

ALERT

# Fourth Circuit Orders New Trial in *BMG v. Cox* Copyright Case

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In a highly anticipated decision for Internet service providers (ISPs) and content owners, the U.S. Court of Appeals for the Fourth Circuit affirmed in part, reversed in part, and remanded for new trial a judgment of the U.S. District Court for the Eastern District of Virginia holding Cox liable for infringement of BMG's copyrights by Cox customers.

*BMG v. Cox* involved the question of under what circumstances an ISP acting as a conduit for Internet traffic may be held liable for customers' copyright infringement. Cox argued that it was entitled to a safe harbor under Section 512(a) of the Digital Millennium Copyright Act (DMCA) because it transmitted or routed material at the direction of customers without modification. To qualify for any of the Section 512 safe harbors, a service provider must demonstrate that it "adopted and reasonably implemented ... a policy that provides for the termination in appropriate circumstances of subscribers ... who are repeat infringers." 17 U.S.C. § 512(i)(1)(A). Cox's repeat infringer policy called for increasingly stringent actions in response to subsequent notices of infringement until the 13th notice, at which point the subscriber was to be suspended and considered for termination. BMG alleged that Cox failed to implement a reasonable termination policy when it failed to fully terminate customers and ignored electronically generated notices from Rightscorp, Inc. alleging Cox's customers used BitTorrent file-sharing programs to infringe BMG's copyrights.

As an initial matter, the Fourth Circuit affirmed the district court's finding that Cox was ineligible for the Section 512(a) safe harbor because Cox had failed to reasonably implement its repeat infringer policy. The Fourth Circuit found that a customer could be considered

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a “repeat infringer” without a court adjudication of infringement but, notably, the court did not question whether Cox’s 13-step policy was sufficient for safe harbor protection, explaining that it was “mindful of the need to afford ISPs flexibility in crafting repeat infringer policies, and of the difficulty of determining when it is ‘appropriate’ to terminate a person’s access to the Internet.” The Fourth Circuit relied on the “reasonably implemented” prong of Section 512(i), declaring that, at a minimum “an ISP has not ‘reasonably implemented’ a repeat infringer policy if the ISP fails to enforce the terms of its policy in any meaningful fashion.” The court cited several factors that contributed to its finding that Cox had “failed to implement its policy in any meaningful way,” including that Cox categorically disregarded all notices from Rightscorp for a period of time, did not terminate subscribers that its employees had deemed repeat infringers, and failed to provide any evidence of circumstances where it followed through with termination or even considered whether “appropriate circumstances” existed for termination.

Despite finding that Cox was not eligible for the Section 512(a) safe harbor, the Fourth Circuit nevertheless found that the district court committed prejudicial error when it instructed the jury that it could impose liability for contributory infringement if it found that “Cox knew **or should have known** of such infringing activity” (emphasis added). In so holding, the Fourth Circuit distinguished willful blindness, which can establish liability because it is the equivalent of actual knowledge, from negligence, which cannot. Willful blindness only occurs, the court explained, when the service provider knows that its action is substantially certain to result in infringement. Relatedly, the court held that a service provider can only be liable for contributory infringement if it has specific enough knowledge of infringement that it could do something about it; general knowledge that infringement is occurring somewhere on the ISP’s network is not enough.

Although a final adjudication of the *BMG* case is months, if not years, away, ISPs should consider reviewing implementation of their repeat infringer policies now to ensure they are consistent with the Fourth Circuit’s opinion. In particular, ISPs should evaluate whether their policies are properly crafted using the “flexibility” afforded to service providers and ensure that their policies include criteria to apply when determining when termination is appropriate.

If you have questions about the Fourth Circuit’s opinion or would like assistance reviewing and revising your company’s repeat infringer policy, please contact one of the attorneys listed on this alert.