IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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

DEFENDANT COXCOM, LLC'S MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM RIGHTSCORP, INC.

Pursuant to Rules 37 and 45 of the Federal Rules of Civil Procedure, and Local Rules 37 and 45, Defendant CoxCom, LLC ("Cox") respectfully submits this Memorandum in Support of its Motion to Compel Rightscorp, Inc. ("Rightscorp") to produce documents, including source code, in response to Cox's subpoenas requesting the production of documents.[1] Specifically, Cox asks the Court to order the production of two categories of documents: (1) certain components of Rightscorp's source code that still appear to be missing from its production; and (2) certain documents identified by Robert Steele—Rightscorp's President, Chief Operating Officer, and Chief Technology Officer—in his June 11, 2015 deposition.

I. INTRODUCTION

Rightscorp's business is to "monetize" copyright infringement. It does so by bringing allegations of copyright infringement against customers of Internet Service Providers ("ISPs")

[1] Rightscorp is Plaintiffs' agent and is represented by the same counsel representing Plaintiffs. Rightscorp and the parties have stipulated to the jurisdiction of this Court in order to resolve all Rightscorp-related discovery issues.

and extracting from them, by various threats, payments that Rightscorp splits 50-50 with copyright owners. Rightscorp outlines its process in its SEC filings.[2] First, Rightscorp claims to detect instances of alleged infringement on peer-to-peer networks (e.g., BitTorrent). Rightscorp then sends automated notices threatening ISP customers with termination of Internet service, unless they pay Rightscorp its "settlement" demands. Finally, Rightscorp "settles" with the notice recipients, both through its website and by telephone. *See generally* **Exhibit A** at 16-18. Rightscorp's extortionate business model depends on ISP participation. Rightscorp has no ability to terminate or suspend any subscriber's Internet service, and Rightscorp must rely on ISPs to forward Rightscorp's notices to consumers.

Cox refused to participate in Rightscorp's extortion scheme. Rightscorp retaliated with this lawsuit (after finding Plaintiffs with actual standing to sue). Now, Rightscorp refuses to produce key categories of documents related to its core activities. Rightscorp has not produced all of its source code modules used for detection of alleged infringements. Nor will Rightscorp produce certain specific documents related to Rightscorp's communications with notice recipients and ISPs, even though Rightscorp's President expressly identified and discussed these materials in his deposition.

As explained below, these materials are critical to Cox's deposition preparation and expert discovery efforts, and the Court should compel their production from Rightscorp.

II. BACKGROUND

Given Rightscorp's central role in this litigation, as apparent from the allegations in Plaintiffs' First Amended Complaint where Rightscorp figures prominently (Dkt. No. 16), Cox has had to issue multiple subpoenas requesting documents from Rightscorp. The first of these, served

[2] For example, attached as **Exhibit A** is Rightscorp's December 2014 Form 8-K filing, which contains a presentation and fact sheet posted on the company's website.

February 6, 2015, contained multiple requests relevant to this motion seeking production of documents and source code, including at least the following:

- **CATEGORY NO. 35:** All documents concerning communications between you and any subscriber, account holder, or customer of any of the Defendants.
- **CATEGORY NO. 46:** One copy of each version of the software system that Plaintiffs' First Amended Complaint mentions at Paragraph 22.
- **CATEGORY NO. 49:** A copy of each program, database or other analytical tool you used with respect to any of the Defendants or their subscribers, account holders, or customers.
- **CATEGORY NO. 64:** All documents concerning communications with any Person regarding suspension or termination of ISP service.

In its February 20, 2015 response, Rightscorp stated that it would, subject to certain objections, produce and/or make available for inspection non-privileged materials responsive to these requests.

Further, on May 15, 2015, Cox issued a second document subpoena to Rightscorp. **REQUEST NO. 9** of that subpoena requested "[a]ll documents (other than notifications of claimed infringement) concerning your contracts with, agreements with, or services to online service providers (including ISPs), including contracts, agreements, and services that are no longer active." On June 1, 2015, Rightscorp responded that it had no responsive, non-privileged materials within its possession.

In the weeks that followed, Cox and Rightscorp's counsel corresponded and conferred extensively over Cox's requests for source code (**CATEGORY NOS. 46 AND 49, *above***). Throughout the meet-and-confer process, Rightscorp repeatedly represented that it had produced "all of the source code." Despite those assertions, Cox repeatedly identified specific deficiencies

in Rightscorp's production of source code, and Rightcorp subsequently produced the additional code. These disputes over the adequacy of Rightscorp's source code production remained unresolved even as Cox moved forward with the deposition of Robert Steele.

Cox served its deposition subpoena for Mr. Steele on May 22, 2015. Among other things, Mr. Steele is Chief Technical Officer of Rightscorp. As such, Cox sought his individual deposition to gather information about technical issues relevant to the preparation of expert reports, including information about the design and operation of Rightscorp's software for purportedly detecting and identifying alleged copyright infringement. Further, given the outstanding discovery disputes concerning Rightscorp's production, Mr. Steele's deposition was critical not only to understand what Rightscorp had produced at that time, but also what it had not yet produced and what discovery remained.

Less than a week before Mr. Steele's deposition (scheduled for June 11, 2015), Rightscorp moved to quash the deposition subpoena for Mr. Steele in an *ex parte* application in the Central District of California.[3] In its application, Rightscorp also sought a protective order that would require Cox "to conduct Steele's deposition in his individual capacity and as a Rule 30(b)(6) corporate designee for non-party Rightscorp *on the same day*," despite the fact that Cox had not at that time even issued a subpoena for the Rule 30(b)(6) deposition of Rightscorp. **Exhibit B** at 1 (emphasis in original). Cox responded that—in light of the deficiencies in Rightscorp's production of source code and other materials—Cox required Mr. Steele's deposition to determine what discovery remained outstanding and to formulate Rule 30(b)(6) deposition topics. *Id.* at 2. On June 10, 2015, the Central District denied Rightscorp's *ex parte* application, holding that "Defendants should not be prevented from taking Steele's deposition in his individual capacity,

[3] Cox attaches the Central District of California's ruling on Rightscorp's *ex parte* application as **Exhibit B**.

and then, based on his answers and the information provided through discovery from Rightscorp and others, formulate its topics for Rightscorp's Rule 30(b)(6) deposition at a later date within the discovery period." *Id.* at 3.

At his deposition the following day, Mr. Steele identified several specific documents regarding Rightscorp's communications with notice recipients and ISPs (**CATEGORY NOS. 35 AND 64 & REQUEST NO. 9*, above*; CATEGORY NOS. 1 AND 2*, below***). These documents include a guideline sheet for Rightscorp's telephone agents regarding pricing of settlements; a phone script to guide Rightscorp telephone agents in their communications with callers; a Rightscorp employee handbook; and letter templates for Rightscorp's communications with ISPs. Despite asserting a number of other objections in connection with Cox's questions regarding these subject matters, Rightscorp's counsel raised no relevance objections with respect to these materials.[4] To date, Rightscorp has not produced these documents.

After Mr. Steele's deposition, on June 15, 2015, Cox sent counsel for Rightscorp a discovery letter. The letter detailed the continuing deficiencies in Rightscorp's source code production and identified a list of specific code modules and components that are still missing from Rightscorp's production. The June 15 letter also noted Rightscorp's failure to produce the specific documents identified in Mr. Steele's deposition. Cox also issued two further subpoenas to Rightscorp. First, on June 16, 2015, Cox served its third document subpoena to Rightscorp.[5]

[4] Rightscorp provisionally designated the entire transcript for Mr. Steele's deposition "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." If necessary, Cox can submit the relevant excerpts of this deposition transcript for *in camera* review.

[5] **CATEGORY NO. 1** of the June 16 subpoena seeks, "[t]o the extent you have not previously produced them, all documents available to Rightscorp's telephone agents, including scripts and employee manuals, with respect to their activities." Meanwhile, **CATEGORY NO. 2** seeks, "[t]o the extent you have not previously produced them, all documents evidencing communications between Rightscorp and recipients of Rightscorp notices, other than the initial notices themselves, including call logs of its telephone agents and their supervisors."

Second, on June 17, 2015, Cox served its subpoena for the Rule 30(b)(6) deposition of Rightscorp, provisionally noticed for July 6, 2015. The latter subpoena includes multiple deposition topics concerning Rightscorp's software and the activities of Rightscorp telephone agents. Rightscorp has not yet formally responded to these subpoenas.

On June 18, 2015, counsel for Cox and Rightscorp participated in a telephone conference to discuss, *inter alia*, the issues raised in Cox's June 15 letter.[6] With respect to Cox's specific source code requests, and consistent with its past practice, Rightscorp once again maintained that it had already produced "all the source code." Cox then asked Rightscorp's counsel to identify the responsive modules and components in its source code production. Rightscorp's counsel refused, stating that Cox's expert should be able to locate this information and, if not, Cox could ask about this information at a deposition. Importantly, Rightscorp does *not* claim that the code Cox seeks is irrelevant and does *not* refuse to produce it—to the contrary, Rightscorp's counsel insists that the specific code components Cox identified *have been* produced, but refuses to identify where in the code they reside.

Moreover, when Cox requested production of the documents and materials, specifically identified by Mr. Steele, regarding Rightscorp's communications with notice recipients and ISPs, Rightscorp refused to produce them. Despite not having made a relevance objection at the deposition, Rightscorp now apparently contends that the requested documents are not relevant to any claims or defenses in this suit. During the meet-and-confer call, Rightscorp's counsel was coy on this point and indicated it would "consider" producing these materials.

Opening expert reports are due for exchange today, June 19, 2015, with rebuttal and reply reports to follow on Friday, July 10, 2015 and Friday, July 24, 2015, respectively. (Dkt. No. 67.)

[6] Cox attaches email correspondence memorializing the June 18 teleconference as **Exhibit C**.

As such, all continuing delays in Rightscorp's productions at this stage pose a material risk of prejudice to Cox.

III. LEGAL STANDARD

The Federal Rules establish a broad right to discovery of "any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1); *see also Brown v. Meehan*, No. 3:14-CV-442, 2014 WL 4701170, at *2 (E.D. Va. Sept. 22, 2014) ("Rule 45 governs subpoenas to nonparties and permits the same scope of discovery as Rule 26."). Courts have consistently interpreted Rule 26 to allow wide-ranging discovery of all information reasonably calculated to lead to the discovery of admissible evidence, regardless of whether the information is itself admissible. *Carefirst of Md., Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 402 (4th Cir. 2003). As a general matter, "the burden of proof is with the party objecting to the discovery to establish that the challenged production should not be permitted." *Union First Mkt. Bank v. Bly*, No. 3:13-CV-598, 2014 WL 66834, at *4 (E.D. Va. Jan. 6, 2014) (quoting *Singletary v. Sterling Transp. Co., Inc.*, 289 F.R.D. 237, 241 (E.D. Va. 2012)). Rightscorp has not shown—and cannot show—that this discovery should not be permitted.

IV. ARGUMENT

A. The Court Should Compel Rightscorp to Produce and Identify Requested Source Code.

As Cox detailed in its June 15 letter, several components of Rightscorp's source code still appear to be missing from its production. Specifically, Rightscorp has apparently failed to produce at least the following code:

- All code that connects to, reads from, and/or writes to the "tracks" database table;
- All code that connects to, reads from, and/or writes to the table(s) that store(s) "validated hashes";

- All code that connects to, reads from, and/or writes to the tables in the "database of infringements";
- All code that connects to, reads from, and/or writes to the following tables: "OwnerPasswords"; "AutoTermContactList"; "InfMultiSummary"; "InfSummary"; "infractions"; and "Emailed";
- The source code for the "Infringement Finder" core routine;
- All source code utilized to run the "Infringement Finder" core routine;
- All source code related to executing the following files: runme0.bat; runme1.bat; runme2.bat; runme3.bat; runme4.bat; runme5.bat; runme6.bat; runme7.bat; runme8.bat; runme9.bat; runmeA.bat; runmeB.bat; runmeC.bat; runmeD.bat; runmeE.bat; runmeF.bat; NEWrunme0V2.bat; NEWrunme1V2.bat; NEWrunme2V2.bat; NEWrunme3V2.bat; NEWrunme4V2.bat; NEWrunme5V2.bat; NEWrunme6V2.bat; NEWrunme7V2.bat; NEWrunme8V2.bat; NEWrunme9V2.bat; NEWrunmeAV2.bat; NEWrunmeBV2.bat; NEWrunmeCV2.bat; NEWrunmeDV2.bat; NEWrunmeEV2.bat; NEWrunmeFV2.bat; NEWRUNTHEMALL.bat; and
- Code that identifies potential infringers by IP address notwithstanding that those IP addresses are dynamically assigned over time.

The requested code is responsive to at least **CATEGORY NOS. 46 AND 49** appearing in the February 6 document subpoena. In fact, Rightscorp concedes the relevance of this code, maintaining that Rightscorp has already produced the code but has no obligation to specifically identify it. *See* **Exhibit C**.

Cox has reason to doubt Rightscorp's assertion that it has produced "all the source code." Discovery opened on February 2, 2015. (Dkt. No. 36.) The same week, Cox issued its document subpoena requesting Rightscorp's source code, even before serving any document requests on Plaintiffs**.** Rightscorp has repeatedly represented that "all the code" has been produced; yet, Cox's expert has identified multiple components missing from the code that Rightscorp has then belatedly produced. Absent an order compelling Rightscorp to produce the missing segments of the source code, or at least to identify the requested source code in its existing production, there

can be no assurance that Rightscorp has in fact satisfied its obligations to produce source code pursuant to Cox's February 6 subpoena.[7]

Any further delay in Rightscorp's source code production will materially prejudice Cox's ability to mount its defense. Cox's rebuttal expert reports are due Friday, July 10, 2015 and will include extensive analysis of Rightscorp's software. Moreover, Cox has served a subpoena for the Rule 30(b)(6) deposition of Rightscorp, noted for July 6, 2015 (prior to the exchange of rebuttal reports), and therefore requires Rightscorp's code to prepare for its deposition on technical topics.

Because of the undisputed relevance of Rightscorp's source code to Cox's expert discovery and deposition preparation efforts, this Court should compel Rightscorp to produce all source code responsive to Cox's requests, as well as any additional relevant but as-yet-unproduced source code. Further, to the extent that Rightscorp contends it has produced all responsive source code, this Court should order Rightscorp to identify with particularity all such code. Finally, if necessary once the source code has been reviewed, Cox should be permitted to supplement its expert report.

B. The Court Should Compel Production of the Specific Documents Mr. Steele Identified at His Deposition.

In his deposition, Mr. Steele identified several documents regarding Rightscorp's communications with notice recipients and ISPs. These documents include at least the following:

- a guideline sheet regarding pricing of settlements;
- a phone script to guide Rightscorp telephone agents in their communications with callers;

[7] During the June 18 meet-and-confer call, counsel for Rightscorp claimed that they had confirmed with someone "knowledgeable" about Rightscorp's source code that it had produced all code responsive to Cox's specific requests. But counsel also admitted that both Mr. Steele and Greg Boswell, Rightscorp's lead developer, are on vacation for two weeks and completely "unavailable" to investigate source code issues or respond to other inquiries. Cox is therefore understandably skeptical that Rightscorp's counsel thoroughly investigated whether the specific code components Cox is seeking are included in the existing production.

- a Rightscorp employee handbook; and
- letter templates for Rightscorp's communications with ISPs.

Rightscorp has not produced these materials. There is also no doubt that these documents exist within Rightscorp's possession, as Mr. Steele described each of them with specificity in his sworn deposition testimony.

Moreover, there is little question about the relevance of these materials. They are responsive to at least three requests appearing in subpoenas issued before the June 11 deposition—namely, **CATEGORY NOS. 35 AND 64** appearing in the February 6 document subpoena; and **REQUEST NO. 9** appearing in the May 15 document subpoena (and for which Rightscorp initially asserted it had no non-privileged, responsive documents). Further, to avoid any doubt, Cox issued a further document subpoena after the deposition of Mr. Steele expressly calling for these materials (**CATEGORY NOS. 1 AND 2** appearing in the June 16 document subpoena).

Rightscorp's counsel did not challenge the relevance of these documents (and Cox's extensive line of questioning about them) at Mr. Steele's deposition, despite recording a laundry list of other objections at the time. And for good reason: these materials go to the heart of Rightscorp's business model for "monetizing" copyright infringement, and the viability of that model is directly at issue in this case.[8] The Court should reject Rightscorp's effort to introduce further delay by claiming that it is "considering [Cox's] position and will confer with Rightscorp." *See* **Exhibit C**.

[8] The media have reported extensively on Rightscorp's business practices in general, and this litigation in particular. For instance, Cox attaches as **Exhibit D** a November 28, 2014 Techdirt article entitled "Music Publishers, With Help From Rightscorp, Test Legal Theory That DMCA Requires Kicking Repeat Infringers Off The Internet," *available at* https://www.techdirt.com/articles/20141128/05045629270/music-publishers-with-help-rightscorp-test-legal-theory-that-dmca-requires-kicking-repeat-infringers-off-internet.shtml.

Because of the manifest relevance of this handful of documents, the production of which cannot pose any conceivable burden, the Court should compel Rightscorp to produce the documents specifically identified by Mr. Steele in his deposition immediately. Further, the Court should compel Rightscorp to produce all non-privileged documents responsive to **CATEGORY NOS. 35 AND 64** appearing in the February 6 document subpoena; **REQUEST NO. 9** appearing in the May 15 document subpoena; and **CATEGORY NOS. 1 AND 2** appearing in the June 16 document subpoena.

C. The Court Should Order Immediate Production.

Ordinarily, a party has eleven calendar days to comply with a discovery order. E.D. Va. Civ. R. 37(C). Respectfully, that would be too long in the circumstances of this action. It cannot be disputed that the requesting party is entitled to "prompt" discovery: "A party to an action has the right to have the benefits of discovery procedure promptly, not only in order that he may have ample time to prepare his case before scheduled trial, but also in order to bring to light facts which may entitle him to summary judgment or induce settlement prior to trial." *United States ex rel. Weston & Brooker Co. v. Continental Grain Cas. Co.*, 303 F.2d 91, 92 (4th Cir. 1962). This case is too far along to indulge Rightscorp's assertion that Cox should stand by while Rightscorp "considers" whether it will comply. Similarly, these indisputably relevant source code modules and documents are needed for Cox's expert reports and for use in Cox's further discovery activity. Rightscorp's immediate compliance should be ordered.

CONCLUSION

For the reasons set forth above, this Court should grant Cox's Motion to Compel.

Respectfully submitted,

Dated: June 19, 2015

/s/ Craig C. Reilly
Craig C. Reilly (VSB No. 20942)
111 Oronoco Street
Alexandria, VA 22314
Tel: (703) 549-5354
Fax: (703) 549-5355
Email: craig.reilly.@ccreillylaw.com

Counsel for Defendants

Of Counsel for Defendants

Andrew P. Bridges (*pro hac vice*)
Fenwick & West LLP
555 California Street
San Francisco, CA 94104
Tel: (415) 875-2300
Fax: (415) 281-1350
Email: abridges@fenwick.com

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2015, the foregoing was filed and served electronically by the Court's CM/ECF system upon all registered users.

/s/ Craig C. Reilly
Craig C. Reilly (VSB No. 20942)
111 Oronoco Street
Alexandria, VA 22314
Tel: 703-549-5354
Email: craig.reilly.@ccreillylaw.com

Counsel for Defendants