Remote DVR Forces the Question: When is a Copy Not a Copy?

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A recent high-profile decision from the Second Circuit illustrates that questions that are relatively simple in the analog world – including whether a copy has been made, and if so, by whom – are more challenging in a digital environment.

In considering whether the placement of a copyrighted work in a temporary data buffer constituted a "copy," the court, in *The Cartoon Network LP v. Cablevision Systems Corp.*, resurrected the long-dormant "duration requirement" and found that a copy embodied in a medium only momentarily may not, in fact, be a "copy" pursuant to the Copyright Act.

The court in *Cablevision* also found that a company that sets up and runs a system for making copies at the remote command of the company's customers does not make any copies itself. Rather, the customers who remotely control the system are the ones making the copies.

The technology in *Cablevision* involved cable television transmission and digital video recorder ("DVR") systems. Cable companies aggregate the television programming of their various content providers into a single stream of content data which is sent to the cable customer's digital set-top box.

Many cable companies, including Cablevision, offer set-top storage DVRs ("STS-DVRs"), which combine the function of a standard digital set-top box and a DVR. In many respects, a DVR is a digital equivalent of an analog VCR. Where the VCR records programming on video cassettes, a DVR records it digitally on a hard disk drive.

In 2006, Cablevision announced its intent to introduce a new "Remote Storage DVR System" ("RS-DVR") as an alternative to its standard STS-DVRs. The RS-DVR system would, from the customer's perspective, function in much the same way as the typical STS-DVR. However, rather than locate the DVR hardware within the set-top box, the RS-DVR system would relocate the bulk of that hardware, including the hard disk drive itself, to a remote Cablevision facility.

To make this system work, Cablevision would split the programming content stream in two. The first stream would be sent directly to Cablevision's customers in real time, but the second stream would flow through the remotely located RS-DVR equipment where the data stream would be temporarily stored in a buffer and, upon remote request from the cable customer, recorded onto a hard disk drive for future playback.

Importantly, the data buffer of the RS-DVR system would hold no more than 1.2 seconds of programming from the content stream at any time before overwriting that data.

After learning of Cablevision's plans, a number of its content providers, including The Cartoon Network, filed suit in the Southern District of New York. They alleged that the proposed RS-DVR system would infringe their copyrights in a number of ways, including by placing an unauthorized copy of their copyrighted programming in the data buffer of the RS-DVR system and by recording programming on hard disk drives when remotely instructed to do so by Cablevision's customers.

The district court agreed, and, on summary judgment, permanently enjoined Cablevision from implementing its RS-DVR system. *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F. Supp. 2d 607 (S.D.N.Y. 2007).

On appeal, the Second Circuit reversed, finding that Cablevision's buffering of the content stream did not create a "copy" of the copyrighted programming; and that the copy made on the hard drive was directly made by the customer, not by Cablevision.

Quoting the Copyright Act, the court noted that "copies" are defined as "material objects … in which a work is fixed by any method … and from which the work can be … reproduced." 17 U.S.C. §101. Further, the court noted that the Act specifies that a work is "fixed" when "its embodiment … is sufficiently permanent or stable to permit it to be … reproduced … for a period of more than transitory duration." *Id.*

The appeals court concluded that the Copyright Act requires two distinct requirements before a work may be considered a "copy" – first, the work must be embodied in a medium such that it can be perceived or reproduced (the "embodiment requirement"), and second, the work must remain in that embodiment for more than a transitory period of time (the "duration requirement").

In reversing the district court, the Second Circuit found that "no bit of data remains in the buffer for more than a fleeting 1.2 seconds" before being "rapidly and automatically overwritten," and this blink in time failed the duration requirement. As a result, the buffered data of the content stream was not a "copy" within the meaning of the Copyright Act, and Cablevision could not be liable for copyright infringement.

In defense of the district court, its focus on the embodiment requirement was not without some precedent. In fact, the district court relied upon a line of cases beginning with *MAI Systems Corp. v. PeakComputer Inc.*, which generally concluded that a work placed in a data buffer or RAM was a fixed copy because the work was capable of being reproduced from the data stored in the buffer or RAM.

The district court was also swayed by the Copyright Office's own 2001 Digital Millennium Copyright Act Report, which noted that a work was fixed "[u]nless a reproduction manifests itself so fleetingly that it cannot be copied[.]" *DMCA Report* at 111.

The Second Circuit, however, unceremoniously dismissed the earlier cases as well as the Copyright Office's own pronouncements. The court explained that reliance on *MAI Systems* and its ilk was misplaced because the duration requirement was simply not raised in those cases, and none of those cases explicitly held that a duration requirement does not exist.

Regarding the 2001 DMCA Report, the Second Circuit noted that the Copyright Office's statements were entitled to deference based only on their power to persuade, and, simply put, the appeals court was not persuaded that Congress intended the duration requirement to be read out of the Copyright Act.

Regarding the programming copied to the RS-DVR hard disk drives at the behest of Cablevision's customers, the Second Circuit accepted Cablevision's argument that the customers – not Cablevision – were the parties who were actually making the copies through their remote operation of the RS-DVR system. (Presumably a customer's copying would be protected as fair use by *Sony Corp. v. Universal City Studios Inc.*, an issue not before the court.) Because the plaintiffs had agreed not to assert any theories of indirect infringement in exchange for Cablevision's stipulation that it would not assert a fair use defense, the question of whether Cablevision was contributing to infringement by its customers was never raised.

Given that many digital devices use buffers that temporarily store and automatically overwrite digital data as it is transferred to its final destination, the Second Circuit's decision to resurrect the "duration requirement" may have a far-reaching impact on the modern copyright landscape.

Moreover, with the proliferation of remotely-operated, networked systems, it is also significant that the court found that the owners and operators of such systems do not directly infringe when their systems are remotely used to make copies.

The holding in *Cablevision* may play a significant role in determining the scope of a copyright holder's rights with respect to the ubiquitous buffering and streaming of music and video content that takes place every day over the Internet via remotely operated systems. For now, it appears that cable operators, including *Cablevision*, are waiting to see if the Cablevision decision is upheld and if other circuits follow suit. As of this writing, no appeal has been filed.