

No. 16-1972

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BMG RIGHTS MANAGEMENT (US) LLC,
Plaintiff-Appellee

v.

COX COMMUNICATIONS, INC., and COMCOX, LLC,
Defendants-Appellants

Appeal from the United States District Court for the
Eastern District of Virginia, Civil No. 14-CV-01611 (O'Grady, J.)

**BRIEF *AMICI CURIAE* OF THE AMERICAN COUNCIL ON
EDUCATION, ASSOCIATION OF AMERICAN UNIVERSITIES,
EDUCAUSE, THE AMERICAN LIBRARY ASSOCIATION,
ASSOCIATION OF RESEARCH LIBRARIES, ASSOCIATION OF
COLLEGE AND RESEARCH LIBRARIES, AMERICAN INDIAN HIGHER
EDUCATION CONSORTIUM, APPA: LEADERSHIP IN EDUCATIONAL
FACILITIES, NATIONAL ASSOCIATION OF COLLEGE AND
UNIVERSITY BUSINESS OFFICERS, THURGOOD MARSHALL
COLLEGE FUND, ASSOCIATION OF CATHOLIC COLLEGES AND
UNIVERSITIES, AND NATIONAL ASSOCIATION OF INDEPENDENT
COLLEGES AND UNIVERSITIES IN SUPPORT OF NEITHER PARTY**

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November 14, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* the American Council on Education, Association of American Universities, EDUCAUSE, American Library Association, Association of Research Libraries, Association of College and Research Libraries, American Indian Higher Education Consortium, APPA: Leadership in Educational Facilities, National Association of College and University Business Officers, Thurgood Marshall College Fund, Association of Catholic Colleges and Universities, and National Association of Independent Colleges and Universities state that they are non-profit associations or corporations with no parent corporations and no privately-owned stock.

s/Jonathan Band
Counsel for *Amici Curiae*

November 14, 2016

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INTEREST OF AMICI¹

The American Council on Education (“ACE”) is a non-profit, national educational association representing all higher education sectors. Its approximately 1,700 members reflect the extraordinary breadth and contributions of degree-granting colleges and universities in the United States. Founded in 1918, ACE seeks to foster high standards in higher education, believing a strong higher education system is the cornerstone of a democratic society. ACE participates as an *amicus curiae* on occasions, such as this, where an issue involves matters of substantial importance to higher education in the United States.

Association of American Universities (“AAU”) is an association of 62 leading public and private research universities in the United States and Canada. Founded in 1900 to advance the international standing of U.S. research universities, AAU today focuses on issues that are important to research-intensive universities, such as funding for research, research policy issues, and graduate and undergraduate education. The 60 AAU universities in the United States award

¹ No counsel for any party authored this brief in whole or part; no such party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amici* made such a contribution. All parties have consented to the filing of this brief.

more than one-half of all U.S. doctoral degrees and 55 percent of those in the sciences and engineering.

EDUCAUSE is a community of information technology (“IT”) leaders and professionals committed to advancing higher education. Its membership includes over 2,000 colleges and universities, over 350 corporations serving higher education IT, and dozens of other associations, state and federal agencies, college and university system offices, and not-for-profit organizations. EDUCAUSE strives to support IT professionals and the further advancement of IT in higher education through analysis, advocacy, community- and network-building, professional development, and knowledge creation.

The American Library Association (“ALA”), established in 1876, is a non-profit professional organization of more than 58,000 librarians dedicated to providing and improving library services and promoting the public interest in a free and open information society. ALA submits amicus briefs on issues relevant to libraries and their users.

The Association of Research Libraries (“ARL”) is an organization of 124 research libraries at comprehensive, research-extensive institutions in the U.S. and Canada that share similar research missions, aspirations, and achievements.

The American Indian Higher Education Consortium (“AIHEC”) is the unifying voice of our nation’s 37 Tribal Colleges and Universities— federally

recognized public institutions working to strengthen tribal nations and make a lasting difference in the lives of American Indians and Alaska Natives. Through public policy, advocacy, research, and program initiatives, AIHEC strives to ensure tribal sovereignty and self-determination through excellence in American Indian higher education.

The Association of Catholic Colleges and Universities (ACCU) serves as the collective voice of U.S. Catholic higher education. Through programs and services, ACCU strengthens and promotes the Catholic identity and mission of its member institutions so that so that all associated with Catholic higher education can contribute to the greater good of the world and the Church.

The Association of College and Research Libraries, the largest division of the American Library Association, is a professional association of academic and research librarians.

The APPA: Leadership in Educational Facilities, promotes leadership in educational facilities for its more than 5,200 professional members throughout the United States, Canada, and abroad.

The National Association of College and University Business Officers (“NACUBO”) represents more than 2,500 colleges, universities, and higher education service providers. It represents chief business and financial officers through advocacy efforts, research, community service, and professional

development activities. NACUBO's mission is to advance the economic viability and business practices of higher education institutions in fulfillment of their academic missions.

The National Association of Independent Colleges and Universities ("NAICU") serves as the unified national voice of independent higher education. With more than 1,000 member institutions and associations, NAICU reflects the diversity of private, nonprofit higher education in the United States. Our 965 member institutions include major research universities, church-related colleges, historically black colleges, art and design colleges, traditional liberal arts and science institutions, women's colleges, two-year colleges, and schools of law, medicine, engineering, business, and other professions.

The Thurgood Marshall College Fund ("TMCF") is the only national organization founded for the sole purpose of providing scholarships to students attending the nation's public Historically Black Colleges and Universities. In addition to scholarships, TMCF provides leadership development, and training as well as programmatic and capacity building and policy and advocacy support to its member schools.

Amici represent nonprofit institutions that provide Internet access to millions of Americans. The safe harbors contained in the Digital Millennium Copyright Act ("DMCA") permit Amici to provide this Internet access without fear of crushing

liability for the infringing activities of their users. Accordingly, this Court's interpretation of the standards for eligibility for the DMCA's safe harbors, set forth in 17 U.S.C. § 512(i)(1)(A), could have a significant impact on the ability of the institutions represented by Amici to provide Internet access to their users.

SUMMARY OF ARGUMENT

Among other issues, this appeal concerns the proper interpretation of the conditions for eligibility for the limitations on copyright remedies provided by the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512.² The DMCA's safe harbors protect providers of Internet access and other online services from damages liability for the infringing activities of their subscribers. To qualify for this protection, the service provider must adopt and implement a policy for terminating the accounts of repeat infringers in appropriate circumstances. 17 U.S.C. § 512(i)(1)(A).

Educational institutions and libraries provide Internet access to over 125 million Americans. By providing this Internet access, these entities fall within the DMCA's definition of "service provider" in 17 U.S.C. § 512(k)(1)(B) ("a provider of online services or network access").³ Like other service providers, in order to

² This issue is discussed generally at pages 45-59 of Cox's brief.

³ These entities often provide other services that also fall within the scope of the DMCA, such as hosting or linking. See 17 U.S.C. §§ (512)(c) and (d).

receive the DMCA's protection from damages liability, these entities must adopt and reasonably implement a policy for terminating the Internet access of repeat infringers in appropriate circumstances.

Amici take no position on whether the appellant in this case, Cox Communications, satisfied the DMCA's repeat infringer policy condition. However, in deciding this case, the Court should avoid any suggestion that the DMCA mandates a uniform repeat infringer policy. Although all service providers must adopt a repeat infringer policy in order to qualify for a DMCA safe harbor, the DMCA does not require all service providers to adopt the *same* repeat infringer policy. This brief demonstrates that interpreting the DMCA to impose a uniform repeat infringer policy could force educational institutions and libraries to restrict Internet access in a manner contrary to the public interest.

Section I of the brief shows that for twenty years, the federal government has strongly supported the expansion of broadband in educational institutions and libraries. In particular, the Federal Communication Commission's E-rate program and 2009 economic stimulus bill's Broadband Technology Opportunities Program have channeled billions of federal dollars to providing high-speed Internet in educational institutions and libraries.

Section II describes how the federal investment in broadband has greatly benefitted students and the public at large. Internet access in educational

institutions has employed the power of technology to provide equal access to educational opportunity. It also has brought a new era of teaching and learning with enhanced teacher effectiveness, increased student engagement, and improved academic outcomes. Internet access in libraries also helps bridge the digital divide, enabling people without broadband connections to apply for jobs and government services as well as to access critical business and medical information.

Finally, section III explains how a uniform repeat infringer policy condition would undermine the federal broadband policy. It could force educational institutions to restrict student access to the Internet unreasonably. Similarly, it could require libraries to limit broadband availability to people who have no other way of accessing information they need. It also could impose burdensome administrative costs on these entities. The DMCA does not mandate a uniform repeat infringer policy, and such uniformity would conflict with the flexibility afforded under the Higher Education Opportunity Act.

ARGUMENT

The federal government has manifested a strong commitment to increasing the availability of broadband in educational institutions and libraries across the country. The safe harbors of the Digital Millennium Copyright Act further this policy by limiting the potential liability of educational institutions and libraries for the infringing activities of the users of these networks. Amici respectfully request

this Court to exercise great care when interpreting and applying the conditions of eligibility for the safe harbors so as not to make it more difficult for amici to use these safe harbors in the future, thereby undermining the federal policy promoting broadband availability.

Specifically, 17 U.S.C. § 512(i)(1)(A) conditions availability of the safe harbors on a service provider adopting, reasonably implementing, and informing subscribers of the service provider’s network of “a policy that provides for the termination in appropriate circumstances” of the accounts of subscribers “who are repeat infringers.” The DMCA does not provide more detail as to the nature of the policy and the circumstances under which termination of the accounts of repeat infringers is appropriate.⁴ This lack of detail is no accident. The DMCA’s broad definition of service provider in 17 U.S.C. § 512(k)(1)(B) (“a provider of online services or network access”) encompasses a large universe of entities, ranging from large corporations such as Cox, Verizon and AT&T, to small nonprofits. A repeat infringer policy that is appropriate for a commercial provider of broadband access to residences might not be appropriate for a nonprofit hospital that provides

⁴ The section-by-section analysis of the DMCA issue by the House Judiciary after its passage notes, in the context of the repeat infringer policy condition, that “it should be recognized that there are different degrees of online copyright infringement, from the inadvertent to the noncommercial, to the willful and commercial.” Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998 at 36 (1998).

Internet access to its employees. The adequacy of a repeat infringer policy for DMCA purposes could turn on a variety of factors, including the size, sophistication, and mission of the service provider, as well as the nature of its services⁵ and users.

Amici take no position on whether or not Cox satisfied the DMCA’s repeat infringer policy condition. However, in deciding this case, the Court should avoid any suggestion that 17 U.S.C. § 512(i)(1)(A) mandates a uniform repeat infringer policy. A uniform repeat infringer policy that is too stringent could undermine the federal objective of promoting the availability of broadband in schools and libraries. It also would run contrary to the flexibility provided to higher education institutions in the Higher Education Opportunity Act.

I. For Two Decades, the Federal Government Has Strongly Supported Broadband Availability in Educational Institutions and Libraries.

In 1996, Congress authorized the Federal Communications Commission (“FCC”) to support the expansion of broadband services in schools and libraries. In response, the FCC developed the Schools and Libraries universal support mechanism (known as E-rate), which enables schools and libraries to receive

⁵ The DMCA’s safe harbors apply to four different online functions, including Internet access (§ 512(a)), system caching (§ 512(b)), hosting (§ 512(c)), and linking (§ 512(d)).

Internet access and other telecommunications services at discounted rates. When E-rate was established, only 14 percent of the K-12 classrooms in the United States had Internet access. By 2010, 94% had at least some Internet access. Similarly, 28% of public libraries had Internet access in 1996, increasingly to nearly 99% by 2010. John Carlo Bertot, et al., *2010-2011 Public Library Funding and Technology Access Survey: Survey Findings and Results 3* (2011), available at http://ipac.umd.edu/sites/default/files/publications/PLFTAS_Report2010-11_0.pdf.

Notwithstanding the success of the E-rate, there was growing awareness that many libraries and educational institutions would need significant upgrades to meet projected broadband bandwidth demand. Thus, expanding E-rate was a major focus of the National Broadband Plan (“NBP”), adopted by the FCC in 2010. The NBP stated that “[b]roadband can be an important tool to help educators, parents and students meet major challenges in education.” Federal Communications Commission, NBP at 224 (2010), available at <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>. The NBP added that “broadband-enabled solutions hold tremendous promise to help reverse patterns of low achievement” that threaten “the country’s economic welfare and long-term success.” *Id.* The NBP explained that, “with broadband, students and teachers can expand instruction beyond the confines of the physical classroom and traditional school day.” *Id.* Broadband could provide more customized learning opportunities

where students could access high-quality, low-cost educational materials. *Id.* To achieve these benefits, the NBP contained detailed proposals for enhancing the E-rate program's efficiency while improving the flexibility, deployment, and use of infrastructure.

Consistent with the NBP, President Obama in June 2013 announced the ConnectED Initiative designed to accelerate getting “high speed Internet connectivity and educational technology into classrooms.” White House, Fact Sheet: Opportunity For All – Answering the President’s Call to Enrich American Education Through ConnectEd (Feb. 4, 2014), <https://www.whitehouse.gov/the-press-office/2014/02/04/fact-sheet-opportunity-all-answering-president-s-call-enrich-american-ed>. The ConnectED initiative called for increased E-rate funding. Accordingly, the FCC in July 2014 adopted the E-rate Modernization Order to expand Wi-Fi networks in schools and libraries across the country while ensuring continued support for broadband connectivity to schools and libraries. FCC, Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184 (July 23, 2014), available at https://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0723/FCC-14-99A1.pdf. In December 2014, the FCC issued the Second E-rate Modernization Order, which increased options for schools and libraries seeking to purchase high-

speed broadband and adjusted the E-rate spending cap to \$3.9 billion. FCC, Second Report and Order, *In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184 (Dec. 19, 2014), available at https://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1219/FCC-14-189A1.pdf.

Although E-rate provides funding only for public libraries and K-12 schools, other federal broadband programs have reached higher education institutions. The Broadband Technology Opportunities Program (“BTOP”), funded by Congress through the 2009 American Recovery and Reinvestment Act, made a large investment in higher education-based research and education networks. BTOP led to the disbursement of approximately \$4 billion in grants that required recipients to provide matching funds toward the total cost of their broadband infrastructure, adoption, and training projects. *See* National Telecommunications and Information Administration (“NTIA”), Broadband Technology Opportunities Program (BTOP) Quarterly Program Status Report at 2 (Jan. 2014), available at https://www.ntia.doc.gov/files/ntia/publications/ntia_btop_19th_quarterly_report.pdf. NTIA found that BTOP resulted in billions of dollars in economic benefits, higher levels of employment, and higher-than-average broadband penetrations in the communities served by the projects. *See* NTIA, Broadband Technology Opportunities Program Evaluation Study at 3-4 (Sep. 15, 2014),

available at http://www.ntia.doc.gov/files/ntia/publications/asr_final_report.pdf.

For example, BTOP provided funding to Internet2, an advanced technology community founded by the leading research universities, to establish the United States Unified Community Anchor Network, which provides broadband capabilities to community anchor institutions such as K-12 schools, public libraries, and health institutions. Internet2, *What is U.S.UCAN?*,

<https://www.internet2.edu/media/medialibrary/2014/07/01/IS-what-is-usucan.pdf>.

The NBP proposed the creation of a Unified Community Anchor Network. NBP at 194. BTOP also benefited libraries; one in five libraries across the country received BTOP grant funding. American Library Association, *U.S. Public Libraries and the Broadband Technology Opportunities Program* (May 2013), http://www.districtdispatch.org/wp-content/uploads/2013/05/uspl_btop_4.30.13_large.pdf.

In addition to funding broadband penetration in libraries and education institutions, the federal government has encouraged the expansion of online learning. The NBP contains detailed proposals for supporting and promoting online learning, including Department of Education grants for the development of online educational content and training teachers in digital literacy. NBP at 232-33. Thus, in 2011, the Department of Education made \$2 billion in grant funding available for the development of open materials, including online courses, for career training

programs in community colleges. Timothy Vollmer, *New federal education fund makes available \$2 billion to create OER resources in community colleges*,

Creative Commons Blog (Jan. 20, 2011),

<https://creativecommons.org/2011/01/20/u-s-department-of-labor-and-department-of-education-commit-2-billion-to-create-open-educational-resources-for-community-colleges-and-career-training-cc-by-required-for-grant-outputs/>. The

National Action Plan in support of the Open Government Partnership contains a section dedicated to promoting the creation of online educational content and training. White House, *Open Government Partnership: Announcing New Open Government Initiatives* (2014),

http://www.whitehouse.gov/sites/default/files/microsites/ostp/new_nap_commitments_report_092314.pdf.

In sum, over the past two decades, the federal government has demonstrated a strong commitment—through the spending of billions of dollars—to promoting Internet access in educational institutions and libraries. This reflects a recognition of the unique important role of educational institutions and libraries in providing access to information, which differs from that of commercial Internet access providers.

II. The Federal Investment in Broadband Deployment in Educational Institutions and Libraries Has Benefitted Students and the Public at Large.

A. Internet Access Has Improved the Quality of Education.

The enormous federal investment in broadband availability in schools, colleges, and universities across the country, combined with spending by state and local government, foundations, and the institutions themselves, has changed the face of education in America. Virtually all colleges and universities have WiFi networks that provide students with Internet access. According to a recent survey, 63% of students typically connect two or three devices (e.g., a smartphone and a laptop) to the campus network simultaneously. *The EDUCAUSE Almanac for Undergraduate Student and Technology Survey (2016)*, available at <https://library.educause.edu/resources/2016/6/~media/files/library/2016/6/etracalm-anac.pdf>. 59% of students spend at least three hours a day online for research or homework purposes. *Id.*

82% of students prefer a blended learning environment, which consists of both face-to-face and online learning experiences.⁶ *Id.* 61% of students report that instructors use technology during class to make connections to the learning material. *Id.* For example, an instructor might stream content from a website (e.g.,

⁶ 91% of higher education institutions have full-function online learning delivery systems. EDUCAUSE, *Core Data Service Almanac (2006)*, available at <https://library.educause.edu/~media/Files/Library/2016/2/cda1501.pdf>.

from YouTube or a news site) to demonstrate a point. The instructor might reference a term or event unfamiliar to a student, and the student can look up the term or event in real time. During a class discussion, a student can find facts online to support her position. Many instructors use course management websites, from which student can access syllabi and other course materials, or engage in course-related chats with the instructor or other students. 57% of students indicate that instructors encourage the use of online collaboration tools. *Id.*

Numerous educational benefits flow from these innovations. 78% of students agree the technology has contributed to the successful completion of courses; 75% believe it has enriched their learning experience; 71% feel it has helped them engage in the learning process; 69% believe it has helped them focus on learning activities or course materials; 69% said it helped them work with other students on class projects; and 67% feel it has helped them understand hard-to-grasp concepts or processes. *Id.*

Similar benefits have accrued to K-12 schools. Largely because of the expansion of E-rate funding in 2014, the percentage of school districts that met the FCC's Internet access goal of 100 kbps per student increased from 30% in 2013 to 77% in 2015. Education Superhighway, *2015 State of the States: A report on the state of broadband connectivity in America's public schools* 6 (2015), available at http://stateofthestates.educationsuperhighway.org/assets/sos/full_report-

[55ba0a64dcae0611b15ba9960429d323e2eadbac5a67a0b369bedbb8cf15ddbb.pdf](https://www.fcc.gov/record/documents/55ba0a64dcae0611b15ba9960429d323e2eadbac5a67a0b369bedbb8cf15ddbb.pdf).

As of 2015, 59% of schools and 53% of students met this goal. *Id.*⁷ Likewise, broadband access for teachers expanded from 300,000 in 2013 to 1.7 million in 2015.

The arrival of broadband in America’s classrooms “has unleashed the power of technology to provide equal access to educational opportunity.” *Id.* It also has “usher[ed] in a new era of teaching and learning that is enhancing teacher effectiveness, increasing student engagement, and improving academic outcomes.” *Id.* In particular, “it is expanding learning beyond the classroom and providing new and innovative educational opportunities.” *Id.* For example, “students in rural communities who may not have the same traditional field trip opportunities as their urban and suburban counterparts are able to use the Internet to travel the globe, expand their cultural awareness by communicating with people in other parts of the world, and virtually participate in experiments and activities they would not otherwise be able to access easily.” *Id.* at 8. Further, with the support of technology, “students everywhere are able to interact with and learn core content in ways that they find most engaging—a shift from the ‘one-textbook-fits-all’ mindset that has long governed the American educational system.” *Id.*

⁷ Notwithstanding this progress, 21 million K-12 students still do not have adequate broadband access in their schools.

Additionally, with broadband “students no longer rely on their classmates to determine the pace, rigor, and style of their lessons.” *Id.* at 9. Instead, “they are able to navigate their learning independently and tailor it to their own needs.” Schools can offer enrichment paths such as access to online advanced placement course materials or accelerating the pacing in the curriculum. *Id.*

B. Public Libraries Provide Essential Internet Access For Millions of Americans.

Unlike other countries, the United States does not have a network of Internet cafes that provide users with the hardware necessary for Internet access. While Starbucks has Wi-Fi, it doesn’t supply laptops. And although increasingly more Americans at all income levels own smart phones, it is difficult (if not impossible) to fill out an online job application, or apply for healthcare, on a smart phone. Public libraries are the only source for free Internet connectivity and Internet-ready computer terminals for most Americans. This is the reason Congress included libraries in the E-rate program.

A 2013 Pew Research Center survey that found that 77% of adult Americans say free access to computers and the Internet is a “very important” service of libraries. Kathryn Zickuhr, Lee Rainie & Kristen Purcell, *Library Services in the Digital Age*, Pew Internet Project, Pew Research Ctr. (Jan. 22, 2013), *available at* <http://libraries.pewinternet.org/2013/01/22/library-services/>. Public libraries

provide Internet access to all people, including the roughly one-third of the population without broadband access at home. One national survey found that local public libraries offer the only no-fee public Internet access in over 60% of all communities. *Public Libraries and the Internet: Community Access and Public Libraries*, Info. Policy and Access Ctr.,

<http://www.plinternetsurvey.org/analysis/public-libraries-and-community-access>.

Public libraries provide the public with access to over 271,000 Internet-ready computer terminals. Institute of Museum and Library Services, *Public Libraries in the United States Survey, Fiscal Year 2012* (2015),

https://www.ims.gov/sites/default/files/legacy/assets/1/AssetManager/PLS_FY2012.pdf. In 2012, there were 340.5 million user-sessions on these computers. There were 227 computer uses per 1,000 visits to public libraries. Public libraries in rural areas had the highest ratio of Internet accessible computers: 7.5 computers per 5,000 people.

A 2013 survey by the Pew Internet and American Life Project found that 60% of those who used the Internet at a library in the past 12 months did research for school or work; 42% say they got health information; 42% say they visited government websites or got information about government services; and 23% say

they looked for jobs or applied for jobs online.⁸ John P. Horrigan, *Libraries at the Crossroads*, Pew Research Ctr. (Sept. 15, 2015), available at <http://www.pewinternet.org/2015/09/15/libraries-at-the-crossroads/>.

A study performed by the Information School of the University of Washington for the Institute of Museum and Library Services demonstrated the importance of the Internet access provided by public libraries to people near or below the poverty line. The study found that in 2009, over 77 million people accessed the Internet from public libraries in the United States. Samantha Becker, *Opportunity for All: How the American Public Benefits from Internet Access at U.S. Libraries 2* (2010), <http://www.ims.gov/pdf/OpportunityForAll.pdf>. 44% of people below the poverty line used library computers for Internet access and other services. Among young adults below the poverty line, the level of usage increased to 61%. *Id.* at 5-8.

A 2012 study on the economic benefit of Texas public libraries found that Internet access via library computer terminals saved users over \$300 million in 2011. Bureau of Business Research, IC2 Institute, University of Texas at Austin, *Texas Public Libraries: Economic Benefits and Return on Investment* (2012) at 39-

⁸ A 2013 survey also showed 16% of Internet users at libraries paid bills or did online banking and 16% took an online class or completed an online certification program. *Library Services in the Digital Age* (2013), <http://libraries.pewinternet.org/2013/01/22/Library-services/>.

42. 62% of the Texas library directors said that the Internet access was “extremely beneficial” to users, while a further 20% indicated that it was “quite beneficial.” 56% of the directors said that Internet access was the single most important resource provided by their libraries. Numerous library directors indicated that some users were running small businesses entirely via Internet at their library.

The Texas directors noted that even users with home Internet access use the library Internet access because of its greater bandwidth and faster service.

Additionally, not all users have the option of Internet access at their residence.

“Ranchers and others in rural area in particular have difficulty obtaining reliable and reasonably priced Internet at their residences.” Further, numerous directors reported that users with laptops accessed their libraries’ wireless service after normal hours; they cited examples of users parking near the library when the library was closed to access an Internet connection.

Lack of connectivity is more than a rural issue. A study of the public libraries in New York City found that 2.9 million residents don’t have broadband access at home. Center for the Urban Future, *Branches of Opportunity* (2013) at 6. Thus, between 2002 and 2011, the libraries increased their total number of public access computers by 89%. Between 2007 and 2011, the number of computer session logged at public computers in the city’s libraries grew by 62%, from 5.8 million sessions in 2007 to over 9.3 million sessions in 2011.

III. A Uniform Repeat Infringer Policy Could Undermine the Achievements of the Federal Government’s Broadband Policy.

Educational institutions provide Internet access to approximately 75 million K-12, college, and university students.

<http://nces.ed.gov/fastfacts/display.asp?id=372Educational>.⁹ Approximately 75 million Americans also access the Internet through public libraries. In total, educational institutions and libraries provide broadband access to 125 million people in the United States.¹⁰

The DMCA’s safe harbor for providers of Internet access, 17 U.S.C. § 512(a), enables these institutions to provide this essential service without the specter of liability for onerous damages because of infringing user activity.¹¹ The DMCA conditions availability of this safe harbor on service providers adopting, reasonably implementing, and informing subscribers of the service provider’s

⁹ This includes 35 million students in public elementary schools; 15 million in public high schools; 5 million in private schools, and 20 million in colleges and universities.

¹⁰ There is some overlap in broadband users in schools and libraries; many K-12 students who have Internet access in their classrooms rely on Internet access in public libraries to do their homework.

¹¹ The Conference Report on the DMCA states that under § 512, a higher education institution that provides Internet access “is eligible for the limitations on liability...to the same extent as any other service provider.” Conf. Rep. 105-796 at 74.

network of “a policy that provides for the termination in appropriate circumstances” of the accounts of subscribers “who are repeat infringers.”¹²

In deciding this case, the Court should avoid any suggestion that 17 U.S.C. § 512(i)(1)(A) mandates a uniform repeat infringer policy such as the Copyright Alert System. *See Cox Br.* at 57. An educational institution’s complete termination of a student’s access to the campus network could adversely affect the student’s ability to participate in her courses, and therefore may rarely, if ever, be appropriate. Similarly, a library’s barring a user from accessing the Internet could prevent an unemployed person from applying for a job and thus have disproportionate personal costs.¹³ Because of the potentially dire consequences of access termination, libraries and educational institutions must have the freedom to craft their own repeat infringer policies that are appropriate to their unique circumstances and those of the alleged infringer.¹⁴ Additionally, implementing new

¹² The Senate Judiciary Committee Report on the DMCA states that the Committee intends for the term “subscribers” to include “students who are granted access to a university’s system or network for digital online communications.” Sen. Jud. Comm. Rep. 105-190 at 52 n.24.

¹³ Consistent with their commitment to user privacy and the freedom to read anonymously, many libraries have open networks without individual accounts for users. Some libraries attempt to prevent infringement over their networks by blocking access to websites that host infringing content.

¹⁴ The need for flexibility in the library and educational contexts is magnified by the possibility of erroneous claims of infringement. A recent study found a high error rate in the notices generated by the automated notice-sending systems

repeat infringer policies that are more appropriate for commercial settings could impose costly administrative burdens on educational institutions and libraries they could ill-afford. Additional costs for copyright compliance would require offsetting cuts elsewhere in the institution's budget.

The DMCA does not contemplate a uniform repeat infringer policy. Such uniformity would undermine the utility of the federal government's investment in broadband in educational institutions and libraries. Mandating a uniform repeat infringer policy also would run contrary to the flexibility afforded to higher education institutions in the Higher Education Opportunity Act ("HEOA").

Congress adopted the HEOA in 2008 in response to heavy (and often misleading) lobbying by the entertainment industry that infringement was occurring on college and university networks at a disproportionately high level. The HEOA requires colleges and universities that receive federal funding for

increasingly used by rights-holders. Jennifer Urban, Joe Karaganis, and Brianna Schofield, *Notice and Takedown in Everyday Practice* (2016), available at <http://ssrn.com/abstract=2755628>. A random sample of DMCA takedown notices sent in 2013 reveals that 4.2% of the requests "were fundamentally flawed because they targeted content that clearly did not match the identified infringed work." *Id.* at 11. Additionally, over 28% of the notices had other characteristics raising concern about the validity of the claim, including over 7% targeting content with potential fair use defenses, and 10% leading to dynamic results or aggregator pages that made identifying the targeted content difficult. The study showed an even higher error rate for notices related to image search.

student financial aid to take several specific measures to reduce the amount of unlawful uploading and downloading of copyrighted works on campus networks. First, institutions must make an annual disclosure that informs students that the illegal distribution of copyrighted materials may subject them to criminal and civil penalties and describes the steps that institutions will take to detect and punish illegal distribution of copyrighted materials. 20 U.S.C. § 1092(a)(1)(P).

Second, institutions must certify to the Secretary of Education that they have developed plans to “effectively combat” the unauthorized distribution of copyrighted material. In developing these plans, institutions are required to consider the use of technology-based deterrents. Report language that accompanies the law explicitly states that technology-based deterrents include “bandwidth shaping” and “traffic monitoring to identify the largest bandwidth users,” and indicates that certain education and enforcement programs will also qualify. The report language explicitly notes that institutions are not required to adopt any particular type of technology-based deterrent, recognizing that even institutions that “prohibit content monitoring” retain the authority to determine their own plans.

Third, “to the extent practicable,” institutions must offer alternatives to illegal file sharing. 20 U.S.C. § 1094(a)(29). Both the practicality and selection of alternatives are to be determined by the institution “in consultation with the chief

technology officer or other designated officer of the institution.” This is not an absolute mandate that institutions offer legal alternatives, but it does mean such alternatives must be carefully considered.

Although the HEOA requirements are far more detailed than the DMCA’s repeat infringer policy condition, the HEOA still provides higher education institutions with great flexibility in how they implement its requirements. The Department of Education’s regulations adopted pursuant to the HEOA underscore that “each institution retains the authority to determine what its particular plans for compliance...will be.” 34 C.F.R. §688.14(b)(30)(i)(D) (2009).

Colleges and universities have taken their obligations under the HEOA seriously. To assist colleges and universities in meeting the HEOA’s requirements, *amicus* EDUCAUSE¹⁵ has “identified a range of campuses to serve as role models and case studies, whose choices can help inform peer institutions.” HEOA Role Models, EDUCAUSE, <http://www.educause.edu/focus-areas-and-initiatives/policy-and-security/educause-policy/issues-and-positions/intellectual-property/heoa-role-models>. EDUCAUSE recognizes that “colleges and universities have a great deal of flexibility in determining how they will comply with the HEOA.” *Id.* Further, “compliance strategies will also change as technology and

¹⁵ EDUCAUSE is an association of IT leaders and professionals committed to advancing higher education.

business models evolve and experience accrues.” *Id.* Thus, there is “no one-size-fits-all approach, now or in the future.” *Id.*

This Court should not interpret the DMCA’s repeat infringer policy condition in a manner that limits the flexibility provided under the HEOA. To the contrary, the flexibility provided under the HEOA confirms that the DMCA’s repeat infringer policy condition should not be applied in a “one-size-fits-all” manner.

CONCLUSION

In interpreting and applying the DMCA’s repeat infringer policy condition in 17 U.S.C. § 512(i)(1)(A), this Court should avoid any suggestion that it mandates the creation of a uniform repeat infringer policy for different kinds of Internet access provider.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 5,491 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the types style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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November 14, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2016, a true and correct copy of the foregoing Brief of *Amici Curiae* the American Council on Education, the Association of American Universities, EDUCAUSE, American Library Association, Association of Research Libraries, Association of College and Research Libraries, American Indian Higher Education Consortium, APPA: Leadership in Educational Facilities, National Association of College and University Business Officers, Thurgood Marshall College Fund, Association of Catholic Colleges and Universities, and National Association of Independent Colleges and Universities was timely filed in accordance with FRAP 25(a)(2)(D) and served on all counsel of record via CM/ECF pursuant to Local Rule 25(a).

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