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Federal Jury Slams Cox Communications with $1 Billion Verdict for Copyright Infringement

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A federal court jury in Virginia, in *Sony Music Entertainment, et al. v. Cox Communications, et al.*, has awarded a coalition of music industry copyright holders a $1 billion verdict against Cox Communications, the United States' third-largest internet and cable television provider, after finding Cox guilty of both contributory and vicarious copyright infringement of a total of 10,017 works.[1]

Finding the infringement willful, the jury awarded $99,830.29 for each work infringed under the statutory damages range provided for in the Copyright Act. Multiplication of the number of works times the statutory damages awarded reveals a number slightly higher than $1 billion, perhaps exposing the jury's desire to aim for a large, round number in determining damages, and thereby punish Cox.

THE CASE GIVEN TO THE JURY

So how did Cox end up on the receiving end of such a large verdict? Examining the parameters of what the jury was asked to decide provides a good start in getting an answer.

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Most large data networks, social media companies, and Internet Service Providers ("ISP's"), like Cox, avoid liability for copyright infringement by users on their networks by adhering to the Safe Harbor provisions of the Digital Millennium Copyright Act ("DMCA").

In general, an ISP may avoid liability if:

(1) It is unaware of, or had no reason to suspect, an infringement related to a specific user;

(2) Receives and processes DMCA takedown notices from copyright owners; and

(3) Terminates accounts of users who are "repeat infringers."[2]

Safe harbor protection under the DMCA requires both the existence of a reasonable policy to address subscriber infringement and the reasonable implementation of that policy. But the court in *Sony* made clear in its jury instructions that Cox was not entitled to rely on the Safe Harbor provisions.[3]

Because of its conduct documented in a companion case, *BMG Rights Management (US), LLC v. Cox Communications*,[4] in which the Fourth Circuit held that Cox was not entitled to a safe harbor defense based on its DMCA takedown process.

In pre-trial proceedings, the plaintiffs established ownership of the works at issue and validity of the associated copyright registrations. More importantly, the plaintiffs also showed that Cox had "specific enough knowledge of infringement" occurring on its network that it could have done something about it.[5] At trial, therefore, the plaintiffs had already established one element necessary to show contributory infringement of their copyrights by Cox.[6]

To establish contributory infringement by Cox, Plaintiffs were required to show that:

(1) There was direct infringement of their works by users of Cox's internet service;

(2) Cox knew of specific instances of infringement or was willfully blind to such instances; and

(3) Cox induced, caused, or materially contributed to the infringing activity.[7]

Separately, to prove vicarious infringement, plaintiffs needed only to show that (1) there was direct infringement of plaintiffs' works by users of Cox's internet service, (2) Cox had a direct financial interest in the infringing activity of its users, and (3) Cox had the right and ability to supervise such infringing activity.[8]

Finally, regarding damages and willfulness, the jury considered several factors, including:

(1) The profits of, and expenses saved by, Cox because of the infringement;

(2) The circumstances of the infringement;

(3) Whether Cox acted willfully or intentionally in infringing plaintiffs' copyrights;

(4) The need for deterrence of future infringement; and

(5) In the case of willfulness, the need to punish Cox.[9]

Based on the 2018 Fourth Circuit Decision, if Cox had knowledge of the infringement, the jury could find willfulness by a showing that Cox acted with reckless disregard for the infringement of plaintiffs' copyrights or was willfully blind to the infringement of plaintiffs' copyrights.[10]

UNDERLYING FACTS THAT AFFECTED THE VERDICT

Although much of the evidence in the case was filed under seal, there are some known facts which likely swayed the jury. Plaintiffs, through the Recording Industry Association of America ("RIAA"), used a service called MarkMonitor to automatically police the Internet. MarkMonitor engaged with and transacted with infringing users on Cox's network via peer-to-peer ("P2P") sites, including BitTorrent, Gnutella, eDonkey, and Ares, and generated infringement notices based on those transactions. MarkMonitor sent the notices to Cox's Abuse Tracking System ("CATS"). CATS then automatically sent a ticket to the subscriber identified in the notice.

On summary judgment, the court found that the MarkMonitor notices complied with the DMCA takedown notice requirements.[11]

The well-documented audit trail detailing the monitoring and reporting of Cox subscribers' infringement provided the plaintiffs with solid evidence of direct infringement of their copyrighted works by Cox users, thus meeting one element of the contributory and vicarious infringement claims. Cox's ISP service agreement also showed it had the right to supervise its user's activity, meeting the third element needed to show vicarious infringement.[12]

Several unhelpful (for Cox) facts enabled the plaintiffs to meet the final element of the contributory infringement and vicarious infringement claims, and also to show willfulness via reckless disregard or willful blindness.

For example, while Cox had a "thirteen strikes" policy, user termination was never automatic and was left to the discretion of Cox employees. Cox also imposed caps on the number of DMCA notices it accepted, and also blacklisted a notice provider, Rightscorp, which sent millions of notices of infringement to Cox.[13]

But likely the most damning evidence came from internal Cox emails of employees in its DMCA abuse department. Plaintiffs used these emails and related testimony to show that Cox prioritized obtaining higher flat fees from high data-rate users over terminating repeat copyright infringers. Plaintiffs were likely able to show that Cox's DMCA abuse department routinely ignored its own policy in favor of continuing to collect higher payments.

For example, in a two-year period, Cox terminated fewer than 100 users for DMCA abuses, despite evidence of receipt of hundreds of thousands of notices. Emails also showed a ready willingness to re-enable the same users who were terminated, thus restarting the "thirteen strikes" counter and repeating the abuse cycle.[14]

Although Cox tried to justify its inconsistent enforcement of its DMCA safe harbor policy by asserting an overarching interest in maintaining the privacy of its subscribers' data, the objective, contemporaneous "financial interest" evidence presented by the plaintiffs was clearly more persuasive to the jury.

MAINTAINING SAFE HARBOR PROTECTION IS KEY

The evidence presented to the jury at trial showed Cox failed to adhere to its own policy and prioritized revenue over stopping DMCA abuse. Safe harbor protection under the DMCA requires both the existence of a reasonable policy to address subscriber infringement *and* the reasonable implementation of that policy. What constitutes "reasonable implementation" is undefined under the statute.

While the *Sony v. Cox* case will still be the subject of post-trial motions and, perhaps, an appeal, the jury verdict shows that those invoking the DMCA Safe Harbor provisions must document good faith compliance with any type of company policy to show "reasonable implementation" of the company's DCMA safe harbor policy.

Notes

1. Verdict Form, Case 1:18-cv-00950-LO-JFA (ECF 669), Inst. No. 18 (E.D.Va., Dec. 19, 2019).
2. 17 U.S.C. § 512.
3. Jury Instructions, Case 1:18-cv-00950-LO-JFA (ECF 671), Inst. No. 18 (E.D.Va., Dec. 19, 2019).
4. *BMG Rights Management (US), LLC v. Cox Communications, Inc.*, 881 F.3d 293 (4th Cir. 2018).
5. Mem. Op. and Order, Case 1:18-cv-00950-LO-JFA (ECF 586), at 24 (E.D.Va., Nov. 15, 2019).
6. Jury Instructions, No. 22.
7. Jury Instructions, No. 24.
8. Jury Instructions, No. 25.
9. Jury Instructions, No. 28.
10. Jury Instructions, No. 29.
11. Mem. Op. and Order, ECF 586, at 1-2 (E.D.Va., Nov. 15, 2019).
12. Plaintiffs' Memo in Opposition to Defendants' Motion for Summary Judgment, ECF 396, at 12 (E.D.Va., Sept. 24, 2019).
13. *Id.* at 13.
14. *Id.* at 13-15.