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Will the Music Industry Continue to Win Its Copyright Battle Against ISPs?

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For the last 20 years, the music industry has been in a pitched battle to combat unauthorized downloading of music. Initially, the industry focused on filing lawsuits to shut down services that offered peer-to-peer or similar platforms, such as Napster,[1] Aimster,[2] and Grokster.[3]

For a time, the industry started filing claims against individual infringers to dissuade others from engaging in similar conduct.

Recently, the industry has shifted gears and has begun to focus on internet service providers ("ISPs"), which provide internet connectivity to their users. So far, with one $25 million verdict and one $1 billion verdict against ISPs, the campaign has been a resounding success for the music industry.

ISPs AS TARGETS

The industry's opening salvo against ISPs was launched in 2014 when BMG sued Cox Communications,[4] an ISP with over three million subscribers. BMG's allegations were relatively straightforward. BMG alleged that Cox's subscribers are engaged in rampant unauthorized copying of musical works using Cox's internet service, and Cox did not do enough to stop it.

While the Digital Millennium Copyright Act ("DMCA") provides safe harbors if an ISP takes appropriate action against "repeat infringers," BMG alleged that Cox could not avail itself of this safe harbor based on its failure to police its subscribers.

In December 2015, the *BMG v. Cox* case went to the jury and resulted in a verdict in favor of BMG. The jury found that Cox's subscribers had used its service to infringe copyrighted works, and while the jury held that Cox was not liable under a theory of vicarious liability, it was liable under a theory of contributory infringement for the acts of its subscribers. The jury awarded $25 million in statutory damages to BMG.

With the playbook in hand, the music industry has sought to replicate BMG's success in the *Cox* case. Record labels have filed a number of additional cases against ISPs alleging they are secondarily liable for the direct copyright infringement of their subscribers under both contributory and vicarious liability theories.

- In April 2017, a number of record labels filed an action against Grande Communications, a Texas based ISP, in the Western District of Texas.[5] The

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case is currently scheduled for a jury trial in September 2020.

- In July 2018, a number of record labels (excluding BMG, which had already prevailed against Cox) filed a follow-on case against Cox in the Eastern District of Virginia based on their own copyrights.[6] In late 2019, the case went to the jury which returned a verdict for $1 billion in statutory damages. The district court is currently considering post-trial briefing for remittitur and a new trial.

- In March 2019, a number of record labels filed an action in the District of Colorado against Charter Communications,[7] one of the largest ISPs in the United States, with more than 22 million subscribers. The case is currently scheduled for a jury trial in November 2020.

- In March 2019, a number of record labels also filed an action in the Middle District of Florida against Bright House Networks LLC,[8] which is now a subsidiary of Charter but was previously one of the top 10 ISPs in the country. The case is currently scheduled for a jury trial in early 2021.

- In August 2019, a number of record labels filed an action in the District of New Jersey against RCN,[9] which is a smaller ISP that provides internet services to customers throughout a number of major metropolitan regions in the United States, including New York, Chicago, Boston, Philadelphia, and Washington D.C. RCN has not yet responded to the complaint, and no trial date has been set

VICARIOUS LIABILITY

While so far the music industry has been quite successful in these cases, the industry has not always been successful in establishing vicarious liability.

In addition to evidence of direct infringement by the subscriber, vicarious infringement would require establishing that the ISP has: (1) the right and ability to supervise the infringing activity, and (2) a direct financial interest in the activity.

In these ISP cases, the direct financial interest factor would be the more difficult factor to establish in that ISPs charge infringing and non-infringing subscribers the same amount for the service.

Although BMG prevailed in the *BMG v. Cox* case, the jury rejected BMG's vicarious infringement claim. Post-trial, BMG moved for judgment as a matter of law on its vicarious infringement claim, and while upholding BMG's overall win, the district court rejected BMG's motion for judgment as a matter of law on that claim. The district court held there was substantial evidence supporting the jury's finding that Cox did not have "an obvious and direct financial interest" in the infringing activity.[10]

In the *UMG v. Grande Communications* case, the district court dismissed the record labels' vicarious infringement claim, holding they had "failed to plead facts showing that Grande receives a direct financial benefit from its subscribers' infringing conduct."[11]

In the *Sony v. Cox* case, Cox moved for summary judgment on the record labels' vicarious infringement claims, but the district court let the vicarious infringement claim go to the jury, which returned a $1 billion statutory damages award on both contributory and vicarious infringement. The district court is currently considering post-trial briefing for remittitur and a new trial.

In both the *Warner Bros. v. Charter* and the *UMG v. Bright House* cases, the defendant ISPs filed motions to dismiss the record labels' vicarious infringement claims. The Bright House motion to dismiss has not been decided, but the magistrate judge recently issued a decision on Charter's motion to dismiss. This time, things did not go well for the ISP on the vicarious infringement question.

In rejecting Charter's motion to dismiss, the magistrate judge first addressed whether Charter has a direct financial interest in the alleged infringement by its subscribers. Charter argued that the subscription fees it charges infringing users constitute only an "indirect benefit" and that "the infringing activity must be more than an 'added benefit' to a subscription; it must be the attracting factor, the 'draw' for subscribers." The magistrate judge held that the record labels allege that Charter's "failure to stop or take other action in response to notices of infringement is a draw to current and prospective subscribers to purchase and use [its] internet service to 'pirate' [the record label's] copyrighted works."[12]

On this basis, the magistrate judge held that the record labels had adequately alleged that Charter has a direct financial interest in the alleged infringement by its subscribers.

With respect to the right and ability to supervise the infringing activity, the magistrate judge found that the record labels had made a sufficient showing because Charter "can stop or limit the infringing conduct by terminating its subscribers' internet access."

It is notable that the *Charter* decision is at the motion to dismiss stage where the required showing is low. It is a magistrate judge's decision, and the plaintiffs have filed an amended complaint giving Charter another opportunity to brief the issue, so it will be subject to review again by the magistrate and ultimately the district court.

Thus, Charter may still prevail on the motion to dismiss, obtain dismissal of the vicarious liability claim on summary judgment after discovery, or perhaps ultimately prevail at trial.

Also, Charter may be able to establish that it is subject to the DMCA safe harbor and thus avoid a damage award altogether. Nonetheless, the decision is still a notable victory in the music industry's ongoing battle with ISPs.

With so many cases pending, we will see whether the music industry continues to prevail in its effort to hold ISPs liable for their subscribers' infringement.

Notes

1. *A&M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir. 2001).
2. *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).
3. *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).
4. *BMG Rights Management (US)LLC v. Cox Enterprises, Inc.*, 1:14-cv-01611-LO-JFA (E.D.Va.) (filed November 26, 2014).
5. *UMG Recordings, Inc. v. Grande Commc'ns Networks LLC*, 17-cv-365-DAE-AWA (W.D.Tex.) (filed April 21, 2017).
6. *Sony Music Entm't v. Cox Commc'ns, Inc.*, 18-cv-950-LO-JFA (E.D.Va.) (filed July 31, 2018).
7. *Warner Bros. Records Inc. v. Charter Commc'ns, Inc.*, 19-cv-874-MSK-MEH (D. Col.) (filed March 22, 2019).
8. *UMG Recordings Inc. v. Bright House Networks LLC*, 19-cv-710-MSS-TGW (M.D. Fla.) (filed March 22, 2019).
9. *UMG Recordings, Inc. v. RCN Telecom Services, LLC*, 3:19-cv-17272-MAS-ZNQ (D.N.J.) (filed August 27, 2019).
10. *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 199 F. Supp. 3d 958, 992 (E.D.Va. 2016).
11. *UMG Recordings, Inc. v. Grande Commc'ns Networks, LLC*, 17-cv-365-LY, 2018 U.S. Dist. LEXIS 32275, at *29 (W.D.Tex. Feb. 28, 2018), adopted by district court, ECF No. 78 (March 28, 2018*); see also, UMG Recordings, Inc. v. Grande Commc'ns Networks, LLC*, 17-cv-365-LY, 2018 U.S. Dist. LEXIS 160492, at *8 (W.D.Tex. Sept. 20, 2018) (denying motion to amend complaint based on additional evidence to support vicarious infringement claim), adopted by district court, ECF No. 208 (Oct. 15, 2018).
12. *Warner Bros. Records v. Charter Communs.*, No. 19-cv-00874-RBJ-MEH, 2019 U.S. Dist. LEXIS 184624, at *18 (D. Colo. Oct. 21, 2019).

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