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With DMCA Safe Harbor Removed, ISP's Blown Into Stormy Water: But Don't Grab the Life Rafts Yet

Safe Harbor limited, but not removed

- As an ISP, you must be responsive to knowledge of infringing users. Not terminating these users can result in barring use of "Safe Harbor"
- On the other hand, rights-holders cannot force a DMCA cause of action by flooding an ISP with DMCA complaints, and then accuse them of being non-responsive

This month the Eastern District of Virginia Court issued a landmark ruling in *BMG Rights Management LLC et al. v. Cox Enterprises Inc*, a highly contentions case between an internet service provider (ISP) and a large-scale music rights holder. The dispute was between Cox Communications, the ISP, and BMG Rights Management, a company holding copyrights for numerous musical artists and songs. BMG alleged there was a high volume of music that was improperly downloaded, or pirated, through Cox Communication's Internet service, and that when given notice of said infringements, Cox did not properly respond. On December 17 a jury found Cox guilty of both direct and contributory copyright infringement, however the real crux of the case was the ruling made in a motion for summary judgment, which made the above jury findings possible.

A little less than a month before the jury ruling, the Court held that Cox could not take advantage of the "Safe Harbor" against copyright liability available to ISP's under the Digital Millennium Copyrights Act (DMCA). To take advantage of this "Safe Harbor", the ISP must demonstrate it has:

> "*adopted and reasonably implemented, and informed subscribers and account holders of the service provider's system or network of, 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.*" 17 U.S.C. § 512(i)(1)(A)

In this motion for summary judgment, BMG argued that Cox had not "adopted and reasonably implemented" a policy, and hence could not take advantage of this "Safe Harbor" for three reasons. First, Cox did not respond to numerous infringement complaints from BMG. Second, Cox had improperly set a "hard-limit" on the number of infringement complaints it would accept per day. Third, that Cox did not terminate repeat offenders they had knowledge of. It is at this point the ruling becomes somewhat dense, but incredibly important for both ISP's and rights holders going forward.

BMG's first argument of Cox's non-response to infringement notices rests on BMG's practice of employing a copyright analytics and enforcement firm named Rightscorp. Rightscorp uses software to detect downloads of pirated music through clients such as Bittorrent. Upon discovery of an instance of infringing downloading, Rightscorp sends an automated infringement complaint to the ISP, including a pre-formed settlement request (usually $10-$20 per infringing song downloaded). Cox had an explicit policy of not accepting infringement complaints coupled with settlement demands, and warned Rightscorp of such, saying they would accept complaints once they were free of settlement demands. Rightscorp however not only continued to send these demand laden notifications, but in incredible volume; 24,000 notices per day. This practice essentially guaranteed that Cox would not accept, let along read, said complaints; Cox had a

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"A service provider's implementation is reasonable if it terminates a repeat infringer's access in appropriate circumstances" – Having knowledge is always an "appropriate circumstance"

policy of not receiving demand-laden complaints, and had a hard-limit of 200 complaints per day. This summarizes BMG's first two arguments in summary judgment. It is important to note, these two issues were ***NOT*** decided in summary judgment. Rather, Cox was barred form invoking the DMCA "Safe Harbor" for the third issue in summary judgment, not terminating repeat offenders they had knowledge of.

This holding by the Court is key when it comes to the interplay of rights-enforcement firms (such as Rightscorp) and ISP's. Rightscorp has a longstanding practice of issuing high volume infringement complaints with pre-formed settlement demands. This practice has traction when complaints are sent to individuals, who usually will pay a settlement to avoid litigation. ISP's are usually immune from liability if they pass these complaints along to individuals or take action internally. In this case however, Cox argued these notifications were sent in a format and volume that Rightscorp fully knew Cox would not accept, and hence could not take the requisite action under the DMCA; BMG and Rightscorp were intentionally "gaming" the system in a way as to manufacture a DMCA cause of action.

If the Court had affirmatively ruled on BMG's first two issues, involving the complaints sent through Rightscorp, this would have given rights-enforcement firms a very powerful sword to go after ISP's. If ISP's ignored or otherwise did not act on complaints, even if sent in a form and manner known to be unlikely received or blocked by the ISP, the ISP could still be liable.

Rather than this potentially sweeping implication, the ruling itself was comparatively benign. Towards their third issue, BMG offered evidence of emails and other communication between Cox administrators showing they knew of high volume downloaders of infringing music, but did not terminate their services because they were high paying customers. The Court took only this knowledge and communication into consideration when denying Cox use of "Safe Harbor", rather than the Rightscorp complaints because those were never seen, and hence never acted on, by Cox.

In conclusion, instead of imbuing rights-enforcement firms with enhanced power to levy liability against ISP's, or on the other hand, insulating ISP's against copyright liability even in the face of knowing inaction against infringing users, the Court could be said to have effectively punted; an important result none-the-less. As an ISP, if you have actual knowledge of infringing users and don't take action terminating said users (or in this case, actively seek to retain said users), you will be in violation of the DMCA, and liable for potentially huge damages; $25,000,000 in the instant. As a rights-holder or an enforcement firm tasked with enforcing someone's rights, flooding an ISP with DMCA complaints, then accusing them of being non-responsive, is not a legitimate litigation tactic.

The courts are slowly moving closer to a narrow definition of liability "Safe Harbor" for ISP's, where they used to effectively be given *carte-blanche*. While this case will not result in the deluge of copyright cases media pundits claim, it certainly adds to the trend of boxing in the previously vast "Safe Harbor" available to ISP's. As always, the storm of litigation continues to blow strong outside that

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