SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, Plaintiff, v. COX ENTERPRISES, INC., COX COMMUNICATIONS, INC., AND COXCOM, LLC, Defendants.	Index No. ____________/2015

COMPLAINT

Plaintiff Certain Underwriters at Lloyd's, London, Syndicates 623 and 2623 subscribing to policy W132E4140301 ("Beazley"), states by way of a complaint against defendants Cox Enterprises, Inc., Cox Communications, Inc., and CoxCom, LLC (collectively, "Cox") as follows:

NATURE OF THE ACTION

1. This is an action for a declaratory judgment that Beazley does not owe insurance coverage under AFB Media Tech Policy No. W132E4140301 issued to Cox for the period December 1, 2014 to December 1, 2015 (the "Policy") for claims against Cox alleging contributory and vicarious copyright infringement.

2. Cox is, among other things, a communications company that provides high-speed internet service. Some of Cox's customers use that internet service to download and distribute copyrighted material, such as music and movies, without the permission of the copyright holder. When they learn of such a download or distribution, copyright holders may notify Cox that Cox's customers infringed the holders' copyrights. In the normal course, Cox would forward

infringement notices to its supposedly infringing customers and ask the customers to remove or disable access to the copyrighted material.

3. In October 2010, Cox made an intentional business decision not to forward certain infringement notices to its customers and not to terminate or block those customers' accounts. A year later, Cox intentionally decided to block receipt of and ignore those notices. By letter dated January 9, 2012, Cox was advised by an agent of copyright holders that if it did not forward those notices to its customers, it would be exposed to claims of contributory and vicarious copyright infringement. Cox continued to intentionally ignore the notices and did not forward them to its customers.

4. On November 26, 2014, two purported copyright holders, BMG Rights Management (US) LLC ("BMG") and Round Hill Music LP ("Round Hill"), filed a complaint against Cox in the Eastern District of Virginia seeking, among other things, damages for contributory and vicarious copyright infringement and a permanent injunction enjoining Cox from infringing BMG's and Round Hill's copyrights (the "BMG Claim"). The BMG Claim arose out of Cox's intentional refusal to forward infringement notices to its customers, its intentional blocking of its receipt of infringement notices, its intentional refusal to terminate its infringing customers' accounts, and its intentional refusal to block its infringing customers' access to copyrighted material.

5. Cox notified Beazley of the BMG Claim on May 15, 2015. Beazley informed Cox that the Policy does not cover the BMG Claim because (a) the claim was first made against Cox on November 26, 2014, before the inception date of the Policy; (b) the BMG Claim arose out of intentional and not negligent acts; (c) the BMG Claim did not arise out of acts in rendering internet services but rather Cox's business policy and practice of ignoring and failing to forward

infringement notices and refusing to terminate or block infringing customers' accounts; (d) the BMG Claim arose out of related and continuing acts committed before December 1, 2012, i.e. Cox's 2010 decision to ignore and not forward certain infringement notices or not terminate or block certain infringing customers' accounts; and (e) before December 1, 2012, Cox reasonably foresaw that its decisions and policies would be the basis of a claim.

6. By this action Beazley seeks a declaratory judgment pursuant to New York CPLR § 3001 that the Policy does not cover the costs arising from or related to the BMG Claim.

PARTIES

7. Certain Underwriters at Lloyd's London, Syndicates 623 and 2623 are underwriting syndicates that subscribed to the Policy issued in the Lloyd's of London insurance market. Notice of a claim under the Policy is required to be and was sent to Beazley at its office in New York County at 1270 Avenue of the Americas, New York, New York 10020.

8. Defendant Cox Enterprises, Inc. purports to be a leading communications, media, and automotive services company with revenues of more than $17 billion and approximately 55,000 employees. It is organized under the laws of Delaware, with its principal place of business at 6205 Peachtree Dunwoody Road, Atlanta, Georgia. Cox Enterprises, Inc. purports to be insured by the Policy and has sought coverage in New York.

9. Defendant Cox Communications, Inc. is an operating subsidiary of Cox Enterprises, Inc. and purports to be a multi-service broadband communications company that, among other things, provides high-speed internet access to its customers. Cox Communications, Inc. is organized under the laws of Delaware, with its principal place of business at 1400 Lake Hearn Drive NE, Atlanta, Georgia. Cox Communications, Inc. purports to be insured by the Policy and has sought coverage in New York.

10. Defendant CoxCom, LLC is a wholly-owned subsidiary of Cox Communications,

Inc. and purports to provide internet services to Cox customers in Virginia. CoxCom LLC is organized under the laws of Delaware, with its principal office located at 1400 Lake Hearn Drive NE, Atlanta, Georgia. CoxCom LLC purports to be insured by the Policy and has sought coverage in New York.

JURISDICTION AND VENUE

11. This Court has jurisdiction over the parties and the subject matter pursuant to CPLR §§ 301 and 302 because the parties have transacted continuous and substantial business in the State of New York and New York County, and this action arises from the parties' transaction of business and contract in the State of New York and New York County.

12. Venue is proper pursuant to CPLR § 503(a) because Beazley designated New York County.

THE INSURANCE POLICY

13. The Policy provides insurance coverage for the cost of defending and indemnifying insured claims first made and reported during the period commencing on December 1, 2014 and ending December 1, 2015 (the "Policy Period"). The Policy is a "claims-made policy" and does not provide coverage for claims first made against an insured or first reported to Beazley outside the Policy Period. A copy of the Policy is attached as Exhibit A.

14. To be covered by the Policy, insured claims must arise from negligent acts related to professional and technology based services, technology products, and information security and privacy. Here, the negligent acts must have been "in rendering" internet services and must have taken place on or after the Policy's December 1, 2012 Retroactive Date.

15. The Policy provides for a $15 million limit of liability in the aggregate, subject to a $1 million retention.

16. The Policy excludes coverage for certain matters, as specified in the Exclusions

section (Section V) of the Policy. Those applicable exclusions bar coverage for, among others, claims: (a) arising out of or resulting from any criminal, dishonest, fraudulent or malicious act, error or omission, or intentional or knowing violation of the law (Exclusion A); (b) for, arising out of or resulting from any act, error, omission, or incident committed or occurring prior to the inception date of the Policy (i) if certain individuals at Cox before December 1, 2012 knew or could have reasonably foreseen that such act, error, omission, or incident might be expected to be the basis of a claim or loss, or (ii) in respect of which Cox has given notice of a circumstance which might lead to a claim or loss to the insurer of any other policy in force prior to the inception date of this Policy, or the inception date of the first consecutive policy issued by the Underwriters of which this Policy is a renewal (Exclusion B); or (c) for, arising out of or resulting from any related or continuing acts, errors, omissions, incidents or events where the first such act, error, omission, incident or event was committed or occurred prior to the Retroactive Date (Exclusion C).

17. The Policy requires that if a claim is made against an insured, the insured shall, upon knowledge of such claim, forward as soon as practicable to Beazley's New York office written notice of such claim. The Policy is governed by New York law.

18. The foregoing description of the Policy is an incomplete summary of potentially applicable provisions and applicable exclusions. The parties' obligations are governed by all of its limits of liability, retention, exclusions, conditions, and other terms and conditions of the Policy.

BACKGROUND OF THE BMG CLAIM

I. Cox's 2010 Intentional Decision Not To Forward Certain Infringement Notices Or Terminate or Block Its Customers' Accounts

19. Cox provides internet services to millions of subscribers. Some of those

subscribers, using their Cox internet service, download and distribute copyrighted material, such as music and movies, without permission from the copyright holder. Since at least 2003, Cox has received notices from copyright holders that Cox's customers have infringed the holders' copyrights by using the internet service that Cox provided to download and distribute (without permission) copyrighted content.

20. Over time, the volume of infringement notices that Cox received grew into the millions annually. Cox began to limit the number of notices it accepted from copyright holders. Copyright holders began to retain enforcement agents to enforce their copyrights and recover money from the allegedly infringing internet users. One such enforcement agent is Rightscorp.

21. Beginning in 2010, infringement notices sent by enforcement agents to Cox included a demand that the Cox customer pay the copyright holder to avoid losing internet service. When Cox first began receiving such notices, Cox's in-house legal counsel intentionally concluded that the threat to pay money or lose internet service was inconsistent with governing law, and advised that Cox should decline to forward the notices to Cox customers. Cox intentionally decided at that time not to forward infringement notices containing threatening language to its customers and not to terminate or block those customers' accounts.

II. Cox's 2011 Intentional Decision To Ignore Rightscorp Infringement Notices

22. On March 9, 2011 Rightscorp, on behalf of its clients, began sending infringement notices to Cox that Rightscorp expected Cox to forward to Cox's allegedly infringing customers. The Rightscorp notices informed the internet user that his or her internet service could be suspended if the user did not make a monetary payment to settle the claimed infringement. Cox told Rightscorp that Cox would not accept notices with that language. Cox did not send those notices to its customers, terminate its customers' service, or blocking its customers' access to copyrighted material.

23. Later in March 2011, when Rightscorp continued to send notices without altering the language, Cox concluded that Rightscorp's infringement notices were not proper and implemented a policy and practice of intentionally not forwarding the notices to Cox's customers and not terminating or blocking the infringing customers' accounts.

24. In October 2011, Rightscorp began flooding Cox's inbox with thousands of notices. That same month, Cox's in-house legal counsel approved blocking Rightscorp's notices so that Cox would not receive them. Cox intentionally ignored the infringement notices it received from Rightscorp.

III. Cox's January 2012 Knowledge That Its Decisions Might Be The Basis of A Claim

25. In December 2011, Rightscorp began sending infringement notices to Cox on behalf of copyright holders BMG and Round Hill. Cox applied the same policy and practice it implemented in 2010 and had been applying to Rightscorp's notices since 2011: it intentionally ignored the notices, intentionally did not forward them, and intentionally did not terminate or block its customers' accounts.

26. Throughout 2010 and 2011, Cox representatives discussed the infringement notices with Rightscorp. In a January 9, 2012 letter to Cox's in-house legal counsel, Rightscorp advised that if Cox did not forward Rightscorp's infringement notices to Cox's customers, Cox would be exposed to claims of contributory and vicarious copyright infringement—the two very claims ultimately asserted in the BMG Claim. A copy of the letter without its enclosure is attached as Exhibit B.

27. Cox did not change its policy and practice; it continued to intentionally ignore and not forward notices from Rightscorp on behalf of BMG and Round Hill and intentionally did not terminate or block the accounts of its customers allegedly infringing BMG's and Round Hill's copyrights.

IV. The BMG Claim

28. On November 26, 2014, BMG and Round Hill initiated a lawsuit in the Eastern District of Virginia styled *BMG Rights Management (US) LLC v. Cox Enterprises, Inc.*, No. 1:14-cv-1611 (E.D. Va.) by filing a complaint against Cox alleging contributory and vicarious copyright infringement. BMG and Round Hill sought monetary damages and a permanent injunction enjoining Cox from infringing BMG's and Round Hill's copyrights. A copy of the complaint is attached as Exhibit C.

29. BMG and Round Hill allege they, through their agent Rightscorp, have provided Cox with notice of copyright infringements by Cox's customers. BMG and Round Hill further allege that Cox applied its infringement notice policy to these notices and intentionally ignored the notices, intentionally did not forward them, refused to terminate internet access for the allegedly infringing internet customers, and refused to block those customers' access to the copyrighted material.

30. Cox received a copy of the complaint on or about the same day it was filed. A Cox representative declined to comment on a Wall Street Journal article about the BMG Claim published on November 27, 2014. A copy of the Wall Street Journal article is attached as Exhibit D. BMG and Round Hill filed a first amended complaint on December 10, 2014.

THE INSTANT INSURANCE COVERAGE DISPUTE

31. By correspondence dated May 15, 2015, Cox notified Beazley (at Beazley's New York office) of the BMG Claim. Beazley and Cox representatives discussed the BMG Claim in May and July of 2015.

32. On July 31, 2015, Beazley advised Cox that the Policy does not cover the BMG Claim because, among others (a) the claim was first made against Cox on November 26, 2014, before the Policy's December 1, 2014 inception date; (b) the BMG Claim arose out of intentional

and not negligent acts; (c) the BMG Claim arose out of Cox's policy and practice of ignoring and failing to forward infringement notices and refusing to terminate or block infringing customers' accounts, not acts in rendering internet services; (d) the BMG Claim arose out of related and continuing acts committed before the Policy's December 1, 2012 Retroactive Date, *i.e.* Cox's 2010 decision to ignore and not forward certain infringement notices or not to terminate or block infringing customers' accounts; and (e) at least as early as January 9, 2012, *i.e.* before the Policy's December 1, 2012 Continuity Date, Cox reasonably foresaw that its decisions and policies would be the basis of a claim.

33. Cox and Beazley subsequently exchanged additional correspondence concerning Beazley's declination of coverage. During a telephone call on November 16, 2015, Cox advised Beazley that the trial of the BMG Claim is scheduled to begin on December 2, 2015.

34. Cox also informed Beazley that it has incurred defenses costs and fees in an amount that exceed the $1 million retention. Notwithstanding Beazley's denial of coverage, Cox continues to pursue coverage from Beazley.

DECLARATORY JUDGMENT

35. Beazley repeats and realleges paragraphs 1-34 above as if set forth fully herein.

36. An actual, ripe and justiciable controversy exists between Beazley and Cox regarding the parties' respective rights and obligations under the Policy.

37. Beazley is entitled to a declaration that based on all of its terms, conditions and exclusions, the Policy provides no coverage for the BMG Claim.

PRAYER FOR RELIEF

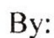
WHEREFORE, Beazley prays for judgment (a) declaring that the Policy provides no coverage for the BMG Claim; (b) awarding Beazley attorneys' fees, costs and other expenses; and (c) awarding Beazley such other and further relief as this Court deems just and proper.

JURY DEMAND

Beazley hereby demands a trial by jury on all claims so triable.

Dated: New York, NY
November 22, 2015

SIMPSON THACHER & BARTLETT LLP

By: 

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