

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

BMG RIGHTS MANAGEMENT (US) LLC, and)
ROUND HILL MUSIC LP,)
)
Plaintiff,) Case No. 1:14-cv-1611 (LOG/JFA)
)
v.)
)
COX ENTERPRISES, INC., COX)
COMMUNICATIONS, INC., and)
COXCOM, LLC,)
)
Defendants.)

**DEFENDANTS’ MOTION FOR INSTRUCTIONS REGARDING
MAY 15, 2015 ORDER ON MOTION TO COMPEL**

Plaintiffs have sued Defendants (“Cox”) for secondary copyright infringement. The alleged direct infringers were unidentified Cox subscribers, not named as defendants in this action (even as “John Doe” parties), who Plaintiffs claim might have been associated with certain specified IP addresses where Plaintiffs have purportedly identified infringing activity during a particular period of time. After filing suit, however, Plaintiffs filed a Motion to Compel the Identities of Direct Infringers, seeking information regarding 500 of the allegedly 150,000 subscribers implicated by Plaintiffs’ claims—the so-called “top” infringers (Doc. 71). On May 15, 2015, following a hearing, the Court entered an Order (Doc. 78) directing that:

[Cox] shall produce customer information associated with the “Top 250 IP Addresses recorded to have infringed in the six months prior to filing the Complaint” as identified in Exhibit 4 of [Plaintiffs’] Memorandum in Support of their Motion to Compel the Identities of the Direct Infringers (Docket no. 72). This production shall include the information as requested in Interrogatory No. 13, specifically: name, address, account number, the bandwidth speed associated with each account, and associated IP address of each customer. Defendants shall also provide a copy of any documents previously produced for

these IP addresses without the name, address, account number, and bandwidth speed being redacted.

The Court ordered that such information be produced within 21 days of the Order—that is, on or before June 5, 2015.

Cox timely provided the vast majority of the information that the Court has ordered. The process that Cox followed to comply with the Court’s Order is generally set forth in the Declaration of Stephanie Allen-Wang filed with this motion, and summarized in Section I, below. As described in Section II, however, Cox now seeks further instructions from the Court regarding a subset of subscribers who had informed Cox that they objected to the production of their personally identifiable information (“PII”), and who further indicated that they would formally file an objection with the Court.

I. COX’S COMPLIANCE WITH THE ORDER

A. SUBSCRIBER PII

Current Subscribers: In Exhibit 4 to the Memorandum in support of their motion (Doc. 72), Plaintiffs identified 250 IP addresses at which allegedly infringing activity occurred during certain periods (also identified in Exhibit 4) in the six months preceding the filing of this lawsuit. Cox understood the Court’s Order to require Cox to produce PII for those subscribers *currently assigned* (viz., as of the date of the Order) to those IP addresses. Of the 250 IP addresses, one is currently unassigned and not associated with any subscriber. *Allen-Wang Dec.*, ¶ 5. One of those IP address was inadvertently overlooked in Cox’s initial mailing to subscribers, but a notice went out to that subscriber on June 9, 2015, and Cox will follow up with Plaintiffs and the Court after that subscriber has an opportunity to respond. *Id.*, ¶ 7. For the remaining 248 IP addresses, Cox notified each of the current subscribers of the Court’s Order. *See Id.*, ¶¶ 5-6, Ex. B (form of notice).

Of those current subscribers, 32 contacted Cox to object, or indicate their intent to object, to the production of their PII. *Id.*, ¶ 9. As explained below, Cox has not produced PII for those subscribers. *Id.*, ¶¶ 9-10. For the remaining 216 IP addresses, the PII for those current subscribers was produced to Plaintiffs in a spreadsheet on June 5, 2015. *Id.*, ¶ 11, Ex. C. (All PII was redacted from the spreadsheet attached to the Allen-Wang Declaration, to avoid the need to file it under seal — if the Court requests a copy of the unredacted spreadsheet, Cox will promptly submit it *in camera*.)

Historical Subscribers: Cox also attempted to identify subscribers associated with the 250 identified IP addresses during the periods of alleged infringement identified in Plaintiffs’ Exhibit 4. *Allen-Wang Dec.*, ¶ 3. Cox was able to identify that historical subscriber information for 139 of the relevant IP addresses. *Id.*, ¶¶ 3-4. Cox then notified those historical subscribers of the Court’s Order. *See Id.*, ¶ 4, Ex. A (form of notice). Of those historical subscribers, 17 contacted Cox to object, or indicate their intent to object, to the production of their PII. *Id.*, ¶ 8. As explained below, Cox has not produced PII for those subscribers. *Id.*, ¶¶ 10-11. For the remaining 122 IP addresses, the PII for those historical subscribers was produced to Plaintiffs in a spreadsheet on June 5, 2015. *Id.*, ¶ 11, Ex. C.

Accordingly, except for the objectors, one inadvertently omitted subscriber, and one unassigned IP address, Cox has provided the PII and other information ordered by the Court. As explained below in Section II, Cox seeks further instructions regarding the 32 current customers and 17 historical customers who have objected.

B. UNREDACTED DOCUMENTS

The Court also ordered that Cox “provide a copy of any documents previously produced for these IP addresses without the name, address, account number, and bandwidth speed being

redacted” (Doc. 78). On June 5, 2015, Cox also produced all documents responsive to the Court’s Order *Allen-Wang Dec.*, ¶ 12. Cox has fully complied with that aspect of the Order.

II. COX’S REQUEST FOR INSTRUCTIONS

At the hearing on Plaintiffs’ motion, counsel for Cox (Mr. Buckley) discussed with the Court the process for dealing with Cox subscribers who sent objections to Cox but had not yet filed objections with the Court. The following colloquy with the Court ensued:

THE COURT: If you get a notice that someone is going to be objecting, then you can withhold production for those. But anybody who has not put you on notice within 21 days that they plan to object, and if they don’t object within 21 days. So they will have a 21-day time period to do something with the Court to object and also put you on notice.

MR. BUCKLEY: Okay. So that’s what I was going to ask. If on the 20th day the subscriber e-mails Cox and says, I object to this, don’t disclose my information, but they haven’t yet come to Your Honor, what should we do in that scenario? Because that’s actually, it’s possible we may have a situation like that.

* * *

THE COURT: ... I think under that circumstance, what we will do is you probably won’t produce the information. If nothing gets done within the 21-day time period with the Court, then we’ll have to follow up with that. And then you will have to produce that information if they haven’t sought leave from the Court within that time. So if you get put on notice, I think you probably are obligated to hold off until we see whether they’ve really followed through and filed something with the Court. If they have, then the Court will have to deal with it and then rule on it at that time. If they put you on notice but don’t follow up with the Court, they just merely send you an e-mail, and the time period has run with the Court, then you will have to do a supplemental production and produce that information. Okay?

MR. BUCKLEY: Thank you, Your Honor.

(Doc. 80, May 5, 2015 Transcript at 33-34). That anticipated scenario has occurred.

A total of 49 current and historical subscribers contacted Cox to state objections and indicated that they would file formal objections, but to Cox’s knowledge most have not (or have not yet) filed formal objections. While some lawyers contacted Cox on behalf of subscribers,

many subscribers contacted Cox directly. Thus, Cox expects that formal objections are likely to be prepared *pro se* and mailed to the Clerk as paper records and then filed by the Clerk as received. Indeed, some subscribers have filed *pro se* objections already (Doc. 81, 82 & 85). Because Cox is precluded, under the federal Cable Privacy Act (47 U.S.C. § 551), from producing subscriber PII without a court order, Cox now seeks further instruction and an order from the Court with respect to the 49 current and historical subscribers who notified Cox of their objections.¹

Cox has had numerous communications and conversations with these 49 Cox subscribers. A general description of the form and nature of those communications is set forth in the Allen-Wang Declaration (*e.g.*, ¶ 9). Some of those subscribers have made subsequent filings with the Court (Doc. 81, 82 & 85), and others may yet do so. Cox respectfully seeks the Court's express direction, and a specific order as required by the Cable Privacy Act, with respect to the subscribers who have not, and do not promptly file a formal objection with the Court.

WHEREFORE, Cox respectfully requests that the Court provide further instruction and enter a further appropriate order regarding the objecting subscribers.

Dated: June 11, 2015

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¹ In support of its arguments, Cox incorporates by reference the brief and legal authorities it previously cited the Court (Doc. 74). Cox therefore seeks leave to file this motion without an independent supporting brief. *Cf. Hirschkop v. Virginia State Bar*, 406 F. Supp. 721, 724 (E.D. Va. 1975) (waiving local rule briefing requirement where merits sufficiently presented).

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2015, the foregoing was filed and served electronically by the Court's CM/ECF system upon all registered users:

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