IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 19-cv-00874-RBJ-MEH

WARNER RECORDS INC., et al

Plaintiffs,

v.

CHARTER COMMUNICATIONS, INC.,

Defendant.

ORDER

This case is before the Court on Magistrate Judge Michael E. Hegarty's recommendation, ECF No. 71, on defendant's motion to dismiss, ECF No. 38, defendant's objections to the recommendation, ECF No. 81, and plaintiffs' response to those objections, ECF No. 87. For the following reasons the recommendation is adopted, and the motion to dismiss is denied.

BACKGROUND

Judge Hegarty provides a detailed account of the factual allegations in this case, and I summarize his findings here. *See* ECF No. 71. The plaintiffs are a collection of record companies and music publishers that produce and distribute commercial sound recordings and musical compositions. *Id.* at 3. Plaintiffs, through the recording artists and songwriters they represent, have created and marketed a large amount of music and recordings which have been registered with the U.S. Copyright Office ("plaintiffs' copyrighted works"). *Id.* Plaintiffs collectively own or control millions of copyrighted musical compositions or sound recordings, which constitute their primary source of income. *Id.*

Defendant Charter Communications, Inc. ("Charter") is one of the largest internet service providers ("ISP") in the country, with more than twenty-two million subscribers nationwide. *Id.* Charter provides high speed internet services in exchange for monthly subscription fees. *Id.* Charter customers may purchase higher download speeds for higher monthly fees. *Id.*

Plaintiffs have become aware of persons infringing their copyrighted works through online peer-to-peer file-sharing programs, such as "BitTorrent." *Id.* BitTorrent and similar file-sharing protocols allow users to share music and other files directly with one another over the internet. *Id.* BitTorrent became popular because it facilitates much faster downloading by breaking files into smaller pieces, allowing users to download different pieces from different peers simultaneously. *Id.* at 4. Once a user has downloaded all pieces of a file, the file automatically assembles itself into its complete form and becomes available for playback by the user. *Id.*

The efficiency of this type of file-sharing system proves particularly conducive to online piracy. *Id.* A 2011 report estimated that 11.4 percent of all internet traffic involved unauthorized distribution of copyrighted works through BitTorrent. *Id.* Plaintiffs' copyrighted works have been unlawfully distributed millions of times through BitTorrent. *Id.*

Charter draws customers in part by advertising their "blazing-fast . . . speeds" that allow users to "download just about anything instantly," including up to "8 songs in 3 seconds." *Id.* Subscribers have used these speeds and Charter's services to pirate plaintiffs' works. *Id.* Plaintiffs have identified hundreds of thousands of specific instances in which Charter's subscribers utilized peer-to-peer systems to distribute and copy plaintiffs' songs illegally. *Id.* Plaintiffs and others have submitted to Charter statutory infringement notices detailing specific

infringements committed by specific subscribers, identified by their unique Internet Protocol ("IP") addresses. *Id*. 4–5.

Charter's terms of service prohibit users from engaging in copyright infringement and state that Charter reserves the right to terminate accounts of participants in piracy. *Id*. at 5. Despite this, Charter has not taken any steps to address the reported infringements. *Id*. Charter generates revenue from infringing subscribers and does not want to lose such revenue or risk the possibility of making its service less attractive to subscribers should it start terminating infringing accounts. *Id*. Additionally, tracking and responding to infringement notices would require resources which Charter does not want to spend. *Id*.

Charter's lack of action against known infringers likely draws further subscriptions, as subscribers know they can download infringing content without consequence. *Id*. This approach encouragers subscribers to continue using Charter's service as well as purchase higher bandwidth to facilitate higher download speeds. *Id*. All this activity undercuts the legitimate music market, plaintiffs' primary source of income. *Id*. at 6.

STANDARD OF REVIEW

A. Magistrate Judge Recommendation

When a magistrate judge makes a recommendation on a dispositive motion, the district court "must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). An objection is sufficiently specific if it "focus[es] the district court's attention on the factual and legal issues that are truly in dispute." *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1060 (10th Cir. 1996). In the absence of a timely and specific objection, "the district court may review a magistrate's report under any standard it deems appropriate." *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991); *see also* Fed. R.

Civ. P. 72 advisory committee's note ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation."). Legal theories raised for the first time in objections to a magistrate judge's recommendation are deemed waived. *United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2011).

B. Motion to Dismiss

To survive a Rule 12(b)(6) motion to dismiss, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plausible claim is one that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While courts must accept well-pled allegations as true, purely conclusory statements are not entitled to this presumption. *Id.* at 678, 681. Therefore, so long as the plaintiff pleads sufficient factual allegations such that the right to relief crosses "the line from conceivable to plausible," she has met the threshold pleading standard. *Twombly*, 550 U.S. at 556, 570.

ANALYSIS

Judge Hegarty concluded that plaintiffs' complaint sufficiently alleged a claim for vicarious copyright infringement. ECF No. 71 at 15–16. In reaching that conclusion Judge Hegarty found that Charter incurred a direct financial benefit from the alleged infringement, and that Charter had the right and ability to supervise the infringing activities. *Id.* Charter objects to both findings. ECF No. 81. According to Charter, Judge Hegarty misapplied the direct financial benefit standard and implausibly presumed that Charter had the practical ability to control infringement. *Id.* I address each objection in turn.

A. Direct Financial Benefit

Charter raises many objections to Judge Hegarty's finding regarding the direct financial benefit requirement. I address first the challenges to Judge Hegarty's articulation of the relevant standard and second the argument that plaintiffs' allegations have not met that standard.

1. Legal Standard

The Tenth Circuit has limited precedent on the issue of vicarious and contributory copyright liability. Judge Hegarty therefore appropriately relied on persuasive precedents from a variety of courts of appeal and other federal courts. He also correctly noted that the Tenth Circuit cases that address similar issues cite particular Ninth Circuit cases favorably. *See Diversey v. Schmidly*, 738 F.3d 1196, 1204 (10th Cir. 2013) (citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261–65 (9th Cir. 1996)), and *La Resolana Architects, PA v. Reno, Inc.*, 555 F.3d 1171, 1181 (10th Cir. 2009) (citing *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004)).

Charter challenges Judge Hegarty's conclusion that ability to engage in infringing conduct need not be the primary draw of defendant's services, but only *a* draw. ECF No. 81 at 7–18. Charter interprets *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657 (9th Cir. 2017) and other Ninth Circuit cases as holding that the ability to infringe on plaintiffs' content must constitute "*the* attracting factor" for subscribers. ECF No. 81 at 12.

I agree with Judge Hegarty that Charter's reading of the case law on this issue is incorrect. In *Perfect 10* the Ninth Circuit held that a "[f]inancial benefit exists where the availability of infringing material acts as a draw for customers" and that "[t]he size of the 'draw' relative to a defendant's overall business is immaterial." 847 F.3d at 673. The court concluded that "[t]he essential aspect of the 'direct financial benefit' inquiry is whether there is a causal

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