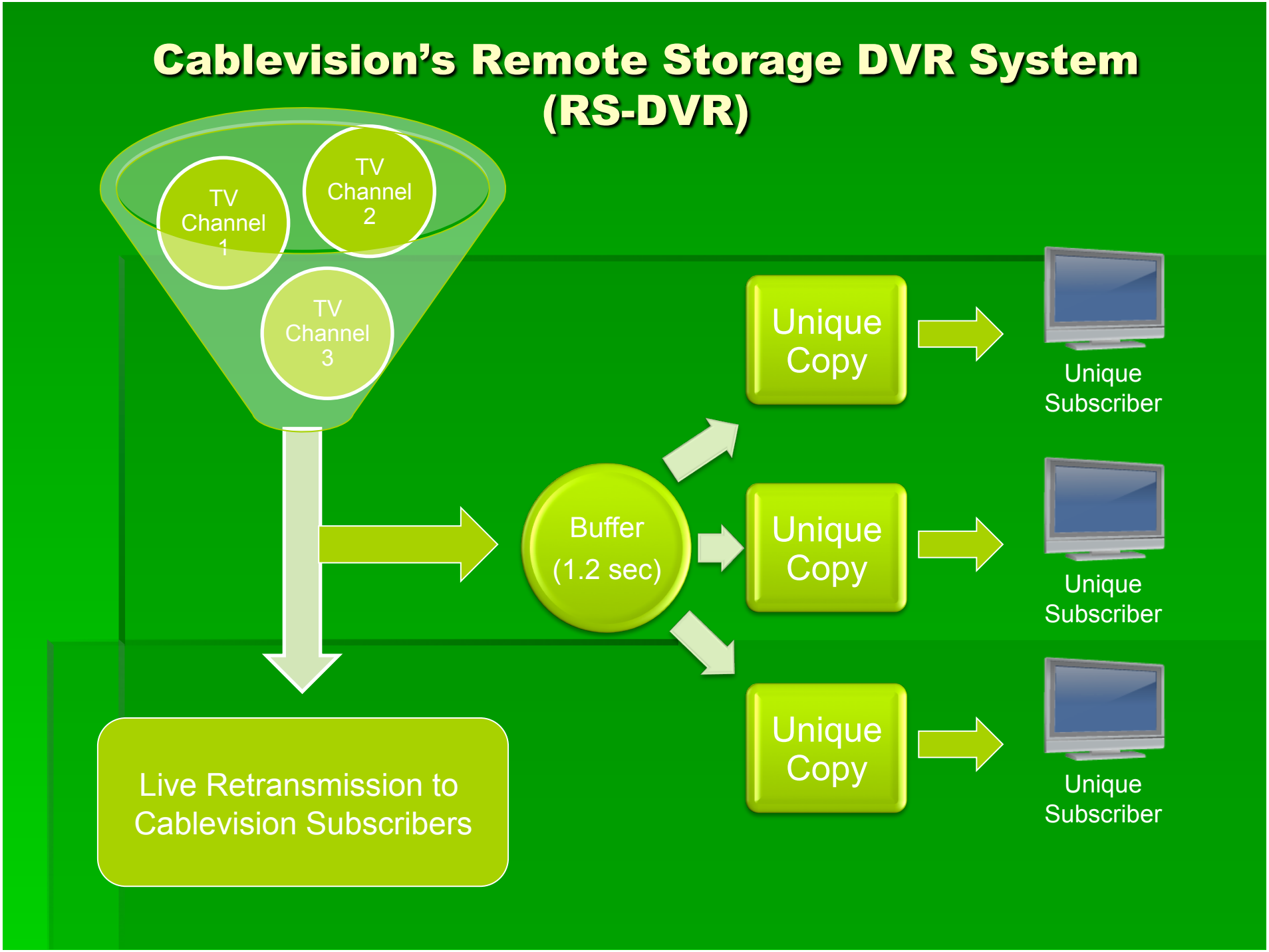
The Cartoon Network LP, LLLP
v.
CSC Holdings, Inc.

Overview of Holdings and Impacts

Cablevision's Remote Storage DVR System (RS-DVR)



Three General Holdings

Fixation

Has 2 distinct elements:

- Embodiment
- Duration

Direct Infringement

Requires a "volitional act" by the infringer

Public Performance

Scope of public performance is limited to:

- A particular, distinct copy of the performance;
- People capable of receiving the transmission; and
- Transmission to more than one person

Fixation

Fixation Requirement

17 U.S.C. §101

"A work is "fixed" in a tangible medium of expression when its **embodiment** in a copy or phonorecord … is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated **for a period of more than transitory duration**."

Fixation Requirement - Analysis

"…for a period of more than transitory duration…"

Court reads this (duration) as a **separate and distinct** requirement from embodiment.*

*(follows a textual interpretation of the Act)

Fixation Requirement - Counterarguments

What about *MAI Systems Corp.*?

MAI Systems Corp. held that copying a software program into a computer's memory was "fixed" **even though the software was erased when the computer was turned off.**

Fixation Requirement - Counterarguments

Cablevision court interprets *MAI* differently

- The *MAI* opinion did not specify the arguments defendants made, therefore the *MAI* parties "**did not litigate the significance of the 'transitory duration' language…**"
- *MAI* could not mean that any nonzero duration would be fixed since that would read the "transitory duration" language out of the definition.

Fixation Requirement - Counterarguments

What about the DMCA report?

According to the Copyright Office's 2001 DMCA report, an embodiment is fixed "[u]nless a reproduction manifests itself so fleetingly that it cannot be copied, perceived or communicated."

Fixation Requirement - Counterarguments

The *Cablevision* court believes the Copyright Office's interpretation of the Copyright Act would also **read the "transitory duration" language out of the statute.**

Application of Embodiment Requirement

- Since the data in the buffers can be copied, meets the embodiment requirement.
- However, the court points out that "[t]he result might be different **if only a single second of a much longer work was placed in the buffer in isolation.**"

Application of Duration Requirement

Held:

- 1.2 seconds is a "transitory duration."
- Distinguishes *MAI* as holding that having a copy reside in memory until the computer is shut down is **not** a "transitory duration."

Court points out, however, that this is specific to the facts of this case!

Summary of Fixation

Fixation requires both (1) embodiment and (2) duration:

- Embodiment
  - If the **entire** work is not embodied **at the same time**, may not meet the embodiment requirement
- Duration
  - If the embodiment **does not last longer than 1.2 seconds**, may not meet the duration requirement

Direct Infringement

Direct Infringement - Requirement

17 U.S.C. 106

- "Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
- (1) to **reproduce the copyrighted work** in copies or phonorecords;"

Direct Infringement - Analysis

BUT…

Remember, the plaintiffs stipulated not to raise a **contributory infringement** claim

Therefore, in order to hold Cablevision liable for direct infringement, the court must hold that **Cablevision** makes the copies, **NOT their subscribers**

Direct Infringement - Holding

Cablevision court holds that direct infringement requires a **volitional act of copying**.

(Based on *Netcom* and *CoStar* precedents)

Direct Infringement - Counterarguments

But what about the District Court's interpretation of *Netcom*?

The District Court held that *Netcom* was not relevant to this issue since *Netcom*'s holding was "premised on the unique attributes of the Internet."

Direct Infringement - Counterarguments

Court of Appeals interpreted *Netcom* differently:

Netcom's "reasoning and conclusions … **transcend the Internet**."

Direct Infringement - Application to Cablevision

"[I]t seems clear … that the **operator of the VCR** … supplies the necessary element [for direct infringement] of volition, **not the person who manufactures, maintains, or if distinct from the operator, owns the machine**."

Therefore, since the RS-DVR subscriber is not sufficiently distinguishable from a VCR user, Cablevision is not liable for direct infringement.

Direct Infringement - Counterargument

What about the District Court's analogy with *Princeton Univ. Press*?

- "The district court found Cablevision analogous to a copy shop that makes course packs for college professors."
- "The district court here found that Cablevision, like this copy shop, would be 'doing' the copying…"

Direct Infringement - Counterargument

Court of Appeals distinguishes *Princeton Univ. Press*

Court held that "[i]n determining who actually 'makes' a copy, a significant difference exists between

- [1] **making a request to a human employee, who then volitionally operates the copying system** to make the copy, and
- [2] **issuing a command directly to a system, which automatically obeys commands** and engages in no volitional conduct."

Direct Infringement - Direct vs. Contributory

- Emphasizes importance of distinction between direct and contributory infringement
- Continuing relationship, control over content, and "instrumentality" of copying "seem to us more relevant to the question of contributory liability."

Direct Infringement - Summary

- (1) Direct Infringement of Copyright requires a **"volitional act"** by the infringer
- (2) The following are **NOT** volitional acts:
  - (a) Designing, housing, and maintaining a system that exists only to produce a copy
  - (b) Cablevision's choice of which channels to offer its customers
  - (c) Cablevision's control over the RS-DVR system.

Public Performance

Public Performance - Requirement

17 U.S.C. §101

"[t]o perform or display a work 'publicly' means

(2) to transmit … **a performance** … **to the public** … whether 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."

Public Performance - Holdings

"… to the public … capable of receiving the performance …"

- (1) Court reads this as defining "the public" as those "**capable of receiving**" the performance
- (2) "To the public" is further restricted to those receiving a transmission made using a **particular, distinct copy** of the work

Public Performance - Counterarguments (1)

What about *NFL*?

- *NFL* held that a public performance **includes "each step in the process** by which a protected work wends its way to its audience."
- Therefore, why is the transmission *into the RS-DVR system* not "to the public"?

Public Performance - Counterarguments (1)

- *NFL* holds that an earlier transmission is "to the public" if the "**final transmission** in the chain … is 'to the public.'"
- Since "the RS-DVR system … 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."

Therefore since the final transmission is not "to the public" but to a single person, *NFL* does not apply.

Public Performance - Counterarguments (2)

Plaintiffs argue that since the RS-DVR system **ultimately distributes the same performance to multiple people** it is still "to the public".

Public Performance - Counterarguments (2)

Cablevision court rejects argument:

- Since the Copyright Act gives a **remedy for both the act of copying and the act of public performance**, "it seems quite consistent with the Act to treat a transmission using Copy A as **distinct** from one made using Copy B..."
- *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.* uses the phrase "same copy":
  - "if the same copy … of a given work is repeatedly played by different members of the public, … this constitutes a 'public' performance."

Public Performance - Counterarguments (3)

What about *On Command Video Corp.*?

On Command Video Corp. held that any commercial transmission is a transmission "to the public".

Public Performance - Counterarguments (3)

Cablevision court rejects this argument:

- "If Congress had wished to make all commercial transmissions public performances, **the transmit clause would read**: 'to perform a work publicly means … **to transmit a performance for commercial purposes.**'"
- *On Command* incorrectly implies that noncommercial transmissions can't be public performances
- *On Command* is factually distinguishable since there, **multiple people could watch a transmission using the same copy** at different times.

Public Performance - Counterarguments (4)

What about *Ford*?

Ford held that "**even one person can be the public** for the purposes of section 106(3)."

Public Performance - Counterarguments (4)

"Commentators have criticized the Ford court for **divesting the phrase 'to the public' of 'all meaning whatsoever'**."

Public Performance - Summary

- Court reads the Copyright Act as defining "the public" as those "**capable of receiving**" the performance.
- "To the public" is further restricted to those accessing a **particular, distinct copy** of the performance.
- "To the public" means **more than one subscriber**.

Closing Notes

Remember that the following claims & defenses were **waived** in this case:

- Secondary liability
- Fair use

Closing Notes

The court specifically states that it did **NOT** address:

- "[W]hether a network operator would be able to escape any other form of copyright liability, such as liability for unauthorized reproductions or
- [L]iability for contributory infringement."

Questions