

Cablefax Daily™

WHAT THE INDUSTRY READS FIRST

Up Ahead: Cox, Sony Copyright Case Has Far-Reaching Implications

In the 1980s, there was the landmark **Sony Betamax** copyright ruling that individual copies of TV shows via VHS recorders constitutes fair use. The turn of the century brought the Grokster case, which established that peer-to-peer file sharing companies could be sued for copyright infringement that takes place using the software. Now there's **Sony Music vs. Cox**, which ISPs all over the country are keep close tabs on.

The Fourth Circuit is reviewing a \$1 billion jury award—the largest ever handed down for statutory damages for copyright infringement—against Cox, which was found liable for secondary copyright infringement for subscribers' illegal music downloads. Opening arguments are scheduled for March 9, with a ruling expected a few months later. Whatever the court decides, it seems that the case, like Betamax and **Grokster** before it, will head next to the U. S. Supreme Court.

"This case is a bellwether for the music industry's theory that ISPs should be liable for all online piracy. But its implications stretch far beyond ISPs, because the decision will set the legal standard that governs all other intermediaries—including wireless and satellite providers—and platforms on the internet," said *Josh Rosenkranz*, Partner and Head of **Orrick's** Supreme Court and Appellate Litigation Practice and outside counsel for Cox. "This case is a key test of who bears responsibility for copyright infringement in the internet age. If the district court ruling stands, these intermediaries may be forced to pre-

turely turn off internet service based on mere allegations of infringement, and develop surveillance programs to monitor the activity of their customers, all in an effort to limit liability."

Other ISPs are already facing similar legal challenges. **Frontier, Charter** and **Grande** have been hit with lawsuits by the major labels, but not much is expected to happen with those cases until Cox-Sony is sorted out. A U.S. District Court for the Eastern District of Virginia jury ordered Cox in 2019 to pay the \$1 billion in damages. The operator tried unsuccessfully to appeal the ruling and the monetary amount, but ultimately everything was upheld. So, Cox turned to the Fourth Circuit last February.

The district court previously stripped Cox of its safe harbor provisions under the Digital Millennium Copyright Act, but it argues that doesn't presuppose copyright liability.

Cox's argument isn't just that it's not responsible for a few bad apples, but that it doesn't have nanny capabilities. "ISPs will have to boot entire households or businesses off the internet—cutting their lifelines, their livelihoods, and their social connections—based on a few isolated and potentially inaccurate allegations. Or they will have to invade our privacy by developing new capabilities to monitor our internet usage 24/7 to ferret out illegal activity. The internet will never be the same," the company told the court.

Cox developed an automated system for contacting subscribers upon receiving a notice of infringement. "For 95% of accused subscribers—that is, 95% of the 1% who infringe—these

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warnings deter further infringing activity,” Cox said, complaining that the music industry wants it to take things further by terminating internet service entirely for any account that infringes more than once—and that failure to do so makes the ISP liable for every subsequent act of infringement on that account. In the Sony case, Cox was fined \$1 billion for infringing acts of 58,000 customers. It argues that if subs had paid the going rate of about a \$1 a download, the music labels loss would have been \$692,000.

The music industry sings a different tune, characterizing Cox as a safe haven for repeat infringers, quoting an email from Cox’s manager of customer abuse operations that declared, “F the dmca!!!”. “Rather than suspend or terminate serial infringers’ accounts, as it had the right and ability to do, Cox instead retained them as subscribers, and collected hundreds of millions of dollars in subscription fees from them,” the labels said. “During the time period at issue here, Cox terminated over 600,000 subscribers for not paying their bill. It terminated 32 for copyright infringement.” Not only do the music labels argue the District Court made no error in law, but they say the jury was well within the statutory range in awarding damages for more than 10,000 copyrighted works.

NCTA hasn’t filed in the case, but other associations representing ISPs have. “The consequences of the district court’s decision could be staggering,” **CTIA, USTelecom** and **NTCA—The Rural Broadband Association** said in a brief in support of Cox. “Businesses, schools, libraries, and households could lose access to what has become an essential service, based solely on accusations that some unidentified person connected through their router—accusations that mere conduit ISPs have neither the duty nor the ability to independently investigate.”

Others filing in support of Cox include groups like Public Knowledge and the Electronic Frontier Foundation as well as a group of intellectual property professors, while the labels have the support of songwriter groups and the nonprofit Copyright Alliance. The latter claims Cox and its supporters are hyperbolic. “If Cox had simply adopted and implemented a [Digital Millennium Copyright Act]-compliant repeat infringer policy—something that countless other ISPs have routinely done—it could have avoided being found liable for facilitating copyright infringement.”

FBA UNVEILS INFRASTRUCTURE PLAYBOOK

The **Fiber Broadband Association**, **NTCA-The Rural Broadband Association** and **Cartesian** released their Broadband Infrastructure Playbook this week, and it offers states a step-by-step breakdown of how to be successful in vying for and implementing funds from **NTIA**’s \$42.45 billion BEAD program. The guide is organized chronologically, walking states through the early steps of establishing and organizing a broadband

office as well as the offering of grants and monitoring of sub-grantee projects. In those first steps, the resource pushes state officials to completely rethink the previous standard of having fewer than 10 full-time staff in a broadband office during state funding rounds. “States can expect to receive far more grant applications, see greater demand for stakeholder engagement, and experience significant federal reporting requirements,” the report said. Another major challenge will be determining which projects each state will prioritize in terms of distributing funds. While there is a prioritization framework that was passed by Congress that ensures projects connecting unserved areas receive service first, there is still a lot of flexibility states have in how they prioritize projects within those categories. Those could be based on criteria like projects targeting high-poverty areas or the speed in which a project could be finished. The Playbook suggested two options for states: opening the application program for applications for all tiers at the same time for a holistic assessment of all projects, or organizing a state’s BEAD programs into distinct phases. It doesn’t explicitly push states to rank projects higher if they utilize technologies like fiber rather than something like fixed wireless, but attendees of a webinar on the Playbook Friday were encouraged to only consider technology neutrality when multiple options can successfully serve consumers far into the future. “It’s technology neutral if all the performance capabilities are equal,” *Tom Cohen*, FBA’s Regulatory Chief Counsel and Partner at **Kelley Drye & Warren LLP**, said during a webinar on the Playbook Friday. “No one is putting in DSL anymore. There’s a technology. Should it be treated neutrally? No.” **NTIA** is scheduled to release its Notice of Funding Opportunity for the BEAD program on May 15, and that will offer even more clarity on the program’s requirements while opening the window for states to apply for \$5 million in planning funds. For now, the Playbook includes templates for what state offices need to include in their letters of intent, initial proposals and final proposals. The Playbook will be revised after the NOFO is released, offering greater information on specific application processes and criteria for subgrants.

STARLINK BRACING FOR RUSSIAN CYBERATTACK

SpaceX CEO *Elon Musk* is warning Ukrainians of a potential risk of a Russian cyberattack on satellite broadband service **Starlink**. “Starlink is the only non-Russian communications system still working in some parts of Ukraine, so probability of being targeted is high. Please use with caution,” he tweeted Friday. It wouldn’t be a stretch for Russia to launch a cyberattack targeting Starlink terminals. That would mimic a strategy Russia allegedly used against Viasat’s operations in Ukraine just before the nation invaded Ukraine. Starlink service was activated in Ukraine [over the weekend](#) with a shipment of

terminals arriving on Monday after a cry for help from Ukrainian Minister of Digital Transformation Mykhailo Fedorov.

DISNEY+ AVOD TIER COMING

Disney+ is launching an ad-supported tier in the U.S. later this year with plans to go international in 2023. **Disney** hopes the move will ensure it reaches its goal closer of 230-260 million subscribers by the end of 2024. Pricing and other details will be announced at a later date. The streaming service's ad-free tier is currently priced at \$7.99/month.

PROMOTIONS

Starting Monday through March 19, new **Amazon Fire TV** users will get 14 days of **Sling TV** for free. Customers will have access to Sling TV Blue or Orange and can input their promotional codes [here](#).

PROGRAMMING

Apple TV+ has given the go ahead to a second season of "Acapulco." Production will begin this spring in Mexico. – New series "Hoffman Family Gold" premieres March 25 at 10pm on **Discovery** following the finale of "Gold Rush." Episodes of Hoffman Family Gold will air at 8pm on Discovery starting April 1 and will be available to stream on **discovery+** the same day.

CABLE CELEBRATES WHM

In honor of Women's History Month, **discovery+** launched "Her Story," a hub featuring programming highlighting stories and contributions of women throughout history. It'll remain on the platform and be updated year-round. **discovery+** originals featured in the destination include "Like Mother, Like Daughter?" and "Introducing, Selma Blair." – **Fox News Channel** is kicking off month-long special "America Together: Women's History Month" this Friday. All month long, the network will feature stories and interviews with notable women, including former Secretary of State *Condoleezza Rice*, former U.S. Ambassador *Nikki Haley* and VA Lt. Gov. *Winsome Sears*. Fox News Media will also feature profiles across its platforms of influential women like *Susan B. Anthony* and champion golfer *Babe Didrikson Zaharias*.

CABLEFAX DASHBOARD

Twitter Hits



Research

(Source: [MediaRadar](#))

- > Total ad spend in OTT reached nearly \$1.3 billion in 2021. On average, OTT represents only 3% of total digital spend/month.
- > 5,530 total advertisers ran ads across Discovery+, HBO Max, Hulu, Paramount+ and Peacock, accounting for 65% of total tracked OTT spent (nearly \$438 million).
- > Retail was the top Q4 category buying OTT ads, representing 16% of the quarter's market. Media spending saw a 46% increase from Q3, holding 14% of total spend. Finance also came in with 14% of the quarter's spend, marking a 31% increase from Q3.

Up Ahead

- MARCH 7-8:** [NCTC IdeaXchange, Cleveland](#)
- MARCH 7-10:** [Morgan Stanley Technology, Media and Telecom Conference](#)
- MARCH 11:** [The FAXIES 2022 Entry Deadline](#)
- MARCH 20-23:** [WICT Network Senior Executive Summit, Stanford University](#)

Quotable

"One of the reasons why we are so committed to the work with Nielsen on the Nielsen ONE Alpha with companies like Google and some of the other holding companies is because we really believe that we have to have a vested, proactive approach to what the future of that currency looks like... As currency moves toward impression-based models, think about the impact to live, to sports, we feel a responsibility to forward currency. Running parallel to that, we also want to be highly innovative as it relates to the layers of measurement that will sit on top of currency. It's not an either/or, it's an and. That's why we're testing with hundreds of vendors. ... we are in the business of ensuring the right KPIs that map to our portfolio and our diversity of audiences we reach is reflected in the measurement partners we choose." – **Disney Advertising Sales' Lisa Valentino, EVP, Client Solutions & Addressable Enablement at Disney's Tech and Data Showcase this week.**