07-1480-cv(L), 07-1511-cv(CON)

United States Court of Appeals

for the

Second Circuit

THE CARTOON NETWORK LP, LLLP
and CABLE NEWS NETWORK LP, LLLP,

Plaintiffs–Counterclaim-Defendants–Appellees,

TWENTIETH CENTURY FOX FILM CORPORATION, UNIVERSAL CITY STUDIOS PRODUCTIONS LLLP, PARAMOUNT PICTURES CORPORATION, DISNEY ENTERPRISES, INC., CBS BROADCASTING INC., AMERICAN BROADCASTING COMPANIES, INC., and NBC STUDIOS, INC.,

Plaintiffs–Counterclaim-Defendants–Appellees,

– v. –

CSC HOLDINGS, INC. and CABLEVISION SYSTEMS CORPORATION,
Defendants–Counterclaim-Plaintiffs–Third-Party-Plaintiffs–Appellants,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS–COUNTERCLAIM-DEFENDANTS–APPELLEES THE CARTOON NETWORK LP, LLLP, ET AL. ("TURNER")

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– v. –

TURNER BROADCASTING SYSTEM, INC., CABLE NEWS NETWORK LP, LLP, TURNER NETWORK SALES, INC., TURNER CLASSIC MOVIES, L.P., LLLP, TURNER NETWORK TELEVISION LP, LLLP, and THE CARTOON NETWORK LP, LLP,

Third-Party-Defendants–Appellees.

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for The Cartoon Network LP, LLLP certifies that The Cartoon Network, Inc. (formerly known as The Cartoon Network LP, LLLP) is jointly owned by Turner Entertainment Networks, Inc. and TEN Investment Company, Inc., both of which are wholly owned indirect subsidiaries of Turner Broadcasting System, Inc. The Cartoon Network, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly traded company has a 10 percent or greater stock ownership in Time Warner Inc.

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Cable News Network LP, LLLP certifies that Cable News Network, Inc. (an entity that was formed following the merger of Cable News Network LP, LLLP into CNN Investment Company, Inc.) is owned entirely by Turner Broadcasting System, Inc. Cable News Network, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly traded company has a 10 percent or greater ownership in Time Warner Inc.

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Turner Broadcasting System, Inc. certifies that it is jointly owned by Historic TW Inc., American Television and Communications Corporation, Warner Communications, Inc., United Cable Turner Investment, Inc. and

Time Warner Companies, Inc. Turner Broadcasting System, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly traded company has a 10 percent or greater stock ownership in Time Warner Inc.

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Turner Network Sales, Inc. certifies that it is owned entirely by Turner Broadcasting System, Inc. Turner Network Sales, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly traded company has a 10 percent or greater stock ownership in Time Warner Inc.

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Turner Classic Movies LP, LLLP certifies that Turner Classic Movies, Inc. (formerly known as Turner Classic Movies LP, LLLP) is jointly owned by Turner Entertainment Networks, Inc. and TEN Investment Company, Inc., both of which are wholly owned indirect subsidiaries of Turner Broadcasting System, Inc. Turner Classic Movies, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly traded company has a 10 percent or greater stock ownership in Time Warner Inc.

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Turner Network Television LP, LLLP certifies that Turner Network Television, Inc. (formerly known as Turner Network Television LP, LLLP) is jointly owned by Turner Entertainment Networks, Inc. and TEN

Investment Company, Inc., both of which are wholly owned indirect subsidiaries of Turner Broadcasting System, Inc. Turner Network Television, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly traded company has a 10 percent or greater stock ownership in Time Warner Inc.

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Citation Conventions

The following abbreviations are used throughout this brief:

- "SPA" for references to the Special Appendix.
- "A" for references to the Joint Appendix.
- "CA" for references to the Confidential Joint Appendix.
- "CV Br." for references to the Brief and Special Appendix for Defendants-Counterclaimants-Appellants.
- "CDT Br." for references to the Brief of Amici Curiae Center for Democracy & Technology, Electronic Frontier Foundation, et al. in Support of Appellants Urging Reversal.
- "Profs. Br." for references to the Brief of *Amici Curiae* Law Professors in Support of Defendants-Counterclaimants-Appellants and Reversal.
- "Wu Br." for references to the Brief of Amicus Curiae Professor Timothy Wu in Support of Reversal.
- "Fox Br." for references to the Brief and Statutory Appendix of Plaintiffs-Counter-Defendants-Appellees Twentieth Century Fox Film Corporation, et al.

Preliminary Statement

This case is not about when consumers have the right to record television programs for later viewing. Nor is it about the future of home-recording technology. It has nothing to do with the *Sony* case, or with the Internet. This case is about a for-profit copying and transmission service for television programming that Cablevision proposes to launch, and whether Cablevision is required to obtain licenses from copyright holders to make reproductions and transmissions of copyrighted programming as part of the service.

The licensing rules for Cablevision's proposed service are straightforward. Cablevision already enters into licensing agreements that specifically govern its uses of copyrighted programming. It is undisputed that Cablevision does not have a license to include plaintiffs' copyrighted programming in its proposed copying and transmission service. But Cablevision has refused to negotiate such a license.

In its opening brief, Cablevision suggests that this Court depart from traditional copyright-law principles and long-established case law, and adopt a rule of law with far-reaching implications for technologies in various fields not before this Court and, indeed, for technologies not yet developed. Cablevision asks the Court to create a rule that excuses any business from liability as a direct infringer

if, at the request of its customers, it uses machines or robots to make what would otherwise be directly infringing reproductions and transmissions, on the ground that—at least superficially—there is no "human intervention" on the part of the business in the physical acts of making particular reproductions and transmissions.

Cablevision's proposed revision of copyright law is inconsistent with sensible, practical application of copyright principles, and would lead to an illogical result in this case. Here, the undisputed material facts show that Cablevision makes the copies and transmissions in the RS-DVR Service. *On its own initiative*—that is, not in response to any subscriber request—Cablevision supplies Turner's copyrighted content (which it has licensed from Turner for limited purposes that do not include the RS-DVR Service), reconfigures that content, and copies that content onto computer equipment located at a Cablevision facility. Then, at subscribers' request, Cablevision copies that content yet again, stores it indefinitely at a Cablevision facility, and transmits it to subscribers over Cablevision's cable system for "on demand" viewing. Cablevision has a pervasive and systematic role in the copying and transmission service, and Cablevision's own conduct exhibits the volition necessary to subject Cablevision to liability as a direct infringer.

Issues Presented

1. Whether a cable operator directly infringes on a copyright owner's exclusive reproduction right where, without a license, the cable operator (a) owns, operates and maintains at a central facility an array of computer equipment used to make unauthorized copies of copyrighted television programs in response to requests from subscribers; (b) provides all the television programming copied by that equipment; (c) stores the copies at a central facility under its control; and (d) uses those copies solely to provide, for commercial gain, an unauthorized "on demand" program viewing service.
2. Whether a cable operator directly infringes on a copyright owner's exclusive reproduction right where, without a license and regardless of any subscriber request, the cable operator (a) copies each and every frame of each and every television program it receives into the memory of its computers; (b) stores those bits of programming long enough to enable the making of permanent copies of entire copyrighted television programs; and (c) uses those copies solely to provide, for commercial gain, an unauthorized "on demand" program viewing service.
3. Whether a cable operator directly infringes on a copyright owner's exclusive public performance right where, without a license, the cable operator transmits the identical performance embodied in a copyrighted television program to

multiple subscribers for "on demand" viewing as part of a service for commercial gain.

Statement of the Case

In March 2006, Cablevision announced that it would conduct a technical trial of the RS-DVR Service, and then offer the RS-DVR Service to all of its subscribers. Shortly before Cablevision's announced start of the technical trial, on May 26, 2006, The Cartoon Network and CNN filed a complaint in this action (No. 06 CV 4092). (A25-39.) On June 7, 2006, the parties agreed to coordinate, for discovery purposes, with a similar action brought against Cablevision by several major movie studios and broadcast networks (No. 06 CV 3990). (A57.) At that time, Cablevision stipulated that (1) "it will not be asserting a 'fair use' defense against claims for direct infringement";[1] and (2) it would not launch the RS-DVR Service "pending resolution by the Court of the question of liability in this action". (*Id.*)

The District Court held a two-day trial on October 31 and November 1, 2006. By consent of the parties, the District Court considered both the arguments on the parties' cross-motions for summary judgment and the "testimony

[1] Cablevision's suggestion that "[t]he parties limited the issues, stipulating that plaintiffs would assert only *direct* infringement—not *contributory* infringement" (CV Br. 6) is wrong. Plaintiffs had already filed their respective complaints asserting only claims of direct infringement. (A25-39, A1339-48.)

from expert witnesses at the hearing". (A953.) The parties agreed that "the Court will be able to assess credibility and to make findings as to the expert testimony presented". (*Id*., A1214, SPA18-19.) At the trial, Turner presented testimony from Ted Hartson, an expert in cable television technology. (A1079-80, A821-24, A1331-34.)

On March 22, 2007, the District Court issued a 37-page opinion granting plaintiffs' motions for summary judgment. After carefully analyzing the RS-DVR Service on its particular facts (SPA4-18), the District Court found that

> "the RS-DVR is not a stand-alone machine that sits on top of a television. Rather, it is a complex system that involves an ongoing relationship between Cablevision and its customers, payment of monthly fees by the customers to Cablevision, ownership of the equipment remaining with Cablevision, the use of numerous computers and other equipment located in Cablevision's private facilities, and the ongoing maintenance of the system by Cablevision personnel." (SPA2-3.)

Based on the undisputed facts and on factual findings as to the expert testimony, the District Court concluded that "Cablevision, and not just its customers, would be engaging in unauthorized reproductions and transmissions of plaintiffs' copyrighted programs". (SPA2.) Accordingly, the District Court permanently enjoined Cablevision "from (1) copying plaintiffs' copyrighted works and (2) engaging in public performances of plaintiffs' copyrighted works, unless it obtains licenses to do so". (SPA36-37.)

Statement of Facts

The Parties

Turner Broadcasting System, Inc. ("TBS") and certain of its subsidiaries (collectively "Turner") produce, create, license and promote some of the most popular and well-known television programming in the United States. Plaintiff Cable News Network LP, LLLP ("CNN") owns the copyrights to numerous programs aired on the CNN family of networks (CNN, Headline News, CNN en Español and CNN International), including *Larry King Live*, *Anderson Cooper 360°* and *Lou Dobbs Tonight*. (CA37, CA39, A26, A29-30.) Plaintiff The Cartoon Network LP, LLLP ("The Cartoon Network") owns the copyrights to numerous programs aired on the network of the same name, including popular animated programming for children and adults such as *Codename: Kids Next Door*, *Camp Lazlo* and *Aqua Teen Hunger Force*. (CA37, CA39, A29.) CNN and The Cartoon Network have applied for and obtained copyright registrations for these programs. (CA39.)[2]

Turner's programming is one of its core assets. Turner's business is centered on exploiting the value of that programming in all media. (CA39-41.)

[2] As set forth in greater detail in the Corporate Disclosure Statement, CNN is now known as Cable News Network, Inc. and The Cartoon Network is now known as The Cartoon Network, Inc. Other Turner entities were brought into this litigation as third-party defendants.

Turner licenses its programming for transmission as "linear networks"—*i.e.*, traditional television in which programs are aired in sequence at set times of day—by all major cable operators, including Cablevision, as well as by direct broadcast satellite companies such as DirecTV and EchoStar. (CA39, A162-254, CA45, A26-27, A61, CA176.) Turner separately licenses certain content for transmission as video on demand ("VOD") and for sale in packaged media, such as DVDs. Turner is also on the forefront of using new technologies to distribute its copyrighted programming, and has licensed content for the Internet—for example, by licensing Apple's iTunes to offer individual television programs for download—and on cell phones. (CA39-41, A255-90, CA360-434, CA168.)

Cablevision is a large cable operator with over three million subscribers in the New York City metropolitan area. With but a few exceptions, Cablevision exercises editorial discretion about what networks it wishes to include on its system. Cablevision enters into licensing agreements with content providers, such as Turner, for the right to transmit television programming to Cablevision's subscribers. (CA42, CA130-31.) Those licenses are typically conveyed in written contracts, often called "affiliation agreements". (CA42, CA128.) Cablevision has entered into affiliation agreements with Turner granting Cablevision a license to transmit certain Turner networks as linear networks, including the Cartoon Network and CNN. (CA41-42, CA435-51, A68-69, A28-30, A62.)

Cablevision concedes that its access and rights to programming on Turner networks are narrowly defined and entirely a function of the affiliation agreements. (CA42, CA128, CA131, CA1054.) In each case, those agreements allow for transmission of each Turner network's programming signal only "on a single designated channel without any editing, delay, addition, alteration or deletion". (CA43, CA436, CA445.) The agreements expressly prohibit Cablevision from recording or duplicating any element of a Turner network programming signal for any purpose unless "expressly authorized in writing" by Turner. (CA43-44, CA437, CA447.) It is undisputed that no provision of those affiliation agreements, or any other contract, authorizes Cablevision to copy or transmit programming as part of the RS-DVR Service. (CA45, CA138, CA144, CA435-51.)

Cablevision has also contracted with a number of content providers for the right to transmit programming as VOD. Cablevision concedes that in order to transmit programming belonging to content providers on an on-demand basis, it must have a license. (CA44, CA134-38, CA132.) The license agreements for VOD that Cablevision has entered into include the essential terms of Cablevision's rights to use the programming, including the specific programs licensed for VOD, the duration of the license, Cablevision's content protection obligations and the economic terms. (CA44, CA137.) Cablevision acknowledges that it has no license

agreement with Turner for any form of on-demand viewing service. (CA45, CA138, A63.)

Cablevision's Design and Operation of the RS-DVR Service

Cablevision proposes to offer to the public, for a fee, a service it calls the "RS-DVR". (CA48, A318, A71, CA49, A64, CA222-23.) Despite its name, the RS-DVR Service is not a "DVR". It is a commercial service in which Cablevision would use a complex system of computer hardware and software (1) to make unauthorized copies of copyrighted programs and store those copies at a central Cablevision facility (called the "head-end"), and (2) to transmit the stored programs to subscribers on demand over Cablevision's cable system. (CA51-57.) Cablevision concedes that it hopes to profit from the Service and enhance its competitive position in relation to satellite distributors. (CA49, CA205-07.)

Cablevision designed and built the RS-DVR Service. (CA49, CA309, CA316, CA506, A1205.) Unlike a set-top DVR box, which operates within a user's home, the RS-DVR Service depends on hardware and software located at Cablevision's head-end facility. (CA50, CA111-13.) Cablevision has purchased the hardware for the Service, and owns or licenses the necessary software, some of which was written at Cablevision's request specifically for the Service. (CA50, CA110-11, CA514, CA542, A590-91.) No subscriber or content provider has played any role in the conception, creation or design of the RS-DVR Service.

In its internal documents, Cablevision repeatedly refers to the RS-DVR as a "service". (CA707, A668, CA815, A609, A612-13, A615, A675.) This characterization is unsurprising given Cablevision's ongoing role in gathering, reconfiguring, storing and transmitting content for the RS-DVR Service. Cablevision-employed system administrators will manage the Service from a central facility, staffed 24 hours a day, seven days a week. (SPA10, CA707, CA732-34, CA750, A1205-06.) Cablevision facilities will host the massive amounts of equipment (running numerous software programs) on which the copies of copyrighted programming will be made and stored and from which they will be transmitted. (SPA10, CA51, CA707, A1100-01.) As Judge Chin found below (SPA10), a Cablevision RS-DVR subscriber "would not be able to walk into Cablevision's facilities and touch the RS-DVR system". (A1206.)

Cablevision would operate, maintain and market the RS-DVR Service. (CA49-51.) Cablevision would offer the Service to its cable subscribers for an additional monthly fee. (CA49-51, CA222-23.) Nothing in the record suggests that Cablevision would or could sell its RS-DVR to retailers as an independent, stand-alone "box" (as, for example, VCRs are sold) or would ever be able to install an RS-DVR system entirely within a subscriber's home.

Cablevision controls the scope of the RS-DVR Service on an ongoing basis. For example, Cablevision decides which channels will be included in the

Service and has the technological ability to include or exclude channels. (SPA11, CA49, CA708, A1084, A1093, A1207-09.) In its short life, the RS-DVR Service has variously included either 50 channels or 170 channels, and in some planned iterations, has excluded pay-per-view, music channels and high definition channels. (CA49, CA708.) Similarly, Cablevision decides how much storage capacity to allocate to each subscriber. It has settled variously on 80 gigabytes and 160 gigabytes, and some Cablevision documents refer to allowing subscribers to make impulse purchases of additional storage. (SPA10, CA55, CA708, A1210-12.) Cablevision also decides the number of programs that may be recorded at a given time and whether recorded programs may be shared within a household (*i.e.*, a home with cable service on multiple television sets) or will be limited to a particular set-top box. (CA60, A810.) Cablevision thus determines the functionality of the system and has the ability—which even before formal product launch it has already demonstrated a willingness to exercise—to alter the operations and functionality of the RS-DVR Service.

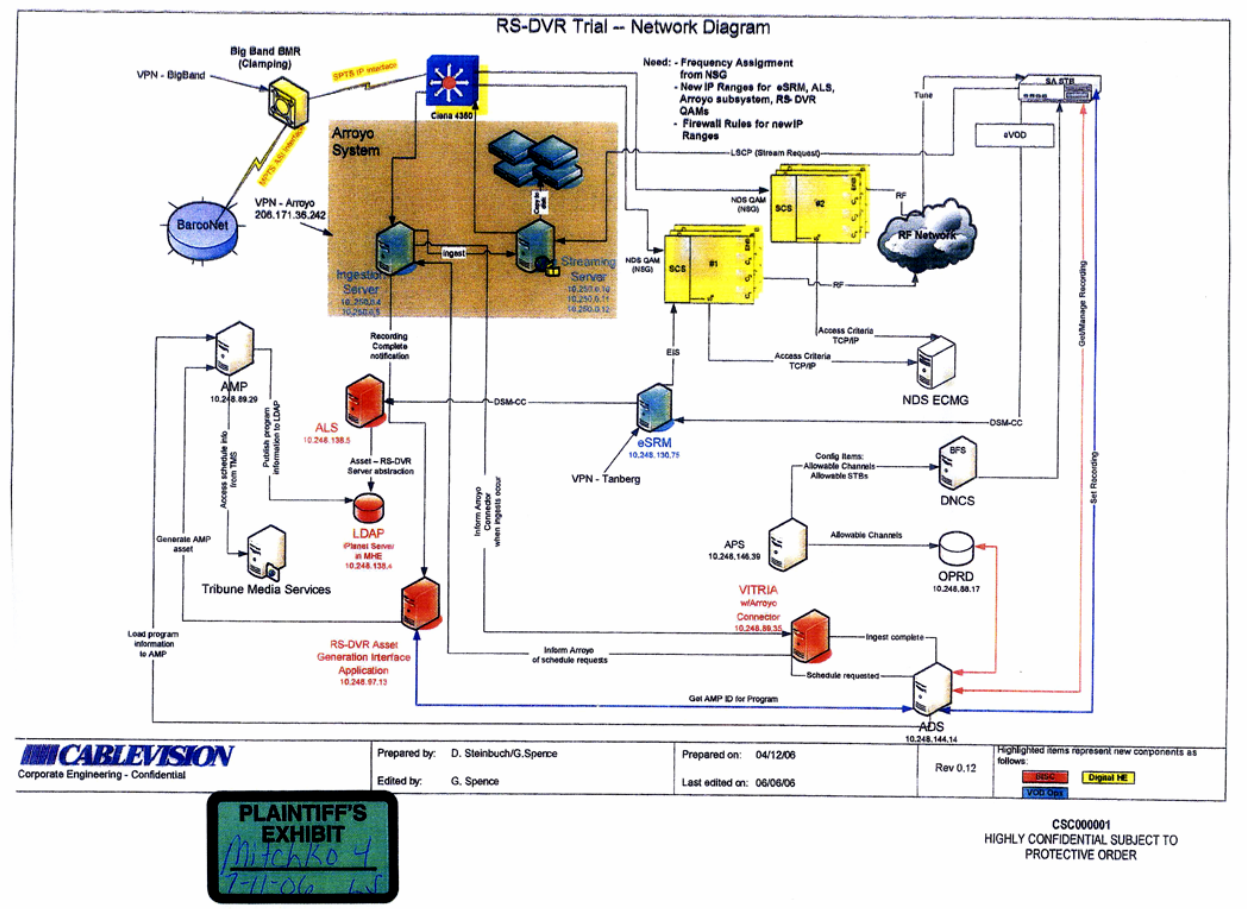
Cablevision also has the ability to monitor and override the requests of RS-DVR Service subscribers. For example, Cablevision employees can monitor which programs are scheduled for recording for a particular set-top box, which programs are currently being copied for that box, which programs are available for playback to that box, which programs are currently being transmitted to that box,

and which programs a subscriber has viewed during a particular time period. (CA710, A850-52.) And although Cablevision contends it will use such abilities only "for troubleshooting purposes" (CV Br. 10), Cablevision employees have the ability in the RS-DVR Service to delete the hard-drive copy of a program recorded for an individual subscriber and to terminate the transmission of a program to an individual subscriber. (CA709, CA792, CA806, CA930, A1101-02.)

How Cablevision Copies Programming in the RS-DVR Service

To explain how the reproduction and public performance violations occur in this case, it is useful to present a brief technological overview of the RS-DVR Service.[3] The components of the Service discussed below are presented in the following network diagram, created by Cablevision for the technical trial (A1325):

[3] For an introduction to cable television technology, see the summary in the District Court's opinion (SPA5-7) or the fuller description in Mr. Hartson's expert report (A827-33).



The first step in the operation of the RS-DVR Service is for Cablevision to obtain the programming that forms the *raison d'être* of the Service. The RS-DVR Service can only record programming that Cablevision supplies centrally; a subscriber cannot use the Service to record (or later play back) content from any other source. (A1206-07.) Cablevision's sole access to plaintiffs' programming for the Service comes from the linear network feed it receives from plaintiffs. (CA51, A592, CA558, CA270.) As a result, Cablevision must make the linear network feed fulfill two purposes: the regular cable programming that, by license, it provides to subscribers, and programming to be recorded without a license by its

RS-DVR Service. To do so, Cablevision splits the linear network feed at its head-end into two streams: transmitting one branch to its subscribers in real time, and diverting the other into the system for the RS-DVR Service. (SPA11, CA51, CA270, CA564-65.)

Once Cablevision creates this second programming stream for the RS-DVR Service, Cablevision must reconfigure the stream to convert it into the right format for copying. (CA51, CA315, CA558.) To do so, Cablevision sends all the programming it intends to make available for recording in the RS-DVR Service through a "clamper", a piece of computer equipment made by BigBand Networks, Inc. and called the Broadband Multimedia-Service Router ("BMR"). (SPA11-12, CA52, A592, CA558, CA270-71.) The BMR clamper copies the programming into its memory and by applying advanced computer algorithms converts it into the format needed for copying in the RS-DVR Service. (CA1295, CA52, A810.) The BMR clamper holds the programming in its random access memory (RAM) in increments of roughly 1.2 seconds, long enough for the clamper to analyze and reformat the programming data. (A810, CA1167, CA735, A1085.)

Cablevision then directs the "clamped" programming streams to the central piece of equipment for the RS-DVR Service, a computer made by Arroyo Video Solutions, Inc. and known as the "Arroyo server". (SPA13, CA52-53,

A592, CA110-11, CA274-75, CA272.)[4] Like the BMR clamper, the Arroyo server is located at Cablevision's head-end facility. The Arroyo server copies each programming stream into a portion of its memory known as a "primary ingestion buffer", and holds the programming there for up to a tenth of a second (which is roughly three frames of video). (SPA13, CA53, CA101.) This is sufficient time for the Arroyo server (if it receives an appropriate request) to make further copies of the programming held in the buffer. (A1127-30, A1188-94.) Over time, the entire content of every program on every channel is copied and held in the primary ingestion buffer. (SPA30, A1127.)

Cablevision undertakes each of those steps as part of the RS-DVR Service regardless whether any subscriber has requested Cablevision to copy a program. (SPA13, SPA16, CA53, CA100, A1086, A1204-05.) It is undisputed that Cablevision's affiliation agreements with Turner do not authorize Cablevision's reformatting of the linear signal when used in conjunction with the RS-DVR Service or the RAM copies that Cablevision makes for the RS-DVR Service. (CA42-45.)

[4] Each Arroyo server is designed to serve up to 96 RS-DVR Service subscribers. (CA104, A1050-51.) For a commercial implementation of the RS-DVR Service, Cablevision plans to use many thousands of Arroyo servers. (CA708, CA959-60, CA745-46.)

Only at the next stage of the process does the subscriber enter the picture. As subscribers to the RS-DVR Service request copies of programming scheduled to air in the future, Cablevision stores that information in a large database that keeps track of which subscribers (if any) have requested copies of each scheduled program. (SPA15, A841-42.)[5] Shortly before the program starts on the linear network feed, a computer made by Vitria Technology, Inc. and known as the "Vitria server" communicates the requests to the Arroyo server. (A843.) The Vitria server sends an "aggregated record request"—a unified list of all the subscribers who have requested copies of a given program. (SPA15, A843, A1087-88.) Based on the information received from the Vitria server, the Arroyo server locates in its primary ingestion buffer memory each frame of video for which there is a record request, and makes multiple copies of that programming into another portion of its memory, known as a "secondary ingestion buffer", and from there onto hard drives located within the Arroyo server at the head-end. (SPA15-16, A843-44.) The programs stored on the Arroyo hard drives all derive in their entirety from programming originally copied by Cablevision into the primary ingestion buffer. (A1190-91.)

[5] Alternatively, RS-DVR Service subscribers can request recording of a program already in progress. (SPA14.)

Cablevision assigns each copy on the Arroyo hard drives to one of the subscribers who requested a copy. (CA53-54, CA102, A550, CA109.) Each hard drive contains stored programming assigned to multiple subscribers, with the data for programming requested for one customer interspersed with data for programming requested by another. (CA54-55, CA90, CA269, CA90.) The copies remain on the hard drives indefinitely, until a subscriber requests that Cablevision delete a program or until Cablevision overwrites it. (CA55-56, CA81, CA83, CA286-87, CA617, A577.)

How Cablevision Transmits Programming in the RS-DVR Service

Cablevision transmits programming in the RS-DVR Service in essentially the same way as it transmits VOD programming. It is therefore helpful to take a brief detour into the technology behind VOD.

VOD programming is intended to be viewed at different times pursuant to a subscriber's request—"on demand". (CA41, A30-31, A63.) Content providers send VOD programming to cable operators not in real time (as with linear programming), but on a periodic basis pursuant to agreed-upon licenses and in an agreed-upon format different from that of linear programming. (CA46, CA184-85.) Like other cable operators, Cablevision stores VOD programming as digital files on hard drives at the head-end. (CA46, CA184-85.) When a subscriber requests a VOD program, Cablevision locates that particular program on

the hard drives and then transmits the VOD programming on a particular dedicated "bandwidth" (or radio frequency) over its cable system, separate from the bandwidth used to transmit linear networks. (CA47, CA177, CA472-73.) Because bandwidth is limited, only a given number of subscribers in a "node" (a geographical service area of a cluster of homes) can view VOD programming at any one time. (CA47, CA345.) If too many subscribers within a node request VOD programming at the same time, some will receive an error or "please try again" message. (CA47, CA345.)

The process by which the RS-DVR Service transmits programming is essentially identical. When an RS-DVR Service subscriber requests that Cablevision play back stored programming, Cablevision software locates the particular program on the hard drives at its head-end, as with VOD, and then transmits the program over the cable system from the head-end to subscribers' homes through a VOD platform using a particular bandwidth dedicated to the RS-DVR Service. (SPA17, CA56, A592, CA559-60, CA273, A317, CA306, CA275-76, CA267, CA359, A551.) As with VOD, because the amount of bandwidth for a given node is fixed, if too many subscribers in the node request RS-DVR Service transmission at the same time, Cablevision will not be able to fulfill all requests. (SPA18, CA57, CA345, CA347, A1099-100.) Because Cablevision retains a copy of the stored program on the hard drive, Cablevision can transmit RS-DVR Service

programming to its subscribers, as with VOD, an indefinite number of times. (CA57.)

The only significant differences between VOD and the RS-DVR Service are that the RS-DVR Service is unlicensed, and content providers, such as Turner, have lost control over their programming. Indeed, as the District Court found, "in its architecture and delivery method, the RS-DVR bears striking resemblance to VOD—a service that Cablevision provides pursuant to licenses negotiated with programming owners". (SPA26-27.)

Although Cablevision now tries to deny that the RS-DVR Service is a form of VOD, Cablevision's COO, Tom Rutledge, publicly described the RS-DVR Service that is the subject of this lawsuit as based on a "VOD platform [that] lends itself to a variety of uses". (CA57, A595; *see also* CA58, CA506, CA600, CA616.) The Arroyo server itself is a commercially available "video on demand server", which Arroyo modified, at Cablevision's direction, for use in the RS-DVR Service. (SPA26, A1102.) Tellingly, in numerous instances Cablevision's own internal engineering specifications for the RS-DVR Service originally referred to "VOD architecture" and the "VOD network"—until, in preparation for this lawsuit, Cablevision revised the specifications to replace "VOD" with "RS-DVR". (CA57-58, CA626-27, CA556-57, CA352-53.)

Fundamental Differences Between the RS-DVR Service and a Set-Top DVR Box

In an obvious effort to distance the RS-DVR Service from its close genealogical roots in VOD, Cablevision has deliberately designed the RS-DVR Service so that the subscriber experience in using the Service "mimics" the look and feel of an in-home set-top DVR box. (CA59, CA326, A314, CA648.) Thus, Cablevision has taken pains to assign purportedly analogous functions to the same buttons on the remote control, and to present the subscriber with a similar on-screen menu. (CA59, A582, CA208.)

The similar functionality is only skin-deep.[6] As the District Court found, "under the hood" the RS-DVR Service is nothing like a DVR. (SPA25-26, A856-59, A1106-10, A1329-30.) Although Cablevision labors to describe the internal mechanics of a set-top DVR box as "complex" (CV Br. 5), the simple fact is that—unlike the RS-DVR Service—a set-top DVR box is under the user's direct control. All of its functions take place inside the home, in direct response to a user command. (CA48, CA189, A314, CA345-46, A857, A859, A1106-07.) By contrast, with the RS-DVR Service, the critical functions take place at Cable-

[6] Cablevision has artificially limited the functionality of its current version of the RS-DVR Service so that it appears to mimic that of a set-top DVR box. (CA60-61, A847-50.) These limitations are unrelated to the technological capabilities of the RS-DVR Service, and Cablevision could remove them at any time. (CA60, CA495, CA326, A578, A847-49.)

vision's head-end facility. Some of the RS-DVR Service functions occur without any subscriber request whatsoever, and the remainder are mediated by a network of hardware and software under Cablevision's control that determines whether the Service fulfills the request. (SPA25-26.)[7] The RS-DVR Service involves creating separate "streams" of programming at the head-end and transmitting them to subscribers over the cable system. (SPA17.) None of that occurs with a set-top DVR box.

Cablevision Refuses to Negotiate a License for the RS-DVR Service

When originally contemplating "a network-based alternative to the in-home DVR experience", Cablevision understood that such a service would require licenses from content providers. In an interview in 2004, Cablevision's head of programming, Mac Budill, stated: "*With support from our programming partners*, we think that we can offer a [network-based] service to our customers that . . . [is] complementary to the interests of copyright holders and programmers." (CA61, A601 (emphasis added).)

[7] A cable operator does not have this kind of control over a set-top DVR box. Although a cable operator can remotely disable a set-top box from functioning altogether (CV Br. 6), a cable operator cannot remotely prevent a subscriber from playing back a particular recording stored on the hard drive located within that subscriber's set-top DVR box. (A857.)

Sometime thereafter, Cablevision apparently changed its mind about the need for a license for a network-based service. On March 21, 2006, Cablevision sent letters to 89 content providers informing them of Cablevision's intended trial and launch of the RS-DVR Service. (CA62, A318-495, CA143-44.) Notably, not a single content provider responded by authorizing inclusion of its programming in the Service. (CA62, CA144, A603, A62.) Turner proposed to enter into licensing discussions for the Service, but Cablevision refused. (CA62, CA148-49, A603, A62.)

Summary of Argument

The undisputed facts are that Cablevision designed the RS-DVR Service, chooses which television programming to make available for copying and supplies that content to the Service, reconfigures the format of that content for copying, makes preliminary copies independent of any individual subscriber request, stores copied content on its servers, hosts and maintains the thousands of pieces of necessary equipment for the Service in multiple facilities that it owns and operates, uses its employees as system administrators, and transmits the content over its cable lines. Cablevision would charge its subscribers a monthly fee for those services. Cablevision does all of that without obtaining any licenses for the RS-DVR Service from content providers such as Turner.

On these facts—none of which Cablevision contests in this appeal—Cablevision itself makes the copies and transmissions in the RS-DVR Service. These facts render Cablevision liable for direct infringement of plaintiffs' rights of reproduction and public performance. Cablevision engages in directly infringing acts even without receiving any subscriber request, but under well-established copyright law, Cablevision is equally liable for making unauthorized copies and transmissions at its subscribers' request. In *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998), and other cases, this Court and others have held businesses directly liable for engaging in infringing acts on customer request, even if the customers themselves might have had a "fair use" defense. These cases require affirmance of the judgment here against Cablevision.

Cablevision seeks to be excused from liability because it claims to have designed and built its Service in such a way that its role in the physical acts of copying and transmitting copyrighted content is "automated". But Cablevision's automation defense is not supported by *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), on which Cablevision relies, or by any other precedent. The notion that one can deliberately automate a service so as to preclude application of copyright protections is likewise unsupported. Accepting Cablevision's purported excuse would

amount to a judicial rewriting of the copyright laws, which the District Court properly rejected. Instead, the District Court decided this case, rightly, on its facts.

Similarly, Cablevision's other leading case, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), is wholly inapposite here. *Sony* addressed (1) the "fair use" defense available to a television viewer who time-shifts viewing of television programming and (2) whether a VCR manufacturer could be held liable for contributory infringement for the act of selling the VCR. Here, there is neither a contributory infringement claim (A25-39, A1339), nor is there any "fair use" issue because Cablevision expressly waived any "fair use" defense to direct infringement (A57). So Cablevision's reliance on *Sony* is a needless sideshow.

Standard of Review

The District Court reached its legal conclusions based on a careful examination of the facts regarding Cablevision's proposed RS-DVR Service. Some of those facts were undisputed; others were factual findings that the District Court was permitted to make, based on the expert testimony at the trial, and under the terms of the parties' stipulation to that effect. (A953.) The District Court's findings of fact are thus entitled to deference and reviewed only for clear error. *O'Mara v. Town of Wappinger*, 485 F.3d 693, 697 (2d Cir. 2007). Notably,

Cablevision does not challenge a single finding of fact by the District Court. The District Court's conclusions of law are reviewed *de novo. Id.*

Argument

To establish a *prima facie* claim of direct copyright infringement, Turner must demonstrate (i) ownership of, or exclusive licenses to, copyrighted works, and (ii) unauthorized "copying". *Rogers v. Koons*, 960 F.2d 301, 306 (2d Cir. 1992). "Copying" in this instance "is shorthand for the infringing use of any of the copyright owner's five exclusive rights, described at 17 U.S.C. § 106". *Microsoft Corp. v. Harmony Computers & Elecs., Inc.*, 846 F. Supp. 208, 210 (E.D.N.Y. 1994) (citation omitted). It is well established that copyright infringement is a strict-liability offense. "Intention to infringe is not essential under the [Copyright] [A]ct." *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198 (1931).

The first element of copyright infringement—Turner's ownership of, or exclusive licenses to, copyrighted programming—is undisputed. (CA39, CA1046.) With regard to the second element—unauthorized "copying"—it is undisputed that Cablevision does not have authorization from Turner to "copy" any Turner programming. The only question is whether Cablevision would, in fact, "copy" Turner's programming as part of the RS-DVR Service. The "copying" at issue in this case relates to two of the exclusive rights conferred on Turner by the

Copyright Act—the rights of reproduction and public performance. 17 U.S.C. § 106(1), (4).

Cablevision asserted no affirmative defenses in its Answer, and by stipulation waived any "fair use" defense to a claim of direct copyright infringement. (A57-77.) Accordingly, if Turner made out a *prima facie* case for such infringement, the District Court's judgment must be upheld.

The District Court correctly concluded that, by operating its RS-DVR Service, Cablevision would infringe on Turner's copyrights in three ways.

First, Cablevision would violate Turner's exclusive right of reproduction by making unauthorized copies of copyrighted television programming. The particular copies are made in response to requests from subscribers. These are the copies Cablevision stores indefinitely on the hard drives in its Arroyo servers. (*See infra* Part I.)

Second, Cablevision would violate Turner's exclusive right of reproduction by making unauthorized copies, unrelated to any subscriber requests, of each and every frame of copyrighted television programming into the memory of its computers. These are the "buffer copies", which provide an independent basis for affirming the judgment. (*See infra* Part II.)

Third, Cablevision would violate Turner's exclusive right of public performance by making unauthorized transmissions of copyrighted television programming to multiple subscribers for "on demand" viewing. (*See* Fox Br.)

I. CABLEVISION MAKES UNAUTHORIZED COPIES OF TURNER'S COPYRIGHTED PROGRAMMING AND STORES THEM INDEFINITELY.

In operating the RS-DVR Service, Cablevision uses its computer equipment to make complete copies of television programs and to store those copies indefinitely at a central Cablevision facility. (SPA22-29.) That is a direct violation of plaintiffs' reproduction right. Cablevision argues that it should escape liability because it claims it makes those copies at its subscribers' request. But well-established copyright law teaches that businesses, such as copy shops, are liable as direct infringers even if they make copies at the request of their customers. Here, the facts are plain that Cablevision exercises even greater control over the copying process than a copy shop does—including taking affirmative steps to begin the copying process even before receiving any subscriber requests. Accordingly, the role of subscribers in making requests cannot excuse Cablevision from liability as a direct infringer.

A. Cablevision Is Directly Liable for the Unauthorized Copies that It Makes at the Request of Its Subscribers.

Based on its careful analysis of the expert testimony and the undisputed material facts, the District Court made a finding of fact that Cablevision

plays a "continuing and active" role in making the copies (and transmissions) in the RS-DVR Service. (SPA22.) In particular, the District Court found that Cablevision would (1) "decide which programming channels to make available for recording and provide that content" (SPA24), (2) "reconfigure the linear channel programming signals received at its head-end" (SPA26), (3) "house, operate, and maintain . . . the equipment that makes the RS-DVR's recording process possible" (SPA24), (4) have "physical control of the equipment at its head-end" (SPA24-25), (5) have personnel "monitor the programming streams at the head-end and ensure that the servers are working properly" (SPA25), and (6) "determine[] how much memory to allot to each customer and reserve[] storage capacity for each on a hard drive at its facility" (SPA25). Cablevision has contested *none* of those factual findings on this appeal. Thus, the District Court correctly concluded that, on these facts, Cablevision "would be 'doing' the copying, notwithstanding that the copying would be done at the customer's behest". (SPA27.)

Courts have consistently rejected schemes to avoid liability for infringement by disguising copying as a customer request. Courts hold that businesses that, like Cablevision, fulfill customer requests for unauthorized copies are liable as direct infringers—whether or not their customers may be able to assert a fair use defense. For example, copy shops such as Kinko's are directly liable for making infringing copies, even if those copies are made at the request of professors

or students. *See Princeton Univ. Press v. Mich. Document Servs. Inc.*, 99 F.3d 1381, 1385-91 (6th Cir. 1996) (en banc), *cert. denied*, 520 U.S. 1156 (1997); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1530-35 (S.D.N.Y. 1991).

In both *Princeton University Press* and *Basic Books*, a defendant copy shop ran a duplicating service for university professors whereby a professor could supply the copy shop with copyrighted materials that he or she wanted to include in a coursepack, and then the copy shop would handle the physical copying of those materials and sell the coursepack to the professor's students. *Princeton Univ. Press*, 99 F.3d at 1384; *Basic Books*, 758 F. Supp. at 1528-29. In each case, the court rejected the suggestion that, because the copy shop was making copies at the direction of its customers, those customers, not the copy shop, were responsible for the copies. *Princeton Univ. Press*, 99 F.3d at 1386 n.2, 1389; *Basic Books*, 758 F. Supp. at 1532, 1545-46. Notably, the courts held that the copy shops were liable as direct infringers, even though their customers might not have been subject to liability because the customers might have had a "fair use" defense. *Princeton Univ. Press*, 99 F.3d at 1389, *Basic Books*, 758 F. Supp. at 1532.

Courts have reached the same result in cases involving businesses that use in-store equipment to copy copyrighted sound recordings onto blank audio tapes at the request of customers. *RCA/Ariola Int'l, Inc. v. Thomas & Grayston*

Co., 845 F.2d 773, 781 (8th Cir. 1988); *RCA Records v. All-Fast Sys., Inc.*, 594 F. Supp. 335, 337-38 (S.D.N.Y. 1984); *Elektra Records Co. v. Gem Elec. Distribs., Inc.*, 360 F. Supp. 821, 823 (E.D.N.Y. 1973).

This Court has endorsed the reasoning of the copy shop cases. In *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998), a case involving a public performance made at customer request, the Court cited *Princeton University Press* and *Basic Books* with approval for the proposition that "courts have rejected attempts by for-profit users to stand in the shoes of their customers". *Id.* at 112. The *Infinity Broadcast* Court therefore concluded that "large-scale photocopying, even for the statutorily-approved purpose of educational use, can still infringe". *Id.* In the same way, Cablevision's large-scale copying of television programming infringes—notwithstanding that Cablevision's subscribers request copies and even if its *subscribers* might qualify for a "fair use" defense (a defense that Cablevision itself has waived).[8]

[8] Notably, Congress has already provided limited exceptions from the copyright laws that permit businesses to make, at the request of their customers, what would otherwise be infringing copies of copyrighted works. *See, e.g.*, 17 U.S.C. § 108 (exception for user-initiated copies of works made by libraries or archives); 17 U.S.C. § 512 (limiting liability of "service provider[s]" for money damages in connection with certain user-initiated actions). Tellingly, the copying contemplated by the RS-DVR Service does not fit within any of these exceptions.

Indeed, Cablevision is even more actively involved in the copying in the RS-DVR Service than a copy shop such as Kinko's is in preparing coursepacks. Unlike Kinko's, Cablevision selects the content for copying and provides that content to its subscribers. (SPA24.) Moreover, up front, before any subscriber is involved, Cablevision processes all of the content and reconfigures it so that it can be copied. (SPA26.) Kinko's does none of that. Cablevision's active involvement throughout the copying process makes the RS-DVR Service an even clearer case of direct infringement.

Nor can Cablevision escape liability by pointing to the fact that, in the copy shop cases, "defendant's *employees* themselves did the copying". (CV Br. 23.) There is no relevant distinction between a business that uses employees to make copies and one that uses machines. Thus, in rejecting Kinko's argument that it acted merely as an agent of its customers, the *Basic Books* court pointed *not* to the role of Kinko's employees in the physical act of making particular copies, but instead to Kinko's "control" over the copying service. 758 F. Supp. at 1546. Likewise, in other legal contexts, a defendant is liable for the acts of machines it owns and programs. *See, e.g.*, *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (affirming preliminary injunction against trespass to chattels through "use of search robots"). That should hold even more true in copyright law, where direct infringement is a strict-liability offense. *Buck*, 283 U.S. at 198.

There is no "robot" exception to copyright infringement. In our increasingly automated world, it would defy common sense if Cablevision could make an end-run around the copyright laws simply by automating the physical act of making a particular copy. There is no legal distinction between copying a manuscript longhand or with a photocopying machine. Returning to the copy shop fact pattern—with modifications to resemble the RS-DVR Service—underscores that point. Suppose Kinko's were to design and implement a service that takes copyrighted books and, without permission from the copyright holders, allows customers to make automated requests (either in-store or remotely) for print copies of those books. Machines at the Kinko's store were programmed by Kinko's to coordinate the requests, make the requested copies, and print them out in-store or transmit them to the customer's personal computer for home reading—all without any human intervention. That a Kinko's employee would not actually press the buttons that would cause the service to make the copies, however, surely would not change the fact that *Kinko's* itself would be making the unauthorized copies and would be liable for direct infringement, just as Cablevision is here.[9]

[9] Morevover, the record here shows not only that Cablevision's employees designed and built the RS-DVR Service, but also that Cablevision's system administrators continuously operate and maintain the RS-DVR Service—from facilities staffed 24 hours a day, seven days a week (SPA10, CA707, CA732-34, CA750, A1205-06)—and would be able to monitor and override the actions of

The District Court's decision is not an insuperable bar to the launch of the RS-DVR Service. It simply means that Cablevision will have to negotiate licenses with copyright holders before including their programming in its RS-DVR Service, just as Cablevision already negotiates licenses to use copyrighted programming in other ways.[10] Cablevision suggests that obtaining licenses for a "network DVR" service like the RS-DVR Service would not be feasible. (CV Br. 60.) But Time Warner Cable's "Start Over" disproves that unsupported assertion. Start Over is a form of "network DVR" service based on technology similar to Cablevision's RS-DVR Service. Start Over allows consumers to view in-progress programs from the beginning, as well as pause and rewind programs.[11] But significantly, Start Over reflects a different approach to licensing from

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RS-DVR Service subscribers (CA709-10, CA850-52, A792, CA806, CA930, A1101-02.)

[10] Because copyright is "a bundle of discrete 'exclusive rights'", a copyright owner has the right to license them separately. *New York Times Co. v. Tasini*, 533 U.S. 483, 495 (2001) (quoting 17 U.S.C. § 106). Thus, even though Turner has given a license for simultaneous transmission, Turner has not given Cablevision licenses for the separate rights to reproduction and delayed transmission.

[11] *See* Alan Breznick, *Time Warner Expands Start Over*, Cable Digital News, Nov. 27, 2006, at http://www.lightreading.com/document.asp?doc_id=115819&site=cdn. Start Over, a successful licensed service, is the successor to the innovative network DVR technology Time Warner developed between 2001 and 2003 for a project called MystroTV. *See* Steve Donohue, *Intellectual Property Portfolio Backs Time Warner Networked DVR Startup*, Multichannel News, Oct. 20, 2003, at 3, available at http://www.multichannel.com/article/CA330389.html.

Cablevision's RS-DVR Service. Start Over includes only those channels for which Time Warner Cable has obtained a separate Start Over license. Where Start Over has been introduced, the service includes, by license, over one hundred of the linear channels on the cable system.

Accordingly, Start Over also demonstrates, contrary to the unsupported assertions of Cablevision's *amici* (CDT Br. 21-26; Wu Br. 12-19), that affirmance of the judgment below would not stifle development of a new technology. Nor would it unduly favor "device DVRs" over "network DVRs". Rather, affirmance of the judgment here would simply enforce the fundamental copyright-law principle that users of copyrighted content must obtain a license.

B. Cablevision's Reliance on *Netcom* Is Misplaced.

Cablevision claims that "'volition' or 'human intervention' to make a particular copy" is a prerequisite for liability as a direct infringer. (CV Br. 14.) But Cablevision points to no support for such a requirement under the Copyright Act itself or in the Act's legislative history. And Cablevision does not cite to a single case from this Circuit in support of such a requirement. Instead, Cablevision looks to *Netcom*, a 1995 district court case from outside this Circuit. The *Netcom* line of cases, however, does not support Cablevision's argument. The District Court properly held that Cablevision's reliance on *Netcom* and its progeny was "misplaced". (SPA29.)

Netcom and its progeny are all expressly based on the unique factual circumstances and policy considerations raised by the Internet, and have been applied only in that context. On the Internet, content flows freely from innumerable sources. By contrast, in the closed environment of a cable television system, the cable operator controls the flow of content through the system. As the District Court explained, "Cablevision is not confronted with the free flow of information that takes place on the Internet, which makes it difficult for ISPs to control the content that they carry." (SPA28.)

Netcom and the cases following it are predicated on the inability of Internet service providers (ISPs)—typically, providers of connectivity to the Internet and website operators—to manage the free flow of massive amounts of digital information that may traverse their facilities. *See, e.g.*, *Netcom*, 907 F. Supp. at 1372-73; *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 548 (4th Cir. 2004). In light of technological developments since *Netcom* was decided in 1995—when the Internet and the World Wide Web were in their infancies—that basic premise probably no longer holds today.[12] But that does not matter here

[12] It is increasingly technologically possible for Internet access providers and website operators to manage the data passing over their facilities or hosted by them, including the ever-improving ability to separate infringing from non-infringing information in a reliable way. *See, e.g.*, Kevin J. Delaney & Ethan Smith, *YouTube Model Is Compromise Over Copyrights*, Wall St. J., Sept. 19, 2006, at B1 (discussing "fingerprinting" process that would allow website

because there is no precedent or basis for applying *Netcom* to a closed architecture like cable television.[13]

Indeed, the Digital Millennium Copyright Act of 1998 ("DMCA") reinforces the uniqueness of the copyright concerns in the Internet context. Congress enacted Title II of the DMCA (codified at 17 U.S.C. § 512) specifically in response to *Netcom* and other Internet cases to deal with issues raised by the passive roles of certain ISPs. *See* H.R. Rep. No. 105-551, pt. 1, at 24 (1998); S. Rep. No. 105-190, at 19 & n.20 (1998). Congress limited the DMCA's protections to "service provider[s]", as defined in 17 U.S.C. § 512(k), and deliberately excluded cable operators—when providing a television programming service and not acting themselves as ISPs (*e.g.*, providing high-speed Internet access)—from the protections of the DMCA. *See* H.R. Rep. No. 105-551, pt. 2, at 63-64 (1998); S. Rep. No. 105-190, at 54-55 (1998). Cablevision did not contend below, nor does it

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operators to screen automatically for copyrighted material in user-submitted content on the Internet); Ethan Smith, *MySpace Deploys System to Guard Copyrighted Works*, Wall St. J., Oct. 31, 2006, at B2 (describing a similar "filtering system").

[13] Although Cablevision relies on the Fourth Circuit's *CoStar* decision to argue that *Netcom* applies beyond the Internet (CV Br. 30), the Fourth Circuit in fact referred to "*Netcom*'s construction of copyright infringement liability for ISPs", and was careful to limit its own holding precisely to "ISPs". *CoStar*, 373 F.3d at 555.

contend here on appeal, that its actions in providing the RS-DVR Service fall within any of the safe harbors of DMCA Section 512.

Further, Cablevision mischaracterizes *Netcom*'s central proposition. *Netcom* and its progeny stand for the proposition that when an ISP serves as nothing more than a passive conduit, it is not liable as a direct infringer. Cablevision repeatedly asserts that those cases hold that "'volition' or 'human intervention' to make a particular copy" is a prerequisite for direct-infringer liability. (CV Br. 14, 19, 20, 24.) But the cases say nothing of the sort. *Netcom* holds that direct infringement requires "some element of volition or causation". 907 F. Supp. at 1370. The cases following *Netcom* likewise articulate the test as one of "volition or causation". *See, e.g.*, *CoStar*, 373 F.3d at 550. Cablevision cites no case that makes "human intervention" the test.[14] Nor does Cablevision cite any case that goes so far as to require volition or causation in the act of making a particular copy.

The *Netcom* cases demonstrate that the determinative aspect of the "volition or causation" test is whether the defendant engaged in affirmative conduct beyond being a "passive conduit". In *Netcom*, for example, the court

[14] Even if "human intervention" were the test, the record demonstrates that human beings are integrally involved throughout the RS-DVR Service. (*See supra* note 9.)

observed the similarity between an Internet access provider and "a common carrier that merely acts as a passive conduit for information". *Id.* at 1370 n.12 (comparing Netcom to a telephone company). Similarly, in *CoStar*, the court explained that mere "passive ownership and management of an electronic Internet facility" is not conduct that has "a nexus sufficiently close and causal to the illegal copying". 373 F.3d at 550. And in *Playboy Enterprises, Inc. v. Webbworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997), *aff'd mem.*, 168 F.3d 486 (5th Cir. 1999), the court held that the critical test for direct infringement was whether an entity acted as a mere "passive conduit of unaltered information" or "took 'affirmative steps to cause the copies to be made'". *Id.* at 552 (quoting *Netcom*, 907 F. Supp. at 1381).[15] Thus, even under the *Netcom* cases, Cablevision cannot escape liability for direct infringement unless its role in the RS-DVR Service is that of a "passive conduit".

But the undisputed facts demonstrate that Cablevision is anything but a passive conduit. Unlike passive ISPs, Cablevision is the sole supplier of copyrighted content for copying in the RS-DVR Service. (A1206-07.) Only one

[15] Although Cablevision holds up *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997), as an example of "human intervention" (CV Br. 24), the court never applied such a test and instead relied on both human and automated activities as evidence of defendant's "active participa[tion]" in the infringement. 982 F. Supp. at 513.

case in the *Netcom* line involved a defendant that itself supplied the copied content, and in that case, *Webbworld*, the defendant *was* held liable as a direct infringer. 991 F. Supp. at 551-52. The defendants in all the other *Netcom* cases provided *none* of the content that was copied. Those defendants were all alleged to have copied content provided by users or by other third parties. *See* cases cited in CV Br. at 21-22. Contrary to Cablevision's claim that supplying content "makes no difference to *direct* infringement" (CV Br. at 31), the very cases that Cablevision urges the Court to follow say just the opposite. *See Netcom*, 907 F. Supp. at 1368 ("Netcom does not create or control the content of the information available to its subscribers."); *CoStar*, 373 F.3d at 547 ("LoopNet does not post real estate listings on its own account.").

Despite being the sole supplier of content to the RS-DVR Service, Cablevision argues that it does not control that content "in any relevant respect" because (1) "it does not choose the content of—the programs included on—any given channel" and (2) "there are some channels Cablevision is obligated to carry". (CV Br. 32.) Those arguments miss the mark. *First*, although Cablevision is obligated to carry a small number of broadcast stations under federal "must carry" rules, 47 U.S.C. §§ 534-535, those stations constitute a small fraction of the programming on Cablevision's system. Further, Cablevision is required to include

those "must carry" channels only as part of its regular linear programming—not in the RS-DVR Service.

Second, but for the small number of "must carry" channels, Cablevision exercises complete control over what channels are included in its regular linear programming. As the Supreme Court has repeatedly held, "cable operators exercise 'a significant amount of editorial discretion regarding what their programming will include'". *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986) (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979)); *see also Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994).[16] Similarly, as the District Court found, "Cablevision has unfettered discretion in selecting the programming that it would make available for recording through the RS-DVR . . . ." (SPA28-29.) Cablevision could, for example, exclude Turner's channels from the RS-DVR Service even while still including them as part of its licensed linear programming. (SPA11, CA49, CA708, A1084, A1093, A1207-09.)

[16] Cablevision's reliance on the Court's decision in *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983), is misplaced. That case, which involved a carrier with the capacity to retransmit "only one" broadcast signal, interpreted the cable compulsory license of 17 U.S.C. § 111 (for which Cablevision concedes the RS-DVR Service does not qualify)—a context entirely distinct from the "control over content" contemplated by *Netcom* and its progeny.

There are numerous other reasons why the District Court was right to conclude that Cablevision "is not similarly situated to an ISP". (SPA28.) Unlike a passive ISP, Cablevision cannot claim that it is unable to screen out infringing content, *see Netcom*, 907 F. Supp. at 1369 n.12, 1372-73; *CoStar*, 373 F.3d at 550-51, or that it has engaged in ameliorating conduct with respect to the infringement that would take place as part of the RS-DVR Service, *see Netcom*, 907 F. Supp. at 1368; *CoStar*, 373 F.3d at 547.

Nor can Cablevision claim, as passive ISPs can, that the copyright infringement is incidental to a legitimate business such as providing Internet access, on-line bulletin boards or Internet search engines. *See* cases cited in CV Br. at 21-22. Copyright infringement lies at the heart of the RS-DVR Service. *Cf. Webbworld*, 991 F. Supp. at 552 (holding website operator liable as direct infringer under *Netcom* where website "functioned primarily as a store" for infringing images). The whole point of the RS-DVR Service is to make copies of (and then transmit) copyrighted programming. Indeed, the infringing aspect of the Service is what makes it attractive to subscribers, and hence profitable for Cablevision.

C. *Sony* Is Legally and Factually Inapposite.

In an effort to distract from the facts of this case, Cablevision repeatedly invokes the *Sony* case. (CV Br. 16-18, 25, 29.) *Sony*, however, is legally and factually inapposite, and provides no basis for protecting Cablevision from liability

as a direct infringer. The District Court correctly held that Cablevision's reliance on *Sony* is "misguided". (SPA23.)

Sony addressed the "fair use" defense in the context of a contributory infringement claim. 464 U.S. at 434-56. Here, there is no contributory infringement claim (A25, A1339), and Cablevision has expressly waived any "fair use" defense to direct infringement (A57).

Cablevision's extended discussion of *Sony*'s holding on contributory infringement is based on the fundamentally mistaken premise that the *Cablevision subscriber* is the only one engaged in copying activity in the RS-DVR Service. Cablevision, in other words, assumes in its favor the central question presented for resolution in this case: is *Cablevision* making infringing copies?

Unlike this case, *Sony* did not present a question as to *who* was doing the copying. The Supreme Court proceeded on the uncontested assumption that the consumer made copies with the Betamax and, given that assumption, addressed whether Sony was a contributory infringer in the consumer's copying. 464 U.S. at 435 n.17 (noting that direct infringement was not before the Court). Contrary to Cablevision's suggestion (CV Br. 2-3), in *Sony* the Supreme Court did not render

some sort of one-size-fits-all ruling that, no matter what the facts of the case may be, the consumer is always doing the copying in the context of time-shifting.[17]

Proceeding from the incorrect premise that *Sony* governs here (notwithstanding that *Sony* explicitly did not address the central issue in this case), Cablevision argues that its role in the RS-DVR Service could subject it to liability only as a contributory infringer. Cablevision assumes, however, that direct and contributory infringement are either/or propositions: *either* Cablevision is a direct infringer *or* it is a contributory infringer. But that assumption is also mistaken. A single defendant like Cablevision can be liable for both direct infringement and contributory infringement, *see, e.g.*, *Russ Hardenburgh*, 982 F. Supp. at 513-14, and multiple defendants can be liable for the same direct infringement, *see, e.g.*, *Buck*, 283 U.S. at 197-98. Thus, even if Cablevision could fit itself under *Sony*—which it cannot—that would be irrelevant to Cablevision's liability for direct infringement.

Moreover, as the District Court correctly found, "the RS-DVR and VCR have little in common, and the relationship between Cablevision and

[17] Accordingly, Professor Wu's assertion that "*Sony/Grokster* today is copyright's system for assessing the market entry of user-directed copying technologies" is incorrect. (Wu Br. 6.) The longstanding line of copy shop cases already discussed (*see supra* Part I.A) provides the proper framework for evaluating direct infringement claims where an alleged infringer makes copies at the request of customers.

potential RS-DVR customers is significantly different from the relationship between Sony and VCR users". (SPA23.) In *Sony*, Sony did no more than provide a machine (the Betamax) with which users could copy content; the only interaction between Sony and the Betamax user was the point of sale. Sony did not, for example, provide copyrighted content for copying. *See Sony*, 464 U.S. at 436 (noting that Sony "[does] not supply Betamax consumers with respondents' [copyrighted] works"). The Supreme Court itself has characterized the holding in *Sony* as one concerning "the design or distribution of a product". *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 933 (2005); *see also Tasini*, 533 U.S. at 504 (describing *Sony*'s holding as about "the 'sale of copying equipment'" (quoting *Sony*, 464 U.S. at 442)).

Cablevision does far more than just sell a piece of machinery in a one-time interaction. Cablevision has an ongoing service relationship with its RS-DVR Service subscribers that involves deciding which channels to make available for recording and providing that copyrighted content; housing, operating, and maintaining the equipment that makes the RS-DVR Service's recording process possible; sending the previously recorded streams from the head-end to the subscriber's home; monitoring the programming streams and ensuring that the servers at the head-end are working properly; and charging subscribers a monthly fee for the Service. Thus, Cablevision's extensive involvement in the RS-DVR

Service is completely unlike Sony's limited actions in connection with the Betamax. (SPA23-26.)

D. Cablevision's References to Set-Top DVR Boxes Are Unavailing.

Throughout its brief, Cablevision suggests that the set-top DVR box provides a useful reference point for the Court's assessment of the RS-DVR Service. It does not.

Cablevision argues that what it describes as "[w]idespread [a]cceptance" of set-top DVR boxes—products not before this Court—somehow makes the RS-DVR Service lawful. (CV Br. 26-27.) Failure to sue cable operators for offering set-top DVR boxes, however, does not constitute an implicit concession of the legality of either set-top DVR boxes or the RS-DVR Service.[18] *See Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 484 (2d Cir. 2004) ("[F]ailure to pursue third-party infringers has regularly been rejected as a defense to copyright infringement or as an indication of abandonment."); *Paramount Pictures Corp. v. Carol Publ'g Group*, 11 F. Supp. 2d 329, 336 (S.D.N.Y. 1998) ("[T]he lack of earlier litigation against other similar works is simply irrelevant."), *aff'd mem.*, 181 F.3d 83 (2d Cir. 1999). Cablevision fares no better by citing to

[18] In fact, copyright owners have brought infringement actions against Internet-based copying and transmission services similar to Cablevision's, as well as against manufacturers of stand-alone DVRs that clearly ran afoul of *Sony*'s principles. (A890-942.)

cases that have considered acquiescence by government officials in construing the meaning of an ambiguous statute. *See United States v. State Bank of N.C.*, 31 U.S. (6 Pet.) 29, 39 (1832); *Union Pac. R.R. v. Anderson*, 120 P.2d 578, 587 (Or. 1941). Here, plaintiffs are not government officials, and Cablevision points to no ambiguity in the Copyright Act that requires construction.

If any "widespread acceptance" should count here, it should be the widespread acceptance by cable operators of the need to obtain licenses from content providers to reproduce and transmit copyrighted programming. Cablevision has entered into affiliation agreements with Turner granting Cablevision a license to transmit certain Turner networks as linear networks and narrowly defining Cablevision's access and rights to Turner's programming. (CA42-44, CA435-51.) Cablevision concedes that a license is also required for VOD transmissions. (CA44, CA132, CA134-38.) As the District Court found, "the RS-DVR bears striking resemblance to VOD—a service that Cablevision provides pursuant to licenses negotiated with programming owners". (SPA26-27.) Thus, the District Court's decision requiring Cablevision to negotiate a license to use Turner's programming as part of the RS-DVR Service comports with industry practice.

Finally, Cablevision's analogy to the set-top DVR box is a false one because Cablevision wrongly focuses on what the RS-DVR Service subscriber

perceives, rather than what Cablevision does as part of the RS-DVR Service. Cablevision asserts that a set-top DVR box and the RS-DVR Service are "functionally indistinguishable", relying entirely on the fact that they appear "virtually identical" to the consumer. (CV Br. 26-28.) But the District Court made a factual finding that the two technologies are "vastly different". (SPA25.) Whereas a set-top DVR box is under the user's direct control and all of its functions take place in the privacy of the user's home, in direct response to a user command, the critical functions in the RS-DVR Service take place at Cablevision's head-end facility, are mediated by a network of hardware and software under Cablevision's control, and occur in some cases without any subscriber request whatsoever. (SPA25-26.) In the RS-DVR Service, Cablevision creates a separate "stream" of programming and transmits it from its head-end over the cable lines to the "node" that includes the requesting subscriber. (SPA17.) By contrast, a set-top DVR box makes no transmissions to or from locations outside the home.

As Cablevision rightly notes, the issue is what Cablevision *does*. (CV Br. 24.) And with respect to what Cablevision does (as opposed to what the consumer perceives), the RS-DVR Service is nothing like a set-top DVR box.

II. CABLEVISION MAKES UNAUTHORIZED COPIES OF TURNER'S COPYRIGHTED PROGRAMMING WITHOUT RECEIVING ANY SUBSCRIBER REQUESTS.

Cablevision does not dispute that it makes at least two sets of buffer copies as part of the RS-DVR Service without receiving any individual subscriber request. *First*, Cablevision makes buffer copies in the BMR clamper of bits of *every* program on each linear network that it has decided to include in the RS-DVR Service. *Second*, Cablevision makes copies in the primary ingestion buffers of the Arroyo server—also of bits of *every* program on each linear network that it has decided to include in the RS-DVR Service.[19] Cablevision cannot—and does not—argue that it is not directly responsible for making these buffer copies. Rather, Cablevision contends that either the buffer copies are not "fixed" under the Copyright Act or, if they are, Cablevision does not infringe because its copies are *de minimis*. The District Court correctly rejected both of those arguments and held that the buffer copies violate Turner's exclusive right of reproduction pursuant to 17 U.S.C. § 106(1).

[19] Although the District Court found that "[b]uffering takes place at several points during the operation of the RS-DVR" (SPA12), Turner focuses on the two sets of buffer copies described above, which are not associated with individual subscriber requests, because they provide a basis for upholding the District Court's judgment independent of the arguments set forth in Part I.

A. The Buffer Copies Are "Fixed".

The buffer copies that Cablevision makes as part of the RS-DVR Service are "fixed" according to the definitions in the Copyright Act. The Act defines "copies" as any material objects in which a work is "fixed" and "from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device". 17 U.S.C. § 101. In turn, a work is "fixed" if it "is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration". *Id.* The buffer copies in the RS-DVR Service are "fixed" because they exist long enough to be reproduced for an indefinite period of time.

Cablevision does not dispute that computers make "copies" when they load data into random access memory (RAM). *See, e.g.*, *Stenograph L.L.C. v. Bossard Assocs., Inc.*, 144 F.3d 96, 101-02 (D.C. Cir. 1998); *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1335 (9th Cir. 1995), *cert. denied*, 516 U.S. 1145 (1996); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994). Nor does Cablevision dispute that the buffer copies in the RS-DVR Service are loaded into RAM and are "reproduced". Instead, Cablevision argues that the buffer copies themselves do not exist "for a period of more than transitory duration". (CV Br. 39.) That argument misunderstands the definition of "fixed". Exactly how long the buffer copies

themselves persist is irrelevant because unquestionably they exist *long enough* to be reproduced into copies lasting "for a period of more than transitory duration", which satisfies the test for fixation. In today's digital environment, many reproductions can be made in under a second. Congress provided a functional rather than temporal definition of fixation: if a copy lasts long enough that it can be reproduced, then it is fixed.

The Copyright Office's interpretation of Section 101 supports the District Court's decision. In its report to Congress on the DMCA, the Copyright Office stated that:

> "[A] general rule can be drawn from the language of the statute. . . . [W]e believe that Congress intended the copyright owner's exclusive right to extend to all reproductions from which economic value can be derived. The economic value derived from a reproduction lies in the ability to copy, perceive or communicate it. *Unless a reproduction manifests itself so fleetingly that it cannot be copied, perceived or communicated, the making of that copy should fall within the scope of the copyright owner's exclusive rights.*" U.S. Copyright Office, *DMCA Section 104 Report* 111 (Aug. 2001), *available at* http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf (emphasis added).

As Cablevision concedes (CV Br. 43), the Copyright Office's interpretation of the Act receives so-called *Skidmore* deference. Given the Office's "specialized experience and broader investigations and information", the Office's views are entitled to weight depending on their "power to persuade". *See United States v. Mead Corp.*, 533 U.S. 218, 234-235 (2001) (quoting *Skidmore v. Swift & Co.*, 323

U.S. 134, 139, 140 (1944)); *Morris v. Bus. Concepts, Inc.*, 283 F.3d 502, 505-06 (2d Cir. 2002). Here, the extensive investigative basis and sound, practical reasoning of the DMCA Report make it persuasive.

There is no dispute that Cablevision's buffer copies persist long enough for Cablevision to make reproductions from them; indeed, that is the reason the buffer copies are made. As the District Court found, "the portions of programming residing in buffer memory are used to make permanent copies of entire programs on the Arroyo servers". (SPA30.) The BMR clamper holds the programming in its buffers long enough for the clamper to analyze and reformat the programming data, and long enough for the clamper to direct the programming streams to the Arroyo server. (A810, CA1167, CA735-36, A840-41, A1085.) The Arroyo server then holds the programming in its primary ingestion buffers long enough to make multiple copies of the programming into another portion of its memory, and from there makes multiple complete copies of the programming onto hard drives located within the Arroyo server at Cablevision's head-end—complete copies that are stored indefinitely. (A1125-30, A1188-94.) As Turner's expert, Ted Hartson, testified, Cablevision makes buffer copies that exist "long enough to be reproduced or copied [to] the succeeding stage". (A1130.) And without the unauthorized clamper buffer copies and the unauthorized primary ingestion buffer copies, the RS-DVR Service would not work. Consequently, the buffer copies

infringe on Turner's copyrights. *See DMCA Section 104 Report* 111; *see also Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1176-78 (N.D. Ill. 1997) (holding that RAM copies infringe even though the "process of duplication and transmission happens so quickly that typically only a portion of a file is in RAM at any one time").

Cablevision and its *amici* rely on a passage from the House Report that they claim supports their reading of the definition of "fixed" in Section 101. (CV Br. 39, 44-45; Profs. Br. 8-9.) But the sentence from the House Report on which Cablevision relies applies to the *second* sentence of the statutory definition, which addresses the circumstances under which works "that are being transmitted" (such as live news or sports broadcasts) are "fixed". H.R. Rep. No. 94-1476, at 53 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5666. That legislative history does not interpret the *first* sentence of the statute, which provides the general definition of "fixed", and hence is inapplicable to the buffer copies that Cablevision makes as part of the RS-DVR Service. *See Midway Mfg. Co. v. Artic Int'l, Inc.*, 547 F. Supp. 999, 1008 (N.D. Ill. 1982), *aff'd*, 704 F.2d 1009 (7th Cir.), *cert. denied*, 464 U.S. 823 (1983).

Cablevision also relies on language in *CoStar* suggesting that buffer copies "are 'transitory' in a 'qualitative' sense as well, since they exist only while data is *in transit*". (CV Br. 40, citing *CoStar*, 373 F.3d at 551.) As an initial

matter, "in transit" is an implausible construction of the statutory term "transitory duration". Moreover, at least with respect to the buffer copies in the RS-DVR Service, that characterization of buffer copies is factually incorrect. Buffered data does not "move"; rather it is copied from one location to another. As Turner's expert, Ted Hartson, testified: "[The data] exists in the primary buffer, it's copied to the secondary buffer. *And for a brief moment in time it's probably in both of those buffers*." (A1129 (emphasis added).) Cablevision's expert also acknowledged that when data is copied into or out of buffers, the data exists temporarily in two locations at the same time. (A1192.)[20]

The buffer copies that Cablevision makes as part of the RS-DVR Service are unlicensed and unauthorized by Turner. In contrast to the commonplace buffers in other technologies that Cablevision and its *amici* discuss (CV Br. 48; Profs. Br. 1, 19), the buffer copies that Cablevision makes as part of

[20] *CoStar*'s discussion of data "in transit" reveals a fundamental misunderstanding of the technology behind buffer copies and therefore casts serious doubt on the *CoStar* court's holding that the Internet buffer copies in that case were not "fixed". Cablevision also mistakenly relies on *Advanced Computer Services of Michigan, Inc. v. MAI Systems Corp.*, 845 F. Supp. 356 (E.D. Va. 1994), which presented facts different from this case, and therefore simply noted that "[i]t is unnecessary here to decide" how long a RAM copy must persist to be "fixed". *Id.* at 363.

the RS-DVR Service are not incidental to a lawful (or licensed) use.[21] Here, the affiliation agreements with Turner permit Cablevision to transmit programming only as part of the linear stream, not as part of the RS-DVR Service. (CA45, CA138, CA144.) Accordingly, no matter how the Court rules on the copies made at subscriber request (*see* Part I), the buffer copies provide an independent basis for affirming the judgment that in the RS-DVR Service Cablevision would violate 17 U.S.C. § 106(1).

B. The Buffer Copies Are Not *De Minimis*.

Cablevision's alternative argument that the buffer copies are *de minimis* is contradicted by the undisputed fact that the buffer copies comprise, in the aggregate, the entirety of each of plaintiffs' copyrighted works being infringed. (A1127.) The District Court correctly found that "[t]he aggregate effect of the buffering that takes place in the operation of the RS-DVR can hardly be called de minimis". (SPA30.)

Cablevision's reliance on *Knickerbocker Toy Co. v. Azrak-Hamway International, Inc.*, 668 F.2d 699 (2d Cir. 1982), and *Sandoval v. New Line Cinema*

[21] In addition, the parade of horribles invoked by Cablevision's *amici*—for example, that consumers would be liable for copyright infringement for "turning on a digital TV, or browsing a website on the Internet" (Profs. Br. 2)—ignores the critical distinctions of *who is doing the copying* and whether that copying is incidental to an otherwise lawful use. In the RS-DVR Service, it is undisputed that Cablevision (not consumers) makes unlicensed buffer copies.

Corp., 147 F.3d 215 (2d Cir. 1998), is unavailing. (CV Br. 46-48.) In *Knicker-bocker*, the infringing copy was held to be *de minimis* because it was only an "office copy" and was not used for the production run. 668 F.2d at 702, 703. And in *Sandoval*, the alleged infringement was the "virtually unidentifiable" display of copyrighted photographs in the background of a motion picture. 147 F.3d at 218. Here, by contrast, the buffer copies are not only used in the RS-DVR Service, but indeed are essential to the operation of the Service. Cablevision's computers identify the programming data in the buffers perfectly and reproduce it faithfully.

It does not matter that the programming stored in the buffers is "im-perceptib[le]" to consumers. (CV Br. 47-48.) All that matters is that the programming can be perceived "with the aid of a machine or device", 17 U.S.C. § 101 (definition of "copies"); H.R. Rep. No. 94-1476, at 52 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5665, which it certainly can. Nor does it matter that only a portion of a program is buffered at any point in time. (CV Br. 47.) Over time, the entire program is copied into buffer memory. (A1127.) Cablevision cannot escape liability because it copies whole copyrighted television programs in little pieces, and later reassembles them.

III. CABLEVISION MAKES UNAUTHORIZED TRANSMISSIONS OF TURNER'S COPYRIGHTED PROGRAMMING TO SUBSCRIBERS FOR "ON DEMAND" VIEWING.

To avoid unnecessary duplication in the briefing, Turner incorporates the arguments on public performance set forth in the Fox Brief as if fully set forth herein. Fed. R. App. P. 28(i).

Conclusion

The District Court's judgment should be affirmed.

June 29, 2007

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,253 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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June 29, 2007

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