07-1480-cv(L), 07-7511-cv(CON)

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Counter-Claimants-Defendants-Appellees,

(For Continuation of Caption See Inside Cover)

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

BRIEF FOR THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS AND BROADCAST MUSIC, INC. AS *AMICI CURIAE* URGING AFFIRMANCE IN FAVOR OF APPELLEES

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Plaintiffs-Counter-Defendants-Appellees,

– against –

CSC HOLDINGS, INC. and CABLEVISION SYSTEMS CORPORATION*,*

Defendants-Counterclaim-Plaintiffs-Third-Party Plaintiffs-Appellants

– against –

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.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Broadcast Music, Inc. certifies that there are no parent corporations to Broadcast Music, Inc. and the only publicly-held company that directly or indirectly owns 10% or more of the stock of Broadcast Music, Inc. is Gannett Co., Inc. through an indirect, wholly owned subsidiary.

The American Society of Composers, Authors and Publishers is an unincorporated membership association of composers of music, authors of lyrics, and music publishers. As an unincorporated entity it is not required to file a disclosure under Fed. R. App. P. 26.1.

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The American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") submit this *amicus* brief in support of Appellees. All parties have consented to the submission of this brief.

I. INTEREST OF *AMICI CURIAE*

Amici curiae ASCAP and BMI are performing rights societies as defined in the Copyright Act. 17 U.S.C. § 101. ASCAP and BMI issue licenses to music users for the public performance of their members' and affiliates' musical works, collect license fees on behalf of those members and affiliates, and distribute those fees as royalties to members and affiliates whose works have been performed on media such as cable television, radio, and the Internet. Together, BMI and ASCAP license the right of non-dramatic public performance in millions of musical works on behalf of their affiliates and members, which comprise almost all American songwriters, composers, lyricists, and music publishers. Through affiliation with foreign performing rights societies, BMI and ASCAP also represent, in the United States, virtually all of the world's writers and publishers of music.

Typical ASCAP and BMI licensees include local television and radio stations, broadcast and cable/satellite television networks, cable system operators and direct broadcast satellite services, Internet service providers and websites, restaurants, night clubs, universities and colleges, hotels, concert promoters, sports arenas, and other businesses that perform music publicly. Given the vast number

and variety of works in the ASCAP and BMI repertories, ASCAP's and BMI's licenses provide music users with efficient access to public performance licenses for the quantity and variety of music the public demands.[1]

Performance rights royalties constitute the largest single source of income for many individual composers, lyricists, and songwriters. The right of public performance at issue in this matter is of vital interest to the individual music creators whom BMI and ASCAP represent.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court's judgment that Cablevision's unlicensed RS-DVR service would directly infringe Appellees' right of public performance under Section 106(4) of the Copyright Act is supported by the plain and unambiguous provisions of the Copyright Act and by cases applying it, including by this Court. There is nothing novel or controversial in the District Court's decision; the Court correctly determined that, because Appellants would transmit performances of copyrighted works to the public through their proposed RS-DVR system, Appellants would be performing those works publicly. In addition, under this Circuit's law, Cablevision's transmission of a copyrighted work from its remote

[1] The role of performing rights organizations in giving practical effect to the performing rights granted by Congress to the creators of music is described generally in Broadcast Music, Inc. v. Columbia Broadcast Sys., Inc., 441 U.S. 1 (1979).

servers to a subscriber is a public performance because it is one of the steps in the process by which that performance reaches the public.

The District Court correctly rejected Appellants' argument that, by virtue of the use of technology that would allow Cablevision's subscribers to control the timing of transmitted performances, the performances would somehow be private and fall outside the exclusive right of public performance granted in 17 U.S.C. § 106(4). There is no little irony in Appellants' position: in effect, Appellants argue that the very technology that permits copying and performance of copyrighted works on a massive scale enables them to avoid liability for copyright infringement. No authority supports Appellants' argument.

Those who profit from the delivery of copyrighted works to the public, like Appellants, increasingly rely on customizable, on-demand technology to attract and reach as many customers as possible. If this Court were to adopt Appellants' narrow view of public performances, it would potentially deprive individual creators, like ASCAP's members and BMI's affiliates, of royalties from the public performance of their works not only by means of Appellants' own services, but over the Internet (which is fast becoming a dominant medium), and by means of any other new medium capable of providing on-demand performances. It is critical to the professional survival of these creators that courts acknowledge and

enforce copyright rights in a technologically neutral manner, just as the District Court did. The District Court's judgment should be affirmed.

III. ARGUMENT

A. Under The Plain Language of the Copyright Act, Cablevision Would Publicly Perform Copyrighted Works as Part of Its RS-DVR Service

Appellants do not dispute that the playback of a program stored on their proposed RS-DVR would constitute a "performance" under 17 U.S.C. § 101, but they argue that the technology involved would render each performance private. The District Court disagreed and correctly held that, under the plain meaning of the Copyright Act, the performances would be public and subject to license by rights-holders. See Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp., 478 F. Supp. 2d 607, 622-24 (S.D.N.Y. 2007). As Appellees demonstrate in detail, no other interpretation of the Act is reasonable. See Fox Plaintiffs Br. at 20-28.

Under the Act,

> "To perform or display a work 'publicly' means . . .
>
> [T]o transmit or otherwise communicate a performance . . . of the work . . . to the public, by means of any device or process whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times."

17 U.S.C. § 101 (emphases added). To "transmit" a performance, in turn, "is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." Id.

Thus, under the express language of the Act, the RS-DVR performances would be public performances even if Cablevision's customers, who are members of the public, received Cablevision's transmissions "in separate places . . . and . . . at different times." 17 U.S.C. § 101. It is also a matter of plain language that the transmission of a performance from Cablevision's RS-DVR server to the requesting customer's television set is a qualifying transmission under the Act, as the "images or sounds are received beyond the place from which they are sent." Id.

There is nothing in the statute or its legislative history to support Cablevision's contention that its creation of, and transmission from, a unique copy of the physical recording for each requesting subscriber avoids the public performance right. The right applies to performances of copyrighted works, not of physical recordings. 17 U.S.C. § 101 (to perform a work publicly means, "[t]o transmit or otherwise communicate a performance . . . of the work") (emphasis added). Cablevision might associate a particular copy of the work with a particular subscriber – on its own servers only and for its own purposes – but what Cablevision ultimately transmits to the RS-DVR subscriber is a performance of the underlying work. That is the material fact for purposes of the public performance inquiry. It simply does not matter how many copies of the work Cablevision has, or where in its network Cablevision stores copies for transmission. After all, if a

thousand subscribers request the same program (which is, of course, available to all or many of them), they will all receive performances of the same work.

Nor does it matter that, as with all on-demand services, the subscriber requests that Cablevision transmit the performance. The transmission, enabled solely by Cablevision's RS-DVR service, still starts at Cablevision's servers and ends at the customer's television. The act of transmission, which is the touchstone of a public performance under the relevant definition in the Act, is directly attributable to Cablevision. Congress anticipated a system such as Appellants' RS-DVR, in fact, and instructed that the transmission should be treated as "to the public" even if it comprises "sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public." H.R. Rep. No. 90-83, at 29 (1967) (emphasis added).

B. The District Court's Decision Is Consistent With Established Case Law On What Constitutes Transmission *To The Public*

The District Court's conclusion that Cablevision's RS-DVR system would infringe the Appellees' public performance rights is consistent with cases in which courts have applied the Act's definitions to closely analogous services and technologies. In addition, under the settled law of this Circuit, Cablevision's transmission of a performance of a copyrighted work from its RS-DVR service to a subscriber is a public performance because it is no more than a step in the process by which the performance reaches the public.

1. Cablevision's RS-DVR Service Is Equivalent To Services Previously Found To Infringe The Right of Public Performance

The District Court correctly described Cablevision's proposed RS-DVR system as essentially no different from the on-demand video-delivery system at issue in On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787, 790 (N.D. Cal. 1991), in which a hotel-operated computer allowed hotel guests to select movies from the hotel's collection for playback in their rooms, at a time of the guests' choosing, via centrally-located videocassette players maintained by the hotel. Applying the definitions in the Copyright Act, the court held that the hotel publicly performed the movies, even though each guest's viewing constituted a private performance. Id. at 789-90.

Similarly, in Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1985), the Third Circuit affirmed that transmissions of video signals to private viewing booths, occupied by one to four people, were public performances, finding that this conclusion was "fully supported" by the transmit clause in the definition of public performances under the Act. Id. at 159. The same conclusion applies to Cablevision's transmissions of digital signals to individual subscribers via the RS-DVR system.

Addressing more recent technology, courts have uniformly held that the "streaming" of digital content embodying copyrighted musical works on the Internet infringes the exclusive right of public performance. The defendant in

Video Pipeline transmitted digital copies of movie previews to potential customers, at the customers' request, on behalf of on-line retail movie sales services. Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 192 F. Supp. 2d 321, 327-28 (D.N.J. 2002), aff'd, 342 F.3d 191 (3d Cir. 2003). When a potential customer selected a desired preview, defendant would transmit the preview to the customer's computer, allowing the customer to view and hear it. 192 F. Supp. 2d at 328. The court held that such transmission constituted a public performance of the copyrighted work, even though each transmission was sent to a single recipient at the recipient's request. Id. at 331-32 (citing Columbia Pictures Indus., Inc. v. Aveco, Inc., 800 F.2d 59, 62 (3d Cir. 1986)).

2. Second Circuit Law Supports The District Court's Holding

Adopting the analysis in David v. Showtime/The Movie Channel, Inc., 697 F. Supp. 752, 759-60 (S.D.N.Y. 1988), this Court has held that intermediate steps in the process by which a copyrighted work "wends its way to its audience" are public performances. See Nat'l Football League v. PrimeTime 24 Joint Venture, 211 F.3d 10, 12-13 (2d Cir. 2000).

At issue in David were Showtime's transmissions of performances of copyrighted music, contained in audiovisual works, to local cable systems for subsequent retransmission to subscribers. David, 697 F. Supp. at 754-55. Showtime argued that it was not "publicly performing" the music because it was

directing the intermediate transmissions to the cable systems rather than "to the viewing public." David, 697 F. Supp. at 759. After reviewing the Act and its legislative history, Judge Tenney rejected Showtime's argument, reasoning that "Congress intended the definitions of 'public' and 'performance' to encompass each step in the process by which a protected work wends its way to its audience." Id. Relying on Congress's broad intent, Judge Tenney explained that a public performance covers not only the initial rendition of a work, but also "'any further act by which that rendition . . . is transmitted or communicated to the public.'" Id. (quoting H.R. Rep. No. 94-1476, at 63 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5676).

In reaching this conclusion, the David court rejected the notion, necessarily implied here by Cablevision, that "the degree of copyright protection [should] turn on the mere method by which television signals are transmitted to the public." David, 697 F. Supp. at 759. The David court also rejected Showtime's argument – similar to Cablevision's argument here – that it did not publicly perform transmitted works because it played only a passive role in the retransmission of those works. Id. (noting that Showtime's argument ignored its "fundamental role in determining how and when the works in this case were used").

In PrimeTime 24, this Court confirmed the principles set forth in David. In that case the NFL brought an action against a satellite carrier that was capturing the

NFL's broadcast signals in the United States and transmitting them to satellites for further transmission to viewers abroad. Primetime 24, 211 F.3d at 11-12. The defendant satellite carrier argued that there was no infringement on the grounds that the transmission of programming to viewers abroad was beyond the scope of the United States Copyright Act, and that, therefore, no public performance was taking place within the United States. On appeal of a judgment and permanent injunction against the satellite carrier, this Court affirmed and held that the satellite carrier's uplink transmission of signals captured in the United States to satellites was itself an infringement of the public performing right. Id. at 13. In doing so, this Court stated that "[w]e believe the most logical interpretation of the Copyright Act is to hold that a public performance . . . includes 'each step in the process by which a protected work wends its way to its audience.'" Id. (quoting David, 697 F. Supp. at 759); see also Nat'l Football League v. PrimeTime 24 Joint Venture, 50 U.S.P.Q.2d 1461, 1463 (S.D.N.Y. 1999) (the "transmission of the signals in the United States is 'a step in the process by which a protected work wends its way to its audience,' . . . although not the only, or the final, step, and an infringement, even though it takes one or more further steps for the work to reach the public") (quoting David, 697 F. Supp. at 759).

Under this Court's Primetime 24 analysis, it is irrelevant that transmissions of programming in Cablevision's RS-DVR service stop at the RS-DVR servers on

their way to the subscribers. Each transmission in Cablevision's RS-DVR service – the original APS transmission of programming content to the RS-DVR servers and the retransmission of that content to Cablevision subscribers – is a public performance, because it represents a step in the process by which a protected work "wends its way" to Cablevision's audience.

C. This Court's Adoption of Appellants' Public Performance Work-Around Proposal Would Have A Potentially Devastating Effect On The Livelihoods of Individual Songwriters And Music Publishers

ASCAP and BMI have concrete interests in having this Court affirm the District Court's correct judgment. Individual songwriters, composers, lyricists, and music publishers depend for their livelihoods on royalties generated through the licensed public performances of their musical works. A growing percentage of this royalty revenue is generated through licenses to Internet sites and services that transmit music to the public, such as Yahoo!, AOL and RealNetworks. Each year, these sites and services transmit billions of music performances on-demand directly to individual members of the public. They also transmit billions of hours of music performances over Internet-only webcasts and simultaneous webcasts of terrestrial radio stations, much as Cablevision transmits broadcast television programming simultaneously with over-the-air broadcasts.

As computer processor speeds, network bandwidth, and computer storage space have increased exponentially, and as high-speed broadband Internet

connections have become widely adopted by the public, digital transmission of music has become faster and more commonplace. More and more music is delivered to the public through digital transmissions over the Internet or through cable, wireless, or satellite feeds, replacing traditional analog broadcast modes of music delivery.

Internet music service providers acknowledge that certain on-demand and other transmissions are public performances, and they pay royalties to ASCAP and BMI accordingly. Under Appellants' theory, Internet service providers could adopt a system similar to Cablevision's RS-DVR service, and argue that they no longer have to pay royalties for providing the same service they presently provide. Such a service provider could establish a service whereby the user selects particular songs, artists, albums, and/or music genres, much as Cablevision's RS-DVR customers would be able to select particular television programs or movies. The provider would then monitor its radio webcast transmissions, divert those that match the user's preferences, and record them separately for each customer, just as Cablevision would divert transmissions of programs and record them on its RS-DVR. The customer's music choices would then be available to the user on-demand from the provider's servers. There might, on Appellants' theory, be no royalty-bearing public performance in such a music-delivery system, and the individual songwriters, composers, lyricists, and publishers whose works are

performed would go uncompensated. Conceivably, a customer could even request that all music be diverted, recorded, and made available in this fashion, making virtually the entire ASCAP and BMI repertories available to the customer on demand, without compensation to those who created the music. As a result, music creators might lose this source of royalty income entirely.

D. The Scope of the Public Performing Right Is Not Affected by the Particular Technology Used to Transmit a Performance to the Public

The language of the statute is clear – the transmission of a performance of a copyrighted work to the public by means of "any device or process" is a public performance under Section 106(4) of the Copyright Act. Cases interpreting the Act, and its legislative history, confirm that the nature of the technology in the "device or process" does not affect, and certainly does not diminish, the scope or applicability of the right, or its value to owners such as BMI's affiliates and ASCAP's members.

The Copyright Act states that a transmission of a public performance can be made by means of "any device or process." 17 U.S.C. § 101. This is expansive language, and, as the legislative history shows, it was so intended. See, e.g., H.R. Rep. No. 94-1476, at 64 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5678 (definition of "transmit" is "broad enough to include all conceivable forms and combinations of wires and wireless communications media . . ."); see also H.R. Rep. No. 94-1476, at 63 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5677 ("A

performance may be accomplished 'either directly or by means of any device or process,' including . . . any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.").

Simply put, the plain language of the Act is to be applied in a technologically neutral fashion. For all Cablevision's technology, at root there can be no serious dispute that, as part of its RS-DVR service, Cablevision would transmit performances of copyrighted works by means of a "device or process" to its subscribers. Those transmissions fall within the Section 106(4) right of public performance, and Cablevision must obtain licenses for them.

Rejecting Cablevision's arguments, and obligating it to compensate copyright holders for its use of their creative works, is in no way a rejection of technological progress. Indeed, ASCAP and BMI have always embraced innovation and the new opportunities it presents for their members and affiliates. However, the Copyright Act grants ASCAP's members and BMI's affiliates the valuable right to perform their copyrighted works publicly (among other rights), and it contains no provision reducing the scope of that right in the name of promoting new technology.

In the case before this Court, Appellants argue for a technological bypass of the public performance right that would diminish the "degree of copyright

protection" enjoyed by a work based "on the mere method by which [the work] is transmitted to the public." See David, 697 F. Supp. at 759. Reading the Copyright Act as it is plainly written, the District Court properly rejected Appellants' arguments and upheld the established rights of copyright owners. This Court should affirm.

IV. CONCLUSION

For the reasons set forth above and in Appellees' briefs, this Court should affirm the judgment of the District Court.

Dated: New York, New York
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 3,346 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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ANTI-VIRUS CERTIFICATION FORM
Pursuant to Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: The Cartoon Network v. CSC Holdings

DOCKET NUMBER: 07-1480-cv(L), 07-7511-cv(Con)

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Robin M. Zuckerman

Date: July 11, 2007