

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

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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THE CARTOON NETWORK LP, LLLP and  
CABLE NEWS NETWORK L.P., L.L.L.P.,

*Plaintiff-Counter-Claimant-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., NBC STUDIOS, INC.,

*Plaintiffs-Counter-Defendants-Appellees,*

– v. –

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

*(For Continuation of Caption See Inside Cover)*

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

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**REPLY BRIEF FOR DEFENDANTS-  
COUNTERCLAIMANTS-APPELLANTS**

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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,

*Third-Party-Defendants-Appellees.*

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## TABLE OF CONTENTS

	<u>Page</u>
I. Cablevision Does Not Directly Infringe When Customers Use the RS-DVR To Make Time-Shifting Copies .....	3
A. <i>Netcom</i> Requires “Volition” or “Human Intervention” in Making the Copy .....	3
1. <i>Netcom</i> Requires Human Conduct.....	4
2. <i>Netcom</i> Requires Volition in the Act of Making the Copy .....	6
3. Plaintiffs’ “Customer Request” Cases Confirm That “Volition” or “Human Intervention” Is Required.....	8
4. <i>Netcom</i> Does Not Establish a “Robot” Exception to Infringement.....	9
5. <i>Netcom</i> Establishes a Generally Applicable Principle of Law.....	11
B. <i>Netcom</i> ’s Volition or Human Intervention Test Is Not Met Here .....	13
C. Plaintiffs’ Alternative Tests Are Unfounded and Unworkable.....	15
1. Cablevision Does Not Directly Infringe Merely Because It Delivers Content.....	15
2. Plaintiffs’ Other Indicia of “Active” Involvement Are Irrelevant and Unworkable .....	19
D. Plaintiffs’ Construction of the Act Defies Widespread Understandings.....	21
II. The RS-DVR Buffers Do Not Infringe Plaintiffs’ Reproduction Rights.....	25
A. Buffer Data Is Not “Fixed” .....	25
B. Buffering Is <i>De Minimis</i> .....	29

III.	The RS-DVR Does Not Infringe Plaintiffs’ Public Performance Rights.....	30
A.	The Customer, Not Cablevision, “Does” the Performing.....	31
1.	The Customer Directs RS-DVR Playback.....	31
2.	Preliminary Data Transfers Between Internal RS-DVR Components Are Irrelevant.....	34
B.	Playing Back a Customer’s Own Recordings to That Customer Is Not a Performance “To the Public” .....	37
1.	The RS-DVR Does Not Make “Public” Performances Because It Does Not Make the Same “Transmission of a Performance” Generally Available .....	38
2.	The RS-DVR Is Not Video-on-Demand.....	43
	CONCLUSION.....	45

## TABLE OF AUTHORITIES

<b>CASES</b>	<u>Page</u>
<i>ALS Scan, Inc. v. RemarQ Cmtys., Inc.</i> , 239 F.3d 619 (4th Cir. 2001) .....	3
<i>Advanced Computer Servs. of Mich., Inc. v. MAI Sys. Corp.</i> , 845 F. Supp. 356 (E.D. Va. 1994).....	27, 28
<i>BMI v. Claire’s Boutiques, Inc.</i> , 949 F.2d 1482 (7th Cir. 1991) .....	37
<i>Bd. of Exam’rs in Optometry v. Spitz</i> , 479 A.2d 363 (Md. 1984) .....	22
<i>Capitol Records, Inc. v. Naxos of Am., Inc.</i> , 372 F.3d 471 (2d Cir. 2004).....	21, 22
<i>Columbia Pictures Indus. v. Aveco, Inc.</i> , 800 F.2d 59 (3d Cir. 1986).....	33, 34
<i>Columbia Pictures Indus. v. Prof’l Real Estate Investors Inc.</i> , 866 F.2d 278 (9th Cir. 1989) .....	37
<i>Columbia Pictures Indus. v. Redd Horne, Inc.</i> , 749 F.2d 154 (3d Cir. 1984).....	32, 41, 42
<i>CoStar Group, Inc. v. LoopNet, Inc.</i> , 373 F.3d 544 (4th Cir. 2004).....	<i>passim</i>
<i>David v. Showtime/The Movie Channel, Inc.</i> , 697 F. Supp. 752 (S.D.N.Y. 1988).....	35, 36
<i>Davis v. The Gap, Inc.</i> , 246 F.3d 152 (2d Cir. 2001) .....	29, 30
<i>Elektra Records Co. v. Gem Elec. Distribs., Inc.</i> , 360 F. Supp. 821 (E.D.N.Y. 1973) .....	9
<i>Ford Motor Co. v. Summit Motor Prods., Inc.</i> , 930 F.2d 277 (3d Cir. 1991) .....	39
<i>Ft. Stewart Schs. v. FLRA</i> , 495 U.S. 641 (1990) .....	27
<i>Infinity Broad. Corp. v. Kirkwood</i> , 150 F.3d 104 (2d Cir. 1998).....	9

<i>Kranker v. Levitt</i> , 327 N.Y.S.2d 259 (N.Y. Sup. Ct. 1971).....	22
<i>MAI Sys. Corp. v. Peak Computer, Inc.</i> , 991 F.2d 511 (9th Cir. 1993).....	27
<i>MGM Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005).....	10
<i>Marobie-FL, Inc. v. Nat’l Ass’n of Fire Equip. Distributions</i> , 983 F. Supp. 1167 (N.D. Ill. 1997).....	9
<i>NFL v. PrimeTime 24 Joint Venture</i> , 211 F.3d 10 (2d Cir. 2000).....	35, 36, 37
<i>N.Y. Times Co. v. Tasini</i> , 533 U.S. 483 (2001).....	16, 34
<i>Newborn v. Yahoo!, Inc.</i> , 391 F. Supp. 2d 181 (D.D.C. 2005).....	4
<i>On Command Video Corp. v. Columbia Pictures Indus.</i> , 777 F. Supp. 787 (N.D. Cal. 1991).....	33, 34, 42
<i>Parker v. Google, Inc.</i> , No. 06-3074, 2007 WL 1989660 (3d Cir. July 10, 2007).....	3, 6, 12
<i>Parker v. Google, Inc.</i> , 422 F. Supp. 2d 492 (E.D. Pa. 2006) .....	5
<i>Playboy Enters., Inc. v. Russ Hardenburgh, Inc.</i> , 982 F. Supp. 503 (N.D. Ohio 1997).....	4, 5, 6
<i>Playboy Enters., Inc. v. Webworld, Inc.</i> , 991 F. Supp. 543 (N.D. Tex. 1997).....	11, 16
<i>Register.com, Inc. v. Verio, Inc.</i> , 356 F.3d 393 (2d Cir. 2004) .....	11
<i>Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.</i> , 907 F. Supp. 1361 (N.D. Cal. 1995).....	<i>passim</i>
<i>S. Bay Corp. v. Comm’r</i> , 345 F.2d 698 (2d Cir. 1965).....	3
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	1, 16, 24, 44
<i>Union Pac. R.R. Co. v. Anderson</i> , 120 P.2d 578 (Or. 1941) .....	22

<i>United States v. State Bank of N.C.</i> , 31 U.S. 29 (1832).....	22
<i>Wells Fargo &amp; Co. v. WhenU.com, Inc.</i> , 293 F. Supp. 2d 734 (E.D. Mich. 2003).....	27

## STATUTES

17 U.S.C. § 101 .....	<i>passim</i>
17 U.S.C. § 102(a) .....	28, 40
17 U.S.C. § 106 .....	6
17 U.S.C. § 106(1) .....	6
17 U.S.C. § 106(4) .....	31
17 U.S.C. § 111 .....	31
17 U.S.C. § 512(l) .....	12

## LEGISLATIVE HISTORY

H.R. Rep. No. 90-83 (1967).....	40
H.R. Rep. No. 94-1476 (1976).....	26

## MISCELLANEOUS

Berne Convention, Sept. 9, 1886, as revised July 14, 1967, 828 U.N.T.S. 221 .....	29
<i>Black's Law Dictionary</i> (8th ed. 2004).....	6
Leslie Ellis, <i>Definitive Broadband: Next Generation</i> (2005).....	44
<i>Goldstein on Copyright</i> (3d ed. 2006) .....	4, 12, 29, 30
<i>Nimmer on Copyright</i> (2006).....	<i>passim</i>

Pasztor, <i>Study Projects Greater Reliance of Cable-TV Subscribers on DVRs</i> , Wall St. J. Online, July 16, 2007.....	21
<i>Patry on Copyright</i> (2007).....	4, 9, 13
Singer, <i>Sutherland’s Statutes &amp; Statutory Construction</i> (6th ed. 2000) .....	22
<i>Start Over</i> , <a href="http://www.timewarnercable.com/southcarolina/products/cable/startover.html">http://www.timewarnercable.com/southcarolina/products/cable/startover.html</a> .....	19
U.S. Copyright Office, <i>DMCA Section 104 Report</i> (Aug. 2001) .....	27, 28
<i>Webster’s New International Dictionary</i> (2d ed. 1948) .....	6
WIPO Copyright Treaty, Dec. 20, 1996, <a href="http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P45_2379">http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P45_2379</a> .....	29
WIPO, <i>Guide to the Copyright and Related Rights Treaties Administered by WIPO</i> (2003).....	29



## ABBREVIATIONS FOR COURT FILINGS

A. __	Joint Appendix
ASMP Br.	Brief of Amici Curiae American Society of Media Photographers, Inc., <i>et al.</i> in Support of Affirmance
ATR Br.	Brief of Amicus Curiae Americans for Tax Reform in Support of Appellees Urging Affirmance
CA. __	Confidential Appendix
CDT Br.	Brief of Amici Curiae Center for Democracy & Technology, <i>et al.</i> Urging Reversal
Cablevision Br.	Opening Brief for Defendants-Counterclaimants-Appellants CSC Holdings, Inc., and Cablevision Systems Corporation
Fox Br.	Brief of Plaintiffs-Counter-Defendants-Appellees Twentieth Century Fox Film Corporation, <i>et al.</i>
Law Professors Br.	Brief of Amicus Curiae Law Professors in Support of Defendants-Counterclaimants-Appellants and Reversal
SPA. __	Special Appendix (attached to Cablevision’s Opening Brief)
Turner Br.	Brief of Plaintiffs-Counterclaim-Defendants-Appellees The Cartoon Network LP, LLLP, <i>et al.</i> (“Turner”)

## REPLY BRIEF FOR APPELLANTS

Plaintiffs made a strategic decision to allege only direct and not contributory infringement. That is understandable: Plaintiffs are unwilling to challenge the *consumer's* right to record television programs for later viewing under *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Having abandoned contributory infringement, plaintiffs cannot prevail merely by showing that Cablevision *contributes* to consumer copying. Rather, they must show that Cablevision *directly* infringes—that, when a customer uses the RS-DVR to record a program, Cablevision “do[es]” the copying within the meaning of the Copyright Act.

Plaintiffs cannot meet that burden. Plaintiffs’ expert conceded that, when a consumer directs a VCR to record a program, the consumer (not the VCR provider) does the copying. Cablevision Br. 27. Plaintiffs’ witnesses conceded that, when a consumer directs a DVR to record a program, the consumer (not the DVR provider) does the copying. *Id.* Court after court has held that, when a consumer causes an automated Internet server to make copies by posting a file, the consumer (not the provider) makes copies. *Id.* at 19-22. And when a consumer uses a self-service photocopier, again the consumer (not the copy-shop) makes the copy. *Id.* at 20-21.

Likewise, when a consumer directs the RS-DVR to record a program, the consumer—not Cablevision—makes the copy. As the district court recognized at one point: “The RS-DVR would permit . . . *customers to record* programs on central servers at Cablevision’s facilities and play the programs back for viewing at home.” SPA.1 (emphasis added). Just as with a VCR or conventional DVR, the customer chooses what (if anything) to record and directs the device to make the recording; like a VCR or conventional DVR, the device responds automatically, with no further human intervention. Under the well-accepted standard of *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), only the person who supplies “volition” or “human intervention” in making the copy “does” the copying. Here, that is the customer, not Cablevision.

Seeking to escape that result, plaintiffs urge this Court to apply a clear error standard. Turner Br. 24-25. But the district court did *not* make “findings of fact.” Rather, it resolved the case on cross-motions for summary judgment. A.1021-280; SPA.19-20; SPA.36. As the court explained, it did *not* “weigh the evidence and determine the truth of the matter”; instead, it determined *only* “whether there is a genuine issue for trial” and “dr[e]w all reasonable inferences” in the non-moving party’s favor. SPA.19-20. Although the parties *authorized* the court to make findings, SPA.18-19, “both sides agree[d] there [we]re no genuine issues of

material fact,” A.1214. What plaintiffs label “findings”—that Cablevision has a “‘continuing and active’ role” in copying (Turner Br. 27-28), or that the RS-DVR and set-top DVRs are “‘vastly different’” (*id.* at 47)—are *characterizations* based on the court’s misunderstanding of governing law and the legal relevance of particular facts. “[C]haracterization[s] of legal effect” are not “factual finding[s].” *S. Bay Corp. v. Comm’r*, 345 F.2d 698, 704 (2d Cir. 1965). Review is *de novo*.

**I. CABLEVISION DOES NOT DIRECTLY INFRINGE WHEN CUSTOMERS USE THE RS-DVR TO MAKE TIME-SHIFTING COPIES**

**A. *Netcom* Requires “Volition” or “Human Intervention” in Making the Copy**

The standard for determining who is a direct infringer—who “does” the copying—is well-established and straightforward: A direct infringer is the person who exercises “volition” or “human intervention” in making the copy. *Netcom*, 907 F. Supp. at 1368-70. By contrast, someone who supplies or maintains an automated facility that *others* use to make copies is at most a *contributory* infringer. *Id.*

*Netcom* has been followed by every court to consider the issue—the Fourth Circuit, *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004); *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 621-22 (4th Cir. 2001); the Third Circuit, *Parker v. Google, Inc.*, No. 06-3074, 2007 WL 1989660, at \*3 (3d Cir. July 10, 2007) (unpublished); and district courts in the Sixth, Seventh, Ninth,

and D.C. Circuits, Cablevision Br. 21-22; *Newborn v. Yahoo!, Inc.*, 391 F. Supp. 2d 181, 186 n.3 (D.D.C. 2005); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 512 (N.D. Ohio 1997). The leading treatises endorse it. 3 *Nimmer on Copyright* § 12B.01[A][1], at 12B-9 (2006) (“Nimmer”); 2 *Goldstein on Copyright* § 7.0, at 7:4 (3d ed. 2006) (“Goldstein”); 5 *Patry on Copyright* § 21:56 (2007) (“Patry”). *Netcom* is not merely a “1995 district court case from outside this Circuit,” Turner Br. 34; it is well-established law.

Under *Netcom*, the result here is clear. Just as with a VCR or conventional DVR, the customer provides the volition to make a recording, choosing what to record and directing the device to record it. A.1149-51; SPA.14. The RS-DVR responds “automatically,” “with no human intervention or decision-making” on Cablevision’s part. A.116; A.119; A.769; A.1114-15 (plaintiffs’ expert) (no “[c]oncurrent human intervention”). That ends the matter: The customer who provides the volition to make a recording “does” the copying; the company that provides the automated *means* for copying does not.

### **1. Netcom Requires Human Conduct**

Plaintiffs contend that Cablevision has “misrepresent[ed]” *Netcom* as requiring “human intervention” as opposed to “automatic” conduct. Fox Br. 47-48; Turner Br. 37. But “human intervention” and “automatic” are *Netcom*’s words, not Cablevision’s. The court rejected the claim that “*Netcom* has caused the

copying” precisely because the defendant’s “systems can operate *without any human intervention*” by the defendant. 907 F. Supp. at 1368-69 (emphasis added). Direct liability was “unreasonable” because the defendant’s “server acts *without any human intervention.*” *Id.* at 1369 (emphasis added). And the court repeatedly emphasized that Netcom’s servers acted “automatically” in response to others’ commands. *See id.* at 1368-69 (“copies *automatically* made on [Netcom’s] computers”; “software *automatically* forwards messages”; “system that *automatically* and uniformly creates temporary copies” (emphasis added)).

*CoStar* thus summarized *Netcom* as holding that “a *person* had to engage in volitional conduct.” 373 F.3d at 551 (emphasis added). *Parker* read *Netcom* to apply “[w]hen an ISP automatically and temporarily stores data *without human intervention.*” *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 497 (E.D. Pa. 2006) (emphasis added). And Nimmer could hardly have described *Netcom* as rooting copyright doctrine “in [its] human origins” if *human* conduct were not the crux. 3 Nimmer § 12B.01[A][1], at 12B-11. Human intervention is not merely “some evidence” of direct infringement (Fox Br. 48); it is the *sine qua non*.<sup>1</sup>

*Netcom*’s reference to “volition or causation” is no different from “human intervention”—it refers to volition or causation *by the defendant himself*, not

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<sup>1</sup> Plaintiffs claim *Russ Hardenburgh* “relied on both human and automated activities” to find direct infringement. Turner Br. 38. But that court deemed the involvement of the defendant’s *human* employees “crucial.” 982 F. Supp. at 513.

merely activity by a machine he provides. *See* 907 F. Supp. at 1368-70; *CoStar*, 373 F.3d at 549 (“‘volition or causation’ *by the purported infringer*” (emphasis added)); *Parker*, 2007 WL 1989660, at \*3 (“volitional conduct *on the part of the defendant*” (emphasis added)). “Volition” connotes *human* conduct—the exercise of *human* will. *See Black’s Law Dictionary* 1605 (8th ed. 2004) (volition: the “act of making a choice or determining something”); *Webster’s New International Dictionary* 2856 (2d ed. 1948) (an “exercise of the will”). Were mere mechanical “causation” enough, those cases all would have come out differently—Internet servers clearly “cause” copying in a mechanical sense.

## **2. Netcom Requires Volition in the Act of Making the Copy**

Plaintiffs also dispute that *Netcom* requires volition *in making a particular copy*. *Turner* Br. 37. But the case could not be more clear: *Netcom* rejected direct infringement because the defendant did no volitional act that “*directly resulted in copying* plaintiffs’ works.” 907 F. Supp. at 1368 (emphasis added). Likewise, *CoStar* held that “a person had to engage in volitional conduct—specifically, *the act constituting infringement*—to become a direct infringer.” 373 F.3d at 551; *see also Russ Hardenburgh*, 982 F. Supp. at 512 (direct infringer must “*actually engage in* one of [the] activities” in 17 U.S.C. § 106). Because the Act grants copyright owners the exclusive right “to do” specified acts, including “to reproduce the copyrighted work in copies,” 17 U.S.C. § 106(1), the direct infringer

is the one who “do[es]” that act. Thus, volition in the *act of making the copy* is what matters.

*Netcom* contrasted volition in making the copy with other volitional acts that *Netcom* engaged in, such as “designing,” “installing,” “maintaining,” “implementing,” or “operat[ing]” a copying system. 907 F. Supp. at 1368-70. *CoStar* likewise distinguished direct infringers from persons “involved in the ownership, operation, or maintenance of a transmission facility.” 373 F.3d at 551. Volition in “designing” or “maintaining” a copying system thus is not enough—if it were, both cases would have come out the other way. Yet plaintiffs and their *amici* repeatedly urge direct liability for precisely those acts. *Compare* ASMP Br. 16 (“design, maintenance, and operation” of a copying system *is* direct infringement), *with Netcom*, 907 F. Supp. at 1368-70 (“designing,” “maintaining,” and “operat[ing]” a copying system *is not* direct infringement).

Plaintiffs contend that *Netcom*’s reference to “passive conduit[s]” creates a class of “active” conduct that is directly infringing even without volition in making the copy. *Turner* Br. 37-40; *Fox* Br. 53-54. The words “passive conduit,” however, appear in a single footnote as a description of *Netcom*’s *argument* for why it qualified for a statutory common-carrier exemption. 907 F. Supp. at 1369 n.12. The court *rejected* that argument and *refused to apply* that exemption. *Id.* Although the court later opined that *Netcom* “acts more like a conduit,” it



mentioned that as a reason it would be “*especially* inappropriate” to hold Netcom liable. *Id.* at 1372 (emphasis added). Thus, *Netcom* is not limited to “passive conduits.” Concepts of “active” and “passive” conduct matter only to the extent they describe volition or human intervention in making the copy: An alleged infringer engages in sufficiently “active” conduct when *that person* (not merely her machine or facility) exercises volition in *making the copy* (not merely in providing or maintaining the copying system).

**3. *Plaintiffs’ “Customer Request” Cases Confirm That “Volition” or “Human Intervention” Is Required***

To avoid *Netcom*, plaintiffs invoke cases holding full-service copy-shops liable when they make copies in response to customer requests. Plaintiffs contend that Cablevision likewise should not “escape liability” simply “because it claims it makes those copies at subscribers’ requests.” *Turner Br.* 27. That begs the question. The issue before the Court is *whether* Cablevision or the customer “makes those copies.” Here, the customer does not merely “request” that someone else make a copy. The customer commits the volitional act (*i.e.*, not only decides what to record, but also performs the manual acts necessary to effect the recording) and thus *makes* the copy.

In the cases cited by plaintiffs, the defendants' *employees* personally made copies. Cablevision Br. 23-24.<sup>2</sup> Because the defendants' *employees* provided volition and human intervention in making the copies, they were direct infringers. By contrast, courts universally agree that, where the *customer* operates a *self-service* photocopier, the copy-shop is *not* a direct infringer. See *CoStar*, 373 F.3d at 550; *Netcom*, 970 F. Supp. at 1369; *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1178 (N.D. Ill. 1997).<sup>3</sup> Plaintiffs are thus wrong to assert that "[t]here is no relevant distinction between a business that uses employees to make copies and one that uses machines." Turner Br. 31. There is a *critical* distinction between businesses whose *employees* make copies for customers, and those that provide an automated facility that *customers* use to make copies. Far from disproving that distinction, the copy-shop cases reinforce it.

#### **4. Netcom Does Not Establish a "Robot" Exception to Infringement**

Plaintiffs caricature Cablevision as advocating a "'robot' exception to copyright infringement," asserting that Cablevision cannot "deliberately automate

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<sup>2</sup> *Elektra Records Co. v. Gem Electronic Distributors, Inc.*, 360 F. Supp. 821 (E.D.N.Y. 1973), the only case not addressed in Cablevision's opening brief, did not specify whether it was applying direct or contributory infringement. Treatises cite *Elektra* as a *contributory* infringement case, 3 Nimmer § 12.04[A][3][b], at 12-87 & n.126; 5 Patry § 21:52 n.3, making it inapposite here.

<sup>3</sup> In *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998), the only question was fair use; the court's observation about "large scale photocopying" had nothing to do with *who* did the infringing act. *Id.* at 111-12.

a service so as to preclude application of copyright protection.” Turner Br. 23, 32. The notion that Cablevision would have *preferred* to hire legions of operators to field calls from customers every time they wanted to record or play back a program—but nefariously “automate[d]” the RS-DVR to avoid liability—is absurd. The RS-DVR is automated because that is how *all* VCRs and DVRs work.

Far from creating a “‘robot’ exception to copyright infringement,” *Netcom* ensures that the Act’s *full* coverage is accomplished through appropriate use of direct and contributory liability. Although the provider of an automated facility is not a direct infringer, it can be a contributory infringer if customers use the facility for unlawful copying. For that reason, plaintiffs’ hypothetical about the copy-shop that “takes copyrighted books and . . . allows customers to make automated requests” for copies (Turner Br. 32) is unpersuasive. That is precisely the sort of conduct *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), condemns as *contributory* infringement. Far from exposing a gap in copyright protection, plaintiffs’ hypothetical—like *amici*’s prophecy of copyright doom (*e.g.*, ASMP Br. 5)—illustrates that facilitating *unlawful* consumer copying is adequately addressed as *contributory* infringement.

Nor does *Netcom* establish an “automation” loophole even for *direct* infringement. When the defendant supplies an automated means that *other people* use to make copies—and only then—the users who “do” the copying are directly

liable, and the system provider is contributorily liable. 907 F. Supp. at 1368-70. But if the defendant himself directs an automated device to make copies without human intervention by anyone else, the defendant himself supplies the necessary volition and becomes a direct infringer.

For that reason, *Playboy Enterprises, Inc. v. Webbworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997), and *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004) (Turner Br. 31; ASMP Br. 11-12), are irrelevant. In *Webbworld*, the *defendant* used a software program to retrieve images from Internet newsgroups and make infringing copies on its servers. 991 F. Supp. at 549-50. The court distinguished *Netcom* on the ground that the defendant had “us[ed] the ScanNews software to troll the Usenet for Webbworld’s product.” *Id.* at 552. Liability was thus based on automated copying, not *in response to customer commands*, but *independent of any customer command*. Likewise, the automated “robot” in *Register.com* did not operate *in response to others’ commands*; the defendant alone set it in motion. 356 F.3d at 396.

##### **5. Netcom Establishes a Generally Applicable Principle of Law**

Finally, plaintiffs attempt to limit *Netcom* to “the unique factual circumstances and policy considerations raised by the Internet.” Turner Br. 35. But *CoStar* specifically rejected the argument that *Netcom* was a “special liability-limiting rule for Internet servers.” 373 F.3d at 552. Professor Goldstein

agrees: *Netcom* “embodies a principle for decision outside as well as inside the Internet context.” 2 Goldstein § 7.0, at 7:4. Indeed, *Netcom* and *CoStar* both analogize ISPs to *self-service copy-shops*—hardly an Internet application. See *Cablevision Br.* 30.<sup>4</sup>

Nor was *Netcom* limited to the Internet’s “infanc[y],” before ISPs could “separate infringing from non-infringing information.” *Turner Br.* 35 & n.12. Failure to exercise control over *other people’s* copying is relevant to indirect, not direct, infringement. That is why *Netcom* relied on evidence of filtering in ruling on *indirect* infringement. 907 F. Supp. at 1376. *Direct* infringement depends only on who *does* the copying. Nothing about *that* has changed since 1995. Courts still routinely follow *Netcom*, *Cablevision Br.* 20-21 (cases from 2004-2006), including the Third Circuit just this month, *Parker*, 2007 WL 1989660, at \*3.

It is likewise irrelevant that Congress limited the safe harbors of *the DMCA* to the Internet (*Turner Br.* 36-37). *CoStar* specifically rejected the argument that the DMCA limits the scope of *Netcom*. 373 F.3d at 552-55; *see also* 17 U.S.C. § 512(l) (“failure . . . to qualify [under the DMCA] shall not bear adversely upon the consideration of a defense by the service provider that the service provider’s

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<sup>4</sup> *Turner* also attempts to limit *Netcom* to conduct merely “incidental to a legitimate business.” *Turner Br.* 41. But the activities of uploading, duplicating, and transmitting challenged in *Netcom* were not “incidental” to the ISP’s services—those *are* an ISP’s services. See *Cablevision Br.* 33 n.9.

conduct is not infringing”); 3 Nimmer § 12B.01[A][1], at 12B-15 (“[C]ourts have rightfully rejected the proposition that [the DMCA] has supplanted *Netcom* . . . .”); 5 Patry § 21:85 (similar). Plaintiffs and their *amici* do not even mention these analyses, much less attempt to rebut them.

**B. *Netcom*’s Volition or Human Intervention Test Is Not Met Here**

Plaintiffs’ half-hearted attempt to show human intervention by Cablevision employees in making the copies falls short. Turner urges that “Cablevision’s system administrators continuously operate and maintain the RS-DVR Service.” Turner Br. 32 n.9. But the cited testimony says only that Cablevision’s *head-end facility* (where Cablevision operates numerous services) is “staffed by personnel twenty-four hours a day.” See A.1205-06; CA.732-34; CA.750. The fact that a technician is physically present does not prove she “continuously operates” the device, let alone *makes copies*.<sup>5</sup> *Netcom* and *CoStar* specifically hold that “operat[ing]” and “maint[aining]” a copying system is not direct infringement. 907 F. Supp. at 1368, 1370; 373 F.3d at 551.

Plaintiffs’ argument that Cablevision’s employees could “override the actions of RS-DVR Service subscribers” (Turner Br. 32 n.9) fares no better.

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<sup>5</sup> That “[s]ome of the components” of the RS-DVR would be “monitored” in the sense that personnel would be “first responder[s]” to any problem, CA.734, likewise does not prove those personnel would “continuously operate” the RS-DVR, let alone *make the copies*.

While Cablevision’s maintenance personnel have the technical ability to delete a recording or playback stream, A.1102; CA.792; CA.806; CA.930, that exists for “troubleshooting purposes”—technicians may need to delete a “failed stream” during maintenance. A.1076; CA.806. There was no evidence Cablevision would permit technicians to use those procedures absent such a problem. *See* CA.812 (“Q. [D]o you know of any circumstances under which [recording deletion] would be used in the production environment of the RS-DVR?” “A. Absolutely none.”); A.852 (technician was “not permitted to click the delete button for a particular program”).<sup>6</sup> Moreover, a person’s ability to *delete* recordings (and thus *undo* copying decisions) does not make him the person who *does* the copying.

The defendants in *Netcom* and *CoStar* had the same power to “override” customer decisions. 907 F. Supp. at 1376 (“evidence shows that Netcom can delete specific postings”); 373 F.3d at 547 (defendant “removed” specific postings). Similarly, a Kinko’s repairman could “override” a customer’s decision by unplugging a self-service photocopier in the middle of a job. None of those possibilities means anyone other than the customer “does” the copying.

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<sup>6</sup> The technician’s screen identifies programs only by numeric data. CA.790; CA.930. To “override” a customer’s decision to store or play back a particular title, the administrator would have to “search other databases” and employ a “translation practice” to decode the data. A.1075.

### **C. Plaintiffs' Alternative Tests Are Unfounded and Unworkable**

Recognizing that *Netcom*'s "volition" or "human intervention" test is fatal, plaintiffs attempt to transform it into a "totality of [the] evidence" or "all relevant circumstances" test in which human intervention is merely "some evidence." Fox Br. 36-40, 47-52; Turner Br. 31, 37-38. Plaintiffs cite no case that has rejected the straightforward "volition" or "human intervention" test in favor of their boundless, indeterminate smorgasbord. Nor do they ever explain *why* the factors matter.

#### **1. Cablevision Does Not Directly Infringe Merely Because It Delivers Content**

Chief among plaintiffs' many factors is their claim that Cablevision is the "sole supplier of copyrighted content" for the RS-DVR. Turner Br. 38. But Cablevision does not *create* content; it merely *retransmits* content from its feeds. SPA.5-6. In any event, delivering content that *customers* may copy is not volition in *making copies*. A library that makes both books and photocopiers available to its patrons is liable only for *contributory* infringement (absent special statutory exemption). *See* 3 Nimmer § 12.04[A][3][b], at 12-88. It may *contribute* to the copying, but it is not "do[ing]" the infringing act of copying.

The same is true here. The *customer* decides what if anything to record out of myriad programs on 170 different channels, and the *customer* uses her remote control to direct the recording. The customer thus provides the "volition" or "human intervention" to make the copy, just as with a VCR or set-top DVR.



Plaintiffs cite no case holding that merely providing content makes one the person who does the copying. Both *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), and *Webbworld*, 991 F. Supp. 543 (Fox Br. 40-41; Turner Br. 39) imposed direct liability because the defendants *made infringing copies*. The defendants in *Tasini* copied newspaper articles onto a database and CD-ROMs. Citing *Sony*, the defendants claimed they were not direct infringers because the articles were non-infringing until the *end-user* retrieved them. 533 U.S. at 504. The Court disagreed: “The [defendants] . . . are selling copies of the Articles. And . . . it is *the copies themselves, without any manipulation by users,*” that infringe. *Id.* (emphasis added). Plaintiffs omit the second sentence, but *that* is the Court’s holding. In *Webbworld* too, the defendant’s software *made infringing copies* independent of any customer command. *See* p. 11, *supra*.

Nor does it matter whether Cablevision somehow determines the universe of content available for copying with the RS-DVR. Choosing what is available to copy may *contribute* to the copying, but it is not *doing* the copying. Case after case makes that clear. *Netcom* held that a Bulletin Board Service was not a direct infringer when subscribers posted infringing content to a newsgroup, even though such services exercise volition in deciding which newsgroups to carry. 907 F. Supp. at 1365 n.4, 1381-82. *CoStar* held that a website operator was not directly liable for third-party postings, even though it chose the subject-matter of the

website and manually screened out off-topic postings. 373 F.3d at 547, 555-57.<sup>7</sup> In each instance, the actions may have included “volitional conduct,” but they “d[id] not amount to ‘copying.’” *Id.* at 556.

In any event, Cablevision does *not* discriminate as to what channels—let alone programs—are available for recording. Like a VCR or conventional DVR, the RS-DVR works for *all* scheduled programs a customer receives. A.115; SPA.11. In that sense, Cablevision is “totally indifferent” to what, if anything, the customer records. *CoStar*, 373 F.3d at 551. Although plaintiffs insist that Cablevision has the “technological ability” to exclude channels (Turner Br. 10-11; Fox Br. 56-57)—in other words, that Cablevision *could have built* the RS-DVR differently—that is irrelevant. Cablevision also has the technological ability to block *VCRs* from recording specific channels, A.1144, but that does not mean Cablevision “does” the copying when a customer uses a VCR. Direct infringement turns on who actually *does the copying*. And that depends on the RS-DVR that Cablevision *actually* built, not ones it did not.<sup>8</sup>

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<sup>7</sup> Although *CoStar* referred to the defendant as an “Internet service provider,” 373 F.3d at 547, LoopNet’s actions went far beyond those of typical access providers such as Netcom. LoopNet was a *website* that hosted content. *See id.*

<sup>8</sup> Turner’s statement that “[i]n its short life” the RS-DVR has included various numbers of channels (Turner Br. 11) is incorrect. The RS-DVR has never had any “life.” A.57. The cited evidence relates solely to possible plans for the RS-DVR’s *technical trial*—not the final product. A.1208-09; CA.49; CA.530.

The fact that Cablevision exercises some discretion in choosing which *channels* to carry on its cable system (Turner Br. 39-40) also does not make it a direct infringer when customers make copies with the RS-DVR. That is not (1) volition in recording the program; nor (2) volition in choosing which programs are made available for recording on the RS-DVR; nor even (3) volition in choosing what programs to include on the channels carried on the cable system.<sup>9</sup> Thus, even ignoring that plaintiffs overstate Cablevision's control in selecting channels for its cable system, Cablevision Br. 32, such volition is far too removed from any *act of copying* to be direct infringement.

Plaintiffs' "providing content" test would lead to absurd results. It would have the immediate effect of banning 25 million set-top DVRs already in American homes. *See* p. 21, *infra*. It would also mean an independent company could offer the RS-DVR to Cablevision's customers, but Cablevision could not. Indeed, two cable companies could offer the RS-DVR to *each others'* subscribers, but not their own. Plaintiffs nowhere explain how that makes sense.

Plaintiffs argue that the district court's decision is not an "insuperable bar" because Cablevision can obtain licenses, pointing to extra-record assertions about Time Warner's "Start Over" service. Turner Br. 33-34. But plaintiffs admit that

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<sup>9</sup> Cablevision does not choose what content to put on each channel; the programmer does. Cablevision Br. 32 n.7.

Start Over has licenses for only *some* channels, *id.* at 34, and omit the fact that it covers only *some programs* on those channels, *see Start Over*, <http://www.timewarnercable.com/southcarolina/products/cable/startover.html>. The RS-DVR cannot be a meaningful substitute for VCRs and conventional DVRs—which work for *every* program on *every* channel—if it works for only *some* programs on *some* channels.

Plaintiffs’ demand for further royalties also lacks economic foundation. Plaintiffs already license Cablevision to provide content to subscribers, with full awareness that many consumers use VCRs or set-top DVRs to make time-shifting copies. To the extent content is more valuable because consumers can time-shift it, that additional value is already reflected in the price of the license. Plaintiffs have no grounds to demand a *second* royalty as well.

**2. *Plaintiffs’ Other Indicia of “Active” Involvement Are Irrelevant and Unworkable***

Plaintiffs surround their content-provision test with a haze of other allegedly “active” conduct. That smokescreen cannot obscure the test’s irrationality. For example, plaintiffs routinely assume the conclusions they seek to prove. Plaintiffs conclude that Cablevision is “actively” involved because “Cablevision would make [each] disk copy”; “Cablevision would store each such copy”; and “Cablevision would transmit the copied programs.” Fox Br. 38. But the *question* before this

Court is whether Cablevision or the customer “does” those acts. That plaintiffs cannot apply their own test without circular reasoning proves the test’s inutility.

Plaintiffs’ remaining factors are merely an effort to impose direct liability for owning, operating, and maintaining a facility that *others* use to copy—precisely what *Netcom* and *CoStar* foreclose. For example, plaintiffs urge that Cablevision “does” the copying because, before any customer presses record, the RS-DVR automatically splits the Aggregated Programming Stream and buffers data momentarily to reformat it. Fox Br. 37-38; Turner Br. 31. But those activities—which are not themselves infringing, *see* pp. 25-30, 34-37, *infra*—do not show that Cablevision “does” the copying when a customer later uses the RS-DVR to record a program of the customer’s choosing. They do not represent volition in “the act constituting infringement”—*i.e.*, making a *fixed* copy on the RS-DVR hard drive. *CoStar*, 373 F.3d at 551. VCRs and set-top DVRs automatically split the incoming cable stream, A.1117-18; A.1143-47, and set-top DVRs automatically store and reformat incoming data in buffers, A.1146-47; A.1170-71. Those activities represent volition in providing a functioning system consumers can use to copy. A library with books and photocopiers does not “do” the copying when its employees put books onto the shelves for customers to use. So too, Cablevision is not “doing” the copying when the RS-DVR automatically transfers incoming data over minute distances through transient buffers to make it available to subscribers.

Plaintiffs and their *amici* never explain what (besides providing content) separates “active” from “passive” involvement. Their “all relevant circumstances” test provides no guidance to those exposed to massive strict liability. As Cablevision’s *amici* make clear, technology providers will not risk millions of dollars to develop innovative products for consumers if they can only speculate about their lawfulness. *See* CDT Br. 4-6, 24-26.

**D. Plaintiffs’ Construction of the Act Defies Widespread Understandings**

Plaintiffs do not dispute that set-top DVRs have been on the market for nearly a decade and are now a fixture in millions of American homes. Cablevision Br. 26-27; *see also* Pasztor, *Study Projects Greater Reliance of Cable-TV Subscribers on DVRs*, Wall St. J. Online, July 16, 2007 (estimating over 28 million DVRs currently in use: 17.6 million from cable companies, 10 million from satellite companies, and 1.3 million others). Nor can plaintiffs seriously contest the absence of significant legal challenge to those devices.<sup>10</sup> Plaintiffs instead argue that widespread acceptance is irrelevant. Turner Br. 45; Fox Br. 59-60. But *Capitol Records, Inc. v. Naxos of America, Inc.*, 372 F.3d 471 (2d Cir. 2004), held only that “failure to pursue third-party infringers” is not a “*defense* to copyright

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<sup>10</sup> Turner’s claim that copyright owners sued services “similar to Cablevision’s,” Turner Br. 45, is incorrect. Both suits involved *non*-standard features—automatic commercial-skipping, A.892, or transmissions to consumers not otherwise entitled to watch a program, A.931.

infringement.” *Id.* at 484 (emphasis added). Cablevision is not citing acquiescence as a “defense”; it does not argue that plaintiffs’ inaction forfeited an otherwise valid claim. Rather, widespread industry and public understanding is relevant to whether the statute applies to devices like the RS-DVR *at all*. As to *that* issue, the law is clear: “The meaning attached by people affected by an act may have an important bearing on how it is construed.” 2B Singer, *Sutherland’s Statutes & Statutory Construction* § 49:06, at 94 (6th ed. 2000). Although Turner claims this principle applies only to government officials (Turner Br. 46), the law is to the contrary. *See* 2B Sutherland § 49:06, at 94 (“people affected by an act”); *United States v. State Bank of N.C.*, 31 U.S. 29, 39 (1832) (construction “by the government, as well as by individuals”); *Union Pac. R.R. Co. v. Anderson*, 120 P.2d 578, 587 (Or. 1941) (“persons engaged in the industry”); *Bd. of Exam’rs in Optometry v. Spitz*, 479 A.2d 363, 370 (Md. 1984); *Kranker v. Levitt*, 327 N.Y.S.2d 259, 262 (N.Y. Sup. Ct. 1971).

Plaintiffs urge that the RS-DVR is distinguishable from set-top DVRs. But their purported distinctions merely underscore similarities:

- Fox claims the RS-DVR would “create a separate ‘stream’ of programming.” Fox. Br. 59. But set-top DVRs also split the incoming cable stream into two separate streams independent of any customer command. A.1118; A.1146-47.

- Turner claims the RS-DVR makes buffer copies “without any subscriber request whatsoever.” Turner Br. 47. But set-top DVRs likewise create multiple buffer copies independent of any customer command, in order to decrypt programming and allow users to pause live TV. A.1146-47; A.1170-71.
- Turner claims that set-top DVRs operate “in direct response to a user command.” Turner Br. 47. But the RS-DVR likewise executes user commands “automatically,” “with no human intervention or decision-making.” A.116; A.119; A.121. In fact, the consumer uses the exact same remote control and on-screen interface to issue those commands. SPA.9; A.1149-51; A1311-22.

The only true distinctions relate to the fact that the RS-DVR stores recordings remotely. But plaintiffs never explain why that matters to *who does the copying*.<sup>11</sup>

Critically, the RS-DVR and set-top DVRs are equivalent in the one respect plaintiffs consider dispositive: Both are provided by cable or satellite companies that also *deliver content*. Turner Br. 38-40. Plaintiffs have never explained how

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<sup>11</sup> RS-DVR playback does involve a “transmission” whereas set-top DVR playback does not. Fox Br. 58-59. But that relates at most to *public performance*, not *reproduction*. As explained below, such transmissions are not public performances by Cablevision. See Part III, *infra*.



this Court could adopt their “providing content” test without banning 25 million cable and satellite DVRs already in consumer homes. *See* p. 18, *supra*.

This Court should be especially wary of banning the RS-DVR given *Sony*’s holding that consumer time-shifting is fair use. A wide range of time-shifting technologies have flourished unchallenged under *Sony*, and plaintiffs—by refusing to allege contributory infringement—have not drawn the lawfulness of that time-shifting into question here.<sup>12</sup> Plaintiffs and their *amici* speculate that such a challenge might succeed, and urge this Court not to “presume the outcome.” Fox Br. 44; ASMP Br. 27-30. But plaintiffs ask this Court in effect to prejudge the issue by banning the RS-DVR as direct infringement without *any* consideration of consumers’ interest in more efficient time-shifting technology.

Plaintiffs’ repeated protests that Cablevision cannot rely on *Sony* because it waived its fair-use defense and cannot “stand in the shoes” of its customers (Turner Br. 41-43; Fox Br. 44-47) are misdirected. Cablevision does not cite *Sony* to raise any fair-use defense—its own or its customers’. *Sony* simply underscores the importance of maintaining the traditional distinction between direct and contributory infringement. To the extent plaintiffs wish to challenge consumer time-shifting, they should do so openly by asserting contributory infringement

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<sup>12</sup> Strangely, Fox takes credit for expediting proceedings by agreeing not to allege contributory infringement, Fox Br. 42, while Turner urges that no agreement existed, Turner Br. 4 n.1. Fox is right; Turner is not.

based on the *consumer's* conduct. They should not be permitted to attack it collaterally by challenging as *direct infringement* a device that *contributes* to consumer copying.

## II. THE RS-DVR BUFFERS DO NOT INFRINGE PLAINTIFFS' REPRODUCTION RIGHTS

Plaintiffs make only a half-hearted effort to argue that the RS-DVR's buffers—which store fragments of programming momentarily as data is processed through the system—violate their copyrights. That effort fails.

### A. Buffer Data Is Not “Fixed”

To infringe, a copy must be “fixed,” *i.e.*, “sufficiently *permanent or stable* to permit it to be perceived, reproduced, or otherwise communicated *for a period of more than transitory duration.*” 17 U.S.C. § 101 (emphasis added). Plaintiffs do not dispute that the lifespan of RS-DVR *buffer data itself*—0.01 to 1.2 seconds—represents a “transitory duration.” Instead, they argue that buffer data is “fixed” because the *copies that can be made from it*—*i.e.*, customer copies on the RS-DVR hard drives—last longer. *See* Turner Br. 49-50.

That novel construction—never raised below—is impossible to reconcile with statutory text. The Act requires the *allegedly infringing copy itself* to be “sufficiently permanent or stable to permit *it* to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” 17 U.S.C. § 101 (emphasis added). As applied to the terms “perceived” and “otherwise

communicated,” “transitory duration” must refer to the allegedly infringing copy itself—the time during which “*it*” exists and can be perceived or communicated. It is grammatically implausible to read “transitory duration” as referring to a different, downstream copy when addressing reproduction.

Plaintiffs’ construction also contravenes the legislative history, which states that “the definition of ‘fixation’ would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the ‘memory’ of a computer.” H.R. Rep. No. 94-1476, at 53 (1976). A television image lasts 1/30th of a second, but can be captured on videotape indefinitely. Momentary computer memory can be copied and stored indefinitely on a hard drive. Because the legislative history states that television images and momentary computer memory are not “fixed,” Congress could not have intended “transitory duration” to refer to the lifespan of potential downstream copies.

That legislative history cannot be dismissed (Turner Br. 52) as addressing the second sentence of the “fixation” definition, which clarifies that a work may be fixed “simultaneously with its transmission.” 17 U.S.C. § 101. The legislative history says the provision at issue “exclude[s] . . . purely evanescent or transient reproductions.” H.R. Rep. No. 94-1476, at 53. Only the first sentence—the one excluding reproductions of transitory duration—fits that description.

Plaintiffs cite no case adopting their interpretation. Courts have consistently determined whether a copy is “fixed” by examining whether the *allegedly infringing copy itself* lasted for a “period of more than transitory duration.” See *CoStar*, 373 F.3d at 551 (“temporary electronic copies” were not “‘fixed’ in the sense that *they* are ‘of more than transitory duration’” (emphasis added)); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993); *Advanced Computer Servs. of Mich., Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356, 363 (E.D. Va. 1994); *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734, 771 (E.D. Mich. 2003).

Even the Copyright Office’s *DMCA Report* interpreted “transitory duration” as the duration of the allegedly infringing copy itself, not downstream copies. See U.S. Copyright Office, *DMCA Section 104 Report* 110 (Aug. 2001) (statute “leaves open the possibility . . . that certain RAM reproductions that exist for only a ‘period of . . . transitory duration’ are not copies”). Despite that divergence in rationales, plaintiffs invoke *Skidmore* deference. Turner Br. 50-51. But plaintiffs cannot claim deference for a rationale the Copyright Office never articulated, *Ft. Stewart Schs. v. FLRA*, 495 U.S. 641, 651-52 (1990), and plaintiffs’ refusal to defend the Copyright Office’s actual reasoning speaks volumes about the *DMCA Report*’s “‘power to persuade,’” Turner Br. 50.

As we have explained, Cablevision Br. 44, the *DMCA Report* reads the words “for a period of more than transitory duration” right out of the Act. By holding that *any* reproducible data is “fixed,” the report rewrites a provision that requires capability of being “perceived, reproduced, or otherwise communicated *for a period of more than transitory duration*” as requiring only capability of being “perceived, reproduced, or otherwise communicated”—for *any* duration.<sup>13</sup>

RS-DVR buffer data clearly lasts only a “transitory duration” in the quantitative sense, since it remains in the buffer only 0.01 to 1.2 seconds before being overwritten. *See Advanced Computer*, 845 F. Supp. at 363 (“seconds or fractions of a second”); Cablevision Br. 40-41 (other authorities). The buffer data is also “transitory” in the qualitative sense because it exists only while *in transit* to its final destination. *See CoStar*, 373 F.3d at 551.<sup>14</sup> Buffer data thus is not “fixed.”

A contrary ruling would threaten countless digital devices. *See* Law Professors Br. 2-3, 18-23. Plaintiffs’ attempt to distinguish other buffers as “incidental” to lawful use (Turner Br. 53-54) is no distinction at all. If this Court

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<sup>13</sup> The same “fixation” standard governs when a work becomes entitled to copyright protection. 17 U.S.C. § 102(a). If buffer copies are “fixed,” even an *unrecorded* live performance would be copyrightable merely because, for example, the singer used a digital microphone that buffered data.

<sup>14</sup> There is nothing “implausible” (Turner Br. 52-53) about interpreting “transitory duration” to mean “the duration during which something remains in transit.” But even if the term is purely quantitative, 0.01 to 1.2 seconds clearly qualifies.

agrees that *consumers* make the fixed copies on hard drives (*see* Part I, *supra*), the RS-DVR buffers *are* incidental to lawful use—namely, consumer time-shifting.<sup>15</sup>

## **B. Buffering Is *De Minimis***

“Ephemeral digital copies made and erased automatically in the course of a copyrighted work’s transmission through a computer communications network presumably also qualify as ‘technical’ and ‘trivial’ violations” that are “*de minimis*.” 2 Goldstein § 7.0.2, at 7:9. Plaintiffs identify no respect in which RS-DVR buffer data differs from the “[e]phemeral digital copies” Professor Goldstein describes, nor any reason to disregard his views, which often receive considerable weight. *See, e.g., Davis v. The Gap, Inc.*, 246 F.3d 152, 169-72 (2d Cir. 2001).

Plaintiffs also ignore *Davis*’s statement that “record[ing] television programs aired while we are out, so as to watch them at a more convenient hour,” is *de*

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<sup>15</sup> *Amici*’s argument that Cablevision’s construction raises “serious questions about U.S. compliance with its treaty obligations” (ATR Br. 15-18) is incorrect. The Berne Convention authorizes legislative exceptions provided they do not “unreasonably prejudice the legitimate interests of the author.” Berne Convention, art. 9(2), Sept. 9, 1886, as revised July 14, 1967, 828 U.N.T.S. 221, 239; *see also* WIPO Copyright Treaty, art. 1(4) agreed stmt., Dec. 20, 1996, [http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html#P45\\_2379](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P45_2379) (“Article 9 of the Berne Convention, *and the exceptions permitted thereunder*, fully apply in the digital environment” (emphasis added)). The official commentary on which ATR relies acknowledges that signatories may invoke this provision to exempt temporary reproductions such as buffer copies. *See* WIPO, *Guide to the Copyright and Related Rights Treaties Administered by WIPO*, at CT-1.45 (2003) (“Of course, it is another matter that the exceptions allowed under [article 9(2)] . . . may be applied in the case of certain temporary reproductions.”).

*minimis*. 246 F.3d at 173. If consumer recording of an *entire* program for *several hours* is *de minimis*, surely *momentary* reproductions of *tiny fragments* to enable such consumer time-shifting is *de minimis* as well.

Plaintiffs insist that buffering is not *de minimis* because, “[o]ver time, the entire program is copied into buffer memory.” Turner Br. 55. But that is *always* true of buffer copies “made and erased automatically in the course of a copyrighted work’s transmission.” 2 Goldstein § 7.0.2, at 7:9. And buffer data is *overwritten in its entirety* every 0.01 to 1.2 seconds. A.1129-30; A.1164-66. Thus, entire programs are *not* copied “in little pieces” and “reassemble[d]” (Turner Br. 55)—rather, the “little pieces” are promptly erased. If a *customer* records a program, the fragments are copied and reassembled on a hard drive. But that proves at most that the *customer’s* copy is not *de minimis* (*but see Davis*, 246 F.3d at 173); it proves nothing about the buffer data itself.

Buffer copies are tiny, fleeting, imperceptible, economically insignificant, and ubiquitous in modern technology. Cablevision Br. 47-49. If anything is *de minimis*, this is.

### **III. THE RS-DVR DOES NOT INFRINGE PLAINTIFFS’ PUBLIC PERFORMANCE RIGHTS**

To prove that Cablevision directly infringes their public performance rights, plaintiffs must show both (1) that *Cablevision* performs the work when its customers play back their recordings, and (2) that the performance is *to the public*.

17 U.S.C. §§ 101, 106(4). Plaintiffs can prove neither. The RS-DVR merely allows the *customer* to play back, in his own home for his own viewing, his own recordings—a quintessential *private* performance.

Fox opens with a pointless analysis of 17 U.S.C. § 111. Fox Br. 16-18. That provision authorizes conduct that would otherwise be infringing. 17 U.S.C. § 111(a). It permits certain transmissions *even though* the cable company does the transmitting, and *even though* the transmission is public. Cablevision does not, and need not, rely on § 111 to authorize the *private* transmissions *by customers* here.

**A. The Customer, Not Cablevision, “Does” the Performing**

**1. *The Customer Directs RS-DVR Playback***

The direct infringer is “the party who *actually engages* in infringing conduct—the one who directly violates the prohibitions” of the Act. *CoStar*, 373 F.3d at 550. For purposes of public performance, that is the person who supplies volition or human intervention in “transmit[ing] . . . a performance . . . of the work.” 17 U.S.C. § 101. The customer does that here. When a customer records a program and plays it back, the device responds “automatically,” “with no human intervention or human decision-making” by any Cablevision employee. A.119; A.121. Under *Netcom*, therefore, the *customer* uses the RS-DVR to “transmit” her own recordings. “[A]utomatic . . . transmission of copyrighted materials, when



instigated by others, does not render [a defendant] strictly liable for copyright infringement . . . .” *CoStar*, 373 F.3d at 555.<sup>16</sup>

Fox points to a laundry list of facts *mentioned* by *Netcom* in an attempt to restrict its scope (Fox Br. 52-55), but none of those statements limits the case’s express *holding*. Cablevision’s actions in selecting channels, processing signals, and otherwise designing and maintaining the RS-DVR are irrelevant—they no more constitute volition in *transmitting the infringing performance* than volition in *making the infringing copy*. See pp. 13-21, *supra*. The *customer* chooses what to record and what to play back; and the *customer* controls the recording and playback using his remote control.

The court below cited only one case in support of its holding—*Columbia Pictures Industries v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984). SPA.33. But in *Redd Horne*, the defendant’s *employees* loaded the store’s videotapes into the system and pressed “play” when the customer asked. See Cablevision Br. 52-53. Cablevision does no such thing here—it merely offers an automated system that *customers* operate. Plaintiffs offer literally *no defense* of the district court’s reliance on *Redd Horne* for this point.

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<sup>16</sup> Although plaintiffs purport to dispute that the RS-DVR plays back recordings automatically (Fox Br. 49), the cited evidence relates solely to troubleshooting by Cablevision maintenance personnel. A.1436-38; see pp. 13-14, *supra*.

Plaintiffs likewise ignore *Columbia Pictures Industries v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986). Although Aveco supplied on-site booths, video equipment, and videotapes to customers, the plaintiffs “acknowledge[d] that under the Act *Aveco’s customers are the ones performing the works*, for it is *they who actually place the video cassette in the video cassette player and operate the controls.*” *Id.* at 62 (emphasis altered). The court agreed and analyzed the case as *contributory* rather than direct infringement. *See id.* *Aveco* forecloses plaintiffs’ argument that merely providing content transforms an automated facility into a direct infringer: The defendant in *Aveco* provided both equipment and content. But because the *customer* “operate[d] the controls” to play back the movies, Aveco did not directly infringe. Here, the *customer* not only “operate[s] the controls” to play back his recordings but also “operate[s] the controls” to record them. Plaintiffs do not cite *Aveco* even once, much less distinguish it.

Instead, plaintiffs cite *On Command Video Corp. v. Columbia Pictures Industries*, 777 F. Supp. 787 (N.D. Cal. 1991). But the only issue in *On Command* was *whether* there was a public performance. Fox quotes the statement that ““On Command . . . “publicly performs” defendants’ movies,”” Fox. Br. 31 (quoting 777 F. Supp. at 790), but the only *conclusion* in that statement was that the performances were public (*i.e.*, “On Command *publicly* performs defendants’ movies”). The identity of the performer was at most dicta. *See* 777 F. Supp. at

788 (only issue presented was *whether* the “hotel occupant’s viewing . . . constitute[d] a ‘public performance’”).<sup>17</sup>

Plaintiffs also compare the RS-DVR to video-on-demand (“VOD”). Turner Br. 46; Fox Br. 60-61. But VOD operators select specific content available for transmission and load it onto the server. *See* Cablevision Br. 54-55; pp. 43-44, *infra*. With the RS-DVR, by contrast, the *customer* loads that content by recording a program. Unlike a VOD operator, therefore, Cablevision is *doubly* removed from transmitting a performance: It exercises no volition in recording *or* playback.<sup>18</sup>

## **2. Preliminary Data Transfers Between Internal RS-DVR Components Are Irrelevant**

Plaintiffs argue that, even if a customer “does” the performing when he uses the RS-DVR to play back his own recordings, Cablevision still “does” the performing because of preliminary steps taken before the customer records a program: combining feeds into the APS; creating a second stream for use in the

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<sup>17</sup> Fox also quotes the statement that “‘On Command transmits movie performances directly under the language of the definition.’” Fox Br. 31 (quoting 777 F. Supp. at 789). The reference to transmitting “directly” merely distinguished “physical borrowing of videotapes”—it did not refer to direct infringement.

<sup>18</sup> Unlicensed VOD operators would confront liability regardless of who “did” the performing. An operator’s loading of content *onto* the server would be an infringing reproduction (as in *Tasini*). And the operator could also face liability for *contributory* infringement when consumers play back the recordings (as in *Aveco*), since consumers have no fair-use right to watch VOD. Licensing of VOD proves nothing about who “does” the performing.

RS-DVR; and copying and reformatting that data in buffers. Fox Br. 49-52. Plaintiffs urge that those steps are performances by Cablevision because “a public performance . . . includes ‘each step in the process by which a protected work wends its way to its audience.’” *NFL v. PrimeTime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000) (quoting *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D.N.Y. 1988)).

The *NFL* rule by its terms applies only to “step[s] in the process by which [a] work wends its way to a *public* audience.” 211 F.3d at 13 (emphasis added). Thus, the Court need not reach this issue at all if it agrees that RS-DVR playback is not a “public” performance. *See pp. 37-45, infra.*

In any event, plaintiffs’ theory—which the district court never adopted—lacks merit. The issue in *NFL* and *David* was not *who* did the performing, but whether the performances were “public.” *See, e.g., David*, 697 F. Supp. at 758 (“[n]either side disputes” defendant was performing). Each defendant unsuccessfully argued that a transmission is not public if it goes to intermediaries rather than the public directly. *NFL*, 211 F.3d at 12-13; *David*, 697 F. Supp. 758-60. Here, the issue is *who* does the performing. The preliminary aggregation, buffering, and data transfers in internal RS-DVR circuitry, which occur so *customers can make recordings*, hardly change the customer-directed character of RS-DVR playback so as to make *Cablevision* the one “doing” the performing.

Moreover, the “steps” at issue in *NFL* and *David* were *substantial* and *proximate* to a program’s ultimate delivery. *NFL* involved transmission over several thousand miles to a satellite, which immediately retransmitted the signal to subscribers in real time. 211 F.3d at 11-13. *David* involved transmission to *different entities*—local cable system operators—which immediately retransmitted to subscribers without interruption. 697 F. Supp. at 758. Here, by contrast, the processes are not proximate to a program’s ultimate delivery. They occur before, and whether or not, a customer even chooses to *record* a program, let alone play it back. Absent *customer* intervention, the processes are not a “step in the process by which [a] protected work wends its way to its audience”; they are a “step in the process” to oblivion.<sup>19</sup>

The “steps” here are also utterly insubstantial. To qualify as a “transmission” and thus a “public performance” under the Transmit Clause, data must be “received beyond the place from which [it is] sent.” 17 U.S.C. § 101. In *NFL* and *David*, the “steps” at issue were *themselves* “transmissions” that satisfied the statutory definition. *See NFL*, 211 F.3d at 13 (“uplink transmission[s]” to satellite); *David*, 697 F. Supp. at 754 (“transmission[s]” to local cable systems). Here, the RS-DVR’s preliminary internal data transfers are *not* “transmissions,”

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<sup>19</sup> Cablevision’s aggregation of programming into the APS (Fox Br. 49) has nothing to do with the RS-DVR *at all*. That is part of Cablevision’s regular cable delivery and occurs whether the RS-DVR exists or not. SPA.5-6.

because they all occur within the RS-DVR at Cablevision’s head-end. *See Columbia Pictures Indus. v. Prof’l Real Estate Investors, Inc.*, 866 F.2d 278, 282 (9th Cir. 1989) (data transfer between two pieces of equipment at the same place is not a “transmission”); *cf. BMI v. Claire’s Boutiques, Inc.*, 949 F.2d 1482, 1495 (7th Cir. 1991) (“To further transmit a performance must mean more than to run speaker wire through a wall.”).<sup>20</sup> *NFL* nowhere suggests that “steps” that are not themselves “transmissions” can nonetheless be public performances.

Indeed, the “steps” here are *de minimis*. It would make no sense to hold that *buffers* are *de minimis* but that transfers of data over internal circuits *to or from* buffers are infringing “public performances.” Nothing in the *NFL* line of cases suggests that these insignificant steps, which may or may not ever result in data leaving the RS-DVR, constitute their own “public performance.”

**B. Playing Back a Customer’s Own Recordings to That Customer Is Not a Performance “To the Public”**

Even if Cablevision were “doing” the performing when a customer plays back his recordings, those performances still would not infringe because they are not “public.” No one would consider it a public performance if a consumer taped a program using a VCR and the program were later played to that consumer alone from a remote location. No one would consider it a public performance if an

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<sup>20</sup> Indeed, the RS-DVR’s preprocessing equipment—the BMR, Ciena switch, and primary ingest buffer in the Arroyo server—are all in the *same room*. A.852.

individual stored *his* recordings in a “virtual locker” accessible only to *him* and those recordings were then played back to him in *his* home. And no one would consider it a public performance if 1000 consumers downloaded the same Miles Davis song from Apple’s iTunes store, stored it on Apple’s .mac remote-storage backup service, and had their *own* lawful copies of the songs streamed to *themselves* for their *own* listening in their *own* homes.

The RS-DVR is no different. This case therefore requires only a narrow and common-sense ruling: that a “public” performance does not occur when a consumer records a program onto a central server where it is accessible only by him, and played back solely to him in his private home. Plaintiffs’ and *amici*’s jeremiads about unregulated video-on-demand and other copyright disasters (Fox Br. 13; ASMP Br. 5) are thus utterly misdirected. Unlike VOD, the RS-DVR plays back only a subscriber’s *personal recordings*—programs he was *invited* to watch and *recorded* when they aired. That is a quintessential *private* performance.

**1. *The RS-DVR Does Not Make “Public” Performances Because It Does Not Make the Same “Transmission of a Performance” Generally Available***

Plaintiffs abandon the theory they successfully urged on the district court—that *any* transmission is “public” so long as a “commercial” relationship exists. SPA.34. They likewise now grudgingly accept that a “public” performance must be “generally available to some segment of the population.” *See* Fox Br. 23-24; *cf.*

2 Nimmer § 8.14[C][2], at 8-190.6 (“[A] ‘public’ performance . . . requires that such performance be ‘open’ to, that is, available to, a substantial number of persons.”).<sup>21</sup> That should end the matter. Playing back a consumer’s *own* recording, available *only* to him, *to him in his own home*, is not “public” in any sense of the word.

Plaintiffs nonetheless urge that the RS-DVR makes “public” performances because Cablevision transmits the same television program—*i.e.*, the same *work*—“(a) to certain subscribers simultaneously with the initial performance and (b) to a subset of those subscribers on a delayed basis at various times of their choosing.” Fox Br. 24-28. The public performance clause, however, does not prohibit making a *work* available to different subscribers at different times. Rather, it covers “*transmit[ting] . . . a performance . . . of the work . . . to the public, . . . whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.*” 17 U.S.C. § 101 (emphasis added). Thus, there must be a “transmi[ssion] [of] . . . a

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<sup>21</sup> Plaintiffs briefly suggest that a performance can be “public” even if available only to a single individual. Fox Br. 23-24. But *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277 (3d Cir. 1991), is off-point. That case addressed distribution, not performance, and it relied on considerations unique to the Act’s distribution provision. *See id.* at 299-300. *Ford*, moreover, has been harshly criticized. Nimmer accurately accuses *Ford* of “divesting the phrase [“to the public”] of all meaning whatsoever.” 2 Nimmer § 8.11[A], at 8-149. “[C]ontrary to the court’s conclusion, . . . liability itself should have been denied” because “the limitation to a designated recipient” precluded *public* distribution. *Id.*



performance . . . of the work” that is “to the public” (*i.e.*, generally available). The availability of the *work* is not the relevant test.

A television program is a “work.” 17 U.S.C. § 102(a)(6). A “performance . . . of the work” is not the program itself, but the “show[ing]” of it. *Id.* § 101. Thus, if HBO premieres an episode of “The Wire” and later shows the same episode as a rerun, it has made two different “performances” of the same “work.” By urging liability merely because the same *program* may be available to different consumers at different times, plaintiffs confuse a “work” with a “transmi[ssion] [of] . . . a performance . . . of the work.”

While plaintiffs insist that “the relevant consideration . . . is not whether each separate *transmission* is available to the public,” Fox Br. 25, the statutory text clearly requires “*transmi[ssion]* [of] . . . a performance . . . of the work . . . *to the public.*” The legislative history does too: It explains that the statute applies “where the *transmission* is capable of reaching different recipients at different times.” H.R. Rep. No. 90-83, at 29 (1967) (emphasis added). Nimmer agrees: “[I]f a *transmission* is only available to one person, then it clearly fails to qualify as ‘public.’” 2 Nimmer § 8.14[C][2], at 8-190.6 (emphasis added).

Plaintiffs cite 17 U.S.C. § 101’s statement that a performance may be “public” even if received at “separate places” and “different times.” Fox Br. 22-25. As we have explained, however, the “separate places/different times” clause

does not *expand* the statute beyond transmissions “to the public.” It merely clarifies that, *if* a transmission is “to the public”—*i.e.*, *if* it is generally available in the first instance—it is not artificially excluded merely because members of the public actually receive it at different times or places. *See* Cablevision Br. 57-58. That clause encompasses services like video-on-demand, which is just a more convenient way for the public to receive transmissions of programs made generally available by the cable operator. The transmissions are still “to the public” because *any* member of the public can receive the offered transmission simply by paying the appropriate fee.

By contrast, merely playing back each customer’s own copy of the same *work* to each individual customer is not a “public” performance. Nimmer explains: “It is *only* when the *same copy of a given work* gives rise to numerous performances by different members of the public that each such performance (although it is not received by the public generally) will be regarded as a public performance, because the public at large receives performances ‘at different times,’ *all emanating from the same copy.*” 2 Nimmer § 8.14[C][3], at 8-192.2(2) (emphasis added). The Third Circuit agrees: “Professor Nimmer’s examination of this definition is particularly pertinent: ‘*if the same copy . . . of a given work is repeatedly played (i.e., “performed”) by different members of the public, albeit at different times, this constitutes a “public” performance.*’” *Redd Horne*, 749 F.2d

at 159 (emphasis in original). “Although [the defendant] has only one copy of each film, it shows each copy repeatedly to different members of the public. This constitutes a public performance.” *Id.*; see also *On Command*, 777 F. Supp. at 788 (same copy played for any guest). Thus, holding out a particular recording to any customer to watch (as in VOD) is clearly a “public” performance—the *transmission of the performance* is offered to all.

With the RS-DVR, by contrast, each customer’s recording can be played *only* to the customer who made it—*i.e.*, only to the particular set-top box from which it was recorded. SPA.17; A.770-71.<sup>22</sup> Although the same *work* may be played back to different subscribers, each playback of a subscriber’s own personal recording is a separate private performance. Because each “transmission is only available to one person”—the customer who made the recording—RS-DVR playback “clearly fails to qualify as ‘public.’” 2 Nimmer § 8.14[C][2], at 8-190.6.

Plaintiffs attempt to confuse matters by pointing to Cablevision’s real-time cable delivery. Fox Br. 24. Even if those real-time performances involve the same *works* as the RS-DVR playbacks, they are not *transmissions of the same performance*. Each RS-DVR playback performance is generated from the

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<sup>22</sup> Plaintiffs state that Cablevision’s playback streams are “supposedly encrypted,” implying that other subscribers could access them. Fox Br. 59. But plaintiffs’ own expert admitted that other customers will “see nothing”—“they won’t get the program.” A.1119-20.

customer's own personal recording. The real-time performances are not generated from *any* RS-DVR copy; they are simply retransmitted directly from the cable feeds. Just as the premiere of an episode and a later rerun are different performances, Cablevision's real-time showing and any later RS-DVR playbacks are separate performances. Moreover, the real-time performances are *licensed*. SPA.4. Plaintiffs cannot combine a *licensed public* performance with allegedly *unlicensed private performances* and somehow come up with an *unlicensed public performance*.

## **2. *The RS-DVR Is Not Video-on-Demand***

Plaintiffs insist that, because video-on-demand requires a license, the RS-DVR should too. *See* Turner Br. 46; Fox Br. 60-61. But the two are fundamentally different. With VOD, the operator offers programs without regard to whether they ever appeared on regular television and offers them to anyone willing to pay; the customer can watch any program simply by selecting it. With the RS-DVR, by contrast, the customer can *only* watch a program if (1) the program *aired on regular television* that the consumer was *already entitled to watch*; and (2) the consumer *recorded the program* on the RS-DVR when it aired. A.771; A.1180-82. “[T]here is a relatively important distinction between VOD and DVR. It is this: With DVRs, consumers must first select a show, before it can be recorded and viewed later. With VOD, the title can be retrieved at any time,

without having to first select it.” Leslie Ellis, *Definitive Broadband: Next Generation* 130 (2005).

Those distinctions are critical for copyright purposes. They explain why consumers are entitled under *Sony* to play back recordings on the RS-DVR, but not to watch unlicensed VOD: With the RS-DVR, the device merely plays back what the customer was already “invited to witness” and can lawfully time-shift. *Sony*, 464 U.S. at 449. With VOD, content is available whether or not the customer could ever have watched it on television. A.771; A.1182. They also underscore why VOD is a *public* performance while RS-DVR playback is not: With VOD, the operator holds out its *own* copy of a program and offers to perform that shared copy repeatedly for *anyone* willing to watch. A.771. With the RS-DVR, a customer can watch only the particular *personal* recording that *she herself* made. A.770-71.

Plaintiffs’ evidence that the RS-DVR is “based on a ‘VOD platform’” and uses “‘VOD architecture’” (Turner Br. 19) is irrelevant. What matters is the technology’s application, not its provenance. A commercial movie projector in a public theater renders public performances. But if the owner takes that same projector home to watch movies by himself, that is a private performance.

The correct analogy for the RS-DVR is not VOD, but the “virtual locker” that allows users to store and retrieve their *own* files from a central server. *See*

Cablevision Br. 59; CDT Br. 22. A virtual locker provider does not “publicly perform” a work merely because multiple users happen to store and retrieve their own copies of the same song—even when (as in the iTunes example) the same company also provides the content. Plaintiffs never explain why the RS-DVR should be treated differently.

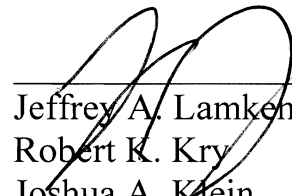
### **CONCLUSION**

The district court’s judgment should be reversed.

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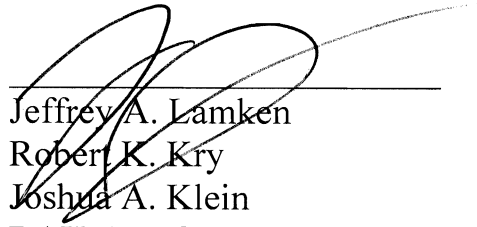
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