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## **Court Upholds Cable Network DVR Systems Against Copyright Claims**

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Score one for the cable guys . . . a big one. A federal appeals court in New York has ruled that a cable company violates no copyrights when it provides virtual digital video recorder services, commonly known as “network DVRs”.

Network DVRs provide TiVo-like services without the inconvenience of having to provide each subscriber with his/her own separate recording device sitting next to, and wired into, the TV set. Rather, network DVRs store programming on the cable company’s computers. All related functions – storing, playback, rewinding and fast-forwarding – are performed through remote connections to the cable system’s server.

The decision, from the U.S. Court of Appeals for the Second Circuit, potentially expands customer options, making any digital cable box or two-way TV into a DVR gateway. For cable providers, it means the cost of providing DVR services will likely decline, potentially cutting the monthly fee needed for a solid return on investment. If prices go down, subscriber numbers could go up, with a consequent increase in overall bottom-line for the cable guys.

The Second Circuit’s decision favors Cablevision, the appellant. It reverses a lower court ruling that the network DVR system constitutes unauthorized – and, therefore, infringing – copying of the various works (*e.g.*, movies, TV shows and the like) requested by cable subscribers availing themselves of the network DVR services. The potential liability for such infringement would be enormous – and the only way that Cablevision, or any other network DVR operator, could avoid it would be to negotiate new copyright licenses with the copyright holders, which would also likely be an extraordinarily pricey proposition. The losers in the appeal – *i.e.*, the copyright holders who claimed infringement – included Turner Broadcasting, Fox, NBC, Disney and CBS. They all asserted that network DVRs would have adverse effects on their distribution of content on the retail level.

For cable and satellite providers, network DVRs make a lot of business sense. Now, with a traditional DVR-sitting-on-the-customer’s-TV approach, inventory, delivery,

installation and setup of individual DVR boxes is costly – some estimates run as high \$500 per DVR installation. By contrast, network DVR services, once available, can be remotely installed without a home visit, and without the need for keeping stacks of DVRs on the shelves.

But for program providers – whether cable channels or over-the-air broadcasters – more DVR use could well mean more commercials getting zapped. DVR services make it incredibly easy to fast-forward through unwanted commercials in seconds or even split-seconds. The more commercials go unwatched through DVR use, the more downward economic pressure is applied to the traditional sponsorship model for broadcasters and many conventional cablecasters.

The legal principle at issue here first arose in a Supreme Court ruling from the early days of consumer video cassettes. That decades-old decision held that TV viewers were engaged in legitimate “time shifting” when they used VCRs to tape programs. “Time shifting” was a “fair use” of copyrighted materials – so it could be done without any additional permission from or payment to copyright owners. In that case, *Sony Corporation of America v. Universal City Studios, Inc.* (often referred to by the *cognoscenti* as “the Betamax case”), a major production house went after Sony, which was not yet a studio owner, but was the manufacturer of then state-of-the-art Betamax VCR systems.

The Second Circuit found no distinction between network DVRs and video cassette recording; it held, essentially, that time-shifting is time-shifting is time-shifting. Of course, fast-forwarding an analog video tape takes more time than skipping ahead once a film has been translated into computer digits. That is, it is possible that the program distributors might be able to distinguish network DVRs from Betamax, and thus undermine the Second Circuit’s rationale. But to do that, they would have to convince a higher court – either the Second Circuit sitting *en banc* or the U.S. Supreme Court – of a legally meaningful distinction between: (a) speedy digital time-shifting by DVR and (b) more cumbersome mechanical time-shifting via video tape.

Broadcasters and cablecasters are now confronted with essentially two choices: find ways to maintain revenue streams despite increased commercial-zapping, or mount a persuasive, last-ditch attack in the courts showing that, for copyright law purposes, time-shifting on a DVR is not a “fair use”. If solid distinctions between digital and old-fashioned cassette recording technologies can’t be established, the appellants would likely have to get the Supreme Court to overrule the old VCR precedent overruled – which is never an easy task.

We have heard no word yet on whether the broadcasters and cablecasters involved plan to seek further review of the Second Circuit's decision. Of course, another way to sort out the rights and responsibilities of all concerned would be through amendment of the Copyright Act, updating the statute so that it specifically articulates how traditional copyright interests are to be interpreted and applied in the context of 21<sup>st</sup> Century technology. Don't hold your breath . . . .