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PERSPECTIVE

2018 starting off great for anti-piracy advocates

By Brandon Milostan
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Entertainment content producers and anti-piracy advocates are enjoying a great 2018. In *BMG v. Cox*, the 4th U.S. Circuit Court of Appeals recently affirmed that the Digital Millennium Copyright Act's safe harbor provisions require an internet service provider to meaningfully implement a policy terminating service to repeat copyright infringers. Meanwhile, in California federal court, the Alliance for Creativity and Entertainment, an anti-piracy group comprised of the major Hollywood studios, Netflix and Amazon, scored its first victory in an anti-piracy battle against over-the-top devices that facilitate copyright infringement.

The alliance recently filed a first-of-its-kind copyright lawsuit against TickBox TV, the manufacturers of an over-the-top device powered by Kodi (an open-source media player). *Universal City Studios Productions LLLP et al. v. Tickbox TV LLC*, 17- 7496 (C.D. Cal., filed Oct. 13, 2017). The device uses downloadable "themes" that allow for user-friendly streaming of pirated content. While Kodi-powered devices are legal, the alliance claimed that TickBox's device was nothing more than a piracy tool that allows, encourages and facilitates copyright infringement by its users. The alliance pointed to TickBox's marketing campaigns that promised would-be customers "unlimited access to all the hottest TV shows, Hollywood blockbusters and live sporting events ... absolutely free." It also highlighted TickBox's initial instructional video page that shows a user how to HD stream a movie currently in theatrical release.

In response to the lawsuit, TickBox changed its marketing campaign to advertise the device as a way to "turn your TV into a content filled home theatre system enjoying thousands of movies, TV shows and apps like YouTube, HBO Now and



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Warner Brothers studios in Los Angeles. Warner is part of a group of studios suing TickBox.

many many more." TickBox also modified the device's user interface with software updates designed to remove copyright-infringing "themes" and present users with authorized streaming services like WatchESPN and A&E.

On Jan. 30, U.S. District Judge Michael Fitzgerald issued a preliminary injunction requiring TickBox to maintain those changes for the duration of the lawsuit. The order came one day after a hearing in which Fitzgerald opined that "[i]t could not be more obvious" that TickBox was encouraging copyright infringement.

TickBox bases its defense on the argument that its device is merely a piece of hardware on which users can "voluntarily install legitimate or illegitimate software" and that TickBox did not itself create the "themes" that allow users to access copyright-infringing content. Fitzgerald rejected this familiar argument, at least for now, just as it has been unsuccessfully proffered in nearly every contributory infringement/ inducement case since *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). Indeed, Fitzgerald's statement that "[t]here is sufficient evidence that [TickBox] can be and is used to access infringing content, and there is sufficient evidence of TickBox's fault — primarily in the form of its advertisements" calls to mind

Justice David Souter's holding in *Grokster* that the "classic instance of inducement ... is by advertising ... designed to stimulate others to commit violations."

The preliminary injunction is only a partial win for the alliance, which had asked the court to shut down TickBox entirely. However, Fitzgerald's more limited status-quo injunction recognized that more fulsome relief could harm cord-cutters who legally use the device to avoid expensive TV packages. On the other hand, Fitzgerald did not accept TickBox's argument that even a limited injunction would put it out of business, noting that "[i]n the event that such an injunction does shut TickBox down, that will be indicative not of an unjustifiably burdensome injunction, but of a nonviable business model." Thus, while TickBox is essentially arguing that its success is not necessarily tied to copyright infringement by its users, Fitzgerald appears to be calling its bluff.

Unresolved technical questions also appear to be responsible for the limited nature of the current preliminary injunction. The alliance requested that TickBox be ordered to remove offending "themes" that had previously been downloaded onto users' devices. TickBox countered that manually removing the offending "themes" would require the company to "hack into and delete content which its customers have downloaded ... which could expose [it] to thousands of potential claims." Seemingly unpersuaded, Fitzgerald's ruling questions whether TickBox has the ability to remove the "themes" through a software update that resets the device. If possible, Fitzgerald may require TickBox to do just that.

Because of these unanswered technical questions, Fitzgerald asked the parties to work together to file a stipulated preliminary injunction order that would replace this one by Feb. 7. That deadline came and went without any such stipulated

order having been filed. As a result, each side must now submit its own proposed preliminary injunction order by Monday.

Perhaps most important, the issuance of a preliminary injunction necessarily means that Fitzgerald believes that the alliance is likely to succeed on the merits of its case. The alliance is fully aware of the importance of the preliminary injunction, issuing a statement last week that the decision is "an important step, particularly given the Court's conclusion that the ACE members are likely to succeed on the merits of their case."

The alliance has also filed a lawsuit in the U.S. District Court for the Central District of California against the makers of Dragon Box, a similar over-the-top device. *Netflix Studios, LLC et al. v. Dragon Media Inc.*, 18-230 (C.D. Cal., filed Jan. 10, 2018). While both cases are far from over, the clock may already be ticking for TickBox, Dragon Box and similar over-the-top devices.

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