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

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A Virginia federal court jury recently awarded a coalition of music industry copyright holders a $1 billion verdict against Cox Communications ("Cox"), 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. *Sony Music Entertainment, et al. v. Cox Communications, et al.*[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.

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 Plainitffs 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.

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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.

Two Cases Raise New Copyright Infringement Concerns for Internet Linking

Jason Whitney

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Modern communications platforms are often designed to maximize sharing of information, but this can produce vexing questions under copyright law, much of which remains rooted in traditional concepts of distribution and publication. An example is in-line linking, also called framing or embedding—code on one page that links to content (often images or videos) hosted elsewhere to produce an embedded view. Although U.S. law grants copyright owners exclusive display rights under 17 U.S.C. § 106(5), in-line linking was generally considered not to directly infringe these rights because embedded links merely provided instructions on how and where to access content, as opposed to providing the content itself for display. But two recent district court cases found that in-line linking or embedding can constitute direct infringement of display rights, creating new uncertainty over the ubiquitous practice.

PRIOR ANALYSES FOUND DISPLAY RIGHTS NOT INFRINGED BY IN-LINE LINKING

The programming language that underlies much of the Internet and social media systems, Hypertext Markup Language (HTML), allows linking so that users can easily and seamlessly embed instructions to display content from a variety of different sources on a single webpage. Examples of these instructions include the short URLs generated by Twitter or Facebook for embedding Tweets or posts into other webpages or posts.

The leading case holding that in-line linking does not directly infringe display rights is *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007). In that case, the Ninth Circuit examined a webpage that "in-line links to or frames the electronic information" posted online by a third party, but which "does not store and serve the electronic information." *Perfect 10,* 508 F.3d at 1159. The webpage in question included HTML instructions linking to third-party content, but did not store, transmit, or otherwise provide a copy of the content. *Id.* at 1161. Instead, the end user's browser followed the HTML instructions to directly download and display the content from other websites.

The Ninth Circuit concluded that transmitting HTML instructions directing a browser to content "is not equivalent to showing a copy" for purposes of the exclusive display right. Id. The "HTML instructions are lines of text, not a photographic image" and "do not themselves cause infringing images to appear." *Id.* As the court explained: "The HTML merely gives the address of the image to the user's browser. The browser then interacts with the computer that stores the . . . image. It is this interaction that causes an . . . image to appear on the user's computer screen." *Id.*

Because the only information transmitted was essentially an address for the content, the Ninth Circuit found that such linking may raise contributory liability issues but "does not constitute direct infringement of the copyright owner's display rights." *Id.*

A PAIR OF NEW CASES FINDS POSSIBLE DIRECT INFRINGEMENT FROM EMBEDDED LINKS

More recently, however, two district courts — one in the Southern District of New York and another in the Northern District of California — have rejected the Perfect 10 rationale and found that embedded links can directly infringe a copyright owner's display rights.

The first case, *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018), involved a photograph of quarterback Tom Brady posted on Twitter and subsequently embedded in multiple articles about Brady's efforts to help recruit basketball player Kevin Durant. *Id*. at 586-87. The photographer sued the publishers of the articles, claiming that they directly violated his exclusive display rights. *Id*. at 586. The defendants moved for summary judgment on the direct copyright infringement claims.

As in *Perfect 10*, none of the defendants in *Goldman* actually copied, saved, or transmitted the photo itself. *Id.* at 587. Instead, the defendants' articles pasted HTML instructions (in at least some instances obtained from Twitter itself) linking to the Tweet containing the photograph. *Id.* at 587, 593-94. And, as in *Perfect 10*, the end users' browsers in *Goldman* directly downloaded and displayed the photograph not from defendants but a third-party source, Twitter. *Id.* at 587 ("[T]his code directs the browser to the third-party server to retrieve the image."). Despite these similarities, however, the *Goldman* court reached the opposite conclusion and ruled that the embedded links "violated plaintiff's exclusive display right." Id. at 586.

First, the *Goldman* opinion reasoned that under the Copyright Act, an image can be displayed indirectly, without the defendant ever having transmitted the image. See *Goldman*, 302 F. Supp. 3d at 593-94. Under this view, a defendant need not possess or transmit an image to display it; rather, sending a reference to the location of the image (e.g., an HTML link) is equivalent to sending the image itself. *See id.* (suggesting that any process "result[ing] in a transmission of the photos so that they could be visibly shown" is a display). Second, the *Goldman* opinion stated that the Supreme Court's decision in *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), establishes "that liability should not hinge on invisible, technical processes imperceptible to the viewer," evidently referring to where the images are hosted and how they are transmitted to the end user. *Id.* at 595. Third, the *Goldman* opinion expressly rejected the analytical framework of *Perfect 10*, noting its view that the Copyright Act did not require possession of a work to display it. The court also distinguished *Perfect 10* as being narrowly applicable to cases involving search engines or where user actions prompt the display of embedded images. *See id*. at 595-96.

Although the defendants and amici in *Goldman* raised concerns about the "tremendous chilling effect on the core functionality of the web" and "radically change[d] linking practices" that could stem from a ruling that embedded linking directly infringes display rights, the court found such fears unjustified, denied the defendants' motion for summary judgment and granted partial summary in favor of the plaintiff. *See Goldman*, 302 F. Supp. 3d at 596.

A second case, *Free Speech Systems, LLC v. Menzel*, 390 F. Supp. 3d 1162 (N.D. Cal. 2019), also declined to apply the Perfect 10 analysis, albeit in a different procedural posture. Free Speech Systems was a declaratory judgment action filed by a website that published a post featuring nine photographs taken by the defendant photographer. *Id*. at 1166-67. The photographer counterclaimed for direct copyright infringement, and the website moved to dismiss those claims based on *Perfect 10*, arguing that the post in dispute merely "pointed" to images hosted at the photographer's own server and that the website "did not itself store any of the photographs at issue." *Id.*

The court denied the website's motion to dismiss the direct infringement claim, suggesting that *Perfect 10* has no application beyond the context of search engines, and noting that the website identified "no case applying the *Perfect 10* server test outside of the context of search engines." *Id*. at 1171-72. Moreover, the *Free Speech Systems* opinion noted other cases — *Goldman* in particular— that "refused to apply the Perfect 10 server test outside of that context." Id. at 1172. The court ultimately declined to reach the issue of the location of the photographs because the underlying code for the post, which would show where the photos were hosted, was not attached to the declaratory judgment complaint.

FUTURE UNCERTAINTY FOR INTERNET LINKING

Although *Goldman* and *Free Speech Systems* have yet to be tested in other district courts, the cases represent (depending on one's viewpoint) either a worrisome new direction for or a worthy safeguard against in-line linking and embedding. The cases involved technical situations highly analogous to *Perfect 10* — content linked/embedded on the defendant's website but hosted elsewhere — yet two district courts reached a conclusion opposite the Ninth Circuit. At the very least, these cases should prompt careful reevaluation by stakeholders about the potential risks arising from the widespread practice of in-line linking and embedding third-party content as copyright law strives to keep pace with rapidly-changing technologies.

Finding Out How Tax Dollars are Spent: New Law in Effect January 1, 2020

Laura Prather

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After a series of court rulings, Texas went from one of the most transparent states to one of the least when it comes to finding out about how tax dollars are spent. The long awaited contracting transparency bill (SB 943) passed by the Texas Legislature last session went into effect on January 1, 2020. Here's a brief recap:

SB 943: CONTRACTING TRANSPARENCY

SB 943, sponsored by Senator Kirk Watson (D–Austin) and Representative Giovanni Capriglione (R–Southlake) aims to improve transparency regarding government contracting, primarily addressing issues created by the 2015 Texas Supreme Court case, Boeing Co. v. Paxton, which significantly limited public access to information about government contracting under the Texas Public Information Act (TPIA).

The Court's decision in Boeing greatly expanded a TPIA exception that prevented the release of commercially-sensitive information regarding private companies' business dealings with government entities. First, Boeing held that private, third-party entities — not just a governmental entity — may claim this “competitive bidding” exception, overturning decades of Attorney General’s opinions. Second, the Court concluded that this exception can foreclose public access to contracting information upon a showing that the release of requested information would result in a competitive disadvantage to the company asserting the exception, even if the governmental body has completed a competitive bidding process and awarded a final contract.

Since it was handed down in 2015, Boeing has been cited in more than 2,700 Attorney General opinions foreclosing access to information under the TPIA. Many of those rulings involved TPIA requests for information regarding final contracts, effectively foreclosing access to even the most basic information about government contracting and expenditures.

SB 943 reverses some of the harmful effects of Boeing and ensures that government entities will be obligated to reveal the core elements of their contracts with private companies — including the final dollar amount of the contract, key contract provisions, and line-item pricing.

SPEAKING ENGAGEMENTS

Laura Prather

ABA Forum on Communications Law 25th Annual Conference
Panelist: Media Advocacy Lunch Panel: Texas Citizens Participation Act
February 6, 2020
Austin, Texas

ABA Forum on Communications Law 25th Annual Conference
Facilitator: Hot Issues in Anti-SLAPP and Other Legislation
February 7-8, 2020
Austin, Texas

Thomas J. Williams

ABA Forum on Communications Law 25th Annual Conference
Facilitator: Hot Issues in Ethics
February 6, 2020
Austin, Texas

University of Texas School Law Conference
Speaker: Defamation Claims in the School Setting
February 21, 2020
Austin, Texas

Wesley Lewis

ABA Forum on Communications Law 25th Annual Conference
Facilitator: Hot Issues in Access and Newsgathering
February 6, 2020
Austin, Texas

RECOGNITIONS

The American Lawyer **Selects Laura Lee Prather for Tony Mauro Media Lawyer Award**

Partner and free speech advocate **Laura Prather** received *The American Lawyer*'s Tony Mauro Media Lawyer Award in recognition of her tireless and successful efforts advocating for legislation to strengthen First Amendment rights in Texas.

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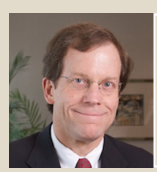

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