

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|--|---|-----------------------|
| RCN Telecom Services, LLC, RCN Telecom |) | |
| Services of New York, L.P., RCN Capital |) | |
| Corp., RCN Telecom Services of Philadelphia, |) | |
| LLC, RCN Telecom Services of |) | |
| Massachusetts, LLC, Starpower |) | |
| Communications, LLC, RCN Management |) | |
| Corporation, RCN ISP, LLC, RCN Digital |) | |
| Services, LLC, RCN NY LLC 1, RCN |) | |
| Telecom Services (Lehigh), LLC, RCN |) | No. 1:16-cv-4417-PKC |
| Telecom Services of Illinois, LLC, 21st |) | |
| Century Telecom Services, Inc., and RCN |) | DEMAND FOR JURY TRIAL |
| Cable TV of Chicago, Inc., |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| vs. |) | |
| |) | |
| BMG Rights Management (US) LLC, |) | |
| |) | |
| Defendant. |) | |
| |) | |

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs RCN Telecom Services, LLC, and its wholly owned subsidiaries RCN Telecom Services of New York, L.P., RCN Capital Corp., RCN Telecom Services of Philadelphia, LLC, RCN Telecom Services of Massachusetts, LLC (formerly, RCN-BecoCom, LLC), Starpower Communications, LLC, RCN Management Corporation, RCN ISP, LLC, RCN Digital Services, LLC, RCN NY LLC 1, RCN Telecom Services (Lehigh), LLC, RCN Telecom Services of Illinois, LLC, 21st Century Telecom Services, Inc., and RCN Cable TV of Chicago, Inc. (collectively “RCN”) state as follows for their Amended Complaint seeking a judgment from this Court declaring that RCN is not liable to Defendant BMG Rights Management (US) LLC (“BMG”) for claims of contributory or vicarious copyright infringement, as more fully set forth below.

Nature of the Dispute

1. The central question for this Court's determination is whether an Internet service provider should be held liable for copyright infringement simply because it provides Internet connectivity to its customers. RCN does not maintain systems that store copyrighted works, does not encourage anyone to download copyrighted works, has no control over the materials its customers access, has no way to distinguish between legitimate and infringing activity on its network, and derives no profit—and in fact suffers substantial losses—from purported acts of infringement conducted through its network.

2. Despite the fact that RCN provides only wires and connectivity, and does not participate in or profit from alleged copyright infringement taking place on its network, BMG and its agent, Rightscorp, Inc. ("Rightscorp"), have accused RCN of numerous specific acts of infringement of BMG's copyrights. Both BMG and Rightscorp wrongly are demanding payment and other concessions from RCN for these alleged acts of infringement, and have clearly expressed their intention to enforce these purported rights.

3. To substantiate its allegations, BMG asserts that RCN is on notice of these alleged infringements due to Rightscorp's history of inundating RCN's email server with millions of notifications purportedly reflecting instances of subscriber infringement. These notices are so numerous and so lacking in specificity, that it is infeasible for RCN to devote the time and resources required to meaningfully investigate them. To merely treat these allegations as true without investigation would be a disservice to RCN's subscribers, who would run the risk of having their Internet service permanently terminated despite using RCN's services for completely legitimate purposes.

4. Without question, digital copyright infringement is a genuine problem in the United States. But RCN does not profit or receive any benefit from subscribers that may engage in such infringing activity using RCN's network. To the contrary, RCN suffers demonstrable losses as a direct result of purported copyright infringement conducted on its network. To hold RCN liable for copyright infringement simply because "something must be done" to address this growing problem is to hold the wrong party accountable. RCN provides legitimate communication facilities that are neither intended nor designed to be used to infringe copyrights. The facilities RCN provides are available for, and have, substantial non-infringing uses. The additional stresses placed on RCN's network by infringing activities makes RCN another victim of this problem, not a perpetrator.

5. The specific digital infringement that BMG complains of involves the use of peer-to-peer file sharing applications like BitTorrent, which allow users to identify and share copyrighted material. Because RCN does not operate BitTorrent applications, RCN has no way to control how those applications function or to stop them from being used to commit copyright infringement.

6. RCN also has no ability to prevent its subscribers from using BitTorrent applications. Even if RCN were able to devote the extraordinary resources it would require to identify subscribers who use these programs to engage in infringing activities, the most RCN can do is terminate those subscribers, who would simply continue the same infringing activities through a different Internet conduit.

7. RCN does not sanction, approve or profit from the use of BitTorrent or other applications that enable copyright infringement. Without any realistic basis for alleging that RCN is complicit in the copyright infringement BMG claims is taking place, BMG's repeated

assertions that RCN is liable for copyright infringement lack merit. RCN therefore seeks a judgment from this Court declaring that it is not liable to BMG for copyright infringement.

Parties

8. Plaintiff RCN Telecom Services, LLC is a Delaware limited liability company with a principal place of business in Princeton, NJ.

9. Plaintiff RCN Telecom Services of New York, L.P. is a New York limited partnership with a principal place of business in Princeton, NJ.

10. Plaintiff RCN Capital Corp. is a Delaware corporation with a principal place of business in Princeton, NJ.

11. Plaintiff RCN Telecom Services of Philadelphia, LLC is a Pennsylvania limited liability company with a principal place of business in Princeton, NJ.

12. Plaintiff RCN Telecom Services of Massachusetts, LLC is a Delaware limited liability company with a principal place of business in Princeton, NJ.

13. Plaintiff Starpower Communications, LLC is a Delaware limited liability company with a principal place of business in Princeton, NJ.

14. Plaintiff RCN Management Corporation is a Delaware corporation with a principal place of business in Princeton, NJ.

15. Plaintiff RCN ISP, LLC is a Delaware limited liability company with a principal place of business in Princeton, NJ.

16. Plaintiff RCN Digital Services, LLC is a Delaware limited liability company with a principal place of business in Princeton, NJ.

17. Plaintiff RCN NY LLC 1 is a Delaware limited liability company with a principal place of business in Princeton, NJ.

18. Plaintiff RCN Telecom Services (Lehigh), LLC is a Delaware limited liability company with a principal place of business in Princeton, NJ.

19. Plaintiff RCN Telecom Services of Illinois, LLC is an Illinois limited liability company with a principal place of business in Princeton, NJ.

20. Plaintiff 21st Century Telecom Services, Inc. is a Delaware corporation with a principal place of business in Princeton, NJ.

21. Plaintiff RCN Cable TV of Chicago, Inc. is a Delaware corporation with a principal place of business in Princeton, NJ.

22. BMG is a Delaware limited liability company with a principal place of business in New York, NY.

Jurisdiction & Venue

23. This is a civil action seeking declaratory relief under the copyright laws of the United States, 17 U.S.C. §§ 101 *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.* This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1338(a), and 2201(a).

24. This Court has personal jurisdiction over BMG because BMG resides in, and/or has a continuous and systematic business presence in, this Judicial District, including through the maintenance of a principal place of business at 1745 Broadway, New York, NY 10019.

25. Venue is proper in this Judicial District under 28 U.S.C. § 1391(b)(1) and 28 U.S.C. § 1400(a) because BMG is a resident of this Judicial District for such purposes. Venue is also proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to RCN's declaratory judgment claims occurred in this Judicial District, where BMG claims to have suffered harm from alleged acts of direct copyright infringement by RCN's subscribers, including subscribers alleged to be located in this Judicial District.

RCN's Internet Services

26. RCN is a provider of telephone, cable television, and high-speed Internet services to customers in New York, Illinois, Massachusetts, Pennsylvania, Virginia, Maryland and Washington, D.C., and through third parties, with dial-up Internet services in additional markets.

27. RCN is one of many companies that offer Internet services to the residential and business customers located within the geographic areas it serves.

28. At present, RCN services in excess of 400,000 subscribers.

29. RCN's high-speed Internet service provides subscribers with the ability to connect to the Internet in order to share information with other connected individuals and businesses.

30. Subscribers may purchase RCN's high-speed Internet services on an *a la carte* basis or they may choose to purchase Internet services as a bundle that also includes video programming, voice services, or both.

31. RCN does not charge its subscribers on a per-download basis and it does not charge subscribers based on the volume of data that a subscriber downloads or uploads in a given period of time.

32. To support the high-speed Internet services it provides, RCN owns, operates and maintains the telecommunications infrastructure (*i.e.*, switches, fiber optic cables, and modems) that make it possible for subscribers to make telephone calls, access the Internet and receive television programming.

33. Like any mainstream Internet provider, RCN's high-speed Internet service merely provides Internet connectivity. RCN cannot, and therefore does not, monitor or otherwise control the manner in which its subscribers utilize that connectivity.

34. Due to the large number of users connected to the Internet, the relatively high

competition that exists among providers, and the relatively low margins that result from such competition, it would be infeasible for RCN to devote the immense resources required to monitor all of the activity on its network to identify potentially infringing activity and still operate a profitable enterprise.

35. RCN also lacks any ability to determine which files are stored on its subscribers' private home computers and networks or to determine whether any file-sharing or other programs running on those private computers and networks are being used to conduct copyright infringement.

BMG Uses a Flawed Approach to Monitor Internet Traffic and Notify RCN of Infringement

36. BMG is engaged in the business of owning, administering, licensing and otherwise exploiting copyrights in musical compositions.

37. Since 2012, BMG has engaged non-party Rightscorp, a copyright enforcement company that uses a technology-based system consisting primarily of crawlers, to monitor BitTorrent peer-to-peer ("P2P") file-sharing systems in order to detect and document potential infringements of BMG's copyrights and to identify the alleged infringers.

38. BitTorrent is a communications protocol for P2P file sharing that allows users to join a so-called "swarm" of hosts to upload or download content from one another. When a file is requested, BitTorrent software identifies multiple host computers that may house portions of that file, downloads small pieces of the requested file from each of the computers willing to share that information, and then reassembles the pieces into one file on the requesting computer.

39. According to BMG, the Rightscorp system is capable of monitoring BitTorrent, systems and extracting information in order to identify alleged infringers of BMG's copyrights by Internet protocol ("IP") address, port number, time, date, ISP, the content uploaded or

downloaded, and the suspected location of the host computer. According to BMG, the Rightscorp system can also download allegedly infringing files from host computers through BitTorrent networks.

40. Using the information obtained from its monitoring activities, Rightscorp generates copyright infringement notification letters that include information about the purported infringement, and transmits those letters to ISPs, including RCN, that administer the allegedly offending IP addresses.

41. However, the Rightscorp system has significant limitations. For example, it generates and transmits notification letters based on the detection of a potentially infinitesimally small portion of an alleged copyrighted work that may exist on a subscriber's home computer. As a result, the notification letters generated by the Rightscorp system do not reflect the actual duplication of a copyrighted work or even a substantial portion of that work.

42. In addition, the Rightscorp system generates and transmits notification letters even though the materials located on a particular computer system and potentially offered for download via BitTorrent and other P2P systems may not represent true and accurate copies of BMG's copyrighted works.

43. Indeed, the Rightscorp system generates and transmits notification letters simply because a user has portions of files that have been indexed using BitTorrent. This does not mean that any of this information is actually available for download or that any of the so-called swarms have copied all or a portion of any of the user's files.

44. The Rightscorp system also is incapable of tracking the dynamic allocation of IP addresses across an ISP's subscriber base. As a result, Rightscorp cannot determine whether alleged infringement conducted over time via a single IP address is attributable to a single

subscriber or multiple subscribers.

45. The Rightscorp system is similarly incapable of determining whether the alleged infringement it detects is committed by an actual subscriber of a particular ISP or by a third party with illegitimate access to that subscriber's Internet connection.

46. The Rightscorp system does not generate letters that include information about the registered copyright that is being violated, but instead only provides the name of the file that allegedly exists on a subscriber's computer. As a result, for RCN to verify that each of the millions of computer generated notices it receives from Rightscorp evidences infringement of a copyrighted work RCN would have to employ a team to obtain and analyze each and every file identified in those millions of notices, and attempt to manually correlate that material with U.S. copyright registrations.

47. The Rightscorp system is also flawed because it generates notification letters even when subscribers do not have a complete and reconstituted instance of a music file on their system. As a result, the Rightscorp system generates notification letters even though it is not possible for a subscriber to make use of the file by listening to any portion of the allegedly infringing work.

48. The Rightscorp system also transmits notification letters that are not digitally signed. Third parties have seized on this lack of digital signatures by generating and transmitting false copyright infringement notification letters to Internet service providers, pretending to be Rightscorp, BMG or other legitimate copyright owners. As a result, RCN and other ISPs are not able to verify that the notification letters they receive are being transmitted by Rightscorp itself or by a third-party masquerading as Rightscorp.

49. The Rightscorp system is only capable of identifying parts of copyrighted

materials that might reside on an Internet subscriber's home computer. As a result, the system lacks the ability to document any instances of actual copyright infringement committed by RCN subscribers.

50. Finally, Rightscorp has a financial incentive to maximize the number of infringement notices it generates because Rightscorp's revenues are directly related to the number of notices it generates and transmits.

BMG's Allegations of Infringement Against RCN

51. Since at least 2012, Rightscorp, as BMG's agent, has engaged in the practice of notifying ISPs of alleged copyright infringements committed by their subscribers.

52. RCN has received millions of automated notices purporting to originate from Rightscorp which allege that RCN's subscribers have engaged in copyright infringement.

53. These automated notices are emailed to RCN in plain text, lack any predetermined structure that would allow them to be processed automatically, and would therefore require substantial processing by RCN personnel.

54. Given the sheer volume of copyright infringement notices transmitted to RCN by Rightscorp and other companies acting on behalf of copyright holders, it is unreasonable for BMG to expect RCN to process and investigate those notices to determine, on an individual basis, whether the allegations of infringement have merit.

55. In a January 29, 2015 letter to RCN, Rightscorp claimed to have sent 1.8 million notices of infringement to RCN since 2011 and 384,397 notices in the third quarter of 2014 alone. Rightscorp also claimed to be actively tracking 24,449 RCN subscribers. A copy of Rightscorp's January 29, 2015 letter is attached to this Complaint as Exhibit A.

56. A list of the files identified in the various notices that Rightscorp and BMG have

transmitted to RCN since 2014—which represent alleged infringements of copyrighted works for which Rightscorp and BMG claim RCN is secondarily liable—is attached to this Complaint as Exhibit B. RCN receives hundreds of similar notices from the Rightscorp system on a daily basis.

57. According to Exhibit B, and as of the date of this Complaint, the notices sent to RCN by BMG and Rightscorp identify over two million files purportedly copied by RCN subscribers.

58. In addition to RCN's general inability to evaluate the extraordinary volume of automated notices transmitted by Rightscorp, Rightscorp's notices also lack legitimacy due to inherent flaws in the way the Rightscorp system identifies and reports purported infringement.

59. For example, the Rightscorp system lacks information necessary to state with certainty that any of its automated notices reflects an instance of actual copyright infringement by an RCN subscriber.

60. Moreover, the Rightscorp system does not associate any of the purportedly infringing files identified in its notice letters with actual copyrights owned by Rightscorp, BMG or any other entity.

61. It is also infeasible for Rightscorp to “actively track” 24,449 RCN subscribers, as Rightscorp suggests, because its system lacks information necessary to determine which IP address is assigned to a particular RCN subscriber at any given time.

62. These and other flaws in Rightscorp's system magnify the burden on RCN and other ISPs to investigate the legitimacy of BMG's allegations.

63. On April 14, 2016, BMG sent a letter accusing RCN of engaging in secondary copyright infringement by providing Internet services to its subscribers. That letter asserted that

RCN was liable for “actual or statutory damages as high as \$150,000 per infringed work.” Based on these allegations, BMG further asserted that the parties should reach “a resolution of this ongoing and damaging infringement” through “a settlement that would include means of preventing or limiting future infringement and appropriate compensation to BMG.” BMG’s letter to RCN is attached to this Complaint as Exhibit C.

64. BMG’s allegations of infringement against RCN are based on the millions of files identified in Exhibit B that are purportedly available for download on computers owned by RCN’s subscribers and on instances of infringement that—according to BMG—continue to be committed by RCN’s subscribers on a daily basis.

65. A representative, but by no means exhaustive, list of almost one hundred federally-registered copyrights that BMG alleges RCN infringes is attached to this Complaint as Exhibit D.

66. On May 25, 2016, BMG’s counsel sent another letter to RCN’s counsel accusing RCN of failing to terminate allegedly infringing subscribers in accordance with Section 512 of the Digital Millennium Copyright Act and reiterating its position that RCN is liable for the alleged copyright infringement taking place on its network. The letter concluded by stating that RCN’s only option for resolving this dispute would be for RCN to “resolve the past and continuing infringement of BMG’s copyrights through the RCN network.”

67. BMG’s allegations of infringement against RCN cast a pall over RCN’s business, placing RCN in the untenable position of incurring a growing potential liability for copyright infringement by continuing to conduct its business.

68. BMG’s allegations of infringement are based on RCN’s status as an ISP and on its receipt of Rightscorp’s infringement notices.

69. At least because of BMG's allegations of past and future infringement, a substantial, immediate and real controversy exists regarding BMG's allegations that RCN is liable for past and continuing infringement allegedly being conducted by RCN's subscribers.

BMG Acknowledges that RCN Does Not Profit from Subscriber Infringement

70. In its January 29, 2015 letter to RCN, BMG's agent, Rightscorp, acknowledged that RCN does not profit—and instead suffers losses—from the alleged infringement committed by its subscribers.

71. Rightscorp acknowledged in its letter that RCN loses revenue by not having the opportunity to rent movies and television shows to its subscribers (emphasis added):

*RCN wants to sell movies and premium TV channels. We estimate that 5.3 Petabytes of content was shared each month on average on RCN's network in 2013. We believe that contained [sic] approximately 15 million movies were distributed illegally on the RCN network in 2013 and seven million TV shows. Many of those millions of pirated movies and TV shows are **not just lost revenue to our clients but to RCN as well.***

72. Rightscorp also acknowledged in its letter that the burden of additional network traffic resulting from alleged illegal file-sharing activities conducted through RCN's network costs RCN "millions of dollars" in capital expenditures (emphasis added):

RCN wants to provide great quality service. Since approximately 27% of your upstream traffic is currently used for peer-to-peer traffic, the reality is that your law abiding subscribers are having their internet slowed down by their neighbors that burden your network with piracy. We want to expand our solution to help you provide the best level of service to all your users.

It is costing RCN a lot of capital expenditure to service all of the infringement occurring on your network. *We want to work with you to reduce that 5.3 Petabytes a month being used by piracy to 500 Terabytes a month. Based on the Cisco forecast, peer-to-peer traffic will grow to 7.6 Petabytes a month on your network. **That is millions of dollars that could be saved in capital expenditure if we work together to reduce this load on your network. Rather than budgeting millions to increase capacity to facilitate this piracy growth,** let us work together to cut it by 90% between now and 2018.*

**FIRST CAUSE OF ACTION
(DECLARATORY JUDGMENT OF NO CONTRIBUTORY INFRINGEMENT BY RCN)**

73. RCN incorporates and realleges the other paragraphs of this Complaint as if fully set forth herein.

74. BMG has no direct evidence that any RCN subscriber engaged in direct copyright infringement because, *inter alia*, Rightscorp's monitoring activities and copyright infringement notification letters do not reliably correspond with instances of actual infringement by RCN subscribers.

75. Because, *inter alia*, RCN merely provides Internet connectivity to its subscribers, RCN does not have knowledge of any of the alleged infringement committed by its subscribers or by third parties with illegitimate access to its subscribers' Internet connections.

76. To the extent the copyright infringement notification letters sent to RCN by Rightscorp reflect instances of actual infringement perpetrated by RCN's subscribers, those letters are delivered well after the infringement, not *at the time* of such infringement, and do not provide RCN with notice of possible anticipated infringement.

77. Because RCN merely provides Internet connectivity to its subscribers, and lacks information about the contents and operation of its subscribers' computers or private networks, RCN does not have knowledge that any infringing material exists on its subscribers' computers or networks and RCN does not have knowledge that any of its subscribers are running software that would make copyrighted works available for illegal download by others.

78. Due to its lack of awareness or control over subscribers' computers and private networks, RCN lacks the ability to exert control over any copyrighted materials that are stored on, or shared through, its subscribers' computers or networks.

79. Because RCN merely provides Internet connectivity to its subscribers, it does not

contribute to any alleged infringing conduct by its customers.

80. The Internet connectivity that RCN provides to its subscribers is capable of substantial non-infringing uses, and RCN's subscribers in fact engage in substantial non-infringing uses of these connections. These non-infringing uses include the transmission of email, video conferencing, voice-over-IP telephony, web browsing, and the download and/or streaming of properly-licensed copyrighted works.

81. Due to its lack of awareness or control over subscribers' computers and private networks, RCN lacks the ability to effectively distinguish between these legitimate uses of its Internet services and other potentially illegitimate uses. As a result, RCN lacks the ability to curtail illegitimate use of its Internet services without adversely affecting the legitimate and non-infringing uses of those services.

82. Moreover, it would not be viable for RCN to attempt to monitor subscriber use of RCN's Internet services for the purpose of curtailing allegedly infringing activity while maintaining the availability of those services for non-infringing activity.

83. RCN does not authorize, direct or encourage its subscribers to engage in copyright infringement and it does not take affirmative steps to foster infringement by its subscribers. Indeed, as BMG acknowledges, RCN does not profit from subscriber infringement. To the contrary, any increase in network traffic resulting from the illegal exchange of copyrighted works over RCN's network increases RCN's costs by, among other things, requiring additional capital expenditures.

84. In light of the foregoing, and based on the allegations of infringement levied by BMG, there is a real and actual controversy regarding whether RCN is liable to BMG for contributory infringement for past and continuing instances of alleged direct copyright

infringement committed by RCN's subscribers.

85. This controversy warrants a declaratory judgment for the purpose of determining and adjudicating the question of RCN's alleged liability for contributory infringement.

86. RCN is not liable for contributory infringement of BMG's alleged copyrights because, *inter alia*, RCN does not knowingly induce, cause, or materially contribute to any infringing conduct by its subscribers.

87. RCN is not liable for contributory infringement of BMG's alleged copyrights because, *inter alia*, RCN engages in no conduct that encourages or assists any infringing conduct by its customers.

88. RCN is not liable for contributory infringement of BMG's alleged copyrights because, *inter alia*, the Internet service that RCN provides to its subscribers is capable of substantial non-infringing uses, and is in fact used for those legitimate purposes.

89. RCN is not liable for contributory infringement of BMG's alleged copyrights because, *inter alia*, RCN does not have knowledge of any actual infringement by its subscribers, specific information that identifies infringing activity by its subscribers, or the ability to exert control over any copyrighted material that resides on its subscribers' private computers and/or networks or any software that may be used to share that copyrighted material with others.

90. RCN is not liable for contributory infringement of BMG's alleged copyrights because, *inter alia*, RCN is protected by the Safe Harbor provided in 17 U.S.C. § 512. RCN has adopted a DMCA repeat infringer policy, publishes that policy on its website, and in appropriate circumstances terminates subscribers under that policy.

91. RCN is therefore entitled to a declaratory judgment that it has not contributorily infringed, and is not contributorily infringing, any of BMG's alleged copyrights.

**SECOND CAUSE OF ACTION
(DECLARATORY JUDGMENT OF NO VICARIOUS INFRINGEMENT BY RCN)**

92. RCN incorporates and realleges the other paragraphs of this Complaint as if fully set forth herein.

93. Because Rightscorp's monitoring activities and allegations of copyright infringement are not reliable evidence that RCN subscribers have committed copyright infringement, BMG has no reasonable basis to conclude that any RCN subscriber engaged in direct copyright infringement.

94. Because RCN merely provides Internet connectivity to its subscribers, RCN lacks information about the contents and operation of its subscribers' computers or private networks. As a result, RCN cannot and does not have knowledge that any infringing material exists on its subscribers' computers or networks and RCN does not have knowledge that any of its subscribers are operating software on those computers and networks that would make copyrighted works available for illegal download by others.

95. Due to its lack of awareness or control over subscribers' computers and private networks, RCN lacks the ability to exert control over any copyrighted materials that are stored on or shared through its subscribers' computers or networks.

96. Due to its lack of awareness or control over subscribers' computers and private networks, RCN lacks the ability to effectively discriminate between legitimate uses of its Internet services and other illegal uses. As a result, RCN lacks the ability to curtail illegal use of its Internet services without adversely affecting the legitimate and non-infringing uses of those services.

97. Moreover, it would not be viable for RCN to attempt to monitor subscriber use of RCN's Internet services for the purpose of curtailing allegedly infringing activity while

maintaining the availability of those services for non-infringing activity.

98. Even if RCN had the infrastructure necessary to monitor subscriber use of RCN's Internet services—which it does not—an ISP is under no obligation to “monitor[] its service or affirmatively seek[] facts indicating infringing activity” pursuant to 17 U.S.C. § 512(m).

99. Because RCN is only one of many ISPs that offer Internet service to the geographic areas in which it operates, RCN is one of many conduits through which individuals may gain access to the Internet for purposes of distributing and/or downloading copyrighted works.

100. As a result of the foregoing, RCN is not an indispensable party to any acts of copyright infringement committed by its subscribers, and any steps RCN may take to attempt to curtail the infringing activity would be ineffective or, at most, would have an indirect effect on reducing the infringing activity.

101. Because the instances of direct infringement that BMG alleges occurred merely require access to BitTorrent or other P2P file sharing services, and because RCN lacks the ability to foreclose subscriber access to those services through other channels, RCN does not have the ability to block an individual's access to the particular environment (*i.e.*, the constituent parts of the BitTorrent system) in which the alleged infringement takes place.

102. RCN does not have any direct financial interest in the alleged infringement conducted by its subscribers.

103. To the contrary, by BMG's own admission, RCN stands to lose millions of dollars as a result of the infringing activity that BMG alleges to be occurring on RCN's network.

104. Subscribers pay the same amount to RCN for Internet service regardless of whether they use the service for purely legitimate purposes or for both legitimate and illegitimate

purposes. As a result, RCN does not receive any financial benefit that is directly or indirectly attributable to the copyright infringement BMG alleges is conducted on RCN's network.

105. In light of the foregoing, and based on the allegations of infringement levied by BMG, there is a real and actual controversy regarding whether RCN is vicariously liable to BMG for past and continuing instances of alleged direct copyright infringement by RCN's subscribers.

106. This controversy warrants a declaratory judgment for the purpose of determining and adjudicating the question of RCN's alleged liability for vicarious infringement.

107. RCN is not vicariously liable for infringement of BMG's copyrights because, *inter alia*, BMG cannot prove any instance of direct infringement by one of RCN's subscribers.

108. RCN is not vicariously liable for infringement of BMG's copyrights because, *inter alia*, it lacks any direct or indirect financial interest in alleged infringement committed by its subscribers. Moreover, tolerating copyright infringement is in fact in direct opposition to RCN's financial interests.

109. RCN is not vicariously liable for infringement of BMG's copyrights because, *inter alia*, RCN lacks the right and ability to supervise the allegedly infringing activities of its subscribers.

110. RCN is not vicariously liable for infringement of BMG's copyrights because, *inter alia*, RCN is protected by the Safe Harbor provided in 17 U.S.C. § 512. RCN has adopted a DMCA repeat infringer policy, publishes that policy on its website, and in appropriate circumstances terminates subscribers under that policy.

111. RCN is therefore entitled to a declaratory judgment that it has not vicariously infringed, and is not vicariously infringing, any of any of BMG's alleged copyrights.

PRAYER FOR RELIEF

WHEREFORE, RCN respectfully requests that the Court:

- A. Enter a declaratory judgment that RCN has not contributorily infringed, and is not contributorily infringing, any of BMG's alleged copyrights;
- B. Enter a declaratory judgment that RCN has not vicariously infringed, and is not vicariously infringing, any of BMG's alleged copyrights;
- C. Enter a declaratory judgment that RCN is not liable for any damages resulting from any instance of secondary copyright infringement as a result of any act of direct infringement committed by a subscriber of RCN's Internet service; and
- D. Grant all such other and further relief to which RCN may be entitled.

DEMAND FOR JURY TRIAL

Plaintiff hereby requests a trial by jury on all issues so triable.

Dated: September 16, 2016

ARMSTRONG TEASDALE LLP

By: /s/ Richard L. Brophy

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