

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3
4 August Term 2007

5 (Argued: October 24, 2007

Decided: August 4, 2008)

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

7 -----x
8 THE CARTOON NETWORK LP, LLLP and CABLE NEWS NETWORK
9 L.P., L.L.L.P.,

10
11 Plaintiffs-Counter-Claimants-Defendants-
12 Appellees,

13
14 TWENTIETH CENTURY FOX FILM CORPORATION, UNIVERSAL
15 CITY STUDIOS PRODUCTIONS LLLP, PARAMOUNT PICTURES
16 CORPORATION, DISNEY ENTERPRISES INC., CBS
17 BROADCASTING INC., AMERICAN BROADCASTING COMPANIES,
18 INC., NBC STUDIOS, INC.,

19
20 Plaintiffs-Counter-Defendants-Appellees,

21
22 -- v. --

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24 CSC HOLDINGS, INC. and CABLEVISION SYSTEMS
25 CORPORATION,

26
27 Defendants-Counterclaim-Plaintiffs-Third-
28 Party Plaintiffs-Appellants,

29
30 -- v. --

31
32 TURNER BROADCASTING SYSTEM, INC., CABLE NEWS NETWORK
33 LP, LLP, TURNER NETWORK SALES, INC., TURNER CLASSIC
34 MOVIES, L.P., LLLP, TURNER NETWORK TELEVISION LP,
35 LLLP

36
37 Third-Party-Defendants-Appellees.

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

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

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.

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