

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 16-2825(L) Caption [use short title]

Motion for: Leave to file amicus brief in support of BWP Media USA, Inc. v. Polyvore, Inc.
Polyvore, Inc.

Set forth below precise, complete statement of relief sought:
Leave to file amicus curiae brief on behalf
of Electronic Frontier Foundation, Public
Knowledge and Center for Democracy and
Technology

Electronic Frontier Foundation, Public Knowledge
& Center for Democracy and Technology
MOVING PARTY: Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent
OPPOSING PARTY: None

MOVING ATTORNEY: Mitchell L. Stoltz OPPOSING ATTORNEY: None
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Court-Judge/Agency appealed from: SDNY (New York City) Hon. Ronnie Abrams

Please check appropriate boxes:
Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain): _____
Opposing counsel's position on motion:
 Unopposed Opposed Don't Know
Does opposing counsel intend to file a response:
 Yes No Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:
Has request for relief been made below? Yes No
Has this relief been previously sought in this Court? Yes No
Requested return date and explanation of emergency: _____

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)
Has argument date of appeal been set? Yes No If yes, enter date: _____

Signature of Moving Attorney: /s/ Mitchell L. Stoltz Date: February 21, 2017 Service by: CM/ECF Other [Attach proof of service]

16-2825(L)

16-2992 (XAP)

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

BWP MEDIA USA INC., DBA PACIFIC COAST NEWS, PACIFIC COAST NEWS,
NATIONAL PHOTO GROUP, LLC

PLAINTIFFS-APPELLANTS-CROSS-APPELLEES,

v.

POLYVORE, INC.

DEFENDANT-APPELLEE-CROSS-APPELLANT.

On Appeal From The United States District Court
for the Southern District of New York, Case No. 13-cv-7867
Honorable Ronnie Abrams, United States District Judge

**MOTION OF THE ELECTRONIC FRONTIER FOUNDATION, CENTER FOR
DEMOCRACY AND TECHNOLOGY, AND PUBLIC KNOWLEDGE FOR
LEAVE TO FILE BRIEF *AMICI CURIAE***

February 21, 2017

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Center for Democracy and Technology states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Public Knowledge states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

Dated: February 21, 2017

/s/ Mitchell L. Stoltz

Mitchell L Stoltz

**MOTION OF THE ELECTRONIC FRONTIER FOUNDATION,
CENTER FOR DEMOCRACY AND TECHNOLOGY, AND PUBLIC
KNOWLEDGE FOR LEAVE TO FILE BRIEF AMICI CURIAE**

Pursuant to Federal Rule of Appellate Procedure 29(b), the Electronic Frontier Foundation (“EFF”), Center for Democracy and Technology (“CDT”) and Public Knowledge (“PK”) respectfully move for leave to file the attached Brief Amicus Curiae in Support of Defendant-Appellee-Cross Appellant Polyvore, Inc. EFF has notified counsel for all parties of its intention to file this brief. Defendant-Appellee-Cross Appellant Polyvore, Inc. (“Polyvore”) consents to the filing. Counsel for *amici* made several attempts to contact counsel for Plaintiff-Appellant-Cross Appellees BWP Media, Pacific Coast News, National Photo Group, LLC (“BWP”) to seek consent, but those parties have not responded.

I. Interest of Amicus Curiae.

Amicus Electronic Frontier Foundation (“EFF”) is a nonprofit civil liberties organization that has worked for 26 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its tens of thousands of active members have a strong interest in a balanced copyright law that serves the interests of creators, innovators, and the general public.

As part of its mission, EFF has often served as *amicus* in key copyright cases, including *American Broad. Cos. v. Aereo*, No. 13-461 (U.S. Supreme Court, filed April 1, 2014); *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 11-697 (U.S.

Supreme Court, filed July 9, 2012); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 15-1164-cv (2d Cir., filed Aug. 5, 2015); *Capitol Records, LLC v. Vimeo, LLC*, No. 14-1048-cv(L) (2d Cir., filed July 30, 2014); and *Viacom Int'l Inc. v. YouTube, Inc.*, No. 13-1720-cv (2d Cir., filed Nov. 1, 2013).

Amicus Center for Democracy and Technology (“CDT”) is a non-profit public interest and Internet policy organization. CDT is dedicated to driving policy outcomes that keep the Internet open, innovative, and decentralized, reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT has litigated or otherwise participated in a broad range of cases and regulatory proceedings applying copyright law to the Internet and other emerging technologies.

Amicus 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. Public Knowledge advocates on behalf of the public interest for a balanced copyright system, particularly with respect to new and emerging technologies.

II. Amicus Briefs Are Accepted Where They Can Assist The Court.

The standard for leave to file an amicus brief is simply whether it will assist the Court. *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002)

(Alito, J.) (“[I]f a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.”); *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1064 (7th Cir. 1997) (“An amicus brief should normally be allowed . . . when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.”); *Massachusetts Food Ass’n v. Massachusetts Alcoholic Beverages Control Com’n*, 197 F.3d 560, 567 (1st Cir. 1999) (“[A] a court is usually delighted to hear additional arguments from able amici that will help the court toward right answers”); *see also Phillips v. AWH Corp.*, 376 F.3d 1382, 1383-84 (Fed. Cir. 2004) (“*Amicus curiae* briefs may be filed by bar associations, trade or industry associations, government entities, and other interested parties.”).

III. *Amici’s* Brief Will Assist the Court.

This appeal has ramifications beyond its impact on the parties. Making and transmitting copies of data which may include creative works is an integral function of nearly all digital technology. Thus, the application of copyright law to technology providers and services affects the development of digital technology and every human activity that relies on it, including an ever-increasing share of communications, political participation, commerce, and creativity. The accompanying *amicus* brief will assist the Court by putting the legal questions raised by this appeal in context. Specifically, the *amicus* brief addresses free

speech, innovation policy, and user privacy concerns that the Court should consider. *Amici* will also address arguments raised by several *amici* who filed briefs in support of Plaintiff-Appellees (or of neither party) with the consent of all parties.

Accordingly, Electronic Frontier Foundation, Center for Democracy and Technology, and Public Knowledge respectfully request leave to file the attached brief *amicus curiae*.

Dated: February 21, 2017

By: /s/ Mitchell L. Stoltz

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Honorable Ronnie Abrams, United States District Judge

**BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION,
CENTER FOR DEMOCRACY AND TECHNOLOGY, AND PUBLIC
KNOWLEDGE IN SUPPORT OF APPELLEE AND AFFIRMANCE**

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Dated: February 21, 2017

/s/ Mitchell L. Stoltz

Mitchell L Stoltz

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Geoff Huston, *Web Caching*, Internet Protocol Journal (Sept. 1999), <http://www.cisco.com/c/en/us/about/press/internet-protocol-journal/back-issues/table-contents-2/ipj-archive/article09186a00800c8903.html>..... 14

Jan Ozer, *Streaming 101: The Basics—Codecs, Bandwidth, Data Rate and Resolution* (Feb. 5, 2009),
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STATEMENTS OF INTEREST¹

Amici curiae submit this brief pursuant to Fed. R. App. P. 29. Defendant-Appellee Polyvore Inc. consents to the filing of this brief. *Amici* made several attempts to contact Plaintiff-Appellants' counsel to obtain their consent, but they did not respond.

Amicus Electronic Frontier Foundation (“EFF”) is a nonprofit civil liberties organization that has worked for 26 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its tens of thousands of active members have a strong interest in a balanced copyright law that serves the interests of creators, innovators, and the general public. EFF regularly participates in important digital copyright cases as party counsel, as *amicus*, or as court-appointed attorneys *ad litem*.

Amicus Center for Democracy and Technology (“CDT”) is a non-profit public interest and Internet policy organization. CDT is dedicated to driving policy outcomes that keep the Internet open, innovative, and decentralized, reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT has litigated or otherwise participated in a broad range of cases and

¹ No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief. Websites cited in this brief were last visited on February 17, 2017.

regulatory proceedings applying copyright law to the Internet and other emerging technologies.

Amicus 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. Public Knowledge advocates on behalf of the public interest for a balanced copyright system, particularly with respect to new and emerging technologies.

INTRODUCTION

Accusations of copyright infringement against Internet-based services can raise complex questions of legal responsibility. The Plaintiff-Appellants in this case, BWP Media USA Inc. et al. (“BWP”), and their *amici*, are looking for shortcuts. Based on nothing more than bare allegations about the design of a website and software, BWP and its *amici* ask this Court to disregard several well-established safeguards in copyright law. Each of these theories should be rejected.

First, BWP asks the court to hold Polyvore liable for direct infringement without showing any actual evidence of volitional conduct. The volitional conduct element of direct liability is firmly established, and serves a vital function: policing the boundary between direct and secondary liability in copyright law. Secondary liability requires a copyright plaintiff to prove additional elements such as knowledge or financial benefit. Allowing plaintiffs to waive those elements by treating Internet services and technology providers as direct infringers would remove the important judicial safeguards that have allowed those businesses to flourish as platforms for communication.

Second, BWP’s *amici* propose to premise a contributory liability claim on the design and operation of a multi-purpose technology alone—a theory the Supreme Court has long rejected. Supreme Court precedent maintains that the design and operation of technology that has both infringing and non-infringing

uses cannot form the sole basis for a claim of contributory liability. Doing away with this requirement would be contrary to precedent, and would also endanger speech-enabling Internet technologies.

Third, BWP seeks to transform a nebulous technological concept—metadata—into a legal requirement. No court has ever recognized the existence of a “standard technical measure[.]” as defined in the Digital Millennium Copyright Act, and “metadata” does not meet that definition. Declaring that it does would invite extensive new violations of Internet users’ privacy.

The doctrines BWP and its *amici* seek to bypass not only preserve the freedom of Internet services like Polyvore to create tools of self-expression, they also protect the autonomy and privacy of Internet users. They should not be disturbed.

I. DISMANTLING THE VOLITIONAL CONDUCT REQUIREMENT WOULD THROW COPYRIGHT DOCTRINE AND BUSINESS PRACTICE INTO DISARRAY

The district court concluded that direct liability for copyright infringement requires volitional conduct on the part of the defendant. This was a sound conclusion, consistent with an unbroken line of precedent.

A. Volitional Conduct Maintains the Separation Between Direct and Contributory Liability.

To prevail on a claim of direct copyright infringement, a plaintiff must prove that the defendant actually *caused* an infringement of its rights. This “basic

requirement of causation” demands volitional conduct on the part of the accused: “As its name suggests, *direct* liability must be premised on conduct that can reasonably be described as the *direct* cause of the infringement.” *Perfect 10, Inc. v. Giganews, Inc.*, No. 15-55500, 2017 WL 279504, at *4 (9th Cir. Jan. 23, 2017) (quoting *Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11–07098, 2014 WL 8628034, at *7 (C.D. Cal Nov. 14, 2014) (emphasis in original)).

Volitional conduct provides the conceptual line between direct and secondary liability. In *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Supreme Court specifically rejected the argument “that supplying the ‘means’ to accomplish an infringing activity and encouraging that activity through advertisement are sufficient to establish liability for copyright infringement.” *Id.* at 436.

Maintaining the boundary between direct and secondary liability is vital because directly causing infringement is actionable regardless of the accused infringer’s knowledge, intent, or financial gain. *Faulkner v. National Geographic Soc.*, 576 F. Supp. 2d 609, 613 (S.D.N.Y. 2008) (“Copyright infringement is a strict liability wrong in the sense that a plaintiff need not prove wrongful intent or culpability in order to prevail.”) In contrast, secondary liability requires the rightsholder to prove additional elements: that the technology is not “capable of substantial noninfringing uses,” *Sony*, 464 U.S. at 442; that the provider distributes

the technology with the specific objective of promoting infringing uses, *Grokster*, 545 U.S. at 936–37; or that the provider supervises the infringing activity and has a direct financial interest in the particular act of infringement, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001). Without the jurisprudential separation of direct and secondary liability by the volitional conduct doctrine, the providers of software or services with only an indirect relationship to infringement could be strictly liable for the actions of others—an untenable situation.

The Supreme Court has recognized that imposing strict liability for merely providing a tool with which an infringing copy is made would fail to “leave[] breathing room for innovation and a vigorous commerce,” and could “trench[] on regular commerce or discourag[e] the development of technologies with lawful and unlawful potential.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 933, 937 (2005).

Lower courts have followed suit. In 1995, the *Netcom* court distilled longstanding tort and copyright doctrines of causation to articulate the “volitional conduct” requirement as a line between parties who could be directly liable without proof of knowledge or culpable intent, and those who could be at most secondarily liable. *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995). *Netcom* was one of many operators of machines in the Usenet network, a system that allowed users to upload content to

be reproduced across the network for retrieval by others. *Id.* at 1367–68. The court explained that the individual who uploaded infringing content would be directly liable (i.e., strictly liable), but not those who merely set up and operate a system that automatically reproduces and distributes information at the direction of its users. *Id.* at 1372. Such a broadening of direct liability was both unnecessary and unreasonable. *Id.*

In *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), the Fourth Circuit held that the defendant service provider was not directly liable where its subscribers chose to post copyrighted photographs on its website. As in *Netcom*, “a person had to engage in *volitional conduct*—specifically, the act constituting infringement—to become a direct infringer”—and thus to be liable without a showing of knowledge. *Id.* at 551 (emphasis added).

This Court has come to the same conclusion. In *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, this Court explained that it was not direct infringement to “sell[] access to a system that automatically produces copies on [the user’s] command,” when it was the user’s actions that created the infringing copy. 536 F.3d 121, 132 (2nd Cir. 2008). The Court wrote, “[w]hen there is a dispute as to the author of an allegedly infringing instance of reproduction, *Netcom* and its progeny direct our attention to the volitional conduct that causes the copy to be made.” *Id.* at 131. In determining who “makes” a copy, the Court concluded that “a

significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct.” *Id.* The service provider in the former situation may be a direct infringer; the provider in the latter situation may not.

Following *Cartoon Network*, the Ninth Circuit ruled that a pay television service provider could not be liable as a direct infringer where television programs were copied at the user’s command. *Fox Broad. Co., Inc. v. Dish Network L.L.C.*, 747 F.3d 1060, 1067–68 (9th Cir. 2014). The court held that “operating 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.” *Id.* at 1067; *see also Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11–07098, 2014 WL 8628034, at *7 (C.D. Cal. Nov. 14, 2014)(concluding that finding direct infringement merely because the infringing material “was stored on or passed through the service provider’s facilities would be, in effect, to hold the entire internet liable for the bad acts of a few”).

Indeed, a provider may take a much more active curating role than Polyvore did without being liable as a direct infringer when users copy the source material. In both *Cartoon Network* and *Dish Network*, the defendant enjoyed “unfettered discretion” in selecting the television channels from which users could make

recordings. *Cartoon Network*, 536 F.3d at 132; *see also Dish Network*, 747 F.3d at 1067 (“[e]xercis[ing] a degree of discretion over the copying process” did not amount to volitional conduct). Such discretion, however, 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.” *Cartoon Network*, 536 F.3d at 132.

Congress has also noted and approved the use of these judge-made limits on liability in copyright cases. *See* 17 U.S.C. § 512(l) (preserving judge-made intermediary liability). Considering in the late 1990s how to protect nascent Internet services from crippling liability risk, the Senate Judiciary Committee acknowledged that the *Netcom* court “approached the issue” of intermediary liability using “contributory and vicarious liability doctrines.” S. Rep. No. 105–190 at 19 & n.20 (1998). Describing its decision to add a statutory safe harbor, the Committee noted its desire to “leave current law in its evolving state” rather than abrogate the volitional conduct requirement. *Id.*; *see Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”).

To be clear, the distinction between a direct infringer and a party with secondary liability does not excuse toolmakers from all liability. Instead, it simply

requires proof of additional elements before a toolmaker can fairly be held responsible for the actions of tool users. Weakening the volitional conduct requirement would conflate the distinct doctrines of direct and secondary liability, creating uncertainty in the law. This Court should avoid that result.

B. The Consensus Among the Courts is that *Aereo* Did Not Disturb the Volitional Conduct Rule.

Contrary to BWP's claim, the Supreme Court's decision in *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), did not alter the volitional conduct analysis. To the contrary, the Court did not expressly address the general volitional conduct requirement for direct liability under the Copyright Act. Rather, *Aereo* considered whether a service provider that used its technology to receive television programs that had been broadcast publicly over the air and then transmit those programs to its own paid subscribers by Internet streaming could be directly liable for copyright infringement. *Id.* at 2506. The Court held that, under those circumstances, the defendant was not merely an equipment supplier and that it actually performed the programming to a public audience as defined by the Copyright Act's Transmit Clause. *Id.* at 2503–04.

The *Aereo* majority did not deny the existence of the “volitional conduct” requirement or claim to limit its scope, and the Court's analysis is easily reconciled with that requirement. The Court explicitly noted that “[i]n other cases involving different kinds of service or technology providers, a user's involvement in the

operation of the provider’s equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act.” *Id.* at 2507. The Court distinguished between an entity that “engages in activities like Aereo’s” and one that “merely supplies equipment that allows others to do so.” *Id.* at 2504. It found that Aereo’s use of broadcast TV signals occupied a very particular place in the broader copyright scheme, saying that “the history of cable broadcast transmissions that led to the enactment of the Transmit Clause informs our conclusion that Aereo ‘perform[s],’ but it does not determine whether different kinds of providers in different contexts also ‘perform.’” *Id.* at 2510 (emphasis added). The Court held on the facts of the case that Aereo had sufficient likeness to a cable TV operator, a business model that Congress had explicitly recognized as a public performance, and thus a form of volitional conduct. In doing so, the Court recognized that the distinction between active and passive participation remains a central part of the analysis of direct infringement. *Id.*

Moreover, although the *Aereo* majority was silent on the doctrine of volitional conduct per se, Justice Scalia provided a thorough exposition of the volitional conduct requirement in his dissenting opinion, traversing the leading appellate cases: *Fox Broadcasting*, 747 F.3d at 1066–68; *Cartoon Network*, 536 F.3d at 130–31; and *CoStar*, 373 F.3d at 549–550. He explained that the volitional conduct requirement is a “profoundly important rule,” and that “our cases are fully

consistent with a volitional-conduct requirement.” *Aereo*, 134 S. Ct. at 2512–13 (Scalia, J. dissenting). The majority did not dispute Justice Scalia’s characterization.

“Because the volitional conduct doctrine is a significant and long-standing rule, adopted by all Courts of Appeal to have considered it, . . . it would be folly to presume that *Aereo* categorically jettisoned it by implication.” *Perfect 10, Inc. v. Giganews, Inc.*, No. 15-55500, 2017 WL 279504, at *5 (9th Cir. Jan. 23, 2017) (quoting *Fox Broad.*, 160 F.Supp.3d at 1160) (internal quotation marks omitted). Indeed, the consensus among the courts, including this one, is that *Aereo*’s holding left the volitional conduct requirement intact. *E.g.*, *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, 844 F.3d 79, 96 (2d Cir. 2016) (“Volitional conduct is an important element of direct liability.”) (quoting *Cartoon Network*, 536 F.3d at 131); *Smith v. BarnesandNoble.com, LLC*, 143 F. Supp. 3d 115, 121 n.3 (S.D.N.Y. 2015), *aff’d on other grounds*, 839 F.3d 163 (2d Cir. 2016) (*Aereo* did not address the volitional conduct requirement “and *Cartoon Network* remains controlling in this Circuit”); *Fox Broad. Companies v. Dish Network*, 160 F. Supp. 3d 1139, 1160 (C.D. Cal. 2015); *Gardner v. CafePress Inc.*, No. 3:13-cv-1108, 2014 WL 6890934, at *3 (S.D. Cal. Dec. 4, 2014).

As the Ninth Circuit recently said in *Giganews*, following extensive analysis: “*Aereo* did not expressly address the volitional-conduct requirement and

the Court's analysis can be reconciled with it. . . . [T]he requirement was left intact." 2017 WL 279504, at *6.

C. Necessary and Ordinary Technological Practices Would Be Left in Question Without a Clear Volitional Conduct Requirement.

Online speech platforms like Polyvore give users a variety of tools to express themselves by uploading, juxtaposing, and commenting on media. It is possible for users to use those general-purpose tools for infringing or noninfringing ends, potentially causing the platform to copy and distribute infringing media. In such circumstances, the *user* engages in the volitional conduct causing infringement, not the *toolmaker*.

Here, it is undisputed that Polyvore's technology retrieves photographic images specified by the user. Slip Op. at 2. In the course of providing the service sought by the user, it allegedly stores nine copies of an image and makes the image available to other users who request it. *Id.* This is common for online media platforms. Transmitting substantial quantities of media across the Internet typically involves multiple storage centers with redundant databases, some compressed to smaller sizes for storage. Changing the resolution of images and video is routine in order to provide thumbnails, render images on smartphones or other small screens, or transmit lower-definition video across slower networks.² These aspects of

² See, e.g., John McIlwain, *How Content Delivery Networks Work* (Apr. 13, 2015), <https://www.cdnetworks.com/blog/how-content-delivery-networks-work/>;

Polyvore’s system are instances of very common Internet technologies, nearly all of which involve multiple copies made automatically.

BWP wrongly insists that only one act of reproduction can be attributed to the user, and that any other copies or display of a work must be attributed to the toolmaker. BWP Opening Br. at 33. Besides being contrary to the leading volitional conduct cases like *Giganews*, *CoStar*, and *Netcom*, that rigid view would upend basic expectations that today’s Internet technology depends on.

The Court should reject BWP’s invitation to upend the unbroken line of precedent supporting the volitional conduct requirement for direct liability, and affirm that this safeguard applies to technologies that rely upon internal copying to function as a user intends or to display uploaded media to other users.

II. THE SUPREME COURT’S *SONY BETAMAX* DOCTRINE IS NOT LIMITED TO 1980S TECHNOLOGY, NOR TO PHYSICAL PRODUCTS.

Over thirty years ago, the Supreme Court held that designing and providing versatile technology “capable of substantial noninfringing uses” is no basis for contributory copyright liability. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (known as the *Sony Betamax* decision). The Court later

Geoff Huston, *Web Caching*, Internet Protocol Journal (Sept. 1999), <http://www.cisco.com/c/en/us/about/press/internet-protocol-journal/back-issues/table-contents-2/ipj-archive/article09186a00800c8903.html>; Jan Ozer, *Streaming 101: The Basics—Codecs, Bandwidth, Data Rate and Resolution* (Feb. 5, 2009), <http://www.streaminglearningcenter.com/articles/streaming-101-the-basics---codecs-bandwidth-data-rate-and-resolution.html>.

reconfirmed this important principle in the Internet age, holding again that courts may not infer “culpable intent . . . from the characteristics or uses of a distributed product” with lawful uses. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* 545 U.S. 913, 934 (2005).

Despite the Supreme Court’s broad, unqualified statements, *amici* Motion Picture Association of America (MPAA) and Copyright Alliance (but not Plaintiff-Appellant BWP) posit that the substantial non-infringing use doctrine applies only to products, not services. To adopt that crabbed reading of *Sony Betamax* would be an error. The *Grokster* decision, and later decisions in the circuit courts, have upheld the application of the “substantial non-infringing use” test to Internet-connected hardware and software. And the reasoning that informed the *Sony* decision in 1984—to balance the rights of copyright holders against the “substantially unrelated” rights and freedoms of technology vendors and users—applies even more strongly today, when the characteristics and uses of information technology are intimately connected to the public’s ability to communicate freely and privately.

A. Caselaw Offers No Support for Distinguishing Services from Physical Products Under *Sony*.

The Supreme Court’s pronouncements evince no intention to limit the substantial non-infringing use rule to physical products. *Sony* announced a rule of broad applicability. In *Sony*, movie studios sued a manufacturer of videocassette

recorders. 464 U.S. at 420. The studios sought to establish a rule that providers of technology that can be used to infringe copyright must obtain a license from copyright holders or be held liable for customers' infringement. *Id.*

On appeal, the Supreme Court held that “the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.” 464 U.S. at 442. In establishing this principle, the Court looked to patent law decisions, which recognized “the critical importance of not allowing the patentee to extend his monopoly beyond the limits of his specific grant.” *Id.* at 441. The Court held that granting a rightsholder legal control over the sale of technology that *could* be used to infringe, but could also be used for unobjectionable purposes, would “block the wheels of commerce.” *Id.* (citation omitted).³

³ *Amicus* MPAA focuses on a sentence in the *Sony* opinion in which the Court noted that “[t]he only contact between Sony and the users of the Betamax . . . occurred at the moment of sale.” 464 U.S. at 438. The purpose of that sentence was to distinguish another case, *Kalem Co. v. Harper Brothers*, 222 U.S. 55 (1911). In that case, the defendant had both produced an unauthorized screenplay with no purpose but to infringe *and* induced subsequent infringement by advertising that specific use of the screenplay. *Sony*, 464 U.S. at 435–36. The *Sony* defendants, in contrast, had no “direct involvement with the allegedly infringing activity.” *Id.* at 438. The Court’s observation that Sony had no ongoing relationship with its customers was simply evidence that Sony made no contribution to subsequent infringement beyond the design and distribution of its technology, not the threshold for applying the “substantial non-infringing use” limitation.

Any remaining question of *Sony*'s applicability to online services was put to rest in *Grokster*. 545 U.S. at 919–23. While the Court in *Grokster* found the defendant file-sharing services liable for contributory infringement, it left the core holding of *Sony* intact: “*Sony*’s rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product.” *Id.* at 934-35.

The technology at issue in *Grokster* was unquestionably an “online service[],” MPAA Br. at 18, in which the technology vendors maintained an ongoing relationship with its users. *Grokster*, 545 U.S, at 924–25 (describing defendants’ tracking of downloads and transmission of *advertising* to users’ computers). Nonetheless, the Court did not hold the *Grokster* defendants liable on the basis of their software design alone, nor on the mere existence of a continuing relationship between vendor and user. In fact, the Court identified various characteristics of an ongoing relationship as “ordinary acts incident to product distribution,” including “technical support or product updates,” which would not “support liability in themselves.” 545 U.S. at 937.⁴ Rather than tie the *Sony* *Betamax* test to the mere existence of a continuing relationship between technology

⁴ While *Grokster*, unlike, *Sony*, did find the defendants liable, the basis was not their business model nor the design of their technology but rather “clear expression or other affirmative steps taken to foster infringement,” demonstrated by “purposeful, culpable expression and conduct.” *See id.* at 934-37. The determining factor was not whether “the defendant’s relationship with its customers ceases at the time of sale,” Brief of Amicus Curiae Copyright Alliance (“CA Brief”) at 10, nor whether the case involves an “online service.” Brief of Amicus Curiae Motion Picture Assoc. of Am. at 18.

vendor and user, the Court held that evidence to support a contributory liability claim must “go[] beyond a product’s characteristics or the knowledge that it may be put to infringing uses,” to include “purposeful, culpable expression and conduct.” *Id.* at 935, 937.

If *amicus* MPAA were correct, there would have been no reason for the *Grokster* Court to look to the defendants’ public statements and advertising for evidence of active inducement. Simply designing and operating a system with the knowledge that some infringement occurred would have been enough to find liability.

Since *Grokster*, the Ninth Circuit has applied the *Sony Betamax* test to Internet-based technology that connects users with the vendor on an ongoing basis. In *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, the court stated that it “appl[ied] *Sony* to the Internet context” by refusing to find contributory liability based on “the structure of the [defendant’s] system” alone. 718 F.3d 1006, 1021 (9th Cir. 2013). In *Fox Broad. Companies v. Dish Network L.L.C.*, that court cited *Sony*’s fair use analysis and implicitly held that the product at issue—a digital video recorder in continuous contact with defendant Dish’s central server—did not cause contributory infringement as long as substantial non-infringing uses existed. 747 F.3d 1060, 1068–69 (9th Cir. 2014).

This Court has never broken with the Ninth Circuit by confining the “substantial non-infringing use” doctrine to non-networked technology. In a recent case, this Court found that the founder of MP3Tunes.com engaged in contributory infringement, based not on the design and operation of the company’s technology, but on specific actions done to promote infringement. *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 100 (2d Cir. 2016). The Court’s opinion in *MP3tunes* is consistent with the application of the *Sony Betamax* rule, as clarified in *Grokster*, to Internet-based technologies.

B. The Service-Based Information Economy Today Underscores the Importance of Applying the Substantial Non-Infringing Use Test to Online Services.

In *Sony* and later cases, the Supreme Court has sought to ensure the continued development of multi-purpose technologies that touch creative works. *Sony*, 464 U.S. at 441. Likewise, in *Grokster*, the Court was “mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential.” 545 U.S. at 937. And in *Am. Broad. Companies v. Aereo*, while construing the scope of exclusive rights in television transmission, the Court concluded that Congress “did not intend to discourage or to control the emergence or use of different kinds of technologies.” 134 S. Ct. 2498, 2510 (2014).

The Court's cautious approach has benefitted innovators, users, and copyright holders alike. Just two years after the *Sony* decision, videocassettes became the motion picture industry's largest source of revenue. Aljean Harmetz, *Hollywood Braces for Directors' Strike*, N.Y. Times (Apr. 11, 1987), <http://www.nytimes.com/1987/04/11/movies/hollywood-braces-for-directors-strike.html>. Recent years have shown record profits in the U.S. film industry and historic revenue growth in the recorded music industry. Brent Lang, *Sluggish China Box Office Brings Down 2016's Global Totals*, Variety (Jan. 25, 2017) (reporting predicted 2016 global movie ticket sales at over \$38 billion, slightly less than 2015's record-breaking \$38.9 billion), <http://variety.com/2017/film/box-office/2016-global-box-office-1201968877/>; *IFPI Global Music Report 2016* (Apr. 12, 2016), <http://www.ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2016> (reporting global music industry's largest annual revenue growth in nearly two decades, with digital music accounting for nearly half of revenues). Those successes coincide with the rapid growth of independent digital technologies that enable both the enjoyment of digital entertainment and many other important forms of communication.

Meanwhile, the *Sony Betamax* rule remains a vital protection for independent technology vendors. By shielding multi-purpose technology from claims of contributory liability based on its design or use, the *Sony Betamax* rule

avoids litigation over technology design, the second-guessing of technology decisions by courts, and the chill on innovation that would result.⁵

The rationale behind the *Sony Betamax* doctrine applies even more strongly to today's Internet-based software and services because, unlike the VCR, they serve many purposes beyond just the consumption of media. Polyvore allows users to build collages of fashion and decorative elements, and share them. Other popular online platforms are used by creators to distribute original creative work and to collaborate on creative projects. The black-and-white rule that BWP's *amici* suggest—denying the protection of the *Sony Betamax* doctrine to “Internet services”—would discourage the creation of new platforms for communication and creativity.

The district court was correct in granting summary judgment on the contributory infringement claim given the lack of evidence of any conduct designed to induce infringement by users, or indeed any evidence beyond the design of Polyvore's system which, under *Sony*, cannot alone give rise to contributory liability.

⁵ *Amicus* MPAA argues that the “subtl[e] structure” of an online service should give rise to contributory liability if it is deemed to “foster direct infringement.” MPAA Br. 24–25. Such judicial inquiry into technology design would invite the very sort of “trenching on regular commerce” that the Supreme Court has long warned against. *Grokster*, 545 U.S. at 937.

III. METADATA IS NOT A STANDARD TECHNICAL MEASURE UNDER THE DMCA.

Should this Court reach the question of whether Polyvore is protected by the Digital Millennium Copyright Act's safe harbor, it should reject BWP's suggestion that metadata is a "standard technical measure" under Section 512(i) of the DMCA and that service providers must retain it to be entitled to safe harbor protection. BWP's argument both ignores the statutory text and, if accepted, would endanger users by incentivizing service providers to publish privacy-invasive metadata.

A. Metadata Does Not Satisfy the DMCA's Statutory Definition of a Standard Technical Measure.

The DMCA defines "standard technical measures" as "technical measures that are used by copyright owners to identify or protect copyrighted works" and (A) "have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process," (B) "are available to any person on reasonable and nondiscriminatory terms," and (C) "do not impose substantial costs on service providers or substantial burdens on their systems or networks." 17 U.S.C. § 512 (i)(2); *see also Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 41 (2d Cir. 2012); *Obodai v. Demand Media, Inc.*, No. 11 Civ. 2503, 2012 WL 2189740, at *5 (S.D.N.Y. June 13, 2012). The statute expressly provides that *all* of these requirements must be met for a technology to qualify as a standard technical measure. *See, e.g., Black v. Nunwood, Inc.*, No.

1:13-CV-7207, 2015 WL 1958917, at *4 (S.D.N.Y. Apr. 30, 2015) (“It is a basic canon of statutory construction that the term ‘and’ joins a conjunctive list.”).

BWP does not identify any “multi-industry standards process” that reached a broad consensus of “copyright owners and service providers.” 17 U.S.C. § 512(i)(2)(A). That is the end of the inquiry. Having failed to present such evidence, despite an opportunity to develop it during discovery, BWP cannot meet its burden.

The decision in *Gardner v. CafePress Inc.*, No. 3:13-cv-1108, 2014 WL 794216 (S.D. Cal. Feb. 26, 2014) does not support BWP’s argument. *Gardner* did not find that “metadata” is a technical standard that comports with Section 512(i). Rather, the court merely held that the plaintiff in that case *might* be able to establish that a particular “use of metadata” did so. *See* 2014 WL 794216 at *5–6. *Gardner* provides no support for the conclusion that BWP, who failed to conduct a single deposition and submitted no expert reports, has established that metadata is a standard technical measure under the DMCA. Further, to the extent that the out-of-circuit district court decision in *Gardner* stands for the conclusion that a technology can be a “standard technical measure” without satisfying all of the express statutory requirements (such as having been developed pursuant to a “multi-industry standards process” that reached a “broad consensus of copyright owners and service providers”), it is simply wrong and should not be followed.

No technology currently meets the DMCA’s strict standard for a “standard technical measure.” As recently as November 8, 2016, the Copyright Office noted that no standard technical measures have ever been adopted pursuant to the process laid out in 17 U.S.C. § 512(i), even though the DMCA has been in force for nearly two decades. *See* Section 512 Study: Request for Additional Comments, Docket No. 2015-7, 81 Fed. Reg. 78,636, 78,638–39 (Nov. 8, 2016). BWP may disapprove of this fact, but its complaint then is with Congress and the statutory definition. This Court cannot rewrite the statute for it.

B. Mandating the Preservation of Metadata Would Endanger Internet Users.

Metadata can contain a wealth of private information and thus raises significant privacy and safety concerns. As an example, well-known television host Adam Savage may have accidentally revealed his home address by sharing a photograph of his car on Twitter, because the photograph’s metadata contained his latitude and longitude. Kate Murphy, *Web Photos That Reveal Secrets, Like Where You Live*, N.Y. Times (Aug. 11, 2010) <http://www.nytimes.com/2010/08/12/technology/personaltech/12basics.html>. With respect to digital photographs, metadata might include dozens of items of information such as location, creation date, camera make, and shutter speed. *See* Timothy L. Warner, *Protect Your Online Privacy by Removing Exif Data from Your Photos* (May 15, 2014), <http://www.quepublishing.com/articles/article.aspx?p=2216446>. Posting a photo

online can reveal one's exact location to burglars or stalkers. *See* Bill Schiffner, *Could You Fall Victim to Crime Simply by Geotagging Location Info to Your Photos?*, Digital Trends (July 22, 2013), <http://www.digitaltrends.com/photography/could-you-fall-victim-to-crime-simply-by-geotagging-location-info-to-your-photos/>. A photograph's metadata might also reveal private personal associations (for example, by revealing who took a photograph of you at a particular place). As a result, online safety guides warn Internet users to be careful about what information they might inadvertently share through metadata. *See* University of Michigan, *Safe Computing, Consider Metadata When Sending Files* (encouraging students to be careful about sharing photos with metadata on social networking sites), <https://www.safecomputing.umich.edu/protect-yourself/be-safe-online/consider-metadata>.

Service providers will often have no way of knowing whether or not individual users would prefer metadata to be shared or private. Many ordinary users will not even be aware that their photographs contain metadata and may not have considered the privacy implications, and risks, of sharing this information. For that reason, the best practice for many service providers will be to strip metadata before publishing files such as photographs. *See* Warner, *supra* (noting that “some social media sites such as Facebook routinely strip metadata from images for privacy concerns”).

By seeking to have metadata declared a standard technical measure, BWP asks this Court to *mandate* that service providers endanger the safety of their users. Fortunately, the law does not require this inflexible and dangerous result. Metadata is not a standard technical measure under the DMCA's definition and its preservation is not required to qualify for the DMCA's safe harbor.

CONCLUSION

Over the past three decades, the courts and Congress have defined and delimited copyright law in the digital context, with an eye towards protecting the rights and freedoms of technology users alongside those of copyright holders. As the district court in this case held, those protections cannot be pled around. This Court should affirm the district court's grant of summary judgment.

Dated: February 21, 2017

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Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of *Amicus Curiae* Electronic Frontier Foundation, Center for Democracy and Technology, and Public Knowledge in Support of Defendant-Appellee complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,750 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: February 21, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2017, a true and correct copy of the foregoing Brief of *Amici Curiae* Electronic Frontier Foundation, Center for Democracy and Technology, and Public Knowledge in Support of Defendant-Appellee was served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Rule 25.1(h)(1)-(2).

Dated: February 21, 2017

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