MEMORANDUM

JENNER & BLOCK LLP

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To: Motion Picture Association of America

From: Kenneth L. Doroshow
Luke C. Platzer

Subject: Whether ISPs' Claim to be "Information Service" Providers for Purposes of Common Carrier Regulation Renders the ISPs Ineligible for the DMCA Safe Harbor

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This memorandum responds to your request for an analysis of whether the Federal Communications Commission's ("FCC") longstanding position that so-called "last-mile" Internet Service Providers ("ISPs") do not provide "telecommunications service" within the meaning of the Communications Act provides a basis for defeating ISPs' entitlement to the Digital Millennium Copyright Act ("DMCA") safe harbor.

As discussed below, although there is a colorable argument that an "information service" provider under the Communications Act (such as a last-mile ISP) cannot be a "service provider" entitled to the DMCA Section 512(a) safe harbor, the argument is not likely to succeed. Moreover, even if such an argument were to succeed, the most likely effect would be to open up only a narrow basis for limiting ISPs' immunity when they provide domain name service ("DNS") functionality linking their users to pirate sites, rather than the more drastic consequence of disqualifying them from DMCA protection altogether.

At the same time, even this narrow limitation on ISPs' immunity could have the salutary effect of requiring ISPs to respond to takedown notices by disabling DNS lookups of pirate sites through the ISPs' own DNS servers, which is not currently a general practice. Importantly, the argument for such a requirement need not turn on the Communications Act, but can instead be based on the DMCA itself, which expressly limits ISPs' immunity to each "separate and distinct" function that ISPs provide. *See* 17 U.S.C. § 512(n). A reasonable argument can be made that DNS functionality is an "information location tool" as contemplated by DMCA Section 512(d) and, therefore, that ISPs are required, as a condition of the safe harbor, to cease connecting users to known infringing material through their own DNS servers. Should this argument hold – and we believe that it has a reasonable prospect of success – copyright owners could effectively

require ISPs to implement a modest (albeit easily circumvented) form of DNS-based site blocking on the basis of only a takedown notice rather than litigation.

BACKGROUND

A. "Telecommunications Service" Under the Communications Act.

ISPs have successfully avoided common-carrier regulation by the FCC under Title II of the Communications Act – which could carry significant regulatory burdens – with the position that their offering of several functionalities, among them DNS service, takes their services outside the scope of the definition of a "telecommunications service" under the Communications Act. A "telecommunications service" under the Communications Act is defined as follows:

> The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

47 U.S.C. § 153(53). This definition, in turn, incorporates the definition of "telecommunications," which the Communications Act defines as follows:

> The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

47 U.S.C. § 153(50).

ISPs successfully advocated before the FCC, and then at the U.S. Supreme Court (which upheld the FCC's interpretation of the Communications Act under *Chevron* deference), that broadband service does not constitute a "telecommunications service" within the definition of 47 U.S.C. 153(53) because broadband ISPs offer functionalities such as email and DNS, which are not "telecommunications." *See In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798 (2002) ("*Cable Modem Declaratory Ruling*"); *aff'd sub nom. National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"). Instead, services such as DNS and email are considered "information services" under the Communications Act:

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. 153(24). Because ISPs offer an intertwined service package that includes both telecommunications and information services, the FCC held in *Cable Modem Declaratory*

Ruling, and the Supreme Court affirmed in *Brand X*, that retail ISP service from a last-mile provider is not an "offering" of telecommunications to the public within the meaning of the "telecommunications service" definition, because the "offering" includes both telecommunications and information services blended into the same service. *Id.*

As a result of these rulings, ISPs have not been subject to the sometimes-substantial regulatory burdens accompanying common-carrier status under the Communications Act, such as the obligations to serve all potential customers free of discrimination, to provide just and reasonable prices and service conditions, and to file tariffs with the FCC setting the prices they charge for their services. Indeed, much of the "net neutrality" debate at the Commission has centered around the FCC's difficulty in trying to enforce nondiscrimination rules on ISPs in the absence of a holding that they provide "telecommunications service" to the public, as the holding that ISPs provide an "information service" rather than a "telecommunications service" substantially weakens the FCC's regulatory authority.

The renewed attention in "net neutrality" efforts over the past several years has led to many calls for the FCC to reverse the *Cable Modem Declaratory Ruling* and declare broadband ISP service a telecommunications service. The FCC has on two occasions solicited comment on proposals to do so, but no such action has been forthcoming, and the Commission is not expected to reverse itself on the question during the current round of net neutrality rulemaking.[1]

B. "Service Provider" Under the DMCA.

The definitions of "telecommunications" and "telecommunications service" under the Communications Act are very similar to the definition of a "service provider" for purposes of Section 512(a) of the DMCA:

> Service provider—
> (A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

17 U.S.C. § 512(k)(1)(A). Although the definitions are in different statutes (the Communications Act and the Copyright Act, respectively), the definition of a Section 512(a) "service provider" is almost verbatim of the definition of "telecommunications" in the Communications Act. The only differences are that:

[1] Although so-called "broadband reclassification" is deeply unpopular as a political matter, the *Cable Modem Declaratory Ruling* and its reasoning are considered by many to be somewhat "shaky" and unconvincingly reasoned.

(1) both definitions refer to the provision of "transmission," but only the DMCA's "service provider" definition also includes the "routing, or providing of connections" as additional functions the service provider may offer, and
(2) both definitions require that the provider be "offering" the service at issue, but the Communications Act imposes an additional requirement that such offering be "to the public."

The parallelism between the two provisions was intentional. The 1996 Telecommunications Act, which amended the Communications Act to add the "telecommunications" and "telecommunications service" definitions, and the DMCA were enacted only two years apart, in 1996 and 1998, respectively. Moreover, the version of the DMCA that was eventually enacted in 1998 was based on a version of the statute that originated in the previous (104th Congress), the same Congress that enacted the 1996 Telecommunications Act. As the Senate Report (from the 105th) Congress noted with respect to Section 512(k)(1)(A) (which was Section (j)(1)(A) at the time of the report),

> [t]his freestanding definition is derived from the definition of 'telecommunications' found in 47 U.S.C. 153(48)[2] in recognition of the fact that the functions covered by this definition are conduit activities, but the Committee has reworked the definition and written subsection (j)(1)(A) to make it appropriate for the Internet and online media. Thus, the subsection (j)(1)(A) definition includes the offering of transmission, routing or providing of connections.

S. Rep. 105-190 at 54.

ANALYSIS

A. Consistency Between the DMCA and the Communications Act.

The initial question presented here is whether an entity (such as a last-mile ISP) that does not provide a "telecommunications service" for purposes of the Communications Act can still be a "service provider" for purposes of Section 512(a) of the DMCA. To show that it cannot, one could argue as follows: both statutory definitions are essentially identical (and the legislative history shows an intent to make them identical), and, having successfully advocated for and obtained a holding from the FCC that they do not provide "telecommunications services" for purposes of the Communications Act, ISPs should not then be allowed to turn around and claim that they are "service providers" for purposes of the DMCA. One might further contend that any specific ISPs[3] that litigated the *Brand X* case or its progeny[4] should be estopped from taking a contrary position under the DMCA.

[2] The definition of "telecommunications" later moved to Section 153(50) in subsequent amendments to the Communications act.

[3] The National Cable & Telecommunications Association ("NCTA")), of which many of the major cable ISPs are members, represented the ISP industry in *Brand X*.

The viability of this argument depends ultimately on a contention that the Communications Act and DMCA must be read consistently and do not permit an ISP simultaneously to be a "service provider" for purposes of Section 512(k)(1)(A) and an "information service" provider under the Communications Act. This raises three questions of statutory interpretation:

(1) Whether the subtle distinctions in wording between the two statutes effects a meaningful distinction – specifically, the fact that the DMCA includes "routing, or providing of connections" whereas the Communications Act does not;[5]

(2) Whether nearly-identical terms can have different meanings across different statutory schemes; and, relatedly,

(3) Whether a binding agency interpretation under one statutory scheme (the Communications Act) can affect the interpretation of the same words in a different statutory scheme the agency does not administer (the Copyright Act).

The strongest response available to ISPs is under point (1) – that the DMCA is meaningfully broader than the Communications Act because it includes "routing" within the functions that a 512(a) service provider may offer. Specifically, ISPs can argue that "routing" of communications is the very function of DNS, and that the provision of DNS was the principal basis on which the FCC deemed last-mile ISP service "information service" in the *Cable Modem Declaratory Order* and a principal basis on which the Supreme Court affirmed the decision.

We are aware of no precedent addressing this question. However, we believe that there is a good chance that a court would view the inclusion of "routing" in Section 512(k)(1)(A) of the DMCA as a persuasive distinction between the DMCA and the Communications Act. At the outset, any claim that ISPs are not service providers under Section 512(a) would face an uphill battle against the widely-held perception that Section 512(a) was designed specifically with last-mile, network access ISPs in mind, meaning that many courts are likely to enter any analysis of the issue highly resistant to the notion that ISPs do not fall within the Section 512(k)(1)(A) definition. Because the provision of DNS was arguably critical to the *Cable Modem Declaratory Ruling* and the *Brand X* decisions, and the function of DNS arguably involves the "routing" of communications, the inclusion of "routing" in Section 512(k)(1)(A) provides a basis for a court to conclude that the DMCA is slightly broader than the Communications Act, and broad enough that DNS remains within the definition of a Section 512(a) service provider irrespective of

[4] The *Cable Modem Declaratory Ruling* initially applied only to broadband provided over cable lines, but the FCC subsequently extended the same holding to various other broadband technologies in subsequent orders.

[5] Although the statutes also differ as to the "to the public" requirement, that distinction is less relevant for present purposes (as it pertains principally to ISPs that provide transit on a private/commercial basis, such as to other telecommunications providers, rather than on the retail market).

whether it disqualifies a provider from the definition of a "telecommunications service" provider. In addition, the fact that the *Cable Modem Declaratory Ruling* decision is itself viewed skeptically in some quarters, at least with respect to its treatment of DNS as an "information service" rather than an element of "telecommunications," may lessen its persuasive impact in seeking to convince a court that the DMCA should be interpreted similarly.

To be sure, we would not be without counters to this argument. First, we could argue that the provision of DNS is not the *only* reason that the FCC found last-mile ISPs to be outside the scope of a "telecommunications service." The *Cable Modem Declaratory Order* also pointed to ancillary services such as email and Usenet newsgroups that many ISPs provide, as well as the provision of caching services by ISPs to speed Internet browsing. 17 FCC Rcd. 4810, ¶17 & 4821, ¶37. We could also point to *Brand X* itself, in which the majority and dissent argued about the significance of DNS, with the dissent taking the position that DNS "is scarcely more than routing information" and therefore still falls within the definition of "telecommunications." *Brand X*, 545 U.S. at 1012. Specifically, we could point to the fact that the majority of the Court considered and *rejected* the dissent's position that DNS was an element of telecommunications. 545 U.S. at 1000 n.3 ("the definition of information service does not exclude 'routing information.'").

Neither response, however, is likely to carry the day. While services such as email and Usenet access are ancillary to and sold alongside transmission by ISPs, DNS and caching were the only functions at issue in *Brand X* that were necessarily intertwined in the service itself. Even the majority did not dispute that DNS consisted of "routing information"; it simply disagreed that its status as "routing information" was significant for purposes of the Communications Act. *See* 545 U.S. at 1000 n.3. As mentioned *supra*, the DMCA expressly includes "routing" among Section 512(a) functions in a way that the Communications Act does not.[6]

ISPs would also be able to make compelling arguments under points (2) and (3) – namely, that the Communications Act and DMCA are different statutory schemes advancing different policies, and that, as a result, similar terms in the two statutes need not necessarily be read together, and an FCC interpretation of the Communications Act is thus not binding as to similar language in the DMCA.

We would have a response here as well: that Congress clearly intended for the two statutory categories to be highly overlapping (as indicated by the legislative history and statutory text), and that ISPs would be "having their cake and eating it too" if they can enjoy the immunities of the DMCA without subjecting themselves to the common carrier requirements of Title II of the Communications Act. However, it is not obvious that a court would necessarily find this equitable rejoinder compelling. It may prove challenging to articulate a case that the

[6] As for caching, the fact that the DMCA expressly protects it as a distinct network function with its own safe harbor, *see* 17 U.S.C. § 512(b), would make it very challenging to argue that an ISP that provides caching as part of its broadband service thereby loses DMCA protection for its transmission functions, as discussed below.

DMCA protections and Title II common carriage obligations are a unitary statutory scheme in which ISPs accept common carriage obligations in the communications context in exchange for copyright protections. Rather, ISPs would have a persuasive argument that they are distinct statutory schemes, advancing separate policies. For instance, so-called "backbone" ISPs that serve as transit providers rather than offering retail service appear to be squarely within the core of intended beneficiaries of the DMCA Section 512(a) safe harbor (indeed, they do very little other than provide transit), and yet the FCC does not regulate them as common carriers under Title II either. Moreover, under neither statutory scheme is the current classification of backbone providers particularly controversial, a fact that may make it difficult to make a convincing case that similar legal treatment is inequitable with respect to retail, "last-mile" ISPs.

B. Consequences of Prevailing on an Argument that ISPs Are Not Section 512(k)(1)(A) "Service Providers."

Assuming a Court were to agree that the provision of non-telecommunications services (particularly DNS) by last-mile ISPs prevents them from being "service providers" under DMCA Section 512(k)(1)(A), the question would become what consequences would flow from such a holding.

At the outset, even a "win" on this point would not imperil the status of ISPs as "service providers" under the DMCA more generally. ISPs would be able readily to fall back on Section 512(k)(1)(B), which is substantially broader than under Section 512(k)(1)(A):

> (B) As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

However, the protection under Section 512(k)(1)(B) is much narrower. A service provider under Section 512(k)(2)(B) is entitled only to the safe harbors in Sections 512(b) (caching), (c) (user-stored material), and (d) (information location tools), and not the broad safe harbor available to transit providers in Section 512(a). The question, then, is whether our prevailing on the argument about DNS (or any other non-telecommunications functions offered by ISPs) would relegate ISPs to Section 512(k)(1)(B) for *all* purposes (in which case they would lose the 512(a) safe harbor entirely, and have no safe harbor available for transit functions), or whether it would merely relegate ISPs to Section 512(k)(1)(B) to the extent that they are providing functions other than transmission.

We believe that a court is substantially more likely to take the second, more limited approach. However, the practical consequences of even such a limited victory could be significant with respect to DNS.

1. Total Disqualification.

The most aggressive position we could take is that, if an ISP is providing functionality to its users that does not fall within the scope of Section 512(k)(1)(A), then the ISP is not a "service

provider" under that section *at all*, because what they are "offering" to end users is not transmission, but rather transmission bundled with DNS, caching, or other information services (such as Usenet access, email, web browsing, etc.). The appeal of this argument is that it tracks precisely the reasoning of the FCC, which declined to treat ISPs' provision of transmission as a separate service "offering," but rather as a comingled "offering" containing multiple information service features alongside transmission, and in which the DNS and caching, in particular, were inextricably intertwined with transmission such that the ISP could not be said to be "offering" transmission to the public. *See Brand X*, 545 U.S. at 998-1000 (approving reasonableness of FCC's holding that DNS and caching are necessarily invoked during use of Internet service).

We do not believe that this argument is likely to be successful. First, as noted above, courts are likely to start any analysis with a degree of hostility to the notion that last-mile ISPs are beyond the scope of the Section 512(a) safe harbor entirely, because the consequence of that holding (that there is no DMCA safe harbor for transmission at all, because none of the other safe harbors cover it) would be quite dramatic and contrary to the perceived policy of the statute to protect ISPs.

ISPs would also have a structural argument available to them here: that the different regulatory schemes under the Communications Act and the DMCA suggest that the word "offering" should not have the same meaning in both. In the Communications Act context, it may make sense to categorize services as a whole, rather than in their constituent parts, in order to systematize the regulatory treatment to which different service providers are subject. In the DMCA context, on the other hand, the DMCA already expressly envisions carving up the services provided by online providers into discrete functions – such as transmission (512(a)), caching (512(b)), storage (512(c)), and information location tools (512(d)). The very structure of the DMCA, ISPs could argue, counsels against the "all or nothing" approach from the Communications Act. The legislative history supports this view, with the Senate Report taking the position that "[t]he subparagraph (A) definition of service provider ***is not intended to exclude providers that perform other functions in addition to those set forth in subparagraph (A)***, including the functions identified in subsection (j)(1)(B)." S. Rep. 105-90 at 54. And ISPs could point to some bizarre outcomes of reading the term "offering" in the DMCA in the same manner as the FCC read it in the *Cable Modem Declaratory Ruling*: even though the DMCA expressly protects transmission (512(a)) and caching (512(b)), treating a service provider's disqualification from Section 512(k)(1)(A) as total if the provider offers both transmission and caching would take away the DMCA protection, for transmission, of any ISP that also offered caching – even though both activities are protected by the statute. A sensible policy defense for this outcome would be difficult to articulate.

For these reasons, we think it extremely unlikely that a court would take the position that an ISP loses its status as a Section 512(k)(1)(A) service provider with respect to its provision of services otherwise subject to Section 512(a), such as transmission, merely because it also offers other features that are not subject to Section 512(a), such as caching, email, Usenet access, or DNS.

2. Partial Disqualification.

An alternative position – and one that has better odds of success – would be to concede that retail ISPs act as service providers for purposes of Section 512(k)(1)(A) when they provide transmission and Internet connectivity to their subscribers generally, but that their provision of DNS (like their provision of caching) is a function for which they are "service providers" only under Section 512(k)(1)(B), with reduced DMCA protection.

This line of argument finds substantial support in Section 512(n) of the DMCA, which makes clear that each of the safe harbors "describe[s] separate and distinct functions" for purposes of determining whether an ISP is entitled to immunity – in other words, that immunity is not provided on a blanket basis, but instead is limited only to the particular ISP function at issue. *See* 17 U.S.C. § 512(n); *see also Perfect 10 v. CCBill*, 488 F.3d. 1102, 1116-17 (9th Cir. 2007) (noting that ISP "does not receive blanket immunity for its other services" even where one of its services is entitled to safe harbor). Thus, an ISP would be protected by Section 512(a) to the extent its liability arises from transmission, but only by Section 512(b) to the extent its liability arises from caching, and so forth.

The potential opportunity here is to convince a court that the provision of DNS is not "routing" under Section 512(a), but is instead an activity addressed by Section 512(d), which protects "referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, *including a directory, index*, reference, pointer, or hypertext link…." 17 U.S.C. 512(d). DNS at least arguably fits this description – *i.e.*, it is "referring" users to online material by way of a "directory or index." To be sure, the argument is not guaranteed to succeed, as unlike a "pointer" or "hyperlink text," DNS provides a user's browser with specific information (IP routing information) that the user has requested by other means (alphanumeric internet addresses), as opposed to providing the user with an active interface allowing the user to request information online, as they might from a clickable page of search results. But at least in the literal sense, DNS appears to fit within the list of Section 512(d) functions and a reasonable argument can be made that DNS is more like a "directory" than the provision of "routing" and should be treated accordingly under the statute as a Section 512(d) function rather than a Section 512(a) function.[7]

Because ISPs must respond to takedown notices to retain their safe harbor liability under Section 512(d), a finding that ISPs are protected only by Section 512(d), and not by Section 512(a), when they provide DNS service to enable users to communicate with online locations could be significant in its practical effect. In much the same way that search engines "materially contribute" to online infringement, the provision of DNS translation of pirate site names to IP addresses also can be said to materially contribute to the infringement committed by subscribers

[7] As noted in our June 9, 2014 memorandum on site-blocking strategies, consumers can opt to use alternative DNS services (such as OpenDNS) instead of those of their ISP. *See* June 9 Memo., Attachment D at 5. The severability of this function from the ISPs' core service of Internet connectivity may further reinforce the argument that DNS is not "routing" for purposes of Section 512(a) and is instead an "information location tool" for purposes of Section 512(d).

and the pirate sites and, therefore, exposes ISPs to liability for contributory copyright infringement. *See, e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007) (accepting that Google's image search engine "substantially assists websites to distribute their infringing copies to a worldwide market and assists a worldwide audience of users to access infringing materials"); *see also* June 9 Memo. Attachment B at 8-10 (analyzing potential contributory infringement liability of ISPs). A takedown notice program, therefore, could threaten ISPs with potential secondary liability in the event that they do not cease connecting users to known infringing material through their own DNS servers. While not making it impossible for users to reach pirate sites (*i.e.*, a user could still use a third-party DNS server), it could make it substantially more complicated for casual infringers to reach pirate sites if their ISPs decline to assist in the routing of communications to those sites.

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