

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

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

WARNER BROS. RECORDS INC.,  
ATLANTIC RECORDING CORPORATION,  
BAD BOY RECORDS LLC,  
ELEKTRA ENTERTAINMENT GROUP INC.,  
FUELED BY RAMEN LLC,  
NONESUCH RECORDS INC.,  
ROADRUNNER RECORDS, INC.,  
WEA INTERNATIONAL INC.,  
WARNER/CHAPPELL MUSIC, INC.,  
WARNER-TAMERLANE PUBLISHING CORP.,  
WB MUSIC CORP.,  
W.B.M. MUSIC CORP.,  
UNICHAPPELL MUSIC INC.,  
RIGHTSONG MUSIC INC.,  
COTILLION MUSIC, INC.,  
INTERSONG U.S.A., INC.,  
SONY MUSIC ENTERTAINMENT,  
ARISTA MUSIC,  
ARISTA RECORDS LLC,  
LAFACE RECORDS LLC,  
PROVIDENT LABEL GROUP, LLC,  
SONY MUSIC ENTERTAINMENT US LATIN,  
VOLCANO ENTERTAINMENT III, LLC,  
ZOMBA RECORDINGS LLC,  
SONY/ATV MUSIC PUBLISHING LLC,  
EMI AL GALLICO MUSIC CORP.,  
EMI ALGEE MUSIC CORP.,  
EMI APRIL MUSIC INC.,  
EMI BLACKWOOD MUSIC INC.,  
COLGEMS-EMI MUSIC INC.,  
EMI CONSORTIUM MUSIC PUBLISHING INC. d/b/a EMI FULL KEEL MUSIC,  
EMI CONSORTIUM SONGS, INC., individually and d/b/a EMI LONGITUDE MUSIC,  
EMI ENTERTAINMENT WORLD INC. d/b/a EMI FORAY MUSIC,  
EMI JEMAXAL MUSIC INC.,  
EMI FEIST CATALOG INC.,  
EMI MILLER CATALOG INC.,  
EMI MILLS MUSIC, INC.,  
EMI UNART CATALOG INC.,  
EMI U CATALOG INC.,  
JOBETE MUSIC CO. INC.,  
STONE AGATE MUSIC,

SCREEN GEMS-EMI MUSIC INC.,  
STONE DIAMOND MUSIC CORP.,  
UMG RECORDINGS, INC.,  
CAPITOL RECORDS, LLC,  
UNIVERSAL MUSIC CORP.,  
UNIVERSAL MUSIC – MGB NA LLC,  
UNIVERSAL MUSIC PUBLISHING INC.,  
UNIVERSAL MUSIC PUBLISHING AB,  
UNIVERSAL MUSIC PUBLISHING LIMITED,  
UNIVERSAL MUSIC PUBLISHING MGB LIMITED,  
UNIVERSAL MUSIC – Z TUNES LLC,  
ISLAND MUSIC LIMITED,  
POLYGRAM PUBLISHING, INC., and  
SONGS OF UNIVERSAL, INC.,

Plaintiffs,

v.

CHARTER COMMUNICATIONS, INC.,

Defendant.

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**RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

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**Michael E. Hegarty, United States Magistrate Judge.**

This action arises out of the alleged secondary infringement by the Defendant of the Plaintiffs’ copyrighted musical compositions and sound recordings. Plaintiffs allege Defendant infringed on their copyrighted works by contributing to its subscribers’ direct infringement (“contributory infringement”) and by profiting from the subscribers’ direct infringement while declining to exercise a right to stop or limit it (“vicarious infringement”). Defendant now moves to dismiss Plaintiffs’ claims for vicarious infringement, and the motion has been referred to this Court for a report and recommendation. For the reasons that follow, this Court respectfully recommends that the Honorable R. Brooke Jackson deny the Defendant’s motion.

## STATEMENT OF FACTS

The following are relevant factual allegations (as opposed to legal conclusions, bare assertions, or merely conclusory allegations) made by Plaintiffs in the operative Complaint, which are taken as true for analysis under Fed. R. Civ. P. 12(b)(6) pursuant to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Plaintiffs are record companies and music publishers that produce, manufacture, distribute, sell, and license commercial sound recordings and musical compositions. Through substantial investments of money, time, and creative effort, Plaintiffs—and the recording artists and songwriters they represent—have developed and marketed the music and recordings listed on the attachments to the Complaint, all of which have been registered with the U.S. Copyright Office (“copyrighted works”). Collectively, Plaintiffs own or control the copyrights to millions of musical compositions and sound recordings, which are one of their primary sources of income.

Defendant Charter Communications, Inc. is one of the largest internet service providers (“ISP”) in the country, with more than twenty-two million subscribers nationwide. Defendant provides high-speed internet service to its customers in exchange for monthly subscription fees by offering a tiered pricing structure allowing a subscriber to purchase higher download speeds for higher monthly fees.

In recent years, Plaintiffs have become aware of persons infringing their copyrighted works through online peer-to-peer file-sharing programs, such as “BitTorrent.” BitTorrent is a file-sharing protocol that allows users to transfer music and other files directly to one another over the internet. What makes BitTorrent unique from other file-sharing programs is that it facilitates much faster downloading by breaking each file into pieces, allowing users to download different pieces of

content simultaneously from different peers. At the same time, the system allows users to begin disseminating the copyrighted content before the complete file has even downloaded. This means that, at any given time, each user connected to the internet can be both downloading and uploading different pieces of a file from, and to, multiple other users. Once a user has downloaded all the pieces, the file is automatically reassembled into its complete form and available for playback by the user.

The efficiencies gained from this type of file sharing have led to significant online piracy. A January 2011 report estimated that 11.4% of all internet traffic at the time involved the unauthorized distribution of copyrighted works through BitTorrent. In a report from September 24, 2013, another company, NetNames, estimated that 99.97 percent of non-pornographic files distributed via BitTorrent systems infringe copyrights. Further, in a well-publicized incident in 2015, millions of individual BitTorrent users downloaded an episode of HBO's "Game of Thrones" within just twenty-four hours of its airing. Plaintiffs' own copyrighted works have been distributed millions of times through BitTorrent, depriving Plaintiffs of untold millions of dollars in legitimate music sales.

Defendant seeks to draw subscribers to its high-speed internet service—including subscribers who wish to download and distribute music illegally through programs such as BitTorrent—by touting "blazing-fast . . . speeds" that allow users to "download just about anything instantly," including up to "8 songs in 3 seconds." Subscribers, in turn, have utilized these speeds to pirate Plaintiffs' works. For example, between 2012 and 2015, Plaintiffs and their representatives identified hundreds of thousands of specific instances in which Defendant's subscribers utilized peer-to-peer systems to distribute and copy Plaintiffs' songs illegally. Tens of thousands of these

subscribers were serial infringers, with some pirating hundreds of Plaintiffs' songs over the course of several months. Defendant ignored the hundreds of thousands of statutory infringement notices the Plaintiffs and others submitted to it under penalty of perjury, each of which detailed specific acts of infringement committed by specific subscribers, identified by their unique Internet Protocol ("IP") addresses.

Defendant's "Terms of Service/Policies" expressly prohibits users from engaging in copyright infringement and reserves to Defendant the right to terminate users' accounts for participating in piracy. Notwithstanding this policy, Defendant has failed to address the repeated infringement that occurs over its network because it derives significant income from subscription fees, and Defendant does not want to lose the revenue generated from these infringing subscribers by terminating their accounts, nor risk the possibility that account terminations would make its service less attractive to other existing or prospective users. In addition, Defendant does not want to devote the resources necessary to track repeat infringers and respond to infringement notices.

Furthermore, Defendant's refusal to terminate infringing users' accounts acts as a further draw to its service, as subscribers come to understand that they can download music and other files illegally over Defendant's network without fear that Defendant will terminate their internet access. That is, the specific infringing subscribers identified in Plaintiffs' notices knew Defendant would not terminate their accounts despite Defendant's receipt of multiple notices identifying them as infringers, and they remained Defendant's subscribers to continue illegally downloading copyrighted works. Defendant's conduct encourages its customers to purchase even more bandwidth from the company and to continue using—and paying subscription fees for—Defendant's services.

When Defendant's subscribers use its network to obtain infringing copies of Plaintiffs'

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