

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**

David E. Weslow
Brett A. Shumate
Ari S. Meltzer
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
dweslow@wileyrein.com

*Counsel for United States Telecom
Association*

November 14, 2016

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,

/s/ David E. Weslow

David E. Weslow

Brett A. Shumate

Ari S. Meltzer

WILEY REIN LLP

1776 K Street, N.W.

Washington, D.C. 20006

(202) 719-7000

dweslow@wileyrein.com

*Counsel for United States Telecom
Association*

November 14, 2016

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).

The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman, 14 point.

/s/ David E. Weslow
