

Respectfully submitted,

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Exhibit A

Large Recording Companies v. The Defenseless **Some Common Sense Solutions to the Challenges of the RIAA Litigations**

By Ray Beckerman

The concern of this court is that in these lawsuits, potentially meritorious legal and factual defenses are not being litigated, and instead, the federal judiciary is being used as a hammer by a small group of plaintiffs to pound settlements out of unrepresented defendants.

—Judge S. James Otero,
 Elektra Entertainment
 Group Inc. v. O'Brien, 2007.¹

As every federal judge must be painfully aware by now, an estimated 30,000 ordinary people² have been sued during the past four years in U.S. district courts by the world's four largest record companies, EMI, SONY BMG, Warner Brothers Records, and Vivendi/Universal, or their affiliates. The suits have been brought for alleged infringement of sound recording



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copyrights. Although these companies are represented by a trade association, the Recording Industry Association of America (RIAA), none of the hundreds of other members of this association has participated in the litigation campaign. The large majority of the defendants have defaulted, and the default judgments against them have been in amounts that represent more than 2,000 times the actual damages sustained by the plaintiffs.³

Of those remaining, most have paid settlement amounts that exceed 1,000 times the plaintiffs' actual damages, and a great number of the settling defendants—perhaps most of them—are people who did not actually engage in file sharing, let alone copyright infringement through file sharing, and against whom no legally cognizable claim for secondary infringement could be mounted. However, they are settling because the alternative—protracted, costly federal litigation—is not possible for them.

As to the handful of defendants who have neither defaulted nor settled, most are pro se. Only a very few have had any form of legal representation. And in those instances where there has been representation, the attorneys are usually working pro bono, or on a basis closely resembling it, sometimes as a favor and sometimes even involuntarily.⁴

The courts of other countries—notably the Netherlands and Canada—are not clogged with these cases for the simple reason that they were quick to recognize the paucity of the RIAA's evidence and refused to permit the identities of Internet subscribers to be disclosed to

the record companies.⁵ The courts of the United States have not been so discriminating and have allowed a veritable flood of one-sided litigation to crowd their dockets.

This article will attempt to remove some of the mythology regarding these cases, to make observations regarding some of the points at which the process is breaking down, and at each of those junctures, to offer one or more practical, constructive suggestions as to what the courts need to do to make the process more fair and balanced.

The Origin of a Case

There is a common misconception, actively fostered by the RIAA's public relations spokespeople, that these are "downloading" cases. Nothing could be further from the truth. The cases are brought without any proof of downloading whatsoever.

The way in which these cases come about is that an unlicensed "investigator" (through a method the RIAA has termed "automated," "proprietary," and "confidential" and that it refuses to disclose),⁶ engages in a pretexting operation in which the investigator pretends to be an ordinary user of one of the peer-to-peer file-sharing networks. When the investigator locates a group of "shared files" on his computer screen, he makes a screen shot, downloads a small number of files, and, from the data packet he retrieves, supplies the RIAA with the Internet protocol (IP) address contained in the packet, together with the date and time of the screenshot.⁷

One investigative company, SafeNet (formerly known as MediaSentry), conducts all of these automated-process

investigations for the RIAA. In each case, a single investigator gathers the information. According to the RIAA's court papers, it appears that a total of three investigators, not a one of whom is a licensed investigator, have collected the information upon which all 30,000 cases have been based over the past four years.

The RIAA's expert witnesses have been deposed only once so far in these cases. In that testimony,⁸ the expert witness conceded that neither his own testimony and methods, nor the investigators' work product upon which he relied, met any of the *Daubert* reliability standards. And yet, the investigator's testimony and that work product have formed the basis for the 30,000—and counting—federal court litigations to date.

The expert's testimony similarly concedes that the investigators could not detect any "individual." Rather, they merely identified a computing device. And yet the RIAA lawyers have continued to sign and to file complaints and other documents stating that their investigators "detected an individual."

Since almost all of the cases are ex parte cases, default cases, pro se cases, or barely defended cases, there is rarely an attorney, and almost never a defendant's expert, to call these oversights to the court's attention.

Armed only with an Internet Protocol (IP) address, the files the RIAA investigator himself downloaded, and a date and time of the screenshot, the plaintiffs then proceed to court to sue the person who paid for the Internet access account linked by an Internet service provider (ISP) to the IP address. The result is the filing of a lot of cases that probably would never have been brought had they been thoroughly reviewed by competent plaintiffs' counsel, or had plaintiffs' counsel asked their clients a few tough questions.

The same adversary system of justice that works brilliantly when there are equally weighted adversaries can sometimes produce disastrous consequences where one side is not represented if the courts are not vigilant, especially where, as here, plaintiffs' attorneys have been

less than mindful of their duties as officers of the court. In such an instance, it is the duty of the court to see to it that the court system is not used in an improper manner. These cases, where four multinational, multibillion-dollar corporations have joined forces to team up against ordinary individuals, represent just such an instance, and courts must pay special attention and be vigilant if they are to ensure a level playing field.

I maintain that the exact opposite has occurred. Many judges, perhaps caught off guard by this onslaught, have been lulled into a pattern of inadvertently waiving, for the plaintiffs' benefit, the normal requirements for federal litigation. As a consequence, the courts have increased, rather than decreased, the imbalances, in some cases presiding over infernos of ex parte communication with judicial personnel, ex parte orders, default judgments, and forced settlements, where defendants see no alternative—because there is no alternative—between accepting the risk of financial ruin and paying thousands of dollars in "settlement" of something they have not done.

The Two Phases of a Case: "John Doe" and "Named Defendant"

There are two distinct phases of the RIAA litigations, the "John Doe" or ex parte discovery phase and the "named defendant" phase.

John Doe. Although the IP address and the date and time of its procurement could at best yield no more than the identity of the owner of an Internet access account and could not show that any particular individual had engaged in the file sharing complained of, the RIAA proceeds on the assumption that the person who paid for the Internet access account is liable and must pay or be sued.

To compensate for this shotgun approach,⁹ the RIAA's lawyers are fond of suggesting that the person who paid for an Internet access account is responsible for any copyright infringement with which that Internet access has been associated. The only problem

with this viewpoint is that the U.S. Supreme Court disagrees with it. In *MGM v. Grokster*,¹⁰ the Court adopted an "inducement rule," holding that secondary copyright infringement liability requires "clear expression or other affirmative steps taken to foster infringement."

Going into the discovery or John Doe phase, the RIAA has an IP address, a date, and a time. Although it could discern, through publicly available Web sites and from the IP address alone, the state and particular region of a state for each John Doe, it disregards that information in selecting the venue of its John Doe suit. Instead, it concerns itself with neither venue nor personal jurisdiction because it has no intention of actually pursuing its copyright infringement claim in that proceeding. The "John Doe copyright infringement" case, in other words, is a sham proceeding. In reality, it is an action for pre-action discovery, which is an action that is not provided for in the Federal Rules of Civil Procedure. So the RIAA improvised a method of its own, one that involves misleading the court.

A long line of unbroken authority makes it quite clear that the Federal Rules do not permit joinder in these cases because the claims are merely "parallel" and do not arise from common acts or transactions. This authority includes a specific joint directive from the District Court in Austin, Texas, to the RIAA plaintiffs to cease and desist from the practice. The RIAA nevertheless commences suit against a number of unrelated John Does in the venue where the ISP is located to pursue its ex parte discovery motion. After it learns the identities of the John Does, it typically dismisses the John Doe cases and brings individual suits against the named defendants (thus, incidentally, denying those defendants the potential economies of scale that the plaintiffs might seek to invoke for themselves by misjoinder in the "discovery" phase).

The John Does are never served with anything, except that after the action has been commenced, after the ex parte

motion has been made, and after the ex parte motion has been *granted*, they receive a few items by mail from the ISP: a copy of a subpoena directed to the ISP and a copy of an ex parte order. They receive no summons, no complaint, no copies of the court rules, no copy of the motion papers, usually little or no time to react, and no meaningful opportunity to be heard in opposition to the motion.

The proceeding is usually hundreds or thousands of miles from the defendant's home and is over before it has begun.

Named Defendant. After getting names and addresses from the ISPs, the RIAA's next litigation step is not to investigate but to file suit against the person identified as having paid for Internet access. Not surprisingly, many, perhaps even most, of the people sued are not the individuals who engaged in file sharing. As noted earlier, the large majority of these cases have resulted in default judgments, a plurality of them have settled, and a handful are contested, almost none meaningfully.

Because of the ex parte applications, the large number of default judgments, and the proliferation of pro se cases in which the defendants show up in court at some scheduled appearances and not at others, there is a huge volume of ex parte communication between the RIAA lawyer handling the cases and the judicial personnel. The ex parte communication problem is further exacerbated by consolidation of the cases (e.g., District of Massachusetts) or "related case" treatment (e.g., Eastern District of New York), where all of the RIAA's cases are turned over to a single district judge, thus giving the single law firm representing the plaintiffs virtually untrammelled ex parte access to a single set of judicial personnel and providing huge economies of scale to plaintiffs that are unavailable to the defendants.

The defendants in these cases invariably experience a sense of hopelessness. They feel that they have no chance at all for a fair hearing. And they are, unfortunately, right.

In the contested cases, the defendants are without the resources needed to challenge the plaintiffs' pleadings or to conduct discovery, and they are barraged with discovery requests by the plaintiff, especially for hard-drive examinations and for unending streams of depositions bearing upon the identities of possible infringers other than the defendant. The RIAA widens its net as far as it is permit-

less motion practice.

If the hard drive does not suggest liability, the RIAA will not dismiss the case, but will instead try to claim that the defendant erased something from the hard drive, in one case persuading the judge that an automatic defragmentation scheduler was somehow a basis for claiming spoliation of evidence. If it cannot claim erasure, it will claim that the defendant switched hard drives. It will never concede that the absence of corroborating evidence on the hard drive means what most reasonable people would conclude it means, which is that the defendant "didn't do it." And the RIAA has paid investigators and expert witnesses on call, which the defendants are without resources to match.

Only a single case in four years, *Capitol v. Thomas*,¹¹ has ever gone to trial, and that one only because the judge denied the defendant's attorney's motion for leave to withdraw. The defendant's involuntary lawyer never even called a single witness on his client's behalf and failed to object to the RIAA's "expert" testifying, even though the expert had conceded meeting none of the *Daubert* reliability standards.

Suggestions for the John Doe Phase

Plaintiffs are ordered to file any future cases of this nature against one defendant at a time, and may not join defendants for their convenience.

—Judges Sam Sparks and Lee Yeakel, *Fonovisa v. Does*, 2004.¹²

[I]t is difficult to ignore the kind of gamesmanship that is going on here. . . . These plaintiffs have devised a clever scheme . . . , but it troubles me that they do so with impunity and at the expense of the requirements of Rule 11(b)(3) because they have no good faith evidentiary basis to believe the cases should be joined.

—Judge Margaret J. Kravchuk, *Arista v. Does*, 2008.¹³

Joinder. The key words from the above two quotations are "2004" and "2008." In

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ted to go, unless and until a court shuts it down. It will first depose close family members, then distant family members, then neighbors, friends, and classmates if the court allows it.

Similarly, in the rare event that the defendants seek discovery of their own, the RIAA will stonewall each and every request except for materials it plans to present as part of its prima facie case. If the defendant asserts one or more counterclaims, the RIAA will move to dismiss all of the counterclaims, thus generating still more expense in point-

November 2004, the RIAA was ordered "to file future cases of this nature against one defendant at a time." And yet in 2008 it continues the practice of deliberate misjoinder, seemingly disregarding the joint order from Austin, Texas. District of Maine Magistrate Judge Kravchuk was so troubled by the false statements the plaintiffs had made in order to justify joinder that she recommended to the district judge that he order plaintiffs to show cause why they should not be subject to Rule 11 sanctions.

Even after that, in *LaFace v. Does 1-38*,¹⁴ Judge Britt was required to remind the RIAA yet again, as so many judges have done before, of the contents of Rule 20. As recently as April 3, 2008, Magistrate Judge Lenihan, did so again.¹⁵ In view of the RIAA's lengthy history of ignoring judicial precedents in this area, a court should consider Rule 11 sanctions, as Magistrate Kravchuk recommended, and contempt. Since most "John Does" never get anywhere near one of the "John Doe" proceedings,¹⁶ courts need to step in and create an effective deterrent to the plaintiffs' persistent rule violation.

Suggestion 1: Be alert to misjoinder in "John Doe" cases. If a court is presented with a "John Doe" case that joins more than one defendant, under well-settled principles the case should be dismissed as to all John Does except John Doe number one. Plaintiffs should be ordered to show cause why they should not be held in contempt of the November 17, 2004, order of the district court in *Fonovisa v. Does*¹⁷ and subject to Rule 11 sanctions. And because there will likely be no defendant's counsel present, the court should read the plaintiffs' response with a critical eye.

Jurisdiction and Venue. As noted above, most of the John Doe defendants are being sued in a jurisdiction hundreds or thousands of miles from their homes although it is readily ascertainable to the plaintiffs, through several publicly accessible Web sites, as to which state and which region of that state each IP address is assigned.

Suggestion 2: Require in personam jurisdiction and venue. If a court is presented with a John Doe case that fails to set forth detailed factual allegations of the basis for venue and for in personam jurisdiction in that district, the action should be dismissed.

Ex Parte Nature of Proceeding

Plaintiffs contend that unless the Court allows ex parte immediate discovery, they will be irreparably harmed. While the Court does not dispute that infringement of a copyright results in harm, it requires a Coleridgean "suspension of disbelief" to accept that the harm is irreparable, especially when monetary damages can cure any alleged violation. On the other hand, the harm related to disclosure of confidential information in a student or faculty member's Internet files can be equally harmful. . . . Moreover, ex parte proceedings should be the exception, not the rule.

—Judge Lorenzo F. Garcia,
Capitol Records, Inc. v. Does,
2007.¹⁸

It is fundamental to practice under the Federal Rules that ex parte motion practice is a last, rather than a first, resort. Not so in the world of RIAA litigation.

In support of a request for an ex parte order, the RIAA generally makes a conclusory allegation that, if the motion is made any other way, the commercial ISP or the college or university ISP will destroy the evidence. First, it is difficult to imagine that any college or university in the United States, or any of the commercial Internet service providers, which are mostly large public utilities, cable companies, and other large corporations, would destroy the evidence if asked not to.¹⁹ Second, even were such an averment to be credited, it could be resolved judicially in a much less onerous fashion by simply issuing a temporary restraining order to retain such records.²⁰

In the third place, papers submitted by the recording industry's lawyers in an ex parte environment should not be accepted as gospel. In *Arista v. Does 1-17*, for instance, the attorney gen-

eral of the State of Oregon pointed out to the court that the RIAA's ex parte motion papers, which had sought to create the aura of an emergency and the need for immediate ex parte action, had concealed a highly material fact: *that the University of Oregon had informed the RIAA prior to the institution of the proceeding that the requested information had been gathered and would be preserved.*²¹ And, as noted earlier, RIAA attorneys routinely allege that RIAA investigators have "detected an individual," only to have investigators admit under oath that they have not.

Suggestion 3: No ex parte motion practice. Nothing should be granted ex parte unless it involves an order providing for meaningful notice of the motion for discovery to be afforded to the John Doe and to the ISP. The order should state that the ISP is to be provided with a full set of papers for transmission to the John Doe, and should provide ample time from the Doc's receipt of such papers, consistent with the court's usual practices for motions on notice, to respond. These should include everything a defendant is normally entitled to receive under the court's usual rules and practices, including the summons and complaint, all of the motion papers, and the court rules, notices, and other materials supplied to defendants.

Merits of Statutory Basis for Discovery Application

The Court is unaware of any other authority that authorizes the ex parte subpoena requested by plaintiffs.

—District Court Judge Walter D. Kelley, Jr., *Interscope v. Does*,
2007.²²

We must accept the fact that digital copyright law, Internet law, information technology law, and the panoply of laws being developed to protect privacy in the Internet age are new and evolving areas and that there are many unsettled questions to be resolved. There is a vacuum of appellate authority on the procedural questions that need to be raised, and in view of the RIAA's preference for ex parte practice and the courts' quiescence

in that practice, it is an unfortunate reality that the questions that need to be asked and the issues that need to be raised are not generally being heard at all, even at the district court level. It is not at all clear that the RIAA even has a legal basis for the pre-action discovery it is seeking.

There are complex statutes on the books protecting the privacy rights of ISP subscribers and college and university students that are being ignored on virtually a daily basis by the courts, in large part because (a) the RIAA has not raised them, and (b) due to the ex parte nature of the proceedings, there is no one in the courtroom to bring them to the court's attention. In such cases, it is up to the courts to protect the privacy rights of the RIAA's targets, both by requiring that defendants be provided ample notice and an opportunity to retain knowledgeable counsel and by ensuring in those instances where the defendants have not been able to retain counsel that the application is consistent with applicable law. In *Interscope v. Does 1-7*,²³ a typical RIAA ex parte John Doe pre-action discovery proceeding, Judge Kelley, for example, did just that. He rejected the RIAA's application altogether, after a thorough review of the laws, concluding that there was simply no legal basis for the identity discovery the RIAA was seeking. Additionally, in *Arista v. Does 1-17*,²⁴ the attorney general in Oregon has argued that the RIAA's discovery application, if granted, would force the university to violate statutes protecting the rights of the university's students.

Suggestion 4: Make explicit the legal authority upon which discovery applications are permitted or rejected. Justice will be well served if a court is able to take the time to scrutinize the statutory basis invoked for each discovery application, cite the authority supporting its rulings, and deny discovery applications on their merits if they are not warranted by existing statutes or case law.

Validity of Plaintiffs' Copyright Infringement Claim

[W]ithout actual distribution of copies . . . there is no violation [of] the distribution right.

—William F. Patry, Patry on Copyright, 2007.²⁵

Plaintiff . . . must present at least some facts to show the plausibility of their allegations of copyright infringement. . . . However, . . . Plaintiffs have presented no facts that would indicate that this allegation is anything more than speculation.

—Judge Rudi M. Brewster, *Interscope v. Rodriguez*, 2007.²⁶

The courts in various jurisdictions are generally in agreement, both as a matter of constitutional law and common law, that pre-action discovery of an anonymous person's identity should not be permitted, regardless of whether there is a valid legal underpinning for the discovery process invoked, absent a concrete showing that the party seeking discovery (1) has pled a valid claim for relief against the anonymous party and (2) has submitted a concrete and competent evidentiary showing of each element of that claim. I am of the view that the RIAA's boilerplate complaint clearly fails to state a claim for relief, even under pre-*Twombly* standards,²⁷ but I cannot ask the reader to necessarily agree in the absence of appellate authority on the subject. I do, however, ask that courts scrutinize the pleading and the evidence carefully at the John Doe stage.

Suggestion 5: Scrutinize John Doe pleadings and evidence without being intimidated by technology jargon. The complaint, of course, affords the opportunity to ensure that plaintiffs have validly pleaded a copyright infringement claim and that the evidence is admissible and covers all elements of the claim. It is easy to be overwhelmed by impressive-sounding technical and pseudo-technical jargon. Allow me to observe that if the court and the court's law clerks and law secretaries (many of whom are "digital natives") do not understand the case, that may be a sign that the plaintiff has none.

Suggestions for the "Named Defendant" Phase

The Sufficiency of the Complaint. Once the RIAA has obtained the information it subpoenaed from the ISP, it then knows the identity and address of the person who paid for an Internet access account. While most of us would think that a place to begin an investigation, the RIAA treats it as the end of its investigation. If that account holder will not pay the RIAA's settlement demand, the RIAA sues. It uses a standard boilerplate complaint.

At this juncture the courts should be especially mindful of the admonition of the Supreme Court in *Bell Atlantic v. Twombly*²⁸ that sustaining a complaint and allowing a federal case to proceed to the discovery phase imposes enormous financial consequences upon the defendant²⁹ and is not a step to be taken lightly. This principle is more, not less, important, in cases like the RIAA cases, because the defendants are not businesses or corporations, but individuals, often poor and working-class individuals, whose family budgets do not include the hundreds of thousands of dollars needed to withstand the hundreds of thousands of dollars the RIAA is willing to spend in any given case.

Some courts³⁰ have made pronouncements to the effect that the court does not "understand the technology" well enough to make the dismissal determination, and that therefore the determination should be made after completion of pre-trial discovery. I submit that, if the court does not understand the technology well enough, it means that the plaintiffs have not pled their claim well enough and their complaint should be dismissed.

A court would be well advised to treat its decision at the pleadings stage to be, by far, the most important determination it will make because a denial of the dismissal motion sentences the defendant to one of two hells: payment of an extortionate settlement for something he did not do or a nightmare of vexatious litigation.

And the dismissal question is especially critical at the district court level at this time because there is no appellate

Preliminary Determination of the

authority at all on the subject. If a court, after due consideration, should sustain a RIAA complaint, it should certify the order for an interlocutory appeal and stay all proceedings during the pendency of the appeal. Thousands of people's lives are being affected by these cases; they are worthy of, and are crying out for, some appellate guidance.

Suggestion 6: Carefully evaluate motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Careful evaluation of a complaint's sufficiency on a motion to dismiss may ultimately spare defendants significant and unwarranted hardship. A court, therefore, should stay all discovery while the motion is pending, and, if it denies the motion, certify the order denying the dismissal motion for an interlocutory appeal.

Relatedness and Consolidation. As noted above, consolidating cases or treating cases as "related" when the only relationship among them is that the plaintiffs are the same, is unfair to the defendants in that it creates a huge economy of scale available only to the plaintiffs and accentuates the problem of ex parte communication, thus heightening, rather than lessening, the already disproportionate imbalance between plaintiff and defendant. Consolidation essentially vests these private, for-profit, corporations with the trappings of a government agency and creates a sense of hopelessness among all defendants who enter the courthouse door. It is simply not consistent with the law to provide consolidation or related-case treatment to one nongovernmental party because it is a high-volume litigant.

What is more, in the absence of appellate guidance on any of the important legal questions, it would be much healthier for each district court to get a diversity of viewpoints from all of its judges, rather than let one judge hearing consolidated cases compound errors that he or she may be making. See, e.g., *Fonovisa v. Does*, *supra*, which, after severing all of the John Does and ordering the record companies to commence separate actions with separate filing fees as to each, specifically admonished plaintiffs not to file the cases as "related."¹

Suggestion 7: No routine consolidation or "related case" treatment. A court need only follow traditional principles for consolidation and "related case" treatment. There is no need to create a special exception for these plaintiffs. Where the defendants are unrelated to each other, their cases are unrelated to each other and should be treated as such.

The Discovery Phase. The greatest

The RIAA nevertheless commences suit against a number of unrelated John Does in the venue where the ISP is located to pursue its ex parte discovery motion.

potential for abuse in these cases lies in the discovery phase, where most defendants simply have no means to fight back. The RIAA lawyers characteristically try to keep a case alive as long as possible, despite the likelihood that the defendant did not commit copyright infringement, because of the subpoena power that the pendency of a federal litigation affords them. However, their subpoena power is invariably directed at targets other than the defendant. Put simply, the subpoena power was not given to attorneys to

enable them to conduct investigations of other cases they might have brought had they conducted a proper investigation in the first place.

The "expert" report, "expert" testimony, and investigator's materials may be dispensed with, under a suitable preclusion order, since the investigator and plaintiffs will likely refuse to disclose the investigator's methods, rendering them unusable at trial, and since the RIAA's "expert" has admitted that neither his methods, nor the methods of the investigators upon whose work he relies, meet *Daubert* reliability standards.

Suggestion 8: Keep discovery short and sweet. If, and only if, the plaintiffs can muster an evidentiary showing that their case has merit and that the defendant committed copyright infringement, then the court may allow (1) a deposition of the plaintiffs; (2) a deposition of the defendant; and (3) an examination of the hard drive by a mutually agreeable independent neutral forensics expert whose fees will be advanced by the plaintiffs and will be treated as a taxable disbursement to abide the event. The plaintiffs would not properly be permitted to use the pendency of the action as a platform for conducting an investigation to find out who, other than the defendant, they should have sued.

Suggestion 9: Expert witness fees should be advanced by plaintiffs. Plaintiffs should be required to pay their own expert witness fees and to advance the defendant's expert witness fees with the expenditure to be a taxable cost to abide the event. Without this, the trier of fact will be unable to obtain a true picture of the technological questions that need to be resolved.

Attorney Fees. In view of the virtual impossibility of defendants finding counsel willing and able to represent them in these proceedings, and in view of the novelty of the legal issues that the RIAA is presenting, the award of attorney fees to those few defendants who somehow manage to fight back and win is crucial. Otherwise, it will continue to be virtually impossible for the courts to

hear the "other side of the story." Each defendant who fights back is fighting on behalf of hundreds of thousands of other people, and each attorney who represents such a defendant, at the risk of being unpaid or of being very poorly paid, is doing an important service to the development of copyright law.

Suggestion 10: The court should award attorney fees, in most cases with a multiplier. In every instance in which a defendant wins on the merits, the plaintiffs voluntarily dismiss with prejudice, or the plaintiffs dismiss without prejudice but have forced the defendant to incur significant attorney fees, the court should deem the defendant a "prevailing party" under the Copyright Act and award attorney fees. In most cases, there should be a multiplier due to the financial risk taken by the attorney.

Confidentiality. The world changes, and litigation in 2008 is different than it was five years ago. One of the major differences has been the advent of electronic filing in the federal courts and the proliferation of digital versions of litigation documents. This shift has enabled Web sites to make actual legal documents available online and to report much more closely on the details of important litigation. See, e.g., Web sites such as <http://growklaw.net>; blogs such as the author's blog, "Recording Industry vs. The People," <http://recordingindustryvspeople.blogspot.com>; and online legal publications such as Pike & Fisher's "Internet Law & Regulation," <http://ilrweb.com>.

At present, the primary way of thoroughly researching the RIAA cases is on the Internet. Prior to the advent of the coverage of these cases by these sites, one of the RIAA's many strategic advantages was that plaintiffs' one national law firm was fully aware of everything going on in all the cases, while the defendants and their lawyers did not know about anything going on in any other case, or indeed if anyone was fighting back anywhere, at all. The Internet coverage of the cases has diminished that particular strategic advantage somewhat, and empowered

defendants and defendants' lawyers by making available to them court decisions and orders, pleadings, motion papers, discovery documents, transcripts of oral arguments and depositions, expert witness reports, stipulations, and other filings, thus reducing the costs of litigation to defendants. In response, the RIAA, whose litigation strategies appear to include driving up the costs of defense, has embarked on a policy of seeking

the RIAA's confidentiality requests.

Suggestion 11: Scrutinize the plaintiffs' confidentiality requests carefully. In analyzing the RIAA's confidentiality requests, the court should take into account the public's right to know under the First Amendment, and should not allow the RIAA to use "confidentiality requests" as a means of depriving current and future defendants, who are already at a significant economic disadvantage, from obtaining the tools they need to defend themselves.

Summary Judgment. In cases where a dismissal motion has not been made, a defendant's early-stage summary judgment motion is the best way for a court to purge cases that should not have been brought in the first place, as summary judgment searches the record. Such motions should be encouraged and evaluated open mindedly, and discovery should be stayed during their pendency to avoid undue expense.

The summary judgment motion should be meaningfully available before, rather than after, protracted litigation has occurred. If the defendant swears under oath that he or she did not do what plaintiffs claim he or she did, that should search the record and the plaintiffs should be put to their proof. If they cannot then make out a case against the defendant, the motion should be granted, and should not await the defendant's having to spend a fortune in legal fees to get to the close of discovery, based on plaintiffs' surmise that discovery might possibly turn up something.

The plaintiffs routinely oppose any summary judgment motion with mounds of inconclusive paper, larded with fake techno-speak but saying nothing about any copyright infringement by the defendant.

The court in this context should be mindful of the admonition of *Grokster* that no case for secondary copyright infringement liability can be mounted absent proof that the defendant engaged in affirmative acts to induce or encourage copyright infringement. If plaintiffs cannot muster enough evidence of (a) direct copyright infringement by the defendant or (b) affirmative acts to induce

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confidentiality wherever possible.

Courts should not succumb. It is in the interest of our society to reduce, not to enhance, the cost of access to legal representation. The RIAA's confidentiality mantra is not in the public interest and should not be countenanced.

Additionally, there is widespread public interest in these cases among people from all walks of life and from all across the world. The courts should take into account the First Amendment and the public's right to know in deciding upon

or encourage copyright infringement by another to create a triable issue of fact, a defendant's summary judgment motion should be granted.

Suggestion 12: In accordance with standard summary judgment practice, grant defendants' summary judgment motions in the absence of proof of infringement or inducement. If, in opposition to the motion, plaintiffs cannot prove that the defendant (1) personally committed a copyright infringement or (2) by affirmative acts induced or encouraged someone else to commit copyright infringement, the motion should be granted, regardless of the stage at which the motion is made. It should not have to await the close of discovery.

Default Judgments. These are unliquidated tort cases, not cases brought on liquidated contract claims, and plaintiffs should not be awarded the privilege of obtaining default judgments based on written papers and scripted submissions. They should be required to produce live witnesses at an inquest, and the witnesses should be subject to cross-examination by the court. What is more, the constitutionality of the plaintiffs' statutory damages theory should be tested at the inquest: the plaintiffs should be required to prove the actual damages proximately flowing from the defendant's alleged infringement, for without such proof a court is unable to determine the all-important question of whether the statutory damages sought are unconstitutionally disproportionate.³²

Suggestion 13: Require inquests in cases of default. Default judgments are never to be granted only on the basis of written papers and scripted submissions. The plaintiffs must (1) produce live witnesses who can be cross-examined by the court and (2) prove actual damages proximately flowing from defendant's infringement, so that the court can determine whether the statutory damages being sought are unconstitutionally excessive.

Helpless Defendants. The rumors of the RIAA pursuing defendants from among the most vulnerable segments of our society are, unfortunately, not exaggerated. It will not drop cases against

defendants based on hardship, helplessness, injury, or any other factor. It has sued, and relentlessly prosecuted, children, people with multiple sclerosis, stroke victims, grandparents, people on welfare, people living on Social Security disability, people displaced by hurricanes, people who have never used a computer . . . the list goes on and on. In *Priority Records v. Chan*³³ where the RIAA planned to sue a fourteen-year-old based upon an alleged copyright infringement she committed at the age of thirteen, the court ruled that a guardian ad litem had to be appointed and that the funding had to come from the plaintiffs. In *Elektra v. Schwartz*,³⁴ a guardian ad litem was appointed to protect a defendant suffering from multiple sclerosis and related conditions. Similar solutions should be invoked by the courts to protect helpless litigants.

Suggestion 14: Justice will be served by the appointment of guardians ad litem or the use of other procedures to ensure that the rights of helpless people are protected. The court should appoint guardians ad litem where authorized by law and seek assistance from pro bono panels, bar associations, legal aid organizations, and other possible sources to ensure that the rights of helpless people are protected.

Need for Published Decisions. It is a small, but important matter: plaintiffs' counsel have access to all of the unpublished decisions, and the defendants do not.

Suggestion 15: Send decisions for publication. Please send all decisions, other than grants of uncontested applications, out for publication so that the defendants' bar will have access to them.

Conclusion

While there is much more that could be written on the subject, I believe that implementing the above suggestions will help to make the federal courts a fairer forum for the determination of these actions. These proposed measures will advance the correct determination of important and evolving legal question, reduce the

number of forced settlements being paid by completely blameless defendants, and reduce the number of cases on the federal court dockets that do not belong there.

Endnotes

1. *Elektra Entertainment Group Inc. v. O'Brien*, 2007 ILR Web (P&F) 1555 (C.D. Cal. 2007), (S. James Otero, J.), www.ilrweb.com/viewILRPDF.asp?filename=elektra_obrien_070302Decision.

2. The author's statistical information is anecdotal, based on personal experience, on press accounts, and RIAA press releases. The actual numbers would be an interesting statistical study.

3. The wholesale price of each song file is approximately 70 cents per song. The royalties payable for each download and other expenses are typically in the neighborhood of 35 cents per song. In lieu of proving its 35 cents per song file in damages, the RIAA predictably elects to obtain statutory damages on a theory that entitles it to \$750 per song file. In *Capitol v. Thomas*, 2006cv01497 (D. Minn. Aug. 31, 2007), the only fully contested case known to have gone to trial, a verdict in favor of the plaintiff was awarded in which the damages, \$9,250 per song file, represented approximately 23,000 times the actual damages. http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html#Virgin_v_Thomas.

4. In *Capitol v. Thomas*, note 3 *supra*, the defendant's lawyer had made a motion for leave to withdraw, which was denied.

5. *BMG v. Doe (Canada)*, documents collected at [http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html#BMG_v_Doe\(Canada\)](http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html#BMG_v_Doe(Canada)); *Foundation v. UPC Nederland*, documents collected at http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html#Foundation_v_UPC_Nederland.

6. See litigation documents in *UMG v. Lindor*, 05-cv-1095 DGT/RML (E.D.N.Y.), appended to "Marie Lindor moves to compel MediaSentry to respond to document subpoena," *Recording Industry vs. The People*, February 19, 2008, <http://recordingindustryvspeople.blogspot.com/2008/02/marie-lindor-moves-to-compel.html>.

7. It would take an entire book to explain how fraught with error even the preliminary identification process, which seeks to identify the owner of an Internet access count, is, but suffice it to say for our purposes that (1) the files on the screenshot, or the files downloaded, probably did not appear on any single computer, but more likely represented the combined contribution of thirty or forty "peer" and "superpeer" computers in the network; (2) the IP address in the data packet may or may not be an IP address that was assigned to a computer that had any of the songs on it; (3) because most IP addresses are dynamic IP addresses that are repeatedly reassigned, each time an Internet connection is turned off, sometimes within a single second, and often within a single minute, MediaSentry does not synchronize its equipment with the Internet service

providers (ISPs) and the ISPs' recordkeeping is not designed for this type of inquiry, so there are numerous incorrect identifications of the Internet service accounts; and (4) the world of the Internet abounds in insecurity, such as insecure wireless connections, "zombies," "slaves," use of routers, and numerous other possibilities, for which the RIAA's witnesses make no allowance.

8. The deposition transcript is hosted online at Pike & Fischer's Internet Law & Regulation, www.ilrweb.com/viewILRPDF.asp?filename=umg_lindor_070223JacobsonDepositionTranscript. Links to the exhibits are likewise hosted on the same site; a list of the links is online at <http://recordingindustryvspeople.blogspot.com/2007/03/deposition-of-riaas-expert-available.html>.

9. The RIAA has itself described it as "fishing with a net": "When you go fishing with a net, you sometimes are going to catch a few dolphin." Dennis Roddy, *The Song Remains the Same*, PITTSBURGH POST-GAZETTE, Sept. 14, 2003, available at www.postgazette.com/columnists/20030914edroddy0914p1.asp, quoted in amicus curiae brief of American Civil Liberties Union, Public Citizen, American Association of Law Libraries, Electronic Frontier Foundation, and ACLU Foundation of Oklahoma, submitted in *Capitol v. Foster*, 2007 WL 1028532 (W.D. Okla. 2007), brief at 8, www.ilrweb.com/viewILRPDF.asp?filename=capitol_foster_amicus.

10. 545 U.S. 913 (2005).

11. *Capitol v. Thomas*, 2006cv01497 (D. Minn.) Aug. 31, 2007, Order, reprinted at <http://docs.justia.com/cases/federal/district-courts/minnesota/mndce/0:2006cv01497/8285048/0.html>.

12. Hon. Sam Sparks & Hon. Lee Yeakel, District Judges, Western District of Texas, Nov. 17, 2004, *Fonovisa v. Does 1-41*, 2004 ILRWeb (P&F) 3053, www.ilrweb.com/viewILRPDF.asp?filename=fonovisa_does_041117OrderGrantSeverance.

13. Hon. Margaret J. Kravchuk, Magistrate Judge, District of Maine, Jan. 25, 2008, *Arista v. Does 1-27*, 2008 WL 222283.

14. 2008 WL 544992 (E.D. N.C., Feb. 27, 2008).

15. *Fonovisa v. Does 1-9*, 2008 U.S. Dist. Lexis 27170, 2008 WL 919701 (W.D. Pa. Apr. 3, 2008).

16. As Judge Otero noted, joinder issues are never subject to challenge by a defendant in these cases because the defendants "do not set foot in the courthouse": "[A]n overwhelming majority of cases brought by recording companies against individuals are resolved without so much as an appearance by the defendant, usually through default judgment or stipulated dismissal. . . . The Defendant Does cannot question the propriety of joinder if they do not set foot in the courthouse." *SONY BMG v. Does 1-5* (C.D. Cal. Aug. 29, 2007) 2007 ILRWeb (P&F) 2533, www.ilrweb.com/viewILRPDF.asp?filename=sony_does1-5_070904OrderDenyReconsideration.

17. *Fonovisa v. Does 1-41*, 2004 ILRWeb (P&F) 3053 (W.D. Tex. 2004).

18. *Capitol Records, Inc. v. Does, 1-16*, 2007

WL 1893603 (N.M. May 24, 2007)(Lorenzo F. Garcia, J.).

19. In *Arista v. Does 1-7*, 07 CV 649 (S.D. W. Va.), it was alleged by attorneys for Marshall University that the RIAA "misrepresented information" to obtain ex parte treatment of its application, falsely claiming that there was a danger of spoliation, when there was not. The university further pointed out that the RIAA had waited four months after obtaining the right to discovery to serve its subpoena, something it would not have done had its concerns about "urgency" been genuine. See "Moving memorandum," at 2-3, in "Second university, Marshall U., moves to quash RIAA subpoena; Magistrate Judge denies motion; *Arista v. Does 1-7*," *Recording Industry vs. The People*, April 15, 2008, <http://recordingindustryvspeople.blogspot.com/2008/04/marshall-university-unsuccessfully.html>.

20. The attorneys for a John Doe at the University of Maine made this observation in *Atlantic v. Does 1-14*: "This is at least the third case brought by these plaintiffs against various Does; the first of which the undersigned is aware of was filed on May 3, 2007. It was *Atlantic et als v. Does 1-22*, Dkt No. 07-00057. It has terminated. The second is 07-162, which is presently before Judge Woodcock. 07-162 has been hotly contested and there was ample opportunity for plaintiffs to do something to protect their interests as respects the records they seek from the University System. However, as far as one can tell from the Linares Declaration, plaintiffs have never inquired of the University System as to the nature of its retention policy. That means they have never sought an agreement that the University System would retain records long enough for the plaintiffs to obtain the information without ex parte discovery. That means they have never learned, even though they had almost a year, what the actual policy might be. Also, if there was such a need for speed, why did the plaintiffs wait over ninety days to sue these defendants who were identified as targets beginning on September 9 and ending on October 31? They waited because they knew there was no urgency. They probably knew the University System would not destroy records they were seeking once it was notified of the pendency of this action. They most likely knew the records would be there if and when this court said they could have them." See "Motion to vacate and quash" at 5-6. In a new John Doe case directed at University of Maine, John Doe #10 moves to strike Linares declaration for illegality, and to vacate ex parte order." *Recording Industry vs. The People*, Apr. 15, 2008.

21. See documents collected in "Oregon Attorney General's Reply Papers Go on the Offensive, Seek Investigation of RIAA Tactics, in *Arista v. Does 1-17*," *Recording Industry vs. The People*, Nov. 29, 2007, <http://recordingindustryvspeople.blogspot.com/2007/11/oregon-attorney-general-files-reply.html>.

22. *Interscope v. Does 1-7*, 494 F. Supp. 2d 388 (E.D. Va. 2007).

23. *Id.*

24. *Id.* See 07-cv-6197 (MRH) (D. Oregon),

Moving papers of Oregon Attorney General, Documents collected at http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html#Arista_v_Does1-17.

25. 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 13:9 (2007); see also *MGM v. Grokster*, 545 U.S. 913 (2005); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007) (affirming the district court's finding "that distribution requires an 'actual dissemination' of a copy"); Hon. Janet Bond Arterton, District Judge, District of Connecticut, Feb. 13, 2008, *Atlantic v. Brennan*, 2008 WL 445819.

26. Senior District Judge, Southern District of California, August 17, 2007, *Interscope v. Rodriguez*, 2007 WL 240848407-cv-6197 (MRH) (D. Oregon), Moving papers of Oregon Attorney General, documents collected at http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html#Arista_v_Does1-17.

27. The earlier version of the complaint failed to provide any details at all of the supposed "distribution" or "reproduction" and concocted a third theory having no basis in the Copyright Act that it termed "making available." After the *Interscope v. Rodriguez* ruling referred to earlier, it began using a modified version of the complaint, which omitted the troubling "making available" language, continued to offer no details at all as to the defendant's "distribution" or "reproduction," and added a few "factual"-sounding allegations about its own investigators' activities that are irrelevant but, more importantly, directly contradicted by the RIAA's witnesses' own sworn testimony, and fail the "plausibility" test on that ground.

28. 127 S. Ct. 1955 (2007).

29. In these cases the consequences are even more ruinous and oppressive than in the average case. The defendants are people without resources, and most have not engaged in the supposed file-sharing activity of which they are suspected. And of those, many have not actually committed copyright infringement. But the cost of defending one's good name from the RIAA onslaught is staggering. In *Atlantic v. Andersen*, documents collected at <http://recordingindustryvspeople.blogspot.com/2007/01/index-of-litigation-documents.html>, where the RIAA pursued an obviously innocent woman for three years before finally admitting its mistake, the defendant's attorney's incomplete time records showed \$150,000 in time charges.

30. *Interscope v. Duty*, 2006 WL 9880 (D. Ariz. 2006).

31. *Fonovisa v. Does, 1-9*, 2008 U.S. Dist. LEXIS 27170, 2008 WL 919701 (W.D. Pa. Apr. 3, 2008).

32. *UMG v. Lindor*, 2006 WL 3335048 (E.D.N.Y. 2006); J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525 (2004).

33. 04-CV-73645 (E.D. Mich. June 23, 2005). www.ilrweb.com/viewILRPDF.asp?filename=priority_chan_050623Order.

34. 06-CV-3533 (E.D.N.Y. April 12, 2007). www.ilrweb.com/viewILRPDF.asp?filename=elektra_schwartz_070412OrderGrantMotGAL.

Exhibit B

07-1480-cv (L)

The Cartoon Network LP, LLLP v. CSC Holdings, Inc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2007

(Argued: October 24, 2007

Decided: August 4, 2008)

Docket Nos. 07-1480-cv(L) & 07-1511-cv(CON)

-----x

THE CARTOON NETWORK LP, LLLP and CABLE NEWS NETWORK
L.P., L.L.L.P.,

Plaintiffs-Counter-Claimants-Defendants-
Appellees,

TWENTIETH CENTURY FOX FILM CORPORATION, UNIVERSAL
CITY STUDIOS PRODUCTIONS LLLP, PARAMOUNT PICTURES
CORPORATION, DISNEY ENTERPRISES INC., CBS
BROADCASTING INC., AMERICAN BROADCASTING COMPANIES,
INC., NBC STUDIOS, INC.,

Plaintiffs-Counter-Defendants-Appellees,

-- v. --

CSC HOLDINGS, INC. and CABLEVISION SYSTEMS
CORPORATION,

Defendants-Counterclaim-Plaintiffs-Third-
Party Plaintiffs-Appellants,

-- v. --

TURNER BROADCASTING SYSTEM, INC., CABLE NEWS NETWORK
LP, LLP, TURNER NETWORK SALES, INC., TURNER CLASSIC
MOVIES, L.P., LLLP, TURNER NETWORK TELEVISION LP,
LLLP

Third-Party-Defendants-Appellees.

-----x

1 B e f o r e : WALKER, SACK, and LIVINGSTON, Circuit Judges.

2
3 Appeal from an entry of summary judgment in the United
4 States District Court for the Southern District of New York
5 (Denny Chin, Judge). Defendant-Appellant Cablevision Systems
6 Corporation argues that the district court erred in holding that
7 its proposed "Remote Storage" Digital Video Recorder system
8 violates the Copyright Act by infringing plaintiffs' exclusive
9 rights of reproduction and public performance.

10 REVERSED, VACATED, and REMANDED.

11 JEFFREY A. LAMKEN (Robert K. Kry
12 and Joshua A. Klein, on the brief),
13 Baker Botts L.L.P., Washington,
14 D.C., and Timothy A. Macht (on the
15 brief), New York, N.Y., for
16 Defendants-Appellants.

17
18 KATHERINE B. FORREST (Antony L.
19 Ryan, on the brief), Cravath,
20 Swaine & Moore LLP, New York, N.Y.,
21 for Plaintiffs-Appellees The
22 Cartoon Network LP, LLLP, et al.

23
24 ROBERT ALAN GARRETT (Hadrian R.
25 Katz, Jon Michaels, Peter L.
26 Zimroth, and Eleanor Lackman, on
27 the brief), Arnold & Porter LLP,
28 Washington, D.C., for Plaintiffs-
29 Appellees Twentieth Century Fox
30 Film Corporation, et al.

31
32 Marc E. Isserles, Cohen & Gresser
33 LLP, New York, N.Y., for Amici
34 Curiae Law Professors.

35
36 Henry A. Lanman, Trachtenberg Rodes
37 & Friedberg LLP, New York, N.Y.,
38 for Amicus Curiae Professor Timothy
39 Wu.

1 Solveig Singleton, The Progress &
2 Freedom Foundation, Washington,
3 D.C., for Amicus Curiae Progress &
4 Freedom Foundation.

5 Carol A. Witschel, White & Case
6 LLP, New York, N.Y. and Richard H.
7 Reimer, New York, N.Y., for Amicus
8 Curiae The American Society of
9 Composers, Authors & Publishers.

10 Michael E. Salzman, Hughes Hubbard
11 & Reed LLP, New York, N.Y., and
12 Marvin Berenson, Broadcast Music
13 Inc., New York, N.Y., for Amicus
14 Curiae Broadcast Music, Inc.

15 David Sohn, Center for Democracy &
16 Technology, Washington, D.C., Fred
17 von Lohman, Electronic Freedom
18 Foundation, San Francisco, Cal.,
19 Sherwin Siy, Public Knowledge,
20 Washington D.C., William P.
21 Heaston, Broadband Service
22 Providers Association Regulatory
23 Committee, Jonathan Band PLLC,
24 Washington, D.C., Julie Kearney,
25 Consumer Electronics Association,
26 Arlington, Va., Michael F. Altschul
27 et al., CTIA-The Wireless
28 Association®, Washington, D.C.,
29 Jonathan Banks, USTelecom,
30 Washington, D.C., Michael K.
31 Kellogg et al., Kellogg, Huber,
32 Hansen, Todd, Evans & Figel,
33 P.L.L.C., Washington D.C., for
34 Amici Curiae Center for Democracy &
35 Technology et al.

36 Donald B. Verrilli, Jr., et al.,
37 Jenner & Block LLP, Washington,
38 D.C., Kenneth L. Doroshov & Scott
39 A. Zebrak, Recording Industry
40 Association of America, Washington,
41 D.C., Jacqueline C. Charlesworth,
42 National Music Publishers'
43 Association, Washington, D.C.,
44 Victor S. Perlman, American Society
45 of Media Photographers, Inc.,
46
47
48
49

1 Philadelphia, Pa., Allan Robert
2 Adler, Association of American
3 Publishers, Washington, D.C., Linda
4 Steinman, Davis Wright Tremaine
5 LLP, New York, N.Y., David
6 Korduner, Directors Guild of
7 America, Inc., Los Angeles, Cal.,
8 Frederic Hirsch & Chun T. Wright,
9 Entertainment Software Association,
10 Washington, D.C., Susan Cleary,
11 Independent Film & Television
12 Alliance, Los Angeles, Cal., Gary
13 Gertzog, National Football League,
14 New York, N.Y., Thomas Ostertag,
15 Office of the Commissioner of
16 Baseball, New York, N.Y., Duncan
17 Crabtree-Ireland, Screen Actors
18 Guild, Inc., Los Angeles, Cal.,
19 John C. Beiter, Loeb & Loeb, LLP,
20 Nashville, Tenn., Anthony R.
21 Segall, Writers Guild of America,
22 West, Inc., Los Angeles, Cal., for
23 Amici Curiae American Society of
24 Media Photographers, Inc. et al.

25
26 Steven J. Metalitz & J. Matthew
27 Williams, Washington, D.C., for
28 Amicus Curiae Americans for Tax
29 Reform.

30
31
32
33 JOHN M. WALKER, JR., Circuit Judge:

34 Defendant-Appellant Cablevision Systems Corporation
35 ("Cablevision") wants to market a new "Remote Storage" Digital
36 Video Recorder system ("RS-DVR"), using a technology akin to both
37 traditional, set-top digital video recorders, like TiVo ("DVRs"),
38 and the video-on-demand ("VOD") services provided by many cable
39 companies. Plaintiffs-Appellees produce copyrighted movies and
40 television programs that they provide to Cablevision pursuant to
41 numerous licensing agreements. They contend that Cablevision,

1 through the operation of its RS-DVR system as proposed, would
2 directly infringe their copyrights both by making unauthorized
3 reproductions, and by engaging in public performances, of their
4 copyrighted works. The material facts are not in dispute.
5 Because we conclude that Cablevision would not directly infringe
6 plaintiffs' rights under the Copyright Act by offering its RS-DVR
7 system to consumers, we reverse the district court's award of
8 summary judgment to plaintiffs, and we vacate its injunction
9 against Cablevision.

10 BACKGROUND

11 Today's television viewers increasingly use digital video
12 recorders ("DVRs") instead of video cassette recorders ("VCRs")
13 to record television programs and play them back later at their
14 convenience. DVRs generally store recorded programming on an
15 internal hard drive rather than a cassette. But, as this case
16 demonstrates, the generic term "DVR" actually refers to a growing
17 number of different devices and systems. Companies like TiVo
18 sell a stand-alone DVR device that is typically connected to a
19 user's cable box and television much like a VCR. Many cable
20 companies also lease to their subscribers "set-top storage DVRs,"
21 which combine many of the functions of a standard cable box and a
22 stand-alone DVR in a single device.

23 In March 2006, Cablevision, an operator of cable television
24 systems, announced the advent of its new "Remote Storage DVR
25 System." As designed, the RS-DVR allows Cablevision customers

1 who do not have a stand-alone DVR to record cable programming on
2 central hard drives housed and maintained by Cablevision at a
3 "remote" location. RS-DVR customers may then receive playback of
4 those programs through their home television sets, using only a
5 remote control and a standard cable box equipped with the RS-DVR
6 software. Cablevision notified its content providers, including
7 plaintiffs, of its plans to offer RS-DVR, but it did not seek any
8 license from them to operate or sell the RS-DVR.

9 Plaintiffs, which hold the copyrights to numerous movies and
10 television programs, sued Cablevision for declaratory and
11 injunctive relief. They alleged that Cablevision's proposed
12 operation of the RS-DVR would directly infringe their exclusive
13 rights to both reproduce and publicly perform their copyrighted
14 works. Critically for our analysis here, plaintiffs alleged
15 theories only of direct infringement, not contributory
16 infringement, and defendants waived any defense based on fair
17 use.

18 Ultimately, the United States District Court for the
19 Southern District of New York (Denny Chin, Judge), awarded
20 summary judgment to the plaintiffs and enjoined Cablevision from
21 operating the RS-DVR system without licenses from its content
22 providers. See Twentieth Century Fox Film Corp. v. Cablevision
23 Sys. Corp. (Cablevision I), 478 F. Supp. 2d 607 (S.D.N.Y. 2007).
24 At the outset, we think it helpful to an understanding of our
25 decision to describe, in greater detail, both the RS-DVR and the
26 district court's opinion.

1 **I. Operation of the RS-DVR System**

2 Cable companies like Cablevision aggregate television
3 programming from a wide variety of "content providers"--the
4 various broadcast and cable channels that produce or provide
5 individual programs--and transmit those programs into the homes of
6 their subscribers via coaxial cable. At the outset of the
7 transmission process, Cablevision gathers the content of the
8 various television channels into a single stream of data.
9 Generally, this stream is processed and transmitted to
10 Cablevision's customers in real time. Thus, if a Cartoon Network
11 program is scheduled to air Monday night at 8pm, Cartoon Network
12 transmits that program's data to Cablevision and other cable
13 companies nationwide at that time, and the cable companies
14 immediately re-transmit the data to customers who subscribe to
15 that channel.

16 Under the new RS-DVR, this single stream of data is split
17 into two streams. The first is routed immediately to customers
18 as before. The second stream flows into a device called the
19 Broadband Media Router ("BMR"), id. at 613, which buffers the
20 data stream, reformats it, and sends it to the "Arroyo Server,"
21 which consists, in relevant part, of two data buffers and a
22 number of high-capacity hard disks. The entire stream of data
23 moves to the first buffer (the "primary ingest buffer"), at which
24 point the server automatically inquires as to whether any
25 customers want to record any of that programming. If a customer
26 has requested a particular program, the data for that program

1 move from the primary buffer into a secondary buffer, and then
2 onto a portion of one of the hard disks allocated to that
3 customer. As new data flow into the primary buffer, they
4 overwrite a corresponding quantity of data already on the buffer.
5 The primary ingest buffer holds no more than 0.1 seconds of each
6 channel's programming at any moment. Thus, every tenth of a
7 second, the data residing on this buffer are automatically erased
8 and replaced. The data buffer in the BMR holds no more than 1.2
9 seconds of programming at any time. While buffering occurs at
10 other points in the operation of the RS-DVR, only the BMR buffer
11 and the primary ingest buffer are utilized absent any request
12 from an individual subscriber.

13 As the district court observed, "the RS-DVR is not a single
14 piece of equipment," but rather "a complex system requiring
15 numerous computers, processes, networks of cables, and facilities
16 staffed by personnel twenty-four hours a day and seven days a
17 week." Id. at 612. To the customer, however, the processes of
18 recording and playback on the RS-DVR are similar to that of a
19 standard set-top DVR. Using a remote control, the customer can
20 record programming by selecting a program in advance from an on-
21 screen guide, or by pressing the record button while viewing a
22 given program. A customer cannot, however, record the earlier
23 portion of a program once it has begun. To begin playback, the
24 customer selects the show from an on-screen list of previously
25 recorded programs. See id. at 614-16. The principal difference
26 in operation is that, instead of sending signals from the remote

1 to an on-set box, the viewer sends signals from the remote,
2 through the cable, to the Arroyo Server at Cablevision's central
3 facility. See id. In this respect, RS-DVR more closely
4 resembles a VOD service, whereby a cable subscriber uses his
5 remote and cable box to request transmission of content, such as
6 a movie, stored on computers at the cable company's facility.
7 Id. at 612. But unlike a VOD service, RS-DVR users can only play
8 content that they previously requested to be recorded.

9 Cablevision has some control over the content available for
10 recording: a customer can only record programs on the channels
11 offered by Cablevision (assuming he subscribes to them).
12 Cablevision can also modify the system to limit the number of
13 channels available and considered doing so during development of
14 the RS-DVR. Id. at 613.

15 **II. The District Court's Decision**

16 In the district court, plaintiffs successfully argued that
17 Cablevision's proposed system would directly infringe their
18 copyrights in three ways. First, by briefly storing data in the
19 primary ingest buffer and other data buffers integral to the
20 function of the RS-DVR, Cablevision would make copies of
21 protected works and thereby directly infringe plaintiffs'
22 exclusive right of reproduction under the Copyright Act. Second,
23 by copying programs onto the Arroyo Server hard disks (the
24 "playback copies"), Cablevision would again directly infringe the
25 reproduction right. And third, by transmitting the data from the
26 Arroyo Server hard disks to its RS-DVR customers in response to a

1 "playback" request, Cablevision would directly infringe
2 plaintiffs' exclusive right of public performance. See id. at
3 617. Agreeing with all three arguments, the district court
4 awarded summary declaratory judgment to plaintiffs and enjoined
5 Cablevision from operating the RS-DVR system without obtaining
6 licenses from the plaintiff copyright holders.

7 As to the buffer data, the district court rejected
8 defendants' arguments 1) that the data were not "fixed" and
9 therefore were not "copies" as defined in the Copyright Act, and
10 2) that any buffer copying was de minimis because the buffers
11 stored only small amounts of data for very short periods of time.
12 In rejecting the latter argument, the district court noted that
13 the "aggregate effect of the buffering" was to reproduce the
14 entirety of Cablevision's programming, and such copying "can
15 hardly be called de minimis." Id. at 621.

16 On the issue of whether creation of the playback copies made
17 Cablevision liable for direct infringement, the parties and the
18 district court agreed that the dispositive question was "who
19 makes the copies"? Id. at 617. Emphasizing Cablevision's
20 "unfettered discretion" over the content available for recording,
21 its ownership and maintenance of the RS-DVR components, and its
22 "continuing relationship" with its RS-DVR customers, the district
23 court concluded that "the copying of programming to the RS-DVR's
24 Arroyo servers . . . would be done not by the customer but by
25 Cablevision, albeit at the customer's request." Id. at 618, 620,
26 621.

1 Finally, as to the public performance right, Cablevision
2 conceded that, during the playback, "the streaming of recorded
3 programming in response to a customer's request is a
4 performance." Id. at 622. Cablevision contended, however, that
5 the work was performed not by Cablevision, but by the customer,
6 an argument the district court rejected "for the same reasons
7 that [it] reject[ed] the argument that the customer is 'doing'
8 the copying involved in the RS-DVR." Id. Cablevision also
9 argued that such a playback transmission was not "to the public,"
10 and therefore not a public performance as defined in the
11 Copyright Act, because it "emanates from a distinct copy of a
12 program uniquely associated with one customer's set-top box and
13 intended for that customer's exclusive viewing in his or her
14 home." Id. The district court disagreed, noting that
15 "Cablevision would transmit the same program to members of the
16 public, who may receive the performance at different times,
17 depending on whether they view the program in real time or at a
18 later time as an RS-DVR playback." Id. at 623 (emphasis added).
19 The district court also relied on a case from the Northern
20 District of California, On Command Video Corp. v. Columbia
21 Pictures Industries, 777 F. Supp. 787 (N.D. Cal. 1991), which
22 held that when the relationship between the transmitter and the
23 audience of a performance is commercial, the transmission is "to
24 the public," see Cablevision I, 478 F. Supp. 2d at 623 (citing On
25 Command, 777 F. Supp. at 790).

1 Finding that the operation of the RS-DVR would infringe
2 plaintiffs' copyrights, the district court awarded summary
3 judgment to plaintiffs and enjoined Cablevision from copying or
4 publicly performing plaintiffs' copyrighted works "in connection
5 with its proposed RS-DVR system," unless it obtained the
6 necessary licenses. Cablevision I, 478 F. Supp. 2d at 624.
7 Cablevision appealed.

8 DISCUSSION

9 We review a district court's grant of summary judgment de
10 novo. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d
11 605, 607 (2d Cir. 2006).

12 "Section 106 of the Copyright Act grants copyright holders a
13 bundle of exclusive rights. . . ." Id. at 607-08. This case
14 implicates two of those rights: the right "to reproduce the
15 copyrighted work in copies," and the right "to perform the
16 copyrighted work publicly." 17 U.S.C. § 106(1), (4). As
17 discussed above, the district court found that Cablevision
18 infringed the first right by 1) buffering the data from its
19 programming stream and 2) copying content onto the Arroyo Server
20 hard disks to enable playback of a program requested by an RS-DVR
21 customer. In addition, the district court found that Cablevision
22 would infringe the public performance right by transmitting a
23 program to an RS-DVR customer in response to that customer's
24 playback request. We address each of these three allegedly
25 infringing acts in turn.

1 **I. The Buffer Data**

2 It is undisputed that Cablevision, not any customer or other
3 entity, takes the content from one stream of programming, after
4 the split, and stores it, one small piece at a time, in the BMR
5 buffer and the primary ingest buffer. As a result, the
6 information is buffered before any customer requests a recording,
7 and would be buffered even if no such request were made. The
8 question is whether, by buffering the data that make up a given
9 work, Cablevision "reproduce[s]" that work "in copies," 17 U.S.C.
10 § 106(1), and thereby infringes the copyright holder's
11 reproduction right.

12 "Copies," as defined in the Copyright Act, "are material
13 objects . . . in which a work is fixed by any method . . . and
14 from which the work can be . . . reproduced." Id. § 101. The
15 Act also provides that a work is "'fixed' in a tangible medium of
16 expression when its embodiment . . . is sufficiently permanent or
17 stable to permit it to be . . . reproduced . . . for a period of
18 more than transitory duration." Id. (emphasis added). We
19 believe that this language plainly imposes two distinct but
20 related requirements: the work must be embodied in a medium,
21 i.e., placed in a medium such that it can be perceived,
22 reproduced, etc., from that medium (the "embodiment
23 requirement"), and it must remain thus embodied "for a period of
24 more than transitory duration" (the "duration requirement"). See
25 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §

1 8.02[B][3], at 8-32 (2007). Unless both requirements are met,
2 the work is not "fixed" in the buffer, and, as a result, the
3 buffer data is not a "copy" of the original work whose data is
4 buffered.

5 The district court mistakenly limited its analysis primarily
6 to the embodiment requirement. As a result of this error, once
7 it determined that the buffer data was "[c]learly . . . capable
8 of being reproduced," i.e., that the work was embodied in the
9 buffer, the district court concluded that the work was therefore
10 "fixed" in the buffer, and that a copy had thus been made.
11 Cablevision I, 478 F. Supp. 2d at 621-22. In doing so, it relied
12 on a line of cases beginning with MAI Systems Corp. v. Peak
13 Computer Inc., 991 F.2d 511 (9th Cir. 1993). It also relied on
14 the United States Copyright Office's 2001 report on the Digital
15 Millennium Copyright Act, which states, in essence, that an
16 embodiment is fixed "[u]nless a reproduction manifests itself so
17 fleetingly that it cannot be copied." U.S. Copyright Office,
18 DMCA Section 104 Report 111 (Aug. 2001) ("DMCA Report") (emphasis
19 added), available at
20 [http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-](http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf)
21 [1.pdf](http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf).

22 The district court's reliance on cases like MAI Systems is
23 misplaced. In general, those cases conclude that an alleged copy
24 is fixed without addressing the duration requirement; it does not
25 follow, however, that those cases assume, much less establish,

1 that such a requirement does not exist. Indeed, the duration
2 requirement, by itself, was not at issue in MAI Systems and its
3 progeny. As a result, they do not speak to the issues squarely
4 before us here: If a work is only "embodied" in a medium for a
5 period of transitory duration, can it be "fixed" in that medium,
6 and thus a copy? And what constitutes a period "of more than
7 transitory duration"?

8 In MAI Systems, defendant Peak Computer, Inc., performed
9 maintenance and repairs on computers made and sold by MAI
10 Systems. In order to service a customer's computer, a Peak
11 employee had to operate the computer and run the computer's
12 copyrighted operating system software. See MAI Sys., 991 F.2d at
13 513. The issue in MAI Systems was whether, by loading the
14 software into the computer's RAM,¹ the repairman created a "copy"
15 as defined in § 101. See id. at 517. The resolution of this
16 issue turned on whether the software's embodiment in the
17 computer's RAM was "fixed," within the meaning of the same
18 section. The Ninth Circuit concluded that

19 by showing that Peak loads the software into the RAM and is
20 then able to view the system error log and diagnose the
21 problem with the computer, MAI has adequately shown that the
22 representation created in the RAM is "sufficiently permanent
23 or stable to permit it to be perceived, reproduced, or
24 otherwise communicated for a period of more than transitory
25 duration."

1 ¹ To run a computer program, the data representing that
2 program must be transferred from a data storage medium (such as a
3 floppy disk or a hard drive) to a form of Random Access Memory
4 ("RAM") where the data can be processed. The data buffers at
5 issue here are also a form of RAM.

1
2 Id. at 518 (quoting 17 U.S.C. § 101).
3

4 The MAI Systems court referenced the "transitory duration"
5 language but did not discuss or analyze it. The opinion notes
6 that the defendants "vigorously" argued that the program's
7 embodiment in the RAM was not a copy, but it does not specify the
8 arguments defendants made. Id. at 517. This omission suggests
9 that the parties did not litigate the significance of the
10 "transitory duration" language, and the court therefore had no
11 occasion to address it. This is unsurprising, because it seems
12 fair to assume that in these cases the program was embodied in
13 the RAM for at least several minutes.

14 Accordingly, we construe MAI Systems and its progeny as
15 holding that loading a program into a computer's RAM can result
16 in copying that program. We do not read MAI Systems as holding
17 that, as a matter of law, loading a program into a form of RAM
18 always results in copying. Such a holding would read the
19 "transitory duration" language out of the definition, and we do
20 not believe our sister circuit would dismiss this statutory
21 language without even discussing it. It appears the parties in
22 MAI Systems simply did not dispute that the duration requirement
23 was satisfied; this line of cases simply concludes that when a
24 program is loaded into RAM, the embodiment requirement is
25 satisfied—an important holding in itself, and one we see no

1 reason to quibble with here.²

2 At least one court, relying on MAI Systems in a highly
3 similar factual setting, has made this point explicitly. In
4 Advanced Computer Services of Michigan, Inc. v. MAI Systems
5 Corp., the district court expressly noted that the unlicensed
6 user in that case ran copyrighted diagnostic software "for
7 minutes or longer," but that the program's embodiment in the
8 computer's RAM might be too ephemeral to be fixed if the computer
9 had been shut down "within seconds or fractions of a second"
10 after loading the copyrighted program. 845 F. Supp. 356, 363
11 (E.D. Va. 1994). We have no quarrel with this reasoning; it
12 merely makes explicit the reasoning that is implicit in the other
13 MAI Systems cases. Accordingly, those cases provide no support
14 for the conclusion that the definition of "fixed" does not
15 include a duration requirement. See Webster v. Fall, 266 U.S.
16 507, 511 (1924) ("Questions which merely lurk in the record,

1 ² The same reasoning also distinguishes this court's opinion
2 in Matthew Bender & Co. v. West Publishing Co., 158 F.3d 693 (2d
3 Cir. 1998). Language in that opinion, taken out of context,
4 suggests that the definition of "fixed" imposes only an
5 embodiment requirement: "Under § 101's definition of 'copies,' a
6 work satisfies the fixation requirement when it is fixed in a
7 material object from which it can be perceived or communicated
8 directly or with the aid of a machine." Id. at 702. Like the
9 MAI Systems cases, Matthew Bender only addresses the embodiment
10 requirement: specifically, whether West's copyrighted arrangement
11 of judicial opinions was "embedded" in a CD-ROM compilation of
12 opinions when the cases were normally arranged differently but
13 could be manipulated by the user to replicate West's copyrighted
14 arrangement. Id. at 703. The opinion merely quotes the duration
15 language without discussing it, see id. at 702; that case
16 therefore does not compel us to conclude that the definition of
17 "fixed" does not impose a duration requirement.

1 neither brought to the attention of the court nor ruled upon, are
2 not to be considered as having been so decided as to constitute
3 precedents.").

4 Nor does the Copyright Office's 2001 DMCA Report, also
5 relied on by the district court in this case, explicitly suggest
6 that the definition of "fixed" does not contain a duration
7 requirement. However, as noted above, it does suggest that an
8 embodiment is fixed "[u]nless a reproduction manifests itself so
9 fleetingly that it cannot be copied, perceived or communicated."
10 DMCA Report, supra, at 111. As we have stated, to determine
11 whether a work is "fixed" in a given medium, the statutory
12 language directs us to ask not only 1) whether a work is
13 "embodied" in that medium, but also 2) whether it is embodied in
14 the medium "for a period of more than transitory duration."
15 According to the Copyright Office, if the work is capable of
16 being copied from that medium for any amount of time, the answer
17 to both questions is "yes." The problem with this interpretation
18 is that it reads the "transitory duration" language out of the
19 statute.

20 We assume, as the parties do, that the Copyright Office's
21 pronouncement deserves only Skidmore deference, deference based
22 on its "power to persuade." Skidmore v. Swift & Co., 323 U.S.
23 134, 140 (1944). And because the Office's interpretation does
24 not explain why Congress would include language in a definition
25 if it intended courts to ignore that language, we are not

1 persuaded.

2 In sum, no case law or other authority dissuades us from
3 concluding that the definition of "fixed" imposes both an
4 embodiment requirement and a duration requirement. Accord CoStar
5 Group Inc. v. LoopNet, Inc., 373 F.3d 544, 551 (4th Cir. 2004)
6 (while temporary reproductions "may be made in this transmission
7 process, they would appear not to be 'fixed' in the sense that
8 they are 'of more than transitory duration'"). We now turn to
9 whether, in this case, those requirements are met by the buffer
10 data.

11 Cablevision does not seriously dispute that copyrighted
12 works are "embodied" in the buffer. Data in the BMR buffer can
13 be reformatted and transmitted to the other components of the RS-
14 DVR system. Data in the primary ingest buffer can be copied onto
15 the Arroyo hard disks if a user has requested a recording of that
16 data. Thus, a work's "embodiment" in either buffer "is
17 sufficiently permanent or stable to permit it to be perceived,
18 reproduced," (as in the case of the ingest buffer) "or otherwise
19 communicated" (as in the BMR buffer). 17 U.S.C. § 101. The
20 result might be different if only a single second of a much
21 longer work was placed in the buffer in isolation. In such a
22 situation, it might be reasonable to conclude that only a
23 minuscule portion of a work, rather than "a work" was embodied in
24 the buffer. Here, however, where every second of an entire work
25 is placed, one second at a time, in the buffer, we conclude that

1 the work is embodied in the buffer.

2 Does any such embodiment last "for a period of more than
3 transitory duration"? Id. No bit of data remains in any buffer
4 for more than a fleeting 1.2 seconds. And unlike the data in
5 cases like MAI Systems, which remained embodied in the computer's
6 RAM memory until the user turned the computer off, each bit of
7 data here is rapidly and automatically overwritten as soon as it
8 is processed. While our inquiry is necessarily fact-specific,
9 and other factors not present here may alter the duration
10 analysis significantly, these facts strongly suggest that the
11 works in this case are embodied in the buffer for only a
12 "transitory" period, thus failing the duration requirement.

13 Against this evidence, plaintiffs argue only that the
14 duration is not transitory because the data persist "long enough
15 for Cablevision to make reproductions from them." Br. of Pls.-
16 Appellees the Cartoon Network et al. at 51. As we have explained
17 above, however, this reasoning impermissibly reads the duration
18 language out of the statute, and we reject it. Given that the
19 data reside in no buffer for more than 1.2 seconds before being
20 automatically overwritten, and in the absence of compelling
21 arguments to the contrary, we believe that the copyrighted works
22 here are not "embodied" in the buffers for a period of more than
23 transitory duration, and are therefore not "fixed" in the
24 buffers. Accordingly, the acts of buffering in the operation of
25 the RS-DVR do not create copies, as the Copyright Act defines

1 that term. Our resolution of this issue renders it unnecessary
2 for us to determine whether any copies produced by buffering data
3 would be de minimis, and we express no opinion on that question.

4 **II. Direct Liability for Creating the Playback Copies**

5 In most copyright disputes, the allegedly infringing act and
6 the identity of the infringer are never in doubt. These cases
7 turn on whether the conduct in question does, in fact, infringe
8 the plaintiff's copyright. In this case, however, the core of
9 the dispute is over the authorship of the infringing conduct.

10 After an RS-DVR subscriber selects a program to record, and that
11 program airs, a copy of the program-a copyrighted work-resides on
12 the hard disks of Cablevision's Arroyo Server, its creation
13 unauthorized by the copyright holder. The question is who made
14 this copy. If it is Cablevision, plaintiffs' theory of direct
15 infringement succeeds; if it is the customer, plaintiffs' theory
16 fails because Cablevision would then face, at most, secondary
17 liability, a theory of liability expressly disavowed by
18 plaintiffs.

19 Few cases examine the line between direct and contributory
20 liability. Both parties cite a line of cases beginning with
21 Religious Technology Center v. Netcom On-Line Communications
22 Services, 907 F. Supp. 1361 (N.D. Cal. 1995). In Netcom, a
23 third-party customer of the defendant Internet service provider
24 ("ISP") posted a copyrighted work that was automatically
25 reproduced by the defendant's computer. The district court

1 refused to impose direct liability on the ISP, reasoning that
2 "[a]lthough copyright is a strict liability statute, there should
3 still be some element of volition or causation which is lacking
4 where a defendant's system is merely used to create a copy by a
5 third party." Id. at 1370. Recently, the Fourth Circuit
6 endorsed the Netcom decision, noting that

7 to establish direct liability under . . . the Act, something
8 more must be shown than mere ownership of a machine used by
9 others to make illegal copies. There must be actual
10 infringing conduct with a nexus sufficiently close and
11 causal to the illegal copying that one could conclude that
12 the machine owner himself trespassed on the exclusive domain
13 of the copyright owner."

14
15 CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 550 (4th Cir.
16 2004).

17 Here, the district court pigeon-holed the conclusions
18 reached in Netcom and its progeny as "premised on the unique
19 attributes of the Internet." Cablevision I, 478 F. Supp. 2d at
20 620. While the Netcom court was plainly concerned with a theory
21 of direct liability that would effectively "hold the entire
22 Internet liable" for the conduct of a single user, 907 F. Supp.
23 at 1372, its reasoning and conclusions, consistent with
24 precedents of this court and the Supreme Court, and with the text
25 of the Copyright Act, transcend the Internet. Like the Fourth
26 Circuit, we reject the contention that "the Netcom decision was
27 driven by expedience and that its holding is inconsistent with
28 the established law of copyright," CoStar, 373 F.3d at 549, and
29 we find it "a particularly rational interpretation of § 106," id.

1 at 551, rather than a special-purpose rule applicable only to
2 ISPs.

3 When there is a dispute as to the author of an allegedly
4 infringing instance of reproduction, Netcom and its progeny
5 direct our attention to the volitional conduct that causes the
6 copy to be made. There are only two instances of volitional
7 conduct in this case: Cablevision's conduct in designing,
8 housing, and maintaining a system that exists only to produce a
9 copy, and a customer's conduct in ordering that system to produce
10 a copy of a specific program. In the case of a VCR, it seems
11 clear-and we know of no case holding otherwise-that the operator
12 of the VCR, the person who actually presses the button to make
13 the recording, supplies the necessary element of volition, not
14 the person who manufactures, maintains, or, if distinct from the
15 operator, owns the machine. We do not believe that an RS-DVR
16 customer is sufficiently distinguishable from a VCR user to
17 impose liability as a direct infringer on a different party for
18 copies that are made automatically upon that customer's command.

19 The district court emphasized the fact that copying is
20 "instrumental" rather than "incidental" to the function of the
21 RS-DVR system. Cablevision I, 478 F. Supp. 2d at 620. While
22 that may distinguish the RS-DVR from the ISPs in Netcom and
23 CoStar, it does not distinguish the RS-DVR from a VCR, a
24 photocopier, or even a typical copy shop. And the parties do not
25 seem to contest that a company that merely makes photocopiers

1 available to the public on its premises, without more, is not
2 subject to liability for direct infringement for reproductions
3 made by customers using those copiers. They only dispute whether
4 Cablevision is similarly situated to such a proprietor.

5 The district court found Cablevision analogous to a copy
6 shop that makes course packs for college professors. In the
7 leading case involving such a shop, for example, "[t]he professor
8 [gave] the copyshop the materials of which the coursepack [was]
9 to be made up, and the copyshop [did] the rest." Princeton Univ.
10 Press v. Mich. Document Servs., 99 F.3d 1381, 1384 (6th Cir.
11 1996) (en banc). There did not appear to be any serious dispute
12 in that case that the shop itself was directly liable for
13 reproducing copyrighted works. The district court here found
14 that Cablevision, like this copy shop, would be "doing" the
15 copying, albeit "at the customer's behest." Cablevision I, 478
16 F. Supp. 2d at 620.

17 But because volitional conduct is an important element of
18 direct liability, the district court's analogy is flawed. In
19 determining who actually "makes" a copy, a significant difference
20 exists between making a request to a human employee, who then
21 volitionally operates the copying system to make the copy, and
22 issuing a command directly to a system, which automatically obeys
23 commands and engages in no volitional conduct. In cases like
24 Princeton University Press, the defendants operated a copying
25 device and sold the product they made using that device. See 99

1 F.3d at 1383 ("The corporate defendant . . . is a commercial
2 copyshop that reproduced substantial segments of copyrighted
3 works of scholarship, bound the copies into 'coursepacks,' and
4 sold the coursepacks to students . . ."). Here, by selling
5 access to a system that automatically produces copies on command,
6 Cablevision more closely resembles a store proprietor who charges
7 customers to use a photocopier on his premises, and it seems
8 incorrect to say, without more, that such a proprietor "makes"
9 any copies when his machines are actually operated by his
10 customers. See Netcom, 907 F. Supp. at 1369. Some courts have
11 held to the contrary, but they do not explicitly explain why, and
12 we find them unpersuasive. See, e.g., Elektra Records Co. v. Gem
13 Elec. Distribs., Inc., 360 F. Supp. 821, 823 (E.D.N.Y. 1973)
14 (concluding that, "regardless" of whether customers or
15 defendants' employees operated the tape-copying machines at
16 defendants' stores, defendant had actively infringed copyrights).
17 The district court also emphasized Cablevision's "unfettered
18 discretion in selecting the programming that it would make
19 available for recording." Cablevision I, 478 F. Supp. 2d at 620.
20 This conduct is indeed more proximate to the creation of illegal
21 copying than, say, operating an ISP or opening a copy shop, where
22 all copied content was supplied by the customers themselves or
23 other third parties. Nonetheless, we do not think it
24 sufficiently proximate to the copying to displace the customer as
25 the person who "makes" the copies when determining liability

1 under the Copyright Act. Cablevision, we note, also has
2 subscribers who use home VCRs or DVRs (like TiVo), and has
3 significant control over the content recorded by these customers.
4 But this control is limited to the channels of programming
5 available to a customer and not to the programs themselves.
6 Cablevision has no control over what programs are made available
7 on individual channels or when those programs will air, if at
8 all. In this respect, Cablevision possesses far less control
9 over recordable content than it does in the VOD context, where it
10 actively selects and makes available beforehand the individual
11 programs available for viewing. For these reasons, we are not
12 inclined to say that Cablevision, rather than the user, "does"
13 the copying produced by the RS-DVR system. As a result, we find
14 that the district court erred in concluding that Cablevision,
15 rather than its RS-DVR customers, makes the copies carried out by
16 the RS-DVR system.

17 Our refusal to find Cablevision directly liable on these
18 facts is buttressed by the existence and contours of the Supreme
19 Court's doctrine of contributory liability in the copyright
20 context. After all, the purpose of any causation-based liability
21 doctrine is to identify the actor (or actors) whose "conduct has
22 been so significant and important a cause that [he or she] should
23 be legally responsible." W. Page Keeton et al., Prosser and
24 Keeton on Torts § 42, at 273 (5th ed. 1984). But here, to the
25 extent that we may construe the boundaries of direct liability

1 more narrowly, the doctrine of contributory liability stands
2 ready to provide adequate protection to copyrighted works.

3 Most of the facts found dispositive by the district
4 court-e.g., Cablevision's "continuing relationship" with its RS-
5 DVR customers, its control over recordable content, and the
6 "instrumental[ity]" of copying to the RS-DVR system, Cablevision
7 I, 478 F. Supp. 2d at 618-20-seem to us more relevant to the
8 question of contributory liability. In Sony Corp. of America v.
9 Universal City Studios, Inc., the lack of an "ongoing
10 relationship" between Sony and its VCR customers supported the
11 Court's conclusion that it should not impose contributory
12 liability on Sony for any infringing copying done by Sony VCR
13 owners. 464 U.S. 417, 437-38 (1984). The Sony Court did deem it
14 "just" to impose liability on a party in a "position to control"
15 the infringing uses of another, but as a contributory, not
16 direct, infringer. Id. at 437. And asking whether copying
17 copyrighted material is only "incidental" to a given technology
18 is akin to asking whether that technology has "commercially
19 significant noninfringing uses," another inquiry the Sony Court
20 found relevant to whether imposing contributory liability was
21 just. Id. at 442.

22 The Supreme Court's desire to maintain a meaningful
23 distinction between direct and contributory copyright
24 infringement is consistent with congressional intent. The Patent
25 Act, unlike the Copyright Act, expressly provides that someone

1 who "actively induces infringement of a patent" is "liable as an
2 infringer," 35 U.S.C. § 271(b), just like someone who commits the
3 underlying infringing act by "us[ing]" a patented invention
4 without authorization, id. § 271(a). In contrast, someone who
5 merely "sells . . . a material or apparatus for use in practicing
6 a patented process" faces only liability as a "contributory
7 infringer." Id. § 271(c). If Congress had meant to assign
8 direct liability to both the person who actually commits a
9 copyright-infringing act and any person who actively induces that
10 infringement, the Patent Act tells us that it knew how to draft a
11 statute that would have this effect. Because Congress did not do
12 so, the Sony Court concluded that "[t]he Copyright Act does not
13 expressly render anyone liable for infringement committed by
14 another." 464 U.S. at 434. Furthermore, in cases like Sony, the
15 Supreme Court has strongly signaled its intent to use the
16 doctrine of contributory infringement, not direct infringement,
17 to "identify[] the circumstances in which it is just to hold one
18 individual accountable for the actions of another." Id. at 435.
19 Thus, although Sony warns us that "the lines between direct
20 infringement, contributory infringement, and vicarious liability
21 are not clearly drawn," id. at 435 n.17 (internal quotation marks
22 and citation omitted), that decision does not absolve us of our
23 duty to discern where that line falls in cases, like this one,
24 that require us to decide the question.

25 The district court apparently concluded that Cablevision's

1 operation of the RS-DVR system would contribute in such a major
2 way to the copying done by another that it made sense to say that
3 Cablevision was a direct infringer, and thus, in effect, was
4 "doing" the relevant copying. There are certainly other cases,
5 not binding on us, that follow this approach. See, e.g., Playboy
6 Enters. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 513 (N.D.
7 Ohio 1997) (noting that defendant ISP's encouragement of its
8 users to copy protected files was "crucial" to finding that it
9 was a direct infringer). We need not decide today whether one's
10 contribution to the creation of an infringing copy may be so
11 great that it warrants holding that party directly liable for the
12 infringement, even though another party has actually made the
13 copy. We conclude only that on the facts of this case, copies
14 produced by the RS-DVR system are "made" by the RS-DVR customer,
15 and Cablevision's contribution to this reproduction by providing
16 the system does not warrant the imposition of direct liability.
17 Therefore, Cablevision is entitled to summary judgment on this
18 point, and the district court erred in awarding summary judgment
19 to plaintiffs.

20 **III. Transmission of RS-DVR Playback**

21 Plaintiffs' final theory is that Cablevision will violate
22 the Copyright Act by engaging in unauthorized public performances
23 of their works through the playback of the RS-DVR copies. The
24 Act grants a copyright owner the exclusive right, "in the case of
25 . . . motion pictures and other audiovisual works, to perform the

1 copyrighted work publicly." 17 U.S.C. § 106(4). Section 101,
2 the definitional section of the Act, explains that

3 [t]o perform or display a work "publicly" means (1) to
4 perform or display it at a place open to the public or at
5 any place where a substantial number of persons outside of a
6 normal circle of a family and its social acquaintances is
7 gathered; or (2) to transmit or otherwise communicate a
8 performance or display of the work to a place specified by
9 clause (1) or to the public, by means of any device or
10 process, whether the members of the public capable of
11 receiving the performance or display receive it in the same
12 place or in separate places and at the same time or at
13 different times.

14
15 Id. § 101.

16
17 The parties agree that this case does not implicate clause
18 (1). Accordingly, we ask whether these facts satisfy the second,
19 "transmit clause" of the public performance definition: Does
20 Cablevision "transmit . . . a performance . . . of the work . . .
21 to the public"? Id. No one disputes that the RS-DVR playback
22 results in the transmission of a performance of a work-the
23 transmission from the Arroyo Server to the customer's television
24 set. Cablevision contends that (1) the RS-DVR customer, rather
25 than Cablevision, does the transmitting and thus the performing
26 and (2) the transmission is not "to the public" under the
27 transmit clause.

28 As to Cablevision's first argument, we note that our
29 conclusion in Part II that the customer, not Cablevision, "does"
30 the copying does not dictate a parallel conclusion that the
31 customer, and not Cablevision, "performs" the copyrighted work.
32 The definitions that delineate the contours of the reproduction

1 and public performance rights vary in significant ways. For
2 example, the statute defines the verb "perform" and the noun
3 "copies," but not the verbs "reproduce" or "copy." Id. We need
4 not address Cablevision's first argument further because, even if
5 we assume that Cablevision makes the transmission when an RS-DVR
6 playback occurs, we find that the RS-DVR playback, as described
7 here, does not involve the transmission of a performance "to the
8 public."

9 The statute itself does not expressly define the term
10 "performance" or the phrase "to the public." It does explain
11 that a transmission may be "to the public . . . whether the
12 members of the public capable of receiving the performance . . .
13 receive it in the same place or in separate places and at the
14 same time or at different times." Id. This plain language
15 instructs us that, in determining whether a transmission is "to
16 the public," it is of no moment that the potential recipients of
17 the transmission are in different places, or that they may
18 receive the transmission at different times. The implication
19 from this same language, however, is that it is relevant, in
20 determining whether a transmission is made to the public, to
21 discern who is "capable of receiving" the performance being
22 transmitted. The fact that the statute says "capable of
23 receiving the performance," instead of "capable of receiving the
24 transmission," underscores the fact that a transmission of a
25 performance is itself a performance. Cf. Buck v. Jewell-La Salle

1 Realty Co., 283 U.S. 191, 197-98 (1931).

2 The legislative history of the transmit clause supports this
3 interpretation. The House Report on the 1976 Copyright Act
4 states that

5 [u]nder the bill, as under the present law, a performance
6 made available by transmission to the public at large is
7 "public" even though the recipients are not gathered in a
8 single place, and even if there is no proof that any of the
9 potential recipients was operating his receiving apparatus
10 at the time of the transmission. The same principles apply
11 whenever the potential recipients of the transmission
12 represent a limited segment of the public, such as the
13 occupants of hotel rooms or the subscribers of a cable
14 television service.

15
16 H.R. Rep. No. 94-1476, at 64-65 (1976), reprinted in 1976

17 U.S.C.C.A.N. 5659, 5678 (emphases added).

18 Plaintiffs also reference a 1967 House Report, issued nearly
19 a decade before the Act we are interpreting, stating that the
20 same principles apply where the transmission is "capable of
21 reaching different recipients at different times, as in the case
22 of sounds or images stored in an information system and capable
23 of being performed or displayed at the initiative of individual
24 members of the public." H.R. Rep. No. 90-83, at 29 (1967)
25 (emphases added). We question how much deference this report
26 deserves. But we need not belabor the point here, as the 1967
27 report is consistent with both legislative history
28 contemporaneous with the Act's passage and our own interpretation
29 of the statute's plain meaning.

30 From the foregoing, it is evident that the transmit clause
31 directs us to examine who precisely is "capable of receiving" a

1 particular transmission of a performance. Cablevision argues
2 that, because each RS-DVR transmission is made using a single
3 unique copy of a work, made by an individual subscriber, one that
4 can be decoded exclusively by that subscriber's cable box, only
5 one subscriber is capable of receiving any given RS-DVR
6 transmission. This argument accords with the language of the
7 transmit clause, which, as described above, directs us to
8 consider the potential audience of a given transmission. We are
9 unpersuaded by the district court's reasoning and the plaintiffs'
10 arguments that we should consider a larger potential audience in
11 determining whether a transmission is "to the public."

12 The district court, in deciding whether the RS-DVR playback
13 of a program to a particular customer is "to the public,"
14 apparently considered all of Cablevision's customers who
15 subscribe to the channel airing that program and all of
16 Cablevision's RS-DVR subscribers who request a copy of that
17 program. Thus, it concluded that the RS-DVR playbacks
18 constituted public performances because "Cablevision would
19 transmit the same program to members of the public, who may
20 receive the performance at different times, depending on whether
21 they view the program in real time or at a later time as an RS-
22 DVR playback." Cablevision I, 478 F. Supp. 2d at 623 (emphasis
23 added). In essence, the district court suggested that, in
24 considering whether a transmission is "to the public," we
25 consider not the potential audience of a particular transmission,

1 but the potential audience of the underlying work (i.e., "the
2 program") whose content is being transmitted.

3 We cannot reconcile the district court's approach with the
4 language of the transmit clause. That clause speaks of people
5 capable of receiving a particular "transmission" or
6 "performance," and not of the potential audience of a particular
7 "work." Indeed, such an approach would render the "to the
8 public" language surplusage. Doubtless the potential audience
9 for every copyrighted audiovisual work is the general public. As
10 a result, any transmission of the content of a copyrighted work
11 would constitute a public performance under the district court's
12 interpretation. But the transmit clause obviously contemplates
13 the existence of non-public transmissions; if it did not,
14 Congress would have stopped drafting that clause after
15 "performance."

16 On appeal, plaintiffs offer a slight variation of this
17 interpretation. They argue that both in its real-time cablecast
18 and via the RS-DVR playback, Cablevision is in fact transmitting
19 the "same performance" of a given work: the performance of the
20 work that occurs when the programming service supplying
21 Cablevision's content transmits that content to Cablevision and
22 the service's other licensees. See Br. of Pls.-Appellees
23 Twentieth Century Fox Film Corp. et al. at 27 ("Fox Br.") ("The
24 critical factor . . . is that the same performance is transmitted
25 to different subscribers at different times more

1 specifically, the performance of that program by HBO or another
2 programming service." (third emphasis added)).

3 Thus, according to plaintiffs, when Congress says that to
4 perform a work publicly means to transmit. . . a performance. . .
5 to the public, they really meant "transmit . . . the 'original
6 performance' . . . to the public." The implication of this
7 theory is that to determine whether a given transmission of a
8 performance is "to the public," we would consider not only the
9 potential audience of that transmission, but also the potential
10 audience of any transmission of the same underlying "original"
11 performance.

12 Like the district court's interpretation, this view obviates
13 any possibility of a purely private transmission. Furthermore,
14 it makes Cablevision's liability depend, in part, on the actions
15 of legal strangers. Assume that HBO transmits a copyrighted work
16 to both Cablevision and Comcast. Cablevision merely retransmits
17 the work from one Cablevision facility to another, while Comcast
18 retransmits the program to its subscribers. Under plaintiffs'
19 interpretation, Cablevision would still be transmitting the
20 performance to the public, solely because Comcast has transmitted
21 the same underlying performance to the public. Similarly, a
22 hapless customer who records a program in his den and later
23 transmits the recording to a television in his bedroom would be
24 liable for publicly performing the work simply because some other
25 party had once transmitted the same underlying performance to the

1 public.

2 We do not believe Congress intended such odd results.
3 Although the transmit clause is not a model of clarity, we
4 believe that when Congress speaks of transmitting a performance
5 to the public, it refers to the performance created by the act of
6 transmission. Thus, HBO transmits its own performance of a work
7 when it transmits to Cablevision, and Cablevision transmits its
8 own performance of the same work when it retransmits the feed
9 from HBO.

10 Furthermore, we believe it would be inconsistent with our
11 own transmit clause jurisprudence to consider the potential
12 audience of an upstream transmission by a third party when
13 determining whether a defendant's own subsequent transmission of
14 a performance is "to the public." In National Football League v.
15 PrimeTime 24 Joint Venture (NFL), 211 F.3d 10 (2d Cir. 2000), we
16 examined the transmit clause in the context of satellite
17 television provider PrimeTime, which captured protected content
18 in the United States from the NFL, transmitted it from the United
19 States to a satellite ("the uplink"), and then transmitted it
20 from the satellite to subscribers in both the United States and
21 Canada ("the downlink"). PrimeTime had a license to transmit to
22 its U.S. customers, but not its Canadian customers. It argued
23 that although the downlink transmission to its Canadian
24 subscribers was a public performance, it could not be held liable
25 for that act because it occurred entirely outside of the United

1 States and therefore was not subject to the strictures of the
2 Copyright Act. It also argued that the uplink transmission was
3 not a public performance because it was a transmission to a
4 single satellite. See id. at 12.

5 The NFL court did not question the first assumption, but it
6 flatly rejected the second on a specific and germane ground:

7 We believe the most logical interpretation of the Copyright
8 Act is to hold that a public performance or display includes
9 each step in the process by which a protected work wends its
10 way to its audience. Under that analysis, it is clear that
11 PrimeTime's uplink transmission of signals captured in the
12 United States is a step in the process by which NFL's
13 protected work wends its way to a public audience.

14
15 Id. at 13 (emphasis added) (internal quotation and citation
16 omitted). Thus, while the uplink transmission that took place in
17 the United States was not, in itself, "to the public," the NFL
18 court deemed it so because it ultimately resulted in an
19 undisputed public performance. Notably, the NFL court did not
20 base its decision on the fact that an upstream transmission by
21 another party (the NFL) might have been to the public. Nor did
22 the court base its decision on the fact that Primetime
23 simultaneously transmitted a performance of the work to the
24 public in the United States. Because NFL directs us to look
25 downstream, rather than upstream or laterally, to determine
26 whether any link in a chain of transmissions made by a party
27 constitutes a public performance, we reject plaintiffs'
28 contention that we examine the potential recipients of the
29 content provider's initial transmission to determine who is

1 capable of receiving the RS-DVR playback transmission.

2 Plaintiffs also rely on NFL for the proposition that
3 Cablevision publicly performs a work when it splits its
4 programming stream and transmits the second stream to the RS-DVR
5 system. Because NFL only supports that conclusion if we
6 determine that the final transmission in the chain (i.e., the RS-
7 DVR playback transmission) is "to the public," plaintiffs'
8 reliance on NFL is misplaced. NFL dealt with a chain of
9 transmissions whose final link was undisputedly a public
10 performance. It therefore does not guide our current inquiry.

11 In sum, none of the arguments advanced by plaintiffs or the
12 district court alters our conclusion that, under the transmit
13 clause, we must examine the potential audience of a given
14 transmission by an alleged infringer to determine whether that
15 transmission is "to the public." And because the RS-DVR system,
16 as designed, only makes transmissions to one subscriber using a
17 copy made by that subscriber, we believe that the universe of
18 people capable of receiving an RS-DVR transmission is the single
19 subscriber whose self-made copy is used to create that
20 transmission.

21 Plaintiffs contend that it is "wholly irrelevant, in
22 determining the existence of a public performance, whether
23 'unique' copies of the same work are used to make the
24 transmissions." Fox Br. at 27. But plaintiffs cite no authority
25 for this contention. And our analysis of the transmit clause

1 suggests that, in general, any factor that limits the potential
2 audience of a transmission is relevant.

3 Furthermore, no transmission of an audiovisual work can be
4 made, we assume, without using a copy of that work: to transmit a
5 performance of a movie, for example, the transmitter generally
6 must obtain a copy of that movie. As a result, in the context of
7 movies, television programs, and other audiovisual works, the
8 right of reproduction can reinforce and protect the right of
9 public performance. If the owner of a copyright believes he is
10 injured by a particular transmission of a performance of his
11 work, he may be able to seek redress not only for the infringing
12 transmission, but also for the underlying copying that
13 facilitated the transmission. Given this interplay between the
14 various rights in this context, it seems quite consistent with
15 the Act to treat a transmission made using Copy A as distinct
16 from one made using Copy B, just as we would treat a transmission
17 made by Cablevision as distinct from an otherwise identical
18 transmission made by Comcast. Both factors--the identity of the
19 transmitter and the source material of the transmission--limit the
20 potential audience of a transmission in this case and are
21 therefore germane in determining whether that transmission is
22 made "to the public."

23 Indeed, we believe that Columbia Pictures Industries, Inc.
24 v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984), relied on by
25 both plaintiffs and the district court, supports our decision to

1 accord significance to the existence and use of distinct copies
2 in our transmit clause analysis. In that case, defendant
3 operated a video rental store, Maxwell's, which also housed a
4 number of small private booths containing seats and a television.
5 Patrons would select a film, enter the booth, and close the door.
6 An employee would then load a copy of the requested movie into a
7 bank of VCRs at the front of the store and push play, thereby
8 transmitting the content of the tape to the television in the
9 viewing booth. See id. at 156-57.

10 The Third Circuit found that defendants' conduct constituted
11 a public performance under both clauses of the statutory
12 definition. In concluding that Maxwell's violated the transmit
13 clause, that court explicitly relied on the fact that defendants
14 showed the same copy of a work seriatim to its clientele, and it
15 quoted a treatise emphasizing the same fact:

16 Professor Nimmer's examination of this definition is
17 particularly pertinent: "if the same copy . . . of a given
18 work is repeatedly played (i.e., 'performed') by different
19 members of the public, albeit at different times, this
20 constitutes a 'public' performance." 2 M. Nimmer, § 8.14
21 [C][3], at 8-142 (emphasis in original). . . . Although
22 Maxwell's has only one copy of each film, it shows each copy
23 repeatedly to different members of the public. This
24 constitutes a public performance.

25
26 Id. at 159 (first omission in original).
27

28 Unfortunately, neither the Redd Horne court nor Prof. Nimmer
29 explicitly explains why the use of a distinct copy affects the
30 transmit clause inquiry. But our independent analysis confirms
31 the soundness of their intuition: the use of a unique copy may

1 limit the potential audience of a transmission and is therefore
2 relevant to whether that transmission is made "to the public."
3 Plaintiffs' unsupported arguments to the contrary are unavailing.

4 Given that each RS-DVR transmission is made to a given
5 subscriber using a copy made by that subscriber, we conclude that
6 such a transmission is not "to the public," without analyzing the
7 contours of that phrase in great detail. No authority cited by
8 the parties or the district court persuades us to the contrary.

9 In addition to Redd Horne, the district court also cited and
10 analyzed On Command Video Corp. v. Columbia Pictures Industries,
11 777 F. Supp. 787 (N.D. Cal. 1991), in its transmit clause
12 analysis. In that case, defendant On Command developed and sold
13 "a system for the electronic delivery of movie video tapes,"
14 which it sold to hotels. Id. at 788. The hub of the system was
15 a bank of video cassette players, each containing a copy of a
16 particular movie. From his room, a hotel guest could select a
17 movie via remote control from a list on his television. The
18 corresponding cassette player would start, and its output would
19 be transmitted to that guest's room. During this playback, the
20 movie selected was unavailable to other guests. See id. The
21 court concluded that the transmissions made by this system were
22 made to the public "because the relationship between the
23 transmitter of the performance, On Command, and the audience,
24 hotel guests, is a commercial, 'public' one regardless of where
25 the viewing takes place." Id. at 790.

1 Thus, according to the On Command court, any commercial
2 transmission is a transmission "to the public." We find this
3 interpretation untenable, as it completely rewrites the language
4 of the statutory definition. If Congress had wished to make all
5 commercial transmissions public performances, the transmit clause
6 would read: "to perform a work publicly means . . . to transmit a
7 performance for commercial purposes." In addition, this
8 interpretation overlooks, as Congress did not, the possibility
9 that even non-commercial transmissions to the public may diminish
10 the value of a copyright. Finally, like Redd Horne, On Command
11 is factually distinguishable, as successive transmissions to
12 different viewers in that case could be made using a single copy
13 of a given work. Thus, at the moment of transmission, any of the
14 hotel's guests was capable of receiving a transmission made using
15 a single copy of a given movie. As a result, the district court
16 in this case erred in relying on On Command.

17 Plaintiffs also rely on Ford Motor Co. v. Summit Motor
18 Products, Inc., 930 F.2d 277 (3d Cir. 1991), in which the Third
19 Circuit interpreted § 106(3) of the Copyright Act, which gives
20 the copyright holder the exclusive right "to distribute copies .
21 . . of the copyrighted work to the public," 17 U.S.C. § 106(3)
22 (emphasis added). The court concluded that "even one person can
23 be the public for the purposes of section 106(3)." Ford, 930
24 F.2d at 299 (emphasis added). Commentators have criticized the
25 Ford court for divesting the phrase "to the public" of "all

1 meaning whatsoever," 2 Nimmer & Nimmer, supra, § 8.11[A], at 8-
2 149, and the decision does appear to have that result. Whether
3 this result was justified in the context of the distribution
4 right is not for us to decide in this case. We merely note that
5 we find no compelling reason, in the context of the transmit
6 clause and the public performance right, to interpret the phrase
7 "to the public" out of existence.

8 In sum, we find that the transmit clause directs us to
9 identify the potential audience of a given transmission, i.e.,
10 the persons "capable of receiving" it, to determine whether that
11 transmission is made "to the public." Because each RS-DVR
12 playback transmission is made to a single subscriber using a
13 single unique copy produced by that subscriber, we conclude that
14 such transmissions are not performances "to the public," and
15 therefore do not infringe any exclusive right of public
16 performance. We base this decision on the application of
17 undisputed facts; thus, Cablevision is entitled to summary
18 judgment on this point.

19 This holding, we must emphasize, does not generally permit
20 content delivery networks to avoid all copyright liability by
21 making copies of each item of content and associating one unique
22 copy with each subscriber to the network, or by giving their
23 subscribers the capacity to make their own individual copies. We
24 do not address whether such a network operator would be able to
25 escape any other form of copyright liability, such as liability

1 for unauthorized reproductions or liability for contributory
2 infringement.

3 In sum, because we find, on undisputed facts, that
4 Cablevision's proposed RS-DVR system would not directly infringe
5 plaintiffs' exclusive rights to reproduce and publicly perform
6 their copyrighted works, we grant summary judgment in favor of
7 Cablevision with respect to both rights.

8 **CONCLUSION**

9 For the foregoing reasons, the district court's award of
10 summary judgment to the plaintiffs is REVERSED and the district
11 court's injunction against Cablevision is VACATED. The case is
12 REMANDED for further proceedings consistent with this opinion.

13

Exhibit C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LONDON-SIRE RECORDS, INC., et al.,)
Plaintiffs,)
)
v.) No. 04cv12434-NG
) LEAD DOCKET NO.
)
DOE 1 et al.,)
Defendants.)
GERTNER, D.J.:

ORDER ON MOTIONS TO QUASH
March 31, 2008

This case consists of numerous actions consolidated under London-Sire Records, Inc. v. Does 1-4, Civil Action No. 04-cv-12434. The plaintiffs include several of the country's largest record companies. The defendants,¹ the plaintiffs claim, are individual computer users -- mainly college students -- who use "peer-to-peer" file-sharing software to download and disseminate music without paying for it, infringing the plaintiffs' copyrights.

In these cases, the plaintiffs have been able to infer some infringing file-sharing activity from their investigations, but have not been able to discover the file-sharer's identity. They have an Internet Protocol number ("IP number" or "IP address") identifying the file-sharer's computer, but no more. Consequently, the plaintiffs -- with the Court's permission -- have served subpoenas on a number of internet service providers ("ISPs"), largely colleges and universities, seeking a name to go with the number. To preserve the rights of those whose identities

¹ The defendants in this case have not yet been named; the Court simply refers to them as "the defendants." Those who contest the subpoena are "the movants."

are sought, the Court has required the ISPs to delay responding to the subpoena until the individual defendants have had an opportunity to move to quash it before their identities are disclosed.² Several defendants have done so; those are the motions presently before the Court.

After briefing, argument, and amicus participation, the Court concludes that it has insufficient information to allow the plaintiffs to take expedited discovery under these circumstances. First, the movants are entitled to some First Amendment protection of their anonymity -- albeit limited. Second, the defendants may have expectations of privacy with regard to their identity, but that depends on the terms of the internet service agreement they have with Boston University, which has not been provided to the Court. Third, the movants have raised an issue of fact with respect to the number of identities disclosed to the plaintiffs by the expedited discovery. As it currently exists, the plaintiffs' subpoena may invade the anonymity of many non-infringing internet users -- anonymity that deserves protection by the Court. Under these circumstances, the best solution is in camera review of the terms of service agreement and the ISP's list of individuals who match the information supplied by the plaintiffs.

² Specifically, the Court requires that the plaintiffs attach a "Court-Directed Notice Regarding Issuance of Subpoena," which the ISPs distribute to the individuals in question. The Notice informs the putative defendants that they have the opportunity to move to quash the subpoena, as these defendants have done. See Appendix A (Court-Directed Notice).

The Court will therefore **GRANT** two of the motions to quash (documents ## 104 and 115), at least until the relevant information is obtained.³ The plaintiffs may renew their motion for expedited discovery, addressing the Court's concerns by modifying the subpoena they seek to serve on Boston University, as discussed below.

I. **BACKGROUND**

A. **Facts**

In each of these cases, the facts are substantially identical. Since the defendants' motions are effectively motions to dismiss -- there is almost no evidence in the case, and the movants argue, among other things, that the plaintiffs have failed to state a claim upon which relief can be granted -- the Court will apply that standard of review to the pleadings. The plaintiffs' pleadings are taken as true, and the Court will draw all reasonable inferences in their favor. See, e.g., Rivera v. Rhode Island, 402 F.3d 27, 33 (1st Cir. 2005) (stating standard for motion to dismiss). To survive a motion to dismiss, the plaintiffs' pleaded facts must "possess enough heft to sho[w] that [they are] entitled to relief." Clark v. Boscher, 514 F.3d 107, 112 (1st Cir. 2008) (internal quotation marks omitted) (quoting Bell Atlantic Corp. v. Twombly, __ U.S. __, 127 S.Ct. 1955, 1959 (2007)) (first alteration in Twombly).

³ Document # 115 is styled "Reply Memorandum of Law of Defendant 'Doe,'" but the Court has no other related documents. The Court takes the filing as a pro se Motion to Quash, and for clarity's sake, refers to it as such.

The plaintiffs allege that the defendants used peer-to-peer software to "download and/or distribute to the public certain of the [plaintiffs'] Copyrighted Recordings. . . . Through his or her continuous and ongoing acts of downloading and/or distributing to the public the Copyrighted Recordings, each Defendant has violated Plaintiffs' exclusive rights of reproduction and distribution." E.g., Compl. at 5 (docket no. 07-cv-10834, document # 1). To clarify the issues on which this case turns, the Court will briefly explain the nature of peer-to-peer software and its use.

Peer-to-peer software primarily exists to create decentralized networks of individual computer users. The software allows the users to communicate directly with one another, rather than routing their transmissions through a central server -- thus the term "peer-to-peer" architecture, as opposed to "client-server." See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 919-920 & n.1 (2005). Each type of architecture has distinct advantages and disadvantages, most of which are not relevant to this case.

What is relevant is that users in a peer-to-peer network can remain relatively anonymous or pseudonymous. Because communications between two computers on a peer-to-peer network can take place directly, without passing through a central network server,⁴ such transactions are not easily observable by a third

⁴ This is a small oversimplification. Many popular peer-to-peer networks use a "supernode" architecture. A supernode is a semi-centralized computer that operates only to relay search queries and responses within the peer-to-peer network. Once the desired file is located, however, it may be

party. By the nature of the network and software, then, peer-to-peer users can control what information they display to the world. See Linares Decl. at 4, Ex. A to Pl. Mot. Leave to Take Immediate Discovery (docket no. 07-cv-10834, document # 5). Moreover, generally speaking, anyone who has the requisite software and internet connection can participate in open peer-to-peer networks, such as the ones the defendants are alleged to have used in this case.

Peer-to-peer users can also transfer files over the network. Many such files are entirely legitimate. See Grokster, 545 U.S. at 920. However, other files transferred are electronic versions of copyrighted music or video files. Notably, because the files on each user's computer are digital, another computer can make a precise copy of them with no attendant loss in quality. See Linares Decl. at 3-4, Ex. A to Pl. Mot. Leave to Take Immediate Discovery (docket no. 07-cv-10834, document # 5).

In this case, the plaintiffs allege that each of the defendants has taken part in just such a file transfer. To

transferred directly from one computer to another. See, e.g., Peter S. Menell & David Nimmer, Legal Realism in Action: Indirect Copyright Liability's Continuing Tort Framework and Sony's De Facto Demise, 55 UCLA L. Rev. 143, 183-84 (2007).

The history of peer-to-peer networks has been one of increasing decentralization, and thus, increasing anonymity. See id. at 179-85 (tracing history of peer-to-peer network technologies through lawsuits asserting contributory copyright liability). Some newer peer-to-peer technologies even dispense with supernodes. See, e.g., Grokster, 545 U.S. at 922; Matthew Helton, Secondary Liability for Copyright Infringement: BitTorrent as a Vehicle for Establishing a New Copyright Definition for Staple Articles of Commerce, 40 Colum. J. L. & Soc. Probs. 1, 20-21 (2006) (discussing new version of software that permits direct peer-to-peer connection without the need for a proxy computer).

discover potentially infringing transfers, the plaintiffs (acting through their trade association, the Recording Industry Association of America, or "RIAA") have retained a third-party investigator, MediaSentry, Inc. ("MediaSentry"). Id. at 4-5. MediaSentry essentially functions as an undercover user of the peer-to-peer networks. It connects to the network and searches for the plaintiff record companies' copyrighted files. Upon finding the files, it downloads them. See id. at 5-6. MediaSentry gathers what information it can about the computer from which the files were downloaded (the "sending computer.") Most crucially, that information includes the date and time at which the files were downloaded and the IP number of the sending computer. It can also include the user's name, but if given, the names are usually pseudonymous. See id. After the files are downloaded, the RIAA verifies that they can form the basis for a suit. It

reviews a listing of the music files that the user has offered for download in order to determine whether they appear to be copyrighted sound recordings. The RIAA also listens to the downloaded music files from these users in order to confirm that they are, indeed, illegal copies of sound recordings whose copyrights are owned by RIAA members.

Id. at 6.⁵

⁵ At the hearing, the defendants protested that it is impossible to determine whether a sound recording is "illegal" merely by listening to it. See Bestavros Decl. at 2-3 (document # 110). True enough. Indeed, one of the key features of digital copyright infringement is that an nth-generation copy is more or less identical to a non-infringing first-generation copy, so there is no drop in sound quality over time. But listening to the files is still important. The defendants must ascertain that what is labeled as a sound

At this point, assuming the plaintiffs wish to sue, they cannot do so; they have only the IP number of the sending computer. An IP number is sometimes called an IP address because it is just that: an address. It serves as a locator declaring the place of a particular piece of electronic equipment so that electronic data may be sent to it, and is usually represented as a series of four numbers between 0 and 255. See, e.g., America Online v. Huang, 106 F.Supp.2d 848, 851 (E.D. Va. 2000). (For example, 168.122.128.38 is one of the IP addresses allegedly used by a defendant in this case. See Doe List, Ex. A to Compl. (docket no. 07-cv-10834, document # 1).)

But relatively few personal computer users have a specific, set IP address, called a "static" address. Instead, many use their computers to connect to a network provided by their ISP, which uses a certain range of IP addresses -- say, all of the numbers between 168.122.1.x to 168.122.100.x. The ISP assigns an address within its range to the user's computer for the user's session, allocating the numbers within its range on an as-needed basis. This process is known as "dynamic" addressing. See, e.g., H. Brian Holland, Tempest in a Teapot or Tidal Wave? Cybersquatting Rights & Remedies Run Amok, 10 J. Tech. L. & Pol'y 301, 305 & nn. 13-18 (2005). This makes the plaintiffs' task of discovering the identity of a particular infringer more difficult.

recording to which they hold the copyright actually is such a recording (and not, say, a misnamed file or fair use that would not infringe the copyright.)

The IP address that they have noted as belonging to a particular user's computer may be assigned to a different user's computer in short order. See id.

However, the plaintiffs are not without leads. The range in which the IP address is assigned may reveal the user's ISP. See Linares Decl. at 7, Ex. A to Pl. Mot. Leave to Take Immediate Discovery (docket no. 07-cv-10834, document # 5); see also, e.g., Network-Tools.com, <http://network-tools.com/default.asp> (last visited Mar. 31, 2008) (providing such a service). And ISPs generally keep logs of which IP address is assigned to which user -- although it may purge those logs after a certain period of time, which was one of the key facts relied upon by the Court in granting expedited discovery. See Linares Decl. at 9, Ex. A to Pl. Mot. Leave to Take Immediate Discovery (docket no. 07-cv-10834, document # 5). Thus, the plaintiffs seek, through their subpoena, the opportunity to place their list of IP addresses side-by-side with the ISP's user logs to determine who was using the IP address at the moment of the alleged infringement. The ISPs, particularly colleges and universities, appropriately decline to reveal the identities of their users without a court order. Therefore, the plaintiffs bring "John Doe" lawsuits and seek discovery in order to determine the real identities of the defendants.

B. Procedural History

The plaintiff record companies have brought approximately forty "John Doe" cases in this Court, many -- perhaps most -- designating more than one defendant, grouped by ISP.⁶ In each case, the Court has granted expedited discovery and leave to subpoena the ISP, recognizing that the plaintiffs' rights may be irreparably and unfairly prejudiced unless they are allowed to seek the defendants' identities. See, e.g., Order re: Expedited Discovery (Dec. 9, 2004) (document # 7). Simultaneously, however, the Court has recognized that the defendants should have the opportunity to combat the subpoena if they desire to do so. Therefore, the Court has ordered that the ISP provide the individual users with notice of the lawsuit and a short statement of some of their rights before revealing their identities to the plaintiffs. Furthermore, the ISP may not respond to the subpoena for 14 days after each defendant has received notice. See id.; see also Appendix A (Court-Directed Notice).

Simultaneous with the grant of expedited discovery, the Court has consolidated each "John Doe" case with the first, London-Sire, No. 04-cv-12434. The cases involve similar, even virtually identical, issues of law and fact: the alleged use of peer-to-peer software to share copyrighted sound recordings and the discovery of defendants' identities through the use of a Rule 45 subpoena to their internet service provider. Consolidating the cases ensures

⁶ According to the amicus brief of the Electronic Frontier Foundation, more than 20,000 individuals have been sued nationwide. Amicus Curiae Br. of the Electronic Frontier Foundation ("EFF Br.") at 5-9 (document # 152).

administrative efficiency for the Court, the plaintiffs, and the ISP, and allows the defendants to see the defenses, if any, that other John Does have raised.⁷

In view of the \$750 statutory minimum damages per song, 17 U.S.C. § 504(c)(2), most defendants choose to settle. The approximate settlement range appears to be \$3,000 to \$6,000 per defendant, a considerable amount of money, particularly to the college students who have been caught in the plaintiffs' nets.

Only three of the defendants have elected to fight the subpoena. Two are Doe defendants from the case originally titled Arista Records LLC v. Does 1-21, No. 07-cv-10834 (consolidated on May 8, 2007). In that case, the plaintiffs sought discovery from Boston University as the defendants' ISP, and the two Does⁸ separately moved to quash the subpoena. Each primarily asserts that the plaintiffs have failed to state a sufficient claim for copyright infringement. See Mem. Supp. Mot. Quash (document # 104); Mot. Quash (document # 115). Because the two motions are substantively similar, the Court will address them together.

⁷ For these reasons, insofar as one of the movant Does requests severance, see Mot. Quash at 1-3 (document # 115), the motion is **DENIED without prejudice**. The case against each Doe will be individually considered for purposes of any rulings on the merits, and the movant may renew the severance request before trial if the case proceeds to that stage.

⁸ It is not clear which Does are the two movants. The Doe filing one Motion to Quash (document # 115) identifies him or herself as Doe no. 21; the Doe filing the other Motion to Quash (document # 103) called himself Doe no. 1. Doe no. 1 has been dismissed, however. See Notice of Dismissal (document # 122) (dismissing Doe no. 1 from the civil action originally docketed with number 07-cv-10834); Notice of Dismissal (document # 136) (same).

The third defendant to move to quash the subpoena is Doe no. 12 from Warner Brothers Records, Inc. v. Does 1-17, No. 07-cv-10924 (consolidated on May 18, 2007). The Internet Service Provider at issue is the University of Massachusetts. Doe no. 12 argues that she is not subject to personal jurisdiction in Massachusetts. See Mot. Quash (document # 113).

The Court held a hearing on the Motions to Quash on January 28, 2008. Shortly thereafter, the Court granted the Electronic Frontier Foundation ("EFF") leave to file an amicus brief supporting the Motion to Quash. See Electronic Order (Feb. 6, 2008). Its brief principally treats the First Amendment implications of the subpoena⁹ and the proper sweep of the copyright laws. The Court thanks the amicus for its participation.

The Court will examine first the motions of the two Does in the Boston University case, which argue that the subpoena ought to be denied on substantive grounds. It will then turn to the University of Massachusetts Doe's argument that the subpoena should be quashed for lack of personal jurisdiction.

II. LEGAL STANDARDS

This case is still at a preliminary stage: The plaintiffs seek to learn the identities of the defendants so that the issue may be properly joined on the merits. Under Federal Rule 45, the

⁹ The EFF's First Amendment arguments are taken on their merits, contrary to the plaintiffs' contention that no party has raised them. See Pls.' Resp. Opp. Amicus Curiae Br. at 2-3 (document # 157). At least one of the motions to quash raises the same issues, albeit in less detail. See Mem. L. Supp. Mot. Quash at 7-8 (document # 104).

Court "shall quash or modify the subpoena if it . . . requires disclosure of privileged or other protected matter and no exception or waiver applies." Fed. R. Civ. P. 45(c)(3)(A)(iii). The substantive inquiry is similar to the one necessary for issuing a protective order. See Micro Motion, Inc. v. Kane Steel Co., 894 F.2d 1318, 1322-23 (Fed. Cir. 1990). The party requesting that the subpoena be quashed must show good cause for protection by specifically demonstrating that disclosure will cause a clearly defined and serious harm. See Anderson v. Cryovac, Inc., 805 F.2d 1, 7-8 (1st Cir. 1986); Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995). The Court balances the harm of disclosure against the harm to the other party of restricting discovery.

The Court must therefore first consider whether the defendants' anonymity is entitled to privilege or other protection. If so, it will turn to the balancing test necessary under Rule 45(c)(3).

III. THE DEFENDANTS' ANONYMITY IS ENTITLED TO SOME FIRST AMENDMENT PROTECTION

The motion to quash raises two First Amendment issues -- the right to anonymous speech and the right to whatever creative activity is involved in the defendants' acts. While the Court recognizes some limited First Amendment protection here, that protection only goes so far as to subject the plaintiffs' subpoenas to somewhat heightened scrutiny. Other courts have

reached the same conclusion. See, e.g., Sony Music Entm't v. Does 1-40, 326 F.Supp.2d 556, 564 (S.D.N.Y. 2004).

As the Supreme Court has repeatedly held, the First Amendment protects anonymous speech. The right to anonymity is an important foundation of the right to speak freely. Indeed, "[a]nonymity is a shield from the tyranny of the majority. It . . . exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation - and their ideas from suppression -- at the hand of an intolerant society." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995). See also NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-62 (1958) (discussing generally the importance of anonymity). Still, the anonymous activity that is being protected must be "speech."

Copyright infringement, per se, is clearly not speech entitled to First Amendment protection. See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555-57, 560 (1985) (discussing the First Amendment and copyright, and examining whether fair use doctrine applied to alleged act of copyright infringement). But there are some creative aspects of downloading music or making it available to others to copy: the value judgment of what is worthy of being copied; the association of one recording with another by placing them together in the same library; the self-expressive act of identification with a particular recording; the affirmation of joining others listening

to the same recording or expressing the same idea. See Rebecca Tushnet, Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It, 114 Yale L.J. 535, 545-47, 562-81 (2004); Jack M. Balkin, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, 79 N.Y.U. L. Rev. 1, 45-46 (2004); cf. Harper & Row, 471 U.S. at 547 (noting that compilation of pure fact "entails originality" in selection and ordering of the facts). Thus, while the aspect of a file-sharer's act that is infringing is not entitled to First Amendment protection, other aspects of it are. Cf., e.g., Schad v. Mount Ephraim, 452 U.S. 61, 66 (1981) ("[N]ude dancing is not without its First Amendment protections from official regulation."); Eugene Volokh, Crime-Facilitating Speech, 57 Stan. L. Rev. 1095 (2005) (arguing that crime-facilitating speech has "some First Amendment value").

Nevertheless, the fact that there is First Amendment value associated with sharing music over a peer-to-peer network does not insulate the defendants from liability. Rather, the minimal First Amendment protection their activity garners¹⁰ entitles them to some

¹⁰ See Sony Music, 326 F.Supp.2d at 564 (finding file-sharers' activity "qualifies as speech, but only to a degree," because the "real purpose is to obtain music for free"); In re Verizon Internet Svcs., Inc., 257 F.Supp.2d 244, 260 (D.D.C. 2003), rev'd on other grounds, Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Svcs, Inc., 351 F.3d 1229 (D.C. Cir. 2003) (holding that file-sharers were entitled to some anonymity on First Amendment grounds, "even though the degree of protection is minimal where alleged copyright infringement is the expression at issue").

scrutiny of a discovery request that uses the power of the Court to threaten the privilege.¹¹

IV. APPLICATION OF THE BALANCING TEST

As to how to balance the harms, the Court finds persuasive the approach of the Southern District of New York in Sony Music, 326 F.Supp.2d 556. In that case, the court reviewed the leading cases on subpoenas seeking disclosure of defendants' identities from their ISP. It isolated five important factors:¹²

(1) a concrete showing of a prima facie claim of actionable harm, (2) specificity of the discovery request, (3) the absence of alternative means to obtain the subpoenaed information, (4) a central need for the subpoenaed information to advance the claim, and (5) the party's expectation of privacy.

¹¹ Other forms of speech also receive such intermediate valuation. See Florida Bar v. Went For It, Inc., 515 U.S. 618, 623 (noting that commercial speech is entitled to "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values" (internal quotation omitted)). The Court need not, and does not, express a view as to the proper place of file-sharing in the speech hierarchy; it is enough for present purposes to determine that it has some First Amendment value.

¹² In doing so, the court subsumed the analysis a number of other leading cases, including, for example, Dendrite International, Inc. v. Doe, 342 N.J.Super. 134, 775 A.2d 756, 760, 772 (2001), a case relied upon by the EFF. See Sony Music, 326 F.Supp.2d at 563-64. Dendrite, like many other cases involving internet speech, is not directly applicable to these facts. In that case, the plaintiff asserted that the anonymous defendant had defamed it on an internet bulletin board -- an act much more clearly in the wheelhouse of the First Amendment's protections. See 342 N.J. Super. at 140-41, 775 A.2d at 760. The court in that case therefore sensibly elected to apply a more stringent standard than the one appropriate here. See id., 342 N.J. Super. at 149-59, 775 A.2d at 765-72.

Id. at 564-65 (citations omitted).¹³ The first factor ensures that the defendants cannot pierce the defendants' anonymity based on an unsupported or legally insufficient pleading. The second, third, and fourth factors ensure that the subpoena is narrowly tailored to reveal no more information about the defendants than necessary, and to ensure that third parties who are not accused of infringement remain anonymous. The fifth factor considers the defendants' expectations of privacy, including whatever service arrangement they might have with their ISP.

The Court considers each factor in turn.

A. Factor One: Prima Facie Claim of Actionable Harm

This factor has three parts. First, the plaintiffs must assert an "actionable harm," a claim upon which relief can be granted. Second, the claim must be supported by prima facie evidence. That standard does not require the plaintiffs to prove their claim. They need only proffer sufficient evidence that, if credited, would support findings in their favor on all facts

¹³ A number of other courts have also found the Sony Music approach persuasive, some on substantially different facts. See Best Western Int'l, No. CV-06-1537-DGC, 2006 WL 2091695, at *3-*5 (D.Ariz. July 25, 2006) (posting to internet bulletin boards); Gen. Bd. of Global Ministries of the United Methodist Church v. Cablevision Lightpath, Inc., No. CV-06-3669-ETB, 2006 WL 3479332, at *4-*5 (E.D.N.Y. Nov. 30, 2006) (unauthorized access to email); Elektra Entm't Group v. Does 1-9, No. 04CV2289-RWS, 2004 WL 2095581, at *2-*5 (S.D.N.Y. Sept. 8, 2004) (file-sharing and copyright infringement). But see Mobilisa, Inc. v. Doe, 217 Ariz. 103, 170 P.3d 712, 720 (Ariz. App. 2007) (declining to apply Sony Music standard in case involving alleged unlawful access to plaintiffs' computer server by anonymous user, and applying a more stringent standard).

essential to their claim. See Adelson v. Hananel, 510 F.3d 43, 48 (1st Cir. 2007) (discussing prima facie standard for personal jurisdiction). Finally, both the claim and the prima facie evidence supporting it must be "concrete." That is, they must be reasonably grounded in allegations of a specific act of infringement.

The movants and the EFF argue that the plaintiffs have failed to meet their burden under each part of the test. See Mot. Quash at 3-7 (document # 104); Mot. Quash at 4-10 (document # 115); EFF Br. at 9-24 (document # 152). Their arguments involve important and difficult questions of copyright law. Ultimately, however, the Court finds that the plaintiffs have satisfied this factor. Considering as true the facts they have pleaded, and drawing all reasonable inferences in their favor, the plaintiffs have made a concrete showing of a prima facie case of an actionable harm.

1. Whether the Plaintiffs Have Asserted a Claim Upon Which Relief Can Be Granted

A claim for copyright infringement has two elements. First, the plaintiffs must demonstrate that they hold a valid copyright (an issue the defendants do not contest.) Second, the plaintiff must show that the defendant violated one of the exclusive rights held by a copyright owner. See T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97, 108 (1st Cir. 2006); see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 360-61 (1991); 17 U.S.C. § 501(a). The plaintiffs claim that "each

[d]efendant, without the permission or consent of [p]laintiffs, has . . . download[ed] or distribut[ed] to the public" music files to which the plaintiff holds the copyright. Compl. at 5 (docket no. 07-cv-10834, document # 1). Two rights reserved to the copyright holder are at issue in this case: the right "to reproduce the copyrighted work in copies or phonorecords," 17 U.S.C. § 106(1), and the right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending," id. § 106(3).

The movants and the amicus present two broad arguments, each of which requires the Court to consider the scope of a copyright holder's exclusive rights under the statutes quoted above. First, they contend that the copyright laws require an actual dissemination of copyrighted material; merely making copyrighted material available for another person to copy, they argue, is only an attempt at infringement -- which is not actionable. Mem. Supp. Mot. Quash at 4-6 (document # 104); Mot. Quash at 7 (document # 115); EFF Br. at 10-15 (document # 152). Second, they contend that the scope of the rights given to copyright owners by § 106 is limited by the definition of "phonorecords" as "material objects" in 17 U.S.C. § 101.¹⁴ In their view, the copyright owner's rights

¹⁴ The parties refer to "copies." The statute makes clear that where sound recordings are at issue, "phonorecords" is a more precise term. See 17 U.S.C. § 101. The two terms appear to be functionally interchangeable, however, differing only in the nature of the copyrighted work. See H.R. Rep. 94-1476 at 53 (1976), reprinted in 1976 U.S.C.C.A.N. at 5666 (noting that under the copyright statutes, "'copies' and 'phonorecords' together will

are limited to tangible, physical objects, and purely electronic transmissions over the internet fall outside those rights.¹⁵

Suppl. Mem. L. Supp. Mot. Quash at 4-6 (document # 149); Mot.

Quash at 7 (document # 115); EFF Br. at 15-24 (document # 152).

Both of these broad arguments question whether the plaintiffs have alleged a legally cognizable harm under the copyright statutes.

If they have not, then the subpoena must be quashed.

a. Whether the Copyright Holder's Right Extends Only to Actual Distributions

The first question the Court must address is whether the distribution right under 17 U.S.C. § 106(3) requires an actual dissemination to constitute an infringement.¹⁶ It is an important issue, determining in part how to evaluate the proffered evidence

comprise all of the material objects in which copyrightable works are capable of being fixed").

¹⁵ Strictly speaking, much of the parties' briefing on this issue is directed toward the scope of the distribution right under § 106(3), not the reproduction right under § 106(1). But both refer to "copies or phonorecords," so the arguments implicate both rights, though to different degrees.

¹⁶ The plaintiffs have also alleged a violation of their reproduction rights under § 106(1). Under that statute, a copyright owner's rights are infringed whenever an unauthorized person "reproduce[s] the copyrighted work in copies or phonorecords." The plaintiffs have alleged that the defendants downloaded music, as well as distributed it, and that they did not have authorization to do so. *See* Compl. at 5 (docket no. 07-cv-10834, document # 1). At least subject to arguments over the definition of "phonorecords," discussed below, the plaintiffs thus appear to have alleged a legally sufficient harm under § 106(1). It is still appropriate to address briefly the distribution right under § 106(3), however; it was the focus of the parties' briefing and arguably constitutes the crux of the alleged infringement in this case. The Court's analysis may also inform later arguments, such as summary judgment or request for further data from the ISP not authorized by the current scope of the subpoena.

in this case. MediaSentry, posing as just another peer-to-peer user, can easily verify that copyrighted material has been made available for download from a certain IP address. Arguably, though, MediaSentry's own downloads are not themselves copyright infringements because it is acting as an agent of the copyright holder, and copyright holders cannot infringe their own rights.¹⁷ If that argument is accepted, MediaSentry's evidence cannot alone demonstrate an infringement.

The plaintiffs suggest two reasons why an actual distribution might not be required. First, the statute reserves to the copyright owner the right "to do and to authorize . . . [the distribution of] copies or phonorecords of the copyrighted work to the public." § 106(3) (emphasis added). The language appears to grant two distinct rights: "doing" and "authorizing" a distribution. Making the copyrighted material available over the internet might constitute an actionable "authorization" of a distribution. Second, if mere authorization is not enough, the plaintiffs argue that in appropriate circumstances -- including these -- "making available" copyrighted material is sufficient to constitute an act of actual distribution. Neither argument has merit.

The First Circuit has squarely considered and rejected the proposition that copyright liability arises where the defendant

¹⁷ See Mem. Supp. Mot. Quash at 4-6 (document # 149); EFF Br. at 12 n.8 (document # 152). The Court need not reach this issue now.

authorized an infringement, but no actual infringement occurred. See Venegas-Hernandez v. Ass'n de Compositores & Editores de Música Latinoamericana, 424 F.3d 50, 57-58 (1st Cir. 2005). It noted that Congress' intent in adding "authorize" to the statute was to "avoid any questions as to the liability of contributory infringers." Id. at 58 (internal quotation marks omitted) (quoting H.R. Rep. 94-1476 ("House Report") at 52 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5674). Authorization is sufficient to give rise to liability, but only if an infringing act occurs after the authorization. See id. at 59; see also Latin Am. Music Co. v. The Archdiocese of San Juan of the Roman Catholic & Apostolic Church, 499 F.3d 32, 46 (1st Cir. 2007) (citing and applying Venegas-Hernandez).

Thus, to constitute a violation of the distribution right under § 106(3), the defendants' actions must do more than "authorize" a distribution; they must actually "do" it. The Court therefore moves to the plaintiffs' second argument: Merely making copyrighted works available to the public is enough where, as in this case, the alleged distributor does not need to take any more affirmative steps before an unauthorized copy of the work changes hands. Other courts have split over whether that is a valid reading of the statute. Compare Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199 (4th Cir. 1997) (holding that making copyrighted material available is sufficient to constitute a distribution), and Arista Records LLC v. Greubel, 453

F.Supp.2d 961, 969-70 (N.D. Tex. 2006) (citing and following Hotaling), and Warner Bros. Records, Inc. v. Payne, No. W-06-CA-051, 2006 WL 2844415, at *3-*4 (W.D. Tex. July 17, 2006) (same), with In re Napster, Inc. Copyright Litig., 377 F.Supp.2d 796, 802-05 (N.D. Cal. 2005) (criticizing Hotaling as being "contrary to the weight of [other] authorities" and "inconsistent with the text and legislative history of the Copyright Act of 1976"), and Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 434 (8th Cir. 1993) (stating that infringement of the distribution right requires the actual dissemination of copies or phonorecords).

To suggest that "making available" may be enough, the plaintiffs rely primarily on the Fourth Circuit's decision in Hotaling.¹⁸ In that case, a library had an unauthorized copy of a book, which it "made available" to the public; the defendant argued that without a showing that any member of the public

¹⁸ The plaintiffs also cite A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). In A & M v. Napster, the the Ninth Circuit considered a suit against a provider of peer-to-peer services. The court stated that "Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights." Id. at 1014. As the EFF argues, the Ninth Circuit's reasoning is not persuasive here. First, as the district court noted in that case, "it is pretty much acknowledged" that infringement had occurred. Id. (internal quotation marks omitted). Second, because the plaintiffs were suing the peer-to-peer network provider rather than any particular user, they did not need to show that any particular copyright was infringed. It was enough to show that approximately 70% of the available material infringed the plaintiffs' copyrights. See id. at 1013. Finally, the court's very statement may betray a slight misunderstanding about the way the technology worked -- it was not the "file names" that were copied, as the court's statement seems to imply, but the actual files themselves. Indeed, merely "upload[ing] file names" does not even constitute making the files themselves available. But see Motown Record Co., LP v. DePietro, No. 04-CV-2246, 2007 WL 576284, at *3 & n.38 (E.D. Pa. Feb. 16, 2007) (finding A & M v. Napster persuasive on facts similar to those in the case at bar).

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actually read the book, it could not be liable for "distribution."

See id. at 201-02, 203. The district court agreed and granted summary judgment to the defendant. The Fourth Circuit reversed:

When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public. At that point, members of the public can visit the library and use the work. Were this not to be considered distribution within the meaning of § 106(3), a copyright holder would be prejudiced by a library that does not keep records of public use, and the library would unjustly profit by its own omission.

Id.; see also id. at 204.

The plaintiffs contend that this case is analogous to Hotaling,¹⁹ and suggest that the Court should reach the same conclusion as the Fourth Circuit. But the EFF correctly points out a lacuna in the Fourth Circuit's reasoning. See EFF Br. at 15 (citing William F. Patry, 4 Patry on Copyright §§ 13:9, 13:11 (2007)). Merely because the defendant has "completed all the steps necessary for distribution" does not necessarily mean that a

¹⁹ Indeed, this case is closer to the facts of Hotaling than were the facts in the Napster litigation. In In re Napster, the court considered an "indexing" system in which central computer servers kept a record of which peer-to-peer users had which files, somewhat analogous to the supernodes used by the peer-to-peer system at issue here. See supra note 4. In rejecting the plaintiffs' theory, the court noted that the index was only an index -- not the actual file containing the sound recording. See In re Napster, 377 F.Supp.2d at 803. In this case, the individual peer-to-peer users are alleged to have had the electronic files on their hard disks, not merely a reference. See also Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1162-63 (9th Cir. 2007) (distinguishing Google's process of indexing images and providing thumbnails to users on similar grounds).

distribution has actually occurred.²⁰ It is a "distribution" that the statute plainly requires. See 17 U.S.C. § 106(3).

The plaintiffs encourage the Court to adopt a much more capacious definition of "distribution." They argue that the Supreme Court has held that the "terms 'distribution' and 'publication' . . . [are] synonymous in the Copyright Act." Pls.' Resp. Opp. Amicus Curiae Br. at 2-3 (document # 157) (citing Harper & Row, 471 U.S. at 552).²¹ They further note, correctly, that the statutory definition of publication can include offers to distribute. See 17 U.S.C. § 101. And sharing music files on a peer-to-peer network does, at least arguably, constitute an offer to distribute them.

While some lower courts have accepted the equation of publication and distribution, see Greubel, 453 F.Supp.2d at 969; In re Napster, 377 F.Supp.2d at 803, the plaintiffs' argument mischaracterizes the Supreme Court's decision in Harper & Row. The Supreme Court stated only that § 106(3) "recognized for the first time a distinct statutory right of first publication," and quoted the legislative history as establishing that § 106(3) gives

²⁰ The First Circuit's decisions in Venegas-Hernandez, 424 F.3d at 57-59, and Latin American Music Co., 499 F.3d at 46, appear to support this distinction.

²¹ Before the Copyright Act was passed in 1976, "publication" determined the date on which statutory protection of the copyright began. See 17 U.S.C. § 24 (1970), repealed by Copyrights Act of 1976, ch. 3, § 302, 90 Stat. 2541. It occurred when "'the original or tangible copies of a work [were] . . . made available to the general public.'" Bartok v. Boosey & Hawkes, Inc., 523 F.2d 941, 948 (2d Cir. 1975) (quoting Melville B. Nimmer, Nimmer on Copyright § 49 at 194-95 (1974)). It did not include the mere public performance of a work. See Ferris v. Frohman, 223 U.S. 424, 435-36 (1912).

a copyright holder "the right to control the first public distribution of an authorized copy . . . of his work." Harper & Row, 471 U.S. at 552 (internal quotation marks omitted) (quoting House Report at 62, reprinted in 1976 U.S.C.C.A.N. at 5675) (alteration in Harper & Row). That is a far cry from squarely holding that publication and distribution are congruent.

To the contrary, even a cursory examination of the statute suggests that the terms are not synonymous. "Distribution" is undefined in the copyright statutes. "Publication," however, is defined, and incorporates "distribution" as part of its definition:

'Publication' is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

...17 U.S.C. § 101. By the plain meaning of the statute, all "distributions . . . to the public" are publications. But not all publications are distributions to the public -- the statute explicitly creates an additional category of publications that are not themselves distributions. For example, suppose an author has a copy of her (as yet unpublished) novel. If she sells that copy to a member of the public, it constitutes both distribution and publication. If she merely offers to sell it to the same member of the public, that is neither a distribution nor a publication.

And if the author offers to sell the manuscript to a publishing house "for purposes of further distribution," but does not actually do so, that is a publication but not a distribution.

Plainly, "publication" and "distribution" are not identical. And Congress' decision to use the latter term when defining the copyright holder's rights in 17 U.S.C. § 106(3) must be given consequence. In this context, that means that the defendants cannot be liable for violating the plaintiffs' distribution right unless a "distribution" actually occurred.

But that does not mean that the plaintiffs' pleadings and evidence are insufficient. The Court can draw from the Complaint and the current record a reasonable inference in the plaintiffs' favor -- that where the defendant has completed all the necessary steps for a public distribution, a reasonable fact-finder may infer that the distribution actually took place. As in Hotaling, the defendants have completed the necessary steps for distribution, albeit electronic: Per the plaintiffs' pleadings, each individual Doe defendant connected to the peer-to-peer network in such a way as to allow the public to make copies of the plaintiffs' copyrighted recordings. See Compl. at 5 (docket no. 07-cv-10834, document # 1). Through their investigator, the plaintiffs have produced evidence that the files were, in fact, available for download. They have also alleged that sound recordings are illegally copied on a large scale, supporting the inference that the defendants participated in the peer-to-peer

network with the intent that other users could download from the defendants copies of the plaintiffs' copyrighted material.

See Linares Decl. at 3-4, Ex. A to Pl. Mot. Leave to Take Immediate Discovery (docket no. 07-cv-10834, document # 5). At least at this stage of the proceedings, that is enough. The plaintiffs have pled an actual distribution and provided some concrete evidence to support their allegation.

b. Whether the Distribution Right Is Limited to Physical, Tangible Objects

Next, the movants and the EFF contend that the distribution right under 17 U.S.C. § 106(3) is limited to physical, tangible objects. By its terms, the distribution right only extends to distributions of "phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending." In turn, 17 U.S.C. § 101 defined "phonorecords" as "material objects in which sounds . . . are fixed." The movants and the EFF focus on the phrase "material object," as well as the meaning of "sale or other transfer," and conclude that purely electronic file sharing does not fall within the scope of the right. If their argument is accepted, it would mean that the plaintiffs' Complaint is legally insufficient to allege a violation of the distribution right protected by § 106(3).

The movants' argument is sweeping, carrying substantial implications for a great deal of internet commerce -- any involving computer-to-computer electronic transfers of information. Indeed, this case is an exemplar. The plaintiffs

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have not alleged a physical distribution. To the contrary, it is clear that their harm comes from the purely electronic copying of music files. See Linares Decl. at 3-4, Ex. A to Pl. Mot. Leave to Take Immediate Discovery (docket no. 07-cv-10834, document # 5). After carefully considering the parties' and the EFF's arguments, the Court concludes that § 106(3) confers on copyright owners the right to control purely electronic distributions of their work.

As noted above, 17 U.S.C. § 106(3) applies to the distribution of "phonorecords." And "phonorecords" are defined in full as follows:

'Phonorecords' are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed.

17 U.S.C. § 101. The movants and the EFF contend that the electronic distribution, if it occurred, did not involve the "distribution" of a material object "by sale or other transfer of ownership, or by rental, lease or lending," as §§ 106(3) and 101 require. The argument has two closely related prongs -- first, that no material object actually changed hands, and second, that even if it did, it was not through one of the methods of transfer enumerated in the statute.

Each of those arguments relies on an overly literal definition of "material object," and one that ignores the phrase's

purpose in the copyright statutes. Congress intended for the copyright owner to be able to control the public distribution of items that can reproduce the artist's sound recording. It makes no difference that the distribution occurs electronically, or that the items are electronic sequences of data rather than physical objects.

Before squarely addressing the parties' arguments, however, the Court briefly revisits an important foundational issue -- whether the electronic files at issue here can constitute "material objects" within the meaning of the copyright statutes. Doing so will help the Court explain the scope of the distribution right and frame the application of the Copyright Act to an electronic world.

(1) Electronic Files Are Material Objects

Understanding Congress' use of "material object" requires returning to a fundamental principle of the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in 17 U.S.C.). Congress drew "a fundamental distinction between the 'original work' which is the product of 'authorship' and the multitude of material objects in which it can be embodied. Thus, in the sense of the [Copyright Act], a 'book' is not a work of authorship, but is a particular kind of 'copy.'" House Report at 53, reprinted in 1976 U.S.C.C.A.N. at 5666.²²

²² The term "material object" also distinguishes a tangible copy of a work from its performance. Compare 17 U.S.C. § 101 (defining "copies"), with id. (defining "perform"). Clearly, different copyrights are implicated by the ownership of a phonorecord and by a public performance of the sound recording

The Copyright Act thus does not use materiality in its most obvious sense -- to mean a tangible object with a certain heft, like a book or compact disc. Rather, it refers to materiality as a medium in which a copyrighted work can be "fixed." See 17 U.S.C. § 101 ("A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."). As the Second Circuit cogently explained, "[t]he sole purpose of § 101's definitions of the words 'copies' and 'fixed' is to . . . define the material objects in which copyrightable and infringing works may be embedded and to describe the requisite fixed nature of that work within the material object." Matthew Bender & Co., Inc. v. West Pub. Co., 158 F.3d 693, 702 (2d Cir. 1998). The opposite is true as well. The sole purpose of the term "material object" is to provide a reference point for the terms "phonorecords" and "fixed."²³

physically embodied in that phonorecord. Compare 17 U.S.C. § 106(1), with id. § 106(3), and with id. §§ 106(4), 106(6). While this seems an elementary distinction, it is important to the scope of the distribution right, discussed more extensively below.

²³ This point of view is supported by Congress' abrogation of one judicial doctrine concerning the nature of a "copy." In White-Smith Publishing Co. v. Apollo Co., 209 U.S. 1 (1908), the Supreme Court rejected the argument that the copyright for a piece of music applied to the perforated sheets used to instruct a player piano, holding that it was limited to sheet music from which a person could read and reproduce the music. Because the perforated sheets were not intelligible to a person, the Court held, they were not "copies." Id. at 17. Congress rightly rejected this "artificial and largely unjustifiable distinction[]," House Report at 52, reprinted in 1976 U.S.C.C.A.N. at 5665, by expanding the definition of "fixed" to include methods that required machines. Concurrently, Congress sought to broaden the definition of the medium in which copyrighted material could be fixed. See id. at 52-53, reprinted in 1976 U.S.C.C.A.N. at 5665-66. A "material object"