



February 21, 2017

Karyn Temple Claggett
Acting Register of Copyrights
U.S. Copyrights Office
Library of Congress
101 Independence Avenue SE
Washington, DC 20559

Re: Section 512 Study: Request for Additional Comments; Docket No. 2015-7

Dear Ms. Temple Claggett:

The United States Telecom Association (USTelecom)¹ is pleased to submit these comments in response to the Request for Additional Comments (Notice)² issued by the U.S. Copyright Office (Copyright Office) regarding the impact and effectiveness of the safe harbor provisions contained in the Digital Millennium Copyright Act (DMCA) and incorporates by reference its detailed submission of April 1, 2016,³ in response to the Copyright Office's first Notice of Inquiry. Because of its direct relevance to many of the questions asked in the Notice, we also attach to these comments a copy of the amicus brief we filed in support of the appeal in the BMG v. Cox case in the 4th Circuit.

After reviewing initial comments filed in this proceeding, and participating in one of the Copyright Office's roundtable hearing proceedings, USTelecom continues to maintain that the safe harbor provisions under section 512 of the DMCA are generally working effectively as intended by Congress and have helped to facilitate the unprecedented growth of the internet and internet users. We advise against making fundamental changes to the DMCA, as even so-called "improvements" could lead to unintentionally harming internet users, technology companies, and the US economy, negatively impacting broadband network investment and increasing the risk for unfounded secondary liability actions brought against service providers.

However, certain stakeholders continue to improperly seek to impose unreasonable requirements on service providers acting as mere conduits under section 512(a) that contradict the clear meaning and intent of the DMCA. Specifically, some rights-holders and their agents

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

² See, Copyright Office Notice of Inquiry, *Section 512 Study: Request for Additional Comments*, 81 Fed. Reg. 78636 (November 8, 2016) (*Notice*).

³ Comments of USTelecom, Section 512 Study Comments, Docket No. 2015-7, p. 25 (submitted April 1, 2016).

continue to flood Internet Service Providers (ISPs) with invalid “DMCA notices” purportedly sent under section 512(c), even when they know that the ISP is acting as a mere conduit. Although federal appellate courts have uniformly held that section 512(c) notices are not valid when sent to an ISP serving as a conduit provider, these rights-holders and their agents send many millions of notices to conduit providers, knowing full well that those providers cannot practically evaluate or act upon them for the purposes of conducting a “takedown.” This situation was specifically excluded from Congress’ carefully tailored notice, takedown, and counter-notice regime, and the role-based allocation of responsibilities among stakeholders under section 512 of the DMCA.

A. Forcing Internet Service Providers to Terminate Internet Access Based Solely on Allegations of Infringement Harms Consumers and Contradicts Longstanding Federal Broadband Policy.

Suggestions from various stakeholders in this proceeding that ISPs must terminate internet access for consumers based solely on unverified allegations of infringement would ultimately harm unwitting consumers and run counter to longstanding federal policy promoting the deployment and adoption of, broadband to, and by, all Americans. Terminating broadband service based solely on such unsubstantiated allegations – regardless of their validity, accuracy or reliability – would put ISPs in the impossible position of directly contradicting and impeding achievement of this explicit and long-standing federal policy.

The exponential growth in the use of the internet and the attendant explosion in internet users is no accident. This growth has been fostered by federal policies designed “to promote the continued development of the Internet,”⁴ and “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”⁵ It’s also the result of USTelecom’s member companies who have been at the leading edge of expanding access to the internet, investing more than \$1.4 trillion in broadband deployment since 1996, including \$78 billion in 2014 alone.⁶ The DMCA and its safe harbor have given confidence to these investments. Moreover, these investments have contributed to “the ‘virtuous circle’ of innovation that has driven the explosive growth of the Internet.”⁷

Terminating consumers’ broadband service based on mere allegations of infringement threatens to undermine America’s broadband success story by stifling, and directly conflicting with, federal telecommunications policy. It forces ISPs to restrict internet access based entirely on the claims of third parties to avoid potentially crushing claims of secondary liability.

⁴ 47 U.S.C. § 230(b)(1).

⁵ 47 U.S.C. § 1302(a).

⁶ See, 2016 Broadband Progress Report, 31 FCC Rcd 699, FCC 16-6, ¶ 137, n.399 (released January 29, 2016) (citing Patrick Brogan, Broadband Investment Gains Continued in 2014, USTelecom Research Brief, at 1 (July 24, 2015)).

⁷ *United States Telecom Ass’n v. FCC*, 825 F.3d 674, at 694 (D.C. Cir. 2016) (quoting *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014)).

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Compelling ISPs to terminate users in response to unsubstantiated allegations of infringement without any form of formal adjudicatory process could reverse today’s virtuous cycle and replace it with a *vicious* one, whereby ISPs are forced to indiscriminately terminate the internet access accounts, without any ability to contest the validity of the allegations of copyright infringement that led to their loss of internet access. Such terminations – based on unsubstantiated allegations – could halt the remarkable progress that has been made toward ensuring internet access is available to all Americans.

As recognized by federal policy and the Federal Communications Commission (FCC), internet access is critical to American consumers’ modern life, and the Copyright Office must understand the DMCA safe harbor through the prism of these longstanding policies that consumers should not lose access to such a fundamental and crucial tool absent some form of formal adjudicatory process. Today, Americans spend an average of more than three hours per day online while at home, with that total rising rapidly as broadband penetration grows and internet use displaces traditional media and other activities.⁸

The average U.S. consumer now spends less than \$500 per year to access the internet, and in return receives an average annual benefit of approximately \$3,000.⁹ As a result, broadband traffic is exploding. According to Forrester Research Inc., online sales in the U.S. are expected to reach \$523 billion by 2020.¹⁰ Wireless traffic alone grew more than 20-fold between 2009 and 2014, and is expected to grow seven times from 2016 to 2021.¹¹ Given this demand, the U.S. now “generates more internet traffic per capita and per internet user than any other major nation except South Korea.”¹²

⁸ See, e.g., Leichtman Research Group, Inc., *Research Notes: Actionable Research on the Broadband, Media & Entertainment Industries*, at 5 (4Q 2014) (available at: http://www.leichtmanresearch.com/research/notes12_2014.pdf) (visited February 14, 2017).

⁹ See, e.g., David Dean et al., Boston Consulting Group, *The Internet Economy in the G-20*, at 50 (Mar. 2012) (available at: <https://www.bcg.com/documents/file100409.pdf>) (visited February 14, 2017).

¹⁰ See, Forrester Brief, *Digital Touchpoint Investments Significantly Influence US Retail Sales*, January 26, 2016 (available at: <https://www.forrester.com/report/Brief+US+CrossChannel+Retail+Forecast+2015+To+2020-/E-RES116715>) (visited February 21, 2017).

¹¹ See, CTIA, *Annual Wireless Survey* (June 2015); Thomas K. Sawanobori & Dr. Robert Roche, CTIA, *Mobile Data Demand: Growth Forecasts Met*, at 1 and 7 (June 22, 2015). See also, USTelecom blog, *Mobile Growth Relies on Wired Network Investment*, February 13, 2017 (available at: <http://www.ustelecom.org/blog/mobile-growth-relies-wired-network-investment>) (visited February 13, 2017).

¹² See, Bret Swanson, American Enterprise Institute, *Internet Traffic as a Basic Measure of Broadband Health*, at 1 (Nov. 20, 2014) (available at: <http://www.aei.org/wp-content/uploads/2014/11/2014-11-Swanson.final-template2.pdf>) (visited February 14, 2017). See also, Patrick Brogan, USTelecom, *U.S. Internet Usage and Global Leadership Are Expanding* at 6 (Aug. 12, 2015) (available at: <https://www.ustelecom.org/sites/default/files/documents/081215%20Internet%20Usage%20%26%20Global%20Leadership.pdf>) (visited February 14, 2017).

The increasing ubiquity of broadband infrastructure has enabled consumers to use their wireless and wired connections for an ever-expanding array of applications and activities beyond ordinary voice and data communications. Consumers currently use internet connected devices as a central part of modern life, including for accessing news and information, completing school projects and homework, utilizing financial services, engaging on social media, making travel and dining reservations, and legally consuming music and video.

As noted by Verizon, “in today’s world, where news comes from tweets, online reports, and social media, it cannot be doubted that the ability to receive information and to communicate opinions effectively are both substantially burdened by the removal of an internet connection.” Such indiscriminate terminations of an internet connection can “cause economic harm, due to the loss of ability to apply for a job online . . . harm the ability to interact with the government at all levels . . .” and “remov[e] the ability to communicate through means such as email, texts, and social media.”¹³

Conduit ISPs of any size (big or small) are not in a position to stand as judge and jury in determining whether allegations of infringement are true or not and have no way of making that determination. Importantly, the DMCA explicitly recognizes conduit providers are different and does not expect them to play that role. In crafting the DMCA, Congress was careful in ensuring that section 512 differentiated between a “notification of claimed infringement,” and actual infringement. Allegations or notices of claimed infringement do not constitute a determination or basis for concluding that anyone is an infringer and multiple notices do not suddenly transform each individual notice from an allegation to a fact.

Unlike sections (b), (c), and (d), section 512(a) is not conditioned on the service provider’s response to any notice alleging infringement, and section 512(a) has no mechanism in place for end users to submit counter-notifications. Thus, proposed terminations of a subscriber’s internet access based on invalid DMCA notices, lack any form of statutory due process for the customer. To merely treat these allegations as true without any process for dispute or adjudication would ignore the careful balance struck by section 512 and subject Internet subscribers to the risk of having their internet service permanently terminated despite using such services for completely legitimate purposes.

The Copyright Office must be careful to avoid finding an implied duty on conduit providers that is not supported by the language of the statute, especially when the stakes for end users are so high. Section 512(i) requires internet service providers to have a policy for the termination of repeat infringers “in appropriate circumstances.” This conditional clause is critical because it recognizes that termination is not a rote exercise and is not intended to be a one-size-fits-all remedy. Conduit providers are treated uniquely under section 512 because, unlike the other delineated categories of online service providers, they do not store the content transiting their networks. They are not in a position to entertain notice and takedown requests

¹³ Comments of Verizon Communications, Section 512 Study Comments, Docket No. 2015-7, p. 25 (submitted April 1, 2016) (*Verizon Comments*).

because they have no ability to take down the allegedly infringing content. Moreover, the function performed by conduit providers is very different from the functions provided by the other categories of online service providers. Uniquely, conduit providers enable end users to access the entire internet. Not allowing a user to upload videos to a particular video storage site or app by terminating their account is not the same as not allowing a user to connect to the internet at all by terminating their ISP service. In the former case, the termination of the service is directly linked to the infringement activity and does not otherwise impact an end user's ability to access all other parts of the internet. In the case of the conduit provider, however, the termination of the service is not so limited and instead necessarily involves the elimination of an end user's ability to engage in a host of otherwise lawful activities by cutting off internet access altogether. Therefore, it is clear as both a matter of statutory construction and sound public policy that termination of end users in the case of conduit providers must be reserved for only the most extreme circumstances and must be conditioned on an adjudicatory process.

Moreover, termination of broadband, specifically, must account for the fact that federal policy promotes the deployment and adoption of broadband to, and by, all Americans.¹⁴ With respect to the condition for eligibility set forth in section 512(i) (A) (*i.e.*, a policy for termination of repeat infringers in appropriate circumstances), it is unreasonable and inappropriate to terminate a subscriber's broadband internet access service without judicial sanction when based on mere allegations of infringement. We note that the DMCA is careful to allow an ISP to handle its own "takedown" processes in response to a valid "takedown." We also note that the DMCA does not dictate what an ISP's repeat infringer policy should actually look like or under which circumstances termination would be "appropriate." That decision on how to implement a policy for repeat infringers was intentionally left to the ISP. Both the structure of section 512 and conformance with federal policy require that any allegations intended to justify the termination or long-term suspension of internet access connections should be subject to some form of judicial review before depriving subscribers of all access to the internet.

Section 512(i) expressly contemplates the importance of this context by recognizing that termination of repeat of infringers should only take place under "appropriate circumstances." Given that the internet has become our core platform for communications, it is clear that termination of an end user's broadband internet access connection must be reconciled with federal policy promoting universal broadband adoption and reserved only for the most narrow and rare circumstances.¹⁵

¹⁴ See e.g., 47 U.S.C. § 1302 (directing the FCC and state commissions with regulatory jurisdiction over telecommunications services to affirmatively "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms).")

¹⁵ See e.g., Second Further Notice of Proposed Rulemaking, *Lifeline and Link Up Reform and Modernization*, 30 FCC Rcd 7818, FCC 15-71, ¶ 4 (released June 22, 2015) (stating that "broadband is essential to participate in society," and that "[d]isconnected consumers . . . are at an increasing disadvantage as institutions and schools, and even government agencies, require Internet access for full participation in key facets of society." See also, *id.*, ¶ 5 (stating that "[b]roadband is necessary for even basic communications in the 21st Century," and that "[b]roadband access thus is necessary for even basic participation in our society and economy."));

B. Answers to Specific Copyright Office Questions

In addition to the general remarks outlined above, USTelecom also provides the following responses to the specific questions posed by the Copyright Office.

Question 1. *How should any improvements in the DMCA safe harbor system account for these differences? For example, should any potential new measures, such as filtering or staydown, relate to the size of the ISP or volume of online material hosted by it? If so, how? Should efforts to improve the accuracy of notices and counter-notices take into account differences between individual senders and automated systems? If so, how?*

The safe harbor provisions under section 512 of the DMCA are generally working effectively as intended by Congress and have helped to facilitate the unprecedented growth of the internet and expansion of internet users. An important reason for this is that the definitions used in the DMCA were broad and should remain broad to cover new technologies, including ISPs of all sizes (big or small). It would be inappropriate and harmful to impose different obligations based on size. In the case of adopting voluntary measures and programs such decisions should be left to each individual stakeholder. We note that voluntary measures and programs have been used outside the DMCA, including the USPTO's Multistakeholder Forum on the DMCA Notice and Takedown System which was attended by a member of USTelecom as it looked to identify best practices and/or produce voluntary agreements for improving the operation of the DMCA notice and takedown system without the need for legislative changes.¹⁶ USTelecom understands that notices and counter notices could be improved to be more accurate but this could be accomplished through voluntary educational initiatives, and the Copyright Office as part of its educational and information services program.

The DMCA reflects a careful balance between the interests of copyright owners and the interests of intermediaries and this balance should remain. Arguments asserting that the safe harbor in section 512 should be narrowly construed because they act as limitations on copyrights are wrong. An ISP can only address valid notices of claimed infringement in relation to its control over the content posted on its system or network.

(footnote cont'd.)

see also, 2016 Broadband Progress Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 31 FCC Rcd 699, FCC 16-6, ¶ 2 (released January 29, 2016) (stating that “Americans continue to turn to advanced telecommunications capability for every facet of daily life, and use fixed and mobile services for distinct but equally important purposes. . . . Fixed and mobile broadband services are both critical means by which Americans communicate.”).

¹⁶ See, Department of Commerce DMCA Multistakeholder Forum, *DMCA Notice-and-Takedown Processes: List of Good, Bad, and Situational Practices* (available at: https://www.uspto.gov/sites/default/files/documents/DMCA_Good_Bad_and_Situational_Practices_Document-FINAL.pdf) (visited February 21, 2017) (*Takedown Practices*).

As noted by Verizon, “the exceptions and limitations in the Copyright Act are a structural part of the balanced means by which Congress fulfills its constitutional authority to promote knowledge and learning. Dissemination of copyrighted works is every bit as important as creation. A work that sits in the closet or that cannot be communicated does not benefit the public.”¹⁷ The correct view is that the protections afforded by section 512, which have fostered the enormous growth of the internet, are critically important. Proposals for a narrow construction of section 512 should therefore be rejected.

Question 7. *Some participants recommended that the penalties under section 512 for filing false or abusive notices or counter-notices be strengthened. How could such penalties be strengthened? Would the benefits of such a change outweigh the risk of dissuading notices or counter-notices that might be socially beneficial?*

Many copyright owners and their agents have consistently abused the DMCA by flooding conduit ISPs with millions of invalid automated section 512(a) conduit notices disguised as section 512(c) take down notices and claiming that those notices have legal significance. These invalid notices are not authorized under the statute and are based on nothing more than purported allegations of infringement. The ongoing flagrant abuse through invalid DMCA notices should be affirmatively addressed by the Copyright Office, possibly through adoption of more robust fines for such abusive and unsubstantiated filings.¹⁸

In the wake of the erroneous decision in the Cox Case, Rightscorp in particular has intensified its efforts to intimidate ISPs, threatening that Rightscorp’s clients are becoming more focused on targeting ISP’s for liability.¹⁹ USTelecom member companies are routinely inundated with millions of invalid notices every month alleging infringement based on content that is only transmitted – not hosted – on their systems or networks. For example, over 1.4 million notices were sent to Verizon’s DMCA mailbox in October 2013, “the overwhelming majority of which were facially invalid and related only to provision of transmission services.”²⁰ In November 2013, Rightscorp, Inc., “inundated Verizon with over 2 million invalid notices in a

¹⁷ See, *Verizon Comments*, pp. 12 – 13.

¹⁸ See Declaratory Judgment motions filed in *Windstream Services LLC v. BMG Rights Management (U.S.) LLC*, No. 16-cv-05015-AT-RLE (S.D.N.Y. filed June 27, 2016); *RCN Telecom Services, LLC et al v. BMG Rights Management (US) LLC*, No. 16-cv-04417-PKC (filed June 13, 2016). We note that in the *BMG v. Cox* case, on appeal at the Fourth Circuit, Rightscorp claimed it was authorized to act and collect settlements on behalf of Round Hill Music LLP, however, during the trial it was discovered that Round Hill was not the copyright owner and therefore was removed as a plaintiff in the case. See *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, No. 1:14-cv-1611, 2016 U.S. Dist. LEXIS 105981 (E.D. Va. Aug. 8, 2016).

¹⁹ See, e.g., *Windstream Services LLC v. BMG Rights Management (U.S.) LLC*, No. 16-cv-05015-AT-RLE (S.D.N.Y. filed June 27, 2016) (declaratory judgment action filed following demands by BMG and Rightscorp based on the district court’s decision); *RCN Telecom Services, LLC et al v. BMG Rights Management (US) LLC*, No. 16-cv-04417-PKC (S.D.N.Y. filed June 13, 2016) (same).

²⁰ See, *Verizon Comments*, p. 5.

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single day, causing the server for inbound DMCA notices to crash.”²¹ Rightscorp has similarly inundated other ISPs, including RCN Telecom Services, LLC (RCN) with “millions of notifications” that are “so numerous and so lacking in specificity, that it is infeasible for RCN to devote the time and resources required to meaningfully investigate them.”²²

These notices frequently include extortionate “settlement” demands that rights-holders pressure ISPs to forward to unrepresented consumers. In some cases, the notices even demand that ISPs terminate internet access based on unverified allegations of infringement. What the notices do not include, however, is dispositive and adjudicated proof of actual infringement that could justify ISPs terminating a customer’s internet access. Congress did not provide for, and did not intend, conduit ISPs to receive millions of invalid notices each month that are, in reality, nothing more than allegations of infringement and attempts to parlay those allegations into an obligation to cut off the internet access of alleged infringers.

Even assuming arguendo that these invalid notices properly identify copyright protected material actually transmitted by the specified customer over the ISP’s network (which the ISP has no way to confirm), they do not attempt to account for the numerous reasons why there may have been a non-infringing transmission of the copyrighted material. These reasons might include the subscriber’s computer being infected with malware, their network unknowingly being used by another household member, their network password having been stolen, or their neighbor or guest accessing their account without permission as a result of an unsecured network connection.²³

These notices also fail to consider the possibility that the transmission might be a fair use or provide for any counter-notification that would be similar to the process created in section 512 for valid DMCA notices.²⁴ Conduit ISPs are faced with the impossible choice of serving as an accomplice to copyright bullying or facing liability for failing to act based on invalid and unverifiable DMCA notices directed to the ISP’s conduit services.

Receiving millions of invalid notices also makes it more difficult for ISPs to identify and respond to valid DMCA takedown notices. Improper notices make up the vast majority of notices received by USTelecom members and require significant resources given their volume. In fact, the DMCA contains no provision for rights holders to send conduit ISPs notifications for

²¹ *Id.*

²² RCN Telecom Services, LLC, Complaint for Declaratory Judgment, p. 2, *RCN Telecom Services, LLC et al v. BMG Rights Management (US) LLC*, No. 16-cv-04417-PKC (S.D.N.Y. filed June 13, 2016).

²³ See e.g., Casey G. Watkins, Note, Wireless Liability: Liability Concerns for Operators of Unsecured Wireless Networks, 65 Rutgers L. Rev. 635 (2013).

²⁴ See, *Lenz v. Universal Music Corp.*, 15 F.3d 1145, at 1151-54 (9th Cir. 2016); see also, Annemarie Bridy, Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement, 89 Or. L. Rev. 81, 127 (2010) (discussing “false positives” in copyright detection technologies).

allegations of infringement, such as P2P infringement. Moreover, the notification and counter-notification provisions specified in the DMCA specifically do not apply to conduit ISPs.

Congress did not intend for ISPs to have to make this choice or carry the burden of responding to millions of these invalid notices. Congress sought to minimize the burdens on ISPs by clarifying that an ISP has no obligation to “monitor[] its service or affirmatively seek[] facts indicating infringing activity.”²⁵ This is particularly true where the allegedly infringing material is merely transiting the service provider’s system for microseconds. Conduit ISPs cannot know who is using the subscriber’s account on any given occasion or whether an allegation of infringement is accurate. Congress’s decision to relieve ISPs of the duty to monitor its service and affirmatively investigate whether its users are engaging in infringement confirms that Congress intended for courts to make judgments about repeat infringement, not ISPs.

Yet that is precisely what copyright owners and their agents demand of ISPs in their abusive DMCA notices. We caution against legislative changes to section 512. If changes were proposed, then DMCA must include stronger penalties to address invalid notices and misrepresentations, as well as other abuses.

Question 8. *For ISPs acting as conduits under section 512(a), what notice or finding should be necessary to trigger a repeat infringer policy? Are there policy or other reasons for adopting different requirements for repeat infringer policies when an ISP is acting as a conduit, rather than engaging in caching, hosting, or indexing functions?*

An ISP has no legal obligation to terminate a customer’s internet access unless there has been an adjudicated finding of repeat infringement. This interpretation is compelled by the plain meaning of the phrase “repeat infringers,” the limiting phrases “reasonably implemented” and “in appropriate circumstances,” and the structure of section 512. Absent such an adjudication, the severe sanction of terminating access to the internet – arguably today’s most important medium of communication – is inconsistent with federal telecommunications policy.

Recent efforts to deny DMCA safe harbor protections to ISP subscribers has emboldened copyright holders and their agents to even more aggressively threaten ISPs and their customers with massive copyright liability. ISPs are forced to handle millions of invalid notices each month that obscure DMCA notices authorized by the statute. Such an approach impedes federal telecommunications policy designed to expand internet access to all Americans because it compels ISPs to restrict internet access based on untested allegations of infringement to qualify for DMCA safe harbor protection. Consumers will ultimately pay the price because they will lose access to the many important uses of the internet, frustrating the “virtuous circle” that has resulted in the exponential growth of internet access and adoption in the United States.

²⁵ 17 U.S.C. § 512(m)(1). *See also*, H.R. Rep. 105-551 (II), at 61 (1998) (declaring that ISPs need not “investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing”).

The safe harbor created by section 512(a) is not subject to the notice and takedown procedure set forth elsewhere in the DMCA because an ISP performing a conduit function “cannot be sent an effective [takedown] notification.”²⁶ Rather, to qualify for this safe harbor, an ISP must have “adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.”²⁷

In the recent Cox Case, the district court incorrectly held that Cox was not entitled to the DMCA safe harbor in section 512(a) because it did not reasonably implement a “repeat infringer” policy as required by section 512(i)(1)(A). Without explaining what constitutes “sufficient,” the court interpreted section 512(i)(1)(A) to mean that ISPs must terminate a customer’s internet access “where a service provider is given sufficient evidence to create actual knowledge of blatant, repeat infringement by particular users, particularly infringement of a willful and commercial nature.” The district court denied DMCA safe harbor protection to Cox based on the fiction that Rightscorp’s invalid notices provided Cox with actual knowledge that its customers were transmitting infringing material.²⁸

Importantly, the DMCA statutory scheme does not contemplate the provision of notices of any kind to a conduit provider, recognizing that conduit providers transmit content, but do not store it. In crafting section 512, Congress carefully delineated the difference between allegation and proof of infringement.²⁹ Indeed, Congress distinguished between “claimed infringement” and adjudicated infringement.³⁰ The omission of the words “claimed” and “alleged” from section 512(i)(1) indicates that “repeat infringers” cannot be persons who are merely alleged to have engaged in copyright infringement.³¹ The phrase “repeat infringers” must refer to persons determined by courts to have engaged in copyright infringement more than once.

Congress’s use of limiting phrases in section 512(i)(1)(A) confirms the need for an adjudication to determine that a user is a “repeat infringer[.]”. Even if there is such an

²⁶ *Recording Industry Ass’n v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1237 (D.C. Cir. 2003).

²⁷ 17 U.S.C. § 512(i)(1)(A).

²⁸ See, *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, No. 1:14-cv-1611, 2016 U.S. Dist. LEXIS 105981 (E.D. Va. Aug. 8, 2016).

²⁹ D. Nimmer, Repeat Infringers, 52 J. Copy’r Soc. U.S.A. 167, 175-84 (2005) (emphasis in original).

³⁰ Compare 17 U.S.C. § 512(c)(1)(C) & (c)(3)(A) (discussing claims of infringement in takedown notices) with id. § 512(j)(1)(A)(iii) (discussing injunctions “to prevent or restrain infringement”). It also distinguished “repeat infringers” from “alleged infringer[s].” Compare id. § 512(i)(1)(A) with id. § 512(f), (h)(1), (h)(2)(C), (h)(3).

³¹ See, *Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (explaining that Congress “acts intentionally when it omits language included elsewhere” in a statute—and that this rule “applies with particular force” where Congress uses the disparate terms “repeatedly” and “in close proximity”).

adjudication, an ISP must still find that the severe sanction of terminating access to the internet is “reasonabl[e]” and “appropriate” under the “circumstances.” The phrases “reasonably implemented” and “in appropriate circumstances” are words of limitation that narrow the circumstances in which ISPs must terminate the internet access of “repeat infringers” to qualify for the safe harbor.³² This qualifying language clarifies that ISPs need not terminate internet access in every case involving repeat infringers. Had Congress wanted ISPs to do so, it would not have included the words “reasonably” or “in appropriate circumstances” in the statute.³³

Given the critical nature of internet access and the federal policy of encouraging its deployment to, and its adoption by, all Americans, section 512(i) must be interpreted to reserve the draconian punishment of terminating a user’s access to “the most important innovation in communications in a generation,”³⁴ for the rarest of cases involving only adjudicated cases of repeat copyright infringement. Not only is termination of internet service an extreme remedy, terminating an entire household’s internet access for the actions of a single user is a far more extensive remedy than simply terminating a user’s ability to access one particular website or application on the internet, which is precisely why section 512 distinguishes conduit ISPs from other service providers.

It is also why section 512(i)(1)(A) requires termination only in “appropriate circumstances.” Absent an adjudicated finding of repeat infringement, terminating a customer’s access to this critical resource is neither “appropriate” nor “reasonabl[e]” given the essential role that the internet plays in modern life – particularly where the allegations of infringement are embodied in invalid notices that lack the substantive safeguards associated with valid DMCA notices.

The plain language of the DMCA indicates that Congress did not believe that terminating a customer’s internet access would be “reasonabl[e]” or “appropriate” absent an adjudication that the customer is a “repeat infringer[.]”³⁵ In the Cox Case, the district court violated the plain language of the DMCA by concluding that, to qualify for the safe harbor, Cox had to terminate its customers’ internet access on the basis of unverified allegations of infringement directed to the use of Cox’s conduit service.

The phrase “repeat infringers” also is unique to section 512(i)(1)(A). An “infringer” is a “person who interferes with one of the exclusive rights of a patent, copyright, or trademark

³² See, e.g., *Grant Thornton, LLP v. FDIC*, 435 F. App’x 188, 207 (4th Cir. 2011) (recognizing that “appropriate” is a “limitation” “Congress use[s] . . . for a purpose”).

³³ See, *Corley v. United States*, 556 U.S. 303, 314 (2009) (“one of the most basic interpretive canons” is that “a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant”) (citation and internal quotation omitted).

³⁴ *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010).

³⁵ 17 U.S.C. § 512(i)(1)(A); see, *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 303 (4th Cir. 2006) (“The first step in determining the meaning of a statute is to examine the statute’s plain language.”).

owner.”³⁶ To “repeat” means to “do or say something again.”³⁷ The phrase “repeat infringer” resembles the phrase “repeat offender,” which means a “person who has been *convicted* of a crime more than once.”³⁸ Just as only a court can declare a person to be a “repeat offender,” only a court can declare a person to be a “repeat infringer[.].” Thus, Congress used the phrase “repeat infringers” to mean persons determined by courts to have interfered with a copyright more than once.

This interpretation is the most logical one because “repeat infringers” cannot be persons against whom there have been merely untested allegations of infringement.³⁹ “It seems wrong . . . to say that one is an infringer merely by virtue of receiving a cease and desist letter, which some content owners have been sending with reckless abandon and which need not even meet the standards of Rule 11.”⁴⁰

Other provisions in section 512 confirm that Congress intended for there to be an adjudication that a user is a “repeat infringer[.]” before losing access to the internet.⁴¹ As noted above, the lack of a counter-notification process in section 512(a) to protect consumers indicates that Congress must have intended for there to be some form of an adjudicatory process to test a copyright holder’s allegations of infringement. Because Congress included substantive safeguards to protect against content being erroneously removed or disabled,⁴² Congress must have intended for there to be some type of safeguard against erroneously losing access to the internet. It is unthinkable that consumers would have no ability to challenge a copyright holder’s unverified allegations of infringement before being cut off from the internet.

Question 9. *Many participants supported increasing education about copyright law generally, and/or the DMCA safe harbor system specifically, as a non-legislative way to improve the functioning of section 512. What types of educational resources would improve the functioning of section 512? What steps should the U.S. Copyright Office take in this area? Is there any role for legislation?*

³⁶ Black’s Law Dictionary 786 (7th ed. 1999).

³⁷ Webster’s II New College Dictionary 962 (3rd ed. 2005).

³⁸ Black’s Law Dictionary 1108 (emphasis added).

³⁹ *Kofa v. INS*, 60 F.3d 1084, 1088 (4th Cir. 1995) (en banc) (recognizing “two principles of statutory construction: plain English and common sense”).

⁴⁰ Mark A. Lemley & R. Anthony Reese, Reducing Digital Copyright Infringement Without Restricting Innovation, 56 Stan. L. Rev. 1345, 1420-21 n.130 (2004)).

⁴¹ See, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, at 133 (2000) (explaining that “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme” and that a “court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole” (citations and quotations omitted)).

⁴² See, 17 U.S.C. § 512(g).

USTelecom supports increased consumer education about copyright law, the DMCA and DMCA notices, and the final recommendations issued by the PTO's multi-stakeholder process on improvements to the DMCA's notice and take down system, which one of USTelecom's members participated in.⁴³ Such an approach can have a tangible and positive impact on copyright issues, and educational outreach has been previously identified by the Register of Copyrights as an essential component to addressing respect for intellectual property rights, including copyright.⁴⁴ Public outreach measures have been successfully implemented by the federal government in the past and are ideally suited in the current context. Whether implemented on a broad public relations scale, or through targeted multi-industry efforts, such outreach measures ensure that valuable information is disseminated and shared amongst target audiences. The Copyright Office should strongly consider further action in this area as a non-legislative way to improve the functioning of section 512.

Question 10. *How can the adoption of additional voluntary measures be encouraged or incentivized? What role, if any, should government play in the development and implementation of future voluntary measures?*

It is critical that voluntary measures be truly voluntary and are by no means a one-size fits all approach. USTelecom members have participated in a number of voluntary measures outside the scope of the DMCA. For example, AT&T and Verizon participated in the Copyright Alert System ("CAS"), a voluntary collaborative effort between ISPs and major content owners designed as an educational tool to educate internet users about P2P infringements and sources of lawful online content. Another example is the US Department of Commerce's multi-stakeholder forum on the DMCA's notice and take down process which resulted in the publication of a "List of Good, Bad and Situational Practices."⁴⁵ This forum was attended by a USTelecom member.

While such voluntary efforts can be helpful, they must be evaluated on an individual basis given the broad range of differences between industry stakeholders. For example, USTelecom members are comprised of companies of all sizes – urban and rural, publicly traded, privately held, and cooperatives. The capabilities of each of these providers vary to a great degree, and while certain voluntary measures may be suitable for one company, those same measures may not be suitable for others. The Copyright Office should be cognizant of such realities as it considers their efficacy in this area.

Question 11. *Several study participants pointed out that, since passage of the DMCA, no standard technical measures have been adopted pursuant to section 512(i). Should industry-wide or sub-industry-specific standard technical measures be adopted? If so, is there a role for*

⁴³ See, *Takedown Practices*.

⁴⁴ See, Report, *Priorities and Special Projects of the United States Copyright Office, October 2011 – October 2013*, October 25, 2011, p. 14 (proposing to prioritize resources for public education and finding innovative ways to reach the audiences who want help understanding general legal copyright principles) (available at: <https://www.copyright.gov/docs/priorities.pdf>) (visited February 13, 2017).

⁴⁵ See, *Takedown Practices*.

government to help encourage the adoption of standard technical measures? Is legislative or other change required?

The requirements imposed by the statute for a technology to qualify as a “standard technical measure” were intentionally rigorous, requiring a broad consensus of all stakeholders in an open standards process. Weaker criteria would lead to endless litigation over whether a particular technology was or should have been adopted, and would require courts to second-guess business and technical decisions by copyright owners and service providers, alike.

Moreover, Congress was careful to not impose burdens on service providers in the accommodation of standard technical measures. The law is clear that the only obligation is to “accommodate and not interfere with” measures used by copyright owners. Moreover, “standard technical measures” should not be construed to include technologies that inspect packets or otherwise investigate data that are stored or transmitted. Such technologies have not been shown to be viable and would raise significant privacy and security and network performance concerns.

Question 12. *Several study participants have proposed some version of a notice-and-stay-down system. Is such a system advisable? Please describe in specific detail how such a system should operate, and include potential legislative language, if appropriate. If it is not advisable, what particular problems would such a system impose? Are there ways to mitigate or avoid those problems? What implications, if any, would such a system have for future online innovation and content creation?*

As described in detail above, section 512(a) does not include a notice and take-down mechanism, and therefore the notice and stay-down mechanism proposed by some study participants is not appropriate in the context of conduit providers. The safe harbor in section 512(a) is distinct among the four DMCA safe harbors because it immunizes an ISP’s conduit function (*i.e.*, “transmitting e-mails, instant messages, or files sent by an internet user from his computer to that of another internet user.”).

Notably present in sections 512(b)-(d), and notably absent from section 512(a), is the so-called notice and take-down provision. Unlike other safe harbors, section 512(a) does not condition immunity on the ISP responding “expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.” Moreover, there is no provision in the DMCA for counter notification in the context of conduit ISPs.

Further, the proposed notice-and-stay-down proposal would require monitoring by ISPs, which is not required under the DMCA.⁴⁶ As previously noted, section 512(m) of the DMCA states that “nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on . . . a service provider monitoring its service or affirmatively seeking facts indicating infringing activity.”⁴⁷ Because monitoring of their networks would be required for

⁴⁶ See, Section 512(m).

⁴⁷ Section 512(m)(1).

any notice-and-stay-down system to function, such an approach would run counter to the framework established by Congress for conduit ISPs. It would also effectively shift the burden of policing copyright infringement to the ISPs themselves, thus undermining the very purpose of the safe harbor in the first place. In addition, section 512(i) of the DMCA is incompatible with the notion of a notice and stay-down provision, since no technologies exist to implement such a measure.

Suggestions by rights holders that the implementation of monitoring technologies by service providers will increase the effectiveness of notice and takedown are unrealistic, especially in the conduit context. Any notion of a ‘stay down’ provision applying to conduit ISPs would require such providers to have the ability to control content on its networks. Conduit ISPs handle data transiting their respective networks for mere milliseconds and do not store any such content on their networks. As noted by CTIA – The Wireless Association, ISPs “transmit trillions of messages and megabytes of data, all moving at the speed of electrons, over their networks. Monitoring such messages and transmissions for purposes of identifying potential copyright claims is not feasible, and doing so would risk dramatically slowing service provider systems, potentially bringing the fast internet service that America has come to rely on to a halt.”⁴⁸

Question 14. *Several study participants mentioned concerns regarding certain case law interpretations of the existing provisions of section 512. Additionally, two new judicial decisions have come out since the first round of public comments was submitted in April 2016. What is the impact, if any, of these decisions on the effectiveness of section 512?*

In the recent Cox Case, the district court incorrectly suggested that invalid notices pertaining to Cox’s section 512(a) services were “powerful evidence” of Cox’s actual knowledge of alleged infringement by its customers. However, even proper DMCA notices of claimed infringement under section 512(c) are merely allegations that should not be deemed to provide an ISP with actual knowledge of the alleged infringement. The court suggested that because Cox “deemed the notices DMCA-compliant and forwarded them on to its account holders,” this provided Cox with actual knowledge of the claims contained in the invalid notices. Although this portion of the ruling was dictum because the court relied on internal Cox communications in finding that Cox did not qualify for the DMCA safe harbors, USTelecom strongly disagrees with the suggestion that an ISPs voluntary forwarding of invalid notices pertaining to section 512(a) services provides the ISP with actual knowledge of the allegations contained within the invalid notices.

USTelecom recently filed an amicus brief with the Court of Appeals in this case (a copy of USTelecom’s Amicus Brief is attached). As detailed in that amicus brief, USTelecom emphasized that with respect to the condition for eligibility set forth in section 512(i)(A) (*i.e.*, a policy for termination of repeat infringers in appropriate circumstances), it is unreasonable and inappropriate to terminate a subscriber’s broadband internet access service without judicial

⁴⁸ Comments of CTIA – The Wireless Association, Section 512 Study Comments, Docket No. 2015-7, p. 10 (submitted April 1, 2016).

sanction when based on mere allegations of infringement. Any allegations intended to justify the termination or long-term suspension of internet access connections should be subject to some form of judicial review before depriving subscribers of all access to the internet. Section 512(i) expressly contemplates the importance of this context by recognizing that termination of repeat of infringers should only take place under “appropriate circumstances.” Given that the internet has become our core platform for communications, it is clear that termination of an end user’s broadband internet access connection must be reconciled with federal policy promoting universal broadband adoption and reserved only for the most narrow and rare circumstances.⁴⁹

A notice of claimed infringement is simply an allegation of infringement by a copyright owner or its agent. Congress was careful in section 512 of the DMCA to differentiate between a “notification of claimed infringement,”⁵⁰ and actual infringement.⁵¹ Allegations or notices of claimed infringement do not constitute a determination or basis for concluding that anyone is an infringer, and ISPs acting as conduits are not in a position to effectively judge whether a subscriber’s particular use of copyrighted material is or is not lawful. Moreover, the DMCA did not contemplate sending mass complaints to ISPs with respect to content that they may or may not have transmitted as a normal part of the internet service they provide, nor did the DMCA contemplate compelling those ISPs to process and forward any such unsubstantiated complaints (and the demands they typically contain) to their subscribers without the safeguard of a counter-notification process as set forth in the context of hosted content for valid section 512(c) notices.

Internet access is essential to modern life, including economic life and exercise of other fundamental rights. It is simply unthinkable, that a consumer should be able to lose access to

⁴⁹ See e.g., Second Further Notice of Proposed Rulemaking, *Lifeline and Link Up Reform and Modernization*, 30 FCC Rcd 7818, FCC 15-71, ¶ 4 (released June 22, 2015) (stating that “broadband is essential to participate in society,” and that “[d]isconnected consumers . . . are at an increasing disadvantage as institutions and schools, and even government agencies, require Internet access for full participation in key facets of society.” See also, *id.*, ¶ 5 (stating that “[b]roadband is necessary for even basic communications in the 21st Century,” and that “[b]roadband access thus is necessary for even basic participation in our society and economy.”); see also, 2016 Broadband Progress Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 31 FCC Rcd 699, FCC 16-6, ¶ 2 (released January 29, 2016 (stating that “Americans continue to turn to advanced telecommunications capability for every facet of daily life, and use fixed and mobile services for distinct but equally important purposes. . . . Fixed and mobile broadband services are both critical means by which Americans communicate.”).

⁵⁰ See, e.g., Sections 512(c)(1)(C) , 512(c)(3)(A) (discussing claims of infringement).

⁵¹ See, e.g., Sections 512(i)(1)(A), 512(f) (both of these sections of the DMCA discuss claims of infringement that prove wrongful). See also, D. Nimmer, Repeat Infringers, 52 J. Copy'r Soc. U.S.A. 167, 175-84 (2005) (“Examination shows that, in crafting section 512, Congress carefully delineated the difference between *allegation* and *proof* of infringement) (emphasis in original). See also, Mark A. Lemley & R. Anthony Reese, Reducing Digital Copyright Infringement Without Restricting Innovation, 56 STAN.L.REV. 1345, note 130, at 1420 – 1421 (2004)) (“It seems wrong . . . to say that one is an infringer merely by virtue of receiving a cease and desist letter, which some content owners have been sending with reckless abandon and which need not even meet the standards of Rule 11.”).

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such a fundamental and crucial tool absent some form of formal adjudication. Such adjudication should not be required of an ISP, and is particularly inappropriate for allegations related to 512(a) services.

C. Conclusion.

USTelecom appreciates this opportunity to participate in the Copyright Office's proceeding on the DMCA's safe harbor provisions and respectfully urges the Office to refrain from recommending changes to section 512. Should you have any further questions, please feel free to contact the undersigned.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kevin G. Rupy".

Kevin G. Rupy
Vice President, Law & Policy
USTelecom

February 21, 2017

Attachment

**Amicus Curiae Brief of
United States Telecom Association
In Support of Defendants-Appellants**

**In the United States Court of Appeals
For the Fourth Circuit**

No. 16-1972

File November 14, 2016

No. 16-1972

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

BMG RIGHTS MANAGEMENT (US) LLC,

Plaintiff-Appellee

and

ROUND HILL MUSIC LP

Plaintiff,

v.

COX COMMUNICATIONS, INC. AND COXCOM, LLC,

Defendants-Appellants

and

COX ENTERPRISES, INC. COXCOM, INC., AND JOHN DOE

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, 1:14-CV-01611-LO-JFA

**AMICUS CURIAE BRIEF OF UNITED STATES TELECOM
ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

United States Telecom Association (“USTelecom”) is a non-profit association of service providers and suppliers for the telecom industry. Its members provide broadband internet access services to millions of consumers and businesses across the country. USTelecom has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

STATEMENT REGARDING CONSENT TO FILE

All parties have consented to the filing of this brief.

Pursuant to Fed. R. App. P. 29(c), *amicus curiae* states that 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 this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

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INTEREST OF AMICUS CURIAE

USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom's member companies offer a wide range of services across communications platforms, including voice, video, and data over local exchange, long distance, wireless, internet, and cable. These companies range from large, publicly traded companies to small rural cooperatives. USTelecom advocates on behalf of its members before Congress, regulators, and the courts for policies that will enhance the economy and facilitate a robust telecommunications industry.

Internet service providers ("ISPs") perform an important function in the internet ecosystem by developing and maintaining the network infrastructure required to facilitate reliable, ubiquitous access to the internet. ISPs have invested \$1.4 trillion in building out their networks since 1996, providing Americans with the capability to access the internet at dizzying speeds with more and more integrated functionality. The depth and breadth of broadband deployment across competing platforms has spurred a dynamic of competitive investment and innovation among networks, applications, content, and devices, providing substantial benefits to consumers and the United States economy.

USTelecom's members are adversely affected by the district court's decision to deny Cox Communications, Inc. ("Cox") the benefit of safe harbor protection

under the Digital Millennium Copyright Act (“DMCA”). Although this *amicus curiae* brief focuses on the DMCA safe harbor, USTelecom agrees that the judgment below should be reversed for the additional reasons stated in Cox’s opening brief. As a result of the district court’s decision, USTelecom’s members face an increased potential of liability for copyright infringement merely for transmitting internet content over their networks.

In addition, USTelecom’s members have experienced a substantial increase in the volume of invalid DMCA notices and associated demands from copyright holders and their agents, including Rightscorp, Inc. Rightscorp inundated one USTelecom member with over two million invalid DMCA notices in a single day, causing the server for inbound copyright notices to crash. These invalid notices interfere with the business of USTelecom’s members, make it more difficult to respond to valid takedown notices, and threaten to deny consumers access to the benefits of the internet by demanding that users’ internet access be terminated.

SUMMARY OF ARGUMENT

This Court should reverse the district court’s order granting summary judgment to BMG Rights Management on Cox’s DMCA safe harbor defense. The decision below forces ISPs like Cox and USTelecom’s member companies to restrict consumers’ access to the internet based on nothing more than unproven allegations of copyright infringement in the form of invalid DMCA notices. It

upsets the careful balance of the interests of copyright holders, internet users, and ISPs that Congress struck in the DMCA. It cannot be reconciled with the plain language of the DMCA, federal telecommunications policy designed to increase access to the internet, or the First Amendment rights of consumers to use the internet to engage in protected speech. The Court should enter summary judgment for Cox on its DMCA safe harbor defense.

In recent years, copyright holders and their agents have been abusing the DMCA by sending millions of invalid DMCA notices to ISPs in their role as conduits for third-party content. These notices are invalid because they are not contemplated by the DMCA, include unverified allegations of infringement, often contain inaccurate information, and lack the consumer safeguards associated with valid DMCA notices. The DMCA does not contemplate copyright holders sending such notices because conduit ISPs cannot “take down” infringing content that is not stored on their systems or networks, nor do ISPs know the content of the communications transmitted by their customers.

Based solely on these invalid notices, copyright holders have demanded that ISPs restrict their customers’ access to the internet or face the prospect of crushing liability. The district court lent credence to these abuses of the DMCA by concluding that the sheer volume of unproven allegations against a user warrants treating that user as a “repeat infringer,” triggering the ISP’s obligation to

terminate the user's access to the internet or risk the liability that comes with losing the protection of the DMCA safe harbor.

The district court's denial of DMCA safe harbor protection should be reversed for two reasons. First, the court erred by concluding that Cox acquired knowledge of its customers' purported infringement from Rightscorp's invalid DMCA notices. ISPs acting as a conduit for the transmission of a third-party's information, such as Cox in this case, have no obligation or ability to investigate or respond to allegations that their customers have transmitted infringing material. Because these notices are invalid under the DMCA, they could not provide Cox with knowledge that its customers were transmitting infringing material.

Second, the court erred by interpreting Section 512(i)(1)(A) of the DMCA as requiring Cox to terminate a customer's internet access based on unverified allegations of copyright infringement associated with the customer's use of the ISP's conduit service. An ISP has no legal obligation to terminate a customer's internet access unless there has been an adjudicated finding of repeat infringement. This interpretation is compelled by the plain meaning of the phrase "repeat infringers," the limiting phrases "reasonably implemented" and "in appropriate circumstances," and the structure of Section 512. Absent such an adjudication, the severe sanction of terminating access to the internet—one of today's most

important mediums of communication—is inconsistent with federal telecommunications policy and the First Amendment rights of consumers.

Aside from these legal flaws, the district court failed to appreciate the implications of its decision. The court’s order denying DMCA safe harbor protection to Cox has emboldened copyright holders and their agents to even more aggressively threaten ISPs and their customers with massive copyright liability. ISPs are forced to handle millions of invalid notices each month that obscure DMCA notices authorized by the statute. The court’s order impedes federal telecommunications policy designed to increase internet access because it compels ISPs to restrict internet access based on untested allegations of infringement to qualify for DMCA safe harbor protection. Consumers will ultimately pay the price because they will lose access to the many important uses of the internet, frustrating the “virtuous circle” that has resulted in the exponential growth of internet access and adoption in the United States.

ARGUMENT

I. THE DISTRICT COURT ERRED BY DENYING DMCA SAFE HARBOR PROTECTION TO COX.

The DMCA recognizes the crucial role that ISPs play in the internet ecosystem. In particular, Section 512(a) immunizes ISPs from copyright infringement liability for “transmitting” communications and information over their networks under certain conditions. 17 U.S.C. § 512(a); *see also In re Charter*

Commc'ns, Inc., 393 F.3d 771, 776 (8th Cir. 2005). The safe harbor created by Section 512(a) is not subject to the notice and takedown procedure set forth elsewhere in the DMCA because an ISP performing a conduit function “cannot be sent an effective [takedown] notification.” *Recording Industry Ass’n v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1237 (D.C. Cir. 2003). Rather, to qualify for this safe harbor, an ISP must have “adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.” 17 U.S.C. § 512(i)(1)(A).

In this case, the district court held that Cox is not entitled to the DMCA safe harbor in Section 512(a) because it did not reasonably implement a “repeat infringer” policy as required by Section 512(i)(1)(A). JA-708. The court interpreted Section 512(i)(1)(A) to mean that ISPs must terminate a customer’s internet access “where a service provider is given sufficient evidence to create actual knowledge of blatant, repeat infringement by particular users, particularly infringement of a willful and commercial nature.” JA-707. The district court denied DMCA safe harbor protection to Cox based on the fiction that Rightscorp’s invalid notices provided Cox with actual knowledge that its customers were transmitting infringing material. JA-718.

The Court should reverse the district court's denial of DMCA safe harbor protection to Cox. As explained below, Cox could not have acquired knowledge of infringement from invalid DMCA notices purporting to allege that its network may have been used to transmit infringing material. Nor did Cox have an obligation to terminate its customers' internet access based on nothing more than purported allegations of infringement associated with the use of Cox's conduit services. Cox is entitled to summary judgment on its DMCA safe harbor defense.

A. Internet Service Providers Do Not Acquire Knowledge Of Copyright Infringement From Invalid DMCA Notices.

The notices sent by Rightscorp to Cox are not contemplated by the DMCA. These notices purport to allege that customers have used Cox's network to transmit infringing material over the internet, but, as Cox explains (at 7-8), the notices often contain inaccurate information without even alleging conduct amounting to infringement. Indeed, there is a long history of inaccurate allegations of infringement, including notices sent by Rightscorp on behalf of a copyright owner who did not, in fact, own the copyright allegedly infringed. JA-704. The DMCA requires those who send notices to act in good faith and sanctions those who make material misrepresentations, but this has not deterred inaccurate takedown notices. 17 U.S.C. § 512(c)(3)(A)(v), (f).

Rightscorp's notices were "ineffective" under Section 512(a) because they implicated Cox's "activity as a mere conduit." *Recording Indus. Ass'n*, 351 F.3d at

1236. The safe harbor in Section 512(a) is distinct among the four DMCA safe harbors because it immunizes an ISP's conduit function, *i.e.*, "transmitting e-mails, instant messages, or files sent by an internet user from his computer to that of another internet user." *Id.* at 1237. "Notably present in §§ 512(b)-(d), and notably absent from § 512(a), is the so-called notice and take-down provision." *Id.* at 1234; *see also In re Charter Commc'ns, Inc.*, 393 F.3d at 776. Unlike other safe harbors, Section 512(a) does not condition immunity on the ISP responding "expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity." 17 U.S.C. § 512(b)-(d).

The absence of a notice and takedown provision in Section 512(a) makes sense because ISPs perform a unique function when they serve as "conduits for the messages of others." *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 741 (D.C. Cir. 2016), *petitions for rehearing filed* (D.C. Cir. July 29, 2016) (No. 15-1063). Unlike the other safe harbors, which involve information residing on the ISP's systems or networks, Section 512(a) applies to "transitory digital network communications" that do not reside on the ISP's systems or networks. 17 U.S.C. § 512(a). As the D.C. Circuit has explained, "[n]o matter what information the copyright owner may provide, the ISP can neither 'remove' nor 'disable access to' the infringing material because that material is not stored on the ISP's servers."

Recording Indus. Ass'n, 351 F.3d at 1235; *accord In re Charter Commc'ns, Inc.*,

393 F.3d at 776. The district court agreed, explaining that Cox “does not store infringing content on servers, nor can it control what customers store,” and it “has no ability to remove or take down infringing content.” JA-2773 n.4.

Section 512(a) is also distinct because it lacks a counter-notification process to protect consumers from erroneous and abusive DMCA notices. *E.g., Lenz v. Universal Music Corp.*, 15 F.3d 1145, 1154 (9th Cir. 2016), *petition for cert. filed* (No. 16-217, Aug. 12, 2016). Under the counter-notification process in Section 512(g), a subscriber whose material has been removed pursuant to a Section 512(c) takedown notice may respond with a statement that the subscriber has “a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.” 17 U.S.C. § 512(g)(3)(C). The absence of a counter-notification process in Section 512(a) to protect consumers makes sense because an ISP could not erroneously remove or disable access to infringing material that does not reside on its systems or networks.

In this case, the district court failed to appreciate Cox’s unique role as a conduit service provider and the transitory nature of the relevant communications transmitted by Cox. Specifically, the court erred by concluding that Rightscorp’s invalid DMCA notices are “powerful evidence” that Cox had actual knowledge that its customers were transmitting copyright infringement over Cox’s network.

JA-719. Rightscorp's invalid notices could not provide Cox with actual knowledge of infringing activity because Cox had no obligation to respond to notices implicating its function as a conduit. Given the transient nature of the data, Cox could not "take down" allegedly infringing content transmitted over its network. *Recording Indus. Ass'n*, 351 F.3d at 1234-37. Because Rightscorp "did not provide effective notice, knowledge of infringement may not be imputed to" Cox. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007).

For the same reason, the district court erred by concluding that Cox's refusal to accept Rightscorp's invalid DMCA notices could establish that Cox willfully blinded itself to copyright infringement. JA-739-40. The concept of willful blindness is appropriate in the context of content hosted on the ISP's network. *See, e.g., Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012) ("A person is 'willfully blind' or engages in 'conscious avoidance' amounting to knowledge where the person 'was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.'" (citation omitted)). But the concept simply makes no sense in the context of transient data because an ISP lacks the ability to remove the infringing material from its network.

B. Internet Service Providers Need Not Restrict Their Customers' Internet Access On The Basis Of Unverified Allegations Of Infringement.

Nor did Rightscorp’s supposed allegations of copyright infringement trigger a duty in Cox to terminate its customers’ access to the internet. The plain language of the DMCA indicates that Congress did not believe that terminating a customer’s internet access would be “reasonabl[e]” or “appropriate” absent an adjudication that the customer is a “repeat infringer[.].” 17 U.S.C. § 512(i)(1)(A); *see Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 303 (4th Cir. 2006) (“The first step in determining the meaning of a statute is to examine the statute’s plain language.”). The district court violated the plain language of the DMCA by concluding that, to qualify for the safe harbor, Cox had to terminate its customers’ internet access on the basis of unverified allegations of infringement directed to the use of Cox’s conduit service.

1. The phrase “repeat infringers” is unique to Section 512(i)(1)(A). An “infringer” is a “person who interferes with one of the exclusive rights of a patent, copyright, or trademark owner.” Black’s Law Dictionary 786 (7th ed. 1999). To “repeat” means to “do or say something again.” Webster’s II New College Dictionary 962 (3rd ed. 2005). The phrase “repeat infringer” resembles the phrase “repeat offender,” which means a “person who has been *convicted* of a crime more than once.” Black’s Law Dictionary 1108 (emphasis added). Just as only a court can declare a person to be a “repeat offender,” only a court can declare a person to be a “repeat infringer[.]” Thus, Congress used the phrase “repeat infringers” to

mean persons determined by courts to have interfered with a copyright more than once.

This interpretation is the most logical one because “repeat infringers” cannot be persons against whom there have been merely untested allegations of infringement. *Kofa v. INS*, 60 F.3d 1084, 1088 (4th Cir. 1995) (en banc) (recognizing “two principles of statutory construction: plain English and common sense”). “It seems wrong . . . to say that one is an infringer merely by virtue of receiving a cease and desist letter, which some content owners have been sending with reckless abandon and which need not even meet the standards of Rule 11.”

Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 Stan. L. Rev. 1345, 1420-21 n.130 (2004)).

As Cox explains (at 48-49), “in crafting Section 512, Congress carefully delineated the difference between *allegation* and *proof*” of infringement. D. Nimmer, Repeat Infringers, 52 J. Copy’r Soc. U.S.A. 167, 175-84 (2005) (emphasis in original). Indeed, Congress distinguished between “claimed infringement” and adjudicated infringement. *Compare* 17 U.S.C. § 512(c)(1)(C) & (c)(3)(A) (discussing claims of infringement in takedown notices) *with id.* § 512(j)(1)(A)(iii) (discussing injunctions “to prevent or restrain infringement”). It also distinguished “repeat infringers” from “alleged infringer[s].” *Compare id.* § 512(i)(1)(A) *with id.* § 512(f), (h)(1), (h)(2)(C), (h)(3).

The omission of the words “claimed” and “alleged” from Section 512(i)(A)(1) indicates that “repeat infringers” cannot be persons who are merely alleged to have engaged in copyright infringement. *See Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (explaining that Congress “acts intentionally when it omits language included elsewhere” in a statute—and that this rule “applies with particular force” where Congress uses the disparate terms “repeatedly” and “in close proximity”). The phrase “repeat infringers” must refer to persons determined by courts to have engaged in copyright infringement more than once.

2. Congress’s use of limiting phrases in Section 512(i)(1)(A) confirms the need for an adjudication to determine that a user is a “repeat infringer[.]”. Even if there is such an adjudication, an ISP must still find that the severe sanction of terminating access to the internet is “reasonabl[e]” and “appropriate” under the “circumstances.”

The phrases “reasonably implemented” and “in appropriate circumstances” are words of limitation that narrow the circumstances in which ISPs must terminate the internet access of “repeat infringers” to qualify for the safe harbor. *See, e.g., Grant Thornton, LLP v. FDIC*, 435 F. App’x 188, 207 (4th Cir. 2011) (recognizing that “appropriate” is a “limitation” “Congress use[s] . . . for a purpose”). These phrases clarify that ISPs need not terminate internet access in every case involving

repeat infringers. Had Congress wanted ISPs to do so, it would not have included the words “reasonably” or “in appropriate circumstances” in the statute. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (“one of the most basic interpretive canons” is that “a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant”) (citation and internal quotation omitted).

The word “appropriate” means “[s]uitable; fitting.” Webster’s II New College Dictionary 57. The word “reasonably” means “[n]ot extreme or excessive; fair.” *Id.* at 945; *see also* Black’s Law Dictionary 1272 (defining “reasonable” as “[f]air, proper, or moderate under the circumstances”). The general nature of these terms indicates that ISPs retain a fair amount of discretion in deciding whether terminating a customer’s internet access is “reasonable” or “appropriate” in a particular circumstance. *Cf. Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996) (explaining that “[t]he generality of these terms—unfair, undue, unreasonable, unjust—opens a rather large area for the free play of agency discretion”).

In deciding whether to terminate internet access, the limiting phrases—“reasonably implemented” and “in appropriate circumstances”—must be interpreted in light of Congress’s preexisting policy regarding access to the internet. “[T]he meaning of one statute may be affected by other Acts, particularly

where Congress has spoken subsequently and more specifically to the topic at hand.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *see also New Cingular Wireless PCS, LLC v. Finley*, 674 F.3d 225, 249 (4th Cir. 2012) (explaining that “statutes addressing the same subject matter generally should be read ‘as if they were one law’” (citation omitted)).

In the Telecommunications Act of 1996, which preceded the DMCA by two years, Congress recognized that the internet would be essential to modern life. 47 U.S.C. § 230(a). It adopted a policy “to promote the continued development of the Internet,” *id.* § 230(b)(1), and instructed the Federal Communications Commission (“FCC”) to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” 47 U.S.C. § 1302(a); *see also* 47 U.S.C. § 254(b)(2) (“Access to advanced telecommunications and information services should be provided in all regions of the Nation.”).

Interpreting these Congressional policies, the FCC has sought to achieve 100 percent deployment and adoption because internet access is now a critical communications service. *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunication Capability to All Americans in a Reasonable and Timely Fashion*, 31 FCC Rcd 699, 701 ¶ 2 (2016) (“FCC 2016 Broadband Progress Report”). As the FCC has explained, the internet is “the most powerful and pervasive platform in our Nation’s history,” and it “has become a prerequisite to

full and meaningful participation in society.” *Lifeline & Link Up Reform & Modernization*, 31 FCC Rcd 3962, ¶ 1 (2016).

Given the critical nature of internet access and the federal policy of encouraging its adoption, Congress would have reserved the draconian punishment of terminating a user’s access to “the most important innovation in communications in a generation,” *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010), for the rarest of cases involving adjudicated cases of repeat copyright infringement. Terminating an entire household’s internet access is a far more extensive remedy than simply terminating a user’s ability to access one particular website or application on the internet, which is precisely why Section 512 distinguishes conduit ISPs from other service providers. It is also why Section 512(i)(1)(A) requires termination only in “appropriate circumstances.” Absent an adjudicated finding of repeat infringement, terminating a customer’s access to this critical resource is neither “appropriate” nor “reasonabl[e]” given the essential role that the internet plays in modern life—particularly where the allegations of infringement are embodied in invalid notices that lack the substantive safeguards associated with valid DMCA notices.

3. Other provisions in Section 512 confirm that Congress intended for there to be an adjudication that a user is a “repeat infringer[]” before losing access to the internet. *See Brown & Williamson*, 529 U.S. at 133 (explaining that “the words of

a statute must be read in their context and with a view to their place in the overall statutory scheme” and that a “court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole” (citations and quotations omitted)).

As noted above, the lack of a counter-notification process in Section 512(a) to protect consumers indicates that Congress must have intended for there to be some form of an adjudicatory process to test a copyright holder’s allegations of infringement. Because Congress included substantive safeguards to protect against content being erroneously removed or disabled, *see* 17 U.S.C. § 512(g), Congress must have intended for there to be some type of safeguard against erroneously losing access to the internet. It is unthinkable that consumers would have no ability to challenge a copyright holder’s unverified allegations of infringement before being cut off from the internet.

Congress also declared that an ISP has no obligation to “monitor[] its service or affirmatively seek[] facts indicating infringing activity.” 17 U.S.C. § 512(m)(1); H.R. Rep. 105-551 (II), at 61 (1998) (declaring that ISPs need not “investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing”). This is particularly true where the allegedly infringing material is merely transiting the service provider’s system. ISPs cannot know who is using the subscriber’s account on any given occasion or

whether an allegation of infringement is accurate. Congress’s decision to relieve ISPs of the duty to monitor its service and affirmatively investigate whether its users are engaging in infringement confirms that Congress intended for courts to make judgments about repeat infringement, not ISPs.

4. Section 512(i)(1)(A) must also be interpreted in a way that avoids “serious constitutional problems.” *United States v. Hamilton*, 699 F.3d 356, 367–68 (4th Cir. 2012) (citation omitted). Individuals have a constitutional right to use the internet to engage in this First Amendment activity, *see In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011), because the internet “offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity,” 47 U.S.C. § 230(a)(3). Access to the internet “serve[s] First Amendment interests of the highest order, promoting ‘the widest possible dissemination of information from diverse and antagonistic sources’ and ‘assuring that the public has access to a multiplicity of information sources.’” *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, 5868 ¶ 545 (2015) (“*Open Internet Order*”) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994)). “Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages,

mail exploders, and newsgroups, the same individual can become a pamphleteer.”

Reno v. ACLU, 521 U.S. 844, 870 (1997).

As numerous courts have recognized, laws that restrict access to the internet raise serious constitutional problems under the First Amendment. *See, e.g., Doe v. Harris*, 772 F.3d 563, 582 (9th Cir. 2014) (holding that a California law restricting the ability to engage in online speech violated First Amendment); *Packingham v. North Carolina*, No. 15-1194 (U.S. Oct. 28, 2016) (granting petition for a writ of certiorari to consider whether the First Amendment permits a state to restrict access to social media websites). Because Section 512(i)(1)(A) impinges upon the First Amendment rights of users to communicate over the internet, only an adjudicated finding of repeat infringement could justify restricting an individual’s right to engage in free speech on the internet.¹

5. In this case, the district court erred by finding that Cox failed to reasonably implement a repeat infringer policy because there was no adjudication that Cox’s customers actually were repeat infringers. Rightscorp’s invalid notices

¹ The Second Circuit’s decision in *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, Nos. 14-4369-cv(L), 14-4509-cv(XAP), 2016 WL 6211836 (2d Cir. Oct. 25, 2016), is inapposite for three reasons. First, *EMI* did not involve the DMCA safe harbor in Section 512(a) reserved for conduit ISPs. Second, *EMI* did not address whether there must be an adjudication of infringement for users to be considered “repeat infringers.” Third, *EMI* did not construe the limiting phrases in Section 512(i)(1)(A) or consider the serious First Amendment implications of forcing conduit ISPs to terminate their customers’ access to the internet.

were merely unverified allegations of infringement directed to customers' use of Cox's conduit service, and they could not have provided Cox with knowledge of repeat infringement in any event. Just as a notice alleging infringement does not mean that a user is an infringer, multiple notices do not render a user a repeat infringer.

As Cox explains (at 55-57), the district court also rendered the limiting phrases in Section 512(a)(1)(i) superfluous by insisting that Cox had a duty to terminate its customers' internet access in *every* case involving repeat infringers. JA-718. Even in cases involving repeat infringers, an ISP has no duty to terminate a repeat infringer's internet access if doing so would not be "reasonabl[e]" or "appropriate." 17 U.S.C. § 512(i)(1)(A).

Reversing the district court's erroneous interpretation of Section 512(i)(1)(A) would not leave copyright holders empty handed if they suspect infringement by a subscriber. Copyright holders have aggressively utilized John Doe lawsuits to target alleged infringers directly, often with great success. *See, e.g., Sony BMG Music Entm't v. Tenenbaum*, 719 F.3d 67, 72 (1st Cir. 2013) (\$675,000 judgment against peer-to-peer user); *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 901 (8th Cir. 2012) (\$1,920,000 judgment reduced on appeal to \$220,000); *BMG Music v. Gonzalez*, 430 F.3d 888, 889 (7th Cir. 2005) (\$22,500 awarded on summary judgment). Copyright holders can use this option to enforce

copyrights instead of using invalid DMCA notices to try to force ISPs to restrict their subscribers' access to the internet.

II. DENYING DMCA SAFE HARBOR PROTECTION BURDENS INTERNET SERVICE PROVIDERS AND IMPEDES FEDERAL TELECOMMUNICATIONS POLICY.

The district court's denial of DMCA safe harbor protection imposes massive burdens on ISPs and frustrates federal telecommunications policy designed to increase internet access. It forces ISPs to process millions of invalid DMCA notices similar to the ones that Rightscorp sent to Cox. It also has the perverse effect of forcing ISPs to terminate their customers' access to the internet on the basis of unverified allegations of copyright infringement contained in invalid notices, while at the same time depriving customers of the safeguards associated with valid DMCA notices. Ultimately, consumers will be the ones who shoulder the costs of complying with the district court's decision.

A. Invalid DMCA Notices Containing Unverified Allegations Of Infringement Impose Massive Burdens On Internet Service Providers.

The district court's decision imposes substantial burdens on ISPs to process, investigate, and respond to millions of invalid DMCA notices implicating their function as a conduit for internet traffic. It has emboldened a cottage industry of contingency-fee-based copyright agents who are already using the decision as an excuse to send millions of invalid notices to ISPs. Copyright owners and their

agents have consistently abused the DMCA by flooding conduit ISPs with millions of automated, invalid notices purporting to invoke the DMCA and claiming that those notices have legal significance. These notices, which are not authorized under the statute, purport to provide ISPs with “actual knowledge” of “repeat infringe[ment]” requiring termination, or the ISP’s incurrence of significant liability, based on nothing more than purported allegations of infringement.

In the wake of the district court’s decision, Rightscorp has intensified its efforts to intimidate ISPs, threatening that Rightscorp’s clients are becoming more focused on targeting ISP’s for liability. *See, e.g., Windstream Services LLC v. BMG Rights Management (U.S.) LLC*, No. 16-cv-05015-AT-RLE (S.D.N.Y. filed June 27, 2016) (declaratory judgment action filed following demands by BMG and Rightscorp based on the district court’s decision); *RCN Telecom Services, LLC et al v. BMG Rights Management (US) LLC*, No. 16-cv-04417-PKC (S.D.N.Y. filed June 13, 2016) (same). USTelecom member companies are routinely inundated with millions of invalid notices every month alleging infringement based on content that is only transmitted, not hosted, on their systems or networks. These notices frequently include extortionate “settlement” demands that rights-holders pressure ISPs to forward to unrepresented consumers.

In some cases, the notices even demand that ISPs terminate internet access based on unverified allegations of infringement. What the notices do not include,

however, is proof of actual infringement that could justify ISPs terminating a customer's internet access. Congress did not provide for, and did not intend, conduit ISPs to receive millions of invalid notices each month that are, in reality, nothing more than allegations of infringement and attempts to parlay those allegations into an obligation to cut off the internet access of alleged infringers.

Receiving millions of invalid notices makes it more difficult for ISPs to identify and respond to valid DMCA takedown notices. Improper notices make up the vast majority of notices received by USTelecom members and require significant resources given their volume and the unregulated manner in which the notices are generated. ISPs continue to receive millions of invalid notices every month, burdening their ability to handle the limited number of valid notices received with respect to hosting services. Although ISPs have no obligation to process invalid notices, some ISPs such as Cox have been doing so on a voluntary basis as an accommodation to copyright holders. The district court's decision not only purports to impose an obligation on ISPs to process invalid notices, but it perversely punishes those ISPs that voluntarily process invalid notices by putting them at a higher risk for potential copyright liability.

Even assuming these invalid notices properly identify copyright protected material actually transmitted by the specified customer over the ISP's network (which the ISP has no way to confirm), they do not even attempt to account for the

numerous reasons why there may have been a non-infringing transmission of the copyrighted material. These reasons might include the subscriber's computer being infected with malware, their network unknowingly being used by another household member, their network password having been stolen, or their neighbor or guest accessing their account without permission as a result of an unsecured network connection. *See generally* Casey G. Watkins, Note, *Wireless Liability: Liability Concerns for Operators of Unsecured Wireless Networks*, 65 Rutgers L. Rev. 635 (2013).

These notices also fail to consider the possibility that the transmission might be a fair use or provide for a counter-notification process that is created by the statute to protect consumers in relation to valid DMCA notices. *See Lenz*, 815 F.3d at 1151-54; *see also* Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 Or. L. Rev. 81, 127 (2010) (discussing “false positives” in copyright detection technologies). The district court’s decision leaves ISPs with the impossible choice of serving as an accomplice to copyright bullying or facing liability for failing to act based on invalid and unverifiable DMCA notices directed to the ISP’s conduit services.

Congress did not intend for ISPs to have to make this choice or carry the burden of responding to millions of these invalid notices. Congress sought to minimize the burdens on ISPs by clarifying that an ISP has no obligation to

“monitor[] its service or affirmatively seek[] facts indicating infringing activity.”

17 U.S.C. § 512(m)(1). Yet that is precisely what copyright owners and their agents demand of ISPs in their abusive DMCA notices. To put an end to this abuse of the DMCA, the Court should clarify that the notices Rightscorp sent to Cox were legally invalid and thus could not provide Cox with the level of knowledge necessary to determine that its customers were, in fact, transmitting infringing material.

B. Forcing Internet Service Providers To Restrict Internet Access Harms Consumers And Impedes Federal Telecommunications Policy.

The district court’s decision will ultimately harm consumers because it compels ISPs to terminate their customers’ access to the internet based on nothing more than unverified allegations of infringement related to ISPs’ conduit services. The court’s only limitation of this purported duty appears to be that the customer must receive more than one notice, regardless of its validity, accuracy or reliability. It puts ISPs into the impossible position of impeding federal telecommunications policies designed to increase internet access and adoption.

There can be no doubt that the DMCA and its safe harbor provisions have contributed significantly to the internet’s growth over the past two decades. When Congress adopted the DMCA in 1998, less than 20% of households had access to the internet at home. *See* Thom File and Camille Ryan, *Computer and Internet*

Use in the United States: 2013, at 4, U.S. Census Bureau (Nov. 2014). The FCC now estimates that approximately 90% of Americans have access to the internet. See FCC 2016 Broadband Progress Report ¶ 79.

The exponential growth in access to the internet is no accident. It is a direct result of federal telecommunications policies designed “to promote the continued development of the Internet,” 47 U.S.C. § 230(b)(1), and “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” 47 U.S.C. § 1302(a). USTelecom’s member companies have been at the leading edge of expanding access to the internet, investing more than \$1.4 trillion in broadband deployment since 1996, including \$78 billion in 2014 alone. See FCC 2016 Broadband Report ¶ 137 & n.399 (citing Patrick Brogan, *Broadband Investment Gains Continued in 2014*, USTelecom Research Brief, at 1 (Jul. 24, 2015)). These investments have contributed to “the ‘virtuous circle’ of innovation that has driven the explosive growth of the Internet.” *United States Telecom Ass’n*, 825 F.3d at 694 (quoting *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014)).

The district court’s decision threatens to undermine America’s broadband success story by impeding, if not conflicting directly with, federal telecommunications policy. It forces ISPs to restrict internet access to avoid crushing liability. Compelling ISPs to terminate users in response to

unsubstantiated allegations of infringement could ignite a new and vicious cycle, whereby ISPs terminate the internet access of an increasing number of users, which will result in Americans being denied access to a critical resource without any ability to contest the validity of the allegations of copyright infringement that led to their loss of internet access. The district court's decision could halt the remarkable progress that ISPs have made toward ensuring internet access is available to all Americans.

CONCLUSION

The Court should reverse the district court's grant of summary judgment to BMG on Cox's DMCA safe harbor defense and enter judgment for Cox.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 5,955 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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/s/ David E. Weslow

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I hereby certify that on November 14, 2016, the foregoing brief was filed electronically using the Court's CM/ECF system, which will send notification of such filing to party counsel, all of whom are registered ECF filers, and I further certify that a copy of the foregoing will be dispatched to a third-party commercial courier on November 15, 2016 for delivery to:

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3

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