RECORD 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., COXCOM, LLC,
Defendants-Appellants,

AND

COX ENTERPRISES, INC.; COXCOM, INC., D/B/A COX COMMUNICATIONS OF NORTHERN VIRGINIA; JOHN DOE 2, IP SUBSCRIBER 174.65.175.31,
Defendants

RIGHTSCORP, INC.,
Party-in-Interest

AMERICAN COUNCIL ON EDUCATION, *ET AL.*,
Amici Curiae

AND

CONSUMER TECHNOLOGY ASSOCIATION; COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION; UNITED STATES TELECOM ASSOCIATION; AMERICAN CABLE ASSOCIATION; INTERNET COMMERCE COALITION,
Amici Supporting Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA

BRIEF OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION AND NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 16-1972 Caption: BMG Rights Management (US) LLC v. Cox Communications, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Music Publishers' Association ("NMPA")
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

NMPA is not aware of any such interest, but refers the Court to the respective disclosures of the parties to this appeal.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Jacqueline C. Charlesworth Date: January 6, 2017

Counsel for: NMPA

CERTIFICATE OF SERVICE

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I certify that on January 6, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Jacqueline C. Charlesworth
(signature)

January 6, 2017
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 16-1972 Caption: BMG Rights Management (US) LLC v. Cox Communications, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Nashville Songwriters Association International ("NSAI")
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

NSAI is not aware of any such interest, but refers the Court to the respective disclosures of the parties to this appeal.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Jacqueline C. Charlesworth Date: January 6, 2017

Counsel for: NSAI

CERTIFICATE OF SERVICE

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I certify that on January 6, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Jacqueline C. Charlesworth
(signature)

January 6, 2017
(date)

RULE 29(a)(4)(E) STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* National Music Publishers' Association ("NMPA") and Nashville Songwriters Association International ("NSAI") state that no party's counsel authored this brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici* and their counsel—contributed money that was intended to fund preparing or submitting the brief.[1]

STATEMENT OF CONSENT TO FILE *AMICUS* BRIEF

All parties to this appeal have consented to the filing of this *amici curiae* brief pursuant to Federal Rule of Appellate Procedure 29(a)(2).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1(b), *amici curiae* state as follows: NMPA and NSAI are non-profit trade associations organized under section 501(c)(6) of the U.S. Tax Code. NMPA and NSAI are not publicly held corporations or other corporate entities. They do not have parent corporations. No publicly held corporation or other publicly held entity owns 10% or more of the stock of the NMPA or NSAI. Per Local Rule 26.1(a)(2)(B), NMPA and NSAI do not know of any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation, other than that identified by the parties.

[1] NMPA further confirms that although Plaintiff-Appellee BMG Rights Management (US) LLC is a member of NMPA, neither it nor its counsel authored this brief, in whole or in part.

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INTEREST OF *AMICI CURIAE*

NMPA is the principal trade association representing the U.S. music publishing and songwriting industry. Over the last one hundred years, NMPA has served as the leading voice representing American music publishers before Congress, in the courts, within the music, entertainment and technology industries, and to the listening public. NMPA's membership includes "major" music publishers affiliated with record labels and large entertainment companies as well as independently owned and operated music publishers of all catalog and revenue sizes. Taken together, compositions owned or controlled by NMPA's hundreds of members account for the vast majority of musical works licensed for commercial use in the United States.

NSAI was established in 1967 in Nashville as an advocacy group for the American songwriting profession. NSAI's reach has grown significantly since that time. Today, NSAI is the largest not-for-profit songwriter trade association in the world, with approximately 5,000 members and nearly 150 local chapters. Its mission is to advocate for songwriters' legal and economic interests and educate a new generation of American songwriters.

The issues before the Court in this appeal are of critical importance to NMPA and NSAI members. NMPA and NSAI's objective has always been to protect the value of their members' intellectual property rights. This challenge has only grown in the age of increased consumption of music by digital means. The proper delineation of the scope of the so-called "safe harbors" of the Digital Millennium Copyright Act ("DMCA") and underlying rules of contributory liability impacts not only Plaintiff-Appellee BMG, but all music publishers and songwriters. A misinterpretation of these principles would skew Congress' careful balance by allowing Internet providers to profit from infringement at the expense of creators and copyright owners.

To be clear, NMPA and NSAI are fully supportive of a robust Internet environment and the authorized use of their members' content. A healthy digital ecosystem, however, requires that service providers cooperate with rightsholders by taking appropriate action to address infringing activity, as Congress intended. For these reasons, NMPA and NSAI have an important interest in the issues implicated by this appeal, and respectfully request that the Court consider the views expressed below.

SUMMARY OF ARGUMENT

The fundamental question before the Court in this case is whether an Internet service provider ("ISP") can be sent over a million notices attesting to infringement of copyrighted songs and, because the ISP believes it to be contrary to its economic interests to take action, simply choose to ignore them. The judge and jury below, after reviewing extensive evidence, determined that Cox Communications, Inc. and Coxcom, LLC (together, "Cox") should be held responsible for such conduct. Cox now asks this Court to set aside that judgment and hold that its blatant disregard for the intellectual property of music publisher BMG Rights Management (US) LLC ("BMG")—and the creators that BMG, in turn, represents—was fully consistent with copyright law.

Cox hopes to excuse itself from liability by advancing unsupportable interpretations of the DMCA and the Supreme Court's opinions in *Sony Corporation v. Universal City Studios*, *Inc.*, 464 U.S. 417 (1984) and *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). *Amici* NMPA and NSAI urge this Court to reject Cox's distorted view of copyright law. Neither the DMCA nor Supreme Court precedent allows a service provider to knowingly participate in infringement for profit.

Congress created the DMCA safe harbors, codified in section 512 of the Copyright Act, on the express understanding that ISPs are subject to traditional principles of secondary copyright liability. Indeed, that is the very reason for the existence of these safe harbors: in exchange for abiding by the statutory requirements set forth in section 512—including reasonable implementation of a repeat infringer policy—ISPs can shield themselves from liability for contributory and vicarious infringement based on their users' activities. In adopting this framework, Congress envisioned a future where "service providers and copyright owners [would] cooperate to detect and deal with copyright infringements that take place in the digital networked environment." H.R. Rep. No. 105-551, pt. 2, at 49 (1998); S. Rep. No. 105-190, at 20 (1998). In this case, however, Cox did exactly the opposite.

As demonstrated by the record below, not only did Cox choose to reject and disregard notices of copyright infringement as it pleased, it avoided acting upon those that it deigned to accept. And it did not meaningfully enforce even its own risible "thirteen-strike" repeat infringer policy by terminating the accounts of blatant copyright violators. For the very small portion of repeat offenders who actually made it up the ladder to the thirteenth rung, Cox looked for any excuse to avoid cutting them off to avoid the loss of their subscriber fees. As made explicit in Cox's internal emails, even the most persistent serial infringers were not terminated—or, if "terminated," would be reactivated within a day or two, which of course is no termination at all.

In the words of the court below, Cox did not "hold up [its] end of the bargain." JA-2774. As the district court found, the record was "replete with evidence" that foreclosed any assertion by Cox that it had reasonably implemented a repeat infringer policy as required to invoke the safe harbor protections of section 512. *Id*. Cox's disdain for the interests of copyright owners, as reflected in numerous internal emails, was manifest. Under Cox's "unwritten" policy, spammers, hackers, and other abusers of its system were subject to termination because they "hurt the network," while copyright violators were not. JA-709-11. In other words, the infringing activities Cox ignored did not harm Cox—only BMG and the songwriters whose works were being taken without permission or compensation.

Now on appeal, Cox and its *amici* would have this Court believe that to hold Cox responsible for ignoring BMG's notices of infringement will somehow imperil the Internet. But this is a diversionary tactic—for the true danger is an Internet that allows for unchecked piracy and no meaningful recourse for rightsholders. It is an unfortunate reality that, absent the potential for legal accountability, there is little incentive for an ISP such as Cox to take action against an infringing user. This is because both of these parties stand to benefit—the subscriber gets free content, while the ISP collects its subscription fee. It is only the creators and copyright owners who lose out.

To hold Cox accountable here for its conduct will motivate Cox and other ISPs to cooperate with rightsholders to address online infringement, as Congress intended. By affirming the court below, this Court will be protecting—not impairing—the promise of the Internet for *all* who seek to participate in the online marketplace.

ARGUMENT

I. COX'S FAILURE TO IMPLEMENT A REPEAT INFRINGER POLICY DISQUALIFIED IT FROM SAFE HARBOR PROTECTION UNDER SECTION 512

The DMCA requires ISPs to "adopt[] and reasonably implement[]" a policy to terminate repeat infringers if they wish to benefit from the section 512 safe harbors. *See* 17 U.S.C. § 512(i). Such a policy is not properly implemented and is "unreasonable . . . if the service provider failed to respond when it had knowledge of the infringement." *Perfect10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007). Here, despite the façade of a policy, the undisputed facts show that Cox had overwhelming knowledge of repeat infringers it did nothing about. *See* JA-720. If Cox's conduct was not unreasonable here, it is difficult to see how any provider could ever be disqualified under the DMCA. The district court's determination that Cox was ineligible for the safe harbor should be upheld.

A. Congress Intended for ISPs to Cooperate With Rightsholders by Terminating Repeat Infringers

Congress adopted section 512 as part of the DMCA in 1998. In enacting the DMCA, Congress realized that online service providers faced legal exposure due to infringing activities that they might be facilitating. *See* H.R. Rep. No. 105-551, pt. 2, at 49-50; S. Rep. No. 105-190, at 20. At the same time, Congress recognized that "copyright owners w[ould] hesitate to make their works readily available on the Internet without reasonable assurance that they w[ould] be protected against massive piracy." S. Rep. No. 105-190, at 8.

Congress' response to these concerns was section 512, which was designed to "balance[] the interests of content owners, on-line and other service providers, and information users" so as to "foster the continued development of electronic commerce and growth of the Internet." H.R. Rep. No. 105-551, pt. 2, at 21. Section 512 "creat[ed] a mechanism for rights holders to inform ISPs of potentially infringing conduct while, at the same time, providing 'greater certainty to service providers concerning their legal exposure.'" *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1098 (W.D. Wash. 2004) (quoting *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004)). In other words—and contrary to the rhetoric of Cox and its *amici*—section 512 was not meant merely to promote only the growth and prosperity of Internet providers and their users, but to protect the interests of copyright owners as well.

The tradeoff represented by section 512 is straightforward: online service providers can protect themselves from the liability they may face as a result of users' infringing activities by undertaking specific actions to address infringement. Congress identified four types of service providers that are eligible for safe harbor protection under section 512: those that act as "conduits" by transmitting content over the Internet, *see* 17 U.S.C. § 512(a); those that make intermediate copies to facilitate such transmissions, *see id.* § 512(b); those that store content at the direction of users, *see id.* § 512(c); and those that index or link to content, *see id.* § 512(d). Congress intended safe harbor protection as a conditional privilege, however—not a guaranteed right. Under the section 512 framework, each type of ISP must take certain prescribed measures to obtain the benefits of the statutory safe harbor.

To begin with, in order to maintain the safe harbor privilege, *all* service providers must adopt and implement a policy to terminate the accounts of repeat infringers. *See* 17 U.S.C. § 512(i).[2] Additionally, ISPs that host, link to, or make intermediate copies of content must remove or disable access to infringing materials of which they become aware or are notified. *See* 17 U.S.C. §§ 512(b)(2)(E), (c)(1), (d)(1). While there are no express takedown provisions for

[2] All service providers must also accommodate "standard technical measures" (as defined in the statute) used by copyright owners to identify and protect copyrighted works. *See* 17 U.S.C. § 512(i).

conduit service providers—because conduits by definition are not hosting or linking to content—that does not mean that conduit ISPs are absolved of the responsibility for addressing infringement. Rather, in specifying that the repeat infringer requirement applies to every type of ISP, Congress was clear in its judgment that conduits seeking to benefit from the safe harbor provisions of section 512 must, like other service providers, do their part to mitigate infringing activity.

It is important to remember that the repeat infringer requirement of section 512(i) is an *overarching condition* of the limitations on liability set forth in four safe harbors. Section 512(i) provides that "[t]he limitations on liability established by … section [512] shall apply ... *only* if the service provider … has adopted and reasonably implemented" a policy to terminate repeat infringers. *Id.* (emphasis added). Thus, even if an ISP abides by other requirements of section 512, it will be outside of the safe harbor if it does not adequately implement a repeat infringer policy.

Section 512(i) requires more than a pretense of a policy. The legislative history of this provision emphasizes that "those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is *a realistic threat of losing that access*." H.R. Rep. No. 105-551, pt. 2, at 61 (emphasis added); S. Rep. No. 105-190, at 52 (same); *see*

CoStar Grp., Inc. v. LoopNet, Inc., 164 F. Supp. 2d 688, 703 (D. Md. 2001) (same), *aff'd*, 373 F.3d 544 (4th Cir. 2004). While Congress did not set forth specific criteria in the statute, looking to the plain language of section 512(i), as well as the legislative history, courts are in agreement that to "reasonably implement" a repeat infringer policy, a service provider must—among other things—keep adequate records to track infringers and actually terminate repeat infringers. *See Capitol Records, LLC v. Escape Media Group, Inc.*, No. 12-CV-6646 (AJN), 2015 U.S. Dist. LEXIS 38007, *14-34 (S.D.N.Y. Mar. 25, 2015) (discussing recordkeeping and termination requirements); *Disney Enters. v. Hotfile Corp.*, No. 11-20427-CIV-WILLIAMS, 2013 U.S. Dist. LEXIS 172339, at *65-77 (S.D. Fla. Aug. 28, 2013) (reasonable policy must be "capable of tracking infringers" and result in actual termination).

Moreover, section 512(i) does not limit the means by which a service provider may become aware of repeat infringers—and neither does any other provision in section 512. Indeed, the inclusive mandate of section 512(i) stands in contrast to the more particularized statutory requirements in sections 512(a), (b) and (c) for sending a notice to a hosting or linking ISP to request the removal of or disabling of access to infringing material. Congress could have imposed similarly specific criteria with respect to notifying providers of repeat infringers for purposes of 512(i), but instead chose to speak broadly. *Cf. Corbis*, 351 F. Supp. 2d at 1101

("The notice and take-down provisions [within section 512] demonstrate that Congress infused the statute with specific detail when it so chose.").

B. Cox's Excuses for Ignoring BMG's Notices of Infringement Should Be Rejected

In pursuing this appeal, Cox seeks to eat its cake and have it, too. It wants the benefit of the safe harbor, but without the responsibility. This is inconsistent with Congress' design. The echo chamber of Cox's *amici* does nothing to alter this conclusion; safe harbor protection was never intended to be an automatic entitlement.

Cox and its *amici* would have this Court believe that there are essentially *no* circumstances under which a service provider that functions as a "conduit" under section 512(a) should ever need to terminate an infringing user. They assert that unlike any other online or offline entity that interacts with copyrighted works, a conduit provider has no obligation to accept or consider a copyright owner's notices of infringement. They claim that in any event, notices provided to a conduit ISP detailing specific instances of infringement cannot serve as evidence of infringement. They further contend that a party must be judicially adjudicated as a copyright infringer (presumably more than once) before the party can be deemed a repeat infringer under section 512—even though the statute contains no such requirement. And certain *amici* additionally urge that an ISP should not be required to terminate an infringing user's Internet service on the ground that such an action is violative of "free expression." *See generally* Brief for Defendants-Appellants ("Cox Br.") at 45-59; Br. of Public Knowledge, The Electronic Frontier Foundation and The Center for Democracy and Technology ("PK/EFF/CDT Br.") at 3.

Of course, the net effect of this litany of objections is that conduit ISPs would never be required to receive or act upon information concerning repeat infringers. Such an approach is plainly contrary to Congress' design.

1. Cox Cannot Disclaim Knowledge When It Turned a Blind Eye to Massive Infringement on Its Network

At bottom, what Cox urges on appeal is that despite being provided over 1.8 million individual notices of infringement—including summary reports in paper and electronic form—as well as a "dashboard" tool that allowed it to access the same information, it cannot now be charged with knowledge of its users' repeat infringing conduct as a matter of law. *See* JA-2777-78 & n.9, JA-2796. In other words, no matter how overwhelming the evidence in its possession, Cox could simply choose to ignore it. The law does not support this view. Courts "do[] not read [section] 512 to endorse business practices that would encourage content providers to turn a blind eye to the source of massive copyright infringement ... until a court orders the provider to terminate each individual account.'" *Escape Media Grp.*, 2015 U.S. Dist. LEXIS 38007, *27-28 (quoting *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1177-78 (C.D. Cal. 2002) (in turn citing *CoStar Grp.*, 164 F. Supp. 2d at 705)); *see also ALS Scan, Inc. v. RemarQ Cmtys., Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) ("The DMCA's protection of an innocent service provider disappears . . . at the moment it becomes aware that a third party is using its system to infringe.").

As noted above, Congress did not impose specific requirements for alerting a conduit ISP to repeat infringer activity. Nor did Congress did eliminate the possibility that an ISP might acquire knowledge of repeat infringement, or infringement in general, from a source other than a copyright owner's notice—for example, from an employee or third party. As a leading commentator has observed with respect to the repeat infringer requirement: "Section 512 offers little support for the . . . requirement that reasonable implementation, and termination when appropriate, depend in any part on the service provider's receipt of 'DMCA-compliant' notifications. Notice of repeated and flagrant abuse can come from a variety of sources, including third parties." *Goldstein on Copyright* § 8.3 n.50.2 (3d ed. 2016).

Ignoring the actual language of the statute, Cox strains to invoke precedent decided under section 512(h)—which allows copyright owners to apply for a subpoena to identify a party whose activity is the subject of a takedown notice served under section 512(c)(3)—to assert that Congress has "barred" the use of "third-party notices" to establish a conduit ISP's knowledge that a subscriber is a repeat infringer.[3] Cox Br. at 51. But there is no such "bar" in 512(a), 512(h), or anywhere else in section 512. *See* 17 U.S.C. §§ 512(a), (h). Indeed, in *CCBill*, the Ninth Circuit expressly held the defendants' "response to adequate *non-party notifications* [to be] relevant in determining whether they reasonably implemented their policy against repeat infringers." *CCBill*, 488 F.3d at 1113 (emphasis added); *see also Cybernet Ventures*, 213 F. Supp. at 1169-70 & n.14, 1177 ("appropriate circumstances" to terminate exist where the provider of an Internet service is "given sufficient evidence to create actual knowledge of blatant, repeat infringement by particular users," which can include third-party notices).

It is true that courts have determined that the subpoena power under section 512(h) does not extend to conduit ISPs because to obtain a subpoena the copyright owner must furnish a notification under section 512(c)(3) to take down or disable access to allegedly infringing material—actions that only apply to service providers that store or link to content. *See* 17 U.S.C. § 512(h)(2)(A) (subpoena request must include copy of notification described in section 512(c)(3)(A))*; see also RIAA v. Verizon Internet Servs.*, 351 F.3d 1229 (D.C. Cir. 2003); *RIAA v. Charter Communs., Inc.*, 393 F.3d 771 (8th Cir 2005). These cases, however, have nothing to say about whether a conduit ISP can acquire knowledge of repeat

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[3] Throughout its brief Cox refers to Rightscorp's notices as "third-party" notices, presumably because Rightscorp was not the copyright owner but was acting on behalf of BMG.

infringement from notifications such as those provided by Rightscorp on behalf of BMG in this case.

Additionally, the fact that a conduit provider cannot (or does not) itself "observ[e]" copyrighted material moving through its network is beside the point. *See* Cox Br. at 1, 5. It is clear that Congress understood conduit ISPs to be facilitators of "transitory" communications—rather than content hosts—when it imposed the repeat infringer requirement on them. *See* 17 U.S.C. § 512(a). In requiring conduit ISPs to abide by section 512(i), Congress was obviously of the view that a provider's role as a conduit did not mean it was immune from acquiring knowledge of infringing subscribers, via notifications or otherwise—or the applicability of 512(i) to conduits would be meaningless.

Here, for example, BMG, acting through Rightscorp, undertook to track and catalog infringing activity and provided specific information to Cox in various formats that was sufficient to link multiple instances of infringement to individual Cox subscribers. In other words, Cox had all of the requisite information upon which to act in its possession. It could not simply ignore that information and expect to enjoy the benefit of the section 512(a) safe harbor.

"'The common element of the DMCA safe harbors is that the service provider must do what it can reasonably be asked to do to prevent the use of its service by repeat infringers.'" *EMI Christian Music Grp. v. MP3tunes, LLC*, 840

F.3d 69, 81 (2d Cir. 2016) (quoting *In re Aimster Copyright Litig*., 334 F.3d 643, 655 (7th Cir. 2004) (additional internal quotation omitted). Although an ISP is not required affirmatively to monitor for infringement, that is not the same as acting upon information already "at its disposal in the form of takedown notices." *MP3tunes*, 840 F.3d at 81. As recently explained by the Second Circuit, a defendant can be found to have acted unreasonably in implementing its repeat infringer policy if it fails to "make use of the information already within its possession and connect[ing] that information to known users." *Id*.

This same principle applies here. Instead of taking appropriate action against the repeat infringers identified by Rightscorp on behalf of BMG, Cox chose to disregard the information in its possession. In addition to rejecting individual notices, it ignored a vast quantity of data in the summary reports and dashboard tool supplied by Rightscorp. Such conduct is the quintessence willful blindness. *See 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.'" (quoting *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003) (additional internal quotation omitted)). Courts are in agreement that a defendant's willful blindness serves to "demonstrate knowledge or awareness of specific instances of infringement under the DMCA." *MP3tunes*, 840 F.3d at 80; *Viacom*, 676 F.3d 19 at 35 (2d Cir. 2012); *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1155 (9th Cir. 2016). As Judge Posner observed in *Aimster*, "willful blindness is knowledge, in copyright law." 334 F.3d at 650.

Whether viewed as actual or constructive knowledge gained as a result of the information provided by Rightscorp, or as knowledge attributable to Cox's willful blindness, the court below was correct to treat BMG's 1.8 million notices of infringement as "'powerful evidence of a service provider's knowledge'"—as other courts have done. JA-719 (quoting *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1021 (9th Cir. 2013)); *accord Hotfile*, 2013 U.S. Dist. LEXIS 172339, at *73 ("'[T]he most powerful evidence of a service provider's knowledge [is an] actual notice of infringement from the copyright holder.'" (citing *Corbis*, 351 F. Supp. 2d at 1107)). As one court explained, for example, in holding an ISP's repeat infringer policy deficient: "[T]he scale of activity—the [millions of] notices and complaints from copyright holders—indicated ... that a substantial number of blatant repeat infringers made the system a conduit for infringing activity. Yet [the defendant] did not act on [them] …." *Hotfile,* 2013 U.S. Dist. LEXIS 172339, at *76; *see also Escape Media Group, Inc.*, 2015 U.S. Dist. LEXIS 38007, at *31-32 (defendant did not reasonably implement repeat infringer policy where it failed to terminate "hundreds or thousands" of users subject to notices of infringement).

Indeed, it is difficult to understand under what legal precept the massive amount of information provided to Cox documenting specific acts of infringement by its users could have or should have been excluded from consideration in this case.[4] *See* Fed. R. Evid. 402 (relevant evidence generally admissible). At both the summary judgment stage and at trial Cox sought to contest the validity of BMG's notices, including Rightscorp's methodology in identifying infringing activity. *See* JA-719-20, JA-2781-86. But the judge and jury were not persuaded that the information generated by Rightscorp failed to substantiate BMG's claims of users' infringement.[5] In addition to the Rightscorp notices, the court had before it as well numerous internal company emails reflecting Cox's knowledge of and refusal to terminate repeat infringers. *See generally* JA-709-20. The record evidence demonstrating an enormous volume of persistent infringing activity amply supported the court's determination that Cox failed to comply with section 512(i).

[4] Notably, the record here indicates that the notices sent to Cox on behalf of BMG adhered to the general format for takedown notices prescribed by section 512(c)(3), including the requisite statement under penalty of perjury that the information they contained was accurate. *See* JA-2776 (describing notices).

[5] Indeed, expert testimony at trial indicated that the accuracy rate of Rightscorp's notices was "well over 99 percent." JA-2783.

2. There Is No Basis to Claim That Congress Meant Judicially Adjudicated Infringers in Section 512(i)

In a further effort to sidestep the impact of BMG's notices, Cox asserts that it should not be required to terminate account holders unless they have been adjudicated as infringers in court. *See* Cox Br. at 48-50. This argument is meritless. No court has held that a copyright owner must provide multiple judicial decrees of infringement in order to have a service provider take action against a repeat infringer under section 512, and fittingly so; there is no evidence in the language of section 512 or the history of the DMCA that that is what Congress intended. Indeed, Cox's own policy—on its face and as "implemented" in practice—did not turn on judicial determinations, either. *See* JA 681-82, JA-709-20.

That certain provisions of section 512 refer to "claimed" infringement or an "alleged" infringer cannot overcome the fact that the statute nowhere suggests the need for a judicial determination before the ISP should take action to terminate a repeat infringer. Cox. Br. at 48-49. To the contrary, when Congress contemplated judicial involvement in the context of section 512, it did not hesitate to say so. *See, e.g.*, 17 U.S.C. §§ 512(g)(2)(C) (copyright owner can seek a court order to restrain subscriber), 512(g)(3) (subscriber seeking to challenge takedown notice must agree to jurisdiction of federal district court), 512(h) (copyright owner can request subpoena to identify alleged infringer from federal district court), 512(j) (where safe harbor applies, court may grant only limited injunctive relief). In light of the multiple references to judicial proceedings within section 512, it is simply implausible that Congress would have omitted the critical qualification that a repeat infringer must be adjudicated as such by a court.[6]

Equally significant is the fact that the takedown provisions within sections 512(b), (c), and (d) that reference "claimed" infringement in fact *impose an obligation on the ISP to expeditiously remove or disable the "material claimed to be infringing"* as a condition of safe harbor protection. *See* 17 U.S.C. §§ 512(b)(2)(E), (c)(1)(C), (d)(1)(C). In other words, Congress plainly intended for ISPs to take action to mitigate infringement without a formal adjudication of infringement.[7]

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[6] Even the *Nimmer* treatise, upon which Cox relies in making this argument, does not support this extreme interpretation of section 512(i). Cox Br. at 48. Rather, *Nimmer* allows for the possibility that an ISP can acquire knowledge of infringement apart from a judicial decree. *See* 4 *Nimmer on Copyright* § 12B.10[B][3][c]. In any event, the highly theoretical discussion of this issue in *Nimmer* seems largely to ignore the judicial view, discussed above, that copyright owners' notices constitute evidence of infringement for purposes of a repeat infringer policy.

[7] Cox's related argument that an ISP should not be required to terminate the account of a repeat infringer unless the ISP believes that termination is "appropriate" is similarly unavailing. *See Cox* Br. at 55-57. As courts have held, "appropriate" implementation of a repeat infringer policy under section 512(i) requires that a service provider "terminate[] users who are 'repeat infringers.'" *CCBill,* 488 F.3d at 1111. Of course, if Cox had concerns about terminating particular account holders, it was free to investigate to ascertain whether a mistake had been made with respect to the relevant IP address. But Cox does not cite any

3. Section 512(i) Requires Termination of Accounts Through Which Infringing Activity Occurs

Similarly, this Court should reject the suggestion of some *amici* that an ISP should not be held responsible for failing to terminate a subscriber's account because it is possible that someone other than the account holder is responsible for the infringement at that IP address. See PK/EFF/CDT Br. at 21-24. In requiring termination of both "subscribers" and "account holders" in section 512(i), it is apparent that Congress intended for the ISP to terminate access to its service through the party with whom it has a subscription or customer relationship. Indeed, as a practical matter, it is difficult to see how it could be otherwise.

The legislative history of the repeat infringer provision confirms that Congress expected providers to "terminat[e] … the accounts of subscribers," and that "subscribers" means parties "*with a business relationship to the service provider*." H.R. Rep. No. 105-551, pt. 2, at 61 & n.3; S. Rep. No. 105-190, at 52 & n.24 (emphasis added). The same passage indicates that Congress was well aware that Internet accounts might be accessed and shared by multiple individuals in a household or school setting, including "students who are granted access to a university's system or network . . . or household members with access to a

particulars in making this argument, relying instead on pure conjecture. *See* Cox Br. at 56-57.

consumer on-line service by virtue of a subscription agreement between the service provider and another member of that household." H.R. Rep. No. 105-551, pt. 2, at 61 n.3; S. Rep. No. 105-190, at 52 n.24. Congress plainly thought it was reasonable to hold the account holder responsible for activity occurring through that person's account.

4. There Is No "Free Expression" Right to Commit Copyright Infringement

Finally, certain *amici* make a broad policy argument that Cox should not be required to terminate repeat infringers under section 512(i) because termination of infringing users could "impede[]" their ability to engage in "free expression." *See* PK/EFF/CDT Br. at 3. This position suggests an uncompromising hostility towards the constitutional and statutory rights of copyright owners and a failure to recognize that songwriters and other creators whose livelihoods are eroded by the infringement of their works are also engaged in "free expression." *See Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) ("[T]he Framers intended copyright itself to be the engine of free expression.") (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)). Tellingly, these same *amici* do not suggest that an ISP should refrain from terminating a user's account in the case of nonpayment or other transgressions. Indeed, the evidence here showed that Cox was perfectly willing to end the accounts of spammers, hackers, and other network abusers—just not violators of copyright.[8]

While the music publishing and songwriting community certainly recognizes the importance of Internet connectivity in today's world, the suggestion that Internet users should be free to misappropriate copyrighted works without constraint in the name of "free expression" is deeply troubling. There is no "cherished libert[y]" to commit copyright infringement. *See* PK/EFF/CDT Br. at 3. It is unlawful. Under the eminently sensible approach adopted by Congress, subscribers are free to preserve their Internet accounts by avoiding infringing activity.[9]

II. NEITHER *SONY* NOR *GROKSTER* PRECLUDES LIABILITY IN THIS CASE

In addition to challenging its exclusion from the section 512 safe harbor, Cox and supporting *amici* urge that even if the safe harbor is not available here, Cox is nonetheless immune from liability because the Supreme Court's decisions in *Sony Corp. v. Universal City Studios, Inc.* 464 U.S. 417 (1984), and *Metro-*

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[8] And presumably Cox terminates service to subscribers who are not paying their bills, just as a cable television or cellphone provider does.

[9] It must also be noted that there are many venues, including libraries, cafés and other public spaces, where someone who is not an account holder can access a free Internet connection to engage in the sorts of educational, job-hunting, and government-related activities highlighted by Cox's *amici*. *See* PK/EFF/CDT Br. at 9-11, 24, 26.

Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005), dictate that traditional rules of contributory liability do not apply to providers of Internet services. This Court should reject such an unprincipled view of the law, which would amount to *carte blanche* for Internet-based services to profit from the infringement of copyright works.

A. *Sony* and *Grokster* Do Not Negate Contributory Liability for ISPs

Under traditional principles of contributory liability, "'one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another' is liable for the infringement, too." *CoStar*, 373 F.3d at 550 (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). In *Sony*, the core question was whether Sony, the manufacturer and distributor of Betamax videotape recorders ("VTRs"), could be charged with the knowledge required to establish contributory liability based on solely on Sony's awareness that the Betamax *could* be used for infringing purposes. *Sony*, 464 U.S. at 436-39; *see also Grokster*, 545 U.S. at 934-35 ("*Sony*'s rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product."). The Supreme Court held that such knowledge could not be imputed to Sony due to Sony's mere sale of a product that was capable of substantial non-infringing uses. *Id.* at 456.

In concluding that Sony was not liable, the Supreme Court was careful to distinguish between the one-time sale of an "article of commerce" such as a VTR to the general public—with no further connection to the buyer—and the situation where the distributor of the product has "an ongoing relationship" with the direct infringer at the time of the time of infringement. *Id.* at 437-38. Clearly Cox, which maintains an ongoing contractual relationship with its subscribers, falls into the latter category. *Cf. Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 156 (S.D.N.Y. 2009) (rejecting application of *Sony* doctrine where defendants "maintain[ed] an ongoing relationship with their users"); *CoStar Grp.*, 164 F. Supp. 2d at 706 ("Sony retained no access control similar to that of a service provider."). Unlike in *Sony*, the repeat infringing activities of Cox's subscribers were facilitated by, and occurred within, the context of an ongoing customer relationship. Had Cox terminated the accounts of these subscribers, it would have ended its role in the acts of infringement.[10]

Further, contrary to Cox's reading, the Supreme Court's subsequent decision in *Grokster* did not override, but instead elaborated upon, the well-established principles of contributory liability in copyright law. In *Grokster*, the Court was

[10] Of course, in the present case, as discussed above, beyond constructive knowledge, there was plenty of evidence to demonstrate that Cox had actual knowledge of, and willfully blinded itself to, numerous specific instances of infringing activity. So *Sony* is readily distinguishable on this ground as well.

confronted with distributors of peer-to-peer software that promoted its use to infringe copyrighted works. *Grokster*, 545 U.S. at 922-24. As in *Sony* (and unlike here), the distributors did not maintain a facility through which the infringements occurred, or an ongoing customer relationship with the users of their product. *See Grokster*, 545 U.S. at 919-22, 939 (once users installed free peer-to-peer software, infringing content did not flow through central servers).

Because the evidence in *Grokster* showed that the distributors actively promoted the use of their software to infringe—and that it was overwhelmingly used for that purpose—the Court relied upon the inducement branch of contributory liability in holding the distributors liable. Accordingly, "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." *Grokster*, 545 U.S. at 933-37. In articulating this specific standard for inducement, the Court nowhere indicated that it was abdicating traditional, "material contribution" liability as it might apply in the appropriate case. To the contrary, the Court was careful to affirm its view that *Sony* "did not displace other theories of secondary liability …. [and] was never meant to foreclose rules of fault-based liability derived from the common law." *Id.* at 934-35. Simply put, the Court "did not suggest that a court must find inducement in order to impose contributory liability under common law principles." *Perfect 10 v. Amazon.com*, 508 F.3d 1146, 1170 n.11 (9th Cir. 2007).

Seizing upon a passage from Justice Ginsburg's concurring opinion in *Grokster*—in which she observed that the software distributors' liability could arise from "actively encouraging (or inducing) infringement through specific acts"—Cox nonetheless attempts to argue that *Grokster* supplanted, rather than expanded upon, the standard for contributory liability in copyright law. Cox Br. at 37-38 (citing *Grokster*, 545 U.S. at 942 (Ginsburg, J., concurring)). This is a misreading of Justice Ginsburg's comment; it is clear in context that her statement was not intended to limit the law, but was instead directed to the facts of the case before her. Indeed, not long after *Grokster* issued, the Ninth Circuit expressly rejected Cox's interpretation of Justice Ginsburg's remark, explaining that *Grokster* in fact preserved "'rules of fault-based liability derived from the common law.'" *Amazon.com,* 508 F.3d at 1170-71 (quoting *Grokster*, 545 U.S. at 934).

Still more to the point, post-*Grokster* courts continue to entertain non-inducement-specific claims of contributory liability against Internet services that are capable of non-infringing uses. *See, e.g.*, *id.* at 1170-72 (rejecting assertion that *Sony* immunized Google search engine from "material contribution" claims where such claims arise from a "knowing failure to prevent infringing actions"); *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 649 (S.D.N.Y.

2011) (rejecting *Sony* defense to traditional contributory infringement claims against online music locker service in light of service's "continuing relationship with users"), *rev'd in part on other grounds sub nom. EMI Christian Music Grp. v. MP3tunes, LLC*, 840 F.3d 69 (2d Cir. 2016).

In sum, it is clear that neither *Sony* nor *Grokster*—either individually or in combination—eliminated the possibility of a "material contribution" secondary liability claim against an ISP—especially where the provider has a continuing relationship with direct infringers through which it facilitates their infringing activities.

B. Cox's Interpretation of *Sony* and *Grokster* Would Eviscerate the Legal Underpinning of Section 512

Relying on the truism that the Internet can be used for non-infringing purposes, Cox asks this Court to adopt an extraordinary new rule that an ISP should never be held responsible for contributory infringement unless it can be shown to have engaged in *Grokster*-like behavior. That is, the ordinary rules of contributory liability should not apply to the Internet. This is a gross distortion of existing law, and one that would have the effect of immunizing ISPs from liability *even when they knowingly contribute to users' infringing activities and are operating outside of the section 512 safe harbors*—as in the case before the Court.

Apart from misconstruing Supreme Court precedent, Cox's view of the world is wholly at odds with Congress' understanding when it addressed the question of ISP liability in section 512. Congress did not enact the section 512 safe harbors in a legal vacuum. Rather, the safe harbors were expressly adopted as *limitations* on the secondary copyright infringement liability that Congress understood ISPs would otherwise face in the absence of such protections. As explained by its framers, "section 512 does not define what is actionable copyright infringement in the on-line environment, and does not create any new exceptions to the exclusive rights under copyright law." H.R. Rep. No. 105-551, pt. 2, at 64; S. Rep. No. 105-190, at 55. Rather, Congress intended that the liability of ISPs be adjudicated "based on the doctrines of direct, vicarious or contributory liability for infringement … which are unchanged …. [S]ection 512 simply defines the circumstances under which a service provider … may enjoy a limitation on liability for copyright infringement." H.R. Rep. No. 105-551, at 64; S. Rep. No. 105-190, at 55; *see also CCBill LLC*, 488 F.3d at 1109 (9th Cir. 2007) (section 512 safe harbors "'do not affect the question of ultimate liability under the various doctrines of direct, vicarious, and contributory liability'" (quoting *Cybernet Ventures,* 213 F. Supp. 2d at 1174)).

In short, there is nothing in the history of section 512 that suggests that Congress believed that *Sony*—which predated the DMCA by over a decade—eliminated the possibility of holding an Internet-based service liable under traditional principles of contributory liability. Nor did *Grokster* undo this background assumption. To the contrary, the legislative history includes multiple references to the possibility of contributory liability, which was a primary motivation for creating the safe harbors. That same history also attests to the fact that Congress well understood that it was the prospect of secondary infringement liability that would incentivize ISPs to work with copyright owners to address online infringement as intended in section 512. To negate such liability here would be to negate the balanced framework Congress intended.

CONCLUSION

On behalf of music copyright owners and creators, *amici* NMPA and NSAI respectfully request that this Court uphold the judgment below.

Dated: January 6, 2017

Respectfully submitted,

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This brief complies with the type volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7) (as in effect on September 7, 2016, when the relevant briefing order was issued in this case) because it contains 6,949 words, excluding the parts of the brief exempted by former Rule 32(a)(7). *See* United States Court of Appeals, Notice Regarding Implementation of December 1, 2016, Amendments to the Federal Rules of Appellate Procedure (Nov. 14, 2016); Briefing Order – Civil, No. 16-1972, *BMG Rights Management (US) LLC v. Cox Communs., Inc.* (Sept. 7, 2016). The brief also 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 in Times New

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/s/ Jacqueline C. Charlesworth

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In accordance with Rule 25 of the Rules of the United States Court of Appeals for the Fourth Circuit, I hereby certify that I have this January 6th, 2017 caused the required copies of the foregoing Brief of National Music Publishers' Association and Nashville Songwriters Association International as *Amici Curiae* in Support of Plaintiff-Appellee to be filed in the Office of the Clerk of the Court via hand delivery and electronically using the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

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