IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

AFTER II MOVIE, LLC, et al.,	)	
	)	
Plaintiffs,	)	Case No. 1:21-cv-01901-DDD-MEH
	)	
vs.	)	
	)	
WIDEOPENWEST FINANCE, LLC,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS
PLAINTIFFS' SECOND AMENDED AND SUPPLEMENTAL COMPLAINT

Defendant WideOpenWest Finance, LLC ("WOW") moves under Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiffs' Second Amended Complaint ("SAC"), which asserts claims against WOW for secondary copyright infringement and for secondary liability under the Digital Millennium Copyright Act ("DMCA").

WOW moves to dismiss the SAC on grounds the Court has not previously considered.[1] First, the Court has not considered the sufficiency of Plaintiffs' new allegations regarding the 300+ new copyrighted works added by Plaintiff Screen Media Ventures, LLC. *See* Order Granting Pls.' Mot. for Leave to File 2nd Am. & Suppl. Compl. at 9-10 (ECF No. 200) (WOW's arguments regarding the futility of amendment should be "addressed through a motion to dismiss"). Second, after the Court denied WOW's previous motion to dismiss, the Supreme Court issued its decision in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023). *Twitter* forecloses Plaintiffs' secondary liability theory in holding that internet communications providers do not incur secondary liability merely

[1] WOW respectfully disagrees with certain aspects of the Court's March 31, 2023 Order (ECF No. 128) granting in part and denying in part WOW's motion to dismiss Plaintiffs' First Amended Complaint. WOW's decision not to reargue issues or highlight areas of disagreement should not be interpreted as a concession of any issue.

for failing to stop customers from misusing their services. And third, at the time of the Court's ruling on WOW's prior motion to dismiss, the Court did not have the benefit of the Fourth Circuit's decision in *Sony Music Entertainment v. Cox Communications, Inc.*, 93 F.4th 222 (4th Cir. 2024), which holds that an internet service provider's receipt of subscription fees for internet access is insufficient to support vicarious liability for copyright infringement.

For the reasons detailed below, the Court should dismiss the SAC, in whole or in part, for failure to state a claim.

FACTUAL AND PROCEDUAL BACKGROUND

WOW is an internet service provider. SAC ¶ 41. Plaintiffs claim to be the owners of the copyrights to certain motion pictures. SAC ¶ 7. Plaintiffs allege that some of WOW's customers infringed Plaintiffs' copyrights by sharing copies of those motion pictures over peer-to-peer networks, and that this conduct also violated section 1202 of the DMCA because the digital copies of the movies contained altered "copyright management information." *See, e.g.,* SAC ¶¶ 105, 120. Plaintiffs contend that WOW is secondarily liable for that conduct because WOW did not terminate the accused customers' internet access. *See generally* SAC at 36-41 (Counts I-III).

This is the third motion to dismiss filed in this case and the second the Court may have to consider. Plaintiffs amended their Complaint in response to WOW's first motion to dismiss (ECF No. 23). WOW then moved to dismiss Plaintiffs' First Amended Complaint ("FAC"), which involved claims for secondary copyright infringement and secondary liability under the DMCA concerning approximately 50 motion pictures. *See generally* FAC (ECF No. 25). The claims in the FAC were all based on peer-to-peer file sharing allegedly detected by Plaintiffs' third-party agent MaverickEye (or "MEU"). *See, e.g.*, *id.* ¶ 89. On March 31, 2023, the Court entered an order largely denying WOW's motion to dismiss. *See* Order Granting in Part and Denying in Part

Def.'s Mot. to Dismiss ("MTD Order") (ECF No. 128) (denying WOW's motion except with respect to Plaintiffs' standalone claim for injunctive relief).

Roughly one year later, the Court granted Plaintiffs leave to file the SAC. *See* Order Granting Pls.' Mot. for Leave to File 2nd Am. & Suppl. Compl. (ECF No. 200). The most significant amendment in the SAC is Plaintiff Screen Media's addition of over 300 new works in suit, which are set forth in a separate section of Exhibit 1 to the SAC (the "New Works"). *See* ECF No. 204-1 at 4-11. Plaintiffs were also permitted to add factual allegations regarding file sharing detected by a new third-party agent, Facterra, and copyright infringement notices sent by another agent, Irdeto. *See, e.g.*, SAC ¶¶ 94, 101, 131. In opposing Plaintiffs' motion for leave to amend, WOW argued that Plaintiffs' amendments are futile in some respects, but the Court concluded that WOW's arguments "are more appropriately addressed through a motion to dismiss, where they can be briefed more thoroughly." ECF No. 200 at 9-10.

On April 5, 2024, the parties met and conferred regarding the SAC. The parties discussed potential grounds for WOW's motion to dismiss as reflected in the futility arguments WOW had previously raised with the Court. Among other things, the parties discussed WOW's contention that the SAC fails to plead the timing of the alleged acts of copyright infringement and fails to plead facts describing how Plaintiffs' agents detected and provided notice of alleged instances of infringement of the New Works. Following the parties' meet and confer, Plaintiffs filed the SAC in its current form.

This motion follows.

ARGUMENT

I. THE COURT SHOULD DISMISS SCREEN MEDIA'S NEW CLAIMS

A. Screen Media Has Not Stated a Claim for Contributory Liability as to the New Works Because the SAC Does Not Sufficiently Allege WOW's Knowledge

Plaintiffs have failed to plead the knowledge element of contributory liability with respect to Screen Media's New Works. As this Court has recognized, to state a claim for contributory copyright infringement, "Plaintiffs must plead that Defendant . . . knew about the direct infringement." *See* MTD Order at 5. The same is true for contributory liability under the DMCA. *See id.* at 11.

In the SAC, Plaintiffs do not allege that WOW had knowledge of any infringement of the 300+ New Works. With respect to infringement of the New Works, Plaintiffs allege that "Facterra identified IP addresses that are being used by people using the BitTorrent protocol to reproduce, distribute, display or perform Screen Media Venture's copyrighted Works." SAC, ¶ 101. Crucially, however, Plaintiffs do not allege that Facterra ever sent email "notices" to WOW about those alleged infringements. *See generally* SAC. Nor do Plaintiffs allege any other facts showing that WOW had knowledge of infringement of the New Works. *See id.*

Plaintiffs' failure to allege facts regarding copyright notices sent by Facterra is a critical and knowing omission. The Court previously relied on Plaintiffs' allegations regarding copyright notices to find that Plaintiffs had sufficiently alleged the knowledge element of their contributory infringement claims. MTD Order at 6-7. This is because Plaintiffs *do* allege that other detection companies—namely, MEU and Irdeto—sent copyright notices to WOW. SAC, ¶ 131-32. However, Plaintiffs allege only that *Facterra* detected infringement of Screen Media's works (*id.* ¶ 101); there is no corresponding allegation regarding MEU or Irdeto, and no allegation that *Facterra* sent copyright notices to WOW. *See generally id.*

In sum, the SAC does not allege facts showing that WOW had knowledge of specific instances of infringement or violations of the DMCA with respect to Screen Media's New Works. *See BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 311-12 (4th Cir. 2018). The Court should therefore dismiss Count I and the contributory liability claims in Count III as to the New Works. *See* ECF No. 204-1 at 4-11.

B. Screen Media Has Not Stated a Claim With Respect to the New Works Because the SAC Does Not Sufficiently Allege Direct Infringement or Violations of the DMCA

Plaintiffs have failed to plead direct copyright infringement and direct violations of the DMCA with respect to the New Works. To show direct copyright infringement of Screen Media's New Works, Plaintiffs offer the single sentence discussed above: "Facterra identified IP addresses that are being used by people using the BitTorrent protocol to reproduce, distribute, display or perform Screen Media Venture's copyrighted Works." SAC, ¶ 101. It appears that Screen Media relies solely on this allegation to show violations of the DMCA as well. *See generally id.* This one-sentence allegation lacks sufficient factual detail to state a claim.

"In copyright infringement cases, given the principle enshrined in Rule 8—namely, to provide defendants fair notice against them—a plaintiff may not rest on bares-bones allegations that infringement occurred." *Boyd v. Yardley*, No. 2:18-cv-00132, 2019 WL 7505682, at *3 (D. Utah Dec. 12, 2019) (cleaned up). "Rather, Rule 8 requires that the particular infringing acts be set out with some specificity." *Id.* (cleaned up). Consistent with this notice principle under Rule 8, "[d]istrict courts within the Tenth Circuit have held that a properly pled copyright infringement claim must allege," among other things, "by what acts and during what time the defendant has infringed the copyright." *Id.* (citations omitted).

Plaintiffs do not allege any facts regarding ***when*** the New Works were infringed or ***when*** the DMCA was violated with respect to those works. *See generally* SAC. The SAC therefore fails to give WOW fair notice of Screen Media's claims. *See, e.g.*, *Boyd*, 2019 WL 7505682, at *3 (plaintiff failed to state a claim because it was not "clear during what time Defendant infringed the copyright"); *Young-Wolff v. McGraw-Hill Cos.*, No. 1:13-cv-4372, 2014 WL 349711, at *5 (S.D.N.Y. Jan. 31, 2014) (dismissing copyright infringement claim because "the Complaint does not contain a single date or reference to a time period") (quotations omitted); *Jacobs v. Carnival Corp.*, No. 1:06-cv-606, 2009 WL 856637, at *5 (S.D.N.Y. Mar. 25, 2009) ("There is no question that Plaintiffs have failed with these pleadings to allege 'during what time' *any* of the Defendant infringed the copyrights to their works . . . . In fact, Plaintiffs make no reference whatsoever to time in the Complaint."); *Sater Grp., Inc. v. Jack Bartlett Custom Homes Creations, Inc.*, No. 8:06-cv-1814, 2007 WL 121218, at *3 (M.D. Fla. Jan. 11, 2007) (granting motion to dismiss because "[t]he Amended Complaint fails to . . . allege when or during what time period the defendant(s) infringed the copyright").

Plaintiffs' failure to plead facts regarding when the New Works were allegedly infringed is particularly noteworthy because Plaintiffs have indicated that at least some of these claims may be time-barred. Plaintiffs have represented to the Court that their claims—including specifically Screen Media's claims—encompass alleged infringement outside the three-year limitations period in 17 U.S.C. § 507(b). *See* Pls.' Mot. to Compel at 4-6 (ECF No. 163) ("The discovery rule allows Plaintiffs to seek damages going back to 2015 because they did not discover Defendant's liability until 2020."). Yet the SAC pleads no facts that support application of the discovery rule or that otherwise show that Screen Media's claims accrued at some time other than the moment of infringement.

Under the circumstances, and consistent with Rule 8, WOW was entitled to fair notice of "by what acts and during what time" Screen Media's copyrights were allegedly infringed. *See*, *e.g.*, *Boyd*, 2019 WL 7505682, at *3. The same principles and considerations apply equally to Screen Media's contention that WOW subscribers violated the DMCA, which is based on the same underlying factual allegations. Because Screen Media fails to allege any such facts, after a full and fair opportunity to do so, the Court should dismiss Screen Media's claims regarding the New Works for failure to state a claim.

II. THE COURT SHOULD DISMISS THE SAC IN ITS ENTIRETY

In denying WOW's previous motion to dismiss, the Court concluded that Plaintiffs stated a contributory infringement claim by alleging that WOW knew about certain customers' acts of copyright infringement and failed to terminate their access to the internet. MTD Order at 7-8. The Court found these allegations sufficient to support Plaintiffs' claims for vicarious infringement and for secondary liability under the DMCA as well. *See id.* at 9 (allegations that WOW had "the legal ability to stop and limit copyright infringement by its subscribers" stated a claim for vicarious copyright infringement) & 11 (WOW could be secondarily liable for DMCA violations if it "materially contributed to those subscribers' violations by continuing to provide them with internet access").

WOW respectfully submits that these conclusions cannot stand. The Supreme Court has since recognized that an internet communications provider does not incur secondary liability merely for failing to stop customers from misusing the provider's services. *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 499-503 (2023). In *Twitter*, issued shortly after the Court's Order, the Supreme Court observed that it "would run roughshod over the typical limits on tort liability" to "effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them." *Id.* at 503. That is ***precisely*** what Plaintiffs are attempting to do in this case, by alleging that WOW is secondarily liable because it did not terminate the accounts of accused copyright infringers and DMCA violators.

Twitter is highly relevant because it addresses common law aiding and abetting liability, which shares the same common law foundation as contributory liability. *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 935-36 (2005); *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 755 (7th Cir. 2012) ("[T]he law allows a copyright holder to sue a contributor to the infringement . . . in effect as an aider and abettor."); *Venegas-Hernández v. Asociación de Compositores y Editores de Música Latinoamericana*, 424 F.3d 50, 58 (1st Cir. 2005) (contributory liability is "a kind of abettor liability"). *Twitter*'s discussion of fundamental principles of secondary liability is germane to vicarious liability as well; the Supreme Court has repeatedly recognized that the line between contributory and vicarious liability is "not clearly drawn." *Grokster*, 545 U.S. at 930 n.9 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 n.17 (1984)).

Twitter held that the wrongful conduct alleged here—providing internet communications infrastructure that is "agnostic as to the nature of the content"—is at worst "passive nonfeasance," which is insufficient to support secondary liability. 598 U.S. at 499-500. Notably, the *Twitter* defendants were social media platforms (Twitter/X, Facebook/Meta, Google/YouTube) with direct control over how customers use their websites and apps. *Id.* at 480-82. Even so, the Court held that the defendants were not liable for failing to stop ISIS from using those platforms to recruit and fundraise, notwithstanding the defendants' knowledge of ISIS's activity. *Id.* at 500-03.

WOW, which merely provides content-neutral access to the internet as a whole, is even further removed from the alleged wrongful conduct at issue here. Indeed, the Supreme Court specifically noted that it "generally do[es] not think that internet or cell service providers incur culpability merely for providing their services to the public writ large." *Id.* at 499. As in *Twitter*, Plaintiffs' allegations fail to show that WOW "treated [the accused bad actors] differently from anyone else." *See id.* at 500.

All of Plaintiffs' claims rely on theories of contributory or vicarious liability, based on WOW's alleged failure to stop internet customers from committing copyright infringement or violating the DMCA. Compl. at 36-41 (Counts I-III). *Twitter* mandates the conclusion that an internet service provider does not incur secondary liability merely for failing to stop customers from engaging in tortious conduct. Accordingly, the Court should dismiss the SAC for failure to state a claim.

III. THE COURT SHOULD DISMISS ALL VICARIOUS LIABILITY CLAIMS

Plaintiffs have failed to allege the "direct financial interest" element of their vicarious liability claims. In denying WOW's previous motion to dismiss, the Court concluded that this element is satisfied if "the availability of infringing materials acts as a draw for customers," and that Plaintiffs sufficiently alleged that WOW's "advertisements for high download speeds and known practice of ignoring or failing to act on notices of infringement serve as a draw for subscribers." MTD Order at 8-9.

WOW respectfully submits that the Court should revisit this issue in view of the Fourth Circuit's recent decision in *Sony Music Entertainment v. Cox Communications, Inc.*, 93 F.4th 222 (4th Cir. 2024) (*Cox II*). In *Cox II*, a similar secondary copyright infringement case against an internet service provider, the Fourth Circuit rejected the reasoning in the MTD Order and concluded that the ISP was entitled to judgment as a matter of law on vicarious infringement. *Id.* at 230-33.[2]

Cox II recognized that "[i]n every case, the financial benefit to the defendant must flow directly from the third party's acts of infringement to establish vicarious liability." *Id.* at 232 (citing *Grokster*, 545 U.S. at 930 & n.9). Because a direct causal connection is required, an ISP's indirect financial interest in any infringing activity—the periodic fees it receives from customers for internet access—is insufficient as a matter of law:

> The continued payment of monthly fees for internet service, even by repeat infringers, was not a financial benefit flowing directly from *the copyright infringement itself*. As Cox points out, subscribers paid a flat monthly fee for their internet access no matter what they did online. Indeed, Cox would receive the same monthly fees even if all of its subscribers stopped infringing. Cox's financial interest in retaining subscriptions to its internet service did not give it a financial interest in its subscribers' myriad online activities, whether acts of copyright infringement or any other unlawful acts. An internet service provider would necessarily lose money if it canceled subscriptions, but that demonstrates only that the service provider profits directly from the sale of internet access. Vicarious liability, on the other hand, demands proof that the defendant profits directly from the *acts of infringement* for which it is being held accountable.

Id. at 232 (emphasis in original).

Because Plaintiffs fail to allege any facts showing that WOW "profit[ed] directly from the acts of infringement" at issue in this case, the Court should dismiss Count II and the vicarious liability allegations in Count III for failure to state a claim. *See id.*

CONCLUSION

For the foregoing reasons, the Court should dismiss the SAC, in whole or in part, with prejudice for failure to state a claim.

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[2] *Cox II* affirmed the jury verdict of contributory liability, but it did so without addressing the Supreme Court's intervening decision in *Twitter*. *See generally* 93 F.4th 222.

Dated: May 17, 2024

Respectfully submitted,

By: */s/ Zachary C. Howenstine*

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2024, a copy of the foregoing was contemporaneously served on all counsel of record via the CM/ECF system.

By: *<u>/s/ Zachary C. Howenstine</u>*
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

I hereby certify that the foregoing pleading complies with the type-volume limitation set forth in Judge Domenico's Practice Standard III(A)(1).

By: *<u>/s/ Zachary C. Howenstine</u>*
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