

**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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**BRIEF AND SPECIAL APPENDIX 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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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, appellants Cablevision Systems Corporation and CSC Holdings, Inc. identify their parent corporations and any publicly held companies that own 10% or more of their stock:

1. Cablevision Systems Corporation is a publicly held corporation with no parent corporation. The following publicly held corporation owns 10% or more of Cablevision Systems Corporation's stock: Legg Mason, Inc. (through Clear Bridge Advisors LLC, Smith Barney Fund Management LLC, and Clear Bridge Asset Management Inc. as a group).

2. CSC Holdings, Inc. is a wholly owned subsidiary of Cablevision Systems Corporation and is not publicly traded.

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Appellants Cablevision Systems Corp. and CSC Holdings, Inc. (collectively “Cablevision”) appeal from a judgment of the U.S. District Court for the Southern District of New York (Chin, J.), reported at 478 F. Supp. 2d 607.

### **JURISDICTIONAL STATEMENT**

The district court entered final judgment disposing of all parties’ claims and granting declaratory and injunctive relief for copyright infringement on April 4, 2007. Cablevision filed notices of appeal on April 10, 2007. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1338. This Court has jurisdiction under 28 U.S.C. § 1291.

### **ISSUES PRESENTED**

1. Whether Cablevision, by offering its Remote Storage Digital Video Recorder (“RS-DVR”), would directly infringe plaintiffs’ exclusive right to reproduce a work under the Copyright Act because:

- a. customers use the RS-DVR to make copies of television programs for later home viewing; or
- b. the RS-DVR incidentally and temporarily buffers small amounts of program data.

2. Whether Cablevision would directly infringe plaintiffs’ public performance rights when its customers use the RS-DVR to play back for home viewing the programs they recorded.

## **STATEMENT OF THE CASE**

Cablevision is a leading media and entertainment company, offering cable television primarily in the New York area. SPA.4.<sup>1</sup> Plaintiffs each hold copyrights in some of the programming Cablevision carries. SPA.3-4. On May 24 and 26, 2006, plaintiffs filed complaints alleging that the RS-DVR would violate their rights under the Copyright Act. A.25; A.1339. On March 22, 2007, the district court granted plaintiffs' motions for summary judgment and denied Cablevision's SPA.1. On April 4, 2007, the court entered judgment declaring that the RS-DVR would infringe plaintiffs' copyrights and enjoining its implementation. SPA.39.

Cablevision appealed. A.1018; A.1741. This Court consolidated the cases and granted expedition.

## **STATEMENT OF FACTS**

In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Supreme Court held that the Copyright Act gives consumers the right to record television programs for later home viewing—a practice the Court dubbed “time-shifting.” The video cassette recorders (“VCRs”) at issue in *Sony* were followed by another time-shifting technology, digital video recorders (“DVRs”), which for years have been offered by TiVo, cable companies, and others without

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<sup>1</sup> Citations to “SPA.\_\_\_\_,” “A.\_\_\_\_,” and “CA.\_\_\_\_” are to the Special Appendix, Appendix, and Confidential Appendix, respectively.

legal challenge. This case concerns whether the Copyright Act proscribes a new technology—Cablevision’s Remote Storage Digital Video Recorder or “RS-DVR”—that likewise enables consumers to time-shift television programs. From the consumer’s perspective, the RS-DVR functions almost identically to a conventional DVR. Unlike a conventional DVR, however, the RS-DVR stores the consumer’s recordings on a hard drive in a Cablevision facility rather than in the set-top box in the consumer’s home. By centralizing storage, the RS-DVR allows Cablevision to offer its customers time-shifting capabilities more efficiently.

## **I. BACKGROUND**

### **A. The Copyright Act**

The Copyright Act grants authors certain exclusive rights. Two are at issue here. First is the right “to reproduce the copyrighted work in copies.” 17 U.S.C. § 106(1). “Copies” are reproductions that are “fixed,” *i.e.*, “sufficiently permanent or stable to permit [them] to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Id.* § 101.

Second is the right “to perform the copyrighted work publicly.” *Id.* § 106(4). To perform a work “publicly” means either (1) to perform it at or transmit it to “a place open to the public” or certain semi-public places; or (2) to “transmit . . . a performance . . . of the work . . . to the public . . . whether the

members of the public . . . receive it in the same place or in separate places and at the same time or at different times.” *Id.* § 101.

Anyone who exercises one of those exclusive rights without permission is liable for infringement, *id.* § 501(a), absent an exception such as “fair use,” *id.* § 107. Those who “have . . . themselves engaged in the infringing activity” are *direct* infringers. *Sony*, 464 U.S. at 435. Those who have not done so may be *contributory* infringers if they knowingly “induce[], cause[], or materially contribute[]” to *another’s* infringing conduct. *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). Because contributory infringement requires direct infringement by someone else, *Sony*, 464 U.S. at 434, there can be no contributory infringement where the underlying act is fair use.

## **B. Consumer Time-Shifting Technology**

### **1. VCRs and the Sony Decision**

In 1976, Sony introduced the Betamax VCR, which allowed consumers to record television programming onto magnetic tapes. SPA.7-8; A.758. Eight years later, the Supreme Court upheld both Sony’s right to sell VCRs and consumers’ right to use them to record television programs for later viewing. *Sony*, 464 U.S. at 456. The Court held that such consumer “time-shifting” is “fair use” because it “merely enables a viewer to see” at a different time a work he had already been “invited to witness in its entirety.” *Id.* at 449, 455. Sony’s sale of VCRs was not

contributory infringement, the Court held, because VCRs were capable of that “substantial noninfringing use.” *Id.* at 442-56. About 100 million VCRs are now in U.S. homes. A.828.

## 2. *Traditional DVRs*

The next evolutionary step in home recording was the DVR. Introduced in the 1990s by TiVo, DVRs likewise permit customers to record television for later viewing. SPA.8; A.834; A.1144-45. Rather than store recordings on magnetic tapes, however, DVRs store them digitally on a hard drive. SPA.8. DVRs are increasingly used in place of VCRs to record television programs. *Id.*

Many cable operators—including Cablevision—offer “set-top DVRs,” which combine the DVR’s recording and playback capabilities with the set-top box subscribers need to receive cable programming. *Id.*; A.1145-46. The customer uses a remote control and on-screen guide provided by the cable company to record programs and to play back his recordings. SPA.8; A.766; A.834; A.1150-51; A.1179.

The internal mechanics of a set-top DVR are complex. The incoming cable stream is split into multiple streams and fed into tuners. A.1170. The signal is decrypted and then filtered to identify and reassemble individual packets of program data. *Id.* If a user selects a program to record, the set-top DVR performs automatic checks—verifying, for example, that the user has not scheduled more

than two simultaneous recordings. A.766. The set-top DVR then records the program by re-encrypting the data, buffering it at the disk interface, and copying it to an internal hard drive. A.767; A.1170.

Cable companies typically retain ownership of the set-top DVRs they provide, assuming maintenance and repair responsibilities as well. A.1173-74. Customers are prohibited from opening set-top DVRs to access their contents, A.959, and security measures are used to prevent access, CA.1037. Recordings are encrypted, A.1170, and the drive in one set-top DVR will not work in any other, A.767 & n.48; A.1173. Finally, cable companies can disable the set-top DVR, or prevent a subscriber from playing back a recording, without entering the customer's home. A.834; A.959; A.1179; CA.1037.

## **II. THE CURRENT CONTROVERSY**

### **A. Proceedings Below**

In March 2006, Cablevision notified content providers that it planned a limited trial of the RS-DVR. A.318-495. Plaintiffs filed these copyright infringement suits in response. A.25; A.1339. The parties limited the issues, stipulating that plaintiffs would assert only *direct* infringement—not *contributory* infringement—and that Cablevision would “not be asserting a ‘fair use’ defense against claims for direct infringement.” A.57.

## **B. The Evidence Concerning the RS-DVR**

Following cross-motions for summary judgment, the district court held a hearing. SPA.18. Although the parties stipulated that the court could assess credibility and make findings as to expert testimony, A.953, the material facts were undisputed, A.1214.

### **1. Consumer Operation**

The evidence showed that, to the customer, the RS-DVR and traditional set-top DVR function almost identically. Both accomplish the same thing: time-shifting of television programming. A.1171. The customer uses the same remote control and on-screen interface. SPA.9; A.1149-51; A1311-22. And the programming the customer can record—all subscription programming on any Cablevision channel—is the same. SPA.8-9; SPA.11; A.113; A.1171.<sup>2</sup> Plaintiffs' expert admitted that the "look and feel of the subscriber's experience is hugely similar." A.1106.

Like VCRs or conventional DVRs, the RS-DVR records programs only as they are televised; the customer cannot record a program that has already aired. To record a program, RS-DVR customers can tune to it as it is televised and press "record" on their remote control, SPA.14, just as with VCRs or conventional

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<sup>2</sup> Subscription programming excludes video-on-demand and interactive services. A.113.

DVRs. Customers can also schedule recordings by using their remote control and the on-screen guide, *id.*, just as with conventional DVRs.

Like conventional DVRs, the RS-DVR keeps a list of the customer's recordings. SPA.16. As with conventional DVRs, to play back his recording, the customer selects it from the list and presses "play." SPA.17. As with VCRs or conventional DVRs, the customer can pause, fast-forward, or rewind. *Id.*; A.833.

The RS-DVR lacks some features of conventional DVRs. If the customer is watching a program, conventional DVRs can "reach back" and record the entire program any time before it ends; the RS-DVR cannot. A.858. Conventional DVRs can begin playing back a program before recording is complete; the RS-DVR cannot. *Id.* Conventional DVRs have multiple speeds for fast-forward and reverse; the RS-DVR has one. *Id.*<sup>3</sup>

## **2. Technical Details**

Recording. Like VCRs and conventional DVRs, the RS-DVR responds to user commands automatically. When the customer uses the remote control to direct a recording, the RS-DVR makes the recording "automatically," "with no human intervention or decision-making" on Cablevision's part. A.116; A.119; *see* A.768-69. The set-top box relays the command to a server at Cablevision's head-

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<sup>3</sup> The district court also stated that RS-DVR users cannot transfer recorded programs to a VCR or external disk, SPA.16, and might receive a "busy signal" if demand exceeds capacity, SPA.18.

end, which performs automatic checks to ensure the selection is valid—checks identical to those by set-top DVRs. SPA.14; A.768-70. As the program is televised, it is recorded and stored on a hard drive in a Cablevision server. SPA.15-16; A.769-70. Each customer is allocated a specific storage capacity. SPA.10; A.115; A.1091-92.

Although several customers may share a hard drive, the recordings are never shared: If 1000 customers record an episode of “The Wire,” 1000 separate copies are made, each uniquely associated with, and accessible only to, the customer who recorded it. SPA.16. If no one records a program, no copies are made on any hard drive. *Id.*

Playback. When a customer uses the RS-DVR to play back his recording, that too occurs “with no human intervention or human decision-making” on Cablevision’s part. A.119; A.121. The set-top box relays the customer’s command to a Cablevision server, which locates the customer’s recording and reserves space on Cablevision’s network to deliver it to that customer. SPA.17. The program can be viewed only from the particular set-top box used to record it. *Id.*; A.1119-20.<sup>4</sup>

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<sup>4</sup> The same encrypted data is sent to all customers on a particular “node” of the cable system, but only the unit used to record a program can decode it. SPA.17. Other customers will “see nothing”—“they won’t get the program.” A.1119-20. This is a routine feature of cable delivery. For example, premium channels are

Buffering. The RS-DVR must perform certain preliminary steps whether or not any customer chooses to make a recording. Like all cable systems, Cablevision receives programming from content providers, aggregates it, and divides it into multiple streams for delivery to subscribers. SPA.5-6. The RS-DVR receives and processes one such stream. SPA.11. To function properly, the RS-DVR—like all digital devices—momentarily stores small amounts of data in transient “buffers” as the data travels through the RS-DVR. SPA.12; pp. 38-39, *infra*. Those buffers never contain more than a tiny slice of any television program. A.1126-27; A.1164-66. After processing, buffered data becomes unusable and is overwritten almost immediately. A.1189-90.

Access and Maintenance. As with set-top DVRs, customers would not have lawful physical access to the hard drive on which recordings are stored. SPA.10. Cablevision would staff the RS-DVR facility with personnel responsible for maintaining it. *Id.*; A.1205-06. Those personnel would have the technical ability to delete a recording or playback stream from the RS-DVR “for troubleshooting purposes,” although witnesses could not identify any circumstance where personnel would delete a recorded program. A.1073-76; A.1102; A.1110.

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sent to all customers on a node, but only those who subscribe can decode them. SPA.6-7.

### C. The District Court's Opinion

On March 22, 2007, the district court granted summary judgment to plaintiffs, holding that Cablevision would *directly* infringe plaintiffs' copyrights in three respects.

Reproduction. The court first held that Cablevision would directly infringe plaintiffs' reproduction rights when its customers use the RS-DVR to record programs. SPA.22-29. The court acknowledged that, because plaintiffs claimed only direct infringement, the dispositive question was "who is 'doing' the copying"—in other words, whether Cablevision *itself* was copying or merely supplying the means for *customers* to make copies. SPA.22. The court did not deny that *consumers* have a right to record programs under *Sony*. The court agreed that the RS-DVR performs the same "time-shifting function[]" as the VCR in *Sony*. SPA.23. And it conceded that the RS-DVR "may have the look and feel" of a set-top DVR. SPA.25.

Nonetheless, the court held that, with the RS-DVR, "it is Cablevision that does the copying." SPA.22. It cited a variety of factors: the RS-DVR is a "complex computer network" with a "multitude of devices and processes" rather than a "stand-alone piece of equipment," SPA.24; SPA.26; "ownership of the RS-DVR set-top box" would remain with Cablevision, creating a "continuing relationship" with customers, SPA.24; the RS-DVR's main components would be

located at a Cablevision facility inaccessible to customers, SPA.24-25; Cablevision personnel would have an ongoing maintenance role, SPA.24-25; and Cablevision would supply the content that its customers record, SPA.24; SPA.28-29.

The court acknowledged that a line of cases beginning with *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), had rejected direct infringement claims against defendants whose systems made copies automatically in response to customer commands. SPA.28. Those courts ruled that the *direct* infringer is the *user* who supplies the “volition” or “human intervention” in making the copy, not the supplier of the automated means for copying. *See pp. 19-22, infra.* The district court, however, refused to follow those cases here, urging that they turned on “the unique attributes of the Internet.” SPA.28.

Buffering. The court also held that the RS-DVR’s momentary “buffering” of snippets of program data would infringe plaintiffs’ reproduction rights. SPA.29-32. Although the Act requires a “copy” 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), the court held that *any* reproduction that can be further copied—even transient buffer data—is covered. SPA.31. The court further held that buffering was not *de minimis*

because, although only a tiny fraction of any program is buffered at any time, every frame passes through the buffer. SPA.30.

Public Performance. Finally, the court held that Cablevision would directly infringe plaintiffs' public performance rights when customers use the RS-DVR to play back their recordings. SPA.32-36. The court first held that Cablevision, not the customer, would be "doing" the performing. SPA.32-33. Cablevision, the court stated, "actively participates in the playback process" because its "operation of an array of computer servers" makes playback possible. *Id.*

The court further held that the performance would be "public." SPA.33-36. The court did not dispute that a customer could play back only recordings *he* made, to *himself*, in his home. But it considered the performance "public" because the relationship between Cablevision and its customers was "commercial." SPA.34.

### **SUMMARY OF ARGUMENT**

In *Sony*, the Supreme Court held that the Copyright Act gives consumers the right to record television programs for later viewing, and that those who provide the means for that lawful activity are not contributory infringers. This case concerns whether Cablevision nonetheless *directly* infringes plaintiffs' copyrights by providing such a means. To consumers, Cablevision's RS-DVR is virtually indistinguishable from traditional set-top DVRs. The only significant difference is *where* the customer's recordings are stored.

I. Plaintiffs attempt to circumvent *Sony* by alleging direct rather than contributory infringement. That effort is foreclosed by a long line of precedent establishing that only the person who provides the “volition” or “human intervention” to make a particular copy can be a direct infringer. The provider of a *means* of copying—whether a photocopier, an e-mail server, a pen, or the RS-DVR—cannot be a *direct* infringer when the device responds automatically to user commands. That rule has been widely followed by courts and leading treatises. *See, e.g., Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995); *CoStar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544 (4th Cir. 2004).

Just as with the VCRs and DVRs used in millions of American homes, the *customer* using the RS-DVR provides the volition and human intervention to make a particular copy. Like a VCR or DVR, the RS-DVR responds “with no human intervention or human decision-making” on Cablevision’s part. A.116; A.119. Cablevision therefore cannot be a direct infringer.

The district court’s attempt to limit that rule to the Internet ignores the rule’s rationale. As *CoStar* explained in rejecting a similar argument, the rule reflects the Act’s fundamental distinction between those who “do” the copying and those who supply a means—the distinction between direct and contributory infringement that is hardly unique to the Internet. The district court, by contrast, invoked an *ad hoc*

compilation of irrelevant factors and conflated direct with contributory infringement. The court's reasoning, moreover, would outlaw myriad valuable products and services in widespread use.

**II.** Nor does the RS-DVR violate plaintiffs' reproduction rights by momentarily "buffering" tiny amounts of programming data deep in its internal recesses. A reproduction cannot infringe unless it is "fixed" for a period of "more than transitory duration." 17 U.S.C. § 101. Data in transit through the RS-DVR's transient buffers for 0.01 to 1.2 seconds does not meet that standard. In any event, as Professor Goldstein's treatise concludes, transient data buffers are *de minimis*. They are tiny in size, fleeting in duration, imperceptible, economically insignificant, and ubiquitous.

**III.** Finally, Cablevision would not directly infringe plaintiffs' public performance rights when customers use the RS-DVR to play back their recordings. Just as the human volition requirement forecloses direct infringement claims against Cablevision when customers use the RS-DVR to record a program, it precludes such claims when customers play back their recordings. In any event, the Act does not prohibit *all* performances—only *public* ones. Playing back a customer's *own* recording to that customer in his home is the antithesis of a "public" performance.

## ARGUMENT

More than two decades ago, in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Supreme Court held that consumers have the right to record television programs for later viewing. In that case, copyright holders argued that Sony was liable for contributory infringement because customers used its Betamax VCR to make infringing copies. The Court rejected that claim, holding that Sony had the right to sell VCRs, and consumers the right to use them, because consumer “time-shifting” was “legitimate fair use.” *Id.* at 442. “One may search the Copyright Act in vain,” the Court concluded, “for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home . . . .” *Id.* at 456.

Since *Sony*, the technology for time-shifting has changed: from the magnetic tape of a VCR, to the digital hard drive of a TiVo, to the integrated set-top DVR. This case concerns a further advance. Cablevision’s RS-DVR performs the same lawful time-shifting function as a set-top DVR. The customer uses the same remote control and the same on-screen guide to record the same programs. Rather than store the recordings in the consumer’s home, however, the RS-DVR stores them in a remote facility.

This case thus does not involve a business based on unlawful consumer conduct. *Cf. MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). Plaintiffs have licensed Cablevision to transmit their programs to its customers. SPA.4. And those customers have a fair-use right to record programs for later viewing. Consequently, Cablevision cannot be liable for *contributory* infringement—there is no infringement to which Cablevision could contribute. *See Sony*, 464 U.S. at 434. Plaintiffs have not even *asserted* such a claim. SPA.18; A.57.

Foreclosed by *Sony* from alleging contributory infringement, plaintiffs assert that Cablevision *directly* infringes their copyrights when its customers use the RS-DVR. But that attempt to circumvent *Sony* ignores the settled distinction between direct and contributory infringement. To be a *direct* infringer—the person who *does* the infringing act—one must do more than provide the *means* for copying. One must provide the “volition” or “human intervention” in making a particular copy. When a customer directs the RS-DVR to record a program, the *customer* provides that volition and human intervention. Like a VCR or conventional DVR, the RS-DVR merely executes that command automatically, with no human intervention by any Cablevision employee.

The district court’s ruling that Cablevision is nonetheless a direct infringer ignores settled precedent, imposes strict liability on those who merely provide a means for lawful copying, and produces irrational distinctions between

technologies that are equivalent in every relevant respect. The only significant difference between the RS-DVR and traditional DVRs and VCRs is where the copies are stored. By moving them to a central location, Cablevision can offer time-shifting capabilities more affordably. Copyright holders have no right to demand that consumers conduct otherwise lawful time-shifting by inefficient means.

### **Standard of Review**

The district court's grant of summary judgment on each issue is reviewed *de novo*. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 607 (2d Cir. 2006).

## **I. THE RS-DVR DOES NOT DIRECTLY INFRINGE PLAINTIFFS' REPRODUCTION RIGHTS**

### **A. Supplying the Means That Customers Use To Copy Is Not Direct Infringement**

Copyright law distinguishes between direct and contributory infringement. Direct infringers are those who "have . . . themselves engaged in the infringing activity." *Sony*, 464 U.S. at 435. The liability of "parties who have not themselves engaged in the infringing activity" depends on doctrines like contributory infringement. *Id.* A contributory infringer is one who "induces, causes, or materially contributes" to another's infringing conduct "with knowledge of the infringing activity." *Gershwin*, 443 F.2d at 1162. Supplying "machinery or goods that provide the means [for others] to infringe" is analyzed as contributory

infringement. 3 *Nimmer on Copyright* § 12.04[A][3], at 12-84 to -105 (2006) (“Nimmer”); see 2 *Goldstein on Copyright* § 8.1, at 8:10 (3d ed. 2006) (“Goldstein”).

As the district court observed, plaintiffs assert only *direct* infringement claims, and thus can prevail only if Cablevision itself “is ‘doing’ the copying.” SPA.22. To “do” the copying, however, a party must supply the “volition” or “human intervention” that directly causes a particular copy to be made. Supplying the *means* to copy can make one a *contributory* infringer—if the user’s copying is unlawful. But it does not establish *direct* infringement.

**1. *Direct Infringement Requires the Defendant’s Personal Volition and Intervention in the Act of Copying***

Time and again, courts have concluded that, to be a direct infringer who “does” the copying, the defendant must himself provide the “volition” or “human intervention” in making a particular copy. In the leading case, *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), copyright holders sued the Internet service provider (“ISP”) Netcom for direct and contributory infringement because a subscriber had posted infringing copies of the plaintiffs’ works. *Id.* at 1367. That posting resulted in “automatic copying of [those works] . . . onto Netcom’s computer and onto other computers” on the Internet. *Id.*

The court rejected the direct infringement claim, holding that direct infringement requires “some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.” *Id.* at 1370. All Netcom had done was to “install[] and maintain[] a system” that “automatically” made copies at the direction of users, “without any human intervention” on Netcom’s part. *Id.* at 1368. One cannot directly infringe, the court held, by operating a “server [that] acts without any human intervention beyond the initial setting up of the system.” *Id.* at 1369. The court viewed Netcom as akin to “the owner of a [photo]copying machine who lets the public make copies with it.” *Id.* “Although some of the people using the machine may directly infringe copyrights, courts analyze the machine owner’s liability under the rubric of contributory infringement, not direct infringement.” *Id.*

*Netcom’s* “volition” or “human intervention” test has been widely followed. In *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), the Fourth Circuit invoked *Netcom* to reject a direct infringement claim against LoopNet, a web-hosting service, after users posted CoStar’s copyrighted photographs. *Id.* at 547, 551. The Fourth Circuit held that *direct* infringement requires “something more . . . than mere ownership of a machine used by others to make illegal copies.” *Id.* at 550. Instead, “the machine owner himself [must have] trespassed on the exclusive domain of the copyright owner.” *Id.*

Endorsing *Netcom*, the Fourth Circuit ruled that a direct infringer must “engage in volitional conduct—specifically, the act [of copying] constituting infringement.” *Id.* at 551. As in *Netcom*, the court compared the defendant to “the owner of a traditional copying machine” because the defendant merely “own[ed] an electronic facility that responds automatically to users’ input” without any “intervening conduct” by the defendant. *Id.* at 550. And like *Netcom*, the Fourth Circuit held that “automatic copying, storage, and transmission of copyrighted materials, when instigated by others, does not render [a defendant] strictly liable for copyright infringement.” *Id.* at 555.

*Netcom* has been widely followed. See *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 497-98 (E.D. Pa. 2006) (“automatic activity . . . do[es] not include the necessary volitional element to constitute direct copyright infringement”); *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006) (“[A]utomated, non-volitional conduct . . . in response to a user’s request does not constitute direct infringement . . . .”); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1167-69 (C.D. Cal. 2002); *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1056-57 (C.D. Cal. 2002), *rev’d in part on other grounds*, 357 F.3d 1072 (9th Cir. 2004); *Marobie-FL, Inc. v. Nat’l Ass’n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1178 (N.D. Ill. 1997); *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 931-32 (N.D. Cal. 1996); *Sega Enters. Ltd. v. Sabella*, No. 93-04260, 1996 WL 780560, at

\*6-7 (N.D. Cal. Dec. 18, 1996); *cf. ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 622 (4th Cir. 2001) (finding *Netcom* “persuasive”).

The leading treatises also endorse *Netcom*. Professor Goldstein lauds *Netcom* as “embod[ying] a principle for decision outside as well as inside the Internet context” that has been “widely followed.” 2 Goldstein § 7.0, at 7:4. Nimmer praises *Netcom*’s “compelling” logic, which roots copyright doctrine “in [its] human origins” and “demonstrate[s] mastery of both the technology and the nuances of the law.” 3 Nimmer § 12B.01[A][1], at 12B-9 to -11; *see also* 5 Patry *on Copyright* § 21:56 (2007) (“Patry”) (*Netcom* “influential”); Gorman, *Copyright Law* 136 (Fed. Judicial Ctr. 2d ed. 2006) (*Netcom* “[p]erhaps the most influential court decision” on the subject).

## **2. *Cablevision Does Not Provide the Volition or Human Intervention Required Under Netcom***

Under *Netcom*, the result here is clear. The *customer* chooses what to record and directs the RS-DVR to record it using his remote control. SPA.14; A.1149-51. The RS-DVR then records it “automatically,” “with no human intervention or decision-making.” A.116; A.119; *see* A.769 (“automatically”); A.1114-15 (plaintiffs’ expert) (no “[c]oncurrent human intervention”); A.1133 (same). Consequently, the customer, not Cablevision, supplies the requisite “volition” or “human intervention” and thus “does” the copying.

Like the ISP in *Netcom*, Cablevision has “install[ed] and maintain[ed] a system” that makes copies “automatically” at the user’s command, “without any human intervention” on Cablevision’s part. 907 F. Supp. at 1368. As in *Netcom*, those recordings are made “[a]ccording to a prearranged pattern established by . . . software,” without any “element of volition” by Cablevision employees. *Id.* at 1367, 1370. Like the defendant in *CoStar*, Cablevision “passively stor[es] material at the direction of users.” 373 F.3d at 555. Cablevision is similarly “analog[ous] to the owner of a traditional copying machine,” since it merely “owns an electronic facility that responds automatically to users’ input” without “intervening conduct.” *Id.* at 550. As a result, Cablevision cannot be a *direct* infringer.

The absence of any volition or human intervention by Cablevision employees in recording any particular program distinguishes this case from others where a defendant’s *employees* themselves did the copying. Copy shops and music stores have been held directly liable where their employees make copies at the request of customers. *See Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1384 (6th Cir. 1996) (en banc); *cf. id.* at 1393 (Martin, C.J., dissenting) (criticizing majority for giving “significance to the identity of the person operating the photocopier”); *RCA/Ariola Int’l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 781 (8th Cir. 1988) (“employees . . . actually operat[ed] the machine”); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522

(S.D.N.Y. 1991); *RCA Records v. All-Fast Sys., Inc.*, 594 F. Supp. 335, 337 (S.D.N.Y. 1984) (“salesperson promptly made a . . . copy”); *see also Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) (defendant’s “employees viewed all files . . . and moved them into the generally available files for subscribers”). Nothing of that sort occurs here.

### 3. Netcom’s Rule Makes Sense

*Netcom*’s “volition” and “human intervention” test is not only widely accepted, but sensible. Because the Act grants owners the exclusive right to “do” six specified acts, 17 U.S.C. § 106, a defendant *directly* infringes only if he “does” one of the acts. *See CoStar*, 373 F.3d at 551 (defendant must “engage in . . . the act constituting infringement . . . to become a direct infringer”); *Russ Hardenburgh*, 982 F. Supp. at 512 (defendant must “*actually engage in* [the specified] activities in order to directly violate the statute”); 7 Patry § 25:87 (“The verb ‘to do’ refers to direct infringement, e.g., [where the] consumer *personally* makes an illegal copy of a rented videocassette” (emphasis added)). Machines cannot violate the Act; only people can. When a defendant supplies an automated system that operates at someone else’s direction, the person “doing” the copying is the one who uses the system. The person providing the means may *contribute* to the copying, but he does not *do* it.

That distinction is important. Many means of copying provide important “societal benefits,” *Sony*, 466 U.S. at 454, but are capable of both infringing and noninfringing uses: the self-service photocopier, for example, or the Internet. Holding those providing such means to be *direct* infringers would expose them to enormous liability, and potentially deny consumers the benefit of their products. Direct infringement is a strict-liability offense. 2 Goldstein § 9.2, at 9:5. By contrast, a company need fear contributory infringement only if it knows of infringement, *id.* § 8.0, at 8:8-9, or its product is incapable of substantial non-infringing uses, *Sony*, 464 U.S. at 442. As *Sony* makes clear, moreover, an alleged contributory infringer will *never* be liable if his customer’s use is *lawful*. *Id.* at 434; 2 Goldstein § 8.0, at 8:7. By limiting direct infringement to those who personally “do” the infringing act, Congress reserved that harsh doctrine for those who provide the human volition to make a particular copy, and protected those who supply the means of copying that others can use for lawful purposes. The *Netcom* test carries out that design.

The district court’s assertion that “Cablevision has waived any arguments based on fair use,” SPA.23, is for that reason misplaced. Cablevision waived the “‘fair use’ defense to claims of direct infringement.” A.57. But Cablevision does not cite *Sony* to assert a fair use defense. The discussion of *Sony* simply illustrates why there is no contributory infringement claim in this case, and why plaintiffs’

direct-infringement theory here represents an effort to end-run both *Sony* and the traditional distinction between direct and contributory infringement.

**B. The Widespread Acceptance of VCRs and Set-Top DVRs Confirms That the RS-DVR Is Lawful**

When interpreting a statute, 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) (“Sutherland”) (collecting cases); e.g., *United States v. State Bank of N.C.*, 31 U.S. 29, 39-40 (1832) (Story, J.) (“A practice so long and so general . . . would justify us in yielding to it as a safe and reasonable [interpretation].”); *Union Pac. R.R. Co. v. Anderson*, 120 P.2d 578, 587 (Or. 1941) (“[C]ourts will receive as an aid to proper interpretation the construction which practical persons engaged in the industry generally place upon [a statute].”).

Here, the industry and consumers have long understood devices functionally indistinguishable from the RS-DVR to be lawful. Sony introduced the Betamax over 30 years ago, A.758, and about 100 million VCRs are in U.S. homes, A.828. DVRs were introduced nearly a decade ago, A.834; A.1144-45, and are used in more than 15 million U.S. homes, Davis, *DVRs To Become Commonplace*, Rocky Mtn. News, Feb. 21, 2006, at 1B. Since *Sony*, no one to our knowledge has sued

VCR manufacturers for direct infringement,<sup>5</sup> or challenged the set-top DVR's basic functionality.<sup>6</sup> That widespread acquiescence reflects a common understanding: These technologies are lawful because they enable *consumers* to time-shift as authorized by *Sony*.

Plaintiffs' own witnesses admitted as much. Plaintiffs' lead expert testified that, with a VCR or set-top DVR, "it is the consumer, the customer who is making the copy." A.1112. Plaintiffs' corporate executives made similar concessions. *See* CA.19-20 (DVR recording is "initiated by the customer"); CA.27 ("consumer initiated"); CA.33 ("100% consumer controlled"). The district court described the *RS-DVR* as permitting "*customers* to record programs." SPA.1 (emphasis added). That widespread understanding—the "meaning attached by people affected by an act," 2B Sutherland § 49.06, at 94—may not *bar* plaintiffs' suit. SPA.25. But it is *evidence* of the Act's meaning and proper application.

The district court attempted to distinguish the *RS-DVR* from VCRs and set-top DVRs. SPA.23-26. But it could not deny that all three devices perform the same function—"enabl[ing] a viewer to see" at a different time "a work which he

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<sup>5</sup> The district court in *Sony* rejected direct infringement claims. *Univ. City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 457-59 (C.D. Cal. 1979). The Supreme Court addressed only contributory infringement. 464 U.S. at 435 n.17.

<sup>6</sup> Suits have challenged only DVRs with non-traditional features such as automatic commercial-skipping. *See Paramount Pictures Corp. v. RePlayTV*, 298 F. Supp. 2d 921 (C.D. Cal. 2004); A.890; A.923. No such features are at issue here.

had been invited to witness.” *Sony*, 464 U.S. at 449; SPA.23; SPA.25; A.833; A.1171. All three allow consumers to record by pressing “record” or by scheduling a future recording, *Sony*, 464 U.S. at 422-23; SPA.8; SPA.14; A.1143; A.1150-51; to record any scheduled programming they receive, SPA.8-9; SPA.11; A.113; A.1144; and to play back, pause, rewind, or fast-forward, *Sony*, 464 U.S. at 423; SPA.8; SPA.17; A.833.

Indeed, to the consumer, Cablevision’s RS-DVR and set-top DVRs are virtually identical. The remote control is the same. SPA.9. The on-screen interface is the same. *Id.*; A.1149; A.1311-22. The available programming is the same. SPA.8-9; SPA.11; A.1171. As plaintiffs’ expert admitted, the “look and feel of the subscriber’s experience is hugely similar.” A.1106.

Losing sight of that functional forest for the technical trees, the district court invoked differences “under the hood.” SPA.25. Those differences boil down to the fact that, for the RS-DVR, hardware has been relocated to Cablevision’s head-end. *See pp. 35-37, infra*. But the court never explained why the location where the customer’s recordings are made and stored—in a Cablevision-owned, Cablevision-maintained, and Cablevision-controlled set-top box, or a Cablevision-owned, Cablevision-maintained, and Cablevision-controlled building—has any relevance to the copyright owner’s legitimate interests or any conceivable purpose of the Act.

Because “time-shifting expands public access to freely broadcast television programs, it yields societal benefits.” *Sony*, 466 U.S. at 454. The district court’s judgment limits those benefits by proscribing the most efficient means of obtaining them. Just as “[o]ne may search the Copyright Act in vain for any sign that [Congress] made it unlawful to copy a program for later viewing at home,” *id.* at 456, one searches in vain for any sign that Congress intended to relegate time-shifting to inefficient technologies.

### **C. The District Court’s Contrary Analysis Cannot Be Sustained**

Refusing to apply *Netcom*, the district court instead invoked an amorphous pastiche of factors that casts a cloud of uncertainty over myriad lawful technologies.

#### **1. The Court Erred in Refusing To Apply Netcom**

**a.** The district court’s rationale for refusing to apply *Netcom*’s “volition” or “human intervention” test—that it is based on the “unique attributes of the Internet,” SPA.28—is unfounded. *Netcom* is based on the Act’s distinction between direct and contributory infringement, 907 F. Supp. at 1368-70, a concept that derives from the Act’s language and structure, *see pp.* 18-19, 24-25, *supra*. *Netcom* mentioned that a contrary rule “would hold the entire Internet liable for activities that cannot reasonably be deterred.” 907 F. Supp. at 1372. But noting

the wisdom of the correct construction of a statute in one context hardly implies that the statute has a different meaning in others.

In *CoStar*, the Fourth Circuit rejected a similar attempt to “marginaliz[e]” *Netcom* as a “new ‘special liability-limiting rule for Internet servers.’” 373 F.3d at 552. “While the court in *Netcom* did point out the dramatic consequences of a decision that would hold ISPs strictly liable” as direct infringers, “the court grounded its ruling principally on its interpretation of § 106 of the Copyright Act as implying a requirement of ‘volition or causation . . . .’” *Id.* at 549. The district court’s attempt to limit *Netcom* to the Internet also ignores *Netcom*’s and *CoStar*’s reliance on an analogy to self-service copy shops—hardly an Internet application. *See Netcom*, 907 F. Supp. at 1369; *CoStar*, 373 F.3d at 550. Surely those cases did not establish a special rule for the Internet . . . and Kinko’s.

Treatises agree: *Netcom* “embodies a principle for decision *outside as well as inside the Internet context.*” 2 Goldstein § 7.0, at 7:4 (emphasis added). *Netcom* deals with “general principles of law.” 5 Patry § 21:85. The Copyright Act does not license courts to invent separate definitions for the Internet. The Act’s terms apply across the board. If *Netcom* governs the Internet—and it surely does—it governs here as well.

**b.** The district court urged that *Netcom* is inapplicable here because the defendant in *Netcom* confronted a “free flow of information” that made it

“virtually impossible . . . to filter out infringing data,” while Cablevision has “unfettered discretion” over content. SPA.28-29. Even if that were accurate—and it is not—it makes no difference to *direct* infringement. Only the person who “does” the copying can be a direct infringer. Someone who makes content available may *contribute* to copying. But he does not “do” the copying.

Provision of content thus might be relevant to *contributory* infringement, for example, by providing knowledge of the infringing use. *See* 2 Goldstein § 8.1, at 8:8-9; *RCA Records*, 594 F. Supp. at 337-38. Thus, a store that provides both books and photocopiers might be at greater risk of *contributory* infringement than a store that provides only one. *Cf.* 3 Nimmer § 12.04[A][3][b], at 12-88. But it would not be a *direct* infringer, because it does not *make* the copies. Likewise, Cablevision’s provision of content that consumers may choose to record might make it a *contributory* infringer—if the consumer copying were unlawful. But *Sony* forecloses any such claim.

The district court’s reliance on the fact that Cablevision distributes content is also economically irrational. It creates an arbitrary distinction between DVRs furnished by cable companies and those furnished by third parties, permitting the former but barring the latter. No rational copyright policy supports that result.

**c.** In any event, the claimed distinction based on control is doubly illusory. ISPs do have some control over content. In *Netcom*, there was evidence

that the ISP “ha[d] acted to suspend subscribers’ accounts,” could “delete specific postings,” and “with an easy software modification . . . could identify postings that contain particular words or come from particular individuals.” 907 F. Supp. at 1376. The ISP in *CoStar* similarly exercised a “gatekeeping function” over postings. 373 F.3d at 556.

By contrast, Cablevision exercises no control over content in any relevant respect. First, to the extent the district court was relying on Cablevision’s control over the content on its *cable system*, that control is limited. Although Cablevision plays some role in deciding which channels to carry, it does not choose the content of—the programs included on—any given channel. The “determination to retransmit the signals of a particular *station*” does not amount to ““control over the content.’” *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 130 (2d Cir. 1982) (emphasis added).<sup>7</sup> And there are some channels Cablevision is obligated to carry. *See* 47 U.S.C. §§ 534(a), 535(a), 541(a)(4)(B), 543(b)(7); *Goldberg v. Cablevision Sys. Corp.*, 261 F.3d 318, 320-22 (2d Cir. 2001).

More fundamentally, with respect to what consumers may record using the RS-DVR, Cablevision—like the ISP in *CoStar*—is “totally indifferent to the material’s content.” 373 F.3d at 551. All scheduled programming on

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<sup>7</sup> Indeed, Cablevision is statutorily prohibited from modifying the content of some channels, 17 U.S.C. § 111(c)(3), and contractually prohibited from modifying the content of others, CA.436; CA.445.

Cablevision’s regular cable system is passed through to the RS-DVR indiscriminately, just as with conventional DVRs. SPA.11; A.1171. Customers can thus use the RS-DVR to record *any* scheduled program. SPA.11. The fact that Cablevision considered limiting the RS-DVR to certain channels *solely for its technical trial*, SPA.29; A.1208-09, is irrelevant. The trial never occurred, A.57, and, in any event, the RS-DVR’s design for commercial rollout permitted customers to record programs on all Cablevision channels. SPA.11.<sup>8</sup> The court’s holding—that Cablevision has “chosen” what gets copied by *refusing to restrict* consumer choice—defies common sense.<sup>9</sup>

## **2. *The District Court Relied on Factors That Are Irrelevant to Direct Infringement***

Rather than apply *Netcom*, the district court assembled a slew of factors with no logical connection to *who* makes the copies. For example, the court characterized the RS-DVR as a “service.” SPA.22. But *Netcom* itself rejected

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<sup>8</sup> Cable companies have had the power to block recording of particular channels since the days of VCRs. A.1144. But that has never been thought to amount to control over what consumers record.

<sup>9</sup> The district court also claimed that “the copies made to the ISP’s computers in *Netcom* were incidental to the ISP’s providing Internet access” whereas “[t]he copies that would be made through the RS-DVR . . . are instrumental to the RS-DVR’s operation.” SPA.29. That attempted distinction lacks even a colorable basis in *Netcom*’s reasoning. It also ignores the fact that *Netcom* was accused of making infringing *transmissions* as well as infringing copies. 907 F. Supp. 1371-72; *see also CoStar*, 373 F.3d at 555. Transmitting data over the Internet is not “incidental” to an ISP’s services—that is what ISPs do.

claims against a “bulletin board *service*” and an Internet *service* provider. 907 F. Supp. at 1365 (emphasis added). Labeling the RS-DVR a “service” does not change the fact that it responds automatically to customer commands.

The court also cited a variety of other factors: the RS-DVR consists of a “complex computer network” rather than a “stand-alone piece of equipment,” SPA.24; SPA.26; Cablevision would retain ownership of the RS-DVR set-top box and have a “continuing relationship” with customers, SPA.24; RS-DVR equipment would be located at a Cablevision facility inaccessible to customers, SPA.24-25; Cablevision personnel would continually ensure the RS-DVR was working properly, SPA.25; and Cablevision’s system would supply the content that its customers could record, SPA.24.

Conspicuously absent is any explanation of why these factors matter to *direct* infringement. None entails any volition or human intervention in making copies of particular works. The RS-DVR’s “complex computer network,” for example, does not change who *does* the copying: A complicated means is still a *means*. Cablevision’s role in “monitor[ing] the programming streams” to “ensure that the servers are working properly,” SPA.25, is likewise irrelevant. Monitoring “for troubleshooting purposes,” A.1076, does not involve volition or human intervention *in the act of making a particular copy*. See *Netcom*, 907 F. Supp. at 1368 (rejecting direct infringement despite defendant’s role in “installing and

maintaining” system); *CoStar*, 373 F.3d at 551 (rejecting direct infringement against those “involved in the ownership, operation, or maintenance of a transmission facility”).

The district court did not merely ignore the test for direct infringement. It replaced that test with factors relevant only to *contributory* infringement. For example, the court noted that, “[i]n *Sony*, ‘[t]he only contact between Sony and the users of the Betamax . . . occurred at the moment of the sale,’” whereas the RS-DVR “requires a continuing relationship.” SPA.24 (quoting 464 U.S. at 438). But *Sony* cited the absence of a “continuing relationship” because that was relevant to whether Sony was a “contributory infringer.” 464 U.S. at 437. *Sony* nowhere suggests that a “continuing relationship” would establish *direct* infringement. *See also* pp. 30-33, *supra* (provision of content).

### **3. *The District Court’s Reasoning Threatens Numerous Lawful Devices***

By relying on irrelevancies and conflating direct with contributory infringement, the district court condemned the RS-DVR based on attributes shared by numerous lawful technologies. For example, if a “complex computer network” were a sign of direct infringement, SPA.26, *Netcom* and every Internet case following it would be wrongly decided.

The processes singled out by the court, moreover, have counterparts in set-top DVRs. The court urged that the RS-DVR “reconfigure[s] the linear channel

programming signals received at its head-end by splitting the APS into a second stream, reformatting it through clamping, and routing it to the Arroyo servers.” *Id.* But set-top DVRs also “reconfigure the linear channel programming signals” through demodulation and filtering. A.1170. Set-top DVRs “split[] the APS into a second stream” (as do most VCRs). A.833; A.1117-18; A.1143-47. Routine cable delivery “reformat[s] [the signal] through clamping.” A.958; A.1168-69. And set-top DVRs “rout[e]” the signal to a hard drive. A.1170. While the court stated that set-top DVRs “do[] not require these activities,” SPA.26, it meant only that set-top DVRs do not require them “at [the] head-end,” *id.* Instead, set-top DVRs perform them in the set-top box.

The court also cited Cablevision’s “ownership of the RS-DVR set-top box” and “continuing relationship [with] its customers.” SPA.24. But ISPs own their servers; self-service copy shops own their photocopiers; and cable companies own the set-top DVRs they provide. A.1173-74. Indeed, even where a customer *purchases* a DVR from TiVo, a continuing subscription provides the on-screen guide. A.834; TiVo, Inc., *Annual Report* 3 (Apr. 16, 2007).

Relying on “physical control,” SPA.24, would condemn ISPs and self-service copy shops, which house the systems their customers use. And while a subscriber cannot “walk into Cablevision’s facilities and touch the RS-DVR,” SPA.10, a Netcom subscriber cannot walk into Netcom’s offices and “touch” the

server where his e-mail is stored. Set-top DVR subscribers likewise lack meaningful physical access: Customers are prohibited from opening set-top DVRs, A.959; A.1173-74; security measures are used to prevent access, CA.1037; the data is encrypted, A.1170; and the drive in one box will not work in another, A.767 & n.48; A.1173. Cable companies can prevent a set-top DVR subscriber from playing back a recording or disable the DVR entirely without entering the customer's home. A.834; A.959; A.1179; CA.1037.

Cablevision's provision of content, SPA.24, is irrelevant for reasons already stated. *See* pp. 30-33, *supra*. It also distinguishes nothing, since Cablevision provides the "identical sets of programs" to its RS-DVR, set-top DVR, and non-DVR customers. A.1171; *see* SPA.8-9; A.113. While Cablevision would "maintain" the RS-DVR and "ensure that the servers are working properly," SPA.24-25, Kinko's maintains its self-service photocopiers, Netcom maintains its servers, and cable companies maintain their set-top DVRs. A.1174.

Finally, the fact that Cablevision "determine[d] how much memory to allot to each customer" and may offer "the option of acquiring additional capacity," SPA.25, is no different from the hundreds of engineering decisions made in designing (and upgrading) VCRs, set-top DVRs, and other modern technology. If that is enough to make one a direct infringer, nothing is safe.

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

The district court also erred in holding that Cablevision would infringe plaintiffs' reproduction rights because the RS-DVR briefly "buffers" tiny snippets of program data in random access memory ("RAM") independently of any customer command. SPA.12; SPA.29-32. To qualify as a "copy," a reproduction must be "fixed," persisting "for a period of more than transitory duration." 17 U.S.C. § 101. Moreover, copying must be more than *de minimis*. The RS-DVR's buffers satisfy neither condition.

Buffers are "regions of memory that temporarily hold data . . . as it moves from some source and is processed and transferred to its final destination." SPA.12. Like all digital devices, the RS-DVR uses buffers. For example, it temporarily reproduces small amounts of incoming data in a "primary ingest buffer" just long enough to determine whether the data corresponds to a program a customer has chosen to record. SPA.13; A.1125-27; A.1164. If no customer has chosen to record that program, the data becomes unusable and is overwritten almost immediately. A.1189-90. Data remains in that buffer for 0.01 to 0.1 seconds—a "mere eyeblink"—and only 0.01 to 0.1 seconds' worth of television programming per channel exists in the buffer at any time. SPA.13; A.958; A.1053-59; A.1086; A.1126-27; A.1164-65; CA.1040-41. The RS-DVR's Big Band Multimedia Router ("BMR") also uses a buffer to aggregate individual data

packets and adjust the cable stream's transmission rate to make it suitable for the RS-DVR. SPA.11-12 & n.5. The BMR stores data for only 1.2 seconds; at any time the buffer contains only 1.2 seconds' worth of data per channel. A.1046-49; A.1084-85; A.1128-30; A.1166-67.<sup>10</sup>

**A. The Buffer Contents Are Not “Fixed”**

**1. *The Buffer Contents Exist for Only a “Transitory Duration”***

To infringe the reproduction right, a defendant must “fix[]” a copy of a work, which means to make a reproduction “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, 106(1). This definition “*exclude[s] . . . purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television . . . , or captured momentarily in the ‘memory’ of a computer.*” H.R. Rep. No. 94-1476, at 53 (1976) (emphasis added). That perfectly describes the transient data buffers here. Data remains in the buffers for 0.01 to 1.2 seconds, and then is overwritten almost immediately. By any standard, that is not a “period of more than transitory duration.” 17 U.S.C. § 101.

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<sup>10</sup> Other RS-DVR buffers exist, but operate only in response to customer commands. *See* SPA.15-18; A.1088-91; A.1094; A.1130; CA.1041. Those buffers are thus noninfringing for the reasons set forth at pp. 18-37, *supra*.

For that reason, *CoStar* rejected the claim that data stored temporarily during transmission over the Internet is a fixed copy. An ISP, the court observed, “hardly ‘copies’ the information and data in the sense that it fixes a copy in its system *of more than transitory duration*. . . . While temporary electronic copies may be made in this transmission process, they would appear not to be ‘fixed’ in the sense that they are ‘of more than transitory duration’ . . . .” 373 F.3d at 51. Such copies are “transitory” in a “qualitative” sense as well, since they exist only while data is *in transit*. *Id.* Like the buffer copies in *CoStar*, the snippets of data in the RS-DVR’s buffers exist fleetingly and while *in transit*—while “mov[ing]” and being “transferred” to their final destination. SPA.12.

*Advanced Computer Services of Michigan, Inc. v. MAI Systems Corp.*, 845 F. Supp. 356 (E.D. Va. 1994), likewise supports that conclusion. There, technicians loaded copyrighted software into RAM and used an “error log” to perform maintenance. *Id.* at 361. The court found those copies “fixed,” but only because they lasted for “minutes or longer.” *Id.* at 363. “Of course,” the court explained, “if a computer is turned off *within seconds or fractions of a second* of the loading, the resulting RAM representation of the program arguably would be *too ephemeral to be considered ‘fixed’ or a ‘copy’ under the Act.*” *Id.* (emphasis added). Because the data here is buffered for “seconds or fractions of a second,” not “minutes or longer,” it is “too ephemeral to be considered ‘fixed.’” *Id.*; *see*

also *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734, 771 (E.D. Mich. 2003).

**2. *The District Court Relied on Cases That Did Not Address Momentary Data Storage***

The district court asserted that “numerous courts have held that the transmission of information through a computer’s . . . RAM, as is the case with the buffering here, creates a ‘copy’ for purposes of the Copyright Act.” SPA.30-31. But none of the cases it cited addressed *momentary* data storage like buffering. *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), held that, because the defendant “load[ed] the software into the RAM and [wa]s then able to view the system error log and diagnose the problem with the computer, MAI ha[d] adequately shown that the representation created in the RAM” was fixed. *Id.* at 518 (emphasis added). That falls far short of holding that *all* RAM copies are fixed. Instead, as in *Advanced Computer*, the software resided in RAM while technicians booted up a computer, viewed an error log, and performed maintenance—conduct typically measured in “minutes,” not “seconds.” 845 F. Supp. at 363. And unlike in *CoStar* and here, the storage was not “transitory” in any “qualitative” sense—the data was not in transit, but residing at its intended destination.

*Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330 (9th Cir. 1995), is equally inapposite. Like *MAI*, it involved technicians copying software

into RAM to perform maintenance—and its one sentence of dictum on this issue contains no relevant detail. *Id.* at 1335.<sup>11</sup> *Stenograph L.L.C. v. Brossard Associates*, 144 F.3d 96 (D.C. Cir. 1998), is farther afield. There, the defendant used transcription software without a license for *months*. *Id.* at 100-03. The issue of momentary buffering appears nowhere in the case.

Finally, *Marobie-FL, Inc. v. National Ass’n of Fire Equipment Distributors*, 983 F. Supp. 1167 (N.D. Ill. 1997), helps plaintiffs not at all. That case *rejected* direct infringement because the defendant ISP did not provide the human volition that *Netcom* requires. *Id.* at 1178. The court did find that consumer downloads were fixed, but it did so because the *copy ultimately received by the user*—not the transient buffer “copies” made during transmission—was sufficiently permanent. *See id.* Like the other cases, *Marobie* does not address whether data passing through transient buffers is fixed.

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<sup>11</sup> Fixation was not raised on appeal. *See* Appellants’ Brief, No. 95-15552, 1995 WL 17068997 (9th Cir. May 15, 1995). The district court’s unpublished opinion stated that a very brief RAM copy could be “fixed” if it was the “functional equivalent of a longer lasting copy”—there, an operating system that communicated with hardware and interacted with applications. *Triad Sys. Corp. v. Se. Express Co.*, No. C-92-1539, 1994 WL 446049, at \*5-6 (N.D. Cal. Mar. 18, 1994). Transient buffer data is *not* the “functional equivalent” of a longer lasting operating system—it is merely data *in transit* to somewhere else.

### 3. *The District Court's Reliance on the DMCA Report Was Misplaced*

The district court cited only one authority that even addressed buffering—the Copyright Office's *DMCA Section 104 Report* (Aug. 2001) ("*DMCA Report*"). SPA.31. That report concluded that buffers are normally *lawful fair use*. *DMCA Report* 133-41. Nonetheless, the district court relied on the report's earlier assertion that buffer copies are "fixed." *Id.* at 111-12.

"[T]he Copyright Office," however, "has no authority to give opinions or define legal terms and its interpretation on an issue never before decided should not be given controlling weight." *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 946-47 (2d Cir. 1975) (footnotes omitted); *Morris v. Bus. Concepts, Inc.*, 283 F.3d 502, 505 (2d Cir. 2002); *Estate of Burne Hogarth v. Edgar Rice Burroughs, Inc.*, 342 F.3d 149, 167 n.22 (2d Cir. 2003). Copyright Office opinions receive at most so-called "*Skidmore*" deference and are followed only if their reasoning is "persuasive." *Morris*, 283 F.3d at 505-06. The *DMCA Report's* interpretation not only is unpersuasive; it flatly contradicts statutory text.

The report opined that "Congress intended the copyright owner's exclusive right to extend to all reproductions from which economic value can be derived." *DMCA Report* 111. Since economic value lies in the ability to "copy, perceive or communicate" a work, the report concluded that the "dividing line" between fixed and unfixed should be drawn "between reproductions that exist for a sufficient

period of time to be capable of being ‘perceived, reproduced, or otherwise communicated’ and those that do not.” *Id.* Because buffer data can be copied during its brief existence, the report considered it “fixed.” *Id.* at 112.

That analysis contravenes statutory text. The Act requires a copy 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). The *DMCA Report* omits that last clause, requiring only that a copy be capable of being “*perceived, reproduced, or otherwise communicated*”—for *any* duration. “It is ‘a cardinal principle of statutory construction’ that ‘a statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant.’” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). If Congress had wanted to reach *all* reproductions capable of being “perceived, reproduced, or otherwise communicated,” no matter how briefly, it would not have added the phrase “for a period of more than transitory duration.” A construction that “read[s] . . . words out of the statute entirely” cannot be upheld even when generous *Chevron* deference applies. See *NCUA v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 502-03 (1998). *A fortiori*, it cannot be accepted here.

Legislative history similarly contradicts the claim that anything reproducible is “fixed.” Television programs can be copied, but Congress intended “the

definition of ‘fixation’ [to] exclude . . . reproductions . . . shown electronically on a television.” H.R. Rep. No. 94-1476, at 53. (That is why broadcasting is “performance,” not “reproduction.” 2 Nimmer § 8.02[B][3], at 8-32 & n.15.) Congress likewise meant to exclude “reproductions . . . captured momentarily in the ‘memory’ of a computer.” H.R. Rep. No. 94-1476, at 53. The *DMCA Report* would nonetheless deem *all* RAM copies “fixed,” since all can be copied virtually instantaneously.

The claim that Congress “intended the copyright owner’s exclusive right to extend to all reproductions from which economic value can be derived,” *DMCA Report* 111, is also unfounded. “[N]o legislation pursues its purposes at all costs.” *PBGC v. LTV Corp.*, 496 U.S. 633, 646 (1990). Congress did not reserve *all* economic value to the copyright holder, since (among other things) consumers can make time-shifting copies without payment. It should hardly be surprising that Congress also excepted the transitory data buffering that enables that activity. In any event, the Act’s text controls. And it excludes transient buffer data that, although reproducible, is not reproducible *for a period of more than transitory duration*.

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

The RS-DVR’s buffers are also *de minimis*. “The *de minimis* doctrine essentially provides that where unauthorized copying is sufficiently trivial, ‘the law

will not impose legal consequences.’” *Davis v. The Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001). That doctrine is “an important aspect of the law of copyright.” *Id.* at 173. Copying may be *de minimis* because the amount copied is small, *see Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74-75 (2d Cir. 1997), or more broadly because it is merely a “technical violation,” *id.* at 74; *see Davis*, 246 F.3d at 172-73; 2 Goldstein § 7.0.2, at 7:9-11; 2 Nimmer § 8.01[G], at 8-25 to -29.

In *Knickerbocker Toy Co. v. Azrak-Hamway International, Inc.*, 668 F.2d 699 (2d Cir. 1982), this Court held that copying an entire product design was *de minimis* because it “‘was only an office copy which was never used’” in production. *Id.* at 702-03. In *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (2d Cir. 1998), this Court held that photographs in the background of 11 film shots were *de minimis* because they appeared “briefly,” “out of focus,” “in poor lighting,” and “at great distance.” *Id.* at 218; *see also Gordon v. Nextel Commc’ns & Mullen Adver., Inc.*, 345 F.3d 922, 924-25 (6th Cir. 2003). *Davis* listed further examples:

We do not hesitate to make a photocopy of a letter from a friend to show to another friend, or of a favorite cartoon to post on the refrigerator. Parents in Central Park photograph their children perched on José de Creeft’s Alice in Wonderland sculpture. We record television programs aired while we are out, so as to watch them at a more convenient hour. Waiters at a restaurant sing “Happy Birthday” at a patron’s table. . . . Because of the *de minimis* doctrine, in trivial instances of copying, we are in fact not breaking the law.

246 F.3d at 173 (footnote omitted); *accord* 2 Nimmer § 8.01[G], at 8-29.

Professor Goldstein’s treatise makes clear that the transient data buffering here meets the *de minimis* standard: “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. That conclusion is unquestionably correct. The buffer “copies” are tiny, fleeting, imperceptible, economically insignificant, and common in modern technology:

Size. The size of the copy in relation to the overall work is important. *See Ringgold*, 126 F.3d at 74-75. Here, only a minuscule portion—0.01 to 1.2 seconds’ worth—is buffered at any time. For a one-hour program, that is 0.03% of the entire work. This Court regularly deems even *complete reproductions de minimis*. *See Knickerbocker*, 668 F.2d at 703 (entire product); *Sandoval*, 147 F.3d at 218 (entire photographs); *Davis*, 246 F.3d at 173 (five examples of entire works). Clearly, tiny fragments are *de minimis* as well.

Duration. The fact that data remains in the buffers only briefly—between 0.01 and 1.2 seconds—also supports *de minimis* status. *See Sandoval*, 147 F.3d at 218 (displayed only “briefly”); *Gordon*, 345 F.3d at 925 (appeared “fleetingly”).

Imperceptibility. Buffer data lies deep inside the RS-DVR, inaccessible to any customer. SPA.10. It is never seen, and will never be used unless a customer

directs the RS-DVR to record a program. That too supports *de minimis* status. See *Knickerbocker*, 668 F.2d at 702-03 (prototype “‘never used’”); *Sandoval*, 147 F.3d at 218 (viewer could not “identify even the subject matter”).

Economic Insignificance. The buffers have no economic significance beyond enabling lawful consumer time-shifting. In *Davis*, this Court cited consumer time-shifting *itself* as an example of *de minimis* copying. 246 F.3d at 173 & n.10. If time-shifting an *entire work* is *de minimis*, making momentary copies of tiny portions to *enable* time-shifting is surely *de minimis* as well.

Ubiquity. “All digital devices . . . utilize transient data buffers.” SPA.12. Cell phones, Internet routers, iPods, fax machines, and digital televisions use buffers. A.762; A.1123-24. Conventional DVRs make multiple buffer “copies” independent of any consumer command. A.767; A.835; A.1146-47; A.1170-71. Even cable delivery without a DVR uses buffers—including some that perform the same function as the BMR. A.762-63; A.958; A.1168-69. The routine use of buffers in digital technology confirms Professor Goldstein’s conclusion that they are *de minimis*.

The analysis of the *DMCA Report*, which upholds buffering as “fair use,” supports the conclusion that buffers are *de minimis*. That is not surprising: These overlapping doctrines both depend largely on whether the copying materially impairs the owner’s rights. Cf. *Davis*, 246 F.3d at 173 & n.7 (approving time-

shifting as *either* fair use or *de minimis*). As the report observes, “the portion residing in the buffer at any given time . . . represents a *de minimis* portion of the entire work.” *DMCA Report* 138.<sup>12</sup> “[T]he individual packets buffered contain no more than is reasonably necessary to effectuate [the buffer’s] function.” *Id.* Critically, “[t]he buffer copy has no economic value independent of the performance that it enables, so there appears to be no conceivable effect upon the market for or value of the copyrighted work.” *Id.* at 139. Thus, buffering “is not a superseding use”—no one could or would watch a buffer *instead of* the original. *Id.* at 136. The same factors that the Copyright Office invoked to find “fair use” show that transient data buffers are *de minimis* as well.

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

Cablevision also would not violate plaintiffs’ exclusive right “to perform the copyrighted work publicly,” 17 U.S.C. § 106(4), when customers use the RS-DVR to play back the programs they recorded. First, under *Netcom*, Cablevision does not do the performing, the *customer* does. Second, a customer’s playback of her

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<sup>12</sup> The *DMCA Report* observed that the “aggregate effect” of buffering was “the copying of the entire work.” *Id.* at 133, 137-38. But the only conclusion it drew was that there “appears to be *at least some risk* that making buffer copies . . . infringes the reproduction right”—not that buffers aren’t *de minimis*. *Id.* at 133 (emphasis added). In any event, this Circuit’s law is clear that a copy may be *de minimis* even if it comprises the “entire work.” *See pp. 46-47, supra.*

*own* copy of a program *she* recorded for viewing *only* in her *own* home is not a *public* performance.

**A. Cablevision Does Not “Do” the Performance When Customers Play Back Their Recordings**

The district court held that Cablevision would infringe plaintiffs’ public performance rights when its customers use the RS-DVR to play back their own recordings because *Cablevision* would “transmit . . . a performance or display of the work . . . to the public . . . in separate places and . . . at different times.” SPA.32-33 (quoting 17 U.S.C. § 101) (emphasis omitted). But *Netcom* forecloses that ruling. Just as *Netcom* sets the standard for determining who “reproduce[s]” a work, so too it establishes the test for determining who “performs” it.

In *Netcom*, the plaintiff accused Netcom of direct infringement not only by reproducing his work, but also by “display[ing]” and “distribut[ing]” it. 907 F. Supp. at 1371-72.<sup>13</sup> The court held that Netcom did not directly infringe those rights because Netcom did not exercise volition or human intervention in the display or distribution; it merely provided an “automatic and indiscriminate” system that responded to user commands. *Id.* at 1372. “Where the [service provider] merely stores and passes along all messages sent by its subscribers and

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<sup>13</sup> The “display” right applicable to fixed literary works is analogous to the “performance” right applicable to video. *See* 17 U.S.C. § 101.

others, [it] should not be seen as causing these works to be publicly distributed or displayed.” *Id.*

Other courts, “[a]greeing with the analysis in *Netcom*,” likewise hold that “the automatic . . . *transmission* of copyrighted materials, when instigated by others, does not render [a defendant] strictly liable for copyright infringement.” *CoStar*, 373 F.3d at 555 (emphasis added); *accord Marobie*, 983 F. Supp. at 1178 (rejecting direct infringement claim where defendant “only provided the means to copy, *distribute*, or *display* plaintiff’s works” and “did not actually engage in any of these activities itself” (emphasis added)); *Field*, 412 F. Supp. 2d at 1115 (rejecting claim that “Google itself is creating *and distributing* copies of [plaintiff’s] works” (emphasis added)).

Here, the *customer*—not Cablevision—supplies the volition or human intervention in playing back his recordings. The customer chooses when to view a program that he recorded, and directs the RS-DVR to play it back. SPA.17. The RS-DVR responds automatically, “with no human intervention or human decision-making.” A.119; A.121. The customer can watch, pause, fast-forward, or rewind the program. SPA.17. Thus, just as with a VCR or conventional DVR, it is the consumer, not any Cablevision employee, who uses the device to “perform” his recording.

Because the district court saw this issue as governed by its ruling on the reproduction right, SPA.32, it did little more than opine that Cablevision “actively participates” in playback because “its operation of an array of computer servers at the head-end . . . make[s] the retrieval and streaming of the program possible.” SPA.32-33. But that repeats the same mistake that pervades the court’s reproduction analysis. Supplying and maintaining the automated *means* that “make the retrieval and streaming of the program possible” does not make one a direct infringer.

The district court cited only one authority for its view—*Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984). That case involved a video rental store with “viewing booths.” After customers paid a fee, “[a]n employee of [the store] then place[d] the cassette of the motion picture chosen by the viewer into one of the video cassette machines in the front of the store and the picture [wa]s transmitted to the patron’s viewing room.” *Id.* at 157. Thus, in *Redd Horne*, the store’s *employees* provided volition and human intervention to do the particular performance: The “employee . . . place[d] the cassette . . . chosen by the viewer” into the VCR, *id.*, and the “employee[] actually played the cassette[]” for the patron, *id.* at 160. Just like a Kinko’s employee who makes copies for a patron, a video store employee who *personally* operates equipment and directly causes it to transmit a particular program provides the

human volition necessary to be a direct infringer. *See* p. 23, *supra*. By contrast, Cablevision employees here do not provide volition or human intervention to perform any particular work.

*Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986), makes that clear. In that case, rather than operate the equipment themselves, clerks furnished on-site booths, video equipment, and videotapes to customers, “assist[ing] only upon request.” *Id.* at 61. 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. Here too, the *customer* does the performing, causing the RS-DVR to place his recording into the system and operating the controls to play it back. In *Aveco*, the court held the defendant liable on a theory of *contributory* infringement—Aveco’s customers had no fair-use right. *Id.*<sup>14</sup> But *Sony* forecloses, and plaintiffs do not assert, any such claim here.

Plaintiffs’ reliance on *On Command Video Corp. v. Columbia Pictures Industries*, 777 F. Supp. 787 (N.D. Cal. 1991), is misplaced. That case involved a “video on demand” system. Hotel guests could order movies from an on-screen menu; the system would transmit the movie from a central bank of VCRs to the

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<sup>14</sup> The court held Aveco liable for “authoriz[ing]” infringing performances by customers. 800 F.2d at 62. That is another way of describing contributory infringement. *See id.*; H.R. Rep. No. 94-1476, at 61; 2 Goldstein § 8.0, at 8:1-2.

customer's room. *Id.* at 788. There was no suggestion that the customers had any fair-use right to watch the movies. The provider argued only that its system did not entail a "public performance" *at all*. *Id.* at 788.

Plaintiffs read *On Command*'s rejection of that argument to mean that a defendant can be a *direct* infringer even if its machine responds automatically to customer commands. But the only issue in *On Command* was *whether* a public performance was occurring, not *who* did the performing. *See id.* at 788-89. *Who* did the performing was irrelevant: Because the customers had no fair-use right to watch the movies, *On Command* was liable even if (like *Aveco*) it was merely a contributory infringer.<sup>15</sup>

In any event, *Cablevision*, unlike the defendant in *On Command*, is doubly removed from providing human volition for transmission of a particular work. In *On Command*, the specific content available for performance was selected and loaded onto the video-on-demand server *by the operator*. Here, nothing is

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<sup>15</sup> Thus, although the court stated that "[t]he fact that hotel guests initiate this transmission by turning on the television and choosing a video is immaterial," 777 F. Supp. at 790, that fact was "immaterial" to *whether* a public performance was occurring—not *who* was performing. Likewise, although the court stated that "*On Command* therefore 'publicly performs' defendants' movies," *id.*, the relevant point was that there *was* a public performance; the fact that *On Command* was the performer was merely an assumption. Similarly, the legislative history cited in *On Command* states that "sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public" would *entail* "public performances," but not by *whom*. H. Rep. No. 90-83, at 29 (1967).

available for playback until the *customer* records a program. Thus, if On Command's role in loading material for later playback raised questions about whether On Command was "doing" the transmitting, here the *customer*, not Cablevision, both records his programs to the RS-DVR and plays them back.

**B. RS-DVR Playback Is Not "to the Public"**

Plaintiffs' "*public* performance" claim also fails because RS-DVR playback is not "public." Indeed, playing back a customer's *own* recording to that customer in his home is the antithesis of a "public" performance.

As relevant here, a performance is "public" if it is "transmit[ted] . . . *to the public*, . . . whether the *members of the public* . . . 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). Something is "public" if it is "[o]pen or available for all to use, share, or enjoy." *Black's Law Dictionary* 1264 (8th ed. 2004); *see also Webster's Third New International Dictionary* 1836 (1971) ("accessible to or shared by all members of the community").

A performance thus is "public" only if it is generally available to some segment of the population. *Redd Horne*, for example, held that the performance was "public" because "[a]ny member of the public [could] view a motion picture by paying the appropriate fee." 749 F.2d at 159 (emphasis added). In *Aveco*, the performance was "public" because it was "available to any member of the public

with the inclination to avail himself of this service.” 800 F.2d at 63; *see also Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1020 (7th Cir. 1991) (inquiry is whether “the public is openly invited”); *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 192 F. Supp. 2d 321, 332 (D.N.J. 2002) (display was “public” because it was “made available to all members of the public”). Nimmer agrees: “[A] ‘public’ performance . . . requires that such performance be ‘open’ to, that is, available to, a substantial number of persons.” 2 Nimmer § 8.14[C][2], at 8-190.6. That understanding of the term “public” pervades the law.<sup>16</sup>

The transmission need not be available to *everyone*—transmissions available to “limited segment[s] of the public, such as the occupants of hotel rooms or the subscribers of a community antenna television service,” are still “public.” H.R. Rep. No. 90-83, at 29 (1967). Nor need it be *actually seen* by multiple people; *availability* to the public is what matters. 2 Nimmer § 8.14[C][2], at 8-190.6. But *no* definition of “to the public” encompasses transmissions *available* only to one

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<sup>16</sup> In discrimination cases, courts distinguish facilities open “to the public” from private ones based on general availability. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 172 n.10 (1976) (school open “to the public” because it catered to “all children in the area who can meet [its] academic and other admission requirements”); *Tillman v. Wheaton-Haven Recreation Ass’n*, 410 U.S. 431, 438 & n.8 (1973) (club open “to the public” because there was “no selective element other than race”). Courts take the same approach in First Amendment cases. *See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-47 (1983) (forum not open “to the public” where it afforded only “selective access,” not “indiscriminate use”).

person and no one else. As Nimmer explains: “[I]f a transmission is only available to a single person, then it clearly fails to qualify as ‘public.’” *Id.*

For that reason, RS-DVR playback is not “to the public.” Recordings on the RS-DVR are uniquely associated with the customer who made them and cannot be retrieved by any other customer. SPA.16; A.115; A.1091-92. Only the set-top box that made a recording can decode it. *See* p. 9 & n.4, *supra*. Transmission of a single customer’s own recorded program back to that customer and no one else is as far removed from a “public” performance as one can imagine.

*On Command* is not to the contrary. The transmissions there were “to the public” because they were generally available to *anyone* who paid for a hotel room and ordered them. That “members of the public” received the performance in “separate” hotel rooms at “different times” was, as the statute says, irrelevant, because the transmissions were generally available. *Cf. Redd Horne*, 749 F.2d at 159 (“[I]f 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.” (emphasis in original)); 3 Nimmer § 8.14[C][3], at 8-192.2. By contrast, the RS-DVR’s transmission of a recording is available *only* to the customer who made that recording.

The fact that multiple customers may happen to record and play back the same program is irrelevant. The statute does not prohibit transmitting a

performance “to persons in separate places and at different times.” It prohibits “transmit[ting] . . . a performance . . . of the work . . . *to the public . . . , whether the members of the public . . . receive it in the same place or in separate places and at the same time or at different times.*” 17 U.S.C. § 101. 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.*, is generally available—it is not artificially excluded merely because it is received *seriatim*.

The district court held that the RS-DVR transmitted performances “to the public” because Cablevision and its customers have a “commercial” relationship. SPA.34. But “public” and “commercial” are not synonyms. A private placement of securities does not become a “public offering” merely because it is commercial. A credit card issuer has a commercial relationship with its customers, but no one would say that the company sends a particular customer’s statement “to the public” when it transmits the statement to that customer alone. Courts have consistently looked to whether the transmission was generally available, not to whether it was commercial. *See* pp. 55-56, *supra*. No opinion holds that a commercial service that allows a consumer to play back his *own* recordings to himself involves a

“public” performance.<sup>17</sup> Indeed, were that sufficient to make a system operator a public performer, the many providers of personal file storage services (which allow consumers to store files on the company’s central server and transmit those files back to their local computers for viewing) would be engaged in public performances whenever multiple customers independently decided to retrieve their own copies of the same movie. If Congress had meant to cover “commercial performances” rather than “public” ones, it would have used that term in the statute. That Congress did not do so forecloses the district court’s rationale.

#### **IV. THE DISTRICT COURT’S RULING DEFIES COPYRIGHT POLICY**

Confronted by a novel technology for consumer fair use, the district court read the Act expansively to proscribe it. The Supreme Court, however, has urged the opposite approach. “Congress,” the Court warned, “has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by . . . new technology.” *Sony*, 464 U.S. at 431. By contrast, the judiciary is properly “reluctan[t] to expand

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<sup>17</sup> The district court cited *On Command*, SPA.34, but that case merely states that the hotel guests, who could view any movie preselected by On Command simply by paying a fee, had a “commercial, ‘public,’” relationship with On Command, even though the viewings took place in private places (hotel rooms). 777 F. Supp. at 790 (emphasis added). That does not mean *all* transmissions made in a commercial relationship are public—much less that commercial character alone is sufficient to convert the transmission of an individual’s *own recordings*, available only to that individual, into a transmission “to the public.”

the protections afforded by the copyright without explicit legislative guidance.” *Id.* “In a case like this, in which Congress has not plainly marked [the] course, [courts] must be circumspect in construing the scope of rights created” by the Act. *Id.*

By expanding rights under the Act here, the district court’s decision distorts choices among equivalent technologies, burdening the RS-DVR alone with a licensing obligation other means of time-shifting do not require. As a result of that burden, the RS-DVR—a better time-shifting technology—will be stillborn. Rights in even a single show “‘can be scattered far and wide’” among producers, actors, musicians, composers, and writers, all of whom may need to consent. *Merges, Contracting into Liability Rules*, 84 Cal. L. Rev. 1293, 1374 n.281 (1996). Consequently, it is unlikely that Cablevision could ever secure licenses to allow customers to use the RS-DVR for every moment of programming on all 170 channels that Cablevision carries. Plaintiffs should not be able to deny consumers, who have a right to time-shift programs, this new technology merely because the recordings are stored remotely.

The district court’s amorphous test for direct infringement, moreover, will chill innovation in other areas. A clear line between direct and contributory infringement is crucial to ensure that those with innovative technologies can offer them to consumers without fear of strict liability—especially where the customer’s use is clearly lawful. *See* pp. 25, 59, *supra*. If factors such as complexity,

ownership, and physical control can make an electronic storage or transmission provider liable for direct infringement, then countless innovative technologies are at risk. Indeed, the district court's ruling puts set-top DVRs under a cloud of uncertainty. Nowhere did that court provide a logical basis for distinguishing set-top DVRs—which are likewise complex machines owned and operated by the cable company—from the RS-DVR. Nor did it give any basis in the Copyright Act for preferring one mode of time-shifting over the other. The *Netcom* rule provides a clear, definite test that offers ample guidance to inventors and copyright holders alike. The district court's unanchored, multifactor approach has the opposite effect.

### **CONCLUSION**

The district court's judgment should be reversed.

May 30, 2007

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