

IN THE
Supreme Court of the United States -

COMMIL USA, LLC,

Petitioner,

v.

CISCO SYSTEMS, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

**BRIEF OF PUBLIC KNOWLEDGE, THE R STREET
INSTITUTE, THE AMERICAN LIBRARY ASSOCIATION,
THE ASSOCIATION OF RESEARCH LIBRARIES, THE
ASSOCIATION OF COLLEGE AND RESEARCH
LIBRARIES, AND THE CENTER FOR DEMOCRACY
AND TECHNOLOGY AS *AMICI CURIAE* IN SUPPORT
OF RESPONDENT**

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INTEREST OF *AMICI CURIAE*

The *amici curiae* on this brief are a diverse group of organizations spanning multiple perspectives and viewpoints. All of the groups share a common interest in a balanced copyright system, calibrated to “promote the Progress of Science and the useful Arts,” as the United States Constitution directs.¹

Public Knowledge is a non-profit organization that is dedicated to preserving the openness of the Internet and the public’s access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. As part of this mission, Public Knowledge advocates on behalf of the public interest for balanced patent and copyright systems, particularly with respect to new and emerging technologies.

Public Knowledge has previously served as *amicus* in key patent and copyright cases. *E.g.*, *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347 (2014); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014); *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014); *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).

The R Street Institute is a non-profit, non-partisan public-policy research organization. R Street’s mission

¹Pursuant to Supreme Court Rule 37(3)(a), all parties received appropriate notice of and consented to the filing of this brief. Pursuant to Rule 37(6), no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support Internet economic growth and individual liberty. R Street's particular focus on Internet law and policy is one of offering research and analysis that show the advantages of a more market-oriented society and of more effective, more efficient laws and regulations that protect freedom of expression and privacy.

The American Library Association ("ALA") is a non-profit professional organization of more than 60,000 librarians dedicated to providing and improving library services and promoting the public interest in a free and open information society. The Association of College and Research Libraries, the largest division of the ALA, is a professional association of academic and research librarians. The Association of Research Libraries ("ARL") is a nonprofit organization of 125 research libraries in North America, including university, public, government and national libraries. Collectively, these three associations represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel.

The Center for Democracy and Technology ("CDT") is a non-profit public interest and Internet policy organization. CDT represents the public's interest in an open, innovative and decentralized Internet, reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT has participated in a broad range of cases and regulatory proceedings applying copyright law to the Internet and other emerging technologies.

SUMMARY OF ARGUMENT

Inducement of infringement, the doctrine central to this case, is not unique to patent law: it is found in copyright as well. The two systems, copyright and patent, share a “historic kinship,” deriving from their shared purpose, defined by the Constitution, “to promote the Progress of Science and the useful Arts.” And their respective doctrines of inducement are intertwined as well, with inducement of copyright infringement originating from an analogy to patent law.

In view of this close relationship, it behooves this Court, as it considers the law of patent inducement, to ask how that doctrine has been applied in the copyright context. The answer is clear: copyright inducement requires a showing of culpable conduct demonstrating an intent to induce acts known to be infringing. Mere knowledge or notice of possible infringement does not suffice to prove inducement.

Such a clear statement of the intent requirement for proving copyright inducement should apply correspondingly to the patent context—indeed the Court has drawn such an analogy in the past. Yet petitioner Commil takes a far-reaching position beyond the original question presented, contending for the first time that inducement liability should attach upon mere notice of possible infringement. That view has been expressly disfavored in copyright, and the Court should disfavor it in patent as well.

Copyright law mandates this particular level of intent and disfavors Commil’s view for at least three reasons.

First, the intent requirement is mandated by the Constitution. Copyrights, to promote progress, must be care-

fully cabined so as not to reach beyond the public interest. In particular, future technological innovation must be balanced against protection of existing rights, and the intent level for inducement strongly affects that balance. Thus, this Court concluded that the balance would be struck only if inducement liability required a showing of “purposeful, culpable expression and conduct.”

Second, a lower intent requirement cannot be squared with other secondary liability doctrines of copyright. Under current copyright law, a distributor of products that might be used for infringement may enjoy a safe harbor from contributory liability if the products have “substantial noninfringing uses.” Similarly, one may not be held vicariously liable for infringement if one lacks a “right and ability to supervise” a direct infringer’s actions. These exceptions to secondary liability might be rendered ineffectual, if inducement liability could attach upon mere notice of a single instance of direct infringement.

Third, the intent requirement ensures the continued progress of technological innovation. If inducement liability could arise merely upon receipt of a letter from an intellectual property right holder—as Commil desires—then technologists and companies would face such a risk of being inundated with inducement liability demands that they might be dissuaded from introducing new products and services to market.

It certainly would be a mistake to draw the rules of copyright inducement in ways that would shut out progress and innovation. It would be a mistake to do so in patent law as well. The Court should reject Commil’s proposals to weaken the laws of inducement liability, and accordingly affirm the Court of Appeals.

ARGUMENT

I. BECAUSE COPYRIGHT AND PATENT SHARE A HISTORIC KINSHIP, THIS COURT MUST CONSIDER THIS CASE'S IMPLICATIONS FOR COPYRIGHT LAW

Though the present case deals exclusively with patent law, this Court must consider implications with respect to copyright law as well. Copyright and patent are closely analogous in many respects, as this Court and others have frequently recognized, and decisions in one field of jurisprudence are influentially cited in the other.

Copyright and patent law share a “historic kinship.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 440 (1984). That kinship arises from their common foundation in the United States Constitution, which endows Congress with the power “to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8, cl. 8; see Dotan Oliar, *Making Sense of the Intellectual Property Clause*, 84 *Geo. L.J.* 1771, 1816 (2006) (explaining that the clause “was intended to limit Congress’s intellectual property power”).

This provision mandates, identically for both fields of law, a balance between the holders of those exclusive rights and the public interest in free competition and the public domain, as observed in numerous decisions of this Court.² “The copyright law, like the patent statutes,

²For patent cases, see, for example, *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (“From their inception, the federal patent laws have embodied a careful balance . . .”). For copy-

makes reward to the owner a secondary consideration,” the primary consideration being “the general benefits derived by the public from the labors of authors.” *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); *see also Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 657 (1834) (“In what respect does the right of an author differ from that of an individual who has invented a most useful and valuable machine?”).

The kinship in origin has led to kinship in doctrine. For example, the doctrine of copyright misuse is “derived from the long-standing existence of such a defense in patent litigation.” *See, e.g., Apple Inc. v. Pystar Corp.*, 658 F.3d 1150, 1157 (9th Cir. 2011). Similarly, the copyright first sale doctrine, which entitles an owner of a copy of a work “to sell or otherwise dispose of the possession of that copy,” precisely mirrors the patent doctrine of exhaustion. 17 U.S.C. § 109(a) (2012) (copyright first sale); *see Quanta Computer, Inc. v. LG Elecs. Corp.*, 553 U.S. 617, 625 (2008) (patent exhaustion); *LifeScan Scot., Ltd. v. Shasta Techs., LLC*, 734 F.3d 1361, 1376 (Fed. Cir. 2013) (noting the “common policies underlying patent exhaustion and the first sale doctrine”). Commentators have similarly latched onto the “shared theoretical underpinnings” of copyright and patent to recommend sharing of doctrines. Maureen O’Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 Colum. L. Rev. 1177, 1181

right cases, *see, for example, Sony*, 464 U.S. at 429 (describing the “difficult balance between the interests of authors and inventors . . . on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand”); *Harper & Row Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 545–46 (1985); *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575–76 (1994) (noting “the inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it”).

(2000); *see also* Simone A. Rose, *On Purple Pills, Stem Cells, and Other Market Failures: A Case for a Limited Compulsory Licensing Scheme for Patent Property*, 48 Howard L.J. 579, 622 (2005) (recommending a patent compulsory licensing system modeled on a similar copyright system).

And, most relevant here, doctrines of indirect infringement are directly shared between copyright and patent law. The *Sony* rule that “sale of a ‘staple article or commodity of commerce suitable for substantial noninfringing use’ is not contributory infringement” for copyright purposes is drawn directly from the Patent Act. *Sony*, 464 U.S. at 440 (quoting 35 U.S.C. § 271(c) (2012)). “*Sony* took the staple-article doctrine of patent law as a model for its copyright safe-harbor rule.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936 (2005). Similarly, this Court found the patent inducement rule of 35 U.S.C. § 271(b) “a sensible one for copyright,” explicitly mirroring that doctrine into copyright law in *Grokster*. *See id.* at 936–37; *see also Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2066–67, 2070 (2011) (citing *Grokster*).

Other courts have followed suit. Patent cases frequently rely on copyright doctrine. *See, e.g., Promega Corp. v. Life Techs. Corp.*, 773 F.3d 1338, 1358–59 & n.2 (Fed. Cir. 2014); *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1295 (Fed. Cir. 2011); *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1305–06 (Fed. Cir. 2006). Copyright cases frequently rely on patent doctrine as well. *See, e.g., Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 979–80 (9th Cir. 2011); *Syncom Sys., Inc. v. Novelis Corp.*, 581 F.3d 431, 436 n.2 (6th Cir. 2009).

Certainly copyright and patent law “are not identical twins,” *Sony*, 464 U.S. at 439 n.20, but decisions in one field will likely affect the other. This is especially so with respect to inducement doctrine, which copyright law directly adapted from patents. In future copyright cases, courts and parties will cite any decision resulting from the present case—indeed, Commil and the government already cite a copyright decision, *Grokster*, in this patent case. *See* Pet’r Br. 35, Jan. 20, 2015; Gov’t Br. 33, Jan. 27, 2015 (noting that “principles of secondary liability serve an analogous function” between patent and copyright). Thus, as this Court decides the present case on inducement of patent infringement, it must remain mindful of the effects its decision will have on copyright law.

II. COPYRIGHT INDUCEMENT REQUIRES KNOWLEDGE THAT THE INDUCED ACTS ARE INFRINGING, NOT MERE NOTICE OF INFRINGEMENT

While the question presented deals specifically with the relevance of a good faith belief in invalidity, Commil and the government surprisingly broaden their positions to argue that no good faith belief *at all* is relevant to the intent requirement of inducement. *See* Pet’r Br. 21; Gov’t Br. 9. Commil all but calls for elimination of the scienter requirement entirely, such that the unilateral act of the patentee in notifying a party of a patent can give rise to inducement liability. *See* Pet’r Br. 16.

Commil’s position is thus irreconcilable with the clear standard for copyright inducement, namely that one must display culpable intent to cause acts of infringement, and that mere notice of infringement is not sufficient. This scienter level is dictated by the very constitutional pro-

vision that enables copyrights and patents to exist. The strict test for copyright inducement sets the backdrop for assessing the parallel test in patent law.

A. *GROKSTER* AND ITS PROGENY REQUIRE INTENT TO COMMIT CULPABLE ACTS TO INDUCE INFRINGEMENT

Grokster states in no uncertain terms that inducement of infringement requires knowledge of the infringing nature of the induced acts. Liability for inducement may only lie, said this Court, when there is “clear expression or other affirmative steps taken to foster infringement.” *Grokster*, 545 U.S. at 937. “The inducement rule,” the Court emphasized, “premises liability on *purposeful, culpable* expression and conduct.” *Id.* (emphasis added). The Court characterized its inducement rule as based on “rules of fault-based liability derived from the common law,” indicating that actual *fault* was a prerequisite. *Id.* at 934–35. Thus, inducement requires a showing of intent including knowledge that the induced acts will actually be acts of infringement.

Indeed, *Grokster* specifically states that a party’s having only notice of possible infringement would not suffice to find that party liable for inducement. In seeming anticipation of Commil’s arguments to the contrary, the Court said, “mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability.” *Id.* at 937; *cf.* Pet’r Br. 16 (“[O]nce the inducer has knowledge of the patent and its potential relevance . . . the intent requirement is satisfied.”).

Similarly, *Grokster* observed that the doctrine of secondary liability generally “limits liability to instances of

more acute fault than the mere understanding that some of one's products will be misused." 545 U.S. at 932–33. *Grokster* thus rejects the view that inducement requires merely "proving that the inducer knew about the patent and was aware of the [rightsholder]'s view that the induced conduct is infringing," Gov't Br. 9.

Subsequent cases have confirmed that inducement of copyright infringement requires intent to cause actual infringement, not mere notice of possible infringement. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 (9th Cir. 2007) ("*Grokster* tells us that contribution to infringement must be intentional for liability to arise."); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 800–01 (9th Cir. 2007) ("Because Perfect 10 alleges no 'affirmative steps taken to foster infringement' . . . , its claim is premised on a fundamental misreading of *Grokster* that would render the concept of 'inducement' virtually meaningless."); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1032 (9th Cir. 2013) (observing that an element of the *Grokster* inducement test is "an object of promoting its use to infringe copyright"); see also *Viacom Int'l, Inc. v. Youtube, Inc.*, 676 F.3d 19, 38 (2d Cir. 2012) (suggesting that *Grokster*-level intent might "rise to the level" of a "right and ability to control" under § 512(c)(1)(b)).

Accordingly, in the context of copyright law, inducement of infringement requires a strong showing that the accused inducer intended to bring about acts known to be infringing. Mere knowledge of the possibility of infringement would not suffice to prove inducement. This strict rule of copyright inducement should militate in favor of a strict rule for inducement generally.

B. THE INTENT REQUIREMENT FOLLOWS FROM THE CONSTITUTIONAL MANDATE FOR BALANCED COPYRIGHT LAW AND PATENT LAW

The rule that copyright inducement requires proof of intent beyond mere knowledge of possible infringement is grounded in the Constitution. Congress is empowered to grant copyrights and patents only to the extent that the exclusive rights endowed will “promote the Progress of Science and the useful Arts.” U.S. Const. art. I, § 8, cl. 8. The intent requirement of *Grokster* derives from principles flowing from this constitutional provision.

This Court has frequently observed that the constitutional provision for patents and copyrights mandates that those intellectual property rights be a “limited grant . . . by which an important public purpose may be achieved,” namely “to motivate the creative activity of authors and inventors by provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” *Sony*, 464 U.S. at 429; *see also Harper & Row Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 545 (1985) (agreeing that “copyright is intended to increase and not to impede the harvest of knowledge”); *Paramount Pictures, Inc.*, 334 U.S. at 158 (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.” (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932))); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 Or. L. Rev. 19, 31 (1996) (“Copyright is said to be a bargain between the public and copyright holders.”). This means that intellectual property laws must balance between what may be exclusively

owned and what must be left available to the public; such laws “must determine not only what is protected, but also what is free for all to use.” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989).

Grokster was guided by this principle of balance in devising the intent requirement for inducement of copyright infringement. The Court began by recognizing that the relevant balance was between those who held intellectual property rights and those who made technologies that might or might not infringe such rights. “The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff.” *Grokster*, 545 U.S. at 928 (citing *Sony*, 464 U.S. at 442). The Court thus remained “mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential.” *Id.* at 937; *see also* Jane C. Ginsburg & Sam Ricketson, *Inducers and Authorisers: A Comparison of the US Supreme Court’s Grokster decision and the Australian Federal Court’s KaZaa ruling*, 11 *Media & Arts L. Rev.* 1, 1 (2006) (describing *Grokster* as a “struggle to balance meaningful protection for works of authorship against the progress of technological innovation”).

The requirement of “purposeful, culpable expression and conduct” for inducement liability, *Grokster*, 545 U.S. at 937, was designed to maintain that balance. Because neither “mere knowledge of infringing potential or actual infringing uses” nor “ordinary acts incident to product distribution” could be swept up within *Grokster*’s inducement rule, the Court concluded that the rule “does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.” *Id.*

Accordingly, the clear intent requirement laid out by *Grokster* not only is well established in law, but also is constitutionally required. Patent law, as explained above, is limited by the Constitution in the same manner as copyright law. *See supra* p. 5. Insofar as Commil and the Solicitor General ask this Court for a lower level of requisite intent for proving inducement, *see* Pet'r Br. 16; Gov't Br. 9, that request is constitutionally suspect.

III. COMMIL'S PROPOSED STANDARD, IF APPLIED TO COPYRIGHT INDUCEMENT, WOULD HAVE NEGATIVE PRACTICAL CONSEQUENCES

If mere notice of infringement could satisfy the scienter requirement of copyright inducement, analogous to what Commil proposes for patent inducement, it would unexpectedly put myriad product and service providers at risk for copyright liability, with its powerful attendant remedies such as injunctions and statutory damages. *See* 17 U.S.C. §§ 502(a), 504(c). This would have at least two seriously problematic consequences. First, it would swallow up key exceptions and defenses to secondary liability, in particular *Sony's* safe harbor for articles with substantial noninfringing uses. Second, it would disrupt copyright's careful balance to the detriment of innovators creating valuable new products and services, thus impeding innovation.

A. THE "MERE NOTICE OF INFRINGEMENT" STANDARD IS INCOMPATIBLE WITH OTHER FORMS OF SECONDARY COPYRIGHT LIABILITY

Besides inducement, copyright law includes two forms of secondary liability: contributory infringement

and vicarious liability, each with its own specific limitations and exceptions. See Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §§ 12.04[2]–[4] (2014). But if mere notice of infringement could give rise to inducement liability, then those judiciously crafted limitations and exceptions would be swept away, as explained below.

1. Commil’s “mere notice” standard would eviscerate a powerful exception to contributory copyright infringement, the substantial noninfringing uses test. Contributory infringement occurs when one “with knowledge of the infringing activity . . . materially contributes to the infringing conduct of another,” *Sony*, 464 U.S. at 487, such as by “provision of machinery or goods that facilitate the infringement,” *Faulkner v. Nat’l Geographic Soc’y*, 211 F. Supp. 2d 450, 473 (S.D.N.Y. 2002).

But there is an important exception to contributory infringement: such liability may not arise solely based on a product that is “widely used, for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.” *Sony*, 464 U.S. at 442. Much like the *Grokster* intent standard, see Section II.B *supra* p. 11, this Court arrived at the “substantial noninfringing uses” exception based on a need to “strike a balance between a copyright holder’s legitimate demand . . . , and the rights of others freely to engage in substantially unrelated areas of commerce.” *Sony*, 464 U.S. at 442.

Since the Betamax videocassette recorders in *Sony* were capable of such substantial noninfringing uses, they fell within the safe harbor and thus could not give rise to contributory infringement. See *id.* at 456. But if mere notice of infringement could satisfy the scienter element

of inducement, then the opposite result would have obtained. Sony obviously satisfied the device distribution requirement of *Grokster*'s inducement test. See 545 U.S. at 936. And Sony had "constructive knowledge" of infringement. *Sony*, 464 U.S. at 426. Thus, under Commil's proposed formulation of inducement, distribution of a product with potential for even minimal infringing use could give rise to liability for copyright infringement, despite this Court's specific conclusion to the contrary.

Besides creating this contradiction in the law, Commil's "mere notice" standard, if applied to *Sony*, would have caused a poor result for the public. The "substantial noninfringing uses" test "leaves breathing room for innovation and a vigorous commerce," *Grokster*, 545 U.S. at 933, permitting for new industries to flourish, such as the video rental market that arose following the videocassette recorder. See Section III.B *infra* p. 17. By cutting off this safe harbor, Commil's inducement standard would cut off the public from innovation and opportunities.

2. Commil's proposed rule also threatens the vicarious liability doctrine, creating infringement liability where courts previously and correctly found none. Generally, one who is "profiting from direct infringement while declining to exercise a right to stop or limit it" is vicariously liable for copyright infringement. See *Grokster*, 545 U.S. at 930; *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (identifying elements of vicarious liability as "right and ability to supervise" and "direct financial interest").

Sony also demonstrates how a defendant who was correctly held not liable for vicarious infringement would

likely have been deemed an inducer under the “mere notice of infringement” standard. *Sony* was held not vicariously liable because it was not in a position to control the use of copyrighted works by others. *See Sony*, 464 U.S. at 437. But, as explained above, the act of distributing the devices with notice that those devices were sometimes used for infringement would be sufficient to find inducement liability under a “mere notice” standard. Thus, with *Sony*, and generally with cases of device distribution, the distributor would bear liability for inducement even where the distributor lacks control over the infringement and therefore could not be vicariously liable.

Contributory infringement and vicarious liability thus both include particular exceptions which limit the doctrines’ scope. Opening up inducement liability in copyright to a “mere notice of infringement” standard, as *Comil* proposes for patent, would effectively erase these exceptions, creating liability in situations where courts have previously decided that no liability should occur.

B. AUTOMATIC INDUCEMENT LIABILITY UPON MERE NOTICE OF INFRINGEMENT WOULD STIFLE INNOVATION

The *Grokster* intent requirement for copyright inducement does not only maintain doctrinal consistency and constitutional validity: it has the practical effect of protecting the most valuable and innovative technologies that the public enjoys today. But had the much lower “mere notice of infringement” standard held sway, many of those technologies would likely never have emerged, having been crushed under the weight of inducement liability. This is so for at least two reasons.

1. By effectively overriding the “substantial noninfringing uses” safe harbor of *Sony*, Commil’s “mere notice” standard would asphyxiate the “breathing room for innovation and a vigorous commerce,” this Court’s stated rationale behind *Sony*’s safe harbor. *Grokster*, 545 U.S. at 933 (citing *Sony*, 464 U.S. at 442).

a. The substantial noninfringing uses doctrine promotes not only the devices that fall within the safe harbor, but also a vast and unexpected range of markets and innovations that follow on because of those devices. To eviscerate that doctrine with an overexpansive inducement regime would be to deny the public all of those follow-on benefits. The very technology at issue in *Sony*, the video-cassette recorder, is a prime example of this.

Sony allowed for continued sales of VCRs by holding that their distribution would not give rise to contributory infringement, because the device had substantial noninfringing uses. *See* 464 U.S. at 456. But the VCR was not simply an exciting new product: it gave birth to the video rental and sales market. In 1985—one year after *Sony* was decided—revenues from those rentals and sales were estimated at \$3.3 billion, nearly outstripping the estimated \$3.7 billion in movie box office revenues. Aljean Harmetz, *Big Gains for Video Cassettes*, N.Y. Times, Aug. 21, 1985, C13. The movie industry, who had sought to blockade the VCR, now profited from it.

Besides creating video rental and sales markets, the VCR engendered innovation in media formats such as DVD and Blu-Ray, and “opened up new opportunities for classroom teachers.” *See* Lori Widzinski, “Step Away from the Machine”: A Look at Our Collective Past, 58 *Libr. Trends* 358, 370–74 (2010), available at URL *supra*

p. vii. These “unanticipated future benefits,” whose value will “often exceed the immediate value of most new technologies,” are the natural result of the *Sony* safe harbor. See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 *Stan. L. Rev.* 1345, 1387 (2004). Were that safe harbor overtaken by an overbroad inducement test, these benefits may be delayed or even eliminated entirely.

b. This fact pattern was not unique to the VCR. Many new technologies open up new and unpredictable opportunities, but only because those technologies are sheltered within *Sony*’s safe harbor. As one scholar notes, new technologies often suffer from “innovation asymmetry,” where infringing uses are “immediately apparent” but noninfringing uses are “less tangible and less apparent at the onset.” Michael A. Carrier, *Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law* 128 (2009).

For example, digital music players (such as Apple’s iPod) can be used for infringing and noninfringing purposes. When the iPod was first introduced, digital music sales were far from prevalent, and certainly some iPod users infringed copyright. Three years later, lawmakers introduced legislation to augment the scope of copyright liability. See S. 2560, 108th Cong. (2004). The legislation was summarily rejected because it might have deemed such music players infringing contraband. See Declan McCullagh, *Senate Bill Would Ban P2P Networks*, CNet News (June 23, 2004), URL *supra* p. vi. But had it passed, it would have extinguished not only the market for such devices, but likely also the now \$5.9 billion digital music industry. *IFPI Digital Music Report 2014: Lighting Up New Markets* 6 (2014), URL *supra* p. vi.

The list of innovations that might never have been is extensive: TiVo and Kindle, YouTube and Facebook, iPhone and Android—all general-purpose products capable of infringing as well as innumerable noninfringing uses. *See, e.g.,* Veronica Corsaro, *From Betamax to YouTube: How Sony Corporation of America v. Universal City Studios, Inc. Could Still Be a Standard for New Technology*, 64 Fed. Comm. L.J. 449, 450 (2012), available at URL *supra* p. v. The “mere notice” standard for inducement, because it would override the *Sony* safe harbor, puts not only these innovations at risk; it puts at risk all future innovations that depended on those first steps.³

2. Under the threat of crushing copyright liability, technology companies would be less likely to invest time and resources in developing new products. Computer technology frequently involves some degree of copying, making many of such devices capable of both infringing and noninfringing uses. *See* 17 U.S.C. § 117(a) (special exception to copyright for computer copying); Brief of Intel Corp. as Amicus Curiae at 22, *Grokster* (Mar. 1, 2005) (No. 04-480) [hereinafter Intel Brief], available at URL *supra* p. v (“Digital technologies are by their nature copying technologies.”); Lemley & Reese, *supra*, at 1355.

If mere notice of infringement was sufficient scienter for inducement, then not one of those technologies could be distributed without running a risk of inducement liability arising from a single notice letter. With a standard that so overwhelmingly favors copyright owners, technology companies would be unable to create new products

³*Cf. KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 427 (2007) (noting that “progress beginning from higher levels of achievement is expected in the normal course”).

without permission from every author whose work might be used with the technology by any user. The resulting thicket of potential copyright liability closely parallels the thicket of software patents that affects complex, multifunctional computing devices,⁴ suggesting yet another reason why this Court should be wary of opening up inducement liability as Commil seeks, in either domain of intellectual property.

Thus, in briefing this Court on *Grokster*, technology companies large and small warned that overbroad secondary liability “may cause innovative companies . . . to abandon promising projects and deprive the public of the benefits of innovation.” Brief of Amici Curiae Emerging Technology Companies at 17, *Grokster* (Mar. 1, 2005) (No. 04-480), URL *supra* p. v; *accord* Intel Brief, *supra*, at 5 (Intel would “have no choice but to withhold from the market socially and economically useful products”).

The same atmosphere of increased financial and legal risk that would deter innovation by existing companies and startups would also deter venture capital and other financial investments in this type of innovation. *See Carrier, supra*, at 133. This entirely rational fear of overwhelming liability would exert a chilling effect on investment decisions, and, in turn, on innovation. *See id.* Entrepreneurs, innovators, and the public would all lose.

“If innovation is constantly checked by this uncertain and unlimited liability, we will have much less vibrant innovation and much less creativity.” Lawrence Lessig,

⁴*See* RPX Corp., Registration Statement (Form S-1), at 55 (Sept. 2, 2011), *available at* URL *supra* p. vii (estimating that “there are more than 250,000 active patents relevant to today’s smartphones”).

Free Culture 192 (2004). The “mere notice of infringement” standard of inducement that Commil urges would create exactly this uncertain and unlimited liability, denying the public that vibrant innovation and creativity in the process. That is why this Court decidedly rejected such a standard in *Grokster*, and it is why this Court should decidedly reject it now.

* * *

It is an oft-cited saying of Justice Holmes, that “a page of history is worth a volume of logic.” *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). Perhaps, in the present case about inducement of patent infringement, a page of copyright law may serve a similar purpose. Copyright law teaches the importance, noted by the Framers themselves, of a balanced system that works primarily toward the public good rather than private reward. Copyright law instructs that all of its doctrines, including that of inducement liability, must reach toward that end of balance and public advancement. Copyright law warns of the dangers of widening the net of infringement, which may unintentionally snare new technologies and innovations, stifling them before they can grow into beneficial fixtures of the consumer economy.

These lessons can be applied to patent law, and they should be applied to patent law. Patents, just like copyrights, must serve that same purpose of advancing the public interest, and must manage that same balance. Taking a page from the doctrine of copyright inducement, this Court should find that only a clear, strong test of intent as elucidated in *Grokster* will suffice to satisfy constitutional requirements, policy interests, and public advancement. It should accordingly affirm the Court of Appeals.

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Appeals.

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