



Remote DVR Service is legal: Supreme Court denies review of Second Circuit ruling

July 2, 2009

By [Jake Linford, Trademark Attorney](#)

On June 29, 2009, the Supreme Court denied a request to review a Second Circuit ruling that Cablevision would not violate the Copyright Act by operating its proposed Remote Storage DVR System ("RS-DVR"). In 2006, Cablevision developed plans for the RS-DVR, which would allow customers to record cable programming on remote hard drives housed by Cablevision, and later view the programming on demand. The plaintiffs, producers of copyrighted movies and television programs, sought declaratory and injunctive relief on the grounds that by operating the RS-DVR, Cablevision would directly infringe the plaintiffs' copyrights both by making unauthorized reproductions and by publicly performing the copyrighted works.

In reversing the award of summary judgment to the plaintiffs by the Southern District of New York, the Second Circuit found that Cablevision's creation of a rolling data buffer necessary to allow consumers to record programming did not amount to "fixing" the programming in violation of the plaintiffs' exclusive right to make or authorize copies under Section 106(1) of the Copyright Act. The Second Circuit based its decision that Cablevision's planned service would not create a copy "fixed" in a tangible medium of expression" on the fact that the storage mechanism used to provide the service to Cablevision customers would buffer the feed by storing programming in tenth-of-a-second increments. Each increment of programming would remain in the buffer no longer than 1.2 seconds and be overwritten immediately. Thus, the buffer copies would not be "sufficiently permanent or stable to permit it to be...reproduced...for a period of more than transitory duration," and would not violate the plaintiffs' exclusive right to create copies of their works.

The Second Circuit also reversed the District Court in determining that Cablevision's customers, and not Cablevision, made the copies in question. While the District Court found the RS-DVR analogous to a copy shop, which would be liable for unauthorized copies that customers instruct employees to make, the Second Circuit found that there was no "volitional conduct" on the part of Cablevision, because consumers issue commands directly to the system which "automatically obeys."



PATTISHALL
McAULIFFE
NEWBURY
HILLIARD &

GERALDSON LLP • 311 South Wacker Drive, Suite 5000 • Chicago IL 60606 • T (312) 554-8000 • F (312) 554-8015 • www.pattishall.com

Finally, the Second Circuit concluded that transmitting the programs from remote hard drives to consumers on demand did not constitute a public performance of the work in violation of the plaintiffs' exclusive rights. The plaintiffs argued that in determining whether a performance was public, it was appropriate to look at the various performances of all the copies made of the original authorized programming feed in the aggregate. Defining performance in the manner proposed by the plaintiffs would make Cablevision liable for retransmitting consumer-produced copies of a particular program back to the individual consumers for private in-home viewing. The Second Circuit instead concluded that because each playback transmission "is made to a single subscriber using a single unique copy produced by that subscriber," the transmissions were not public performances.

Before ruling on the petition for certiorari, the Supreme Court requested an amicus brief from the Solicitor General. The Solicitor General's brief urged the Court not to review the case, in part because the parties agreed at trial to set aside questions of fair use and contributory infringement, leading to an "artificial truncation of the possible grounds for decision." The Solicitor General also expressed some concern that the Second Circuit's ruling "could be read to suggest that a performance is not made available 'to the public' unless more than one person is capable of receiving a *particular* transmission" which might threaten copyright protection in other circumstances where parties stream copyrighted material on an individualized basis over the Internet. Nevertheless, the government urged that the Second Circuit's decision was not particularly far-reaching and thus did not warrant Supreme Court review.

The Supreme Court's denial of certiorari leaves the Second Circuit decision intact. Under this decision, content distributors like Cablevision can provide similar tools which allow consumers to make and retrieve copies without "volitional conduct" on the part of the distributor without directly infringing the copyright in the distributed content. As the Solicitor General's brief notes, this decision may also limit the ability of plaintiffs to obtain relief from unauthorized distribution of copyrighted works on the grounds that the distribution is a public performance, at least where the content is distributed serially to individual consumers. This suggests a potential safe harbor of sorts for content streamers who do not originate content.

Prospective plaintiffs are not without remedy on copying grounds. The Second Circuit decision does not cover a suit focused on whether consumers themselves would violate plaintiffs' copyrights by using the RS-DVR to copy programming. If plaintiffs could show at trial that consumers were creating unauthorized copies in violation of plaintiffs' rights, then Cablevision could be held liable for providing consumers with the tools to do so, as the Supreme Court held in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). Nevertheless, success based on contributory liability may be hard to secure, especially for a tool like the RS-DVR, which with the exception of its remote storage feature, resembles the Betamax video tape recorder, the distribution of which the Supreme Court held did not constitute copyright infringement. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("[T]he sale of copying equipment, like the sale of other

articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes.”).

[Cable News Network, Inc. v. CSC Holdings Inc., 536 F.3d 121 \(2d. Cir. 2008\), cert. denied \(June 29, 2009\).](#)

Jake Linford is an attorney with [Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP](#), a full-service trademark law firm based in Chicago, Illinois. Pattishall has been recognized for many years as [a preeminent trial and appellate firm](#) in trademark and copyright law. Pattishall counsels clients in a broad range of intellectual property fields, providing strategic planning for brand protection, counseling on internet business development, due diligence research into the sale or acquisition of trademarks, copyrights and trade secrets, and design and implementation of international trademark acquisition and brand development strategies. Mr. Linford's practice focuses on [trademark](#), [copyright](#) and [right of publicity litigation](#) and [counseling](#).