

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico**

Civil Action No. 1:21-cv-01901-DDD-MEH

AFTER II MOVIE, LLC;
BADHOUSE STUDIOS, LLC;
BODYGUARD PRODUCTIONS, INC.;
DALLAS BUYERS CLUB, LLC;
HANNIBAL CLASSICS, INC.;
KILLING LINK DISTRIBUTION, LLC;
LF2 PRODUCTIONS, INC.;
MILLENNIUM FUNDING, INC.;
MILLENNIUM IP, INC.;
MILLENNIUM MEDIA, INC.;
MON, LLC;
NIKOLA PRODUCTIONS, INC.;
OUTPOST PRODUCTIONS, INC.;
PARADOX STUDIOS, LLC;
RAMBO V PRODUCTIONS, INC.;
SCREEN MEDIA VENTURES, LLC;
VENICE PI, LLC;
VOLTAGE HOLDINGS, LLC;
WONDER ONE, LLC;
HITMAN TWO PRODUCTIONS, INC.;
GLACIER FILMS 1, LLC; and
CINELOU FILMS, LLC,

Plaintiffs,

v.

WIDEOPENWEST FINANCE, LLC,

Defendant.

**ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT'S MOTION TO DISMISS**

Defendant moves to dismiss all claims asserted in this action pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim

upon which relief can be granted. (Doc. 35.) For the following reasons, the motion is denied with respect to Plaintiffs' claims alleging secondary copyright infringement and violation of the Digital Millennium Copyright Act. The motion is granted with respect to Plaintiffs' "claim" for injunctive relief, as this is not an independent cause of action but rather a potentially available remedy if Plaintiffs are successful on the merits of their copyright-infringement and DMCA claims.

BACKGROUND

The following facts are drawn from the allegations in Plaintiffs' Amended Complaint (Doc. 25), which I must take as true for purposes of Defendant's motion to dismiss.

This is a copyright infringement case, specifically regarding secondary infringement. Plaintiffs own a variety of copyrights for motion pictures, and Defendant WideOpenWest Finance, LLC is an internet service provider. (*Id.* ¶¶ 7, 38.) Plaintiffs claim that Defendant contributorily and vicariously infringed on their copyrights, and they also accuse Defendant of violating the Digital Millennium Copyright Act, 17 U.S.C. § 1202. Defendant denies all claims.

Plaintiffs contend that Defendant's subscribers have been actively infringing their copyrights by using BitTorrent to download and share copies of Plaintiffs' movies. (*See id.* ¶¶ 70-80.) According to the complaint, Plaintiffs used a program called Maverickeye to detect infringement and track the IP addresses where the infringement occurred. Maverickeye data shows that numerous WideOpenWest subscriber IP addresses were used to infringe on Plaintiffs' copyrights. Plaintiffs, through Maverickeye, sent Defendant notices about the infringing activities. (*Id.* ¶ 51.)

Plaintiffs allege that Defendant has not reasonably implemented a safe-harbor policy by terminating the accounts of repeat infringers. (*Id.* ¶¶ 148-49.) Plaintiffs sent over 33,000 notices to Defendant regarding infringement at its subscribers’ IP addresses, and Defendant did not terminate the subscribers’ accounts or take any meaningful action to deter or stop the illegal behavior. (*Id.* ¶¶ 150-51; *see also, e.g., id.* ¶¶ 153-58.)

Plaintiffs style their claims for relief as follows: (1) “Contributory Copyright Infringement based upon material contribution” (*id.* ¶¶ 179-85); (2) “Vicarious Infringement” (*id.* ¶¶ 186-92); (3) “Application for Injunctive Relief” (*id.* ¶¶ 193-204); and (4) “Secondary Liability for Digital Millennium Copyright Act Violations” (*id.* ¶¶ 205-23).

DISCUSSION

I. Motion to Dismiss Standard

When presented with a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the question is whether the facts alleged in the complaint, if true, would entitle the plaintiff to some legal remedy. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *abrogated on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). In reviewing the sufficiency of the complaint, courts must accept the alleged facts as true and view them in the light most favorable to the plaintiff. *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007). Courts need not, however, accept conclusory allegations that are unsupported by factual averments. *VDARE Found. v. City of Colo. Springs*, 11 F.4th 1151, 1159 (10th Cir. 2021). A complaint need not contain detailed factual allegations to state a claim for relief, but the facts alleged must be enough to raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555. “Threadbare recitals of the elements of a cause of action . . . do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion

to dismiss, the complaint must contain sufficient factual allegations that, accepted as true, allow me to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Id.*

II. Secondary Copyright Infringement

Plaintiffs are seeking relief for secondary copyright infringement. The Copyright Act does not explicitly create secondary liability; the concept derives from case law. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 914 (2005). Secondary liability for copyright infringement does not exist in the absence of direct infringement. *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 n.2 (9th Cir. 2001). To successfully plead a prima facie case of direct infringement, Plaintiffs must allege facts demonstrating (1) ownership of the allegedly infringed material; and (2) that the alleged direct infringers violated at least one exclusive right granted to copyright holders by 17 U.S.C. § 106. *Id.* at 1013; *see also* 17 U.S.C. § 501(a). Exclusive rights include, but are not limited to, the rights to reproduce and distribute the copyrighted works. 17 U.S.C. § 106(1), (3).

In their complaint, Plaintiffs allege ownership of the copyrighted material. (Doc. 25 ¶ 47; Doc. 25-1.) Plaintiffs also identify numerous IP addresses of Defendants' subscribers where their copyrighted works (or pieces of those works) were allegedly reproduced (by downloading) or distributed (by uploading) without authorization. (Doc. 25 ¶¶ 70-80, 85-104; Doc. 25-2.) Because Plaintiffs satisfactorily allege the elements

of direct infringement in their complaint, their claims for secondary infringement may be considered.¹

A. Contributory Infringement

To be liable for contributory copyright infringement, Plaintiffs must plead that Defendant (1) knew about the direct infringement; and (2) caused or materially contributed to the infringement. *Diversey v. Schmidly*, 738 F.3d 1196, 1204 (10th Cir. 2013).

1. Knowledge

To satisfy the knowledge element, Plaintiffs must sufficiently allege that Defendant actually knew of, or had reason to know of and was willfully blind to, the direct infringement. *BMG Rts. Mgmt. LLC v. Cox Commc'ns, Inc. (BMG II)*, 881 F.3d 293, 308, 310 (4th Cir. 2018); *accord Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068 (9th Cir. 2013) (“actual knowledge of specific acts of infringement” or willful blindness involving “deliberate actions to avoid learning about infringement” is required to establish knowledge element). “[T]he proper standard

¹ Defendant argues that Plaintiffs have not adequately identified any alleged direct infringer because Plaintiffs have only identified the subscriber IP addresses used to infringe, but have not alleged facts showing that WideOpenWest’s subscribers themselves, as opposed to some other person(s) using the identified subscriber IP addresses, committed the infringing conduct. But Defendant relies on inapposite cases in which the defendant was an individual internet subscriber rather than an ISP like WideOpenWest. *Compare Cobbler Nev., LLC v. Gonzales*, 901 F.3d 1142, 1145 (9th Cir. 2018) (cited by Defendant), *with UMG Recordings, Inc. v. RCN Telecom Servs., LLC*, No. 19-17272 (MAS) (ZNQ), 2020 WL 5204067, at *10 n.5 (D.N.J. Aug. 31, 2020) (finding ISP defendant’s reliance on *Cobbler* misplaced); *see also BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc. (BMG I)*, 149 F. Supp. 3d 634, 664 (E.D. Va. 2015) (“While identity is a key issue in many individual infringement suits, it has little relevance in a large-scale secondary liability suit.”).

requires a defendant to have specific enough knowledge of infringement that the defendant could do something about it.” *BMG II*, 881 F.3d at 311-12; accord *UMG Recordings, Inc. v. Grande Commc’ns Networks, LLC*, 384 F. Supp. 3d 743, 768 & n.7 (W.D. Tex. 2019) (ISP can be contributorily liable if it has actual knowledge of or is willfully blind to specific infringing material available using its system yet continues to provide internet access).

Plaintiffs allege that they sent over 30,000 notices to Defendant, sometimes thousands per subscriber IP address, which they argue proves Defendant’s substantial knowledge of direct infringement occurring using the service it provides. (Doc. 25 ¶¶ 128-144; see also Doc. 25-3.) Plaintiffs also provide email correspondence between Plaintiffs’ counsel and Defendant’s counsel discussing the alleged infringement by Defendant’s subscribers. (Doc. 25-4; Doc. 25-5.) Defendant argues that these notices and emails are not enough to demonstrate knowledge because Plaintiffs’ notices and correspondence did not include documentation or evidence supporting Plaintiffs’ allegations of infringement. (Doc. 35 at 9.) But at the motion-to-dismiss stage, I must view the facts alleged in the light most favorable to Plaintiffs. Taking Plaintiffs’ factual allegations as true in this early stage of litigation, Plaintiffs have plausibly stated that Defendant had knowledge of its subscribers’ direct infringement, if not from the 30,000 notices, then from the correspondence between counsel. It is reasonable to infer that such notices and correspondence gave Defendant enough knowledge to have done something about the alleged direct infringement. See *BMG II*, 881 F.3d at 299, 312 (ISP can match IP address to subscriber’s identity; willful blindness if ISP consciously avoided learning about specific instances of infringement); *RCN*, 2020 WL 5204067, at *8 (notices that “provided the IP address of the user, the date and time of the activity,

and the name of the infringed upon content [were] sufficient to confer actual knowledge” to defendant); *cf. Luvdarts*, 710 F.3d at 1072-73 (no willful blindness where “notices were 150-page-long lists of titles, apparently just a transcription of every title copyrighted by [the plaintiff]” and “d[id] not identify which of these titles were infringed, who infringed them, or when the infringement occurred”).

2. Material Contribution

To sufficiently allege that Defendant caused or materially contributed to the infringement, Plaintiffs must show that Defendant intentionally engaged in conduct that encouraged or assisted in the direct infringement. *BMG II*, 881 F.3d at 306-308 (citing *Grokster*, 545 U.S. at 930, 932-35); *Napster*, 239 F.3d at 1019; *see also Diversey*, 738 F.3d at 1204 (“One way of establishing contributory liability is by showing a defendant ‘authorized the infringing use.’”). The material contribution element is tied closely to the knowledge element. A defendant’s intent to cause or encourage direct infringement may be presumed or inferred if a defendant sells a product with knowledge that the buyer will use the product to infringe copyrights. *BMG II*, 881 F.3d at 307. “In that circumstance, the seller knows that infringement is substantially certain to result from the sale; consequently, the seller intends to cause infringement” *Id.* This is true regardless of whether the product in question is capable of substantial non-infringing uses. *Id.* at 306-08.

In both *BMG II* and the present case, the defendants received notices from the plaintiffs of infringement being committed by their subscribers, yet they did not terminate the identified subscribers’ accounts. *BMG II*, 881 F.3d at 299-300. In *BMG II*, the Fourth Circuit concluded that a reasonable jury could find the material contribution element of contributory infringement is satisfied based on evidence that an ISP had

knowledge that specific customers were using its services to commit copyright infringement and nonetheless continued to provide internet access to those customers. *Id.* at 308, 311-12. Similarly, here Plaintiffs' allegations that Defendant continued to provide internet access to subscribers it had been notified were infringing are sufficient to support a reasonable inference that Defendant materially contributed to those subscribers' infringement.

B. Vicarious Infringement

To sufficiently allege vicarious liability for copyright infringement, Plaintiffs must plead that Defendant (1) has the right and ability to supervise the infringing activity; and (2) has a direct financial interest in the infringing activity. *Diversey*, 738 F.3d at 1204; *Shell v. Henderson*, No. 09-cv-00309-MSK-KMT, 2013 WL 2394935, at *11 (D. Colo. May 31, 2013) (to show vicarious liability, plaintiff must show that: (i) third party engaged in acts of infringement; (ii) defendant had the capacity to supervise or the right and ability to control the infringing activity; (iii) defendant failed to exercise its authority to halt the infringement; and (iv) defendant had a direct financial interest in the infringing activity (citing *Luvdarts*, 710 F.3d at 1071)). Unlike contributory liability, a defendant may be vicariously liable for copyright infringement even when it does not have knowledge of the direct infringement. *Diversey*, 738 F.3d at 1204. A direct financial benefit may be found where the availability of infringing material acts as a draw for customers. *Warner Records, Inc. v. Charter Commc'ns, Inc.*, 454 F. Supp. 3d 1069, 1074 (D. Colo. 2020). For Defendant to have the right and ability to supervise the infringing activities, it must be legally able to stop or limit the infringing conduct. *Id.* at 1078.

The facts in this case mirror the facts in *Warner Records*, where the court found that the combination of the defendant's advertisements for high-speed services and lack of action regarding infringement was sufficient to demonstrate a causal relationship between subscribers' infringing activity and financial benefit to the defendant ISP. *Id.* at 1084. Plaintiffs in this case have sufficiently pleaded that Defendant'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. (See Doc. 25 ¶¶ 161-68.) Likewise, Plaintiffs sufficiently pleaded that Defendant has the legal ability to stop and limit copyright infringement by its subscribers. Defendant's website states that it uses tools to control network management, and "states it will throttle a subscriber[s] Internet speed if Defendant determines that said subscriber is using Internet service for non-preferred traffic." (*Id.* ¶¶ 175-76.) Plaintiffs have alleged facts sufficient to support a reasonable inference that the requisite elements of a claim for vicarious liability are present.

III. Secondary Liability Under DMCA Section 1202

Copyright Management Information ("CMI") is governed under Section 1202 of the Digital Millennium Copyright Act. CMI includes, but is not limited to, the title of the work, the author, the owner, and any other identifying numbers or symbols corresponding with the work that is conveyed with copies of the work. 17 U.S.C. § 1202(c). The statute prohibits a person from both (1) removing or altering CMI, and (2) distributing copyrighted works or CMI with knowledge that the CMI is false or has been removed or altered, if the person knows or has reasonable grounds to know that such removal, alteration, or distribution will induce, enable, facilitate, or conceal copyright infringement. 17 U.S.C. § 1202(a)-(b).

Defendant argues that there can be no secondary liability for violations of Section 1202 because the DMCA does not expressly provide for it. Defendant cites to case law for the proposition that the lack of an express provision for secondary liability indicates that Congress did not intend to allow for secondary liability under this law for people who provide services but do not perform the acts prohibited by the law. (Doc. 35 at 14 (“Section 1202 imposes liability for specified acts. It does not address the question of liability for persons who manufacture or provide services.”).) Several courts have held, however, that there can be vicarious liability for violation of the statute. *See, e.g., Gordon v. Nextel Commc’ns & Mullen Advert., Inc.*, 345 F.3d 922, 925-56 (6th Cir. 2003); *Rosenthal v. MPC Computers, LLC*, 493 F. Supp. 2d 182, 190 (D. Mass. 2007); *In re Dealer Mgmt. Sys. Antitrust Litig.*, No. 18-cv-864, 2019 WL 4166864, at *14 (N.D. Ill. Sept. 3, 2019); *Atlanta Photography, LLC v. Ian Marshall Realty, Inc.*, No. 1:13-CV-2330-AT, 2014 WL 11955391, at *4 (N.D. Ga. Mar. 7, 2014); *see also Millennium Funding, Inc. v. Private Internet Access, Inc.*, No. 21-cv-01261-NYW-SKC, 2022 WL 7560395, at *17 (D. Colo. Oct. 13, 2022) (“At this [motion-to-dismiss] juncture, the Court declines to rule whether vicarious liability is available in the context of § 1202, reserving the issue for more developed briefing from the Parties, and assumes, without deciding, that Plaintiffs can bring vicarious liability claims under § 1202.”); *but see Masterfile Corp. v. Bigsy Music, Inc.*, Civil Action No. 11-337, 2012 WL 13015119, at *9 n.6 (E.D. Pa. Jan. 23, 2012) (“We are unsure . . . of the wisdom of applying [vicarious liability] to a statute that so clearly requires knowledge (whether actual or constructive) as a predicate for liability . . .”).

Like Judge Wang in *Millennium Funding*, I will presume at this juncture that there can be secondary liability for violations of Section 1202. Plaintiffs sufficiently allege direct violations of Section 1202 by

Defendant’s subscribers. (*See, e.g.*, Doc. 25 ¶¶ 106-123 (subscribers with infringing copies of Plaintiffs’ works altered CMI in file titles to “brand” pirated files before uploading to BitTorrent, knowing altered file names would induce and enable further copyright infringement).) As to contributory liability, Plaintiffs provide an example notice sent to Defendant where Plaintiffs identified a subscriber IP address from which a copyrighted work with altered CMI in the file title was downloaded. (Doc. 25-3.) The notice included the file name with altered CMI. (*Id.*; *see also* Doc. 25 ¶ 123.) Viewing Plaintiffs’ allegations in the light most favorable to them, a reasonable inference can be drawn that Defendant knew or was willfully blind to direct violations of Section 1202 by its subscribers, and that it materially contributed to those subscribers’ violations by continuing to provide them with internet access. And as to vicarious liability, Plaintiffs sufficiently allege Defendant had a right and ability to supervise and control its subscribers’ distribution of works that had altered CMI, and had a direct financial interest in such distribution. *See Millennium Funding*, 2022 WL 7560395, at *18 (“Plaintiffs need not prove their case at the pleading stage.”).

Also like Judge Wang, given the unsettled nature of the applicable law in this area, I find that the specific requirements of Plaintiffs’ claims under Section 1202—*e.g.*, whether adding wording to the title of a work constitutes alteration of CMI—are “more appropriately definitively determined at a later stage in the proceedings.” *Id.* at *19 (“The Court thus declines to order dismissal of [Plaintiff’s Section 1202 claim] on this basis, but simply notes that assuming that vicarious liability is available for violations of § 1202 . . . Plaintiff’s allegations are sufficient to state a claim at this stage in the case.”).

IV. Injunctive Relief

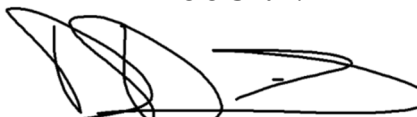
Defendant argues that “an injunction is not an independent cause of action”; rather, it is a remedy. (Doc. 35 at 16 (citing *Romstad v. City of Colo. Springs*, 650 F. App’x 576, 585 (10th Cir. 2016)).) I agree and will grant Defendant’s motion to dismiss Plaintiffs’ “claim” for injunctive relief. I note, however, that dismissal of this “claim” does not preclude Plaintiffs’ from seeking injunctive relief if appropriate as a remedy should they prevail on the merits of one or more of their claims.

CONCLUSION

It is **ORDERED** that Defendant WideOpenWest Finance, LLC’s Motion to Dismiss the Amended Complaint (**Doc. 35**) is **GRANTED IN PART** as to Plaintiffs’ “claim” for injunctive relief and **DENIED** in all other respects.

DATED: March 31, 2023

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Daniel D. Domenico', written over a horizontal line.

Daniel D. Domenico
United States District Judge