

WHERE'S THE REMOTE?

THE IMPORTANCE OF THE LOCATION OF THE REMOTE CONTROL (AND THE ONE WHO USES IT) IN DETERMINING LIABILITY FOR COPYRIGHT INFRINGEMENT FOR REMOTE STORAGE DVRs[♦]

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I. INTRODUCTION

I live in a tiny studio apartment in Manhattan without my own VCR. Luckily, I have a nice neighbor who has allowed me (for a small fee) to use the VCR located in his apartment. The walls between our apartments are thin, allowing me to use the VCR remote control in my apartment, and to press the record button every Friday night at 9 p.m. to tape *Battlestar Galactica*.¹ My neighbor never uses the VCR, though occasionally might have to plug it back in if his dog pulls the cord out. Is my neighbor a direct copyright infringer?

Since it is no longer the '80s or '90s, we can replace the hypothetical VCR with a DVD recorder, and since it is 2009 we can replace it further with a DVR (digital video recorder). By now most

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¹ The all-new *Battlestar Galactica* is a fantastic television show that airs on the SCI FI Channel and which everyone should set their DVR to record. Rolling Stone calls it "the best show on TV." Gavin Edwards, *Battlestar is Back*, ROLLING STONE, Sept. 21, 2006, at 41.

of us are acquainted with what is known as a set-top DVR. Examples of these are the popular TiVos or cable-owned versions that are combined with a consumer's cable box. These machines have a similar appearance to a VCR, though they record selected programs onto a hard drive, thus eliminating the need for videotapes. Cablevision has recently furthered the technology to eliminate the need for the actual box in your residence. This technology offers consumers the ability to have access to the same functions of a DVR (primarily recording and playback) without actually having a DVR in your home; this technology is called a Remote Storage DVR (hereinafter "RS-DVR").² Using the RS-DVR, one would access the functionality with a remote and regular cable box. Instead of programs being copied onto a hard drive on a machine in your home, they are copied onto a machine at Cablevision.

In May of 2006, content providers brought suit in federal court against Cablevision arguing that Cablevision should be required to obtain additional licenses from the providers in order to offer this service.³ The district court granted an injunction and the Second Circuit reversed.⁴ The plaintiffs claimed violations of their rights to reproduce and publicly perform.⁵ At issue were two violations of the right of reproduction—one in the buffer copies and one in the playback copies.⁶ In all of these claims, the plaintiffs argued that the defendant was a direct infringer.⁷ The plaintiffs waived any claim of indirect liability.⁸ This Note focuses on the issues surrounding the playback copy and public performance, as those are the two claims which deal with uncertainties as to who is the primary actor—Cablevision or the home viewer.⁹

² Cablevision is not the only cable provider to develop this technology; Time Warner Cable is also developing similar equipment. Jeff Baumgartner, *Time Warner Cable Eyeing Network DVR Case*, LIGHT READING'S CABLE DIGITAL NEWS, Aug. 6, 2008, http://www.lightreading.com/document.asp?doc_id=160979&site=cdn. It is also interesting to note that subsidiaries of Time Warner (such as the Cartoon Network) are some of the plaintiffs in the *Cablevision* lawsuit.

³ *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.* (*Cablevision I*), 478 F. Supp. 2d 607, 616 (S.D.N.Y. 2007), *rev'd*, 536 F.3d 121, 123-24 (2d Cir. 2008), *petition for cert. filed*, (U.S. Oct. 6, 2008) (No. 08-448).

⁴ *Cartoon Network v. Cablevision Sys. Corp.* (*Cablevision II*), 536 F.3d 121 (2d Cir. 2008), *petition for cert. filed*, (U.S. Oct. 6, 2008) (No. 08-448).

⁵ *Id.* at 124.

⁶ *Id.* at 126. Buffer copies are those copies momentarily created by Cablevision while a customer decides if they want to create a playback copy. The Second Circuit found these copies are not fixed for a long enough duration to be considered an unlawful reproduction. *Id.* at 129-30.

⁷ *Id.* at 124.

⁸ In conjunction with the plaintiffs waiving an indirect liability claim, the defendants agreed to waive a fair use defense. *Id.* Most likely, the reason why the plaintiffs agreed to waive indirect liability was because, under an indirect claim, Cablevision would have a better argument analogizing with the *Sony v. Universal* decision (to be discussed later) and winning under a fair use defense.

⁹ Although this Note does not deal with the issue of the buffer copies (since there is no

In this Note, I contend that the location of the copies and the copying technology should not be determinative of direct copyright infringement. Rather, I argue, the location of and the identity of the person in control (signaled by the location of the remote control) should be a more relevant factor when determining liability. In Part II, I will explain why the end result of time-shifting is legally permissible, as well as why the legality of traditional DVRs has not been challenged. In Part III of the Note, I will discuss the similarities and differences between a DVR and an RS-DVR and why the differences should not be cause for infringement. In Part IV, I will discuss third party liability and direct versus indirect infringement. In Part V, I will discuss the issues concerning public performance and the history of cases dealing with location and performance. Finally, in Part VI, I will conclude and remark on the significance of networked technology such as the RS-DVR.

II. WATCHING WHENEVER I WANT—THE HISTORY AND JOYS OF TIME-SHIFTING!

People assume that time is a strict progression of cause to effect, but actually from a non-linear, non-subjective viewpoint—it's more like a big ball of wibbly wobbly . . . time-y wimey . . . stuff.¹⁰

Dr. Who is a television character who is not constrained by time. Unfortunately, a DVR will not let you travel back in time, but it will allow you to “time-shift” your programming into the future. Time-shifting is defined as “the practice of recording a program to view it once at a later time, and thereafter erasing it.”¹¹

I have my Time Warner Cable set-top DVR programmed to automatically record all new episodes of *Dr. Who* so that I can watch the shows whenever I want. No one in the present or past has ever brought a copyright infringement claim against me for doing so, and I expect that no one in or from the future will do so either. In fact, SCI FI Channel (which airs *Dr. Who*) is well aware

question of who is responsible), it should be noted that the Second Circuit did not find that the buffer copies, which are created by Cablevision momentarily while customers decide if they want to create a playback copy, are not fixed for a long enough duration (they only last 1.2 seconds) in order to be considered an unlawful reproduction. *Id.* at 129-30.

¹⁰ *Dr. Who: Blink* (SCI FI Channel television broadcast June 9, 2007). *Dr. Who* is a show about a charming and witty alien who travels through time in his spaceship, the TARDIS (which on the outside looks like a blue British police box), and often saves mankind from total annihilation. The show originally aired from 1963-1989, and after a long hiatus new episodes now air on the SCI FI Channel. Internet Movie Database page for “Dr. Who” (1963-1989), <http://www.imdb.com/title/tt0056751> (last visited Jan. 3, 2009); Internet Movie Database page for the new “Dr. Who” (2005 - ???), <http://www.imdb.com/title/tt0436992> (last visited Jan. 3, 2009).

¹¹ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 423 (1984).

that even though many sci-fi lovers are home on Friday evenings watching its channel, there are also many fans who record their Friday night original lineup and watch it at a later time.

Set-top DVRs, including ones provided by and owned by cable operators, have been widely accepted as legal; no cable operator has ever been sued regarding their supplying the customer with a set-top DVR.¹² This assumption of legality derives from the 1984 Supreme Court decision in *Sony Corporation of America v. Universal City Studios, Inc.*, which held that time-shifting by consumers in private homes is fair use and not a copyright infringement, and, therefore, the manufacturer of such technology cannot be held liable for any activity on the part of the consumer.¹³ The *Sony* case dealt with Betamax players that allowed consumers to record television programs onto videotapes.¹⁴ Sony, the manufacturer of the Betamax players, was deemed not to be a direct infringer.¹⁵ After eliminating the possibility of Sony being a direct infringer, the Supreme Court then conducted an analysis of Sony as an indirect or secondary infringer. Ultimately, the Court determined that the factors benefiting society outweighed any role Sony might have played in any possible infringement.¹⁶ The time-shifting that was deemed legal in *Sony* and that which occurs in set-top DVRs is the same end result as with RS-DVRs.

Television content providers¹⁷ are well aware that the home viewer frequently partakes in time-shifting. Content providers know that at-home viewers time-shift, and these viewers time-shift knowing that they have been allowed to do so for decades. I believe that there is, in fact, an implied license between the content provider and the at-home consumer that this activity may and often does occur. The cable provider, aware of this relationship, is acting no differently than Sony did in providing the equipment to allow for the time-shifting. It should make no difference where the equipment is stored, so long as not just the end result but also the amount of viewer control is the same as in accepted forms of time-shifting.

Time-shifting as discussed in the *Sony* case required a fair use

¹² Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp. (*Cablevision I*), 478 F. Supp. 2d 607, 619 (S.D.N.Y. 2007), *rev'd*, 536 F.3d 121 (2d Cir. 2008), *petition for cert. filed*, (U.S. Oct. 6, 2008) (No. 08-448).

¹³ *See generally Sony*, 464 U.S. 417.

¹⁴ *Id.* at 419.

¹⁵ *See generally Sony*, 464 U.S. 417.

¹⁶ *Id.* at 421.

¹⁷ The content providers/plaintiffs in the *Cablevision* case are: the Cartoon Network, Cable News Network, Turner Broadcasting System, Turner Network Sales, Turner Classic Movies, Turner Network Television, Twentieth Century Fox Film Corporation, Universal City Studio Productions, Paramount Pictures, Disney Enterprises, CBS Broadcasting, and NBC Studios. *Cablevision I*, 478 F. Supp. 2d. at 609-10.

analysis.¹⁸ One of the most important factors in *Sony* was is in determining the effect on the market.¹⁹

In the event a new pay TV home taping suit is brought, like *Sony* the principal issue will be harm to the studio's markets. The District Court in *Sony* had noted the ability of the video marketplace to adjust to any potential harm. Given the current patterns and practices of marketing pay television services . . . it may be even more difficult to find significant economic harm in the home taping of cable or other pay TV services.²⁰

The market has changed significantly since the *Sony* case and content providers have been finding ways to adjust and expand to new markets in light of prevalent time-shifting. The old business model for content providers, such as television channels, was to sell advertising in the form of live commercials during the broadcast show. One major fear with time-shifting was that it would have a negative impact on the market because viewers would conceivably fast forward through the commercials when they decide to play back the recorded program. In recent years, television networks have returned to an older practice of imbedding product placement into the programming.²¹ They have also found other creative ways to retain the advertising revenue, such as by creating ads in conjunction with advertisers that act like bumpers (short segments that occur prior to returning to the program after commercials and just after programming segments end) to the programming, thus almost fooling viewers into watching the ads.²² The television networks have also found ways to incentivize watching live programming in lieu of time-shifting by encouraging the at-home audience to participate in live call-ins and texting activity.²³

Content providers also have more markets that they can exploit with their programming. In addition to traditional televi-

¹⁸ *Sony*, 464 U.S. at 433.

¹⁹ 2-23A TELECOMMUNICATIONS & CABLE REGULATION ¶ 23A.05(2) (2007).

²⁰ *Id.*

²¹ For example, in one episode of *30 Rock*, the characters (a group of writers) are sitting around at a meeting and continuously refer to the beverage, Snapple. *30 Rock's Product Placement: Brilliant or Annoying?*, BUZZSUGAR, Nov. 28, 2007, <http://buzzsugar.com/843223>. In fact, in its 2007 season, the show had 142 product placements; that same year, *The Office* had over 380. *Id.*

²² In a 2007 holiday episode of *30 Rock*, segments which initially appeared to be a part of the episode turned out to be advertisements. Cory Bergman, *Expert Commercial Skipper Fooled by Ad*, LOST REMOTE, Dec. 7, 2007, <http://www.lostremote.com/2007/12/07/expert-commercial-skipper-fooled-by-ad>.

²³ The immensely popular *American Idol* has an upper-hand in gaining a larger live television viewing audience, as a large part of the show relies on viewers calling in and voting for their favorite contestant; these phone numbers are only open for a limited time after the live broadcast. Gael Fashingbauer Cooper and Andy Dehnart, *Unanswered 'American Idol' Questions*, msnbc.com, Aug. 1, 2006, <http://www.msnbc.msn.com/id/13689219>.

sion, many networks now offer their programming online for purchase via services, such as iTunes, or for free (with limited ads) on sites such as hulu.com.²⁴ The cable providers have no such option. The only way that cable providers can compete in a market filled with multiple platforms and technical capabilities is to offer their own competitive technological method for customers to be able to view the product on which the cable providers rely. To deny them the advancement of networked RS-DVRs would be to halt their market capabilities.

III. WHAT'S THE DIFFERENCE BETWEEN SET-TOP DVRs AND RS-DVRs?

I have already discussed why a set-top DVR and the resulting time-shifting have been uncontested and deemed permissible. I have also discussed how the end result of time-shifting occurs in both set-top DVRs and RS-DVRs. So, what's the big deal? What's the difference? On what basis can the content providers challenge this new technology? And, finally, how does location factor into all of this?

The primary difference between a set-top DVR and an RS-DVR is the location of the equipment; with an RS-DVR, the technology is housed with the cable provider and not in the consumer's home. As a result, in the *Cablevision* case, the district court deemed Cablevision to be *in control* of the recording and playback of the programming because it was in custody of this technology, and therefore engaged in unlicensed copying and public performance.²⁵ Thus, the court found a direct connection between the physical custody of the technology, and the final control of that technology. In comparing Cablevision's role with Sony's role in the Betamax case, the district court had the following to say:

In stark contrast, Cablevision would not only supply a set-top box for the customer's home, but it would also decide which programming channels to make available for recording and provide that content, and it would house, operate, and maintain the rest of the equipment that makes the RS-DVR's recording process possible. Cablevision has physical control of the equipment at its head-end, and its personnel must monitor the programming streams at the head-end and ensure that the

²⁴ For example, Bravo currently offers episodes of *Real Housewives of Orange County* for free on hulu.com and for \$1.99 on iTunes. Online Video Guide: The Real Housewives of Orange County, [http://video.tvguide.com/SHOWS/The Real Housewives of Orange County](http://video.tvguide.com/SHOWS/The%20Real%20Housewives%20of%20Orange%20County) (last visited Feb. 23, 2009).

²⁵ *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp. (Cablevision I)*, 478 F. Supp. 2d 607, 620-21 (S.D.N.Y. 2007), *rev'd*, 536 F.3d 121 (2d Cir. 2008), *petition for cert. filed*, (U.S. Oct. 6, 2008) (No. 08-448).

servers are working properly.²⁶

However, if we look entirely at the end result for context, then it is the at-home user of an RS-DVR that makes all relevant decisions: the user decides what shows to record, when to watch those shows, and when to erase those shows.²⁷ The district court judge stated that Cablevision is the “driving force behind the RS-DVR’s recording and playback functions,”²⁸ but then did not properly support that assertion. In fact, the opinion specifically outlines how it is the *customer* who “can use the remote control to navigate the on-screen program guide and schedule a future program to record. The customer scrolls through a list of channels and programs, then presses the ‘record’ button.”²⁹ It is unclear how Cablevision suddenly becomes the “driving force” of the recording and playback functions, particularly if one can identify the role of the customer and that person’s unobstructed power over the remote control as described above.

The Second Circuit rejected the district court’s analysis and instead analogized the RS-DVR user to that of a VCR user. “We do not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer’s command.”³⁰ Considering how “volitional conduct is an important element of direct liability,” the Second Circuit correctly attributed the relevant conduct to the consumer and not to Cablevision.³¹

The processes of how the copies are made and how the number of copies is made are the same with both set-top DVRs and RS-DVRs. With both types of technology, the at-home viewer decides what to record and uses her remote control in her home to make those decisions. And, in both cases, an individual copy is made for each request and only the customer who chose to make that copy can view it at a later time. In other words, if 200 customers choose to record *Lost*, then 200 copies of *Lost* will be made on the equipment.³² Each copy is linked to the individual customer who chose to record it, and only that person (or the small group of people who have access to that particular television) will be able to watch

²⁶ *Id.* at 619.

²⁷ Although, there would be a system in place that would automatically erase old shows when the customer’s allotted amount of storage space gets filled up. *Id.* at 614. But, this aspect is no different from the way set-top DVRs allocate limited storage space. *Id.* at 611.

²⁸ *Id.* at 620.

²⁹ *Id.* at 614.

³⁰ *Cartoon Network v. Cablevision Sys. Corp. (Cablevision II)*, 536 F.3d 121, 131 (2d Cir. 2008), *petition for cert. filed*, (U.S. Oct. 6, 2008) (No. 08-448).

³¹ *Id.*

³² *Cablevision I*, 478 F. Supp. 2d at 615.

that specific copy at a later time of their choosing.³³ The RS-DVR technology and the owners of that technology neither choose what to record nor when to play back any of these copies. The fact that the copies are stored with the cable provider should be irrelevant since the cable providers are not actually controlling the number of copies that are made or when those copies are later viewed.

In addition to the set-top DVRs like TiVos, which are sold to consumers who then own and are responsible for the equipment, many people now use cable provider set-top DVRs. These cable provider set-top DVRs are owned and maintained by the cable provider and the differences between them and RS-DVRs, in terms of both the equipment and the way they work, are hard to distinguish. In *Cablevision*, the district court seemed to place a good deal of emphasis on the fact that Cablevision is in control of the copies – since they are made and stored on equipment located at the company’s headquarters – and that it therefore provides maintenance over this equipment.³⁴ But, if maintenance is an issue, then it fails in comparison to the cable-owned set-top DVRs since those are also only maintained by the cable provider.³⁵ In fact, the consumer is forbidden to tamper in any way with the cable operator owned set-top DVR.³⁶ Therefore, the only difference we are left with is the location of the equipment and the copies. This hardly seems an important enough distinction to create a valid direct copyright infringement claim. If a manufacturer of a VCR or even a set-top DVR is not to be held liable for any infringing activity, then why should the location of that equipment become a determinative factor, so long as the decision making and control still come from the same person in the same place: the private individual in his or her home?

The RS-DVR is like a traditional DVR combined with the hypothetical VCR left at the neighbor’s house discussed in the beginning of this Note. The role of Cablevision is similar to the role of the friendly neighbor, and goes little beyond that. The same person decides what to record, when to view it, and when to erase it. The role of maintenance is incidental to the role of housing the equipment and should not be given any more weight in determining direct liability.

The content providers argue that an RS-DVR is not similar to

³³ *Id.* The individual customer can choose any time at which to view the recorded program. *Id.*

³⁴ *Id.* at 619.

³⁵ Brief of Defendants-Counterclaimants-Appellants at 6, *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607 (S.D.N.Y. 2007) (No. 07-1480-CV(L) 07-1511-CV(CON)).

³⁶ *Id.*

a set-top DVR, and instead is most similar to a video-on-demand (hereinafter "VOD") service.³⁷ They further assert that since Cablevision gets licensing in order to provide VOD service, it should be required to acquire additional licenses to provide the RS-DVR service.³⁸ A VOD service allows an at-home viewer to go to a designated channel and scroll through a list of available programs and watch them with all the functionality of a VCR or DVR (i.e., pause, fast forward, rewind, etc.). Some VOD programming is free to cable customers, while some requires a fee to be paid via one's cable account. Some programming is offered as VOD shortly after it has already been broadcast, intended for an audience that missed the initial broadcast, whereas some VOD programming is designated specifically for a VOD audience, such as movies not currently airing or programming, movie reviews, or exercise programs specifically produced to air as VOD programming. The at-home viewer has no control whatsoever in determining what will be available as VOD. These decisions are made entirely between the content provider and the cable provider, and are contracted accordingly.³⁹ While the Second Circuit thinks that RS-DVRs do have many similarities to VOD, it acknowledges that, with RS-DVRs, "Cablevision possesses far less control over recordable content than it does in the VOD context"⁴⁰

While I maintain that the RS-DVR is most similar to the set-top DVR, as well as the VCR, there is one important difference to note: the technology of the RS-DVR, which eliminated the need to own a piece of equipment, arguably makes it easier for consumers to have access to the benefits afforded by DVRs, thus making the art/programming more accessible by society as a whole. While Cablevision would surely charge for the service, the company would ideally pass along its own savings and be able to charge less than it would for the set-top DVR.

Another relevant difference between set-top DVRs and RS-DVRs is that most people with set-top DVRs have the ability to take any recordings that were made onto the DVR hard drive and transfer them to a VHS tape or DVD, so as to keep a copy of the recorded show.⁴¹ But time-shifting, as defined by *Sony*, includes erasing the recording.⁴² Therefore, it is an important difference that, currently, one cannot indefinitely save the recordings one

³⁷ *Cablevision I*, 478 F. Supp. 2d at 619.

³⁸ *Id.*

³⁹ *Cartoon Network v. Cablevision Sys. Corp. (Cablevision II)*, 536 F.3d 121, 132 (2d Cir. 2008), *petition for cert. filed*, (U.S. Oct. 6, 2008) (No. 08-448).

⁴⁰ *Id.*

⁴¹ *Cablevision I*, 478 F. Supp. 2d at 615.

⁴² *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 423 (1984).

makes with an RS-DVR.⁴³ This is surely a difference that content providers should welcome.

IV. DIRECT OR INDIRECT LIABILITY OR NOTHING TO WATCH ON TV

There are two major questions at issue in this Note: is there copyright infringement with RS-DVRs, and, if so, who is the one infringing? More specifically, who is *directly* infringing? Currently, the courts acknowledge two types of copyright infringement: direct and indirect. Indirect liability or, as it is sometimes called, secondary infringement, provides us with tests to determine liability.⁴⁴ These tests were used and developed in cases such as the *Sony* (Betamax) case and *Grokster*.⁴⁵ Indirect infringement has two subspecies: vicarious liability and contributory infringement.⁴⁶ Vicarious liability is applicable when a party is capable of supervising the infringing activity and has a direct financial interest in those activities.⁴⁷ Contributory infringement will hold a party liable if it has knowledge of, and in some way induces, the infringing activity.⁴⁸

While vicarious liability and contributory infringement are somewhat involved doctrines with several factors that need to be determined and weighed, it might seem like finding direct liability would be a much simpler task. More specifically, if you can prove a copy is made then it might initially seem a straightforward process to directly blame the party that made that copy. However, with modern technology and with even more complicated networked technology (like that of an RS-DVR), there is often more than one person involved in the making of any copy. Consequently, it has become increasingly more difficult to determine which party is the direct infringer.

While there are tests to determine what kind of indirect infringer one might be, there is no clear test separating the direct from the indirect users. This is one place where location becomes an important factor. The district court in *Cablevision* would make it seem that the location of where the copy is made and stored will

⁴³ Currently, RS-DVRs do not have the capacity to transfer programming to a more permanent medium, such as video tapes or DVDs. *Cablevision I*, 478 F. Supp. 2d at 615.

⁴⁴ "The jurisprudence of secondary liability has been crafted to balance content owners' rights against the dangers to innovation that would occur from over-protection." Brief of Timothy Wu as Amicus Curiae in Support of Reversal at 5, *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607 (S.D.N.Y. 2007) (No. 07-1480-CV(L) 07-1511-CV(CON)).

⁴⁵ See generally *Sony*, 464 U.S. 417, and *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁴⁶ Craig A. Grossman, *From Sony to Grokster, The Failure of the Copyright Doctrines of Contributory Infringement and Vicarious Liability to Resolve the War Between Content and Destructive Technologies*, 53 BUFF. L. REV. 141, 148 (2005).

⁴⁷ *Id.*

⁴⁸ *Id.*

point to the direct infringer. But this is a naïve solution, particularly in light of the current times when networked technology is advancing and people are capable of creating and storing copies (both legal and illegal) thousands of miles from where they are. Therefore, I argue that is not the location of the copy that should determine the direct infringer, but rather it should be the location of the person who has primary decision making control that should point to the true direct infringer (if they even are infringing). With networked technology, the person controlling the equipment does not need to be in the same location as the actual equipment. Therefore, we should place a higher degree of importance on the location of the person actually controlling the machine, and not on the person controlling the location and the maintenance of the machine.

The *Sony* and *Grokster* cases might lead one to believe that when a piece of technology is responsible for producing the uncensored copy, then the manufacturer of that technology would be subject to analysis under the secondary copyright infringer test in order to determine liability.⁴⁹ However, this is not what happened in *Cablevision*. There, the plaintiffs waived any secondary liability claim and instead only pursued the direct infringement claim.⁵⁰ The district court judge seemingly ignored the reasoning of having these secondary infringement analyses exist in the first place and found his own reasons why *Cablevision* should be liable as a direct infringer.⁵¹ In so doing, the district court was accused of creating “an end-run around the Supreme Court’s secondary liability doctrines.”⁵² Granted, *Cablevision* is doing more than what *Sony* did (solely manufacturing and selling a piece of equipment capable of copying), but is *Cablevision*’s involvement really enough to warrant direct copyright infringement liability? The district court judge in *Cablevision* looked at the issues that he felt were important, such as location of the equipment and regular maintenance of the equipment,⁵³ and not at the issues that are implicit in the actual secondary test – determining the identity of the one actually deciding what to copy.⁵⁴ *Sony* and *Grokster* consider the “direct infringer to be the actor who *decides* that a copy of the

⁴⁹ See generally *Sony*, 464 U.S. 417; *Grokster*, 545 U.S. 913.

⁵⁰ *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp. (Cablevision I)*, 478 F. Supp. 2d 607, 616 (S.D.N.Y. 2007), *rev’d*, 536 F.3d 121 (2d Cir. 2008), *petition for cert. filed*, (U.S. Oct. 6, 2008) (No. 08-448).

⁵¹ See generally *id.*

⁵² Brief of Timothy Wu, *supra* note 44, at 1 (referring to the secondary liability doctrines as created by the Supreme Court in *Sony* and *Grokster*).

⁵³ *Cablevision I*, 478 F. Supp. 2d at 619.

⁵⁴ Volition is a key element in determining infringement liability. *Sony*, 464 U.S. at 433.

work be made.”⁵⁵ The district court improperly assumed that the amount of decision making control that this new type of networked technology requires on the part of Cablevision is sufficient to warrant an analysis of direct copyright infringement. However, the Second Circuit did not find Cablevision’s conduct to be so significant as to apply direct liability, and pointed to the existence of the contributory liability doctrine as providing appropriate measures for copyright protection.⁵⁶ “[T]o the extent that we may construe the boundaries of direct liability more narrowly, the doctrine of contributory liability stands ready to provide adequate protection to copyrighted works.”⁵⁷

One would be foolish to argue that Cablevision does not make any decisions and has no control. But this is all relative and liability should be placed accordingly, if at all.⁵⁸ With modern technology, it is too much to say that only one person is in control of a piece of equipment that may result in copyright infringement. It is also extreme to say that everyone that maintains some level of control over that piece of equipment could or should be held responsible as a direct copyright infringer. Therefore, while Cablevision does maintain some amount of control and decision making, it is not a sufficient amount of control to qualify as a potential direct copyright infringer, and, therefore, should not be subject to a direct infringement analysis in the first place. *Sony* and *Grokster* apply contributory liability for “user-directed copying technologies”⁵⁹ to defendants who are not the users, and here, Cablevision is not the user.

When dealing with networked technology, it is important and necessary to look beyond the automation of copying, as is demonstrated in *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*⁶⁰ “The mere fact that Netcom’s system incidentally makes temporary copies of plaintiffs’ works does not mean Netcom has caused the copying.”⁶¹ In *Netcom*, the plaintiff held a copyright in a work that was copied onto the Internet via one defendant, the writer of a Usenet newsgroup, which was posted via another defendant who ran a website that connected to the Internet through the relevant

⁵⁵ Brief of Timothy Wu, *supra* note 44, at 5 (emphasis added) (citing *Sony*, 464 U.S. at 433, and 17 U.S.C. § 501(a) (2006)).

⁵⁶ *Cartoon Network v. Cablevision Sys. Corp. (Cablevision II)*, 536 F.3d 121, 132 (2d Cir. 2008), *petition for cert. filed*, (U.S. Oct. 6, 2008) (No. 08-448).

⁵⁷ *Id.*

⁵⁸ “Were this dispute presented as a secondary liability problem, this Court would be forced to engage in a careful analysis of the social costs and benefits of the technology in question, weighed through the various safe harbors created by *Sony* and *Grokster*.” Brief of Timothy Wu, *supra* note 44, at 2.

⁵⁹ *Id.* at 6.

⁶⁰ 907 F. Supp. 1361 (N.D. Cal. 1995).

⁶¹ Brief of Timothy Wu, *supra* note 44, at 7 (citing *Netcom*, 907 F. Supp. at 1368-69).

defendant here, Netcom.⁶² Netcom is a subscriber service that provides access to the Internet; it neither creates the content viewed by the subscribers nor does it monitor the content posted by its subscribers.⁶³ Netcom did nothing to initiate the copying that was in dispute.⁶⁴ The court in *Netcom* likened Netcom's implementation of a system that automatically makes temporary copies to that of an owner of a copying machine available for use by the public.⁶⁵ "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."⁶⁶ The court went on further to say that, "[a]lthough copyright is a strict liability statute, there should still be 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."⁶⁷ Cablevision's role and volition is no different with its set-top DVRs as it is with its RS-DVRs. The plaintiffs in the *Cablevision* case rely on the fact that the defendants somehow have more control over the copies because they reside on their premises, and even though the question of control may exist, certainly their volition and their role in causation is no different in either technology. Nevertheless, the Second Circuit found that all secondary to the lack of control that Cablevision maintains over what programs are made available and what programs are recorded.⁶⁸

Even if RS-DVRs were to fall under the rubric of secondary liability, Cablevision would not be liable since there is no underlying infringement. "Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party."⁶⁹ With RS-DVRs, the underlying act is time-shifting, which *Sony* has resolved as non-infringing activity under the fair use doctrine.⁷⁰ So, if there is no indirect liability because the act at issue is permissible, then how can there have even been direct infringement in the first place? It is only by excluding the at-home user entirely and placing all of the decision-making control in the hands of the cable operator that a court was able to arise at direct infringement. However, it is illogical to reduce or even eliminate

⁶² *Netcom*, 907 F. Supp. at 1365-66.

⁶³ *Id.* at 1368.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1369.

⁶⁶ *Id.* (referring to *RCA Records v. All-Fast Sys., Inc.*, 594 F. Supp. 335 (S.D.N.Y. 1984), and 3-12 NIMMER ON COPYRIGHT §12.04[A][3][b]).

⁶⁷ *Netcom*, 907 F. Supp. at 1370.

⁶⁸ *Cartoon Network v. Cablevision Sys. Corp. (Cablevision II)*, 536 F.3d 121, 132 (2d Cir. 2008), *petition for cert. filed*, (U.S. Oct. 6, 2008) (No. 08-448).

⁶⁹ *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (citing *Netcom*, 907 F. Supp. at 1371).

⁷⁰ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

the end user's role in the copying at hand.

V. PUBLIC PERFORMANCE IN YOUR OWN PRIVATE HOME?

Every Wednesday night at 10:00 p.m. when I watch episodes of *Top Chef* on Bravo, I am watching a public performance. “[A] television or radio broadcast received in the privacy of individual homes is . . . a ‘public’ performance.”⁷¹ Even though it seems odd that watching a program by myself in the privacy of my home is a public performance, it has been interpreted as such because of how the transmission clause is defined in § 101 of the United States Copyright Act.⁷² The public performance right is found in § 106(4) of the Act, and is defined as follows in § 101:

[t]o perform or display a work “publicly” means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.⁷³

It is fairly obvious to say that if I make my own VCR recording of *Top Chef* and watch it again in my own home, then that would not be a public performance, as it would not fall under either clause of what is considered a public performance. But what if a transmission is required to watch your own personal copy? The questions that then arise are: does this type of transmission fall under the definition of what is a public performance? If so, who is the one “performing” the public performance (and, therefore, consequently directly liable if unauthorized)—the viewer who requests the transmission, or the entity from where the transmission originates?

The district court in *Cablevision* thought this type of transmission was in fact a public performance because it considered the potential audience for the single work as opposed to the potential audience for a single transmission.⁷⁴ However, the Second Circuit interpreted the transmission clause to refer to a particular trans-

⁷¹ 2-8 NIMMER ON COPYRIGHT §8.14[C][2].

⁷² 17 U.S.C. § 101 (2006).

⁷³ *Id.* (emphasis added).

⁷⁴ *Cartoon Network v. Cablevision Sys. Corp. (Cablevision II)*, 536 F.3d 121, 135 (2d Cir. 2008), *petition for cert. filed*, (U.S. Oct. 6, 2008) (No. 08-448) (discussing the district court's decision in *Cablevision I*).

mission and not a particular work.⁷⁵ Under this analysis, the playback transmission is only going to one person's home and does not have the potential of reaching the public, even "in separate places and at the same time or at different times."⁷⁶

Even though a cable subscription service is considered in the realm of public performance, once the initial broadcast is made, that aspect of the service is over and the retransmission of copies made by and for the private viewer should not fall under a public performance category. The first performance of the transmission is permissible due to the licensing arrangements, and the second transmission is permissible because it is a transmission of a second copy that has been made by the costumer, and that specific copy is not being broadcast to anyone else. "[B]ecause the RS-DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber, we believe that the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission."⁷⁷

Section 101 of the Copyright Act states that there is a public performance regardless of whether it is received "at the same time or at different times."⁷⁸ This definition on its own can be quite confusing, and in fact neither the Senate nor House Reports offer any explanation.⁷⁹ One fear is that if it were taken literally, a person who purchases a pre-recorded video cassette and plays it in his own private home might be liable for violating public performance rights since other people may also be viewing the same work in their own homes at other times.⁸⁰ Therefore, Nimmer has proposed one explanation to the definition: "Upon reflection, it would seem that what must have been intended was that if the same copy . . . of a given work is repeatedly played (i.e., 'performed') by different members of the public, albeit at different times, this constitutes 'public' performance."⁸¹ Therefore, since the second transmission is of a second copy directed only to an individual's home and to nowhere else, that transmission would not qualify as a public performance. "[T]he concept of 'public performance' does not cover separate private viewings of a work where each viewing involves a different, personal copy."⁸² The

⁷⁵ *Id.* at 135-36.

⁷⁶ 17 U.S.C. § 101.

⁷⁷ *Cablevision II*, 536 F.3d at 137.

⁷⁸ 17 U.S.C. § 101.

⁷⁹ 2-8 NIMMER ON COPYRIGHT §8.14[C][3].

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Brief for Center for Democracy & Technology et al. as Amici Curiae in Support of Appellants Urging Reversal at 19, *Twentieth Century Fox Film Corp. v. Cablevision Sys.*

only way for this second copy to be performed publicly would be if the location where it was received was a public place.

There have been some court decisions that have held that small booths and even hotel rooms occupied by individuals or small groups of related people have been considered public places since they are places open to the public.⁸³ In *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, a video store, Aveco, had private booths that it rented to costumers to use to watch videos rented from the store.⁸⁴ The video machines were kept in the individual booths.⁸⁵ The customer could operate the machines and be allowed “complete control” over them; employees would only assist if it was requested.⁸⁶ The court found Aveco to have violated the copyright holders’ right to public performance.⁸⁷ The Third Circuit stated that Aveco could be liable even if it does not itself operate the machines.⁸⁸ The court compared this case to its earlier decision in *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, where it came to the same decision, though the facts were slightly different.⁸⁹ The primary difference in *Redd Horne* was that the video players were not stored in the viewing booths but rather in the general store area.⁹⁰ An additional difference between these two cases was that in *Redd Horne*, the customers had no control over the video players.⁹¹ The court in *Redd Horne* found the performances to be occurring in the entire store (including, but not limited to, the viewing booths), which was open to the public.⁹²

There are three distinct and important locations relevant to *Aveco*, *Redd Horne*, and *Cablevision*: the location of the viewer, the location of the performer (person controlling the machine), and the location of the machine itself. In *Aveco*, the locations of all three were in the private viewing booths located inside the store.⁹³ The court in *Aveco* held these viewing booths to be public in the same way it would hold a telephone booth to be public – it is considered “open to the public” even if it is only occupied by small numbers of related people at a time.⁹⁴ In *Redd Horne*, the viewers were in a booth while the performers and the machines were in

Corp., 478 F. Supp. 2d 607 (S.D.N.Y. 2007) (No. 07-1480-CV(L) 07-1511-CV(CON)).

⁸³ See generally *On Command Video Corp. v. Columbia Pictures Indus.* 777 F. Supp. 787 (N.D. Cal. 1991); *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986); *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984).

⁸⁴ *Aveco*, 800 F.2d at 61.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 60.

⁸⁸ *Id.* at 62.

⁸⁹ *Id.* (referring to *Redd Horne*, 749 F.2d 154).

⁹⁰ *Id.* at 62-63 (discussing *Redd Horne*, 749 F.2d 154).

⁹¹ *Id.* at 63 (discussing *Redd Horne*, 749 F.2d 154).

⁹² *Id.*

⁹³ *Id.* at 59.

⁹⁴ *Id.* at 63.

the general parts of the store.⁹⁵ The court in *Redd Horne* held that the performance was occurring in the entire store which, since it was open to the public, was considered a public place.⁹⁶ Since in both of these cases the locations of all three variables were considered within the store, it does not initially offer much guidance as to the importance that should be placed on, and the relevance of, the locations of each of the three components that are necessary for infringement to occur. However, if we look deeper at the discussion in the *Aveco* opinion, we can find some revealing statements made by the court.

Our opinion in *Redd Horne* turned not on the precise whereabouts of the video cassette players, but on the nature of Maxwell's stores. Maxwell's, like Aveco, was willing to make a viewing room and video cassette available to any member of the public with the inclination to avail himself of this service. It is this availability that made Maxwell's stores public places, not the coincidence that the video cassette players were situated in the lobby.⁹⁷

This discussion would lead one to believe that, in fact, the locations of the playback machines were irrelevant; rather, what was important was that the consumers were located in the place of business, which was deemed public, when they viewed the films. Therefore, it seems that the location of the viewer trumps the location of the equipment and the copy therein when determining if there has been an unlawful public performance.

Furthermore, the court in *Aveco* did not distinguish between the instances when customers operated the playback on the VCRs and when the store employees were the operators.⁹⁸ Therefore, the action left is the actual viewing, thus implying that it is the location of the viewer that should be the most determinative in recognizing whether or not the act is occurring in a public place. It is clear that in the case of the RS-DVR, we can assume that the viewer is at home watching this programming and, therefore, there is no issue of public performance so long as the home viewing remains private.

"[A] performance of a work does not occur every place a wire carrying the performance passes through; a performance occurs where it is received."⁹⁹ In saying this, Judge Stanley Wiegel was rejecting the argument made by content providers alleging a public

⁹⁵ *Redd Horne*, 749 F.2d 154.

⁹⁶ *Id.*

⁹⁷ *Aveco*, 800 F.2d at 63.

⁹⁸ 2-23A TELECOMMUNICATIONS & CABLE REGULATION ¶ 23A.05(3) (2007).

⁹⁹ *On Command Video Corp. v. Columbia Pictures Indus.* 777 F. Supp. 787, 789 (N.D. Cal. 1991).

performance violation in *On Command Video Corp. v. Columbia*.¹⁰⁰ The argument was that the “performance” at issue occurred in the entirety of a hotel and not in the hotel room since the playback equipment was stored outside of the individual rooms.¹⁰¹ The defendants had created a system whereby customers staying in their hotel rooms could rent videos that were played via equipment stored in a central location at the hotel.¹⁰² Judge Wiegel ultimately found for the plaintiffs on the grounds that the hotel was still transmitting to a public place even if the recipients were not all gathered in the same place.¹⁰³ Regardless of the outcome, the argument that the court rejected is the one at issue here. Therefore, if the place of performance is determined by where the images are received, then, regarding RS-DVRs, the place of performance would be the *private* home.

The district court decision in *On Command* is at odds with an earlier decision in the Ninth Circuit.¹⁰⁴ In *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, the Ninth Circuit found that there was no violation of public performance when a hotel rented videos to guests for them to watch in their hotel rooms.¹⁰⁵ The guests operated the equipment that was provided by the hotel but located within the individual hotel rooms.¹⁰⁶ The Ninth Circuit analogized the circumstance to people viewing in their own homes, and found that this precluded having a public performance.¹⁰⁷ Therefore, it seems likely that if the viewer is actually in his or her own home, then the performance should not be deemed public if the “viewing” location is (and should be) determinative of whether there has been a public performance.

Since the Second Circuit interpreted the type of transmission made during playback from an RS-DVR as not constituting a public performance, the court declined to answer the question of who is the person directly responsible for the transmission.¹⁰⁸ However, the court did conclude that the customer, and not Cablevision, does the copying; in its analysis, the court does not automatically transfer that relationship to the performance element.¹⁰⁹ However, I would argue that the location of where the transmission is

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278 (9th Cir. 1989).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Cartoon Network v. Cablevision Sys. Corp. (Cablevision II)*, 536 F.3d 121, 134 (2d Cir. 2008), *petition for cert. filed*, (U.S. Oct. 6, 2008) (No. 08-448).

¹⁰⁹ *Id.*

coming from is not determinative of who is transmitting, but rather that the person who selects the time of transmission is the one in control and, therefore, the one "performing." This becomes a necessary analysis if the transmission is viewed in a public place that places it under the first clause of the public performance definition. For example, if a bar owner used an RS-DVR to playback shows in his bar then he could be liable as a direct infringer of the public performance right, but Cablevision should still escape liability as a direct infringer. If Cablevision were to be held directly liable under such circumstances, then it would have an unnecessary and unrealistic burden placed upon it as the maintainer of equipment that is controlled by its customers.

VI. CONCLUSION

If owners/maintainers of networked technology such as the RS-DVR become subject to direct copyright infringement liability, then the natural and necessary direction of technology will be halted. Whenever a company maintains a certain level of control over its equipment, such as storing some part of the equipment in its facilities, it will risk unwarranted liability. If the Second Circuit had not reversed the district court's decision in *Cablevision*, then a whole new area of direct infringement would have been created. "[T]he district court's holding would bypass *Sony* and *Grokster* and allow a content owner to establish copyright liability based on product design alone."¹¹⁰ The specific aspect of the product design at issue is in its ability to be located wherever the manufacturer chooses, and that does not appear to have any negative copyright or societal impact. In fact, this technology actually supports incentives for the arts and access to them by providing more effective and efficient options for viewing works. "[T]o the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits."¹¹¹ Here, not only is time-shifting at issue but it is also being made more economically efficient, thus equalizing societal access to modern technological advancements in paying for and in enjoying television and films.

Networked technology is becoming increasingly commonplace, as it affords access to the benefits of modern technology without the need to actually own it. If the district court's analysis in placing direct liability on Cablevision had not been overruled, it would have had a negative impact on all sorts of networked technology.

¹¹⁰ Brief of Timothy Wu, *supra* note 44, at 11.

¹¹¹ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 454 (1984) (discussing the district court's decision).

For instance, a tourist photographing copyrighted artwork in New York and remotely printing the photograph in a Des Moines drugstore's self-service machine would place the drugstore at peril of liability for direct infringement. Under the district court's test, the drugstore's operation of the remote printing service would make the store a "copier" of the copyrighted work. Moreover, even though the tourist's use of the photograph is almost certainly a fair use, the drugstore's provision of the means of copying would be subject to a separate, fact-intensive fair use analysis Under cases such as *CoStar*, by contrast, the drugstore would not be liable for direct infringement because it plays no role in deciding whether to transmit and print the customer's particular photograph.¹¹²

Placing direct infringement liability on the manufacturer and maintainer of equipment does not make any sense when the person actually making the copies has the right to do so under the fair use analysis as applied to time-shifting in *Sony*.¹¹³ Cablevision lacks any control over customers' choice in recording and playback, and should not be held liable as a direct infringer. It is the location of the remote control (being the piece of equipment that requires choice and not automation) that points the finger to who is controlling the making of the copy, and in the case of RS-DVRs, it is the at-home consumer making these copies and not the cable provider. A service provider "who owns an electronic facility that responds automatically to users' input is not a direct infringer."¹¹⁴

The location of the remote control not only indicates who is making the copies but also where the performance is taking place. Therefore, a claim of unlicensed public performance makes no sense when considering that it is the location where the viewing occurs that determines where the performance occurs. It is that location that is then evaluated to determine whether it is "public" or not. Since the copies are individualized and each copy is only transmitted to one home, then the private home cannot be considered a public place.

The cable providers' concerns (and the consumers')¹¹⁵ outweigh the content providers' concerns. Copyright is intended to benefit both society and the authors of the works. While content

¹¹² Brief for Center for Democracy & Technology et al. as Amici Curiae in Support of Appellants Urging Reversal at 24-25, *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607 (S.D.N.Y. 2007) (No. 07-1480-CV(L) 07-1511-CV(CON)).

¹¹³ *See generally Sony*, 464 U.S. 417.

¹¹⁴ *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004).

¹¹⁵ "Consumers would lose access to networked services that may be less costly and more capable, reliable, and secure than stand-alone devices." Brief for Center for Democracy & Technology et al. as Amici Curiae in Support of Appellants Urging Reversal at 25, *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607 (S.D.N.Y. 2007) (No. 07-1480-CV(L) 07-1511-CV(CON)).

providers used to rely solely on television broadcast as an outlet for their programming, they now have several other options and can benefit financially from the availability of these additional methods of distribution (e.g., selling their shows on iTunes). While some of these outlets are still emerging, it has become increasingly obvious that television networks can change their business models and expand to other platforms.¹¹⁶ On the other hand, cable providers that rely on this programming can only offer better methods of receiving this programming. Many cable providers now offer High Definition (“HDTV”) options as well as their own set-top DVRs to compete with other brands such as TiVo. If we do not allow the advancement of networked technology, we are simply stunting the growth of one industry in favor of another.

The fears that were expressed in *Sony* of commercial skipping and saving recordings of programming (also referred to as “libraring”) are no longer such severe issues. According to leading copyright scholars:

Although the preservation of commercials in Betamax playbacks may have played an important background role in the justices’ minds, the *Sony* majority placed little express weight on it. Instead, it reached an express ruling that wholesale copying via Betamax of copyrighted broadcasts made over-the-air is non-infringing – without limiting that pronouncement in a way to avoid future technological advancement as to commercial squelching.¹¹⁷

Content providers have been finding creative ways to address commercial skipping (and have even successfully prevented technology that makes it extremely easy to skip through commercials).¹¹⁸ Additionally, RS-DVRs actually make it harder, if not impossible, to keep recordings of programming (libraring), thus actually defeating any possible negative impact on the home sales market.¹¹⁹

¹¹⁶ This is also evidenced by the 2007 WGA writers’ strike during which television and film writers demanded and received a share in the profits made by content providers from Internet sales of programming. Michael Cieply, *Writers Reach Tentative Deal With Producers*, N.Y. TIMES, Feb. 10, 2008, at A1.

¹¹⁷ Peter S. Menell & David Nimmer, *Legal Realism in Action: Indirect Copyright Liability’s Continuing Tort Framework and Sony’s de facto Demise* 33, 45-46 (2007), available at <http://repositories.cdlib.org/belt/Its/33>. The authors also contend that the content providers would lack standing to complain that viewers have failed to copy the copyrighted advertisements. *Id.*

¹¹⁸ In November 2001, content providers brought a lawsuit against the makers of ReplayTV (a competitor to TiVo), which had a special feature that allowed viewers to automatically skip commercials. When the company faced bankruptcy, it agreed to remove the feature in exchange for having the lawsuit dropped. Eric A. Taub, *ReplayTV’s New Owners Drop Features That Riled Hollywood*, N.Y. TIMES, July 21, 2003, at C3.

¹¹⁹ As mentioned earlier in this Note, a customer currently cannot make permanent copies of programming recorded onto the RS-DVR. *Twentieth Century Fox Film Corp. v. Cable-*

Content providers have also developed successful home video sales markets in spite of over twenty years of time-shifting, proving that those who like to purchase and collect the programming are not willing to settle for the versions they can record themselves. Therefore, librarying and commercial skipping are no longer inherently relevant factors in determining fair use.

There was also a time when networks were afraid of ratings dilution, which would occur if they aired the same program more than once in a short period of time. However, since they have discovered that offering more time slot options for the same programming can actually increase overall viewership (and, therefore, advertising revenue), they have begun to not only offer their programming during multiple time slots, but also, sometimes within the span of a week, to offer that same program to be watched on cable channels as well as on their websites. Thus, the content providers have figured out ways to essentially time-shift their own programming for the convenience of the at-home viewers and for the content providers' benefit. The cable providers should be able to do the same in light of the fact that there is no infringing activity.

The location of the remote control points us to the person responsible for making the copy, who is the at-home viewer and who, under *Sony*, has a right to time-shift her programming. The location of the remote control also guides us to where the performance is occurring, which is in the privacy of a person's home and not a public place; therefore, there is no public performance.

The remote control is the same. The consumer is the same. The programming is the same. The end result is the same. The only new elements that come about with Remote Storage DVRs are the location of the copying machine and the physical copy. However, it is only the location of the consumer/viewer that should be relevant. The viewer is in primary control of making copies and is the direct user of the copies that are made, and no other person or entity should be held directly liable for any potential infringement.

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vision Sys. Corp. (*Cablevision I*), 478 F. Supp. 2d 607, 614 (S.D.N.Y. 2007), *rev'd*, 536 F.3d 121 (2d Cir. 2008), *petition for cert. filed*, (U.S. Oct. 6, 2008) (No. 08-448).

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