UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

BMG RIGHTS MANAGEMENT (US) LLC, and ROUND HILL MUSIC LP, *Plaintiffs*, v. COX ENTERPRISES, INC., COX COMMUNICATIONS, INC., and COXCOM, LLC, *Defendants*.	No. 1:14-cv-1611 (LO/JFA)

BRIEF OF PUBLIC KNOWLEDGE AND THE ELECTRONIC FRONTIER FOUNDATION AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Charles Duan (admission *pro hac vice* pending)
Public Knowledge
1818 N Street NW, Suite 410
Washington, DC 20036
(202) 861-0020
cduan@publicknowledge.org

William J. Dinkin
Stone, Cardwell & Dinkin, PLC
101 Shockoe Slip, Suite K
Richmond, VA 23219
VSB No. 31198
(804) 539-0000
bill.dinkin@gmail.com

Counsel for amici curiae

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INTEREST OF *AMICI CURIAE*

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

The Electronic Frontier Foundation is a non-profit civil liberties organization that has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its thousands of members have a strong interest in helping the courts and policy-makers strike the appropriate balance between intellectual property and the public interest.

SUMMARY OF ARGUMENT

It is simply unthinkable that a person could be deprived of a basic, vital service, practically essential to contemporary societal participation, based on nothing more than unadjudicated, unverified, unreliable allegations of civil wrongdoing. But that is precisely what Plaintiffs seek in this case: disconnection of Internet service of "large numbers of subscribers" based on automatically generated, robosigned claims of copyright infringement.

On behalf of the millions of Americans who depend on Internet access to perform their jobs, communicate with loved ones, educate themselves, and participate in government and society, *amici curiae* ask this Court to reject Plaintiffs' bid to deny those Americans the necessary consumer protections that underlie § 512 of the Digital Millennium Copyright Act.

Section 512 requires a service provider like Cox to establish "a policy that provides for the termination in appropriate circumstances of . . . repeat infringers" in order to obtain safe harbors from copyright liability. § 512(i)(1)(A). Plaintiffs sent out "millions of notices of copyright infringement" and contend that those notices gave Cox a duty to "potentially terminate large numbers of subscribers." BMG Mem. Supp. Mot. Summ. J. 24, Sept. 21, 2015 (Doc. No. 324). Thus, Plaintiffs necessarily assume that those notices were sufficient to deem at least some subscribers to be "repeat infringers" deserving of Internet access termination.

This interpretation of the § 512 safe harbor is wrong and detrimental to the public interest, and so Plaintiffs' motion for summary judgment should be denied, for at least the following reasons.

1. Internet access is a virtually essential service for Americans today. People depend on Internet access for basic information, communication, and interaction with government and society. So termination of consumers' Internet access is a uniquely harsh penalty, one which should only issue in rare and extenuating circumstances, based on a complete and reliable evidentiary record.

Plaintiffs cannot show an evidentiary record warranting this severe sanction that § 512 reserves only for "repeat infringers." For one thing, the millions of form notices merely allege infringement but do not establish it. And furthermore, there are at least two serious defects in the notices of infringement.

First, the notices identify not the person who allegedly infringed, but rather the person paying for the Internet connection through which the infringement allegedly occurred. Besides being legally wrong, it is concerningly bad policy to attribute the acts of a third party to the Internet connection subscriber. Doing so would discourage the widespread practice of Internet connection sharing which, besides being an unavoidable fact of life today, promotes numerous public benefits.

Second, the notices allege that the accused person is a copyright infringer based on acts of making copyrighted material available. But case law clearly establishes that the mere making available of copyrighted material is not an infringement of copyright law.

This Court should not require Cox to issue the penalty of Internet access termination on the basis of such inadequate evidence.

2. More broadly, the evidentiary record demonstrates that Plaintiff's agent Rightscorp wishes to leverage threats of Internet disconnection to extract settlement payments from a gigantic swath of consumers. Rightscorp needs complicity of Internet service providers like Cox to do so, and the threat of loss of § 512 safe harbors, Rightscorp hopes, will push ISPs into such complicity.

Such threats can be effective in frightening consumers into paying out settlements even based on defective claims. Policymakers have observed these exact problems in other areas such as abusive debt collection practices and deceptive patent demand letters. Indeed, given the defects in Rightscorp's notices, this case presents a particularly acute concern of undue threats leading to unjustified settlements.

The Court should thus be mindful of the effect its decision will have on American consumers of Internet services. Cox itself bears a fairly minimal cost for disconnecting a consumer: loss of subscriber fees. But the consumer bears a far weightier cost: loss of Internet access. Denying Cox the protection of § 512 would potentially open consumers up to extortive demands, declare them guilty as "repeat infringers" without trial or jury, and deny them access to a necessary service, perhaps innocently, perhaps without cause. This Court should not countenance such a result.

ARGUMENT

I. Internet Access Is a Vital Resource for Americans

Though the Internet is certainly a young technology, it has quickly ingrained itself into even the most basic workings of society today, to the point that millions of Americans find it practically essential. Disconnection of Internet service, as Plaintiffs call for based on § 512(i)(1)(A), is a severe punishment that should only be meted out in the most necessary and tightly proven of circumstances. This Court should tread lightly before asserting, as Plaintiffs ask this Court to do, that Defendant Cox had a duty to terminate certain subscribers Internet access.

Internet usage is pervasive. Nearly three quarters of Americans have an Internet subscription, as reported in 2013. Thom File & Camille Ryan, U.S. Census Bureau, *Computer and Internet Use in the United States* 3 tbl.1 (2013), URL *supra* p. iii. That degree of prevalence allows people, companies, and government to assume that the Internet is an efficient—perhaps the most efficient—way of communicating and transferring information.

As a result, many basic services have shifted to using the Internet as a primary medium. It is all but necessary for professional work, as any worker's email inbox can attest; a recent survey deemed email and the Internet "the dominant technological tools in American workplaces." Kristen Purcell & Lee Rainie, Pew Research Ctr., *Technology's Impact on Workers* 5 (2014), URL *supra* p. iv. Online education opens the doors of knowledge to millions of students. Tamar Lewin, *College of Future Could Be Come One, Come All*, N.Y. Times, Nov. 19, 2012, A1, *available at* URL *supra* p. iii. And public participation is moving online: "the Internet allows people to give voice to their democratic aspirations." *OECD Council Recommendation on Principles for Internet Policy Making* 5 (2011), *available at* URL *supra* p. iv.

It should thus come as no surprise that access to the Internet is incredibly important, to the point of being nearly essential in the current world. A multinational study found that "computer and internet technologies are increasingly crucial resources for functioning in today's society," and that opening up public access to the Internet "enables change in personal, social, economic, and other realms of life." Araba Sey et al., *Connecting People for Development: Why Public Access ICTs Matter* 26, 28 (2013), URL *supra* p. iv.

To terminate a person's Internet access, then, is to deny that person these benefits, services, and opportunities. That strong sanction of termination is what Plaintiffs ask this Court to mete out, in asserting that Cox has failed to meet its burden of terminating its subscribers' Internet access. The Court should weigh heavily the consequences to consumers of such a sanction.

II. Plaintiffs' Infringement Notices Cannot Meet the High Burden that Should Be Required to Deem a Person a "Repeat Infringer"

Given the severity of Internet disconnection, this Court should hold that § 512 does not require termination of a subscriber's access absent a strong case that the subscriber is a "repeat infringer."

Here, the only evidence that any of Cox's subscribers are "repeat infringers" is the series of notices that Plaintiffs' agent Rightscorp sent to Cox. These mere form accusations cannot be enough; to hold otherwise would create a bizarre guilty-until-proven-innocent scheme by which one can be deemed a repeat infringer based on unproven allegations of infringement.[1]

And equally problematically, the infringement notices simply fail to properly allege infringement at all. First, the notices confuse the person paying for the Internet connection with the actual infringer, and second, they mistakenly assert that merely making available content can be an act of copyright infringement.

A. An Internet Protocol Address Merely Identifies An ISP Account, Not The Users Of the Internet Connection

Plaintiffs' agent Rightscorp apparently uses Internet Protocol addresses to identify infringers. Decl. Brian D. Buckley 1, Aug. 28, 2015 (Doc. No. 244-1). But an IP address identifies only the

[1] Plaintiffs make much of their claim that their notices comply with § 512(c)(3)(A), but this is wholly beside the point. Compliance with that part of the statute merely establishes "claimed infringement," not actual infringement.

subscriber paying for the Internet connection, not the actual person who conducted the infringing activity. To declare the possibly innocent subscriber a "repeat infringer," as Plaintiffs would have this Court do, would chill the important and common practice of Internet connection sharing. The Court should avoid that result by refusing to give legal weight to Plaintiffs' notices of infringement.

The sharing of IP addresses is pervasively common. An IP address is simply a unique numeric identifier assigned to an Internet connection, which may be used by numerous people. *See* Info. Scis. Inst., *RFC 791, Internet Protocol: DARPA Internet Program Protocol Specification* 7 (1981) (specification defining IP addresses). Aside from address sharing in business establishments such as cafés and libraries, households often share a single Internet connection, and thus IP address, among family members, roommates, houseguests, or even members of the public. Indeed, certain Internet service providers open public Internet access on a customer's home equipment without the customer's consent, which may also lead to IP address sharing. *See* Michael Horowitz, *Comcast XFinity WiFi: Just Say No*, Computerworld (June 27, 2014), URL *supra* p. iii.

IP address sharing is not just the fact of the matter, however; it is a positive activity. Shared computer labs and open networks help to expand Internet access to the sizable fraction of the population unable to attain sufficient service on their own. *See* Sey et al., *supra*, at 24; *see also* Penny Pritzker & Tom Vilsack, *Broadband Opportunity Council Report and Recommendations* 8, 39 n.50 (2015), *available at* URL *supra* p. iv ("Commenters supported the idea of expanding free public Wi-Fi hot spots, especially in Federal buildings and on Federal lands."). Sharing an Internet connection also helps to reduce overcrowding on the limited resource of wireless spectrum, because users of mobile phones can offload data transmissions that would be otherwise sent by wireless spectrum onto, for example, a shared broadband Internet connection.

Also, sharing of IP addresses enhances privacy, at a time when privacy is a top concern for many Americans. There is a long tradition of anonymous speech in the United States, *see McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995), as such privacy fosters safety, free expression, and engagement in public discourse. That right does not vanish when a speaker goes on the Internet, and thus strategies for maintaining online anonymity are highly important. Shared computers and networks allow individuals to access the Internet without subjecting themselves to additional tracking and monitoring of their activities. Indeed, at least one organization advises domestic abuse survivors to use such privacy strategies to keep abusers from online stalking. *See* Nat'l Network to End Domestic Violence, *Who's Spying on Your Computer? Spyware, Surveillance, and Safety for Survivors* (2013), URL *supra* p. iv.

In sum, sharing IP addresses is not just common but beneficial. The Court should not interpret § 512 in such a way, as Plaintiffs seek, that would make a person potentially liable for infringing acts of others merely because that person engaged in the common and often useful practice of Internet connection sharing.

B. By Alleging That Users Merely Made Offers to Upload Copyrighted Material, the Notices Failed to Specify an Actual Violation of Copyright

Rightscorp's demand notices state vaguely that an ISP account "has been used to download, upload or *offer for upload* copyrighted content." Doc. No. 244-1 (emphasis added). That suggests that Plaintiffs may be charging consumers with infringement based on those consumers' making available of copyrighted material, regardless of whether those consumers actually caused the actual transfer of such material. On this basis, Plaintiffs contend that the targets of the letters are "repeat infringers."

Plaintiffs' contention is mistaken. Courts have clearly held that it is not an act of copyright infringement to merely make content available without an actual transfer of that content. "Merely making a copy available does not constitute distribution." *See Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981 (D. Ariz. 2008); *Elektra Entm't Group, Inc. v. Barker*, 551 F. Supp. 2d 234, 246–47 (S.D.N.Y. 2008) ("Section 106 . . . cannot form the basis for a 'make available' right.").[2]

Furthermore, even assuming *arguendo* that the act of making a copyrighted work available is a violation of the 17 U.S.C. § 106(3) exclusive distribution right, an "offer to upload" content online cannot violate that distribution right, because online transmissions are not distributions under the settled understanding of the law. The § 106(3) right only encompasses distribution of "copies or phonorecords," and courts have repeatedly held that "infringement of the distribution right requires an actual dissemination of either copies or phonorecords." *Nat'l Car Rental Sys. v. Computer Assocs. Int'l*, 991 F.2d 426, 434 (8th Cir. 1993) (quoting 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.11[A] (2014)) (internal alterations omitted).[3] Plaintiffs' notices that users

[2]Some have suggested that *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997), approved of a "making available" right under copyright law. But subsequent cases are to the contrary. *Cf. Diversey v. Schmidly*, 738 F.3d 1196, 1202 n.7 (10th Cir. 2013) (applying *Hotaling* but declining to opine on its applicability to Internet transmissions); *Warner Bros. Records, Inc. v. Doe*, No. 5:08-cv-116, 2008 WL 5111883, at *3 (E.D.N.C. Dec. 4, 2008) ("The court, however, need not decide here whether 'making available' a sound recording over the internet constitutes a distribution, as plaintiffs' complaint sufficiently alleges an actual dissemination of copies of the recordings has occurred.").

[3]*See also Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 718 (9th Cir. 2007); *Musical Prods., Inc. v. Roma's Record Corp.*, No. 05-cv-5903, 2007 WL 750319, at *3 (E.D.N.Y. Mar. 7, 2007); *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 802 (N.D. Cal. 2005); *Paramount Pictures Corp. v. Labus*, No. 89-C-797-C, 1990 WL 120642, at *4 (W.D. Wis. Mar. 23, 1990). *See generally* R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM Copies*, 2001 U. Ill. L. Rev. 83, 126 (2001) (distribution right applies only to "tangible, physical things").

made "offer[s] to upload" content thus again fail to allege a violation of an exclusive § 106 right, rendering those notices defective and unreliable.

The nonexistence of a "making available" right obviously does not excuse actual infringement. The reproduction right and secondary liability principles remain available. Yet requiring proof of actual reproduction to establish liability limits the use of infringement accusations for speculative invoicing, in which copyright owners demand settlements for infringements that *might* have occurred, and other abusive tactics. Ramon Lobato & Julian Thomas, *The Business of Anti-Piracy: New Zones of Enterprise in the Copyright Wars*, 6 Int'l J. Comm. 606, 619–20 (2012), *available at* URL *supra* p. iv.

* * *

For at least the foregoing reasons, Plaintiffs' notices fail to actually establish that any subscriber was actually an infringer, let alone a "repeat infringer." To treat those notices otherwise would be to give legal power to unsubstantiated and unverified accusations—and not just any legal power, but legal power to deny American consumers access to the vital service of Internet access. Such a result could be devastating to the consumer and public interest. To avoid such a result, this Court should reject Plaintiffs' overbroad interpretation of "repeat infringers" under § 512(i).

III. This Court Should Be Cognizant of the Real-World Harmful Effects of Plaintiffs' Demand Letters on Consumers

Although the subject matter of this lawsuit is over the relationship between copyright owners and an Internet service provider, it is plain as day from the evidentiary record that the real objective of Plaintiffs (or, rather, their agent Rightscorp) is to send millions of consumers threats of Internet access termination, through those consumers' ISPs, to extract payments of settlements. Were the

Court to deny Cox the protection of the § 512 safe harbor, Cox and other ISPs would likely swing toward the direction of facilitating this demand letter project of Rightscorp.

This practice of sending widespread demand letters has been seen in other fields, most notably debt collectors, patent asserters, and other copyright assertion entities. Of concern for consumers, the demand letters in this field often bore indicia of deception, fraud, and extortion, suggesting an intent to use coercive threats to obtain settlement payments based on even non-meritorious claims. It is thus worrying that Rightscorp's notice letters bear many of those same indicia.

Insofar as policymakers have sought to avoid perpetuating those demand letter practices in those fields, this Court should be mindful that its decision in this case could perpetuate—or avoid—those same effects on consumers.

Abusive demand practices plagued the debt collections industry prior to Congress's passage of the Fair Debt Collection Practices Act (FDCPA) of 1977. Before the FDCPA, debt collection notices commonly used language designed to "promote fear, distress and emotional discomfort." *H.R. 29: The Debt Collection Practices Act: Hearing Before the Subcomm. on Consumer Affairs of the H. Comm. on Banking, Finance and Urban Affairs*, 95th Cong. 28 (1977) [hereinafter FDCPA Hearing], *available at* URL *supra* p. iii (testimony of Hugh Wilson). To this end, collectors routinely threatened debtors with costly litigation. *Id.* As a result of these coercive tactics, "there were many instances when persons who had no legal obligation to pay were scared into doing so." *Id.* at 33.

Demand letters issued by abusive patent assertion entities are similar. Often "[t]he claims in the letter are vague . . . But the demand is crystal clear: pay up, or else we'll bleed you dry in a courtroom somewhere in Eastern Texas." Chuck Schumer, *We're Getting Patent Reform Done This Year*, Medium (Apr. 29, 2015), URL *supra* p. iv.

Recently, some copyright lawyers and their agents have adopted similar abusive practices, leveraging accusations of infringement against ISP customers into cash payments. Acting primarily on behalf of rightsholders in pornography and independent film, these "copyright trolls" purport to identify Internet Protocol addresses associated with alleged infringement, then seek the identities of ISP customers associated with those IP addresses. They then contact subscribers and demand cash "settlements" to avoid litigation, public humiliation, and other threatened or implied consequences. *See* Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 Iowa L. Rev. 1105, 1107–14 (2015); *Ingenuity 13 LLC v. John Doe*, No. 2:12-cv-8333, 2013 WL 1898633, at *1 (C.D. Cal May 6, 2013) (plaintiffs use "paralyzing social stigma, and unaffordable defense costs . . . by accusing individuals of illegally downloading . . . ").

Of particular concern, one commentator noted that the legal merits were nearly irrelevant to these threats:

> Rather, the objective is to process as many settlement payments as possible in the shortest time possible. Whether copyright infringement can or cannot be proven is immaterial: the strategy relies on scared customers with little knowledge of legal process paying up to make the problem go away.

Lobato & Thomas, *supra*, at 619.

The copyright trolling phenomenon has unsurprisingly led to widespread abuses of the legal system. For example, attorneys associated with a group known as Prenda Law were sanctioned for, *inter alia*, misappropriating a person's identity in order to conceal the attorneys' own financial interest in the copyrights at issue and disobeying court-ordered limits on discovery. *See Ingenuity 13*, 2013 WL 1898633, at *5. Similarly, an attorney representing pornography producer Malibu

Media was sanctioned in 2013 for filing lists of films with salacious or embarrassing titles that were not owned by the company, in an apparent attempt to increase the potential embarrassment to defendants who refused settlement. *See Malibu Media LLC v. John Doe Subscriber Assigned IP Address 24.183.51.58*, No. 13-cv-205, 2013 WL 4821911, at *5 (W.D. Wis. Sept. 10, 2013).

The scope of this problem is staggering. In 2013, multi-defendant John Doe copyright infringement suits (one form of this type of litigation) were 43% of *all* federal copyright infringement suits filed in the U.S. *See* Sag, *supra*, at 1108–09. In the first quarter of 2014 this percentage rose to 46%. *See id.* Courts have referred to these cases as "outmaneuver[ing] the legal system," *Ingenuity 13*, 2013 WL 1898633, at *1, and noted a "stiffening judicial headwind" against them, *Pac. Century Int'l, Ltd. v. John Does 1–37*, 282 F.R.D. 189, 194 (N.D. Ill. 2012). The Federal Court of Australia recently enjoined the sending of misleading demand notices in a copyright case, calling it "speculative invoicing" and requiring pre-approval by the court of the notice text. *Dallas Buyers Club LLC v. iiNet Ltd. [No. 4]*, [2015] FCA 838, para. 1 (Austl. Aug. 14, 2015), *available at* URL *supra* p. ii.

Rightscorp's demand letters echo these practices, and will likely lead to the same troubling results: under-resourced individuals frightened into paying unjustified settlements. Like these other forms of abusive demand letter, Rightscorp's letters threaten unrealistic litigation awards and other implausible penalties, including unjustified termination of Internet service.

Just as abusive debt collectors and patent assertion entities threaten targets with expensive litigation,[4] Rightscorp's personnel reference "penalties as high as $150,000 per infringement"—the

[4] *See* Letter from Farney Daniels PC, to unknown recipient, *CalNeb, LLC Patent Licensing* (Jan. 21, 2013) [hereinafter MPHJ Letter Exhibit C], URL *supra* p. iii ("To avoid suit, court costs, and much unpleasantness, you must pay today"); FDCPA Hearing, *supra*, at 34 (California Collection Center Manual) ("[I]f we do not hear from you within two weeks from the date of this letter, our

statutory maximum, which to *amici*'s knowledge has never been awarded for noncommercial file sharing. Def.'s Notice Filing Sealed or Redacted Filings Ex. 31, at 2, Sept. 19, 2015 (Doc. No. 299-8). And just as abusive debt collectors and patent assertion entities impress upon their targets that contesting the claim would be far more expensive than quick compliance,[5] Rightscorp's letters tell the recipient that its client "will pursue every available remedy including injunctions and recovery of attorney's fees, costs and any and all other damages which are incurred by [the client] as a result of any action that is commenced against you." Doc. No. 244-1 Ex. 1, at 1.

Further, just as other senders of abusive demand letters avoid verifying or addressing the merits of their claims,[6] Rightscorp's letters threaten litigation and disconnection over *unspecified* allegations of infringement. *Id.* Ex. 1, at 3 (referencing "compositions, including but not limited to those items listed in this correspondence.").

Rightscorp also evokes the practices of copyright trolls when it tells its targets via phone that "[m]ore than 200,000 people have been sued for [infringement] since 2010." Doc. No. 299-8 Ex. 31, at 3. This is a direct reference to suits by entities such as Prenda and Malibu Media. And Rightscorp's threats of Internet disconnection are potentially as coercive, if not more so, than threats of monetary penalties, for the reasons explained previously.

client will be forced to file a Complaint against you for patent infringement.").

[5]Under the heading "Use Motivating Words," one manual urges collectors to say: "[t]he attorney will sue and add court costs, attorney fees and other expenses to the bill. Why not pay now and avoid this expense?" FDCPA Hearing, *supra*, at 34; *see also* Letter from Aeton Law Partners, to Danny Seigle, FindTheBest.com, Inc., *Lumen View Technology LLC v. FindTheBest.com, Inc., S.D.N.Y.* (May 30, 2013), URL *supra* p. iii ("Plaintiff is prepared for full-scale litigation to enforce its rights, this includes all motion practice as well as discovery . . . for each nondispositive motion filed by the Company, Plaintiff will incorporate an escalator into its settlement demand . . . .").

[6]Collectors were "not interested if the debt [was] disputed or, in fact, if the debt [was] even owed . . . ." FDCPA Hearing, *supra*, at 24 (testimony of William R. Mann). Indeed, one agency's manual instructs collectors "Do not argue merit if at all possible–go over the top such as: 'Now, you know better than that' . . . ." *Id.* at 59 (California Collection Center Manual).

It is bad for consumers and bad for society when companies like Rightscorp can wield the penalties of copyright law as a hammer to threaten without adequate discretion, investigation, or caution. This is why § 512(i)(1)(A) strictly limits one of the heaviest such penalties—termination of Internet access—to "repeat infringers," not merely "infringers" or "alleged infringers." Such a limitation is essential to protecting consumers from abusive practices by companies who would go so far as to threaten cutting a person off from an essential service just to make a few dollars. This Court should affirm the importance of that limitation, reject Plaintiffs' attempt to skirt its rigor, and deny the motion for summary judgment.

CONCLUSION

For at least the foregoing reasons, this Court should deny Plaintiffs' motion for summary judgment with respect to Cox's safe harbor eligibility.

Respectfully submitted,

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/s/

William J. Dinkin
Stone, Cardwell & Dinkin, PLC
101 Shockoe Slip, Suite K
Richmond, VA 23219
VSB No. 31198
(804) 539-0000
bill.dinkin@gmail.com

Charles Duan (admission *pro hac vice* pending)
Public Knowledge
1818 N Street NW, Suite 410
Washington, DC 20036
(202) 861-0020
cduan@publicknowledge.org

Counsel for amici curiae