

DOCKET NO.
RM 2000-7
COMMENT NO. 15

ORIGINAL

RECEIVED
AUG 19 2008
GENERAL COUNSEL
COPYRIGHT

BEFORE THE

~~COPYRIGHT~~ OFFICE LIBRARY OF CONGRESS Washington, D.C.

Compulsory License for Making and Distributing
Phonorecords, Including Digital Phonorecord Deliveries

Docket No. RM 2000-7

COMMENTS OF NEW MEDIA RIGHTS

New Media Rights submits the following comments in response to the Copyright Office's Notice of Proposed Rulemaking, published at 73 Fed. Reg. 137 (July 16, 2008) (proposing revision of 37 CFR Part 201 and 255). In its Notice, the Copyright Office seeks comment on proposed amendments to its regulations to clarify the scope and application of the Section 115 compulsory license to make and distribute phonorecords of a musical work by means of digital phonorecord deliveries.

In particular, these comments address the treatment of buffer reproductions made by transmission services within both server-end and recipient-end systems.

I. COMMENTING PARTY

New Media Rights (NMR) is a project of the non-profit Utility Consumers' Action Network. NMR provides legal information and assistance to emerging artists, software and web developers, and creators of all types on the legal issues surrounding new media (copyright, licensing, and trademark law, particularly fair use, parody, mash-ups, sampling, re-mixing, and open source licensing). NMR seeks to facilitate the creation of grassroots content that is not currently supported or funded by mainstream business models by providing individual assistance, educational resources, advocacy, and use of our free new media studio and equipment.

NMR seeks to expose artists to open-source creative tools, licensing options, and new media distribution alternatives, while educating users and creators on their rights under current copyright/IP law. NMR encourages the use of open-source technology and creative commons licenses out of our belief that the public benefits from less restrictive and more flexible content rights.

NMR believes no one should hold a monopoly over creativity, and seeks to encourage a vibrant grassroots, non-hierarchical creative community that provides alternatives to traditional, hierarchical media.

Further information regarding New Media Rights' mission and activities can be obtained at <http://www.newmediarights.org>.

II. SUMMARY OF COMMENTS

The Office's conclusion that buffer reproductions are phonorecords should be revisited because of reliance on the reserved cablevision decision and DMCA Section 104 Report.

Finding that buffer reproductions of digital sounds recordings are phonorecords would have a chilling effect on innovation in digital technology.

The elimination of the durational requirement in the evaluation of buffer reproductions of sounds recordings would necessarily implicate the reproduction of other kinds of protected works.

The reproduction of protected works in a computer's RAM does not always result in copying, and to hold such would mistakenly read the 'transitory duration' language out of the Copyright Act.

Treating buffer reproductions as phonorecords would grant copyright holders an unintended monopoly over the right to read and access digital information.

The proposed rulemaking would have damaging implications for digital transmission technology, as all digital transmission technology requires buffering.

Internet browsing necessarily creates buffer reproductions of web content and would be subject to unnecessary copyright regulation under the proposed changes.

Innovation in the area of remote network based data storage would be chilled, even though remote storage can be cheaper, safer, and more convenient.

Recent and future innovation in cloud computing would be chilled, endangering the widespread availability of supercomputing technology.

III. THE OFFICE'S CONCLUSION THAT BUFFER REPRODUCTIONS ARE PHONORECORDS SHOULD BE REVISITED BECAUSE OF RELIANCE ON THE REVERSED CABLEVISION DECISION AND DMCA SECTION 104 REPORT.

As the Copyright Office faces significant challenges in addressing the confusion surrounding the treatment of various digital phonorecord distribution methods, this endeavor should be undertaken cautiously so as to prevent a chilling of innovations in digital technology. A finding that buffer reproductions of digital sound recordings are copies or phonorecords would have just such a chilling effect, discouraging innovation in data transmission technology. While we understand the current proposed rulemaking is intended to limit discussion to buffer reproductions of phonorecords in the context of the Section 115 compulsory license for Musical Works, drawing a dividing line between the creation of phonorecords and the creation of copies of other protected works such as written, pictorial, or audiovisual works would be impractical when discussing the fundamental concept of what is a “copy” under copyright law. The elimination of the durational requirement in the evaluation of buffer reproductions of sounds recordings would necessarily implicate the reproduction of other kinds of protected works.

In the Notice of Proposed Rulemaking, the office cited the *DMCA Section 104 Report* and *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F.Supp.2d 607 (S.D.N.Y. 2007) for their conclusion that buffer reproductions are phonorecords.¹ The Notice said, “The office has no reason to believe that developments in either technology or the law require us to revisit the above-stated conclusions.”² The Second Circuit’s recent reversal of the district court’s Cablevision decision, as well as

¹ See *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, 36 CFR Part 201 and 255 at 40809.

² *Id.*

their repudiation of the district court's reliance on the DMCA Section 104 Report, represent substantial developments of law which warrant the Office to revisit their conclusions on buffer reproductions.³ The Office should follow the recent Cablevision reversal from the Second Circuit as a guide for the treatment of buffer reproductions.

In the Cablevision decision, the Second Circuit reversed the district court's ruling which argued in part that buffer reproductions of time shifted television programming were copies of protected works.⁴ Judge Walker argued in his opinion that the district court "mistakenly limited its analysis primarily to the embodiment requirement" and "[as] a result of this error, once it determined that the buffer data was "[c]learly ... capable of being reproduced," i.e., that the work was embodied in the buffer, the district court concluded that the work was therefore "fixed" in the buffer, and that a copy had thus been made."⁵ We agree with Judge Walker that such an approach is mistaken; mere embodiment does not automatically implicate fixation.

The plain language of the Copyright Act supports the notion that buffer reproductions are not copies or phonorecords of protected works. Judge Walker explained,

"Copies," as defined in the Copyright Act, "are material objects ... in which a work is fixed by any method ... and from which the work can be ... reproduced." *Id.* § 101. The Act also provides that a work is "'fixed' in a tangible medium of expression when its embodiment ... is sufficiently permanent or stable to permit it to be ... reproduced ... for a period of more than transitory duration." *Id.* We believe that this language plainly imposes two distinct but related requirements: the work must be embodied in a medium, *i.e.*, placed in a medium such that it can be perceived, reproduced, etc., from that medium (the "embodiment requirement"), and it must remain thus embodied "for a period of more than transitory

³ See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 2008 WL 2952614, 3 (C.A.2 (N.Y.), 2008).

⁴ See *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F.Supp.2d 607 (S.D.N.Y. 2007).

⁵ *Cartoon Network*, 2008 WL 2952614 at 5.

duration” (the “duration requirement”). See 2 *Melville B. Nimmer & David Nimmer, Nimmer on Copyright* § 8.02[B][3], at 8-32 (2007). Unless both requirements are met, the work is not “fixed” in the buffer, and, as a result, the buffer data is not a “copy” of the original work whose data is buffered.”⁶

Much of the confusion surrounding the duration requirement stems from a misunderstanding of the Ninth Circuit’s ruling in *MAI Systems Corp. v. Peak Computer Inc.*, 991 F.2d 511 (9th Cir.1993). While *MAI Systems* serves as a strong precedent for embodiment analysis, the Ninth Circuit only “referenced the “transitory duration” language but did not discuss or analyze it.”⁷ About the *MAI Systems* decision Judge Walker reasoned,

“[W]e construe *MAI Systems* and its progeny as holding that loading a program into a computer's RAM can result in copying that program. We do not read *MAI Systems* as holding that, as a matter of law, loading a program into a form of RAM always results in copying. Such a holding would read the “transitory duration” language out of the definition, and we do not believe our sister circuit would dismiss this statutory language without even discussing it.”⁸

Judge Walker also criticizes the DMCA Section 104 Report for similarly trying to omit the duration requirement;

“[T]he Copyright Office's 2001 DMCA Report, also relied on by the district court in this case, explicitly suggest that the definition of “fixed” does not contain a duration requirement. However, as noted above, it does suggest that an embodiment is fixed “[u]nless a reproduction manifests itself so fleetingly that it cannot be copied, perceived or communicated.” *DMCA Report, supra*, at 111. As we have stated, to determine whether a work is “fixed” in a given medium, the statutory language directs us to ask not only 1) whether a work is “embodied” in that medium, but also 2) whether it is embodied in the medium “for a period of more than transitory duration.” According to the Copyright Office, if the work is capable of being copied from that medium for any amount of time, the answer to both

⁶ *Cartoon Network*, 2008 WL 2952614 at 4.

⁷ *Id.* at 5.

⁸ *Id.* at 6.

questions is “yes.” The problem with this interpretation is that it reads the “transitory duration” language out of the statute.” *Id.*⁹

IV. TREATING BUFFER REPRODUCTIONS AS PHONORECORDS WOULD GRANT COPYRIGHT HOLDERS AN UNINTENDED MONOPOLY OVER THE RIGHT TO READ AND ACCESS DIGITAL INFORMATION.

We strongly urge the Office to reject reasoning which seeks to eliminate the durational requirement from an analysis of buffer reproductions. Such reasoning would have damaging implications for digital transmission technology, as all digital transmission technology requires buffering.¹⁰

The most troubling example of a digital technology being dramatically affected by such treatment of buffer reproductions is internet browsing. As noted by numerous prominent professors of law in their *Brief of Amicus Curiae* to the Second Circuit,

“Because it is impossible to browse or view a website on the Internet without the browsing computer necessarily and automatically making transitory buffer copies in RAM, a holding that all RAM reproductions are “copies” within the meaning of the Copyright Act would subject these transitory RAM reproductions to copyright regulation as well – again, despite the fact that they are a necessary incident of browsing the Internet with a digital-processing device. Thus, the fundamental “right to read” – a right that has never been part of the copyright holder’s bundle of rights – would, in the digital age, be brought for the first time within the copyright monopoly.”¹¹

Unfortunately, the negative effects of treating buffer reproductions as copies would not be limited to general internet browsing but would extend to usage of network based remote storage services, remote data transmission services, and ‘cloud’ computing.

⁹ *Id.*

¹⁰ See *Twentieth Century Fox*, 478 F.Supp.2d at 613.

¹¹ *Brief of Amici Curiae Law Professors in Support of Defendants Counterclaimants and Appellants and Reversal*, Docket No. 07-1480-cv(L), 07-1511-cv(CON).

Central storage of digital information can be cheaper, more secure, and more reliable. It is significantly cheaper to bundle storage in a large central server and you can generally provide faster and more reliable equipment than most of the hard drives currently packed into personal computers, laptops, and DVR units. Remote data storage also provides some individuals peace of mind as they can backup their files online or for easy access to their files when they are away from where their information is stored. The proposed treatment of buffer reproductions would ultimately chill innovation in the remote data storage industry, even though remote storage can be cheaper, safer, and more convenient.

Also, what is often referred to as ‘cloud computing’ would implicate copyright liability with every transaction. Cloud computing is;

“Internet ('Cloud') based development and use of computer technology ('Computing'). It is a style of computing where IT-related capabilities are provided “as a service”, allowing users to access technology-enabled services "in the cloud" without knowledge of, expertise with, or control over the technology infrastructure that supports them. It is a general concept that incorporates software as a service, Web 2.0 and other recent, well-known technology trends, where the common theme is reliance on the Internet for satisfying the computing needs of the users. For example, Google Apps provides common business applications online that are accessed from a web browser, while the software and data is stored on the servers.”¹²

The internet based nature of cloud computing necessitates the creation of buffered reproductions of digital information from computer to computer and would therefore be implicated by the proposed rulemaking, chilling innovation and creating uncertainty in the technology’s future. Currently cloud computing is becoming increasingly popular as it provides access to software and super-computing power for individuals and businesses that have not had access to such technology in the past due to the high cost of the

¹² *Cloud Computing*, Wikipedia, August 14, 2008, < http://en.wikipedia.org/wiki/Cloud_computing>.

equipment.¹³ Organizations such as the military, government intelligence agencies, large corporations, and research labs have had access to super-computing technologies in the past to perform massive calculations measured in the tens of trillions per second while those limited to the power of even the most powerful personal computers have been limited to around three billion calculations per second.¹⁴ Cloud computing shows promise to even the playing field between those who have and those who have not been able to afford such technology in the past, a goal that plainly falls in line with the aims of the Copyright Act.¹⁵ This technology will also provide individuals the ability to access supercomputer-like processing power and complex software applications through simple network enabled devices such as mobile phones and laptops, an innovation that will drastically improve mobile computing capabilities.¹⁶

V. CONCLUSION

The Second Circuit's *Cartoon Network* decision should be given full attention by the Copyright Office in considering action in this proceeding. It is a significant repudiation of the arguments regarding buffer reproductions in the District Court's decision in *Cablevision*, the section 104 study, as well as the original notice for this proceeding. Judge Walker succeeded in clarifying the need for both an embodiment as well as a durational requirement when considering if a copy has been made. This analysis is as true for the Section 115 compulsory license to make and distribute phonorecords of

¹³ See *Computing Heads for the Clouds*, Business Week, November 16, 2007, <http://www.businessweek.com/technology/content/nov2007/tc20071116_379585.htm>.

¹⁴ Id.

¹⁵ See U.S. Const. art. I, § 8, cl. 8.

¹⁶ See *In Sync to Pierce the Cloud*, The New York Times, July 17, 2008, <http://www.nytimes.com/2008/07/17/technology/personaltech/17pogue.html?_r=1>.

a musical work by means of digital phonorecord deliveries as it is for all types of protected works transmitted digitally. The analysis accounts for new technologies, and encourages innovation in digital transmission and cloud computing, without unduly extending rights never before granted under copyright law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Art Neill", written over a horizontal line.

Art Neill
Attorney
New Media Rights / Utility Consumers' Action Network
3100 5th Ave Suite B
San Diego, CA 92111
art@newmediarights.org
www.newmediarights.org

A handwritten signature in black ink, appearing to read "Dillon Coil", written over a horizontal line.

Dillon Coil
Legal Intern
New Media Rights / Utility Consumers' Action Network
3100 5th Ave Suite B
dillon@newmediarights.org
www.newmediarights.org

August 14, 2008