

***The Cartoon Network (Cablevision) Decision:  
Copyright Cataclysm or Tempest in a Teapot?"***

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*Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008),  
*cert. pending*, No. 08-448 (U.S. Supreme Court)

**Digital Video Recorder (DVR):**

A digital video recorder (DVR) or personal video recorder (PVR) is a device that records video in a digital format to a disk drive or other memory medium within a device. The term includes stand-alone set-top boxes, portable media players (PMP) and software for personal computers which enables video capture and playback to and from disk. Some consumer electronic manufacturers have started to offer televisions with DVR hardware and software built in to the television itself; LG was first to launch one in 2007. ...

-- Wikipedia, "Digital video recorder" (April 2, 2009)

**Cablevision's Remote Storage Digital Video Recorder (RS-DVR) (description for the court of appeals opinion)**

As designed, the RS-DVR allows Cablevision customers who do not have a stand-alone DVR to record cable programming on central hard drives housed and maintained by Cablevision at a "remote" location. RS-DVR customers may then receive playback of those programs through their home television sets, using only a remote control and a standard cable box equipped with the RS-DVR software. ...

At the outset of the transmission process, Cablevision gathers the content of the various television channels into a single stream of data. Generally, this stream is processed and transmitted to Cablevision's customers in real time. ... Under the new RS-DVR, this single stream of data is split into two streams. The first is routed immediately to customers as before. The

second stream flows into a device called the Broadband Media Router ("BMR"), which buffers the data stream, reformats it, and sends it to the "Arroyo Server," which consists, in relevant part, of two data buffers and a number of high-capacity hard disks. The entire stream of data moves to the first buffer (the "primary ingest buffer"), at which point the server automatically inquires as to whether any customers want to record any of that programming. If a customer has requested a particular program, the data for that program move from the primary buffer into a secondary buffer, and then onto a portion of one of the hard disks allocated to that customer. As new data flow into the primary buffer, they overwrite a corresponding quantity of data already on the buffer. The primary ingest buffer holds no more than 0.1 seconds of each channel's programming at any moment. Thus, every tenth of a second, the data residing on this buffer are automatically erased and replaced. The data buffer in the BMR holds no more than 1.2 seconds of programming at any time. While buffering occurs at other points in the operation of the RS-DVR, only the BMR buffer and the primary ingest buffer are utilized absent any request from an individual subscriber. ...

To begin playback, the customer selects the show from an on-screen list of previously recorded programs. The principal difference in operation is that, instead of sending signals from the remote to an on-set box, the viewer sends signals from the remote, through the cable, to the Arroyo Server at Cablevision's central facility. In this respect, RS-DVR more closely resembles a VOD service, whereby a cable subscriber uses his remote and cable box to request transmission of content, such as a movie, stored on computers at the cable company's facility. But unlike a VOD service, RS-DVR users can only play content that they previously requested to be recorded.

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

## **The Court of Appeals' Ruling**

### *I. Buffer Copies ("Buffer Data")*

Section 106 of Copyright Act (Exclusive rights in copyrighted works):

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

...

Section 101 of Copyright Act (definitions):

"Copies" are material objects, other than phonorecords, in which a work is *fixed* by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

...

A work is "*fixed*" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated *for a period of more than transitory duration*. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

### **Court of Appeals:**

We believe that this language [*i.e.*, the definition of "fixed"] plainly imposes two distinct but related requirements: the work must be embodied in a medium, *i.e.*, placed in a medium such that it can be perceived, reproduced, etc., from that medium (the "embodiment requirement"), and it must remain thus embodied "for a period of more than transitory duration." ... Unless both requirements are met, the work is not "fixed" in the buffer, and, as a result, the buffer data is not a "copy" of the original work whose data is buffered.

*[Embodiment:]* [The "embodiment" requirement might not be met] if only a single second of a much longer work was placed in the buffer in isolation. In such a situation, it might be reasonable to conclude that only a minuscule portion of a work, rather than "a work" was embodied in the buffer. Here, however, where every second of an entire work is placed, one second at a time, in the buffer, we conclude that the work is embodied in the buffer.

*[Duration:]* Given that the data reside in no buffer for more than 1.2 seconds before being automatically overwritten, and in the absence of compelling arguments to the contrary, we believe that the copyrighted works here are not "embodied" in the buffers for a period of more than transitory duration, and are therefore not "fixed" in the buffers. Accordingly, the acts of buffering in the operation of the RS-DVR do not create copies, as the Copyright Act defines that term. Our resolution of this issue renders it unnecessary for us to determine whether any copies produced by buffering data would be de minimis, and we express no opinion on that question.

## II. *Direct Liability for Creating the Playback Copies: Volition*

### **Court of Appeals:**

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

*[Citing Religious Technology Center v. Netcom On-Line Communication Services, 907 F.Supp. 1361 (N.D.Cal.1995):]* When there is a dispute as to the author of an allegedly infringing instance of reproduction, *Netcom* and its progeny direct our attention to the volitional conduct that causes the copy to be made. There are only two instances of volitional conduct in this case: Cablevision's conduct in designing, housing, and maintaining a system that exists only to produce a copy, and a customer's conduct in ordering that system to produce a copy of a specific program. In the case of a VCR, it seems clear—and we know of no case holding otherwise—that the operator of the VCR, the person who actually presses the button to

make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or, if distinct from the operator, owns the machine. We do not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer's command.

In determining who actually "makes" a copy, a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct. ... Here, by selling access to a system that automatically produces copies on command, Cablevision more closely resembles a store proprietor who charges customers to use a photocopier on his premises, and it seems incorrect to say, without more, that such a proprietor "makes" any copies when his machines are actually operated by his customers.

[Although Cablevision had] "unfettered discretion in selecting the programming that it would make available for recording." we do not think it sufficiently proximate to the copying to displace the customer as the person who "makes" the copies when determining liability under the Copyright Act. ... [W]e find that the district court erred in concluding that Cablevision, rather than its RS-DVR customers, makes the copies carried out by the RS-DVR system.

We need not decide today whether one's contribution to the creation of an infringing copy may be so great that it warrants holding that party directly liable for the infringement, even though another party has actually made the copy. We conclude only that on the facts of this case, copies produced by the RS-DVR system are "made" by the RS-DVR customer, and Cablevision's contribution to this reproduction by providing the system does not warrant the imposition of direct liability.

### *III. Transmission of RS-DVR Playback: Public Performance?*

Section 106 of Copyright Act (Exclusive rights in copyrighted works):

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: ...

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; ...

Section 101 of Copyright Act (definitions):

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

...

To perform or display a work “publicly” means —

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to *transmit* or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, *whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.*

**Court of Appeals:**

The parties agree that this case does not implicate clause (1). Accordingly, we ask whether these facts satisfy the second, “transmit clause” of the public performance definition: Does Cablevision “transmit ... a performance ... of the work ... to the public”? *Id.* No one disputes that the RS-DVR playback results in the transmission of a performance of a work – the transmission from the Arroyo Server to the customer's television set.

...

[I]t is relevant, in determining whether a transmission is made to the public, to discern who is "capable of receiving" the performance being transmitted. The fact that the statute says "capable of receiving the performance," instead of "capable of receiving the transmission," underscores the fact that a transmission of a performance is itself a performance.

...

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

...

In essence, the district court suggested that, in considering whether a transmission is "to the public," we consider not the potential audience of a particular transmission, but the potential audience of the underlying work (i.e., "the program") whose content is being transmitted.

We cannot reconcile the district court's approach with the language of the transmit clause. That clause speaks of people capable of receiving a particular "transmission" or "performance," and not of the potential audience of a particular "work."

...

[A]ccording to plaintiffs, when Congress says that to perform a work publicly means to transmit ... a performance ... to the public, they really meant "transmit ... the 'original performance' ... to the public." The implication of this theory is that to determine whether a given transmission of a performance is "to the public," we would consider not only the potential audience of that transmission, but also the potential

audience of any transmission of the same underlying “original” performance.

...

Although the transmit clause is not a model of clarity, we believe that when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission.

...

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

...

[One case and one treatise writer have concluded that “if the same copy... of a given work is repeatedly played (*i.e.*, ‘performed’) by different members of the public, albeit at different times, this constitutes a ‘public’ performance.”] Unfortunately, neither the *Redd Horne* court nor Prof. Nimmer explicitly explains *why* the use of a distinct copy affects the transmit clause inquiry. But our independent analysis confirms the soundness of their intuition: the use of a unique copy may limit the potential audience of a transmission and is therefore relevant to whether that transmission is made “to the public.”

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

In sum, we find that the transmit clause directs us to identify the potential audience of a given transmission, *i.e.*, the persons “capable of receiving” it, to determine whether that transmission is made “to the public.” Because each RS-DVR playback transmission is made to a single



subscriber using a single unique copy produced by that subscriber, we conclude that such transmissions are not performances "to the public," and therefore do not infringe any exclusive right of public performance. We base this decision on the application of undisputed facts; thus, Cablevision is entitled to summary judgment on this point.

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

### **Copyright Cataclysm or Tempest in a Teapot?**

"[T]he Second Circuit's recent decision in *Cartoon Networks v. CSC Holdings*, if followed, could substantially eviscerate the reproduction and public performance rights. ... The court's parsing of the text of the Copyright Act is peculiar if not perverse."

Jane C. Ginsburg, *Recent Developments in US Copyright Law- Part II, Caselaw: Exclusive Rights on the Ebb*, *Revue Internationale du Droit d'Auteur* (Jan. 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1305270](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1305270), at pp. 1, 26 (last revised Feb. 1, 2009).

Frankly, this is among the most untenable distinctions that I have seen in an appellate opinion. The design and implementation of a complex, networked automated system is wholly "volitional." If an employer instructs an employee, "Make a copy when a customer requests one," any resulting copies were created as a result of the employer's volitional act. The same conclusion should necessarily follow if that employer instead instructed an employee, "Program that computer to make a copy when a customer requests one." To hold otherwise makes no sense, and may cause great harm unless corrected.

Thomas Sydnor, *Copyrights and New Technologies: Why Copyright Law Should Not Differentiate between "Automatic" and "Non-Automatic" Networks or Copying Devices*, Progress & Freedom Foundation Blog,

[http://blog.pff.org/archives/2009/04/copyrights\\_and\\_new\\_technologies\\_why\\_copyright\\_law.html](http://blog.pff.org/archives/2009/04/copyrights_and_new_technologies_why_copyright_law.html) (April 1, 2009)

Halleluiah! Finally a decision that takes the words of the statute seriously. For some reason, the Second Circuit preferred to distinguish *MAI*, thereby avoiding a direct confrontation and the potential for a clear circuit split. *The Cartoon Network* reasoned that distinction by holding that *MAI* decided only on the PRC prong of the fixation test, not on the limitation clause (i.e., *MAI* did not touch the question of duration). A careful reading of *MAI* suggests, I believe, that the Ninth Circuit intentionally disregarded the limitation clause in order to avoid having to answer the question of how many second (or milliseconds) constituted the modicum of fixation. Unfortunately, the Second Circuit now fell precisely to this very trap by stating that 1.2 seconds was too brief. What is then the minimum duration rendering a digital representation subject to the exclusive reproduction right (or a candidate for an exception or the fair use defense)? Well, it is safe to say that no one knows the answer to this question, and the Second Circuit in *The Cartoon Network* did not provide concrete indications in this regard.

Zohar Efroni, *The Cartoon Network v. CSC Holdings & Cablevision Systems*, <http://cyberlaw.stanford.edu/node/5841> (posted August 23, 2008).

The good news is that the opinion eliminates the odd regulatory distinctions between DVRs as a device and DVR as a service. The bad news is that to reach this conclusion, the Second Circuit has to override a lot of adverse precedent, and I'm not sure that other circuits will find this panel's arguments entirely convincing. As a result, it will be interesting to see if Cablevision interprets this opinion as a greenlight for a national rollout.

Eric Goldman, "*DVR as a Service*" *Isn't Copyright Infringement--Cartoon Network v. CSC Holdings*, Technology & Marketing Law Blog, [http://blog.ericgoldman.org/archives/2008/08/dvr\\_as\\_a\\_servic.htm](http://blog.ericgoldman.org/archives/2008/08/dvr_as_a_servic.htm), August 4, 2009

This is exactly the right result. As we pointed out in our amicus brief, a rule holding Cablevision liable merely

because it housed and maintained the servers in this case could imperil a wide variety of innovative business models that rely on the use of remote computing, ranging from examples like Internet-enabled self-service photo processing and printing, to cloud computing services offered by companies like Amazon, Apple and Google.

Michael Kwun, *Victory for DVRs in the Cloud*, Electronic Frontier Foundation website, <http://www.eff.org/deeplinks/2008/08/victory-dvrs-cloud> (August 4, 2008).

The appeals court's decision, and its discussion of the merits of the various arguments, goes into far more detail than I can provide in this brief report. However, the upshot of the decision is not only a victory for user rights, home recording, and new digital technologies—it's a victory for common sense.

Sherwin Siy, *Victory for Home Recording in Cablevision Remote DVR Case*. Public Knowledge Policy Blog, <http://www.publicknowledge.org/node/1697> (August 4, 2008)