No. 24-171

IN THE

Supreme Court of the United States

COX COMMUNICATIONS, INC. and COXCOM, LLC,

Petitioners,

v.

SONY MUSIC ENTERTAINMENT, et al.,

Respondents.

On Writ of Certiorari to the
U.S. Court of Appeals for the Fourth Circuit

JOINT APPENDIX VOLUME 1 of 2
PAGES 1-396

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TABLE OF CONTENTS*

VOLUME 1

VOLUME 2

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* [#] indicates the page of the Joint Appendix filed in the underlying Fourth Circuit case, No. 21-1168 and [*#] indicates the page of the trial transcript filed in the Eastern District of Virginia, case No. 18-cv-00950.

[159] **UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA**

Case No. 1:18cv950 [Filed July 31, 2018]

COMPLAINT AND JURY DEMAND

SONY MUSIC ENTERTAINMENT, ARISTA MUSIC, ARISTA RECORDS, LLC, LAFACE RECORDS LLC, PROVIDENT LABEL GROUP, LLC, SONY MUSIC ENTERTAINMENT US LATIN, VOLCANO ENTERTAINMENT III, LLC, ZOMBA RECORDINGS LLC, SONY/ATV MUSIC PUBLISHING LLC, EMI AL GALLICO MUSIC CORP., EMI ALGEE MUSIC CORP., EMI APRIL MUSIC INC., EMI BLACKWOOD MUSIC INC., COLGEMS-EMI MUSIC INC., EMI CONSORTIUM MUSIC PUBLISHING INC. D/B/A EMI FULL KEEL MUSIC, EMI CONSORTIUM SONGS, INC., INDIVIDUALLY AND D/B/A EMI LONGITUDE MUSIC, EMI FEIST CATALOG INC., EMI MILLER CATALOG INC., EMI MILLS MUSIC, INC., EMI UNART CATALOG INC., EMI U CATALOG INC., JOBETE MUSIC CO. INC., STONE AGATE MUSIC, SCREEN GEMS-EMI MUSIC INC., STONE DIAMOND MUSIC CORP., ATLANTIC RECORDING CORPORATION, BAD BOY RECORDS LLC, ELEKTRA ENTERTAINMENT GROUP INC., FUELED BY RAMEN LLC, NONESUCH RECORDS INC., ROADRUNNER RECORDS, INC., WARNER BROS. RECORDS INC., WARNER/CHAPPELL MUSIC, INC., WARNER-TAMERLANE PUBLISHING CORP., WB MUSIC CORP., W.B.M. MUSIC CORP.,

UNICHAPPELL MUSIC INC., RIGHTSONG MUSIC INC., COTILLION MUSIC, INC., INTERSONG U.S.A., INC., UMG RECORDINGS, INC., CAPITOL RECORDS, LLC, UNIVERAL MUSIC CORP., UNIVERSAL MUSIC – MGB NA LLC, UNIVERSAL MUSIC PUBLISHING INC., UNIVERSAL MUSIC PUBLISHING AB, UNIVERSAL MUSIC PUBLISHING LIMITED, UNIVERSAL MUSIC PUBLISHING MGB LIMITED., UNIVERSAL MUSIC – Z TUNES LLC, [160] UNIVERSAL/ISLAND MUSIC LIMITED, UNIVERSAL/MCA MUSIC PUBLISHING PTY. LIMITED, UNIVERSAL – POLYGRAM INTERNATIONAL TUNES, INC., UNIVERSAL – SONGS OF POLYGRAM INTERNATIONAL, INC., UNIVERSAL POLYGRAM INTERNATIONAL PUBLISHING, INC., MUSIC CORPORATION OF AMERICA, INC. D/B/A UNIVERSAL MUSIC CORP., POLYGRAM PUBLISHING, INC., RONDOR MUSIC INTERNATIONAL, INC., AND SONGS OF UNIVERSAL, INC.,

Plaintiffs,

v.

COX COMMUNICATIONS, INC. AND COXCOM, LLC.

Defendants.

Plaintiffs Sony Music Entertainment, Arista Music, Arista Records LLC, LaFace Records LLC, Provident Label Group, LLC, Sony Music Entertainment US Latin, Volcano Entertainment III, LLC, Zomba Recordings LLC, Sony/ATV Music Publishing LLC, EMI Al Gallico Music Corp., EMI Algee Music Corp., EMI April Music Inc., EMI Blackwood Music Inc., Colgems-EMI Music Inc., EMI Consortium Music Publishing Inc. d/b/a EMI Full Keel Music, EMI Consortium Songs, Inc., individually and d/b/a EMI Longitude Music, EMI Feist Catalog Inc., EMI Miller Catalog Inc., EMI Mills Music, Inc., EMI Unart Catalog Inc., EMI U Catalog Inc., Jobete Music Co. Inc., Stone Agate Music, Screen Gems-EMI Music Inc., Stone Diamond Music Corp., Atlantic Recording Corporation, Bad Boy Records LLC, Elektra Entertainment Group Inc., Fueled By Ramen LLC, Nonesuch Records Inc., Roadrunner Records, Inc., Warner Bros. Records Inc., Warner/Chappell Music, Inc., Warner-Tamerlane [161] Publishing Corp., WB Music Corp., W.B.M. Music Corp., Unichappell Music Inc., Rightsong Music Inc., Cotillion Music, Inc., Intersong U.S.A., Inc., UMG Recordings, Inc., Capitol Records, LLC, Universal Music Corp., Universal Music – MGB NA LLC, Universal Music Publishing Inc., Universal Music Publishing AB, Universal Music Publishing Limited, Universal Music Publishing MGB Limited, Universal Music – Z Tunes LLC, Universal/Island Music Limited, Universal/MCA Music Publishing Pty. Limited, Universal – Polygram International Tunes, Inc., Universal – Songs of Polygram International, Inc., Universal Polygram International Publishing, Inc.,

Music Corporation of America, Inc. d/b/a Universal Music Corp., Polygram Publishing, Inc., Rondor Music International, Inc., and Songs of Universal, Inc., (collectively, "Plaintiffs"), for their Complaint against Defendants Cox Communications, Inc. and CoxCom, LLC (collectively, "Cox" or "Defendants"), allege, on personal knowledge as to matters relating to themselves and on information and belief as to all other matters, as set forth below.

NATURE OF THE CASE

1. Plaintiffs are record companies that produce, manufacture, distribute, sell, and license commercial sound recordings, and music publishers that acquire, license, and otherwise exploit musical compositions, both in the United States and internationally. Through their enormous investments of not only money, but also time and exceptional creative efforts, Plaintiffs and their representative recording artists and songwriters have developed and marketed the world's most famous and popular music. Plaintiffs own or control exclusive rights to the copyrights to some of the most famous sound recordings performed by classic artists and contemporary superstars, as well as the copyrights to large catalogs of iconic musical compositions and modern hit songs. Their investments and creative efforts have [162] shaped the musical landscape as we know it, both in the United States and around the world.

2. Cox is one of the largest Internet service providers ("ISPs") in the country. It markets and sells high-speed Internet services to consumers

nationwide. Through the provision of those services, however, Cox also has knowingly contributed to, and reaped substantial profits from, massive copyright infringement committed by thousands of its subscribers, causing great harm to Plaintiffs, their recording artists and songwriters, and others whose livelihoods depend upon the lawful acquisition of music. Cox's contribution to its subscribers' infringement is both willful and extensive, and renders Cox equally liable. Indeed, for years, Cox deliberately refused to take reasonable measures to curb its customers from using its Internet services to infringe on others' copyrights—even once Cox became aware of *particular customers* engaging in *specific, repeated acts* of infringement. Plaintiffs' representatives (as well as others) sent hundreds of thousands of statutory infringement notices to Cox, under penalty of perjury, advising Cox of its subscribers' blatant and systematic use of Cox's Internet service to illegally download, copy, and distribute Plaintiffs' copyrighted music through BitTorrent and other online file-sharing services. Rather than working with Plaintiffs to curb this massive infringement, Cox unilaterally imposed an arbitrary cap on the number of infringement notices it would accept from copyright holders, thereby willfully blinding itself to any of its subscribers' infringements that exceeded its "cap."

3. Cox also claimed to have implemented a "thirteen-strike policy" before terminating service of repeat infringers but, in actuality, Cox never permanently terminated any subscribers. Instead, it lobbed "soft terminations" with virtually automatic reinstatement, or it simply did nothing at all. The

reason for this is simple: rather than stop its subscribers' unlawful activity, Cox prioritized its own profits over its legal obligations. Cox's profits [163] increased dramatically as a result of the massive infringement that it facilitated, yet Cox publicly told copyright holders that it needed to reduce the number of staff it had dedicated to anti-piracy for budget reasons.

4. Congress created a safe harbor in the Digital Millennium Copyright Act ("DMCA") that limits the liability of ISPs for copyright infringement when their involvement is limited to, among other things, "transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider." 17 U.S.C. § 512(a). To benefit from the DMCA safe harbor, however, along with meeting other pre-conditions, an ISP must demonstrate that it "has adopted and reasonably implemented…a policy that provides for the termination in appropriate circumstances of subscribers…who are repeat infringers." 17 U.S.C. § 512(i)(1)(A).

5. Cox's "thirteen-strike policy" has already been revealed to be a sham, and its ineligibility for the DMCA safe harbor—for the period of (at least) February 2012 through November 2014—has been fully and finally adjudicated by this Court and affirmed by the Court of Appeals for the Fourth Circuit. In a related case, *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc. and CoxCom, LLC*, 149 F. Supp. 3d 634, 662 (E.D. Va. 2015), *aff'd in relevant part*, 881 F.3d 293 (4th Cir. 2018) ("*BMG Rights*"), this Court established, as a matter of law, that Cox

could not invoke the DMCA safe harbor to limit its liability. *Id.* at 655-662.

6. Specifically, the Court concluded:

> Cox did not implement its repeat infringer policy. Instead, Cox publicly purported to comply with its policy, while privately disparaging and intentionally circumventing the DMCA's requirements. Cox employees followed an unwritten policy put in place by senior members of Cox's abuse group by which accounts used to repeatedly infringe copyrights would be nominally terminated, only to be reactivated upon request. Once these accounts were reactivated, customers were given clean slates, meaning the next notice of infringement Cox received linked to those [164] accounts would be considered the first in Cox's graduated response procedure.

Id. at 655. The Court further found that starting in September 2012, Cox abandoned its tacit policy of temporarily suspending and reactivating repeat infringers' accounts, and instead stopped terminating accounts altogether. *Id.* at 655-58.

7. The Fourth Circuit affirmed this Court's holding, explaining that although "Cox formally adopted a repeat infringer 'policy,'…both before and after September 2012, [Cox] made every effort to avoid reasonably implementing that policy. Indeed, in carrying out its thirteen-strike process, Cox very clearly determined *not* to terminate subscribers who

in fact repeatedly violated the policy." 881 F.3d at 303. The former head of Cox's Abuse Group, Jason Zabek, summed up Cox's sentiment toward its DMCA obligations best in an email exclaiming: "f the dmca!!!" Unsurprisingly, the Fourth Circuit affirmed this Court's ruling, holding that "Cox failed to qualify for the DMCA safe harbor because it failed to implement its policy in any consistent or meaningful way—leaving it essentially with no policy." *Id.* at 305. The *BMG Rights* decision that Cox is ineligible for the DMCA safe harbor from at least February 2012 through November 2014 controls here.

8. It is well-established law that a party may not assist someone it knows is engaging in copyright infringement. Further, when a party has a direct financial interest in the infringing activity, and the right and practical ability to stop or limit it, that party must act. Ignoring those basic responsibilities, Cox deliberately turned a blind eye to its subscribers' infringement. Cox failed to terminate or otherwise take meaningful action against the accounts of repeat infringers whose identities were known. It also blocked infringement notices for countless others. Despite its professed commitment to take action against repeat offenders, Cox routinely thumbed its nose at Plaintiffs by continuing to provide service to individuals it [165] knew to be serially infringing copyrighted works and refusing to even receive notice of any infringements above an arbitrary cap. In reality, Cox operated its service as an attractive tool, and as a safe haven, for infringement.

9. Cox has derived an obvious and direct financial benefit from its customers' infringement. The unlimited ability to download and distribute Plaintiffs' works through Cox's service has served as a draw for Cox to attract, retain, and charge higher fees to subscribers. Moreover, by failing to terminate the accounts of specific recidivist infringers known to Cox, Cox obtained a direct financial benefit from its subscribers' infringing activity in the form of illicit revenue that it would not have received had it shut down those accounts. Indeed, Cox affirmatively decided not to terminate infringers because it wanted to maintain the revenue that would come from their accounts.

10. The infringing activity of Cox's subscribers that is the subject of Plaintiffs' claims, and for which Cox is secondarily liable, occurred *after* Cox received multiple notices of a subscriber's infringing activity. Specifically, Plaintiffs seek relief for claims of infringement that accrued from February 2013 through November 2014, with respect to works infringed by Cox's subscribers *after* those particular subscribers were identified to Cox in multiple infringement notices. Those claims are preserved through tolling agreements entered into with Cox, and Cox cannot limit its liability for claims in this period under the DMCA safe harbor.

JURISDICTION AND VENUE

11. This is a civil action in which Plaintiffs seek damages for copyright infringement under the Copyright Act, 17 U.S.C. § 101, *et seq*.

12. This Court has original subject matter jurisdiction over Plaintiffs' copyright infringement claims pursuant to 28 U.S.C. §§ 1331 and 1338(a).

[166] 13. This Court has personal jurisdiction over Cox because Cox resides in and/or does systematic and continuous business in Virginia and in this judicial district. Cox provides a full slate of services in Virginia, including TV, Internet and phone services, among others. Cox also has a number of retail stores and customer service centers within this judicial district, including stores located at 5958 Kingstowne Town Ctr., Ste. 100, Alexandria, Virginia 22315 and 11044 Lee Hwy, Suite 10, Fairfax, Virginia 22030 and 3080 Centerville Road, Herndon, Virginia 20171.

14. Each of the Cox defendants has in the past been (or is presently) a party, as a plaintiff or a defendant, in this Court, including in the related case of *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns., Inc. and CoxCom, LLC*, No. 14-cv-1611-LO-JFA.

15. Cox continuously and systematically transacts business in the Commonwealth of Virginia and maintains sizable operations in Virginia—employing thousands of employees and providing an array of services to customers within the Commonwealth. Additionally, Cox has engaged in substantial activities purposefully directed at Virginia from which Plaintiffs' claims arise, including, for instance, establishing significant network management operations in this district, employing individuals within Virginia who have

responsibility for managing its network, enforcing subscriber use policies against violators, and/or responding to notices of infringement. Much of the conduct alleged in this Complaint arises directly from Cox's forum-directed activities—specifically, repeated acts of infringement by specific subscribers using Cox's network and Cox's awareness of those activities, Cox's receipt of and failure to act in response to Plaintiffs' notices of infringement activity, and Cox's failure to take reasonable measures to terminate repeat infringers.

16. Many of the acts complained of herein occurred in Virginia and in this judicial [167] district. For example, a number of egregious repeat infringers, who are Cox subscribers, reside in and infringed Plaintiffs' rights in Virginia and this judicial district.

17. Indeed, Plaintiffs have identified hundreds of Cox subscribers suspected of residing in Virginia, who have repeatedly infringed one or more of Plaintiffs' copyrighted works. For example, Cox subscriber account having IP address 216.54.125.50 at the time of the infringement, believed to be located east of Richmond, Virginia, was identified in infringement notices 97 times between November 15, 2013 and March 6, 2015. A different Cox subscriber believed to be located in Norfolk, Virginia, having IP address 72.215.154.66 at the time of infringement, also was identified in infringement notices 97 times between February 6, 2013 and March 6, 2015. Yet another Cox subscriber having IP address 174.77.93.179, believed to be from Virginia Beach,

was identified in infringement notices 34 times between February 8, 2013 and March 25, 2015.

18. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and (c) and 1400(a), because a substantial part of the acts of infringement, and other events and omissions complained of herein occur, or have occurred, in this district, and this is a district in which Cox resides or may be found.

PLAINTIFFS AND THEIR COPYRIGHTED MUSIC

19. Plaintiffs are the copyright owners of and/or control exclusive rights with respect to millions of sound recordings (*i.e.*, recorded music) and/or musical works (*i.e.*, compositions), including many by some of the most prolific and well-known recording artists and songwriters in the world.

20. Plaintiff Sony Music Entertainment ("Sony") is a Delaware general partnership, the partners of which are citizens of New York and Delaware. Sony's headquarters and [168] principal place of business are located at 25 Madison Avenue, New York, New York 10010.

21. Plaintiff Arista Music ("Arista Music") is a New York partnership with its principal place of business at 25 Madison Avenue, New York, New York 10010.

22. Plaintiff Arista Records LLC ("Arista Records") is a Delaware Limited Liability Company

with its principal place of business at 25 Madison Avenue, New York, New York 10010.

23. Plaintiff LaFace Records LLC ("LaFace") is a Delaware Limited Liability Company with its principal place of business at 25 Madison Avenue, New York, New York 10010.

24. Plaintiff Provident Label Group, LLC ("Provident") is a Delaware Limited Liability Company with its principal place of business at 741 Cool Springs Boulevard, Franklin, Tennessee 37067.

25. Plaintiff Sony Music Entertainment US Latin ("Sony Latin") is a Delaware Limited Liability Company with its principal place of business at 3390 Mary St., Suite 220, Coconut Grove, Florida 33133.

26. Plaintiff Volcano Entertainment III, LLC ("Volcano") is a Delaware Limited Liability Company with its principal place of business at 25 Madison Avenue, New York, New York 10010.

27. Plaintiff Zomba Recording LLC ("Zomba") is a Delaware Limited Liability Company with its principal place of business at 25 Madison Avenue, New York, New York 10010.

28. Plaintiff Atlantic Recording Corporation ("Atlantic") is a Delaware corporation with its principal place of business at 1633 Broadway, New York, New York 10019.

[169] 29. Plaintiff Bad Boy Records LLC ("Bad Boy") is a Delaware Limited Liability Company with

its principal place of business at 1633 Broadway, New York, New York 10019.

30. Plaintiff Elektra Entertainment Group Inc. ("Elektra") is a Delaware corporation with its principal place of business at 1633 Broadway, New York, New York 10019.

31. Plaintiff Fueled By Ramen LLC ("FBR") is a Delaware Limited Liability Company with its principal place of business at 1633 Broadway, New York, New York 10019.

32. Plaintiff Nonesuch Records Inc. ("Nonesuch") is a Delaware corporation with its principal place of business at 1633 Broadway, New York, New York 10019.

33. Plaintiff Roadrunner Records, Inc. ("Roadrunner") is a New York corporation with its principal place of business at 1633 Broadway, New York, New York 10019.

34. Plaintiff Warner Bros. Records Inc. ("WBR") is a Delaware corporation with its principal place of business at 3300 Warner Boulevard, Burbank, California 91505.

35. Plaintiff UMG Recordings, Inc. ("UMG") is a Delaware corporation with its principal place of business at 2220 Colorado Avenue, Santa Monica, California 90404.

36. Plaintiff Capitol Records, LLC ("Capitol Records") is Delaware corporation with its principal

place of business at 2220 Colorado Avenue, Santa Monica, California 90404.

37. Plaintiffs Sony, Arista Music, Arista Records, LaFace, Provident, Sony Latin, Volcano, Zomba, Atlantic, Bad Boy, Elektra, FBR, Nonesuch, Roadrunner, WBR, UMG, and Capitol Records are referred to herein collectively as "The Record Company Plaintiffs."

38. The Record Company Plaintiffs are some of the largest record companies in the world, engaged in the business of producing, manufacturing, distributing, selling, licensing, and otherwise exploiting sound recordings in the United States through various media. They invest substantial money, time, effort, and talent in creating, advertising, promoting, selling, and [170] licensing sound recordings embodying the performances of their exclusive recording artists and their unique and valuable sound recordings.

39. Plaintiff Sony/ATV Music Publishing LLC ("Sony/ATV") is a Delaware Limited Liability Company with its principal place of business at 25 Madison Avenue, New York, New York 10010.

40. Plaintiff EMI Al Gallico Music Corp. ("EMI Al Gallico"), an affiliate of Sony/ATV, is a Delaware corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

41. Plaintiff EMI Algee Music Corp. ("EMI Algee"), an affiliate of Sony/ATV, is a Delaware

corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

42. Plaintiff EMI April Music Inc. ("EMI April"), an affiliate of Sony/ATV, is a Connecticut corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

43. Plaintiff EMI Blackwood Music Inc. ("EMI Blackwood"), an affiliate of Sony/ATV, is a Connecticut corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

44. Plaintiff Colgems-EMI Music Inc. ("EMI Colgems"), an affiliate of Sony/ATV, is a Delaware corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

45. Plaintiff EMI Consortium Music Publishing Inc. d/b/a EMI Full Keel Music ("EMI Full Keel"), an affiliate of Sony/ATV, is a New York corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

[171] 46. Plaintiff EMI Consortium Songs, Inc., individually and d/b/a EMI Longitude Music ("EMI Longitude"), an affiliate of Sony/ATV, is a New York corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

47. Plaintiff EMI Feist Catalog Inc. ("EMI Feist"), an affiliate of Sony/ATV, is a New York corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

48. Plaintiff EMI Miller Catalog Inc. ("EMI Miller"), an affiliate of Sony/ATV, is a New York corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

49. Plaintiff EMI Mills Music, Inc. ("EMI Mills"), an affiliate of Sony/ATV, is a Delaware corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

50. Plaintiff EMI Unart Catalog Inc. ("EMI Unart"), an affiliate of Sony/ATV, is a New York corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

51. Plaintiff EMI U Catalog Inc. ("EMI U"), an affiliate of Sony/ATV, is a New York corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

52. Plaintiff Jobete Music Co. Inc. ("Jobete"), an affiliate of Sony/ATV, is a Michigan corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016. Plaintiff Stone Agate Music ("Stone Agate") is a division of Jobete.

53. Plaintiff Screen Gems-EMI Music Inc. ("Gems-EMI"), an affiliate of Sony/ATV, is a Delaware corporation with its principal place of business at 245 Fifth Avenue, [172] Suite 1101, New York, New York 10016.

54. Plaintiff Stone Diamond Music Corp. ("Stone"), an affiliate of Sony/ATV, is a Michigan corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

55. Plaintiff Warner/Chappell Music, Inc. ("Warner/Chappell") is a Delaware corporation with its principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

56. Plaintiff Warner-Tamerlane Publishing Corp. ("Warner-Tamerlane") is a California corporation with its principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

57. Plaintiff WB Music Corp. ("WB Music") is a California corporation with its principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

58. Plaintiff W.B.M. Music Corp. ("W.B.M.") is a Delaware corporation with its principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

59. Plaintiff Unichappell Music Inc. ("Unichappell") is a Delaware corporation with its

principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

60. Plaintiff Rightsong Music Inc. ("Rightsong Music") is a Delaware corporation with its principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

61. Plaintiff Cotillion Music, Inc. ("Cotillion") is a Delaware corporation with its principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

62. Plaintiff Intersong U.S.A., Inc. ("Intersong") is a Delaware corporation with its [173] principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

63. Plaintiff Universal Music Corp. ("UMC") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

64. Plaintiff Universal Music – MGB NA LLC ("MGB") is a California Limited Liability Company with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

65. Plaintiff Universal Music Publishing Inc. ("Universal Music Publishing") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

66. Plaintiff Universal Music Publishing AB ("AB") is a company organized under the laws of Sweden.

67. Plaintiff Universal Music Publishing Limited ("Publishing Limited") is a company incorporated under the laws of England and Wales.

68. Plaintiff Universal Music Publishing MGB Limited ("MGB Limited") is a company incorporated under the laws of England and Wales.

69. Plaintiff Universal Music – Z Tunes LLC ("Z Tunes") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

70. Plaintiff Universal/Island Music Limited ("Island") is a company incorporated under the laws of England and Wales.

71. Plaintiff Universal/MCA Music Publishing Pty. Limited ("MCA Limited") is a company organized under the laws of the Australia.

72. Plaintiff Universal – Polygram International Tunes, Inc. ("Polygram [174] International") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

73. Plaintiff Universal – Songs of Polygram International, Inc. ("Songs of Polygram") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

74. Plaintiff Universal Polygram International Publishing, Inc. ("Polygram International Publishing") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

75. Plaintiff Music Corporation of America, Inc. d/b/a Universal Music Corp. ("Music Corp.") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

76. Plaintiff Polygram Publishing, Inc. ("Polygram Publishing") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

77. Plaintiff Rondor Music International, Inc. ("Rondor") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

78. Plaintiff Songs of Universal, Inc. ("Songs of Universal") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

79. Plaintiffs Sony/ATV, EMI Al Gallico, EMI Algee, EMI April, EMI Blackwood, EMI Colgems, EMI Full Keel, EMI Longitude, EMI Feist, EMI Miller, EMI Mills, EMI Unart, EMI U, Jobete, Stone Agate, Gems-EMI, Stone, Warner/Chappell, Warner-Tamerlane, WB Music, W.B.M., Unichappell, Rightsong Music, Cotillion, Intersong, UMC, MGB, Universal [175] Music Publishing, AB, Publishing

Limited, MGB Limited, Z Tunes, Island, MCA Limited, Polygram International, Songs of Polygram, Polygram International Publishing, Music Corp., Polygram Publishing, Rondor, and Songs of Universal are referred to herein collectively as "The Music Publisher Plaintiffs."

80. The Music Publisher Plaintiffs are leading music publishers engaged in the business of acquiring, owning, publishing, licensing, and otherwise exploiting copyrighted musical compositions. Each invests substantial money, time, effort, and talent to acquire, administer, publish, license, and otherwise exploit such copyrights, on its own behalf and on behalf of songwriters and other music publishers who have assigned exclusive copyright interests to The Music Publisher Plaintiffs.

81. Plaintiffs own and/or control in whole or in part the copyrights and/or exclusive rights in innumerable popular sound recordings and musical compositions, including the sound recordings listed on Exhibit A and musical compositions listed on Exhibit B, both of which are illustrative and non-exhaustive. All of the sound recordings and musical compositions listed on Exhibits A and B have been registered with the U.S. Copyright Office.

DEFENDANTS AND THEIR ACTIVITIES

82. Defendant Cox Communications, Inc. is a Delaware corporation with its principal place of business at 1400 Lake Hearn Drive NE, Atlanta, Georgia. Cox Communications, Inc. operates as a broadband communications and entertainment

company for residential and commercial customers in the United States. Specifically, Cox Communications, Inc. offers digital video, high-speed Internet, telephone, voice, and long distance, data and video transport, high definition video, digital cable television, and DVR services over its IP network.

[176] 83. Defendant CoxCom, LLC is a Delaware Limited Liability Company with its principal place of business at 1400 Lake Hearn Drive NE, Atlanta, Georgia. CoxCom, LLC conducts business in Virginia as Cox Communications of Northern Virginia. CoxCom, LLC is a wholly-owned subsidiary of Cox Communications, Inc. CoxCom, LLC provides Internet and related services to Cox subscribers including in Virginia and this judicial district.

84. The Cox defendants, individually and collectively, are ISPs. Cox has approximately 4.5 million Internet subscribers. At all pertinent times, Cox's customers have paid Cox substantial subscription fees for access to Cox's high-speed Internet network, with Cox offering a tiered pricing structure, whereby for a higher monthly fee, a subscriber can have even faster downloading speeds.

85. For many of Cox's subscribers, the ability to use Cox's network to download music and other copyrighted content—including unauthorized content—as efficiently as possible is a primary motivation for subscribing to Cox's service. Accordingly, in its consumer marketing material in 2014, Cox touted how its service enabled subscribers

to download large amounts of content "Faster Than A Speeding Bullet" and at "The Speed You Need." In exchange for this service, Cox charged its customers monthly fees ranging in price based on the speed of service. https://web.archive.org/web/20140616085246/http://www.cox.com:80/residential/internet.cox. To satisfy its customers' need for speed, "Cox has increased internet speeds more than 1,000 percent over the past 17 years," making it even easier and faster for subscribers to illegally download and upload infringing sound recordings and musical compositions. http://newsroom.cox.com/2018-01-09-Cox-Expands-Gigabit-Speeds-at-Rapid-Pace.

86. On its "Frequently Asked Questions" page on its website, Cox describes a [177] process called "bandwidth throttling" that is often used by ISPs to reduce infringement by subscribers who have a history of illegal behavior. Cox tells its customers and prospective customers that bandwidth throttling "can interfere with the download speed, upload speed and overall performance of your network's Internet service," and assures actual and prospective customers that "[a]t Cox, we never throttle Internet speeds. And we never block or otherwise interfere with your desire to go where you want to go on the Internet." https://www.cox.com/residential/internet.html.

87. At the same time, Cox has consistently and actively engaged in network management practices to suit its own purposes. This includes monitoring for, and taking action against, spam and other unwanted activity. But Cox has gone out of its way *not* to take action against subscribers engaging in

repeated copyright infringement at the expense of copyright owners, ultimately forcing Plaintiffs to bring this litigation.

88. At all pertinent times, Cox knew that its subscribers routinely used its networks for illegal downloading and uploading of copyrighted works, especially music. As described below, Plaintiffs repeatedly notified Cox that many of its subscribers were actively utilizing its service in order to infringe; those notices gave Cox the *specific identities of its subscribers*, referred to by their unique Internet Protocol or "IP" addresses. Yet Cox persistently turned a blind eye toward the massive infringement of Plaintiffs' works. Cox condoned the illegal activity because it was popular with subscribers and acted as a draw in attracting and retaining subscribers. In return, Cox's customers purchased more bandwidth and continued using Cox's services to infringe Plaintiffs' copyrights. Cox recognized that if it prevented its repeat infringer subscribers from using its service, or made it less attractive for such use, Cox would enroll fewer new subscribers, lose existing subscribers, and lose revenue. For those account [178] holders and subscribers who wanted to download files illegally at faster speeds, Cox obliged them for higher rates. The greater the bandwidth its subscribers required for pirating content, the more money Cox made.

PLAINTIFFS' ENFORCEMENT ACTIVITIES AND COX'S EFFORTS TO THWART THEM

89. Over the past two decades, Internet piracy over so-called "peer-to-peer" ("P2P") networks has

become rampant, and music owners and other copyright owners have employed litigation and other means to attempt to curtail the massive theft of their copyrighted works. Cox has been keenly aware of those efforts. Cox has also been acutely aware of the use of its network for P2P piracy, including the specific identities of subscribers who are using its network to infringe.

90. Indeed, Cox was made aware of its subscribers using its network for such infringing activities before the time frame at issue in this suit, when a number of copyright holders, including The Record Company Plaintiffs, initiated a multi-year effort to enforce their copyrights against individuals using P2P systems to directly infringe copyrighted musical or other works. As part of that effort, because the copyright holders could only determine the unique IP addresses of an ISP's infringing subscribers, but not their actual identities, they served subpoenas on Cox and other ISPs to obtain the infringing subscribers' names and contact information. Cox was required to provide identifying information about infringing subscribers.

91. Thereafter, The Record Company Plaintiffs began sending notices to Cox (and other ISPs) identifying additional specific instances of their subscribers' infringement through P2P activities. From early 2013 through March 2015 alone, Cox received more than *200,000 notices*, provided under penalty of perjury, detailing specific instances of its subscribers using [179] its network to infringe copyrighted music.

92. But those hundreds of thousands of notices Cox received represented only a fraction of the infringements that occurred through Cox's network in the same time frame. For years, Cox has arbitrarily capped the number of infringement notices it is willing to receive—refusing to even hear any complaints in excess of the cap. Starting in 2008, Cox refused to accept any more than 200 infringement notices per day from Plaintiffs' representatives. In early 2009, Cox agreed to increase that number to 400 per day. In July 2009, many of The Record Company Plaintiffs asked Cox to increase the limit to 800 or 1,000 per day but Cox denied the request on the grounds that it was "currently at the maximum number of notices [Cox could] process, measured against the staff [they] have to process calls from customers." In 2013, Plaintiffs' representatives again asked Cox to increase the limit, this time more modestly from 400 to 500 or 600 per day, to which Cox finally agreed. Thus, while Cox received 200,000 infringement notices from 2013 to 2015 from Plaintiffs' representatives, the actual number of infringements identified through Cox's network in those years was vastly more. In other words, Cox willfully blinded itself to scores of infringements by refusing to accept notices beyond its arbitrary cap.

93. The infringement notices provided to Cox the unique IP address assigned to each user of Cox's network and the date and time the infringing activity was detected. By reviewing its subscriber activity logs, Cox alone had the ability to match an IP address in an infringement notice to a particular subscriber. Importantly, only Cox, as the provider of

the technology and system used to infringe, had the information required to match the IP address to a particular subscriber, and to contact that subscriber or terminate that subscriber's service.

94. Plaintiffs' infringement notices concerned clear and unambiguous infringing [180] activity by Cox's subscribers—that is, unauthorized downloading and distribution of copyrighted music. There was no legal justification for Cox's subscribers to download or distribute digital copies of Plaintiffs' sound recordings and musical compositions to thousands or millions of strangers on the Internet.

95. Apart from attesting to the sheer volume of the infringing activity on its network, the infringement notices sent to Cox pointed to specific subscribers who were flagrant and serial infringers. The infringement notices identified *almost 20,000* Cox subscribers engaged in blatant and repeated infringement. To cite just a few specific examples:

- During a 601-day period, Cox's subscriber with IP address 174.78.143.156 was identified in 142 infringement notices, which were sent on at least 116 separate days.

- During a 539-day period, Cox's subscriber with IP address 70.167.91.154 was identified in 104 infringement notices, which were sent on at least 96 separate days.

- During a 426-day period, Cox's subscriber with IP address 72.198.185.108 was

identified in 96 infringement notices, which were sent on at least 80 separate days.

- During a 326-day period, Cox's subscriber with IP address 184.191.182.8 was identified in 84 infringement notices, which were sent on at least 71 separate days.

- During a 248-day period, Cox's subscriber with IP address 184.177.171.108 was identified in 64 infringement notices, which were sent on at least 52 separate days.

These examples and countless others amply illustrate that, rather than terminating repeat infringers—and losing subscription revenues—Cox simply looked the other way.

96. During all pertinent times, Cox had the full legal right, obligation, and technical ability to prevent or limit the infringements occurring on its network. Under Cox's "Acceptable Use Policy," which its subscribers agreed to as a condition of using its Internet [181] service, Cox was empowered to exercise its right and ability to suspend or terminate a customer's Internet access. Cox could do so for a variety of reasons, including a subscriber's "use [of] the Service to post, copy, transmit, or disseminate any content that infringes the patents, copyrights, trade secrets, trademark, moral rights, or propriety rights of any party." With respect to infringement, Cox is the gatekeeper of the network over which data—including infringing works—is transferred.

97. Although Cox purported to create a repeat infringer policy, as this Court already found, it never implemented it, and thus it is ineligible for the DMCA's safe harbor. Cox's Copyright Policy provides that upon receipt of copyright infringement complaints regarding subscribers, "Cox uses a graduated approach of increasing severity to notify subscribers, from in-browser and email notifications, to the suspension of Internet service for repeated or severe cases."

98. But, in denying Cox's motion for judgment as a matter of law after trial, this Court explained:

> The graduated response system is essentially a thirteen-strike policy. No action is taken on receipt of a subscriber's first notice. The second, third, fourth, fifth, sixth, and seventh notices generate an email to the subscriber, warning that if Cox "continues to receive infringement claims such as this one concerning your use of our service, we will suspend your account and disable your connection until you confirm you have removed the infringing material." On the eighth and ninth notices, Cox limits a subscriber's internet access to a single webpage containing a warning. The customer can self-reactivate by clicking an acknowledgment. On the tenth and eleventh notices, Cox suspends service and requires the subscriber to call a support technician. The technician explains the reason for the suspension, advises removal of the allegedly infringing file, and then reactivates service.

> On the twelfth notice, the subscriber is suspended and directed to specialized technicians. On the thirteenth notice, the subscriber is again suspended and this time considered for termination.

99. Regardless of whether a thirteen-strike policy could ever be reasonable, this [182] Court previously found that Cox did not reasonably implement that policy. For example, in addition to its arbitrary cap on—and, in some instances, outright refusal to accept—Plaintiffs' infringement notices, any notice Cox did receive beyond its self-imposed limit was not counted in the graduated response. Cox also counted only one notice per subscriber per day. Thus, if a subscriber generated 10 or 50 or 100 notices in a day, they were "rolled up" into a single ticket. Cox also restarted the thirteen-strike count every six months, so an infringing subscriber with twelve notices would get a "free pass" back to zero strikes if six months had passed since his or her first notice. When Cox did "soft terminate" subscribers for repeat copyright infringements, it enforced an unwritten policy of re-activating the subscribers shortly thereafter. And with few exceptions, starting in September 2012, Cox simply stopped terminating repeat infringers altogether.

100. Despite these alleged policies, and despite receiving hundreds of thousands of infringement notices, along with similar notices from other copyright owners, Cox knowingly permitted identified repeat infringer subscribers to continue to use Cox's network to infringe. Rather than

disconnect the Internet access of blatant repeat infringers to curtail their infringement, Cox knowingly continued to provide these subscribers with the Internet access that enabled them to continue to use BitTorrent or other P2P networks to illegally download or distribute Plaintiffs' copyrighted works unabated. Cox's provision of high-speed Internet service materially contributed to these direct infringements.

101. Cox's motivation for refusing to terminate or suspend the accounts of blatant infringing subscribers is simple: It valued corporate profits over its legal responsibilities. Cox did not want to lose subscriber revenue by terminating accounts. Jason Zabek, the former head of Cox's Abuse Group, made this clear by urging a Cox customer service representative (in an [183] internal email that he instructed should not be forwarded) to "start the warning cycle over" for terminated customers with cox.net email addresses: "A clean slate if you will. This way, we can collect a few extra weeks of payments for their account. ;-)".

102. Nor did Cox want the possibility of account terminations to make its service less attractive to other existing or prospective users. Moreover, Cox was simply disinterested in devoting sufficient resources to tracking infringers, responding to infringement notices, and terminating accounts in appropriate circumstances. Considering only its own pecuniary gain, Cox ignored and turned a blind eye to flagrant, repeat violations by known specific subscribers using its service to infringe, thus facilitating and multiplying the harm to Plaintiffs.

And Cox's failure to adequately police its infringing subscribers was a draw to subscribers to purchase Cox's services, so that the subscribers could then use those services to infringe Plaintiffs' (and others') copyrights.

103. The consequences of Cox's infringing activity are obvious and stark. When Cox's subscribers use Cox's network to obtain infringing copies of Plaintiffs' copyrighted works illegally, that activity undercuts the legitimate music market, depriving Plaintiffs and those recording artists and songwriters whose works they sell and license of the compensation to which they are entitled. Without such compensation, Plaintiffs, and their recording artists and songwriters, have fewer resources available to invest in the further creation and distribution of high-quality music.

CLAIMS FOR RELIEF

Count I – Contributory Copyright Infringement

104. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 103 as if fully set forth herein.

[184] 105. Cox and its subscribers do not have any authorization, permission, license, or consent to exploit the copyrighted recordings or musical compositions at issue.

106. Cox's subscribers, using Internet access and services provided by Cox, have unlawfully reproduced and distributed via BitTorrent or other

P2P networks thousands of sound recordings and musical compositions for which Plaintiffs are the legal or beneficial copyright owners or exclusive licensees. The copyrighted works infringed by Cox's subscribers, which have been registered with the U.S. Copyright Office, include those listed on Exhibits A and B, and many others. The foregoing activity constitutes direct infringement in violation of 17 U.S.C. §§ 106 and 501 *et seq*.

107. Cox is liable as a contributory copyright infringer for the direct infringements described above. Through Plaintiffs' infringement notices and other means, Cox had knowledge that its network was being used for copyright infringement on a massive scale, and also knew of specific subscribers engaged in such repeated and flagrant infringement. Nevertheless, Cox facilitated, encouraged and materially contributed to such infringement by continuing to provide its network and the facilities necessary for its subscribers to commit repeated infringements. At the same time, Cox had the means to withhold that assistance upon learning of specific infringing activity by specific users but failed to do so.

108. By purposefully ignoring and turning a blind eye to the flagrant and repeated infringement by its subscribers, Cox knowingly caused and materially contributed to the unlawful reproduction and distribution of Plaintiffs' copyrighted works, including but not limited to those listed on Exhibits A and B hereto, in violation of Plaintiffs' exclusive rights under the copyright laws of the United States.

109. Each infringement of Plaintiffs' copyrighted sound recordings and musical [185] compositions constitutes a separate and distinct act of infringement. Plaintiffs' claims of infringement against Cox are timely pursuant to tolling agreements.

110. The foregoing acts of infringement by Cox have been willful, intentional, and purposeful, in disregard of Plaintiffs' rights. Indeed, the sound recordings on Exhibit A and the musical compositions on Exhibit B represent works infringed by Cox's subscribers *after* those particular subscribers were identified to Cox in multiple infringement notices.

111. As a direct and proximate result of Cox's willful infringement of Plaintiffs' copyrights, Plaintiffs are entitled to statutory damages, pursuant to 17 U.S.C. § 504(c), in an amount of up to $150,000 with respect to each work infringed, or such other amount as may be proper under 17 U.S.C. § 504(c). Alternatively, at Plaintiffs' election, pursuant to 17 U.S.C. § 504(b), Plaintiffs shall be entitled to their actual damages, including Cox's profits from the infringements, as will be proven at trial.

112. Plaintiffs also are entitled to their attorneys' fees and full costs pursuant to 17 U.S.C. § 505.

Count II – Vicarious Copyright Infringement

113. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 112 as if fully set forth herein.

114. Cox and its subscribers have no authorization, license, or other consent to exploit the copyrighted sound recordings or musical compositions at issue.

115. Cox's subscribers, using Internet access and services provided by Cox, have unlawfully reproduced and distributed via BitTorrent or other P2P services thousands of sound recordings and musical compositions for which Plaintiffs are the legal or beneficial copyright owners or exclusive licensees. The copyrighted works infringed by Cox's subscribers, which [186] have been registered with the U.S. Copyright Office, include those listed on Exhibits A and B, and many others. The foregoing activity constitutes direct infringement in violation of 17 U.S.C. §§ 106 and 501 *et seq.*

116. Cox is liable as a vicarious copyright infringer for the direct infringements described above. Cox has the legal and practical right and ability to supervise and control the infringing activities that occur through the use of its network, and at all relevant times has had a financial interest in, and derived direct financial benefit from, the infringing use of its network. Cox has derived an obvious and direct financial benefit from its customers' infringement. The ability to use Cox's high-speed Internet facilities to illegally download

Plaintiffs' copyrighted works has served to draw, maintain, and generate higher fees from paying subscribers to Cox's service. Among other financial benefits, by failing to terminate the accounts of specific repeat infringers known to Cox, Cox has profited from illicit revenue that it would not have otherwise received.

117. Cox is vicariously liable for the unlawful reproduction and distribution of Plaintiffs' copyrighted works, including but not limited to those listed on Exhibits A and B hereto, in violation of Plaintiffs' exclusive rights under the copyright laws of the United States.

118. Each infringement of Plaintiffs' copyrighted sound recordings and musical compositions constitutes a separate and distinct act of infringement. Plaintiffs' claims of infringement against Cox are timely pursuant to tolling agreements.

119. The foregoing acts of infringement by Cox have been willful, intentional, and purposeful, in disregard of Plaintiffs' rights. Indeed, the sound recordings on Exhibit A and the musical compositions on Exhibit B are works infringed by Cox's subscribers *after* those particular subscribers were identified to Cox in multiple prior infringement notices.

[187] 120. As a direct and proximate result of Cox's willful infringement of Plaintiffs' copyrights, Plaintiffs are entitled to statutory damages, pursuant to 17 U.S.C. § 504(c), in an amount of up to

$150,000 with respect to each work infringed, or such other amount as may be proper under 17 U.S.C. § 504(c). Alternatively, at Plaintiffs' election, pursuant to 17 U.S.C. § 504(b), Plaintiffs shall be entitled to their actual damages, including Cox's profits from the infringements, as will be proven at trial.

121. Plaintiffs further are entitled to their attorneys' fees and full costs pursuant to 17 U.S.C. § 505.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment from this Court against Cox as follows:

a. For a declaration that Defendants willfully infringed Plaintiffs' copyrights;

b. For statutory damages pursuant to 17 U.S.C. § 504(c), in an amount up to the maximum provided by law, arising from Defendants' willful violations of Plaintiffs' rights under the Copyright Act or, in the alternative, at Plaintiffs' election pursuant to 17 U.S.C. § 504(b), Plaintiffs' actual damages, including Cox's profits from the infringements, in an amount to be proven at trial;

c. Pursuant to 17 U.S.C. § 505, awarding Plaintiffs their costs in this action, including their reasonable attorneys' fees;

d. For pre-judgment and post-judgment interest at the applicable rate on any monetary award made part of the judgment against Defendants; and

e. For such other and further relief as the Court deems proper.

[188] **JURY TRIAL DEMAND**

Pursuant to Federal Rule of Civil Procedure 38 Plaintiff her by demand a trial by jury of all issues that are so triable

Dated: July 31, 2018 Respectfully submitted,

/s/ [h/w signature]
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[189] **UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA**

Case No. 1:18-cv-00950-LO-JFA [Filed Apr. 23, 2019]

FIRST AMENDED COMPLAINT AND JURY DEMAND

SONY MUSIC ENTERTAINMENT, ARISTA MUSIC, ARISTA RECORDS, LLC, LAFACE RECORDS LLC, PROVIDENT LABEL GROUP, LLC, SONY MUSIC ENTERTAINMENT US LATIN, VOLCANO ENTERTAINMENT III, LLC, ZOMBA RECORDINGS LLC, SONY/ATV MUSIC PUBLISHING LLC, EMI AL GALLICO MUSIC CORP., EMI ALGEE MUSIC CORP., EMI APRIL MUSIC INC., EMI BLACKWOOD MUSIC INC., COLGEMS-EMI MUSIC INC., EMI CONSORTIUM MUSIC PUBLISHING INC. D/B/A EMI FULL KEEL MUSIC, EMI CONSORTIUM SONGS, INC., INDIVIDUALLY AND D/B/A EMI LONGITUDE MUSIC, EMI FEIST CATALOG INC., EMI MILLER CATALOG INC., EMI MILLS MUSIC, INC., EMI UNART CATALOG INC., EMI U CATALOG INC., JOBETE MUSIC CO. INC., STONE AGATE MUSIC, SCREEN GEMS-EMI MUSIC INC., STONE DIAMOND MUSIC CORP., ATLANTIC RECORDING CORPORATION, BAD BOY RECORDS LLC, ELEKTRA ENTERTAINMENT GROUP INC., FUELED BY RAMEN LLC, ROADRUNNER RECORDS, INC., WARNER BROS. RECORDS INC., WARNER/CHAPPELL MUSIC, INC., WARNER-TAMERLANE PUBLISHING CORP., WB MUSIC CORP., W.B.M. MUSIC CORP.,

UNICHAPPELL MUSIC INC., RIGHTSONG MUSIC INC., COTILLION MUSIC, INC., INTERSONG U.S.A., INC., UMG RECORDINGS, INC., CAPITOL RECORDS, LLC, UNIVERAL MUSIC CORP., UNIVERSAL MUSIC – MGB NA LLC, UNIVERSAL MUSIC PUBLISHING INC., UNIVERSAL MUSIC PUBLISHING AB, UNIVERSAL MUSIC PUBLISHING LIMITED, UNIVERSAL MUSIC PUBLISHING MGB LIMITED., UNIVERSAL MUSIC – Z TUNES LLC, UNIVERSAL/ISLAND MUSIC LIMITED, UNIVERSAL/MCA MUSIC PUBLISHING PTY. [190] LIMITED, MUSIC CORPORATION OF AMERICA, INC. D/B/A UNIVERSAL MUSIC CORP., POLYGRAM PUBLISHING, INC., AND SONGS OF UNIVERSAL, INC.,

Plaintiffs,

v.

COX COMMUNICATIONS, INC. AND COXCOM, LLC.

Defendants.

Plaintiffs Sony Music Entertainment, Arista Music, Arista Records LLC, LaFace Records LLC, Provident Label Group, LLC, Sony Music Entertainment US Latin, Volcano Entertainment III, LLC, Zomba Recordings LLC, Sony/ATV Music Publishing LLC, EMI Al Gallico Music Corp., EMI Algee Music Corp., EMI April Music Inc., EMI Blackwood Music Inc., Colgems-EMI Music Inc., EMI Consortium Music Publishing Inc. d/b/a EMI

Full Keel Music, EMI Consortium Songs, Inc., individually and d/b/a EMI Longitude Music, EMI Feist Catalog Inc., EMI Miller Catalog Inc., EMI Mills Music, Inc., EMI Unart Catalog Inc., EMI U Catalog Inc., Jobete Music Co. Inc., Stone Agate Music, Screen Gems-EMI Music Inc., Stone Diamond Music Corp., Atlantic Recording Corporation, Bad Boy Records LLC, Elektra Entertainment Group Inc., Fueled By Ramen LLC, Roadrunner Records, Inc., Warner Bros. Records Inc., Warner/Chappell Music, Inc., Warner-Tamerlane Publishing Corp., WB Music Corp., W.B.M. Music Corp., Unichappell Music Inc., Rightsong Music Inc., Cotillion Music, Inc., Intersong U.S.A., Inc., UMG Recordings, Inc., Capitol Records, LLC, Universal Music Corp., Universal Music – MGB NA LLC, Universal Music Publishing Inc., Universal Music Publishing AB, Universal Music Publishing Limited, Universal Music Publishing MGB Limited, Universal Music – Z Tunes LLC, Universal/Island Music Limited, Universal/MCA [191] Music Publishing Pty. Limited, Music Corporation of America, Inc. d/b/a Universal Music Corp., Polygram Publishing, Inc., and Songs of Universal, Inc., (collectively, "Plaintiffs"), for their Complaint against Defendants Cox Communications, Inc. and CoxCom, LLC (collectively, "Cox" or "Defendants"), allege, on personal knowledge as to matters relating to themselves and on information and belief as to all other matters, as set forth below.

NATURE OF THE CASE

1. Plaintiffs are record companies that produce, manufacture, distribute, sell, and license commercial sound recordings, and music publishers

that acquire, license, and otherwise exploit musical compositions, both in the United States and internationally. Through their enormous investments of not only money, but also time and exceptional creative efforts, Plaintiffs and their representative recording artists and songwriters have developed and marketed the world's most famous and popular music. Plaintiffs own or control exclusive rights to the copyrights to some of the most famous sound recordings performed by classic artists and contemporary superstars, as well as the copyrights to large catalogs of iconic musical compositions and modern hit songs. Their investments and creative efforts have shaped the musical landscape as we know it, both in the United States and around the world.

2. Cox is one of the largest Internet service providers ("ISPs") in the country. It markets and sells high-speed Internet services to consumers nationwide. Through the provision of those services, however, Cox also has knowingly contributed to, and reaped substantial profits from, massive copyright infringement committed by thousands of its subscribers, causing great harm to Plaintiffs, their recording artists and songwriters, and others whose livelihoods depend upon the lawful acquisition of music. Cox's contribution to its subscribers' infringement is both willful and extensive, and renders Cox equally liable. Indeed, for years, Cox deliberately refused to take reasonable measures to curb its customers from using its [192] Internet services to infringe on others' copyrights—even once Cox became aware of *particular customers* engaging in *specific, repeated acts* of infringement. Plaintiffs'

representatives (as well as others) sent hundreds of thousands of statutory infringement notices to Cox, under penalty of perjury, advising Cox of its subscribers' blatant and systematic use of Cox's Internet service to illegally download, copy, and distribute Plaintiffs' copyrighted music through BitTorrent and other online file-sharing services. Rather than working with Plaintiffs to curb this massive infringement, Cox unilaterally imposed an arbitrary cap on the number of infringement notices it would accept from copyright holders, thereby willfully blinding itself to any of its subscribers' infringements that exceeded its "cap."

3. Cox also claimed to have implemented a "thirteen-strike policy" before terminating service of repeat infringers but, in actuality, Cox never permanently terminated any subscribers. Instead, it lobbed "soft terminations" with virtually automatic reinstatement, or it simply did nothing at all. The reason for this is simple: rather than stop its subscribers' unlawful activity, Cox prioritized its own profits over its legal obligations. Cox's profits increased dramatically as a result of the massive infringement that it facilitated, yet Cox publicly told copyright holders that it needed to reduce the number of staff it had dedicated to anti-piracy for budget reasons.

4. Congress created a safe harbor in the Digital Millennium Copyright Act ("DMCA") that limits the liability of ISPs for copyright infringement when their involvement is limited to, among other things, "transmitting, routing, or providing connections for, material through a system or

network controlled or operated by or for the service provider." 17 U.S.C. § 512(a). To benefit from the DMCA safe harbor, however, along with meeting other pre-conditions, an ISP must demonstrate that it "has adopted and reasonably implemented…a policy that provides for the termination in appropriate circumstances of subscribers…who are [193] repeat infringers." 17 U.S.C. § 512(i)(1)(A).

5. Cox's "thirteen-strike policy" has already been revealed to be a sham, and its ineligibility for the DMCA safe harbor—for the period of (at least) February 2012 through November 2014—has been fully and finally adjudicated by this Court and affirmed by the Court of Appeals for the Fourth Circuit. In a related case, *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc. and CoxCom, LLC*, 149 F. Supp. 3d 634, 662 (E.D. Va. 2015), *aff'd in relevant part*, 881 F.3d 293 (4th Cir. 2018) ("*BMG Rights*"), this Court established, as a matter of law, that Cox could not invoke the DMCA safe harbor to limit its liability. *Id.* at 655-662.

6. Specifically, the Court concluded:

> Cox did not implement its repeat infringer policy. Instead, Cox publicly purported to comply with its policy, while privately disparaging and intentionally circumventing the DMCA's requirements. Cox employees followed an unwritten policy put in place by senior members of Cox's abuse group by which accounts used to repeatedly infringe copyrights would be nominally terminated, only to be reactivated upon request. Once

> these accounts were reactivated, customers were given clean slates, meaning the next notice of infringement Cox received linked to those accounts would be considered the first in Cox's graduated response procedure.

Id. at 655. The Court further found that starting in September 2012, Cox abandoned its tacit policy of temporarily suspending and reactivating repeat infringers' accounts, and instead stopped terminating accounts altogether. *Id.* at 655-58.

7. The Fourth Circuit affirmed this Court's holding, explaining that although "Cox formally adopted a repeat infringer 'policy,'…both before and after September 2012, [Cox] made every effort to avoid reasonably implementing that policy. Indeed, in carrying out its thirteen-strike process, Cox very clearly determined *not* to terminate subscribers who in fact repeatedly violated the policy." 881 F.3d at 303. The former head of Cox's Abuse Group, Jason Zabek, summed up Cox's sentiment toward its DMCA obligations best in an email exclaiming: "f the dmca!!!" Unsurprisingly, the Fourth Circuit affirmed this Court's ruling, [194] holding that "Cox failed to qualify for the DMCA safe harbor because it failed to implement its policy in any consistent or meaningful way—leaving it essentially with no policy." *Id.* at 305. The *BMG Rights* decision that Cox is ineligible for the DMCA safe harbor from at least February 2012 through November 2014 controls here.

8. It is well-established law that a party may not assist someone it knows is engaging in copyright infringement. Further, when a party has a direct

financial interest in the infringing activity, and the right and practical ability to stop or limit it, that party must act. Ignoring those basic responsibilities, Cox deliberately turned a blind eye to its subscribers' infringement. Cox failed to terminate or otherwise take meaningful action against the accounts of repeat infringers whose identities were known. It also blocked infringement notices for countless others. Despite its professed commitment to take action against repeat offenders, Cox routinely thumbed its nose at Plaintiffs by continuing to provide service to individuals it knew to be serially infringing copyrighted works and refusing to even receive notice of any infringements above an arbitrary cap. In reality, Cox operated its service as an attractive tool, and as a safe haven, for infringement.

9. Cox has derived an obvious and direct financial benefit from its customers' infringement. The unlimited ability to download and distribute Plaintiffs' works through Cox's service has served as a draw for Cox to attract, retain, and charge higher fees to subscribers. Moreover, by failing to terminate the accounts of specific recidivist infringers known to Cox, Cox obtained a direct financial benefit from its subscribers' infringing activity in the form of illicit revenue that it would not have received had it shut down those accounts. Indeed, Cox affirmatively decided not to terminate infringers because it wanted to maintain the revenue that would come from their accounts.

10. The infringing activity of Cox's subscribers that is the subject of Plaintiffs' [195] claims, and for

which Cox is secondarily liable, occurred *after* Cox received multiple notices of a subscriber's infringing activity. Specifically, Plaintiffs seek relief for claims of infringement that accrued from February 1, 2013 through November 26, 2014, with respect to works infringed by Cox's subscribers *after* those particular subscribers were identified to Cox in multiple infringement notices. Those claims are preserved through tolling agreements entered into with Cox, and Cox cannot limit its liability for claims in this period under the DMCA safe harbor.

JURISDICTION AND VENUE

11. This is a civil action in which Plaintiffs seek damages for copyright infringement under the Copyright Act, 17 U.S.C. § 101, *et seq*.

12. This Court has original subject matter jurisdiction over Plaintiffs' copyright infringement claims pursuant to 28 U.S.C. §§ 1331 and 1338(a).

13. This Court has personal jurisdiction over Cox because Cox resides in and/or does systematic and continuous business in Virginia and in this judicial district. Cox provides a full slate of services in Virginia, including TV, Internet and phone services, among others. Cox also has a number of retail stores and customer service centers within this judicial district, including stores located at 5958 Kingstowne Town Ctr., Ste. 100, Alexandria, Virginia 22315 and 11044 Lee Hwy, Suite 10, Fairfax, Virginia 22030 and 3080 Centerville Road, Herndon, Virginia 20171.

14. Each of the Cox defendants has in the past been (or is presently) a party, as a plaintiff or a defendant, in this Court, *including* in the related case of *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns., Inc. and CoxCom, LLC*, No. 14-cv-1611-LO-JFA.

15. Cox continuously and systematically transacts business in the Commonwealth of Virginia and maintains sizable operations in Virginia—employing thousands of employees and [196] providing an array of services to customers within the Commonwealth. Additionally, Cox has engaged in substantial activities purposefully directed at Virginia from which Plaintiffs' claims arise, including, for instance, establishing significant network management operations in this district, employing individuals within Virginia who have responsibility for managing its network, enforcing subscriber use policies against violators, and/or responding to notices of infringement. Much of the conduct alleged in this Complaint arises directly from Cox's forum-directed activities—specifically, repeated acts of infringement by specific subscribers using Cox's network and Cox's awareness of those activities, Cox's receipt of and failure to act in response to Plaintiffs' notices of infringement activity, and Cox's failure to take reasonable measures to terminate repeat infringers.

16. Many of the acts complained of herein occurred in Virginia and in this judicial district. For example, a number of egregious repeat infringers, who are Cox subscribers, reside in and infringed Plaintiffs' rights in Virginia and this judicial district.

17. Indeed, Plaintiffs have identified hundreds of Cox subscribers suspected of residing in Virginia, who have repeatedly infringed one or more of Plaintiffs' copyrighted works. For example, Cox subscriber account having IP address 216.54.125.50 at the time of the infringement, believed to be located east of Richmond, Virginia, was identified in infringement notices 97 times between November 15, 2013 and March 6, 2015. A different Cox subscriber believed to be located in Norfolk, Virginia, having IP address 72.215.154.66 at the time of infringement, also was identified in infringement notices 97 times between February 6, 2013 and March 6, 2015. Yet another Cox subscriber having IP address 174.77.93.179, believed to be from Virginia Beach, was identified in infringement notices 34 times between February 8, 2013 and March 25, 2015.

18. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and (c) and 1400(a), [197] because a substantial part of the acts of infringement, and other events and omissions complained of herein occur, or have occurred, in this district, and this is a district in which Cox resides or may be found.

PLAINTIFFS AND THEIR COPYRIGHTED MUSIC

19. Plaintiffs are the copyright owners of and/or control exclusive rights with respect to millions of sound recordings (*i.e.*, recorded music) and/or musical works (*i.e.*, compositions), including many by some of the most prolific and well-known recording artists and songwriters in the world.

20. Plaintiff Sony Music Entertainment ("Sony") is a Delaware general partnership, the partners of which are citizens of New York and Delaware. Sony's headquarters and principal place of business are located at 25 Madison Avenue, New York, New York 10010.

21. Plaintiff Arista Music ("Arista Music") is a New York partnership with its principal place of business at 25 Madison Avenue, New York, New York 10010.

22. Plaintiff Arista Records LLC ("Arista Records") is a Delaware Limited Liability Company with its principal place of business at 25 Madison Avenue, New York, New York 10010.

23. Plaintiff LaFace Records LLC ("LaFace") is a Delaware Limited Liability Company with its principal place of business at 25 Madison Avenue, New York, New York 10010.

24. Plaintiff Provident Label Group, LLC ("Provident") is a Delaware Limited Liability Company with its principal place of business at 741 Cool Springs Boulevard, Franklin, Tennessee 37067.

25. Plaintiff Sony Music Entertainment US Latin ("Sony Latin") is a Delaware Limited Liability Company with its principal place of business at 3390 Mary St., Suite 220, [198] Coconut Grove, Florida 33133.

26. Plaintiff Volcano Entertainment III, LLC ("Volcano") is a Delaware Limited Liability Company

with its principal place of business at 25 Madison Avenue, New York, New York 10010.

27. Plaintiff Zomba Recording LLC ("Zomba") is a Delaware Limited Liability Company with its principal place of business at 25 Madison Avenue, New York, New York 10010.

28. Plaintiff Atlantic Recording Corporation ("Atlantic") is a Delaware corporation with its principal place of business at 1633 Broadway, New York, New York 10019.

29. Plaintiff Bad Boy Records LLC ("Bad Boy") is a Delaware Limited Liability Company with its principal place of business at 1633 Broadway, New York, New York 10019.

30. Plaintiff Elektra Entertainment Group Inc. ("Elektra") is a Delaware corporation with its principal place of business at 1633 Broadway, New York, New York 10019.

31. Plaintiff Fueled By Ramen LLC ("FBR") is a Delaware Limited Liability Company with its principal place of business at 1633 Broadway, New York, New York 10019.

32. Plaintiff Roadrunner Records, Inc. ("Roadrunner") is a New York corporation with its principal place of business at 1633 Broadway, New York, New York 10019.

33. Plaintiff Warner Bros. Records Inc. ("WBR") is a Delaware corporation with its principal

place of business at 3300 Warner Boulevard, Burbank, California 91505.

34. Plaintiff UMG Recordings, Inc. ("UMG") is a Delaware corporation with its principal place of business at 2220 Colorado Avenue, Santa Monica, California 90404.

35. Plaintiff Capitol Records, LLC ("Capitol Records") is Delaware corporation with its principal place of business at 2220 Colorado Avenue, Santa Monica, California 90404.

36. Plaintiffs Sony, Arista Music, Arista Records, LaFace, Provident, Sony Latin, [199] Volcano, Zomba, Atlantic, Bad Boy, Elektra, FBR, Roadrunner, WBR, UMG, and Capitol Records are referred to herein collectively as "The Record Company Plaintiffs."

37. The Record Company Plaintiffs are some of the largest record companies in the world, engaged in the business of producing, manufacturing, distributing, selling, licensing, and otherwise exploiting sound recordings in the United States through various media. They invest substantial money, time, effort, and talent in creating, advertising, promoting, selling, and licensing sound recordings embodying the performances of their exclusive recording artists and their unique and valuable sound recordings.

38. Plaintiff Sony/ATV Music Publishing LLC ("Sony/ATV") is a Delaware Limited Liability

Company with its principal place of business at 25 Madison Avenue, New York, New York 10010.

39. Plaintiff EMI Al Gallico Music Corp. ("EMI Al Gallico"), an affiliate of Sony/ATV, is a Delaware corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

40. Plaintiff EMI Algee Music Corp. ("EMI Algee"), an affiliate of Sony/ATV, is a Delaware corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

41. Plaintiff EMI April Music Inc. ("EMI April"), an affiliate of Sony/ATV, is a Connecticut corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

42. Plaintiff EMI Blackwood Music Inc. ("EMI Blackwood"), an affiliate of Sony/ATV, is a Connecticut corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

43. Plaintiff Colgems-EMI Music Inc. ("EMI Colgems"), an affiliate of Sony/ATV, [200] is a Delaware corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

44. Plaintiff EMI Consortium Music Publishing Inc. d/b/a EMI Full Keel Music ("EMI

Full Keel"), an affiliate of Sony/ATV, is a New York corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

45. Plaintiff EMI Consortium Songs, Inc., individually and d/b/a EMI Longitude Music ("EMI Longitude"), an affiliate of Sony/ATV, is a New York corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

46. Plaintiff EMI Feist Catalog Inc. ("EMI Feist"), an affiliate of Sony/ATV, is a New York corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

47. Plaintiff EMI Miller Catalog Inc. ("EMI Miller"), an affiliate of Sony/ATV, is a New York corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

48. Plaintiff EMI Mills Music, Inc. ("EMI Mills"), an affiliate of Sony/ATV, is a Delaware corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

49. Plaintiff EMI Unart Catalog Inc. ("EMI Unart"), an affiliate of Sony/ATV, is a New York corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

50. Plaintiff EMI U Catalog Inc. ("EMI U"), an affiliate of Sony/ATV, is a New York corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

51. Plaintiff Jobete Music Co. Inc. ("Jobete"), an affiliate of Sony/ATV, is a [201] Michigan corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016. Plaintiff Stone Agate Music ("Stone Agate") is a division of Jobete.

52. Plaintiff Screen Gems-EMI Music Inc. ("Gems-EMI"), an affiliate of Sony/ATV, is a Delaware corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

53. Plaintiff Stone Diamond Music Corp. ("Stone"), an affiliate of Sony/ATV, is a Michigan corporation with its principal place of business at 245 Fifth Avenue, Suite 1101, New York, New York 10016.

54. Plaintiff Warner/Chappell Music, Inc. ("Warner/Chappell") is a Delaware corporation with its principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

55. Plaintiff Warner-Tamerlane Publishing Corp. ("Warner-Tamerlane") is a California corporation with its principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

56. Plaintiff WB Music Corp. ("WB Music") is a California corporation with its principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

57. Plaintiff W.B.M. Music Corp. ("W.B.M.") is a Delaware corporation with its principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

58. Plaintiff Unichappell Music Inc. ("Unichappell") is a Delaware corporation with its principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

59. Plaintiff Rightsong Music Inc. ("Rightsong Music") is a Delaware corporation with its principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

[202] 60. Plaintiff Cotillion Music, Inc. ("Cotillion") is a Delaware corporation with its principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

61. Plaintiff Intersong U.S.A., Inc. ("Intersong") is a Delaware corporation with its principal place of business at 10585 Santa Monica Boulevard, Los Angeles, California 90025.

62. Plaintiff Universal Music Corp. ("UMC") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

63. Plaintiff Universal Music – MGB NA LLC ("MGB") is a California Limited Liability Company with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

64. Plaintiff Universal Music Publishing Inc. ("Universal Music Publishing") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

65. Plaintiff Universal Music Publishing AB ("AB") is a company organized under the laws of Sweden.

66. Plaintiff Universal Music Publishing Limited ("Publishing Limited") is a company incorporated under the laws of England and Wales.

67. Plaintiff Universal Music Publishing MGB Limited ("MGB Limited") is a company incorporated under the laws of England and Wales.

68. Plaintiff Universal Music – Z Tunes LLC ("Z Tunes") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

69. Plaintiff Universal/Island Music Limited ("Island") is a company incorporated under the laws of England and Wales.

[203] 70. Plaintiff Universal/MCA Music Publishing Pty. Limited ("MCA Limited") is a company organized under the laws of the Australia.

71. Plaintiff Music Corporation of America, Inc. d/b/a Universal Music Corp. ("Music Corp.") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

72. Plaintiff Polygram Publishing, Inc. ("Polygram Publishing") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

73. Plaintiff Songs of Universal, Inc. ("Songs of Universal") is a California corporation with its principal place of business at 2100 Colorado Avenue, Santa Monica, California 90404.

74. Plaintiffs Sony/ATV, EMI Al Gallico, EMI Algee, EMI April, EMI Blackwood, EMI Colgems, EMI Full Keel, EMI Longitude, EMI Feist, EMI Miller, EMI Mills, EMI Unart, EMI U, Jobete, Stone Agate, Gems-EMI, Stone, Warner/Chappell, Warner-Tamerlane, WB Music, W.B.M., Unichappell, Rightsong Music, Cotillion, Intersong, UMC, MGB, Universal Music Publishing, AB, Publishing Limited, MGB Limited, Z Tunes, Island, MCA Limited, Music Corp., Polygram Publishing, and Songs of Universal are referred to herein collectively as "The Music Publisher Plaintiffs."

75. The Music Publisher Plaintiffs are leading music publishers engaged in the business of acquiring, owning, publishing, licensing, and otherwise exploiting copyrighted musical compositions. Each invests substantial money, time, effort, and talent to acquire, administer, publish,

license, and otherwise exploit such copyrights, on its own behalf and on behalf of songwriters and other music publishers who have assigned exclusive copyright interests to The Music Publisher Plaintiffs.

[204] 76. Plaintiffs own and/or control in whole or in part the copyrights and/or exclusive rights in innumerable popular sound recordings and musical compositions, including the sound recordings listed on Exhibit A and musical compositions listed on Exhibit B, both of which are illustrative and non-exhaustive. All of the sound recordings and musical compositions listed on Exhibits A and B have been registered with the U.S. Copyright Office.

DEFENDANTS AND THEIR ACTIVITIES

77. Defendant Cox Communications, Inc. is a Delaware corporation with its principal place of business at 1400 Lake Hearn Drive NE, Atlanta, Georgia. Cox Communications, Inc. operates as a broadband communications and entertainment company for residential and commercial customers in the United States. Specifically, Cox Communications, Inc. offers digital video, high-speed Internet, telephone, voice, and long distance, data and video transport, high definition video, digital cable television, and DVR services over its IP network.

78. Defendant CoxCom, LLC is a Delaware Limited Liability Company with its principal place of business at 1400 Lake Hearn Drive NE, Atlanta, Georgia. CoxCom, LLC conducts business in Virginia as Cox Communications of Northern Virginia.

CoxCom, LLC is a wholly-owned subsidiary of Cox Communications, Inc. CoxCom, LLC provides Internet and related services to Cox subscribers including in Virginia and this judicial district.

79. The Cox defendants, individually and collectively, are ISPs. Cox has approximately 4.5 million Internet subscribers. At all pertinent times, Cox's customers have paid Cox substantial subscription fees for access to Cox's high-speed Internet network, with Cox offering a tiered pricing structure, whereby for a higher monthly fee, a subscriber can have even faster downloading speeds.

80. For many of Cox's subscribers, the ability to use Cox's network to download [205] music and other copyrighted content—including unauthorized content—as efficiently as possible is a primary motivation for subscribing to Cox's service. Accordingly, in its consumer marketing material in 2014, Cox touted how its service enabled subscribers to download large amounts of content "Faster Than A Speeding Bullet" and at "The Speed You Need." In exchange for this service, Cox charged its customers monthly fees ranging in price based on the speed of service. https://web.archive.org/web/20140616085246/http://www.cox.com:80/residential/internet.cox. To satisfy its customers' need for speed, "Cox has increased internet speeds more than 1,000 percent over the past 17 years," making it even easier and faster for subscribers to illegally download and upload infringing sound recordings and musical compositions. http://newsroom.cox.com/2018-01-09-Cox-Expands-Gigabit-Speeds-at-Rapid-Pace.

81. On its "Frequently Asked Questions" page on its website, Cox describes a process called "bandwidth throttling" that is often used by ISPs to reduce infringement by subscribers who have a history of illegal behavior. Cox tells its customers and prospective customers that bandwidth throttling "can interfere with the download speed, upload speed and overall performance of your network's Internet service," and assures actual and prospective customers that "[a]t Cox, we never throttle Internet speeds. And we never block or otherwise interfere with your desire to go where you want to go on the Internet." https://www.cox.com/residential/internet.html.

82. At the same time, Cox has consistently and actively engaged in network management practices to suit its own purposes. This includes monitoring for, and taking action against, spam and other unwanted activity. But Cox has gone out of its way *not* to take action against subscribers engaging in repeated copyright infringement at the expense of copyright owners, ultimately forcing Plaintiffs to bring this litigation.

[206] 83. At all pertinent times, Cox knew that its subscribers routinely used its networks for illegal downloading and uploading of copyrighted works, especially music. As described below, Plaintiffs repeatedly notified Cox that many of its subscribers were actively utilizing its service in order to infringe; those notices gave Cox the *specific identities of its subscribers*, referred to by their unique Internet Protocol or "IP" addresses. Yet Cox persistently turned a blind eye toward the massive infringement

of Plaintiffs' works. Cox condoned the illegal activity because it was popular with subscribers and acted as a draw in attracting and retaining subscribers. In return, Cox's customers purchased more bandwidth and continued using Cox's services to infringe Plaintiffs' copyrights. Cox recognized that if it prevented its repeat infringer subscribers from using its service, or made it less attractive for such use, Cox would enroll fewer new subscribers, lose existing subscribers, and lose revenue. For those account holders and subscribers who wanted to download files illegally at faster speeds, Cox obliged them for higher rates. The greater the bandwidth its subscribers required for pirating content, the more money Cox made.

PLAINTIFFS' ENFORCEMENT ACTIVITIES AND COX'S EFFORTS TO THWART THEM

84. Over the past two decades, Internet piracy over so-called "peer-to-peer" ("P2P") networks has become rampant, and music owners and other copyright owners have employed litigation and other means to attempt to curtail the massive theft of their copyrighted works. Cox has been keenly aware of those efforts. Cox has also been acutely aware of the use of its network for P2P piracy, including the specific identities of subscribers who are using its network to infringe.

85. Indeed, Cox was made aware of its subscribers using its network for such infringing activities before the time frame at issue in this suit, when a number of copyright holders, including The Record Company Plaintiffs, initiated a multi-year

effort to enforce their [207] copyrights against individuals using P2P systems to directly infringe copyrighted musical or other works. As part of that effort, because the copyright holders could only determine the unique IP addresses of an ISP's infringing subscribers, but not their actual identities, they served subpoenas on Cox and other ISPs to obtain the infringing subscribers' names and contact information. Cox was required to provide identifying information about infringing subscribers.

86. Thereafter, The Record Company Plaintiffs began sending notices to Cox (and other ISPs) identifying additional specific instances of their subscribers' infringement through P2P activities. From early 2013 through March 2015 alone, Cox received more than *200,000 notices*, provided under penalty of perjury, detailing specific instances of its subscribers using its network to infringe copyrighted music.

87. But those hundreds of thousands of notices Cox received represented only a fraction of the infringements that occurred through Cox's network in the same time frame. For years, Cox has arbitrarily capped the number of infringement notices it is willing to receive—refusing to even hear any complaints in excess of the cap. Starting in 2008, Cox refused to accept any more than 200 infringement notices per day from Plaintiffs' representatives. In early 2009, Cox agreed to increase that number to 400 per day. In July 2009, many of The Record Company Plaintiffs asked Cox to increase the limit to 800 or 1,000 per day but Cox denied the request on the grounds that it was

"currently at the maximum number of notices [Cox could] process, measured against the staff [they] have to process calls from customers." In 2013, Plaintiffs' representatives again asked Cox to increase the limit, this time more modestly from 400 to 500 or 600 per day, to which Cox finally agreed. Thus, while Cox received 200,000 infringement notices from 2013 to 2015 from Plaintiffs' representatives, the actual number of infringements identified through Cox's network in those years was vastly [208] more. In other words, Cox willfully blinded itself to scores of infringements by refusing to accept notices beyond its arbitrary cap.

88. The infringement notices provided to Cox the unique IP address assigned to each user of Cox's network and the date and time the infringing activity was detected. By reviewing its subscriber activity logs, Cox alone had the ability to match an IP address in an infringement notice to a particular subscriber. Importantly, only Cox, as the provider of the technology and system used to infringe, had the information required to match the IP address to a particular subscriber, and to contact that subscriber or terminate that subscriber's service.

89. Plaintiffs' infringement notices concerned clear and unambiguous infringing activity by Cox's subscribers—that is, unauthorized downloading and distribution of copyrighted music. There was no legal justification for Cox's subscribers to download or distribute digital copies of Plaintiffs' sound recordings and musical compositions to thousands or millions of strangers on the Internet.

90. Apart from attesting to the sheer volume of the infringing activity on its network, the infringement notices sent to Cox pointed to specific subscribers who were flagrant and serial infringers. The infringement notices identified *almost 20,000* Cox subscribers engaged in blatant and repeated infringement. To cite just a few specific examples:

- During a 601-day period, Cox's subscriber with IP address 174.78.143.156 was identified in 142 infringement notices, which were sent on at least 116 separate days.

- During a 539-day period, Cox's subscriber with IP address 70.167.91.154 was identified in 104 infringement notices, which were sent on at least 96 separate days.

- During a 426-day period, Cox's subscriber with IP address 72.198.185.108 was identified in 96 infringement notices, which were sent on at least 80 separate days.

- During a 326-day period, Cox's subscriber with IP address 184.191.182.8 was identified in 84 infringement notices, which were sent on at least 71 separate [209] days.

- During a 248-day period, Cox's subscriber with IP address 184.177.171.108 was identified in 64 infringement notices, which were sent on at least 52 separate days.

These examples and countless others amply illustrate that, rather than terminating repeat

infringers—and losing subscription revenues—Cox simply looked the other way.

91. During all pertinent times, Cox had the full legal right, obligation, and technical ability to prevent or limit the infringements occurring on its network. Under Cox's "Acceptable Use Policy," which its subscribers agreed to as a condition of using its Internet service, Cox was empowered to exercise its right and ability to suspend or terminate a customer's Internet access. Cox could do so for a variety of reasons, including a subscriber's "use [of] the Service to post, copy, transmit, or disseminate any content that infringes the patents, copyrights, trade secrets, trademark, moral rights, or propriety rights of any party." With respect to infringement, Cox is the gatekeeper of the network over which data—including infringing works—is transferred.

92. Although Cox purported to create a repeat infringer policy, as this Court already found, it never implemented it, and thus it is ineligible for the DMCA's safe harbor. Cox's Copyright Policy provides that upon receipt of copyright infringement complaints regarding subscribers, "Cox uses a graduated approach of increasing severity to notify subscribers, from in-browser and email notifications, to the suspension of Internet service for repeated or severe cases."

93. But, in denying Cox's motion for judgment as a matter of law after trial, this Court explained:

> The graduated response system is essentially a thirteen-strike policy. No action is taken on

> receipt of a subscriber's first notice. The second, third, fourth, fifth, sixth, and seventh notices generate an email to the subscriber, [210] warning that if Cox "continues to receive infringement claims such as this one concerning your use of our service, we will suspend your account and disable your connection until you confirm you have removed the infringing material." On the eighth and ninth notices, Cox limits a subscriber's internet access to a single webpage containing a warning. The customer can self-reactivate by clicking an acknowledgment. On the tenth and eleventh notices, Cox suspends service and requires the subscriber to call a support technician. The technician explains the reason for the suspension, advises removal of the allegedly infringing file, and then reactivates service. On the twelfth notice, the subscriber is suspended and directed to specialized technicians. On the thirteenth notice, the subscriber is again suspended and this time considered for termination.

94. Regardless of whether a thirteen-strike policy could ever be reasonable, this Court previously found that Cox did not reasonably implement that policy. For example, in addition to its arbitrary cap on—and, in some instances, outright refusal to accept—Plaintiffs' infringement notices, any notice Cox did receive beyond its self-imposed limit was not counted in the graduated response. Cox also counted only one notice per subscriber per day. Thus, if a subscriber generated

10 or 50 or 100 notices in a day, they were "rolled up" into a single ticket. Cox also restarted the thirteen-strike count every six months, so an infringing subscriber with twelve notices would get a "free pass" back to zero strikes if six months had passed since his or her first notice. When Cox did "soft terminate" subscribers for repeat copyright infringements, it enforced an unwritten policy of re-activating the subscribers shortly thereafter. And with few exceptions, starting in September 2012, Cox simply stopped terminating repeat infringers altogether.

95. Despite these alleged policies, and despite receiving hundreds of thousands of infringement notices, along with similar notices from other copyright owners, Cox knowingly permitted identified repeat infringer subscribers to continue to use Cox's network to infringe. Rather than disconnect the Internet access of blatant repeat infringers to curtail their infringement, Cox knowingly continued to provide these subscribers with the Internet access [211] that enabled them to continue to use BitTorrent or other P2P networks to illegally download or distribute Plaintiffs' copyrighted works unabated. Cox's provision of high-speed Internet service materially contributed to these direct infringements.

96. Cox's motivation for refusing to terminate or suspend the accounts of blatant infringing subscribers is simple: it valued corporate profits over its legal responsibilities. Cox did not want to lose subscriber revenue by terminating accounts. Jason Zabek, the former head of Cox's Abuse Group, made

this clear by urging a Cox customer service representative (in an internal email that he instructed should not be forwarded) to "start the warning cycle over" for terminated customers with cox.net email addresses: "A clean slate if you will. This way, we can collect a few extra weeks of payments for their account. ;-)".

97. Nor did Cox want the possibility of account terminations to make its service less attractive to other existing or prospective users. Moreover, Cox was simply disinterested in devoting sufficient resources to tracking infringers, responding to infringement notices, and terminating accounts in appropriate circumstances. Considering only its own pecuniary gain, Cox ignored and turned a blind eye to flagrant, repeat violations by known specific subscribers using its service to infringe, thus facilitating and multiplying the harm to Plaintiffs. And Cox's failure to adequately police its infringing subscribers was a draw to subscribers to purchase Cox's services, so that the subscribers could then use those services to infringe Plaintiffs' (and others') copyrights.

98. The consequences of Cox's infringing activity are obvious and stark. When Cox's subscribers use Cox's network to obtain infringing copies of Plaintiffs' copyrighted works illegally, that activity undercuts the legitimate music market, depriving Plaintiffs and those recording artists and songwriters whose works they sell and license of the compensation to which they are entitled. Without such compensation, Plaintiffs, and their recording artists [212] and songwriters, have fewer resources

available to invest in the further creation and distribution of high-quality music.

CLAIMS FOR RELIEF

Count I – Contributory Copyright Infringement

99. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 98 as if fully set forth herein.

100. Cox and its subscribers do not have any authorization, permission, license, or consent to exploit the copyrighted recordings or musical compositions at issue.

101. Cox's subscribers, using Internet access and services provided by Cox, have unlawfully reproduced and distributed via BitTorrent or other P2P networks thousands of sound recordings and musical compositions for which Plaintiffs are the legal or beneficial copyright owners or exclusive licensees. The copyrighted works infringed by Cox's subscribers, which have been registered with the U.S. Copyright Office, include those listed on Exhibits A and B, and many others. The foregoing activity constitutes direct infringement in violation of 17 U.S.C. §§ 106 and 501 *et seq*.

102. Cox is liable as a contributory copyright infringer for the direct infringements described above. Through Plaintiffs' infringement notices and other means, Cox had knowledge that its network was being used for copyright infringement on a

massive scale, and also knew of specific subscribers engaged in such repeated and flagrant infringement. Nevertheless, Cox facilitated, encouraged and materially contributed to such infringement by continuing to provide its network and the facilities necessary for its subscribers to commit repeated infringements. At the same time, Cox had the means to withhold that assistance upon learning of specific infringing activity by specific users but failed to do so.

103. By purposefully ignoring and turning a blind eye to the flagrant and repeated [213] infringement by its subscribers, Cox knowingly caused and materially contributed to the unlawful reproduction and distribution of Plaintiffs' copyrighted works, including but not limited to those listed on Exhibits A and B hereto, in violation of Plaintiffs' exclusive rights under the copyright laws of the United States.

104. Each infringement of Plaintiffs' copyrighted sound recordings and musical compositions constitutes a separate and distinct act of infringement. Plaintiffs' claims of infringement against Cox are timely pursuant to tolling agreements.

105. The foregoing acts of infringement by Cox have been willful, intentional, and purposeful, in disregard of Plaintiffs' rights. Indeed, the sound recordings on Exhibit A and the musical compositions on Exhibit B represent works infringed by Cox's subscribers *after* those particular

subscribers were identified to Cox in multiple infringement notices.

106. As a direct and proximate result of Cox's willful infringement of Plaintiffs' copyrights, Plaintiffs are entitled to statutory damages, pursuant to 17 U.S.C. § 504(c), in an amount of up to $150,000 with respect to each work infringed, or such other amount as may be proper under 17 U.S.C. § 504(c). Alternatively, at Plaintiffs' election, pursuant to 17 U.S.C. § 504(b), Plaintiffs shall be entitled to their actual damages, including Cox's profits from the infringements, as will be proven at trial.

107. Plaintiffs also are entitled to their attorneys' fees and full costs pursuant to 17 U.S.C. § 505.

Count II – Vicarious Copyright Infringement

108. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 98 as if fully set forth herein.

109. Cox and its subscribers have no authorization, license, or other consent to exploit the copyrighted sound recordings or musical compositions at issue.

[214] 110. Cox's subscribers, using Internet access and services provided by Cox, have unlawfully reproduced and distributed via BitTorrent or other P2P services thousands of sound recordings and musical compositions for which Plaintiffs are the

legal or beneficial copyright owners or exclusive licensees. The copyrighted works infringed by Cox's subscribers, which have been registered with the U.S. Copyright Office, include those listed on Exhibits A and B, and many others. The foregoing activity constitutes direct infringement in violation of 17 U.S.C. §§ 106 and 501 *et seq*.

111. Cox is liable as a vicarious copyright infringer for the direct infringements described above. Cox has the legal and practical right and ability to supervise and control the infringing activities that occur through the use of its network, and at all relevant times has had a financial interest in, and derived direct financial benefit from, the infringing use of its network. Cox has derived an obvious and direct financial benefit from its customers' infringement. The ability to use Cox's high-speed Internet facilities to illegally download Plaintiffs' copyrighted works has served to draw, maintain, and generate higher fees from paying subscribers to Cox's service. Among other financial benefits, by failing to terminate the accounts of specific repeat infringers known to Cox, Cox has profited from illicit revenue that it would not have otherwise received.

112. Cox is vicariously liable for the unlawful reproduction and distribution of Plaintiffs' copyrighted works, including but not limited to those listed on Exhibits A and B hereto, in violation of Plaintiffs' exclusive rights under the copyright laws of the United States.

113. Each infringement of Plaintiffs' copyrighted sound recordings and musical compositions constitutes a separate and distinct act of infringement. Plaintiffs' claims of infringement against Cox are timely pursuant to tolling agreements.

114. The foregoing acts of infringement by Cox have been willful, intentional, and [215] purposeful, in disregard of Plaintiffs' rights. Indeed, the sound recordings on Exhibit A and the musical compositions on Exhibit B are works infringed by Cox's subscribers *after* those particular subscribers were identified to Cox in multiple prior infringement notices.

115. As a direct and proximate result of Cox's willful infringement of Plaintiffs' copyrights, Plaintiffs are entitled to statutory damages, pursuant to 17 U.S.C. § 504(c), in an amount of up to $150,000 with respect to each work infringed, or such other amount as may be proper under 17 U.S.C. § 504(c). Alternatively, at Plaintiffs' election, pursuant to 17 U.S.C. § 504(b), Plaintiffs shall be entitled to their actual damages, including Cox's profits from the infringements, as will be proven at trial.

116. Plaintiffs further are entitled to their attorneys' fees and full costs pursuant to 17 U.S.C. § 505.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment from this Court against Cox as follows:

a. For a declaration that Defendants willfully infringed Plaintiffs' copyrights;

b. For statutory damages pursuant to 17 U.S.C. § 504(c), in an amount up to the maximum provided by law, arising from Defendants' willful violations of Plaintiffs' rights under the Copyright Act or, in the alternative, at Plaintiffs' election pursuant to 17 U.S.C. § 504(b), Plaintiffs' actual damages, including Cox's profits from the infringements, in an amount to be proven at trial;

c. Pursuant to 17 U.S.C. § 505, awarding Plaintiffs their costs in this action, including their reasonable attorneys' fees;

d. For pre-judgment and post-judgment interest at the applicable rate on any monetary award made part of the judgment against Defendants; and

e. For such other and further relief as the Court deems proper.

[216] **JURY TRIAL DEMAND**

Pursuant to Federal Rule of Civil Procedure 38, Plaintiffs hereby demand a trial by jury of all issues that are so triable.

Dated: April 8, 2019 Respectfully submitted,

Scott A. Zebrak
Matthew J. Oppenheim (*pro hac pending*)
Scott A. Zebrak (38729)
Jeffrey M. Gould (*pro hac pending*)
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Washington, DC 20015
Tel: 202-480-2999
matt@oandzlaw.com
scott@oandzlaw.com
jeff@oandzlaw.com

Attorneys for Plaintiffs

[224] **From:** Zabek, Jason (CCI-Atlanta)
Sent: Saturday, March 05, 2011 6:58 PM
To: HRD-TOC (CCI-Hampton Roads); CCI - Abuse Corporate
Cc: CCI - TOC
Subject: RE: CATS 7442149

It is fine. We need the customers.

Jason Zabek
Manager - Customer Safety / Abuse Operations
Cox Communications
(404) 269-8129
(Insert benign saying here)

From: Vredenburg, Roger (CCI-Virginia) **On Behalf Of** HRD-TOC (CCI-Hampton Roads)
Sent: Saturday, March 05, 2011 9:29 AM
To: CCI - Abuse Corporate
Cc: CCI - TOC
Subject: CATS 7442149

Hello

7442149

Here is another example of a customer that I consider an habitual abuser.

In a year was terminated twice and turned back on.

I suspended him again since no e-mail address and according to procedure he start over in the process.

Thanks

Roger Vredenburg
Hampton Roads Technical Operation Center (TOC)
TOC (866)269-8627 Opt.2
Supervisor: Chris Burns
Wed-Sat 5:30 AM - 4:00 PM
roger.vredenburg@cox.com

How am I doing? Click on the link below to fill out the survey.
http:/ /teams.atl.cox.com/toc/lists/toc_feedback/newform.aspx

* * *

[2013] **UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA**
Case No. 1:18-cv-00950-LO-JFA

SONY MUSIC ENTERTAINMENT, *et al.*
Plaintiff,
v.
COX COMMUNICATIONS, INC., *et al.*
Defendants.
REBUTTAL EXPERT REPORT OF LYNNE J. WEBER, Ph.D.

* * *

[2016] using their network in ways for which they lacked permission, and by those suspecting their WiFi has been hacked:

- "This is not from our computer. I am unaware if someone can tap into our computer or not.[72] We are senior citizens -77 and 74 and wouldn't even begin to know how to do what is set forth below. Please advise."
  - Per the McCabe Data File, this senior citizen customer received one Prior Ticket followed by one Notice in the first half of February 2013 and no subsequent Notices in the Relevant Period.
- "COX CUSTOMER SAFETY, I have no knowledge of the below noted problem. With proper authorization and identification your

[72] See also the Deposition of Carothers dated April 25, 2019, p. 117, regarding the possibility that a customer might have an "open WiFi" or have "forgotten to secure my WiFi."

representatives can look at my computers and the computers of those I have provided my Netgear 600 router Password to. [REDACTED][73] I have highlighted in RED the 'infringing content'. KENNY CHESNEY COME OVER is listed below in the body of this transmission as the 'infringing content'. Please read all the way to end of this series of emails. If you have any knowledge of this content (song?) please contact me. I want to continue to provide you with WiFi access however I/we need to understand/fix this problem (this is the 3rd notification within the past month or two - before December 2012 I never had notices like this.)) If this problem is not with any of the aforementioned computers then somebody within close proximity to my home has hacked my router system without my knowledge or permission. I do not know how that would happen."

- [2017] Per the McCabe Data File, this customer, who has given other people access to his WiFi network and who is offering to allow Cox to examine his and their computers, received three Prior Tickets followed by one Notice (in the first half of February 2013) and no subsequent Notices in the Relevant Period.

[73] Note that there are other email addresses in the CC field of this email that are also redacted.

- "I have no idea what you guys are talking about, I only use my internet for working business. Is there a number where I can call to solve this matter?"
  - Per the McCabe Data File, this customer received one Prior Ticket followed by one Notice in the first half of February 2013 and no subsequent Notices in the Relevant Period.
- "I have read this email and found the content and deleted both source and material. I am 61 yrs. old and not in the habit of allowing my nephews to use my computer, however, not anymore. I do apologize and assure you this will not occur again."
  - Per the McCabe Data File, this customer received no Prior Tickets; this email was in response to the second Notice (in the first half of February 2013); there were no subsequent Notices in the Relevant Period.
- "Hello, I believe this is an error because I do not download any material and we do have a secure network so I'm not sure if someone hacked our network or what but I had no involvement with this."
  - Per the McCabe Data File, this customer had 7 Prior Tickets; followed by one Notice in the first half of February 2013 and no subsequent Notices in the Relevant Period.

* * *

[2020] **HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY**

Sony Music Entertainment, et al. v. Cox Communications, Inc., et al.

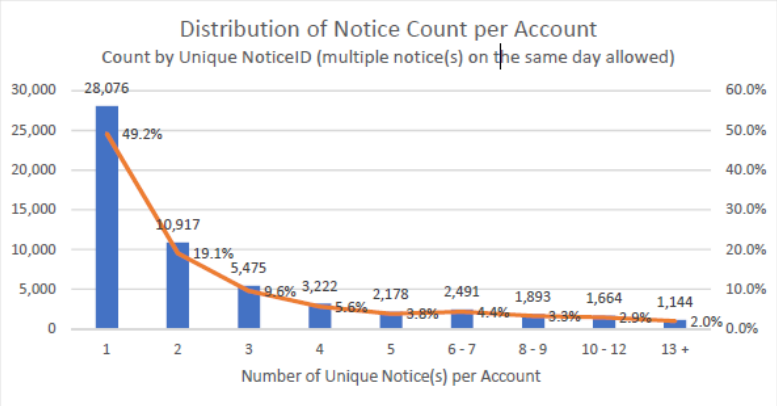
Appendix C

Exhibit C-2

Distribution of Notice Count per Account (1)

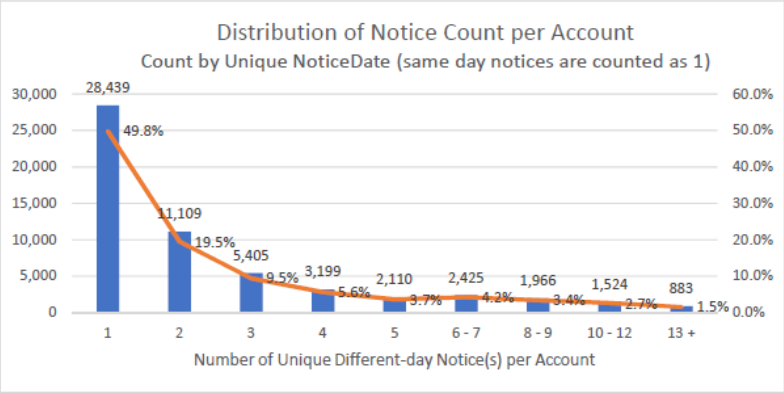
Distribution of Unique Notice Count per Account - Count by Unique NoticeID (multiple Notice(s) on the same day allowed)

Number of Unique Notice(s) per Account	Number of Account(s) (2)	Number of Account(s) as a Percentage of Total	Cumulative Percentage
1	28,076	49.2%	49.2%
2	10,917	19.1%	68.3%
3	5,475	9.6%	77.9%
4	3,222	5.6%	83.6%
5	2,178	3.8%	87.4%
6 - 7	2,491	4.4%	91.8%
8 - 9	1,893	3.3%	95.1%
10 - 12	1,664	2.9%	98.0%
13 +	1,144	2.0%	100.0%
Total	**57,060**	**100.0%**	



Distribution of Unique Different-day Notice Count per Account - Count by NoticeDate (same day Notices are counted as 1)

Number of Unique Different-day Notice(s) per Account	Number of Account(s) (2)	Number of Account(s) as a Percentage of Total	Cumulative Percentage
1	28,439	49.8%	49.8%
2	11,109	19.5%	69.3%
3	5,405	9.5%	78.8%
4	3,199	5.6%	84.4%
5	2,110	3.7%	88.1%
6 - 7	2,425	4.2%	92.3%
8 - 9	1,966	3.4%	95.8%
10 - 12	1,524	2.7%	98.5%
13 +	883	1.5%	100.0%
Total	**57,060**	**100.0%**	



Notes:

(1) Per the McCabe Data File, Plaintiff_00288853, which contains 1,248,063 rows and 70 columns. In this file, there are 57,061 unique IcomsIDs and 160,348 unique NoticeIDs. The Notice dates range from 2/4/13 to 11/26/14.

(2) Excludes an account (IcomsID 2527347) that has only 1 NoticeID, which is null. The complaint was not sent from antipiracy2@riaa.com.

COX'S PROPOSED JURY INSTRUCTIONS

Defendants Cox Communications, Inc. and CoxCom, LLC ("Cox"), submit these proposed jury instructions. Cox reserves the right and requests the opportunity to supplement these proposed jury instructions with additional instructions in the event that issues arise in pretrial rulings or during trial and for all other purposes contemplated by the Local Rules and Federal Rules of Civil Procedure.

[Filed Nov. 25, 2019]

Cox's Proposed Jury Instruction No. 27

27. Contributory Infringement

A copyright may be infringed by contributory infringement. With certain exceptions, which I will explain below, a person is liable for copyright infringement by another if the person, acting with the intent to cause direct copyright infringement of specific works, materially contributes to such infringement. Plaintiff has the burden of proving each of the following by a preponderance of the evidence for each of Plaintiffs' copyrighted works at issue.

- First, that there was direct infringement of Plaintiffs' copyrighted work by subscribers using Cox's Internet service;

- Second, that Cox actually knew of the specific act of direct infringement of Plaintiffs' copyrighted work; and

- Third, that Cox induced, caused, or materially contributed to the infringement of Plaintiffs' copyrighted work.

To establish contributory infringement, it is not enough for Plaintiffs to prove that Cox *should* have known of direct infringement of a specific copyrighted work at issue. It is also not enough for Plaintiffs to prove that Cox actually knew that direct infringement of Plaintiffs' works was occurring *in general* on its network. If you find that Plaintiffs proved that a specific act of direct infringement

occurred, then a copyright notice sent to Cox by Plaintiffs or their agent that specifically identifies the time, subscriber, and copyrighted work with respect to that act of infringement provides sufficient knowledge of it.

However, if you find that Cox's service has substantial non-infringing uses, you may not hold Cox liable unless you find that Cox promoted or encouraged the use of its service to infringe Plaintiffs' copyrights.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil No. 1:18-cv-950 (LO / JFA)

SONY MUSIC ENTERTAINMENT, *et al.*,
Plaintiffs,

v.

COX COMMUNICATIONS, INC, *et al.*,
Defendants.

COX'S REVISED PROPOSED JURY INSTRUCTIONS

Defendants Cox Communications, Inc. and CoxCom, LLC ("Cox"), submit these proposed jury instructions, which have been revised to reflect developments in the case since Cox's original proposed jury instructions were filed. Cox reserves the right and requests the opportunity to supplement these proposed jury instructions with additional instructions in the event that issues arise in pretrial rulings or during trial and for all other purposes contemplated by the Local Rules and Federal Rules of Civil Procedure.

* * *

Cox's Proposed Jury Instruction No. 33

33. Statutory Damages—Willfulness

Infringement is considered willful if the defendant had knowledge that its actions constituted copyright infringement. If you find that Cox is liable for contributory or vicarious infringement, such infringement is considered willful if Plaintiffs prove by a preponderance of the evidence that either:

- Cox knew that its actions constituted contributory or vicarious infringement of Plaintiffs' copyrights; or

- Cox acted with reckless disregard for its contributory or vicarious infringement of Plaintiffs' copyrights.

Authority: *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 799-800 (4th Cir. 2001) ("In this case, the district court found that the defendant's infringement was not willful, and we conclude that the court's finding is not clearly erroneous. Although the Copyright Act does not define willful infringement, other circuits have held that infringement is willful if the defendant 'has knowledge,' either actual or constructive, 'that its actions constitute an infringement,' *Fitzgerald Publ'g Co. v. Baylor Publ'g Co.*, 807 F.2d 1110, 1115 (2d Cir.1986), or recklessly disregards a copyright holder's rights, *see N.A.S. Import Corp. v. Chenson Enterprises*, 968 F.2d 250, 252 (2d Cir.1992); *see also RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 779 (8th Cir.1988) (holding that a

defendant does not act willfully within the meaning of the statute if he believes in good faith that his conduct is innocent). In this case, substantial evidence supports the district court's finding that Morris Costumes neither knew nor should have known that it was infringing Lyons' copyrights."); 3B Fed. Jury Prac. & Instr. § 160:53 (6th ed.) [46] ("'Willful' means defendant had knowledge that [its] [his] [her] actions constituted copyright infringement."); Model Civ. Jury Instr. 9th Cir. 17.37 (2019).

* * *

Dated: December 12, 2019

Respectfully submitted,

/s/ Thomas M. Buchanan
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[822] **IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA**

[Dec. 19, 2019 File Stamp]

Alexandria Division

Civil Case No. 1:18-cv-950
Hon. Liam O'Grady

SONY MUSIC ENTERTAINMENT, *et al.*,
Plaintiffs

v.

COX COMMUNICATIONS, *et al.*,
Defendants.

VERDICT FORM

We, the jury in the above-captioned action. answer the questions submitted to us as follows:

LIABILITY: CONTRIBUTORY AND VICARIOUS INFRINGEMENT

1. Did Plaintiffs prove by a preponderance of the evidence that Cox was contributorily liable for infringement?

Answer: Yes X No ____

2. Did Plaintiffs prove by a preponderance of the evidence that Cox was vicariously liable for infringement?

Answer: Yes X No ____

If you answered "NO" to both Question 1 and Question 2, DO NOT answer any more questions.

3. Plaintiff have asserted infringement claims for 10,017 works. How many of the works did Cox vicariously or contributorily infringe?

Answer: 10,017 works (up to 10,017)

[823] *If you answered "YES" to either Question 1 or Question 2, and filled in the blank in Question 3, please proceed to Question 4.*

WILLFUL INFRINGEMENT

4. Do you find by a preponderance of the evidence that Cox's contributory or vicarious infringement was willful?

Answer: Yes X No ____

AMOUNT OF DAMAGES

Answer Questions 5 and 6 only if you answered "YES" to Question 1 or 2.

If Not Willful	You must award damages between $750 and $30,000 per work infringed

If Willful — You must award damages between $750 and $150,000 per work infringed

5. What amount of statutory damage do you award for each work contributorily or vicariously infringed?

Answer: $ 99,830.29 per work

6. What is the total amount of damages you award to Plaintiffs in this case?

   a. Calculate the total damages, if any, by multiplying the number of infringed works in your answer to Question 3 times the damages per work in Question 5.

   Number of works infringed 10,017

   X Damages per work $ 99,830.29

   TOTAL DAMAGES $ 1,000,000,000

Please sign and return the verdict form.

Jury Foreperson REDACTED Date 12/19/19

JA-94

No. 21-1168

In The
United States Court of Appeals for the Fourth Circuit

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs-Appellees,

v.

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

On Appeal from the United States District Court for the Eastern District of Virginia
No. 1:18-cv-950 (LO/JFA)
Hon. Liam O'Grady

FINAL OPENING BRIEF FOR DEFENDANTS-APPELLANTS

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September 8, 2021

* * *

[Page 43]

B. As a matter of law, Cox did not materially contribute to every act of infringement for which it was held liable.

This Court should also reverse for the independent reason that, as a matter of law, Cox did not "materially contribute[] to [each accused subscriber's] infringing conduct." *CoStar*, 373 F.3d at 550 (quotation marks omitted). To prevail on their material contribution theory, Plaintiffs needed proof that Cox provided "substantial assistance" to every infringer in committing every act of infringement, *BMG*, 881 F.3d at 309, and that this assistance amounted to "culpable…conduct" equivalent to aiding and abetting the infringement, *Grokster*, 545 U.S. at 936-37. See *BMG*, 881 F.3d at 309 (recognizing aiding and abetting "analog to contributory infringement" (quotation marks omitted)). As a matter of law, Plaintiffs did not satisfy this element as to *any* infringement at issue—let alone for *every one* of them.

1. The district court was flatly wrong in asserting that Cox provided a material contribution because "high-speed internet services were necessary to the infringing actions" such that "Cox was indispensable to each instance of [peer-to-peer] infringement on its network." JA882. On this rationale, Cox substantially assisted every

* * *

[Page 55] had specific enough knowledge of the infringement occurring on its network that Cox could have done something about it." JA800. That virtually foreordained the jury's verdict, on material contribution, that Cox should have "done" that very "something." And instructing the jury that Cox "could have done something about [infringement]" tainted the vicarious liability verdict as well, effectively directing a verdict that Cox could have supervised and controlled subscriber behavior.

Overturning summary judgment on knowledge also requires vacatur of the willfulness finding, and therefore damages. As noted above (at 51 n.2), the district court essentially directed a verdict on willfulness when it instructed the jury, over Cox's objection, that Cox was willful "if plaintiffs prove … that Cox *had knowledge* that its subscribers' actions constituted infringement of plaintiffs' copyrights."[3]

---

[3] This Court approved the district court's instruction in *BMG*. 881 F.3d at 312-13. Cox preserves its objection that such an instruction erroneously conflates Cox's knowledge that *subscribers'* actions may violate the law with knowledge that *Cox's* actions may violate the law. JA704, 744-45.

JA804 (emphasis added). And since the willfulness verdict is tainted, so too is the jury's decision to award an amount that far exceeds the $30,000 limit for non-willful infringement. *See* 17 U.S.C. § 504(c)(1).

[260] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 1

TRIAL TRANSCRIPT

December 2, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

* * *

[*6] All right. The preliminary motions then. I understood there were—that we had a couple of preliminary matters.

MR. OPPENHEIM: Yeah, I think, Your Honor, just a couple of housekeeping matters.

I think still outstanding is the question of what the preliminary instruction will say with respect to the safe harbor and with respect to the infringement notices.

Also, I think one of the other issues that was—substantive issues that was outstanding was the question of what to do with the employee reviews for Messrs. Zabek and Sikes. And I believe that the Court indicated that to the extent that Cox intends to throw them under the bus, for lack of a better expression, that we then should be allowed to use the employee reviews. But, obviously, we need to know that in advance.

THE COURT: Yeah, that's the way I thought I wrote it up. And if it becomes relevant, then you can use them. And don't refer to them in your opening statements, but wait and see—and I understand you're in a position where you're not going to know, perhaps, until later in the case and you're unsure how that's all going to work out.

MR. OPPENHEIM: Yeah, I'm not sure how I'm going to use them if they—

THE COURT: Yeah.

[*7] MR. OPPENHEIM: If they use them at the end of their case, if they do that—excuse me—not use the documents—

THE COURT: Right.

MR. OPPENHEIM:—but if they throw them under the bus at the end of the case, and I don't have the witnesses available to put forward those reviews, I'm foreclosed.

THE COURT: Yeah, I understand that. And it's a valid point that we really didn't close the loop on. So I understand. All right.

Well, I guess the time is now then, Mr. Elkin, and what is your intent with the Cox witnesses? Is the company going to take the same position as it did in BMG with regard to trying to minimize fault just in the—within that small circle of people?

MR. ELKIN: Thank you, Your Honor. No, we're going to stand shoulder to shoulder, Mr. Zabek and Mr. Sikes. There will be no throwing them under the bus.

THE COURT: Okay. All right.

MR. ELKIN: One thing that I think we discussed when we were before Your Honor last week was the verdict sheets. We exchanged as Your Honor ordered.

THE COURT: Yeah, thank you.

MR. ELKIN: We could not reach an agreement. We're still going to meet and confer with the other side to see whether we can narrow the issues. I don't think it's something [*8] that Your Honor necessarily said the Court would take up now, but I just wanted to highlight that.

There are some issues that we might have that would inevitably key off of Your Honor's decisions with respect to the opening instructions. But I think rather than to belabor that, we should just wait for that.

THE COURT: Well, I'm going to give a little fuller explanation to the jury in preliminary instructions. I'm going to describe—I'm going to give a shortened version of the fact that the safe harbor provision is not a defense in this case. I'm not going to talk substantively about the laws.

I am going to give a version of the infringement, both contributory and vicarious liability. I think that the plaintiffs' instructions that they proposed, especially for contributory infringement, track the Fourth Circuit's decision, you know, word for word, and I'm going to give that.

I'll tell them that they'll have a more fulsome body of instructions at the end of the case, but I wanted to give them just a brief overview and leave it at that.

MR. ELKIN: Thank you, Your Honor. I think the only thing that—without seeing the instruction on the DMCA that I think was made last week, and I'm

sure will be observed, is this notion under Section 512(l) that even if we litigated and presented and lost the DMCA defense here, as we did in BMG, it doesn't have a bearing on underlying liability.

* * *

[OPENING STATEMENT BY OPPENHEIM]

[263] [*37] held liable for the actions of its users, remember there is a legal way for companies like Cox to avoid these lawsuits, but Cox can't take advantage of that here.

Let me turn to the infringement evidence in this case. At the heart of this case is Cox's continued provision of service to subscribers that were illegally distributing music using peer-to-peer networks. So what is a peer-to-peer network? It's basically an online network that enables strangers to distribute an endless number of digital copies of anything from books to software to music to movies, anything you want, across the internet.

Now, in this case, a large number of Cox customers were using peer-to-peer networks to illegally copy and distribute plaintiffs' music. Now, we have no idea how many Cox customers were using peer-to-peer because peer-to-peer activity is done privately, and Cox didn't track what its user were doing and didn't maintain records, so there's no idea how many Cox subscribers were actually infringing.

When a Cox customer is distributing on a peer-to-peer network, they are essentially running the equivalent of a digital record store. I know there are very few record stores anymore, but if you remember, there used to be record stores. And so when a Cox subscriber is using a peer-to-peer network to distribute music, they're essentially a digital record store where they're providing an unlimited number of perfect digital [264] [*38] copies of recordings, and they keep no records of how many copies they give out, and you can't possibly see how many people go in the store to get them.

So while we do not know the exact numbers, you will hear evidence of over 57,000 Cox subscribers who were infringing on plaintiffs' copyrights during the period at issue in this case, 2013 to 2014. That is over 57,000 private digital record stores on Cox's network distributing plaintiffs' music for free without permission.

Now, Cox knew that its network was being used for piracy. For years, Cox had been measuring what its subscribers were doing on the network. Cox had detailed data that demonstrated that peer-to-peer piracy was one of the primary uses of its network and that it was a—that peer-to-peer activity was, in fact, driving increased bandwidth demand at Cox. Now, Cox liked this because they could sell their customers who needed more bandwidth a higher tier of service and make more money from those customers.

So while Cox liked peer-to-peer piracy, it didn't fare well for the record industry. In fact, peer-to-peer

piracy had a devastating effect on the music industry. Between 2004 and 2012—excuse me, 2004 and 2014, the use and enjoyment of music went through the roof. People were discovering things, new devices and iPads and iPods to listen to music in ways they never had before. You could listen to [265] [*39] music on your phone. You could listen to music in—on your computer. There were lots and lots of ways to listen to music, and so consumption was going up and up and up, and so you would have expected that's great for the music industry.

No, it wasn't. And, in fact, what you see is that between 2004 and 2014, because of peer-to-peer piracy, annual revenues went down year after year and were cut in half, cut in half.

You can imagine that if you go to work every day and you do the same thing and you get paid a little less and a little less and a little less, so ten years later you're making half of what you were before, ten years before, that's what was happening to the record industry. And yet everybody was listening to their product.

So in 2008, the record industry began sending infringement notices to Cox. These infringement notices informed Cox about specific Cox subscribers who were infringing on music copyrights. These were the people running the digital music record stores.

And as you will hear, there were many other content companies that were also sending infringement notices to Cox. It wasn't just the record

industry. It was movie studios, game companies, lots and lots of others.

Well, the record industry used a company, a very well-known and well-respected company, antipiracy vendor called

* * *

[268] [*49] blacklisting. In some instances, Cox simply refused to accept any notices from a rights owner. In the case of a company called BMG Music, who is not a plaintiff in this case, Cox blacklisted their antipiracy company called Digital Rightscorp, or DRC, and you'll see some e-mails about that. The records show that Rightscorp sent Cox over a million notices. Cox simply refused to accept any of them. It's hard to imagine greater willfulness than that.

As the number of infringement notices increased, Cox made change after change to be more lenient towards the infringement, and the effect of the five cheats, or the five ways that Cox was gaming the system, had a dramatic impact. What Cox was telling the public was: We take it seriously. What Cox was doing internally was not taking it seriously.

As part of the charade internally at Cox—as part of its charade internally at Cox, the department charged with implementing graduated response was called the abuse group. The group is later renamed the safety department, but as you will see, it really was an abuse group.

The abuse group was at the heart of Cox's effort to avoid implementing its so-called no infringement policy. Rather than stopping the infringement on Cox's network and protecting the law and the rights of artists, the abuse group dedicated itself to protecting Cox's customers by not terminating those who were caught over and over again.

[269] [*50] For many years, the abuse group was run by an individual by the name of Jason Zabek, and his lieutenant was Joseph Sikes. Mr. Zabek and Mr. Sikes were long-time valued employees at Cox. Unfortunately for the music industry, Mr. Zabek and Mr. Sikes were the proverbial foxes guarding the henhouse. They were responsible for overseeing the department that handled the infringement notices.

Mr. Zabek and Mr. Sikes saw little value in copyrights or in copyright owners, but don't take my word for it. Here's an e-mail that demonstrates the point. In response to a question from another ISP, Mr. Zabek made his views of the copyright law clear: F the DMCA.

In this e-mail chain, they are discussing infringement notices from Digital Rightscorp, who I mentioned a moment ago, who had been blacklisted. So in response to Mr. Zabek, Mr. Sikes added his two cents: So, yeah, F the DRC.

Matt Carothers, who is Cox's principal security architect, responded to this e-mail. Now, his response was not: Hey, Cox needs to respect the copyright law and the 20 copyright owners.

What did he say? He says: Sorry to be Paranoid Panda here, but please stop sending out e-mails saying F the law or F some company. If we get sued, those e-mails are discoverable and would not look good in court.

Mr. Carothers was right. Incredibly, those few words

* * *

[DIRECT – DENNIS KOOKER]

[279] [*106] MR. ELKIN: No objection, Your Honor, now that I know what it is.

THE COURT: All right. Thank you, sir.

Please go ahead. It's received.

MR. ZEBRAK: Thank you.

BY MR. ZEBRAK: (Continuing)

Q. Let's start again, Mr. Kooker.

A. Sure.

Q. So if you could turn your attention to the first tab in that—in that document.

A. Yes.

Q. And do you recognize what's there?

A. Yes. This is a list of the plaintiffs' copyrighted sound recordings in this case.

MR. ZEBRAK: Your Honor, with the Court's permission, we would like to move PX 1 into evidence.

THE COURT: It's received.

MR. ZEBRAK: Thank you, Your Honor.

BY MR. ZEBRAK: (Continuing)

Q. Mr. Kooker, how many record companies' sound recordings are on that list that you have at Plaintiffs' PX 1 in front of you?

A. 6,734.

Q. Thank you. And if you could also look at that document and tell me, how many Sony Music sound recordings are on that [280] [*107] list of sound recordings in this case?

A. 3,225.

Q. Thank you. You can turn the binder closed for now. Thank you.

So let's—let's explore a little more about the background in the music industry. Could you tell the jury something about the different types of jobs that there are in the record industry.

A. Sure. So I touched a little bit on the creative—some of the creative-oriented jobs from talent scouts to producers and engineers. But in addition to that, we have marketing and promotion staff, sales teams,

and then support functions like Human Resources, legal and business affairs, finance.

Q. And are these jobs all within record companies?

A. These are jobs that are typical within record companies, yes.

Q. And could you describe the value that record companies add to the creation of music.

A. Yes, it's very significant. You know, I think about—you know, when I think about the value that we add, I think about the 5,000 employees who literally wake up every day focused on our artists, our roster, to maximize what ultimately—you know, the creative works that they are putting into the marketplace.

Q. So you mentioned your roster. What does it mean for an [281] [*108] artist to be signed by a record company?

A. It's very significant. I think it's, you know, a recognition that they have achieved a very significant level in the development of their career if they're serious about being a musical artist for their career.

Q. And what's the impact on the artist of being signed by a record company?

A. Especially when it's the first time for an artist, it's pretty incredible. And I can think of an example in the last couple of months where we had a new and developing artist that had been signed to one of our

labels, they came into our building, we have a giant billboard screen as you walk in the building, and it said congratulations to the artist for signing to the label. And she immediately broke into tears, took a picture, sent it to mom. It's a really big deal.

Q. And what happens with the artist, generally speaking, after they have been signed to a deal?

A. Really that's the beginning. You know, from that standpoint then we start focusing on making records, making singles, making albums. And at the point in time when the creative process is completed, then a marketing plan will be put together, a sales strategy.

So that signing is really just the beginning of all of the hard work that is yet to come.

Q. And then walk the jury, please, through what happens in [282] [*109] terms of the recording process and then thereafter.

A. Sure. So, you know, the recording process will be, you know, working with an artist, putting them in a studio, matching them up with collaborators, potentially with songwriters if necessary if they haven't written all of their own music. And also with talented engineers, with talented studio musicians to ultimately make a recording.

Q. And then what happens once the recording is made?

A. Once the recording is made, then typically what would happen is a marketing plan would be put

together, which would be really planning to release that new music into the marketplace. A sales strategy and sales plan working with all of our retail partners would then accompany that marketing plan.

And those two components would really lead the release into the market when consumers like us hear it for the first time.

Q. Could you explain what are generally the core assets of record companies?

A. Yeah. First and foremost, it's the music. The music is our asset. It is how we generate our revenue. It is the life blood of the business. But beyond that, you know, for me, and especially coming from the business side of things, it was important to understand that our business is built on artists. Our most important stakeholder is the artists.

[283] [*110] But in addition to that, you know, we work with a very unique product. It is not a hard good. You know, the product that we are working with is ultimately a human being, very talented human beings.

And because of that, you know, those 5,000 people at Sony Music that wake up each day thinking about that have very unique skill sets. You know, so that is also a key asset to ultimately running and being a successful company in a creative industry.

Q. So Cox has made the argument that record companies just collect money for themselves and not their artists. Did you have a reaction to that?

A. Yeah. I could not disagree more. Ultimately, you know, my job is doing what I do on behalf of our artists. And if I don't do it well, then artists stop signing to me. And in today's world, an artist has many, many choices in the marketplace.

And so, you know, ultimately I have to deliver for that artist. And that means that I have to look out for what's best for them. I have to protect their intellectual property, their copyrights, and I have to maximize the commercial opportunity for those copyrights in the marketplace.

Q. Sure. And you used the term "royalties" before. Could you explain what royalties are with respect to the record company's relationship.

[284] [*111] A. Yeah. So royalties are the term that is used to designate the payment that is made from the record company to the artist. It's usually based on a contractual relationship between the record company and the artists. And it's usually paid as a percentage of the revenues that are collected on behalf of that artist.

Q. Are copyrights among the core assets of record companies?

A. Copyrights ultimately are absolutely the core asset of the company. They are the music. They are the thing that protects the music, that allows us to

enforce that protection, and ultimately it is what we are monetizing and commercially delivering in the marketplace that generates revenue for the company and for the artist.

Q. What relationship, if any, is there between protection of copyright and the royalties that artists obtain?

A. I think they go hand in hand. If there is no protection of the copyright, then ultimately no one is—there is no remuneration, there is no payment being made, and ultimately the artist is not able to get paid a royalty.

Q. Sure. Let's talk a little bit about how record companies generally make money for themselves and the artists.

A. Sure.

Q. Could you explain how that has worked historically.

A. Yes. So historically, you know, all the way back to the '50s and '60s, you know—and the business has gone through a

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[293] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

Case No. 1:18-cv-950

VOLUME 2 (A.M. Portion)

TRIAL TRANSCRIPT

December 3, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

* * *

[CROSS - DAVID KOKAKIS]

[299] [*173] individual subscribers?

A. Did you Universal Publishing Group?

Q. Yes.

A. Not to my recollection, no.

Q. So do you recall ever suing individual subscribers?

A. When you say "individual subscribers," I need that clarified, if you don't mind. I don't know if you mean to Cox or to—

MS. NOYOLA: Objection, Your Honor.

THE COURT: I am sorry, the objection? What's the objection?

MS. NOYOLA: Who are the individual subscribers?

MR. OPPENHEIM: Subscribers to what?

MS. NOYOLA: To what?

BY MR. BUCHANAN: (Continuing)

Q. Subscribers to Internet service providers, the people who download the music illegally. File sharers.

THE COURT: Go ahead.

A. Within the Cox echosystem or outside of it? Because there are individuals who we take issue with who we send claim letters to. Many of them operate on YouTube, on Facebook, on Twitter.

Specific to Cox? I can't recall any.

Q. So I direct you to page 14 of your deposition. Why don't you start at line 10. It says: Were any of these lawsuits [300] [*174] directed at entities that provide file sharing services, such as BitTorrent, or PirateBay, or entities such as that? Not directly, no. Were any directed at individual users of the Internet, people? Some, yes.

So how many?

A. I don't know how many. And I can tell you that, as I mentioned, in the normal course we try not to go after individuals when there is a large multibillion dollar corporation behind the scenes driving the getaway car. And that's what's at case here.

I mean, yeah, we could go after tens of millions of individuals, students, and children, and grandmothers. That's not a prudent use of our resources or something that we want to do.

Q. Okay. So the people that are actually doing the downloading, as you just described, are students, grandmothers, and children. So they are the ones that do it.

And so what you're saying is that Cox, on behalf of a notice that you didn't send, should terminate—

MS. NOYOLA: Objection, Your Honor.

Q. —grandmothers, children, and students.

THE COURT: Hold on. Stop. Hold on.

If there is an objection, make it louder so that Mr. Buchanan can hear it over his asking his own question.

And it's overruled.

[301] [*175] Can you answer the question?

THE WITNESS: If you could repeat the question, I would appreciate it.

BY MR. BUCHANAN: (Continuing)

Q. So you just said that UMPG, which is part of a $30 billion conglomerate, makes a decision—

MS. NOYOLA: Objection, Your Honor.

Q. —not to sue—

MS. NOYOLA: Objection, foundation.

THE COURT: The fact is not in evidence. Just ask the specific question in response to his last answer.

BY MR. BUCHANAN: (Continuing)

Q. The question is, you just testified that you did not pursue children, grandmothers, and students because you wanted to pursue the one that was driving the getaway car.

So, however, you're saying that when they get a notice, a single notice of a copyright from UMPG or anybody else, that Cox should then terminate the student, the child, or the grandmother; is that right?

A. No, I didn't say any of that. But I will explain if you'd like because I see where you're going with it.

Q. I just—

A. Well, no, I didn't—you're putting words in my mouth. I did not say that they get one notice and they should be terminated.

[302] [*176] THE COURT: Okay, next question.

Q. Okay. So two notices and you cut off the child and the family?

A. I didn't say that either.

Q. Three notices?

A. I didn't say that either. However, I will say—

Q. How about for a military base or a hospital, how many notices should we send them and then terminate them? After how many notices?

A. Sir, the law is quite clear on this. Cox had an obligation to enforce the law, and it failed to do so.

And we have recourse because of that, irrespective of who may have actually been file sharing, Cox still had an obligation legally and it did nothing. And that's what's at issue here.

THE COURT: Next question.

A. Not the grandmother or the child who might be engaging—

THE COURT: Next question.

THE WITNESS: Sorry, sir.

BY MR. BUCHANAN: (Continuing)

Q. So the children and the grandmother and the student, these people when they're copying your works, they're not doing anything illegal?

A. I didn't say that, no.

Q. Okay.

A. No, not at all. They are doing something illegal.

[303] [*177] Q. Okay.

A. The party against whom we choose to enforce our rights is our choice to make. That's—

Q. Oh, really?

A. Yes, absolutely.

Q. Selectively, you can just select who you want to sue?

A. Well, if somebody is breaking the law, we have the right to go after that party.

Q. Right. And you had the right—

A. And in this case we're talking about Cox breaking the law, so we decided to go after Cox—

Q. But you talk about—

A. —to facilitate the—

THE COURT: Yeah, all right.

THE WITNESS: Sorry, sir.

THE COURT: All right. Only one person can speak at a time or we don't get the recording. And now you're just—you've completely lost the jury. You're just arguing the law. It's not your job to argue what the law is or what it's not.

Mr. Buchanan, ask questions that are factual in nature that you want to get the answer to, and let's move on.

BY MR. BUCHANAN: (Continuing)

Q. So you would agree that in residential households where grandmothers, or children, or kids are downloading music illegally, they are the ones that are actually doing the

* * *

[304] [*179] after? Name me one that you went after.

A. On the Cox—

Q. An individual thief.

A. On the Cox platform during this—

Q. No, just any platform, Verizon, Comcast, Time Warner. Who were thieves out there that you just identified and did you sue them?

A. I can give you a list, if the Court would please, of everyone we've sued during this period and beyond if you would like. I can't recall specific names. There are a lot of them. So excuse me for not being able to name names.

But I could tell you that in most instances when there is an individual involved, and we go and issue a take-down notice, or we issue a cease and desist letter, they're responsive and they comply. Okay. In instances when they refuse to engage with us, then we have to escalate matters.

The reason that we choose not to typically go after individuals is because there are millions of them and it's untenable. So why not go to the source of the problem, which is the platform facilitating rampant and blatant theft? That's what makes sense to us. And that's why we chose to name Cox as the defendant to sue in this case.

Q. What about the platforms, the piracy networks? BitTorrent, have you sued them?

[305] [*180] A. There have been instances when companies like Megaupload were sued, yes. And that

is a direct BitTorrent site that was the subject of protracted litigation.

Q. So in fact, you testified in another proceeding that when platforms like LimeWire, or Megaupload, or PirateBay are taken out, that dramatically reduces piracy and drives up sales; isn't that true?

A. That's accurate, yes.

Q. Okay. So in this case we have Ares, we have eDonkey, we have Gnutella, and BitTorrent. Which one of those entities, the platforms that were providing the access to do the downloading by the grandmothers, and the children, and the students—

A. And the thieves.

Q. And how many of those entities have you suited?

MS. NOYOLA: Objection, Your Honor.

THE COURT: Overruled.

A. Universal Music Publishing Group has not sued any of those specific platforms. LimeWire was the subject of litigation. PirateBay was the subject of litigation. Megaupload was the subject of litigation. The record labels, as in this case, took the lead on those litigations and we didn't have to take a proactive role because we knew that our rights were being implicated as well and our copyrights were involved in those cases.

[306] [*181] Q. So what record label companies have sued the platforms that provide the access to do the

unlawful downloading, the peer-to-peer sharing that we're talking about here, eDonkey, Ares, Gnutella, and BitTorrent? Which of the—

A. Of those specific companies?

Q. Have sued them. Tell me—tell me who else has sued them that that is a plaintiff in this case?

A. Those specific companies?

Q. Yes.

A. I'm not aware of any. I don't have personal knowledge of that.

Q. But you just said you piggybacked on lawsuits, suggesting that the record label companies had gone after them. So what you're saying is they have not?

A. No, that's not what I'm saying. I said that they went after LimeWire, Megaupload, and PirateBay.

Q. Okay. When did they go after PirateBay?

A. Those are the three biggest—I don't recall the year. I don't recall—

Q. When did they go after LimeWire?

THE COURT: Stop.

A. Sir, I'm not an encyclopedia.

THE COURT: Let me answer the question and ask your next question, or we can't get this down on—

BY MR. BUCHANAN: (Continuing)

* * *

[DIRECT – ALASDAIR MCMULLAN]

[*222] Q. And what kind of genres of music does UMG have within its catalog?

A. Oh, it spans all genres of music. It obviously has some of the most popular music of today, pop music. It has a large rap/hip hop catalog. It has a classical catalog. It has a phenomenal jazz catalog, Blue Note, Verve, Decca. Country music, we have a business in Nashville. Latin music, we have a business in Miami.

Q. I'm sorry, did you say Blue Note?

A. Blue Note.

Q. Can you just describe for the jury what Blue Note is?

A. Blue Note was—is a historic jazz label that dates back to 1939. Some of the most iconic and famous jazz recording artists recorded for Blue Note. And it's a label that, you know, we are pretty proud that it still operates today, still puts out music today.

Q. Do you recall some of the artists in the Blue Note catalog?

A. Herbie Hancock, John Coltrane. I mean, Norah Jones. I mean, again, it spans decades of musical history.

Q. Are you familiar with some of the works that are asserted were infringed in this case?

A. I am.

MR. OPPENHEIM: Your Honor, we would like to publish PX 1, which has already been admitted.

[*223] THE COURT: Right. Go ahead.

BY MR. OPPENHEIM: (Continuing)

Q. Mr. McMullan, have you seen this document before?

A. I have.

Q. And can you describe what it is for the jury, please.

A. It's a list of the recordings that the plaintiffs in this case contend were infringed by defendant in this case.

Q. And I have asked that we flip to the pages of the UMG recordings. And are these some of the UMG recordings that are in this case?

A. Those are, yes.

Q. And are you familiar with some of these recordings?

A. I am familiar with many of them.

Q. And why?

A. These—many of these are very popular recordings that I am familiar with either through working in the business or just familiar with through being a fan of music.

Q. Were you involved in the preparation of a medley of some of these recordings for purposes of the jury?

A. I was.

MR. OPPENHEIM: Your Honor, permission to play a short medley.

THE COURT: Any objection?

MR. BUCHANAN: No, Your Honor. I will have to listen to the music first, and then I may have an objection.

[*224] MR. OPPENHEIM: I think—

THE COURT: All right. Let's go ahead.

MR. OPPENHEIM: I think he's going to like it, Your Honor.

NOTE: A music excerpt is played.

BY MR. OPPENHEIM: (Continuing)

Q. Mr. McMullan, can you describe the importance of recordings like the ones we just heard to UMG?

A. That's some very key hit music that UMG has helped bring to the world. I mean, some of those are iconic pieces of our culture. I heard music that I used

to play in a bar band when we did covers. I heard my prom song in there, "Wonderful Night."

I mean, it's just very important music from very important recording artists.

Q. So let me turn now away from the legitimate recordings that we just listened to and turn to the infringing ones.

Have you had occasion to listen to any of the infringing recordings in this case?

A. I did.

Q. How many?

A. I listened to 100 of them.

Q. And do you recall how the 100 recordings were selected?

A. They were picked randomly by a computer.

Q. And why did you listen to them?

[*225] A. I understood that during the course of this case there was some issue raised about whether the recordings were in fact copies of our recordings. We believe that the technology used to find and select them is essentially infallible, but, you know, I wanted to listen for myself and put aside any possible doubt. And I listened to 100 of them.

Q. And when you say the issue was raised, do you know—who do you understand raised the issue?

A. Oh, I understand it was raised by Cox.

Q. And was there a reason you didn't listen to all of the UMG recordings in this case?

A. Well, it's thousands of recordings, I think. So—

Q. And after you listened to them, what conclusion did you come to?

A. They were exact copies of our copyrighted sound recordings.

Q. How did they sound?

A. They sounded great. They sounded like exact copies of our sound recordings.

Q. In your position at Universal Music Group, do you deal with piracy issues?

A. Unfortunately, I do.

Q. So at a high level, can you describe for the jury what piracy is.

A. Piracy is essentially the theft of our content. It's the

* * *

[314] [*227] Q. Let me interrupt you. When you say "one-to-one," what do you mean by that?

A. Well, like a copy would be made in a factory or somewhere and it had to get into someone's hand. With Internet piracy, peer-to-peer piracy, unlimited

copies can be generated and distributed across the Internet.

Q. Can you describe, at a consumer level, how peer-to-peer piracy works?

A. So if—well, at a user level, someone might have a copy of the recording on their computer, on their hard drive, as well as software that allows them to connect into a peer-to-peer system. And it allows them to distribute a copy of that recording to anyone else who has that peer to peer software client installed and connected to that system.

So that user can upload it into a system where millions of people can have illegal access to the recording.

Q. When—strike that.

I think you said earlier that the business of UMG is to sell recordings; is that right?

A. Yeah, to sell, distribute, license, market recordings.

Q. When UMG sells recordings through a service like iTunes or Amazon, what rights does UMG give the consumer to distribute the recordings on a peer-to-peer service?

A. The consumer gets no rights to do that.

Q. Why not?

[315] [*228] A. Because that would allow a consumer to be in direct competition with our legitimate sales of that music.

Q. In the course of your personal work and time within the music industry, how has peer-to-peer piracy impacted the companies you've worked at?

A. It had a very severe impact. I was at a record company at the time that the first peer-to-peer service launched, it was called Napster, and then multiple other large services allowing millions and millions of people to illegally distribute our recordings developed.

And it had a devastating impact on our business, on the finances of our business, on our ability to invest in new content. And it was all happening at a time when we were trying to figure out what's the best and safest way to sell, market, distribute music through the Internet. And here we were doing it in competition with millions of folks who were giving it away and taking it for free.

Q. When these peer-to-peer networks were first launched, how did the record industry deal with it?

A. We sued Napster. And then we sued another set of services, Kazaa and Grokster. That case actually went to the Supreme Court. And then we sued another company called LimeWire.

We engaged in educational programs to try to educate consumers that they shouldn't be doing this. And we worked [316] [*229] hard to develop a

legitimate business to try to compete with this distribution of free music illegally.

Q. You mentioned a moment ago that Grokster and Kazaa went to the Supreme Court. What happened there?

A. We won that case unanimously. And, you know, each of those companies and businesses, Napster, Grokster, Kazaa, LimeWire, they were all eventually shut down through an expensive legal process.

Q. Are you familiar with the peer-to-peer networks at issue in this case?

A. I am.

Q. Can you list them?

A. I think there is BitTorrent, Ares, eDonkey—BitTorrent, Ares, eDonkey—there might be others. Those are the ones I remember.

Q. With respect to those—

A. Gnutella, I think, is one.

Q. So eDonkey, Ares, Gnutella, and BitTorrent. With respect to those four peer-to-peer networks at issue in this case, why hasn't the music industry just sued those entities?

A. There's no company to sue. There's no entity. This is now—peer-to-peer moved to a decentralized model where, again, consumers have software on their computers and simply communicate with each

other. Nothing goes through a central server. There's no central company to sue.

* * *

[*231] BY MR. OPPENHEIM: (Continuing)

Q. A moment ago, Mr. McMullan, you described a variety of different things that the industry has done in response to peer-to-peer piracy. Did the industry also sue individual peer-to-peer users?

A. There was a time where we did do that.

Q. Can you explain why the industry did that.

A. At that time, I think there were a couple—there were a couple of reasons for it. One, we needed to establish in this sort of new form of piracy that this was illegal and that you should not do it. So we needed the legal precedent to do that.

And secondly, peer-to-peer piracy became such a phenomenon that we were in danger of a generation of people believing that music is free, does not have to be paid for. And we wanted to send that—a message that that is not the case. And we wanted to change behavior and perception on that point.

Q. And did there come a point in time where the industry stopped filing those types of suits on a regular basis?

A. There did.

Q. And why?

A. I think we found other ways. You know, we don't sue anyone lightly. We're a music business, we're not a litigation/lawsuit business. And we believed that there were—the precedence were sufficiently established and that there [*232] were other means by which we could deal with this type of piracy without having to clog the courts with hundreds of lawsuits.

Q. And what were those other means?

A. Well, we—again, we engaged in educational means. But one of the means was sending notices to Internet service providers notifying them of repeat infringers on their systems.

Q. Well, you said notifying them of repeat infringers.

A. Well, notifying them of infringers on their systems and, by nature, infringers who would continue to do it repeatedly. Despite the fact that we had already engaged in a large litigation program against consumers and had established precedence against peer-to-peer networks, there were people that continued to do this.

Q. Were you able to identify who was a repeat infringer and who was not when you were sending notices?

A. No. I think our notices were just—were just identifying there is someone infringing this content on an ISP, and the ISPs can identify who's a repeat infringer.

Q. So what role do the ISPs play in peer-to-peer piracy?

A. Well, the ISPs provide the network by which the piracy occurs and have the ability to—when notified about it, to stop it.

Q. And so what does—what did the record industry expect an ISP, like Cox, to do to address peer-to-peer piracy?

[*233] A. Well, we expected them to do something. We expected them to work with their customers that were infringing to stop the infringement. And if a customer continued to do it, ultimately they might have to lose their service and be terminated.

Q. All right. Are you familiar with the term "infringement notice"?

A. I am.

Q. Can you describe for the jury, at a high level, what an infringement notice is.

A. It's a notice to a company or to someone that on their system there is infringement occurring of a particular work.

Q. Have you ever heard the term "take-down notice"?

A. Take-down notice, yes.

Q. And is an infringement notice and a take-down notice the same thing, or are they different?

A. Well, I mean, a take-down notice might also notify you of infringement. But a take—the purpose of a take-down notice really has to do with the DMCA. And it's a—you know, a notice to a company like YouTube, saying, we found this content on your system, take it down.

And if they do comply with taking it down within the parameters of the law, then, you know, YouTube can avoid a liability for that infringement that it has been notified of.

Q. Are infringement notices, in your experience, typically successful?

[*234] A. Infringement notices are successful if the company that's receiving them takes them seriously and acts upon them.

Q. And what is—what does the record industry expect an ISP to do in response to an infringement notice?

A. Again, we—what we expect them to do is take them seriously, notify their customer, and work with that customer to make the infringement stop.

Q. Are you familiar with the Copyright Alert System?

A. I am.

Q. And what was—let me ask you this. Is the Copyright Alert System still in effect?

A. No.

Q. Okay. So what was the Copyright Alert System?

A. The Copyright Alert System was an attempt by some content owners and some ISPs to work together to see if they could educate and inform consumers within the parameters of a program, to see what impact it might have on infringement across those particular ISPs' networks.

And to provide some learnings back that might help in understanding this consumer behavior and how to curb infringement through this consumer behavior.

Q. From a time frame perspective, do you know when CAS began roughly and ended roughly?

A. I'm thinking 2013 to very early 2017.

Q. And were you involved—I am sorry.

[*235] How long did it take to—do you know how long it took to negotiate the agreement to start CAS?

A. I believe it took a number of years to put that in place.

Q. And were you involved in any way in those negotiations?

A. I didn't—I certainly didn't negotiate anything directly. I was informed of them from time to time.

Q. And at the time those negotiations were going on, where were you working?

A. At the time of the negotiations, the bulk of them, I would have been working at EMI.

Q. And then when you moved to Universal Music Group, were you involved at all?

A. I think when I moved to Universal Music Group, by that time CAS had just—would have just launched. You know, our company was acquired in late 2012, and I think maybe it launched in 2013, shortly thereafter.

Q. And was UMG a participant in CAS?

A. It was.

Q. Who else do you recall was a participant in CAS?

A. Other record companies, Sony and Warner. The movie companies were involved. And then a number of ISPs were involved.

Q. When you say "movie companies," what do you mean by that?

A. Film, the film industry, movie studios.

Q. Like Sony Pictures?

[*236] A. Disney, Sony, Warner Brothers.

Q. And you said several ISPs?

A. And several ISPs. I know—I think Verizon—

Q. Do you recall—

A. —Time Warner, Comcast.

Q. Did Cox participate?

A. No, Cox did not participate.

Q. Do you know whether there were any music publishers who participated in the CAS?

A. No, music publishers were not involved in CAS.

Q. Can you explain how CAS sought to address peer-to-peer infringement.

A. You know, CAS established a board. It established an executive committee. It created a full educational program. And then it prescribed some parameters that the ISPs could use to deal with notices that were given to them by the content owners of infringements occurring on their system.

Q. Do you recall whether there was a—what's called a graduated response within CAS?

A. I guess it was a graduated response. There were educational steps where they would tell a consumer or one of their customers, hey, we have—this infringement has occurred on your system.

There were—there was an increased step where they would force the consumer to interact with them and acknowledge [318] [*237] they got these notices.

Q. What do you mean by "interact with them"?

A. I guess it might put up—if you tried to use your Internet, it might put up a page saying, you've gotten this infringement notice and, you know, click here and acknowledge it.

They had a call center where they might require people to call in. Part of what CAS was was operating a, you know, a call center to field questions.

And then there were, I guess, what you call mitigation measures if it escalated further that might throttle down your bandwidth of your Internet connectivity or slow it down, something to get a user's attention even more.

Q. And do you recall how many steps there were within the CAS graduated response?

A. I think there were these sort of three areas of education, acknowledgement, mitigation. But I think it took you through—it could be either five or six steps. The parameters were given, but each ISP could implement them in a slightly different way based upon what they were interested in, and that would give different learnings on how consumers might react to different methods of communications to them.

Q. When the record industry was sending notices in CAS, did you know how many steps the infringer in the notice had already gone through?

[319] [*238] A. No.

Q. Can you explain that?

A. Well, we were identifying that an infringement occurred and sending that notice to the ISP. But it is the ISP that knows, well, who that infringer is and how many times they have been caught doing this before.

Q. Well, if you didn't know, was it possible—do you understand it was possible that an ISP may have received a notice for a subscriber which would have been past the sixth step?

A. They could easily have gotten notices past the sixth step.

Q. And what did you understand that CAS obligated the ISPs—excuse me. What did you understand that the ISPs had to do with notices that were past the sixth step?

A. Past the sixth step, CAS didn't deal with it. CAS was looking at with these six steps, what has occurred and what can we learn from that. Past the sixth step, the ISPs had to comply with the law.

Just like they had to comply with the law for notices they might be getting from other copyright holders like the publishers outside of CAS.

Q. What obligations did an ISP participating in CAS have to terminate repeat infringers?

A. Well, CAS' six steps didn't have anything to do with terminating infringers. That's not what it was looking at. [320] [*239] But all of these companies had policies that noted that users could be terminated if they engaged in repeat infringement.

Q. In the course of the discussions to create CAS, do you recall there ever being a discussion about having a 14-step graduated response policy?

A. That I don't recall.

Q. Do you—do you recall how many steps the record industry wanted CAS to have?

A. I believe we wanted three steps. We believed three steps was something that we had seen in graduated response programs in other countries that had been effective.

Q. Can you describe that a little more.

A. There were certain countries, in France there was a program called HADOPI that mandated three steps before termination. And the learnings we received from that was that greatly reduced peer-to-peer piracy across networks that were participants in HADOPI.

I think there were similar programs in New Zealand and some other countries.

Q. Sorry, I didn't mean to interrupt you.

A. That's okay.

Q. Do you think CAS was effective?

A. I don't think CAS proved to be a solution to anything. Some learnings may have come out of it that were useful. If it were—if it were highly effective, we would still be

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[CROSS – ALASDAIR MCMULLAN]

[322] [*251] Q. Do you know who was the head of it?

A. I don't off the top of my head, no.

Q. But it was funded by all these entities that were part of CAS?

A. I think it was funded half by the content owners and half by the—

Q. Right.

A. —Internet service providers.

Q. And so, you said that you wanted them to do three, at least do—take three notices and then terminate; is that right?

A. We think a three-notice graduated response would be very effective in curbing infringement of this nature.

Q. Okay. So three notices and then what? That's what I don't get. What happens after three?

A. Well, after three, if a subscriber simply will not stop using these peer-to-peer systems to infringe our content, we think that the Internet service provider should terminate them.

Q. So you said three. And if they continued, how many more infringement notices before you really

think they should shut down the family, or the hospital, or the military base, whatever might—

MR. OPPENHEIM: Objection.

THE COURT: Sustained. Ask the question, Mr. Buchanan.

[323] [*252] MR. BUCHANAN: Okay.

BY MR. BUCHANAN: (Continuing)

Q. So we're talking about a residential home, okay? At what point should they cut off their Internet service?

A. I think that if the ISP takes appropriate action to notify and inform its customer what's happening on the system that through their household is illegal and shouldn't happen, we think that if that continues to occur and it occurs three times, I do think it might be appropriate to terminate that customer.

But we would hope it doesn't get to that. We're not here to require terminations. We want responsible companies to do responsible things, to work with their customers to stop infringements.

And certainly in the—as to what Cox did, they fell down on that responsibility entirely.

Q. Okay. So I want to get back to the three. What you negotiated under CAS was six steps, or alerts rather, right?

A. I think—

Q. Each step had an alert with it that got a little bit different, depending on the content owner?

A. The alert was what the ISP sent to its customer.

Q. Right. That was a notice, right?

A. No, the notice was what we sent to the ISP.

Q. Yeah. So do you know, did the alert attach the notice?

* * *

[*264] BY MR. BUCHANAN: (Continuing)

Q. All right. But then he said, I don't know which—who I am talking about.

A. Yeah, I said I don't know who you are talking about.

Q. Okay. I'm talking about—I thought I was clear, but maybe I wasn't. I was talking not about Cox, but about those members of CAS, those ISPs that were members of CAS.

And you pointed out several times that Cox is not part of CAS, right?

A. Cox is not part of CAS.

Q. So what I want you to tell me is how many subscribers of the members of CAS received over a

hundred infringement notices from the copyright owners that were part of CAS?

A. I don't know.

Q. How many received over 50?

A. I don't know.

Q. How many received just one?

A. I don't—I don't know. I imagine there was some that received just one.

Q. All right. And in making determinations whether to terminate somebody, you would distinguish a business, say, like a hospital, from a residence, would you not?

A. I have never thought about it.

Q. Well, let me—you know, since you—well, let me ask you. Say a hospital got three notices over three months.

[*265] Would you terminate the hospital?

A. I mean, is it the—

THE COURT: I'm sorry, I'm sorry. Lay a foundation as to how he would know that a hospital got a notice in his position before you ask that next question.

BY MR. BUCHANAN: (Continuing)

Q. Okay. I mean, you—do you know that there is both residential subscribers and business subscribers?

A. I imagine an ISP has different types of subscribers.

Q. And what I'm asking you is: Do you—in terms of how many notices to—before you would terminate, if there is a distinction from your standpoint between a residence and, say, a business, like a hospital?

A. Again, we don't want anybody terminated. What we want is Cox to work with its subscribers to stop the infringement.

Q. Okay.

A. When you say generically a hospital, is it the hospital's public WiFi? Is it the—like, I don't know. Cox should be in the position, once they are notified, hey, there's a business—

MR. BUCHANAN: Your Honor, I would—

THE COURT: No.

MR. BUCHANAN: He's not—

THE COURT: He does not know the answer. You're asking him what I—what the—Cox or an ISP knows and what [*266] they should do and he doesn't know. And he has told you he doesn't know. So let's move on.

MR. BUCHANAN: Okay.

BY MR. BUCHANAN: (Continuing)

Q. So what about with regard to a residential? I think you've said three and maybe more. I wasn't sure exactly what you said.

But does it matter, for example, if they got three notices in a week and it was for the same song and there was some kid that was 12 years old that did it?

A. I think—

MR. OPPENHEIM: We—

THE COURT: Yeah, I'm going to allow the question.

A. I think in your hypothetical, if Cox knows that it's one kid getting three notices over the period of one week, it should be able to work with that subscriber to figure out how to stop that.

MR. BUCHANAN: All right. No further questions, Your Honor.

THE COURT: All right, thank you. Redirect.

MR. OPPENHEIM: I think it's a good time for lunch, Your Honor. We have no further questions.

THE COURT: Well, we're going to keep going for about another—

MR. OPPENHEIM: All right.

* * *

[324] [*275] activities that the RIAA engages in.

A. There are a number of different things. One would be litigation to bring cases when necessary. There are also contacting sites before litigation. Or if it's offline in the—you know, previous to digital, it focused a lot on CD plants that were manufacturing CDs without authorization, counterfeit goods that would show up either in stores or in flea markets and things like that.

So there's that kind of enforcement. There is—there are notice programs. The litigation I mentioned. Participating on panels and in important industry and interindustry discussions about the threats facing the industry at any given time. Those are some of the things.

Q. What about law enforcement, does the RIAA work with any law enforcement efforts in the antipiracy realm?

A. Yeah. I should have mentioned that one. The copyright law has a provision for criminal copyright violations. Somebody can be prosecuted under the criminal law for willfully infringing copyrights for financial gain.

Sometimes in our investigations to—with CD plants or others that were involved in that kind of activity, we would make referrals to law enforcement. Other times law enforcement would

contact us based on things that they were working on for victim impact statements and things like that.

Q. What's a CD plant? I think you just mentioned a CD plant. [325] [*276] What is that?

A. Yeah. That's a manufacturing facility for the bright, shiny disks that everybody used to buy back in the '80s and '90s.

Q. Counterfeit?

A. Right. So the enforcement actions against those plants or facilities was that they were manufacturing CDs without authorization and trying to sell them as authorized CDs.

Q. And you mentioned lawsuits or litigations. I want to talk about some of that history.

At a high level, what kinds of lawsuits does the RIAA engage in with respect to copyrights?

A. So it takes many different forms. Principally the litigations or the lawsuits are directed toward those that our members feel are infringing upon their—the intellectual property that I was describing earlier.

So that did occur against manufacturing facilities like CD plants over time, individual lawsuits, lawsuits against individual sites online that were selling music without having any authorization. We had a number of lawsuits against peer-to-peer companies as digital piracy grew.

So it's a variety of things depending on, you know, what's happening at the moment.

Q. Now, you talked about these CD plants or counterfeit CDs. Have you seen in—a change in the manner of piracy with the [326] [*277] evolution of digital distribution of music as people are getting their music more and more online?

A. Yeah, it changed pretty dramatically. You know, when you were dealing with a manufacturing facility and there were hard goods, you could, you know, intercept those goods or halt the manufacture of them and it was done.

With digital and online, what we saw was that any individual could, in effect, be a worldwide publisher of all the music that they had, owned, or didn't own, and distribute it worldwide.

So it was vastly different. And the other main difference was that the copies that were being distributed were, and are to the extent this still continues as it does, perfect digital copies.

So unlike back in the day when people made, you know, tapes for each other, or copied a tape from tape to tape, then there was a loss of quality.

With digital, you can maintain that quality. So you're basically giving away or distributing or copying recorded copies of the files that otherwise should be sold, you know, on an—in an iTunes store or other kinds of stores online.

Q. In what kind of networks did the RIAA start to see this distribution of pirated music?

A. It started with companies that were called peer-to-peer [327] [*278] networks. They were—there were technology protocols that were developed, peer-to-peer networks, and then companies that would use those to provide individual users the ability to copy and distribute without authorization.

Q. Is there a way, Mr. Marks, that you can analogize a peer-to-peer distribution model to an old school record store that you would walk into?

A. Sure. It would be as if an individual could walk into any record store, choose every recording that they liked, and just walked out with all of that. Except they didn't actually have to go to the store, they could just do it from home at their computer.

So they could get access to every recording in the history of U.S. recorded music from their desk at their computer without paying anything, and then distributing it to others.

Q. Does that impact the RIAA?

A. It impacted us in the industry very significantly. Industry sales fell off a cliff within a couple of—within a few years. The industry decline was down to 50 percent.

So you had what was a mature, healthy, growing business over time suddenly, you know, go from that to falling right off—right off of a cliff. And continued to fall for many years.

Q. What about RIAA? You were there a long time. Did you see [328] [*279] impact at the RIAA?

A. Yeah. We had to mobilize to address that infringement. And that meant retooling in antipiracy to figure out new strategies and new processes for dealing with it.

You know, sending investigators out to look for CDs that were being manufactured paled in comparison to the breadth and scope of the infringement that occurred on these networks.

Q. Was there impact to the staff or the size of the RIAA?

A. Yes. Several years after this started, as the industry was declining—I mean, at our member companies, all of our member companies had huge layoffs. They slashed artist rosters, meaning that they had to drop artists that were on the roster. They weren't really able to invest the same amount of money in new and developing artists.

And RIAA went through the same kind of layoffs that many of the record companies did. RIAA was about 125 people before this started or around that time, and went all the way down to 50.

Q. Now, you mentioned that the RIAA needed to—I forget your word—retool or rethink enforcement methods because they were no longer just looking for CD plants, correct?

A. Correct.

Q. How do you do that?

A. Well—

Q. Starting from scratch with this new delivery model.

[329] [*280] A. It was started from scratch. I mean, we had to create an entire online antipiracy department. Bring in people who understood that environment. Determine strategies for addressing the companies that were facilitating this and inducing it and contributing to it, as well as, you know, the individuals who were engaged in it.

Q. When was the first time you heard or learned about peer-to-peer piracy?

A. It was in the late '90s. I can't remember whether it was '97 or '98 or '99, but when Napster—that was the first well-known and widely used P2P network.

Q. And what did the music industry do in response to Napster's launch?

A. Well, we first contacted Napster and expressed our very significant concern that they were enabling this very widespread infringement of literally billions of music files that were being copied and then distributed and made available publicly.

And it was so easy to use. And as I was saying before, the digital copies were basically the same as you would get from a store. The entire industry was basically competing with free.

Q. Did Napster agree to fix the problem?

A. No, they didn't. And, unfortunately, we had to sue them.

Q. What was the outcome of that effort?

[330] [*281] A. After several years of litigation, Napster was ordered to keep all the copyrighted content off or shut down. Which it did.

Q. You said it shut down?

A. Yes.

Q. And after Napster shut down, did the peer-to-peer infringement stop?

A. Unfortunately not. There were other companies that came on afterward.

Q. Do you recall the names of some of those others that popped up?

A. Kazaa, Grokster, Morpheus, AudioGalaxy. There's several others. Aimster. Those are some of them, not all of them.

Q. What was Grokster?

A. So Grokster was a software that was made available on what was called a decentralized P2P network.

So the way Napster had worked was Napster maintained a central server or directory of all of the

recordings that were being traded or distributed, you know, between individual peers, people on the network.

The decision to shut down Grokster, the court decision talked a lot about having that central directory.

And so, what others did was, to get around that, they developed what were called decentralized P2P protocols. And that meant there wasn't a central server, but they basically [331] [*282] worked the same way. You would go on, you would use the software, you would find the recording you want, you could copy it, and then distribute to others.

Q. I think you said Napster had the central?

A. Yeah.

Q. And then you were talking about Grokster after that?

A. Yes. Grokster was decentralized, right.

Q. Was there litigation over Grokster?

A. There was litigation over Grokster. That litigation went all the way to the U.S. Supreme Court, which decided unanimously in 2005 that Grokster was, in fact, liable for infringement.

Q. Was the RIAA involved in that Grokster case?

A. Yes. We coordinated on behalf of the entire recording industry.

Q. Do you recall the music industry's response to a unanimous Supreme Court decision shutting down Grokster in 2005?

A. It was huge. I mean, you know, we had been litigating against them, not only for a long time, but there were all these other companies that were based on this same principle of it being decentralized.

And so, winning that lawsuit, especially in a 9/nothing decision from the U.S. Supreme Court, it set the record pretty straight about what was legal and what was not.

And so, while it was a long, hard battle, we really [332] [*283] couldn't have asked for a better result.

Q. So surely with that kind of decision from the Supreme Court, the peer-to-peer infringement must have stopped?

A. You would have thought so. But, unfortunately, it didn't. You know, the way I would describe a number of the companies that were P2P companies is that they were essentially short-term profiteers. They knew that at some point they wouldn't be able to continue it, but they were making a tremendous amount of money. And the way they made the money was that they would sell advertising to be shown to everybody using it.

Now, you're only able to sell advertising if you have a lot of people. And they had a lot of people and

billions and billions of files. And so, advertisers flocked there because there were, you know, a lot of people using that software, and they would advertise, and the operators and owners of those companies were earning a lot of money annually, millions and millions of dollars every year.

Q. At some point in this history of battling peer-to-peer piracy, did the RIAA try to enforce copyrights against individual peer-to-peer users?

A. Yes. In about 2004 we had made the decision that as part of the strategy or effort to deal with this widespread infringement, we felt it was necessary to sue the individuals who were actually the ones copying and distributing the [333] [*284] recorded music using the P2P software.

So we felt that this was a very complex problem, and it required a number of different strategies and kind of a multifaceted approach. So we clearly had to enforce against those that were making the networks available, and they were fully aware of what was going on. Then there were the individuals that were using it, needed to do that. As well as, you know, other things at the same time.

Q. What was the time frame, generally, for the lawsuits against individuals?

A. It started in '04 and lasted about four years into '08.

Q. And could you just tell us a little bit, what did those individual enforcement efforts entail?

A. Well, they weren't as straightforward as you might think because we did not know who the—the identity of the people using the software.

So we could go on and see which computers were involved because every computer has what is called an IP address or Internet protocol address. So it's, you know, basically a long string of numbers.

We could—we could see that. And that related back to a person, but we needed to get that information so that we could move forward with the lawsuit.

Q. And how could you find out who an individual was that was associated with an IP address?

[334] [*285] A. Internet service providers had that information because those individuals were the Internet service provider's subscribers. And each Internet service provider, or ISP, had that information about which IP address related to which account.

Q. Was the RIAA—were you able to figure out who some of the folks were associated with those infringing activities?

A. Eventually we were. And then—and we moved forward with—it was a lawsuit program, but it was premised around actually trying to settle before filing the actual lawsuit against the individual. So, yeah.

Q. Do you recall trying to figure out the identities of any Cox subscribers in the time frame of this end user lawsuit period?

A. Yes.

Q. And what was that like? How did that go?

A. When we went to Cox, we thought, okay, they have this information, there's no reason for them not to give it. We've got proof that infringement is occurring.

But Cox told us that they wouldn't voluntarily give up—give the information over and needed us to get a court order of some kind to force it to give that information.

Q. Do you recall generally whether Cox was cooperative in these efforts?

MR. ELKIN: Objection.

[335] [*286] THE COURT: Yeah, sustained. Ask him—next question.

BY MR. GOULD: (Continuing)

Q. Do you recall generally how many of the end user suits were filed?

A. We contacted thousands of individuals. Most of those individuals settled without us having to actually file—you know, go through with a lawsuit against them.

So the numbers that went past that stage, my recollection is, you know, probably in the hundreds from, you know, a much larger group.

Q. I think you said that that—the end user lawsuits ended around 2008?

A. Correct.

Q. Why did you stop that approach?

A. We felt that the program had basically run its course. You know, one of the main things that we wanted to get out of it—this wasn't about punishment so much. It was about awareness and education, for people to understand that that activity, which had become very normal to a lot of people, was actually not legal.

And when we—before filing—before starting that program, you know, we had tried a number of different ways to educate, and found that education really doesn't work with something like this unless there's a consequence. You have to

[336] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 2 (P.M. Portion)

TRIAL TRANSCRIPT

December 3, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

* * *

[DIRECT – STEVEN MARKS]

[338] [*295] Q. What kind of lawsuit or legal claim was brought against Napster?

A. Contributory and vicarious—contributory infringement and vicarious infringement liability.

Q. And what kind of lawsuit or legal claim was brought against Grokster?

A. Principally, the same.

Q. And what were those?

A. Contributory infringement and vicarious infringement.

Q. You were also asked some questions about lawsuits against end users. Do you recall that?

A. Yes.

Q. Did RIAA try to find out some of the Cox subscribers?

A. Correct.

Q. How did Cox respond?

A. They—

MR. ELKIN: Objection.

THE COURT: Yeah, it was already asked and answered. You're retreading old ground now. Let's move forward.

MR. GOULD: Understood.

THE COURT: Okay. Thank you.

BY MR. GOULD:

Q. Has the RIAA ever sued BitTorrent?

A. No. It's not really possible to sue BitTorrent because BitTorrent is a protocol, not an actual company or service.

[339] [*296] Q. What about eDonkey?

A. Same thing.

Q. What about Ares?

A. Same.

Q. And Gnutella?

A. The same.

Q. Has the record industry ever sued ISPs, other ISPs for contributory infringement, copyright infringement?

A. Yes. There are a number of additional suits against other ISPs that I think are either currently pending. I'm not in the role anymore, so I don't know the exact stage, but they include Grande, Charter, RCN, Bright House, and maybe one or two others.

Q. I want to turn to the period starting around 2008, when you said the end user lawsuits ended. Did the RIAA shift its approach to battling peer-to-peer infringement at that time?

A. Yeah. As I explained earlier, suing individuals was not something that could stop all of the infringement because there were just too many people engaged in it, and so as part of, you know, our effort to deal with the problem, we decided to create what we called a notice program where we would send notices to ISPs with information about specific instances of infringement by subscribers on their networks.

Q. Why did you take that approach?

A. Well, as—one is that the ISPs have responsibility for

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[340] [*301] into a notice that we could send to the ISP.

Q. I want to back up just two questions just to clarify what you meant by "immunity" before.

A. Yeah. Immunity is just, sorry, a way of saying no liability or not being sued.

Q. Is that—you're referring to the safe harbor?

A. Yes.

Q. Why did RIAA select MarkMonitor?

A. MarkMonitor was known to be a very sophisticated and reputable vendor for these kinds of services. There weren't a lot of these services that existed, and MarkMonitor had the best reputation as far as we knew and could tell.

Q. When did RIAA start sending infringement notices to Cox?

A. 2008, I believe.

Q. Were there any discussions with Cox about getting that off the ground?

A. Yes. We wanted to make sure, for example, that the notices we were sending were going to be accepted, because they—you know, just to make sure that they were in the right form and we were sending them according to a certain file format and things, and we wanted that to go smoothly.

Q. Were you able to figure that out?

MR. ELKIN: Objection.

THE COURT: Well, it's a pretty broad, general question. Why don't you ask a more specific question, please.

[341] [*302] BY MR. GOULD:

Q. Did you come to a point where you were able to send notices to Cox?

A. Eventually, yes.

Q. Did you understand Cox would accept the format of those notices?

A. Yes, yes.

Q. Do you recall what information was included in the notices?

A. Well, the notice identified—it had the IP address, which, as I was saying earlier, is the way to identify the computer, the device being used. It had the name of the recording, for example, that was one of our members' recording that was being infringed.

It, it had, you know, a certain format. We were required, for example, to state everything under penalty of perjury, and so all of that information was there. I mean, in short, it was all the information that Cox needed to be able to address the infringement that we were giving them notice about.

MR. GOULD: Your Honor, if I may approach to hand the witness a binder?

THE COURT: No, Mr. Ruelas will be happy to do that for you.

MR. GOULD: Thank you, sir.

BY MR. GOULD:

[342] [*303] Q. Mr. Marks, if you could turn to tab 5 in your binder, please. Do you recognize this document?

A. Yes.

THE COURT: Is it one of plaintiff's exhibits separately?

MR. GOULD: Yes. Thank you, Your Honor. For the record, this—I'm directing the witness to PX 537.

THE WITNESS: Yes, I recognize it.

MR. GOULD: I would move to admit 537, plaintiff's.

MR. ELKIN: No objection.

THE COURT: It's received.

MR. GOULD: Could we please publish 537 for the Court?

BY MR. GOULD:

Q. Mr. Marks, what did you say this exhibit is?

A. This is a notice that Jeremy Landis in the RIAA antipiracy department sent to Cox identifying a specific act of infringement.

Q. And I just want to take a look visually at an overview here first. What's the format of this?

A. The format is—I'm sorry?

Q. It looks like an e-mail.

A. Oh, yeah. Sorry. Yeah, it's an e-mail that was sent from a dedicated antipiracy account at RIAA to the dedicated account that Cox had. This would have been part of the discussion that

* * *

[*314] A. Randy, per our discussion, attached please find the data on "infringements found" (labeled "1"), and "notices sent" (labeled "2") for Cox subscribers that was used in the analysis, along with the annotated version of the code used for the model and an associated flow diagram.

Q. Are you familiar with the information she referenced that she attached?

A. Yes.

Q. And what is that?

A. She—Vicky was sending a list of, hey, here are all the infringements we found, which were a lot, and here are the notices we've sent, which were just a tiny—a small fraction of that amount. So it was meant to demonstrate with the, the volume that we're capped at, we're not really able to meaningfully address the infringement through these notices, because you're not accepting any, any notices above the 200 or the 400 at the time, and there's all this infringement going on on your network. We really need to be able to send you more notices so that you can effectively address it.

Q. Did you prepare a slide to assist the jury in understanding the information in this spreadsheet?

A. Yes.

MR. GOULD: Permission to publish, Your Honor?

THE COURT: Any objection?

MR. ELKIN: No objection.

[*315] THE COURT: It's received. Go ahead.

MR. GOULD: We can call this Plaintiff's Demonstrative Exhibit—what are we up to? Why don't we say 5 to be safe.

THE COURT: Okay.

MR. GOULD: We'll try to backfill when we figure it out.

THE COURT: Okay.

BY MR. GOULD:

Q. And, Mr. Marks, can you explain what this—what you've summarized in this slide?

A. Yeah. It's a pie chart showing the total number of infringements that we found on February 23, 2010, which was, you know, shortly before this e-mail, and how many of those—so there were 4,051 total infringements that we found on that day, and we had sent notices to Cox totaling 445, so roughly, you know, a little more than 10 percent, 11-12 percent of the total.

So 3,606 infringements we were not able to send a notice to Cox because they had instituted this unilateral cap.

Q. Was every day this big a difference?

A. Yes, pretty much. I mean, it may have varied from day to day, but it was generally a small fraction of what the total was.

Q. Some days more, some days less?

[343] [*316] MR. ELKIN: Objection.

MR. GOULD: Withdrawn.

THE COURT: If he knows.

MR. GOULD: Yeah, withdrawn.

THE COURT: Ask your next question.

MR. GOULD: Turn to the next slide, please. Thank you.

BY MR. GOULD:

Q. And what does the second slide show?

A. It's the same—it's showing basically the same thing except instead of looking just at the one day, it's looking at a complete year. So we had found more than 366,000 infringements on the Cox network, and we were only able to send 84,000 notices during that year period. So, you know, it's roughly—well, it's less than a quarter, 20 to 22 percent or 23. I'm not sure of the exact amount, but, again, a small fraction.

Q. Do you know if the RIAA always sent up to the full amount of the cap?

MR. ELKIN: Objection. Foundation.

THE COURT: Yeah, lay a foundation.

BY MR. GOULD:

Q. You were involved to some degree with the RIAA notice program?

A. Yes.

[344] [*317] Q. And had some involvement in understanding the nature of that program and the number of notices sent?

A. Yes.

Q. Did you have an understanding of—do you know as you sit here today whether Cox was sending the full amount under the caps? I'm sorry, strike that.

Do you know as you sit here today if RIAA was sending the full amount Cox permitted under the cap?

A. I think there were times during that -- the period over those years that we were and some times where we were not.

Q. Do you know why?

A. Yeah. We, we had a mistake on our end. When Cox did agree to go from 400 to 600, internally it was not communicated to our vendor that it could be increased all the way up to that level. I didn't know that at the time and found out about it much later.

Q. I want to turn back to 234, please.

Excuse me, I apologize. I'd like to call up PX—excuse me.

Mr. Marks, could you turn to tab 4 in your binder?

A. Sure.

Q. Do you recognize this PX 327?

A. Yes.

MR. GOULD: I move to admit PX 327.

THE COURT: Any objection?

[352] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 3 (A.M. Portion)

TRIAL TRANSCRIPT

December 4, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

* * *

[CROSS – BARBARA FREDERIKSEN-CROSS]

[355] [*417] MR. ZEBRAK: Yes, Your Honor. In the analysis of computer software and computer-generated data.

THE COURT: All right. Any objection?

MR. BRODY: I have no objection to her opining, Your Honor. I do have an objection as to—I mean, we can do it, too, but normally I would object to asking the Court to certify her as an expert.

THE COURT: I didn't hear the last couple of words. Serving as—

MR. BRODY: I have no objection to her opining, giving opinion testimony.

THE COURT: All right.

MR. BRODY: I—and we can do this with all the experts if that's the practice, but normally I would object to the Court—asking the Court to certify the witness as an expert.

THE COURT: All right. I understand now. Thank you.

I find that Ms. Frederiksen-Cross has the educational and professional qualifications to testify on the subjects that she's been asked to testify on.

All right. Go ahead.

MR. ZEBRAK: Thank you, Your Honor.

BY MR. ZEBRAK:

Q. Ms. Frederiksen-Cross, are you familiar with the name [356] [*418] MarkMonitor?

A. I am, Counsel.

Q. And what is your understanding of what MarkMonitor is?

A. MarkMonitor is an antipiracy company, amongst other things, and in the context of this case, their role was to attempt to detect illicit trading of files on peer-to-peer networks and to provide e-mailed notification of the events that they detected to Cox.

Q. And what is your understanding of why MarkMonitor was engaged in that activity?

A. They were engaged on behalf of the RIAA to provide that information so that Cox would be able to take action upon those notices.

Q. And we're going to talk about this in much more detail in a while, but these were notices of what?

A. They were notices where MarkMonitor had detected Cox subscribers who were using the peer-to-peer network on the internet to copy and distribute files which belonged to the recording companies.

Q. And when you say files that belong to the recording companies, what do you mean by that?

A. Music files that were being traded using these peer-to-peer networks.

[357] [*419] Q. And—

A. Copyrighted music files specifically.

Q. And why was MarkMonitor reporting that to Cox specifically?

A. Well, because in the case of those particular detections, Cox had been identified as the internet service provider who was giving those individuals access to the internet.

Q. All right. So—by internet service provider, I presume you—we're going to by shorthand just call that an ISP; is that all right?

A. That would be great.

Q. Now I'm violating the rule of—I'm going from the long phrase to an acronym. Before, I asked you to go the other direction.

What is an ISP?

A. An internet service provider, or ISP, is a company that provides access to the internet for its customers so that they are able to connect their computers, their home or their business computers to the internet.

Q. And do you have an understanding of when MarkMonitor sent the notices relevant to this case to Cox on behalf of the RIAA?

A. I think that the time period of greatest interest is 2013 and 2014. The evidence I have received was actually notices for a little broader period, from 2012 through 2015.

Q. And I believe you made a reference to MarkMonitor monitoring for certain music files on peer-to-peer networks.

[358] [*420] Was that correct?

A. That is correct.

Q. Which specific peer-to-peer networks was MarkMonitor trying to detect the sharing of music files on?

A. There are four particular networks that MarkMonitor was monitoring. Those are BitTorrent, Ares, eDonkey, and Gnutella, G-n-u-t-e-l-l-a.

Q. Thank you.

And in the course of your work in this matter, did you have the opportunity to review the MarkMonitor system that was used to detect the sharing of these music files and report that to Cox?

A. Yes, I did.

Q. And at a high level, what did your review consist of?

A. I reviewed the source code for those systems, that is to say, the human readable form of their computer programs. I also had the opportunity to

interview MarkMonitor engineers, and I was provided some documents that gave me some background about the systems in anticipation of those reviews.

I also reviewed evidence that is produced or collected by those systems, that is to say, the contemporaneous records that those systems generate as they go about their business.

Q. And is that a complete recitation of everything you've looked at, or is that just a summary?

[359] [*421] A. That's just a summary. There was a lot of material. You know, I've also seen deposition transcripts from some of—and declarations from some of the MarkMonitor personnel and other personnel who were involved in software used in these systems.

Q. And you mentioned, I believe you said you spoke with MarkMonitor engineering employees. Was that correct?

A. Yes, with some of their engineers.

Q. Did you speak with anyone else at MarkMonitor?

A. There were two specific individuals, Sam Bahun and a gentleman whose last name I'm sure I will mangle with a Russian last name.

Q. That's okay. And, I'm sorry, I know you mentioned source code and you gave a bit of a short description of what that is, but could you please give

the jury a little more of an understanding of what source code is?

A. Sure. When programmers write a program, they do so in a computer language that's designed specifically to facilitate giving that instruction to the computer, and it's an artificial language, but it has a syntax and verbs and nouns you create and data structures, and you write out the instructions that the computer is to perform. Those then get translated into the form that the computer actually uses.

Q. And are you familiar with the name Audible Magic?

A. I am.

[360] [*422] Q. And what is Audible Magic?

A. Audible Magic is one of the leading content identification services. I believe they are the leader in the Western world at least. And the services they provide, amongst other things, are the identification of sound recordings and movies and other types of electronic content, but as they relate to this case, it's sound recordings.

Q. And what do you mean by an "identification of sound recordings"?

A. Well, you can submit a recording that maybe you don't know what the title and artist is to them or even a snippet of a recording, and they are able using a proprietary and patented technology to

figure out what artist and title that is and whether it's a copy of a, of a particular song.

Q. And could you please explain at a high level your understanding of Audible Magic's relationship to this case?

A. Yes. Audible Magic is a company that is used by MarkMonitor to provide song identification services. So when MarkMonitor collects a song from one of these peer-to-peer networks, in order to verify that that song is what they think it might be, they submit it to Audible Magic to get an identification.

Q. And did you do any investigation in the course of your work in this case with respect to the Audible Magic system?

A. I did.

[361] [*423] Q. And did you come to any conclusions about the Audible Magic system? Just a yes or no question.

A. Yes, yes.

Q. And are you prepared to discuss those today?

A. I am.

Q. Thank you.

And did you come to conclusions with respect to the overall MarkMonitor system?

A. Yes, I did.

Q. And are you prepared to discuss those today?

A. Yes, I am.

Q. At a high level, what was your conclusions about the MarkMonitor system, including the Audible Magic system used as part of it?

A. Based on the evidence I've reviewed and examined, it's my opinion that that system both accurately detects acts of copying and distribution on the internet on these peer-to-peer systems, and it also provides and produces accurate notices that can be sent to an ISP like Cox to notify them of that activity.

Q. Thank you.

Ms. Frederiksen-Cross, were you in the courtroom on Monday for the parties' opening statements?

A. I was, Counsel.

Q. And did you hear Cox's counsel argue that, in very stark [362] [*424] terms, that there's no evidence of infringement in this case?

A. I heard that argument.

Q. And what do you think about that?

A. I completely disagree. I think that the amount of evidence in this case is overwhelming that there were Cox subscribers who were copying and distributing the plaintiffs' music files on the internet.

Q. And we're going to discuss the basis for your opinion in much more detail today, but at a high level, would you please explain why you believe what you just said?

A. It is based first on a foundation of my understanding of these peer-to-peer technologies, how they operate and the way in which they allow the distribution and copying of content, and then upon the specific evidence that I reviewed with respect to the activity of Cox subscribers, and finally on my inspection of the source code as well to understand exactly how that worked and how it was able to do this detection and how the notices were provided.

Q. And finally, I believe you said you did some work with respect to reviewing the Cox CATS system; is that correct?

A. That is correct, Counsel.

Q. And, generally speaking, what is the CATS system?

A. CATS stands for the Cox Abuse Tracking System, and it's a system that's designed to receive e-mails that are abuse complaints and then to take the actions that Cox has

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[363] [*433] distribution system that's also used on the network. And I have a few slides about peer-to-peer that might help illustrate that as well.

Q. And what's being illustrated in this slide?

A. One of the principal differences between client server and peer-to-peer is that in a peer-to-peer network, any computer that's in that network can be sending or receiving information from any other computer. So it—the boundaries of who's the sender and who's the receiver are, are less clearly defined because each computer is both a sender and a receiver. That's why they're called peers. They're equal within the network.

Q. And you've used the phrase "peer-to-peer protocol" and, I believe, "peer-to-peer network." Is there a difference between the two?

A. The protocol is what enables the exchange—and that's the proper technical term really—but these are often referred to as peer-to-peer networks because it's a group of computers who are intercommunicating, and so in that sense, it is a network. They're networking.

Q. So the network are the groups of computers or peers communicating with each other on that protocol; is that correct?

A. That's correct.

Q. Are you familiar with the term "file share"?

[364] [*434] A. Yes, I am.

Q. And what does that refer to?

A. A file sharing network is a network that uses a protocol in order to facilitate the—typically the copying and distribution of files. Sometimes it's used for files that just—or for networks that just distribute. But in this context that we're going to talk about here, it's a network that's used to both copy and distribute.

Q. Now, you mentioned that—you mentioned BitTorrent, Ares, Gnutella, and eDonkey. Are those file sharing networks?

A. They're file sharing protocols whose users together form the networks.

Q. And, you know, when I think of the term "sharing," I think of maybe loaning someone a book that I just bought from the bookstore. Is that—is that how it works in file sharing?

A. No. With electronic file sharing, a copy is distributed such that—like, if I have a file and I, I share a copy with you, I'm actually creating a copy of that work and providing you with that copy I've created. So I still have my copy, and now you have a copy, too.

Q. Now, you mentioned that MarkMonitor monitored four peer-to-peer file sharing networks for the RIAA; is that correct?

A. That is correct, yes.

[365] [*435] Q. With respect to the notices that MarkMonitor sent to Cox, was—did they relate to

each of those four networks equally, or was—did the notices involve one network at a higher level?

A. The primary network was BitTorrent. That is to say, it had the largest volume of notices, in the order of 60 to 65 percent of the notices were BitTorrent, and then followed by Ares, which had roughly 30 percent of the notices, and then the others were much smaller.

Q. Okay. Are you prepared today to talk about these four networks, though?

A. I am, yes.

Q. All right. I'm going to advance the slide, if that's all right.

A. Yes, please.

Q. Okay. So just to be clear, these are different file sharing systems; is that correct?

A. Yes. They each have their own peculiarities and protocols, but they operate in essentially the same fashion and for the same purpose.

Q. What do you mean by that?

A. Well, the purpose of each of these protocols is the efficient and robust distribution of copies of files. I mean, that's what they were designed to do, is to allow people to copy and distribute content using their specific protocol.

[366] [*436] Q. And is there a common technique upon which these peer-to-peer file sharing systems each rely?

A. Well, they have several common characteristics. Obviously, they're all designed to operate on the internet, so they all rely on internet connections to be able to carry out the distribution. They also all rely very heavily on a technique called hashing for file identification and for authentication of content.

Q. Could you elaborate on what hashing is?

A. Yeah. I think if we go to the next slide, I'd like to introduce an icon here that I'll be using throughout too. This little fingerprint icon is going to be used when I talk about hashing, just to help to remind you about that, but hashing is a technique—or a hash is a technique that was developed by the U.S. government. It's based on a specific calculation of the file's contents, and it uniquely identifies what a file's contents are.

So if you have a hash that you have gotten from one file and you see that hash again, you know that the file—the second file with that same hash has got the same contents.

Q. And if you could turn your attention back to the image on this, on this slide, it looks like there's a fingerprint with a little icon in the lower right. What is that depicting?

A. This is the hash that represents a particular file. So I have combined the fingerprint, because sometimes these are

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[367] [*444] different tastes in music, but would you explain when you said ZZ "Legs," what were you referring—

A. ZZ Top "Legs."

Q. Okay. And that's a band and a song by them?

A. Yeah.

Q. Okay. Thank you.

And—okay. And then what's being depicted here in the third slide—in the third step in a little more detail, please?

A. Well, as soon as you open that torrent file in your client software, it automatically goes and gets this information, goes out and begins establishing the connection with those peers that will allow you to copy that content to your machine and actually to distribute it to others as well.

Q. Now, there's three steps listed here. Does this mean if I don't—every time if I'm someone that wants to go get my music from one of these peer-to-peer sites, that I have to do each of these steps every time?

A. No. You just install the software once, and you could go out to a site and download a whole bunch of torrents at once if you want to, or you could download a torrent whenever you want to go get some new music.

Q. And generally speaking, I know you said it doesn't cost anything to download the software. Does it generally speaking cost anything to download torrent files?

[368] [*445] A. No. That's free.

MR. BRODY: Objection, Your Honor.

THE COURT: Overruled.

BY MR. ZEBRAK:

Q. I'm sorry. So—and does it cost anything to download and distribute files with peers?

A. No. That's free, too.

Q. And what's happening in that process at a very high level?

A. The peers are creating copies and distributing copies of the particular song that's represented or songs. It could be a whole album or even a collection of albums that that torrent file represents.

Q. Okay. And I know there's three steps, and I know you said that you don't have to download the software each time, but once you have the software

on your, on your computer, is it a complicated process to download the torrent files?

A. No, not at all. It's—you go to Google and run a search, or you go to one of these sites like Pirate Bay and run a search, and then you download the torrent. It's a couple of clicks.

Q. And—okay. Thank you.

Now, you mentioned and provided a little bit of an overview of these torrent files. Are you prepared to explain those in a little bit more detail?

[369] [*446] A. Sure.

Q. I believe you have a—there we go.

A. Thank you.

Q. And so what—could you explain what this slide is depicting?

A. Yeah. One of the really important things to understand about a torrent file is it does not contain the music or the software or the movie, whatever it is you're downloading. Rather, it's just information that helps you locate it. And that's part of what makes it so hard to take any effective action against a torrent-providing site, because there's really nothing illegal they have in their file.

Q. Well, let's explore that in a little more detail. So—

MR. BRODY: Your Honor, may I approach?

THE COURT: Yes, sir.

MR. BRODY: I have an objection.

NOTE: A sidebar discussion is had between the Court and counsel out of the hearing of the jury as follows:

AT SIDEBAR

THE COURT: Yes, sir.

MR. BRODY: I object to him asking her for an opinion about legal strategy and how to pursue these people.

MR. OPPENHEIM: I didn't hear it.

THE COURT: The comment on BitTorrent, that it's hard to detect. There's nothing on BitTorrent that is being [370] [*447] stored, so—is that what you're talking about?

MR. BRODY: Maybe I misheard the question. I thought the question was: Is that a reason why it's hard to pursue these people?

MR. ZEBRAK: No, sir, that's not what I asked.

THE COURT: He didn't ask it. She offered it on her own there. It was a little bit off the target of the question, but she sua sponte, as they say, did that.

All right. Let's move along. The jury, we've got a good jury. They understand things.

MR. ZEBRAK: You think they understand that?

THE COURT: You know, and you keep saying "at a high level," and we're going to get to the real specifics, but you're actually getting to the specifics.

MR. ZEBRAK: Okay. Yes, sir. And I don't mean to make it sound like there's a large thing to follow. I think we're moving along at a fast clip, sir.

THE COURT: Okay. Thank you. So, I mean, are you moving to strike it? I don't think it was—

MR. BRODY: I don't think it needs to be—if I misheard, I misheard. I thought he was asking her to draw—to opine about why it would be difficult to sue people.

THE COURT: Yeah. No.

MR. BRODY: Okay. Then if we're not going there, we're not going there.

[371] [*448] THE COURT: Good. Thank you, sir.

MR. BRODY: Thank you.

NOTE: The sidebar discussion is concluded; whereupon, the case continues before the jury as follows:

BEFORE THE JURY

BY MR. ZEBRAK:

Q. Thank you.

So you're explaining what a torrent file is, and I believe you said it's not the content but it's—and then you were in the middle of explaining.

A. Right. It contains a couple of key pieces of information that help the software that's running on your computer locate the music files you're looking for. So one of them is the location of a computer called a tracker, and the other is information about the music files you're seeking. So that includes the hash of the music file—or the hash of this particular collection of music files, it's not the hash for an individual file, and other information that's used so that when you collect that file, it can be verified to be an accurate copy.

Q. Does the person who's downloaded the software on their computer need to understand how these torrent files work?

A. Not at all. All they need to know how to do is to download a torrent file and to open it in their client.

Q. And then just at a very high level, what's the function [372] [*449] of a tracker?

A. A tracker provides to the computer that's seeking music or seeking this file a list of those other peers who are sharing that particular file at that particular point in time. It's not all the peers that are sharing it, but you get a nice set of them.

Q. Sure. And then so what happens next in the process?

A. If we can go to the next slide.

So on my computer, I've downloaded a torrent file, and I've drug it into my torrent window or opened it from the torrent software, and what will happen at that point without any other activity on my part if I'm using the normal settings is my computer will reach out to the tracker and get a list of peers that I show over here on the left-hand side of the—or, I'm sorry, on the right-hand side of the screen, and it will begin requesting the music I want from those peers so that it can assemble that file, and it can get a piece from each peer or it can download the file in multiple pieces from multiple peers at the same time, which makes the process really fast, and it also makes it really robust because if one of those peers goes away, well, there's somebody else I can ask for the piece. So it's a really efficient way to transfer and copy data.

Q. Sure. You've used the phrase "piece." What do you mean by that?

[373] [*450] A. Well, the sound file or files that I'm looking for will be broken up into pieces, and one of the pieces of information that the torrent has is what the size of that piece is.

Q. And—

A. And each of these peers that's using the same torrent to exchange that same file will have the same size pieces, and it will have whatever part of that song they currently have in those pieces, and the torrent file helps you put them back together.

Q. Okay. And so what's being depicted on the left side of this slide?

A. That's the computer that's just about to open a torrent.

Q. Okay. And in this example, the box around it, does that illustrate how they're connected to the internet?

A. Right. In this case, Cox is providing that connection to the internet.

Q. Okay. And what—what's depicted in the—so there's different percentages on the computers on the right side of the screen. What is that?

A. Well, at any point in time, as soon as you have a piece that's been verified, your computer can be distributing that piece to others. It doesn't wait with BitTorrent until it has the entire file.

So in this group of peers, some may have 100 percent, some may be just like you starting out with [374] [*451] 0 percent, and others might have some other number of pieces.

Q. Okay. So in this example, does the empty—the user connected through Cox, is the idea that that user doesn't have anything at that point?

A. That's right.

Q. Okay. Okay. And then so what happens when the user has the software on their computer and opens up a torrent file?

A. The computer—the user's computer will go out and do what's called a handshake with each of these peers on this forum so that, you know, do you have this file?

Yeah, I have this file.

And then they will begin exchanging pieces of the file.

So if you could click here and watch the—watch what happens in the box on the computer. You see that as it collects those pieces, it very quickly is able to collect and assemble all of the pieces, and at the same time, the peers on the other side are also exchanging pieces with each other so that they can all build complete copies of that file as well.

Q. And then what happens?

A. Well, once the, the, all of the pieces are collected, the torrent file allows them to be reassembled in the proper sequence so that the music can be played by the user.

Q. And does the user have to do anything to put those pieces together?

[375] [*452] A. No, no. That all happens automatically, just like the distribution. You know, as soon as a user computer gets a piece, it can be sharing that piece with others, and as soon as it gets all the pieces, a little icon pops up that that song is fully assembled, and you can play it now.

Q. And I see a reference on the slide to a peer swarm. What does that refer to?

A. Well, this—there's only so much room on a slide. You know, I showed four peers here. A typical swarm is larger than that, and the actual number of computers that might be trading in a particular piece of music at a particular time can be in the tens of thousands.

Q. I see. And you—this slide depicts—now it depicts more computers.

A. A few more joined the swarm.

Q. And do you have an understanding about the number of users that are on the BitTorrent network?

A. The most recent reputable study I found was by IEEE, and it's a few years old. It indicates that at any one point in time, there'll be between maybe 15 and 27 million peers exchanging content on the internet, and it's—that's at any one point in time.

Q. Is there an official place one can go to see exact measurements of how many users there are on the BitTorrent network?

[376] [*453] A. No, there is not.

Q. And why is that?

A. Well, the communication for any of these computers—any of the peers is between the peers, and some of these peer-to-peer systems use a tracker, so if you were to put a test tracker up with

the right monitoring stuff, you could see the transactions maybe that were going to that tracker, but you still couldn't see everything else that was going on in the network.

Q. So, so there's nowhere you can go to see the number of users on the network overall; is that correct?

A. That's correct. By design, these systems are extremely robust and these machines talk directly to each other without central control.

Q. What about if I went to the Cox user that downloaded and is then distributing files to others? Could I uncover the number of times that Cox user distributed files from a review?

A. Not in any practical way, no.

Q. What do you mean by that?

A. Well, if you just went to a user's computer and inspected it forensically, you might have some evidence of their activity, but you would not have evidence of all of their activity.

Q. Let me ask you—

A. And you would, you would have to actually do a forensic [377] [*454] examination of that machine to get any information.

Q. Let me ask it to you this way: Are logs kept with—from the software otherwise of the number of times that user distributes a file?

A. No.

Q. Okay. Can you explain a little bit about the other three peer-to-peer networks that were identified in MarkMonitor's infringement notices to Cox?

A. Sure. Can we go on to the next slide?

Q. Okay. And so these are the other three? Is that the Ares logo?

A. Yes, Ares, Gnutella, and eDonkey.

Q. Okay. And I see again the, the file hash value image we're using. Why is that there?

A. Again, all of these systems rely on hash to authenticate and identify files. That's a really important technology. That's one of the foundation technologies of these systems.

Q. And there's a bunch of icons under file types. What is that meant to convey?

A. Again, these networks can be used to distribute any kind of file. Anything that's in an electronic form can be transmitted on BitTorrent, so electronic books, movies, music, if I want to send a video of my dog chasing her tail, any of that can be distributed on the—using BitTorrent across the internet to others.

[379] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 3 (P.M. Portion)

TRIAL TRANSCRIPT

December 4, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

* * *

[DIRECT – SAMUEL BAHUN]

[382] [*609] Q. Is it more than just football?

A. Yes.

Q. Does MarkMonitor also do work in the film and television space?

A. Yes.

Q. And what kind of work does MarkMonitor do there?

A. Again, kind of a variety. For film and TV content, we provide services related to peer-to-peer piracy, Web piracy, piracy that's made available on search engines. There is a number of areas. Really virtually any area that we see piracy occurring, we provide services to identify that and take action.

Q. Are there other content industries that MarkMonitor does work for in the antipiracy space beyond movies and television?

A. Yeah, yes. So I think virtually all the media types. We work with film, TV, music, publishing, video games, software, all the different categories you would assign to that content, yeah.

Q. And what types of antipiracy services does MarkMonitor offer with respect to peer-to-peer networks?

A. The main focus is in monitoring the infringing activity that is taking place. So identifying the infringement that is occurring, collect evidence, and send notices to the ISPs to inform them of it.

Q. And how many ISPs does MarkMonitor send notices to?

[383] [*610] A. Globally, it's in the thousands. In the U.S., hundreds.

Q. So you have mentioned a lot of large companies and industries that retain MarkMonitor. Based on your experience in talking to them, do you have a sense of why MarkMonitor is retained by all these companies?

A. Yeah. I mean, our reputation, our history and our reputation that we maintain in this area is impeccable. I mean, we have become in many ways kind of the leaders in this space. And the services that we provide are critical for content owners to identify and understand the level of infringement that is taking place and, you know, do something about it. So…

Q. In the course of your antipiracy work, do you have any background in working with law enforcement?

A. Yes. So, yeah, in addition to all the stuff we have already talked about, I have assisted the Department of Justice in conducting training with their agents, as well as FBI and Homeland Security.

I have also worked in kind of a consultative role with the Royal Canadian Mounted Police in their efforts to identify and address things like human trafficking, child exploitation, that kind of thing.

As well as I have done kind of ongoing—I occasionally do work with local and state law enforcement and teams of prosecuting attorneys.

[384] [*611] Q. And when you're doing work with law enforcement like this, is this just sales work, or is it something different?

A. No, actually, none of that would be considered sales. It is more related to training and consulting those groups to help them understand, you know, the technology that is involved and the crimes that they're working with and, you know, helping them understand how to—how to monitor it and how to interact with those issues, yeah.

Q. Do you also work with state law enforcement from time to time?

A. Yes.

Q. When did you start working on peer-to-peer networks?

A. So I started—back at the beginning of my career, I actually started my career in antipiracy on a team that was hired to work with the music industry related to Napster. So at the very beginning of peer-to-peer.

Q. And what role did your team play in the Napster case?

A. So we were hired at that time to collect data on the infringing activity taking place and provide evidence that supported the various enforcement efforts that were going on at that time.

Q. Over the course of the last—over the course of the time that you have been working on peer-to-peer activities, roughly how much of your time is dedicated to peer-to-peer versus other types of piracy?

[385] [*612] A. Probably—I mean, it has been continuous throughout the 16-and-a-half years. But I would—I would estimate about half of my time. I mean, it's a big portion of what I do, yeah.

Q. At a high level, over the course of your time working with peer-to-peer, can you describe for me, consumer perspective, what a peer-to-peer network is for?

A. Yes. So, I mean, at a high level, peer-to-peer networks predominantly are used to gain access to pirated content.

Q. Can peer-to-peer—based on your understanding, can peer-to-peer be used for other purposes?

A. Sure, yes.

Q. And what experience do you have in seeing peer-to-peer used for non-piracy purposes?

A. I mean, there are—there are some examples where software companies and others have been able to leverage the technology as a means to distribute content, you know, across different groups of people.

Most of the time, I think, the legitimate—or, you know, the legitimate uses of it, it's often integrated in the background of a piece of software. So the people don't even know that it is leveraging that.

But that is, you know, one example that I can think of where peer-to-peer software can be used in a legitimate manner.

[386] [*613] Q. And are you aware of the four peer-to-peer networks at issue in this case?

A. Yes.

Q. And what are they?

A. BitTorrent, eDonkey, Gnutella, and Ares.

Q. And in your experience, to what extent of the content on those networks is infringing or is piratical?

COURT REPORTER: I am sorry, counsel?

MR. BRODY: Objection.

MR. OPPENHEIM: I said piratical, but I'll go with piracy. Maybe that's a little easier.

THE COURT: All right. Overruled.

THE WITNESS: I'm sorry. Can you repeat the question?

BY MR. OPPENHEIM: (Continuing)

Q. In your experience on those four networks—

A. Yeah.

Q. —to what extent is the content piracy?

A. It'd be difficult for me to quantify it. But the overwhelming majority of the content we see on those networks is pirated content.

Q. In the course of your work, do you monitor what's happening on peer-to-peer networks?

A. Yes.

Q. And how do you do that?

[387] [*614] A. So we've developed proprietary technology at MarkMonitor that interacts with the peer-to-peer networks in very similar ways to a typical user. But our technology allows us to do it at a much larger scale.

And so, we use the scanning technology that we've developed to monitor that activity.

Q. And do you ever monitor it just to get a sense of the total measure of what's happening on the networks?

A. Yes.

Q. And how often do you do that?

A. So we have kind of an ongoing monitoring project that we run independent of any of our customers. It focuses—it's—there's so much content on those networks, it's difficult to cover everything. So we developed a methodology that identifies kind of a—in a consistent manner, a sample set of the most popular film, TV, and music content. And we monitor on an ongoing basis for that content.

Q. And what do—does that monitoring generate reports or information in some way?

A. Yeah. So the data that we—the data we collect from that gives us kind of an accurate view, at least in a consistent way from a statistical standpoint, on how much pirated activity we see taking place on those popular titles.

And so, we use it in a number of ways. Some customers purchase that data for their own types of analysis.

* * *

[388] [*666] NOTE: A music excerpt is played.

BY MR. OPPENHEIM: (Continuing)

Q. Mr. Bahun, do you recognize that recording?

A. Yes, I do.

Q. You recognize that recording?

A. Yes.

Q. Now, was that Taylor Swift or Lady Gaga?

A. That was—that was Lady Gaga.

Q. Let's turn to PX 12, please. I am sorry.

Did you—just the first page of it.

So we have a stipulation on the first page of PX 12.

THE COURT: All right.

MR. OPPENHEIM: So if you could publish just the first page, please, Mr. Duval.

BY MR. OPPENHEIM: (Continuing)

Q. Do you recognize this document, Mr. Bahun?

A. Yes.

Q. Can you describe what it is?

A. This is a summary of the notices that we sent to Cox between 2012 and 2015.

Q. And did you assist in the preparation of this summary?

A. Yes.

Q. And can you describe the difference between the column that says Full Data Set and the column that says February 1, 2013, to November 26, 2014?

[389] [*667] A. Sure. So the full data set is—we provided data from January 1 of 2012 through March 31 of 2015.

So the first column—or the full data set column there represents a summary of the numbers involved with those notices.

And then the other one is kind of a subset, it's trimmed down. And basically within the time frame specified, those are the corresponding numbers.

Q. And you said the time frame specified. Do you understand that that's the claim period of this case?

A. Yes.

Q. Okay. And can you just describe the notices sent in the full data set.

A. Yes. So during—or in full data set, we had 284,444 notices sent.

Q. To whom?

A. To Cox.

Q. And what kind of notices?

A. Infringement notices.

Q. And then within the claim period, how much infringement notices were sent to Cox?

A. 163,148.

Q. And all of them came from antipiracy2@riaa e-mail address?

A. Yes.

[390] [*668] Q. And where did all of them go to?

A. They were all sent to abuse@cox.net.

MR. OPPENHEIM: No further questions. We will pass the witness.

THE COURT: All right. I think that we will end the testimony for tonight now and go to cross-examination tomorrow morning.

So thank you all for your patience. It was a long day.

On Monday afternoon, when I initially instructed you, I talked about infringement and using the word "infringement" and "infringement notices." And you have seen the words. And we have talked about it a lot during the course of the trial.

I just wanted to remind you that the ultimate decision on whether Cox is liable for infringement is yours. It's an issue of—ultimately an issue of fact. And what you have been hearing is evidence in support of that or non-support of that.

So I just want you to keep that in mind. I know it was just a day-and-a-half ago, but I am sure it seems like quite a bit longer than that.

So have a good evening. Again, no research, no investigation, please don't speak to anybody about the case. Thank you.

We will see you tomorrow at 9 o'clock.

[403] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 5 (A.M. Portion)

TRIAL TRANSCRIPT

December 6, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

[406] [*930] apologize for bringing you in and having you sit. But I think it's—I'm beginning to think it's a genetic problem.

All right. We have Ms. Trickey back on the stand to continue her testimony.

And, Mr. Oppenheim, please proceed.

MR. OPPENHEIM: Good morning. Thank you, Your Honor.

LINDA TRICKEY, called by counsel for the plaintiffs, having been previously duly sworn, continues to testify and state as follows:

DIRECT EXAMINATION

BY MR. OPPENHEIM:

Q. Good morning, Ms. Trickey.

A. Good morning.

Q. Feeling a little better?

A. Still dripping. Sorry.

Q. Sorry. If you need a break, let me know.

May I ask whether you spoke to your counsel about the case, either last night or this morning?

A. No.

Q. Last night—or yesterday afternoon, we spoke about the three-strike policy, some documents that are a three-strike policy. And we spoke about PX 165, which was a 2008 policy for residential customers.

I'd like to now turn to PX 174, please.

A. I'm sorry, 174?

[407] [*931] Q. Yes.

MR. OPPENHEIM: Any objection?

MR. ELKIN: No objection, Your Honor.

THE COURT: All right. It's received.

MR. OPPENHEIM: Could we publish that, please, Mr. Duval?

BY MR. OPPENHEIM: (Continuing)

Q. Ms. Trickey, is this a 2011 version of Cox's graduated response for residential customers?

A. Yes.

Q. And if we turn to page—I'm going to go with 12 of 87. We literally have four different pages on this.

Do you see where 12 of 87 is?

A. Yes.

Q. And that's the section that's—it says: Copyother; right?

A. Yes.

Q. That was Cox's internal reference at this point in time for copyright; is that correct?

A. Yes.

Q. And under this 2011 policy, if we go to the next page, it says that when Cox received its first notice with respect to a particular subscriber, that it would, it says here: Note ticket, hold for more and close.

Do you see that?

[408] [*932] A. Yes.

Q. Now, you don't know why Cox implemented that policy, correct?

A. I'm not positive why, but I have an idea.

Q. Well—and when I asked you in your deposition, in fact, that I took of you back in April, I believe, April 15, 2019, you indicated you didn't know, right?

A. I may have.

Q. What's that?

A. I said I may have. I don't recall exactly what I said, but—

Q. But you now believe you do know why?

A. Well, I'm not positive, again, but I have—you know, I—as I've reviewed documents, I, you know, believe I have an idea, but I can't say for certain.

Q. So at the time you didn't know. But now having reviewed some documents, you think you may know?

A. Again, I'm not positive.

Q. Okay. Back when you were work—doing work for the abuse group, did you know?

A. So back when this policy was done in 2011, I was not the primary lawyer working on graduated response. That would have been Mr. Cadenhead.

Q. But subsequently you were, and there was the same provision in subsequent policies, right?

[409] [*933] A. Yes.

Q. So at the time that you were providing legal counsel to the group, right, and they had this policy, did you know why it was implemented?

A. You know, I wasn't positive. I believe I probably did know at that time and just don't recall it today, or did not recall it in my deposition. But, you know, I probably knew at one time.

Q. Okay. So you think you knew what it was back when you were doing the work for that group, you didn't know it when I took your deposition, and now you think you may know; is that right?

A. Well, again, I'm trying—I have a recollection of something, but I can't say for certain.

Q. Okay. But you don't know for sure, is what you're saying?

A. Right.

Q. Okay. And then after the first step, the first notice that Cox would receive with respect to any particular notice, they would—Cox would send a warning to the subscriber, right? And that's under Second right there?

A. You're talking about section 6?

Q. Yes.

A. Yes, that was—that's the warn by e-mail that we talked about yesterday.

Q. And what we're about to go through is only in those [410] [*934] instances where Cox had an e-mail address for the subscriber, right?

A. Yes. At that time, that's right.

Q. So the second notice resulted in an e-mail warning to the customer, as did the third, the fourth, the fifth, the sixth and the seventh, right?

A. Yes.

Q. Okay. So Cox receives six notices, and all they do is send the same e-mail out, right?

A. So they would send a warning e-mail that would, you know, try to coach the customer, yes.

Q. Okay. And then after that, Cox would—it says here: Suspend (Tier 2) CATS - Auto - with Self-Reactivation Option; right?

A. Yes.

Q. Now, the colloquial term that Cox uses internally for that is it's a soft-walled garden, right?

A. Yes.

Q. Okay. And what a soft-walled garden was was a situation where Cox would suspend the customer's ability to surf the Internet, and there would be a pop-up on the screen that the subscriber was supposed to read and the subscriber could click a button and reactivate the service, correct?

A. Yes. So it would quarantine them from being able to go further in whatever activity they were trying to do, and it [411] [*935] would bring up information for them to read about the complaints, and then there was a button for them to reactivate once they read it.

Q. But all the customer had to do to reactivate was click "okay," right?

A. Right.

Q. Okay. And that's exactly what the customer had to do on the ninth notice as well, right?

A. Yes.

Q. So copyright owners now complain ten times about infringement, and there—there have been do nothing, there have been seven warnings, and two suspensions they can click out; is that right?

A. If they had an e-mail address on file with us, which not every customer did.

Q. And then on the tenth, then Cox would actually suspend the user, correct?

A. Yes.

Q. And the user could call into a customer call center and get reactivated, right?

A. Yes.

Q. And that was what happened as well on the 11th, only they had to call to a different customer call center, correct?

A. Right.

Q. And it wasn't until the 12th notice that Cox would—the [412] [*936] 12 infringement complaint for that particular subscriber that Cox would terminate the subscriber, right?

A. They were eligible for termination at that point, yes.

Q. Well, you said: Eligible for termination. Can you go down to Section 7 of that document, please.

A. Yes.

Q. Under No. 3 in Section 7, could you read that, please.

A. Yes. If DMCA complaints continue after the third suspension/final warning, the account is terminated. HSI service should only be restored with the approval of Corporate Abuse (Manager, Jason Zabek).

Q. So what it says here is the account is terminated and Mr. Zabek had the ability to restore it, right?

A. That's what it says.

Q. Let's turn to PX 179.

A. 179?

Q. 179, I apologize.

Any objection?

MR. ELKIN: No objection, Your Honor.

THE COURT: Thank you. 179 is received.

BY MR. OPPENHEIM: (Continuing)

Q. Now, Ms. Trickey, this is yet another Cox policy and procedure manual for how to handle graduated response for residential customers, correct?

A. Yes.

[413] [*937] Q. And this one is dated, it's a little small, but it looks like October 18, 2012; is that correct?

A. Yes.

Q. If we can turn, please, to page 9 of the document. You see that that's where the copyright section begins again?

A. Yes.

Q. And Cox again use the term "copyother," correct?

A. Yes.

Q. By the way, have you ever heard the term "copyother" other than its use in Cox?

A. I think this is just how they termed it in CATS. I don't know why it changed.

Q. Copyright isn't—excuse me. "Copyother" is not a term that as a lawyer you've ever heard other lawyers use outside of Cox, right?

A. No.

Q. So if we turn to page 10, it says at the bottom of that page, again, that on the receipt of the first notice Cox would hold the notice for further complaints, correct?

A. Yes.

Q. So this is, again, the same thing that existed in the last policy, that for the first notice Cox would not send the infringement notice to the customer, right?

A. Yeah. It looks like that it would—they would ticket it though, it would be assigned a ticket, and then it would be

[417] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 5 (P.M. Portion)

TRIAL TRANSCRIPT

December 6, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

* * *

[CROSS – LINDA TRICKEY]

[420] [*1020] been designed to protect our service, our subscribers, and the internet community from inappropriate, illegal, or otherwise objectionable activities.

Q. And what's your understanding as to the purpose of that statement?

A. Well, that's to—you know, there are many parties in the internet ecosystem, and so this was to put customers on notice that the, what we have said in the AUP is designed to protect, you know, us and our network as well as them and the internet community from activities that they shouldn't be doing.

Q. Okay. If you skip the next sentence, could you read the following sentence that begins with: Violation of any term?

A. Violation of any term of this AUP may result in the immediate suspension or termination of either your access to the Service and/or your Cox account.

Q. Okay. What is your understanding as to the purpose of that statement?

A. That's to put customers on notice that if they misuse the service, that they could lose the privilege of the service.

Q. And does Cox believe that this statement obligates Cox to suspend or terminate a subscriber's access to the internet if they violate any term of the AUP?

A. No, I think the word "may" is in there because the circumstances will, will vary, and so this is to put them on notice that you, you could lose your service.

[421] [*1021] Q. So in circumstances where a customer violates the AUP, do you have an understanding as to what steps Cox will take?

A. Yes.

Q. And what are they?

A. So if they violate the AUP and we become aware of it, typically the, the goal is to reach out and to educate and to modify behavior, to coach, to help them try to figure out what's going on, how they can, you know, fix the problem, close the open WiFi. I mean, there's a lot of things that we walk through. So we try to educate and get them to, you know, change behavior.

Q. Okay. On direct, I think there were questions that were put to you as to the AUP related to a, I think, a zero tolerance policy. How did you view the AUP relative to any notion of zero tolerance?

A. Well, the—you want to make sure your subscribers understand in strong language, you know, what they can and can't do using the service, but I did not believe that the AUP required a zero

tolerance because there are a variety of circumstances that could be at play.

Q. Well, wouldn't it have been easier if Cox just terminated these subscribers if there was a violation of the AUP?

A. Well, not really because, you know, internet access is a very important part of our society, and people need it to, you know, work, to shop, to do all kinds of things online. Now we [422] [*1022] have streaming media that has risen so much. So, you know, it is a very serious thing—as I stated earlier this morning, it's a very serious thing to terminate someone's internet access.

Q. Do you have an understanding as to whether the AUP gives Cox the right to watch what its customers are doing online?

A. No. We do not spy on what our customers do online.

Q. Why don't you do that?

A. Because we believe they have a privacy right in what they're doing online, and we do not track or spy, you know, the websites that they go to.

Q. Okay. Now, during the two thousand and—I'm sorry—2013 and 2014 time frame, absent cybersecurity reasons, do you know whether Cox could block websites or throttle bandwidths?

A. No.

Q. Could they do that?

A. No.

Q. Why not?

A. Well, first of all, I think technically we didn't have the ability to do it, but in any event, you know, there was the concept of net neutrality, which is still very much in the news these days, and is—the concept is that ISPs, being the gatekeeper to the internet, should not be artificially blocking or deciding, like, what traffic gets through and doesn't get through. [423] [*1023] So—and so we, we don't block or throttle, slow down the service artificially.

Q. Does Cox have other types of customers besides residential?

A. Yes. So as I talked about this morning, we have a wide variety of business customers as well.

Q. Okay. I'd like for you to turn to tab 3 in your binder. That's Defendants' Exhibit 103.

A. Okay. I'm there.

Q. Can you recognize—do you recognize Defendants' 103?

A. Yes.

Q. What is it?

A. These are Cox Business policies—pardon me—including the Cox Business Acceptable Use Policy is included in this.

Q. Did you contribute to the content of these documents?

A. Yes.

MR. ELKIN: Your Honor, I would offer Defendants' 103 into evidence.

THE COURT: Any objection?

MR. OPPENHEIM: My apologies, Your Honor.

No objection, Your Honor.

THE COURT: It's received.

BY MR. ELKIN:

Q. Could you take the jury through what Cox Business policies are covered in this exhibit?

[424] [*1024] A. Well, let's see. It starts out with your privacy rights. There's an annual privacy notice that's actually included, and then—

Q. I'm sorry to interrupt you. That was a bad question.

A. Oh.

Q. Let me direct you to the first page of the exhibit. This Cox Business policies, do you see the effective date of when this particular policy went into effect?

A. It says it was updated November 18, 2011.

Q. And then let me direct your attention to the fourth page of this exhibit. In the middle of the page, do you see any other new effective policy AUP for the business for Cox?

A. Yes. There's a Cox Business Acceptable Use Policy. It says it was updated October 1, 2012.

Q. Do you know whether or not these were the Cox Business AUPs that were in effect during the 2013 and 2014 time frame?

A. I think so, yes. I don't think there was a later business one after this.

Q. Does Cox view the business AUP violations differently than residential AUP violations?

A. Well, so how we treat the potential violations, we do have different processes.

Q. Why is that?

A. Well, because business customers are very different from residential customers, and as I stated earlier this morning, [425] [*1025] business customers range from, you know, a very small business up to very large businesses, but they are businesses, and they are largely reliant on their internet service.

You also have many businesses that have users of the internet service who they may not even know who the person actually is, because they could be a

doctor's office that offers WiFi, or it could be—you know, we talked about a hospital. We've got government buildings, you know, police, fire, all kinds of different buildings, and so you don't always know who the actual—the identity of who the actual users are.

Q. Okay. You can take that down, James.

I want to turn to a different subject, if I may. Do you know whether there was a particular group at Cox that dealt with copyright infringement claims during 2013 and 2014?

A. Yes. That was the customer safety team.

Q. And what was the customer safety team's role and responsibility for this?

A. So that, that team would ingest the complaints that came in from the copyright holders into our—what we called our CATS system, the Cox abuse tracking system. It would sign a ticket, and they were responsible for carrying out the graduated response.

Q. Do you know what the focus of the customer safety team was in dealing with customers who were accused of copyright [426] [*1026] infringement?

A. Yes. Their role was very much based around education, and it didn't—wasn't just around copyright infringement. There were other activities that were considered to be abuses that they tried to help the customers understand and troubleshoot. So it was a, very much of an educational role, hey,

here's what's going on. We need to help you with this.

Q. You testified in your direct a little bit about Cox's graduated response program. Can you explain the—what that is for the jury, please?

A. Yes. So graduated response is the process of dealing with the complaints that were coming in from the copyright holders, and so it could be, you know, as we talked about this morning, you could do warnings via e-mail, and then the reason it's called graduated response is because if the activity continued, then how we handle it got stricter.

So, of course, you know, if there was no response to sort of the e-mail warnings, then we would suspend their service to what we called the soft-walled garden, and they had information to read to explain why their internet access had been suspended, and then they could go to the bottom and click through, and hopefully that got their attention, but if it didn't, then ultimately they could be also suspended to a, what we called the hard-walled garden, which they couldn't click out of. They had to actually talk to a human being who would help [427] [*1027] coach and educate, and that really created a lot of friction for them.

And then ultimately, there could be circumstances where we would terminate as well.

Q. Thank you. I'm going to in a few minutes show you a document and have you take the jury through the specific steps, but before we do that, can you let

us know based on your knowledge when Cox actually began this graduated response program, roughly?

A. I think it was in the early 2000s, because Cox originally offered its internet service through, you know, a third party; I think it was called "Excite@Home"; and that was before I got to Cox, but then when I got to Cox, they had started building out their own network at that point.

So I think soon thereafter, we were actually the first ISP to build a system to handle copyright infringement complaints. So I think it was maybe 2003-4, somewhere in there.

Q. Okay. Why were—you mentioned a few minutes ago that there were various steps along the way of graduated response. Why were there multiple escalation steps in the process?

A. Because again, it's to, it's to educate. And so, you know, if you're sending e-mails, you hope they get to the right place. There were some customers—back then we actually didn't even have a lot of e-mail addresses for our customers [428] [*1028] because some of them had cox.net e-mails, but others did not, and we wouldn't have an e-mail address on file for them, and so, you know, we would—I'm sorry, I forgot the question now.

Q. Why there were multiple escalation steps.

A. Oh, why there were multiple escalation steps. Okay. Yes. Because you wanted to have an

opportunity to have that touch with the customer to try to educate and change their behavior.

Q. Okay. Now, to what extent did the graduated response system become automated?

A. Yeah. At some point, and I don't know exactly what year it was, but they automated the system so that when the complaints came in, they could handle them in a more automated fashion, up to the point where people were suspended and had to talk to a human being.

Q. I think you made reference to this early in your testimony. You've heard of the term "CATS," or the copyright abuse tracking system?

A. Yes.

Q. What is that?

A. So that's the actual system that Cox built to ingest and handle abuse issues and keep track of them.

Q. And to what extent is it a ticketing system?

A. So it essentially is a ticketing system. It's a ticketing and tracking system, I guess, is the way I think of it. So when the complaints would come in, at least for copyright [429] [*1030] a lengthy document covering all sorts of situations, not just copyright.

Q. Was this in effect during the 2013-2014 time frame?

A. Yes.

Q. So beginning on page 10 of this document, at the bottom of that page, there's something reference 6.0, Resolution - Repeated Offenses.

Do you see that?

A. Yes.

Q. And it goes on to the next page. What is this page, page 11?

A. These are the various steps of the graduated response process at that time.

Q. So now that we have this document open, could you take the jury now through step by step with regard to this process?

A. Sure. So the—as we talked about this morning, the first step was held to close for more to see if there were any, any additional complaints that came in, and if other additional complaints come in, the second through the seventh steps, the customer would receive an e-mail warning if we had their e-mail address on file.

On the eighth and ninth steps, that's when they ended up going into a soft-walled garden, where they had information that was to read that would explain to them why their service was sort of interrupted, and then they would have a bottom—a [430] [*1031] button at the bottom that they could click through to reactivate and move on.

If additional complaints were received after that, they would get—on the 10th and 11th steps, they would be suspended to what we called our Tier 2 team, which was an 800 number, and there they had to call in if they wanted to get their internet service back up and running. They could not reactivate it on their own, so they had to do the dreaded call into, into the company.

And then the 12th and 13th and continued offense steps, they would be suspended again, and this time it was to sort of the higher-level abuse team number, which was we called it the Atlanta 404, 404 being the area code. And—but—and then at each step, of course, there was education and explanation going on.

Q. So what would happen if there were further copyright infringement notices affecting a subscriber on or past continued offenses?

A. Yes. So at that point, they would be—continue to be suspended to 404, and they would be considered for termination after step 13.

Q. Why were there multiple warning steps?

A. Well, because, you know, for residential customers, you know, not everybody—some people in the house were more sophisticated than others, and so often the accountholder might [431] [*1032] be a parent or somebody who has no idea what's going on that their, you know, teenager might be engaging in, and so, you know, if they get the e-mail, if they even see the e-mail, you know, hopefully they can try to

address it, but they, they weren't always aware or didn't always understand the technology. Like, they would get a warning with some sort of title on it and they're like, I've never heard of this song, or, you know, I don't know what this is.

So, again, this was an opportunity to try to educate, and so that's why there are, you know, guidelines in here, too, about make sure you ask the customer these certain types of questions to try to troubleshoot what's going on.

MR. OPPENHEIM: Objection, Your Honor. We'd move to strike the hearsay in that answer, please.

THE COURT: Overruled.

BY MR. ELKIN:

Q. You made reference in your direct to the fact that Cox subscribers who were accused of copyright infringement, as they progressed through a graduated response, eventually had resulted in the subscribers receiving fewer notices or, or not at all. Do you know if Cox ever observed that allegations of infringement as relating to suspected subscribers decreased after these different steps?

MR. OPPENHEIM: Objection. Can you lay a foundation, please?

* * *

[433] [*1037] safety team, because it seemed like it was working well.

Q. Who—what members of the safety team did you interact with during that period?

A. So I would have interacted with Jason Zabek, Joe Sikes, Andrew Thompson. I don't know that I interacted with anyone in the Virginia office or not, but primarily those three.

Q. What about Brent Beck?

A. Oh, well, Brent, of course. He was more the technical guy who ran the system, yes.

Q. And did you interact with Matt Carothers at any time related to the system?

A. Yeah, yeah, some. Yeah.

Q. And did you have occasion in your interactions with the safety team to form any conclusions with regard to whether the graduated response system worked?

A. Yeah. I mean, it seemed to—it seemed to work. It seemed to have the, the desired effect, particularly as you got further into the steps.

THE COURT: Did you actually speak with them about the graduated response program?

THE WITNESS: Oh, absolutely, yeah.

THE COURT: Okay. All right. Go ahead.

MR. ELKIN: Thank you, Your Honor.

BY MR. ELKIN:

Q. Now, I may have lost the thread, so if you don't follow [434] [*1038] me, just let me know, but what if after repeated warnings, Cox continued to receive notices of infringement pertaining to the same customer accounts? What would happen?

A. Well, I mean, you know, as we—as it says in here, I mean, at that point, they would probably do a final discussion, and then some of those accounts would be considered for termination. Some would be terminated.

Q. And were customers automatically terminated when they hit the last step?

A. No. I mean, this, this safety team had a lot of knowledge in working with customers, and, you know, they had discretion to decide what was appropriate, and so it wasn't an automatic termination, but they would decide whether, whether the circumstances were appropriate to terminate.

Q. And what was your understanding as to why Cox didn't automatically terminate subscribers when they hit that point?

A. Well, because these, you know, these again—these were guidelines, and so, you know, the whole graduated response—I mean, you know, to my knowledge, when the law was passed, it never set for requirements for specific steps or anything like that that you had to do. So each ISP had to decide what

was an appropriate process for them to implement that would balance the needs of their customers, and I said this earlier, their customers as well as the needs of the other parties in the whole internet ecosystem. So this was a balancing.

[435] [*1039] Q. So aside from the automation, do you have an understanding as to whether the graduated response steps were hard-and-fast rules?

A. No. I mean, they weren't hard-and-fast rules. They were, they were, you know, guidelines and procedures.

Q. Mr. Oppenheim, plaintiffs' counsel, on direct took you through some earlier versions of the ticket handling procedures pertaining to copyright infringement. Do you remember that?

A. Yes.

Q. And do you remember that some of those versions had fewer steps related to graduated response as it pertained to copyright infringement? Do you remember that?

A. Yes.

Q. And first of all, do you know whether or not those procedures were in effect during the 2013-2014 time frame?

A. I, I think no. I think the ones we went through were earlier than that.

Q. Did—now, with regard to the steps that were in place during this claims period, do you know whether Cox decided to increase the number of steps so that it wouldn't have to send more notices out to Cox customers about copyright infringement?

MR. OPPENHEIM: Leading, Your Honor.

THE COURT: Well, I'm allowing him to lead.

THE WITNESS: I'm sorry, I'm not sure I understand the question.

[436] [*1040] THE COURT: Well, you know, you're right; I apologize. You can answer that question, but let's try not to lead.

MR. ELKIN: Sure.

BY MR. ELKIN:

Q. So the steps in the version of, of graduated response during the claims period—

A. Right.

Q. — had more steps than the prior—did they have more steps than the prior versions?

A. Oh, yes.

Q. Was that designed to, to permit more copyright infringement on Cox's system?

THE COURT: Yeah, ask her why that was designed that way.

BY MR. ELKIN:

Q. Why was it designed that way?

A. Well, I mean, I think I said earlier I didn't know exactly why they had added the additional steps, but I am assuming that this, you know, team had based it upon, you know, some kind of data or something and—but, again, as I stated before, too, this was an evolving process. So you're not going to launch something in 2002 or '3 or '4 and have it look completely the same 15 years later or 10 years later.

So I think this was just an evolving process. It [437] [*1041] wasn't designed to, you know, hide or do anything. It was just, again, balancing the needs of the internet ecosystem from the subscribers in—to the copyright holders, and we were stuck in the middle.

Q. Could you describe the staffing levels at Cox with regard to handling residential copyright notices during 2013 to 2014?

A. So if a, if a customer got a complaint via e-mail or somehow, then if they called in, some people would maybe call what we call our Tier 1 customer care, which is our general customer care support. They probably could answer very basic questions but really weren't highly trained to deal with these kinds of issues, but they did number in, you know, the hundreds.

You know, typically, they would end up going to, like, what we called our Tier 2, which was a group of

persons—I can't remember, I think they were in multiple locations, maybe there were multiple dozen of them. Then we also had a group called Tier 2.5, which was a smaller group but also had more experience in these areas, and then ultimately, we also had this group in Atlanta we called the safety team, the Atlanta 404.

So there was—there were quite a few people who could handle these kinds of things.

Q. So during 2013 and 2014, are you aware of approximately how many people Cox employed in these groups?

[438] [*1042] A. Well, I mean, again, the Tier 1 was not really—there was a large number of Tier 1, but they really weren't very sophisticated in dealing with customers on this issue, so they probably would have put them to Tier 2. I think Tier 2 maybe had—I'm not sure exactly, but I think maybe around 80-ish or so persons that could deal with abuse issues in general. Tier 2.5, I think, was around maybe four or five people, and then we also had the safety team in Atlanta.

Q. Okay. Now, I'm going to turn to business customers, Cox Business customers. Did Cox also receive and process copyright infringement notices for Cox Business customers?

A. Yes.

Q. Was there a particular group that handled copyright tickets for the Cox Business accounts?

A. The safety team.

Q. Okay. And was there any special call center that was set up to address them?

A. Well, there was a—there was a call center in Las Vegas that was called the NSC, and they, they would field a lot of different kinds of business calls, but they could also field the calls that business customers would make regarding copyright infringement.

Q. Okay. Now, did Cox's graduated response program for business subscribers differ from how it handled copyright infringement notices for its residential customers?

[439] [*1043] A. Yes.

Q. Why was that?

A. Well, with business customers, again, they're heavily reliant on the internet service for their actual business, and so, you know, you wouldn't want to just immediately suspend their service because you could disrupt their entire business operations, and so—and we had a smaller number of business customers, too.

So we had—the process was to reach out directly to the business customer to, to try to figure out what was going on.

Q. And were these processes laid out in any company documents?

A. Yeah. They had a procedures document for Cox Business.

Q. Okay. Turn, please, to tabs 5 and 6 in your binder.

MR. ELKIN: And, Your Honor, this is Defendants' Exhibit 106 and Defendants' Exhibit 107.

THE COURT: Any objection?

MR. OPPENHEIM: No, Your Honor.

THE COURT: All right. It's received—or they're received.

Sometimes you're going to get a plaintiffs' exhibit that will be the same as a defendants' exhibit. It may have maybe a modest tweak to it, but that's why we're doing it this way. Thank you.

* * *

[DIRECT – ROGER VREDENBURG]

[440] [*1107] Q. Including copyright violations that came to Cox's attention?

A. Yes.

Q. And during your time, isn't it right, sir, that the bulk of the abuse complaints that you dealt with in your time had to do with copyright abuse violations?

A. Yes, I would say the bulk were copyright.

Q. And sometimes you could resolve those issues on your own, correct?

A. Yes.

Q. And other times you would want to escalate those and ask someone else about them?

A. About copyright?

Q. If you had a question or an issue or you weren't sure what to do, you might escalate and ask somebody else for—what they thought?

A. We would contact Atlanta.

Q. You would contact Atlanta. And Atlanta was typically Mr. Zabek and Mr. Sikes?

A. Correct.

Q. And you took direction from Mr. Zabek and Mr. Sikes?

A. Yes.

Q. And you looked to Mr. Zabek and Mr. Sikes to make—to help make decisions about how to handle certain kinds of abuse issues?

[441] [*1108] A. Yes.

Q. Including at times whether to terminate the service of repeat copyright infringers, correct?

A. That's correct.

Q. When you weren't sure whether to terminate a customer who might have been at that stage of consideration in the graduated response, you might reach out to Mr. Sikes and say, what should I do here?

A. Correct.

Q. Those gentlemen, Mr. Zabek and Mr. Sikes, set the tone for the abuse group, correct?

A. Yes.

Q. Mr. Zabek and Mr. Sikes provided guidance and the direction for the TOC team handling abuse issues on a day-to-day basis, correct?

A. Correct.

Q. Now, when you started at Cox in 2004 as a 2.0 tech—as a 2.0 tech, you said? I am sorry, let me ask—

A. Tier 2.

Q. Tier 2. Thank you.

And when you first started with Cox around 2004, there was a three-strike policy for copyright infringement and the customers were terminated, correct?

A. No.

Q. Mr. Vredenburg, there was a three-strike policy for [442] [*1109] copyright infringement notices

when you started and the customer was terminated; is that correct?

A. As far as I remember, there was never a three-strike policy. We had our graduated response system, but I don't ever remember it being called a three-strike policy.

THE COURT: Was it three warnings and then termination?

THE WITNESS: No.

THE COURT: Is that the terminology?

THE WITNESS: No, it would go up by steps.

THE COURT: Okay.

BY MR. GOULD: (Continuing)

Q. Mr. Vredenburg, do you recall—do you recall testifying at a trial in a prior case involving Cox Communications?

A. Yes, sir.

Q. And issues arose in that case related to Cox's graduated response system?

A. Yes, sir.

Q. And when you gave that testimony, you swore to tell the truth, right?

A. Yes.

Q. Just like you raised your right hand and swore to tell the truth today?

A. Absolutely.

MR. GOULD: Page 871, line 6, of his *BMG* testimony.

JA-247

[*1138] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 6 (A.M. Portion)

TRIAL TRANSCRIPT

December 9, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

* * *

[VIDEO DEPOSITION – JASON ZABEK]

[*1256] originated from the Cox network, which is why we would receive the complaint.

Q. And when you say, it originated from the Cox network, you are referring to the alleged infringement, correct?

A. For this case, yes.

Q. Okay. While you were working in the abuse department, Cox received millions of infringement notices, correct?

A. We got a lot. I can't give you a number. I'm sorry, I don't remember the exact numbers.

Q. But it was a lot?

A. It was a lot.

Q. Assuming that the infringement notices came in included all of the requirements that Cox set forth, Cox presumed that the infringement notices were valid, correct?

A. Yeah, not every single time. One of the things that we did is we would set up partnerships. When I say partnerships, we would talk to a lot of copyright holders that wanted to send these in, and we would make sure that they would have the right information in there. So digital signatures, things

like that. Ones like that that came in, we could look at that and have good faith in saying that it was.

If we would get something from, say, a mom-and-pop shop, which did happen every once in a while, or from somebody even trying to even fake their buddy out or friends, we have seen those in the past, to get them in trouble, those were [*1257] absolutely under scrutiny.

Q. And you're aware that Cox received notices from the RIAA, correct?

A. Yes, we did receive notices from them.

Q. And when you received those notices, you presumed they were valid, correct?

A. As long as they had the proper information on there, P2P signatures, things like that, that we had spoke with them, yes, we would assume that it was valid and make an action letter.

Q. And in your opinion, the vast majority of the subscriber, Cox subscribers who were using peer-to-peer were doing so on purpose, correct?

A. I would not speculate that our customers were using it on purpose every single time. I'm sure, you know, some were. But every customer, I don't know exactly what they were doing with it. I am sure there were some that were actually using it for, you know, nefarious activity.

Q. In fact, you believe that 99 percent of the infringement notices is from people using peer-to-peer on purpose, correct?

A. With our complaints that were coming in, if they were against the Bit—against BitTorrent, for using BitTorrent, that in those cases they were—they would have more than likely installed it or at least using it at that point in time.

Q. And using it on purpose, correct?

A. I would believe so. The only other case I know is that if [*1258] a hacker got on their computer, was running proxy server or software, things like that, we have seen infections in those kind of cases. There are always some areas where it's not known.

Q. But that was the exception, correct, not—not the rule?

A. We saw several of those out there. I couldn't give you an exact number on it.

Q. But in the overwhelming majority of instances, you believed that the peer-to-peer activity was taking place on purpose, correct?

A. That they wanted to use it.

Q. Yes. And you believed, Mr. Zabek, that if a customer was doing something on purpose and you could discover it, then you didn't want them on the Cox network, correct?

A. Not necessarily. If we could help the customer, educate them on anything that they didn't understand, felt they were doing incorrectly, if we could do that, we would want to see if we could help them instead of immediately just disconnecting them.

Q. If a Cox customer was intentionally using—engaging in spam, hacking, or DOS attacks, you didn't want those people on the Cox network, correct?

A. Again, each case is kind of different. I mean, we have seen DOS attacks where the customer wasn't even aware it was happening, they were infected. Those people I still would want

* * *

[467] [*1275] A. People handling the tickets or phone calls coming in.

Q. And the subject of the e-mail was DMCA Terminations, correct?

A. Yes.

Q. And by DMCA, you were referring to copyright infringement?

A. It was interchangeable as we would speak.

Q. The DMCA was interchangeable for copyright infringement?

A. Yeah.

Q. And in this e-mail you headed off in bold language—bolded—excuse me—language, that says: Proprietary Info! This is not to be shared about outside of Cox or abuse reps. It is not to be passed to Tier 1 or Tier 2. This info stays within Tier 2.5 only; correct?

A. That is what it stated.

Q. So this was a document that you were sending out that was not only internal to Cox, but internal to just Cox 2.5 reps, correct?

A. It would be to our highest level of reps.

Q. And in this document you go on to indicate that: As we move forward in this challenging time, we want to hold on to every subscriber we can; correct?

A. It does state that.

Q. And by we, you're referring to Cox, correct?

A. In this one I believe I am.

Q. And then you say: With this in mind, if a customer is [468] [*1276] terminated for DMCA or copyright infringement, you are able to reactivate them after you give them a stern warning about violating our AUP and the DMCA.

Do you see that?

A. I do.

Q. And that's what you wrote, right?

A. That's what I typed out, yeah.

Q. And then you went on to tell the team that: We still must terminate in order for us to be in compliance with safe harbor, but once the termination is complete, we have fulfilled our obligation; correct?

A. That is what is stated there.

Q. And then you say that: After you reactivate them, the DMCA counter restarts; the procedure restarts with the sending of warning letters, just like a first offense; correct?

A. That is stated there.

Q. And by that, what you meant was that after somebody was terminated, if they were reactivated, they wouldn't be suspended or terminated for another notice, they would be subject to another e-mail, and potentially seven other e-mails, before they would be suspended again, correct?

A. Not in every case. Again, we had given the flexibility to our folks that they could absolutely suspend off another single one. Things that we had talked about within our weekly meetings. You know, again, if anything wasn't clear and they [469] [*1277] would ask on them, we would clear it up later.

Q. But here what you were saying was that the procedure was to restart with warning letters?

A. That we could restart.

Q. It doesn't say, could, does it?

It says: The procedure restarts with sending of warning letters.

Right?

A. It does say that.

Q. It doesn't say, use your best judgment to do what's best for the copyright holders, does it?

A. It does not say that specifically.

Q. Well, it doesn't even infer it, does it?

A. Yes.

Q. Yes, it doesn't?

A. Correct.

Q. And this e-mail says: This is to be an unwritten semi-policy; right?

A. Yes.

Q. We do not talk about it or give the subscriber any indication that reactivating them is normal; right?

A. Correct.

Q. Now, this new policy you say in here only pertains to copyright infringement, not to spammers or hackers, correct?

A. In this case, yes. Our folks would not be able to look at…

JA-256

[471] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 6 (P.M. Portion)

TRIAL TRANSCRIPT

December 9, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

* * *

[VIDEO DEPOSITION – JASON ZABEK]

[474] [*1312] exponentially, you know, if we got 400 more in, it was going to be 400 more calls.

Q. But you agree that more notices meant more call center volume, right?

A. It's absolutely possible.

Q. And so by capping the number of notices, that meant less call, call center volume, right?

A. Could mean a steady call volume coming in.

Q. And less notices also meant fewer terminations, correct?

A. No, not necessarily, because the—when the, the notices came in, we did hold onto those, but you could get less terminations for those, too.

Q. Yeah. So you'd end up with less terminations, right?

A. It's possible.

Q. Right. And if there were less terminations, that would mean that Cox would retain more revenue, right?

A. That we would retain those customers and they would, yes, still pay their bills on a monthly basis.

Q. In addition—so we've talked about a number of things already that was not contained within the written graduated response policy, or I think you referred to it as the M&Ps. We talked about auto-—we talked about reactivations. We talked about caps. We talked about blacklisting. I now want to talk about auto-suspend limits.

A. Okay.

[475] [*1313] Q. Do you know what an auto-suspend limit is?

A. I've heard—yeah, I've heard the term. Absolutely.

Q. Was an auto-suspend limit the—a limit on the number of suspensions that Cox would implement in a day?

A. Yes, for those. Yes.

Q. I'm sorry. I didn't want to cut you off. For those—

A. For any abuse issue.

Q. Right. So an auto-suspend limit would cap the number of suspensions that Cox would do in a day across all types of abuse, right?

A. Yes.

Q. And if Cox received an infringement notice that would have normally called for a suspension under the graduated response policy but the auto-suspend

limit had been hit, then Cox would just send an e-mail to the customer instead of doing a suspension, right?

A. I gotta tell you, I'd have to go back through the procedures. It's been a while since I've even looked at those. I'm sorry.

Q. The normal auto-suspend limit was set at 300 suspensions per day, right?

A. Okay. The number sounds familiar, but I can't be a hundred percent.

Q. Mr. Zabek, you've been handed what's been previously marked as Plaintiffs' 74, which is an e-mail exchange among [476] [*1314] people in the abuse department in December of 2009, and if we—if you start at the back of the e-mail exchange—

A. Um-hum.

Q. —you'll see Chris Burns is e-mailing Brent Beck and you, and he says: We've been hitting the 300 suspension limit fairly regularly now.

Do you see that?

A. I do.

Q. Does that refresh your recollection that the auto-suspend limit was normally set at 300 suspensions per day?

A. Back in 2009, yes. Yes.

Q. And that in this e-mail exchange, in fact, Mr. Burns is complaining that there was going to be a decrease in staffing over the next several days?

A. Um-hum.

Q. And that there was a problem with handling the call volume, and asked whether or not the auto-suspend limit could be reduced to 250 per day, right?

A. Um-hum. That's what he is requesting here, yes.

Q. And you go ahead and you authorize the auto-suspend limit to be dropped to 250, correct?

A. I do.

Q. And then in January, you ask whether or not it can be raised back up to 300 again, right?

A. Asking Chris Burns, yes. Again, with these, these are [477] [*1315] auto suspensions. We can still suspend manually as other issues were coming in. Our auto suspension was one thing, again, that was automatic. If a DOS attack came in or anything else, we could actually manually suspend them with these folks, too. So it wasn't just 250 or 300. Those were just the auto suspends. But we did have the ability to do manual suspensions.

Q. And—

A. So if somebody was attacking the network, you know, from our—inside of our network, we could take action on those.

Q. And even though there was an auto-suspend limit that would have covered all abuse situations, it's your testimony that if there were suspensions that should have occurred for reasons other than copyright infringement, that might still happen?

A. It could be for any reason actually. Even as Chris says at the top, some San Diego agents are continued to process past the 250, meaning we were doing manual suspensions for some type of issue that really required it.

Q. Are you aware of a single instance where there was a manual suspension of a copyright infringement notice that was over the cap?

A. Ten years ago, I could not recall. I'm sorry.

Q. Mr. Zabek, you've been handed what's been marked as Plaintiffs' 270, which is Bates labeled COX_SONY_974255 through 257, and this is in August of 2000—this is an e-mail

* * *

[DIRECT – BRENT BECK]

[493] [*1404] Notices Not Stored in CATS," the second one, deleted notices, those are the notices that Cox deleted, correct?

A. Those were deleted by CATS, yes.

Q. And the notices from Rightscorp that were blocked don't appear in these charts?

A. That's correct.

Q. Okay. And then this third column, it looks like it's a small exception about a small number that I think we can just move past.

Now, the last sentence of the narrative says that for a particular month, the sum of those columns reflect all e-mail notices received at abuse@cox.net in that month that relate to alleged copyright infringement, correct? Basically, you could do the math horizontally and figure out the total notices per month?

A. Yes. Yes, that should be correct.

Q. Now, if we could just go to the chart, please, and just kind of—let's go to the next page and zoom up a little bit, and then just kind of scroll down slowly, and let's look and eyeball the figures in the first two columns: notices in CATS and deleted notices, and do you see that over time, Mr. Beck, keep going, the deleted notices start to increase?

Let's go to the next page, please.

Do you see that by 2013, the deleted notices starting in February 2013 start to increase a bit more into the 114,000, [494] [*1405] 123,000, 109,000? Do you see that?

A. Yes.

Q. And you see that as the months continue, that the deleted notices actually exceed the number of notices that CATS accepted?

A. That is the case for some of the months, yes.

Q. Isn't it the case for all of the months there shown in 2013, sir?

A. No, it's not.

Q. No, it's not? Is there one that you see where the deleted notices are smaller than the accepted notices?

Oh, you're right. May 2013, there were about 10,000 more accepted than deleted. And the other months, the deleted exceeded the accepted, correct?

A. Yes. That matches what I'm seeing.

Q. Now, I've done the math here, and I counted the number of deleted notices in the years shown in this chart, and it's about 5 million. And is there any reason to doubt my math?

A. I would have to run the numbers myself to speak to that.

Q. Okay. And then I did the same for the claims period.

And if we could pull up the first slide of the demonstrative?

What this slide shows, sir, is the claim period, February 2013 through November 2014, for the information we just looked at, including the accepted notices, the deleted [495] [*1406] notices, and the total notices.

Do you see that the total number of notices was about 5.7, 5.8 million that Cox received in this time period?

A. Based on the document, yes.

Q. Assuming the math is correct.

A. That's right.

Q. And do you see that the number that Cox accepted was just over 2 million, and that comes to about 36 percent of that total?

A. I see.

Q. And do you see, Mr. Beck, that the number that Cox deleted is about 3.68 million, which comes to about 63 percent of the notices?

A. I see that.

Q. So according to this sworn information that Cox provided, Cox deleted over 63 percent of the infringement notices it received in 2013 and 2014, correct?

A. Based on the numbers we're looking at.

Q. And not one of those would have received a customer facing action of any kind, correct?

A. For the deleted notices. They may have received notices from non-blacklisted senders, however.

Q. Of those 3.68 million, not a single customer faced any action, correct?

A. For those particular notices.

[496] [*1407] Q. And you don't know how many of those millions of notices pertain to the subscribers who are identified in the notices from plaintiffs, do you?

A. I just know if they are deleted, then we do not have copies of those.

Q. Now, I want to talk a little bit about what CATS does when it receives a copyright infringement notice from a non-blacklisted party. So first CATS automatically scans the notice for information. You call it parsing; is that right?

A. That's a general term I would use, yes.

Q. And CATS tries to figure out what type of abuse complaint it is?

A. Yes.

Q. So it tries to figure out is this a copyright infringement complaint?

A. Yes, that's correct.

Q. And it looks for an IP address, a date, and a time related to the instance of infringement identified, correct?

A. Yes. Those are some of the things we look for.

Q. And that allows CATS to match that infringement notice to a particular customer?

A. Those are some of the key values we would use.

Q. So that's a process that CATS does. It matches that information to try and find the customer, right?

A. Yes, that's part of the flow.

[497] [*1411] A. Right. 2012, 2013, 2014.

Q. And just in this limited time frame, do you recall that there were approximately 315,000 tickets in this document?

A. That sounds—that matches what I recall, yes.

Q. You've reviewed this. You remember it. That sounds about right?

A. Yeah. 315,000 tickets in here.

Q. Now, if we look at column H in the ticket data, it's a column called "Action." Do you see that?

A. Um-hum.

Q. And we can filter it in different ways to figure out how many, how many times Cox took different kinds of actions, correct?

A. That column does show what the action was taken.

Q. For example, we could filter on column H for sent reply.

Why don't we do that, Mr. Duval. Sent reply. There you go.

And you see on the bottom left, there's a number there that tells you how many records came up after you filtered in that way?

A. I see.

Q. And what's that number? What's that number, sir?

A. The number showing here is roughly 48,000.

Q. So 48,018, is that correct?

A. Yep, out of the 570,000-plus total.

[498] [*1412] Q. But that's out of 315,000 tickets, right?

A. Yes. 570,000 is the count of the number of actions, and a given ticket could have multiple action entries.

Q. Sometimes a ticket has multiple entries because it might say sent a reply for one entry and then closed the ticket on another entry?

A. That is correct. That is one possible.

Q. So in order to understand the number of actions taken out of the number of tickets, we really want to look at it out of a function of 315,000, correct?

A. Possibly. It depends on what we're looking at.

Q. Let's do that. So we have 48,000 instances of sent reply out of these 315,000 tickets. Now, "sent reply" is the language that Cox and CATS uses typically when CATS receives an e-mail that exceeds a given sender's hard cap limit, correct?

A. Depends on the action content form here.

Q. And you see on the action content form in column I, they all look like hard limit complaints?

A. For this particular page, yes.

Q. I think there might be a couple of other ones, but let's, let's do this: Let's unselect and just select hard limit complaints. So for all of those hard limit complaints, it's 46,997?

A. Yes.

Q. Okay. So just about 47,000 times that Cox sent a hard [499] [*1413] limit reply to a sender. Am I correct, sir, that means that Cox sent an e-mail back to whoever sent it, closed the ticket, and did nothing as to the customer?

A. I can't say that we did nothing, but yes, we did not take a customer facing notification at that time.

Q. So you took no customer facing notification.

A. Correct.

Q. Didn't send the customer a warning for those 47,000, correct?

A. No, but it will serve as their first step in our graduated response program if they haven't received any other complaints.

Q. So this might replace the ignore hold for all?

A. The hold for more, yes.

Q. So this might replace the ignore hold for more, but other than that exception, this doesn't bump them up in the graduated response step, correct?

A. No. It can take the place of the hold for more, but there's no additional customer facing action on those.

Q. This would not give the customer a warning e-mail, would it?

A. No.

Q. They wouldn't be suspended based on this, right?

A. No. That would be a customer facing.

Q. There would be no customer call, correct?

A. That would be customer facing action.

[500] [*1414] Q. There would be no suspension?

A. Also customer facing action.

Q. And no termination?

A. That would be very much a customer facing action.

Q. And as for the graduated response, I want to make sure I understand how that works. So ordinarily, when CATS receives a notice that it takes a customer facing action, it might bump up the customer in the graduated response, correct?

A. Conversationally speaking, yes.

Q. Conversationally speaking. That's—that works for me.

Say a customer is on their fifth ticket under the graduated response and then they get their sixth ticket. Ordinarily if it it's a notice—if it's a ticket that Cox processes and recognized, it would bump that customer up to the sixth step, correct?

A. Yes.

Q. Okay. But if it's a hard limit reply, that customer just stays at the fifth?

A. Yes.

Q. They essentially get a free pass on the graduated response, don't they?

A. I don't know that I would call it a free pass. The complainant can resend the complaint at a later time if they have a lower volume spot.

Q. Can we pull up—actually in your binder, please, take a [501] [*1415] look at 310, PX 310, tab 10. PX 310.

Mr. Beck, this is a two-page e-mail that you're included on. Let me know if you can—if you recognize that, sir.

A. Okay. Give me just a moment to review.

Q. Sure.

A. Okay.

MR. GOULD: I'd move to admit PX 310.

THE COURT: Any objection?

MS. GOLINVEAUX: No objection, Your Honor.

THE COURT: It's received.

MR. GOULD: So if we pull that up and start at the second page, please, just zoom in on the whole e-mail, if you could.

MR. GOULD:

Q. So, Mr. Beck, here you're sending an e-mail to the corporate abuse and data ops - CATS teams, and the subject is High Complaint volume for Universal Studios, correct?

A. Yes.

Q. And you say: We have a "hard limit" of 200/day applied for Universal's complaints to us, but we're seeing quite a bit more than that coming in. In general it isn't a big deal really (we create closed tickets once the limit is exceeded each day), but this

complainant in particular has had daily complaint volumes as high as 3,700+ lately. Does that seem…

JA-273

[502] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 7 (A.M. Portion)

TRIAL TRANSCRIPT

December 10, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

* * *

[CROSS – BRENT BECK]

[505] [*1460] time that I shifted over to a software engineer title, the whole thing just kind of being a slow evolution really, rather than sort of, you know, stair-step responsibility changes. It just sort of evolved and grew over time.

Q. Sure. And, Mr. Beck, what is your current position at Cox?

A. I think officially at the moment, I am considered a software engineer 2.

Q. Okay. And can you describe generally what you do in your current role?

A. My current role, I handle pretty much all of the technical aspects for the CATS platform, so everything from support to architecture and design, software development, engineering.

Q. And was that also your role during the 2013 and 2014 time period?

A. Yes, it was.

Q. Okay. And, Mr. Beck, we've heard from a number of folks about CATS, about Cox's CATS system. What is CATS at a high level?

A. So I guess CATS, to start, is the Cox abuse tracking system, and that's an in-house-built system that was stood up to, to be able to handle—pardon

me, abuse complaints related to our customer internet services. So generally speaking, abuse complaints are sent to abuse@ whatever, you know, the domain is. And so abuse@cox.net or any other Cox domains we [506] [*1461] have tend to flow into the front of CATS, and CATS can pick up those complaints, document them, take actions, so forth.

Q. Okay. And, Mr. Beck, putting aside for the moment the blacklisted complainants that Mr. Gould asked you about, can you give us a sense of the volume of copyright complaints that CATS processed during the 2013 and 2014 time period?

A. Yes. If I remember correctly, we—in that time frame, I think 2013 was probably just over a million; 2014 was about 1.4 million.

Q. I'm sorry?

A. I believe it was about 1.4 million for 2014, a little over a million for 2013.

Q. All right. And, Mr. Beck, do you know approximately how many abuse complaints total, including copyright complaints, CATS processed in the 2013 and 2014 time period?

A. Yeah. So including all of the abuse types that we deal with in CATS, that would have been on average about in excess of 3 million per year average in that time range.

Q. All right. Mr. Beck, have you heard of an entity called the Recording Industry Association of America, which is also referred to as the RIAA?

A. Yes, I have.

Q. And to your knowledge, did Cox receive copyright notices from the RIAA during the 2013 and 2014 time period?

A. Yes, we did.

[507] [*1462] Q. And did Cox keep copies of all the notices it received from the RIAA during that period?

A. Yes.

Q. As part of this lawsuit, were you asked to retrieve copies of those notices that Cox received from the RIAA?

A. Yes.

Q. How did you retrieve them?

A. Performed inquiries into the CATS database, so that's—you know, we have a database at the, at the heart of the CATS platform is a database, and that's where all the information is stored, you know, in a structured fashion.

So querying the database is basically, you know, there's an SQL language. I don't want to get too technical, but there's a programming like language you can formulate advanced searches or filters and ways to retrieve out particular data, so I performed database queries using that method to find that information.

Q. And what is—you referred to database queries. What is a—what is a query? Can you explain that for us, please?

A. Sure. It's just a—it's a special way of formulating commands to tell the database, you know, which information you're looking for in this particular case. In this particular example, pulling the complaints here, I would be able to write a small snippet of code that basically says, you know, grab all of the records where, you know, the dates are between this date

* * *

[508] [*1471] know, of the complaint. It can't actually tell what's happened or verify that, no. We're basically just taking the complaint, you know, at face value, you know, someone is saying this is happening.

Q. And once CATS determines that this is—this incoming e-mail is a copyright notice, what does it do next?

A. So once we have determined this is a copyright notice, we're going to continue parsing the body, try to extract some key information out of there, especially like IP port, time stamp, run some back inquiries and see if we can take that information and match it up to a customer account hopefully, and even if we don't match it up to a customer account, we're most likely going to move on and create a ticket, and then from that ticket, we can take customer-facing actions as appropriate.

Those could be automated. They could be done manually by a Cox representative, either way.

Q. Okay.

A. But generally, we're going to parse it, get some information, and create a ticket in the CATS system.

Q. Okay. And you mentioned CATS would try to match this notice up to a customer account. How, how does it do that?

A. So to match it up to a customer account, we may perform a series of queries within Cox. Most of the time, we're looking for DHCP records, but we're going to take that—the IP [509] [*1472] address from the complaint.

And since IPs can change over time, they are technically dynamic, for the most part, they—almost all of them are going to typically be dynamic.

Then we're going to use that date and time that the complaint says the event occurred, and we're going to use that combined with the IP and possibly the port and see if we can match up, you know, find a record where the IP at that particular time, you know, which device was that associated with, which customer account is that, in turn, associated with. So that's typically the flow that we're going to follow.

Q. And, Mr. Beck, does determining the account also determine the user that engaged in the alleged behavior?

A. No, that's not really possible.

Q. Why not?

A. That's—it's not really a technically possible sort of thing. I mean, we can—the IP will match up to most likely a cable modem or something of that nature, and then that modem is, of course, you know, associated to a particular customer account. But, you know, within a customer's home, you know, there could be multiple people. We don't really know who's actually using the internet at that time. It could be any number of situations. I mean, typically, it's going to have multiple people in it.

Basically if you see a car speed down the road, you [510] [*1473] can report the tag, but you don't really know if the owner of the car was driving or their spouse or their kid or their neighbor or their guest.

Q. Well, and is it possible for someone other than a family or household member to use an account service?

A. Oh, certainly. So, you know, you could have people visiting, of course. You could have guests in the home. You could have a neighbor on the WiFi, especially if you, you know, bought a new router, plugged it in, and didn't realize that the default password was "password." That happens. So your neighbors may figure that out and get on there and think that they get free internet by just riding on top of yours. So there are certainly cases where that can happen, and that's just in the residential space.

If we get into other use cases, you could see certainly other people involved with business use cases, that sort of thing.

Q. Well, does Cox have both residential and business subscribers for its internet service?

A. Absolutely. We certainly do.

Q. And does CATS receive copyright notices directed to Cox Business subscribers as well as residential subscribers?

A. Certainly. Absolutely.

Q. And might a business account also have multiple users?

A. Even more so, I would say. Absolutely.

[511] [*1474] Q. Can you give us an example?

A. Sure. I mean, even if we just start with a small business, you know, all of their employees. It could be—you know, any of those employees could be using the internet. I would imagine most of them probably would just in day to day.

But, I mean, working up the, up the line with business, you have all sorts of these cases. So they may offer guest WiFi services, you know, maybe they have a guest WiFi in their waiting room and—or it's a small restaurant or something, maybe they have WiFi in their cafe.

But then you get into larger use cases with commercial, too. So you could have situations like universities. You could have situations like military bases. You could have hospitals. We certainly have a number of hospitals as customers.

So even—there are even hospitality cases like convention centers. That's going to be a huge number of users really. So there are definitely some, some situations like that.

Q. Now, once CATS identifies the subscriber, is Cox able to contact the subscriber?

A. Yeah, typically. A customer account is going to typically have contact information on it, yeah.

Q. And once a ticket is created in CATS, what does CATS do with the complaint?

* * *

[513] [*1526] issue.

MR. OPPENHEIM: Well, except then the question is do I ask Mr. Carothers the question—I mean, somebody has to—it seems obvious that that has to be why it happened, Your Honor, at least the implication.

THE COURT: We're not going—we're not going there based on just that document. Okay? I mean, that would open up BMG. It's too significant.

MR. OPPENHEIM: Would it be simpler to just not show him that quarter?

THE COURT: Do you want to ask him the totals for the year?

MS. GOLINVEAUX: Sure. That's fine, Your Honor.

THE COURT: Why don't you do it that way.

MR. GOULD: Ask for 2013 and '14?

THE COURT: And '14, yeah.

MR. GOULD: Without the document?

THE COURT: Without the document.

MR. GOULD: Thank you.

NOTE: The sidebar discussion is concluded; whereupon the case continues before the jury as follows:

BEFORE THE JURY

BY MS. GOLINVEAUX:

Q. So, Mr. Beck, in connection with this litigation, were you asked to provide information about the total number of Cox [514] [*1527] subscribers that Cox terminated for AUP violations for the years 2013 and 2014?

A. Yes.

Q. And do you recall the total number of subscribers that Cox terminated in those years?

A. The total number was low 30s. I feel like it was 31, 32, 33. I can't remember the exact number, but it was in the 31 to 33 range, if I remember correctly.

Q. And that's the total number of subscribers that Cox terminated for violations of its AUP during the years 2013 and 2014?

A. Yes, that's correct.

Q. And, Mr. Beck, of those 31, 32, or 33 terminations, do you know how many were for—in connection with a customer getting a copyright notice?

A. They were all for copyright.

Q. All of them?

A. Yes, that's correct.

Q. And, sir, of those terminated subscribers, do you recall how many had received copyright notices specifically from the RIAA?

A. I believe it was 13. I believe it was 13, if I'm remembering correctly.

Q. If we pull up the ticket action report and sort on terminations, would we get that number?

[REDIRECT – BRENT BECK]

[515] [*1528] A. Yes. The ticket action history report would reflect termination actions. We could sort by action.

MS. GOLINVEAUX: James, could you pull the ticket action report and sort on terminations?

Q. Mr. Beck, how many does this show?

A. Thirteen.

Q. Okay. So does that tell you 13 subscribers who received RIAA notices during the period were terminated by Cox?

A. Yes.

MS. GOLINVEAUX: Thank you.

Your Honor, no further questions.

THE COURT: All right. Thank you. Redirect?

MR. GOULD: Yes, please.

MS. GOLINVEAUX: Pass the witness, Your Honor.

THE COURT: All right. Thank you.

REDIRECT EXAMINATION

BY MR. GOULD:

Q. Mr. Beck, you were asked a number of questions and talked at some great length about forged copyright infringement notices. Do you recall that?

A. Yes, I do.

Q. There's no suggestion here that any of the RIAA notices are forged, is there?

A. No. None of RIAA notices were forged, to my knowledge.

Q. You testified about instances of infringement where [516] [*1529] someone else using the customer's account might be the one doing the infringement, correct? Do you recall that?

A. Yes. That can happen a number of ways.

MR. GOULD: Can we pull up PX 184, please? This is already in evidence.

Q. This is Cox's Residential Acceptable Use Policy. Are you familiar with this, sir?

A. Generally.

Q. And if we could—we looked at this the other day. If we could scroll down to on the second page and highlight or call out the content under—keep going, please—under User Content, just blow up that whole paragraph?

And, sir, do you see that this user AUP that Cox requires every subscriber to agree to says: You—and that means the subscriber—are solely responsible for any information that is transmitted from your IP address or your account on the web or other internet services. You must ensure that the recipient of the content is appropriate and must take appropriate precautions to prevent minors from receiving inappropriate content.

Are you familiar with that?

A. I see that.

Q. This means that the customer, the subscriber is responsible for whatever happens to their IP, correct?

A. I don't know that I'm in a position to interpret the legal

[526] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 7 (P.M. Portion)

TRIAL TRANSCRIPT

December 10, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

* * *

[CROSS – MATT CAROTHERS]

[529] [*1584] NOTE: The afternoon portion of the case on December 10, 2019, begins in the absence of the jury as follows:

JURY OUT

THE COURT: All right. Ready for our jury?

MR. ELKIN: Yes, Your Honor.

THE COURT: Okay. Joe, let's get the jury, please.

NOTE: At this point the jury returns to the courtroom; whereupon the case continues as follows:

JURY IN

THE COURT: All right. Please have a seat. We—I guess we just need our witness, huh. All right. Please proceed.

MR. ELKIN: Thank you, Your Honor.

MATT CAROTHERS, called by counsel for the plaintiffs, first being duly sworn, testifies and states:

CROSS-EXAMINATION

BY MR. ELKIN: (Continuing)

Q. Good afternoon, Mr. Carothers.

A. Good afternoon.

Q. Does Cox track what its users are doing online with Cox's broadband system?

A. It doesn't.

Q. Why not?

A. Two reasons. One is lack of a technical capability to do so. And the second is that we have very strong privacy [530] [*1585] policies.

Q. I am going to take you back to the years 2013 and 2014.

Outside of any cyber security concerns, do you know whether Cox blocked subscribers' access to any Web sites?

A. It didn't.

Q. And again, during this same time frame, again outside of any cyber security concerns, did Cox reduce or throttle subscribers' bandwidth or connection speeds?

A. It didn't.

Q. Why not?

A. A couple reasons. One is, again, a lack of technical capacity. And also, our lawyers advised us that we couldn't do any sort of site blocking because it would be a violation of the network neutrality laws.

Q. Now, does Cox track what its customers upload and distribute using it service?

A. It doesn't.

Q. Do you know whether Cox subscribes to and uses the technology that would permit it to track what Cox users upload and distribute on the Internet?

MR. OPPENHEIM: Objection.

THE COURT: Yeah, it's leading. Let's ask non-leading questions.

BY MR. ELKIN: (Continuing)

Q. All right. Do you know of any technology that would [531] [*1586] permit Cox to track what its customers are doing?

A. No. No such technology exists.

Q. Now, Mr. Oppenheim referred you to Procera or deep packet inspection. Do you remember that line of questioning?

A. Yes.

Q. Do you know whether deep packet inspection would permit Cox to track copyright infringement of its users—of its users?

A. No, it wouldn't do that.

Q. Do you know whether Cox would use such a technology if it was available?

A. It wouldn't.

MR. OPPENHEIM: Your Honor, can we stop with the leading questions, please?

THE COURT: Well, no, I will allow that question. He's said he's familiar with it, and I think that's a fair follow-up question. Thank you.

You may answer the question.

A. No, we wouldn't use such a technology if it existed.

BY MR. ELKIN: (Continuing)

Q. Why not?

A. It would be a gross violation of our customers' privacy.

Q. Now, have you ever heard of a system referred to as CATS, C-A-T-S?

A. I have.

[532] [*1587] Q. How did you hear about it?

A. I invented it.

Q. When did you do that?

A. This would have been 2002-ish.

Q. What does it stand for, CATS?

A. CATS is the Cox Abuse Tracking System.

Q. Why did you decide to develop that system?

A. The volume of e-mails that comes into that abuse@cox.net mailbox we talked about earlier is huge. It is way too much for people to handle manually. So we needed an automated system.

Q. And what types of notices was CATS originally designed to handle?

A. All of them.

Q. Such as?

A. Denial of service attacks, spam, hacking, port scanning, threats and harassments, copyright allegations, of course.

Q. Do you know whether CATS has evolved over time?

A. It has.

Q. How so?

A. It has gotten more and more automated.

Q. Could you describe that a little bit.

A. Sure. It has the ability to automate a lot of the tasks that a security engineer would want to do, such as figuring out who was using an IP address at a time, figuring out what type [533] [*1588] of abuse that is being complained about, and even taking automated action, such as sending warning e-mails or taking subscribers offline.

Q. Who operated CATS, if you know, during the 2013-2014 time frame?

A. That was Brent Beck.

Q. And to what extent did you interact or consult with Mr. Beck about CATS during that time?

A. Regularly.

Q. Were you aware of how Mr. Beck was running the program at that time?

A. I was.

Q. Could you describe—we have had a lot of testimony on this, so I'm going to be very brief, but could you explain to the jury how CATS processes incoming notices on an automated basis?

A. Sure. The e-mail arrives in the abuse@cox.net mailbox. CATS downloads it. It looks for some information about the allegations, such as the IP address, the time of the offense, and the list of infringing works. It then looks up the subscribers' IP address to see if we can identify who it is. And then takes action appropriately.

Q. And what kind of information does CATS extract from incoming notices?

A. So it gets the IP address that's being complained about. [534] [*1589] It gets the timestamp when the offense allegedly took place. And it gets the list of infringing works.

Q. Do you know whether CATS can recognize a notice of copyright infringement?

A. It can.

Q. Have you ever heard of the term "copyother"?

A. I have.

Q. Who came up with that term?

A. That was me.

Q. What does it mean?

A. So every ticket within the CATS system has a tag on it that just describes what the type of complaint is. It's a short one or two-word phrase, usually an abbreviation.

So, for example, if the complaint is that the customer sent spam intentionally, the tag on the ticket would be Spam UCE. UCE stands for unsolicited commercial e-mail.

If it was, on the other hand, spam that we thought was sent from malware, it would be Spam Trojan to differentiate the two.

At the beginning of the program the copyright complaints that we got were almost entirely about an old system called Usenet. So the tag for those tickets was Copy Usenet.

And then we had a catchall bucket for all other types of copyright complaints that was Copy Other.

Q. Mr. Carothers, do you know whether CATS can determine from [535] [*1590] a notice of copyright infringement whether an actual copyright infringement has taken place?

A. It can't.

Q. Why can't it?

A. There is no way to verify that the traffic was there, what the contents of that traffic were, or whether or not the customer held some copyright.

Q. To what extent does handling copyright infringement tickets require human intervention?

A. It is almost entirely automated.

Q. Has CATS ever been configured to automatically terminate a customer in response to a copyright infringement complaint?

A. It has not.

Q. Why not?

A. Termination is a very serious step. It is something that always requires human review.

Q. Have you ever heard of the term "graduated response program"?

A. I have.

Q. What is graduated response?

A. Graduated response is a series of escalating steps that we take to contact a subscriber, use the subject of copyright allegations. Each step is increasingly more intrusive in order to get that contact with the customer.

Q. Do you have an understanding of where the graduated [536] [*1591] response program at Cox originated?

A. I do.

Q. Could you tell the jury.

A. I invented it.

Q. And why did you develop this?

A. It's the most effective way of communicating with subscribers.

Q. When did you develop it?

A. Early 2000s, probably 2002/2003 time frame.

Q. What is the purpose of engaging in escalating steps with customers related to copyright infringement?

A. We need to make sure that we reach the actual account holder, and sometimes that can be tricky.

Q. And what, if anything, have you done to determine whether the graduated response at Cox was effective?

A. I have run a number of queries in the CATS database to check repeat offense rates.

Q. When did you do that?

A. I did it throughout my time. It was something that I did just as the normal course of my job.

Q. How often would you do it?

A. It wasn't a set schedule, but I would say quarterly, probably.

Q. And what did you observe when you ran those queries?

A. The program was very effective. The vast majority of [537] [*1592] customers never made it past the e-mail warning stage.

Q. Now, how do you know that?

A. I ran the numbers myself.

Q. Does CATS sometimes aggregate complaints or notices into a single ticket?

A. It does.

Q. What does that mean, to aggregate complaints?

A. So when the first allegation comes in against a subscriber, it generates a ticket in the CATS system. And then for 24 hours any subsequent allegations that we get are appended to that one ticket rather than generating a new ticket.

Q. But why does CATS aggregate complaints rather than treating each one as a separate incident?

A. Fairness for the customers. If every single notification generated a new ticket, then we could potentially have someone go through all steps of the program up through termination within a few minutes before they had even had a chance to look at the issue.

Q. How many copyright notices will CATS aggregate?

A. There is no set limit.

Q. Do you know whether Cox also has a limit on the number of customers CATS can automatically suspend?

A. It does.

Q. Why was there—why was a suspension limit imposed, if [538] [*1593] you know?

A. A couple of reasons. First is that we have seen issues of false allegations against subscribers. So we have documented cases where complaints came in against IP addresses that weren't even in use in our network. So we know that some portion of the complaints that we get are false accusations. So—

Q. Do you know why—I am sorry, did you finish?

A. Eh.

Q. Okay. Do you know why Cox doesn't automatically suspend users past a certain limit?

A. Yes.

Q. Why?

A. Well, a couple of reasons. One is that we are concerned about a haywire system or someone deliberating attacking the system.

When we give a computer system the ability to take our subscribers offline, that's a big deal. We want to make sure it's secure. We want to make sure that someone can't game the system and cause a situation that would take all of our subscribers offline.

Q. What was the auto suspend limit in 2013 and 2014?

A. It was 300.

Q. I want to refer now to some non-customer-facing actions. Are there types of actions other than customer-facing actions [539] [*1594] that CATS can take automatically?

A. There are.

Q. Such as?

A. Well, for example, there is the hold for more, which I am sure you all have heard about.

Q. What is hold for more?

A. Hold for more means that the very first allegation we receive against a customer generates a ticket in the CATS database, then that ticket is closed without taking customer-facing action.

Q. Now, I believe Mr. Oppenheim asked you a question regarding when that happens. Did you refer to it in that 2010 e-mail as ignoring the notice?

Can you comment on that.

A. Yes, I did use that phrase.

Q. Is that accurate?

A. The notice isn't actually ignored. It still generates a ticket. It is still there in the database. And it's still there for future reference if there are any subsequent complaints.

Q. And who at Cox decided to implement hold for more?

A. That was a combination of myself and our legal counsel.

Q. Can you describe the work that you did leading up to the implementation of the hold for more rule?

A. Yes, absolutely. So we had a group of customers who did

* * *

[VIDEO DEPOSITION – JOSEPH SIKES]

[557] [*1675] A. Yes. Basically a suspension that is called a termination with the likelihood of reactivation for DMCA. We don't want to loose the revenue.

Q. And then looking down further at 7:00 and 13 seconds, you explain this further. Can you read what you said there?

A. This is a relatively new process that we've been doing for the past year, again, to retain revenue.

Q. Exhibit 132, Mr. Sikes, is an e-mail chain from December 2012, Bates number Cox_Sony_513220 to 513221 in which you are a sender and recipient based on your personal address or through an abuse corporate distribution group, correct?

A. Correct.

Q. Any reason to think you didn't send and receive—send or receive the e-mails in Exhibit 132?

A. No.

Q. The e-mail starts with an e-mail from Mr. Mathews, who is a TOC Level 2.5 rep, correct?

A. Yes.

Q. And the subject is: Termination Review CATS Ticket, and it lists the ticket number, correct?

A. Correct.

Q. He says: The customer was warned the next infraction could result in termination of service, lists the ticket number.

And it says: Please advise.

[558] [*1676] Do you see that?

A. Yes.

Q. And this time Mr. Zabek says: Do it, they've had plenty of chances.

Do you see that?

A. Yes.

Q. And Ms. Dameri, another TOC Level 2.5 rep, correct?

A. Yes.

Q. Replies and says: Please ensure when terminating a customer for real that we remove the CHSI charges, correct?

A. Yes.

Q. CHSI is Cox high-speed Internet?

A. I believe so, yes.

Q. And then you reply December 12, 7:33 p.m. And could you read your response, please.

A. Yep. Good point, Andrea. Now when we terminate customers, we really terminate the customer (for six months).

Q. And REALLY is in all caps, is that why you emphasized it in your reading?

A. Yes, as in the service is removed from the customer's account, the HSI service is removed, as Andrea mentions below.

Q. And you describe that as a real termination or really terminating, correct?

A. It's not a—it's not a soft termination. And I—I regret to use that word because, like I said, that's my own—[559] [*1677] that's not our process? But, yes, it's a—it's a termination where the high-speed Internet service was removed from the account.

Q. So you're making a distinction in Exhibit 132 between a soft termination and a real termination, correct?

A. Well, a soft termination, I mean, you know, as we discussed, basically there is a possibility that the customer may be reactivated.

So this—in this case, this customer apparently had—had been through the process however many times and was a candidate to have their service cut off. Basically we worked with them, exhausted all efforts and, you know, had to make the decision to—to terminate them from the Cox network and cut them off from Internet services.

Q. So just to be clear, when you talk about really terminating in 132, you're drawing a distinction between a soft termination and a real termination, correct?

A. Correct, yes.

Q. And so, by looking at a real termination, that gives you some context to understand what you were describing as a soft termination before, correct?

A. Correct. Yes. The CHSI service was removed from their account.

Q. But continued offenses occurred—the continuing offenses section of the procedures occurred on the 14th notice, correct? [560] [*1678] Started on the 14th notice, correct?

A. Yes.

Q. And sometimes you would give another warning to that customer and reactivate them, correct?

A. Correct, yes. Depending on the circumstances.

Q. Something you called special circumstances?

A. Special circumstances, yes.

Q. What—what would special circumstances be?

A. Well, I guess for the example of the customer that had the mentally disabled child and that we had—well, Cox had sent them a brand new router and secured it for them.

We—I mean, there were cases where the customer clearly didn't understand what the cause or where the source of the alleged infringement was.

Q. I've handed you what's marked Exhibit 134. It's a one-page e-mail, Cox_Sony_511299 from March 2014, with the subject: Termination Review. In which you are a recipient or a sender either individually or through a distribution group, correct?

A. Yes.

Q. Mr. Mathews says: Customer's son has once again reinstalled the BitTorrent program and resumed file sharing again. Customer was informed last time that I talked to her that further complaints could result in termination of service. This will be the third time that her son has reinstalled the

* * *

[VIDEO DEPOSITION – JOSEPH FUENZALIDA]

[568] [*1701] A. Yes.

Q. That consumer education didn't concern whether the category of online behavior was lawful versus unlawful, correct?

A. No.

Q. But as part of this project, Cox did break data consumption down based on activity type, correct?

A. Yes.

Q. Sir, could you turn your attention back to the document numbered Exhibit 88, please.

A. Okay.

Q. This is the Mid-Term Readout, correct?

A. Yes.

Q. And is this for the average Cox user across the board, or is this for those Cox high-speed Internet subscribers that engage in P2P usage?

A. Neither. So this is a, first of all, Mid-Term Readout. So these are initial findings. Many, if not nearly all of them, would have changed or evolved between this readout and the final readout.

And what this is is an industry view to—to get back to our scope, is to assign a level of usage for a low, a medium, and a high user category customer for each service.

In this case, the assumptions that—or the analysis that was presented here changed as well before the final.

[569] [*1702] Q. Okay.

A. So these were not the final numbers.

Q. Okay. And if you could turn to page 4 of this same exhibit, please. This is a slide labeled Executive Summary. There is a sub-bullet that says: P2P is the most bandwidth intensive category.

Then it says: (13 percent of all broadband households) on average use 82 gigabytes a month, accounting for 21 percent of all Internet traffic.

Do you see that sub-bullet?

A. Yes.

Q. Could you explain what that means?

A. Yeah. This means for the U.S., and a lot of our analysis was done for profiling the United States user base and then applying it to Cox.

So this would mean that 13 percent of all broadband households across the country engaged in P2P. And those that do, use an average of 82 gigabytes per household per month for peer-to-peer.

And that total then extrapolated out accounts for 21 percent of all Internet traffic.

Q. So at the time of this Mid-Term Readout, this was 2012, correct?

A. Yes.

Q. And here you're indicating that Cox has five different [570] [*1703] tiers of high-speed Internet service; is that correct? Ultimate, Premier, Preferred, Essential, and Starter?

A. Yes.

Q. And is the idea that each of those tiers has a different monthly data allowance?

A. Yes.

Q. And the idea is that the more data a customer consumes, the higher the tier they need to move into unless they stop—stop the usage, correct?

A. Yes.

Q. What online activities besides streaming or downloading a video account for higher bandwidth usage than peer-to-peer?

A. Okay, just give me a second.

Okay. So if you refer to page 18 in the same document, in terms of the overall, you'll see video streaming of two different flavors, SD and HD, absorb more bandwidth.

So then on this slide, it would show that peer-to-peer is third. But what it doesn't show is the other, which contains many other services.

So those detailed breakdowns are not there.

Q. Okay. So after video streaming, peer-to-peer represents the category that consumes the most bandwidth usage by subscribers that engage in that activity, correct?

A. Yeah. I would have to look at what's in Other, right? Because Other is 17 percent. So what I don't know is whether [571] [*1704] there's something that's 6 or 7 or 8 inside of that.

Q. And it says the data set was validated against Cox high-speed Internet Procera data.

Could you explain what that means?

A. Yes. So the—I'm just checking the year. Yeah, it says 2011. It's not—it's not labeled there.

So this is basically our what we'll call, outside-in view that I've described with leveraging some of the third-party data.

The middle column is our estimate as to what we believe Cox's demand would be. Right?

Q. Uh-hum.

A. So we had taken the national—the national forecasts, came up with our own view, and possibly adjusted it thinking about Cox's footprint. So that was a view that we developed, you know, entirely or almost entirely on our own.

Q. And is it correct that this data that inCode provided to Cox showed Cox that at least in terms of the forecast, was that the downstream data consumption for those that engage in peer-to-peer was forecast to increase in each of the years from 2011 through 2015, correct?

A. Correct.

Q. And in this data that inCode provided to Cox, with respect to upstream traffic, it reflects that in each of the years from 2011 to 2015 data consumption demand for those that engaged in [572]

[*1705] peer-to-peer usage was forecasted to increase year over year?

A. Yes.

Q. And if you could turn to the High Household Profile section of this excerpt.

Do you see that?

A. Yes.

Q. Does this reflect that inCode forecasted to Cox that for those that engage in peer-to-peer activity, that their overall data consumption for peer-to-peer would increase in each of the years for 2011 to 2015?

A. Yes.

Q. In 2011 the Procera data showed that 12-and-a-half percent of the data of Cox's network was being used for peer-to-peer file—file usage, correct?

A. Yes.

EXAMINATION

BY MS. LEIDEN:

Q. Could you first turn to the document that Mr. Zebrak marked earlier as Exhibit 94. That's the hard copy of the spreadsheet that you were looking at electronically.

A. Okay.

Q. Just a couple of clarifying questions on this data. If you flip to the second tab after the first blue page, the page titled Summary of Data Usage.

A. Yes.

[573] [*1706] Q. And I believe that you testified earlier that this broadband consumption analysis took place predominantly in 2012, correct?

A. Yes.

Q. And does the 2011 data here reflect actual data?

A. No. This is our view of what actual data would be. It was then subsequently compared against Cox's Procera tool, but this is our outside-in view, as you call it.

Q. And when you say, outside-in view, is that because the data is based on information from the third-party sources?

A. Yes.

Q. Such as Cisco?

A. Yes.

Q. And for the other years on this spreadsheet, 2012 through 2015, you testified that those were forecasts that inCode had come up with, correct?

A. Yes, based on, you know, the third-party research.

Q. And going back to the 2011 data, and specifically talking about this page of this spreadsheet for now, was any of this data under 2011 a reflection of the broadband consumption of Cox subscribers specifically?

A. Well, the—the—in a few of the fields we gained insights from Cox to help form this. Okay. I believe in the peer-to-peer session usage, I'll call it, as I pointed out earlier, and there may have been others, but it was more of…

[574] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 8 (A.M. Portion)

TRIAL TRANSCRIPT

December 11, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

* * *

[DIRECT – WILLIAM H. LEHR]

[588] [*1771] Can you—what information did you consider in forming this opinion?

A. So I actually—in this case I actually got, it was closed, a subsample of Cox's data about the levels of infringement. So excerpts from their CATS system that documented the—you know, matched the tickets to subscriber accounts from 2012 to 2014.

So I know what—how many tickets and when those tickets arrived for those subscribers in that data.

I also received for that subsample of subscribers from Cox's billing system all of the bills that were billed and paid by Cox subscribers identified in the CATS data, that subsample we got, from 2012 to 2016.

So I have like month by month this is how much they paid for the services they got. So I had that data and I matched that up.

And when you match that data up—there were a few missing records, you know, in terms of things, but basically there were 57,279 subscribers that were identified as infringing. In other words, they had received at least one ticket, for which I had billing data.

Q. And for those 57,000-odd subscribers, what did you determine Cox billed those customers?

A. Well, then having matched those datasets up, you can go through and you can sum the revenue over whatever period you [589] [*1772] want. And the period that I summed it over for this table was from February 2013 to December 2016. And that number for all those subscribers in that—those 57,279, it is $307 million that were billed.

Q. Now, this time frame that you've identified here, why did you use that time frame?

A. I used that time frame because I think it's—one, it's the claim period in this case and it's illustrative of this. I could have used a different time period. I mean, I could have shown even more, the numbers would be bigger.

And I didn't—I wouldn't—I didn't—I stopped at 2016 because that's all the data I had. I believe a number of these subscribers were still subscribers and were still producing revenue. So that would drive the number up if I had been given data up to the present.

And presumably also, since the ticket data ends at 2014, a number of those subscribers received additional tickets and it's possible that additional, you know, subscribers would have been provided.

So this number here is what the data is. I am showing you what's in the data and give you an idea of what it's telling you.

Q. I'll turn to 3+ and 5+ in a moment. But I want to understand what do the amounts that Cox billed and

collected from these customers tell you about Cox's incentives or

* * *

[600] [*1783] each of the different subscribers. And there are some that billed lower amounts and some that billed higher amounts. And, you know, this is a subscriber that billed a fair amount.

It turns out that this amount is not that different than sort of what you might think the average value of subscriber would be over their lifetime. You know, it's order of magnitude. It's okay, it's a little bit more valuable. So this is—you know, this also would go to a thing of like, geez, a 101 ticket subscriber also billed $8,594 in the subsample of the data that I'm showing.

You know, that shows this is an infringing subscriber that Cox is deriving a direct financial benefit from. And they were close to 60,000 subscribers that have a different number like this.

But, you know, you look at them and I showed other ways to think about that with the—

Q. But this is a residential. Did you consider a couple of business customers to demonstrate?

A. Yeah, the business—yes, I did, and the next one is the business subscriber. The business subscribers were, as I said, a smaller number, but they account for a lot more dollars per account typically. And this one was one of the observations that had one of the

highest numbers of tickets in the whole dataset to give you an idea.

So this one got eventually 4,074 tickets. And they [601] [*1784] also had received their 13th ticket by early in 2012. And this particular account is a reseller of Cox's broadband services. So it might—you know, it could be like one of these like WiFi resellers that's selling, you know, access. Cox billed that customer $706,000.

And if you look at this, there are some things that look a little strange. So you see these arrows like around 2015, and then the numbers drop way down. We don't know precisely what's going on there. But what it looks like is that this customer prepaid for like a year of service. And so, they didn't get billed in subsequent months because they had—that's sort of what I would interpret that means.

But this is what the data looks like.

Q. And did you look at another business customer?

A. Sure.

Q. And what does this show us?

A. Well, this just shows you, again, this turns out to be a fraternity, surprise, surprise, that had 67 tickets and had gotten its 13th ticket in 2012, also. That Cox billed, you know, from February 2013 to 2016, $12,525 to this account, you know. So—

Q. And why did you select these examples, Dr. Lehr?

A. Because I understand there has been testimony here about, you know, characterize the nature of their business customers and their residential customers. And the fact of the matter [602] [*1785] is, is that Cox wants to sell service to all the customers that it can make money from and is profitable. That's a normal business, you know, proposition, and Cox does that.

And it sells it to its infringing customers, and many of its business customers and many of its residential customers are, you know, all kinds of different businesses, and there's a lot of heterogeneity. The thing that's clear is that the vast majority of their customers, including their infringing customers, are highly profitable to Cox. Some are more profitable than others. But almost all of them are profitable to Cox.

Q. Now, I want to turn to your next opinion, Dr. Lehr, that repeat infringers are—

THE COURT: Let me stop you there.

The—let's take our morning break now. So let's take 15 minutes and we'll come back and continue our testimony. Thank you all.

NOTE: At this point the jury leaves the courtroom; whereupon the case continues as follows:

JURY OUT

THE COURT: All right. I got the signal from one of the jurors that it was time for a break.

Anything before we go?

All right. Let's take 15 minutes then. We're in recess.

JA-320

[626] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 8 (P.M. Portion)

TRIAL TRANSCRIPT

December 11, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

* * *

[DIRECT – SIDDHARTHA NEGRETTI]

[641] [*1901] the consumer is actually using inside their home.

So this talks about, again, a stack ranking based on choices that the consumer was given about what they're using the internet for.

Q. And how does streaming audio and video relate to downloading in terms of what's more prevalent—

A. Well, first of all—

Q. — that's depicted on this slide?

A. — as you see here, it's actually 20 percent more important to a consumer in terms of what they're using the internet for than downloading speeds, for example, downloading things.

Q. And have you observed trends in your work at Cox in how consumers use the internet to consume music?

A. Sure, absolutely.

Q. Could you comment on that?

A. Sure. Again, then, just as today, there are services such as iHeartRadio, Pandora, and Spotify available to a consumer to allow them to stream music services into their home, not only onto their, you know, laptops and tablets, but also on their

phones so they can use inside and outside of the home to be able to listen to music.

MR. ELKIN: Okay. You can take that down, James.

BY MR. ELKIN:

Q. In your job, did you ever review at any time any surveys [642] [*1902] or studies that looked at the prevalence of copyright infringement by consumers?

A. There's two answers to that. The first answer is no, and then the second answer is not only did I not review it, we never fielded any studies like that.

Q. And why is that?

A. It's not helpful to us. It doesn't help us understand what the consumer wants to use the internet for. As you saw earlier, there's lots of different uses for the consumer to use the internet both in terms of making a purchase decision and in what they actually use the internet for, and that's not something that helps us.

Mainly, it's an illegal activity that we don't want anything to do with.

Q. To your knowledge, do you know whether Cox ever asked survey questions about copyright infringement in any consumer surveys?

A. No.

Q. Have you ever reviewed any surveys or studies that concern consumers' use of peer-to-peer file sharing?

A. Sure. And that's a little different than infringing copyrighted material.

Q. And what effect did that information, file sharing, have on Cox's marketing strategies?

A. Not much. Although there are some mentions in some [643] [*1903] different research studies from time to time about the presence of peer-to-peer as a source of activity for consumers, it doesn't rate high or popular with most of our consumers, so it's not something that we actively use to create messages.

Q. Okay. Take a look at the other exhibit in your binder, and this is Defendants' Exhibit 337.

A. Okay.

Q. Do you know—have you seen this document before?

A. Yes. A member of my team, Robert Jordan, prepared this document.

Q. Okay. And do you know whether Mr. Jordan prepared this in the ordinary course of business?

A. Yes, he did.

Q. Did he have a business duty to do so?

A. Yes, he did.

Q. Was this maintained in the ordinary course of business at Cox?

A. Yes, it was.

MR. ELKIN: Your Honor, I would offer into evidence Defendants' Exhibit 337.

THE COURT: Any objection?

MR. ZEBRAK: No objection, Your Honor.

THE COURT: It's received.

BY MR. ELKIN:

Q. Could you take the jury through the contents of this?

* * *

[DIRECT – LYNNE JANET WEBER]

[655] [*1961] go through and become incorporated as tickets in the ticket database.

And then in the ticket database, we have the data that was produced. We have the date, a ticket ID, a number for the ticket. We have the account ID, which identifies the subscriber. We have the IP address, and we have the actions that were taken based on, on that ticket.

And you'll notice that both the RIAA notice database and the ticket database that's Cox's, they both have a date and an IP address, and I think

you've already heard testimony that that is how the two are linked together.

Q. And what did you look at with regard to the Cox billing data?

A. So for the Cox billing data, I looked at whether the subscriber was a single family residential subscriber, what's called a multifamily residential subscriber, which is a very small subset of the subscribers at issue here, and the commercial subscribers. I used it for that.

And then I also used it to determine at what point the subscriber left Cox and was no longer being billed, and that—you'll see that may be—that will be relevant to some of my analyses.

Q. So let's turn to your first opinion. Do you have it on the screen?

A. I do.

[656] [*1962] Q. And could you explain how you reached conclusions in this opinion?

A. Okay. So the opinion is that after each step in Cox's graduated response, fewer subscribers continued to be the subject of copyright infringement notices, and by the 12th such notice, the notices stop for the vast majority of subscribers.

So that's the opinion, and I got to that opinion by analysis of the RIAA notices as well as the Cox tickets.

Q. Okay. You used the term "vast majority." What do you mean by that?

A. So I mean it's not—it's more than half and it's not just a little bit more than half. It's, it's the vast majority. It's—and for the cases I'm going to talk about, it's over 90 percent.

Q. Do you have additional slides that show your analysis and your results?

A. Yes, I do. So, so the first thing I looked at was I looked at the RIAA notices. These are the notices that are in the database that MarkMonitor allegedly sent to Cox. And the 49 percent of the at-issue subscribers here only got one notice—were only the subject of one notice from the RIAA in the relevant period, which is roughly February 2013 through the end of November 26, 2014. So almost half only got one.

When we go to three or fewer notices, 78 percent, or more than three-quarters of the at-issue subscribers got one, [657] [*1963] two, or three notices, were the subject of one, two, or three notices from the RIAA.

When we get to five, 88—87 percent of the at-issue subscribers were the subject of five or fewer notices from the RIAA. We go up a little bit more and we see that by the time we get to 12 notices, that 98 percent of the at-issue subscribers were the subject of no more than 12 notices from the RIAA. So that means that 2 percent got—were the subject of

13 or more notices from the RIAA in this relevant period.

Q. Okay. Did you analyze this data in any other way?

A. I did.

Q. Did you put it on a slide?

A. I did. So, so the—I have two issues with this data, and the first issue is the set of subscriber accounts is biased.

Q. Which set of accounts?

A. The set of accounts that are in the data, both in the RIAA notice data and also, more importantly, in the, in the Cox ticket data. That set of subscriber accounts is biased.

Q. Okay. And you say you took a deeper dive to determine this bias. First, explain the bias.

A. Sure. So, I mean, you might think, how can it be biased? It just is the set of at-issue subscribers, right? You would think it's not biased, but it is biased, and let me see if I can explain how.

[658] [*1964] So if there's a—and I'm going to use an example of three notices received, a subscriber who was the subject of three notices from the RIAA in 2012. So if a subscriber was the subject of three notices from the RIAA to Cox in 2012 and then no notices at all after that in 2013 and '14, that subscriber is not in any of the data I looked at or any

of the other experts you've heard testify so far looked at in—as far as the RIAA data and the Cox ticket data.

Q. Why, why is that? Why are they excluded?

A. Because this, this period, the relevant period, which is very similar to the claim period, it's just off by a couple days from the claim period, this relevant period is the period for which Cox matched the RIAA notices and the IP addresses in those notices to their customer database.

So if there was a subscriber that didn't get any, any notices from the RIAA in 2013 or 2014, that subscriber was not one of the accounts that was picked out as matching, and so I don't see that subscriber in, in any of the data that, that I was given for this case.

However, consider another subscriber who also got three notices—was the subject of three notices from the RIAA in 2012, but that subscriber also had some notices that they were the subject of from the RIAA in 2013. All right. That same subscriber is in, but the subscriber who got three notices and then no more is out.

* * *

[662] [*1981] database, you know. It's been done both ways.

Dr. McCabe testified about the tickets, and I'm testifying about the RIAA notices, notice database that he also relied on, but, yes, so I tied the whether

it's commercial, multifamily, or single family residential in the billing database, and then I used the account ID to find the people that were the at-issue subscribers to tie those two together, at-issue subscriber, what's the account ID, look in the billing data, see if it's commercial, single family residential, or multifamily.

I will say there were a few accounts I couldn't tell but—because the billing data, you know, didn't have an indication, but that was just a very small number.

Q. So did you hear Dr. Lehr testify about how many residential subscribers had over a hundred tickets?

A. I did.

Q. Okay. How many based on your research had over 100 tickets? How many residential customers?

A. They were—it was only one single family residential subscriber that it was at issue that had more than 100, and it—that particular residential subscriber had 101, so it must be the one that—the one that Dr. Lehr chose to pull out and show the jury is the one with—the only one over, with over 100 tickets.

Q. From an expert statistical standpoint, is that [663] [*1982] representative of what had transpired here?

A. It is not at all representative of either the subscribers with 100 or more tickets, and that one single family residential subscriber with 101 tickets

is—it's, it's the one out of over 50,000 single family representative—single family residential subscribers, it's the only one out of 50,000 that has more than 100 tickets.

Q. You mentioned something about subscribers with 50 or more RIAA notices in a relevant period. What category did they fall in?

A. I do have that in my report. Oh, no, no, I do know that. So the ones with 50 or more—that are subject to 50 or more notices from the RIAA in the relevant period, all of them, and I think there are 20-something of them, but all of them are commercial accounts.

Should I go ahead and finish up on the—

Q. Sure. Can you break down further the type of subscriber that we're talking about here?

A. Right. So with the subscribers with the 100-plus tickets, the picture completely flips. So for the subscribers with 100-plus tickets, 46 of 49 of them are commercial subscribers. Two of them are the multifamily subscribers, and there's only 17 of them in the entire list of at-issue subscribers for multifamily, and only one, the one we've just been talking about that Dr. Lehr showed the jury, only one is a single [664] [*1983] family residential subscriber with actually 101 tickets.

Q. And did you break down these commercial subscribers further in your analysis?

A. I did. So of these 49 commercial—49 at-issue subscribers that had 100 or more tickets over the three-year period, they're mostly ISPs and multi-occupancy housing. So the largest number of them, 15 of them are ISPs. They're other ISPs.

Q. And ISP is what?

A. It's another internet service provider, a regional internet service provider, for example, that contracts with Cox so that that service provider can provide internet service to their hundreds or thousands or tens of thousands of customers, and they have a contract with Cox to do that.

So 15 of these subscribers with more than 100 tickets, they are internet service providers.

Q. What about the breakdown for the rest?

A. So for the rest, there's a fair number of university or student housing. There's hotels. There's a few apartment complexes. There's a few that are military housing. There's a few that are retail and, as I said before, two multifamily and one single family residential.

Q. Were you able to determine which of this group had the, the most tickets?

A. Yes. So I looked at the five subscribers with the most [665] [*1984] tickets in this period, and the five top subscribers ranged from 713 tickets up to 4,786 tickets, and these five were all regional internet service providers who have—you know, as I've

mentioned before, they have potentially many, many customers.

Q. And what's the time period that these notices or tickets were created with regard to these particular internet service providers?

A. It's a span of over three years—sorry, not exactly. It's a span of three years, from 2012, '13, '14.

Q. Okay. So what is the impact of terminating a local ISP's access to Cox's networks?

MR. OPPENHEIM: Objection. No foundation.

THE COURT: Sustained.

BY MR. BUCHANAN:

Q. Okay. You worked with internet service providers?

A. I have. I have worked with, for example, I've worked with—I've worked with many companies in the telecommunications industry, including internet service providers. I've worked with AT&T. I've worked with Cablevision. I've worked with a number of other internet service providers. I've worked with telecommunications companies and satellite industry cell phones, etc.

Q. Are you familiar with the operations between one ISP such as Cox and a regional ISP?

JA-333

[670] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 9 (A.M. Portion)

TRIAL TRANSCRIPT

December 12, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

[VIDEO DEPOSITION – RANDY CADENHEAD]

[679] [*2101] with, with the one exception I've mentioned, I don't remember ever being involved in any specific changes related to anybody.

Q. Why did you need to confer with Matt Carothers in order to respond to the RIAA request?

A. I can say that in my opinion, he was the right person to communicate with about this particular kind of question. That's, that's it.

Q. You see that Ms. Sheckler on behalf of the RIAA in April of 2013 reaches out to you to ask whether or not Cox will increase the limit of 400 notices per day?

A. Right.

Q. And you respond several days later, saying: We have a fairly hard limit on the number of calls from customers that our team can handle in a day, but within those parameters, we'd be happy to discuss the number of notices that we accept from you.

Do you see that?

A. Um-hum.

Q. And you ask her a sense of what she's thinking, right?

A. Right. I did.

Q. And she responds 500 to 600 per weekday?

A. Right.

Q. And you then, I guess, forward that to Brent Beck; is that right?

A. That sounds right.

[680] [*2102] Q. And—

A. It may have included Jason. It says it's cc'd to Jason Zabek, just—go ahead.

Q. Correct. And, and then you got an e-mail back from Jason Zabek, correct?

A. I did.

Q. Why did you forward these notices to the two of them?

A. They, they were the people around that time that, that were managing the, you know, the flow of, of these notices and the processing, and they were the right ones to answer her question.

Q. So at the time, you didn't view it as a negotiation, but rather just an effort to work with the RIAA's request?

A. I never analyzed it one way or the other. I—my primary interest and concern was responding to the recording industry re Vicky, about a legitimate question that, that, that she, she wanted us to, to consider, and, and we did. And I asked if that sounded okay. She said thanks.

And I didn't draw any legal conclusions from that at the time, and it's been so long, I don't think I could answer your question about legal anyway at this point.

Q. So, Mr. Cadenhead, you personally participated in the discussions regarding the copyright alert system, correct?

A. I did.

Q. And you served as, for lack of a better term, Cox's [681] [*2103] representative in those discussions?

A. One of them.

Q. And did you participate in the discussions for as long as Cox participated in them?

A. I think so.

Q. Cox ultimately decided not to join the copyright alert system, correct?

A. Right.

Q. Why?

A. I can give you my general recollection, although I think there's a document floating around that you probably have that summarizes it better than, than I could, and for the sake of time, maybe, maybe that would be smart.

Q. No, no. I'm not aware of the document you're referring to, so—

A. Oh, so maybe you just have to do best with my memory. We'll do that. That's fine.

Q. Well, that and the RIAA's, but—

A. Oh, well, no. You're asking me. I don't know theirs.

Cox—I presented our process early in the discussions to the whole group as an example of the fact that good things could be done to do meaningful work to address copyright infringement issues over the internet, and, and the negotiations that went on and took place, there were companies—you know, negotiations have give and take, and [682] [*2104] there were companies that had things that they just couldn't or weren't willing to do, and—so the ultimate agreement, in my opinion, fell short of what our process was designed to do and would have required us to, to spend a good deal of money to, to revise it in a way that seemed to—seemed to me to be less effective.

And so I felt like the process we had designed was better and under, under all the circumstances, it made sense for us to apply what we were doing, apply what we had designed. And that was, that was my recommendation.

Q. In your participation in CAS, did you have a view one way or the other on whether or not CAS was intended to provide the paradigm for how ISPs

would comply with the DMCA safe harbor requirements?

A. I don't think so. I think it was—it wasn't replacing any law. It was, it was, it was a cooperative effort to work together to put together a program that everybody could live with, that addressed the problem everybody recognized, that there was a need for dealing with content infringement from people on the internet.

Q. And it was principally focused on the issue of education, correct?

A. No. I, I think it was—it was what it was, and I—it's not fair to call it one thing.

Q. Was one of the principal issues that was discussed as part [683] [*2105] of CAS the desire to have an educational program?

A. Absolutely.

Q. I'm going to hand you what's been marked as Plaintiff's Exhibit 201. Mr. Cadenhead, Plaintiff's Exhibit 201, which is Bates labeled COX_SONY_00519137 through 199. Earlier you described that—I believe you described having given a presentation to those who were participating in the CAS discussions. Is that correct?

A. Yes.

Q. Is the presentation you gave the document that is attached to Plaintiff's Exhibit 201?

A. Some of it looks familiar.

Q. Mr. Cadenhead, I'm going to focus on pages 8—

A. Oh, good. Thank you.

Q. —through 22 of the presentation, which I do believe was part of the presentation you gave, but you tell me.

A. Yeah, this, this looks—this looks like—I gave, I gave presentations like this, I don't know, a bunch of times, but I did give it to the group and—or a version of it to the group, and this looks like that, a version of something close to that, yeah.

Q. And according to the cover e-mail, you gave this presentation on March 11, 2010. Does that sound right to you?

A. That's a good guess.

Q. Okay. And did you create the slides, at least 8 to 22?

JA-340

[687] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 9 (P.M. Portion)

TRIAL TRANSCRIPT

December 12, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

* * *

[DIRECT – NICK FEAMSTER]

[691] [*2199] was not sufficient in this case; is that right?

A. That's what I said, yes.

Q. Can we see the next slide, please?

What did you—what conclusion did you draw from the deficiencies in the verification process?

A. Because the verification process was deficient, right, essentially because they didn't adequately verify what was going on, there's no reliable evidence that the Cox subscribers actually were sharing copies of the plaintiffs' works.

Q. Okay. And the verification we're talking about here, that's verification of what was going on on the subscribers' computers, right?

A. That's correct.

Q. Okay. So with all that by way of prelude, can you briefly summarize the basis for your—the opinions that you reached?

A. Yes.

Q. Next slide, please.

What—how are you going to do that?

A. Right. So before we get into the details there, what I need to do is lay some groundwork and talk a little bit about how peer-to-peer networks operate, and I'm going to do that in the context of BitTorrent. Okay?

Q. Okay.

A. Then what we're going to do, given that basic understanding, is talk about the general capabilities of the [692] [*2200] MarkMonitor system, some of which we've heard about a little bit at trial as well, but how basically it operated in the context of the Copyright Alert System.

Q. Okay.

A. And then by way of contrast, I should say, we'll talk about how it operated in the context of this trial.

Q. So let's start with the operation of peer-to-peer networks.

Can we have the next slide, please?

What's the—what's illustrated on this slide?

A. Right. So here we have a cartoon picture of the internet. It's a little bit more complicated than this, but the main thing to—that I want to point out here is that while, you know, it's sort of common to think in colloquial terms of the internet as, you know, one homogenous thing, it's actually not that at all.

Internet actually comes from the word "internetwork," okay, meaning that there's actually

tens of thousands of independently operated networks that connect to form the internet, upwards to 70,000 now, I think, all around the world. Cox is but one of those.

So when you transfer a file on the internet, as the animation is showing, your data actually might start in the Cox network but end up somewhere, somewhere completely different in a totally different network.

[693] [*2201] Q. How does the internet relate to peer-to-peer networking?

A. Good question. So in the context of a peer-to-peer network, the peers in a peer-to-peer network like BitTorrent are going to be located all around the internet, all right, so not just all on the Cox network. There might be one peer on the Cox network. There may be other peers in other parts of the, of the internet.

Q. Okay. Can we—have you got a slide that illustrates that?

A. Yes.

Q. Can we see the next slide, please?

What does this slide show?

A. Right. It shows what I just described, and then we're going to get into a little bit more detail. You can see here peer 1 is sitting in the Cox network, and then we've basically got a bunch of other peers in

that peer-to-peer network. In BitTorrent parlance, we'd call this a swarm.

So these are all peers who would like to exchange or obtain copies of a particular file. This one, for the sake of illustration is, in deference to Mr. Zebrak, a good song, "Lean on Me," Bill Withers, and in this particular case, what we're seeing is the peer says, I'm interested in, you know, getting a copy of, you know, "Lean on Me."

Q. Okay. Before we—

A. Yes.

[694] [*2202] Q. —start downloading music—

A. Sure.

Q. —let me just ask you some questions to orient us with respect to the network.

First of all, are you going to talk about a particular type of network for the most part in your testimony?

A. We'll focus mostly on BitTorrent for the sake of examples here.

Q. Okay. And the jury's heard about three other peer-to-peer networks: Ares, Gnutella, and eDonkey.

A. That's right.

Q. For purposes of your testimony today, how do those differ from BitTorrent?

A. There are some differences. I think for the purposes of today, we can think of them as substantially the same.

Q. Okay. Now, in this illustration, one of the peers has a, what I take it is a complete copy of "Lean on Me," and one has nothing, and three have portions of the file. What does that illustrate?

A. That is—that's what we're seeing. Okay. So basically, this is pretty fundamental to the operation of BitTorrent, and this is one of the differences, right, is that BitTorrent, actually, the peers exchange pieces or chunks. In Ares and Gnutella, I believe they exchange entire files.

Q. Okay.

[695] [*2203] A. Here the idea is that all these peers eventually want to get a complete copy. Only one in this case, peer 4, has that complete copy. It's called a seeder. Okay?

But in order for everybody to get the copy, they have to trade pieces. Obviously, if we're going to trade, I need to have something you don't have, and you need to have something I don't have. So there are some strategies that—and aspects of the design of BitTorrent that kind of make it all work out, but generally speaking, this is sometimes referred to as tit for tat.

Q. What—you said that tit for tat creates some incentives. What's the incentive that tit for tat creates?

A. It's a good question. So this is, this is really important, right? Because in order for me to download pieces of a file that I want, I have to have pieces that somebody else wants. If you can see, there's a bootstrapping problem here, right? If you start out with nothing, I've got a problem.

Now, BitTorrent has some ways to get around that particular corner case, but generally speaking, we're trading, and so I have incentives to basically say that I have certain pieces of a file that you want, all right?

So, Mike, if you have a piece that—if you're looking for a piece and I'm looking for a piece that you have, I might say, I've got that piece.

Q. Are you familiar with the concept of a bitfield in

* * *

[CROSS – NICK FEAMSTER]

[704] [*2292] that.

And, you know, as far as willfulness, we made the argument that Your Honor declined in BMG, and we appealed it and lost that at the Fourth Circuit. I have to reserve on it. I know what the decision here is, but if this case were to go up to en banc or beyond that, I have to reserve on that.

THE COURT: Sure.

MR. ELKIN: So I'm not going to sit here and—I'm going to stand here and argue that, but I have to do that.

THE COURT: Okay.

MR. ELKIN: But with regard to the, you know, statutory damages, I do think that the issues that we have are—I'm sure Your Honor is not going to be surprised to hear this, you know, Cox's profits and size, we heard a lot of that testimony the last couple of days, and also this notion that they have in their proposed instruction about punishing, I find that—you know, that's also an issue.

I just want to make sure I'm sort of done.

THE COURT: Yeah, I mean, we'll revisit these later instructions, so I'll ask you—

MR. ELKIN: Is that helpful? Is that what you wanted to hear?

THE COURT: Yeah. Thank you. Let me hear from—

MR. OPPENHEIM: Unless the Court wants otherwise, I'm going to limit my comment to just this safe harbor issue for

JA-348

[*2329] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 10 (A.M. Portion)

TRIAL TRANSCRIPT

December 16, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

* * *

[CROSS – NICK FEAMSTER]

[*2358] THE COURT: No, wait, wait.

THE WITNESS: Oh, I'm sorry.

THE COURT: Listen to the question. Answer the question. On Thursday in your testimony, did you say that?

THE WITNESS: Yes.

BY MR. ZEBRAK: (Continuing)

Q. Okay. And isn't it true that at the time of your expert analysis and subsequent deposition, you believed that the likelihood of peers lying was also only about 1 percent?

A. Incorrect. I never said that. In fact, I said it was quite likely. And I'd be happy to offer you precise statistics on that.

THE COURT: Okay. Okay. All right. Just, you know, try and answer the question.

THE WITNESS: Sorry.

BY MR. ZEBRAK: (Continuing)

Q. You recall that you were under oath in your deposition, right?

A. Yes.

Q. And you tried to tell the truth in your deposition, right?

A. I did tell the truth.

Q. Do you remember in your deposition I asked you if there was a question you didn't understand, to let me know, right?

A. Yes.

Q. All right. I'm going to play a clip at lines 312-25 to [*2359] 313-20.

Mr. Duval, would you please bring up clip 26.

NOTE: At this point a portion of a video recording is played into the record as follows:

BY MR. ZEBRAK: (Video)

Q. I'm asking you what you've done to date. To date, you have no expert opinion about the percentage likelihood that the bitfield information about what a peer is sharing will be inaccurate.

MR. LANE: Form.

A. I can tell you a ballpark number, which would certainly be—you know, around—certainly in the ballpark of—again, you're asking me to offer precise numbers on something which isn't in my report and that I haven't had the opportunity to do research on. So I'm going to reserve the right to—to revise my statistics here.

But since you asked over and over again specifically for numbers, let me do my best.

These would probably be in the range of the 1 percent. Okay.

NOTE: The video recording is concluded.

BY MR. ZEBRAK: (Continuing)

Q. Okay. Dr. Feamster, let's move on to some things that I think we can likely agree upon.

You understand that BitTorrent was one of the [*2360] successor peer-to-peer networks to Napster, don't you?

A. Yes.

Q. And when you did your analysis in this matter and were subsequently deposed, were you aware that copyright infringement was against the law?

A. Absolutely. But—yes.

Q. And again, Dr. Feamster, you—could you look at the deposition that you have in front of you. It should be in the small book. It should be the last tab.

A. Sure. The last tab is my expert report. Let's see. 8 maybe?

Q. And if you could look at page 66, and I'll refer you to the line number when you get there.

A. I'm there.

Q. Could you look at lines 22, 66-22 to 67-05, and see if that refreshes your recollection about whether you were aware copyright infringement was against the law at the time of your deposition?

A. Yes, it agrees with what I just told you.

Q. At your deposition did you refuse to answer the question about whether copyright infringement was against the law?

A. No, I did not.

Q. Mr. Duval, would you play clip eight that captures the same page and line numbers?

NOTE: At this point a portion of a video recording

* * *

[REDIRECT – NICK FEAMSTER]

[*2387] Q. Okay. On this subject of notices and checks, is it ever the case that MarkMonitor—let me ask it this way.

Is there ever a reason why MarkMonitor might send a notice before it has completed the Audible Magic check?

MR. ZEBRAK: Objection.

A. Yes.

THE COURT: Overruled.

MR. ZEBRAK: Lack of foundation, calls for speculation.

THE COURT: Thank you. Overruled.

BY MR. BRODY: (Continuing)

Q. And what is that reason?

A. As described in some of the audit documents, step 2 and step 3 in the MarkMonitor process were not performed sequentially. The scanning of the peer-to-peer networks for peers that report to be sharing a file sometimes occurred before the Audible Magic fingerprint checks.

Q. Okay. Thank you.

Now, counsel directed you to—or he didn't actually direct you to it, he played a clip of your deposition from page 312 of the transcript about the 1 percent, what the—whether there was a 1 percent inaccuracy problem of some sort.

Do you recall that generally?

A. I remember him playing that clip.

Q. Okay. Could you take a second and look at pages 309 [*2388] through 311?

Do you recall the context of that question at your deposition? And I would direct you to the pages immediately preceding it to refresh your recollection.

A. Yes, I remember this pretty clearly from the deposition as well.

Q. What do you recall being the context of that question and answer that he played to the jury?

A. That line of questioning was exclusively in the context of bit errors in storage and transmission.

Q. Okay. So is this related to the corrupted file issue that we were talking about?

A. About the likelihood of a corrupted file, exactly.

Q. Could you look at page 289 of your deposition. I will direct you in particular to lines 21 through 24.

A. I see it.

Q. Okay. Did Mr. Zebrak ask you about how frequent or how likely it was that there would be dishonest reporting of files in a BitTorrent network?

A. Many times.

Q. Okay. Now, I don't believe you gave a quantitative answer to that question at your deposition, but did you give a qualitative answer?

A. Yes, I did.

MR. ZEBRAK: Objection, Your Honor. He is

* * *

[719] [*2464] the Zabek transcript because I—my recollection is not the same as Mr. Elkin, but I'd like to check it before we say anything.

THE COURT: I'm just going to tell them this last question was a hypothetical and didn't assume any specific facts in evidence, okay?

MR. BUCHANAN: All right. Your Honor, can I just—I mean, they're examining this witness as if he's an expert on graduated response.

THE COURT: I mean, they've asked two questions. So are you going to continue on with—he knows a whole lot more about the Cox's system than you suggested early on in his—in this cross. So he studied—

MR. BUCHANAN: But I didn't ask—what he might know has nothing to do with what he testified to and what he was responding to.

THE COURT: But if he's disregarding what—

MR. BUCHANAN: But he just took Dr. Lehr's one, three, and five. That's all he focused on. Dr. Lehr didn't—

THE COURT: And he said it makes no sense and it's arbitrary.

MR. BUCHANAN: Right.

THE COURT: He can't get any stronger than arbitrary, except it's nonsense. And so I think that identifying what Sony believes should have been other information that he should [720] [*2465] have considered is relevant, and it may—you know, I mean, he's answered—I don't—it doesn't change my opinion, but I think it's in the wheelhouse. So I'm going to allow it.

MR. ELKIN: All right. Thank you, Your Honor.

THE COURT: All right. Thank you.

NOTE: The sidebar discussion is concluded; whereupon the case continues before the jury as follows:

BEFORE THE JURY

THE COURT: All right. You've heard some testimony about, you know, getting back into graduated response and when Cox took—may have taken certain actions. Those were hypothetical questions and not assuming facts in evidence. So just consider them as that, okay? Thank you.

All right. Please continue, Mr. Gould.

BY MR. GOULD:

Q. Sir, you also agree that if Cox had terminated this customer after three or five tickets, it wouldn't have billed or received internet revenue from that customer during the period of that termination, correct?

A. In that hypothetical, during whatever that period of termination would be, however that's defined, that would be true by definition.

Q. And I want to take a look at one more of these charts, sir, a similar chart for a business customer that was a fraternity. You recall this slide and testimony about it?

[721] [*2466] A. Yes, I do.

Q. And you don't dispute that Cox billed this customer over $12,000 in the period after Cox had received and processed 13 tickets for the customer?

A. I don't take issue with that.

Q. And you agree that if Cox had terminated this customer after 3 or 5 or 13, Cox wouldn't have billed or received any revenue for the internet service for the period during the termination?

A. Only during the part where you say during the termination, whatever that might be, I'd agree with because it's terminated for whatever that period might be.

Q. And your point, I think, is that if they sign back up, then they would resume billing and revenue?

A. You can terminate somebody and then reinstate. Like, if you discuss with them that their behavior is going to change and you get some assurance, then you can—they'd be reinstated, and I'm sure everybody would be fine with that.

Q. You understand, sir, that Dr. Lehr provided no opinions on when Cox should have terminated customers?

A. I agree. I raised that as an issue.

Q. And you understood his testimony to demonstrate in his opinion for the jury, the different scenarios of what might occur if Cox terminated at different scenarios?

A. I don't think he quite said that, but I can accept that. [722] [2467] I don't think that's exactly right, but for purposes of moving things along, I'll accept it.

Q. You recall this slide, sir?

A. Yes.

Q. And when you talked about this slide, you talked about that the infringing activity was a small amount of the user's activity or something along those lines, right?

A. I don't think I actually said that, but I did say that context is important, yes.

Q. Well, I may have misheard because I didn't expect it, but I thought you did. You didn't do any measurement or analysis or study to determine the amount of peer-to-peer activity occurring on Cox's network, did you?

A. I know the subscribers, I know some information that I've read, but I haven't done, like, created an equation with that in it.

Q. And you don't dispute or disagree that peer-to-peer is a highly bandwidth-intensive activity, do you?

A. When it's done, it's bandwidth intensive. The question is, like, when it's done relative to everything else that's happening—

Q. And you—I'm sorry.

A. —that might be—might go to what you're asking.

But when it's done, it takes a fair amount of data, yes.

JA-360

[724] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 10 (P.M. Portion)

TRIAL TRANSCRIPT

December 16, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

[743] [*2666] MR. OPPENHEIM: But the point that the Court made still applies. Which is that there are times where a copyright owner brings a secondary liability claim, it's more efficient and it's more appropriate.

And to suggest that there should be a mitigation instruction to the jury would be to undermine the principle that the Supreme Court articulated.

But I come back to, mitigation is an offsetting of damages issue. And what the defendants have presented is this idea that because we sued Cox, that they shouldn't be held liable because we chose not to sue the direct infringers. That's what they've said.

I also can't let go, Mr. Elkin got up here and said that we have brought a case based on the idea that Cox didn't terminate. That's not what our case is. And it's not a proper interpretation of our case.

I think when you come back to the fundamental notion that copyright infringers are jointly and severally liable for an infringement, right, Cox is arguably jointly and severally liable with the direct infringers, that's the way the law would play out.

THE COURT: Well, that's why you have contributory and various infringement instructions, right? I mean, the jury is going to understand that that's what they're asked to decide.

[744] [*2667] MR. OPPENHEIM: In the context of traditional copyright law, if you have two parties who jointly engage in infringement and you sue one,

and you get a verdict against one, that one can seek contribution from the other.

But there is no law that suggests that this one can say, because you chose not to sue this one, the jury gets to consider a lesser damage award. The defendants haven't cited to any case law like that because I'm not aware that it exists. But that's the principle that they're putting forward.

THE COURT: Okay. I'll look at Grokster, but I really don't believe your argument is correct. I mean, I think—and we'll look at it a little further, but I don't—I think you can—unless I'm convinced otherwise, I'm going to give the mitigation instruction. And I'm just not sure whether I'm going to put it in the verdict form or not.

So what's your next one?

MR. OPPENHEIM: I'm not sure there were any issues on the willfulness instruction, which would be the last one, I believe.

MR. ELKIN: Your Honor, we—I think we addressed this at the last charging conference.

THE COURT: Yeah.

MR. ELKIN: We—Your Honor gave the instruction that was upheld by the Fourth Circuit. We know that you're not going to change that instruction. We're just reserving in case [745] [*2668] it goes up, up, up.

THE COURT: Okay. All right. So I am going to give instruction 31 on willfulness as plaintiffs have proposed.

And, of course, your exceptions are noted.

All right. Where else are we going?

MR. OPPENHEIM: Your Honor, I think the remaining issues are—for us to address is the verdict form and the length of the closing. That's all I have left on my list, I believe.

THE COURT: So we talked about giving you an hour each, and you thought that was a good idea. You might—you were thinking about whether you needed a little extra time for the rebuttal.

Where are you on length?

MR. OPPENHEIM: I think we can do our initial opening in the hour, but we would like 15 minutes for rebuttal, Your Honor. We're trying to narrow the issues, and maybe we don't need all that time, but we think that that's, that would allow us to present the evidence cleanly.

THE COURT: All right. I will give you that.

Verdict form.

MR. OPPENHEIM: Verdict form.

THE COURT: Incredibly, I've found it.

MR. OPPENHEIM: So we did make some progress, Your Honor, on the verdict form. There still remain some disputes.

[746] [*2669] Should we hand up a copy of your redline just so the judge can follow this and we can identify the disputes?

So, Your Honor, I think the first question was whether or not there needed to be a direct infringement instruction, and Cox now agrees to remove that. So we're past that hurdle.

THE COURT: Okay.

MR. OPPENHEIM: With respect to the liability for contributory and vicarious infringement, we think that our approach in our proposed verdict form is the better approach. It is a cleaner, easier question to the jury.

We think that including "preponderance of the evidence" and the language of "for direct infringement of it subscribers" is unnecessary here.

We think that there is a lot of instructions that you're going to give the jury, and to just call out those two to put them in, I think just what we have proposed is, "is Cox liable for contributory infringement of plaintiffs' copyrighted works"? Yes or no. I think that's a simpler, easier question.

THE COURT: I always give the burden in the verdict forms as well. It is—is it repetitious? Yes, but I think it's important to have it on the verdict form.

So I would leave it in there.

MR. OPPENHEIM: Okay. But we would recommend, Your Honor, taking out "for the direct infringement of its

JA-366

[747] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 11 (A.M. Portion)

TRIAL TRANSCRIPT

December 17, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

[761] [*2754] billed, correct?

A. I would say yes.

Q. In general, Cox collects about 98 to 99 percent of the bills issued, correct?

A. Yes.

MR. GOULD: Pull up PX 365.

BY MR. GOULD:

Q. Mr. Mencher, I want to talk about disconnects for nonpayment.

Page 11, please.

You testified about this in direct, but we didn't look at the numbers. So I want to make sure we're on the same page here.

If you could pull up just the two paragraphs, including the yellow? That's fine.

And the jury has seen this before, so I'll move quickly. You agree, sir, that Cox has reported disconnecting the internet service for roughly 600,000 and change residential customers, and 21,000 and change business customers, in the years 2013 and 2014, correct?

A. Yes.

Q. And you understand, sir, that Cox has argued in this case that it can't be expected to terminate internet service of business customers for copyright infringement violations because they might include hospitals or fire stations? [762] [*2755] I'm unaware of any testimony in the case.

Q. Notwithstanding, you would agree that Cox terminated over 21,000 business customers in the two years, 2013 to 2014?

A. I haven't done the math, but that's—it looks in the general vicinity.

Q. And you described a process of late bills and soft disconnects about nonpayment. I want to go through that in a minute, but I first want to understand, was that the process that's in place now or in the 2013-2014 period?

A. That is the process that is in place now, but I don't know of any major changes to that process over the last few years.

Q. Fairly confident that it was the same process in 2013-2014?

A. I am.

Q. Not certain but fairly confident?

A. Yes.

Q. So I want to walk through that to make sure that I understood it. There's a lot going on in that slide. The—Cox sends a customer a bill, correct?

A. We do.

Q. And generally that bill is due in about 21 to 22 days. I think your slide showed the March 1 bill was due March 22, correct?

A. Yes.

Q. And if the customer hasn't paid that bill within 30 days [763] [*2756] of the due date, then Cox disconnects the service, right, a soft disconnect?

A. Yes.

Q. So if the bill's 30 days late—30 days late, turn off their service, right?

A. Thirty days late, we deprovision their services, yes.

Q. From the customer's point of view, you turned off their service, right?

A. Yes.

Q. And you called it a deprovisioning. You basically flick a switch on the modem, and maybe they still get 911, but they can't do their TV, their phone, their internet, other than the emergency call?

A. That is correct.

Q. And if the customer still hasn't paid for another two weeks, 14 days, then you do a hard disconnect, right?

A. Yes.

Q. And a hard disconnect means you really shut them off, correct?

A. Yes.

Q. I want to pull up a slide that you showed about this for a second. We have a due date, and then after 30 days, a soft disconnect, and you've talked about some things here: texts and phone calls and e-mails.

Those are all automated things, correct?

* * *

[DIRECT – CHRISTIAN D. TREGILLIS]

[764] [*2777] Why don't you just go through and summarize them.

A. Okay. So I think you read it accurately, and that is what I intend to—intended to depict here. I put these slides together in an attempt to explain my opinions.

And so, this one relates to the idea that Dr. Lehr has offered opinions that in some instances, like I said, I find to be not supported, not supported by facts, and in some situations are not tied to the accused wrongful acts of Cox.

I think I'll explain that in more detail when we get into it. But he talks about things that are more general harms about piracy generally, but not

related to what I understand to be at issue in this lawsuit. That's what that first one relates to.

Q. Okay. And the second one?

A. The second is using the infringement notices sent by the RIAA, and assuming that each notice represents a displaced legitimate digital download of each track with a copyright in suit, I've calculated what I've referred to as displaced downloads of $692,000.

So for all of the notices, each one, if that was to have a $1 price tag associated with it, that adds up to $692,000, if you pick up each of the tracks that has a copyright in suit in those notices.

Q. And your third opinion?

A. The third is that many users and tracks had few notices. [765] [*2778] Dr. McCabe testified about the fact that there was one, at least, notice that implicated each of the copyrights in suit. And I thought I would go deeper and say, is it more than one or how many? I thought I would investigate that further.

Q. Now, you testified a moment ago that you have additional slides or information with regard to each of these opinions. So could we start with the first of your opinions.

Did you prepare some slides to summarize or help with your testimony in that regard?

A. Yes. So the first area is, like I said, is my opinion relating to the opinions of Dr. Lehr.

And so, what I have done here is put up a slide that was one of his slides in which he talks about, as it says in the title: Piracy harms copyright holders.

So like I was saying a minute ago, this is an opinion about piracy, generally. This is not an opinion about the accused wrongful acts of Cox.

Cox is accused of engaging in its business in a way that is alleged to be wrongful. Again, I'm not taking on whether it's wrongful or not. That's not my opinion. My opinion though is that any time you're talking about quantifying economic harm, it should be the harm relating to the accused wrongful behavior, not piracy generally.

So Dr. Lehr, when he talks about the effects of piracy generally, well, piracy has been something that has been

* * *

[766] [*2810] was about 49,000 and change that didn't have a work in suit, but 113,000 I found that did.

And then also, like I said earlier, there are a lot more of these in 2013 than 2014.

Q. Okay. So what did you do next with this data?

A. If you go to the next slide, I think that—well, here we go back to that next slide. And continue one further. There you go.

So what you found—or what I found is, I was able—Dr. McCabe said he found all of the 10,017 claimed works in suit. I was able to find 9,801 of them. So that's 98 percent agreement.

There are some examples where I disagreed with him. It really is situations in which he has found what he thinks is the musical composition. It looked to me like it wasn't the same musical composition. It might be a different song with the same title, and I thought that he had made an improper connection.

But for purposes of my analysis, I'm just giving him the benefit of the doubt. It's only 2 percent, so I'm just going to assume all of them, even if I disagree. I'm going to give him those anyway for purposes of my analysis.

Q. Okay. So let's go to the—you looked at the notices and tracks. Let's go to the next slide, and this is: Displaced download and revenue share to plaintiffs.

[767] [*2811] So what does this depict and how does this relate to your conclusions and analysis.

A. Well, like I was saying earlier, I calculated displaced downloads of $692,000. So I tried to put together a graph to explain what that means. What that means is, we have examples where this user on the left has gotten files from those three people that

are each through BitTorrent making files available and pieces of files that could be assembled on that user on the left's computer.

What I'm saying is, if that didn't happen and it didn't go through path 2 and it went through path 1, then what does that turn into?

And you can see if that had been a legitimate download, it would have been a purchase for between $0.79 and $1.29 through iTunes. And there's a part of that, a revenue share that goes to the plaintiffs.

So for those that, like I said, it's a range of $0.79 up to $1.29, I looked at the information that the plaintiffs produced about how much their revenue share is, and I rounded it up. And it looks at about $0.90 for sound recordings and $0.10 for musical compositions.

And so, I used that in my calculation of the money that the plaintiffs would have gotten if these downloads, that group of downloads had gone through channel 1, had all been iTunes types of purchases, instead of getting them from [768] [*2812] BitTorrent or another peer-to-peer network.

Q. Okay. So did you do any analysis or make any assumptions with regard to whether if someone downloaded a song, whether that same person would have purchased that same song from iTunes if they were unable to download it?

A. Yes. I think Dr. Lehr testified about that. There was a question for many of these people who are going the route of BitTorrent, would these people, if they weren't able to do that and go through BitTorrent or a peer-to-peer network, would they have purchased something from the plaintiffs?

Dr. Lehr said that it might not be all of them. And I agree, it might not be all of them. But for purposes of my analysis, I assumed every one of them, even if it's somebody that maybe wouldn't have, I'm assuming they all would have bought a download through iTunes or a similar source.

Q. Okay. So you talked about looking at the tracks and the notices. And so, what did you find or conclude after looking at them and comparing them?

A. I think if you go to the next slide, you can see here the results of what I found.

And that is, there are 677 total, what I call, track notices. So I described earlier how there is that dataset of the notices of about 162,000, about 113,000 of which contain the works in suit. But this shows that there are about six tracks per notice, because there are a lot of albums.

[769] [*2813] And so, if you say that each one—let's say there's an album of ten tracks, that's going to turn into $10 that would go to the plaintiffs for purposes of my analysis, because it depends on how many tracks are in each notice.

And so, all of the tracks in all of the notices gets you to 677,000 of the ones that I was able to trace. And that is for a total of 7,421 tracks that are covered by those 9,801 works in suit that I found.

So it's a little higher if you give the benefit of the doubt to Dr. McCabe and the plaintiffs. Instead of 9,801 works in suit, then it goes all the way up to the 10,017. And 7,421 becomes 7,608.

Q. You used the term "a conservative approach or analysis" several times. What do you mean by that?

A. There were multiple times in my analysis where I used what I thought were conservative inputs. Like, for example, assuming all of these would have turned into legitimate downloads that the plaintiffs would have gotten paid for. That's an example.

But I think in the next slide, perhaps—there you go.

So you can see in the next slide that there is the benefit of the doubt on that 2 percent. So although there are some with which I think Dr. McCabe, I think, got it wrong, I'm saying, put those in there anyway.

[770] [*2814] Also, I'm giving the plaintiffs a dollar per track no matter how—what copyright they hold. Because as we described earlier, like the Nicki Minaj track where they just have a musical composition, if all they have is the musical composition, they would only get the $0.10 musical composition royalty for their revenue share.

If they have just a sound recording, like with Katy Perry, they just would get $0.90.

I have assumed that for all of the 7,421 tracks, they have all—well, actually 7,608, I'm assuming—because I'm giving them the benefit of the doubt, I'm going—I'm adding that 2 percent in there.

So for all 7,608, they get credit for having a sound recording and a musical composition, even if they only have one, which is frequently. Normally they have only one. I gave them the benefit of having both, gave them a dollar, not just $0.90 or $0.10.

Q. And you used the word "track." What do you mean by tracks?

A. Well, like I said, a track is a song. And so, you have copyrights, there are 10,017 copyrights, but only 7,608 tracks. And that's because some of the tracks have both a copyright and—a copyright and a musical composition and a sound recording. So you're going to have fewer. There's a piece that have just one, there's a piece that have just the other,

JA-378

[771] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:18-cv-950

SONY MUSIC ENTERTAINMENT, et al.,
Plaintiffs,

-vs-

COX COMMUNICATIONS, INC., et al.,
Defendants.

VOLUME 11 (P.M. Portion)

TRIAL TRANSCRIPT

December 17, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

* * *

[CROSS – CHRISTIAN D. TREGILLIS]

[774] [*2840] A F T E R N O O N S E S S I O N

NOTE: The December 17, 2019, afternoon portion of the case begins in the absence of the jury as follows:

JURY OUT

THE COURT: Ready for the jury?

MR. ZEBRAK: Yes, Your Honor.

THE COURT: Okay. Joe, let's get our jury, please.

NOTE: At this point, the jury returns to the courtroom; whereupon, the case continues as follows:

JURY IN

THE COURT: All right. Please have a seat.

Mr. Zebrak, please continue, sir.

MR. ZEBRAK: Thank you, Your Honor.

CHRISTIAN D. TREGILLIS, DEFENDANTS' WITNESS,

PREVIOUSLY SWORN, RESUMED

CROSS-EXAMINATION (Cont'd.)

BY MR. ZEBRAK:

Q. Good afternoon, Mr. Tregillis.

A. Hi.

Q. Do you recall that just before the lunch break, we were talking about your damages calculations?

A. I think it was an analysis of economic harm; that's right.

Q. With respect to your analysis of economic harm, you multiplied the infringement notices times a royalty rate, [775] [*2841] correct?

A. Right. The revenue share that would go to the plaintiffs, a dollar.

Q. Okay. So before lunch, we already talked about what you used for the quantity. I'd like to now talk about the royalty rate that you applied. Okay?

A. Okay. Great.

Q. Now, you used a dollar per notice, right?

A. Right.

Q. Okay. And you used the dollar because that was your calculation, sort of the average cost of a single-track download from iTunes, correct?

A. Not exactly. A single-track download from iTunes is somewhere between $0.79 and $1.29. In production, you and your clients provided

information that told me how much of that you get, and for sound recordings, you get up to about $0.90, and for musical compositions, you get $0.10. So I used all of that, assuming you get all of the musical compositions and all sound recordings, even though those—that's not actually the case, but that's where those come from, is your disclosures.

Q. All right. The activity for which that rate applied was the single-track download for digital download from iTunes, correct?

A. It's based on the $0.79 up to a $1.29 for a single-track [776] [*2842] download, that's right.

Q. Right. And you looked to the single-track download rate because you understood that these tracks were available for purchase on an individual basis on iTunes, correct?

A. Right.

Q. Now, in choosing a royalty rate, it's true, is it not, sir, that it's important that the royalty rate fit the economic realities of the situation that you're applying it toward, correct?

A. Yes.

Q. And the single-track download rate when someone buys a track from iTunes, that's the rate for obtaining the track for personal use, correct?

A. Yes.

Q. That price is not the price for authorization to distribute it to countless people through a peer-to-peer network, correct?

A. That's right. It's for an individual to purchase and use that track. That's my understanding of it.

Q. Right. And it's also your understanding, sir, that plaintiffs have never granted a license for anyone to distribute their music all across peer-to-peer networks on an unlimited basis, correct?

A. That's right.

Q. The cost of that would be enormous, correct?

* * *

[DIRECT – TERRENECE PATRICK MCGARTY]

[*2879] One is to explain the background technology.

I admit he didn't delineate MILNET, Internet2, internet. That issue was well out there—

MR. BUCHANAN: Oh—

MR. ZEBRAK: Excuse me, me sir. And he responded to Mr. Buchanan's deposition questions not by saying it's an irrelevant question, but by saying the same thing he said here: I'm not here to dictate what Cox should have done.

It's just—

THE COURT: Okay. So he's not permitted to testify about whether Cox and its internet system was capable or not capable of operating in a military base or a hospital. You can ask him the general infrastructure in a multiple-tier system, and he can explain that. He's not going to tie it into his testimony.

MR. ZEBRAK: I will do my best to avoid that. Thank you.

NOTE: The sidebar discussion is concluded; whereupon, the case continues before the jury as follows:

BEFORE THE JURY

THE COURT: Please proceed.

MR. ZEBRAK: Thank you, Your Honor.

BY MR. ZEBRAK:

Q. Dr. McGarty, I'm going to ask you some questions now just about the background technology. I'm not asking you about, [*2880] anything about Cox specifically, okay?

A. Yes, sir.

Q. Are you familiar with something called MILNET?

A. MILNET?

Q. Yes, sir.

A. MILNET was an offshoot of the ARPANET in the late 1980s, and what happened is that MILNET was the DoD's private secure version of the internet. What was left over became what we now call the public internet.

And MILNET has evolved over time. It was under DCA, Defense Communications Agency—I think that's what it was—and then it went into DISA. So it's now distributed amongst DOD in various agencies. Homeland Security also has an element of this secure network.

So it's, it's to some degree a separate network that provides secure internet connections for DOD and other entities.

Q. When you say "DOD," you're referring—

A. Department of Defense.

Q. Yes, sir. And are you familiar with something called Internet2?

MR. BUCHANAN: Your Honor, I would just renew my objection.

THE COURT: Yeah, overruled.

MR. BUCHANAN: In the report, there's nothing—

[*2881] THE COURT: I've ruled.

MR. BUCHANAN: All right.

THE COURT: Your exception is noted.

Are you familiar with Internet2? Is that the question?

MR. ZEBRAK: Yes, Your Honor.

THE WITNESS: May I answer?

THE COURT: Yes, sir.

BY MR. ZEBRAK:

Q. Yes, please.

A. Okay. Internet2 is a consortium of universities, hospitals, and organization—there's now more than a thousand of them—that have their own parallel internet network. So for example, the three universities in Georgia: Georgia Tech, University of Georgia, they're members of Internet2. MIT, Harvard are members of Internet2.

I work with one of my partners, Mr. Hauser, and together we did pro bono work connecting internet to, also to hospitals and other facilities. I worked with the World Bank and Institute of Peace.

So it's a separate internet parallel to the common internet that universities and other types of organizations join, and it provides them high-speed internet access at substantially lower price, and most of these organizations now participate in that effort.

[*2882] Q. Does the military run MILNET?

A. The military MILNET has evolved into multiple networks within various DoD elements, but MILNET was the seed founder in, I think, 1988 or '87. I was—at that time, I was doing things at NYNEX where we work with something called NYSERNet, which was New York State's element that was—became part of Internet2. So there was a, actually a trifurcation occurring at that time between commercial, Internet2, and the military.

Q. And just so there's no confusion, you said there's the internet, Internet2, and MILNET, correct?

A. MILNET and its subsequent players.

Q. Three separate—

A. Three separate, different fibers, different connections, and generally they do interconnect at certain levels, but the point is security is a key point.

Q. Okay. Thank you, Dr. McGarty.

Dr. McGarty, turning back to the opinion that you provided in this matter, could you elaborate on that a little bit more, starting first with your opinion with respect to Cox's actions versus capabilities on the residential side?

A. Well, Cox's technical capabilities were there. It was, in my opinion, a fairly simple and straightforward system of collecting e-mails, finding out who they were sent—you know, related to, IP address to customer, recording those complaints in a database and then doing something about it.

[*2883] So from the technical perspective, it was a fairly simple and straightforward process.

Q. You mentioned front-end limits and back-end limits before. Do you recall that?

A. Yeah. The front end, the front end is when they would accept incoming complaints, all right; and Cox did throttle some of the front-end complaints because there were certain entities that were capable of putting in many more complaints than Cox would accept. So therefore, there was a throttling on the number of complaints that came in on that front end.

And if you follow the record, you can see that there was a—somewhat of a continual request to try to increase that over a period of time; and, you know, in my opinion, the system from a technical perspective could have easily handled a substantially larger number of complaints. So it was not, in my opinion, based upon my experience, a technical bottleneck, because many of these systems are very scalable.

Q. What do you mean when you say the system is "scalable"?

A. You can add additional capacity and capability. You could do cloud computing or a bunch of other things that would allow you to handle a substantially larger number of incoming complaints. So you were not technologically limited at the front end, especially in this time frame which—that we're looking at.

At the back end, I think to follow up on your [*2884] question, there's an issue of policy, and Cox decides what their policy is. I'm not here to tell anybody what they should do. I'm just observing it.

And for a while, Cox did terminate people who had multiple complaints, and then there was a period where they ended up with—having sat here, I've seen the various descriptions of these complaints, and in various technicolor of presentations, but basically it is that 13th complaint that it says: Consider for termination.

Ambiguity, as I said earlier, is a serious problem. You either terminate or you don't terminate. Do you terminate on the 14th? Do you terminate on the 15th? I don't know, but you gotta do something. Okay? It's—you know, the ship is going towards the shoals. Turn the wheel. All right? That's the only thing I can think of.

And generally in my operations, I always try to avoid ambiguity.

Q. Dr. McGarty, just a few more questions. You just spoke to the residential side. Could you explain your analysis with respect to the business side in terms of the customer base?

A. You want me to discuss the business side?

Q. Yeah. I mean, the observations you just made, was there a limitation for Cox with respect to acting with respect to its business subscribers?

A. My observations on the business side is that they

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[JURY INSTRUCTIONS]

[798] [*2922] signed and sworn to by another party. A party is bound by its sworn answers.

By introducing an opposing party's answers to interrogatories, the introducing party does not bind itself to these answers. The introducing party may challenge the opposing parties' answers in whole or in part or may offer contrary evidence.

As I stated in my initial instructions at the beginning of the case, you have heard testimony now and seen documents that refer to the Digital Millennium Copyright Act, known as the DMCA. The DMCA provides that an internet service provider, like Cox, may have a defense to liability arising from infringement on its network and that there is a defense called a safe harbor defense, which is included in the DMCA in part of that statute. It's not a defense for Cox in this case.

However, the fact that the safe harbor provision does not apply does not bear adversely on the consideration of a defense by Cox that Cox's conduct is not infringing under the Copyright Act or any other defense.

I will be sending the exhibits that have been received in evidence during the trial back to you, and you will have them while you deliberate.

A copyright is a set of rights granted by federal law to the owner of an original work of authorship.

The owner [799] [*2923] of a copyright has the exclusive right to: One, reproduce the copyrighted work.

Two, prepare derivative works based upon the copyrighted work.

Three, distribute copies or phone records—phonorecords of the copyrighted—to the public by sale or other transfer of ownership or by rental, lease, or lending.

Four, perform publicly a copyrighted literary work, musical work, dramatic work, choreographic work, pantomime work, or motion picture.

Five, display publicly a copyrighted literary work, music work, dramatic work, choreographic work, pantomime work, pictorial work, graphic work, sculptural work, or the individual images of a motion picture.

The term "owner" includes the author of the work, an assignee, and an exclusive licensee.

This case involves two kinds of copyrighted works: Sound recordings, i.e., recorded music, and musical compositions, which include music and lyrics.

In this case, plaintiffs contend that Cox is contributorily and vicariously liable for the infringement of plaintiffs' 10,017 copyrighted works by users of Cox's internet service.

Plaintiffs have already established that they are the owners of the 10,017 copyrighted works as issue—at [800] [*2924] issue in this case, and that the copyright and registration in each of these 10,017 works is valid.

Plaintiffs have also established the knowledge element of their contributory infringement claim. That is, plaintiffs have established that Cox had specific enough knowledge of the infringement occurring on its network that Cox could have done something about it.

In order to prove contributory or vicarious copyright infringement, plaintiffs must first establish by a preponderance of the evidence that users of Cox's internet service used that service to infringe plaintiffs' copyrighted works.

Plaintiffs are not required to prove the specific identities of the infringing users.

A copyright owner's exclusive right to distribute, reproduce, and copy its copyrighted work is infringed by the downloading or uploading of the copyrighted work without authorization.

If you find that users of Cox's internet service uploaded or downloaded all or part of plaintiffs' copyrighted works at issue without authorization, then plaintiffs have established that the users of Cox's internet service have infringed plaintiffs' copyrighted works.

A copyright may be infringed by contributory infringing. With certain exceptions, a person is liable for [801] [*2925] copyright infringement by another if the person knows or was willfully blind to the infringing activity and induces, causes, or materially contributes to the activity.

Plaintiff has the burden of proving each of the following by a preponderance of the evidence: First, that there was direct infringement of plaintiffs' copyrighted works at issue by users of Cox's internet service.

Second, that Cox knew of specific instances of infringement or was willfully blind to such instances.

And, third, that Cox induced, caused, or materially contributed to the infringing activity.

The second element, that Cox knew of the specific instances of infringement, has already been established. As such, there is no need to consider this knowledge element in your deliberations.

A copyright may also be infringed by vicariously infringing. A person is liable for copyright infringement by another if the person has a financial interest and the right and ability to supervise the infringing activity, whether or not the person knew of the infringement.

In order to prove vicarious copyright infringement, plaintiffs have the burden of proving each of the following by a preponderance of the evidence: First, that there was direct infringement of

plaintiffs' copyrighted works by users of Cox's internet service.

[802] [*2926] Second, that Cox had a direct financial interest in the infringing activity of its users.

And, third, that Cox had the right and ability to supervise such infringing activity.

The fact that I'm instructing you on the proper measure of damages should not be considered as indicating any view of mine as to which party is entitled to your verdict in the case. Instructions as to the measure of damages are given for your guidance only in the event you should find in favor of the plaintiffs from a preponderance of the evidence in the case in accordance with the other instructions.

If you find that Cox is liable for contributory infringement or you find Cox is liable for vicarious infringement, then you should consider the amount of money to award the plaintiffs.

If you find that Cox is neither liable for contributory or vicarious infringement, then you should not consider this issue.

Plaintiffs seek an award of statutory damages under the United States Copyright Act. Statutory damages are damages that are established by Congress in the Copyright Act because actual damages in copyright cases are often difficult to establish with precision. The purposes are to

compensate the copyright owner, penalize the infringer, and deter future copyright law violations.

[803] [*2927] The amount awarded must be between 750 and $30,000 for each copyrighted work that you find to be infringed.

If plaintiffs prove that Cox acted willfully in contributorily or vicariously infringing plaintiffs' copyrights, you may, but are not required to, increase the statutory damage award to a sum as high as $150,000 per copyrighted work.

You should award as statutory damages an amount that you find to be fair under the circumstances. In determining the appropriate amount to award, you may consider the following factors: The profits Cox earned because of the infringement.

The expenses Cox saved because of the infringement.

The revenues that plaintiffs lost because of the infringement.

The difficulty of proving plaintiffs' actual damages.

The circumstances of the infringement.

Whether Cox acted willfully or intentionally in contributorily or vicariously infringing plaintiffs' copyrights.

Deterrence of future infringement.

In the case of willfulness, the need to punish Cox.

In considering what amount would have a deterrent effect, you may consider Cox's total profits and the effect [804] [*2928] the award may have on Cox in the marketplace.

Plaintiffs are not required to prove any actual damage suffered by plaintiffs to be awarded statutory damages. You should award statutory damages whether or not there is evidence of the actual damage suffered by plaintiffs, and your statutory damage award need not be based on the actual damages suffered by plaintiffs.

Cox's contributory or vicarious infringement is considered willful if plaintiffs prove by a preponderance of the evidence that Cox had knowledge that its subscribers' actions constituted infringement of plaintiffs' copyrights, acted with reckless disregard for the infringement of plaintiffs' copyrights, or was willfully blind to the infringement of plaintiffs' copyrights.

You must follow these rules while deliberating and returning your verdict. First, when you go to the jury room, you must select a foreperson. The foreperson will preside over your discussions and speak for you here in court.

Second, it's your duty as jurors to discuss this case with one another in the jury and try to reach an agreement. Each of you must make your own conscious decision, but only after you have

considered all the evidence, discussed it fully with the other jurors, and listened to the views of the other jurors.

Do not be afraid to change your opinions if the

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