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U.S. Court of Appeals for the Fourth Circuit Opens Door to Future ISP Defenses in Vacating \$1 Billion Copyright Judgment Against Cox Communications

By Ari Meltzer, David E. Weslow and Stephanie Rigizadeh

The U.S. Court of Appeals for the Fourth Circuit has vacated an unprecedented \$1 billion judgment against Cox Communications, Inc. (Cox) for copyright infringement based on Cox's customers' actions. In a highly anticipated decision¹ for internet service providers (ISPs) and content owners, the Fourth Circuit, in *Sony Music Entertainment v. Cox Communications*, reversed the district court's vicarious liability verdict against Cox.

Additionally, while the court left in place the judgment against Cox for contributory copyright infringement, it provided a potential path for ISPs to challenge similar claims in future cases.

The authors, attorneys with Wiley Rein LLP, may be contacted at ameltzer@wiley.law, dweslow@wiley.law and srigizadeh@wiley.law, respectively. The authors' firm filed an amicus brief with the Fourth Circuit in support of Cox on behalf of NTCA – The Rural Broadband Association, CTIA – The Wireless Association, and USTelecom – The Broadband Association.

HISTORY: PAVING THE WAY FOR A \$1 BILLION JURY VERDICT

The *Sony* opinion follows a 2018 decision in *BMG v. Cox*,² in which the Fourth Circuit found that Cox was ineligible for safe harbor under Section 512(a) of the Digital Millennium Copyright Act (DMCA). In *BMG*, the court concluded that Cox did not reasonably implement a repeat infringer policy, which is required to invoke a safe harbor defense under the DMCA. Following the Fourth Circuit's decision, *BMG* and Cox entered into what *BMG* characterized as a "substantial settlement."

Soon thereafter, Sony and other Recording Industry Association of America (RIAA) members sued Cox for contributing to and/or benefiting from copyright infringement by Cox's subscribers. The jury found that Cox was vicariously and contributorily liable for users' infringement of 10,017 copyrighted works. In a decision that sent shockwaves throughout the industry, the jury awarded Sony \$1 billion in statutory damages.

Cox appealed the district court's decision, raising questions regarding whether ISPs can be secondarily liable for users' copyright infringement.

Specifically, Cox appealed the district court's findings that it was vicariously and contributorily liable for users' copyright infringement.

Additionally, Cox challenged how the district court calculated damages for certain copyrighted works.

THE LONG-AWAITED FOURTH CIRCUIT DECISION: A VACATED \$1 BILLION JUDGMENT – BUT QUESTIONS REMAIN

On appeal, the Fourth Circuit reversed in part, vacated in part, and affirmed in part the district court's decision. Although the court vacated the jury's \$1 billion award for Sony, it remanded the matter for a new trial on damages.

First, the Fourth Circuit reversed the district court's failure to find as a matter of law that Cox was not vicariously liable for the infringement of its subscribers. To be liable for vicarious copyright infringement, a party must profit directly from the infringement and have a right and ability to supervise the infringement. In finding that Cox did not profit directly from the infringement, the Fourth Circuit reasoned that users' monthly internet service fees did not constitute "a financial benefit flowing directly from *the copyright infringement itself*." Because Sony failed to prove that Cox directly profited from users' infringement, as opposed to profiting from the broader provision of internet access services, the Fourth Circuit concluded that Cox could not be vicariously liable for subscriber downloading and distribution of copyrighted works.

Second, the court affirmed the district court's grant of summary judgment against Cox for contributory copyright infringement while leaving a key question about contributory liability unresolved. Cox argued that it could not have been contributorily liable because the notices it received of past infringement by subscribers did not establish knowledge on the part of Cox that they were "substantially certain to infringe

again." The Fourth Circuit did not address this argument on the merits, however, finding that "unfortunately" Cox forfeited its right to raise this argument by failing to introduce it before the district court. As a result, this key question about whether notices of users' past infringement can constitute sufficient knowledge to trigger contributory liability remains unresolved.

Because the jury's verdict did not distinguish between liability for vicarious copyright infringement and contributory copyright infringement, the Fourth Circuit remanded the case for a new trial on damages.

Finally, the court affirmed the district court's denial of judgment as a matter of law regarding Cox's request to reduce damages for certain copyrighted works including derivative works and compilations. Essentially, Cox argued that the presence of derivative works and compilations "inflated" the number of copyrighted works relevant to the case. As a result, Cox claimed that the court gave Sony an excessive damages award. Agreeing with the district court's analysis, the Fourth Circuit explained that the evidence presented to the jury for both derivative works and compilations failed to identify overlapping recordings and compositions that would inflate damages.

LOOKING AHEAD: POTENTIAL IMPACT ON ISPS

ISPs and copyright owners alike will be watching closely to see whether the new jury finds Cox liable for anywhere near the \$1 billion in statutory damages that the original jury awarded.

Meanwhile, ISPs will have to wait for another case for further clarity on the issue of whether notices of prior infringement by subscribers provide ISPs with the requisite knowledge that the customers are "substantially certain to infringe again" in the future.

Notes

1. <https://www.ca4.uscourts.gov/opinions/211168.P.pdf>.
2. <https://copyrightalliance.org/wp-content/uploads/2018/02/BMG-v-Cox-Opinion-4th-Cir.pdf>.

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