might infringe again. However, that knowledge is clearly not substantial certainty. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 1 cmt. c (“[I]t is not sufficient that harm will probably result from the actor’s conduct; the outcome must be substantially certain to occur.”).

Second, to the extent that the Fourth Circuit imposed liability because Petitioners knew with substantial certainty that some subscribers would infringe, such reasoning disregarded the proper boundaries of intent based on substantial certainty. As the Restatement (Third) of Torts notes, “[t]he substantial-certainty definition of intent requires an appreciation of its limits.” *Id.* § 1 cmt. e. When a defendant acts hoping to cause tortious injury to another, her culpability is clear. It is simply wrong to act for the purpose of injuring another. *See id.* § 1 cmt. a (“There is a clear element of wrongfulness in conduct whose very purpose is to cause harm.”). But when a defendant acts with substantial certainty that injury will result, the case for culpability becomes complicated because a person is not necessarily culpable simply because she acts with substantial certainty that injury to another will follow.

Many reasonable and socially valuable activities carry with them the certainty of injury. For example, the operator of a railroad knows with substantial certainty that this activity will eventually cause injury to someone. The same would be true for the electric company because eventually someone will suffer an electric shock. Despite the fact that all of these activities come with substantial certainty of injury, common law rules of fault-based liability do not consider their operators intentional tortfeasors, and for good reason. *See id.* § 1 cmt. f (stating

that those who operate railroads, construct buildings, or sell knives are not intentional tortfeasors).

There is nothing culpable about the basic act of operating a railroad or power company. If the law considered those who offer these services intentional tortfeasors, they would be liable for all injuries caused by the services, even if they had done nothing wrong. Such blanket liability would be overbroad and unfair. Moreover, it would harm the public interest by potentially driving the providers of these valuable services out of business.

This does not mean, of course, that these providers are beyond the reach of tort law. All of them would face negligence liability if they conducted their activities unreasonably, perhaps by ignoring basic safety precautions. This makes sense because negligence law goes beyond the overly simplistic analysis of substantial certainty intent. Instead of imposing liability without regard to fault, negligence law requires examination of the circumstances in which a defendant acts, thereby ensuring that liability exists only when the specific context of the defendant's behavior demonstrates culpability. *See id.* § 3 (defining negligence as failure to “exercise reasonable care under *all* the circumstances” (emphasis added)).

Accordingly, a proper understanding of substantial certainty rejects its application to actors “engaging in a generally proper activity for generally proper reasons, even though the activity produces harm as an unavoidable but unwanted byproduct.” *Id.* § 1 cmt. a (rejecting overbroad application of substantial certainty). Indeed, “[Such generally proper activity] can provide an element of justification or reasonableness that is lacking for

purposeful harms.” *Id.*; *see id.* § 1 cmt. e (noting that “in many situations a defendant’s knowledge of substantially certain harms is entirely consistent with the absence of any liability in tort”). In other words, the proper analytical framework for those engaged in generally proper activities is negligence, not intentional tort. *See* Alfred C. Yen, *Third Party Copyright Liability After Grokster*, 91 Minn. L. Rev. 184, 229–39 (2006) (explaining why courts should avoid substantial certainty intent analyses in contributory copyright liability cases).

The foregoing demonstrates that the Fourth Circuit erred by applying substantial certainty intent in a case where it should not have been used. Petitioners were obviously “engaging in a generally proper activity for generally proper reasons” – namely the provision of internet services. Petitioners may have been substantially certain that continued provision of those services to certain subscribers would lead to infringement, but the benefits of this legitimate activity may have justified Petitioners’ decision to continue providing internet service to the subscribers in question. Perhaps it was reasonable for Petitioners to provide internet service to accounts on which infringement had previously taken place because terminating service would necessarily prevent those subscribers from conducting vital daily activities like work, finances, and medical care.

This does not necessarily mean that Petitioners should ultimately win this case. If the Fourth Circuit had properly reversed the District Court, it is possible that Respondents would persuade a jury that Petitioners behaved unreasonably and were therefore culpable. Nevertheless, the Fourth Circuit was obligated to let

Petitioners litigate this question instead of jumping to the conclusion that Petitioners were culpable on the basis of substantial certainty intent.

B. Supreme Court Precedent Supports the Conclusion That the Fourth Circuit Erred.

Supreme Court precedent in the area of contributory copyright liability further supports the conclusion that the Fourth Circuit misapplied common law rules of fault-based liability. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), this Court refused to hold defendant Sony contributorily liable for selling videorecorders to individuals who used them to commit copyright infringement because the videorecorders were capable of being used for non-infringing as well as infringing purposes. As was further explained in *Grokster*, imputation of culpable intent did not make sense because the existence of non-infringing uses destroyed the argument that the defendant effectively intended to cause infringement. 545 U.S. at 931–32 (“[T]he manufacturer could not be faulted solely on the basis of its distribution.”). Liability based on intent is therefore limited “to instances of more acute fault” when a defendant has acted with the purpose of causing infringement. *Id.* at 915 (stating that the doctrine adopted in Sony “limits liability to instances of more acute fault” and noting that culpable intent may exist when a defendant has taken “actions directed to promoting infringement”).

In short, this Court has rejected substantial certainty as a form of culpable intent in internet technology cases because the many proper and reasonable uses of such technology make it inappropriate to infer culpability simply because the defendant knows that distribution

of the technology will lead to infringement. Culpable intent exists only when the defendant explicitly wants infringement to occur, and that description does not apply to Petitioners.

Additionally, *Sony* and *Grokster* illustrate how limiting the application of substantial certainty advances the public interest. When, as in *Sony*, a defendant contributes to infringement without the purpose of causing infringement, this Court refused to impute intent to the defendant because, absent facts indicative of specific intent, it is reasonable to sell someone goods or services capable of infringing and non-infringing uses. *Grokster*, 545 U.S. at 931–32 (explaining that defendant Sony could not be faulted for selling videorecorders, even if Sony knew this would lead to infringement, because videorecorders are capable of commercially significant non-infringing uses). This result is fair to the defendant, and it ensures that the public enjoys the benefits associated with non-infringing uses of technology. Only when the technology is not “capable of substantial noninfringing uses,” *Sony*, 464 U.S. at 442 (stating that sale of copying equipment is not contributory infringement as long as the equipment is “capable of substantial noninfringing uses”), does this balance change because it is not reasonable (and therefore culpable) to sell technology whose overwhelming uses are infringing.

By contrast, although the *Grokster* defendants may have distributed technology capable of substantial non-infringing use, 545 U.S. at 920–22 (noting that software distributed by defendants could be used to share any type of digital file and considering defendants’ argument that software was capable of substantial non-infringing use),

they did so for the purpose of causing infringement. *Id.* at 941 (“Here, evidence of the distributors’ words and deeds going beyond distribution as such shows a purpose to cause and profit from third-party acts of copyright infringement.”). This is classic intentional tort behavior, so this Court correctly imposed liability with no need to impute intent. Such liability did relatively little harm to the public interest because similar technology could be distributed by a defendant promoting its non-infringing uses.

II. THE FOURTH CIRCUIT’S OPINION DOES NOT ESTABLISH PETITIONERS’ NEGLIGENCE

Respondent may try to salvage the Fourth Circuit’s opinion by arguing that the opinion, although addressed to intent, actually established Petitioners’ negligence. This argument is also demonstrably false because a finding of material contribution alone cannot support negligence, even when a defendant knows with substantial certainty that providing internet service will lead to infringement.

The Fourth Circuit found against Petitioners because “sufficient evidence supported a finding that Cox materially contributed to its subscribers’ direct infringement of Plaintiffs’ copyrights.” 93 F.4th at 235. Thus, if the jury believed that Petitioners provided internet service with sufficient knowledge of infringement, failing to take the precaution of terminating the subscribers’ accounts arguably made Petitioners negligently culpable. This argument fails because neither the Fourth Circuit nor District Court correctly applied basic negligence principles.

The definition of negligence is well known. A defendant is negligent if he does not behave as a reasonable person in the same or similar circumstances. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 3 (defining negligence as failure to exercise reasonable care under all the circumstances). It is therefore not enough for a plaintiff to identify a precaution that the defendant could have taken to prevent a harm. A defendant's failure to take a precaution is negligent only if the circumstances in which the defendant acted made the failure to take the precaution unreasonable.

This requirement is no minor detail. Defendants often act in circumstances where precaution against harm includes undesirable consequences. A given precaution may involve great cost or other adverse consequences that outweigh the risk of the harm prevented. Negligence therefore requires consideration of the entire circumstances surrounding a defendant's behavior to balance the costs and harms associated with precautions. *See id.* (emphasizing reasonable care under *all* the circumstances).

The Fourth Circuit overlooked this fundamental principle of negligence law. By accepting liability on the basis of knowledge and material contribution, the court failed to consider the consequences of denying internet service to Petitioners' infringing subscribers. The harm of copyright infringement is meaningful, but before a valid conclusion of negligence can be reached, the jury must consider whether preventing that harm is sufficiently important to justify the consequences of missing job-related emails and virtual conferences, losing the ability to handle one's finances, and foregoing medical care.

The Fourth Circuit knew that the district court instructed the jury to find Petitioners liable if it found that Petitioners “induced, caused, or materially contributed to the infringing activity.” 93 F.4th at 235 n.4 (quoting J.A. 801). And, as noted above, the Fourth Circuit affirmed the district court because “sufficient evidence supported a finding that Cox materially contributed to its subscribers’ direct infringement of Plaintiffs’ copyrights.” *Id.* at 235. Assuming for the sake of argument that such evidence existed, considering it sufficient to establish negligence is clear error. Nothing in the district court’s instructions told the jury to consider whether other consequences associated with terminating internet service could justify Petitioners’ failure to take the desired precaution. Accordingly, there is no reason to think that the jury properly deliberated the question of Petitioners’ negligence and no reason for the Fourth Circuit to affirm the district court’s decision about contributory liability.

CONCLUSION

The Fourth Circuit’s error opens the door to overbroad and vexatious litigation against defendants who lack culpability. In the case at hand, Petitioners’ knowledge was supposedly established by notices received about infringement. 93 F.4th at 228–29. Petitioners became liable because the jury understandably considered internet service material to the commission of online infringement. *Id.* at 235 (stating that “[t]he district court declined to disturb the jury’s contributory liability verdict because sufficient evidence supported a finding that Cox materially contributed to its subscribers’ direct infringement of Plaintiffs’ copyrights”). In other words, the Fourth Circuit accepted the principle that the provider of any material

service could be made liable for infringement simply by sending the provider enough notices of infringement. Once those notices are received, continuation of service would render the provider liable as an intentional tortfeasor.

Although perhaps superficially attractive, this logic has dangerous consequences. Many potential defendants provide services to individuals who may use that service to infringe. Customers use electricity to commit infringement because electricity is necessary to run computers used for infringement. Users store infringing files on the servers of cloud storage companies. People who get regular deliveries of printer ink sometimes use the ink to print infringing copies of copyrighted works. The Fourth Circuit's logic makes all of these service providers culpably responsible for infringement as long as they receive the same kinds of notice sent to Petitioners and continue providing service.

Notification that a specific customer commits infringement does not make power providers, cloud storage companies, or ink providers culpably responsible for that infringement if they continue to provide service. A court must consider the amount and value of infringement against the consequences of terminating service before concluding that any of these potential defendants is culpable. That is why sending notices to the power company about customer infringement would not create liability for failing to suspend electrical service. Turning off the power means that the customer's food will rot, life critical equipment will not work, and her heat may fail. See *Life Sustaining Equipment*, nationalgrid, <https://www.nationalgridus.com/MA-Home/Outage-Central/Life-Sustaining-Equipment> (last visited Aug, 29, 2024) (recognizing danger of electric power outages

associated with life sustaining equipment). Imposing such consequences on someone precipitously would not be reasonable. These harms must be considered and balanced against the benefit of stopping copyright infringement before a finding of culpability can be made.

The Fourth Circuit's error is all the more concerning because other Circuits have apparently and correctly made fault a prerequisite for contributory copyright liability. For example, the Ninth Circuit conditions contributory liability upon a defendant's knowledge of infringement and failure to take "simple measures" that could prevent infringement. *See, e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007). Given Ninth Circuit's further elaboration that simple measures are "reasonable and feasible," *Id.* at 1176–77, it is clear that the Ninth Circuit uses simple measures to test whether a defendant is culpably at fault for failing to prevent infringement. Additionally, the Second Circuit has cited *Sony* and *Grokster* for the proposition that contributory liability arises when a defendant distributes technology "with the object of promoting its use to infringe copyright." *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 100 (2d Cir. 2016) (quoting *Grokster*, 545 U.S. at 919). Although this explanation of contributory liability may not be as clearly fault-based as the Ninth Circuit's, it clearly takes seriously the implications of *Sony* and *Grokster* in a way that the Fourth Circuit has not.

It is therefore vital for this Court to correct the Fourth Circuit's error. Failure to do so will make the opinion below binding in the Fourth Circuit and risk the repetition of its error in other Circuits. This would mean that, contrary to Supreme Court precedent, common

law rules of fault-based liability would no longer control contributory liability, and society would suffer because the balance struck by *Sony* and *Grokster* has been destroyed.

Amicus therefore urges this Court to grant the Petition for writ of certiorari.

DATED: September 12, 2024.

Respectfully submitted,

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