

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

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

**BMG RIGHTS MANAGEMENT (US) LLC AND ROUND HILL MUSIC LP’S  
MEMORANDUM IN SUPPORT OF THEIR MOTION TO COMPEL**

Pursuant to Federal Rule 37 and Local Rule 37, Plaintiffs BMG Rights Management (US) LLC and Round Hill Music LP (collectively “Copyright Holders”) respectfully submit this Memorandum in Support of their Motion to Compel Defendants Cox Communications Inc., CoxCom, LLC, and Cox Enterprises, Inc. (collectively “Cox”) to respond to certain of Copyright Holders’ document requests and interrogatories. Specifically, Copyright Holders move this Court to compel Cox to produce (1) certain Cox financial information, including revenue, profit, and costs associated with providing Internet services to its customers; and (2) Cox’s policies and procedures for addressing infringement notices between January 1, 2005 and January 1, 2008. As explained below, the information sought is reasonable in scope and relevant to this copyright infringement case.

## INTRODUCTION

Using sophisticated software, Copyright Holders' agent, Rightscorp Inc. ("Rightscorp"), identified millions of instances of direct copyright infringement by Cox customers on the Cox network. Rightscorp sent millions of notices to Cox over the last several years, on behalf of Copyright Holders, identifying these specific instances of direct infringement occurring on Cox's network. These notices document each instance of direct infringement and include, for example, the song name, date and time of infringement, and IP address and port number of the Cox subscriber. Because Cox has known of this massive, repeat infringing by its specific subscribers, has had the right and ability to control their infringing acts, and has knowingly protected these subscribers for its financial gain, Cox is not protected by the Digital Millennium Copyright Act, 17 U.S.C.A. § 512, and is liable for vicarious and contributory copyright infringement.

Discovery commenced on February 3. On February 4, Copyright Holders served their First Set of Requests for Production of Documents and Things and First Set of Interrogatories to each of the Defendants (Interrogatories attached as Exhibit 1; Requests for Production attached as Exhibit 2). On February 23, Cox served its objections, and on March 9, Cox served its discovery responses. (Objections to Interrogatories attached as Exhibit 3; Objections and Responses to Requests for Production attached as Exhibit 4).

After reviewing Cox's responses, Copyright Holders asked Cox to meet and confer regarding several deficient responses. On March 11, the parties participated in a telephonic meet and confer. The next day, Copyright Holders sent Cox a letter seeking clarification on several issues raised during the meet and confer. (Ex. 5). The parties then exchanged several letters attempting to resolve the dispute. (Cox 3/17/15 letter attached as Ex. 6; Copyright Holders 3/18

letter attached as Ex. 7; Cox 3/19/15 letter attached as Ex. 8). Though the parties have been able to resolve some of the issues discussed during the meet and confer, there remain two areas of dispute. *First*, Cox has refused to produce any financial information relevant to the benefits it derived from its infringing users (RFP Nos. 53-58). *Second*, Cox has refused to produce any discovery or information about its policies and procedures for addressing notices of copyright infringement before January 1, 2008 (Interrogatory Nos. 3-4).

### **ARGUMENT**

Pursuant to Federal Rule of Civil Procedure 26(b), a party is entitled to any nonprivileged information that is relevant to a claim or defense in the matter. The concept of relevance is broad and is not limited the information admissible at trial. Relevant information is merely information that is reasonably likely to lead to the discovery of admissible evidence. *Id.* Discovery “is broad in scope and freely permitted.” *Carefirst of Md., Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 402 (4th Cir.2003).

#### **I. COX SHOULD BE COMPELLED TO PROVIDE FINANCIAL INFORMATION. (RFP Nos. 53 - 58 (Ex. 2)).**

Copyright Holders have requested documents concerning Cox’s revenues, profits, and costs associated with providing Internet services, as well as the pricing, number of customers, and average time Cox retains a customer for its Internet services. *See* RFP Nos. 53-58. Specifically, Copyright Holders seek financial information directed and relevant to the above claims and defenses. Copyright Holders seek the revenues and profits that Cox makes from providing Internet services (RFP Nos. 54, 55), the number of Cox’s Internet customers and the average time it retains a customer (RFP Nos. 56, 57), Cox’s pricing for Internet services (RFP No. 58), and Cox’s costs for obtaining an Internet customer (RFP. No. 53).

Cox has refused to produce any documents responsive to these requests. In so refusing, Cox relies on its objections that the requests are “neither relevant to the claims and defenses of the Action nor reasonably calculated to lead to the discovery of admissible evidence.” *See, e.g.*, Cox’s Responses to RFP Nos. 53-58; Cox 3/19/15 Letter at 2 (standing on its objections). Contrary to Cox’s stated objections, this financial information sought by Copyright Holders is directly relevant for four reasons.<sup>1</sup>

First, this information is relevant to the damages that the Copyright Holders seek. The Copyright Holder seeks both an injunction and statutory damages up to \$150,000 per copyright infringed. *See* 15 U.S.C. 504(c). It is black letter law that defendant’s revenues, profits, costs, and other financial information are relevant to these statutory damages. In fact, this Court explicitly cited this kind of information as relevant to a determination of statutory damages: “In determining the proper amount for an award of statutory damages within the applicable limits set by the Copyright Act, a Court may consider the expenses saved and profits reaped by the defendants in connection with the infringements . . . .” *Olde Mill Co., Inc. v. Alamo Flag, Inc.*, Civil Action No. 1:10cv130 (LMB/TRJ), 2010 U.S. Dist. LEXIS 97179, \*5-\*6 (Jones, J.) (E.D. Va. Aug. 4, 2010) (internal quotation marks and citations omitted); *accord Bryant v. Media Rights Prods., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010) (“When determining the amount of statutory damages to award for copyright infringement, courts consider . . . .the expenses saved, and profits earned, by the infringer . . . .”); *Disney Enters., Inc. v. Delane*, 446 F. Supp. 2d 402, 406 (D. Md. 2006) (“The determination of statutory damages within the applicable limits may turn on such factors as the expenses saved and the profits reaped by the defendant in connection

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<sup>1</sup> Given Cox’s unwillingness to produce any financial information, this issue will likely arise again when Copyright Holders receives Cox’s responses to Copyright Holders’ Third Set of Requests for Production, which asked for additional financial information (RFP Nos. 85-101) (attached as Ex. 9).

with the infringement . . .”). Thus Copyright Holders are entitled to discovery of information related to Cox’s profits and costs associated with providing Internet services to its users so they can demonstrate the appropriate amount of statutory damages.

Second, Copyright Holders have alleged that Cox improperly reaps profits from its Internet services by refusing to take any meaningful actions against its customers whom Cox knows repeatedly infringed Copyright Holders’ copyrights. *See, e.g.*, Am. Compl. ¶5 (Cox’s refusal to terminate or take actions against its infringing customers “protects a large revenue stream that Cox receives every month from the many repeat infringers who are its subscribers and account holders.”) and in ¶35 (“Cox has refused to terminate any or any meaningful number of its account holders by reason of their repeat infringement and continues to collect substantial internet service subscription fees from accounts of known repeat infringers.”). The financial information that Cox refused to produce is directly relevant to Cox’s strong motivation for ignoring rampant infringement on its network because ignoring this infringement results in a financial benefit to Cox. Moreover, Cox’s financial motivation for refusing to take meaningful actions against its repeat infringing customers is important to both the knowledge element of contributory infringement and the financial benefit element of vicarious liability. Thus, Copyright Holders justifiably seek discovery of the requested financial information because it is relevant to their liability claims against Cox.

Third, the requested financial information is relevant to defeating Cox’s affirmative defenses. Cox has asserted, as affirmative defenses, that “Defendants’ lack . . . direct financial interest” and “lack . . . direct financial benefit” and that this bars the Copyright Holders’ claims. *See Cox Answer at 6 (Affirmative Defenses 6 and 7)*. While Copyright Holders disagree with this allegation for many reasons, Copyright Holders are entitled to Cox’s financial information to

show that Cox's actions, or inactions, with respect to repeat infringers on its network were financially motivated.

Fourth, the requested financial information is directly relevant to Cox's affirmative defense that it is protected by the DMCA safe harbor provision under 17 U.S.C. §512. Cox Answer at 6 (Affirmative Defense 15). The DMCA safe harbor provision is not available unless the service provider "has adopted and reasonably implemented, and informs 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). The financial information requested by Copyright Holders is relevant to show Cox had a huge financial incentive not to reasonably implement a policy that terminates repeat infringers, as required by the statute.

Cox cannot avoid discovery with the conclusory and self-serving proclamation that such information is simply not relevant. *See Comstock Potomac Yard, L.C. v. Balfour Beatty Constr. LLC*, Civil Action No. 1:08-cv-894, 2009 U.S. Dist. LEXIS 73206, \*53 (O'Grady, J.) (E.D. Va. Aug. 14, 2009) ("The purpose of the federal discovery rules is 'to avoid surprise and the possible miscarriage of justice, to disclose fully the nature and scope of the controversy, to narrow, simplify and frame the issues involved, and to enable a party to obtain the information needed to prepare for trial.'" (quoting and citing 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2001 (2d ed. 1987))).

Given the direct relevance of the requested financial information to Copyright Holders' claims and Cox's defenses, the requested financial information is discoverable. Cox should produce the requested financial information now.

**II. COX SHOULD BE REQUIRED TO PRODUCE ITS POLICIES AND PROCEDURES FOR ADDRESSING NOTICES OF COPYRIGHT INFRINGEMENT FROM JANUARY 1, 2005 THROUGH THE PRESENT. (Interrogatory Nos. 3-4 (Ex. 1)).**

Cox produced its policies and procedures that were in place after January 1, 2010 and has now represented that it will produce its policies and procedures that were in place between January 1, 2008 and that date, but Cox refuses to produce its policies that were in place prior to 2008, arguing that it is beyond the statute of limitations period. *See Cox 3/19/15 Letter at 2.* Copyright Holders seek the policies and procedures in place back through 2005 to understand whether Cox had policies and procedures in place at that time to address infringement notices and whether these policies changed over time.

Copyright Holders' requests are narrowly tailored and seek these policies and procedures because they are relevant to Cox's intent in implementing its current policies and procedures. The changes or lack of changes that Cox made to its policies and procedures over the ten-year period will show, among other things, what aspects of the policies and procedures Cox thought important and how the policies and procedures evolved in response to the infringement notices sent to Cox. Moreover, allowing Copyright Holders to understand the evolution of the policies will shed further light onto the alleged reasonableness and the motivations for such policies. Cox is not entitled to self-limit discovery of the policies and procedures in this case based on the statute of limitations, as it suggests in its March 19 letter. *See Cox 3/19/15 Letter at 2.* Cox's policies and procedures are not irrelevant for discovery purposes simply because they fall outside the statute of limitations. *See, e.g., Byard v. Verizon W. Virginia, Inc.*, No. 1:11CV132, 2013 WL 30068, at \*11-13 (N.D.W. Va. Jan. 2, 2013) (permitting discovery beyond limitations period because it was relevant to decision making process for workplace policies-at issue).

Nor can Cox complain that it would be overly burdensome to provide information about or produce the policies and procedures that were in place for the three years immediately preceding January 1, 2008. The policies and procedures that Cox produced amounted to just a few hundred pages. Cox should be ordered to immediately answer Interrogatories 3 and 4 for the period January 1, 2005 through January 1, 2008.

### **CONCLUSION**

For the reasons set forth above, this Court should grant Copyright Holders' Motion to Compel. A proposed order is attached.

### **Local Rule 37(E) Meet and Confer Statement**

Counsel for Copyright Holders held a telephonic meet and confer with Defendants' counsel on March 11, 2015 concerning Defendants' discovery responses. Both parties subsequently exchanged letters clarifying their discussions. Despite their efforts, the parties were unable to resolve all of their disputes.

Respectfully submitted,

/s/\_\_\_\_\_

Walter D. Kelley, Jr. (VSB No. 21622)  
HAUSFELD, LLP  
1700 K Street, NW  
Washington, DC 20006  
202-540-7200

Paul Gennari (VSB No. 46890)  
pgennari@steptoe.com  
Jeremy D. Engle (VSB No. 72919)  
jengle@steptoe.com  
STEPTOE & JOHNSON, LLP  
1330 Connecticut Ave, NW  
Washington, DC 20036

Tel.: (202) 429-3000  
Fax: (202) 429-3902

*Of Counsel*

Michael J. Allan (admitted *pro hac vice*)  
William G. Pecau (admitted *pro hac vice*)  
John M. Caracappa (admitted *pro hac vice*)  
Stephanie L. Roberts (admitted *pro hac vice*)  
Elizabeth McKenzie (admitted *pro hac vice*)  
STEPTOE & JOHNSON, LLP  
1330 Connecticut Avenue, NW  
Washington, DC 20036  
Tel.: (202) 429-3000  
Fax: (202) 429-3902

Michael O. Crain  
Crain Law Group, LLC  
The Bottleworks  
297 Prince Avenue, Suite 24  
Athens, Georgia 30601  
Tel. (706) 548-0970  
Fax: (706) 369-8869

*Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on March 20, 2015, I electronically filed a true and correct copy of the foregoing using the Court's CM/ECF system, which then sent a notification of such filing (NEF) to all counsel of record:

Craig C. Reilly (VSB No. 20942)  
craig.reilly@ccreillylaw.com

/s/  
Jeremy D. Engle (VSB No. 72919)  
jengle@steptoe.com  
STEPTOE & JOHNSON, LLP  
1330 Connecticut Ave, NW  
Washington, DC 20036  
Tel.: (202) 429-3000  
Fax: (202) 429-3902