



judgment issues. Plaintiffs' arguments, and this Court's questions and observations, at the summary judgment hearing on October 30 made clear that the Spoliation Order findings gut Plaintiffs' case. Cox therefore respectfully submits that the Spoliation Order should be factored into the Court's pending summary judgment rulings.

Plaintiffs' evidence of direct infringement rests entirely on Rightscorp's "technological systems" for purportedly observing "infringement" on the Internet and sending notices to ISPs like Cox. Plaintiffs themselves collected no evidence related to this case; Plaintiffs sent no notices to Cox. Their claims therefore hinge on the functionality, and more importantly the *reliability*, of Rightscorp's systems. As Judge Anderson found: "Plaintiffs emphasize their reliance on the Rightscorp system in their amended complaint and *their entire damages case is built on the premise that the Rightscorp system accurately identified infringers of plaintiffs' copyrighted works from February 2012 through November 24, 2014.*" Spoliation Order at 3 (emphasis added). As it turns out, that reliance was misplaced.

Cox cannot analyze, and the jury cannot assess, the operation or accuracy of Rightscorp's pivotal systems. That is because Rightscorp intentionally destroyed *every* version of its technological systems that existed prior to July 15, 2015. Spoliation Order at 4. Despite actively planning this lawsuit for over *three years*, Plaintiffs and their litigation agent, Rightscorp, knowingly and intentionally failed to preserve the most critical evidence in the case. *Id.* at 3-4. It is difficult to imagine a more stark or more prejudicial example of spoliation. As a result of that misconduct, as Judge Anderson found, it is literally impossible for Cox or the jury "to know how the Rightscorp system operated during the relevant time period." *Id.* at 5.

Throughout this lawsuit, Plaintiffs have consistently made clear that they have no intention of proving copyright infringement by any specific Cox subscriber or any particular

person. Instead, Plaintiffs hope to rely on “circumstantial evidence” of such infringement in the form of data allegedly collected by Rightscorp. But as Judge Anderson found, there is no such evidence. Plaintiffs cannot establish how Rightscorp identified *any* of the alleged instances of “infringement,” or how it generated *any* of the notices, underpinning Plaintiffs’ claims. Thus, there is literally no evidence for Plaintiffs to rely on to prove direct infringement.

To both sanction and remedy Plaintiffs’ spoliation of the most material evidence in this case, Judge Anderson has recommended, at a minimum, a series of strongly worded corrective jury instructions. If the jury both understands and follows those instructions, it should be very difficult if not impossible for Plaintiffs to carry their burden of proof. But Judge Anderson also found that, as a result of the extreme prejudice to Cox as a result of Plaintiffs’ spoliation, “an evidentiary sanction is appropriate,” and he left to this Court what the sanction should be. Spoliation Order at 5, 6. In these circumstances, the most appropriate sanction is dismissal, particularly given that Judge Anderson’s factual findings effectively defeat Plaintiffs’ claims in any event. For the many reasons Cox addresses below, this case should end now.

### **ARGUMENT**

Much of the vigorous discovery motion practice in this case related to the Rightscorp source code underlying its “technological systems” for purportedly observing infringements on the Internet and notifying ISPs. Judge Anderson repeatedly admonished Rightscorp and its counsel Steptoe & Johnson (which represents both Plaintiffs and their agent) for their conduct with respect to the Rightscorp code.

Cox learned through discovery that Rightscorp destroyed all historical versions of its software systems for observing infringements and sending notices. Rightscorp, Plaintiffs, and Steptoe began planning this lawsuit against Cox in 2012. In 2013, they hired a forensic code

expert, Barbara Frederiksen-Cross (the same expert Plaintiffs are using here), specifically to analyze Rightscorp's audit and recordkeeping procedures in connection with a possible lawsuit against Cox, in case the reliability of Rightscorp's systems were ever in question. Despite those pre-litigation efforts, Rightscorp inexplicably failed to preserve the historical versions.

Instead, Rightscorp implemented a highly unusual practice — particularly for a company whose business model relies on collecting data for use in litigation — of manually overwriting its code every time Rightscorp made any change to the software. Had it employed the simplest version-control software (many versions of which are publicly available for free), Rightscorp could easily have preserved a complete record of the structures and functionalities of its historical systems. Instead, Rightscorp routinely deleted its code and left no verifiable trace of the functionalities of prior versions.

On August 28, 2015, Cox filed a Motion For Evidentiary Sanctions Based On Spoliation Of Rightscorp Source Code And Other Evidence (Dkt. No. 255). On September 8, Plaintiffs opposed Cox's motion (Dkt. No. 265), and on September 11, Cox replied (Dkt. No. 280). On September 18, 2015, Judge Anderson held a hearing on Cox's motion and heard extensive arguments from counsel. Following that hearing, Judge Anderson requested supplemental briefing regarding specific issues related to the impact of Rightscorp's destruction of its historical code. On September 29, the parties submitted their supplemental briefs (Dkt. Nos. 351, 357), with supporting declarations from their respective experts.<sup>1</sup>

On October 22, 2015, Judge Anderson entered the Spoliation Order. His findings regarding Plaintiffs' spoliation are damning. He found that, since at least March 2012,

---

<sup>1</sup> Cox's thorough briefing in support of its spoliation motion — comprising 60 pages in total, plus declarations and extensive documentary evidence — set forth in detail both the facts underlying the destruction of the Rightscorp code and the extreme prejudice to Cox resulting from that destruction. Cox will not reproduce or repeat that full analysis here.

Rightscorp and Plaintiffs, with the assistance of Steptoe, were actively planning for litigation.

Spoliation Order at 3. As Judge Anderson summed it up:

The evidence presented by the defendants establishes far beyond any reasonable doubt that the plaintiffs and Rightscorp were preparing for and anticipating filing a lawsuit against Cox since at least early 2013. Accordingly, plaintiffs and their agent Rightscorp had a duty to preserve material evidence, including how the Rightscorp system was allegedly detecting infringements and forwarding notices to Cox. The court finds that *by altering the source code, deleting portions of the source code, and by overwriting portions of the source code without maintaining a record of those alterations, deletions, or overwrites, material information was intentionally destroyed and it was not lost through inadvertence or mistake.*

*Id.* (citing *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277 (E.D. Va. 2001)) (emphasis added).

As discussed below, Plaintiffs' egregious spoliation not only impedes Cox's defense against Plaintiffs' infringement claims but it also undermines and defeats Plaintiffs' legal theories.

It therefore compels dismissal of this case.

Judge Anderson's findings — entered after careful review of an extensive record — establish that Plaintiffs and Rightscorp intentionally destroyed and spoliated the most central evidence for Plaintiff's theories in this case, the Rightscorp code. The only remaining question is the appropriate remedy: "Once spoliation has been established, the sanction chosen must *achieve deterrence, burden the guilty party with the risk of an incorrect determination and attempt to place the prejudiced party in the evidentiary position it would have been in but for the spoliation.*" *Trigon*, 204 F.R.D. at 287 (emphasis added). Cox respectfully submits that dismissal is the only sanction that appropriately advances all three *Trigon* requirements.

**I. PLAINTIFFS NEVER INTENDED OR TRIED TO PROVE DIRECT INFRINGEMENT BY ANY SPECIFIC PERSON.**

From the outset of this suit, Plaintiffs have expressly disclaimed any intention to prove direct infringement by any specific Cox subscriber or any particular person, relying instead on purported machine-based proof of infringements. They contend that "a plaintiff in a secondary

liability case against an internet service provider need only show that ‘users of [the defendant’s] services’ have engaged in direct infringement, not each infringer’s specific identity.” Dkt. No. 386 at 10. Nor do Plaintiffs intend to establish any specific action by any particular person who connected to the Cox network. At the summary judgment hearing, Plaintiffs’ counsel reinforced Plaintiffs’ theory that “you don’t have to identify the name of each individual when you’re dealing in secondary liability cases. ... All you have to show is that users of Cox’s services are infringing plaintiffs’ copyrights.” Dkt. No. 510 (October 30, 2015 Hearing Transcript) at 29.<sup>2</sup>

Having no direct evidence to prove direct infringement by any Cox subscriber or any other specific person connecting to the Internet over Cox’s network, Plaintiffs propose instead to use the data purportedly derived by Rightscorp as circumstantial evidence. But, as addressed below, that strategy is not viable because Plaintiffs cannot establish the accuracy and reliability of Rightscorp’s data or the systems that generated that data.

At the summary judgment hearing, Plaintiffs suggested they should be afforded a more lenient standard of proof because Cox failed to preserve certain transient records:

[T]he rationale of *Hotaling* certainly makes sense in the digital context as well. I mean, one of the reasons that the Court found that the copyright owners’ rights were infringed by this ‘making available’ is because the library didn’t keep records of who actually saw it. Well, we have the same problem here. And you do have the same problem in the digital context. Is that, you know, for example, *Cox has actually destroyed the subscribers’ names*, so that’s not available. And Cox is a gatekeeper of those subscribers’ names. So it’s not available. *So that’s one reason why it makes sense to have a broader view of this distribution right.*

---

<sup>2</sup> For that position, Plaintiffs rely on Section 512(c) cases involving *hosts*, or storage service providers, of infringing content. *See, e.g., Sega Enterprises Ltd. v. MAPHIA*, 857 F. Supp. 679, 686-87 (N.D. Cal. 1994) (finding prima facie case of contributory infringement based on direct infringement by unknown users of electronic bulletin board). Where a host has the ability both to identify infringing content and to take it down, the specific identity of the person posting the content is obviously less relevant. But a 512(a) conduit ISP like Cox has no ability to verify the existence or presence of allegedly infringing content, let alone “take down” that content. That is precisely why Plaintiffs must rely on Rightscorp’s software to try to establish the existence of infringing content associated with a Cox IP address.

Dkt. No. 510 at 10 (emphases added). Those assertions are false and fly in the face of the record. On May 8, 2015, Plaintiffs filed a motion to compel Cox to disclose personally identifiable information (PII) for 500 subscribers associated with IP addresses at which Plaintiffs claimed to have identified as the “most egregious” infringing activity. *See* Dkt. No. 72 (corrected memorandum). But Plaintiffs specifically represented that they were *not* seeking subscriber PII in order to prove direct infringement by any particular Cox subscriber. At the May 15, 2015 hearing, Judge Anderson largely denied Plaintiffs’ motion to compel because, in light of Plaintiffs’ liability theories, subscriber PII was not broadly relevant. Dkt. No. 80 at 32. Instead, he granted Plaintiffs only a “significant sampling” of PII associated with 250 IP addresses at which Rightscorp had supposedly identified “egregious infringement.” *Id.*

Cox was able to identify, and then produced to Plaintiffs, PII for subscribers historically associated with 139 of the 250 IP addresses that Plaintiffs identified, which was still a “significant sampling.”<sup>3</sup> Plaintiffs did literally *nothing* with that information. Plaintiffs later admitted that they did not even *attempt* to contact any of the subscribers (who were purportedly among “the most egregious infringers” on the Cox network). *See* Dkt. No. 375 at 7 n.11.<sup>4</sup>

In short, Plaintiffs’ suggestion that Cox somehow “stymied” Plaintiffs’ ability to prove direct infringement by individual Cox subscribers is pure fantasy. Plaintiffs never sought

---

<sup>3</sup> Plaintiffs attempt to capitalize on Cox’s routine purging of six months of transient DHCP data. That data is independently useless; it is only part of a chain used to link a particular IP address to a particular Cox account holder. If Cox had preserved more of that data, the only effect would have been that Plaintiffs might have received PII for another 111 Cox subscribers, in addition to the 139 subscribers Cox identified. But because Plaintiffs made no use of the PII “sampling” they *did* receive (as noted below), they suffered no conceivable prejudice. *That is precisely why Judge Anderson denied Plaintiffs’ motion for evidentiary sanctions with respect to the DHCP logs.* *See* Dkt. No. 381.

<sup>4</sup> One subscriber initiated contact with Plaintiffs’ counsel after being notified by Cox that his PII might be disclosed. In exchange for a broad release of liability, the subscriber provided a short declaration “admitting” to downloading a few songs through BitTorrent *before* he became a Cox subscriber. *See* Cox’s summary judgment motion (revised), Dkt. No. 354 at 10, 26.

subscriber PII for that purpose, and Plaintiffs did literally nothing with the significant sampling of subscriber information they requested and received. By Plaintiffs' own contention, specific subscriber information is irrelevant to their liability theories. Plaintiffs certainly are not entitled to a more lenient burden of proof based on the lack of immaterial evidence that Plaintiffs did not pursue and admittedly would not have used.

**II. RIGHTSCORP'S MISSING EVIDENCE IS ESSENTIAL TO PLAINTIFFS' CLAIMS OF DIRECT INFRINGEMENTS AND SECONDARY LIABILITY.**

One needs look no further than Plaintiffs' First Amended Complaint to understand that this case is predicated entirely on Rightscorp's "technological system that identifies actual infringements and the perpetrators of these infringements." *See* Dkt. No. 16, ¶ 2; *see also id.*, ¶ 22 ("Plaintiffs' notifications to Cox are based upon a software system developed and employed by their agent. This system identifies specific actual infringements of Plaintiffs' copyrighted works and the users of BitTorrent networks who infringe Plaintiffs' copyrighted works."). Judge Anderson noted that "Plaintiffs are seeking damages for the notices that were sent to Cox from February 2012 through November 26, 2014," the date this suit was filed. Spoliation Order at 2. Judge Anderson found further that:

[T]here can be no serious dispute that *the manner in which the Rightscorp system operates to identify suspected infringers of plaintiffs' copyrighted works is material evidence*. Plaintiffs emphasize their reliance on the Rightscorp system in their amended complaint and *their entire damages case is built on the premise that the Rightscorp system accurately identified infringers of plaintiffs' copyrighted works from February 2012 through November 26, 2014*.

*Id.* at 3 (emphases added).

Plaintiffs' summary judgment opposition reinforces that their infringement claims rise or fall with the purported reliability and accuracy of the Rightscorp data:

Plaintiffs have overwhelming evidence that Cox subscribers repeatedly use BitTorrent to infringe Plaintiffs' copyrights over the Cox network. *Rightscorp's software* identifies torrents containing files that infringe Plaintiffs' copyrights and



searches BitTorrent for users who are sharing those torrents. When it detects a user who is sharing infringing material, *Rightscorp* records the IP address of the infringer, the port number through which the infringer is sharing the file, the date and time of infringement, and the work infringed. *Rightscorp* identified and memorialized 2.5 million instances in which users on Cox IP addresses used the Cox network to share infringing files over BitTorrent. In addition, *Rightscorp* actually downloaded 100,000 full copies of files infringing almost all of the works at issue in this case.

Dkt. No. 386 at 9 (emphases added); *see also* Dkt. No. 510 (October 30, 2015 Hearing Transcript) at 29-31 (admission by Plaintiffs' counsel that the only "evidence" of direct infringement is the pre-suit data that Rightscorp purportedly collected). Consequently, unless "the Rightscorp system accurately identified infringers" (Spoliation Order at 3), Plaintiffs' infringement claims completely collapse.

But neither Cox nor the jury can ever know whether the Rightscorp systems accurately identified infringements or infringers at issue in this action. Judge Anderson found that "[i]t is undisputed that changes were made to the source code underlying the operation of the Rightscorp system from February 2012 through July 15, 2015 and that Rightscorp did not preserve historical versions of the Rightscorp system." Spoliation Order at 2. With respect to the notices that Rightscorp allegedly sent to Cox, Judge Anderson found that, "[g]iven the large number of notices during the relevant time period (in the range of 2 to 2.5 million), it is understandable that an investigation of all the notices would not be practical *and the primary focus should be on the accuracy of the system generating those notices.*" *Id.* at 5 (emphasis added).<sup>5</sup> Finally, Judge Anderson concluded:

---

<sup>5</sup> Rightscorp's notices themselves are not evidence of anything. *See, e.g., Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 639 (S.D.N.Y. 2011). With respect to the purported infringement "data" they contain (IP address, port, file name, etc.) the notices are hearsay, which is not only inadmissible but highly misleading absent any proof of how those notices were generated. *See* Spoliation Order at 5 ("the primary focus should be on the accuracy of the system generating those notices.").

[T]he defendants have made a strong showing that *the deposition testimony provided by Rightscorp is a poor substitute for a documented, historical version of the Rightscorp system*. The deposition testimony does not fully describe how the Rightscorp system operated starting in February 2012 [the beginning of the damages period], the changes that were made to the Rightscorp system during the relevant time period, and when those changes were made. It is also clear that the limited portion of the source code that was provided to the expert [Ms. Frederiksen-Cross] in 2013 and eventually produced in discovery *does not provide an adequate basis for the defendants to know how the Rightscorp system operated during the relevant time period*.

*Id.* (emphasis added).<sup>6</sup> In short, it is impossible to know how Rightscorp’s systems, on which this entire lawsuit relies, functioned before July 2015.

Plaintiffs’ threshold direct-infringement allegations cannot survive Judge Anderson’s spoliation rulings. On summary judgment, Plaintiffs argued that they can prove infringement merely by showing “that Cox subscribers made thousands of Plaintiffs’ copyrighted works available to the world for copying millions of times without authorization.” Dkt. No. 386 at 11. The Court properly rejected that “making available” theory. *See* Dkt. No. 510 at 5 (“[W]hen we’re dealing with file-to-file sharing and the presence -- the possession of these copyrighted works in the electronic area, I think that ‘making available’ is inconsistent with the language of the statute itself, which requires distribution. Not publication, but distribution.”). Even if “making available” alone were a viable theory, as a result of the intentional spoliation of the Rightscorp source code, Plaintiffs have no reliable evidence that any of their copyrighted works were “made available” through the Cox network. Because all of the pre-July-2015 Rightscorp systems are gone, there is no reliable evidence establishing how Rightscorp’s systems allegedly

---

<sup>6</sup> In mid-July 2015, Plaintiffs suddenly “discovered” that Ms. Frederiksen-Cross inadvertently had retained a certain files of the Rightscorp code that she was provided in connection with her 2013 engagement by Steptoe. Ms. Frederiksen-Cross had no idea how those files operated together (if they did) or fit into a broader Rightscorp system (if one existed). And, as Judge Anderson found, those files do not establish how the Rightscorp’s systems functioned (assuming they did) at *any* point in the past.

observed files that a peer possessed (and thereby allegedly offered for upload or download), during the relevant period.

Because “making available” alone is insufficient to prove direct infringement, the Court noted that Plaintiffs must “prove circumstantially that there has been distribution.” Dkt. No. 510 at 6. In response, Plaintiffs claimed that “there is lots of evidence to show that there actually has been distribution. Direct evidence of it is that Rightscorp downloaded 100,000 full copies of musical compositions that the plaintiffs claimed even before the case was brought.” *Id.*; *see also* Dkt. No. 386 (Plaintiffs’ summary judgment opposition) at 13-14 (Rightscorp downloaded “full copies of copyrighted works from Cox subscribers using Cox’s systems, including over 100,000 full copies of the works at issue in this case.”). But, even crediting Plaintiffs’ assertion and theory, there is *no* evidence of how those file samples were purportedly identified or downloaded, or if or how those files were supposedly connected to Cox IP addresses. *See* Dkt. No. 358 (Cox’s supplemental expert declaration), ¶¶ 17, 19. In connection with Cox’s spoliation motion, Plaintiffs admitted that Rightscorp did not begin collecting samples until February 2014 (two years into the damages period). *See* Dkt. No. 357 (Cox’s supplemental brief) at 4-5. When Plaintiffs’ expert, Ms. Frederiksen-Cross, reviewed fragments of the Rightscorp code in 2013, Rightscorp’s systems did not even have a sampling function. *Id.* Indeed, there is no record of how *any* of Rightscorp’s software systems operated at *any* point during 2014, when the samples were purportedly downloaded.<sup>7</sup>

---

<sup>7</sup> The fact that Plaintiffs now lean so heavily on the Rightscorp sound recording files further highlights the tenuousness of Plaintiffs’ theories. Almost as an afterthought, Plaintiffs dumped those file samples on Cox on July 3, 2015, nearly two months after the substantial-completion deadline for discovery in this case. Now Plaintiffs identify those samples as the linchpin to their ability to “prove circumstantially that there has been distribution” (Dkt. No. 510 at 6).

Moreover, in the file samples that Plaintiffs produced, Cox's expert identified multiple errors in identifying songs, of which Rightscorp itself was not even aware until Cox's expert pointed them out. *See* Dkt No. 358, ¶¶ 17, 19. It is impossible ever to know why those specific errors occurred, or whether flaws in Rightscorp's systems may have generated other systematic errors in detection or sampling. *Id.*

As Judge Anderson noted, the purported *outputs* from Rightscorp's historical systems (*e.g.*, notices of alleged infringement or file samples) are unreliable and meaningless apart from proof of the accuracy and reliability of the underlying systems. Spoliation Order at 5.<sup>8</sup> Without that proof, Rightscorp's downloads are simply alleged sound recording files with no evidentiary link to Cox's system or to any Cox subscriber. Because Plaintiffs cannot establish how Rightscorp's systems functioned before July 2015, they cannot bridge the "circumstantial" chasm between works (allegedly) possessed or "made available" and files actually downloaded.<sup>9</sup>

Just as Judge Anderson's spoliation rulings result in a complete failure of proof on Plaintiffs' direct infringement claims, those rulings also gut Plaintiffs' secondary liability arguments. Plaintiffs' secondary liability claims depend on actual direct infringements. Plaintiffs also argue that their contributory infringement claims turn on notices that Rightscorp allegedly sent to Cox regarding alleged infringements over its network. *See* Dkt. No. 386 at 6

---

<sup>8</sup> This fatal flaw in Plaintiffs' "circumstantial evidence" theory is independent of the fact that Plaintiffs also have no evidence of any download by a party *other than Rightscorp*. Plaintiffs' counsel admitted as much at the summary judgment hearing. *See* Dkt. No. 510 at 8. Even setting aside Plaintiffs' spoliation, without evidence of a third-party download of Plaintiffs' works, Plaintiffs cannot prove any transmissions to third parties.

<sup>9</sup> Cox does not concede that a third-party download of one of Plaintiffs' works constitutes a violation of the Section 106(3) distribution right. Consistent with *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 985 (D. Ariz. 2008), such a download might support claims of an uploader's contributory infringement of the *reproduction* right when the downloader reproduces the work on some storage medium upon receiving the transmission.

(“Each of those notices established that an infringing work had been obtained by a Cox user and was being offered via BitTorrent at the Cox IP address stated”). But, as noted, there is no evidence establishing the functions, accuracy, or reliability of Rightscorp’s systems prior to July 15, 2015. More to the point, there is no way for Plaintiffs to establish how any of the Rightscorp notices were generated, what those notices purportedly represent, or even that those notices in fact went to Cox.<sup>10</sup>

Without such evidence, Plaintiffs are left with nothing but generalized arguments that some persons accessing the Internet over the Cox network use BitTorrent and that Cox knows there “must be” infringement occurring somewhere over its network. The U.S. Supreme Court rejected that generalized “constructive knowledge” approach over 30 years ago. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 436-39 (1984) (finding no “constructive knowledge” of infringement where defendant’s technology is capable of substantial non-infringing uses).

In sum, as a matter of law, because of Plaintiffs’ spoliation, they cannot prove direct infringement, under either a “making available” theory or any other theory, nor can they prove secondary liability. Dismissal is the only proper sanction to redress Plaintiffs’ spoliation (which is discussed further below). Dismissal also independently results from a failure of essential proof, based on Judge Anderson’s findings. Plaintiffs have no reliable way to show the jury how Rightscorp observed the alleged infringements on which this case rests, or to prove, even circumstantially, direct infringement by any user of Cox Internet service.

---

<sup>10</sup> Plaintiffs also argue that Cox was “willfully blind” to Rightscorp’s so-called “Dashboard,” which supposedly lists all the infringements on Cox’s network observed by Rightscorp’s systems. Dkt. No. 386 at 17. But Plaintiffs’ “Dashboard” argument suffers from the same fatal flaws as Rightscorp’s notices and file samples: it is the output of Rightscorp’s software systems, and there is no “adequate basis for the defendants to know how the Rightscorp system operated during the relevant time period.” Spoliation Order at 5.

Cox respectfully submits that the Court cannot assess the parties' summary judgment arguments without considering Judge Anderson's factual findings in the Spoliation Order. Those findings make it impossible for Plaintiffs to establish any evidence, circumstantial or otherwise, of infringements over the Cox network before July 2015. Because Plaintiffs' "entire damages case is built on the premise that the Rightscorp system accurately identified infringers of plaintiffs' copyrighted works from February 2012 through November 24, 2014" (Spoliation Order at 3), and there is no reliable evidence to support that premise, Plaintiffs' claims must fail.

### **III. DISMISSAL IS THE ONLY PROPER SANCTION AND RESULT.**

"It has long been the rule that spoliators should not be able to benefit from their wrongdoing." *Trigon*, 204 F.R.D. at 284. A district court has inherent authority to sanction spoliation, and it also has "considerable discretion, including ordering dismissal, granting summary judgment, or permitting an adverse inference to be drawn against the party as a means of leveling the playing field and sanctioning the conduct of the party." *Id.* at 285 (citing *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995)). At the very minimum, Cox is entitled to strong corrective jury instructions recommended by Judge Anderson to address Plaintiffs' spoliation of the most critical evidence in this case. A severe evidentiary sanction, which issue Judge Anderson stated was for the Court to impose, also is a just result, as explained below.

At the hearing on Cox's spoliation motion, Judge Anderson made clear that this Court must ultimately determine the appropriate sanctions and remedies based on Judge Anderson's spoliation findings. In his Spoliation Order, Judge Anderson stated that the Court should consider a series of specific corrective jury instructions. Spoliation Order at 6. Those instructions include the facts that (1) the structure and function of the Rightscorp systems from

February 2012 through November 2014 are material information, (2) that Plaintiffs failed to comply with their obligations to preserve that material information, and (3) that the July 2015 version of Rightscorp's systems does not establish how those systems operated during the time period relevant to this case. *Id.* Importantly, Judge Anderson also found that the Court should instruct the jury as follows:

The plaintiffs must present sufficient evidence for the jury to make a determination as to whether the Rightscorp system accurately identified infringements of plaintiffs' copyrighted works and generated accurate notices to the defendants based on those identified infringements during the relevant time period.

*Id.* That is a reasonable and logical instruction given the nature of Plaintiffs' theories.

If the jury understands and follows that instruction, it would be impossible for Plaintiffs to carry their burden of proof in light of Judge Anderson's other findings. Plaintiffs cannot "present sufficient evidence" of whether Rightscorp's systems accurately identified infringements or generated accurate notices, with respect to Plaintiffs' works or any other works for that matter, prior to July 2015. Spoliation Order at 5-6. Judge Anderson specifically found that the historical versions of Rightscorp systems are gone, and the evidence on which Plaintiffs attempt to rely — *i.e.*, biased, self-serving, and flawed testimony from Rightscorp personnel, and the 2013 code fragments that Ms. Frederiksen-Cross retained — is not an adequate substitute.

*Id.* In short, Plaintiffs *must* prove that the Rightscorp systems were reliable, but *cannot* do so. Read together, Judge Anderson's factual findings and recommended jury instructions compel dismissal.

Given the gravity and consequences of Plaintiffs' spoliation, however, Judge Anderson also found that "an evidentiary sanction is appropriate." Spoliation Order at 5. In addition to his proposed corrective jury instructions, Judge Anderson indicated that this Court "will make the ultimate decision whether an evidentiary sanction is appropriate and, if so, what that sanction

should be given the evidence presented.” *Id.* at 6. The Fourth Circuit has established that, in some spoliation circumstances, “dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case.” *Silvestri v. General Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001). This is such a case.

“But for” Plaintiffs’ and Rightscorp’s spoliation of the code, Cox’s “evidentiary position” would have been that Cox could have examined the operation of Rightscorp’s systems that purportedly observed all of the copyright infringements on which Plaintiffs base this lawsuit. Cox could have tested the accuracy and reliability of those systems for identifying purported infringements and generating notices to ISPs. Cox could have analyzed why sound recording file samples Rightscorp claims to have downloaded in 2014 contained errors and misidentified songs. Cox could have tested the thresholds used by Rightscorp to identify allegedly infringing BitTorrent files and to trigger infringement notices. But Cox can never be placed in that “evidentiary position.” As Judge Anderson found, neither Cox nor the jury can ever understand or test the operation or outputs of Rightscorp’s historical systems.

*Silvestri* is determinative here. In that case, the plaintiff was injured in an accident when the airbag in his landlady’s car (which he was driving) failed to deploy. In light of that failure, the plaintiff hired a lawyer who in turn engaged accident reconstruction experts to inspect the vehicle “in anticipation of filing a lawsuit against General Motors.” *Id.* at 586. Those experts photographed and analyzed the vehicle and the crash scene, and they issued reports concluding that the airbag was defective and contributed to the plaintiffs’ injuries. *Id.* at 587.

“Notwithstanding the anticipation of litigation against General Motors, neither [the plaintiff] nor [his lawyer] took any steps to preserve the vehicle ....” *Id.* It remained in its damaged condition for several months, but by the time the plaintiff brought suit the car had been repaired and sold.



*Id.* After the suit was filed, General Motors' expert attempted to conduct his own analysis but was forced to rely on the limited, skewed evidence collected by the plaintiff's experts. The trial court found that General Motors was so "highly prejudiced" by the spoliation that dismissal of the lawsuit was the only appropriate sanction. *Id.* at 589.

The Fourth Circuit agreed. The *Silvestri* Court determined that, while harsh, dismissal was the only adequate remedy because the spoliation "denied General Motors access to the only evidence from which it could develop its defenses adequately." 271 F.3d at 594. When the suit was filed, the car had been repaired, so the best evidence of its condition following the accident was gone, but there was some remaining evidence in the form of photographs and measurements taken by the plaintiff and his experts. *Id.* at 586. The analogy to this case is plain: the historical Rightscorp code is gone, but there is some limited and wholly unreliable evidence of its condition, *i.e.*, the 2013 file fragments and oral testimony. In *Silvestri*, it was unclear whether the airbag system in the repaired car was the same as the original; the Court noted that, like here, "Defendant, at this late date, has no way of proving that the systems are the same." *Id.* at 589. As the Plaintiffs do here, the *Silvestri* plaintiff argued that General Motors could rely on the data collected by the plaintiff's experts. The Fourth Circuit rejected that notion because "not only was the [best] evidence lost to General Motors, but the evidence that was preserved was incomplete and indefinite." *Id.* at 594. General Motors was thereby precluded from conducting its own analysis of all the evidence, just as Cox is prevented from doing here.<sup>11</sup> *Accord Vodusek*,

---

<sup>11</sup> In fashioning a remedy, the *Silvestri* Court also rejected the idea of taking certain facts as established, because when the plaintiff's only evidence "is incomplete and perhaps inaccurate, the court would have no basis for determining what facts should be taken as established." 271 F.3d at 595. The same is acutely true here: to establish how Rightscorp's systems historically functioned, the Court and Cox would simply be guessing. It is not reasonable or fair to shift to Cox or to the Court the burden of "inventing" for the jury the critical system that Rightscorp intentionally destroyed.

71 F.3d at 155 (expert’s spoliation “made it impossible for his own theory to be verified or for the Defendants to make a full and fair inspection to develop alternative theories based on the evidence.”).

The analogy between this case and *Silvestri* is complete. The most critical evidence in this lawsuit — *i.e.*, the systems for allegedly observing the alleged infringements on which this entire lawsuit is predicated — was destroyed as the result of intentional conduct by Plaintiffs and their agent. Cox has no ability to analyze that evidence or develop a defense to the purported reliability of Rightscorp’s historical systems. And, as Judge Anderson also found, Cox is not required to confront the incomplete, inaccurate, and self-serving “evidence” proffered by Plaintiffs in place of the spoliated code. *Silvestri*, 271 F.3d at 594. Thus, Cox literally cannot defend against Plaintiffs’ claims regarding how Rightscorp’s systems operated in the relevant time period. Dismissal is not only warranted, but also the only adequate sanction. *Id.*

The only alternative remedy is to prevent Plaintiffs from relying on, or deriving any benefit from, the evidence that Rightscorp destroyed. “[T]here is an inherent unfairness in allowing a party to destroy evidence and then to benefit from that conduct.” *Trigon*, 204 F.R.D. at 284. This remedy would compel the Court to preclude Plaintiffs from introducing *any* evidence — testimony or exhibits — of how Rightscorp’s systems operated prior to July 2015, when the current version of the code was finally produced. That remedy must include prohibiting any testimony from any witness, either lay or expert (including Ms. Frederiksen-Cross), regarding the historical operation or outputs of the Rightscorp systems.

Plaintiffs have complained that this sanction would effectively result in the dismissal of Plaintiffs’ case. Judge Anderson noted that it was “unclear if the sanction requested by the defendants would necessarily result in the dismissal of this action. While it may limit the claim

for damages, it may not alter the claim for injunctive relief in the amended complaint.”

Spoliation Order at 6 n.1. If Plaintiffs’ protest is true, it only highlights the critical nature of the code that was destroyed. If Plaintiffs’ claims cannot stand without the lost evidence of Rightscorp’s historical systems (and, as discussed above, they cannot), then how could Plaintiffs possibly have permitted the wholesale destruction of that evidence? Plaintiffs essentially argue that the consequences of their spoliation are so severe that they should be relieved of any penalty at all. That perverse position is antithetical to “the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine.” *Silvestri*, 271 F.3d at 590 (emphasis added).

Finally, the Court should not disregard the parallel goal to “achieve deterrence.” *Trigon*, 204 F.R.D. at 287. Rightscorp, Plaintiffs, and their lawyers have been planning this landmark lawsuit for years, and yet knowingly destroyed the central evidence in the case. This is a test case for Rightscorp’s business model, and inevitably it will set the groundwork for future suits against others. The Court should not condone or reward Plaintiffs’ spoliation: “The policy underlying this inherent power of the courts [to sanction spoliation] is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.” *Silvestri*, 271 F.3d at 590. This is an exceptionally egregious example of spoliation, and it calls for the severest sanction.

## CONCLUSION

For all these reasons, Cox respectfully requests that the Court dismiss this case, both because the Spoliation Order results in a failure of essential proof on Plaintiffs' claims and because dismissal is the most appropriate sanction for Plaintiffs' egregious spoliation.

Dated: November 5, 2015

Respectfully submitted,

*/s/ Craig C. Reilly*

Craig C. Reilly VSB # 20942

111 Oronoco Street

Alexandria, Virginia 22314

TEL: (703) 549-5354

FAX: (703) 549-5355

E-MAIL: craig.reilly@ccreillylaw.com

*Counsel for Defendants*

*Of Counsel for Defendants*

Andrew P. Bridges (*pro hac vice*)

David L. Hayes (*pro hac vice*)

Jedediah Wakefield (*pro hac vice*)

Guinevere L. Jobson (*pro hac vice*)

Fenwick & West LLP

555 California Street, 12th Floor

San Francisco, CA 94104

Tel: (415) 875-2300

Fax: (415) 281-1350

Email: abridges@fenwick.com

gjobson@fenwick.com

Brian D. Buckley (*pro hac vice*)

Fenwick & West LLP

1191 2nd Avenue, 10th Floor

Seattle, WA 98101

Tel: (206) 389-4510

Fax: (206) 389-4511

Email: bbuckley@fenwick.com

Armen N. Nercessian (*pro hac vice*)  
Ronnie Solomon (*pro hac vice*)  
Ciara Mittan (*pro hac vice*)  
Fenwick & West LLP  
801 California Street  
Mountain View, CA 94041  
Tel: (650) 988-8500  
Fax: (650) 938-5200  
Email: anercessian@fenwick.com

**CERTIFICATE OF SERVICE**

I hereby certify that on November 5, 2015, the foregoing document was filed and served electronically by the Court's CM/ECF system upon all registered users:

/s/ Craig C. Reilly  
Craig C. Reilly, Esq. (VSB # 20942)  
111 Oronoco Street  
Alexandria, Virginia 22314  
TEL (703) 549-5354  
FAX (703) 549-5355  
craig.reilly@ccreillylaw.com  
*Counsel for Defendants*