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, Incorporated; CoxCom, LLC,

Defendants-Appellants,

and

Cox Enterprises, Inc.; CoxCom, Inc., d/b/a Cox Communications of Northern Virginia; John Doe 2,

Defendants,

Rightscorp, Inc.,

Party-in-Interest.

Appeal from the United States District Court for the Eastern District of Virginia

BRIEF OF PUBLIC KNOWLEDGE, THE ELECTRONIC FRONTIER FOUNDATION, AND THE CENTER FOR DEMOCRACY AND TECHNOLOGY AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fourth Circuit Rule 26.1(b), *amici curiae* Public Knowledge, the Electronic Frontier Foundation, and the Center for Democracy and Technology state as follows:

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DISCLOSURE OF RELATIONSHIPS WITH COUNSEL

In the interest of disclosure and pursuant to agreement with the parties, *amici* hereby disclose their relationships in which counsel to the parties to this case were in a position to advise any *amicus* on any matters.

Certain trial counsel for Defendants-Appellants Cox Communications, Inc. et al., namely David Hayes and Andrew Bridges of Fenwick & West LLP, were previously part of the advisory board of *amicus* EFF. Neither Mr. Hayes nor Mr. Bridges has ever been a director, officer, trustee, or employee of EFF.

Public Knowledge is a former client of Steptoe & Johnson LLP, who represents Plaintiff-Appellee BMG Rights Management in this case. Additionally, one attorney from Steptoe & Johnson, who is not involved in this litigation, served as an ad hoc advisor to Public Knowledge in 2007.

Counsel for *amici* are aware of no further relationships with appellate or trial counsel.

To avoid any appearance of impropriety, counsel have discussed the content of this brief neither with EFF's advisory board nor with attorneys at Fenwick & West or Steptoe & Johnson.

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INTEREST OF *AMICI CURIAE*

Public Knowledge[1] is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. Public Knowledge advocates on behalf of the public interest for a balanced copyright system, particularly with respect to new and emerging technologies.

The Electronic Frontier Foundation ("EFF") is a nonprofit civil liberties organization that has worked for over 25 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 26,000 dues-paying members have a strong interest in helping the courts ensure that intellectual property law serves the public interest.

The Center for Democracy and Technology ("CDT") is a non-profit public interest and Internet policy organization. CDT is dedicated to driving policy outcomes that keep the Internet open, innovative, and decentralized, reflecting constitutional and democratic values of free expression, privacy, and individual

[1]Pursuant to Federal Rule of Appellate Procedure 29(a), all parties received appropriate notice of and consented to the filing of this brief. Pursuant to Rule 29(c)(5), 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 the brief. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

liberty. CDT has litigated or otherwise participated in a broad range of cases and regulatory proceedings applying copyright law to the Internet and other emerging technologies.

Counsel thank Haley Fine for her valuable contributions to this brief.

SUMMARY OF ARGUMENT

Just as a tenant's water should not ordinarily be cut off when a landlord alleges nonpayment of rent, a subscriber's connection to the Internet should not be terminated in response to alleged copyright infringement except in the most extenuating circumstances. This premise must inform the interpretation of § 512(i) of the Digital Millennium Copyright Act, which governs a service provider's obligations to terminate access in response to copyright infringement.

1. This case presents a distinct situation. Prior cases interpreting § 512 largely deal with entities on the Internet, like websites or content providers. Appellant Cox Communications does something vastly different: it is the bridge between its subscribers and the Internet as a whole. This distinction is important, because the punishment of Internet access termination goes far beyond stopping the infringing activity.

As detailed in Section I of this brief, terminating a subscriber's Internet access handicaps the subscriber's access to educational opportunities, job seeking, and even the most important public services such as healthcare and 911 emergency response. Termination impedes the subscriber's ability to exercise one of our most cherished liberties, the right of free expression. And termination potentially imposes those far-reaching effects on an entire household sharing the subscriber's Internet connection.

Non-Internet options exist to fill many (but not all) of these voids. But the power of online services compared to the paper-and-mail alternatives can impose a substantial burden on the terminated party. Perhaps those with greater means can bear that burden, but those from economically and socially disadvantaged communities often cannot.

Section 512(i) is flexible by design. By requiring Internet service providers to terminate subscribers' access only in "appropriate circumstances," the statute lets service providers narrowly tailor terminations in view of the services being offered and the consequences of termination. The district court's suggestions to the contrary were in error and should be corrected.[2]

2. The term "repeat infringers" in § 512(i) should be construed in light of current realities of Internet access. An Internet subscription is often associated not with a single person, but rather shared among a family, a household, or even a small community in the case of public libraries and such facilities. Just as cutting off water punishes not just the nonpaying tenant but also family members and other residents, cutting off Internet access has an overbroad effect.

[2]Disapproval of the district court on this and other points raised in this brief does not necessarily require reversal of the result; other specific facts at issue may independently support the outcome. The interest of *amici* is in proper interpretation of the law and correction of any misstatements that might affect future cases.

Section 512 contains a safeguard against this: Only subscribers "who are repeat infringers" are to have their access terminated. Where a third-party user causes the infringement, the subscriber cannot properly be deemed a "repeat infringer" without a further showing implicating the subscriber's own participation. To hold otherwise would contravene § 512's letter and intent, and it would discourage the desirable practice of Internet subscription sharing.

The district court largely strayed from this proper construction, appearing to say that "repeat infringers" could include those whose "accounts were being used" for infringement. This Court should clarify that the statute, properly read, applies only to subscribers who themselves are liable for infringement.

Contrary to what popular culture would have us believe, the Internet is not just for trivialities; it is not just the domain of time-wasters and teenagers. The consensus of experts and policymakers is that Internet access is, in the words of President Obama, "not a luxury, it's a necessity." Section 512 was intended from the start to help the Internet evolve to that level of importance.[3] The statute should be construed flexibly in view of that continuing evolution, and indeed to encourage that evolution.

[3] *See* H.R. Rep. No. 105-551(II), at 21–22 (1998).

ARGUMENT

I. The Unquestionable Importance of Internet Access Today Demands a Flexible Construction of Section 512's Provision for Termination of Internet Access

The Digital Millennium Copyright Act offers service providers wide flexibility in establishing the "appropriate circumstances" that warrant service termination of a repeat infringer. 17 U.S.C. § 512(i)(1)(A). Multiple courts agree that the determination of whether a repeat infringer policy satisfies § 512(i) must "be informed by an awareness of the service provider's function [and] existing technology," among other things. *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1177 (C.D. Cal. 2002).[4] Appellant Cox Communications explains in detail how the phrase "appropriate circumstances" is a "subjective and fact-bound question of judgment, propriety, and fit." Br. Defs.-Appellants 55–59.

The flexibility within § 512(i) is especially important to this case because of the nature of Cox's business. Precedents on § 512(i)—indeed, every relevant case the district court cited[5]—largely deal with termination from entities on the In-

[4] *See also Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1101 (W.D. Wash. 2004) (noting DMCA's "balancing efforts" and Congress's "intent to leave the policy requirements, and the subsequent obligations of the service providers, loosely defined"); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007) ("The statute permits service providers to implement a variety of procedures . . . .").

[5] *See Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 28 (2d Cir. 2012); *Capitol Records, Inc. v. Mp3tunes, LLC*, 821 F. Supp. 2d 627, 633–34 (S.D.N.Y. 2011), *rev'd sub nom. EMI Christian Music Group, Inc. v. Mp3tunes, LLC*, No. 14-4369, -4509 (2d Cir. Oct. 25, 2016); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir.

ternet like websites or content providers. By contrast, Cox is an Internet service provider, the link between its subscribers and the Internet *in toto*. Termination of service in this context means not merely loss of access to a single website on the vast Internet; it means severance from the Internet entirely.

Given this unique context, § 512(i)'s termination provision must account for the degree of harm caused by Internet access termination. As set forth below, that degree of harm is potentially massive.

The district court made no acknowledgment of Cox's distinguishable situation, the importance of Internet access, or the need to construe § 512(i) in a flexible manner. Rather, the summary judgment opinion might be read to go so far as to mandate termination of repeat infringers regardless of circumstances.[6] Especially in the unique context of Internet service provision, that holding is inconsistent with both the plain statutory language and the public good.

2007); *Disney Enters., Inc. v. Hotfile Corp.*, No. 11-cv-20427, 2013 WL 6336286, at *2 (S.D. Fla. Sept. 20, 2013); *Capitol Records, LLC v. Escape Media Group, Inc.*, No. 12-cv-6646, 2015 WL 1402049, at *6 (S.D.N.Y. Mar. 25, 2015); *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 505 (S.D.N.Y. 2013); *Cybernet*, 213 F. Supp. 2d at 1158; *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1094 (W.D. Wash. 2004); *ALS Scan, Inc. v. RemarQ Cmtys., Inc.*, 239 F.3d 619, 620 (4th Cir. 2001); *In re Aimster Copyright Litig.*, 334 F.3d 643, 646 (7th Cir. 2003); *Perfect 10, Inc. v. Giganews, Inc.*, 993 F. Supp. 2d 1192, 1194 (C.D. Cal. 2014); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1011 (9th Cir. 2013).

[6] *See* Summ. J. Op. 29 (J.A. 707) ("Thus, appropriate circumstances clearly cover account holders who repeatedly or flagrantly infringe copyright . . . ."). The disjunctive "or" might imply that flagrancy is not a necessary element of "appropriate circumstances."

A. Deprivation of Internet Access Impairs Access to Key Economic and Social Services

Internet access underlies many facets of people's lives today. Termination of that access could thus deny the terminated person access to important, essential, and even lifesaving services. Three examples among many[7] are described here: access to education, access to employment, and access to government services.

Those consequences are most assuredly at stake in this case on copyright infringement. Other members of a household whose account is terminated—who may be wholly innocent of infringement—are equally deprived of the same essential benefits. And even repeat infringers ought not to be regularly impaired in success in school, finding a job, or calling 911. The gravity of the harms of denying these services must play a role in the proper construction of § 512(i).

Education. Internet access has a direct effect on a student's academic performance. Students report that 96.5% of them receive homework that requires Internet use.[8] When students lack Internet access, 49% report being unable to complete a homework assignment, and 42% report receiving a lower grade as

[7] *See generally* Nat'l Telecomms. & Info. Admin. & Econ. & Statistics Admin., *Exploring the Digital Nation: America's Emerging Online Experience* (2013), *available at* URL *supra* p. ix.

[8] *See* Hispanic Heritage Found. et al., *Taking the Pulse of High School Student Experiences in America* 9 (2015), URL *supra* p. viii; *see also* Larry Barrett, *77% of Teachers Assign Internet-Required Homework: Survey*, Multichannel News (Oct. 24, 2008), URL *supra* p. vii (77% of teachers report assigning Internet-requiring homework).

a result.[9] Jessica Rosenworcel, a commissioner on the Federal Communications Commission, has written that lack of Internet access "means too many young people will go through school without fully developing the skills that give them a fair shot in the digital age." Jessica Rosenworcel, *How to Close the "Homework Gap"*, Miami Herald (Oct. 31, 2016), URL *supra* p. ix.

Schools are desperately trying to offer alternatives to students who have no home Internet access, such as library computers and school bus Wi-Fi.[10] These substitutive efforts reveal how important home Internet access is to education, and they reveal even more in their limitations: Denial of home Internet access forces students to use awkward, ineffective workarounds, undercutting their ability to learn. *See also* discussion *infra* p. 12.

Employment. The Internet is an increasingly crucial tool for Americans seeking jobs. A recent study estimates that out of the 34% of Americans who have looked for a new job in recent years, 79% used online resources, and 34% said that online resources were the most important tool available to them. Aaron Smith, *Searching for Work in the Digital Era*, Pew Res. Center (Nov. 19, 2015), URL *supra* p. x. Job-seeking individuals with irregular Internet access will not see or apply to

[9] *See* Hispanic Heritage Found. et al., *supra*, at 11.

[10] *See In re Modernizing the E-rate Program for Sch. & Libraries*, 29 F.C.C. Rcd. 15538, ¶ 2 (Dec. 11, 2014); Nichole Dobo, *Wi-Fi-Enabled Bus Connects Students in Poor Calif. Community*, Educ. Wk. (Jan. 2, 2015), URL *supra* p. viii; Cecilia Kang, *Bridging a Digital Divide that Leaves Schoolchildren Behind*, N.Y. Times, Feb. 22, 2016, at A1, *available at* URL *supra* p. viii.

new hiring opportunities on sites like LinkedIn, Monster, or Indeed as quickly as those with access to broadband. Job applicants without Internet access, unable to respond quickly to interview offers or other opportunities, thus face an automatic disadvantage compared to their Internet-using competitors. *See* Cecilia Kang, *Unemployed Detroit Residents Are Trapped by a Digital Divide*, N.Y. Times, May 22, 2016, at B1 [hereinafter Kang, *Detroit*], *available at* URL *supra* p. ix.

Government services. Those without Internet access face significant challenges in obtaining government services, even vitally essential ones. Tasks such as registering to vote, renewing a driver's license, and filing taxes can be done online or offline, but the online options are often faster and easier, and the alternatives might require time off of work, child care arrangements, or other costs.

Even lifesaving emergency services may be conditioned upon Internet access. As telecommunications providers retire copper phone lines, services such as 911 will run over Internet connections.[11] Telecommunications companies are already stripping out phone lines in favor of Internet-based phone systems run over fiber-optic cable.[12] It is entirely possible that a person whose Internet access is terminated will be unable to call an ambulance or the police.

[11] *See* New and Emerging Technologies 911 Improvement Act of 2008, Pub. L. No. 110-283, sec. 6, § 6(b), 122 Stat. 2620 (requiring Voice-over-Internet Protocol services to provide 911 service).

[12] *See, e.g.,* Bob Fernandez, *Verizon's Quiet Plan to Change Copper Phone Lines to FiOS*, Phila. Inquirer (Apr. 10, 2016), URL *supra* p. viii.

And notably, the federal health insurance exchanges operated under the Affordable Care Act are highly dependent on the government's HealthCare.gov website. In-person and telephone options do exist and are indeed often used, but the website is the sole avenue that can offer an immediate eligibility decision and interactive plan comparisons.[13] Those without Internet access thus face an additional challenge to obtaining health care.

The purpose of § 512(i) is to deter repeat copyright infringement. It is not to strike alleged copyright infringers with a crippling and disproportionate penalty like denying access to chunks of the public safety net—at least not in the ordinary course. The "appropriate circumstances" language of the DMCA provides Internet service providers with the flexibility to account for these considerations. By effectively reading this flexibility out of the statute, the district court erred.

B. The Harms of Internet Access Termination Are Especially Severe for Traditionally Disadvantaged Communities

The roadblocks from Internet disconnection discussed above are multiplied many times over when that household is within a rural, low-income, or traditionally marginalized community. The already-low levels of Internet access within

[13] *See* Jeffrey Young, *Seven Alternatives to HealthCare.gov, Obamacare's Glitchy Website*, Huffington Post (Oct. 16, 2013), URL *supra* p. x; *see also* Lisa Stiffler, *Obamacare Signup Is by Computer—And Some of Us Don't Have One*, Seattle Times (Sept. 18, 2013), URL *supra* p. x (Washington state insurance exchanges are "only be available through an online portal").

those communities, sometimes called the "digital divide,"[14] offer a case study in what might happen if § 512(i) were to demand termination of Internet access on a more regular basis.

People of ordinary means have viable alternatives to Internet access—they may use office computers, or borrow from friends—but those without advantages are more at a loss. Consider, for example, the situation of Eric Hill, who lives in a low-income Detroit neighborhood and cannot afford a broadband connection. He is searching for work, but to apply for jobs he must wait to use a computer at the public library, one hour-length session at a time. "Once I leave, I worry that I'm missing an email, an opportunity," he said. Kang, *Detroit*, *supra*.

Economically disadvantaged students have an equally difficult time getting an education. April Willis, a 17-year-old living in a public housing project, makes her way to the library, the community college, and even fast food restaurants simply to use the Internet to do her homework. Marcia Pledger, *Cleveland Initiative to Help Bridge Digital Divide, Homework Gap*, Plain Dealer (Apr. 5, 2016), URL *supra* p. ix. "It's just very stressful sometimes," she explained, "because you have to plan and figure out how to get things done."

Mr. Hill and Ms. Willis are not unique. A 2015 survey found that "African Americans, Hispanics, and young adults are generally more likely to view the lack

[14] *See, e.g.,* 2016 Broadband Progress Report, 31 F.C.C. Rcd. 699, ¶¶ 90–91, tbls.8–9 (Jan. 28, 2016).

of home high-speed access as a major disadvantage in various facets of people's lives," in particular "for getting health care information and learning about or accessing government services" as well as "for learning about things that might improve or enrich their lives." John B. Horrigan & Maeve Duggan, Pew Research Ctr., *Home Broadband 2015*, at 13 (2015), *available at* URL *supra* p. viii.

Members of these communities go to extraordinary lengths to find Internet access, showing the importance of that access. For example, Isabella and Tony Ruiz, 11 and 12, must do their homework by standing on the sidewalk outside their school to download assignments. *See* Cecilia Kang, *Bridging a Digital Divide that Leaves Schoolchildren Behind*, N.Y. Times, Feb. 22, 2016, at A1, *available at* URL *supra* p. viii. Sean Pearson, looking for a job paying more than $8.50 an hour, has "asked to fill out paper applications, only to be told to apply online." Kang, *Detroit*, *supra*. Internet access is irreplaceable to these individuals.

These examples show that loss of Internet access, to those people of limited means, is especially devastating to their efforts at economic and social advancement. A rigid interpretation of § 512(i), especially one that demands termination of an entire household's Internet access without regard to the particular situation, could have far-reaching punitive effects well beyond what is warranted to remedy copyright infringement.

C. The Fundamental Right of Free Expression Largely Depends on Internet Access Today

A flexible interpretation of § 512(i) is further warranted in view of the great importance of Internet access to the exercise of our constitutional right to access and share information.

1. Free expression is among our most fundamental values. This nation observes "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Freedom of expression embodies the "prized American privilege to speak one's mind," *Bridges v. California*, 314 U.S. 252, 270 (1941), and "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues," *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Learned Hand, J.).[15]

Free expression includes rights to listen and to associate with other's views. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured" by the Constitution. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

[15] *See also* U.S. Const. amend. 1; *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (the Framers "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth"); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 19, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (recognizing universal human right "to seek, receive and impart information and ideas through any media and regardless of frontiers").

2. The practical reality today is that denial of Internet access is a serious barrier to the exercise of free expression. Without question, the Internet is the greatest speech platform available today. Networking company Cisco estimates that Internet traffic in 2015 amounted to 906 exabytes of data,[16] equivalent to transmitting three times the entire text collection of the Library of Congress every second.[17] Every minute, users reportedly publish over 400 hours of video to the website YouTube.[18] And Internet speech is important speech. It is used to petition the government,[19] to shape culture,[20] and to engage in political dialogue such as elections.[21]

[16] *See* Cisco, *Cisco Visual Networking Index: Forecast and Methodology, 2015-2020*, at 10 (2016), URL *supra* p. vii.

[17] The Library of Congress's text collection has been estimated at 10 terabytes. Employees of the Library dispute this number and suggest it is much larger owing to newer digital collections. *See* Leslie Johnston, *How Many Libraries of Congress Does It Take?*, Libr. Congress (Mar. 23, 2012), URL *supra* p. viii.

[18] *See* Greg Jarboe, *VidCon 2015 Haul: Trends, Strategic Insights & Tactical Advice*, Tubular Insights (July 27, 2015), URL *supra* p. viii (quoting YouTube CEO).

[19] *See* Katelyn Sabochik, *Petition the White House with We the People*, White House (Sept. 22, 2011), URL *supra* p. ix.

[20] *See* Elizabeth Stark, *Free Culture and the Internet: A New Semiotic Democracy*, Open Democracy (June 20, 2006), URL *supra* p. x.

[21] *See* Stephen Mills, *How Twitter Is Winning the 2012 US Election*, Guardian (Oct. 16, 2012), URL *supra* p. ix; Bethany A. Conway et al., *The Rise of Twitter in the Political Campaign: Searching for the Intermedia Agenda-Setting Effects in the Presidential Primary*, 20 J. Computer-Mediated Comm. 363 (2015). Certainly much online dialogue is unpleasant, but "[o]ne of the prerogatives of American citizenship is . . . the freedom to speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944) (Frankfurter, J.).

As the Supreme Court acknowledged in *Reno v. ACLU*: "It is no exaggeration to conclude that the content on the Internet is as diverse as human thought." 521 U.S. 844, 852 (1997) (internal quotations omitted).

The architecture of the Internet is strongly conducive to individual expression. "Speech becomes democratized because technologies of distribution and transmission are put in the hands of an increasing number of people and increasingly diverse segments of society throughout the planet." Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. Rev. 1, 8–9 (2004). "Interactive platforms have become vital not only to democratic participation but also to the ability of users to forge communities, access information, and discuss issues of public and private concern." Ctr. for Democracy & Tech., *Shielding the Messengers: Protecting Platforms for Expression and Innovation* 21 (2012), URL *supra* p. vii.

3. The importance of the Internet to free expression makes termination of Internet access particularly injurious to that fundamental right. While certainly other platforms for speech exist, they are not adequate substitutes. *Reno* presciently recognized this in rejecting the government's argument that restrictions on certain modalities of Internet speech (chat groups, newsgroups, and mailing lists) could be suppressed since other, albeit more expensive, fora were available; "one is not to have the exercise of his liberty of expression in appropriate places

abridged on the plea that it may be exercised in some other place." 521 U.S. at 880 (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)).

In view of the enormous reach of the Internet, the low cost and high effectiveness of individual expression thereon, and the opportunities for association that come with a broad range of content and ideas, one must conclude that the Internet is a speech platform of primary importance. Cutting off an individual's Internet access severs that individual from the preeminent public forum, substantially handicapping that individual's ability to enjoy the fundamental right of free expression. That drastic consequence must inform the construction of § 512(i).

D. The Consensus Among Experts, Courts, and Policymakers Is That Internet Access Is Essential and Termination Must Be Exercised Sparingly

In view of the centrality of Internet access both to basic services and to free expression, the consensus of expert authorities is that Internet access is essential. Termination of such access ought to occur rarely in view of that essentiality.

United States policymakers have repeatedly emphasized the value of Internet access to all people. The Federal Communications Commission has explained that "broadband is essential to participate in society" because "institutions and schools, and even government agencies, require Internet access for full participa-

tion in key facets of society."[22] Federal appellate judges have called the Internet "arguably the most important innovation in communications in a generation" and "one of the most important aspects of modern-day life."[23] The President put it more succinctly: "[T]he Internet is not a luxury, it's a necessity."[24]

Authorities outside the United States go further, treating Internet access within a human rights framework. A United Nations council called for "applying a comprehensive human rights–based approach in providing and in expanding access to the Internet," and noted it was "[d]eeply concerned" by those who "intentionally prevent or disrupt access to or dissemination of information online."[25] The Organisation for Economic and Cultural Development similarly explained that Internet policy "must promote openness and be grounded in respect for human rights and the rule of law."[26]

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[22] *In re Lifeline & Link Up Reform & Modernization*, 30 F.C.C. Rcd. 7818, ¶ 4 (June 18, 2015) (Second Further Notice of Proposed Rulemaking).

[23] *ClearCorrect Operating, LLC v. Int'l Trade Comm'n*, 810 F.3d 1283, 1302 (Fed. Cir. 2015) (O'Malley, J., concurring) (quoting *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010)); *see also United States Telecom Ass'n v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016) (describing Internet as "one of the most significant technological advancements of the 20th century" (quoting S. Rep. No. 107-240, at 7 (2001))).

[24] Remarks During the ConnectHome Initiative at Durant High School in Durant, Oklahoma, Daily Comp. Pres. Doc. No. 497 (July 15, 2015), *available at* URL *supra* p. ix.

[25] *See* G.A. Human Rights Council Res. 32/13, at 2–3, U.N. Doc. A/HRC/RES/32/13 (July 1, 2016).

[26] *OECD Council Recommendation on Principles for Internet Policy Making* 5 (2011), *available at* URL *supra* p. ix.

France's HADOPI law is also instructive on overbroad use of Internet access termination as a penalty for copyright infringement. The 2009 law created a government agency with power to punish Internet subscribers whose connections were repeatedly used for infringing activities with one-month access termination.[27] The Constitutional Council found the provision for Internet access termination unconstitutional. Citing to a constitutional declaration that the "free communication of ideas and opinions is one of the most precious rights of man," the Council held that the importance of Internet access to enjoying those rights "implies freedom to access such services."[28] The HADOPI law conflicted with those constitutional rights and was thus invalid.[29]

A revised version of the law passed constitutional muster, but in 2013 French authorities chose to forbear from the penalty of Internet access termination. Tellingly, France's digital minister explained this decision on the grounds that Internet access termination was "like cutting off someone's water."[30]

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[27]Law No. 2009-669 of June 12, 2009, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 13, 2009, p. 9666, art. 5. *See generally* Annemarie Bridy, *Graduated Response American Style, 23 Fordham Intellectual Property*, Media & Ent. L.J. 1, 18–23 (2012).

[28]CC decision no. 2009-580DC, June 10, 2009, J.O. 9675, ¶ 12 (Fr.) (quoting *Declaration of Rights of Man and the Citizen* art. 11 (1789) (Fr.)). The Declaration of Rights of Man carries constitutional weight in France. *See* 1958 Const. pmbl. (Fr.).

[29]*See* CC decision no. 2009-580DC, *supra*, ¶ 16.

[30]*See* Cyrus Farivar, *France Removes Internet Cut-off Threat from its Anti-Piracy Law*, Ars Technica (June 3, 2013), URL *supra* p. viii.

The water does not need to be cut off here. Properly construed, § 512(i) gives service providers flexibility in determining the "appropriate circumstances" in which a person's Internet access should be terminated. This Court should reject rigid views to the contrary, to let Internet service providers accommodate these important public considerations of Internet use before terminating access.

II. The Statute Should Be Construed in View of, and in Support of, the Common Practice of Shared Internet Access

Section 512(i)(1)(A) obligates service providers to take action only against "subscribers and account holders . . . who are repeat infringers." The district court assumed that notices of claimed infringement were sufficient to raise a duty to terminate subscribers. This view was in error because, among other things, the district court failed to account for the fact that those notices did not actually identify the person who committed the infringement.

Cox provides broadband Internet access rather than access to a website or content service. Thus, a single Cox account may be shared among multiple people. Every member of a family living in a house most likely uses a single shared Internet subscription, as distinguished from Internet services like email where each household member may have a separate account.

The statutory phrase "repeat infringers" must be construed in light of this reality. Internet service providers should not be required to shut down an entire

account based on allegations that may involve only a single user, for two reasons: it would be at odds with the statutory language, and it would discourage valuable practices of Internet connection sharing.

A. A Person Not Responsible for the Infringing Acts Cannot Be a "Repeat Infringer" Within the Meaning of the DMCA

Copyright infringement by a third-party user does not, by the plain language of the statute, require termination of the subscriber. Only "subscribers . . . who are repeat infringers" need be terminated to maintain the safe harbor. § 512(i)(1)(A).

The term "repeat infringer" in § 512(i) at a minimum means a person who actually infringed copyrights, not merely one accused of infringement.[31] That comports with Congress's use of the term "infringement" elsewhere in the DMCA: When not qualified as "alleged" or "claimed" infringement, Congress consistently used the term to refer to actual infringement. Each of the four principal safe harbors in § 512(a)–(d) bars monetary and other remedies "for infringement of copyright," a construction that would be meaningless if it referred to mere accusation. And given that a premise of § 512 is that service providers "need not act or address difficult infringement issues,"[32] an Internet service provider wishing

[31]This "actual infringement" construction is correct even if this Court disagrees with Cox's view that the person must be adjudicated as an infringer.

[32]*Cybernet*, 213 F. Supp. 2d at 1176 (quoting H.R. Rep. No. 105-551(II), at 61 (1998)); *see also* 17 U.S.C. § 512(m)(1).

to maintain its safe harbor under the DMCA need only terminate (in appropriate circumstances) subscribers who actually infringe copyrights.

When a user other than the subscriber engages in copyright infringement, the subscriber is generally not liable. As this Court has held, one who "is simply the owner and manager of a system used by others who are violating [] copyrights . . . is not *directly* liable for copyright infringement." *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 546 (4th Cir. 2004); *accord Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1369–70 (N.D. Cal. 1995). Only if other factors are present, such as a fiduciary relationship or knowledge of the infringement coupled with a material contribution, would a noninfringing subscriber be liable for another's acts. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005); *Netcom*, 907 F. Supp. at 1374 (knowledge of infringement is a prerequisite to contributory liability); *id.* at 1377 (vicarious liability requires financial benefit).

Likewise, under basic principles of tort law, an Internet access subscriber has no duty to copyright holders to prevent infringement by third parties. *See AF Holdings v. John Doe*, No. 4:12-cv-2049, 2012 WL 3835102 (N.D. Cal. Sept. 4, 2012); *Liberty Media Holdings, Inc. v. Hatanaka*, No. 1:11-cv-262 (D. Haw. Jan. 30, 2012).

The notices in this case alleged infringement at particular Internet Protocol addresses, numbers that identify accounts but that "do not distinguish between

users" of those accounts. *See Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1145 (N.D. Cal. 2008). Thus, these notices do not indicate whether the person who committed the infringement was the subscriber, a family member, a houseguest, a hacker, or anyone else. As such, the notices cannot suffice to show that the subscriber is an infringer, let alone a repeat infringer.

Evidence in this case suggests that many of the claimed infringements reported to Cox were done by third parties, not by subscribers. In one case, a Cox representative asked a subscriber to "secure his open wireless router," Summ. J. Op. 37 (J.A. 715), suggesting that Cox believed that a third party and not the subscriber was the actual infringer. Another document noted a Cox employee's belief that "the account holder is not the one using BitTorrent [to infringe copyrights]." *Id.* at 38 (J.A. 716).

Nevertheless, the district court was inconsistent in applying this relevant difference between subscribers and third-party users. On the one hand, the court held that Cox lost the protection of § 512's safe harbor in part because "BMG has identified specific instances in which Cox knew *accounts were being used* repeatedly for infringing activity yet failed to terminate." *Id.* at 39 (J.A. 717) (emphasis added). On the other hand, the court also said that a service provider's obligations regarding an account holder arise when the service provider has "actual

knowledge that the *account holder* is using its services for infringing purposes." *Id.* at 40 (J.A. 718) (emphasis added).

It is this latter standard that is correct: the relevant acts are those of the account holder, not the acts of others. Insofar as the district court applied the former test, that was an error requiring correction.

B. Section 512 Should Not Be Interpreted to Discourage the Desirable Practice of Internet Subscription Sharing

Requiring that repeated notices of infringement by *any* user of an Internet connection result in termination, besides being contrary to the statute, would cause Internet access subscribers to avoid sharing their connections, for fear of termination. It will likely reduce the number of establishments that provide free Internet access to the public. The Court should avoid this result.

It is pervasively common for multiple users to use a single account with an Internet service provider like Cox. In the case of a coffeeshop or library, dozens or hundreds of guests may use the same account for numerous purposes each day. A home Internet subscription will generally be held by one person but used by many: spouses, children, roommates, houseguests, neighbors, and even strangers. Indeed, certain Internet service providers enable wireless Internet access *for the public* through a customer's home equipment, without the customer's

consent. *See* Michael Horowitz, *Comcast XFinity WiFi: Just Say No*, Computerworld (June 27, 2014), URL *supra* p. viii.

Long-standing federal government policy calls for the expansion of access to broadband, especially for people of limited means. *See, e.g.,* Telecommunications Act of 1996 § 706(a), 47 U.S.C. § 1302 (FCC "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"); *In re Modernizing the E-rate Program for Sch. & Libraries*, 29 F.C.C. Rcd. 15538, ¶¶ 3–4 (Dec. 11, 2014). Sharing of broadband connections furthers this policy by getting more people online.

Besides being extremely common, the sharing of Internet subscriptions is beneficial. Shared computer labs and open networks help to expand Internet access to the sizable fraction of the population unable to attain sufficient service on their own.[33] Sharing of Internet connections also helps to reduce congestion on the wireless spectrum, a limited resource, by allowing users of mobile phones, tablets, and other common computing devices to limit their use of cellular networks.[34]

[33] *See* Araba Sey et al., *Connecting People for Development: Why Public Access ICTs Matter* (2013), URL *supra* p. x; *see also* Penny Pritzker & Tom Vilsack, *Broadband Opportunity Council Report and Recommendations* 8, 39 n.50 (2015), *available at* URL *supra* p. ix.

[34] *See* Aruna Balasubramanian et al., *Augmenting Mobile 3G Using WiFi*, 8 Proc. Int'l Conf. on Mobile Systems Applications & Services 209 (2010).

A reading of § 512(i) that requires or even encourages Internet service providers to terminate connections based on acts of third parties would chill these practices of Internet subscription sharing. Internet access account holders would have to weigh the risk of disconnection, and all the attendant harms, against their generosity in letting others enjoy the benefits of access. A family might as a result refuse to allow Internet access to a houseguest, for example. Or the public library might remove the free public terminals, preventing people like Eric Hill from applying for jobs. Or a fast food franchise might turn off free access for its customers—making it even more difficult for schoolchildren of low-income families, like April Willis, to do their homework. *See* Section I.B *supra* p. 11.

By not punishing Internet subscribers for acts of third parties, the correct construction of § 512(i)'s "repeat infringers" provision thus leads to a result that benefits families, communities, and society at large. This Court should not hesitate to adopt this construction.

CONCLUSION

For the foregoing reasons, § 512(i)(1)(A) of the Digital Millennium Copyright Act should be construed and applied in accordance with the principles set forth in this brief.

Respectfully submitted,

Dated: November 14, 2016

s/Charles Duan

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Dated: November 14, 2016

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I certify that on **November 14, 2016** the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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