

Copyright Alert

Cartoon Network v. Cablevision—Buffer Reproductions Are Not Infringing Copies, Holds Second Circuit in “Remote” DVR Case

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In a long-awaited ruling, the Second Circuit held on Monday that unauthorized reproductions of data, such as digital movie files, in computer buffers are not infringing copies because they are not fixed “for a period of more than transitory duration.” *Cartoon Network LP v. CSC Holdings, Inc. and Cablevision Systems Corp.*, Nos. 07-1480-cv(L) & 07-1511-cv(CON) (2nd Cir. Aug. 4, 2008) (reversing *Twentieth Century Fox v. Cablevision*, 478 F. Supp. 2d 607 (S.D.N.Y. 2007)).

A substantial line of cases has held replications in the random access memory (RAM) of computers to constitute fixed “copies.” *Cartoon Network* is the first case to consider whether the same conclusion applies to buffer copies, a ruling that could have swept a wide range of technologies into the realm of prima facie copyright infringement. The Second Circuit opinion also addressed important issues concerning responsibility for direct infringement and the public performance right, in each instance upholding Cablevision’s “Remote Storage” Digital Video Recording System (RS-DVR) against infringement claims.

Cartoon Network’s Key Holdings

- Before a data reproduction can be deemed an infringing copy, it must satisfy a “duration requirement” as well as the requirement it be embodied in a tangible medium of expression; where fragments of a work of authorship contained in a stream of data are copied into a buffer for no more than 1.2 seconds before being automatically overwritten, such reproductions are not copies and their unauthorized creation is not copyright infringement.
- Even though unauthorized, fixed copies of complete video works are created on Cablevision’s hard drives, Cablevision is not liable as a direct infringer because it is Cablevision’s customers, not Cablevision, who make the copies by supplying the “volitional conduct” required for direct liability.

- Cablevision does not infringe the public performance right through the operation of its system. When each playback transmission of previously recorded programming is made to a single subscriber, using a single unique copy produced by that subscriber on Cablevision’s hard drives, such transmissions are not performances *to the public* and therefore do not infringe.

Factual Background: The “Remote Storage” DVR System

Cablevision is an operator of cable television systems. It designed the RS-DVR System to allow customers who do not have a stand-alone DVR to record cable programming on central hard drives housed and maintained by Cablevision at a “remote” location. Customers can then receive playback of those programs through their home television sets.

Cablevision does not record all of its programming for possible later retransmission. Rather, when a customer asks, either in advance of a broadcast or when one is under way, to record that broadcast, the system stores that programming onto a portion of one of the hard disks allocated to that customer.

As part of that process, a data stream consisting of all available programming is first routed through two buffers. The entire stream moves to the first buffer (the “primary ingest buffer”), at which point the server automatically checks whether any customers want to record anything. If a customer has requested a particular program, the data for that program moves from the primary buffer into a secondary buffer, and then onto the hard drive, where separate copies are made for each requesting customer.

New data flow into the primary buffer, overwriting the data already on the buffer. The primary ingest buffer holds no more than 0.1 seconds of each channel’s programming at any moment. Thus, every tenth of a second, the content residing on this buffer is automatically erased and replaced. The second buffer holds no more than 1.2 seconds of programming at any time before it is erased and replaced.

Plaintiffs' Claims and District Court Proceedings

Cablevision announced its system before deploying it, and a number of copyright holders sued for declaratory and injunctive relief. Plaintiffs alleged that reproducing their entire works in the buffers created infringing copies, that Cablevision was directly liable for the complete copies made on its hard drives, and that Cablevision violated the copyright holders' exclusive right to publicly perform their works when Cablevision retransmitted their works to more than one customer. Plaintiffs alleged theories only of direct infringement, not secondary liability; and Cablevision waived any defense based on fair use. On cross-motions for summary judgment, the district court ruled for plaintiffs.

The "Buffer Copying" Claim

Under the Copyright Act, a copyright holder has the exclusive right to reproduce the work "in copies." 17 U.S.C. § 106(1). The Act defines a copy as a material object in which the work is fixed, and fixation in turn requires embodiment in a tangible medium of expression "sufficiently permanent or stable to permit it to be ... reproduced ... for a period of more than transitory duration." § 101.

Buffers are forms of RAM that hold data for a brief amount of time, usually shortly before use, to improve performance. A well-established line of cases has held that a digital copy of a work that is maintained in RAM is fixed, notwithstanding that RAM contents disappear when the computer is turned off. See, e.g., *MAI Systems Corp. v. Peak Computer Inc.*, 991 F.2d 511 (9th Cir. 1993). No case had hitherto expressly considered whether works passing through a buffer can be deemed fixed copies.

As a law professor's amicus brief argued, since buffers are employed in all currently available digital devices – computers, cell phones, personal digital assistants, MP3 and compact disk players, fax machines, digital televisions, etc. – if buffers were held to create "copies" within the meaning of copyright law, then each "use of a digital device of any kind (turning on a digital TV, or browsing a website on the Internet)" would "become[] an act fraught with potential copyright liability."

The Second Circuit began its analysis by unpacking the fixation requirement. The Court held that the statutory definition of fixation "plainly imposes two distinct but related requirements: the work must be embodied in a medium ... (the 'embodiment requirement'), and it must remain thus embodied 'for a period of more than transitory

duration' (the 'duration requirement')." The district court erred, the Court of Appeal held, by considering only the embodiment and not the duration requirement.

Similarly, the Court argued that *MAI Systems* addressed only the embodiment requirement, on the theory that the duration requirement was not analyzed and was not at issue in the case. "[W]e construe *MAI Systems* and its progeny as holding that loading a program into a computer's RAM *can* result in copying that program. We do not read *MAI Systems* as holding that, as a matter of law, loading a program into a form of RAM *always* results in copying. Such a holding would read the 'transitory duration' language out of the definition...."

The Court readily concluded the duration requirement was not satisfied by Cablevision's use of buffers:

"No bit of data remains in any buffer for more than a fleeting 1.2 seconds. And unlike the data in cases like *MAI Systems*, which remained embodied in the computer's RAM memory until the user turned the computer off, each bit of data here is rapidly and automatically overwritten as soon as it is processed.... [T]hese facts strongly suggest that the works in this case are embodied in the buffer for only a 'transitory' period, thus failing the duration requirement."

The Hard Drive Copying Claim

Although copyright is a strict liability regime, there is a line of cases beginning with *Religious Technology Center v. Netcom On-Line Communication Services*, 907 F. Supp. 1361 (N.D. Cal. 1995), holding that absent some volitional act by the owner of the system a party cannot be held directly liable for copyright infringement based on its passive ownership of an electronic facility which, responding automatically to users' input, creates infringing copies. In a case of first impression for the Second Circuit, the Court adopted the *Netcom* volition standard.

The Court compared the RS-DVR with a traditional VCR and found, for the purpose of the volition analysis, that the two technologies are not sufficiently distinguishable: whether the consumer is pushing the record button on an RS-DVR or a VCR, that person is directing an otherwise automatic copying process. Turning to the district court's reliance on Cablevision's selection of the programming it would make available for recording using the RS-DVR, the Second Circuit found that Cablevision's selection was not sufficiently proximate to the copying to constitute volition.

The Court considered finally Cablevision's ongoing relationship with its customers and its control over the recordable content offered. These factors would potentially bear on secondary liability, but did not negate the limitation on Cablevision's direct responsibility as the passive owner of instrumentalities used for copying.

The Public Performance Claim

The Copyright Act grants copyright owners the exclusive right, "in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly." 17 U.S.C. §106(4). Under the relevant portion of the Act, to perform a work "publicly" means to transmit a performance of the work "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 . . . , at the same time or at different times.*" 17 U.S.C. §101 (emphasis added).

Relying on what it considered the plain meaning of the definition in §101 and several cases interpreting the phrase "to the public," the Court held that the transmission of recorded programming using the RS-DVR was not an infringement of the public performance right because such transmission was not "to the public." According to the Court, the "transmit clause" of the definition treats the transmission itself as the performance. Therefore, members of the public must be capable of receiving a *particular transmission* at different times or in different places in order to constitute a public performance. It is not enough, according to the Court, that the original content is capable of being received by Cablevision subscribers at different times, in different places. Because each copy of such content in the RS-DVR is capable of transmission to only one subscriber, there is no public performance. Any other result, the Court maintained, would "obviate any possibility of a purely private transmission," a non-infringing transmission clearly contemplated by the drafters of §101.

The Court's holding on public performance may appear to some content delivery network providers as a loophole, prompting such providers to make separate copies of each work and associate each copy with one subscriber, or allow subscribers to do so, in order to avoid liability. Anticipating this criticism, the Court pointed out that such providers would still be subject to other forms of copyright liability, including infringement of the reproduction right or liability for contributory infringement.

The *Cartoon Network* case raises several issues of first impression and shows some tension with related decisions from other circuits. While courts considering future cases will no doubt find the decision instructive, all may not follow the Second Circuit's analysis. These evolving issues therefore remain far from settled.

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