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**SECOND CIRCUIT HOLDS THAT CABLE COMPANY'S PROPOSED AUTOMATED COPYING AND TRANSMISSION OF TELEVISION PROGRAMMING AT REQUEST OF CABLE SUBSCRIBERS WOULD NOT CONSTITUTE DIRECT COPYRIGHT INFRINGEMENT**

In a significant decision regarding the application of U.S. copyright law to the user-directed recording and transmission of copyrighted content using a company's automated equipment, the Second Circuit overturned the decision of Judge Denny Chin of the Southern District of New York and held on August 4, 2008 that defendant Cablevision Systems Corporation's proposed "Remote Storage DVR" system ("RS-DVR") would not constitute direct infringement of plaintiff movie and television program producers' rights under the Copyright Act. *The Cartoon Network LP, LLLP, et al. v. CSC Holdings, Inc.*, 2008 WL 2952614 (2d Cir. Aug. 4, 2008). The decision, which is the first of its kind, could have a substantial impact on the rights of copyright owners with respect to the delivery of their works to end-users through a variety of new technologies.

The case arose after Cablevision, a cable television provider, announced the advent of its new RS-DVR system in March 2006. As opposed to the stand-alone digital video recorder ("DVR") that is connected to a user's cable box or the set-top storage DVR that many cable companies lease to their subscribers, the RS-DVR system allows Cablevision customers to record a television show upon, and transmit it to their homes from, central hard drives housed and maintained by Cablevision at a remote location. With RS-DVR, such recordings are made on portions of hard drives dedicated to particular subscribers, and are made only upon the request of the individual subscriber. Similarly, the playback transmissions are made, at the request of a subscriber, from those subscriber-specific copies, and are individually transmitted to the subscriber's television. Cablevision notified its content providers of its plans to offer the RS-DVR system, but it did not seek any licenses from them to copy or transmit the television shows to subscribers.

In the district court, plaintiffs expressly disavowed any contributory theory of liability by Cablevision, but successfully argued that Cablevision's proposed system would constitute direct infringement of their copyrights in three ways. First, by briefly storing program data in "data buffers" integral to the function of the RS-DVR, Cablevision would make copies of protected works and thereby directly infringe plaintiffs' exclusive right of reproduction under the Copyright Act. Second, by copying programs onto a portion of a hard drive allocated to a particular customer, Cablevision would again directly infringe the reproduction right. And third, by transmitting program data from the customer-allocated hard drives to its RS-DVR customers in response to playback requests, Cablevision would directly infringe plaintiff's exclusive right of public performance. On these three grounds, the district court granted summary judgment for plaintiffs and enjoined Cablevision from operating the RS-DVR system without obtaining licenses from the plaintiff copyright holders.

In reviewing the district court's decision *de novo*, the Second Circuit reversed each of the district court's three holdings of direct infringement. Turning first to the data stored in the "data buffers," the Court addressed whether Cablevision reproduces plaintiffs' works "in copies" by buffering the data that makes up the given works. The Second Circuit noted that the Copyright Act defines the term "copies" as "material objects ... in which a work is fixed by any method" "in a tangible medium of expression [where] its embodiment ... is sufficiently permanent or stable to permit it to be ... reproduced ... for a period of more than transitory duration." This

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definition, the Court held, “plainly imposes two distinct but related requirements: that the work must be embodied in a medium, *i.e.*, placed in a medium such that it can be perceived, reproduced, etc., from that medium (the ‘embodiment requirement’), and that it must remain thus embodied ‘for a period of more than transitory duration’ (the ‘duration requirement’).” The Court further held that “unless both requirements are met, the work is not ‘fixed’ ... and the data is not a ‘copy’ of the original work.” Because Cablevision’s RS-DVR system causes every second of an entire work to be placed, one second at a time, in a buffer, the Second Circuit readily agreed with the district court that the works are embodied in the buffer and that the first requirement is satisfied. However, the Second Circuit found that the district court, as well as the several cases on which it relied, mistakenly limited its analysis to the embodiment requirement and did not properly address the duration requirement.

Examining in detail the duration requirement, the Second Circuit did not explicitly define what “more than transitory duration” means, but did hold that merely because data persists long enough for Cablevision to make reproductions from them, it does not necessarily follow that the work exists in the buffer for “more than transitory duration.” The Court reasoned that if such were the case in every circumstance, the duration language would be impermissibly read out of the Copyright Act. On the facts before it, the Court held that since “[n]o bit of data remains in any buffer for more than a fleeting 1.2 seconds ... before being automatically overwritten,” the copyrighted works are not embodied for more than transitory duration and are not “fixed” in the buffers. Accordingly, it held that the buffering process in Cablevision’s RS-DVR system does not create “copies” of the works, as defined under the Copyright Act, and thus Cablevision cannot be held directly liable for any copying that occurs in the buffering process.

Turning to whether Cablevision is directly liable for the creation of playback copies on the portions of hard drives allocated to individual customers, the Court held that Cablevision’s liability turned on the question of whose “volition” caused the copies to be made. The Court stressed that “volitional conduct is an important element of direct liability,” and identified only two instances of volitional conduct with respect to the creation of the playback copies: “Cablevision’s conduct in designing, housing, and maintaining a system that exists only to produce a copy, and a customer’s conduct in ordering that system to produce a copy of a specific program.” In assessing whether it is Cablevision or the customer who actually “makes” a copy, the Second Circuit analogized Cablevision to “a store proprietor who charges customers to use a photocopier on his premises” and who therefore does not make any copies when his machines are actually operated by his customers. The Court stated that “[i]n determining who actually ‘makes’ a copy, a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct.” Additionally, the Court factored into its analysis the fact that “Cablevision has no control over what programs are made available on individual channels or when those programs will air, if at all,” in contrast to traditional video-on-demand services where the cable company “actively selects and makes available beforehand the individual programs available for viewing.” Following this logic, the Second Circuit concluded that copies produced by Cablevision’s RS-DVR system are “made” by the volitional conduct of the customer, and not by Cablevision. In so holding, the Court relied on case law refusing to impose direct liability on Internet service providers (“ISPs”) for the posting by users of copyrighted works that were automatically reproduced by the ISP’s system.

Notably, the Second Circuit also pointed out that its “refusal to find Cablevision directly liable on these facts is buttressed by the existence and contours of the Supreme Court’s doctrine of contributory liability in the copyright context,” as in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), where the Supreme Court emphasized the lack of an ongoing relationship between Sony, a VCR manufacturer, and its VCR customers in holding that the VCR maker was not contributorily liable for infringement by VCR owners. Although the Second Circuit did not rule on whether Cablevision could be held contributorily liable, it did caution that “[m]ost of the facts found dispositive by the district court [in favor of direct infringement] ... *e.g.*,

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Cablevision's 'continuing relationship' with its RS-DVR customers, its control over recordable content, and the 'instrumental[ity]' of copying to the RS-DVR system ... seem to us more relevant to the question of contributory liability."

Lastly, the Second Circuit addressed whether transmission of an RS-DVR playback to a customer would violate the Copyright Act as an unauthorized public performance of plaintiffs' work. The Court noted that the relevant inquiry in determining whether a transmission is made to the "public" is: "who is 'capable of receiving' the performance being transmitted." In making this inquiry, the Second Circuit emphasized that the RS-DVR system transmitted a subscriber-dedicated copy of the work to the single subscriber who had requested it, and faulted the district court for considering the potential audience of the underlying work whose content is being transmitted, rather than the potential audience of a particular transmission. The Second Circuit stated that such an analysis would "obviate[] any possibility of a purely private transmission" and "make[] Cablevision's liability depend, in part, on the actions of legal strangers." The Court explained:

Assume that HBO transmits a copyrighted work to both Cablevision and Comcast. Cablevision merely retransmits the work from one Cablevision facility to another, while Comcast retransmits the program to its subscribers. Under plaintiffs' interpretation, Cablevision would still be transmitting the performance to the public, solely because Comcast has transmitted the same underlying performance to the public. Similarly, a hapless customer who records a program in his den and later transmits the recording to a television in his bedroom would be liable for publicly performing the work simply because some other party had once transmitted the same underlying performance to the public.

The Second Circuit reasoned that such odd results were never intended to flow from the Copyright Act and accordingly found that when "Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission." Therefore, "a public performance or display includes each step in the process by which a protected work wends its way to its audience." Because Cablevision's RS-DVR system only makes transmissions to one subscriber from that subscriber's dedicated hard drive on Cablevision's system, using a copy made by that subscriber, the universe of people capable of receiving a particular RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission — not the "public."

It is impossible to predict the impact that the Second Circuit's decision will have on the use of existing content distribution technologies and services and the potential development of new technologies and services. Nonetheless, it is clear that the decision is a significant one in the application of traditional copyright principles to the unique issues raised by the rapidly advancing systems by which consumers view and transmit movie and television programs, as well as music and other recorded content. Although the Court of Appeals cautions that there is still a possibility that a content delivery network offering a service similar to RS-DVR could be liable for contributory infringement, and further warns that its decision "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," it is by no means clear that the holding is limited to the specific facts of the case, and it can be expected that many companies will attempt to offer user-directed video and audio programming in ways analogous to Cablevision's RS-DVR system.

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