

BMG Rights Mgmt. (US) LLC v. Cox Communs., Inc. 881 F.3d 293 (4th Cir. 2018)

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BACKGROUND

Appellant Cox Communications, Inc. (“Cox”) provides internet access to its subscribers. Cox does not control how its subscribers use the internet service, but if subscribers use the service to infringe on copyrights, Cox is able to suspend or terminate the service. Subscribers share files using the BitTorrent technology which helps subscribers share all types of files, including copyrighted music files.

Appellee BMG Rights Management (US) LLC (“BMG”) is a music publishing company that owns music copyrights. It hired Rightscorp, Inc. (“Rightscorp”) to monitor BitTorrent activity and to identify instances where copyrighted work is shared without authorization. Rightscorp, on behalf of BMG, notifies Cox of the infringement by its subscriber. BMG relies on Cox to notify its subscriber of the copyright infringement.

Cox has a thirteen-strike policy for subscribers who use its internet service to share copyrighted files. Each time an incident occurs, Rightscorp provides Cox with notice, and each notice is considered a strike for its subscriber. The initial notices result in warning emails, followed by limitation of access, and finally, the later notices result in a temporary suspension of access. Subscribers are reactivated after they speak with a technician who explains the reason for suspension. There is no automatic termination of a subscriber. In 2011, Cox “blacklisted” Rightscorp, which meant Cox deleted Rightscorp’s notices without reading them.¹ Millions of notices went unread.

PROCEDURAL HISTORY

In 2014, BMG sued Cox in the United States District Court for the Eastern District of Virginia, alleging copyright infringement and arguing Cox was liable for the contributory infringement of its subscribers’ activities. Following discovery, both parties moved for summary judgement on the issue of the safe harbor defense. The district court granted summary judgment for BMG because it held that Cox did not prove an established policy to entitle it to a safe harbor defense under the Digital Millennium Copyright

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1. BMG Rights Mgmt. (US) LLC v. Cox Communs., Inc. 881 F.3d 293, 300 (4th Cir. 2018).

Act (DMCA)². Regarding the contributory infringement issue, after a two-week trial, a jury found Cox liable for willful contributory infringement and awarded BMG \$25 million in statutory damages. Shortly thereafter, Cox appealed contending that the district court erred in denying it the safe harbor defense and that the district court erred in its instructions to the jury.

ISSUE

The United States Court of Appeals for the Fourth Circuit addressed two issues: (1) whether the district court erred in granting BMG summary judgment and thereby denying Cox the safe harbor defense under the DMCA; and (2) whether the district court erred in its jury instruction regarding contributory infringement.

DECISION

The appellate court affirmed the district court's denial of the safe harbor defense under the DMCA, thereby affirming the trial court's decision regarding the first issue. For the second issue of contributory infringement, the appellate court reversed and remanded for a new trial due to errors in the jury instructions.

REASONING

The court first addressed the safe harbor issue by looking at the DMCA and the safe harbors that it provides to internet access providers such as Cox. DMCA safe harbors limit liability for copyright infringement if the internet access provider establishes and reasonably adheres to a policy for terminating subscribers that repeatedly infringe on third party copyrights³.

Cox argued that the term "repeat infringement" did not apply to its subscribers because none had been adjudicated.⁴ The court looked at the plain language of the statute, as well as the legislative history and determined that repeat infringement did not mean "adjudicated infringer."⁵ Instead, the court noted the Second Circuit's definition of "repeat infringer" in the context of DMCA as "someone who repeatedly interfered with another person's exclusive rights of a copyright."⁶ The court also noted that repeat infringers should not fear losing internet access only after being found liable for copyright infringement. The threat of termination should occur well before a lawsuit.

Next, the court examined Cox's actions with regard to establishing a policy and the company's reasonable implementation of such policy. The court found that Cox's thirteen-strike policy always resulted in reactivation

2. 17 U.S.C. § 512(a).

3. *BMG Rights Mgmt.*, 881 F.3d at 300.

4. *Id.* at 301.

5. *Id.* at 302.

6. *Id.*

2018] *BMG Rights Mgmt. (US) LLC v. Cox Commus., Inc.* 51

of the repeat infringing subscribers. Until September 2012, Cox reactivated any terminated subscribers as evidenced by internal emails. The emails showed that Cox employees understood the DMCA requirement to be fulfilled when a subscriber was terminated for infringement, which meant the same subscriber could be reactivated a short time later. After September 2012, internal emails indicated that the termination and reactivation process had ended because Cox stopped terminating any of its subscribers. In the months between September 2012 to October 2014, only twenty-one subscribers had been terminated. Of the twenty-one terminations, seventeen were for lack of payment. Cox could not show any evidence that the remaining four terminated subscribers were for copyright infringement.

Furthermore, the court determined that electing not to receive infringement notices from Rightscorp, on behalf of BMG, further indicated Cox's lack of reasonable implementation of a policy. Internal Cox emails indicated that Cox was mostly concerned with its loss of revenue because each terminated subscriber symbolized the loss of a monthly subscription fee payment. Some subscribers would pay as much as \$400 per month.

Cox carried the burden of proof to show that it was entitled to a safe harbor defense because it reasonably implemented its policy; however, Cox failed to provide any evidence disputing BMG, which showed Cox was more concerned with its lost profits than copyright infringement. Thus, the court found that Cox's lackluster implementation process left it essentially without a policy.

The second issue the court addressed was whether the trial court's jury instruction of contributory infringement was given in error. Cox contended that it could not be held contributorily liable because although its technology could be used for infringing purposes, it could also be substantially used for many non-infringing purposes. The court held that the test is not whether the technology is capable of infringing or non-infringing use, but rather if it is made available with the intent of causing copyright infringement, through its subscribers' conduct. According to the appellate court, the district court did not err in this instruction because Cox's requested instruction misstated the law.

The court then turned to the intent needed to prove contributory infringement. Cox contended that the trial court erroneously instructed the jury that Cox's knowledge of infringing activity was enough to establish the intent required for contributory infringement. The appellate court held that the trial court erred in this instruction. The court reasoned that, in looking at the plain language of long-established precedent, actual knowledge was required to establish intent, and willful blindness was recognized equivalent to actual knowledge. Willful blindness is when a party knows enough of the facts to turn a blind eye to the situation in order to shield itself from actual knowledge.⁷ The court could not reconcile a negligence standard with willful blindness or actual knowledge.

7. *Id.* at 308.

The court looked to patent law to further support the intent requirement. Since there are parallels between patent law and copyright law, the court looked for similar standards of the mental state required in the context of contributory infringement. The court held that the “*Global-Tech*” rule developed in the patent law context, which held that contributory liability could be based on willful blindness but not on recklessness or negligence, is a sensible one in the copyright context.”⁸

Lastly, the court also looked to criminal law and tort law for the intent needed for contributory infringement. In criminal law, a person aids and abets when that person actively participates in the crime.⁹ Whereas in tort law, a tortfeasor can only be held liable when it knows that its actions are encouraging the wrongdoing.¹⁰ Therefore, the appellate court held that the jury instruction was erroneous because BMG’s assertion that Cox “should have known” of the infringing activity was a negligence standard and was not sufficient to prove the intent needed for contributory infringement.

After addressing the two main issues of this case, the court also addressed two further issues in order to ensure that proper jury instructions regarding contributory infringement were provided on remand. The first was Cox’s generalized knowledge of copyright infringement activity versus its knowledge of specific instances. It was insufficient to show that Cox had some users who infringed. BMG needed to show that Cox had knowledge of specific instances of infringement by its subscribers. Next, the court made clear that the willful blindness instruction must also be tied to specific instances, such that Cox consciously avoided these specific instances rather than avoiding confirmation of the fact that the infringement was occurring.

8. *Id* at 309.

9. *Id*

10. *Id*