

Art v. Tech:

The Clash of the Clause 8 Titans and the Content-Control Distinction

INTRODUCTION:

Copyright law has continuously evolved in response to technological advances that facilitate the reproduction and dissemination of creative works.<sup>1</sup> In England in 1710, the Parliament passed “The Statute of Anne” in response to the ease with which written works could be copied and dispersed as the printing press, invented some two hundred years earlier, had increased in use.<sup>2</sup> The Statute of Anne intended to give authors exclusive rights to their works for a limited number of years in order to encourage “learned men to compose and write useful work” while imposing a time limit in order to increase distribution of these works to benefit the public.<sup>3</sup> As new technologies have been invented, copyright law has expanded in order to encompass more types of creative works while striving to maintain a balance between private incentive to create and public benefit through distribution. The Cablevision case offers an opportunity for the court to further clarify the distinction between direct and secondary liability in the digital age by placing greater weight in the infringement analysis on which entity provides or can exert control over the content being copied.

In writing the Constitution of the United States, the founding fathers recognized the need to establish uniformity in the copyright and patent law that had previously formed within the individual colonies.<sup>4</sup> Article 1, Section 8, Clause 8 delegates the power to Congress “To promote the Progress of Science and the useful Arts, by securing for limited Times, to Authors

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<sup>1</sup> Leaffer, Marshall. *Understanding Copyright Law, Fourth Edition*, at 4. Matthew Bender: San Francisco, 2005.

<sup>2</sup> *Id.* at 4-5.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 6.

and Inventors, the exclusive Right to their respective Writings and Discoveries.<sup>5</sup> Unfortunately, neither the Constitution nor Congress' Copyright Acts of 1909 and 1976 offer much guidance in situations where the promotion of science conflicts with the promotion of the arts, and vice versa.

As the United States and the world transition from industrial countries to information countries, the importance of promotion of technologies that disburse this information frequently conflicts directly with the protection of such information. While this is true in areas of music, writings, and video, this paper will focus on the evolution of the law and technology in the area of home entertainment.

The seminal starting point is frequently regarded not as the invention of the television, but rather, the invention of the Betamax/VCR. This technology allowed the television viewer to make individual copies of television shows, store them on video cassette recorders, and view them at any time that the owner of the machine wished. In *Sony*, the movie and television industries lost in their claim for contributory liability against Sony.<sup>6</sup> Unfortunately for content owners, not only did they lose in litigation, but their subsequent ability to exploit the extremely profitable home video market created a situation whereby copyright owners' concerns of copyright infringement by new technologies would be subject to comparison with the home video explosion, and perhaps not recognized as *de novo* situations.<sup>7</sup> This may have had a chilling effect on the decision of copyright holders to pursue further litigation to protect their

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<sup>5</sup> *Id.*

<sup>6</sup> *Sony Corporation of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984).

<sup>7</sup> Evidence of this is seen in the recent inability of the WGA writers to recognize the distinctive differences between the VHS market and current digital technology, and the perhaps more applicable analogy with the failure of the music industry to prevent widespread piracy of its copyrighted works over the Internet. Instead, the writer's belittled these concerns, claiming that the situation is directly analogous to the VHS market and accusing the studios of 'crying wolf'.

interests as new technologies in home entertainment evolved where only theories of secondary liability were available to the owner of the work, at least in the home video arena.

As digital technology improved and became more affordable, DVD players have gradually replaced home VCR machines. The first generation DVD player merely played DVDs, but as DVD technology spread to computers, DVR devices that would record in a digital format became more commonplace. Next, DVR services, such as TiVo and ReplayTV allowed television users to use a set-top DVR device (“STS-DVR”) that would record television shows in better quality and with greater ease of functions than traditional VCRs. Cable companies, seeing an opportunity, began to market STS-DVRs at an additional fee to their subscribers.

Throughout these incarnations, content owners rarely filed copyright infringement suits. The playback DVD was no doubt unobjectionable because it created a new market of home DVDs. STS-DVRs created a different scenario, but TiVo, no doubt recognizing the potential infringement suits, actively raised investment capital from key players in the content industries.<sup>8</sup> The strategic decision to collaborate with copyright holders in determining the product features and services likely led the content owners to tolerate TiVo to this point.<sup>9</sup> ReplayTV did face lawsuits that undoubtedly would have challenged the fair use defense and Sony’s ‘staple article of commerce’ safe harbor (discussed *infra*) but was driven to bankruptcy before any such legal determinations were made.<sup>10</sup>

The current controversy (and focal point of this paper) involves a cable provider’s intent to offer ‘Remote Service’ DVRs to its subscribers for an additional fee. On summary judgment, the district court found that such a service would directly infringe upon the copyright holder’s

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<sup>8</sup> Menell, Peter S. and Nimmer, David. *“Legal Realism in Action: Indirect Copyright Liability’s Continuing Tort Framework and Sony’s De Facto Demise.”* 55 UCLA L. Rev. 143 at 194, Oct., 2005.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 194-195.

rights of reproduction and public performance.<sup>11</sup> Cablevision has appealed the decision, which is currently to be considered *de novo* by the appellate court in the Second Circuit. This paper will examine the district court's analysis in finding for the copyright holders in *Cablevision*, then examine *Sony* and its progeny to shed light on the plaintiff's seemingly unique position in arguing direct rather than secondary infringement. Then the claims made by two of the parties in their appellate briefs will be analyzed in light of case law and academic theory. Finally, I will discuss whether, in the ongoing controversy between Art and Tech, if the court gives greater weight to the provider/controller of the copyrighted content, the decision in *Cablevision* could create a reasonable factor for consideration in future direct infringement claims.

#### CABLEVISION I:

In order to understand the district court's decision to grant summary judgment to the plaintiff content owners and find Cablevision's proposed RS-DVR would directly infringe the copyright holders' exclusive rights to make copies and for public performance, the district court spent an extensive amount of time sorting through the complexities of Cablevision's proposed RS-DVR system.<sup>12</sup>

Since November of 2004, Cablevision has offered a STS-DVR to its subscribers for an additional fee.<sup>13</sup> This set-top box remains in the customer's home and allows the customer to digitally record content from the programming options for which the subscriber has paid.<sup>14</sup> The programming records in the actual set-top box as it is aired and the copy remains in the STS-

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<sup>11</sup> *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F.Supp 2d 607, 609 (2007).

<sup>12</sup> *Fox v. Cablevision*

<sup>13</sup> *Id.* at 611-612.

<sup>14</sup> *Id.*

DVR until the customer deletes it.<sup>15</sup> Each STS-DVR has a limited amount of storage capacity.<sup>16</sup> The STS-DVR offered by Cablevision differs from a STS-DVR provided by a company like TiVo because unlike TiVo, the customer cannot record programming from other sources, such as satellite or other cable companies, it is only capable of recording programming provided by Cablevision.<sup>17</sup> Cablevision also offers Video-On-Demand Service (“VOD”) which allows the customer to request content chosen and stored by Cablevision at anytime.<sup>18</sup>

The remote server DVR (“RS-DVR”) system differs from the STS-DVR in that the recorded content is stored on Arroyo servers at a Cablevision-owned and maintained facility.<sup>19</sup> The facility contains a complex system of computers and servers, and requires supervision by Cablevision staff at the facility 24 hours a day, 7 days a week.<sup>20</sup> Each customer subscribing to this service (in addition to the original programming cable service) receives a dedicated amount of storage capacity on an Arroyo server.<sup>21</sup> Cablevision controls and determines the amount of storage provided to each subscriber.<sup>22</sup> Cablevision also determines the programming that is available for the subscriber to record, currently deciding to make all 170 channels available to subscribers.<sup>23</sup>

The number of channels is pertinent because when the STS-DVR records at the set-top box for whatever channel the customer has decided to record, the activity required by the RS-DVR process is substantially different from the source. As the original programming streams to the customers, a secondary stream is separated and fed to the Big Band Broadband Multimedia

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 612.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 613. Originally Cablevision had decided to offer 12 and then 15 channels to customers to record from, but the latest choice is to make all 170 channels available.

Router (“BMR”), which converts it to a more efficient bitrate.<sup>24</sup> As it converts the programming, portions of each program are stored temporarily in the BMR’s “buffer” memory.<sup>25</sup> The converted programming is then fed into the “Primary Ingest Buffer” on the Arroyo server, where approximately three frames of video are stored for about a tenth of a second at a time.<sup>26</sup> These two buffer copies are made automatically for every program offered by Cablevision to the RS-DVR subscribers, regardless of whether any customer has requested that program or not.<sup>27</sup>

At this point in the process, if a customer then requests the program to be recorded, the portion of the program stored in the primary ingest buffer is then copied to the secondary ingest buffer, which then makes a separate copy for each individual customer requesting the programming and writes a copy of the program to that customer’s dedicated hard drive space on the Arroyo servers.<sup>28</sup> If no customer requests the programming, the portion stored in the primary ingest buffer is not copied to the hard drive, but is instead replaced by the next three frames.<sup>29</sup>

When the customer then requests to view the recorded programming, the stream containing the programming is transmitted from that individual’s copy on the Arroyo server to every home in the ‘node’ where the requester is located.<sup>30</sup> Only the requesting customer’s set-top box is provided with the key to decrypt the streamed programming from viewing, pausing,

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* A buffer is a form of Random Access Memory (“RAM”) found in computer and Internet transmissions, as well as some electronic devices, such as CD players, which copies a few seconds of music in order to allow for continuous playback despite a temporary ‘jog’ or disruption. Such copies would be consistent with *Sony* and the content provision/control distinction advocated in this paper because they are more analogous to *Sony* ‘time-shifting’ and the provider of the content would be the individual consumer.

<sup>26</sup> *Id.* at 614.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 615.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 615-616. The court’s decision doesn’t specify, but according to the Turner brief, a ‘node’ is a geographical service area of a cluster of homes. *Turner Appellate Brief* at 18.

fast-forwarding, and rewinding.<sup>31</sup> A complete copy of the recorded programming remains on the hard drive of the Arroyo server until the subscriber deletes it.<sup>32</sup>

Unlike *Sony*, where the non-infringing uses of the Betamax allowed the court determine that the customer's uses could be fair use or otherwise authorized, and therefore secondary liability for infringement was denied, Turner and the other plaintiffs in this case alleged only direct copyright infringement through the copying in the buffers and on the Arroyo servers and the violation of their exclusive right to public performance. Therefore, the district court was able to avoid the precedential issues created by *Sony* and grant summary judgment to the plaintiffs on all three complaints of direct infringement.

The court found that the buffer copies and the copies on the Arroyo server functionally were more similar to the Video-On-Demand services already offered by Cablevision for which licenses were obtained.<sup>33</sup> Additionally, the district court found that Cablevision had directly infringed under the 'transmit clause' of the Copyright Act because the unauthorized

transmissions to Cablevision subscribers amounted to 'public performance' by Cablevision.<sup>34</sup>

The court concluded that, "Cablevision, and not just its customers, would be engaging in unauthorized reproductions and transmissions of plaintiffs' copyrighted programs".<sup>35</sup> Having lost the first round, Cablevision now is in the process of appealing the decision to the Second Circuit Court of Appeals. The remainder of this paper briefly discusses the *Sony* legacy and the possible reasons why Turner and the other plaintiffs would seek a situation where direct

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<sup>31</sup> *Id.* What is confusing about Cablevision's proposed service is that it clearly requires some sort of set-top box at the subscriber's location. Perhaps the benefits of the program is because the on-location box doesn't copy or store any programming, Cablevision can offer greater storage capacity to subscribers, but barring that, the benefits of the RS-DVR system are unclear.

<sup>32</sup> *Id.* at 617.

<sup>33</sup> *Id.* at 619.

<sup>34</sup> *Id.* at 622. The 'transmit clause' is the second clause of section 101 of the Copyright Act and will be discussed further in detail.

<sup>35</sup> *Turner Appellate Brief ("Turner")* at 5.

infringement could be alleged, then focuses on Cablevision’s appeal and the possible outcome and effects of that decision on future copyright battles.

#### IN THE BEGINNING, THERE WAS *SONY*

At first glance, the legal reasoning in *Sony* might appear to be analogous with the Cablevision’s claim that it is simply offering a more contemporary and convenient form of television programming ‘time-shifting’, such as that offered by the Betamax machine.<sup>36</sup> Yet the *Sony* decision itself remains controversial. The district court found for Sony, only to be reversed by the Ninth Circuit Appellate Court. Ultimately, the Supreme Court reversed again, finding for Sony in a close, 5-4 decision.<sup>37</sup> Initially, the Court agreed to hear the case in order to determine whether the private copying of television shows constituted a violation of the copyright laws.<sup>38</sup> The final opinion, constructed by Stevens to satisfy enough justices to create a majority, hardly reached that issue at all.<sup>39</sup> Instead, after failing to reach a satisfactory majority the court decided to rehear the arguments in its next session.<sup>40</sup> The result was a majority which ruled that even if consumers sometimes violate copyright law by taping programs from the television, that because the recorder also had substantial non-infringing, fair-use (such as “time-shifting” programs for later viewing), or authorized recording capabilities, the manufacturer of the recorder could not be held liable for secondary infringement.<sup>41</sup> The Court noted that the seller of a product that expanded the audience could not be a contributory infringer if he had no direct involvement with

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<sup>36</sup> *Cablevision Reply Brief* at 18.

<sup>37</sup> *Sony v. Universal*, 464 U.S. 417 (1984).

<sup>38</sup> Litman, Jessica. “The Story of Sony v. Universal Studios: Mary Poppins Meets the Boston Strangler” *Intellectual Property Stories*, p. 1. Ed. Jane C. Ginsberg and Rochelle C. Dreyfuss. Foundation, 2006. Available at: [http://works.bepress.com/cgi/viewcontent.cgi?article=1002&content=jessica\\_litman](http://works.bepress.com/cgi/viewcontent.cgi?article=1002&content=jessica_litman).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 17.

<sup>41</sup> *Id.* at 1. After the first arguments were heard, only Justice Stevens believed that home videotaping does not violate copyright law, which explains in part why he had to abandon that argument and decide the case on a “substantial noninfringing use” basis in order to acquire a majority.

any infringing activity.<sup>42</sup> One point of interest to our current case is the reasoning of the *Sony* district court regarding the infringement of the film ‘Ben –Hur’, which stated, “The producer in *Kalem* did not merely provide the “means” to accomplish an infringing activity; the producer supplied the work itself...Sony, in the instant case, does not supply Betamax consumers with respondents’ works, respondents do.”<sup>43</sup>

The “safe harbor’ created in *Sony* to protect third party manufacturers of goods that can be used for both infringing and non-infringing purposes was a potential stumbling block for the Court when faced with deciding some of the peer-to-peer file sharing cases, such as *MGM v. Grokster*.<sup>44</sup> Although *Grokster*’s arguments mirrored those of *Sony*, claiming that its file sharing system could be used for both non-infringing and infringing purposes, the *Grokster* court’s opinion relied on the inducement theory of secondary liability in order to leave *Sony* unmodified.<sup>45</sup> Even though *Sony* had also advertised its Betamax machine as a way to record and create libraries of television shows, the *Grokster* court appeared to rely more on this argument to find the company guilty of secondary infringement for the violation of music copyrights by its users.<sup>46</sup> Another distinction the Court made between the cases “recognizes that a product which is manufactured and sold may qualify for immunity under *Sony*, but a service requiring ongoing support and involvement may not”.<sup>47</sup> The district court also dismissed Cablevision’s reliance on *Sony* since the claim was for direct infringement and Cablevision had waived a fair use defense.<sup>48</sup> To avoid the complications *Sony*’s legacy has created, plaintiffs

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<sup>42</sup> *Sony v. Universal*. 464 U.S. 417, 448 (1984).

<sup>43</sup> *Id.* at 436, discussing copyright infringement in *Kalem Company v. Harper Brothers*, 222 U.S. 55 (1911).

<sup>44</sup> Litman at 29-30. *Metro-Goldwyn-Mayer Studios, Inc. (MGM) v. Grokster, Ltd.* 545 U.S. 913 (2005). See also, *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9<sup>th</sup> Cir. 2001), and *In re Aimster*, 334 F.3d 643 (7<sup>th</sup> Cir. 2003) for circuit court decisions finding secondary liability of peer-to-peer file sharing services.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Menell and Nimmer at 180.

<sup>48</sup> *Sony* at 618.

emphasized this ongoing relationship to support claims that the manufacturer is guilty of direct infringement.<sup>49</sup>

While *Sony*, despite its rather convoluted opinion suggesting too many cooks were involved in that kitchen, has not been overruled, later cases of peer-to-peer networking and copy-shop copying show the Court's recognition that the 'safe harbor' suggested in the original case would not offer copyright holders' sufficient protection of their works in the digital age. Current challenges in the courts against Bit-Torrent providers may be able to build on the peer-to-peer file sharing precedents to combat the next level of internet piracy.<sup>50</sup> However, there has not been a significant case challenging manufacturers for secondary liability for in-home personal video recording products as the Betamax evolved into the VCR, the DVR, and the subscription-based STS-DVR. The *Cablevision* litigation may represent the first opportunity that the studios recognized where an argument for direct infringement could responsibly be brought before the court in order to further define the grey areas left in the *Sony* aftermath, such as STS-DVRs that physically remain in the home, like a VCR or third-party DVR, but are only capable of recording content provided through a subscription to a content-providing service.

## PLAINTIFFS' ARGUMENT

The Turner appellate brief offers an example of the issues and claims made by the copyright holders in their challenge to Cablevision's proposed RS-DVR service and it is readily available to the public, so the analysis of the copyright holder's position will be based primarily on the arguments made in this document. In examining these issues, Turner makes the best argument possible for direct infringement; however, this argument is stronger if the appellate

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<sup>49</sup> Menell and Nimmer at 185-186, n. 224.

<sup>50</sup> *Columbia Pictures Industries v. Justin Bunnell*, 2007 U.S. Dist. LEXIS 46364

court opinion notes the distinction from *Sony* based on the control over the content from which the copies and performances are made.

Turner's appellate brief is limited solely to the issue of direct copyright infringement by Cablevision.<sup>51</sup> The decision to limit the litigation to direct infringement isn't as surprising after considering the effect *Sony* had on subsequent cases, resulting in the aforementioned distortion of case law. In its brief, Turner makes it clear that it is solely concerned with the launching of a "for-profit copying and transmission service for television programming" and whether or not Cablevision should be required to obtain licenses to do so.<sup>52</sup> Turner presents three issues.<sup>53</sup> The first is whether Cablevision is directly infringing on the copyright owner's exclusive reproduction right by maintaining a facility with equipment that creates and stores unauthorized copies from programming provided by Cablevision.<sup>54</sup> The second issue is whether Cablevision directly infringes on the reproductive right by copying each and every frame of a television show in the buffers and storing it long enough to enable the making of a permanent copy on the Arroyo servers regardless of any customer request to do so.<sup>55</sup> The third issue is whether Cablevision directly infringes on the copyright holder's exclusive public performance right by transmitting the copies of the copyrighted television shows to subscribers.<sup>56</sup>

Turner, like many of the other copyright owners, states that Turner licenses its programming to cable operators and direct broadcast satellite companies to air their programming in a set sequence at a set time of day.<sup>57</sup> Turner also licenses certain programs for

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<sup>51</sup> *Turner Appellate Brief ("Turner")* at 4. See also *Id.* n. 1.

<sup>52</sup> *Id.* at 1

<sup>53</sup> *Id.* at 3

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 7. The Plaintiffs are all copyright owners who sell their programming in similar ways so as to share the same complaints as Turner. Turner's case will be discussed here as representative of the claims of all Plaintiff parties to this complaint.

sale as ‘packaged media’ like DVDs and also for transmission as video-on-demand (“VOD”).<sup>58</sup>

Turner also has licensed programming to Internet companies such as iTunes for download and for cell phones and receives licensing fees for all of these activities.<sup>59</sup> Cablevision enters into licensing agreements with copyright holders, such as Turner, in ‘affiliation agreements’ that provide very limited licensing to transmit linear programming.<sup>60</sup> Turner relies on the specific provisions of the licensing agreements, which forbid Cablevision to make any copies other than those necessary in broadcasting the licensed content, to protect its programming from unauthorized copying and performance. Cablevision’s attempt to characterize its RS-DVR service as the exact same as a VCR would allow it to make the unauthorized content available in its new subscription service, an outcome that Turner clearly feels it should have the right to control, just as it has opted not to license its programming for use in Cablevision’s VOD service.

Turner’s affiliation agreement with Cablevision allows for transmission of each programming signal only “on a single designated channel without any editing, delay, addition, alteration, or deletion,” and also expressly prohibits Cablevision from “recording or duplicating any element of a Turner network programming signal for any purpose unless ”expressly authorized in writing” by Turner”.<sup>61</sup> While Cablevision has agreed it must obtain a separate license to transmit programming as VOD and has obtained such licenses from other copyright holders, it does not have a VOD license with Turner.<sup>62</sup>

Turner characterizes the RS-DVR subscription offered by Cablevision as a ‘service’, based on the same description by Cablevision in its internal documents and on the fact that

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* Linear networks are those that transmit the copyright owners’ programming in a set sequence at a set time and are limited to that single transmission.

<sup>61</sup> *Id.* at 8

<sup>62</sup> *Id.* at 8-9.

Cablevision operates, markets, controls and maintains the RS-DVR service on an on-going basis.<sup>63</sup> Cablevision controls which channels will be offered to subscribers, how much storage to offer the subscribers (including the possibility allowing the subscriber to purchase more instantly if necessary to record a show when the account is full).<sup>64</sup> Cablevision also has the ability to monitor the programs scheduled to record, recording, available to playback and in transmission to any given box and can delete the programming or halt the transmission at any time.<sup>65</sup>

Turner claims that functionally, the RS-DVR system functions more like an unlicensed form of VOD and less like a STS-DVR or other VCR offspring. Unlike a traditional home box, the RS-DVR requires that the linear programming being streamed as licensed must be split into a separate stream and then traverse through the various buffers as described previously in order to be able to be copied and stored on the Arroyo server space designated to that customer.<sup>66</sup> A STS-type box simply accepts the originally-licensed transmitted programming into the set-top box where only then is it stored. Similarly, the copy on an STS remains in the home and is therefore only transmitted back to the television from the home for subsequent viewing, while the RS-DVR set-top never stores a copy of the programming; it merely decrypts the transmission of the copy stored at Cablevision's Arroyo server facility. Turner claims this is similar to Cablevision's VOD service, where the programming previously licensed to Cablevision for this service, is copied in full and stored on servers at a Cablevision facility, although these copies are copied and stored in their entirety regardless of any consumer request.

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<sup>63</sup> *Id.* at 9-10.

<sup>64</sup> *Id.* at 10-11. In short, Cablevision determines the parameters and functions of the system and can alter them at will.

<sup>65</sup> *Id.* at 11-12.

<sup>66</sup> *Id.*

VOD programming is similarly stored at Cablevision facilities, although prior to any subscriber requests and pursuant to agreed-upon licenses with copyright holders.<sup>67</sup> When the VOD programming is requested, it is sent over the bandwidth separately from the linear networking bandwidth. Both the VOD and the RS-DVR use separate dedicated bandwidth for transmission, and both can therefore only handle a certain amount of requests for programming from a particular ‘node’ to which that bandwidth is dedicated, causing error messages to display.<sup>68</sup>

To prove direct infringement of copyright, Turner must first show that it has ownership of or exclusive license to the copyrighted works in question and this first prong is undisputed.<sup>69</sup> Second, Turner must show that ‘unauthorized copying’ was engaged in by Cablevision.<sup>70</sup> It is undisputed that Cablevision’s affiliation agreement does not authorize it to copy any Turner programming as well, so the basic issue in this case is whether Cablevision would engage in ‘copying’ Turner’s programming.<sup>71</sup> Turner agrees with the district court’s determination that Cablevision’s RS-DVR service infringes Turner’s reproduction rights and public performance rights in the three ways previously described.<sup>72</sup>

#### CABLEVISION’S ARGUMENT

After losing on summary judgment at the district court level, Cablevision’s appellate brief provides its arguments contending that its role in providing the RS-DVR service is as non-volitional as a STS-DVR and that it should not be found liable for direct copyright infringement.

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<sup>67</sup> *Id.* at 17.

<sup>68</sup> *Id.* at 17-18.

<sup>69</sup> *Id.* at 25.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 26.

If the higher courts agree that the control of content being copied should be given greater weight in distinguishing between direct and secondary infringement liability, programming services such as cable companies and satellite television services may find their STS-DVR services facing similar challenges. Therefore, Cablevision must convince a higher court that the district court's determinations of copying and performance were either non-volitional in the case of the Arroyo copies, *de minimis* or unfixed in the case of the buffer copies, and that the transformation to a single television having the ability to decode the programming to watch it does not constitute a 'public performance'.

In what has been commented on as an unusual strategic posture, the Plaintiff's original claim and its appellate brief allege only direct infringement.<sup>73</sup> In response, Cablevision waived a fair use defense.<sup>74</sup> Cablevision's waiver of a fair-use defense becomes more understandable when considering that it would be Cablevision's infringement and not the infringement of the end user that would be subject to the fair use analysis in allegations of *direct* rather than *contributory or vicarious* infringement. Accordingly, the majority of Cablevision's defense focuses on refuting the direct infringement claims.<sup>75</sup>

In its opening appellate brief, Cablevision begins by asserting that the RS-DVR functions essentially the same as a conventional VCR or DVR because the customer uses the same remote control and on-screen interface, can only record programs contemporaneously with their linear broadcast, and the remote control allows recording, playback, pausing, fast-forward, and rewind.<sup>76</sup> Cablevision also notes several differences between the RS-DVR and a conventional DVR: the RS-DVR cannot 'reach back' to record a show's beginning, nor begin playing back a

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<sup>73</sup> *Turner Appellate Brief* ("Turner") at 4.

<sup>74</sup> *Cablevision Opening Appellate Brief* (hereinafter "*Cablevision*") at 6.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 7-8.

program before the recording is complete, and it lacks multiple speeds for fast-forwarding and reverse.<sup>77</sup>

Cablevision claims that the recording and playback occurs solely by command on the subscriber's remote, with "no human intervention or decision-making on Cablevision's part."<sup>78</sup> They also make note that a separate individual copy is made and stored on the Arroyo servers for each and every subscriber request and that each recording can only be viewed from the particular set-top box from which the record command originates.<sup>79</sup> Cablevision admits that the buffer copies are made and temporarily stored whether or not a subscriber orders the recording, but claims that after processing, the buffered data is almost immediately overwritten and becomes unusable.<sup>80</sup> Cablevision also concedes that the staff at the RS-DVR facility has the ability to delete a program or playback stream from the RS-DVR, although it would only occur for 'troubleshooting purposes'.<sup>81</sup>

Relying on precedent that Cablevision claims establishes the legal rule that "only the person who provides the "volition" or "human intervention" to make a particular copy can be a direct infringer, Cablevision contends that it merely provides the 'means' of copying and therefore cannot be a direct infringer.<sup>82</sup> Instead, they claim that the RS-DVR system is analogous to an in-home VCR or DVR where the customer provides the necessary human intervention or volition and that Cablevision is like a passive machine that is merely responsive to the customer's push of the button.<sup>83</sup> Cablevision claims that distinguishing between the STS-

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<sup>77</sup> *Id.* at 8.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 9. While only the particular set-top box can decrypt the signal, the copy is actually sent to all customers on that particular 'node', but the other customers will not have the key in their set-top boxes to decrypt the transmitted copy.

<sup>80</sup> *Id.* at 10.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 14.

<sup>83</sup> *Id.*

DVR and the proposed RS-DVR based on the provider/controller of the content to be copied is unreasonable because the net result of either product or service is essentially the same because the consumer retains the volition to record the programming and everything else is done automatically.<sup>84</sup> However, courts often have to draw distinctions and Cablevision's claim would be stronger if it acted more like an ISP service by offering remote storage of *any* content the subscriber wished recorded. The fact that this may affect some STS-DVR services by content-providing entities doesn't mean that such a distinction is *per se* unreasonable.

Cablevision next claims that the buffer copies made during transmission are too transient to be considered 'fixed', a requirement under the language of the Copyright Act. It also claims that each buffer copy must be considered individually, so that the copying of just a few frames at a time should be considered *de minimis*.<sup>85</sup> Cablevision states that human volition must be present for direct infringement of the right to perform publicly, and so since Cablevision doesn't push the playback button, it lacks the volition requirement.<sup>86</sup> Additionally, Cablevision asserts that playback in a subscriber's own home is not a 'public' performance.<sup>87</sup> Finally, Cablevision claims that the widespread acceptance of VCRs and STS-DVRs is confirmation that the RS-DVR is lawful and that the district court's decision threatens numerous lawful devices such as STS-DVRs, Internet Service Providers ("ISP"s) and copy shops.<sup>88</sup>

## ANALYSIS

In granting the copyright owners summary judgment, the district court was not persuaded by Cablevision's arguments. The direct infringement claim provided issues of first impression to

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<sup>84</sup> *Cablevision Reply Brief* at 18.

<sup>85</sup> *Cablevision Opening Appellate Brief* at 15.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 26-27 and 35-36.

the district court and both sides were forced to analogize to cases involving other technologies in an attempt to sway the district court to follow that interpretation. Below is an analysis of the legal arguments made and the court's interpretation of preceding decisions in regards to the RS-DVR service plan. However, many of the issues are close and merit further examination.

#### A. CABLEVISION'S RELIANCE ON NETCOM

Cablevision spends a significant amount of time arguing that *Religious Technology Center v. Netcom On-Line Communication Services, Inc.* (“*Netcom*”) is analogous to its position. However, while the digital revolution may make a cable television service provider technically more like an ISP, in that it transfers digital data through its wires, functionally Cablevision operates quite differently in terms of the sources of the data being exchanged through those wires. An ISP subscriber generally has significant control over the data it had flowing through the internet. Access to websites and ability to download is generally unrestricted by the ISP itself, although individual websites may restrict access or downloading capability. If an ISP does restrict consumer use, generally it is in regards to time spent on the ISP or bandwidth used, not a content-based restriction. Additionally, ISPs generally do not filter or track the content sent through the service by the consumer, nor the content requested by the consumer. Cablevision cannot claim the same, as consumer information sent out over its wires is restricted to ordering services provided by Cablevision. Additionally, a consumer cannot receive information or data from any source but Cablevision. Therefore, Cablevision's reliance on an analogy to an ISP service is problematic before the analysis of *Netcom* begins because Cablevision has the ultimate control of the content.

In *Netcom* the court rejected a direct liability claim against an ISP when a subscriber posted infringing copies of the plaintiff's works on a Bulletin Board Service (“BBS”) that had

been accessed through the ISP.<sup>89</sup> The *Netcom* court noted that Netcom didn't maintain an archive of files for its users, so "it cannot be said to be "supplying a product"."<sup>90</sup> Additionally, "Netcom does not create or control the *content* of the information available to its subscribers, it merely provides access to the Internet, whose content is controlled by *no single entity*" (emphases added).<sup>91</sup> The court found Netcom's actions extended only to creating a system that "automatically and uniformly creates temporary copies of all data sent through it" and likened Netcom's participation in the process to that of a copying machine owner who allows the public to make copies on his machine but does not involve himself in either the content being copied or the physical act of using the machine.<sup>92</sup>

The *Netcom* court further determined that, "Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party", therefore Netcom could not be found directly liable because its sole involvement in the posting of the infringing material was as a passive conduit.<sup>93</sup> In Cablevision's interpretation of the decision, "All Netcom had done was to "install and maintain a system" that "automatically" made copies at the direction of users, "without any human intervention" on Netcom's part."<sup>94</sup> Cablevision then claims that *Netcom's* "volition" or "human intervention" tests have been widely followed in other copyright direct infringement cases.<sup>95</sup>

Referring to *CoStar Group, Inc. v. LoopNet, Inc.*, Cablevision cites the Fourth Circuit's rejection of a claim of direct infringement in circumstances where users of a web hosting service

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<sup>89</sup> *Id.* at 19-20.

<sup>90</sup> *Netcom* at 1372.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1369.

<sup>93</sup> *Id.* at 1369 and 1372.

<sup>94</sup> *Cablevision* at 20 (quoting *Netcom* at 1368).

<sup>95</sup> *Id.*

posted copyrighted photographs and the court held that, “*direct* infringement requires “something more ... than mere ownership of a machine used by others to make illegal copies”.”<sup>96</sup> The court went on to state that “If the Copyright Act does not hold the owner of a copying machine liable as a direct infringer when its customer copies infringing material without knowledge of the owner...” then the same should apply to an ISP.<sup>97</sup>

The problem with Cablevision’s reliance on the *Netcom* precedent is that both *Netcom* and *LoopNet* were ISP type Internet services. In those instances it was a third party subscriber or user who provided the infringing content that was then automatically and mechanically copied in the process of sending the information through the Internet. Neither party exercised any control over the information being sent along its wires nor cached or stored on its servers because subscribers provided the content. As mentioned above, the analogy fails where Cablevision is concerned because it is not the subscribers who are providing the copyrighted materials to be copied and stored on the Arroyo servers. The content comes from only one place – the Cablevision-controlled programming streamed through its system pursuant to licenses that Cablevision had obtained and agreed to. It is in this distinction that the district court found that even if human volition were required in a non-Internet capacity, Cablevision had so provided that volition in obtaining and providing the content being offered to the subscribers through its RS-DVR system.

In its brief to the appellate court, Cablevision goes on to cite various other authorities that followed the *Netcom* precedent. Yet all also fail to provide sufficient facts similar enough to Cablevision to persuasively overturn the lower courts determination that Cablevision did provide the volitional acts necessary to a direct infringement claim. For example, in *Perfect 10 v.*

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<sup>96</sup> *Id.* (quoting *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 at 550).

<sup>97</sup> *CoStar* at 550.

*Cybernet Ventures, Inc.*, Cybernet ran a website that linked to various adult websites, some of which contained infringing images belonging to Perfect 10.<sup>98</sup> The court found that direct infringement did not exist because the third party sites were committing the actual infringement, and that Cybernet didn't use hardware to store the images or to move them from one place to another in order to display them, it merely linked its website to the infringing site.<sup>99</sup> Likewise, in *Parker v. Google* and *Field v. Google*, the courts found that the cache copies automatically created by Google's automated bots while scanning the Internet were not liable of direct infringement for the reproduction of the cached copies.<sup>100</sup> In *Parker*, the court determined that an ISP maintains a system that automatically transmits users' material, but "is itself *indifferent* to the material's content (emphasis added).<sup>101</sup> That court went on to find that "When an ISP automatically and temporarily stores data without human intervention so that the system can operate and transmit data to its users, the necessary element of volition is missing."<sup>102</sup> However, Cablevision is neither a passive conduit ISP, nor is it indifferent to the material's content, for Cablevision alone decides the content provided to subscribers, not just in choosing how many channels to make available to the RS-DVR service, but also in controlling its transmission through the creation of two initial buffer copies from which the stored copies requested by the subscribers are ultimately created.

Cablevision argues that it merely provides the servers, that it is the customer that hits the button that begins the recording process, just as with a VCR, and that it is the customer that chooses what and when to record. This analogy and argument are not persuasive; however, for

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<sup>98</sup> *Perfect 10 v. Cybernet Ventures, Inc. et al.*, 213 F.Supp. 1146 at 1159-1160 (C.D. Cal. 2002).

<sup>99</sup> *Id.* at 1168-1169.

<sup>100</sup> *Parker v. Google, Inc.*, 422 F. Supp. 2d 492 (E.D. Penn. 2006) and *Field v. Google, Inc.*, 412 F. Supp 2d 1106 (Dist. Of Nev. 2006).

<sup>101</sup> *Parker* at 497.

<sup>102</sup> *Id.*

several reasons. First, the buffer copies, which are necessary for the customer to be able to record the programming, are copied *prior* to the pushing of any button by the customer and all the programming is copied through the buffers in this manner with absolutely no action or volition on the consumer's part. Second, a VCR could record anything playing on the television, regardless of the source of the programming, while the RS-DVR can *only* copy programming provided by Cablevision. In other words, if the customer is playing old home videos recorded on VHS on the television and wants to record it onto the Arroyo server, he or she would not be able to, as the only source able to be recorded is incoming from Cablevision, not outgoing from the television. Finally, Cablevision has complete control over the service, and could choose to turn it off at any time or alter the available content, while a traditional VCR or DVR by a third-party manufacturer is solely under the control of the consumer that owns the device.

Cablevision also cites to *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, which it says finds *Netcom* 'persuasive'.<sup>103</sup> However, *ALS* actually discusses Congress' codification of *Netcom* principles in Title II of the DMCA, which defines the limitations of liability without which an ISP would be exposed to copyright infringement and includes the DMCA's definition of a service provider to include, "any provider of "online services or network access, or the operator of facilities therefore".<sup>104</sup> Not only is Cablevision not likely to be included in the definition of a 'service provider', but *ALS* also states that it "would not be workable to hold the entire Internet liable for the activities that cannot be easily deterred".<sup>105</sup> This also does not apply to a company such as Cablevision because, unlike an ISP, it is providing the content and therefore very easily can 'deter' the infringing activities.

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<sup>103</sup> *Cablevision* at 22.

<sup>104</sup> *ALS* at 623.

<sup>105</sup> *Id.* at 621-622.

Cablevision also contends that leading treatises also endorse *Netcom*.<sup>106</sup> While *Netcom* fails to provide Cablevision with a means to avoid direct infringement, researching treatises may provide greater understanding of current thought on direct copyright infringement. Cablevision quotes Professor Goldstein as lauding “*Netcom* as “embod[ying] a principle for decision outside as well as inside the Internet context” that has been “widely followed”.”<sup>107</sup> However, in that same section, Goldstein quotes from the *Netcom* decision, “it does not make sense to adopt a rule that could lead to the liability of countless parties whose infringement is nothing more than setting up and operating a system that is *necessary* for the functioning of the *Internet*” (emphases added).<sup>108</sup> Thus Goldstein’s embracing of *Netcom*’s principle for use outside of the Internet suggests that it is limited to copying of third party-provided content that occurs incidental to the automatic and necessary machinations of a system. He does not openly endorse in this section any interpretation of *Netcom* that would include a system operator that provided and controlled the infringing materials being automatically copied.

Similarly, while Cablevision states in its brief that “Nimmer praises *Netcom*’s “compelling” logic, which roots copyright doctrine “in [its] human origins” and demonstrate[s] mastery of both the technology and the nuances of the law”.”<sup>109</sup> What Nimmer actually says is that although the facts in *Netcom* were not as blatant as the Internet-related cases preceding it, “the *judge* demonstrated mastery of both the technology and nuances of the law”.<sup>110</sup> Nimmer goes on to suggest that the conclusion of *Netcom* reflects a “policy judgment as to where the line of liability should be drawn”, noting that due to the billions of bits of information

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<sup>106</sup> *Cablevision* at 22.

<sup>107</sup> *Id.* quoting 2 Goldstein § 7.0 at 7:4.

<sup>108</sup> Goldstein, Paul. *Goldstein on Copyright, Third Edition, Vol. 3*, § 7.0 at 7:4 quoting Judge Whyte in *Netcom* at 1372.

<sup>109</sup> *Cablevision* at 22.

<sup>110</sup> 3 *Nimmer on Copyright* 12B.01[A][1] at 12B-9.

flowing through the Internet and being necessarily stored on servers throughout the network making it impossible to sort infringing bits and such a policy line drawn by the courts is unavoidable due to the inability of Congress to foresee the future challenges of the Internet when passing the Copyright Act in 1976.<sup>111</sup> It is there that Nimmer states that, “By rooting the high-tech riddles of current copyright application in their human origins, the logic is compelling” and concludes that “Congress in fact endorsed the result of *Netcom* when it later entered the fray”, but notes in a footnote that “Congress deliberately rejected *Netcom*’s standard of volition as the touchstone”.<sup>112</sup> Careful consideration of Nimmer’s treatise in regards to *Netcom* doesn’t suggest any treatment of the principles therein that would serve to strengthen Cablevision’s interpretation of the necessity of volition in direct copyright infringement. All in all, *Netcom* fails to provide Cablevision with a means to avoid direct copyright infringement as a “passive conduit”, particularly given the control Cablevision maintains over the entire system and the fact that Cablevision itself provides the content to be copied in its entirety.

## B. CABLEVISION’S FLAWED ANALOGY TO THE COPYSHOP CASES

The district court considered the copy shop cases, but ultimately found that Cablevision’s analogy was misguided in part because Cablevision creates the buffer copies prior to the ‘volitional act’ by the subscriber to the RS-DVR service, but primarily because unlike the copy shop owner, Cablevision maintains control over the content available to the subscriber to be copied.

Specifically, Cablevision contends in its appellate brief that it cannot be a direct infringer because it is “similarly “analog[ous] to the owner of a traditional copying machine,” since it

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<sup>111</sup> *Id.* at 12B-11.

<sup>112</sup> *Id.*

merely “owns an electronic facility that responds automatically to users’ input” without “intervening conduct”.”<sup>113</sup> It erroneously interprets cases such as *Basic Books, Inc. v. Kinko’s Graphics Corp.* and *Princeton University Press v. Michigan Document Services, Inc.* as directly liable for copyright infringement because it was the copy shops’ employees who did the copying, rather than the end-user.<sup>114</sup> It distinguishes itself from these cases by claiming that it is not a human employee of Cablevision who intervenes to create the infringing copies, it is solely the action of the end-user in pushing the record button that automatically causes the Cablevision RS-DVR system to create the copy.<sup>115</sup>

However, the defendant in *Princeton, Michigan Document Services, Inc* (“MDS”) ran a service whereby it solicited professors at nearby universities to provide them with readings that they would require of the students enrolled in their courses (typically readings that were only a chapter or two of a book, making it impractical for the student to purchase the entire book), and then MDS would acquire a copy of the readings, copy them, and bind them all together in a ‘course pack’ which it then sold exclusively to students enrolled in the particular course.<sup>116</sup> The copy shop also was aware that it could obtain a license to copy the works but failed to do so, claiming that the individual student could do the copying, as could the professor, so MDS claimed that all it was doing was providing the same materials to the students that they were entitled to under the fair use doctrine but more efficiently and economically.<sup>117</sup> However, the court, quoting *Patry*, stated that, “courts have properly rejected attempts by for-profit users to stand in the shoes of their customers making nonprofit or noncommercial uses”, rejected that

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<sup>113</sup> *Cablevision* at 23.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 at 1383.

<sup>117</sup> *Id.* at 1389.

argument.<sup>118</sup> Cablevision seems to find that the fact that employees did the copying was determinative to the courts; however, this seems to be a misinterpretation of the court's discussion of the employees not being able to 'stand in the shoes' of the students or the professors when making copies that for the latter two groups would be defensible under fair use principles. To defend a direct infringement claim, Cablevision cannot look to the possible fair use defense that the end user might use (such as 'time shifting', ala Sony), but would only be able to defend its own actions under fair use, which, due to the commercial nature of the subscription copies and the non-transformative copying of the complete works, would most likely be unsuccessful (which is probably why Cablevision waived a fair use defense, because it would be ineffectual against a direct infringement claim). While *Basic Books v. Kinko's* had a similar fact pattern, what is most analogous to Cablevision is that the owner of the machine creating the copies for profit also provided the copyrighted content to the end-user. This is unlike a student or professor that comes into a shop with the copyrighted materials and proceeds to use the copy shop's copiers to make the reproductions, because in that case, the owner of the copying device does not exert control over the content of the materials being copied on his machine. The lack of control of content distinguishes the non-volition of the copy shop owner from that of Cablevision, who may not control the push of the button, but nonetheless exerts complete control over the availability of the content. Therefore, with this distinction, Cablevision's interpretation of the copy shop cases fails to support its claim that it is merely a passive conduit and therefore cannot be held liable for direct copyright infringement.

### C. BUFFER REPRODUCTION AND FIXATION REQUIREMENTS

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<sup>118</sup> *Id.* at 1389 quoting Patry, *Fair Use In Copyright Law* at 420, n. 34.

The buffer copies are stored on the buffer for little over a second and consist of a few frames of programming at a time. In order for the court to find that this is an infringing copy, it must be sufficiently fixed so that it can be ‘perceived, reproduced, or otherwise communicated’ longer than a ‘transitory duration’. Otherwise, the buffer copies are not infringing. This is probably the weakest claim of the three for the plaintiffs, as well as an area of great importance for the courts. Previous courts have determined that RAM copies (the incidental copies stored on a computer until it is shut off) are sufficiently fixed because the computer could remain on for minutes, hours, even days, thus meeting the fixation duration because of the *potential* length it can be fixed.

Cablevision next attacks the district court’s finding that the buffer copies in the BMR and the Primary Ingest Buffer on the Arroyo servers meet the fixation requirement of the reproduction right.<sup>119</sup> Cablevision claims that the longest time that the bits of programming are stored in any buffer is 1.2 seconds per channel and that if no user has chosen to record that program, the data is not stored, but is immediately overwritten.<sup>120</sup> Copyright infringement requires that a reproduction be ‘fixed’, which has been further clarified as making the copy “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration”.<sup>121</sup> Cablevision refers to the House Report that states that the definition of ‘fixed’ reproductions “exclude[s]...purely evanescent or transient reproductions such as those projected briefly on a screen, shown

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<sup>119</sup> *Cablevision* at 38.

<sup>120</sup> *Id.* at 38-39.

<sup>121</sup> *Id.* at 39. Quoting the Copyright Act of 1976, 17 U.S.C. §§ 101, 106(1).

electronically on a television...or captured momentarily in the ‘memory’ of a computer”.<sup>122</sup>

Cablevision claims that the buffer copies are so transitory as to be excluded from fixation.<sup>123</sup>

Cablevision relies on cases like *Advanced Computer Services of Michigan v. MAI Systems Corp.* where the court found that the copies created in the computers RAM were ‘fixed’ and not transitory, but mentioned in dicta that, “if a computer is turned off within seconds or fractions of a second of the loading, the resulting RAM representation of the program arguably would be too ephemeral to be considered ‘fixed’ or a ‘copy’ under the Act.”<sup>124</sup> This is a valid point for Cablevision because its data in the buffer exists of seconds or fractions thereof so under this analysis, it cannot be considered ‘fixed’.<sup>125</sup> Yet the dicta in *MAI* only states that such an exemption for RAM is arguably possible – it doesn’t conclude that it is one way or the other. And other cases, such as the *Netcom* case that Cablevision holds so dear, state that there is no question that after *MAI* that copies loaded into RAM constitute copying because such copies stay in the RAM long enough for it to be perceived.<sup>126</sup> Likewise, *MAI* states that, “Although of RAM are, in some respects, ephemeral or transient, it is important to remember that the [Copyright] Act does not require absolute permanence for the creation of a copy”.<sup>127</sup> The *MAI* court went on to recognize that even though the data flowing through the RAM is made up of electrical impulses that are imperceptible to the ordinary observer, they can be perceived with the aid of the computer and therefore are ‘capable of perception’ and therefore are not so transitory as to be imperceptible.<sup>128</sup> Where *Netcom* focused on the ability of ‘perception’ language, it is possible that, by relying on the ability to ‘reproduce’ the buffer copies onto the Arroyo servers, a court

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<sup>122</sup> *Id.* Quoting H.R. Rep. No. 94-1476 at 53 (1976).

<sup>123</sup> *Id.*

<sup>124</sup> *Advanced Computer Services of Michigan, Inc. v. MAI Systems Corp.*, 845 F. Supp. 356 at 363 (E.D. Va. 1994).

<sup>125</sup> *Cablevision* at 40.

<sup>126</sup> *Netcom* at 1368.

<sup>127</sup> *MAI* at 362-363.

<sup>128</sup> *Id.* at 363.

will conclude that the buffer copy is sufficiently fixed and therefore, particularly since these copies occur prior to any request by a third party, the copies directly infringe on the copyright holders' rights.

In *Marobie-FL, Inc. v. National Association of Fire Equipment Distributors*, the court determined that the duplication in RAM happens so quickly that usually only a portion of a file is in RAM at any given time, but determines that they are not transitory because although “the information is transmitted in pieces, Northwest itself states that the “smaller units are reunited and the files arrive at the requester’s Internet address” where they can be viewed”.<sup>129</sup> The court went on to conclude that, “The fact that a copy is transmitted after it is created, or even *as* it is created, does not change the fact that once an Internet user receives a copy, it is capable of being perceived and thus ‘fixed’”.<sup>130</sup> From this the district court in the present case concluded that fixation occurred in the aggregate, because all of the programming was at times copied by the buffer and it clearly was capable of being perceived by the requesting subscriber because the ultimate complete copy stored in the Arroyo server for the customer was made up of the tiny copies that had been transmitted through the buffers.<sup>131</sup>

Cablevision claims that because the *Marobie-FL* court ultimately rejected the direct infringement claim because the ISP lacked the ‘human volition’ Cablevision claims that *Netcom* requires, that the district court should not have relied on the RAM part of the decision.<sup>132</sup> However, this reasoning is flawed because as discussed above, Cablevision does not act as a passive conduit like the ISPs in the *Netcom* cases do, and the discussion of RAM copies is relevant as the copies made in buffers are essentially the same as copies created in RAM.

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<sup>129</sup> *Marobie-FL, Inc. v. National Ass’n of Fire Equipment Distributors*, 983 F.Supp. 1167 at 1177-1178.

<sup>130</sup> *Id.* at 1178.

<sup>131</sup> *Twentieth Century Fox Films* at 621.

<sup>132</sup> *Cablevision* at 42.

In August 2001, the U.S. Copyright Office published “A Report of the Register of Copyrights Pursuant to § 104 of the Digital Millennium Copyright Act (“DMCA Report”) to evaluate the effects of the Digital Millennium Copyright act of 1998 particularly with regards to emergent technologies. The DMCA report stated that based on the text of the Copyright Act and its legislative history. “We conclude that the making of temporary copies of a work in RAM implicates the reproduction right so long as the reproduction persists long enough to be perceived, copied, or communicated.”<sup>133</sup> In this case, the buffer copies may be too temporary to be perceived, but it can be argued that the copies persist long enough to be capable of communication and reproduction. The report went on to recognize that at every court addressing the subject of RAM copies found them to be within the scope of the reproduction right, and that at least nine cases decided after *MAI* held that RAM reproductions are ‘copies’.

Cablevision claims that the Copyright Office has no authority to define legal terms or give opinions on issues of first impression and therefore the district court should not have considered the DMCA report in its determination that buffer copies were analogous to RAM copies.<sup>134</sup> However, the report was consistent with legal precedent, as *MAI* had been decided in 1994, four years before the enactment of the DMCA and 7 years before the DMCA report was published, allowing the DMCA report to consider the *MAI* case and its progeny before its publication. The report then goes on to recommend that Congress enact legislation precluding liability for temporary buffer copies created incidentally to licensed audio transmissions.<sup>135</sup> In recommendations, the DMCA Report states that “Outside the context of buffer copies that are

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<sup>133</sup> *DMCA Report* at xxii

<sup>134</sup> *Cablevision* at 43.

<sup>135</sup> *DMCA Report* at xxvi.

incidental to a licensed performance of a work, no compelling case has been made that a broad exception is needed”.<sup>136</sup>

Cablevision claims that the DMCA Report’s interpretation contradicts statutory text because it allows for a reproduction of any duration, no matter how minimal and notes that that could not have been Congress’ intent or else it would not have included the phrase “for a period of more than a transitory duration”.<sup>137</sup> While this reasoning has merit, its rationale clearly has not been followed thus far by courts faced with RAM copying situations. Additionally, in looking at the language of the statute, it reads that the copy must be “sufficiently permanent or stable to permit it to be perceived, *reproduced*, **or** otherwise communicated for a period of more than a transitory duration”.<sup>138</sup> Here, the buffer copy is capable of being reproduced (and is meant to be reproduced) by the Arroyo server, where it will remain for an indefinite amount of time until the subscriber deletes it. It is ‘fixed’ enough to *permit* the Arroyo server to reproduce and store it; therefore, while the actual copying may be frame by frame for little more than a second, it is not transitory in that those individual copies become another copy, which likewise can be perceived for more than a transitory duration. The district court may not have erred in finding the copies sufficiently fixed after looking at the capability for the buffer copy to be communicated and reproduced. However, Cablevision could argue that images on a television screen are both perceptible and capable of being reproduced by a camcorder pointed at the screen and then fixed on media. If such images are not considered ‘fixed’, Cablevision could argue that any reliance by the court on the fact that the buffer copies are sufficiently ‘fixed’ because they are capable of being communicated and reproduced is erroneous.

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<sup>136</sup> *Id.* at 141.

<sup>137</sup> *Cablevision* at 43-44.

<sup>138</sup> *Id.* at 39. Quoting the Copyright Act of 1976, 17 U.S.C. §§ 101, 106(1).

#### D. BUFFERING AND *DE MINIMIS* DOCTRINE

Copying is not infringing if the amount of the copying or the duration for which it can be perceived is ‘de minimis’ – or too insignificant to matter in this resolution. The *de minimis* doctrine differs from the fixation requirement because fixation determines if an unauthorized copy has been created while the *de minimis* doctrine is a defense that is argued only after it has been determined that an unauthorized copy of sufficient fixation has been made. A copy can be infringing, but then be too insignificant in quantity or quality to hold the creator of the copy liable for infringement. Particularly in this case, three frames of programming standing alone could clearly be considered *de minimis* but the multiple ‘three frames’ in aggregate (the whole show) is highly unlikely to be considered *de minimis*.

In regards to the transient buffer copies created by Cablevision’s RS-DVR system prior to the subscriber ordering a recording, the cable company argues that the copying does not infringe under the *de minimis* doctrine.<sup>139</sup> Essentially the *de minimis* doctrine applies in instances where the amount of the copying is trivial, or merely a technical violation.<sup>140</sup> Cablevision addresses five factors that it claims make its copies *de minimis*.

First, Cablevision rightly claims that the courts have found even complete works to be *de minimis* in relation to the overall work.<sup>141</sup> In doing so, it cites both *Knickerbocker Toy Company v. Azrak-Hamway International, Inc.* and *Sandoval v. New Line Cinema*.<sup>142</sup> In *Knickerbocker*, the court found that although an entire copyrighted image was used on a sample to position where the final artwork would be, the use was *de minimis* because the sample was strictly an

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<sup>139</sup> *Cablevision* at 45.

<sup>140</sup> *Id.* at 45-46.

<sup>141</sup> *Id.* at 47.

<sup>142</sup> *Id.*

office copy that was never used outside of the confines of the workspace.<sup>143</sup> In *Sandoval*, the court found that although 10 complete photos were shown in the background of a movie, they were only briefly visible and out of focus throughout eleven different camera shots that lasted a total of 35.6 seconds, with the longest uninterrupted shot lasting only six seconds.<sup>144</sup> The *Sandoval* court quoted *Nimmer on Copyright* in determining that, “the alleged infringer must demonstrate that the copying of the protected material is so trivial as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying”.<sup>145</sup> Cablevision argues that the tiny fragments of programming in the buffers qualify as *de minimis*.

Cablevision also contends that the brief duration and the imperceptibility of the buffer data within the RS-DVR system to any customer (unless the customer initiates the recording from the buffers to the Arroyo server complete copy) also supports the conclusion that the buffers are *de minimis*.<sup>146</sup> Cablevision again relies on *Sandoval* in concluding that even if its buffer copies are “copies,” they are of a shorter duration than those of the copies of the photos and for the proposition that even the subject matter of the photos was unidentifiable.<sup>147</sup>

Cablevision surprisingly endorses the very *DMCA Report* whose authority it decried previously, for the proposition that buffering is fair use and therefore “supports the conclusion that buffers are *de minimis*.”<sup>148</sup> The *DMCA Report* itself is not so conclusive. Stating, “the fact that the copies made in the course of streaming are very small portions of a work does not necessarily render them noninfringing...even if each individual copy were to be considered a *de*

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<sup>143</sup> *Knickerbocker Toy Company v. Azrak-Hamway International, Inc.*, 668 F.2d 699 at 702-703 (2d. Cir. 1982).

<sup>144</sup> *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 at 216 (2d. Cir. 1998).

<sup>145</sup> *Id.* at 217. Quoting 4 *Nimmer on Copyright* § 13.03[A] at 13-27”.

<sup>146</sup> *Cablevision* at 47-48.

<sup>147</sup> *Id.*

<sup>148</sup> *Cablevision* at 48.

*minimis* portion...the aggregate effect is the copying of the entire work”.<sup>149</sup> The *DMCA Report* then analyzes the buffer copies under fair use; however, in discussing the commercial nature of a buffer copy, the report states that the “purpose of making the copy is solely to render a performance that is fully licensed” and that “there is no separate exploitation of the buffer copy”.<sup>150</sup> This skews the analysis relied upon by Cablevision, for while the report assumes that the streaming music being buffered is properly licensed for performance, in the present case, Cablevision has *not* licensed the RS-DVR service, so the copies being made *are* separately exploited because they are the means by which Cablevision can provide its subscribers with the RS-DVR service. Without these unlicensed buffer copies, the Arroyo copies would not be able to create complete copies of the recordings for the subscribers. Therefore, this analogy to the facts used by the courts in analyzing buffer copies under the fair use doctrine are inapt and cannot decisively conclude, as Cablevision postulates, that “The same factors that the Copyright Office invoked to find “fair use” show that transient data buffers are *de minimis* as well.”<sup>151</sup>

In examining the factors by which Cablevision argues that the buffer copies are *de minimis*, the size of each individual buffer fragment is minimal in both size and duration. However, as the *DMCA Report* suggests, the pieces in the aggregate can add up to the whole. In Cablevision’s case, every portion of every program on every channel available to the RS-DVR subscribers is copied on the buffers prior to subscriber request. In the aggregate, then, that is the whole of every program. However, even if only the copies that ultimately became those stored on the Arroyo server, it is unlikely that a subscriber would only copy a minute portion of a program. Since the buffer copies are required to make the final copies that are transmitted to the viewer, clearly they are eventually perceivable by the subscriber; otherwise the service would be

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<sup>149</sup> *DMCA Report* at 133.

<sup>150</sup> *Id.* at 136.

<sup>151</sup> *Cablevision* at 49.

worthless. A similar analogy might be the copying of a music CD. Technically it could probably be copied on a program three notes at a time and individually these notes might be *de minimis*, but the resulting copy of the entire musical piece in the aggregate would clearly not meet the standards of the *de minimis* principle and would clearly be a direct infringing copy of the original CD, regardless of how one might parcel up the copying to attempt to avoid infringement liability.

#### E. PUBLIC PERFORMANCE RIGHTS

In response to the claim that Cablevision violated the copyright owner's exclusive right to public performance, the district court agreed that Cablevision was directly liable for the performances in the subscribers' homes. While the court seemed to rely on the cases discussed below in determining that the in-home performances are 'public' under copyright law, it also found that Cablevision, not the subscriber, caused the performance. This seems to indicate the court's interest in creating a distinction whereby the content provider or controller is subject to greater scrutiny when the content is ultimately viewed or performed by a third party.

Cablevision claims that it neither 'does' the performance in the playback of recordings, nor are the performances 'public'.<sup>152</sup> Cablevision again relies on *Netcom* for the proposition that because Netcom did not exercise volition or human intervention in the display of the infringing material, it is not liable for direct infringement as an "automatic and indiscriminate system that responds to user commands".<sup>153</sup> While Cablevision's involvement in the playback is further removed, the district court did find that Cablevision can delete programs or choose to not transmit them, thereby maintaining control over the performance of the programs. While this

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<sup>152</sup> *Id.* at 49 - 50.

<sup>153</sup> *Id.* at 50.

may be a closer determination than the infringement of the reproduction rights, it is likely that the appellate court will also find that Cablevision is ‘doing’ the performance, particularly since the actual copies are located at the Cablevision facility and are ‘played’ or transmitted from that facility to the subscriber’s television.

Determination of the “public” nature of the performance appears more controversial. However, *OnCommand Video Corp. v. Columbia Pictures Industries* is instructional in this regard. In *OnCommand*, a bank of video cassette players were located in a hotel’s equipment room and then connected to each room with wiring.<sup>154</sup> Each VCR could play a single cassette tape at any given time, and only one television in each individual room could access a single VCR at any given time.<sup>155</sup> Just like the Cablevision RS-DVR system, a hotel guest could make a selection by remote to start a movie in a VCR at which time the system would automatically transmit that movie to that private hotel room.<sup>156</sup> The only other significant difference (other than the remote location of the Cablevision facilities in comparison to the less-remote hotel equipment room) was that the same VCR and movie could later be ordered by a separate room, while in the Cablevision service, the Arroyo servers would create a separate copy and dedicate a specific space on the hard drive for each home subscriber.

In finding the performance to be ‘public’ despite the privacy of the hotel room, the *OnCommand* court interpreted the second clause of 17 U.S.C. §101: “a performance is public if someone transmits or otherwise communicates a performance or display of a work to a place specified by clause (1) or to the public by means of any device or process”.<sup>157</sup> It went on to find that, under the transmit clause, a performance is public: whether the members of the public

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<sup>154</sup> *OnCommand Video Corp. v. Columbia Pictures Industries*, 777 F.Supp. 787 at 788 (N.D. Cal. 1991).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 789.

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”.<sup>158</sup> Additionally, the court found that the commercial nature of the relationship between the hotel guests and the transmitter of the performance made the viewing a public one because hotel guests are members of the public regardless of where the transmitted viewing takes place.<sup>159</sup> Similarly, the relationship between Cablevision and subscribers (who also are members of the public) is a commercial one; therefore, the transmission constitutes a performance to the public regardless of the fact that the viewing takes place in a private home.

Historically, the provisions of the Copyright Act of 1976 made it clear that the public display right gives copyright holder’s the exclusive control over transmission of their images.<sup>160</sup> In the drafting of the Act, the copyright owners accepted the right of the owner of a copy to show it in a public place, but objected to the transmission of an image of that copy over the airwaves.<sup>161</sup> For example, a person could lawfully wear a copyrighted copy of a piece of art, but the transmission of the copy on television would infringe on the copyright owner’s exclusive right to public performance. However, “if...the displayed copy is not lawfully made, then the making of the copy will infringe the copyright owner’s reproduction right, and any public display of the copy, whether in person or transmitted will infringe the public display right”.<sup>162</sup> This distinction seems to suggest yet another attempt by the legislature to balance the copyright owner’s control in limiting performance rights in order to be fairly compensated against a desire

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 790.

<sup>160</sup> Reese, Anthony R., *The Public Display Right: The Copyright Act’s Neglected Solution to the Controversy Over RAM “Copies”*, 2001 U. Ill. L. Rev. 83 at 92.

<sup>161</sup> *Id.* at 95-98.

<sup>162</sup> *Id.* at 107.

to allow some degree of public dissemination to allow that work to be seen by a greater number of people than might be possible were the work simply to remain in one location.

*Nimmer on Copyright* asserts that, “a television or radio broadcast received in the privacy of individual homes is nevertheless a “public” performance”.<sup>163</sup> Nimmer further explains, “The Supreme Court confirmed that a broadcast constitutes a performance, noting that “Congress in effect validated” this principle “when it added to § 1 (c) of the 1909 Act a special damages provision for ‘infringement by broadcast.’” Because only public performances may infringe, this also constituted a congressional validation that broadcast performances are public.”<sup>164</sup> *Nimmer* goes on to suggest that under case law, that when different members of the public at large receives performances at different times but that all emanate from the same copy, then each performance will be considered a ‘public’ performance.<sup>165</sup> Under either analysis, the district court then would have correctly found Cablevision’s transmissions of the programming to be a public performance after determining that the fact that Cablevision took the single buffer copies and created individual copies for each subscriber request was merely to avoid this type of copyright infringement liability.

## CONCLUSION

When balancing the public benefits of the RS-DVR system and the copyright holder’s protection, it seems likely that the district court’s decision draws a reasonable line. From a public policy standpoint, Cablevision is in a significantly different position in regards to the system it operates because, unlike an ISP who has little if any control over the information flowing through its system, Cablevision has great if not complete control over the information of

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<sup>163</sup> 2 *Nimmer on Copyright* § 8.14[C][2] at 8-190.5.

<sup>164</sup> *Id.* at 8-190.6, n. 9 (citing *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968)).

<sup>165</sup> *Id.* at 8-192.2(2).

programming flowing over its RS-DVR system. Furthermore, Cablevision already has licenses with the copyright owners to broadcast the linear programming and there is no indication that it would not be able to obtain licensing for the RS-DVR system, as even Turner, which has no VOD agreement with Cablevision, sought a licensing agreement but was rejected. Whatever additional cost to the public, it is likely to be reasonable since other licensed broadcast schemes have been offered to the public at reasonable prices. Particularly since Cablevision intended to offer the RS-DVR service to its subscribers for an additional fee, it is reasonable for the copyright holder to expect a portion of the additional value Cablevision will gain from selling its RS-DVR service.

As the district court's decision stands, if the RS-DVR system is truly beneficial, the public is unlikely to lose the use of that technology since all Cablevision must do in order to defeat the injunction is obtain licenses. The copyright holders have incentives to keep the additional licensing fees reasonable because they frequently benefit from their work enjoying greater exposure. Additionally, it is possible that Congress may react by imposing a compulsory licensing scheme (similar to those in the music industry) if the studios fail to negotiate with Cablevision to reach an independent agreement.

Finally, one important lesson taught to copyright holders in the aftermath of *Sony* is that had they been successful in their suit and the Betamax and its kin never marketed, the highly profitable home video market might never have been established. Therefore, it should be recognized that prescient copyright owners are also invested in promoting technological innovation in hopes that they may later find a way to exploit the new technology to their benefit. The court in *MP3.com* noted that, "Copyright...is not designed to afford consumer protection or convenience but, rather, to protect the copyholders' property interest". Here, where Cablevision

already has STS-DVR service available for its subscribers and could easily contact copyright holders in order to negotiate licensing of the Arroyo system if it wished, the court is fair in determine that Cablevision’s requisite ongoing relationship with the subscribers and its ultimate control over the programming distinguishes it from the *Sony* precedent.

As courts continue to face challenges asking them to weigh technological advancements against promotion of the arts through copyright protection, it may be helpful for them to consider the guiding policy behind the statutes. As Justice Stewart quoted in *Sony*, “The immediate effect of our new copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. ‘The sole interest of the United States and the primary object in conferring the monopoly’ this court has said ‘lies in the general benefits derived by the public from the labors of authors’ ... When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose”.<sup>166</sup> Emphasizing the control and source of the content provided in analyzing direct copyright infringement claims would provide a reasonable boundary for courts facing similar issues in balancing Art and Technology, while remaining consistent with the policies and principles of Clause 8 of the Constitution and the Copyright Act.

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<sup>166</sup> *Sony* at 431-32 (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 at 156).