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July 6, 2017

Ms. Patricia S. Connor  
Clerk, U.S. Court of Appeals  
for the Fourth Circuit  
Lewis F. Powell Jr. Courthouse & Annex  
1100 East Main Street, Suite 501  
Richmond, VA 23219

Re: *BMG Rights Management (US) LLC v. Cox Communications, Inc.*, Nos. 16-1972(L), 17-1352, 17-1353 (consolidated): Response to Cox's Rule 28(j) notice of *Packingham v. North Carolina*, No. 15-1194, 2017 WL 2621313 (U.S. June 19, 2017)

Dear Ms. Connor,

The Supreme Court's First Amendment decision in *Packingham* decision is not pertinent. There, the Court struck down a "prohibition unprecedented in ... scope" – a blanket, criminal ban "endur[ing] for 30 years or more" on access to social networking sites by registered sex offenders, whether or not they had "committed any . . . illicit act[] on the Internet." *Id.* at \*4.

Here, Cox has not mounted a First Amendment challenge to contributory copyright liability. And the DMCA – whose supposedly "coercive" effect is Cox's hook for *Packingham's* relevance – is a *defense* that Cox previously claimed to be "optional" and "irrelevant to determining whether Cox is liable." Opening Br. 33.

Moreover, this case does not involve a "30 years or more" felony ban on internet access arising out of conduct that was not "committed . . . on the internet." *Id.* Cox lost its DMCA defense to civil copyright liability because it refused to terminate subscribers whom it knew continued to use its internet service to infringe. The First Amendment does not guarantee Cox's subscribers the right to use Cox's internet service to steal music any more than it prevents Cox from terminating subscribers who violate Cox's policies or fail to pay their bills. *See id.* at \*5 ("Specific criminal acts are not protected speech even if speech is the means for their commission.").

Indeed, *Packingham* is careful to explain that enactments targeted at “specific criminal acts” were “not before the Court” and that States may “prohibit a sex offender from . . . using a website to gather information about a minor.” *Id.* at \*6. Just as criminalizing the use of Facebook for sexual exploitation does not violate the First Amendment, the civil law of copyright liability may incentivize ISPs to terminate those subscribers who repeatedly use their service to infringe. *Packingham* thus has no relevance to question of what are appropriate circumstances in which an ISP should terminate the internet access of repeat infringers.

Infringers do not have First Amendment right to use Cox’s internet service to commit crimes, and *Packingham* does not hold otherwise.

Respectfully submitted,

/s/ Michael J. Allan

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