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

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Holdings, Inc.

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Imagine that your digital video recorder (“DVR”) lived in the “clouds”¹ and offered the possibility of unlimited storage space for your recorded programs.² As early as 2005, experts were predicting that network-DVRs would significantly impact the cable television industry.³ Today, the Set-Top Storage DVR (“STS-DVR”) is the preferred medium for television viewers to record their favorite programs and play them back at a later, more convenient time.⁴ The STS-DVR is a device that sits on top of the viewer’s television set and utilizes an internal hard drive to store recorded programs.⁵ A network-DVR system, in contrast, offers viewers the ability to record and store content in the “clouds,” i.e., on reliable, industrial strength servers, centrally located at the cable company’s data center.⁶ Network-DVR hardware is more reliable and less costly to maintain than STS-DVR hardware.⁷ In March 2006, Cablevision

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1. “Cloud computing” is a term used to describe a recent computing trend whereby data is stored on remote servers and accessed with a web browser and a connection to the Internet. See Steve Lohr, *Gates Departs, and Microsoft Seeks Path Beyond His Legacy*, N.Y. TIMES, June 27, 2008, at A1 (discussing the shift from traditional desktop software to software “accessed with a Web browser and delivered over the Internet from vast data centers.”).
 2. See Brian Stelter, *A Ruling May Pave the Way For Broader Use of DVR*, N.Y. TIMES, Aug. 5, 2008, at C8 (quoting Craig E. Moffett, an analyst at an investment research firm, who called Cablevision’s RS-DVR a DVR that has a “very long cord”); see also *Next Inning Technology Announces Investment Opinion, Updates Outlooks for Seagate Technology, EZchip Semiconductor, NetLogic Microsystems, Garmin, and SiRF Technology*, BUSINESS WIRE, Aug. 6, 2008, available at http://findarticles.com/p/articles/mi_m0EIN/is_2008_August_6/ai_n27971818/?tag=content;col1 (quoting Paul McWilliams, *Next Inning Technology Research* Editor in Chief who said, “What makes this interesting and precedent-setting is that if the [Cablevision] case stands, it basically sets the precedent that we can own storage space remote from our home and from a legal perspective it is viewed the same as if it were in our home.”).
 3. See Mike Shields, *Next Wave: Network DVRs*, MEDIAWEEK, Mar. 28, 2005, available at <http://www.allbusiness.com/services/business-services-miscellaneous-business/4762924-1.html> (predicting that network-DVR use will dramatically increase DVR usage among cable television subscribers because, according to a Magna Global report, it “would immediately make time-shifting technology available to 40 [percent] to 50 percent of a cable operator’s subscribers . . . significantly impacting how video content is consumed.”); see also Charles Hall, *The Case for Network DVRs*, THE ONLINE REPORTER, Oct. 21, 2006, http://www.onlinereporter.com/article.php?article_id=7959.
 4. See Jacqueline Renfrow, *Consumer Ability to Skip Ads Could Get Easier*, RESPONSE, Sept. 1, 2008, available at <http://www.response-digital.com/response/200809/?pg=16#pg17>. A report from September 2008 lists STS-DVR use at nearly one quarter of all television households. See *id.* (“[A]bout 26 million homes, 23.4 percent of all TV households, had DVRs, and nearly 30 percent of digital set-top boxes and DVRs were installed in 2007 with at least one other set-top box already in operation.”).
 5. *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F. Supp. 2d 607, 611–12 (S.D.N.Y. 2007), *rev’d in part*, *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).
 6. See Hall, *supra* note 3; see also Matt Stump, *Digital Recording Comes Out of the Box: Cablevision Set to Light Up a Networked System*, MULTICHANNEL NEWS, Mar. 27, 2006 (“Cablevision Systems Corp. is launching a groundbreaking technical trial today (March 27), in which its subscribers will record TV shows and movies on servers in its network, rather than on the set-top box in their homes.”).
 7. See Hall, *supra* note 3 (making the point that STS-DVR boxes are “noisy, heat-generating and less reliable,” while network-DVRs would eliminate the need to install STS-DVRs in the home and thus, lower the cost for both the cable company and subscriber); see also Stump, *supra* note 6 (noting that Cablevision “will never have to send out an installer in a truck to set up, fix or replace recording equipment in customer homes”).

Systems Corporation, one of the cable companies leading the charge toward network-DVRs, introduced its new “Remote Storage” Digital Video Recorder System (“RS-DVR”).⁸ In response, content copyright owners sued Cablevision, alleging copyright infringement.⁹ Striking a blow to the content owners, the United States Court of Appeals for the Second Circuit effectively gave Cablevision the green light to roll out RS-DVR without the need for an additional license.

In *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, the Second Circuit reversed the United States District Court for the Southern District of New York’s (“District Court”) grant of summary judgment to the plaintiffs and vacated an injunction against the defendant Cablevision.¹⁰ Judge John M. Walker, writing for a unanimous panel, held that Cablevision would not directly infringe plaintiffs’ exclusive rights to reproduce and publicly perform their works under the Copyright Act.¹¹ This case comment contends that the Second Circuit’s interpretation of the Copyright Act’s definition of “public performance” departs from the statutory language and prior Circuit Court decisions interpreting the same provisions. It also departs from a pragmatic approach in favor of a strict, formalistic analysis of the “public performance” issue. As a result, the court’s holding legitimizes an inefficient use of technology as an end-run around copyright liability.

A more detailed explanation of the RS-DVR technology is helpful to understand the courts’ analyses. To deliver content to subscribers, cable companies gather programming from content providers at their “head-end”¹² and transmit a single data

8. *Cartoon Network*, 536 F.3d at 124. Cablevision was the first major cable television company to announce a network-DVR system that would offer its customers the ability to record and store programs remotely on centrally located servers. See Hall, *supra* note 3.

9. *Cartoon Network*, 536 F.3d at 123. Cablevision Systems Corporation and its wholly owned subsidiary, CSC Holdings, Inc., were named defendants in the complaint. *Twentieth Century Fox*, 478 F. Supp. 2d at 609. Plaintiffs alleged that Cablevision’s proposed RS-DVR system “would directly infringe their copyrights both by making unauthorized reproductions, and by engaging in public performances, of their copyrighted works.” *Cartoon Network*, 536 F.3d at 123.

10. *Cartoon Network*, 536 F.3d at 123.

11. *Id.* The right “to reproduce the copyrighted work in copies or phonorecords,” and “in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission,” are two of the six exclusive rights granted to copyright owners under the Copyright Act. 17 U.S.C. § 106 (2006).

12. A “head-end,” as defined by the Federal Communications Commission, is:

[T]he origination point for signals in the cable system. It has parabolic or other appropriately shaped antennas for receiving satellite-delivered program signals, high-gain directional antennas for receiving distant TV broadcast signals, directional antennas for receiving local signals, machines for playback of taped programming and commercial insertion, and studios for local origination and community access programming.

In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, 16 F.C.C.R. 6547, 6572 n.187 (2001) (quoting WALTER CICIORA ET AL., MODERN CABLE TELEVISION TECHNOLOGY 12 (1999)).

stream in real time into homes via coaxial cable.¹³ However, with RS-DVR, Cablevision splits this single stream of data into two streams: the first is transmitted to subscribers in real time, and the second is sent to the RS-DVR system.¹⁴ The second stream of data moves to the RS-DVR's first buffer, where it remains for 1.2 seconds while Cablevision's computers determine whether any individual subscriber has requested a recording of the program.¹⁵ If the computer receives a recording request, the data stream is then sent to a second buffer, from which the program is copied to the individual subscriber's hard drive storage space.¹⁶ Data residing in the buffers is automatically erased and overwritten as new data flows into the buffers.¹⁷ Absent any recording requests from the individual subscribers, data in the second stream is never permanently captured by the RS-DVR.¹⁸

To the end user, Cablevision's proposed RS-DVR service functions much like the current STS-DVR, but without the internal hard drive.¹⁹ However, as just described, the RS-DVR stores recorded programming remotely on centralized servers at Cablevision's head-end.²⁰ The standard digital set-top boxes already in the home become part of the RS-DVR system following a simple software upgrade.²¹ Using the remote control, a customer requesting to record a program triggers Cablevision's system to record the program on the customer's hard-drive storage space on Cablevision's computers.²² Later, the customer can "receive playback of those programs

13. *Cartoon Network*, 536 F.3d at 124. The basic function of cable television is further explained using the example: "[I]f a Cartoon Network program is scheduled to air Monday night at 8pm, Cartoon Network transmits that program's data to Cablevision and other cable companies nationwide at that time, and the cable companies immediately re-transmit the data to customers who subscribe to that channel." *Id.*

14. *Id.*

15. *See id.* at 124–25.

16. *Id.* at 124.

17. *Id.*

18. *See id.* at 125.

19. *See Stelter, supra* note 2 (Like STS-DVRs, RS-DVRs enable users to record, play back programming, and fast-forward past advertisements.).

20. *Twentieth Century Fox*, 478 F. Supp. 2d at 612; *see also* CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS, *CARTOON NETWORK LP v. CSC HOLDINGS, INC.: REMOTE-STORAGE DIGITAL VIDEO RECORDERS AND COPYRIGHT LAW 3* (Oct. 23, 2008) [hereinafter CRS REPORT]. The RS-DVR "is designed so that each user creates and views separate copies of each television program that Cablevision broadcasts." *Id.* "[I]f 1000 customers elect to record the February 25th 9:00 p.m. showing of *Desperate Housewives*, 1000 separate and distinct copies of that specific showing are made, each copy uniquely associated by identifiers with the set-top box of the customer who made the copy." Declaration of Stephanie Mitchko in Support of Defendants' Motion for Summary Judgment, *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F. Supp. 2d (S.D.N.Y. 2007) (No. 06 Civ. 2990).

21. *See Stelter, supra* note 2.

22. *See* CRS REPORT, *supra* note 20, at 4.

through their home television sets.”²³ Cablevision charges subscribers an “additional fee” for their use of the RS-DVR.²⁴

Cablevision notified content providers of its plan to roll out the RS-DVR service,²⁵ however, it failed to obtain licenses from its content providers to reproduce and transmit the providers’ programming.²⁶ On May 24, 2006, a consortium of major film studios and television networks (collectively “plaintiffs”)²⁷ brought a copyright infringement action in the District Court against Cablevision.²⁸ Plaintiffs, the owners of numerous copyrighted entertainment programs,²⁹ alleged that Cablevision violated two of their exclusive rights under the Copyright Act: first, that the unauthorized copies made by Cablevision violated plaintiffs’ right to reproduce their programming, and second, that the unauthorized transmissions of plaintiffs’ programming violated plaintiffs’ right to perform the work publicly.³⁰ Plaintiffs sought a declaratory judgment that Cablevision infringed their copyrights and an injunction to prevent the roll-out of RS-DVR without proper licenses.³¹

The District Court granted plaintiffs’ motion for summary judgment and permanently enjoined Cablevision from rolling out the proposed RS-DVR service.³² The court found that as a matter of law, Cablevision’s active role in “the copying of programming to the RS-DVR’s . . . servers” violated plaintiffs’ exclusive right of reproduction under the Copyright Act.³³ Furthermore, the court held that the buffering used by the RS-DVR created a “copy” for purposes of the Copyright Act and its aggregate effect could “hardly be called de minimis.”³⁴

23. *Cartoon Network*, 536 F.3d at 124.

24. *Twentieth Century Fox*, 478 F. Supp. 2d at 612.

25. *See Cartoon Network*, 536 F.3d at 124.

26. *Twentieth Century Fox*, 478 F. Supp. 2d at 609.

27. Paul Sweeting, *Studios Move to Block Cablevision DVR Service*, VIDEO BUSINESS, May 29, 2006 (“The studio plaintiffs in the case are 20th Century Fox, Universal, Paramount and Disney. They’re joined by broadcasters NBC, ABC and CBS.”).

28. *Twentieth Century Fox*, 478 F. Supp. 2d at 616.

29. *Id.* at 610 (programming includes “movies, television series, news and sports shows, and cartoons, which are shown on television and also used (or licensed for use) in other media, including the Internet, DVDs, and cellular phone technology”).

30. *Id.* at 617. The Copyright Act of 1976 grants “copyright owners the exclusive rights to, among other things, ‘reproduce the copyrighted work in copies’ and ‘in the case of . . . audiovisual works, to perform the copyrighted work publicly.’” *Id.* (quoting 17 U.S.C. §§ 106(1), (4) (2006)).

31. *Twentieth Century Fox*, F. Supp. 2d at 609. It is also important to note that, by stipulation, the plaintiffs agreed to assert only a claim of direct copyright infringement, thus excluding contributory and vicarious liability, while Cablevision agreed not to assert a “fair use” defense. *See id.* at 616. Those issues were not litigated, although their inclusion would certainly have affected the court’s analysis.

32. *Id.* at 624 (prohibiting Cablevision “from (1) copying plaintiffs’ copyrighted works and (2) engaging in public performance of plaintiffs’ copyrighted works, unless it obtains licenses to do so.”).

33. *Id.* at 621.

34. *Id.* “Under the Copyright Act, ‘copies’ are defined as: [M]aterial objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or

Hammering the final nails into Cablevision’s coffin, the District Court held that Cablevision engaged in public performance of plaintiffs’ copyrighted works during the RS-DVR playback transmission, “thereby infringing plaintiffs’ exclusive rights under the Copyright Act.”³⁵ The court placed an RS-DVR playback squarely within the plain language of the transmit clause contained within the Copyright Act’s definition of public performance³⁶ and likened Cablevision to service providers whose transmissions of recorded programming were held to be unauthorized public performances.³⁷ Cablevision subsequently appealed the District Court’s decision to the Second Circuit.³⁸

The Second Circuit reversed, holding that Cablevision’s RS-DVR did not directly infringe plaintiffs’ exclusive rights under the Copyright Act.³⁹ Focusing first on the question of whether the buffering of data reproduced the copyrighted works, the court concluded that the buffering performed by the RS-DVR does not create copies since the works “are embodied in the buffer for only a transitory period,” and therefore, are not “fixed.”⁴⁰ The court also rejected plaintiffs’ theory of direct infringement, holding that Cablevision was not directly liable for “copies produced by the RS-DVR system,” as the copies were “made by the RS-DVR customer,” not Cablevision.⁴¹

otherwise communicated, either directly or with the aid of a machine or device. . . .” *Id.* (citing 17 U.S.C. § 101). Cablevision argued that “[t]he buffer copies . . . cannot be considered infringing copies because they are ‘not fixed’ and are ‘otherwise de minimis.’” *Id.* (quoting Brief of CSC Holdings, Inc., Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008) (No. 07-1480)). The District Court disagreed and concluded that the buffer copies are “capable of being reproduced,” and “in the aggregate, comprise the whole of plaintiffs’ programming.” *Id.*

35. *Id.* at 624.

36. 17 U.S.C. § 101 (defining a public performance to include either: (1) a performance at a place open to the public or where a substantial gathering of persons other than family and acquaintances is gathered, or (2) a transmission of a performance to the public, whether the members of the public capable of receiving the performance receive it in the same place at the same time or in separate places at different times).

37. See 478 F. Supp. 2d at 623 (noting that “where the relationship between the party sending a transmission and party receiving it is commercial . . . the transmission is one made ‘to the public’” (quoting *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991))). *Accord*, *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984) (allowing video rental store patrons “in-store rental” service in the privacy of a small booth was a transmission made to the public).

38. *Cartoon Network*, 536 F.3d 121.

39. *Id.* at 123.

40. *Id.* at 130 (internal quotations omitted). Rejecting the District Court’s analysis, prior case law, and the Copyright Office’s 2001 DMCA Report, the court read the plain language of the Copyright Act’s definition of “fixed” to impose “two distinct, but related requirements: the work must be embodied in a medium” (embodiment requirement) “for a period of more than transitory duration” (duration requirement). *Id.* at 127. To hold otherwise, the court reasoned, would be to read the “transitory duration” language out of the statute. *Id.* at 128.

41. *Id.* at 133. The Second Circuit refused to broaden the boundaries of direct liability and hold Cablevision directly liable on the facts of this case. *Id.* at 132–33. The court’s reasoning behind that decision centers around the Supreme Court’s doctrine of contributory liability in *Sony Corp. of America v. Universal City*

Finally, the Second Circuit addressed the question of whether Cablevision “transmit[s] . . . a performance . . . of the work . . . to the public.”⁴² Reading the plain language of the transmit clause of section 101 of the Copyright Act, the court concluded that proper determination of whether a given transmission is “to the public” requires an examination of the potential audience of that transmission.⁴³ The court reasoned that because each “transmission is made to a single subscriber using a single unique copy produced by that subscriber,” the potential audience of an RS-DVR playback transmission is limited to the single subscriber, and thus, “such transmissions are not performances ‘to the public.’”⁴⁴

The Second Circuit’s reasoning is flawed for three reasons. First, the court’s interpretation of the Copyright Act’s definition of “public performance” departs from the statutory language and from prior Circuit Court decisions interpreting the same provisions. Second, the court abandoned its pragmatic style of reasoning used with respect to the reproduction issue, holding in favor of a strict, formalistic approach to the public-performance issue. Lastly, the court’s holding legitimizes an inefficient use of technology as an end-run around copyright liability.

A proper analysis begins with a fundamental question: What is the purpose of copyright law? The answer may help to illustrate the flaws in the Second Circuit’s conclusion that RS-DVR playback transmissions do not infringe the copyright

Studios, Inc., 464 U.S. 417, 437–38 (1984). *Cartoon Network*, 536 F.3d at 132–33. The stipulation between the parties in the instant case took the issue of contributory liability off the table, thus the court left the issue for another day, noting that the doctrine “stands ready to provide adequate protection to copyrighted works.” *Id.* at 132.

42. *Cartoon Network*, 536 F.3d at 134 (quoting 17 U.S.C. § 101 for its definition of “public performance”) (alteration in original).
43. *Id.* at 135. The second clause, or the “transmit clause,” of the Copyright Act’s public performance definition, explains:

[T]o perform . . . a work “publicly” means . . . to transmit or otherwise communicate a performance . . . 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 . . . receive it in the same place or in separate places and at the same time or at different times.

Id. at 134 (quoting 17 U.S.C. § 101). The court supported its reading of the “transmit clause” with a recount of the Copyright Act’s legislative history, starting with the House Report on the 1976 Copyright Act:

[U]nder the bill, as under the present law, a performance made available *by transmission to the public at large* is “public” even though the recipients are not gathered in a single place, and even if there is no proof that any of the *potential recipients* was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the *potential recipients of the transmission* represent a limited segment of the public, such as occupants of hotel rooms or the subscribers of a cable television service.

Id. at 135 (citing H.R. REP. NO. 94-1476, at 64–65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5678). The court also discussed a 1967 House Report referenced by the plaintiffs, stating, “the same principles apply where the transmission is ‘capable of reaching different recipients at different times, as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public.’” *Id.* (quoting H.R. REP. NO. 90-83, at 29 (1967)).

44. *Id.* at 139 (quoting 17 U.S.C. § 101).

owners' exclusive right to public performance. There has been vast debate over the philosophical underpinnings of copyright law.⁴⁵ In the United States, an economic or utilitarian theory prevails.⁴⁶ Our Constitution grants Congress the power "[t]o promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries."⁴⁷ Under this theory, the ultimate goal of copyright law is to balance incentives for the creation of artistic works and the public availability of such works.⁴⁸ In accordance with this rationale, Congress has granted copyright owners a bundle of exclusive rights under the Copyright Act, without which artistic works would be under-produced.⁴⁹

45. ROBERT MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 390 (4th ed. 2007) (citing Alfred Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L. J. 517 (1990) (tracing roots of natural law in American copyright law) and Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 350-53 (1988) (suggesting various strains of the personhood justification in American copyright law)).

46. See WILLIAM F. PATRY, 1 *PATRY ON COPYRIGHT* § 1:1 (2009) ("Copyright in the United States is not a property right, much less a natural right. Instead, it is a statutory tort, created by positive law for utilitarian purposes: to promote the progress of science.").

47. U.S. CONST. art. I, § 8, cl. 8 (popularly known as the "Copyright and Patent Clause").

48. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Justice Potter Stewart described the Copyright Act's underlying purpose as follows:

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: [c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.

The immediate effect of our 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.

Id. (footnotes omitted).

49. See 17 U.S.C. § 106. The Act grants the copyright owner:

[T]he exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (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;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

Under the economic theory, copyright law has evolved from the owner's right in a physical copy of a work to the owner's exclusive control over the right to copy the work.⁵⁰ Thus, copyright law in the United States places a great deal of significance on the term "copy," as the basic unit of copyright.⁵¹ The term "copy" has come to mean "the material object in which the [owner's] intellectual property [is] embodied," as well as the "legal determination of whether the copyright ha[s] been infringed—whether the defendant's work [is] a copy of the plaintiff's."⁵²

It was the Second Circuit's formalistic approach to addressing the legal significance of a "copy" in the context of the public performance right that permitted the court to hold that Cablevision's RS-DVR "would not directly infringe plaintiffs' rights under the Copyright Act."⁵³ The RS-DVR system makes a copy of a work and transmits that copy to the subscriber.⁵⁴ Prior courts considering on-demand performances via separate transmissions have held that the copyright owner's public performance right had been infringed.⁵⁵ It is puzzling that the *Cartoon Network* court came to the opposite conclusion, finding that this transmission is a non-infringing use.⁵⁶

In the case of motion pictures and other audiovisual works, the Copyright Act protects the owner's right to publicly perform the work.⁵⁷ As defined by the Act, to perform 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.⁵⁸

In *Cartoon Network*, the parties agreed that clause (1) was not implicated, and as such, the Second Circuit focused solely on the issue of "whether [the] facts satisf[ie]d the second, 'transmit clause' of the public performance definition."⁵⁹ Cablevision

50. See 3 PATRY, *supra* note 46, § 8:1.

51. See *id.*

52. *Id.*

53. *Cartoon Network*, 536 F.3d at 123.

54. *Id.* at 137–38.

55. See, e.g., *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991); *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191 (3d Cir. 2003).

56. *Cartoon Network*, 536 F.3d at 139.

57. 17 U.S.C. § 106(4).

58. *Id.* § 101.

59. *Cartoon Network*, 536 F.3d at 134.

argued that the customer, not Cablevision, transmits the performance and, in the alternative, that the playback transmission is not made “to the public.”⁶⁰ The court chose not to address Cablevision’s first argument in full, and instead focused its inquiry on whether the RS-DVR playback transmission is made to the public.⁶¹ Although the phrase “to the public” is not expressly defined by the Act, the court’s analysis of the statutory language considered the potential audience of a given transmission or “who precisely is ‘capable of receiving’ a particular transmission of a performance.”⁶² Thus, the Second Circuit framed the issue in a way that allowed it to depart from the pragmatic reasoning it applied to the reproduction issue,⁶³ and instead, to hone in on a formalistic distinction between RS-DVR and other on-demand video services—that the RS-DVR playback transmission is made to one subscriber using a unique, distinct copy made by that subscriber.⁶⁴

The Second Circuit’s holding that acts of buffering in the operation of the RS-DVR do not create copies is an atypical interpretation of the fixation requirement of the reproduction right,⁶⁵ and one that introduces a sense of pragmatism into an area of law riddled with formalistic analyses. Seventeen years ago, in *MAI Systems Corp. v. Peak Computer, Inc.*, the United States Court of Appeals for the Ninth Circuit held that software loaded into a computer’s random access memory (“RAM”) “is ‘sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration,’” and thus fixed for the purposes of the Copyright Act.⁶⁶ *MAI Systems*, with its so-called RAM doctrine interpretation of the fixation requirement, has been criticized for being at odds with congressional intent.⁶⁷ Nevertheless, numerous courts have applied *MAI Systems*

60. *Id.*

61. *Id.* The court’s holding rendered Cablevision’s first argument moot. *See id.* Even if the court had assumed that Cablevision does, in fact, make the playback transmission, the court concluded, “the RS-DVR playback, as described here, does not involve the transmission of a performance ‘to the public.’” *Id.*

62. *Id.* at 135 (quoting 17 U.S.C. § 101(2)).

63. *See infra* text accompanying notes 66–76.

64. *See Cartoon Network*, 536 F.3d at 137. *Compare id.*, with *Redd Horne*, 749 F.2d at 159, and *On Command Video*, 777 F. Supp. at 790 (both stating that defendants showed the same copy of a work repeatedly to different members of the public).

65. The Copyright Act states, “[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.” 17 U.S.C. § 101.

66. 991 F.2d 511, 518 (9th Cir. 1993) (quoting 17 U.S.C. § 101).

67. *See, e.g.*, 3 PATRY, *supra* note 46, § 9:63 (discussing the legislative history of the definition of “fixed”). Patry notes, “[t]he legislative history shows Congress wished to exclude from protection (and therefore from being infringed) ‘evanescent or transient reproductions . . . captured momentarily in the ‘memory’ of a computer.’” *Id.* Patry also points out the irony of the Ninth Circuit’s erroneous reasoning of the RAM Doctrine:

It is with the greatest irony . . . that the definition of ‘fixed’ has been used to render infringing acts that Congress wished to exclude from the ambit of the Act. There is not the slightest indication that Congress intended to inhibit courts from doing what they

strictly, and have consistently held that the act of loading data into RAM constitutes copyright infringement.⁶⁸

However, the Second Circuit took a different approach. The court read the Copyright Act's definition of the term "fixed" to impose two distinct but related requirements: "embodiment" and "duration."⁶⁹ The court pointed out that *MAI Systems* and its progeny "conclude that an alleged copy is fixed without addressing the duration requirement," and therefore, "[these cases] do not speak to the issues squarely before [the court]."⁷⁰ Thus, the court construed the RAM doctrine to mean "that loading a program into a computer's RAM *can* result in copying that program," and not, as a matter of law, that it "*always* results in copying."⁷¹ Applying this two-part requirement, the court held that the works are embodied in the buffer, but "[g]iven that the data reside in no buffer for more than 1.2 seconds before being automatically overwritten, . . . the works here are not 'embodied' in the buffers for a period of more than transitory duration, and are therefore not 'fixed' in the buffers."⁷² The result of this holding is that data that pass through the RS-DVR buffers do not create copies under the Copyright Act's definition of the term.⁷³

Indeed, the Second Circuit appears to have employed a theory about copyright law in the digital age that has been raised by legal scholars—the practical effect of the *MAI Systems* RAM doctrine, which sets "the basic compensable unit of copyright (which is also the basic infringing unit) at the ephemeral RAM copy," is that it implicates the fundamental operation of a digital device that operates with a buffer.⁷⁴

have always done: adapt, in a common-sense, common-law way, infringement analysis to the purposes of the Copyright Act, the technologies involved, and the economic value of the activity

Id.

68. *Twentieth Century Fox*, 478 F. Supp. 2d at 621 (citing *Stenograph L.L.C. v. Bossard Assoc., Inc.*, 144 F.3d 96, 100 (D.C. Cir. 1998) (loading of software into RAM is "copying"); *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1335 (9th Cir. 1995) (same); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (same); *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distrib.*, 983 F. Supp. 1167, 1177–78 (N.D. Ill. 1997) (downloading of file from website constitutes "copying" by host computer, where portions of file pass through RAM before being immediately transmitted over Internet)).

69. *Cartoon Network*, 536 F.3d at 127. ("[T]he 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' (the 'duration requirement')." (citing 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8.02[B][3], at 8-32 (2007))). "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." *Id.*

70. *Id.*

71. *Id.* at 128.

72. *Id.* at 130.

73. *Id.*

74. JESSICA LITMAN, *DIGITAL COPYRIGHT* 28 (Prometheus Books) (2001). It has been said that incidental buffering and caching that occurs in Internet and other digital transmissions should be well outside of *MAI's* reach. 3 PATRY, *supra* note 46, § 9:63. The fact is:

This is tantamount to finding all individuals to be copyright infringers, since the digital devices we use everyday, from computers to digital video camcorders to digital televisions, all utilize transient data buffers.⁷⁵ The court's novel approach to this issue is a rational step towards updating the RAM doctrine for the digital age.⁷⁶

The Second Circuit's pragmatism did not bleed into the reasoning of its "public performance" holding. The court held that nothing in the RS-DVR playback transmission infringed the public performance right because Cablevision "only makes transmissions to one subscriber using a copy made by that subscriber."⁷⁷ The effect of this formalistic holding is that a service provider can transmit a copyrighted work to a subscriber without infringing the public performance right, provided that the transmission uses a unique copy made by that subscriber. Had the court adopted an approach suggested by legal scholars, the infringement analysis would have addressed the practical effects of Cablevision's actions on the copyright owners' opportunities for "commercial exploitation."⁷⁸ Moreover, if the Second Circuit had tracked the language and followed the reasoning of prior cases dealing with the public performance right, the outcome may not have been as favorable to Cablevision.

The court relied on *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.* to support its belief that the existence and use of distinct copies in the transmit clause analysis is controlling.⁷⁹ In *Redd Horne*, the defendant video rental store offered private viewing booths to its patrons.⁸⁰ The court concluded that the defendant violated the transmit clause by showing "the same copy of a work seriatim" to different members of the

[C]aching and buffering is not viewable or hearable by consumers, usually consists of extremely small amounts of data, is a function of the manner in which digital transmissions occur rather than being a volitional act, and have no independent economic value. . . . Yet, the allegation that buffering and caching represents an infringing reproduction has served to retard severely lawful online distribution of music, providing music publishers and record labels with undeserved windfalls and leverage in litigation. It is well past time for the courts to put an end to such efforts.

Id.

75. *Twentieth Century Fox*, 478 F. Supp. 2d at 613 ("All digital devices . . . utilize transient data buffers, which are regions of memory that temporarily hold data.")
76. The court's holding seems to echo the idea that current copyright law may not be suited for the digital age. In response to the exposure to liability under the RAM doctrine for "the activities of everyone, everywhere," using a digital device, Professor Litman suggests that "we stop defining copyright in terms of reproduction," and instead, "recast[] copyright as an exclusive right of commercial exploitation." LITMAN, *supra* note 74, at 180. Under this approach "[m]aking money . . . from someone else's work without permission would be infringement, as would large-scale interference with the copyright holders' opportunities to do so." *Id.*
77. *Cartoon Network*, 536 F.3d at 137.
78. The "commercial exploitation" approach, suggested by Professor Litman, is discussed *supra* note 76.
79. *Cartoon Network*, 536 F.3d at 138.
80. *Redd Horne*, 749 F.2d at 156–57. The store, Maxwell's Video Showcase, offered an "in-store rental" service, which allowed patrons to view any of an assortment of video cassettes in the privacy of a small booth. *Id.* Each booth contained seats and a television. *Id.* at 157. To view a film, the patron would pay a fee based on the number of people viewing and the time of day, select a film from the catalogue, and enter the assigned viewing booth. *Id.* Once the door was closed, a Maxwell's employee would load the

public.⁸¹ As noted by the Second Circuit, this reasoning begs the question, *why* does the use of the same copy affect the transmit clause inquiry?⁸² According to the Second Circuit, “the use of a unique copy may limit the potential audience of a transmission,” and therefore, because the RS-DVR playback transmission uses a copy made by the subscriber, there is no infringement.⁸³ This reasoning ignores the practical effects of Cablevision’s actions and instead focuses on a superficial factual distinction.

Furthermore, the Second Circuit rejected the District Court’s reliance on *On Command Video Corp. v. Columbia Pictures Indus., Inc.*,⁸⁴ in which the defendant had developed a system for electronic delivery of motion picture video tapes to hotel guest rooms.⁸⁵ In *On Command Video*, the court held that the defendant’s system transmitted “movie performances directly under the language of the [statutory] definition,”⁸⁶ and concluded that such transmissions were made to the public “because the relationship between the transmitter of the performance, On Command, and the audience, hotel guests, is a commercial, ‘public’ one regardless of where the viewing takes place.”⁸⁷ The Second Circuit in *Cartoon Network* interpreted *On Command* to hold that “any commercial transmission is a transmission ‘to the public,’” and is therefore untenable because it contradicts Congress’ intent behind the Copyright Act.⁸⁸ This broad interpretation ignores the economic justification of copyright and the “commercial exploitation” approach.⁸⁹

The Second Circuit concluded that the RS-DVR playback transmission to a single subscriber, using a single unique copy created by the subscriber, is not a performance “to the public” for purposes of the Copyright Act.⁹⁰ However, Cablevision’s actions—the transmissions of multiple, unlicensed copies to its subscribers—had a direct negative effect on the copyright owners’ opportunities for

video cassette into a bank of VCRs at the front of the store and the film would be transmitted to the patron’s viewing booth. *Id.*

81. *Cartoon Network*, 536 F.3d at 138. The *Redd Horne* court relied on Professor Nimmer’s treatise: “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.” *Redd Horne*, 749 F.2d at 159 (quoting 2 NIMMER & NIMMER, § 8.14[C][3], at 8-142).

82. *Cartoon Network*, 536 F.3d at 138.

83. *Id.*

84. *Id.* at 139.

85. *On Command Video*, 777 F. Supp. at 788. The system, centrally located in the hotel equipment room, directed a bank of video cassette players to transmit a particular motion picture to a particular guest’s room once the guest selected the motion picture from the menu of available titles. *Id.* While in use, the motion picture was available for viewing only in the room where it was selected. *Id.* Once the motion picture finished, it was rewound and immediately made available for viewing by another guest. *Id.*

86. *Id.* at 789.

87. *Id.* at 790.

88. *Cartoon Network*, 536 F.3d at 139.

89. See *supra* note 76 and accompanying text.

90. *Cartoon Network*, 536 F.3d at 139.

“commercial exploitation” of their content. As noted by one amici, “[t]he value of a creative work in the entertainment industry is based on revenues earned during discrete windows of exploitation”⁹¹ A copyrighted work, whether motion picture or television series, is “commercially exploited” in subsequent markets following the initial broadcast.⁹² Giving subscribers the ability to record such a large amount of content and store it for an indefinite amount of time undermines the need for other licensed uses such as DVD release, streaming Internet video, and video-on-demand services.⁹³

Furthermore, by finding in Cablevision’s favor, the Second Circuit legitimized an inefficient use of technology. This point does not suggest that all network-DVR systems are inefficient. Indeed, it is the future of consumer television “time-shifting” technology and its introduction brings various societal benefits.⁹⁴ However, Cablevision’s RS-DVR system was not designed with technological progress in mind—it was designed to avoid copyright liability.⁹⁵ Under the Second Circuit’s

91. Brief of Screen Actors Guild, Inc. & Writers Guild of America, West, Inc. as Amicus Curiae in Support of Petitioner at *6, *Cable News Network, Inc. v. CSC Holdings, Inc.*, No. 08-448, 2008 WL 4843616, at *1 (2d Cir. Nov. 5, 2008).

92. *See id.* The amici brief presented examples of how the motion picture market functions:

[T]he typical life cycle of a theatrical motion picture would include a window of theatrical release, followed by a release to DVD and pay-per-view, then pay television (including video-on-demand), and finally broadcast and/or cable television. It might also be made available for licensed download on the Internet concurrently with or between other windows. Some windows will overlap and some will be revisited later in the work’s lifetime, either through existing licenses or new ones.

Id. (footnote omitted). The television market follows a nearly identical path:

A typical television series will run first on a television or cable network and might re-run multiple times within that same season. A recent practice is for episodes of the series to be available for viewing on the Internet—either ad-supported or through paid downloads—as early as the next day following its first run. A successful series will eventually be syndicated to other broadcast or cable channels. Frequently, television series, whether successful or just well-received, are released to DVD.

Id. at n.5.

93. *See id.* at *11–12 (arguing that RS-DVR is a commercial, subscription-based service that requires an on-going relationship between Cablevision and its subscribers, more akin to video-on-demand than to a VCR). Thus, by usurping the plaintiffs’ opportunity to exploit these subsequent markets without paying the license fees, “Cablevision has unjustly enriched itself.” *Id.* at 12.

94. *See* Shields, *supra* note 3 (predicting that network DVRs “would immediately make time-shifting technology available to 40 [percent] to 50 percent of a cable operator’s subscribers” (quoting Magna Global)); Hall, *supra* note 3 (noting that network DVRs would store and routinely back up recorded programming on a remote and “industrial strength” server, “eliminating the need to install and maintain noisy, heat-generating and less reliable DVR boxes in the home”); Stelter, *supra* note 2 (predicting that network DVR would “prop open the door to new methods of advertising”). Network DVR would also lower the cable company’s DVR operating costs, and that cost saving would be passed on to subscribers. *See* Hall, *supra* note 3.

95. Cablevision designed the RS-DVR “to provide subscribers with their own dedicated hard-disk space in the headend” and argued to the Second Circuit “that because of this architecture, the network-based system was no different than conventional set-top DVRs.” Todd Spangler, *Network DVR Plans Come*

“public performance” holding, to pass muster, network DVR systems must make individual copies of content and associate one unique copy with each subscriber. Accordingly, in order to support RS-DVR for 50,000 subscribers, Cablevision “would need almost 4,000 Terabytes to provide 80 Gigabytes of recording space” for each subscriber.⁹⁶ This is simply inefficient. For instance, instead of storing 50,000 copies, one per subscriber, of last night’s episode of *LOST*, it would be more efficient for Cablevision to maintain one shared and licensed copy of popular content to stream to subscribers.⁹⁷

Finally, the Second Circuit’s holding may provide a blueprint for future content-delivery networks to avoid copyright liability by emulating Cablevision’s RS-DVR system. Not only will the other major cable television companies follow suit,⁹⁸ but what is to prevent online service providers that offer subscription-based streaming from designing a similar architecture? The Second Circuit’s formalistic holding relieves transmitters of unlicensed copyrighted content from infringing on the “public performance” right. Liability is avoided, so long as a content delivery network either makes copies of each content item and associates one unique copy with each subscriber, or gives subscribers the capacity to make their own individual copies. The court itself seems to acknowledge the risky implications of its decision by limiting the holding to the facts of the case.⁹⁹

In summary, the Second Circuit’s reasoning of the “public performance” holding is flawed. The court’s interpretation of the Copyright Act’s definition of “public performance” departs from the statutory language and prior Circuit Court decisions interpreting the same provisions. By focusing on the recipient of each transmission and holding in favor of a strict, formalistic approach to the public performance issue,

Out of Cold Storage, MULTICHANNEL NEWS, Aug. 8, 2008, http://www.multichannel.com/article/134269-Network_DVR_Plans_Come_Out_of_Cold_Storage.php.

96. *Id.* This is far more storage than that required by video-on-demand, “which store only one physical copy of a video file and then streams it to many subscribers.” *Id.*

97. *See id.* A spokesman for a video-on-demand vendor believes a more efficient shared-storage model will be developed, stating, “I think what will happen is, people will realize that you don’t have to force everyone to have different copies of the same program.” *Id.* Ironically, forcing subscribers to have distinct copies of the same program is what allowed Cablevision to prevail in this case. Had RS-DVR been designed on a shared-storage model, the outcome of the public performance issue would likely have been different.

98. *Id.* (predicting that “cable operators would be likely to initially deploy a network DVR service that closely hews to the way Cablevision described its Remote Storage DVR in court documents, to be on the safe side of the law”).

99. *See Cartoon Network*, 536 F.3d at 139–40.

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.

Id.

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the court departed from the pragmatic reasoning it applied to the reproduction issue. Cablevision's RS-DVR playback transmissions used distinct copies for each subscriber made by that subscriber, and are therefore deemed not to be "public performances." This formalistic interpretation highlights the struggles of copyright law in the digital age. As a result of the court's holding, Cablevision's inefficient RS-DVR system design may become the blueprint for an end-run around copyright liability.