APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1168

SONY MUSIC ENTERTAINMENT; ARISTA MUSIC; ARISTA RECORDS, LLC; LAFACE RECORDS LLC; PROVIDENT LABEL GROUP, LLC; SONY MUSIC ENTERTAINMENT US LATIN LLC; VOLCANO ENTERTAINMENT III, LLC; ZOMBA RECORDINGS LLC; SONY/ATV MUSIC PUBLISHING LLC; EMI AI 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., 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 COMPANY, INCORPORATED; STONE AGATE MUSIC; SCREEN GEMS-EMI MUSIC, INCORPORATED; STONE DIAMOND MUSIC CORP.; ATLANTIC RECORDING CORPORATION; BAD BOYS RECORDS LLC; ELEKTRA ENTERTAINMENT GROUP, INCORPORATED; FUELED BY RAMEN LLC; ROADRUNNER RECORDS, INC.; WARNER-

TAMERLANE PUBLISHING CORPORATION; WB MUSIC CORPORATION; UNICHAPPELL MUSIC, INCORPORATED; RIGHTSONG MUSIC INC.; COTILLION MUSIC, INCORPORATED; INTERSONG U.S.A., INC.; UMG RECORDINGS, INCORPORATED; CAPITOL RECORDS, LLC; UNIVERSAL MUSIC CORPORATION; UNIVERSAL MUSIC-MGB NA LLC; UNIVERSAL MUSIC PUBLISHING INC.; UNIVERSAL MUSIC PUBLISHING AB; UNIVERSAL PUBLISHING LIMITED; UNIVERSAL MUSIC PUBLISHING MGB LIMITED; UNIVERSAL MUSIC - Z TUNES LLC; UNIVERSAL/ISLAND MUSIC LIMITED; UNIVERSAL/MCA MUSIC PUBLISHING PTY. LIMITED; POLYGRAM PUBLISHING, INC.; SONGS OF UNIVERSAL, INC.; WARNER RECORDS, INC., F/K/A W.B.M. MUSIC CORP.; WARNER CHAPPELL MUSIC, INC., F/K/A WARNER/CHAPPELL MUSIC, INC.; W.C.M. MUSIC CORP., F/K/A W.B.M. MUSIC CORP.,

Plaintiffs–Appellees,

and

NONESUCH RECORDS INC.; WARNER BROS. RECORDS, INC.; WARNER/CHAPPELL MUSIC, INC.; W.B.M. MUSIC CORP.; 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 Corporation; RONDOR MUSIC INTERNATIONAL,

Plaintiffs,

v.

COX COMMUNICATIONS, INCORPORATED; COXCOM, LLC,

Defendants–Appellants.

INTERNET ASSOCIATION; ELECTRONIC FRONTIER FOUNDATION; CENTER FOR DEMOCRACY AND TECHNOLOGY; AMERICAN LIBRARY ASSOCIATION; ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES; ASSOCIATION OF RESEARCH LIBRARIES; PUBLIC KNOWLEDGE; NTCA THE RURAL BROADBAND ASSOCIATION; CTIA - THE WIRELESS ASSOCIATION; USTELECOM THE BROADBAND ASSOCIATION; INTERNET COMMERCE COALITION; INTELLECTUAL PROPERTY LAW PROFESSORS,

Amici Supporting Appellant,

and

NATIONAL MUSIC PUBLISHERS' ASSOCIATION; NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL; SONGWRITERS OF NORTH AMERICA; COPYRIGHT ALLIANCE,

Amici Supporting Appellee.

On Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.

Liam O'Grady, Senior District Judge.
(1:18-cv-00950-LO-JFA)

Argued: March 9, 2022
Decided: February 20, 2024

Before HARRIS and RUSHING, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed in part, reversed in part, vacated in part, and remanded by published opinion. Judge Rushing wrote the opinion, in which Judge Harris and Senior Judge Floyd joined.

ARGUED: E. Joshua Rosenkranz, ORRICK, HERRINGTON & SUTCLIFFE LLP, New York, New York, for Appellants. Catherine Emily Stetson, HOGAN LOVELLS US LLP, Washington, D.C., for Appellees. **ON BRIEF:** Michael S. Elkin, Jennifer A. Golinveaux, Geoffrey P. Eaton, WINSTON & STRAWN LLP, New York, New York; Mark S. Davies, Sheila A. Baynes, Washington, D.C., Christopher J. Cariello, Rachel G. Shalev, Alexandra Bursak, ORRICK, HERRINGTON & SUTCLIFFE LLP, New York, New York, for Appellants. Matthew J. Oppenheim, Scott A. Zebrak, Jeffrey M. Gould, OPPENHEIM + ZEBRAK, LLP, Washington, D.C.; Jo-Ann Tamila Sagar, Patrick C. Valencia, HOGAN LOVELLS US LLP, Washington, D.C., for Appellees. Joseph C. Gratz, Samuel J. Zeitlin, DURIE TANGRI LLP, San Francisco, California, for Amicus Internet Association. Mitchell L. Stoltz, Corynne McSherry, ELECTRONIC FRONTIER FOUNDATION, San Francisco, California; Erik Stallman, Juliana DeVries, Samuelson Law, Technology & Public Policy Clinic, UC BERKELEY SCHOOL OF LAW, Berkeley, California, for Amici Electronic Frontier Foundation, Center for Democracy and Technology, American Library Association, Association of College and Research Libraries, Association of Research Libraries, and Public Knowledge. David E. Weslow, Megan L. Brown, Ari S. Meltzer, Kevin G. Rupy, Adrienne J. Kosak, WILEY REIN LLP, Washington, D.C., for Amici NTCA – The Rural Broadband Association, CTIA – The Wireless Association, and USTelecom – The Broadband Association. Andrew L. Deutsch, DLA PIPER LLP (US), Los Angeles, California, for Amicus Internet Commerce Coalition. Phillip R. Malone, Juelsgaard Intellectual Property and Innovation Clinic, Mills Legal Clinic, STANFORD LAW SCHOOL, Stanford, California, for Amici Intellectual Property Law Professors. Danielle M. Aguirre, Kerry M. Mustico, Christopher A. Bates, NATIONAL MUSIC PUBLISHERS' ASSOCIATION, Washington, D.C.; Ruthanne M. Deutsch, Hyland Hunt, Alexandra Mansbach, DEUTSCH HUNT PLLC, Washington, D.C., for Amici National Music Publishers' Association, Nashville Songwriters Association International, and Songwriters of North America. Nancy Wolff, Sara Gates, COWAN DEBAETS

ABRAHAMS & SHEPPARD LLP, New York, New York, for Amicus The Copyright Alliance.

RUSHING, Circuit Judge:

Defendant Cox Communications sells internet, telephone, and cable television service to 6 million homes and businesses across the United States. Plaintiffs—Sony Music Entertainment and numerous other record companies and music publishers—own some of the most popular copyrighted musical works of our time. Some users of Cox's internet service infringed Plaintiffs' copyrights by downloading or distributing songs over the internet without permission. Rather than sue those individuals, Plaintiffs sued Cox, seeking to hold it responsible for its customers' copyright infringement.

Federal law protects internet service providers from monetary liability for copyright infringement committed by users of their networks, but only if those service providers reasonably implement a policy to terminate repeat infringers in appropriate circumstances. In a prior case, our Court held that Cox had failed to reasonably implement an anti-piracy program and therefore did not qualify for the statutory safe harbor.

This case proceeded to trial on two theories of secondary liability: vicarious and contributory copyright infringement. The jury found Cox liable for both willful contributory and vicarious infringement of 10,017 copyrighted works owned by Plaintiffs and awarded $1 billion in statutory damages. Cox appealed.

We affirm the jury's finding of willful contributory infringement. But we reverse the vicarious liability verdict and remand for a new trial on damages because Cox did not profit from its subscribers' acts of infringement, a legal prerequisite for vicarious liability.

I.

Copyright owners possess the "exclusive rights" to "reproduce," "distribute," "perform," "display," or "prepare derivative works based upon" their copyrighted works, subject to limitations not relevant here. 17 U.S.C. § 106. Anyone who violates any of these exclusive rights of the copyright owner is "an infringer of the copyright." *Id.* § 501(a). A copyright owner may "institute an action" against an infringer, *id.* § 501(b), and receive either statutory damages, *id.* § 504(a)(2), or actual damages plus the infringer's profits, *id.* § 504(a)(1). Although the Copyright Act "does not expressly render anyone liable for infringement committed by another," the Supreme Court has long held that vicarious and contributory liability for copyright infringement rest on firm legal footing. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434–435 (1984).

Congress recognized that internet service providers may get caught in the crossfire when infringers use the internet to reproduce or distribute copyrighted works, so it created a safe harbor defense in the Digital Millennium Copyright Act (DMCA). *See* 17 U.S.C. § 512. To be eligible for the defense, an internet service provider must have "adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers." *Id.* § 512(i)(1)(A). This Court previously held that Cox did not qualify for the safe harbor because its repeat infringer policy as implemented was inadequate under the DMCA. *See BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 301–305 (4th Cir. 2018). The claim period in this case coincides with the period during which Cox was ineligible for the safe harbor, so Cox faces the secondary liability claims here without that protection.[1]

This lawsuit began when Sony and other owners of copyrighted musical works (collectively, Sony or Plaintiffs) sued Cox for infringement committed by subscribers to Cox's internet service from 2013 to 2014. During the claim period, Cox provided internet service to residential and commercial subscribers, charging different flat fees for different download speeds according to a tiered pricing plan.

Plaintiffs are members of the Recording Industry Association of America (RIAA), which hired the anti-piracy company MarkMonitor to catch infringements of its members' copyrights on peer-to-peer networks using file-sharing protocols like BitTorrent and others. *See BMG*, 881 F.3d at 298–299 (explaining peer-to-peer file sharing and BitTorrent). When MarkMonitor discovered an internet user downloading or distributing a copyrighted music file, it notified the user's internet service provider. Only

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[1] The DMCA safe harbor defense is not exclusive, so Cox remains "entitled to all other arguments under the law" in its defense. *CoStar Grp., Inc. v. LoopNet, Inc.,* 373 F.3d 544, 552 (4th Cir. 2004); *see* 17 U.S.C. § 512(l).

the service provider can match an alleged infringer's internet protocol address to its owner's identity. When Cox received infringement notices from MarkMonitor, Cox's automated system sent notices to the infringing subscribers. The notice Cox sent varied by how far along the subscriber was in Cox's thirteen-strike policy, ranging from an email warning to a temporary suspension. *See BMG*, 881 F.3d at 299 (describing the thirteen-strike policy).

Over time, Cox developed various methods to stem the tidal wave of infringement notices it was receiving and mitigate the consequences for its subscribers. It capped the number of notices it would accept from RIAA, eventually holding it at 600 notices per day. It took no action on the first DMCA complaint for each subscriber, limited the number of account suspensions per day, and restarted the strike count for subscribers once it terminated and reinstated them. MarkMonitor sent Cox 163,148 infringement notices during the claim period. Over that time, Cox terminated 32 subscribers for violation of its Acceptable Use Policy, which prohibits copyright infringement among other things. By comparison, it terminated over 600,000 subscribers for nonpayment over that same time. Frustrated with Cox's lackluster response to the notices, Sony sued Cox for vicarious and contributory copyright infringement.

After discovery, Sony and Cox cross-moved for summary judgment. Two of the district court's rulings at that stage are relevant for this appeal. First, the district court concluded that the infringement notices MarkMonitor sent to Cox proved Cox's knowledge of infringement as a matter of law. That knowledge established one element of contributory liability.

Second, the district court denied Cox's motion to reduce the number of copyrighted works in suit. Cox argued that, for the purpose of statutory damages, all songs included on a single album constitute one work, and a sound recording and the music composition it embodies likewise count as a single work. *See* 17 U.S.C. § 504(c)(1) (authorizing statutory damages for infringement "with respect to any one work" and explaining that "all the parts of a compilation or derivative work constitute one work"). The district court found that issues of material fact remained and so this claim should "be resolved at trial." *Sony Music Ent. v. Cox Commc'ns, Inc.*, 426 F. Supp. 3d. 217, 236 (E.D. Va. 2019).

The parties presented their case to the jury over the course of twelve days. Plaintiffs limited their case to Cox subscribers who received three or more infringement notices. In the end, the jury found Cox liable for vicarious and contributory infringement of all 10,017 copyrighted works alleged. The jury also found that Cox's infringement was willful, which increased the available maximum statutory damages to $150,000 per work. *See* 17 U.S.C. § 504(c)(1)–(2). The jury awarded Sony $99,830.29 per infringed work, for a total of $1 billion in statutory damages.

After the verdict, Cox renewed its motion for judgment as a matter of law, which the district court ultimately denied in full. Regarding liability, the district court rejected Cox's arguments that the evidence did not prove vicarious or contributory infringement. Cox also sought again to reduce the number of works—and with it, damages—to account for compilations and derivative works. The district court rejected Cox's request as to compilations but invited Cox to submit a calculation of the derivative works that were allegedly double counted. After receiving Cox's submission, however, the district court denied any reduction in the number of works, reasoning that Cox's posttrial arguments required factfinding within the province of the jury and that Cox had failed to present evidence sufficient to enable the jury to make the adjustments it requested.

Now on appeal, Cox raises numerous questions of law concerning the scope of secondary liability for copyright infringement and what constitutes a compilation or derivative work in the internet age. Ultimately, we find we must answer only some of these novel questions to resolve this appeal.

II.

We begin with Cox's contention that the district court erred in denying it judgment as a matter of law on Sony's vicarious infringement claim. We review that ruling de novo. *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 391 (4th Cir. 2014). Judgment as a matter of law is proper if, viewing all evidence and reasonable inferences in the light most favorable to the nonmoving party, "a reasonable jury would not have a legally sufficient evidentiary basis to find for [that] party." Fed. R. Civ. P. 50(a)(1). A district court should grant judgment as a matter of law "if the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the burden of proof." *Russell*, 763 F.3d at 391 (internal quotation marks omitted).

A defendant may be held vicariously liable for a third party's copyright infringement if the defendant "[1] profits directly from the infringement and [2] has a right and ability to supervise the direct infringer."

Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 n.9 (2005); *see also CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004) ("[A] defendant who 'has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities' is [vicariously] liable." (quoting *Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971))). Cox contests both elements on appeal. Because we conclude Sony failed, as a matter of law, to prove that Cox profits directly from its subscribers' copyright infringement, we do not reach the additional question of Cox's right and ability to supervise its subscribers.

Cox argues that it does not profit directly from its subscribers' infringement because "[a]ll subscribers pay Cox a flat monthly fee for their internet access package no matter what they do online." Opening Br. 27. Whether a subscriber uses her internet access for lawful or unlawful purposes, Cox receives the same monthly fee, and a subscriber's decision to download or distribute a copyrighted song without permission does not benefit Cox. The district court rejected this argument, concluding that Sony had proven Cox's direct financial interest by showing that Cox repeatedly declined to terminate the accounts of infringing subscribers in order to continue collecting their monthly fees. To understand this issue, some legal background is necessary.

Vicarious liability for copyright infringement is an "outgrowth of the agency principles of respondeat superior." *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996); *see also A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001). It extends beyond a strict employer-employee relationship to other settings in which a defendant similarly "'has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.'" *Costar Grp.*, 373 F.3d at 550 (quoting *Gershwin Pub. Corp.*, 443 F.2d at 1162). So, for example, we have held that a property owner was vicariously liable for its closely related developer's infringing use of copyrighted architectural drawings in a construction project. *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 513–514 (4th Cir. 2002). In addition to its control over the project, the property owner had "an obvious and direct financial interest in the [developer's] infringing activities" because the owner "enjoyed the benefit of any increase in the Project's value resulting from [the developer's] infringement" of the copyrighted drawings. *Id.* at 514. In another example, a company that sold nutritional supplements was vicariously liable for its distributors' infringing use of copyrighted photographs to advertise its products because the company could control the distributors and stood to benefit from increased sales spurred by the infringing advertisements. *Leonard v. Stemtech Int'l, Inc.*, 834 F.3d 376, 389 (3d Cir. 2016).

The landmark case on vicarious liability for infringing copyrighted musical recordings is *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304 (2d Cir. 1963). There a department store was held accountable for the infringing sale of "bootleg" records by a concessionaire operating in its stores. *Id.* at 307–308. The store retained the ultimate right to supervise the concessionaire and its employees, demonstrating its control over the infringement. And the store received a percentage of every record sale, "whether 'bootleg' or legitimate," giving it "a most definite financial interest" in the infringing sales. [2] *Id.*

Courts have recognized, however, that a defendant may possess a financial interest in a third party's infringement of copyrighted music even absent a strict correlation between each act of infringement and an added penny of profits. For example, *Fonovisa* concerned the operator of a swap meet who allowed vendors to sell infringing records. The complaint alleged that the operator collected "admission fees, concession stand sales and parking fees"—but no sales commission—"from customers who want[ed] to buy the counterfeit recordings at bargain basement prices." *Fonovisa*, 76 F.3d at 263. These allegations sufficed to state a direct financial benefit to the swap meet operator, the court held, because "the sale of pirated recordings at the . . . swap meet [was] a 'draw' for customers." *Id.* The infringing sales "enhance[d] the attractiveness of the venue to potential customers," giving the swap meet operator a financial interest in the infringement sufficient to state a claim for vicarious liability. *Id.*

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[2] In an analysis that courts still use today, the *Shapiro* court contrasted two types of relationships: (1) landlords and tenants and (2) dance halls and bands. *Shapiro,* 316 F.2d at 307; *see Sony,* 464 U.S. at 437 n.18 (picking up this comparison); *Leonard,* 834 F.3d at 388–389 (same). A landlord is not vicariously liable for a tenant's copyright infringement, the court explained, because he exercises no supervision over the tenant and charges a fixed rental fee regardless of whether the tenant infringes copyrights in the rented house. *Shapiro,* 316 F.2d at 307. But the dance hall proprietor who hires a band can control the premises, and the band's infringing performances of copyrighted songs "provide the proprietor with a source of customers and enhanced income," exposing him to vicarious liability. *Id.*

Applying these principles to copyright infringement in cyberspace, courts and Congress agree that "'receiving a one-time set-up fee and flat periodic payments for service'" from infringing and noninfringing users alike ordinarily "'would not constitute receiving a financial benefit directly attributable to the infringing activity.'" *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (quoting S. Rep. 105-190, at 44 (1998)). But "'where the value of the service lies in providing access to infringing material,'" those flat fees may constitute a direct financial benefit. *Id.* (quoting S. Rep. 105-190, at 45).

For example, the file-sharing service Napster had a direct financial interest in its users' exploitation of copyrighted music. An increasing volume of pirated music available for download drew more users to register with Napster, and its "future revenue [was] directly dependent upon increases in userbase." *Napster*, 239 F.3d at 1023 (internal quotation marks omitted).

By contrast, America Online (AOL) was not vicariously liable for copyright infringement occurring over an online forum to which it provided its subscribers access. Although access to online forums encouraged overall subscription to AOL's services, there was no direct financial benefit from infringement where no evidence indicated "that AOL customers either subscribed because of the available infringing material" or "canceled subscriptions" when the material was no longer available. *Ellison*, 357 F.3d at 1079. Without "evidence that AOL attracted or retained subscriptions because of the infringement or lost subscriptions because of [its] eventual obstruction of the infringement," "no jury could reasonably conclude that AOL received a direct financial benefit from providing access to the infringing material." *Id.*

As these cases illustrate, the crux of the financial benefit inquiry is whether a causal relationship exists between the infringing activity and a financial benefit to the defendant. If copyright infringement draws customers to the defendant's service or incentivizes them to pay more for their service, that financial benefit may be profit from infringement. *See*, *e.g.*, *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 99 (2d Cir. 2016). But in every case, the financial benefit to the defendant must flow directly from the third party's acts of infringement to establish vicarious liability. *See Grokster*, 545 U.S. at 930 & n.9; *Nelson-Salabes*, 284 F.3d at 513.

To prove vicarious liability, therefore, Sony had to show that Cox profited from its subscribers' infringing download and distribution of Plaintiffs' copyrighted songs. It did not.

The district court thought it was enough that Cox repeatedly declined to terminate infringing subscribers' internet service in order to continue collecting their monthly fees. Evidence showed that, when deciding whether to terminate a subscriber for repeat infringement, Cox considered the subscriber's monthly payments. *See*, *e.g.*, J.A. 1499 ("This customer will likely fail again, but let's give him one more chan[c]e. [H]e pays 317.63 a month."). To the district court, this demonstrated the requisite connection between the customers' continued infringement and Cox's financial gain.

We disagree. The continued payment of monthly fees for internet service, even by repeat infringers, was not a financial benefit flowing directly from *the copyright infringement itself*. As Cox points out, subscribers paid a flat monthly fee for their internet access no matter what they did online. Indeed, Cox would receive the same monthly fees even if all of its subscribers stopped infringing. Cox's financial interest in retaining subscriptions to its internet service did not give it a financial interest in its subscribers' myriad online activities, whether acts of copyright infringement or any other unlawful acts. An internet service provider would necessarily lose money if it canceled subscriptions, but that demonstrates only that the service provider profits directly from the sale of internet access. Vicarious liability, on the other hand, demands proof that the defendant profits directly from the *acts of infringement* for which it is being held accountable.

Sony responds that, even if we disagree with the district court, the jury heard other evidence of Cox's direct financial interest in its subscribers' copyright infringement. But none of Sony's alternative theories supports vicarious liability here.

First, Sony contends that the jury could infer from the volume of infringing activity on Cox's network that the ability to infringe was a draw for customers. In support, Sony highlights evidence that roughly 13% of Cox's network traffic was attributable to peer-to-peer activity and over 99% of peer-to-peer usage was infringing. Even if the jury believed Sony's characterization that this was a high volume of infringing activity in general, the evidence falls considerably short of demonstrating that customers were drawn to purchase Cox's internet service, or continued to use that service, because it offered them the ability to infringe Plaintiffs' copyrights. *Cf. Ellison*, 357 F.3d at 1079. Many activities of modern life demand internet service. No one disputes that Cox's subscribers need the internet for countless reasons, whether or not they can infringe. Sony has not identified evidence that any infringing subscribers purchased internet access because it enabled them to infringe copyrighted music. Nor does any evidence suggest that customers chose Cox's internet service, as opposed to a competitor's, because of any knowledge or expectation about Cox's lenient response to infringement.

Second, Sony asserts that "subscribers were willing to pay more for the ability to infringe," but the evidence does not go nearly so far. Response Br. 36. Cox had a tiered pricing structure by which it charged customers higher monthly fees for increased data allowances. According to Sony, peer-to-peer activity is "bandwidth-intensive," "more data usage requires more speed," and Cox advertised its network speeds in relation to how quickly a user could download songs. Response Br. 37. Further, Sony explains, "residential subscribers who were the subject of 20 or more infringement notices from 2012 [to] 2014 paid Cox more per month, on average, than residential subscribers who were the subject of only 1 or 2 infringement notices." Response Br. 34.

None of this raises a reasonable inference that any Cox subscriber paid more for faster internet in order to engage in copyright infringement. As Sony's expert testified, other data intensive activities include legally streaming movies, television shows, and music, as well as playing video games. Subscribers may have purchased high speed internet for lawful streaming and downloads or because their households had many internet users; Sony's expert didn't claim to know why any customer purchased a higher tier of service. Sony has not identified any evidence that customers were attracted to Cox's internet service or paid higher monthly fees because of the opportunity to infringe Plaintiffs' copyrights.

At bottom, Sony offered no legally adequate theory to establish the required causal connection between subscribers' copyright infringement and increased revenue to Cox. While Cox profited from the sale of internet service, Sony has not shown that Cox, in any sense, had a financial interest in its subscribers committing infringement. *See Costar Grp.*, 373 F.3d at 550. And it is the infringement itself that must in some fashion profit the defendant for vicarious liability to attach. Accordingly, under the correct legal standard, no reasonable jury could find that Cox received a direct financial benefit from its subscribers' infringement of Plaintiffs' copyrights. We therefore conclude that Cox is not vicariously liable for its subscribers' copyright infringement and reverse the district court's denial of Cox's motion for judgment as a matter of law.

III.

We turn next to contributory infringement. Under this theory, "'one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another' is liable for the infringement, too." *CoStar Grp.*, 373 F.3d at 550 (quoting *Gershwin Pub.*, 443 F.2d at 1162). The district court resolved the question of Cox's knowledge on summary judgment, while the jury found material contribution at trial, so we address Cox's challenge to each element separately.

A.

We review the district court's grant of summary judgment de novo, applying the same standard the district court was required to apply. *See Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Our Court has recently clarified the intent necessary to prove contributory infringement by an internet service provider based on its subscribers' direct infringement. In *BMG Rights Management v. Cox Communications*, we held that intent to cause infringement may be shown by willful blindness—which is not at issue in this appeal—or by "know[ledge] that infringement [was] substantially certain to result from the sale" of internet service to a customer. 881 F.3d at 307. General knowledge of infringement occurring on the defendant's network is not enough; "[s]elling a product with both lawful and unlawful uses suggests an intent to cause infringement only if the seller knows of *specific* instances of infringement." *Id.* at 311. Applying these principles to Cox in that case, we held that Cox could not be contributorily liable absent "knowledge that infringement [was] substantially certain to result from Cox's continued provision of Internet access to particular subscribers." *Id.*

As *BMG* suggests, in this scenario, knowledge that particular subscribers are substantially certain to infringe is a predictive question. We reasoned in *BMG* that knowledge of past infringement is relevant to proving this element. *See id.* at 308. Here, Cox produced data purporting to show the effectiveness of each step of its thirteen-strike policy at reducing future infringement, which could also be relevant. And Sony highlights internal emails implying that Cox continued providing internet service to certain habitual infringers despite believing they would infringe again. A jury could consider this and other evidence to determine whether, when Cox continued providing internet service to customers receiving three or more infringement notices, it knew they were substantially certain to infringe Plaintiffs' copyrights by, for example, downloading another song or distributing a song they had previously downloaded.

Cox argues that the district court erred by taking this factual determination away from the jury and deciding as a matter of law that notices of past infringement established Cox's knowledge that subscribers were substantially certain to infringe in the future. Unfortunately, Cox did not make any argument of this ilk to the district court when opposing summary judgment on the knowledge element. Instead, Cox's opposition to Sony's motion for summary judgment on knowledge focused exclusively on the adequacy of the infringement notices from MarkMonitor. Cox argued that the notices lacked information, that the notices were too vague to notify Cox of infringement of specific copyrighted works by specific internet users, and that Sony needed additional evidence beyond the notices to prove that those infringements occurred.

In the district court, all parties (and the court itself) appear to have proceeded on the assumption that knowledge of subscribers' past infringement sufficed to prove this element of contributory liability. Addressing the arguments Cox actually made, the district court concluded that the infringement notices from MarkMonitor were sufficiently detailed to notify Cox of specific instances of infringement.[3] And based on Cox's knowledge of those notices, the court concluded that Sony had established the knowledge element of contributory liability as a matter of law.

Cox did not argue to the district court, as it does now on appeal, that notices of past infringement failed to establish its knowledge that the same subscriber was substantially certain to infringe again. Cox cites certain pages of its memorandum opposing Sony's motion for summary judgment where it claims to have preserved this argument. But no arguable interpretation of those pages or their context reveals any theory like the one Cox advances on appeal. In the district court, Cox contested the sufficiency of the infringement notices to prove Cox's knowledge *of the past infringements alleged therein*. On appeal, Cox argues that its knowledge of past infringements "does not prove Cox *knew ex ante that the same subscriber was 'substantially certain' to infringe again*." Opening Br. 38 (emphasis added). "These are different arguments entirely, and making the one does not preserve the other." *Laber v. Harvey*, 438 F.3d 404, 428 n.24 (4th Cir. 2006). Indeed, Cox did not even

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[3] To the extent Cox suggests that disputes about the information in particular infringement notices independently warrant vacatur of summary judgment, we agree with the district court that these disputes are immaterial.

mention the "substantially certain" standard anywhere in its memorandum opposing summary judgment. *Cf.* Opening Br. 38 (Cox faulting the district court for not mentioning this "requirement" in its opinion).

Because Cox did not press this argument in the district court, it is forfeited for appeal. "Arguments raised in a trial court must be specific and in line with those raised on appeal." *In re Under Seal*, 749 F.3d 276, 287 (4th Cir. 2014). "[A]n objection on one ground does not preserve objections based on different grounds." *Id.* (internal quotation marks omitted); *see also*, *e.g.*, *United States v. Zayyad*, 741 F.3d 452, 459 (4th Cir. 2014) ("To preserve an argument on appeal, the defendant must object on the same basis below as he contends is error on appeal."); *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 379 (4th Cir. 1995) ("[A] theory not raised at trial cannot be raised on appeal.").

"Absent exceptional circumstances, . . . we do not consider issues raised for the first time on appeal." *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 242 (4th Cir. 2009); *see also Agra, Gill & Duffus, Inc. v. Benson*, 920 F.2d 1173, 1176 (4th Cir. 1990) ("We will not accept on appeal theories that were not raised in the district court except under unusual circumstances."). Cox does not contend that any such circumstances exist here, nor does Cox make any effort to show "fundamental error or a denial of fundamental justice." *In re Under Seal*, 749 F.3d at 285 (internal quotation marks omitted); *see id.* at 292 (finding that appellant abandoned any argument for overlooking forfeiture by failing to brief it).

Consequently, we decline to consider Cox's new argument on appeal.

B.

Moving to the material contribution element of contributory liability, Cox appeals the district court's denial of its renewed motion for judgment as a matter of law. We review that denial de novo and must affirm if, "viewing the facts in the light most favorable to the non-moving party, there is sufficient evidence for a reasonable jury to have found in the non-moving party's favor." *First Union Com. Corp. v. GATX Cap. Corp.*, 411 F.3d 551, 556 (4th Cir. 2005) (internal quotation marks and brackets omitted); *see* Fed. R. Civ. P. 50(a)(1). We may not weigh evidence or judge the credibility of witnesses. *See First Union Com. Corp.*, 411 F.3d at 556.

The district court declined to disturb the jury's contributory liability verdict because sufficient evidence supported a finding that Cox materially contributed to its subscribers' direct infringement of Plaintiffs' copyrights.[4] As the court explained, Cox's internet service "was indispensable to each instance of [peer-to-peer] infringement on its network." *Sony Music Ent. v. Cox Commc'ns, Inc.*, 464 F. Supp. 3d 795, 816 (E.D. Va. 2020). And, considering the evidence in the light most favorable to Plaintiffs, a reasonable jury could have found that Cox provided that service "with actual knowledge" of infringement occurring "on specific subscribers' accounts," yet "fail[ed] to address" that infringement occurring on its network. *Id*.

[4] The jury instruction asked if Cox "induced, caused, or materially contributed to the infringing activity," J.A. 801, but only material contribution is before us on appeal.

Cox makes two principal objections. The first rests on the contention that it cannot be liable for materially contributing to copyright infringement because the internet service it provides is capable of substantial lawful use and not designed to promote infringement. We rejected that argument in *BMG*: "In fact, providing a product with 'substantial non-infringing uses' *can* constitute a material contribution to copyright infringement." 881 F.3d at 306. As we explained there, "*Grokster* makes clear that what matters is not simply whether the product has some or even many non-infringing uses, but whether the product is distributed with the *intent* to cause copyright infringement." *Id.* Accordingly, Cox's concern that businesses "would be automatically liable for providing any product or service with knowledge that some small set of customers may use it, in part, to infringe" is misplaced. Opening Br. 45.

Second and similarly, Cox claims its contribution must "amount[] to culpable conduct equivalent to aiding and abetting the infringement," Opening Br. 43 (internal quotation marks and ellipsis omitted), and that "failing to prevent" its subscribers' infringement does not suffice, Opening Br. 46. This argument ignores the evidence before the jury.

It is true that "mere[] . . . failure to take affirmative steps to prevent infringement" does not establish contributory liability "in the absence of other evidence of intent." *Grokster*, 545 U.S. at 939 n.12. But supplying a product with knowledge that the recipient will use it to infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement. For example, in *BMG* we reasoned that leasing a VCR to a customer—innocent conduct by itself—can support contributory liability if the lessor knows the customer is substantially certain to use it for copyright infringement. *See BMG*, 881 F.3d at 308. In such a situation, providing the means to infringe *is* culpable pursuant to the common law rule that a person is presumed to intend the substantially certain results of his acts. *See id.* at 307. This accords with principles of aiding and abetting liability in the criminal law. Lending a friend a hammer is innocent conduct; doing so with knowledge that the friend will use it to break into a credit union ATM supports a conviction for aiding and abetting bank larceny. *See United States v. Thompson*, 539 Fed. App. 778, 779 (9th Cir. 2013); *United States v. Thompson*, 728 F.3d 1011, 1013 (9th Cir. 2013).

The evidence at trial, viewed in the light most favorable to Sony, showed more than mere failure to prevent infringement. The jury saw evidence that Cox knew of specific instances of repeat copyright infringement occurring on its network, that Cox traced those instances to specific users, and that Cox chose to continue providing monthly internet access to those users despite believing the online infringement would continue because it wanted to avoid losing revenue. Sony presented extensive evidence about Cox's increasingly liberal policies and procedures for responding to reported infringement on its network, which Sony characterized as ensuring that infringement would recur. And the jury reasonably could have interpreted internal Cox emails and chats as displaying contempt for laws intended to curb online infringement. To be sure, Cox's anti-infringement efforts and its claimed success at deterring repeat infringement are also in the record.

But we do not weigh the evidence at this juncture. The evidence was sufficient to support a finding that Cox materially contributed to copyright infringement occurring on its network and that its conduct was culpable. Therefore we may not disturb the jury's verdict finding Cox liable for contributory copyright infringement.

IV.

Having reversed on one theory of liability and affirmed on the other, we now must address the scope of the vacatur and proceedings on remand. We conclude that reversal of the vicarious infringement verdict warrants vacatur of the damages award and remand for a new trial on damages. But we see no reason to vacate the contributory infringement verdict, nor will we direct the district court to enter judgment on any part of the now-vacated statutory damages verdict.

A.

When a jury returns a special verdict form finding two bases for liability but a general damages verdict that does "not apportion damages between the claims," reversal of one theory of liability on appeal typically requires "a new trial . . . on the damages issue." *Barber v. Whirlpool Corp.*, 34 F.3d 1268, 1278 (4th Cir. 1994). Only "where it is reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it" is vacatur of the general damages award unnecessary. *Tire Eng'g & Distrib., LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 314 (4th Cir. 2012) (internal quotation marks omitted).

We lack sufficient confidence that the jury's vicarious liability verdict here did not materially influence its statutory damages award. The $1 billion award was a "global figure" for all infringements in the case. *Barber*, 34 F.3d at 1278. Although the vicarious and contributory infringement claims were predicated on the same conduct and the maximum damages for each is identical, the statutory range is wide and the jury's choice within it is highly discretionary and may have been influenced by the vicarious infringement verdict. *See* 17 U.S.C. § 504(c)(1), (2) (authorizing a "just" award between $750 and $150,000 per work for willful infringement). Unlike actual damages, statutory damages are not tethered to concrete figures like lost profits or incurred expenses. To the contrary, the jury was instructed to award an amount it found "fair under the circumstances," taking into consideration factors such as "[t]he profits Cox earned because of the infringement," "[t]he expenses Cox saved because of the infringement," "[t]he circumstances of the infringement," and "the need to punish Cox," among others. J.A. 803. We have reversed the vicarious liability verdict because Cox did not directly profit from its subscribers' infringement. Without that legally erroneous finding, the jury's assessment of at least these damages factors may be different. Given the jury's wide discretion in assessing the appropriate damages and its legally erroneous finding that Cox had a direct financial interest in its subscribers' infringement, we are not "reasonably certain that the jury was not significantly influenced" in its statutory damages award by its finding of vicarious liability. *Tire Eng'g*, 682 F.3d at 314 (internal quotation marks omitted). We therefore vacate the damages award and remand for a new trial on damages.

B.

Cox urges us to vacate not just the damages award but also the contributory liability verdict because, in its view, the two types of secondary liability are intertwined. We don't see much to support Cox's unadorned claim that a wrong conclusion on direct financial interest in subscriber infringement would significantly influence the jury's finding on material contribution to infringement. Accordingly, we decline to vacate the contributory infringement verdict on this ground.

C.

Finally, Cox argues that, even if we remand the case for a new trial on damages, we should direct the district court to enter judgment in Cox's favor as to certain copyrighted works that Cox claims cannot be used to calculate statutory damages. Cox renewed its motion for judgment as a matter of law on this ground after trial, and the district court denied relief. Even though we have vacated the entire damages determination, we address this issue because if Cox were right, it would be entitled to exclude a number of works from consideration for statutory damages and would not have to prove the status of those works to the jury at retrial.

The Copyright Act authorizes an award of statutory damages within a certain dollar range "for all infringements involved in the action, with respect to any one work" and specifies that, "[f]or the purposes of this subsection, all the parts of a compilation or derivative work constitute one work."[5] 17 U.S.C. § 504(c)(1). "Although parts of a compilation or derivative work may be regarded as independent works for other purposes, for purposes of statutory damages, they constitute one work." *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279, 285 (4th Cir. 2003) (internal quotation marks omitted), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). It is undisputed on appeal that Cox's subscribers infringed 10,017 copyrighted works owned by Plaintiffs. But Cox contends that many of those works cannot properly be the subject of separate statutory damages awards because they are part of a compilation or derivative work. Specifically, Cox claims that the number of compensable works was inflated in two ways: (1) by counting both musical compositions and their derivative sound recordings, and (2) by counting individual sound recordings that were compiled in a single album.

A "derivative work" is "a work based upon one or more preexisting works, such as a . . . sound recording[.]" 17 U.S.C. § 101. The copyrighted works in this case include sound recordings and musical compositions, some of which overlap. In other words, some of the copyrighted recordings are performances of the copyrighted compositions. Throughout this litigation, Cox has maintained that Plaintiffs cannot collect statutory damages for infringement of both a copyrighted musical composition and its derivative sound recording. *See* 17 U.S.C. § 504(c)(1).

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[5] The range depends on whether the infringement was willful. Non-willful infringement results in a statutory damages range of $750 to $30,000 per work, whereas for willful infringement the upper limit increases to $150,000. 17 U.S.C. § 504(c)(1), (2).

A "compilation" is "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes [a] collective work[]," which is "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101. In Cox's view, a musical album is a compilation, and because "all the parts of a compilation . . . constitute one work" for purposes of statutory damages and some of the infringed songs were included on albums together, Plaintiffs were limited to one statutory damages award per album, not one per song. 17 U.S.C. § 504(c)(1).

Whether any of the works in this case are derivative or part of a compilation is a mixed question of law and fact. *See Bryant v. Media Right Prods.*, 603 F.3d 135, 140 (2d Cir. 2010); *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116 (1st Cir. 1993). The subsidiary legal questions were for the district court to resolve, and the factual questions were for the jury to decide. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998) ("[T]he Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself."); *cf. Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1199– 1200 (2021) (explaining mixed questions of law and fact).

Before and during trial, the parties were aware of the need for evidence to identify the alleged derivative works and compilations among the 10,017 copyrighted works at issue. Pretrial, the district court denied Cox's motion for summary judgment on the topics, observing that issues of material fact remained. At various points during the trial, Cox acknowledged its obligation to put forth evidence identifying the derivative works and compilations and forecasted that it would do so through requests for admissions, answers to interrogatories, deposition testimony, certificates of registration, or expert testimony. But it did not, and pertinent testimony from Cox's expert witness was excluded from evidence as beyond the bounds of his expert report and disclosures.[6] Having heard no evidence or argument about the number of derivative works or compilations, the jury returned a statutory damages award for each of the 10,017 copyrighted works infringed.[7]

After trial, Cox asked the district court to reduce the damages award to account for derivative works and compilations. The court declined, and we review its judgment de novo. *See First Union Com. Corp.*, 411 F.3d at 556.

1.

Regarding derivative works, the district court agreed with Cox on the legal question, ruling that Plaintiffs were entitled to only one statutory damages award, not two, for infringement of a musical

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[6] Cox does not appeal this evidentiary ruling.

[7] Cox does not challenge the jury instructions or verdict form on appeal.

composition and its derivative sound recording.[8] But on the factual question, the court concluded that Cox had not presented evidence from which the jury could determine which recordings and compositions overlapped.

In support of its posttrial motion, Cox created three schedules identifying the works that it claimed overlapped and those that did not. To do so, Cox consulted two trial exhibits—PX1, which listed the infringed sound recordings, and PX2, which listed the infringed musical compositions—and the works' copyright registration certificates, some but not all of which were in evidence. Cox compared information from these sources, including the title of the work, artist, album, publication date, and ownership information, to make judgment calls about whether a particular sound recording and musical composition overlapped.

As the district court realized, this additional information necessary for distinguishing derivative from non-derivative works had not been presented to the jury. Even if the jury had been asked to comb through the thousands of entries on PX1 and PX2, that comparison alone would not have enabled it to determine which entries were derivative of each other, as demonstrated by Cox's posttrial submissions. The court therefore correctly concluded that it could not use the new analysis in Cox's posttrial schedules to decide which works were derivative and reduce the damages award. As the

[8] Sony challenges that ruling on appeal as an alternative basis for affirmance. Because we affirm on the ground Cox raised, we need not address Sony's alternative argument.

court explained, "Cox did not provide the information to the jury that it has provided to the [c]ourt in its post-trial brief," and "[t]he jury answered that question [about statutory damages] with the information available" at trial. *Sony Music Ent. v. Cox Commc'ns, Inc.*, No. 1:18-cv-00950, 2021 WL 1254683, at *3 (E.D. Va. Jan. 12, 2021).

Cox now argues, based on the information it presented to the district court after trial, that the jury's verdict was unjust because 2,235 sound recordings are undisputedly derivative works. But like the district court when deciding the Rule 50 motion, we must assess the verdict based on the evidence before the jury, not Cox's efforts to supplement the record after trial. *See* 9B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2529 (3d ed. & Supp. 2023) ("Rule 50 motions must be considered in light of the evidence presented at trial."). Because the evidence at trial supported the jury's verdict, we affirm the district court's denial of judgment as a matter of law.

2.

As for compilations, Cox contends that Plaintiffs were not entitled to separate statutory damages awards for songs that were contained on the same album. We need not decide whether Cox's legal premise is sound because, even assuming it is for the sake of argument, Cox does not identify evidence from which the jury could have determined which songs were released on albums together.[9]

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[9] The district court rejected Cox's legal theory. It instead followed the reasoning of the Second Circuit in *EMI Christian*, which "allowed separate statutory damages awards for songs

Nowhere in its briefing does Cox identify evidence it presented to the jury about whether infringed works were contained on albums. Neither PX-1 (the list of infringed sound recordings) nor PX-2 (the list of infringed compositions) mentions the album information for any work. To bridge this gap, Cox relies on the summary judgment record, citing deposition testimony and the supposed absence of dispute at that stage about certain facts. But we see no indication this evidence was presented to the jury, and our focus when reviewing the district court's Rule 50 ruling must be the record created at trial. *See* Fed. R. Civ. P. 50(a)(1); *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011) ("Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion."). Accordingly, we affirm the district court's denial of judgment as a matter of law on compilations too.

V.

For the foregoing reasons, we reverse the district court's order denying Cox judgment as a matter of law on Sony's claim of vicarious copyright infringement. We affirm the district court's orders denying Cox relief from the jury's contributory infringement verdict and denying judgment as a matter of law regarding the number of derivative works and compilations. Given

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that the plaintiffs issued as singles, even if those songs were also made available on albums." 844 F.3d at 101. Other circuits have applied a third approach—the "independent economic value test"—to determine whether a copyrighted work is part of a compilation subject to only one statutory damages award. *See*, *e.g.*, *Sullivan v. Flora, Inc.*, 936 F.3d 562, 570–572 (7th Cir. 2019). We need not delve into these conflicting interpretations of the Copyright Act to resolve this appeal.

our reversal of the vicarious liability verdict, we also vacate the damages award and remand for a new trial on the amount of statutory damages to be awarded.

SO ORDERED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Case No. 1:-18-cv-950-LO-JFA

Hon. Liam O'Grady

SONY MUSIC ENTERTAINMENT, *et al.*,

Plaintiffs,

v.

COX COMMUNICATIONS, *et al.*,

Defendants.

Filed: 06/02/20

MEMORANDUM OPINION & ORDER

Before the Court are Defendants Cox Communications, Inc. and CoxCom, LLC's ("Defendants" or "Cox") post-trial motions: Renewed Motion for Judgment as a Matter of Law ("Renewed JMOL" or "Rule 50 Motion") (Dkt. 681); and Motion for Remittitur or, in the Alternative, a New Trial Under Federal Rule of Civil Procedure 59(a) ("Rule 59 Motion") (Dkt. 683).[1] Both post-trial motions are fully

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[1] The Court issued a ruling on the Parties' twenty-one motions *in limine* on November 19, 2019, indicating an opinion to follow to address certain matters in further detail. Dkt. 590.

briefed, and the Court dispensed with oral argument, as it would not aid in the decisional process. The Court first will address the issues in the Renewed JMOL before proceeding to Cox's Rule 59 Motion, which challenges the jury's statutory damages award.

I. BACKGROUND[2]

On July 31,2018, over fifty members of the music industry ("Plaintiffs" or "Sony"), including groups under Sony, Universal, and Warner, filed this action against Defendants.[3] The plaintiff group comprises

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Considering evidentiary rulings from the bench during trial proceedings, as well as the content of the discussion herein, said *in limine* matters are sufficiently addressed and no longer require separate analysis.

[2] The facts herein are consistent with the trial record and based largely on Plaintiffs' Amended Complaint (Dkt. 136), Defendants' Answer (Dkt. 21), Plaintiffs' Summary Judgment brief (Dkt. 325) and Defendants' Response (Dkt. 394), and Defendants' Summary Judgment brief (Dkt. 330) and Plaintiffs' Response (Dkt. 392).

[3] Plaintiffs include, alphabetically: Arista Music; Arista Records, LLC; Atlantic Recording Corporation; Bad Boy Records LLC; Capitol Records, LLC; Colgems-EMI Music Inc.; Cotillion Music, Inc.; Elektra Entertainment Group Inc.; EMI Al Gallic© Music Corp.; EMI Algee Music Corp.; EMI April Music Inc.; EMI Blackwood Music Inc.; EMI Consortium Music Publishing Inc. d/b/a EMI Full Keel Music; EMI Consortium Songs 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.; Fueled by Ramen LLC; Intersong USA, Inc.; Jobete Music Co. Inc.; LaFace Records LLC; Music Corporation of America Inc. d/b/a Universal Music Corp.; Polygram Publishing, Inc.; Provident Label Group, LLC; Rightsong Music Inc.; Roadrunner Records, Inc.; Screen Gems-EMI Music Inc.; Songs of Universal, Inc.; Sony Music Entertainment (SME); Sony Music Entertainment US Latin; Sony/ATV Music Publishing LLC; Stone Agate Music Stone Diamond Music Corp.;

sixteen Record Company Plaintiffs who collectively produce, manufacture, distribute, sell, and license sound recordings. The group also contains thirty-seven Publisher Plaintiffs asserting protected musical compositions, which they acquire, license, and otherwise commercially exploit. Plaintiffs own or control exclusive rights to the copyrights to some of the most famous music, both classic and contemporary. Their claims are for vicarious liability and contributory infringement arising out of alleged copyright infringement by Defendants' subscribers.[4]

Unichappell Music Inc.; Universal Music-MGB NA LLC; Universal Music - Z Tunes LLC; Universal Music Corp.; Universal Music Publishing Inc.; Universal Music Publishing AB; Universal Music Publishing, Ltd; Universal Music Publishing MGB Ltd.; Universal/Island Music Limited; Universal/MCA Music Publishing Pty. Ltd.; UMG Recordings, Inc.; W.C.M. Music Corp, f/k/a W.B.M. Music Corp.; Warner Chappell Music, Inc. f/k/a Wamer/Chappell Music, Inc.; Warner Records, Inc. f/k/a W.B.M. Music Corp.; Warner- Tamerlane Publishing Corp.; WB Music Corp.; Volcano Entertainment III, LLC; and Zomba Recordings LLC.

[4] The Digital Millennium Copyright Act ("DMCA") provides a safe harbor to limit liability for internet service providers. 17 U.S.C. § 512(a). When various other requirements are met, an ISP will not be liable for "transmitting, routing, or providing connections for" infringing material. *Id.* The ISP is only eligible for this safe harbor if it "has adopted and reasonably implemented .. . a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers." *Id.* at § 512(i)(1)(A). In 2015, this Court held that Cox's repeat infringer policy was inadequate under § 512(i), and thus failed to qualify for the safe harbor. *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.,* 149 F. Supp. 3d 634, 662 (E.D. Va. 2015), *aff'd in part, rev'd in part,* 881 F.3d 293 (4th Cir. 2018) ["*BMG I,*" *aff'd* "*BMG III*"] [*BMG I, II, III* collectively "*BMG*"]. The Fourth Circuit affirmed in 2018. *Id.* 881 F.3d at 303. As the

While the exact number fluctuated before trial, the total number of copyrights presented to the jury—including both musical compositions and sound recordings— was 10,017. The claim period for most Plaintiffs spans approximately twenty-two months from February 1, 2013, to November 26,2014 ("Claim Period").

Cox is a broadband communications and entertainment company, providing internet, telephone, and home security services; for purposes of this litigation, Cox is an internet service provider ("ISP"). Cox Communications is "a wholly-owned subsidiary of Cox Enterprises, a privately-held, family-owned corporation with $20 billion in annual revenues (2016)." Cox: Cox Communications Fact Sheet, https://newsroom.cox.com/company-overview (last visited May 15, 2020); *see also* Trial Tr. 882:9-12 (Trickey). It is the largest telecom company in the United States, with approximately 20,000 employees serving approximately 6 million customers.

The Recording Industry Association of America ("RIAA") is the Record Company Plaintiffs' trade association. The RIAA engages in a variety of anti-piracy endeavors, including hiring third party vendors to scan the internet for potentially infringing file-sharing activity, such as the anti-piracy company MarkMonitor. MarkMonitor serves over half of the Fortune 100 companies, operating online in an effort to protect brands and content across industries like

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Claim Period here coincides with the period of ineligibility for Cox's policy, the DMCA safe harbor was not at issue in the instant case and Cox faces these secondary liability claims without qualification.

fashion, technology, entertainment, and pharmaceuticals. Dkt. 325 at 4.

In this case, MarkMonitor searched for digital files potentially infringing Plaintiffs' copyrights. The alleged infringement occurred on peer-to-peer ("P2P") networks, and the specific claims—while predominantly from BitTorrent—involved four P2P protocols: BitTorrent, Gnutella, eDonkey, and Ares. One aspect of digital infringement on a P2P network is that the pirated files are "perfect digital copies," and there is no loss of quality, as there can be in other forms of piracy. Trial Tr. 277 (Marks). Central to MarkMonitor's evidence-gathering process for these perfect digital copies is a file's cryptographic hash value. A cryptographic hash value ("hash value" or "hash") is an alphanumerical representation of the contents of a file, and two files with the same hash value will almost invariably contain the same content, regardless of when downloaded.[5]

Upon the first instance of encountering a file, MarkMonitor downloaded the full file. It coordinated with Audible Magic, a major content recognition service, in large part by "fingerprinting" technology to identify a file's contents. Audible Magic used the file's fingerprint data to check its reference database for a

[5] Cox disputes that the hash value "is a representation of a file's contents," claiming there is no evidentiary basis that reported hash values are accurate. Dkt. 394 at 4 (citing Kearney Decl. ¶ 15, Ex. K8; ¶ 25, Ex. K15). The trial record suggests otherwise. Furthermore, the digital files identified by hash value in MarkMonitor's notices of infringement were produced in discovery. *See infra* Part II.B.1, explaining that "in the wild" the hash values will always match, and there is a one in one trillion-trillion chance of the files having different content.

match; a match generated artist, album, and track data that MarkMonitor then associated with the file's hash value.

Whether encountering a file for the first time or one with a known hash, MarkMonitor engaged in a so-called handshake with the potentially infringing peer. The MarkMonitor software connected with the subscriber to confirm the subscriber was online, running a file sharing program, and downloading or distributing a file, identified by its hash value; the Cox subscribers in suit that engaged in the handshake reported percentages of shared files with MarkMonitor.[6] Dkt. 325 at 5-6. MarkMonitor used this information as "evidence packages" to generate infringement notices sent to Cox. In the Claim Period, MarkMonitor sent Cox 163,148 infringement notices. *Id.* at 7. The notices included, *inter alia,* the subscriber's IP address, the specific date and time of the infringing act, the cryptographic hash value, and the P2P protocol used.

Every Cox subscriber agrees to an Acceptable Use Policy ("AUP") as a condition of access to Cox's network. Subscribers relevant to the underlying facts either agreed to the Cox AUP or the Cox Business AUP. Both prohibit users from infringing intellectual property, including copyrights, and allow Cox to suspend or terminate service upon violation of the agreement. *See, e.g.,* PX 178 ("Complaints and AUP Violations"). Defendants employed the Cox Abuse Tracking System ("CATS") to receive and process

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[6] Because of how the peer connections operate, MarkMonitor's technology could not gather direct evidence of a peer's file sharing activity with any P2P user other than MarkMonitor.

infringement notices and other content related to AUP violations and reported abuse of the network. Specifically, Cox created the CATS system in the early 2000s to handle customer-facing internet related issues. Dkt. 394 at 2. During the Claim Period, CATS implemented a graduated response system to address the reported infringing activity; the graduated response involved a thirteen-strike policy, or "13-plus," given that the customer-facing action generally began at the second notice. The first seven notices resulted in an email warning to the subscriber's account; the eighth and ninth notices required the user to click an agreement before accessing the internet again; the tenth and eleventh would suspend service until the subscriber called Cox for reactivation; the twelfth and thirteenth notices were also suspensions, though the thirteenth made the user eligible for termination. The point person overseeing CATS during the Claim Period explained that Cox referred to DMCA as synonymous with copyright infringement. Trial Tr. 1275:5-6 (Zabek; "Q: And by DMCA, you were referring to copyright infringement? A: It was interchangeable as we would speak."). Ultimately, termination was rare.

Cox's Abuse Team, which has been renamed as the Customer Safety Team, managed and operated the CATS system. During the Claim Period, a relatively small Abuse Team had to handle complaints relating to phishing, spam, malware, copyright infringement, among other issues.[7] Trial Tr. 1635:4-10; 1640:8-12

[7] In April 2011, Cox reduced the number of technical operations center employees handling abuse complaints from nine to four. Cox rejected multiple requests for additional

(Sikes Vid. Dep.). It is undisputed that Cox's desire to reduce the volume of calls to the abuse team representatives motivated, at least in part, expanded leniency within its graduated response system. Trial Tr. 1301:20-23 (Zabek Vid. Dep.). Between 2008 and 2010, CATS implementation allowed additional infringement notices against a single account before considering termination of internet service. Trial Tr. 1651:17-19 (Sikes Vid. Dep.).

To control the overall number of complaints or notices it received from certain sources, Cox used hard limits, or caps. Cox raised the cap for RIAA incrementally, eventually holding it at 600 notices per day, though RIAA requested more. *See* PX 234 (requesting the cap be at least 800 or 1000). Internal correspondence at Cox included the abuse team's enthusiasm toward caps, such as one email in reference to hundreds of daily DMCA complaints from Fox: "WE NEED TO CAP THESE SUCKERS!" 1653:6-9 (referencing PX 251, Bates No. COX_SONY_520018). Another email—this one from the head of the Abuse Team—targeted the statute, the Digital Millennium Copyright Act, rather than a particular complainant: "F the dmca!!!" *See* Trial Tr. 1656:6-10 (referencing PX 335, Feb. 19, 2010 email from Jason Zabek). The team remarked, "we told each copyright holder to limit [the notices] or give us money to hire people." Trial Tr. 1656:11-12 *(Id)*.

Plaintiffs brought suit to challenge the CATS procedure and Cox's conduct as it related to Cox subscribers' copyright infringement of Plaintiffs'

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personnel to handle volume. *See* Trial Tr. 1329-30 (Zabek Vid. Dep.).

protected works. The Court denied the Parties' cross summary judgment motions in large part, but established: (1) Plaintiffs owned all of the copyrights in suit within the meaning of the Copyright Act; and (2) Cox had sufficient knowledge of the alleged infringement to satisfy the knowledge element of the contributory infringement claim. The Parties also filed, collectively, nine *Daubert* motions and twenty-one motions *in limine.* The Court ruled on all thirty of these pre-trial motions.[8]

There was a twelve-day jury trial in December 2019, and Defendants moved for judgment as a matter of law at the close of evidence, pursuant to Federal Rule of Civil Procedure 50(a). [9] The Court denied the motion. After deliberation, the jury returned a special verdict that held Cox both vicariously and contributorily liable for willful infringement of all 10,017 claimed works. Plaintiffs elected statutory damages under 17 U.S.C. § 504(c), thus the damages had to fall within the statutory range under § 504(c)(2) for willful infringement of $750-$l50,000 per work. The jury awarded Plaintiffs $99,830.29 for each of the works in suit for a total of $ 1 billion in statutory damages. Cox now moves the Court under both Rule 50 and Rule 59 for post-verdict relief.

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[8] Based on Cox's opening statement to the jury, it became clear that Defendants would frame their case much more broadly than anticipated. As such, and upon Sony's oral motion to reconsider, the Court vacated its conditional grant of Defendants' Motion *in limine* No. 9. Dkt. 626.

[9] Defendants renewed this motion post-verdict, pursuant to Fed. R. Civ. P. 50(b); that motion is now before the Court.

II. RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

A. <u>Legal Standard</u>

Federal Rule of Civil Procedure 50(a) allows a motion for judgment as a matter of law if "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). A party may renew its motion under Rule 50(b) after the jury verdict. "On a renewed motion for judgment as a matter of law, a court must affirm a verdict '[i]f, viewing the facts in the light most favorable to the non-moving party, there is sufficient evidence for a reasonable jury to have found in the non-moving party's favor.' *First Union Commercial Corp.* v. *GATX Capital Corp.,* 411 F.3d 551, 556 (4th Cir. 2005) (alteration omitted). If, by contrast, 'the only conclusion a reasonable trier of fact could draw from the evidence is in favor of the moving party,' it must grant the motion." *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.,* 199 F. Supp. 3d 958, 969 (E.D. Va. 2016), *aff'd in part, rev'd in part,* 881 F.3d 293 (4th Cir. 2018) ["*BMG II*"] (quoting *Figg v. Schroeder,* 312 F.3d 625, 635 (4th Cir. 2002)).

"In denying a summary judgment motion, the district court... 'decides only one thing—that the case should go to trial.'" *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.,* 51 F.3d 1229, 1236 (4th Cir. 1995) (quoting *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966)) (additional citation omitted). As a general matter, then, "bifurcating summary judgment decisions based on law and fact is unnecessary because a party that believes the district court committed legal or factual error in denying summary judgment has adequate remedies," such as judgment as a matter of law under Rule 50 and subsequent appellate review. *Chesapeake Paper,* 51 F.3d at 1236 (citing *Watson v. Amedeo Steel,* 29 F.3d 274, 279 (7th Cir. 1994)). A district court's "judgment after a full trial is superior to a pretrial decision because the factfinder's verdict depends on credibility assessments that a pretrial paper record simply cannot allow." *Chesapeake Paper,* 51 F.3d at 1236 (citing *Johnson Intn'l Co. v. Jackson Nat'l Life Ins. Co.*, 19 F.3d 431, 435 (8th Cir. 1994)).

B. <u>Discussion</u>

Defendants' Renewed JMOL reiterates, in large part, the same claims from their Motion for Summary Judgment (Dkt. 328), which was denied (Dkt. 610).[10] Cox claims the evidence at trial was insufficient regarding, in modified order: (I) Direct Infringement; (II) Infringement by Cox Business Subscribers; (III) Vicarious Liability; (IV) Contributory Liability; and (V) Statutory Damages per Work. The Court examines each in turn.

1. Direct Infringement

An ISP is not generally a direct infringer. But, "[w]hen a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for

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[10]As such, the Court is familiar with the Parties' arguments surrounding the major issues in Defendants' brief, as well as the relevant evidentiary requirements, and will recite them as needed for discussion herein.

secondary liability on a theory of contributory or vicarious infringement." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929-30 (2005) (citing *In re Aimster Copyright Litigation,* 334 F.3d 643, 645-46 (7th Cir. 2003)). Indeed, an ISP allows transmission of data and information, and "is itself totally indifferent to the material's content, . . . [but] [w]ith additional facts, of course, an ISP could become *indirectly* liable." *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004) (emphasis original). These "additional facts" supporting indirect liability are those at issue *infra* Part II.B.2 for vicarious liability and contributory infringement. Here, Cox argues that the requisite direct infringement by its subscribers is not sufficiently proven and, therefore, cannot support either type of secondary infringement claim.

To establish direct infringement, a plaintiff must prove: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. *Id.* at 549; *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.,* 499 U.S. 340, 361 (1991). In the instant case, the Court found that Plaintiffs demonstrated ownership of valid copyrights at summary judgment; consequently, the second element—copying of original works—was the only direct infringement question for the jury. Infringement in this case involved two of the exclusive rights granted to copyright holders in section 106 of the Copyright Act: the distribution right; and the reproduction right. Cox argues Sony failed to provide evidence of either.

As a general matter, before addressing specific exclusive rights, Defendants attack the sufficiency of MarkMonitor evidence. The Court deemed the

MarkMonitor evidence admissible pre-trial, and the jury subsequently heard and saw extensive evidence related to MarkMonitor's practices. Cox is adamant that MarkMonitor's procedures are inadequate to show infringement, and specifically that the failure to download a full infringing file before generating any infringement notice is fatal to Plaintiffs' allegations. As it is undisputed that MarkMonitor only downloaded a full file once, when it encountered that file's cryptographic hash value for the first time, Defendants contend that the majority of MarkMonitor's evidence packages are—in several ways—deficient to show direct infringement. This attack is largely the same as it was both before and at trial, and the Court is not compelled to disturb the evidence or the jury's verdict.

The method of infringement in this case poses several challenges to the production of direct evidence. Expert testimony explained that P2P networks enable enormous volumes of infringements. "While piracy did happen and has been a problem forever - you know, when people did discs . . . did copyright CDs, that just wasn't quite the same thing." Trial Tr. 1750:1921 (Lehr). What is more, policing infringing conduct is significantly limited in scope, as peer-to- peer activity "is kind of like piracy on steroids." Trial Tr. 1750:18 (Lehr). As infringing digital files in the P2P context are fundamentally different from books and CDs and the like, Cox has not shown that Plaintiffs' evidence packages and cryptographic hash values are invalid or inadequate.

A reasonable jury could hold that the MarkMonitor evidence established direct infringement of Plaintiffs' works. To begin, "[c]ourts have routinely rejected the argument that evidence of infringement gathered by a copyright owner's investigative agent cannot be used to establish infringement." *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.,* 149 F. Supp. 3d 634,664 (E.D. Va. 2015), *aff'd in part, rev'd in part,* 881 F.3d 293 (4th Cir. 2018) ["*BMG I*"] (collecting cases). Further, a plaintiff "may establish direct infringement using circumstantial evidence that gives rise to an inference that Cox account holders or other authorized users accessed its service to directly infringe." *Id.* at 663 (citing *Capitol Records, Inc. v. Thomas,* 579 F. Supp. 2d 1210, 1225 (D. Minn. 2008) ("Plaintiffs are free to employ circumstantial evidence to attempt to prove [a violation].") (alteration original)).

As explained *supra* Part I, MarkMonitor's approach embraces the reliability of hash values as identification markers. Cox maintains that hash values are not sufficient to prove infringement of the file, but, as Plaintiffs' expert said, "[t]here is about a one in a trillion-trillion chance mathematically as an abstract possibility that two files with [] different contents could generate the same hash. That's 1 followed by 24 zeroes." Trial Tr. 507:20-23 (Frederiksen-Cross). Hash values can be effective evidence—direct or circumstantial, depending on the application—in the P2P context.

a. <u>The Distribution Right</u>

The Copyright Act defines the exclusive right to distribute as the right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 106(3). The Fourth Circuit held, when considering unauthorized copying of a microfiche among library collections, that when an individual or entity "makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public." *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997). Courts have struggled to define the scope of the holding in *Hotaling.* But this Court has held, and now maintains:

> *Hotaling* did not announce a rule of general applicability, but instead articulated a principle that applies only in cases where it is impossible for a copyright owner to produce proof of actual distribution. *See [Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 982 (D. Ariz. 2008)] (explaining *Hotaling* as reaching instances where proof of use by the public was impossible to produce); *Arista Records, Inc. v. MP3 Board, Inc.*, No. 00 Civ. 4660,2002 WL 1997918, at *4 (S.D.N.Y. Aug. 29, 2002) ("While a copyright holder may not be required to prove particular instances of use by the public when the proof is impossible to produce because the infringer has not kept records of public use, *see Hotaling,* 118 F.3d at 204, in the present case there has been no showing that the record companies did not have access to such data.").

BMG I, 149 F. Supp. 3d at 666.

Hotaling has limited applicability in the instant case because it is possible to collect evidence of infringing activity, even if only for a fraction of the actual infringement occurring on BitTorrent and other P2P networks. Even a court that expressly declined to adopt a "deemed-disseminated theory" from *Hotaling* held that direct proof of dissemination is unnecessary to bring a claim under the Copyright Act. "Plaintiffs are free to employ circumstantial evidence . . . Overall, it is apparent that implementation of Congress's intent through a plain meaning interpretation of § 106(3) will not leave copyright holders without recourse when infringement occurs over a peer-to-peer network." *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d at 1225.

Cox argues that the evidence can only support the conclusion that Plaintiffs' works were available for sharing, not actually disseminated. Emphasizing that *Hotaling* is not directly applicable to these facts, Defendants reject the notion that either direct or indirect evidence is sufficient in the record. Testimony from Ms. Frederiksen-Cross explained MarkMonitor's P2P interactions, and how, as Cox says, the evidence conveyed what the peer had available to share rather than what was in fact shared.

Plaintiffs assert the validity of the MarkMonitor evidence as it relates to the nature of direct infringement on P2P networks. The four P2P protocols—BitTorrent, Ares, Gnutella, and eDonkey—at issue in this case have "this notion of exchange, that it's two peers exchanging content." Trial Tr. 488:13-14 (Frederiksen-Cross). They "are all designed to prioritize exchanges with peers that are, are downloading to you . . . if you're not also uploading, the tit- for-tat system kind of puts you at the back of the line." Trial Tr. 488:2-9 (Frederiksen-Cross). The testimony gave the jury no reason to "think [] that there is any lack of proof that the Cox clients were participating in these file sharing networks and were providing content that based on its hash identification is plaintiffs' content." Trial Tr. 487:2-5 (Frederiksen-

Cross). Cox's expert confirmed, "(i]n the BitTorrent protocol, any participating peer will generally be downloading or retrieving pieces of the file, as well as providing." Trial Tr. 2364:20-22 (quoting deposition).

Further, over ninety percent of the infringement notices in suit reference allegedly infringing conduct on BitTorrent. *See* PX 11 (Plaintiffs_00286431). Plaintiffs' expert Dr. William Lehr cited what he called a fairly comprehensive report, QUANTIFYING GLOBAL TRANSFERS OF COPYRIGHTED CONTENT USING BITTORRENT, finding that "only .55 percent... about half a percent of the content in BitTorrent is not copyright infringing and potentially legitimate." Trial Tr. 1748:10-13 (Lehr). Out of 12,500 torrents analyzed in that study, only two files offered non-infringing content.[11] Trial Tr. 1750:1-4 (Lehr). Peer users in BitTorrent engaged with MarkMonitor, offering infringing files—as indicated by hash value—in an environment where approximately 99.45% of the content is pirated. In other words, the P2P protocols themselves provided overwhelming circumstantial evidence that comfortably supports direct infringement liability from distribution alone, and a reasonable jury could find as much.

b. <u>The Reproduction Right</u>

Much of the reasoning regarding the distribution right also applies to reproduction. Cox's core argument against infringement of the reproduction right is that Plaintiff failed to show where the Cox subscriber first obtained the allegedly infringing file. The Cox subscribers could have purchased Plaintiffs'

[11] This does not speak to the other P2P platforms; the BitTorrent data is most relevant and available.

works legally on iTunes or Amazon, Defendants say, and then created torrents and shared on a P2P network thereafter. Ms. Frederiksen-Cross rejected this notion as very unlikely, though Cox contends she could only speak to a small percentage of the evidence. But the argument that alleged infringers bought a lawful copy of a song to share via a torrent file *is* unsupported. Where Defendants speculate as to the source of the P2P files, Plaintiffs produced evidence to support illegitimate downloads by Cox subscribers.

Defendants heard—and failed to disprove—evidence from Dr. Lehr that over 99% of P2P content is pirated. What is more, Cox's abuse team knew that "99% of DMCA violations is from people using P2P on purpose and not Trojan activity," and did not state or suggest that those P2P infringement notices were erroneous. PX 264 at 1 (Aug. 4, 2010 email from Jason Zabek to abuse team members). The head of Cox's abuse team said in an email, "Bittorrent is used for one thing only... and I would know.;-)" PX 318. Indeed, the evidence indicated that all Cox subscribers in suit were *probably* distributing and copying, but for fifteen percent of them, they *were* doing both. The data underlying the infringement notices for those fifteen percent showed an increase over time from less than the full file to 100% of the file. For these users, it was "a fact that they were downloading copies." Trial Tr. 487:19-20. Cox knew that "Bittorrent [was] used for one thing only..." and those peer downloads were not from iTunes or Amazon Music.[12]

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[12]A guy walked into a bar, and then the Parties' jokes diverged. The Court attempts to clarify an analogy from trial, as both Parties perpetuate it in their briefs, and in different ways. Cox argued that music files might be bought lawfully from a vendor

Put another way, the circumstantial evidence of reproduction against Cox users remains strong, and for about fifteen percent of instances the evidence is direct and even more compelling. Cox characterizes this as *limiting* all cognizable infringing conduct to the fifteen percent, which is contrary to the record. Dkt. 682 at 24-25. Cox's position turns a blind eye to the evidence; the Court cannot do the same. There is sufficient evidence to uphold the jury's finding.

2. Secondary Liability for Copyright Infringement

a. <u>Infringement by Cox Business Subscribers</u>

Defendants' motion repeats the argument set forth at summary judgment: Cox Business subscribers cannot support claims of vicarious liability or contributory infringement against Cox. The Court rejected these arguments at summary judgment, and

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and *then* added to BitTorrent to disseminate unlawfully. To dispute that, Ms. Frederiksen-Cross used an analogy for the P2P network: "it's kind of like saying you walk into a bar and there's a guy there with a beer in his hand. Where did he get it? Well, he probably bought it at the bar." Trial Tr. 485:5-7 (Frederiksen-Cross). Ms. Frederiksen-Cross simply meant that, just as we know bars distribute drinks, we know P2P networks distribute infringing content - over 99% of the time. In other words, just like transferring a file from iTunes to BitTorrent is implausible, it is highly unlikely that the guy bought his beer at a store or a different bar and *then* came to this bar to drink it. Cox, however, reinterprets the bar setting altogether, asking the Court to ignore the evidence of overwhelming infringing activity. Essentially, Cox proffers that the evidence of 99% infringing activity on BitTorrent does not give Sony any favorable presumption of infringement: "[i]f Plaintiffs want to claim that some of them are drinking unlawfully obtained beer, it is Plaintiffs' burden to prove which of them did." Dkt. 682 at 25 n.15. Cox's suggestion clearly cannot stand.

declines to reconsider them in great depth here. As an overall matter, for both vicarious liability and contributory infringement, the law does not discriminate between residential and business subscribers the way that Cox contends. While *Cobbler Nevada, LLC v. Gonzalez* is a non-binding case, the Court maintains that Cox misapplies it to the underlying facts. 901 F.3d 1142 (9th Cir. 2018); *see* Am. Mem. Op. & Order, ECF No. 610 at 21-26.

A reasonable jury could find vicarious liability on these facts because, for the reasons stated *infra* Part II.B.2.b, Cox received direct financial benefit from its Cox Business subscribers. Further, Cox had the right and ability to terminate both business subscribers and individual subscribers alike. The first numbered provision of the Cox Business Acceptable Use Policy ("AUP") addresses "Illegal or Infringing Activity," clearly stating "[c]ustomer may also not use the Services in a manner that infringes on the copyright, trademark, moral rights, patent, rights of privacy, rights of publicity or any other intellectual property right of any third party." PX 178 at 1. Further, the Cox Business AUP states, "[i]f Cox Business receives a complaint against Customer or believes there is a violation of this AUP, Cox Business *will* investigate and if appropriate, inform Customer of the complaint." [13] *Id.* at 9 (emphasis added). Where parties fail to resolve certain issues under the AUP, "Cox Business may suspend the Services." *Id.* The Cox Business AUP contemplates both suspension and termination, as it includes a disclaimer: "Cox

[13] This response is Cox Business' baseline policy, independent of any agreements with RIAA and MarkMonitor to relay infringement notices.

Business is not liable for suspension or termination of Services arising from an alleged or actual violation of this AUP." *Id.* Cox's right and ability to terminate is well-supported in the record.

Moreover, the evidence supports a reasonable finding that there was contributory infringement with respect to business subscribers. At summary judgment, the Court found that Sony satisfied the knowledge prong of the contributory infringement claim. There is nothing to disturb that holding post-trial, as the infringement notices included sufficient non-generalized information such that "the defendant could *do* something about [each one]." *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 311 (4th Cir. 2018) ["*BMG III*"] (emphasis original). Even if the business subscriber only acts as the conduit to the specific infringing end-user, the Cox Business AUP anticipates that and should be enforced as such. *See, e.g.*, PX 178 at 1 ("This Acceptable Use Policy [] applies to all Cox Business Internet-related services, including without limitation services provided through WiFi []."). Indeed, the fact that businesses agree to accept varying levels of risk of liability does not *ipso facto* weaken Plaintiffs' copyright protections or render them less enforceable. The material contribution element of contributory liability is supported for the reasons stated in relation to all subscribers. *See infra* Part II.B.2.C.

b. <u>Vicarious Liability</u>

"[V]icarious liability holds a defendant accountable for third-party infringement if he '(1) possessed the right and ability to supervise the infringing activity; and (2) possessed an obvious and direct financial interest in the exploited copyrighted materials.'" *BMG*

I, 149 F. Supp. 3d at 673 (quoting *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 513 (4th Cir. 2002)). Cox argues that the instant record does not support either element of Sony's vicarious liability claim.

The jury found Cox liable on both elements, and there is sufficient evidence in the record to support that finding. The right and ability to supervise the infringing activity is supported, as Cox had both a contractual and actual ability to stop or limit ongoing infringement by modifying or terminating an account. Trial Tr. 886:2-888:25 (Trickey) (explaining the obligatory Acceptable Use Policy for Cox's high-speed internet services, which prohibits all copyright infringement through the services and allows Cox to immediately suspend or terminate access to the service and/or the Cox account entirely). The Court finds, therefore, that for this prong, "vicarious liability . . . is 'manifestly just' [because] the defendant can 'control the use of copyrighted works by others.'" *BMG III*, 881 F.3d at 310 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 437 (1984)); *see also Grokster*, 545 U.S. at 930 n.39 ("One . . . infringes vicariously by profiting from direct infringement *while declining to exercise a right to stop or limit it.*" (emphasis added) (citation omitted)).

A finding of direct financial benefit from the infringement—prong two—also survives a Rule 50 motion based on the record. Cox focuses primarily on the aspect of "draw" as an element of the financial benefit, but, as Plaintiffs emphasize, Sony was not required to prove "draw" according to Cox's proffered standard. In *BMG I,* this Court held that the financial benefit element "requires a 'causal relationship between the infringing activity and any financial benefit a defendant reaps, regardless of how substantial the benefit is in proportion to a defendant's overall profits.'" 149 F. Supp. 3d at 675 (quoting *Ellison v. Robertson,* 357 F.3d 1072, 1079 (9th Cir. 2004)). Indeed, courts have discussed access to infringing activity as an initial, introductory draw to the relevant service as evidence of the causal connection, as cited in Defendants' briefs. But *Ellison* emphasized that a "draw" need not be substantial, and that the inquiry must show "a causal relationship between the infringing activity and any financial benefit a defendant reaps, regardless of *how substantial* the benefit is in proportion to a defendant's overall profits." *Id.* (emphasis original).

As Defendants point out, Congress and several courts have said that flat-fee subscription services would not be sufficient to establish the causal relationship unless the value of the service was derived from providing access to the infringing material. *See* S. Rep. 105-190, at 44 (1998); *Ellison*, 357 F.3d at 1079. What Defendants fail to include is the Senate's primary instruction immediately before the "flat periodic payments" comment: "In determining whether the financial benefit criterion is satisfied, courts should take a common-sense, fact-based approach, not a formalistic one." S. Rep. 105-190 at 44. Immediately after addressing flat fees, it continues: "[direct financial benefit] would however, include *any such fees* where the value of the service lies in providing access to infringing material." *Id.* (emphasis added). It follows that any such flat periodic payments may satisfy the direct financial benefit element; there is no bright line prohibition.

Moreover, the summation of the Ninth Circuit's "draw" analysis states there was no direct financial benefit in *Ellison* because "[t]he record lack[ed] evidence that AOL attracted or retained subscriptions because of the infringement or lost subscriptions because of AOL's eventual obstruction of the infringement." *Id.* Ultimately, the *Ellison* standard upon which Defendants—and various other non-binding cases—rely does not limit the "draw" inquiry to facts or conduct *prior* to the initial subscription. Rather, it suggests that retention of subscriptions and potential losses from obstructions to customer infringement are relevant considerations to establish this causal connection.

Here, there was ample evidence for a reasonable jury to conclude, as this jury did, that Cox gained *some* direct financial benefit from the infringement, no matter how small. The Court agrees with Plaintiffs' argument that Cox's treatment of repeat infringer accounts suffices as a causal connection between the infringement and financial gain. Internal emails among Defendants clearly establish a connection between infringing accounts and continued collection of revenue rather than termination. *See* Dkt. 699 at 10.[14] The jury heard that Cox looked at customers' monthly payments when considering whether to terminate them for infringement. *See, e.g.* Trial Tr. 1271:1-19. (Zabek); *see also* Tr. 1275:15-1277:9 (Zabek explaining instructions to upper management to terminate or suspend for DMCA compliance purposes,

[14] Sony's Opposition cites several compelling examples, including PX 347 at 1, discussing a repeat infringer: "This customer will likely fail again, but let's give him one more change [sic]. He pays 317.63 a month."

then immediately reactivate account and reset the graduated response, because "in this challenging time, we want to hold on to every subscriber we can." (citing Pl's Ex. 263, Bates label Cox_Sony_00005514)).

In sum, the evidence allows a reasonable jury to find Cox vicariously liable in this case, and the Court declines to disturb the verdict on this issue.

c. Contributory Infringement

"A contributory infringer is one who, (1) 'with knowledge of the infringing activity,' (2) 'induces, causes or materially contributes to the infringing conduct of another.'" *BMG I*, 149 F. Supp. 3d at 670 (quoting *CoStar Grp., Inc.*, 373 F.3d at 550; *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). The question before the Court is limited to whether a reasonable jury could find that Cox materially contributed to the underlying infringement.

In the Ninth Circuit, "a 'computer system operator' is liable under a material contribution theory of infringement 'if it has *actual* knowledge that *specific* infringing material is available using its system, and can take simple measures to prevent further damage to copyrighted works, yet continues to provide access to infringing works.'" *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 671 (9th Cir. 2017) (emphasis original) (quoting *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007) (internal citations and quotation marks omitted)). In back-to-back cases in 2007, the Ninth Circuit held that financial institutions that processed credit card payments to allegedly infringing websites were *not* liable for material contribution to underlying infringement, but that an internet search engine was for knowingly assisting worldwide infringers and failing to take simple steps to avoid further harm. *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n,* 494 F.3d 788, 796-800 (9th Cir. 2007); *Amazon.com*, 508 F.3d at 1172. The *Visa* court noted, "[w]hile Perfect 10 has alleged that [the financial institutions] make it easier for websites to profit from this infringing activity, the issue here is reproduction, alteration, display and distribution, which can occur without payment. Even if infringing images were not paid for, there would still be infringement." *Visa*, 494 F.3d at 796 (citing *A&M Records, Inc. v. Napster, Inc.,* 239 F.3d 1004, 1014 (9th Cir. 2001)). Further, the *Amazon* court said, Google substantially assists worldwide distribution of infringing products, and "[w]e cannot discount the effect of such a service on copyright owners, even though Google's assistance is available to all websites." *Amazon*, 508 F.3d at 1172.

Here, Cox distinguishes itself from these and other similar cases - Defendants argue there can be no liability because of Cox's policy actively discouraging copyright infringement. Cox took simple measures to prevent infringement through its graduated response system, Defendants say, and that should not be construed against them. Defendants also note that internet access is available from several sources, and that P2P infringement can occur without Cox.

In *BMG,* this Court found enough evidence for a reasonable jury to hold Cox responsible for the infringement among its subscribers given its failure to address specific infringement occurring on its network. *BMG II*, 199 F. Supp. 3d at 980. So too here. In the light most favorable to Sony, a reasonable jury could find that Cox substantially assisted widespread infringement with actual knowledge of the conduct on specific subscribers' accounts. Further, Defendants' high-speed internet services were necessary to the infringing actions in this case; unlike the financial institutions in *Visa*—which participated after the infringement at issue—Cox was indispensable to each instance of P2P infringement on its network. Defendants' claimed anti-infringement efforts are well-established in the record, yet the jury held Cox liable for willful secondary infringement. The Court cannot opine as to the jury's measure of witness credibility or characterization of Cox's efforts.

The Court recognizes valid arguments on both sides of this issue, and, accordingly, defers to the jury as the proper finder of fact. The contributory liability finding is reasonably supported by the evidence.

3. Statutory Damages per Work

The Court denied Cox's summary judgment motion on the issues of statutory damages awards as they pertained to the number of works in suit. There are two questions still before the Court: (1) whether "compilations" of certain songs render them ineligible for individual awards; and (2) where Plaintiffs allege infringement of both a musical composition ("MC") and a sound recording ("SR") in the same song, whether Plaintiffs are limited to one statutory award. If either question is answered in the affirmative, the $1 billion jury award is subject to reduction.

In *Sony BMG Music Entertainment v. Tenenbaum,* the First Circuit commented on the courts' role when applying the Copyright Act, independent of the parties' proposed rationale:

> The Supreme Court has expressly instructed that courts apply the Copyright Act to new technologies. In *Sony Corp, of America* v. *Universal City Studios, Inc.,* 464 U.S. 417 [] (1984), the Court instructed that courts must "[a]pply[] the copyright statute, as it now reads, to the facts as they have been developed" even though Congress might ultimately "take a fresh look at this new technology, just as it so often has examined other innovations in the past." *Id.* at 456.

660 F.3d 487,501 (1st Cir. 2011) (alterations original). While the First Circuit was discussing the identification of proper defendants for infringing file sharing, the same instruction applies to statutory damages; the Court "must 'apply the copyright statute, as it now reads, to the facts as they have been developed'" in this case. *Id.* (internal alterations omitted).

Statutory damages pursuant to the Copyright Act are available to a "copyright owner [who] elect[s], at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work." 17 U.S.C. § 504(c)(1). Awards for willful infringement may be as high as $150,000.00 per work infringed. *Id.* § 504(c)(2). And, most important to the instant inquiry, "[f]or the purposes of this subsection, all the parts of a compilation or derivative work constitute one work." *Id.* § 504(c)(1). Indeed, "[although parts of a compilation or derivative work may be 'regarded as independent works for other purposes[,]' for purposes of statutory damages, they constitute one work."

Xoom, Inc. v. *Imageline, Inc.*, 323 F.3d 279, 285 (4th Cir. 2002) (quoting H.R. Rep. No. 94-1476, at 162 (1976)).

While compilations and derivative works are enumerated in this statutory limitation, copyright registrations are not.[15] It is established in the Fourth Circuit that a single copyright registration may include multiple, individually cognizable copyrights for purposes of statutory damages under 17 U.S.C. 504(c). *See Xoom,* 323 F.3d at 285 (finding it true that "the language of the Copyright Act does not bar multiple awards for statutory damages when one registration includes multiple works."). The question before the Court is whether individually copyrighted works are *also* incorporated into a compilation or derivative work, as defined in the Copyright Act.[16]

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[15] Cox argues that, to calculate statutory damages, "the process would have been simple, since the jury needed only to award statutory damages for each unique registration number..." but the Fourth Circuit and seemingly all circuits agree that this is incorrect. Dkt. 704 at 11.

[16] The Copyright Act defines these terms in section 101:

> A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.
>
> A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole,

The individual copyrights for each song included in the jury award are not disputed.

Accordingly, compilations or derivative works must be established in the record to determine if any works in suit were ineligible for their own award. The Court addresses compilations and derivative works in turn.

a. Compilations

The total number of "'compilation[s]' for purposes of statutory damages pursuant to Section 504(c)(1) of the Copyright Act is a mixed question of law and fact.'" *Tattoo Art, Inc. v. TAT Intn'l, LLC*, 794 F. Supp. 2d 634, 651 (E.D. Va. 2011) (quoting *Bryant* v. *Media Right Prods., Inc.*, 603 F.3d 135, 140 (2d Cir. 2010) (citing *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116 (1st Cir. 1993)), *cert. denied,* 131 S. Ct. 656 (2010)); *see also Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255 (11th Cir. 2015) (holding that because it is a mixed question, the court would only review the district court's application of the law to the facts *de novo).* Regarding this mixed question, courts have differed in their interpretations and outcomes. Several United States Courts of Appeals apply the "independent economic value" test; but the Second Circuit expressly declined to do so, emphasizing the plain meaning of the statutory language. There remains a circuit split with respect to the independent economic value test, "though the dividing lines are far from absolute." *Sullivan v. Flora, Inc.*, 936 F.3d 562, 569 (7th Cir. 2019).

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represent an original work of authorship, is a "derivative work."

17 U.S.C. § 101.

i. The Independent Economic Value Test

Following the independent economic value test, the First, Seventh, Ninth, Eleventh, and D.C. Circuits have adopted the premise that individual copyrights are not distinct works unless they are able to "live their own copyright life."[17] *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990). "The test set forth in *Walt Disney* is a functional one, with the focus on whether each expression . . . has an independent economic value and is, in itself, viable." *Gamma Audio & Video*, 11 F.3d at 1116-17. Indeed, analyzing independent economic value requires that the record include factual information about the copyrights as they operate in the market:

> To stop at the Second Circuit's inquiry does not allow a possibility Congress made available in § 504(c)(1)—a situation where a copyright holder encounters infringement on multiple works available in the market as a group but where discernable value lies at the level of a particular individual work—for example, at the level of a particular photo or song which, although released as part of an album, is likewise marketed and available at the individual level. Sellers regularly allow buyers to acquire a part of a whole and the market assigns value accordingly.

Sullivan v. *Flora, Inc.*, 936 F.3d at 571-72.

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[17] *See, e.g., Gamma Audio & Video, Inc. v. Ean-Chea,* 11 F.3d 1106 (1st Cir. 1993); *Sullivan* v. *Flora,* 936 F.3d 562 (7th Cir. 2019); *VHT, Inc.* v. *Zillow Grp., Inc.,* 918 F.3d 723 (9th Cir. 2019); *MCA Television Ltd. v. Feltner,* 89 F.3d 766 (11th Cir. 1996); *Walt Disney Co. v. Powell,* 897 F.2d 565 (D.C. Cir. 1990).

As noted above, the independent economic value test is not clearly defined, and its application varies. The test "focuses on whether each expression . . . is, in itself, viable." *MCA TV, Ltd. v. Feltner*, 89 F.3d 766, 769 (11th Cir. 1996) (citing *Gamma Audio & Video*, 11 F.3d at 1116; *Walt Disney*, 897 F.2d at 568). Cases that discuss independent economic value have considered the method of registration, and the connection of the content among the constituent parts. *See Feltner*, 89 F.3d at 769-70 (considering individual copyrights and the absence of a plot arc across episodes in a television series). This approach has given weight to how the constituent parts were produced, and the method of consumption of the works - e.g. watching one or twenty television episodes in one sitting, or not watching certain episodes at all. *Gamma Audio & Video*, 11 F.3d at 1117. In addition to licensing arrangements and marketing efforts, one court considered the individual effort put into each individual image in a collection: "each image represents a singular and copyrightable effort concerning a particular model, photographer, and location." *Playboy Enterprises, Inc. v. Sanfilippo*, No. 97-0670-IEG (LSP), 1998 WL 207856, at *5 (S.D. Cal. Mar. 24, 1998). The format of the registration appears to be no more persuasive than other factors. The factual record in *Yellow Pages,* for instance, supported a conclusion based on revenue-generating units, and the manner in which the works were registered "also support[ed] the conclusion." *Yellow Pages* at 1277 (awarding statutory damages based on subject matter headings rather than underlying photos where "to make his photos relevant and marketable, [plaintiff] spent a lot of years working with customers to determine what headings generate revenue and what headings generate usage." (internal quotes omitted)).

This mix of inquiries presents a fluid body of law. Unsurprisingly, the *Sullivan v. Flora* court noted, the Fourth Circuit in *Xoom* gave an answer on this issue "with mixed signals." *Id.* at 571. The individual, disputed clip-art images in *Xoom* were attached to the registration application for the SuperBundle copyright but not specifically enumerated on the registration. Recognizing that § 504(c) does not bar multiple awards for multiple copyrights on the same registration, the Fourth Circuit said, ". . . we find that, *given the facts of the instant case,* Imageline is only entitled to a maximum of two awards of statutory damages." *Xoom,* 323 F.3d at 285 (emphasis added). "The registration covered SuperBundle in its entirety; there was no specific mention of the individual clip-art images." *Id.* at 281.

The analysis in *Xoom* does not include much factual detail beyond the registrations themselves, and the independent economic value of the specific clip-art images is expressly ignored. As discussed further below, though, the Fourth Circuit did not discuss or reject the independent economic value test or lack thereof. While the *Xoom* decision "appears to side with the Second Circuit's approach in *Bryant*," it left open the possibility of a different outcome on different facts. *Tattoo Art*, 794 F. Supp. 2d at 652.

ii. The Plain Statutory Language Approach

Courts that have relied—in large part—on the plain language of § 504(c)(1) have been critical of the independent economic value test. While the question of what constitutes a "compilation" for statutory damages is still a mixed question of law and fact, courts like the Second Circuit have determined that when it comes to music, "[a]n album falls within the Act's expansive definition of compilation." *Bryant*, 603 F.3d at 140. "Based on a plain reading of the statute, therefore, infringement of an album should result in only one statutory damage award." *Id.* at 141. The *Bryant* court found separate copyrights for individual songs irrelevant to the analysis. *Id.* The district court in *UMG Recordings, Inc. v. MP3.Com, Inc.,* declined to consider the factual arguments related to the treatment of individual songs "in the face of the unequivocal statutory language and plaintiffs' own assertion that what the defendant actually copied were the complete CDs." 109 F. Supp. 2d 223, 225 (S.D.N.Y. 2000). What is more, the *UMG* court said, "[w]hen, as here, Congress' statement is clear, to disregard that message would be nothing less than an unconstitutional arrogation of power by the judiciary." *Id.*

The Second Circuit's emphasis on the statutory language over independent economic value is a departure from that court's application of the *Walt Disney* approach in *Robert Stigwood Grp. Ltd.* v. *O'Reilly*, 530 F.2d 1096 (2d Cir. 1976). There, separately copyrighted songs from the *Jesus Christ Superstar* musical received individual statutory awards because each song could "live [its] own copyright life." *Bryant* at 142 n.7 (quoting *Robert Sligwood,* 530 F.2d at 1104-05 (alteration original)). The Second Circuit said the holding in *Robert Stigwood* was no longer applicable, however, because it pre-dated the one-award restriction for compilations in the Copyright Act of 1976. Notwithstanding that, the Second Circuit has awarded per-episode and per-song statutory damages since the 1976 amendment. *See Twin Peaks Prods., Inc. v. Publ'ns. Int'l Ltd.*, 996 F.2d 1366, 1381 (2d Cir. 1993); *WB Music Corp. v. RTVComm. Group, Inc.*, 445 F.3d 538, 541 (2d Cir. 2006). But those cases, the Second Circuit maintains, are readily distinguishable from *Bryant.*

The Second Circuit's express rebuke of the independent economic value test asserts that "[t]he Act specifically states that all parts of a compilation must be treated as one work for the purpose of calculating statutory damages," and there is "no exception for a part of a compilation that has independent economic value." *Bryant*, 603 F.3d at 142. Importantly, *Bryant* directs the inquiry to the copyright holder's conduct. The court distinguished *Bryant* from *Twin Peaks* and *WB Music* because of how the copyright holders *issued* the works. 603 F.3d at 140-41. For instance, in *WB Music* "[i]t was the *defendant* who issued the songs in album form," whereas in *Bryant,* "it [wa]s the copyright holders who issued their works as 'compilations'; they chose to issue Albums." *Id.* at 141 (emphasis original).

While the act of "issuing" a work was somewhat vague in the *Bryant* discussion, the holding in *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, brought more clarity. 844 F.3d 79 (2d Cir. 2016), *cert. denied sub nom. Robertson v. EMI Christian Music Grp., Inc.*, 137 S. Ct. 2269 (2017). In *EMI Christian*, the Second Circuit awarded "separate statutory damages awards for songs that the plaintiffs issued as singles, even if those songs were also made available on albums." *Id.* at 101. Further, the record confirmed that "all the songs in question were made available as singles on the date of infringement." *Id.* (emphasis omitted).

This market-availability approach was described in contrast with "[m]aterials that are *sold* as part of a compilation, such as songs on an album." *Id.* (emphasis added). Indeed, in this sense *EMI Christian* is consistent with each of the Second Circuit cases, including the cautionary, statute-driven holding in *UMG.* The copyright holders in *UMG* only distributed physical copies of CDs, and the *defendants* at MP3.com digitized the individual files.

The *EMI Christian* analysis, therefore, essentially treats the act of "issuing" as the act of selling or offering the work in the marketplace during the period in question; to be sure, the copyright registration itself cannot answer the "compilation" question. In sum, every court considering "compilations" under § 504(c)(1) would consider factual sales information to determine—at least in part—statutory damages awards.

There is sparse, but some, additional case law rejecting the per-song notion. [18] With such weight given to the method of sale in determining "compilations" for statutory damages awards, though, the applicability to the instant facts is limited.

iii. Discussion

To begin, there is very little binding case law in this endeavor to apply § 504(c)(1) to music copyright infringement—of music available for sale in multiple

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[18] For instance, the Third Circuit has yet to take a position, though a district court in New Jersey adopted a rule established in the Southern District of New York: statutory damages are properly calculated on a "per-CD" basis rather than a "per-song" basis. *Arista Records, Inc. v. Flea World, Inc.*, Civ. No. 03-2670 (JBS), 2006 WL 842883, at *21-22 (D.N.J. Mar. 31, 2006).

mediums and through streaming subscriptions—via unlawful file sharing on P2P networks. There is no dispute, however, that it is a mixed question of law and fact. As such, beyond registration information, defining "compilations" within the meaning of § 504(c)(1) relies on factual support with respect to the copyrights in the marketplace.[19] The Court denied summary judgment on the issue, leaving the findings of fact for the jury. "Once the case proceeds to trial." as here, "the full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011). Accordingly, the trial record governs the discussion herein.

A reasonable jury could find on these facts that each song was eligible for its own statutory award. Ultimately, the Court agrees with the Second Circuit to the extent that it approaches the mixed question of law and fact for "compilations" by applying the plain meaning of § 504(c)(1) to the copyright holder's chosen commercial distribution of each copyrighted work. The format of sale will generally delineate each work for purposes of statutory damages. Considerations like "the precise method by which the copyright holder registers his work," and "the existence of separate copyrights for each constituent element of a

[19] The Court is cognizant of Cox's continued arguments regarding copyright registrations indicating "works made for hire." Citing the Act's definitions in § 101, Defendants insist that certain copyright registrations at issue necessarily create "compilations" that preclude individual awards for songs therein. The Court does not find registration information to be dispositive in this inquiry, and collective registrations do not carry material weight in the instant case.

copyrighted work" are informative, but not dispositive. *Tattoo Art*, 794 F. Supp. 2d at 654. The emphasis on how a work is issued to consumers is most persuasive in defining "compilation" under 504(c)(1). The Court sees no need to hypothesize as to independent economic values for units not for individual sale. Rather, each work will be already "living its own copyright life"—proving its viability—to warrant an individual award.

As this Court noted in *BMG II,* the most applicable Fourth Circuit law comes from *Xoom.* There, as noted above, Imageline had a copyright for "SuperBundle," a CD-ROM containing 1,580 clip-art images, and for "Master Gallery," a database with over 9,000 images in black and white line-art in varying file formats. *Xoom,* 323 F.3d at 281. These two copyright registrations covered the collections in their entireties, encompassing the underlying clip-art images as a protected set - not individually. Xoom's subsequent "Web Clip Empire" products included hundreds of thousands of clip-art images, some allegedly overlapping with those in SuperBundle and Master Gallery.

The *Xoom* court first opined on the relationship between the copyrighted compilation and the protection extended to the underlying parts of the compilation. Declining to address clip-art images individually, the Fourth Circuit held that "[i]f Xoom improperly used *any* copyrightable image contained in SuperBundle and Master Gallery, new or preexisting, that usage would give rise to potential statutory damages." *Id.* at 284 (emphasis original). When the court reached the statutory damages question, it concluded, "given the facts of the instant case," statutory damages were limited to the two compilation registrations. *Id.* at 285. The opinion emphasized that the action in *Xoom* was based on "the products in their entirety *and* the underlying preexisting works contained therein in which Imageline also owned copyright," not the parts of the compilation individually. *Id.* (emphasis original). The holding expressly declined to address a copyright action—like this one—with enumerated, individually registered constituent parts of an alleged compilation.

At its core, the legal issue in *Xoom* was about the relationship between a sub-set of underlying content and an overarching compilation copyright. Unlike the instant case, *Xoom* began its inquiry with packaged software, and declined to consider any individual copyrights in the relevant sub-set. Had Sony put forth works by album, and sought separate statutory awards for unnamed underlying songs, *Xoom* would govern. But the instant suit presents the inverse: Plaintiffs assert over 10,000 discrete copyrighted songs, and Defendants contend those songs are *also* included in compilations for purposes of statutory damages. Ultimately, *Xoom* was structured differently from the instant action.

Several years later, the Second Circuit considered the facts in *Bryant*. There, a pair of songwriters created and produced two albums and registered the albums with the US Copyright Office. "They also separately registered at least some of the twenty songs on the Albums." *Bryant*, 603 F.3d at 138. The copyright holders then entered into an agreement for marketing and ultimate distribution of the albums through Orchard, a music wholesaler. The albums were physically provided for sale by the copyright holders, and the wholesale agreement with Orchard involved only physical copies of recordings. *Id.* "In 2006, Appellants discovered that digital copies of the Albums were available online." *Id.* at 139. Upon this discovery, they sought statutory damages for infringement.

As explained above, the court distinguished this case based on the copyright holders' choice to issue albums. The copyright holders only sold or contracted to sell complete, physical albums. While the facts are reversed, the reasoning is consistent with the Second Circuit's holding in *WB Music,* because the infringing conduct of the defendant does not alter the treatment of the original work under § 504(c)(1). Whereas in *WB Music* the defendant compiled individual songs—which received individual awards—into an album in the infringing action, the facts in *Bryant* were the inverse. In *Bryant,* the defendant divided up the albums—which each received a single award—into individual songs for digital sale. The infringing conduct does not affect the ultimate statutory award; here, Plaintiffs' choice to offer each individual song for online sales is not disturbed when calculating the total number of works.

It is somewhat misleading to state, as Cox does, that "the fact remains that *Xoom* did follow *Bryant,* and the Fourth Circuit has not revisited the issue." Dkt. 682 at 18. *Xoom* did not follow the *Bryant* holding as Cox seeks to impose it here. First, it could not, as it predated *Bryant* by more than seven years. And while the two holdings are generally compatible, the connection between *Bryant* and *Xoom* is undeveloped. *Bryant* cites to *Xoom* once, in a footnote, characterizing the holding as follows: "plaintiff could receive only one statutory damage award for its computer clip art software, which contained many individual pieces of clip art, because plaintiff had packaged and sold the clip art in one piece of software, and thus the software constituted a compilation." *Bryant,* 603 F.3d.at 141 n.6. Ultimately accurate, the summary does not capture the fact that the "pieces of clip art" were never individually counted, named, or considered for their own statutory damages. It certainly does not convey a possibility, as the Court finds here, that the *Bryant* holding can be consistent with a per-song award.[20]

A per-song award is also consistent with the holding in *Tattoo Art,* where this district thoroughly addressed a similar "compilation" question for statutory damages. There, the copyright holder organized his tattoo designs for copyright registration *and sale* into books, each consisting of fifty "tattoo flash sheets." *Id.* at 639. There were several images on each sheet, and the plaintiff sought to recover for 212 such images as individual works. Without expressly adopting or rejecting a test, the court said, "[t]he Fourth Circuit's decision in *Xoom* appears to side with the Second Circuit's approach in *Bryant*." *Id.* at 652. *Tattoo Art* proceeded to analyze the facts based on the

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[20] This holds true even considering the Second Circuit's observation in *Bryant:* "[w]e cannot disregard the statutory language simply because digital music has made it easier for infringers to make parts of an album available separately." 603 F.3d 135, 142. Indeed, the infringing activity of the defendant cannot bolster an argument for a "compilation." Cox's argument that the *Bryant* court failed to award damages to individual songs "even though *the accused infringers sold* the album's songs individually," therefore, is irrelevant. Dkt. 682 at 15 (emphasis added) (internal quotation omitted).

assumptions "that neither the precise method by which the copyright holder registers his work nor the existence of separate copyrights for each constituent element of a copyrighted work is dispositive of the work's status as a 'compilation' for purposes of statutory damages." *Id.* at 654. Acknowledging that the copyright holder in *Tattoo Art* sometimes sold individual images, "it [did] not appear from [the] testimony that he *issued* those sheets in any economically meaningful way—i.e., for sale or licensing—on a separate, sheet-by-sheet or image-by-image basis." *Id.* In sum, the tattoo art was issued in books, the record did not support meaningful sales in other units, thus statutory damages were awarded by book.

Even where courts have purported to reject "the Second Circuit's more limited approach in *Bryant*," the "more functional" inquiry still places substantial weight on the *Bryant* considerations - how the works are marketed and offered for sale. *Sullivan v. Flora,* 936 F.3d at 571. In *Sullivan v. Flora,* the Seventh Circuit criticized the Second Circuit's inquiry for failing to recognize "where discernible value lies at the level of a particular individual work - for example, at the level of a particular photo or song which, although released as part of an album, is likewise marketed and available at the individual level." *Id.* at 572. As the Court interprets *Bryant* and its progeny, however, this example of an individual song "marketed and available at the individual level" would not be ineligible for an individual award. It is where the emphasis shifts from the copyright holder's decision-making to the consumer's or defendant's—"requir[ing] a focus on where the market assigns value"—that the independent economic value inquiry departs from the plain meaning of the statute.

Ultimately, the Court finds the Second Circuit's holding in *EMI Christian* to be persuasive and consistent with the Copyright Act. It is also consistent with this Court's finding in *BMG,* upholding a per-song award where "[t]here was no evidence that BMG issued any of the works in album form only." *BMG II,* 199 F. Supp. 3d at 984. In line with these cases, the statutory language in § 504(c)(1) is applied to the factual circumstances surrounding commercial sales or availability in the marketplace. In *EMI Christian,* defendant MP3tunes sold, at MP3tunes.com, MP3 versions of music files as well as a data storage service for a fee. *EMI Christian*, 844 F.3d at 86. Similar to *BMG,* there was evidence at trial from record company executives that the plaintiff made all relevant songs available as singles on the date of infringement, thus the court "properly allowed separate statutory damages awards for songs that the plaintiffs issued as singles, even if those songs were also made available on albums." *Id.* at 101. The Court agrees, and finds this to be consistent with *BMG, Xoom, Bryant, Tattoo Art, UMG,* and *WB Music,* among others.

Here, the evidence on "compilations" is minimal. In keeping with the Court's findings herein, the method of infringement—P2P file sharing—is not material to the inquiry. Rather, the inquiry requires evidence of the marketing and sales of the individual songs. At trial, just as in *EMI Christian,* Plaintiffs' executives testified to the works as available on a per-song basis. Dennis Kooker, head of the global digital business and U.S. sales group at Sony Music Entertainment, testified about the retail environment for purchase and that sound recordings "typically would be available as individual tracks or also as albums," such as in the Apple iTunes download store. Trial Tr. 112:16-17. Matthew Flott, Warner Music Group's executive vice president and chief financial officer for the recorded music division, testified that sound recordings are sold, *inter alia,* "in digital formats, downloads, and streaming," as well as "in mobile formats, ring back tones." Trial Tr. 1194:11-12. Defendants elicited additional testimony from Mr. Flott about quantifying per-song sales. Trial Tr. 1205:21-25 ("Q: If someone goes to iTunes and buys a song, it's treated as one sale. A: Right."). Ultimately, Defendants confirmed with Mr. Flott the concept of "the disaggregation of the album," meaning consumers "could now pick and choose whatever individual song [they] wanted," and could go "to iTunes and pay[] a dollar for their favorite song." Trial Tr. 1225:5-14. Here, no doubt, Plaintiffs "'*issued* [their songs] in an[] economically meaningful way." *Tattoo Art*, 794 F. Supp. 2d at 654.

Plainly, Cox accepted the possibility of the per-song purchase premise throughout the trial. Furthermore, Defendants' own expert witness on damages assumed and analyzed track-by-track data. Christian Tregillis, an eminently qualified forensic financial analyst for the defense, testified to the economic harm to Plaintiffs. Mr. Tregillis assumed that, had the infringing downloads been legitimate purchases, they would have been for $0.79-$1.29 as "iTunes types of purchases." Trial Tr. 2811: 17-25 (Tregillis). Plaintiffs clarified: "Q: ... 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." Trial Tr. 2842:2-5 (Tregillis). Further, Mr. Tregillis' analysis of royalties was also by individual recording or composition, and was not presented to the jury by any other metric. Any argument that Defendants used the per-track format simply because that was the best data available only goes to support the conclusion that the works were issued and treated individually in the market.

Based on the trial record, a reasonable jury could find that Plaintiffs issued songs as individual works pursuant to § 504(c)(1). This is a mixed question of law and fact, and Cox did not put facts in evidence to recharacterize or rebut the individual characterization of these works. The Court does not find cause to modify the number of works in suit based on "compilations."

b. Derivative Works

Determining the number of statutory damages awards for derivative works might be a more complex thought exercise than for compilations, but both outcomes generally align with the focus of § 504(c)(1): the one work that is the subject of the infringing conduct. The discussion above addresses copyrighted songs as individual works that can be included in albums or other compilations. Now the inquiry zooms in further, considering whether a single work that envelops multiple copyrights may warrant separate statutory awards where there are separate copyright owners of those multiple copyrights.

To bring an infringement action as a copyright holder, one must hold at least one exclusive right to the copyrighted work as enumerated in § 106 of the Copyright Act. These exclusive rights include:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106. Exclusive rights in a copyright may be transferred in whole or in part and owned separately, and "[t]he owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title." *Id.* § 201(d). To recover statutory damages, the copyright must be registered, *inter alia,* pursuant to the prerequisites in § 412.

A copyright owner bringing suit pursuant to an exclusive right in the infringed work has a choice between recovering actual or, as an alternative, statutory damages. The plaintiff may elect statutory damages "at any time before final judgment is rendered." § 504(c)(1). It is generally accepted that a plaintiff may "elect[s] statutory damages, 'regardless of the adequacy of the evidence offered as to his actual damages and the amount of the defendant's profits.'" *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1194 (9th Cir. 2001), *cert. denied sub nom, Feltner v. Columbia Pictures Tel., Inc.*, 534 U.S. 1127 (2002) (citing 4 Nimmer on Copyright § 14.04[A]). If, however, a copyright holder elects statutory damages—and the potential benefit of the relaxed evidentiary requirements—there is a clear limitation on the unit of recovery: "[f]or the purposes of this subsection, all the parts of a compilation or derivative work constitute one work." § 504(c)(1).

The Copyright Act defines a derivative work:

> A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, *sound recording,* art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

Id. at § 101 (emphasis added). As sound recordings "are works that result from the fixation of a series of musical, spoken, or other sounds," they often encompass other copyrightable material, such as musical compositions. *Id.*

In this litigation, the Court has already held that a single digital file may contain both a copyrighted sound recording and a separately copyrighted musical composition. *See Newton v. Diamond*, 204 F. Supp. 2d 1244, 1248-49 (C.D. Cal. 2002) ("Sound recordings and their underlying musical compositions are separate works with their own distinct copyrights." (citing 17 U.S.C. § 102(a)(2), (7))). As such, two or more copyright holders may have legitimate claims arising from infringement of the same derivative work if the owners of the underlying work or works are different from that of the derivative. Indeed, the copyright in a derivative work "extends only to the material contributed . . . as distinguished from the preexisting material employed in the work." § 103(b). Courts have clarified:

> [T]he copyright in the derivative work "does not affect" the ownership or subsistence of copyright protection in the preexisting material. § 103(b). Therefore, "[a]ny elements that the author of the derivative work borrowed from the underlying work . . . remain protected by the copyrights in the underlying work." *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1112 (1st Cir. 1993); *accord* [1] Nimmer, § 3.05, at 3-34.30 n.2.1. Thus, even if the infringer copies underlying material only from the derivative work, the copyright owner of the underlying material has a cause of action against the infringer. *Montgomery v. Noga*, 168 F.3d 1282,1292-93 (11th Cir. 1999); *accord* Nimmer § 3.05, at 3-34.31; *cf. Richmond Homes*

> *Mgmt., Inc. v. Raintree, Inc.*, 66 F.3d 316 (4th Cir. 1995) ("Because RHMI cannot assert the [underlying] copyright, it may claim damages based solely on the aspects of the Louisa 'distinguished from the preexisting material employed in the work.'" (emphasis added) (quoting § 103(b)))."

Lennar Homes of Tex. Sales & Mktg. v. Perry Homes, LLC, 117 F. Supp. 3d 913, 928-929 (S.D. Tex. 2015). This, of course, assumes the absence of any ownership transfers or exclusive licensing.[21]

The upshot is that multiple copyright owners may have a cause of action against a defendant when there are compilations or derivative works involved in the infringement action. The Court does not believe any of this fundamental copyright law to be controversial. Reasonable minds differ, however, in its application under § 504(c)(1).

The Court understands the statute as follows. If multiple copyright owners, as plaintiffs, can apportion the injury from the infringement in the suit based on their separate exclusive interests in the work, they are free to do so, and collect actual damages from the defendant for the infringement in suit. On the other hand, if they elect not to demonstrate actual damages, either as a matter of preference or of difficulty, they can recover statutory damages; but the language governing statutory damages tells them, clearly, "[f]or

[21]By the "derivative work" definition, the derivative copyright holder would be infringing the underlying work without permission from the original copyright holder. Licensing arrangements or other contractual permissions are beyond the reach of this discussion.

the purposes of this subsection, all the parts of a compilation or derivative work constitute one work." § 504(c)(1). To reiterate, "[a]lthough parts of a compilation or derivative work may be 'regarded as independent works for other purposes[,]' (*e.g.* having a statutory cause of action), for purposes of statutory damages, they constitute one work." *Xoom,* 323 F.3d at 285 (quoting H.R. Rep. No. 94-1476, at 162).

Accordingly, the Court finds § 504(c)(1) is most accurately construed to limit statutory damages to a single award for each compilation or derivative work, regardless of the number or identity of copyright owners that may have claims to that one work.

i. <u>*The Legal Landscape*</u>

There are two general interpretations among the courts when addressing this question. To appreciate each, a brief summary of select case law is useful.

One approach says that multiple statutory damages awards are possible for copyrights incorporated into the same derivative work. In such a case, duplicate awards are allowed where "a separate plaintiff allegedly owns the copyright on the music composition from the plaintiff that owns the copyright on the sound recording." *TeeVee Toons, Inc. v. MP3.com, Inc.,* 134 F. Supp. 2d 546, 548 (S.D.N.Y. 2001). If the owners were to have to share one award, the *TeeVee Tunes* court said, it would lead to an absurdity: "it would permit separate copyrightholders of the composition and the recording, if suing separately, to each recover statutory damages, but if suing in the same action to be limited to a single award of statutory damages." *Id.* (citing 2 Paul Goldstein, Copyright § 12.2.2.1(b), at 12:52 (2d ed. 2000); 4 Nimmer on Copyright § 14.04[E][l], at 14-70 to 14-70.2

(2000)). Rather, the *TeeVee Tunes* court said, the statute uses "copyright owner" singularly because Congress assumed a single owner of all parts of the derivative work. *Id.* (relying on legislative history to confirm that Congress "simply meant to preclude an author from recovering multiple statutory damages for infringements of several different versions of a single work.") (citing 4 Nimmer § 14.04[E][l], at 14-70 to 14-70.1; *see* 2 Goldstein § 12.2.2.1(b), at 12:52).

Years later, in *Beastie Boys v. Monster Energy Co.*, the district court adopted the presumption that if the musical composition and sound recording copyrights in the same song had the same owner, then only one statutory damages award was permitted. 983 F. Supp. 2d 354 (S.D.N.Y. 2014). Otherwise, there would be two awards in that case, because the musical composition and sound recording had purportedly different copyright owners. As the court accepted this interpretation as true, it offered no legal analysis. Quoting *Teevee Toons,* the court allowed the defendant "to 'attempt[ ] to prove at trial that [the Beastie Boys Partnership and Brooklyn Dust] are so closely affiliated as to be considered one company for statutory damages purposes.'" *Beastie Boys*, 983 F. Supp. 2d at 368 (quoting *TeeVee Tunes*, 134 F. Supp. 2d at 548 n.1). In a similar way, a district court in Maine implied that ownership was material to statutory damages when it supported a single award with "the fact that a single copyright holder holds the rights to both the sound recording and the musical composition of [the song]." *Spooner v. EEN, Inc.,* No. 08-cv-262-P-S, 2010 WL 1930239, at *4 (D. Me. May 11, 2010).

On the other hand, courts say, there is a clear limit to one statutory award as applied to every part of a derivative work. The statute does not address or expressly contemplate whether a work's copyright owners are unified or diversified. The Second Circuit held that, in accord with a plain reading of the Copyright Act's text, "the plaintiffs could recover only one statutory damages award for a musical composition and its corresponding sound recording, even where the composition and the recording were owned by separate plaintiffs." *EMI Christian*, 844 F.3d at 94. Holding the same, several courts have found "Professor William Patry's criticism of the *TeeVee Toons* rule persuasive." *Capitol Records, Inc. v. MP3tunes, LLC*, 28 F. Supp. 3d 190, 192 (S.D.N.Y. 2014). Professor Patry offers an anthology of poems as an analogy, saying there is no reason to differentiate it from the derivative sound recording: "no one would dispute that there is one award, no matter how many different [artists'] works are embodied therein." *Id.* (quoting 6 Patry on Copyright § 22:186); *see also EMI Christian*, 844 F.3d at 95 (citing 6 Patry on Copyright § 22:186 ("Sound recordings are defined in section 101 as a species of derivative work of the underlying musical composition, and, as such, both fall within the one work, one award rule for statutory damages that only award[s] for infringement of both works . . . regardless of whether there are different owners.")).

The Second Circuit has walked back on certain aspects of its holding in *Robert Stigwood Group, Ltd. v. O'Reilly,* explaining that *Stigwood* was an application of the Copyright Act of 1909, not 1976. 530 F.2d 1096 (2d Cir. 1976). Of course, it was "the Copyright Act of 1976[] in which '[t]he one-award restriction for compilations was introduced.'" *Tattoo Art*, 794 F. Supp. 2d at 652 (quoting *Bryant*, 603 F.3d at 142 n.7). But these revisions mostly involve the "independent economic value test" which is not the focus here. Rather, the Second Circuit's position in *Stigwood*—a single award for overlapping copyrights in one work—was only *confirmed* by the 1976 Act. Operating under the 1909 Act, the court considered a song from the rock opera *Jesus Christ Superstar* that included: Musical Excerpts Complete Libretto; Libretto and Additional Words; and a Vocal Score. "While the point is not altogether clear, it appears to us that infringement of performing rights of overlapping copyrights on substantial parts of the entire work should be considered as a single infringement" for statutory damages. *Stigwood,* 530 F.2d at 1104. *Stigwood* effectively asked Congress for more clarity on this issue on January 19, 1976. The Copyright Act of 1976 took effect soon after on January 1, 1978, stating "all the parts of a compilation or derivative work constitute one work." § 504(c)(1).

Facing a complex and splintered litigation with multiple copyright holders, one court asserted a single award as defined by § 504(c)'s statutory range:

> There is nothing that can be discerned in the statutory scheme to require that recovery by one owner of a particular exclusive right precludes the recovery for infringement by the owner of another exclusive right, as long as the infringer's liability on these statutory damages does not exceed the maximum amount provided in Section 504(c) with the limitation that the minimum amount remains that specified in Section 504(c).

Kamakazi Music Corp. v. Robbins Music Corp., 534 F. Supp. 69, 75 (S.D.N.Y. 1982). It is not before the Court whether statutory awards in multiple forums might allow cumulative damages in excess of the statutory cap. The *Kamakazi* court's overall intent, however, is consistent with the theme of § 504(c)(1): to limit the infringer's liability to one statutory award for the conduct in suit.

The counter arguments to these single-award cases are generally captured in *TeeVee Tunes,* and supplemented in Plaintiffs' briefs. The Court considers this legal landscape in its analysis.

ii. The Statutory Language

Plaintiffs argue that the jury's award comports with the plain text of the statute because MCs and SRs are separate and distinct as copyrightable works. Section 504(c)(1) precludes the same singular "copyright owner" from recovering multiple statutory damages, Sony says, and the singular nature of the owner "necessarily limits its application to such cases." Dkt. 699 at 18. Sony addresses the Dictionary Act, 1 U.S.C. § 1, which states, "unless the context indicates otherwise - words importing the singular include and apply to several persons, parties, or things." Plaintiffs contend that, in this case, "the context indicates otherwise," and thus "copyright holder" cannot be construed to include multiple owners. It is the rare occasion that invokes the Dictionary Act to carry out the intent of the statute, Sony maintains. Plaintiffs argue that the singular owner is necessary to avoid the "perverse incentive" discussed in *Blackman v. District of Columbia,* 633 F.3d 1088 (D.C. Cir. 2011) to bring multiple suits to avoid a fee cap rather than have plaintiffs litigate together — as was the argument in *TeeVee Tunes. Blackman*, 633 F.3d at 1092. Finally, Plaintiffs caution against Cox's reliance on legislative history and treatises, arguing that legislative history, in particular, detracts from the clarity of the statutory language.

Cox's examination of the statutory language produces, unsurprisingly, a different result. To begin, 1 U.S.C. § 1 is more widely applicable than Sony suggests, Defendants say, and its application to the Copyright Act—assuming the singular can also be plural—comports with the intent of the statute. Citing to legislative history, Cox continues that Congress was well aware of the possibility that multiple copyright owners could have rights in a single work infringed by a defendant. The policy argument related to multiple suits cannot overturn a result the statute demands, Defendants say, and, regardless, this argument is weak. The *Blackman* case addressed a specific issue regarding class actions that is not relevant here, and Plaintiffs' reading is simply inconsistent with the statute as a cohesive Act; the absurdity, Cox argues, would result from Sony's interpretation.

The Court generally agrees with Defendants. It is contrary to the language and structure of the Copyright Act to construe "copyright owner" as strictly singular, refusing to acknowledge the possibility of multiple copyright owners in the infringement of one work. Section 201 begins, "Copyright in a work protected under this title vests initially in the author *or authors* of the work. *The authors of a joint work are coowners* of copyright in the work." § 201(a) (emphasis added). Accordingly, Plaintiffs would suggest that upon infringement of this original, multi-authored work, there is no statutory language recognizing the "coowners of the copyright." It is difficult to believe that Congress has such an aversion to creative collaboration. Section 504(c)(1) must assume a pluralization of "owner" to accommodate the joint-authors, and neither Party has offered or supported the idea that the singular can be pluralized, but only selectively. What is more, the Act expressly provides, "[t]he ownership of *a copyright* may be transferred in whole *or in part*..." but does not indicate that transferring a part of that copyright destroys or so complicates the ability to enforce the remaining rights. § 201(d)(1) (emphasis added). Exactly the opposite. The section continues, "exclusive rights comprised in a copyright . . . may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded the copyright owner by this title." § 201(d)(2). In sum, "copyright holder" may be pluralized in the Copyright Act.

Considering the statutory damages provision as a whole, the effect of § 504(c)(1) is to protect the infringer's risk exposure. This is demonstrated at least three different ways. First, the statute specifies that one statutory damages award applies to "all infringements involved in the action, with respect to any one work," thereby limiting liability regardless of repetitive infringing conduct. *Id.* at § 504(c)(1). Thus, the "number of 'awards' of statutory damages that a plaintiff may recover in any given action against a single defendant depends on the number of *works* that are infringed," not the number of infringements, "and the number of individually liable *infringers* and is unaffected by the number of *infringements* of those works." *Venegas- Hernandez v. Sonolux Records*, 370 F.3d 183, 194 (1st Cir. 2004) (emphasis original).

Then, to solidify the idea that the number of infringers is also measured by the work infringed, Congress specifies that the "infringer is liable individually, or [] any two or more infringers are liable jointly and severally." § 504(c)(1). Accordingly, the Act refuses to expand liability by the number of infringers involved, no matter how many there are inside a nesting-doll-like defendant; the mirror of this, of course, is to limit the statutory award where there might be scores of copyright holders hiding in a nesting-doll-like compilation or derivative work.

Indeed, the third infringer-focused protection built into § 504(c)(1) addresses the limitation on the infringed work or works involved in the suit. "One work," as it is used in § 504(c)(1), defines the scope of the infringement action and limits the multiplication of awards. "One work" appears twice in § 504(c)(1): first, the scope of the infringement itself is limited to "any *one work?* and second, "all the parts of a compilation or derivative work constitute *one work." Id.* (emphasis added). If that "one work" is a sound recording, for instance, which by definition embodies an underlying work, then § 504(c)(1) does not recognize the underlying work separately for purposes of statutory damages. In other words, if a sound recording is the "one work" infringed, an underlying musical composition cannot escape inclusion in the sound recording's award. All of that said, even if the singular copyright holder argument prevailed, the last sentence of § 504(c)(1) will always operate as a potential limitation on liability.

Lastly, the court in *EMI Christian,* like many other courts, and Cox, pointed to the House and Senate Reports accompanying the Copyright Act in support of the single award limit. While the Court is wary to rely on legislative content outside the statute itself, it is worthy of note from a broader perspective. As just explained based on the statute, the overall intention of the report on this issue is, also, to shield a defendant's potential liability from undue multiplication:

> [A]lthough the minimum and maximum amounts are to be multiplied where multiple "works" are involved in the suit, the same is not true with respect to multiple copyrights, multiple owners, multiple exclusive rights, or multiple registrations. This point is especially important since, under a scheme of divisible copyright, it is possible to have the rights of a number of owners of separate "copyrights" in a single "work" infringed by one act of a defendant.

H.R. Rep. No. 94-1476, at 162 (1976); S. Rep. No. 94-473, at 144 (1975).

iii. Policy Considerations in Copyright Litigation

Similar to the statutory language, many policy arguments align with this intent to prevent undue multiplication of damages. In addition to the overall liability exposure, there are several concerns about multiple awards and sliding amounts of statutory damages that would accompany them. What is more, a single copyright owner could construct a scheme to recover more than the maximum amount Congress provided: "[i]f separate ownership of composition and sound recording rights permitted multiple awards, then an entity that owned both rights in a song could recover 150% of the statutory damages by licensing out one of the rights in exchange for a 50% share in any damages." *Capitol Records v. MP3tunes*, 28 F. Supp. 3d at 192.

In response to Plaintiffs and the contrary case law, the Court respectfully disagrees with the notion that—beyond possessing the right to sue—the copyright holder's identity is material to defining the work within the meaning of § 504(c). Judge Rakoff's "absurd" hypothetical in *TeeVee Tunes* might not be quite as absurd as he suggests. Suing separately, the scenario went, separate owners could each recover, but if together, they could only recover once. This potential oddity may carry some weight, but not a lot. To begin, it is not clear that the second suit is permissible under the laws of preclusion and rules of civil procedure. *See, e.g.*, Fed. R. Civ. P. 19(a) (requiring, if within the court's jurisdiction, "[a] person . . . must be joined as a party if: . . . that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."). Advocates of multiple recoveries in this context do not dispute that the defendant would be repeatedly liable for the same infringing conduct of the same protected content in each suit.[22] And as a practical matter, multiple

[22] Even Nimmer addresses this topic timidly in his leading treatise, stating "[a] full treatment of that doctrine of law is beyond the scope of this [copyright] treatise, but certain tentative

infringement actions will rarely be economically feasible or appealing for copyright holders, as the initial suit rarely is. It seems unlikely that any absurdity would ever begin.[23]

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conclusions may be suggested." 4 Nimmer on Copyright § 14.04[E][2][b] (2019). He continued by saying:

> May a plaintiff avoid this limitation by simply suing the same infringer in a number of separate actions, each for a particular infringement, and thus recover at least the statutory damages minimum in each such action? Nothing in the Copyright Act would appear to prevent a plaintiff from resorting to this means of multiplying the number of statutory damages awards which he may recover. If there is a limitation on the plaintiffs ability to resort to such a device, it is to be found in the law of *res judicata,* and perhaps by judicious transfer of venue and joinder (for cases still pending).

Id. (internal footnotes omitted). It is also not for this Court to determine herein whether, *arguendo*, if multiple lawsuits were permitted, the total statutory award across plaintiffs would have to fall within Congress' statutory range. District courts have said, "[i]f Plaintiffs sue separately, they may of course collect separately 'as long as the infringer's liability on these statutory damages does not exceed the amount provided in Section 504(c).'" *Capitol Records, Inc. v. MP3tunes, LLC*, 28 F. Supp. 3d at 192 (quoting *Kamakazi Music*, 534 F. Supp. at 75 (allowing separate awards where the defendant successfully compelled arbitration against one copyright holder, but not the others)).

[23] Steven Marks, former General Counsel of R1AA until 2018, testified to the industry's challenges with infringement lawsuits against individuals in the *first* instance. While there were efforts to engage in this litigation from 2004 to 2008, he testified, "they weren't as straightforward as you might think because we did not know who the - the identity of the people using the software." Trial Tr. 284:14-16. Some ISPs, including Cox, only revealed individuals' identities upon court order. Trial Tr. 285:17-22. The

A few examples are instructive. Suppose a defendant infringes a digital music file of a three-minute song non-willfully. In this scenario, the MC and SR are owned by the same artist, exposing the defendant to a minimum of $750-$30,000. In the next scenario, a defendant infringes on a three-minute song, but that song is a "mash-up" containing samples of ten different copyrighted recordings, each with separately copyrighted compositions. The second song exposes the defendant to a minimum of $15,000-$600,000 in statutory damages. With the popularity of digital sampling, the twenty-fold increase may be an underestimate. It is difficult to fathom that Congress intended such dramatic discrepancies in liability for substantially the same conduct. As willful infringement exposes the defendant to a maximum of $150,000.00 per work infringed, that three-minute mash-up could cost a defendant $3 million.

Moreover, the "mash-up" example's nonsensical outcome is not new. To the contrary, the same applies where advances in technology are not as pronounced. For instance, no one would dispute that there is one award for an anthology of poems, no matter how many different works are included. *See* 6 Patry on Copyright § 22:186). The same if a copyrighted photograph was of a nature scene, commanding a single award, but another photograph captured a scene at an art fair, including protected works of fifteen other artists. Reprinting the former without permission exposes the infringer to significant liability. Reprinting the latter,

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instant litigation is an exceptional undertaking supported by the largest members of the entire industry. In short, if the music industry offers any indication, multiple suits for the exact same works would be extraordinary.

Plaintiffs argument goes, likely bankrupts most defendants. These kinds of "gotcha" scenarios raise several issues like problems with fair notice and a desired consistency in application of copyright laws.

Finally, a court should not have to make a wager on a statutory award. A judge or jury might want to reduce damages if the defendant may be sued time and time again, adjusting for factors relative to cumulative harm and deterrence. Again, this level of uncertainty is contrary to consistent administration of the law.

iv. Procedural Considerations and Re-Calculation

Plaintiffs begin their argument with evidentiary considerations, stating that Cox presented no evidence to the jury on the issue of the number of works for purposes of statutory damages. Sony emphasizes the fact that a Rule 50 motion must be based on evidence adduced at trial. Fed. R. Civ. P. 50(a)(1)(A). Plaintiffs also argue that Defendants' expert Christian Tregillis never testified as to an overlap between MCs and SRs, because he was precluded from doing so based on the way Cox tried its case. Dkt. 699 at 17.

Defendants contend that the overlapping copyrights on the same songs are evident on the face of the exhibits, and that no additional evidence was necessary, as this is a pure question of law. Cox claims it can rely on the entire record when arguing a JMOL, as, "in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record." *Reeves* v. *Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150 (2000). On the final day of trial, though certain demonstratives were excluded from

Mr. Christian Tregillis' testimony,[24] the Court provisionally admitted registration evidence into the record: PX 612-8478. As these exhibits were not on Defendants' exhibit list for trial, the evidence was admitted provisionally, and not for use in any further testimony at trial. The Court allowed Sony "an opportunity to actually look at what's in there and file any supplemental pleading [if] they think [it] is appropriate." Trial Tr. 2707:11-13. To the Court's knowledge, Sony has not filed anything with regard to PX 612-8478 as of the date of this opinion and order.

Unlike for "compilations" within the meaning of § 504(c)(1), the question of overlapping copyrights in a single work can—or should be able to—be determined by the requisite copyright registration, and any other proof of ownership, that may be needed to bring a

[24] In concert with the expert testimony of Mr. Tregillis, Defendants proposed demonstratives that displayed numbers of individual musical compositions and sound recordings, as well as the number of works that contained both. Defendants claimed that the numbers could be derived from the underlying data in Mr. Tregillis' expert report, because he included the distinctions in portions of the report and an attached schedule. Plaintiffs objected to the foundation for the final calculations, arguing that PX 1 and PX 2 did not include enough information to make these determinations, that *post hoc* calculations were improper, and the analysis was not disclosed prior to trial. The Court granted Plaintiffs' motion to exclude exhibits which contain the lower portion of slides 13, 21, 22, 23, 26, and the last two. Trial Tr. 2713:3-5. The Court found that the analysis was not done in Mr. Tregillis' expert reports, and there was a lack of notice to Plaintiffs. "[A]lthough they're not, as Mr. Buchanan pointed out, the most resounding modifications, they are modifications, and they do change the dynamics of his report, and [] it's impermissible to do that [] on the last day of trial." Trial Tr. 2713:13-17.

copyright infringement suit. The Court held that Plaintiffs met this requirement at summary judgment, and said ownership was not an issue for trial; then at the end of trial, Defendants moved and the Court admitted approximately 7200 electronic exhibits containing registration information, as discussed above. *See* Dkt. 610 at 15. As such, the record holds all registration and contractual evidence. While calculation of works in suit was premature at that time, *see supra* Part II.B.3.a. the compilation question is now settled; the ownership documentation should allow the Parties to identify overlapping copyrights within individual songs.

There are still 10,017 copyrights in suit, but the verdict form does not quantify copyrights. The jurors expressly determined that the amount of statutory damages to "award for each *work* contributorily or vicariously infringed" was $99,830.29. Dkt. 669 at 2 (Verdict Form) (emphasis added). Using the adjusted number of works in suit after combining those MCs and SRs that overlap in one work, the multiplier will remain, as the jury set, at $99,830.29.

Sony will almost certainly oppose the adjustment to the number of works in suit as a matter of law. If there are two copyrights incorporated into one work, Plaintiffs might say, the jury may have weighted the award differently. Or, if the jury's aggregate award reflected the amount commensurate with the overall conduct and everything in the trial record, Sony might say that a reduction distorts the verdict. But these arguments fail, as they fly in the face of the very statutory discussion herein. The Supreme Court found that "the Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself." *Feltner v. Columbia Pictures TV*, 523 U.S. 340, 355 (1998). The Copyright Act discusses "one work," not total works, thus the issues, as *Feltner* says, "pertinent to . . . § 504(c)" have already been before and decided by a jury.

Cox proffers that comparing PX 1 and PX 2 is a "ministerial" task to determine the number of overlapping works, but Sony disagrees. It seems no unreasonable burden, then, that Cox shall prepare a list of overlapping works in suit, identifying which copyrights in PX 1 correspond with which copyrights in PX 2. Each of the 10,017 copyrights considered at trial shall be listed, whether Cox proposes them to be independent works or paired with another copyright in one work. Cox shall calculate and propose a new number of works in suit for purposes of statutory damages within sixty days of the date of this opinion. The proposal may include supporting documentation if Cox finds it appropriate.[25] Plaintiffs shall have sixty days to produce sufficient evidence to demonstrate which, if any, pairings or groupings should remain separate works under 17 U.S.C. § 504(c)(1). The Court will determine the final number of works in suit as it deems appropriate based on both Parties' submissions.

Cox's footnote 23 at the end of its JMOL motion notes Cox will seek discovery to determine whether the works withdrawn from *Warner Records, Inc. el al. v. Charter Communications, Inc.* (No. l:19-cv-00874-

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[25] At the very least, Cox shall provide an itemized representation of the 2,556 (less any works removed from the case before trial) musical compositions it references in its motion. Dkt. 682 at 10-12.

RJB-MEH (D. Colo), ECF No. 100, should be withdrawn from this case as well. There is nothing currently before the Court addressing the specific works or documentation thereof. Should the Parties take up this challenge in the final tally of the works in suit, the Court will review relevant documentation.

C. Conclusion: Renewed Motion for Judgment as a Matter of Law

For these reasons, Defendants Renewed Motion for Judgment as a Matter of Law is granted in part and denied in part.

III. MOTION FOR A NEW TRIAL UNDER RULE 59

Defendants also move under Rule 59(a) for remittitur or, in the alternative, a new trial. For the following reasons, the motion must fail.

A. Legal Standard

A court may grant a new jury trial upon a motion by a party "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). Specifically, a Rule 59(a) motion will be granted if "(1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Atlas Food Sys. and Servs., Inc. v. Crane Nat 'I Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996).

Looking at the evidence in the light most favorable to the party who received the verdict, a trial court generally "will not disturb a jury verdict for damages which have been impartially rendered and are dependent upon competent evidence." *Fairshter v. Am. Nat. Red Cross*, 322 F. Supp. 2d 646, 658 (E.D. Va. 2004) (additional citations omitted). Where a plaintiff in a copyright case elects a jury trial, "although the [Copyright Act] is silent on the point, the Seventh Amendment provides a right to a jury trial, which includes a right to a jury determination of the amount of statutory damages." *Feltner*, 523 U.S. at 342. The Court exercises caution when asked to upset any damages award within a statutory range. "[L]ong before the enactment of the Copyright Act of 1909, 35 Stat. 1075, it was settled that the protection given to copyrights is wholly statutory . . . [and] [t]he remedies for infringement 'are only those prescribed by Congress.'" *Sony Corp.*, 464 U.S. at 431 (internal citation omitted) (quoting *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889)). Where Congress sets the range and a jury decides an award within it, courts offer deference to both.

"A motion for a new trial is governed by a different standard from a directed verdict motion," as Rule 59 allows a trial judge to weigh the evidence and consider the credibility of witnesses. *Poynter by Poynter v. Ratcliff*, 874 F.2d 219, 223 (4th Cir. 1989) (quoting *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888, 891 (4th Cir. 1980)).

Regarding the constitutional challenge to the statutory damages award, the parties agree that *St. Louis, I. M. & S. Ry. Co. v. Williams* governs the constitutional inquiry here.[26] 251 U.S. 63 (1919). As

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[26] When reviewing the constitutionality of a statutory damages award such as this, *Williams* is the appropriate standard rather than the test for punitive damages set out in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996). In *Tattoo Art, Inc. v.*

established in *Williams*, even if primarily intended to punish the defendant and paid directly to a private party, a statutory penalty:

> [I]s not contrary to due process of law; for, as is said in *Missouri Pacific Ry. Co. v. Humes,* 115 U. S. 512, 523 [1885], 'the power of the state to impose fines and penalties . . . and the mode in which they shall be enforced . . . and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.' Nor does giving the penalty to the aggrieved passenger require that it be confined or proportioned to his loss or damages; for, as it is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state. *See Marvin v. Trout,* 199 U.S. 212, 225 [1905].

Williams, 251 U.S. at 66. The discretion is not limitless, but "the limitation only [operates] where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Id.* at 66-67 (collecting cases).

TAT Int'l LLC, the Fourth Circuit—as many other courts have—rejected arguments based on *Gore* and similar authority, distinguishing punitive damages from statutory damages, "where Congress has limited the district court's discretion by establishing a statutory' range." 498 Fed. App'x 341, 348 (4th Cir. 2012) (unpublished).

B. Discussion

1. Inherent Power of the Court; Remittitur

The broad discretion of the court—whether the fact finder is the judge or jury—is well-established in awarding statutory damages. "[l]n every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court's discretion and sense of justice are controlling." *L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106-07 (1919).

This discretion is appropriate for copyright law, the Supreme Court observed, as there are "[f]ew bodies of law [that] would be more difficult to reduce to a short and simple formula than that which determines the measure of damage recoverable for actionable wrongs." *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952). This difficulty is clearly illustrated by peer-to-peer file sharing abilities, where it established that "a file that is distributed illegally, once it gets out there virally, how many illegal copies that copy can spawn . . . there is no way to precisely estimate that." Trial Tr. 1753:4-7 (Lehr). And where there is no way to produce an estimate, there is certainly no way to make a calculation. Trial Tr. 1751:13-16 (Lehr) ("[I]f you want to try and quantify that in dollar terms, like what is the economic damage that plaintiffs would suffer in a case like this, that data just doesn't exist."). As a result of these impediments, "[t]he necessary flexibility to do justice . . . can be achieved only by exercise of the wide judicial discretion within limited amounts conferred by this [copyright] statute." *Woolworth*, 344 U.S. at 232.

When a copyright plaintiff elects a jury trial, the discretion lies with the jury, not the judge. In *Fellner v. Columbia Pictures TV,* the Supreme Court held, "although the [Copyright Act] is silent on the point, the Seventh Amendment provides a right to a jury trial, which includes a right to a jury determination of the amount of statutory damages." 523 U.S. at 342. *Feltner* emphasized the common law rule at "'the adoption of the Constitution' [] that 'in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.'" *Id.* at 353 (quoting *Dimick* v. *Schiedt,* 293 U.S. 474,480 (1935)). "Thus, if the jury was presented with evidence justifying a finding of willful infringement, it is given broad discretion to award up to $1[5]0,000 for each work copied."[27] *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 496 (4th Cir. 1996).

To guide the Court's inquiry, "[a] fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 445 (1988) (citing *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P. C.*, 467 U. S. 138, 157-158 (1984)); *see also Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) ("[P]rior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision."). As

[27] The Copyright Act was amended in 1999 to raise the maximum statutory damages for willfulness from $100,000.00 to $150,000.00. Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, PL 106-160, 113 Stat 1774 (1999).

such, in reviewing statutory damages under the Copyright Act, remittitur arguments precede any analysis of Due Process challenges. *See Sony BMG v. Tenenbaum*, 660 F.3d at 511. The Court, therefore, begins with Defendants' Rule 59 arguments.

a. Against the Weight of the Evidence

Cox's assertion that the Court has authority to remit damages is undisputed. But, here, the weight of the evidence reasonably supports the jury's verdict.

Based on the factors the jury was instructed to consider for the statutory award, Cox argues the ultimate award is grossly excessive in light of the evidence. Defendants focus on the language that connects the statutory damages factors to the infringement - that the statistical and financial evidence in support of the award had to be "because of the infringement," and related to the repeat infringing subscribers. High speed internet service is only one of Cox's product offerings, Defendants say, and the repeat infringers at issue in this case only make up a fraction thereof. Based on expert testimony, Cox contends the profits from the infringement were "some fraction of $21.3 million, $376,262, or something in between, [and] that figure bears no relationship to the 'massive,' 'excessive,' multi-billion-dollar profits on which Plaintiffs urged the jury to base its award." Dkt. 685 at 10. The argument is similar for Cox's alleged expenses saved and Plaintiffs' alleged revenues lost. The lack of data to calculate actual numbers does not justify unproved infringing acts, Cox continues, and "[t]he difficulty of proving damages in the abstract provides no guidance for where an award should fall in the statutory range." *Id.* at 13 (citing *Woolworth*, 344 U.S. at 232).

Defendants maintain that emphasis on improper evidence led to an inflated award untethered to these smaller or non-existent data points.[28]

Cox also characterizes its conduct pursuant to CATS as effectively deterring and stopping infringement. It compares its conduct to that of other defendants in copyright infringement cases, arguing that having a graduated response program to process infringement notices precludes a finding of misconduct here to the degree reflected in the $1 billion award. This argument also discusses the weight of the evidence by comparisons with other cases, which are addressed *infra* Part III.B.1.b.i.

In short, Plaintiff's note that there was ample evidence of misconduct and unlawful activity to support the award, and Cox's proportionality argument does not stand up to case law. The jury is justified in basing an award on many factors beyond the infringement-related profits and percentages of Defendant's overall business.

As for the jury's measure of Cox's conduct, Sony provides an array of evidentiary examples from trial to argue that Cox's graduated response program essentially was a charade. The undisputed backdrop for Defendants' conduct included P2P activity as "[n]early 13% of traffic on Cox's network," where ninety-nine percent of P2P traffic is infringing, and hundreds of thousands of infringement notices from

[28] Additionally, Cox relies on well-established economic principles of deterrence and *Gore*—a punitive damages case—to attack the deterrence factor, and on another punitive damages case in response to the jury instruction that said, "in the case of willfulness, the need to punish Cox." Deterrence and punishment are discussed *infra* Part III.B.1.b.ii.

Plaintiffs - Cox never questioned the accuracy or reliability of the information in the infringement notices, but only accepted a fraction of them.[29] Dkt. 697 at 4-5. In essence, Plaintiffs point to evidence to say that, despite having CATS in place, and an overall graduated response program, Cox understaffed its groups to address infringement, made continued efforts to keep infringing customers, and indeed continued to serve nearly all of them. The sham policy, Sony says, included "soft terminations" with immediate reactivation, clean slates for repeat infringers, and a clear prioritization of customer retention and revenue generation over the DMCA. *Id.* at 11-13. When terminations were to be enforced for longer periods of time, Cox allegedly just stopped terminating infringing subscribers altogether. *Id.* (20 terminations for copyright infringement out of 5.8 million total notices during the Claim Period). Plaintiffs note the contrast in 2013 and 2014, between terminations for copyright infringement, 32, and terminations for failure to pay bills, approximately 620,000.

With respect to the appropriate measure of profits and the punitive nature of the award, Cox's arguments fall flat.[30] Cox leans on the Supreme Court in *Woolworth* to say that the inability to prove actual damages is a justification for the existence of statutory damages, but not for awarding damages for

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[29] With caps on the number of notices Cox would receive from each source like RIAA, Sony notes that Cox still received, in total, "nearly *5.8 million* infringement notices during the claim period." Dkt. 697 at 5 (emphasis original).

[30] The jury instruction including "the need to punish Cox" is discussed *infra* Part III.B.1.b.ii.

acts of infringement that the copyright holder cannot prove. Dkt. 685 at 13. But *Woolworth* repeatedly says, "'the court's discretion and sense of justice are controlling, but it has no discretion . . . to go outside of [the statutory range].'" 344 U.S. at 232 (citing *LA. Westermann*, 249 U.S. at 106-07). Contrary to Defendants' claim that there is no justification for damages where infringement is not proven, the Supreme Court said that a statutory award would be "one based on a necessarily somewhat arbitrary estimate within the limits permitted by the Act." *Id.* at 232.

The jury heard evidence about Cox's services beyond the internet, and how they factored into corporate decision making. Indeed, Cox's services are generally bundled, intertwining revenue streams from each service such that a reasonable jury could consider the effect of one service on another. *See* Trial Tr. 1777:17-1778: 4 (Lehr) (explaining the economic benefit of bundled services to Cox and its customers). Cox did not consider its customers in silos by service; to the contrary, the abuse team looked at the total revenue coming from each subscriber when considering possible suspension or termination. *See, e.g.*, PX 347 (Jun. 12, 2014 email from Andrew Thompson (CCI-Atlanta) to the abuse team: "This customer will likely fail again, but let's give him one more change [sic]. [H]e pays 317.63 a month."); PX 342 at 3 (Mar. 27, 2014 email from Joseph Sikes to abuse team members, counseling to try to avoid terminating because "[t]his Customer pays us over $400/month and if we terminate their [sic] internet services, they will likely cancel the rest of their services.").

Cox also elevated the company's overall interests over those of copyright holders, protecting its network by allocating resources away from DMCA enforcement. *See* PX 245 (Jan. 17, 2010 email from Jason Zebrak to abuse team members, explaining that they could just start the DMCA count over again because "DMCA does not hurt the network like DOS attack, spam or hacking. It is not something we advertise, however."). Cox's policy was, in essence, "DMCA = reactivate." Trial Tr. 1665:10-11 (referencing Bates No. COX_SONY_510844-46). Overall, Cox's individual conduct could reasonably support the jury's measure of damages within the statutory scheme.

Finally, it was not improper for Sony to present evidence of industry-wide harms. This is not a new consideration. In *Thomas-Rasset* the district court stated:

> All of the potential ills caused by unauthorized peer-to-peer networking and illegal downloading are relevant to the damages award. The Court does not discount that, in aggregate, illegal downloading has caused serious, widespread harm to the recording industry. These facts justify a statutory damages award that is many multiples higher than the simple cost of buying a CD or legally purchasing the songs online.

Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1054 (D. Minn. 2010), *rev'd on other grounds,* 692 F.3d 899 (8th Cir. 2012). While the district court in *Thomas-Rassett* was reversed for an alternative damages theory, its attention to industry-wide harms was affirmed. The Eighth Circuit reiterated that copyright protection "is meant to achieve an important public interest." *Id.,* 692 F.3d at 908 (citing *Sony Corp.*, 464 U.S. at 429). The court noted the problem of online file-sharing to the recording industry as a whole, including lost industry jobs and an overall reduction in the number of artists and albums released. *Id.* (citing *Sony BMG v. Tenenbaum*, 660 F.3d at 492). Dr. Lehr, a telecommunications internet industry economist focused on the evolution of broadband distribution of digital media, explained at a high level, "[p]iracy just sucks oxygen out of the whole ecosystem and means that there's less money available and less of an incentive to use the money to invest in creative content." Trial Tr. 1744:6-8 (Lehr). Plaintiffs adequately connected Defendants' conduct to the injury to said ecosystem, thus the jury could reasonably award additional damages for the far-reaching adverse effects of piracy.

For the reasons stated herein and the evidence cited in Plaintiffs' brief, the jury's award is reasonably supported by the evidence and based on a range of relevant financial concerns.

b. <u>Miscarriage of Justice</u>

Per-work damages here are $99,830.29 out of $150,000.00, or more than $50,000.00 below the statutory maximum. "'[I]n the specific context of statutory damages under the Copyright Act [and Lanham Act], Congress has placed an upper bound on the damages that a jury can award, which mitigates the risk of a truly untethered award.'" *John Wiley & Sons. Inc. v. Book Dog Books, LLC*, 327 F. Supp. 3d 606, 635 (S.D.N.Y. 2018) (alteration original) (quoting *Agence Fr. Presse v. Morel*, No. 10-cv-2730 (AJN), 2014 WL 3963124, at *15 (S.D.N.Y. Aug. 13,2014)).

Also notable—bewildering, even—in framing this discussion is that Defendants argue, "in the time period at issue there was no authority to suggest that an ISP's failure to terminate a subscriber could or would give rise to secondary liability." Dkt. 685 at 21. Before and during the Claim Period, Cox's employees and the Copyright Act, say otherwise. *See, e.g.*, PX 253 (Aug. 12, 2009 email from Jason Zabek to abuse team leadership: "[I]f a customer is terminated for DMCA, you are able to reactivate them after you give them a stem warning about violating our AUP and the DMCA. *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.") (emphasis added); PX 245 at 1 (Jan. 17, 2010 email from Jason Zabek to abuse team members: "We have been turning customers back on . . . As long as our process of warnings, suspensions, then termination is followed, we can turn the customer back on and start the DMCA count over."); PX 264 at 1 (Aug. 4, 2010 email from Jason Zabek to abuse team members: "Per legal, we are doing this. No one is really happy with the DMCA process..."); PX 282 at 3 (Apr. 18, 2011 email from Jason Zabek to abuse team members: "We can not just close the ticket due to the DMCA and Cox's responsibility under the law."). The DMCA and the potential for liability clearly shaped Cox's conduct, and the Court finds the DMCA to be compelling authority. Neither the inability to invoke the safe harbor in this litigation nor the timing of adjudication make Cox any less culpable.

i. Comparisons to Other Cases

Cox argues that the $1 billion award is grossly excessive relative to statutory damages awards in other copyright cases.[31] Defendants provide an array of statutory damages amounts, claiming that this award cannot stand because it is so much larger than the others. Additionally, Cox contends that its conduct as a secondary infringer should be relevant, as direct infringers should be subject to larger judgments. Because of this distinction, Cox says *BMG* is most applicable, as Cox was similarly situated as an ISP in that case. The per-work award in *BMG* was $17,895.00. Dkt. 685 at 5.

In short, Plaintiffs counter that these numbers are not relevant to this case, as every case has its own facts. This case involved a significant portion of the music industry as plaintiffs, and the jury heard competent evidence illustrating the extensive harm to the industry due to the viral piracy at issue. Dkt. 697 at 22. There is no support, Sony continues, to say that secondary infringers should pay "secondary" damages. Moreover, Cox did not seek a jury instruction for this false distinction.

To begin, Congress did not set aggregate damages caps for copyright infringement, nor did it indicate any unit beyond "one work" by which to measure damages. Section 504(c) gives careful attention to the singular work infringed, and damages awards are determined accordingly. The cumulative total is relevant to a Rule 59 inquiry, but the per-work award

[31] Defendants' brief includes additional numbers and calculations, but a few examples are representative: $1 billion exceeds any other copyright statutory damages ever awarded; $1 billion is more than $400 million larger than the aggregate of all statutory damages awarded between 2009 and 2016; to date, the largest statutory damages award for copyright infringement to survive appeal was $136 million. Dkt. 685 at 3.

is emphasized, as it is expressly contemplated in the statute.

The Court understands Cox to claim that remittitur is warranted here because different cases had different outcomes. This is minimally persuasive. "[C]omparing jury verdicts for similar injuries in different cases is 'not greatly helpful because each case must be evaluated as an individual one, within the framework of its distinctive facts.'" *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d at 1055 (quoting *Vanskike v. Union Pac. R.R. Co.*, 725 F.2d 1146, 1150 (8th Cir. 1984) (citation omitted)). Other jury trials have not only different parties, evidence, and facts presented, but also different fact finders. *See Vanskike*, 725 F.2d at 1150 ("Assessment of damages is within the sound discretion of the jury. Each case is evaluated by a different, randomly selected group of individual jurors."). Awarding maximum damages for each of several works infringed, this court has noted, "[w]hen a defendant's acts are 'clearly willful,' courts in this district have been willing to grant maximum statutory damages." *Ez-XBRL Sols, Inc.* v. *Chapke*, No. l:17-cv-700 (LMB/TCB), 2018 WL 5808724, at *9 (E.D. Va. Sep. 25, 2018), *report and recommendation adopted,* 2018 WL 5809406 (E.D. Va. Oct. 22, 2018). The award at bar is essentially just two-thirds of what the total damage could have been according to Congress' chosen parameter.

Cox's emphasis on the *BMG* award is overstated for multiple reasons, including different plaintiff groups and a new jury. To start, Cox asserts the "critical caveat[] that the *BMG* judgment was reversed on appeal." Dkt. 703 at 4. It is true that the judgment was reversed and the case was remanded for a new trial, but the Fourth Circuit's reversal was based on an erroneous jury instruction; it never suggested that the magnitude of the damages had an effect on the decision, and the Court declines to forge that inference here.

What is more, Defendants fail to consider that the jury in *BMG* found Cox liable for contributory infringement, but *not* for vicarious liability. *BMG,* 1:14-cv-1611, ECF No. 754 (Verdict Form). The jury in the instant case found Cox liable for both. This is a significant difference, making it even more difficult to extrapolate a meaningful comparison between the two cases. The jury's finding of vicarious liability against Defendants is also germane to Cox's argument that secondary infringers are generally less liable than direct infringers. Cox cites to *Columbia Pictures v. Krypton,* in part to illustrate what Defendants describe as behavior worse than its own because the defendants were plausibly viewed as pirates. 259 F.3d at 1195; Dkt. 685 at 25. In *Columbia Pictures,* however, the Ninth Circuit upheld the damages award based on the statutory range and substantial evidence in support of the willfulness finding. There is no basis on which to infer that the secondary nature of the willful conduct had any bearing on the examination of the jury's award. Indeed, Defendants' argument for degrees of culpability is unavailing, as "[e]ven in copyright cases, in which the touchstones of benefit and control have become the defining elements for vicarious liability, we nevertheless are considering "the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the acts of another."' *Polygram Int'l Publ'g, Inc. v.*

Nevada/TIG, Inc., 855 F. Supp. 1314, 1325 (D. Mass. 1994) (quoting *Sony Corp.*, 464 U.S. at 435). In short, the thesis of vicarious liability is holding one accountable for the acts of another; here, the jury held Cox accountable without qualification.

ii. Consideration of Total Profits and Dividends

Defendants say "the notion that Cox's total wealth is relevant to the deterrence factor is inconsistent with basic principles of damages," noting that it offers television and telephone services as well as high speed internet, and deterrence cannot affect provision of those services. Dkt. 685 at 28. The dollar value of cash dividends paid to Cox's owners during the claims period was irrelevant and prejudicial, Defendants continue, as they are too attenuated from the relevant conduct in the case and the Cox owners are not party to the suit. Since only profits may be used for deterrent purposes, Cox claims, the dividend amounts - "1 to 1.5 billion a year," as Plaintiffs' counsel put it, were inappropriate.

Plaintiffs argue it is axiomatic that a wealthier defendant will require a greater sanction to have a deterrent effect. As one court said, "[t]he wealth of the defendant has been widely recognized as relevant to the deterrent effect of a damages award." *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 461 (D. Md. 2004) (collecting cases). In *Basic Books, Inc. v. Kinko's Graphics Corp.*, Plaintiffs note, the court "conclude[d] that substantial damages [were] necessary to deter Kinko's from repeating the conduct proved," considering not only the company's net income ($3 million), but also its total assets ($15 million). 758 F. Supp. 1522, 1545 (S.D.N.Y. 1991).

The overall size and wealth of the defendant is a valid consideration for a statutory damages award. Indeed, the jury is justified in finding that a "'sizeable award . . . is both suitable and necessary to punish and deter a corporation of this size.'" *Lowry's Reports*, 302 F. Supp. 2d at 461 (quoting *Lampley v. Onyx Acceptance Corp.*, 340 F.3d 478, 485 (7th Cir.2003)). The distinction Cox makes between consideration of profits and dividends is contrary to the idea of capturing the big picture for purposes of deterrence, not just profit. To the extent that the damages serve a punitive function, discussed below, courts have compared a defendant's wealth to the award. "Recognizing that the defendant's wealth can also be a factor in assessing the ratio . . . [t]he award was [not] out-of-line with defendant's net worth. . . . The ratio of the award is not excessive in view of this financial picture." *Swinton v. Potomac Corp.*, 270 F.3d 794, 818-19 (9th Cir. 2001) (internal quotation omitted). The whole "financial picture" is more helpful in assessing deterrence than fractions thereof. Additionally, as described above, Cox's services are generally bundled together. This blends motivations for and specific effects of business decisions, making it difficult if not impossible for a jury to ascertain the true relative values of Cox's services.

Furthermore, Cox cannot escape the broader financial picture when its own representations to the jury extended far beyond the infringing conduct at issue. Cox did not introduce itself within the framework of the infringing actions at bar. Rather, Defendants opened their case by saying Cox "has tens of thousands of employees and owns television and radio stations, newspapers, cable, security, and automotive business throughout the United States." Trial Tr. 66:19-21. Defendants did not clarify where within or what portion of this enormous company the jury should limit its consideration, nor whether they were referring to Cox Enterprises or its subsidiaries. The evidence at trial did not give the jury a reason to doubt that Cox was the large and long-standing fixture of the industry it claimed to be. Further, throughout trial Defendants framed the termination discussion by emphasizing the importance of the internet in all aspects of consumers' daily lives. But the jury was free to interpret this as an emphasis on the durability of Cox's market position given nearly inelastic demand for internet services. The Court cannot divine the jury's intentions, though it would be reasonable for deterrence to factor significantly in the award.

iii. Punishment as a Statutory Damages Consideration

In addition to profits and cash dividends, Defendants object to "the need to punish Cox" as a factor to consider for statutory damages in the jury instructions.

Under the Copyright Act, as amended, "the Supreme Court has found that the statutory damages provision of the Copyright Act does 'not merely compel [ ] restitution of profit and reparation for injury but also is designed to discourage wrongful conduct.'" *Newport News Holdings Corp. v. Virtual City Vision*, 650 F.3d 423, 442 (4th Cir. 2011) (citing *E. & J. Gallo Winery*, 286 F.3d 270, 278 (5th Cir. 2002) (quoting *Woolworth*, 344 U.S. at 233)). The Supreme Court did not stop at discouragement, as, in *Feltner* it said, "an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and *punishment.*" *Feltner*, 523 U.S. at 352-53 (emphasis added) (additional citations omitted). Through the twentieth century "[t]he Supreme Court . . . reaffirmed that '[e]ven for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.'" *Sony BMG Music Entm't v. Tenenbaum,* 660 F.3d 487, 502 (1st Cir. 2011) (quoting *Woolworth,* 344 U.S. at 233). Vindication of the statutory policy, as an aim, appears to extend beyond deterrence.

It is established that a plaintiff under the Copyright Act may elect either actual or statutory damages. 17 U.S.C. § 504. There is no discrete punitive option:

> As a general rule, punitive damages are not awarded in a statutory copyright infringement action. *See* 4 *Nimmer* § 14.02[B], at 14-23 to 24; *Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983). The purpose of punitive damages—to punish and prevent malicious conduct—is generally achieved under the Copyright Act through the provisions of 17 U.S.C. § 504(c)(2), which allow increases to an award of statutory damages in cases of willful infringement. *See* 4 *Nimmer* § 14.02[B], at 14-23 to 24; *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F.Supp. 69, 78 (S.D.N.Y.1982).

On Davis v. The Gap, Inc., 246 F.3d 152, 172 (2d Cir. 2001), *as amended* (May 15, 2001).

In accordance with statutory damages' far-reaching objectives, a judge or jury in the Fourth Circuit may assign weight to a range of factors when determining a statutory award for copyright infringement, including but not limited to:

> [A]ny evidence that the defendants have a history of copyright infringement; any evidence that the defendants are apparently impervious to either deterrence or rehabilitation; the extent of the defendant's knowledge of the copyright laws; any misleading or false statements made by the defendants; . . . and any factor which the jury believes evidences the defendants knew, had reason to know, or recklessly disregarded the fact that its conduct constituted copyright infringement.

Superior Form Builders, 74 F.3d at 496 (additional citations omitted). In cases of willful infringement, courts have emphasized not only the defendant's culpability for the infringing conduct and deterrence thereof, but also the defendant's patterns of behavior and general attitude as applied to the case:

> (1) the defendant's history of copyright infringement, *see, e.g.*, *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 496-497 (4th Cir. 1996); (2) deterrence against future violations of copyright infringement, *see, e.g.*, *International Korwin Corp.* v. *Kowalczyk*, 855 F.2d 375, 383 (7th Cir. 1988); (3) the defendant's purpose and intent, *see, e.g.*, *Sony BMG Music Entertainment v. Tenenbaum,* 660 F.3d 487, 503-4 (1st Cir. 2011); and (4) the attitude and conduct of the parties, *see, e.g.*, *Warner Bros. Inc.* v. *Dae Rim Trading, Inc.*, 877 F.2d 1120, 1126 (2d Cir. 1989).

Spanski Enterprises, Inc. v. Telewizja Polska S.A., No. 12-CV-957 (TSC), 2017 WL 598465, at *1 (D.D.C. Feb. 14, 2017), *aff'd*, 883 F.3d 904 (D.C. Cir. 2018).

Ultimately, beyond actual harm, and "beyond deterrence, '[i]n a case where a defendant's infringement is found to be willful, the act contemplates that the award may, in the judge's discretion, punish the wrongdoer.'" *EMI April Music, Inc. v. White*, 618 F. Supp. 2d 497, 508 (E.D. Va. 2009) (Davis, J.) (quoting *Music City Music v. Alfa Foods, Ltd.*, 616 F. Supp. 1001, 1003 (E.D. Va. 1985)); *see also John Hailey & Sons*, 327 F. Supp. 3d at 635 ("Statutory damages serve multi-faceted purposes, including compensating the owner, penalizing the infringer, and deterring future infringement.").

Insisting that the punitive verdict is untethered to the evidence, Cox cites, *inter alia,* to *Woolworth* for the repeated assertion that the purposes of statutory damages are restitution of profit, reparation for injury, and discouraging wrongful conduct. Dkt. 703 at 6 (citing *Woolworth*, 344 U.S. at 233). Defendants maintain that *Woolworth* "says nothing about punishment." Dkt. 685 at 23. The Court is hesitant to accept this conclusion, as the very paragraph Cox cites includes: "[e]ven for uninjurious and unprofitable invasions of copyright the court may, if it deems just, impose a liability within statutory limits to sanction and vindicate the statutory policy." *Woolworth*, 344 U.S. at 233.

For these reasons, and due consideration of the Parties' additional arguments, overall profit evidence and "the need to punish Cox" instruction were both within the bounds of the law for the jury's consideration.

Accordingly, the Court will not upset the jury's measure of $99,830.29 per work based on Federal Rule of Civil Procedure 59.

2. Violation of Due Process

Having rejected Defendants' arguments thus far, the Court proceeds to consider Cox's constitutional claims. In *St. Louis, I. M. & S. Ry. Co. v. Williams,* the Supreme Court upheld an Arkansas state statutory damages award against a railroad company charging rates above what the statute prescribed. 251 U.S. 63 (1919). The *Williams* court acknowledged that the damages were "essentially penal," and, even if the award is paid to private parties rather than the state, "nor does . . . [that] require that it be confined or proportioned to his loss or damages." *Id.* at 66. The states contravene the Fourteenth Amendment, the court said, "only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Id.* at 66-67.

Cox frames *Williams* to say that statutory damages awards *can* be unconstitutional if they are so severe, oppressive, and disproportioned to the offense they they are obviously unreasonable. *Id.* Cox argues that the award is shocking, and that the constitutional inquiry must include proportionality between the offense and the magnitude of the statutory damages award. Defendants also claim that Cox's underlying conduct was not so reprehensible as to warrant a $1 billion award. Defendants say,

> In short, Cox's infringement involved no misappropriation or exploitation of Plaintiffs' works; was a tiny and incidental part of an otherwise lawful, socially valuable activity

> (providing high-speed internet access); was similar in most key respects to conduct that Plaintiffs expressly allowed other ISPs to engage in; and occurred in spite of Cox's active efforts to discourage direct infringement via warnings, soft suspensions, and—in rare cases—terminations.

Dkt. 703 at 16. Defendants cite to *Golan v. Freeeats.com, Inc.*, a Telephone Consumer Protection Act (TCPA) case, where the Eighth Circuit affirmed a finding that the statutory damages were unconstitutional. 930 F.3d 950 (8th Cir. 2019). Cox describes itself and the *Golan* defendants as "relatively non-culpable in light of the evils that the statute is intended to remedy." Dkt. 703 at 17.

The aggregate damages are especially important to consider when facing a due process challenge, Defendants continue, because it amplifies disproportionate damages to make them "severe and oppressive" under *Williams.* The absolute amount is what matters, Cox says, as in the *Golan* case, where the Eighth Circuit found a $1.6 billion award wholly disproportioned and obviously unreasonable based on the offense.

On the other hand, Sony cites *Williams* as an instance where the Supreme Court upheld an award approximately 113 times the $0.66 violation, showing great deference to legislative guidance, and recognizing that the award may address "the public wrong rather than the private injury." *Id.* at 66; *see* Dkt. 697 at 23 (quoting *Capitol Records*, 692 F.3d at 909). Sony also reiterates the extraordinarily deferential standard of review. In this case, where the award is more than $50,000.00 below the statutory cap, “an award of this magnitude was foreseeable and is ‘not so severe and oppressive as to be . . . obviously unreasonable.’” *John Wiley & Sons*, 327 F. Supp. 3d at 635 (alteration original) (quoting *Williams*, 251 U.S. at 67-68). Plaintiffs argue there are salient differences between the facts at bar and those in Cox’s cited authorities—which are based on inapposite statutory schemes and divergent conduct.

“Because Congress specifically determined the appropriate statutory range for damages in trademark and copyright actions, a court's review of such a reward ‘is *extraordinarily* deferential.’” *John Wiley*, 327 F. Supp. 3d at 635 (emphasis added) (quoting *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007)). But Defendants are correct to say there is a possibility, however slight, for statutory awards within the established range to be unconstitutional; the underlying award here is not.

While not *per* se constitutional, an award within range, such as “awarding $100,000 out of a possible $150,000 on Plaintiffs’ copyright claims . . . [is] foreseeable.” *John Wiley*, 327 F. Supp. 3d at 635. Congress published an infringer’s potential liability on the face of the statute in § 504(c), providing clear notice and undercutting Cox’s repeated arguments that “the magnitude of the award is shocking.” *See, e.g.*, Dkt. 685 at 19. Whereas a defendant ignorant of the statute might be shocked by a similar outcome, there is ample support that Cox knew about both the number of infringement notices and the requirements of the DMCA. *See, e.g.*, PX 335, Feb. 19, 2010 email from Jason Zabek (lamenting Cox’s copyright compliance obligations, the head of the Abuse Team wrote, "F the dmca!!!"). As there is no potential ambiguity in construing the statutory dollar amounts, and Cox was keenly aware of the volume of infringement notices it received, the product of these two values was reasonably foreseeable. The $99,830.29 per-work award is well below Congress's $150,000.00 cap.

Cox cites to *Golan* in its representation "that it is '[t]he absolute amount of the award, not just the amount per violation,' that matters in determining disproportionality under *Williams*." Dkt. 703 at 17 (quoting *Golan*, 930 F.3d at 963 (quoting *Capitol Records*, 692 F.3d at 910)). But Defendants overstate the emphasis on the absolute amount. Cox asserts, "it is '[t]he absolute amount of the award . . . ' that matters," whereas the *Golan* court actually quotes *Capitol Records* to say, "[t]he absolute amount of the award . . . is relevant." *Id.* To be clear, though the absolute amount is not all that matters, it is relevant to the constitutional inquiry, and the Court treats it as such here.

What is more, Defendants support their absolute amount, not per-work, argument by asking the Court to consider an alternative world. Cox claims that, were Plaintiffs to prevail on this issue—and based on the volume of infringement MarkMonitor was detecting—Cox might be liable "for $1 billion *per day*—on an annualized basis, roughly the gross domestic product of Ireland—without running afoul of constitutional limits." Dkt. 703 at 17. "That outcome," Cox says, "is absurd." *Id.* In response, the Court need not go further than to say this very hypothetical is impossible, and Cox made sure of it by capping the number of infringement notices it would accept from

Plaintiffs, significantly limiting the number of infringements and works in suit. It would be arguably absurd for the Court to alter a jury award on this basis.

Cox also cites to *Parker v. Time Warner Entertainment Co., L.P.*, for the proposition that combining the effects of "'a statutory scheme that imposes minimum statutory damages awards' with a 'mechanism that aggregates many claims'" may invoke the Due Process clause. Dkt. 685 at 20 (quoting *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003)). Plaintiffs accurately explain that *Parker* is inapposite to the instant case. Aside from the fact that *Parker* was not a copyright case and operated under a distinct damages scheme, the main disconnect is that *Parker* was discussing class certification; the "mechanism" to which the *Parker* court refers is a class action, and there is no such "mechanism" here.

Further, the award is lawful based on the conduct and related data and information in the record. The jury had broad discretion to characterize Cox's conduct, as the jurors observed each witness and assigned credibility to the evidence put before them. As discussed *supra* Part II.B, the jury's findings of vicarious liability, contributory liability, and willfulness are reasonable on the trial record. Even so, Defendants again contend that the "offense," or underlying conduct, in this case does not merit the damages, as there is a lack of proportionality.

Golan is instructive, Defendants say, because the court found \$1.6 billion to be a "shockingly large amount" and in violation of *Williams.* But Defendants cannot claim to be aligned with the defendant in

Golan, where the statutory damages were fixed, the defendant "plausibly believed it was not violating the TCPA," the violation lasted approximately six days, and "the harm to the recipients was not severe." *Id.* at 962-63; *see also id.* at 959 ("The harm here was the receipt of two telemarketing messages without prior consent."). Cox faced damages that were not fixed, but rather flexible to the tune of $149,250.00, the violations continued over a period of years, and the evidence allowed a reasonable jury to determine that the harm to Plaintiffs was willful and severe.

Moreover, Cox refers to itself as "relatively non-culpable in light of the evils that the statute is intended to remedy." Dkt. 703 at 17. Cox's leadership, however, effectively summarized its supposed termination policy for repeat infringers in an internal email: "DMCA = reactivate." Trial Tr. 1665:10-11 (Sikes) (referencing Bates No. COX_SONY_510844-46). This suggests conduct in direct and deliberate contravention of the statute's intentions.

Ultimately, Defendants offer hypothetical examples of unlawful things Cox did *not* do, but fail to demonstrate why the trial record cannot support the damages award. The Court is not compelled to find the award unconstitutional because, setting the actual facts aside, in Cox's words, "considering] an alternative world," the conduct could have been worse. Dkt. 703 at 16.

The Court has considered these and Defendants' additional arguments, none of which are availing against an in-range award with competent evidentiary support.[32] The aggregate award, while substantial, is not unconstitutional.

C. Conclusion: Motion for Remittitur, or, in the Alternative, a New Trial

In sum, Plaintiffs were well within their rights to elect both a jury trial and statutory damages. After significant deliberation, the jury awarded $99,830.29 per work, well within the Act's statutory range of $750.00-$l50,000.00. 17 U.S.C. § 504(c)(2).

The jury heard evidence justifying its finding of willful infringement, and, therefore, acted within the appropriate statutory range. In light of all facts of the case, the jury could lawfully consider a range of factors and objectives, including, *inter alia,* to sanction and to punish. There is nothing before the Court to suggest that the per-work award is improper; the Court cannot usurp the broad discretion afforded a statutory damages award simply because the case is no longer with the jury. There is no basis on which to disturb the reasonable findings of the jury, and, therefore, the Court defers to the verdict rendered.

IV. CONCLUSION

For the reasons stated herein, and upon due consideration, Defendants' Renewed Motion for Judgment as a Matter of Law (Dkt. 681) is hereby **GRANTED IN PART AND DENIED IN PART.** Pursuant to Part II.B.3.b.iv of this opinion, *Procedural Considerations and Re-Calculation*, the

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[32] In affirming a $20,000.00 per-work award within the $750.00-30,000.00 range, the Fourth Circuit simply said the argument in that case that an "award[] within the statutory range [is] constitutionally excessive [] is an unavailing argument." *Tattoo Art*, 498 Fed. App'x at 348.

number of works in suit shall be re-calculated to address multiple copyrights asserted in one work as indicated in 17 U.S.C. § 504(c)(1).

The Motion for Remittitur or, in the Alternative, a New Trial (Dkt. 683) is hereby **DENIED.** Total statutory damages shall be the product of the total number of works in suit and $99,830.29.

Judgment shall enter once the number of works in suit is finalized.

It is **SO ORDERED**.

June _2_, 2020	________________________
Alexandria, Virginia	Liam O'Grady United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1168

(1:18-cv-00950-LO-JFA)

SONY MUSIC ENTERTAINMENT; ARISTA MUSIC; ARISTA RECORDS, LLC; LAFACE RECORDS LLC; PROVIDENT LABEL GROUP, LLC; SONY MUSIC ENTERTAINMENT US LATIN LLC; VOLCANO ENTERTAINMENT III, LLC; ZOMBA RECORDINGS LLC; SONY/ATV MUSIC PUBLISHING LLC; EMI AI 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., 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 COMPANY, INCORPORATED; STONE AGATE MUSIC; SCREEN GEMS-EMI MUSIC, INCORPORATED; STONE DIAMOND MUSIC CORP.; ATLANTIC RECORDING CORPORATION; BAD BOYS RECORDS LLC; ELEKTRA ENTERTAINMENT GROUP, INCORPORATED; FUELED BY RAMEN LLC; ROADRUNNER RECORDS, INC.; WARNER-TAMERLANE PUBLISHING CORPORATION; WB

MUSIC CORPORATION; UNICHAPPELL MUSIC, INCORPORATED; RIGHTSONG MUSIC INC.; COTILLION MUSIC, INCORPORATED; INTERSONG U.S.A., INC.; UMG RECORDINGS, INCORPORATED; CAPITOL RECORDS, LLC; UNIVERSAL MUSIC CORPORATION; UNIVERSAL MUSIC-MGB NA LLC; UNIVERSAL MUSIC PUBLISHING INC.; UNIVERSAL MUSIC PUBLISHING AB; UNIVERSAL PUBLISHING LIMITED; UNIVERSAL MUSIC PUBLISHING MGB LIMITED; UNIVERSAL MUSIC - Z TUNES LLC; UNIVERSAL/ISLAND MUSIC LIMITED; UNIVERSAL/MCA MUSIC PUBLISHING PTY. LIMITED; POLYGRAM PUBLISHING, INC.; SONGS OF UNIVERSAL, INC.; WARNER RECORDS, INC., f/k/a W.B.M. Music Corp.; WARNER CHAPPELL MUSIC, INC., f/k/a Warner/Chappell Music, Inc.; W.C.M. MUSIC CORP., f/k/a W.B.M. Music Corp.,

Plaintiffs – Appellees,

and

NONESUCH RECORDS INC.; WARNER BROS. RECORDS, INC.; WARNER/CHAPPELL MUSIC, INC.; W.B.M. MUSIC CORP.; 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 Corporation; RONDOR MUSIC INTERNATIONAL,

Plaintiffs,

v.

COX COMMUNICATIONS, INCORPORATED; COXCOM, LLC,

Defendants – Appellants.

INTERNET ASSOCIATION; ELECTRONIC FRONTIER FOUNDATION; CENTER FOR DEMOCRACY AND TECHNOLOGY; AMERICAN LIBRARY ASSOCIATION; ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES; ASSOCIATION OF RESEARCH LIBRARIES; PUBLIC KNOWLEDGE; NTCA THE RURAL BROADBAND ASSOCIATION; CTIA - THE WIRELESS ASSOCIATION; USTELECOM THE BROADBAND ASSOCIATION; INTERNET COMMERCE COALITION; INTELLECTUAL PROPERTY LAW PROFESSORS,

Amici Supporting Appellant,

and

NATIONAL MUSIC PUBLISHERS' ASSOCIATION; NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL; SONGWRITERS OF NORTH AMERICA; COPYRIGHT ALLIANCE,

Amici Supporting Appellee.

FILED: March 19, 2024

O R D E R

The court denies the petition for rehearing en banc and the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Harris, Judge Rushing, and Senior Judge Floyd.

For the Court
/s/ Nwamaka Anowi, Clerk

APPENDIX D

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

Video Deposition of J.C. Fuenzalida
[pp. 1702:22-1703:10]

* * *

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 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.

* * *

APPENDIX E

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 examination of W.H. Lehr
[pp. 1786:14-1791:4]

* * *

Q. Dr. Lehr, did you reach any conclusions about the relative value and benefit to Cox of retaining repeat infringing subscribers?

A. Yes, I did. There's -- I considered several types of evidence to -- regarding this matter.

Q. And could you walk us through the basis for this opinion.

A. Yeah. First off, when Cox sells its broadband service, it doesn't have just a single, you know, broadband service. It offers different tiers. You know, like a -- you know, a low tier service that's less expensive, provides a lower data rate and tells the customers that, you know, their data allowance is going to be less. And that's suitable for people that are going to be really light broadband users.

And then it has higher tiers. And the higher the tier, the higher the price for the service, the more you get.

So it's like a lot of things. So it is sort of if you want to get a fully-loaded car, you pay more for the extras. You want to have broadband that runs really fast and has a big data cap, supports multiple users in your household, these sorts of things, you get a higher tier service. So --

Q. You talked about data, but you also just mentioned speed. What does this -- how does the speed impact the tiers?

A. Well, they --

Q. Or relate to the tiers.

A. They -- when they define the nature of the service, they also tell you what its likely performance is going to be, you know, so what – they'll say a data rate up to this certain speed, and sort of what's the average data rate you could expect.

And so, for certain activities, for example, downloading files, having something like BitTorrent work and having a usable experience, you need -- the faster your service is, the faster the files will download, the better the experience you'll have if, for example, you're using it to infringe, which is what it's principally used for, and the better the experience other subscribers in the BitTorrent, you know, world will have when they pull the file from you, you know.

So if you try to basically, you know, download a file and the connection is too small, it's like trying to drive on the highway in a Model T Ford, you know. It's not going to be a pleasant experience.

You know, whereas if you have a very fast speed service, you'll download files quickly, you can download more of them. And you'll also, you know, have -- it won't interfere with other things that you're doing.

Q. Now, on this notion of -- the second and third point: P2P consumes more bandwidth and was a key driver of Cox's bandwidth.

Did you prepare a slide showing some of the information you considered?

A. Yeah, I did. I mean, what's important to understand is that it -- you know, the broad -- the companies that provide broadband service have to manage their network and provision their network for the peak traffic loads. And they also want to look at sort of what people are doing and what -- you know, what kind of services they have so they can give those customers the experience those customers, you know, want and expect.

And so, they look at the different types of traffic. And if you have someone that all they're doing is e-mail occasionally, they're not moving a lot of data and they're not -- they don't need a very fast high speed service.

If someone's doing something like peer-to-peer, That's one of the most intensive -- bandwidth intensive services, both on the upload and the download, that broadband subscribers do.

And this slide is -- you know, pieces out of a consultancy report that was prepared by this company, inCode that, you know, provided advice to Cox on sort of, you know, what they should be expecting in the future, what traffic looked like in the Internet, what traffic looked like, and what other, you know, broadband providers around the country were doing.

And what this one says is basically what I've been saying. Is that peer-to-peer is the most bandwidth intensive category. And this one shows that, you know, peer-to-peer households were 13 percent of all broadband households. Which is a much higher number, for example, than the 60,000 subscribers that have been identified here relative to the 4.5 million broadband subscribers that Cox had.

So 60,000 over 4.5 million is well less than 13 percent. Which would suggest and is consistent with the inference I make that we were only observing a subset of the actual infringement that was happening on the network.

But this is -- this one is showing that this is a heavy use thing.

Now, the lower chart is showing the forecast that these consultants prepared for sort of the typical household's monthly usage. And so, there are three lines here. There's a yellow line, a red line, and a green line. And in its models for coming up with these forecasts, it characterizes what these firms -- you know, what these types of households do.

So the yellow lines are households that are doing -- you know, using the Internet relatively lightly. And their bandwidth demand is relatively low. And they're candidates for this Starter or Essential tier, the lower priced services, you know, these lower dark blue bands that run across.

But if you're in the red band, you need to be in the Preferred tier.

And if you're a green type of customer, you need to be the Premiere band or the Ultimate tier because your utilization doesn't fit with the experience you have.

Now, the users of peer-to-peer are most likely to be in this green band or the red band, but certainly not in this yellow band.

So just understanding the character of what peer-to-peer is and what people are doing, and understanding that peer-to-peer is almost all infringing activity, Cox is, you know, listening to and knows -- this is evidence that Cox internally knew that the customers that were doing peer-to-peer were more likely to be customers and candidates for its more expensive broadband services.

So that's a piece of evidence. That's some of the evidence that goes with the general understanding of how the business operates.

* * *

APPENDIX F

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-examination of C. Bakewell
[p. 2467:17-25]
* * *

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.

* * *

APPENDIX G

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

Cross-examination of S. Mencher

[p. 2741:5-10]

* * *

Q. And generally, the higher the bandwidth and the higher the speed, the higher the price for that service, correct?

A. Yes.

Q. And the different prices that Cox charges its tiers of internet service factor into Cox's profitability?

A. Yes.

* * *