Casenote

BE KIND, PLEASE REWIND — THE SECOND CIRCUIT GIVES CABLE PROVIDERS SOMETHING TO WATCH IN *CARTOON NETWORK L.P. V. CSC HOLDINGS, INC.*

I. Introduction

According to The Nielsen Company, television viewing has reached an "all-time high."[1] As television viewing increases, the percentage of viewers using a Digital Video Recorder ("DVR") has also increased.[2] Currently, around thirty-four percent of American households use a DVR of some kind.[3] DVRs allow viewers to watch previously aired television content at their convenience, radically changing how people watch television.[4]

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1. *See* Taylor Gandossy, *TV Viewing at 'All-time High,' Nielsen Says*, CNN.com, http://www.cnn.com/2009/SHOWBIZ/TV/02/24/us.video.nielsen/ (last visited Oct. 31, 2009) (providing Nielsen's Quarterly A2/M2 Three Screen Report on video viewership); *see generally* Nielsen Television Overview, http://en-us.nielsen.com/tab/measurement/tv_research (last visited Oct. 31, 2009) ("Nielsen measures over 40% of the world's TV viewing behavior). In addition to Television viewership, the "Three Screen Report" also measures the "[v]iewership of videos on the Internet and on mobile phones." Gandossy, *supra*. The Report concluded that the average American television viewer watches more than 151 hours of television in a month. *See id.* The Report also determined that an increase of Digital Video Recorder (DVR) viewership has contributed to the overall rise in viewing. *See id.* "With a DVR, you can easily record your favorite shows without tapes, without a VCR, or without troublesome timers. With the touch of a button, you can pause live TV, view an instant replay, rewind your favorite scenes, or play your show in slow motion." Comcast FAQs, http://www.comcast.com/Customers/FAQ/FaqDetails.ashx?Id=1822 (last visited Oct. 31, 2009).

2. *See* Brian Stelter, *A New Ratings System Stirs Up the Fall TV Season*, N.Y. Times, Oct. 8, 2007, http://www.nytimes.com/2007/10/08/business/media/08ratings.html (noting increasing use of DVR and its impact on ratings); *see also* Bill Gorman, *DVR Viewership Up 64% in Broadcast Primetime*, TVbytheNumbers.com, May 8, 2008, http://tvbythenumbers.com/2008/05/08/dvr-viewership-up-64-in-broadcast-primetime/3679 (calculating DVR usage during primetime broadcasts). Gorman concluded DVR usage might have a major impact on TV viewership, as viewership has increased 64% over the past year. *See* Gorman, *supra*.

3. *See* Richard Mullins, *DVR Fallout: More People Delaying Season Premiere Watching*, Tampa Trib., Mar. 12, 2009, http://www2.tbo.com/content/2009/mar/12/dvr-fallout-more-people-delaying-season-premiere-w/news-metro (reporting percentage of Americans who use DVR services). Even though individuals often want to watch a season premier when it is first aired, their busy schedules often conflict with scheduled times. *See id.*

4. *See* Cartoon Network L.P. v. CSC Holdings, Inc., 536 F.3d 121, 123 (2d Cir. 2008) (noting DVRs' increasing role in modern television viewing).

In March 2006, Cablevision Systems Corporation ("Cablevision") announced a technologically new DVR, the Remote Storage DVR ("RS-DVR").[5] Cablevision provides digital cable to much of the New York metropolitan area and surrounding parts.[6] The new RS-DVR records media content for digital cable consumers who do not have a stand-alone DVR by storing the recorded content on central hard drives in a "remote" location maintained by Cablevision.[7] The RS-DVR will revolutionize DVRs because customers will no longer need their stand-alone DVR system to record their favorite shows.[8] Cablevision informed its content providers of the RS-DVR without seeking licenses from the providers to operate or sell the RS-DVR and the content providers filed suit.[9] The suit eventually reached the Second Circuit, which ruled that there was no violation of the content providers' copyrights.[10]

This note examines the Second Circuit's decision in *Cartoon Network L.P. v. CSC Holdings, Inc* ("*Cartoon Network*").[11] Section II presents the underlying facts of the case.[12] Section III provides important history of the Copyright Act and relevant case law.[13] Section IV summarizes the Second Circuit's decision.[14] Section V

5. *See Cartoon Network*, 536 F.3d at 124 (reporting Cablevision announcement of its new RS-DVR). Cablevision is one of the nation's largest telecommunications, media and entertainment companies. *See* Cablevision, *Corporate Information*, http://www.cablevision.com/about/index.jsp (last visited Oct. 31, 2009) (establishing Cablevision as "single largest cable cluster, passing more than 4.7 million households and 600,000 businesses"). Cablevision owns and operates the legendary Madison Square Garden among other assets. *See id.* For a further discussion of how the RS-DVR operates, see *infra* notes 18-26 and accompanying text.

6. *See* Cablevision, *supra* note 5 (detailing Cablevision's operations). Currently, Cablevision is the fifth largest cable provider in the United States. *See* National Cable & Telecommunications Association, *Top 25 MSOs*, http://www.ncta.com/Stats/TopMSOs.aspx (last visited Oct. 31, 2009) (ranking cable providers' distribution nationwide).

7. *See Cartoon Network*, 536 F.3d at 124 (describing RS-DVR).

8. *See id.* at 123-24 (comparing stand-alone DVRs with RS-DVRs). Many companies, like TiVo, manufacture and sell stand-alone DVRs that connect straight to the cable box. *See id.* at 123. Cable companies also provide to their customers set-top DVRs, a combination of the cable box and a stand-alone DVR. *See id.*

9. *See id.* at 124 (describing basis for disagreement between Cablevision and its content providers).

10. *See id.* at 140 (holding that Cablevision's RS-DVR would not directly violate content providers' exclusive rights of reproduction and public performance).

11. *Id.*

12. For a further discussion of the facts and procedural history in *Cartoon Network*, see *infra* notes 16-35 and accompanying text.

13. For a further discussion of history of the Copyright Act and relevant case law, see *infra* notes 36-93 and accompanying text.

14. For a further discussion of the Second Circuit's opinion, see *infra* notes 94-132 and accompanying text.

analyzes the court's decision, concluding that its ruling relies on sound legal principles.[15] Finally, Section VI discusses the potential impact of the decision on both copyright law and technology.[16]

II. PAUSE: FACTS OF THE CASE

Content providers transmit their television programs through a single stream to Cablevision and other cable companies which in turn are immediately re-transmitted to subscribing customers.[17] The proposed RS-DVR will split the single stream of data into two separate streams.[18] The first stream is routed directly to the customer, while the second stream enters a Broadband Media Router ("BMR") that "buffers the data stream, reformats it, and sends it to the 'Arroyo Server,' which consists, in relevant part, of two data buffers and a number of high-capacity hard disks."[19] Next, the stream enters the first buffer, or the "primary ingest buffer," where the server determines if any customers wish to record any portion of the program.[20] When a customer wants to record programming, the stream moves into the secondary buffer and is then recorded onto one of the hard disks for later playback.[21] The primary ingest buffer continually erases and replaces data every tenth of a second while holding no more than 1.2 seconds of data at any given time.[22]

To watch a show, the customer selects their previously recorded show from an on-screen list.[23] The Arroyo Server identifies the corresponding copy of the program and streams it to the cus-

15. For a critical analysis of the court's opinion in *Cartoon Network*, see *infra* notes 133-183 and accompanying text.

16. For a further discussion of the impact the decision will have on copyright law and technology, see *infra* notes 184-194 and accompanying text.

17. *See* Cartoon Network L.P. v. CSC Holdings, Inc. 536 F.3d 121, 124 (2d Cir. 2008) ("Thus, if 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.").

18. *See id.* (noting that stream is split by Cablevision before reaching customer).

19. *Id.*

20. *See id.* (stating purpose of primary ingest buffer).

21. *See id.* (discussing where stream goes after first buffer).

22. *See id.* at 124-25 ("Thus, every tenth of a second, the data residing on this buffer are automatically erased and replaced. The data buffer in the BMR holds no more than 1.2 seconds of programming at any time."). Because the content is continuously overwritten, it is not in the program for more than those 1.2 seconds. *See id.*

23. *See id.* at 125 (explaining playback process for customers).

tomer for viewing.[24] The RS-DVR is similar to a Video On Demand ("VOD") Service because content for both services is stored by the cable company at a remote location, whereas a regular DVR system stores its content on the customer's individual cable box.[25] With the RS-DVR technology, a customer can only record programs offered by Cablevision and subscribed to by the customer.[26]

This dispute arose when Cablevision informed its content providers of the new RS-DVR.[27] Subsequently, multiple content providers filed suit against Cablevision seeking declaratory and injunctive relief.[28] The content providers alleged that Cablevision's proposed RS-DVR "would directly infringe their exclusive rights to both reproduce and publicly perform their copyrighted works."[29] Moreover, the content providers only claimed direct infringement, waiving any claim of contributory infringement, while Cablevision agreed that it would not raise the fair use defense.[30]

The United States District Court for the Southern District of New York granted summary judgment for the content providers and enjoined Cablevision from using the RS-DVR without the appropriate licenses.[31] The district court held that the RS-DVR would make copies of the content by storing its data in the primary ingest buffer, resulting in direct infringement of the content providers' exclusive rights of reproduction.[32] The district court also held that the Arroyo Server would directly infringe the content providers' reproduction rights.[33] Finally, the court found that the RS-DVR would directly infringe on the content providers' exclusive rights of public performance when it transmitted the previously recorded

24. *See* Jeff Baumgartner, *Inside Cablevision's 'RS-DVR'*, CABLE DIGITAL NEWS, Apr. 11, 2007, http://www.lightreading.com/document.asp?doc_id=121644&page_number=2 (describing how Arroyo Server sends copied data to customer). "It's at this point that the customer can watch the recorded program and can move around the asset using trick modes (pause, fast-forward, rewind, etc.)." *Id.*

25. *See Cartoon Network*, 536 F.3d at 125. (drawing similarities between RS-DVR and VOD services). Both VOD and the RS-DVR services incorporate data being stored by the cable providers. *See id.* "But unlike a VOD service, RS-DVR users can only play content that they previously requested to be recorded." *See id.*

26. *See id.* (noting limitations imposed by Cablevision on customer).

27. *See id.* at 124 (describing basis for disagreement between Cablevision and its content providers).

28. *See id.* (introducing content providers' action against Cablevision).

29. *Id.*

30. *See id.* (detailing content of plaintiffs' theories and that defendants agreed not to raise fair use defense).

31. *See id.* (reviewing procedural history of noted case).

32. *See id.* at 125 (stating district court's reasoning for decision in favor of plaintiffs).

33. *See id.* (explaining district court's reasons for finding for plaintiffs).

data to the customer.[34] Cablevision appealed to the United States Court of Appeals for the Second Circuit.[35]

III. CHANNEL GUIDE: A HISTORY OF THE COPYRIGHT ACT

A. The Digital Millennium Copyright Act

Article 1, Section 8 of the Constitution provides Congress with the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[36] The intent of this limited grant of monopoly privilege is to encourage the author and inventor's creativity through reward.[37] Nonetheless, "[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."[38] Herein lays the difficulty of balancing the competing interests of preserving the rights of the authors and inventors against promoting the free exchange of ideas, information and commerce for the public benefit.[39]

Copyright protection is "wholly statutory."[40] Although it is the "role of the Congress, not the courts, to formulate new principles of copyright law when the legislature has determined that technological innovations have made them necessary," a defendant is not "immune from liability for copyright infringement simply because the technologies are of recent origin or are being applied to innovative uses."[41] Additionally, "[t]he Copyright Act does not expressly

34. *See id.* (describing how data transfer directly infringed on content providers' exclusive right of public performance).

35. *See id.* at 126 (summarizing procedural history of case).

36. U.S. CONST. art. I, § 8, cl. 8.

37. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (noting public purpose of limited grant).

38. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

39. *See Sony*, 464 U.S. at 429 (stating competing interests in copyright law); *see also* MGM Studios, Inc., v. Grokster, Ltd., 545 U.S. 913, 928-29 (2005) (remarking on tension between two values). S*ee generally* Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613 (2001) (discussing balancing interests). Furthermore, "imposing liability, not only on infringers but on distributors of software based on its potential for unlawful use, could limit further development of beneficial technologies." *Grokster*, 545 U.S. at 929. The Court, in *Grokster*, mentioned the public contempt for copyright protection limiting ease of use and the likelihood of the public becoming directly involved in copyright policy to offset their disdain. *See id.*

40. *See Sony*, 464 U.S. at 431 (citing Wheaton v. Peters, 33 U.S. 591, 661-62 (1834)) (noting that statutory law provides basis for copyright protection).

41. Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 157 (3d Cir. 1984); *see also Sony*, 464 U.S. at 430-31 (discussing legislative pursuits in copy-

render anyone liable for infringement committed by another."[42] Consequently, the Copyright Act protects authors and inventors from infringers and does not hold people liable for infringement by others.[43]

B. Copying a Work

The Copyright Act gives the owner of a copyright, among other rights, the exclusive right "to reproduce the copyrighted work in copies."[44] The Copyright Act defines "copies" as "material 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 otherwise communicated, either directly or with the aid of a machine or device."[45] A work is "fixed" when it is "embodied" in a medium "for a period of more than a transitory duration."[46] Some courts have required a volitional or causal relationship between the copying and the infringer to find direct liability, while other circuits have not followed this requirement.[47]

Copyrighted data loaded onto a computer's random access memory ("RAM") constitutes copyright infringement.[48] In *MAI Systems Corp. v. Peak Computer Inc.*, ("*MAI Systems*") the Ninth Circuit rejected Peak's argument that the loading of copyrighted software into RAM did not result in a copy being fixed.[49] The court rea-

right law); Teleprompter Corp. v. CBS, Inc., 415 U.S. 394, 414 (1974) (indicating problems of adjudicating copyright claims involving new technology).

42. *Sony*, 464 U.S. at 434. Contributory infringement, however, bridges the gap between direct infringement and no violation. *See id.* at 435.

43. *See id* at 434-34 (discussing Copyright Act).

44. *See* 17 U.S.C. § 106 (2008) (providing copyright owners' exclusive rights).

45. *Id.* § 101.

46. *Id.*

47. *Compare* Religious Tech. Ctr. v. Netcom On-Line Commc'ns Servs., Inc., 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) (requiring volitional conduct in copyright infringement action), *and* CoStar Group, Inc. v. Loopnet, Inc., 373 F.3d 544, 550 (4th Cir. 2004) (noting causal relationship between infringer and infringing conduct), *with* Playboy Enters., Inc. v. Webbworld, Inc., 991 F. Supp. 543, 550 (N.D. Tex. 1997) (holding that copyright infringement does not require intent or any particular state of mind), *aff'd*, 168 F.3d 486 (5th Cir. 1999) (unpublished table decision).

48. *See, e.g.*, MAI Sys. Corp. v. Peak Computer Inc., 991 F.2d 511, 518-19 (9th Cir. 1993) (finding RAM copies in violation of copyrights); Stenograph L.L.C. v. Bossard Assocs., Inc., 144 F.3d 96, 101-02 (D.C. Cir. 1998) (holding that loading software onto RAM creates copies); Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc., 421 F.3d 1307, 1311 (Fed. Cir. 2005) (stating that copy is created through computer's RAM).

49. *See* 991 F.2d 511, 518 (9th Cir. 1993) (rejecting Peak's argument that RAM copy does not constitute infringement). The court found no evidence that the copy was not fixed. *See id.* The loading of software into a computer, however, is generally regarded as the creation of a copy. *See id.* at 519 (citing multiple

soned that because the RAM copy could be "perceived, reproduced, or otherwise communicated," the RAM copy qualified as a copy under the Copyright Act.[50] Therefore, the court deemed the RAM copy "fixed."[51]

Volitional conduct or causation is required to directly infringe copyrights.[52] In *Religious Technology Center v. Netcom On-Line Communications Services*, ("*Netcom*") the court found no direct liability for a third party who maintained an internet service provider ("ISP") system being used to host user-supplied copyrighted works.[53] The court stated that holding Netcom liable for direct copyright infringement would result in unreasonable liability.[54] On this basis, the court determined that "some element of volition or causation" in creating the copy was necessary to find direct infringement.[55]

Following the *Netcom* decision, Congress enacted the Online Copyright Infringement Liability Limitation Act, which provided safe-harbors for ISPs from copyright infringement committed by its users.[56] The ISP must meet certain requirements before it can take advantage of the safe-harbors, and must be involved in blocking re-

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sources that conclude loading software onto computer constitutes copying under Copyright Act).

50. *See id.* (quoting 17 U.S.C. § 101) (explaining court's reasoning for finding copyright infringement). "The law also support[ed] the conclusion that Peak's loading of copyrighted software into RAM creates a 'copy' of that software in violation of the Copyright Act." *Id.* at 518.

51. *See id.* at 519 (examining features of RAM).

52. *See, e.g.*, Religious Tech Ctr. v. Netcom On-Line Commc'ns Servs., 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) (referencing court's requirement of volitional or causational conduct to satisfy direct infringement); CoStar Group, Inc. v. Loopnet, Inc., 373 F.3d 544, 549-50 (4th Cir. 2004) (requiring causal relationship between copying and machine owner).

53. *See* 907 F. Supp. 1361, 1368 (N.D. Cal. 1995) (explaining Netcom's systems functions).

54. *See id.* at 1369 ("Plaintiffs' theory would create many separate acts of infringement and, carried to its natural extreme, would lead to unreasonable liability."). Contributory infringement is the correct theory for determining a machine owner's liability for others' directly infringing conduct. *See id.* The defendants in *Netcom* only owned and provided a system for others to use. *See id.* at 1369-70.

55. *Id.* at 1370. Requiring volitional conduct or causation helps to separate the differences between contributory infringement and direct infringement. *See id.* at 1369; *see also CoStar*, 373 F.3d at 551 (indicating that volitional or causation element furthers purpose of Copyright Act).

56. *See* 17 U.S.C. § 512 ("A service provider shall not be liable [. . .] for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider. . . ."). The legislation only applies to certain ISPs. *See id.* § 512 (a)-(d) (providing safe harbor to transitory digital network communications, system caching, information residing on systems or networks at direction of users and information location tools).

peat infringers and taking appropriate steps to prevent infringement.[57]

Moreover, a party must actually engage in infringing conduct for a court to find direct copyright infringement.[58] The Fourth Circuit, in *CoStar Group, Inc. v. Loopnet, Inc.*, ("*CoStar*") required a "nexus sufficiently close and causal" existing between the illegal copying and the machine owner to find actual infringement.[59] The court noted that the Copyright Act does not extend direct liability to third parties; rather, liability follows the party "who *actually engages* in infringing conduct – the one who directly violates the prohibitions."[60] Loopnet, an ISP, provided a website where users copied and displayed CoStar's copyright protected photographs.[61] The court reasoned that holding persons "involved in the ownership, operation, or maintenance of a transmission facility that automatically records material – copyrighted or not" liable for direct infringement "would miss the thrust of the protections afforded by the Copyright Act."[62]

An automated service, however, is liable for copyright infringement when the service is more than a passive actor.[63] In *Playboy Enterprises v. Webbworld*, the Fifth Circuit, affirming a district court opinion without publishing its own decision, upheld direct liability for copyright infringement by an automated service.[64] The district

57. *See generally id.* (stating requirements ISP must meet for safe-harbor limitations on liability).

58. *See CoStar*, 373 F.3d at 549-50 (holding that person must be directly involved with infringing conduct). Infringing conduct occurs when one of the exclusive rights of the Copyright act is violated. *See generally* 17 U.S.C. § 106 (2008).

59. *See* 373 F.3d 544, 550 (4th Cir. 2004) ("The *Netcom* court described this nexus as requiring some aspect of volition or causation."). According to the court in *CoStar*, the nexus must be "sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner." *See id.* Ownership of the machine used for illegal copying by others is not alone sufficient to find direct infringement. *See id.*

60. *Id.* at 549-50 (emphasis in original). The court stated that a customer is responsible for the copy, not the owner of the copier. *See id.* at 550. The ISP is similar to the owner of the copier because both are not actually engaged in the infringing conduct. *See id.*

61. *See id.* at 547 (describing Loopnet's service operation).

62. *Id.* at 551; *cf.* Religious Tech. Ctr. v. Netcom On-Line Commc'ns Servs., 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) (indicating requirement of volition or causation connecting infringement to defendant).

63. *See* Playboy Enters., Inc. v. Webbworld, Inc., 991 F. Supp. 543, 553 (N.D. Tex. 1997) (holding that automated service can still infringe copyrights), *aff'd*, 168 F.3d 486 (5th Cir. 1999) (unpublished decision).

64. *See id.* (affirming on grounds stated in district court opinion). Playboy sued defendant Webbworld for displaying images on its website substantially similar to those owned by Playboy. *See id.* at 548.

court distinguished the case from *Netcom* by claiming the defendants were not passive conduits of copyright-infringed material.[65] Because Webbworld sold images, and not access to the images, the court found direct infringement of copyrighted works by the defendants.[66]

C. Time-Shifting and Direct Infringement

Manufacturing and selling a time-shifting device does not violate copyrights.[67] The Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*, ("*Sony*") decided whether manufacturing video tape recorders ("VTRs") used by consumers to time-shift, or record television for later viewing, violated copyrights.[68] The Court recognized that time-shifting would increase the television viewing audience for any given show, creating an incentive for content providers to allow time-shifting.[69] The Court deemed that, without continued contact between the customer and the manufacturer, a substantial number of copyright holders would approve the time-shifting VTR, and the VTR would cause little harm to the potential market for the content providers' copyrighted works.[70]

Operators and publishers of an automated electronic database, however, violated copyrights when offering copyrighted data to

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65. *See id.* at 552 (noting differences between case and *Netcom*). The court labeled Webbworld a "commercial destination within the internet." *See id.* Webbworld took "affirmative steps" in creating the copies. *See id.*

66. *See id.* at 553 (stating court's conclusion on copyright issue). The district court analogized Webbworld to a store selling images unlike the defendants in *Netcom* who were merely providers of access to the mall. *See id.* According to the court, the defendants in *Netcom* were passive conduits of infringed material and played no active role in copyright infringement. *See id.*

67. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 454-56 (1984) (finding that time-shifting does not infringe copyrights).

68. *See id.* at 419-20.

69. *See id.* at 443 (detailing benefits of time-shifting for content providers). Third party conduct, however, is irrelevant to a direct infringement claim. *See id.* at 446.

70. *See id.* at 456 (listing Court's conclusions). The only contact between Sony and the VTR users was at the moment of sale with no further contact or involvement on Sony's part. *See id.* at 438. Consequently, Sony was not directly involved in the infringing conduct. *See id.* at 456. Furthermore,

> Sony demonstrated a significant likelihood that substantial numbers of copyright holders who license their works for broadcast on free television would not object to having their broadcasts time-shifted by private viewers. And second, respondents failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works.

Id.

consumers.[71] In *N.Y. Times Co. v. Tasini*, ("*Tasini*") the Supreme Court corrected a misreading of *Sony*, stating that the operators and publishers of an automated electronic database were not just selling "equipment" used for the actual infringing, but were selling the individual copyrighted articles not manipulated by the user.[72] The Court held that the publishers infringed the authors' exclusive rights of reproduction and distribution.[73] The application of *Sony* was further defined by the Court in *MGM Studios, Inc. v. Grokster, Ltd.*[74] The Court in *Grokster* explained that a distributor is liable for infringement by third parties when the product is distributed with clear expression or other affirmative steps are taken to promote copyright infringement.[75]

Similarly, a copy shop responsible for distributing course packets to students with copyrighted material infringes copyrights.[76] Sitting en banc, the Sixth Circuit in *Princeton University Press v. Michigan Document Services* ("*Princeton*") noted that, when copying "was performed on a profit-making basis by a commercial enterprise," the for-profit users could not "stand in the shoes of their customers."[77] The court held the copy shop liable for copyright

71. *See* N.Y. Times Co. v. Tasini, 533 U.S. 483, 506 (2001) (finding operators and publishers in violation of copyrights).

72. *See id.* at 504 ("The Electronic Publishers, however, are not merely selling 'equipment'; they are selling copies of the Articles. And, as we have explained, it is the copies themselves, without any manipulation by users, that fall outside the scope of the § 201(c) privilege."). The operators and publishers of the databases argued that, under *Sony*, they could only be contributorily liable. *See id.* at 504. They also argued that the user manipulated the content by generating specific search results. *See id.* at 505. The Court countered that the articles themselves were not manipulated and were intact as received by the publishers from the authors. *See id.* at 502.

73. *See id.* at 506 (providing case holding). The Court decided that the publishers violated copyrights and were not protected under 17 U.S.C. § 201(c). *See id.*

74. *See* 545 U.S. 913, 933 (2005) (clarifying Ninth Circuit's reading of *Sony*). The defendant, Grokster, distributed software allowing users to share electronic files through peer-to-peer networks. *See id.* at 919. The Court corrected the Ninth Circuit's reading of *Sony*'s substantial lawful use doctrine. *See id.* at 933. The Ninth Circuit held that a producer is never contributorily liable when the product is capable of substantial lawful use. *See id.* at 934. The Supreme Court stated that "*Sony* barred secondary liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement." *Id.* at 933.

75. *See id.* at 936-37 (detailing application of *Sony* holding).

76. *See* Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1389-90 (6th Cir. 1996) (en banc) (determining that copy shop violated copyrights by distributing to students for profit).

77. *Id.* at 1389 (internal quotations and citations omitted). Copying for the purpose of profit by a commercial enterprise does not exempt one from liability.

infringement because the copy shop's employees, not the customers, were responsible for the copying.[78]

D. Public Performance of a Copyrighted Work

The Copyright Act gives the owner of a copyright the exclusive right to public performance of the copyrighted work.[79] The Copyright Act defines performing a work "publicly" as "to transmit or otherwise communicate a performance or display 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 and at the same time or at different times."[80] A passive carrier is exempt from liability if: (1) the carrier has no control over the content and the recipients of the transmission; and (2) the passive carrier is merely providing the means for the retransmission for the use of others.[81] Congress stated that any method of performance or display of images or sound is a transmission.[82] Further, the Copyright Act governs a transmission that reaches the public in any form.[83] A transmission is public even if the recipients of a transmission are not gathered in a single place.[84]

Retransmission of a television broadcast is a public performance.[85] In *WGN Continental Broadcasting Co. v. United Video, Inc.*, the Seventh Circuit determined that an indirect performance to the public could violate the Copyright Act.[86] The court found that United Video was not a passive carrier because it did not retransmit the content in exactly the same condition it received the content, a

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See id. Specifically, the fair use defense does not apply in such circumstances. *See id.*

78. *See id.* (stating courts holding and reasons for finding copyright infringement).

79. *See* 17 U.S.C. § 106 (2008) (listing copyright owners' exclusive rights).

80. 17 U.S.C. § 101 (2008).

81. *See* 17 U.S.C. § 111 (a)(3) (2008) (providing passive carrier exception).

82. *See* H.R. REP. NO. 94-1476, at 64 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678 (defining transmission).

83. *See id.* (establishing guidance for Copyright Act).

84. *See id.* at 64-65 (explaining Congress' interpretation of "public").

85. *See* WGN Cont'l Broad. Co. v. United Video, Inc., 693 F.2d 622, 625 (7th Cir. 1982) (discussing application of right to television rebroadcasts).

86. *See id.* (finding indirect performances under Copyright Act's definition of public performance). Indirectly transmitting content to the public by routing the signal to cable systems did not automatically exempt United Video under the passive carrier exemption. *See id.* Finding United Video exempt from infringement would mean it could "mutilate to its heart's content the broadcast signal it picked up" without allotting the provider a remedy. *Id.*

necessity for passive carrier immunity.[87] Moreover, in *National Football League v. PrimeTime 24 Joint Venture*, the Second Circuit found that, although the transmission from the NFL to a satellite was not "to the public," the transmission of content to the subscribers was public.[88]

Furthermore, a single viewer can be the public.[89] In *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, ("*Redd Horne*") the Third Circuit decided that transmitting a performance to the public-albeit separately in private rooms-amounted to a public performance under the Copyright Act.[90] The court analogized the services offered in *Redd Horne* to a movie theater with the added convenience of privacy.[91] Therefore, the performances were open to the public even if they were essentially private screenings.[92] Following this reasoning, another court has held that electronic rentals to the public through a hotel room service also constituted public performances.[93]

IV. PLAY: THE SECOND CIRCUIT'S ANALYSIS

A. Buffering Data

The Second Circuit focused on whether the buffering of data by the RS-DVR resulted in a copying of the content providers'

87. *See id.* ("United Video cannot avail itself of the passive carrier exemption, because it was not passive — it did not retransmit WGN's signal intact.").

88. 211 F.3d 10, 13 (2d Cir. 2000). PrimeTime provided secondary transmissions of football broadcasts to Canadian subscribers. *See id.* at 11. The court held that PrimeTime's transmissions were a step in the process through which the NFL's copyrighted content reached the public. *See id.* at 13. The court determined that the transmission was a public performance under the Copyright Act. *See id.*

89. *See* Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 159 (3d Cir. 1984) (finding single viewer constituted public).

90. *See id.* at 159 (concluding private viewings were public performances).

91. *See id.* (stating similarities between movie theater and services disputed in case). Just like movie theaters, the private viewings were open to any member of the public by paying a fee. *See id.* The only difference between the movie theater example and the private viewings was the privacy. *See id.* Thus, the private viewings were essentially open to the public. *See id.*

92. *See id.* (reasoning that performances were public).

93. *See* On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787, 790 (N.D. Cal. 1991) (finding copyright violation where rentals were delivered electronically to separate hotel rooms). "[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 direct proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission." *Id.* (quoting H.R. REP. NO. 83, at 29 (1967)).

works.[94] According to the court, for a work to be defined as a "copy," the work must (1) be "embodied" in a medium, and (2) be embodied "for a period of more than a transitory duration."[95]

The Second Circuit found that Cablevision's buffering system embodied the content providers' works.[96] The court concluded that the buffering system met the embodiment requirement because every second of a work was in the buffer.[97] However, as noted previously the analysis does not end with mere embodiment.[98] Although some cases only discuss embodiment in "copying," the Second Circuit assumed that the "transitory duration" requirement was not in dispute in those cases.[99] As to the duration requirement, the Second Circuit concluded "the works in this case are embodied in the buffer for only a 'transitory' period, thereby failing the duration requirement."[100] The data only lasted in the buffer for 1.2 seconds before it was automatically overwritten after processing.[101] Therefore, the new buffering system does not create copies as defined by the Copyright Act.[102]

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94. *See* Cartoon Network L.P. v. CSC Holdings, Inc., 536 F.3d 121, 127 (2d Cir. 2008) (discussing issue presented by Cablevision's newly proposed buffering system).

95. *See id.* (quoting 2 MELVILLE B. NIMMER & DAVID NIMMER, *Nimmer on Copyright* § 8.02(B)(3), 8-32 (2007)) (providing requirements of copying under Copyright Act). Both requirements must be present for a work to be defined as a copy. *See id.* "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.*

96. *See id.* at 129 (detailing embodiment requirement). "[A] work's 'embodiment' in either buffer 'is sufficiently permanent or stable to permit it to be perceived, reproduced,' (as in the case of the ingest buffer) 'or otherwise communicated' (as in the BMR buffer)." *Id.* (quoting 17 U.S.C. § 101 (2008)). The data either was transmitted through the RS-DVR system, or it would be copied to the Arroyo Server if requested. *See id.*

97. *See id.* (explaining reasoning behind buffering embodiment).

98. *See id.* (noting that no case law points to embodiment being final step for analyzing copied works).

99. *See id.* at 128 (holding "transitory duration" language necessary for work to be copied). The Second Circuit distinguished this case from *MAI Systems* by noting that "transitory duration" was more than likely not in dispute; otherwise, the Ninth Circuit would have mentioned the topic. *See id.* at 129. The Second Circuit stated that "those cases provide no support for the conclusion that the definition of 'fixed' does not include a duration requirement." *Id.*

100. *Id.* at 130.

101. *See id.* at 129 (stating that data remained in buffer for 1.2 seconds before being overwritten). Although the data was stored long enough for Cablevision to make reproductions, the data was never "fixed" in the buffers because it was stored for no longer than a "transitory" period. *See id.* at 130.

102. *See id.* ("Accordingly, the acts of buffering in the operation of the RS-DVR do not create copies, as the Copyright Act defines that term.").

B. Creating Playback Copies

Usually, the copyright infringer's identity is not a question for the court to decide because the plaintiff typically identifies the infringer when filing the claim.[103] A central part of the dispute in this case rested on whether the customer or Cablevision was responsible for the creation of the copy recorded onto the Arroyo Server's hard disks.[104]

In copyright law, there must be volition or causation by the infringer for the infringer to be directly liable.[105] Cablevision's proposed volitional conduct consisted of designing, housing and maintaining the machinery for the customer.[106] The Second Circuit stated that the RS-DVR user is similar to the VCR user because the copy is made automatically upon the user's request.[107] The Second Circuit rejected the district court's argument that Cablevision resembled a copy shop.[108] The court differentiated between a human employee producing a copy and a command sent to a machine to create a copy.[109] The Second Circuit reasoned that Cablevision merely sold customers the ability to use the system, acting more like

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103. *See id.* (expressing problem before court).

104. *See id.* (proposing that question of who created copies determined whether Cablevision directly infringed content providers' exclusive rights). If Cablevision were found to be responsible for creating the copies, it would have directly infringed on the content providers' exclusive rights; however, if the customers were found to be responsible for creating the copies, Cablevision would at best be contributorily liable — a claim not pursued by the content providers. *See id.*

105. *See* Costar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 550 (4th Cir. 2004) (holding that "[t]here must be actual infringing conduct with a nexus sufficiently close and causal" for there to be direct liability); *see also* Religious Tech. Ctr. v. Netcom On-Line Commc'ns Servs., 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) (reasoning that volition or causation is essential element). Being a third party does not automatically violate copyrights. *See id.*

106. *See Cartoon Network*, 536 F.3d at 131 (stating Cablevision's volitional conduct).

107. *See id.* (stating that RS-DVR automatically creates copies at customer's command). The Second Circuit analogized Cablevision's role to that of a VCR, noting that the person who presses the record button on the VCR provides the necessary volitional act for direct infringement. *See id.*

108. *See id.* (finding district court's reasoning for finding Cablevision directly liable flawed).

109. *See id.* (highlighting differences between copy shop and Cablevision). In *Princeton University Press v. Michigan Document Services*, a copy shop distributed course packets to students with copyrighted material from professors who provided material to the shop. *See* 99 F.3d 1381, 1384 (6th Cir. 1996). The Fourth Circuit found that the shop directly infringed because this shop was a direct participant of the copying. *See id.* at 1391.

a proprietor of the store.[110] Thus, the Second Circuit found that the RS-DVR customers were responsible for making the copies through the RS-DVR system.[111]

Relying on *Sony Corporation of America v. Universal City Studies, Inc.*, the Second Circuit distinguished direct infringement from contributory infringement.[112] The court reasoned that explicitly separating direct and contributory infringement followed the congressional intent of the Copyright Act to "not expressly render anyone liable for infringement committed by another."[113] According to the court, "the doctrine of contributory liability stands ready to provide adequate protection to copyrighted works."[114] Therefore, the court determined that Cablevision's part in recording the content did not rise to the level of direct infringement.[115]

C. Transmission of Data to the Customer

Finally, the content providers claimed that the transmission of copied data to customers violated the content providers' exclusive right of public performance.[116] The Copyright Act provides that performing a work "publicly" means "to transmit or otherwise communicate a performance or display of the work . . . to the public."[117] Neither party disputed whether the RS-DVR playback transmits to the customer.[118] The Second Circuit did not decide, however,

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110. *See Cartoon Network*, 536 F.3d at 132 (describing Cablevision as store proprietor). Cablevision also lacked control over what content would be recorded by the customer, therefore playing a less active role in the copying itself. *See id.*

111. *See id.* (concluding that customers, for purposes of copyright infringement, made copies, not Cablevision).

112. *See id.* at 132-33 (referencing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434 (1984) (noting Supreme Court's decision regarding contributory infringement in *Sony*). The *Sony* Court maintained a "meaningful distinction" between contributory infringement and direct infringement that the Second Circuit preserved. *See id.*

113. *Id.* at 133. The Second Circuit also determined that:

> If Congress had meant to assign direct liability to both the person who actually commits a copyright-infringing act and any person who actively induces that infringement, the Patent Act tells us that it knew how to draft a statute that would have this effect. Because Congress did not do so, the Sony Court concluded that '[t]he Copyright Act does not expressly render anyone liable for infringement committed by another.'

See id. (quoting *Sony*, 464 U.S. at 434).

114. *Id.* at 132.

115. *See id.* at 133 (concluding that reproduction of content would not create direct liability for Cablevision).

116. *See id.* at 134 (considering final theory of content providers' claim).

117. 17 U.S.C. § 101 (2008).

118. *See Cartoon Network*, 536 F.3d at 134 (noting that transmission to customer not in dispute).

whether Cablevision "performs" the work to the customer because the court found that the transmission was not "to the public."[119]

Determining who is "capable of receiving" the transmitted performance is imperative for deciding whether the performance is made "to the public."[120] Cablevision's RS-DVR operates by transmitting a copy of the previously recorded content, which is decoded only by that individual's cable box, to the individual subscriber who requested the recording.[121] The Second Circuit rejected the district court's interpretation of the transmission clause.[122] According to the Second Circuit, the transmission clause focuses on the audience receiving a particular "transmission" or "performance," not the underlying "work."[123]

On appeal, the content providers contended that Cablevision sends the "same performance" of a work to customers when it transmits through the RS-DVR playback.[124] The Second Circuit rejected this argument because it could lead to inappropriate applications of the law, such as holding a person liable for copyright infringement for transmitting the "original performance" of a work by recording a program and subsequently watching the tape in another room.[125] The court claimed that prior jurisprudence pointed to-

119. *See id.* ("We need not address Cablevision's first argument further because, even if we assume that Cablevision makes the transmission when an RS-DVR playback occurs, we find that the RS-DVR playback, as described here, does not involve the transmission of a performance 'to the public.'").

120. *See id.* (determining whether transmission is made public is relevant to deciding if right has been infringed). Legislative history of the Copyright Act supports the thesis that exactly who receives the transmission plays a large role in determining whether the work is made "to the public." *Id.* at 134-35

121. *See id.* at 135 (detailing how RS-DVR transmits data to customer who requested recording of that content). Cablevision's RS-DVR only transmits the copy to the one subscriber responsible for the creation of the copy, making that person alone capable of receiving the individualized copy. *See id.* at 137. The content providers argued that it was irrelevant that the copies would be "unique" copies of the original work. *See id.* Finding no support for this argument, the Second Circuit turned to its interpretation of the transmit clause and concluded that "any factor that limits the potential audience of a transmission is relevant." *Id.*

122. *See id.* at 135 (explaining difference in interpretation). The underlying work is the show, while the transmission is the unique copy sent to each individual. *See id.* The district court defined the potential audience as the entire group set to receive the underlying work, not a particular transmission. *See id.*

123. *See id.* at 136 (interpreting statutory language drafters considered non-public transmissions when drafting narrow language of statute).

124. *See id.* (detailing argument by content providers on appeal that Cablevision provides "same performance"). "Thus, according to [the content providers], when Congress says that to perform a work publicly means to transmit . . . a performance . . . to the public, they really meant 'transmit . . . the "original performance" . . . to the public.'" *Id.*

125. *See id.* (rejecting argument by content providers that Cablevision would be providing "original performance").

ward looking downstream to the potential audience, not upstream to the provider's intended initial audience.[126] Therefore, although the initial audience was the public, the particular transmission to the individual subscriber did not result in a copy made "to the public."[127]

The Second Circuit distinguished this case from *On Command*, reasoning that the holding conflicted with the court's interpretation of the transmission clause because the *On Command* court broadly defined any commercial transmission as a transmission "to the public."[128] Additionally, the Second Circuit determined that the Third Circuit's interpretation of the distribution clause that "even one person can be the public" did not require the Second Circuit to find one person to qualify as the public.[129] Thus, the transmission of the data by Cablevision would not constitute direct infringement under the transmission clause because the transmissions were not "to the public".[130]

In conclusion, the Second Circuit found that the proposed RS-DVR system would not directly infringe on the content providers' exclusive rights to reproduce and publicly perform their copyrighted works.[131] The court reversed the district court's grant of summary judgment, vacating the district court's injunction against Cablevision and remanding the case for further proceedings.[132]

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126. *See id.* at 137 (reasoning that performance would be made "to the public" if receiving audience of copy was public rather than initial audience). The content providers relied on *National Football League* to argue that when the stream is split and transmitted to the RS-DVR, Cablevision is publicly performing the work. *See id.* (delivering second argument based on *National Football League*). The court rejected this argument, stating that the *National Football League* court did not decide on the issue and only focused on the final transmission in the chain of the performance. *See id.*

127. *See id.* (discussing downstream effect of transmission).

128. *See id.* 139 (disagreeing with *On Command*'s interpretation of transmission clause). The Second Circuit contended that a transmission is not always public. *See id.* To find every transmission public would rewrite the statutory language. *See id.*

129. *See id.* (distinguishing cases from present case). The transmissions in *On Command* were identical to one another. *See id.* Therefore, an identical video could be shown to multiple viewers successively. *See id.* The transmission clause, however, requires that the court look at the potential audience of the transmission at issue. *See id.*

130. *See id.* (examining transmission of data).

131. *See id.* at 140 (providing holding of case).

132. *See id.* (concluding case).

V. REPLAY: DID THE SECOND CIRCUIT CHANGE THE CHANNEL?

A. The Exclusive Right to Reproduction

1. *The Buffer Data*

The Second Circuit distinguished the buffer data in the case from the RAM of *MAI Systems* by requiring that the data be stored for a "transitory duration" for the data to be fixed.[133]In *MAI Systems*, the Ninth Circuit stated that no facts indicated that the RAM did not fix the data.[134] The data was repeatedly overwritten as opposed to the data in *MAI Systems.*[135] Here, the data was stored for, at most, 1.2 seconds before being overwritten.[136] The court determined that 1.2 seconds was not enough time for the work to "be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[137] Thus, the court determined that 1.2 seconds was not long enough for the work to be properly "fixed," as required by the Copyright Act.[138]

The *MAI Systems* court focused on the "sufficiently permanent or stable" language of the statute, the Second Circuit decided that the court in *MAI Systems* was not ultimately faced with the issue of duration. [139] Conversely, other courts have relied upon the durational requirement.[140] The *Netcom* court, noting *MAI Systems*, found that storing messages for eleven days qualified them as copies

133. *See id.* at 129 (distinguishing case from *MAI Systems*).

134. *See* MAI Sys. Corp. v. Peak Computer Inc., 991 F.2d 511, 518 (9th Cir. 1993) ("After reviewing the record, we find no specific facts (and Peak points to none) which indicate that the copy created in the RAM is not fixed.").

135. *See Cartoon Network*, 536 F.3d at 129-30 (isolating differences between RAM data and buffer data of RS-DVR). One commentator posits that a poem written in sand and washed away by the ocean would not satisfy the durational requirement because it can only be perceived for a short time. *See* Ned Snow, *Article: The TiVo Question: Does Skipping Commercials Violate Copyright Law*, 56 SYRACUSE L. REV. 27, 38 (2005) (discussing embodiment of work requiring more than transitory duration).

136. *See Cartoon Network*, 536 F.3d at 130 (calculating amount of time data is embodied during buffering process).

137. *Id.* at 129. The court reasoned that 1.2 seconds constituted a "transitory duration" and that the data was not "fixed" for a substantial amount of time. *See id.* Thus, the court distinguished the present facts from *MAI Systems* because in *MAI Systems* the storage of data was much longer. *See id.*

138. *See id.* at 130 (stating that works would not be fixed in RS-DVR buffer data).

139. *See id.* at 129 (emphasizing that *MAI Systems* did not deal with durational requirement).

140. *See, e.g.*, Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1368 (N.D. Cal. 1995) (providing "transitory duration" requirement in *MAI Systems*); CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 551 (4th Cir. 2004) (defining "transitory duration" requirement).

under the Copyright Act.[141] The Fourth Circuit, in *Costar*, stated that "[w]hile temporary electronic copies may be made in this transmission process, they would appear not to be 'fixed' in the sense that they are 'of more than transitory duration.'"[142] The court asserted that the transitory duration requirement looks not only at the length of the transmission but also at the type of transmission.[143] The RS-DVR buffering system in *Cable News Network* is similar to the ISP in *CoStar* because both systems are automated and are only steps in the transmission of data.[144] Therefore, the data in this case was not "fixed" because it would not be stored long enough and the transmission would be automatic.[145]

The Copyright Office does not recognize a durational requirement, yet the Second Circuit pointed out that it is not bound by the Copyright Office's report.[146] Moreover, the court found the reasoning of the report questionable because a failure to recognize a durational requirement reads the "transitory duration" language out of the statute.[147] Although the Copyright Office does not recognize a durational requirement, it did not explicitly state that

141. *See Netcom*, 907 F. Supp. at 1368 (finding that eleven days was sufficient for violation of Copyright Act). "Even though the messages remained on their systems for at most eleven days, they were sufficiently 'fixed' to constitute recognizable copies under the Copyright Act." *Id.* The court seemed hesitant to find the messages fixed when they were being overwritten. *See id.*

142. *CoStar*, 373 F.3d at 551. The Fourth Circuit does cite to *MAI Systems* in explaining that its holding does not mean a person downloading copyrighted material onto a computer is incapable of copyright infringement. *See id.*

143. *See id.* ("'Transitory duration' is thus both a qualitative and quantitative characterization. It is quantitative insofar as it describes the period during which the function occurs, and it is qualitative in the sense that it describes the status of transition."). According to the court, when a computer owner downloads copyrighted material, it is no longer stored for a transitory duration because the computer owner now possesses the material. *See id.*

144. *Compare id.* (contrasting person who downloads copyrighted works onto their computer with ISP which transmits data to user for user's own use) *with* Cartoon Network L.P. v. CSC Holdings, Inc., 536 F.3d 121, 129-30 (2d Cir. 2008) (stating buffering system process' relationship to 'transitory duration').

145. *See Cartoon Network*, 536 F.3d at 130 (finding data not stored for more than "transitory duration").

146. *See id.* at 129 (rejecting plaintiffs' argument that Copyright Office's reading of Copyright Act is binding).

147. *See id.* (finding report unpersuasive). The report states that "attempting to draw a line based on duration may be impossible." U.S. Copyright Office, *DMCA Section 104 Report* at 113 (Aug. 2001), *available at* http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf. Courts have taken a factual analysis when determining the transitory duration requirement, demonstrating that it is possible. *See, e.g.*, *Cartoon Network*, 536 F.3d at 130 (holding that 1.2 seconds does not meet transitory duration requirement); Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1368 (N.D. Cal. 1995) (determining whether eleven days satisfied transitory duration requirement).

none existed.[148] The Second Circuit relied on *Nimmer on Copyright* in finding a durational requirement as it was written into the statute, and since no reason existed to follow the Copyright Office, the Second Circuit held instead that a durational requirement does exist.[149] Consequently, the Second Circuit was correct in finding no direct infringement by the buffering system because the data was never "fixed" for a "transitory duration."[150]

2. *Creating Playback Copies*

In *Cable News Network*, the Second Circuit found that Cablevision's automated RS-DVR system could not exercise the necessary volitional conduct for the creation of playback copies to rise to the level of direct infringement.[151] The *Netcom* court required that some element of volitional conduct or causation be present to find a third party in direct violation of copyright.[152] The Supreme Court in *Sony* determined that a VTR did not infringe copyrights directly or indirectly because the manufacturer of the VTR only sold the machine to the customer and was therefore not responsible for pressing the record button on the machine.[153] Through the RS-DVR, Cablevision controls, maintains and houses an automated system to record the content the customer has requested.[154] Thus, there is more volitional conduct in the present case than in *Sony* because the relationship between the customer and Cablevision extends beyond providing the RS-DVR hardware.[155] The Second Circuit posited that Cablevision is similar to a proprietor of a store

148. *See Cartoon Network*, 536 F.3d at 129 (locating nothing explicit in report against "fixed" definition including durational requirement).

149. *See id.* at 127-29 (referencing *Nimmer on Copyright* for durational requirement and finding Copyright Office's report unpersuasive).

150. *See id.* at 130 (finding no violation of copyright act through buffering system).

151. *See id.* at 133 (deciding that RS-DVR operation would not include volitional conduct required for direct infringement). The automated service is a passive conduit, with the customer responsible for creating the copy. *See id.*

152. *See Netcom*, 907 F. Supp. at 1370 (requiring element of causation or volitional conduct for copyright infringement).

153. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 441-42 (1984) (determining that VTR manufacturer did not infringe copyrights because manufacturer was not connected to infringing conduct sufficiently). Sony manufactured and sold the machine with no further contact existing between it and the customer. *See id.*

154. *See Cartoon Network*, 536 F.3d at 131 (stating Cablevision's volitional conduct).

155. *See id.* (concluding that volitional conduct of Cablevision is similar to conduct of VTR manufacturer). The RS-DVR is housed by Cablevision and the machinery is automatically creating copies, whereas in *Sony* the VTR is only produced and sold by *Sony*. *See id.* at 124-25.

because Cablevision will provide access to store merchandise.[156] The content providers argued that the proposed RS-DVR is more like the copy shop in *Princeton*.[157] The Second Circuit correctly stated that this analogy fails because the court in *Princeton* focused on the conduct of human employees creating the copies; whereas for the RS-DVR, a customer pushes the record button and an automated time-shifting service creates the copy.[158]

Alternatively, Cablevision's RS-DVR is similar to the ISPs in *CoStar* and *Playboy*.[159] Here, however, Cablevision is not "actually engaging" in infringing conduct; rather, Cablevision is simply selling access to this technology, not the content itself, as customers already receive the content, regardless of whether they utilize the RS-DVR.[160] Moreover, as pointed out by the Second Circuit, Cablevision is not in control of what content the customer records beyond allowing the user to record content to which they already subscribe.[161] Therefore, the RS-DVR is an intermediary between a copy shop and a VTR, and because there is no volitional conduct and no

156. *See id.* at 132 (analogizing store owner to Cablevision).

157. *See id.* at 131 (noting content providers' analogy of RS-DVR to copy shop in *Princeton*).

158. *See id.* at 131-32 (rejecting content providers' analogy to *Princeton* copy shop). The copy shop in *Princeton* distributed the course packets to students. *See* Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1384 (6th Cir. 1996) (finding copy shop not liable for reproducing copyright works). The copy shop physically produced the course packets. *See id.* Moreover, the *Princeton* court focused primarily on the plaintiff's fair use defense rather than the connection between the copy shop and the copying because this connection was quite obvious. *See id.* at 1385-90.

159. *See, e.g.*, CoStar Group, Inc. v. Loopnet, Inc., 373 F.3d 544, 556 (4th Cir. 2004) (holding that ISP owner's volitional conduct did not rise to level of infringement required); Playboy Enters. v. Webbworld, Inc., 991 F. Supp. 543, 552-53 (N.D. Tex. 1997) (stating that ISP owner is only providing access to images whereas defendant sold images), *aff'd*, 168 F.3d 486 (5th Cir. 1999) (unpublished decision).

160. *See Playboy*, 991 F. Supp. at 553 (asserting that party acting as link between customers and transmission of data should not be held liable). The court in *CoStar* stated that holding persons in violation of the Copyright Act liable for ownership, operation, or maintenance of a transmission facility would miss the intention of the Copyright Act. *See CoStar*, 373 F.3d at 551 ("To conclude that these persons are copyright infringers simply because they are involved in the ownership, operation, or maintenance of a transmission facility that automatically records material-copyrighted or not-would miss the thrust of the protections afforded by the Copyright Act."). *See* Cartoon Network L.P. v. CSC Holdings, Inc., 536 F.3d 121, 131 (2d Cir. 2008) (asserting Second Circuit noted that Cablevision only controlled, maintained and housed system used for RS-DVR). By holding Cablevision liable the courts will miss the "thrust" of the Copyright Act. *See id.* (declaring liability would violate intent of Copyright Act). *Compare CoStar*, 373 F.3d at 551 (indicating conflict with purpose of Copyright Act), *with Cartoon Network*, 536 F.3d at 131 (drawing similarities between conduct in *CoStar* and present case).

161. *See Cartoon Network*, 536 F.3d at 125 (noting that customers can only access content they recorded).

employee involved, there is likely no direct infringement by Cablevision.[162]

In support of their Petition for Writ of Certiorari, the content providers pointed out that the Second Circuit neglected to comment on the Supreme Court's decision in *Tasini* regarding copyright infringement by automated services.[163] The holding in *Tasini*, however, that an automated service can be held liable for copyright infringement, does not mean that every automated service is liable for infringement.[164] As noted above, the requisite volitional conduct does not exist here because Cablevision is not responsible for what customers record on the RS-DVR.[165] Cablevision simply provides the technology for the customer to record, or time-shift, content they already receive.[166]

Additionally, the content providers argued that Congress never intended immunity for non-internet providers like Cablevision's RS-DVR under the Online Copyright Infringement Liability Limitation Act.[167] Hence, Congress only intended to narrowly apply the safe-harbor provision to ISPs.[168] Cablevision, however, asserted that the Fourth Circuit rejected this very argument in *CoStar*.[169] The *CoStar* court, quoting from the Act itself, reasoned that immunity does not exclusively extend to ISPs.[170] Therefore, Cablevision did not create

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162. *See id.* at 131-32 (distinguishing RS-DVR from VTR and copy shop).

163. *See* Petition for Writ of Certiorari at 2, *Cartoon Network*, 536 F.3d 121 (Oct. 6, 2008) (No. 08-448) 2008 WL 4484597 ("Petition for Writ") (contending that court misapplied *Sony* and omitted analysis of *Tasini*).

164. *See* N.Y. Times Co. v. Tasini, 533 U.S. 483, 504 (2001) (emphasizing that ruling focuses on creation of copies not access to copies). The Court distinguished selling equipment from selling the copies themselves. *See id.* "The Electronic Publishers, however, are not merely selling 'equipment'; they are selling copies of the Articles. And, as we have explained, it is the copies themselves, without any manipulation by users, that fall outside the scope of the § 201(c) privilege." *Id.*

165. *See Cartoon Network*, 536 F.3d at 133 (finding no volitional conduct by Cablevision).

166. *See id.* at 124-25 (demonstrating how RS-DVR operates).

167. *See* Petition for Writ, *supra* note 163, at 26 (contending that Online Copyright Infringement Liability Limitation Act narrows exemption to ISPs).

168. *See id.* at 27 ("If automated services were immune from direct liability when they automatically respond to user requests, there would have been no need for Congress to create very narrow and highly qualified ISP safe-harbors under these circumstances.").

169. *See* Brief of Respondents in Opposition to Petitioners for Writ of Certiorari at 16, *Cartoon Network*, 536 F.3d 121 (U.S. Dec. 5, 2008) (No. 08-448) 2008 WL 5168381 ("Brief of Respondents") (citing CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 552-55 (4th Cir. 2004)) (reasoning that *CoStar* court rejected this same argument when issue was before court).

170. *See CoStar*, 373 F.3d at 552 (noting that Copyright Act does not preclude other services from gaining immunity). The Copyright Act does not exempt providers from other arguments under the law. *See id.* The court concluded that "Con-

playback copies because there was no volitional conduct and immunity is not solely reserved for ISPs.[171]

B. The Exclusive Right of Public Performance

The Second Circuit held that Cablevision's RS-DVR did not violate the content providers' exclusive right of public performance when it retransmitted content to customers.[172] The Second Circuit found that such transmissions were not made "to the public," so the court did not reach the question of whether Cablevision performed the work.[173]

The Second Circuit's conclusion possibly creates a circuit conflict for two reasons.[174] First, simply retransmitting data does not immunize a party from liability for copyright infringement.[175] Cablevision did not dispute that it transmitted previously recorded content to customers who requested the recording.[176] Second, transmission to a single person can be considered "public."[177] The content providers maintain that the Second Circuit's holding, that a single customer who receives the data is not the public, creates a circuit conflict.[178] The Third Circuit, in *Redd Horne*, found a store in violation of copyrights when it played movies in private rooms for

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gress did not preempt the decision in *Netcom* nor foreclose the continuing development of liability through court decisions interpreting §§ 106 and 501 of the Copyright Act." *Id.*

171. *See Cartoon Network*, 536 F.3d at 134 (ruling no volitional conduct by Cablevision).

172. *See id.* (concluding no violation of content providers' exclusive right of public performance).

173. *See id.* ("We need not address Cablevision's first argument further because, even if we assume that Cablevision makes the transmission when an RS-DVR playback occurs, we find that the RS-DVR playback, as described here, does not involve the transmission of a performance 'to the public.'").

174. *See* Petition for Writ, *supra* note 163, at 35-36 (contending that decision creates circuit conflict).

175. *See* WGN Cont'l Broad. Co. v. United Video, Inc., 693 F.2d 622, 625 (7th Cir.1982) (stating that intermediate carriers are not automatically immune from copyright violations); *see also* Nat'l Football League v. PrimeTime 24 Joint Venture, 211 F.3d 10, 13 (2d Cir. 2000) (indicating that retransmitting data violated copyrights).

176. *See Cartoon Network*, 536 F.3d at 137 (highlighting audience of public performance, rather than nature of retransmission).

177. *See* Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 159 (3d Cir. 1984) (holding private screenings public); *see also* On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787, 790 (N.D. Cal. 1991) (finding copyright violation for electronic transmissions to single rooms).

178. *See* Petition for Writ, *supra* note 163, at 35-36 ("Thus, the Second Circuit's 'conclusion that, under the transmit clause, we must examine the potential audience of a given transmission . . . to determine whether that transmission is "to the public,"' Pet. App. 36a, creates a Circuit conflict.").

its customers.[179] Customers paid for the content, while the service offered by the store simply gave customers privacy, creating a de facto private movie theater [180] Cablevision argued, however, that the two are distinguishable: the service in *Redd Horne* is similar to a public phone booth where one person is allowed in at a time for the same service, whereas the service offered by Cablevision is most similar to access to a house given only to the house builder.[181] The latter reasoning is more persuasive because it accounts for the factual differences between the two cases.[182] Thus, Cablevision did not violate the content providers' right to exclusive performance by allowing customers to watch self-recorded content.[183]

VI. COMING ATTRACTIONS

The Supreme Court has readjusted previous courts' interpretations of *Sony* on more than one occasion.[184] Here, the Second Circuit relied heavily on its own reading of *Sony*, yet that reading provides a clear and logical progression consistent with prior prece-

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179. *See Redd Horne*, 749 F.2d at 159 (establishing that store owners violated Copyright Act).

180. *See id.* (drawing analogy between services offered by cablevision and services officered by movie theaters).

181. *See* Brief of Respondents, *supra* note 169, at 28 (distinguishing facts of *Cartoon Network* from *Redd Horne*).

> A phone booth is "public" because anyone willing to pay can use it – even though only one person occupies it at a time. But a house open only to the person who built it is not "public." Similarly, videos in a VOD library are offered "to the public" via transmission because anyone willing to pay can view them – even though, once a transmission begins, only one person actually receives it. But RS-DVR recordings are not available "to the public." Each one is available for transmission solely to the customer who made in it.

Id.; *see also Redd Horne*, 749 F.2d at 159 (3d Cir. 1984) ("Any member of the public can view a motion picture by paying the appropriate fee. The services provided by Maxwell's are essentially the same as a movie theatre, with the additional feature of privacy."). Therefore, the primary difference between the facts of *Redd Horne* and *Cartoon Network* is the individualization of the content and who is able to view the content. *See id.*

182. *Cf.* Cartoon Network L.P. v. CSC Holdings, Inc., 536 F.3d 121, 125 (2d Cir. 2008) (comparing RS-DVR with VOD system). The Second Circuit noted that the difference between the RS-DVR and a VOD system is the individualization of the content the RS-DVR user receives. *See id.*

183. *See id.* at 134 (finding no violation of content providers' right of exclusive public performance).

184. *See, e.g.*, MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936-37 (2005) (correcting Circuit Court's reading of *Sony*'s substantial lawful use doctrine); N.Y. Times Co. v. Tasini, 533 U.S. 483, 519 (2001) (applying law from *Sony* correctly). For a further discussion on the Supreme Court's *Sony* jurisprudence, see *supra* notes 67-78 and accompanying text.

dent, negating any need for readjustment.[185] Moreover, the volitional or causation requirement in creating copies correctly applies relevant case law.[186] The Second Circuit's decision follows *Netcom*'s volitional conduct requirement and its progeny's reading of the Copyright Act.[187] *Cartoon Network* will guide future cases regarding digital copying of a work and exclusive rights of public performance.[188]

Courts continually try to balance the competing interests of promoting the free exchange of ideas with preserving the rights of artists and authors.[189] The proposed RS-DVR will dramatically change the relationship between customers and their DVRs because customers will no longer need their stand-alone DVR system.[190] Furthermore, the Second Circuit's ruling that the RS-DVR does not constitute copyright infringement may increase the role of DVRs by consumers.[191] Recent studies show that DVR users skip the majority of advertisements, creating a disincentive for advertisers to invest money into advertising on television.[192] In fact, potential for harm

185. For a further discussion of the court's *Sony* interpretation, see *supra* notes 153-158 and accompanying text.

186. *But see* Petition for Writ, *supra* note 163 at 28 (scrutinizing lower courts which have relied heavily on *Netcom* ruling). There is concern that lower courts are treating *Netcom* as a ruling by the Supreme Court of the United States. *See id.*

187. *See Cartoon Network*, 536 F.3d at 131 (requiring evidence of volitional conduct by Cablevision to prove direct infringement).

188. *See* Lewis R. Clayton, *New RS-DVR System: Not a Direct Violation of Copyrights*, N.Y. L.J., Sept. 10, 2008, *available at* http://www.paulweiss.com/files/Publication/1c9401ae-44b0-4ddf-8dba-41062cf4e9e9/Presentation/PublicationAttachment/74e5117e-79cd-45db-9f8c-47bd081cd1ab/IPL10Sep08.pdf (predicting that future court battles will rely on opinion when deciding similar issues); *see also* Kent Gibbons, *Cablevision Network DVR Ruling Has Web Radio Impact*, MULTICHANNEL NEWS, Aug. 11, 2008, *available at* http://www.multichannel.com/article/82280-Cablevision_Network_DVR_Ruling_Has_Web_Radio_Impact.php (assessing impact of Second Circuit's ruling on Web Radio case).

189. For a further discussion of these competing interests, see *supra* notes 37-39 and accompanying text.

190. *See Cartoon Network*, 536 F.3d at 123-24 (comparing stand-alone DVRs with RS-DVR)

191. *See* Brian Stelter, *A Ruling May Pave the Way for Broader Use of DVR*, N.Y. TIMES, Aug. 5, 2008, http://www.nytimes.com/2008/08/05/business/media/05adco.html?ref=business (discussing impact of ruling on DVR use). The *Cartoon Network* decision will allow cable providers the ability to market DVR capability already included in set-top boxes without the set-top box. *See id.* This will greatly expand the amount of viewers with DVR capability. *See id.* Cablevision considers the ruling a great victory for consumers because DVRs will become more available, faster and less expensive. *See* Mike Farrell, *'Huge Win' on Net DVR*, MULTICHANNEL NEWS, Aug. 10, 2008, http://www.multichannel.com/article/134281-_Huge_Win_on_Net_DVR.php (reporting Second Circuit's decision).

192. *See* Snow, *supra* note 135, at 32 (detailing relationships of DVRs, advertisements and content providers); *see also Nielsen Finds Most DVR Viewers Skip Commercials*, BOSTON GLOBE, June 1, 2007, *available at* http://www.boston.com/

is so great that an ABC executive expressed the desire for DVR manufacturers to disable the fast-forward button on newly released DVRs.[193] Nonetheless, "[detractors] never explain how a court could deem Cablevision a direct infringer without also banning the 27 million set-top DVRs that cable and satellite companies already provide."[194]

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business/technology/articles/2007/06/01/nielsen_finds_most_dvr_viewers_skip_commercials/ (reporting Nielsen finding that DVR users skip commercials); Farrell, *supra* note 191 (noting content providers worry over mass DVR use). "By skipping commercials, DVR users jeopardize the creative incentives underlying a network's efforts to produce quality programming." Snow, *supra* note 136, at 32. Accordingly, the potential for harm to content providers is an increasing reality. *See id.*

193. *See* David Goetzl & Wayne Friedman, *ABC Looks Beyond Upfront To DVR, Commercial Ratings Issues*, MEDIA DAILY NEWS, July 6, 2006, http://www.mediapost.com/publications/?fa=articles.showArticle&art_aid=45264 (mentioning reaction to DVR use and ability to skip advertisements).

194. Brief of Respondents, *supra* note 169, at 21. The difference between the RS-DVR and set-top DVRs is the storage location of the recording. *See id.*

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