

JUDGE FINDS NETWORK DVR VIOLATES ENTERTAINMENT RIGHTS

Beth Bar

A Federal judge has sided with entertainment producers who claimed that Cablevision's network-based remote-storage digital video recorder (DVR) system violated copyright infringement laws.

'I conclude that Cablevision, and not just its customers, would be engaging in unauthorized reproductions and transmissions of plaintiffs' copyrighted programs,' Southern District Judge Denny Chin held in *Twentieth Century Fox v. Cablevision Systems*, 06 Civ. 3990, and *The Cartoon Network V. CSC Holdings*, 06 Civ. 4092.

Judge Chin granted requests by Twentieth Century Fox, CNN, Universal, Paramount Pictures and other networks, and permanently enjoined Cablevision from proceeding with technology that would have allowed its customers who do not have digital video recorders in their homes to record and play back programs stored on central servers at Cablevision's facilities.

Cablevision spokesman James Maiella said in a statement that the company was disappointed in the decision and was considering an appeal.

The Bethpage, Long Island-based cable company had argued that it was not required to receive a license from the networks because its customers, not Cablevision, choose content and record programs for personal viewing. It cited to [Sony Corp. v. Universal Studios, Inc., 464 U.S. 417 \(1984\)](#), in which the U.S. Supreme Court held that Sony could not be held liable for infringement because it supplied Betamax recorders, video cassette recorders or DVRs to consumers for recording TV programs for in-home personal viewing.

Cablevision said its RS-DVR was no different from those devices, and argued it could not be held liable for copyright infringement for merely providing customers with the machinery to make copies.

'The RS-DVR is clearly a service, and I hold that, in providing this service, it is Cablevision that does the copying,' Judge Chin wrote.

He noted that, at most, Cablevision contended that 'its role with respect to the RS-DVR establishes indirect infringement, but plaintiffs have waived such a claim.'

But the entertainment companies argued the RS-DVR technology was unique and unauthorized because a complete copy of a program selected for recording would be stored indefinitely on a customer's allotted hard drive space on the company's facility. It also said the fact that portions of the programs are stored temporarily in 'buffer memory' on the company's servers was problematic.

The networks also said Cablevision was directly infringing on their copyright because it was the one 'doing' the copying.

Judge Chin accepted the plaintiffs' arguments.

He said Cablevision's ongoing participation in the recording process set the RS-DVR system apart from 'set-stop storage DVRs' (STS-DVRs), like TiVo, which are currently on the market.

'Cablevision claims that with both, the customer is 'doing' the copying, and it points to the fact that no programmer...has ever sued Cablevision or any other cable operator in connection with its providing STS-DVRs to its customers,' he said. 'By extension, the RS-DVR, it argues, presents no copyright infringement.'

Judge Chin held that the fact that plaintiffs and other programming owners have not sued cable operators over the legality of set-stop storage DVRs does not insulate the RS-DVR from such a challenge.

He said the RS-DVR may have the look and feel of an STS-DVR, but 'under the hood' the two types are vastly different. The judge said the RS-DVR is more akin to video-on-demand (VOD) than to a VCR, STS-DVR, or other time-shifting devices.

'In fact, the RS-DVR is based on a modified VOD platform,' the judge concluded. 'In its architecture and delivery method, the RS-DVR bears striking resemblance to VOD.'

Cable companies have been eager to experiment with network DVRs because the technology could greatly increase their ability to add DVR customers, who pay a monthly fee, without having to provide new set-top boxes for each one.

These boxes can cost up to several hundred dollars each, a cost usually borne by the cable company.

The Twentieth Century Fox plaintiffs were represented by Arnold & Porter attorneys Peter L. Zimroth, Eleanor M. Lackman, Robert A. Garrett and Hadrian R. Katz.

Gregory Paul Goeckner and Simon Barsky, in-house attorneys at the Motion Picture Association of America, also represented Twentieth Century Fox.

Mr. Goeckner said on Friday he was not yet able to comment.

The Cartoon Network and CNN were represented by Cravath, Swaine & Moore attorneys Katherine B. Forrest, Anthony L. Ryan and Chelsea Teachout.

Cablevision was represented by Benjamin Hershkowitz, John C. Englander, J. Anthony Downs, R. David Hosp, Timothy A. Macht, and Robert D. Carroll of Goodwin Proctor.

Beth Bar can be reached at bbar@alm.com.