



VOD or Time Shifting? The Cablevision Appeal.

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In May 2006 Cablevision proposed to launch a new DVR offering whereby subscribers could store their time shifted content on Cablevision's remote servers on a "locker" type partitioned hard drive. This "remote Storage DVR System" would enable Cablevision to offer scalable DVR services to its customers without incurring the hardware expense for upgrading. Essentially, the cable box would control distribution of content, while Cablevision could remotely store a subscriber's time shifted programming for viewing at the subscriber's discretion. Cablevision did not seek a separate license from content owners for this service.

Twentieth Century Fox, Universal Studios, Paramount, Disney and other content providers, sued Cablevision for declaratory and injunctive relief under allegations of direct infringement. The US District Court for the Southern District of NY awarded summary judgment for the plaintiffs and enjoined Cablevision's remote storage program. On appeal to the Second Circuit, the court reversed. (Twentieth Century Fox Corp. v. Cablevision Sys. Corp. (No. 07-1480-cv (L) USCA2 App 2nd Cir. August 4, 2008).

The essential basis for the plaintiff's argument for infringement in this case were that: (1) the brief storage of content through buffering technology would constitute an unauthorized copies to be made in contravention of the content owner's exclusive right of reproduction; (2) by copying the programs to cablevision's servers hard disks, there would be an unauthorized copy; and (3) by transmitting the content remotely back to a subscriber upon playback

would infringe upon the content' owners' exclusive right to public performances. The plaintiffs ultimately claimed that the remote service was akin to a Video On Demand ("VOD") service which would require a different license and additional fees to content owners. The appellate court analyzed all three arguments and criticized the analysis of the District Court.

First, with respect to buffering system, the court noted the analysis of whether these were "fixed" copies as depicted under the Copyright Act 17 USC §106 (1) requires consideration of both embodiment and duration. While the embodiment question was undisputed, the fact that the transitory duration of the embodiment was for only 1.2 seconds during the buffering before being overwritten, the court found this insufficient to constitute a fixed copy.

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