

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, AND COXCOM, LLC,
DEFENDANTS-APPELLANTS

AND

COX ENTERPRISES, INCORPORATED; COXCOM, INC.; AND JOHN DOE 2,
DEFENDANTS, AND RIGHTSCORP, INC., PARTY-IN-INTEREST

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(CIV. NO. 14-1611)
(THE HONORABLE LIAM O'GRADY)*

**BRIEF OF RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,
AS AMICUS CURIAE IN SUPPORT OF APPELLEE**

GEORGE M. BORKOWSKI
RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC.
1025 F Street, N.W.
Washington, DC 20005

KANNON K. SHANMUGAM
THOMAS G. HENTOFF
CONNOR S. SULLIVAN*
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Counsel for Amicus Curiae

* Admitted in New York and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).

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.

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.

BMG Rights Management (US) LLC v. Cox Communications,

No. 16-1972 Caption: Incorporated

Pursuant to FRAP 26.1 and Local Rule 26.1,

Recording Industry Association of America
(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:

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: Kannon K. Shanmugam

Date: January 6, 2017

Counsel for: Recording Industry Association of America, Amicus Curiae

CERTIFICATE OF SERVICE

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:

Kannon K. Shanmugam
(signature)

January 6, 2017
(date)

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE.....1

SUMMARY OF ARGUMENT2

ARGUMENT4

 I. ANY INTERNET SERVICE PROVIDER THAT FAILS TO
 TAKE THE REQUIRED STEPS TO ADDRESS
 INFRINGEMENT ON ITS SERVICE IS NOT ELIGIBLE
 FOR THE SECTION 512 SAFE HARBORS4

 II. THE STATUTORY PHRASE ‘REPEAT INFRINGERS’
 DOES NOT MEAN ‘REPEAT ADJUDICATED
 INFRINGEMENTS’7

 A. Cox’s Proposed Interpretation Is Contrary To The Stat-
 ute’s Text And Structure7

 B. The Legislative History Confirms That ‘Repeat Infringers’
 Does Not Mean ‘Repeat Adjudicated Infringers’13

 C. Cox’s Proposed Interpretation Is Incompatible With The
 Statute’s Purpose And Would Incentivize Bad Behavior ..15

 III. COX HAS NO VALID BASIS FOR CHALLENGING THE
 DISTRICT COURT’S GRANT OF SUMMARY JUDGMENT
 ON THE SAFE-HARBOR AFFIRMATIVE DEFENSE20

CONCLUSION.....25

TABLE OF AUTHORITIES

CASES

<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	21
<i>Columbia Pictures Indus., Inc. v. Fung</i> , 710 F.3d 1020, 1039 (9th Cir. 2013).....	21
<i>Doe v. Miles Labs., Inc.</i> , 927 F.2d 187 (4th Cir. 1991).....	22
<i>EMI Christian Music Group, Inc. v. MP3tunes, LLC</i> , --- F.3d ---, 2016 WL 7235371, as amended (Dec. 13, 2016).....	8, 13
<i>FDIC v. Meyer</i> , 510 U.S. 471 (1994)	7
<i>Halpern v. Wake Forest Univ. Health Scis.</i> , 669 F.3d 454 (4th Cir. 2012).....	21, 22
<i>Lissau v. Southern Food Serv., Inc.</i> , 159 F.3d 177 (4th Cir. 1998).....	21
<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005)	11, 18
<i>News & Observer Publ’g Co. v. Raleigh-Durham Airport Auth.</i> , 597 F.3d 570 (4th Cir. 2010).....	22
<i>Perfect 10, Inc. v. CCBill LLC</i> , 488 F.3d 1102 (9th Cir. 2007), amended May 31, 2007.....	13
<i>Perfect 10, Inc. v. Cybernet Ventures, Inc.</i> , 213 F. Supp. 2d 1146 (C.D. Cal. 2002)	7, 15
<i>Stonehenge Eng’g Corp. v. Emp’rs Ins. of Wausau</i> , 201 F.3d 296 (4th Cir. 2000).....	21
<i>United States v. Mills</i> , 485 F.3d 219 (4th Cir. 2007).....	7
<i>Viacom Int’l, Inc. v. YouTube, Inc.</i> , 676 F.3d 19 (2d Cir. 2012).....	10

STATUTES AND LEGISLATIVE HISTORY

17 U.S.C. § 501	9, 11
17 U.S.C. § 512	passim
H.R. Conf. Rep. No. 105-796 (1998).....	6
H.R. Rep. No. 105-551, pt. 1 (1998).....	6
H.R. Rep. No. 105-551, pt. 2 (1998).....	passim
S. Rep. No. 105-190 (1998)	4, 14, 15

RULES AND REGULATIONS

<i>Section 512 Study: Notice and Request for Public Comment, 80</i> Fed. Reg. 81,862 (Dec. 31, 2015)	15
Fed. R. Civ. P. 56	20

OTHER AUTHORITIES

3 Melville B. Nimmer & David Nimmer, <i>Nimmer on Copyright</i> § 12.04 (Matthew Bender, Rev. Ed. 2016)	11
4 Melville B. Nimmer & David Nimmer, <i>Nimmer on Copyright</i> § 12.B10 (Matthew Bender, Rev. Ed. 2016).....	12
<i>Black's Law Dictionary</i> (10th ed. 2014).....	8
Shyamkrishna Balganesh, <i>Copyright Infringement Markets</i> , 113 Colum L. Rev. 2277, 2280 (2013)	19
2 Paul Goldstein, <i>Goldstein on Copyright</i> § 8.3.2.1	12
<i>Oxford English Dictionary</i> (3d ed. 2009)	8

INTEREST OF AMICUS CURIAE

Amicus curiae Recording Industry Association of America, Inc. (RIAA), respectfully submits this brief urging affirmance of the judgment below.¹

The RIAA is a nonprofit trade organization representing the American recording industry. RIAA members create, manufacture, and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. The RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conducts consumer, industry and technical research; and monitors and reviews state and federal laws, regulations, and policies. The RIAA also promotes the ability of the record industry to invest in new artists and new music and, in the digital arena, to collaborate with online services to promote the continued expansion of legitimate markets for music.

Despite the best efforts by its members to increase the availability of their works through authorized services, unlawful competition from infringers continues to inhibit growth of legitimate online music services. This infringing conduct deprives the members of the RIAA (and other copyright holders) of important sources of revenue, undermines the value of American intellectual

¹ No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

property, and unfairly disadvantages service providers that cooperate to limit infringement. By adopting and reasonably implementing repeat infringer policies, internet service providers can help thwart such infringement, as Congress intended. But by failing to do so, service providers foster such infringement. For those reasons, the RIAA has a significant interest in this case.

SUMMARY OF ARGUMENT

The Digital Millennium Copyright Act (DMCA) and its safe-harbor provisions establish a balance of the interests and incentives offered to internet service providers (ISPs) and industries that rely on copyright protection. To receive the special protection of the DMCA safe harbors, internet service providers must take the statutorily mandated steps to work to curtail copyright infringement by users of their services. Service providers that fail to take those steps are not eligible for the safe harbors.

The text, history, and purpose of the DMCA confirm that the district court correctly interpreted the term “repeat infringer.” Cox has no valid basis to support its claim that the term should be limited only to adjudicated infringers. That interpretation departs from the statute’s text and conflicts with other statutory provisions that also employ the term “infringe,” as well as with the legislative history. In addition, it is contrary to case law interpreting the “repeat infringer” provision. And Cox’s interpretation would directly impair the DMCA’s purposes: ISPs would delay addressing infringement by their

subscribers instead of acting expeditiously to address it—a delay that could last for years, given the length of time it takes a civil case to work its way to resolution. And copyright holders would be forced first to launch a flood of litigation and obtain multiple judgments against individual users in order merely to trigger *the beginning* of ISPs' repeat-infringer obligations.

The district court did not err in granting summary judgment to BMG regarding Cox's ineligibility for the safe-harbor affirmative defense. Cox has not suggested that the court below articulated an incorrect legal standard for summary judgment. Nor is there any rule that summary judgment is unavailable under legal standards that incorporate such concepts as reasonableness and appropriateness. As with any legal question the answer to which is dispositive of a claim or a defense, summary judgment should issue where no reasonable jury could find for the non-moving party. Here, no reasonable jury could have found that Cox's sham repeat-infringer policy satisfied the safe-harbor requirements. The judgment of the district court should therefore be affirmed.

ARGUMENT

I. ANY INTERNET SERVICE PROVIDER THAT FAILS TO TAKE THE REQUIRED STEPS TO ADDRESS INFRINGEMENT ON ITS SERVICE IS NOT ELIGIBLE FOR THE SECTION 512 SAFE HARBORS

In the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (DMCA), Congress intended to strike a balance between, on the one hand, protecting copyright owners from rampant copyright infringement made possible by the internet, and, on the other, giving internet service providers that act responsibly the opportunity, in certain circumstances, to avoid liability for copyright infringement committed by users of their services. Title II of the DMCA—the Online Copyright Infringement Liability Limitation Act (OCILLA) (codified at 17 U.S.C. § 512)—sought to effectuate that balance by creating “strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” S. Rep. No. 105-190, at 20 (1998); *see also* H.R. Rep. No. 105-551, pt. 2, at 49 (1998) (same).

Section 512 offers that incentive to ISPs in the form of the safe-harbor provisions, providing ISPs a defense against secondary infringement liability if they undertake certain steps to combat direct infringement by their subscribers. Those safe harbors impose an array of different requirements, depending on whether the ISP’s alleged connection to infringement consists of

transmitting information through its network, caching information on its network, hosting user-directed storage, or offering search services. *See* 17 U.S.C. § 512(a)-(d).

Cox argues here that it should qualify for what is often called the “conduit” safe harbor, protecting ISPs from liability arising from “transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider.” 17 U.S.C. § 512(a). The conduit safe harbor potentially applies if infringing material is transmitted through an ISP’s system at the direction of a third party, to recipients selected by that third party, pursuant to an automated process, without modification, and is not maintained on the system longer than necessary for access by others. *Id.* In addition, in order to be eligible for *any* safe harbor, an ISP must have “adopted and reasonably implemented, and inform[ed] subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.” 17 U.S.C. § 512(i)(1)(A).

Cox submits that the “point of the § 512(a) safe harbor is to protect ISPs like Cox” that say they are unable to remove or disable access to infringing content from their service. Br. 50; *see also* Consumer Technology Ass’n Br.

27; American Cable Ass’n Br. 22. That is an incomplete and misleading characterization of the statute. Congress designed the safe harbors, for which ISPs bear the burden of proof as affirmative defenses, to protect ISPs only if they take the statutorily mandated steps to address copyright infringement occurring on or through their services. *See, e.g.*, H.R. Rep. No. 105-551, pt. 1, at 26 (1998) (noting that “[t]he exemption and limitations provided in this subsection are affirmative defenses . . . [and] a defendant asserting this exemption or limitation as an affirmative defense . . . bears the burden of establishing its entitlement.”); H.R. Conf. Rep. No. 105-796, at 73 (1998) (stating that, “[t]o qualify for these protections, service providers must meet the conditions set forth in subsection (i), and service providers’ activities at issue must involve a function described in subsection (a), (b), (c), (d) or (g), respectively”); H.R. Rep. No. 105-551, pt. 2, at 61.²

² Cox’s amici overstate their case when they contend that the district court’s ruling against Cox on the safe-harbor defense means that “failure to qualify for a DMCA safe harbor” becomes “tantamount to contributory infringement.” Consumer Technology Ass’n Br. 27. An ISP lacking safe-harbor protection does not automatically become liable for infringement. The safe harbors were “not intended to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify. Rather, the limitations on liability apply if the provider is found to be liable under existing principles of law.” H.R. Conf. Rep. No. 105-796, at 73 (1998); *see* 17 U.S.C. § 512(l).

II. THE STATUTORY PHRASE ‘REPEAT INFRINGERS’ DOES NOT MEAN ‘REPEAT ADJUDICATED INFRINGERS’

Among other things, qualifying for the Section 512 safe harbors requires an ISP to adopt and reasonably implement a policy that provides for the termination in appropriate circumstances of “subscribers and account holders . . . who are repeat infringers.” 17 U.S.C. § 512(i)(1)(A). The district court interpreted that provision to apply to “repeat infringement by particular users.” J.A. 718 (quoting *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1177 (C.D. Cal. 2002)). The district court’s interpretation of the statutory phrase “repeat infringers” is correct, as the statute’s text, structure, history, and purpose confirm. Cox argues that the district court erred because “one cannot be a ‘repeat infringer[.]’ without being an *adjudicated* infringer.” Br. 50. That reading would defy the statutory text and obstruct the goals Congress intended Section 512 to accomplish. Cox’s effort to rewrite the DMCA in its favor should be rejected.

A. Cox’s Proposed Interpretation Is Contrary To The Statute’s Text And Structure

“It is a cornerstone of statutory interpretation that an undefined term is construed ‘in accordance with its ordinary or natural meaning.’” *United States v. Mills*, 485 F.3d 219, 222 (4th Cir. 2007) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). Cox contends that the ordinary meaning of the statutory

phrase “repeat infringer” is an individual who has been adjudicated a copyright infringer in a court proceeding multiple times. Br. 48-49. But that interpretation is unsustainable. It is much more natural, as the district court held, to read the phrase to apply generally to subscribers who repeatedly infringe copyrights. This is precisely what the Second Circuit later held in *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, --- F.3d ---, 2016 WL 7235371, *as amended* (Dec. 13, 2016), noting that the “ordinary meaning” of “repeat” is “a person who does something . . . again or repeatedly” and of “infringer” is “[s]omeone who interferes with one of the exclusive rights of a . . . copyright.” *Id.* at *4 (quoting *Oxford English Dictionary* (3d ed. 2009) and *Black’s Law Dictionary* 902 (10th ed. 2014)).

There is no valid textual basis to accept Cox’s assertion that, simply because Section 512(i) omits the modifier “claimed” before “infringer,” the phrase denotes only “adjudicated” infringers—a term that conspicuously does not appear in the statute.³ Cox’s principal justification for its interpretation is

³ One of Cox’s amici urges an application of the canon of constitutional avoidance to the phrase “repeat infringer,” suggesting that allowing internet termination for infringers whose conduct had not been adjudicated in court would violate the First Amendment. United States Telecom Ass’n Br. 18-19. But Cox’s amicus does not and cannot argue that the First Amendment requires ISPs to provide internet access to all potential subscribers. An ISP is free to end its commercial relationship with subscribers who violate its terms of service—such as when Cox terminated internet access to its subscribers who exceeded bandwidth caps or failed to pay their bills. J.A. 715. Nor does Cox’s amicus explain why a finding of civil liability for copyright infringement

to claim that, throughout the DMCA, each use of the term “infringer” or its cognates, without a modifier, invariably refers to adjudicated infringement. Br. 48-49. That is simply incorrect. Other provisions of the Copyright Act also use the term “infringe,” standing alone, to embrace the entire category of infringing activity, not just the much smaller set of activity that has actually been adjudicated in court to be infringing. One such provision, 17 U.S.C. § 501(a), which creates a civil cause of action for copyright owners against infringers, states that “[a]nyone who violates any of the exclusive rights of the copyright owner” secured in the statute “is an *infringer* of the copyright or right of the author” (emphasis added). The language of Section 501(a) is straightforward: anyone who violates a copyright owner’s exclusive rights is an “infringer.” It is immaterial whether he has been adjudicated to be an infringer at the end of a court proceeding, or has escaped judicial judgment against his copyright infringement. The same is true of the storage safe harbor in Section 512(c), applicable to ISPs that “stor[e] at the direction of a user . . . material that resides on a system or network controlled or operated by or for the service provider.” 17 U.S.C. § 512(c)(1). Storage ISPs are potentially eligible for the storage safe harbor only if they do “not have actual knowledge that the material or an activity using the material on the system or network *is infringing*,”

should justify applying a repeat-infringer policy, but an ISP’s knowledge of and ongoing complicity in a subscriber’s infringement of copyright through its service should not.

or if they “act[] expeditiously to remove, or disable access to, the material” upon obtaining such knowledge. 17 U.S.C. § 512(c)(1)(A) (emphasis added).

Cox resists the plain language of the statute, arguing instead that where the DMCA conditioned storage safe harbor eligibility on an ISP’s unawareness or swift removal of material that “is infringing,” the only relevant material is material for which a copyright holder had already “prove[n] both valid ownership of the copyright and infringement.” Br. 49 (internal quotation marks and citation omitted). That reading is inconsistent with the statute’s text, which requires ISPs seeking storage safe harbor eligibility to “act[] expeditiously to remove” material that “*is* infringing,” not material that a court has ruled to be infringing. 17 U.S.C. § 512(c)(1)(A) (emphasis added). Courts construing that provision uniformly apply the statute as written, requiring ISPs to comply with takedown procedures without any prior adjudication of each underlying infringement claim. *See, e.g., Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012) (explaining that the “actual knowledge” standard of Section 512(c)(1)(A)(i) applies when the ISP has “subjective belief” of infringement).⁴

⁴ Moreover, Cox’s argument ignores that when Congress wanted to address litigation in the DMCA it did so expressly—in *other* portions of Section 512, but not in the provision about repeat infringer policies. *See* 17 U.S.C. § 512(b)(2)(E)(i) (noting circumstance when “a court has ordered that . . . material be removed”); § 512(g)(2)(C) (stating in notice-and-takedown provision that in the event of a counter-notification by a user, a service provider will restore the challenged material within 14 business days unless the copyright

That Cox’s interpretation is incorrect is further demonstrated by courts’ uniform treatment of the term “infringer” when deciding secondary-infringement copyright cases. A secondary-infringement action is, by definition, brought by a copyright owner against parties that are alleged to have facilitated the direct infringement of third parties—third parties that are “infringer[s]” under 17 U.S.C. § 501(a). For that reason, courts uniformly hold that plaintiffs in secondary-infringement cases establish direct infringement without obtaining a judgment against the direct infringer. In the words of one leading copyright treatise, “a finding of liability against a ‘direct’ . . . defendant” in court has never been required to impose secondary-infringement liability; to the contrary, such liability may attach even “in circumstances where the direct infringer is not subject to service of process or is unknown.” 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.04[D][1] (Matthew Bender, Rev. Ed. 2016) (footnote omitted); *see also, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929-930 (2005). Even so, Cox insists that repeat-infringer policies should apply only to subscribers whose activity has been adjudicated to be infringing at the end of a court proceeding—and thus that the safe harbors should automatically bar li-

owner “has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material”).

ability unless the copyright owner has already gone to court against some subscriber. But if any defendant can face secondary-infringement liability on a showing that its subscribers “are” infringers, there is no valid justification for concluding that “repeat infringers” for safe-harbor purposes must be adjudicated as such at the end of a court proceeding.

Cox relies on a discussion of the phrase “repeat infringer” from Nimmer’s treatise on copyright and suggests that Nimmer understands “infringe” to refer only to “proven infringement,” as opposed to conduct whose “future disposition remains unclear.” Br. 48 (quoting 4 *Nimmer on Copyright* § 12B.10[B][2][c]). But Nimmer does not express the view that only adjudicated infringers qualify as “infringers” for purposes of Section 512(i). Instead, as the district court noted in relying on Nimmer for its holding, J.A. 706, Nimmer considers a number of possible meanings for the term before concluding that “an ‘infringer’ in the statutory sense may be either a party who has been adjudicated to have committed copyright infringement, *or* a party” “whose infringement is known to the service provider.” 4 *Nimmer on Copyright* §§ 12B.10[B][3][c], 12B.10[F] (emphasis added).⁵

⁵ Nor do other leading copyright treatises support Cox’s reading of the statute. *See, e.g.*, 2 Paul Goldstein, *Goldstein on Copyright* § 8.3.2.1 n.49 (3d ed. 2016) (discussing the “ad hoc” approach courts have taken to determining whether specific subscribers constitute repeat infringers based on a variety of considerations, including the scope of infringing activity and whether the activity is “blatant” (internal quotation marks omitted)).

Finally, other circuits have considered the scope of the phrase “repeat infringer” in recent years, and none has interpreted the phrase to mean “adjudicated infringer.” Most recently, after evaluating the “text, structure, [and] legislative history of the DMCA” and reversing a district court’s repeat infringer definition as “too narrow,” the Second Circuit concluded that “all it [takes] to be a ‘repeat infringer’ [is] to repeatedly [upload or download] copyrighted material for personal use.” *MP3tunes*, 2016 WL 7235371, at *4; *see also Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007), *amended* May 31, 2007 (holding that a repeat-infringer policy would satisfy the Section 512 requirements if “the service provider terminates users who repeatedly or blatantly infringe copyright”).

B. The Legislative History Confirms That ‘Repeat Infringers’ Does Not Mean ‘Repeat Adjudicated Infringers’

Although the text standing alone is clear, the legislative history confirms that the phrase “repeat infringers” is not limited to subscribers who have been adjudicated infringers in court proceedings.

Both the House Commerce and Senate Judiciary Committee Reports explain as follows:

[T]he service provider is expected to adopt and reasonably implement a policy for the termination in appropriate circumstances of the accounts of subscribers of the provider’s service who are repeat on-line infringers of copyright. The Committee recognizes that there are different degrees of on-line copyright infringement, from the inadvertent and non-commercial, to the willful and commercial. In addition, the Committee

does not intend this provision to undermine the principles of new subsection (l) or the knowledge standard of new subsection (c) by suggesting that a provider must investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing. *However, 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 (1998) (emphasis added) (footnote omitted); *see also* S. Rep. No. 105-190, at 52 (1998) (same).

This passage from the legislative history further undermines Cox's interpretation of the statute. If Congress meant that a subscriber should have been sued in court, had a judgment entered against her, and failed to overturn that judgment on appeal—multiple times—before facing even the threat of losing internet access as a repeat infringer, it would have said so. It did not. Congress also made clear that the possibility of losing internet access should pose a “realistic threat” to discourage subscribers from directly infringing copyrights, without mentioning the separate, far more serious burden of legal fees and civil penalties adjudicated infringers would already shoulder before facing the loss of internet access under repeat-infringer policies. Instead, Congress explained the obvious: repeat-infringer policies should apply to any subscribers who actually “are” infringers and actually do “abuse their access to the Internet,” and the “realistic threat” of losing internet access was designed to discourage infringement by subscribers regardless of whether they had lost an infringement action as well. Congress did not identify any other criterion

for the scope of Section 512 repeat-infringer policies, and this Court should not ratify Cox's effort to invent one.

C. Cox's Proposed Interpretation Is Incompatible With The Statute's Purpose And Would Incentivize Bad Behavior

Cox also cannot reconcile its reading with the purpose underlying Section 512. The safe-harbor provisions were designed to create "strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements." S. Rep. No. 105-190, at 20; *see also* H.R. Rep. No. 105-551, pt. 2, at 49 (same). The "possible loss of the safe harbor provides that incentive and furthers a regulatory scheme in which courts are meant to play a secondary role to self-regulation." *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1178 (C.D. Cal. 2002).

More specifically, the safe-harbor provisions were intended to engender timely action in responding to infringing activity when it happens. As the Copyright Office has put it, qualifying for the DMCA safe harbors hinges on "implementing measures to expeditiously address online copyright infringement." *Section 512 Study: Notice and Request for Public Comment*, 80 Fed. Reg. 81,862, 81,862 (Dec. 31, 2015). For example, the caching, storage, and search safe harbors expressly require ISPs to respond to infringement "expeditiously" by taking down infringing material when they become aware of its existence, whether by notice from the copyright owner or otherwise. *See* 17 U.S.C. § 512(b)(2)(E), (c)(1)(A)(iii), (c)(1)(C), (d)(1)(C), (d)(3). Although the

conduit safe harbor does not expressly contain a “takedown” provision like Section 512(b)-(d), it is nonetheless similarly designed to promote rapid, flexible responses from ISPs to their subscribers’ infringing activity.

That is for good reason: the damage inflicted by repeated online copyright infringement can be dramatic even in a short period of time. No matter the safe-harbor provision in question, Section 512 as a whole promotes specific mechanisms—such as repeat-infringer policies and takedown procedures—that are specifically tailored to limit the harm attributable to infringement by encouraging the parties to work together quickly. And in the context of repeat-infringer policies in particular, given the extensive harm copyright owners can incur from repeated infringement of their copyrights by ISP subscribers, timely ISP intervention is just as important as it is to the implementation of takedown procedures for infringing material.

The district court’s interpretation of the phrase “repeat infringer” is consistent with the statute’s purpose. It encourages ISPs to take affirmative anti-infringement steps in exchange for liability protection, and it promotes collaboration between ISPs and copyright owners rather than forcing them to resort to litigation. By the same token, the district court’s interpretation facilitates timely response by ISPs when their subscribers actively infringe on the copyrights of others—exactly what the statute unambiguously requires.

By contrast, Cox's interpretation undermines those goals and would lead to absurd, counterproductive outcomes. Instead of promoting expeditious action by ISPs to address infringement by their users, Cox's interpretation would incentivize precisely the opposite behavior. ISPs would have no reason to implement a repeat-infringer policy as to any subscriber until multiple copyright-infringement judgments had already been entered against that subscriber. The expeditious process the safe-harbor provisions were intended to create would be extinguished, replaced with a meaningless requirement that an ISP *begin* to address a subscriber's copyright infringement only after the conclusion of successive judicial proceedings brought against the subscriber. This is hardly the "cooperat[ion]" between service providers and copyright owners that Congress intended to promote. *See* H.R. Rep. No. 105-551, pt. 2, at 49 (1998).

Under Cox's interpretation, copyright owners would be forced to launch demanding campaigns of multiple lawsuits against every individual infringer even to hope to obtain the benefit of ISP repeat-infringer policies. That would require a stream of individual lawsuits in federal district courts all over the country, imposing an additional burden on the courts and draining the resources of copyright owners and individual subscribers alike—essentially the opposite result to the one intended by Congress in enacting the safe-harbor provisions in the first place.

Moreover, copyright owners, particularly smaller ones, simply cannot afford to pursue infringing subscribers in this manner with success. As the Supreme Court has observed, “[w]hen a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.” *Grokster*, 545 U.S. at 929-930. Cox’s proposed interpretation ignores that reality.

The prohibitively burdensome litigation requirements of Cox’s interpretation would effectively render infringement of the works of copyright owners with limited resources irrelevant for safe-harbor purposes. Individual songwriters and other artists, small independent record labels, and other content creators and copyright owners without the capacity to prosecute expensive infringement actions would never be able to establish that even the most flagrant infringers qualify as “repeat infringers” under Section 512.⁶ As a result, ISPs could confidently disregard all such copyrights when seeking to preserve safe-harbor eligibility. Cox ignores the effect its interpretation would have on

⁶ According to one study, the average cost to a party of litigating a copyright infringement case through trial was estimated to range from \$384,000 to \$2 million. See Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 Colum. L. Rev. 2277, 2280 (2013).

all copyright holders who could not pursue adjudication of every individual subscriber's infringing activity.

Finally, even after a copyright owner managed to satisfy the adjudicated-infringer rule, an ISP would be required only to *initiate* its repeat-infringer policy to obtain safe-harbor eligibility. This means that a repeat-infringer subscriber might receive only the first in a sequence of warnings eventually leading to termination. Requiring copyright owners to travel so far merely to cross the starting line of a protracted repeat-infringer policy could ultimately prove little different from placing conduit ISPs beyond the reach of secondary-infringement liability entirely.

An ISP seeking safe-harbor protection should be required to take the steps Congress provided to combat infringement at the time the infringement takes place, rather than waiting for "repeat infringers" to be adjudicated in court. Cox provides no textual basis for its interpretation; that interpretation has no support in the statute's legislative history; and Cox ignores the serious consequences of its interpretation for the statute's ability to accomplish its purposes. Cox's interpretation should be rejected, and the judgment of the district court upheld.

III. COX HAS NO VALID BASIS FOR CHALLENGING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT ON THE SAFE-HARBOR AFFIRMATIVE DEFENSE

Cox argues in the alternative that the district court should not have granted summary judgment because whether a repeat-infringer policy has been “reasonably implemented” and provides for termination “in appropriate circumstances,” 17 U.S.C. § 512(i)(1)(A), presents “classic” jury questions. Br. 47. But Cox does not contend that the district court articulated the incorrect standard for summary judgment; instead, it contends only that the court misapplied the correct standard in this case.

Cox is wrong for at least two reasons. First, whenever a non-movant fails to present sufficient evidence to create a disputed issue of material fact, summary judgment is appropriate. *See* Fed. R. Civ. P. 56(c). The mere fact that a case involves a substantive “reasonableness” standard does not exempt the case from that rule. Second, Cox’s failure reasonably to implement a repeat-infringer policy does not present a close case: there was overwhelming evidence that Cox’s repeat-infringer policy was a sham designed to protect repeat infringers and retain them as customers rather than to terminate their accounts in appropriate circumstances. That evidence came from irrefutable admissions against interest in e-mails by and to high-level employees of Cox’s abuse department.

A. Although Cox's brief nowhere mentions it, "the DMCA safe harbors are affirmative defenses," as to which a defendant ISP bears the burden of proof. *See Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1039 (9th Cir. 2013). "[T]he plain language" of Federal Rule of Civil Procedure 56(c) "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In this case, that party is the defendant asserting the affirmative defense. *See Stonehenge Eng'g Corp. v. Emp'rs Ins. of Wausau*, 201 F.3d 296, 303 (4th Cir. 2000).

Contrary to Cox's suggestion, there is no rule that summary judgment is unavailable in cases involving substantive legal standards such as the "reasonableness" of a defendant's conduct. To the contrary, as this Court has emphasized, "[m]any cases involve a reasonable care requirement and a preponderance burden yet summary judgment standards are not suspended on account of that." *Lissau v. Southern Food Serv., Inc.*, 159 F.3d 177, 182 n.* (4th Cir. 1998). Accordingly, courts often grant summary judgment under similar legal standards when, given the evidence, no reasonable jury could find the standard satisfied. *See, e.g., Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 464-466 (4th Cir. 2012) (affirming the grant of summary judgment to an employer against an employee's claim under the Rehabilitation Act and the

Americans with Disabilities Act for failure to accommodate his disabilities because the requested accommodation plan “was unreasonable on its face”); *News & Observer Publ’g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 577-578, 581 (4th Cir. 2010) (affirming the grant of summary judgment in a case alleging First Amendment violation, holding that an airport authority’s total ban on newsracks inside a terminal was not “reasonable”); *Doe v. Miles Labs., Inc.*, 927 F.2d 187, 193 (4th Cir. 1991) (affirming the grant of summary judgment in a negligence case because the defendant had displayed “the standard of care, skill and diligence that a reasonable pharmaceutical manufacturer would use under the same or similar circumstances”).

B. Cox argues that the district court erred in its evaluation of the evidence. Br. 45. But Cox’s brief is most notable for its failure to address the district court’s specific basis for its holding that Cox did not reasonably apply its repeat-infringer policy: “Cox publicly purported to comply with its [stated repeat infringer] policy, *while privately disparaging and intentionally circumventing the DMCA’s requirements.*” J.A. 709 (emphasis added).

An ISP that “intentionally circumvent[s]” the DMCA’s requirements cannot be eligible for a DMCA safe harbor. The district court’s opinion extensively quoted and relied on admissions that came in e-mails written by and to

Cox's Manager of Customer Abuse Operations and other high-level employees. J.A. 709-710. Those included such flagrant statements, conveyed as internal guidance in the period before the fall of 2012, as the following:

- “We do not talk about it” but “we want to hold on to every subscriber we can” and “if a customer is terminated for DMCA, you are able to reactivate them” immediately;
- “DMCA *Term[ination]s are not really Terminations any longer*”; and
- “DMCA = reactivate.”

J.A. 710, 713 (emphasis in original).

Appropriately applying the familiar summary-judgment standard, the district court concluded that “[e]ven viewed in the light most favorable to Cox, . . . the contents of the emails cannot be explained away.” J.A. 709. The district court reached a similar conclusion as to emails sent in the period after the fall of 2012, such as one in which Cox's Senior Lead Abuse Engineer justified the decision not to terminate a repeat infringer under Cox's policy because “[t]his customer pays us over \$400/month and if we terminate their service, they will likely cancel the rest of their services.” J.A. 716.

The admissions by senior Cox employees are so damning that, even now, Cox declines to address them directly. Instead, Cox retreats to describing the employees' e-mail guidance with such euphemisms as “unrestrained language” and “intemperate remarks.” Br. 51, 52. It is telling that Cox does not even

attempt to defend the appropriateness of its senior employees' decisions privately to undermine Cox's public repeat-infringer policy.

Nor did these high-level employee communications occur in a vacuum. Cox received enormous numbers of notices of infringement from BMG and other copyright owners, with BMG alone reporting that 2.5 million notices had been sent to Cox on its behalf. J.A. 681. Cox forwarded to its account holders only those notices it unilaterally "deemed DMCA-compliant." J.A. 719. From September 2012 to November 2014, Cox issued 711,000 warnings "in response to alleged infringements," yet Cox terminated only a total of 22 accounts during that period, of which 17 were subject to termination for other reasons, such as failure to pay their bills on time. J.A. 715.

The district court committed no legal error in concluding that Cox had failed to meet its burden of raising a genuine dispute of material fact to defeat summary judgment on its ineligibility for the Section 512(a) safe harbor. The district court's decision to grant summary judgment should therefore be upheld.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

s/

GEORGE M. BORKOWSKI
RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC.
1025 F Street, N.W.
Washington, DC 20005
(202) 775-0101

KANNON K. SHANMUGAM
THOMAS G. HENTOFF
CONNOR S. SULLIVAN*
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

JANUARY 6, 2017

* Admitted in New York and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).

**CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD COUNT LIMITATIONS**

I, Kannon K. Shanmugam, counsel for amicus curiae and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached Brief of Recording Industry Association of America, Inc., as Amicus Curiae Supporting Appellee is proportionately spaced, has a typeface of 14 points or more, and 5,541 words.

s/

KANNON K. SHANMUGAM

JANUARY 6, 2017

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for amicus curiae and a member of the Bar of this Court, certify that, on January 6, 2017, a copy of the attached Brief of Recording Industry Association of America, Inc., as Amicus Curiae Supporting Appellee was filed with the Clerk and served on the parties through the Court's electronic filing system. I further certify that all parties required to be served have been served.

s/
KANNON K. SHANMUGAM