

COPYRIGHT AND NEW TECHNOLOGIES

AUTUMN 2015

LOYOLA LAW SCHOOL

JUSTIN HUGHES

Take Home Examination

Introduction

This is a twenty-four (24) hour, take-home examination. You have 24 hours from the time you pick up this examination at the Registrar's Office to submit your answers back to the Registrar's Office.

Conditions and your professional commitments

Once you have received this examination, you may not discuss it with anyone prior to the end of the LLS examination period. Nor may you discuss the exercise at ANY time with any student in the class who has not taken it (in case a student gets a special dispensation to take an exam later). You may NOT collaborate on this work.

Professor Hughes permits you to use any and all inanimate resources. The only limitations on outside resources are those established by the law school for take home examinations.

By turning in your answers you certify that you did not gain advance knowledge of the contents of the examination, that the answers are entirely your own work, and that you complied with all relevant Loyola Law School rules.

The Examination consists of two parts. Part I is a set of true/false questions worth 30 points. In Part II, you will choose two out of three essay topics, with each essay answer worth 35 points. The combined essays cannot exceed a 2,200 word limit.

The Exhibits appear at the end of this document.

GOOD LUCK

*Thank you for an enjoyable class. Happy holidays
and may you have a 2016 full of good health, adventure, and meaning.*

I. TRUE/FALSE QUESTIONS

(30 points)

This part of the exam is worth 30 points. Each answer is worth 3 points. There are 12 questions, so in the same spirit as the LSAT and other standardized tests, you can get two (2) wrong and still get a maximum score (30 points) on this section.

Please provide your answers to this section as a single column series, numbered 1 to 12, with “T” or “F” beside each number. Make sure these T/F answers are on a separate page from the essay.

If you are concerned about a question being unclear, you may write a note at the end, but only do so if you believe that there is a fundamental ambiguity in the question.

01. *Universal Music Australia v. Sharman Licence Holdings* provides a narrower scope to liability for “authorizing” copyright infringement under Australian copyright law than the House of Lords provided for “authorizing” copyright infringement under English copyright law in the 1988 *CBS Songs v. Amstrad Consumer Electronics* decision.
02. Article 8 of the Chinese Supreme People’s Court “Interpretations” provides that if a copyright owner is unable to provide adequate information for its take-down request (“proof of his identification, ownership of the copyright and the circumstances of the infringement”), then the “warning or request [for take-down] shall be deemed not to have been made” – a legal provision roughly similar to 17 U.S.C. 512(c)(3)(B)(i), which provides that where a take-down notice “fails to comply substantially” with the 512(c) information requirements, the notice shall not be considered in determining whether the ISP knows or should have known about the infringing activity.

03. In *Diversey v. Shmedly*, 738 F.3d 1196 (2013) the 10th Circuit Court of Appeals concluded that a copyright owner's right of distribution under 17 U.S.C. 106(3) is not violated unless the defendant has actually distributed an unauthorized copy of the work to a member of the public.
04. The 2nd Circuit Court of Appeals in *Cartoon Network v. Cablevision Systems* (2008) concluded that Cablevision, not its customers, made the copies of television programs recorded by Cablevision's "Remote Storage" Digital Video Recorder (RS-DVR) system.
05. In the *Rogue File* case, the Tokyo district court developed a three part test to determine the liability of the P2P service; the second and third elements of that test are similar to the two elements of vicarious liability in U.S. copyright law.
06. 17 U.S.C. §1201 in U.S. copyright law and §53a of Norwegian copyright law implement Article 12 of the 1996 WIPO Copyright Treaty (WCT).
07. In *Lexmark International v. Static Control Components* (6th Cir. 2004) the appellate court determined that Lexmark's "Toner Loading Program" was ineligible for copyright protection.
08. The 1996 WIPO Copyright Treaty (WCT) defines the "right of distribution" as "the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership."
09. In their laws on internet service provider (ISP) liability, the United States and China provide for "safe harbors" against potential liability when the ISP takes down infringing material "expeditiously" while the European Union's "Information Society" Directive provides for "joint liability" when the ISP fails to remove the infringing content.
10. Computer software was not guaranteed copyright protection in any multilateral intellectual property agreement until the 1996 WIPO Copyright Treaty (WCT).

11. In *In re Aimster* (7th Cir. 2003), Judge Posner determined that the encryption feature that prevented Mr. Deep from knowing what files were being copied did not prevent Deep from being liable because “[w]illful blindness is knowledge, in copyright law”

12. In *Authors Guild v. Google, Inc.* (2d Cir. 2015), Judge Leval concluded that the copyright owner in a book has “an exclusive derivative right to supply . . . information [about the book] through query of a digitized copy.”

COMMENTS on FUNDAMENTAL AMBIGUITIES? Note them with your T-F answers!

PART II – ESSAY QUESTIONS

(70 points total)
[2,200 word limit]

In this part of the Examination, you are to choose TWO of the three essay topics.

Each essay is worth 35 points; each essay should be approximately 1000-1200 words **with the combined word count of the two essays not exceeding 2,200 words**. At the end of each essay, **indicate the word count of that essay**.

*Please make sure that you use 1.5 line or double line spacing and include a header or footer **on each page** that has both the page number **and the exam number**.*

Please make sure each essay starts on a separate page.

ESSAY A ISP LIABILITY IN JAPAN

We have seen that Japanese courts had as little sympathy for “peer to peer” (PSP) systems as American and Australian courts, but what about mainstream internet service providers (ISPs)?

Exhibit A shows Japan's 2001 "Provider Liability Limitation Act," the Japanese counterpart to the section 501 provisions of the DMCA, Articles 12-15 of the E-Commerce Directive, and China's Supreme People's Court "Interpretation" (of issues relating to . . . cases of Copyright Disputes on Computer Networks).

Based on your in-depth knowledge of the corresponding law in these other jurisdictions, evaluate the Japanese law, considering the perspectives of copyright owners, ISPs, and internet users.

* * *

ESSAY B WHAT TO DO ABOUT "MOD CHIPS"

The PlayStation video game system is one of the great successes of the Sony Corporation. The software on a PlayStation device is engineered to run only legitimate Sony game CD/DVDs through a kind of technological "handshake" between the code on a legitimately manufactured Sony game CD/DVD and the software on the PlayStation device.

A few years ago, Sony found itself defending its lucrative PlayStation market against "modification chips" (called "mod chips") that, once installed on a PlayStation platform, override the software handshake. In other words, without a mod chip, you could buy pirate video game discs, but they would not operate on the PlayStation. Once a mod chip is installed on your PlayStation, you can use unauthorized CD/DVDs on the system.

Sony sued and prevailed in many jurisdictions, including Australia, the United Kingdom, Japan, and Germany. Sony brought two suits in the United States, but one was decided on a stipulated judgment and the other was a default judgment, so questions about the mod chip technology under U.S. copyright law were never fully explored by U.S. courts.

Exhibit B is an approximately 2,000 word excerpt from the 2008 decision of the Munich Regional Court shutting down modchip sales in Germany. Based on what you learn about the modchip technology in that excerpt – and accepting the German court's factual conclusions – write an essay describing how a mod-chip distributor in the United

States would fare against a lawsuit brought both for violation of 17 U.S.C. §1201 and on theories of secondary liability under U.S. copyright law.

* * *

ESSAY C

CARTOON NETWORK IN THE SHADOW OF AEREO

Early in the semester, we read *Cartoon Network v. Cablevision Systems* (2d Cir. 2008) in which the Second Circuit examined Cablevision’s “Remote Storage DVR” (RS-DVR) system that allowed a subscriber to choose selected television programs for recording and playback like a normal VCR or DVR system, but in which the recording was done on Cablevision’s central servers and, when requested, the copy was transmitted back to the subscriber through the cable system.

On the first issue, the “buffer” copying definitely being done by Cablevision, the Court of Appeals concluded that while a buffer copy *could* meet the fixation standards necessary for a section 106 “reproduction,” Cablevision’s activities did not. As to the second question posed in the case – *who* made the copies of programs kept on Cablevision central servers – the Court of Appeals concluded that it was the subscriber who did this copying, almost certainly shielding the copying from liability under the Supreme Court’s *Betamax* case.

We did not study the third issue: liability for transmission of the copy back to the subscriber. Here is how the appellate court framed the question:

“No one disputes that the RS–DVR playback results in the transmission of a performance of a work—the transmission from the Arroyo Server to the customer’s television set. Cablevision contends that (1) the RS–DVR customer, rather than Cablevision, does the transmitting and thus the performing and (2) the transmission is not “to the public” under the transmit clause.”

The Court of Appeals declined to decide issue “(1)” but said it could be a different result than its conclusion that the subscriber made the copy, i.e. perhaps the subscriber made the copy and *Cablevision* transmitted it back. The court said:

We need not address Cablevision’s first argument further because, even if we assume that Cablevision makes the transmission when an RS–DVR playback occurs, we find that the RS–DVR playback, as described here, does not involve the transmission of a performance “to the public.”

The Court of Appeal’s reasoning is provided in **Exhibit C**. The appellate panel concluded that the transmission to a single subscriber from a copy uniquely made for that subscriber is “private” not “public.”

Obviously, the Second Circuit’s reasoning as to a “private” performance may be in tension, if not conflict, with the Supreme Court’s subsequent 2014 decision in *ABC v. Aereo*.

Review the Second Circuit’s reasoning as to why the RS-DVR transmissions back to a subscriber were not “public” (**Exhibit C**) and see if there is any way to distinguish the Cablevision and Aereo technologies on this question. Is there any way to preserve the Second Circuit’s conclusion? Would you recommend that the copyright holders relitigate the Cablevision case? Is there any way for Cablevision’s RS-DVR service to survive?

[**Exhibit C** is a roughly 2,200 excerpt from the Second Circuit’s 3,600 word discussion on this point; there is no need to go back to the original.]

* * *

EXHIBITS FOLLOW

EXHIBIT A**JAPAN -- PROVIDER LIABILITY LIMITATION ACT**

(passed November 30, 2001, effective May 27, 2002)

(Object)

Article 1. This Law establishes limitation of liabilities of the Designated Telecommunications Service Provider, and the right to disclosure of the Sender Identity Information in the event of impairment of rights by distribution of information by Designated Telecommunications.

(Definitions)

Article 2. For the purpose of this Law, the terms listed under the items below shall have the meanings as ascribed therein:

- (1) Designated Telecommunications: Transmission of telecommunications (used in this item as per the definition in Article 2, Item 1, of the Telecommunications Business Law (Law No. 86 of 1984)) to be received by unspecified persons, excluding the transmission of telecommunications to be directly received by the public;
- (2) Designated Telecommunications Facilities: Telecommunications facilities (used as per the definition in Article 2, Item 2, of the Telecommunications Business Law) which are made available for use in Designated Telecommunications
- (3) Designated Telecommunications Service Provider: A person who intermediates communication between other persons with Designated Telecommunications Facilities, or who otherwise makes available the Designated Telecommunications Facilities for the use of communication of other persons;
- (4) Sender: A person who has recorded information in the storage media (such media from which the recorded information will be transmitted to unspecified persons) of Designated Telecommunications Facilities used by a Designated Telecommunications Service Provider, or who has input information into the transmission equipment (such equipment from which the input information will

be transmitted to unspecified persons) of the said Designated Telecommunications Facilities.

(Limitation of Liabilities)

Article 3. In the event that rights of a third party is impaired because of distribution of information by Designated Telecommunications, the Designated Telecommunications Service Provider who uses the Designated Telecommunications Facilities for the said Designated Telecommunications (hereinafter in this Article referred to as the "Subject Service Provider") shall not be liable for compensation of the damages caused therefrom, *unless* it is technically possible to take measures to prevent transmission of the information which has impaired the rights to unspecified persons *and*:

- (1) The Subject Service Provider was aware of the impairment of the rights of the third party by distribution of information by the said Designated Telecommunications; *or*
- (2) The said Subject Service Provider was aware of the distribution of the information by the said Designated Telecommunications and there is sufficient and reasonable ground to find that the Provider could have been aware of the impairment of the rights of the third party by such distribution of the information by the said Designated Telecommunications.

The preceding provision shall not apply, however, if the said Subject Service Provider was the Sender of the information which impaired the said rights.

2. When a Designated Telecommunications Service Provider has taken measures to prevent transmission of information by Designated Telecommunications, the Designated Telecommunications Service Provider shall not be liable for compensation for the damages caused on the Sender who has been prevented from transmitting the information, *if* the measures were necessary to prevent transmission to unspecified persons of the said information *and*:

- (1) There was sufficient and reasonable ground for the said Designated Telecommunications Service Provider to believe that distribution of the information by the said Designated Telecommunications has

unjustifiably impaired the rights of a third party; *or*

- (2) When a party claiming the impairment of his rights because of distribution of information by the Designated Telecommunications filed with the Subject Service Provider a request for measures (the “Preventive Measures” in this Item) to prevent transmission of the information impairing the rights (the “Impairing Information”), showing the Impairing Information, the rights he claims to have been impaired and the ground of the claim of impairment (the “Impairing Information, Etc.”) and the said Subject Service Provider contacted the Sender of the said Impairing Information showing the Impairing Information, Etc. to ask if the Sender would consent to introduction of the said Preventive Measures, the said Sender has not filed refusal of the consent to the introduction of the said Preventive Measures within seven (7) days of the date when the Sender received the said contact.

(Disclosure of Sender Identity Information)

Article 4. A party who claims to have been subjected to impairment of its rights because of distribution of information by Designated Telecommunications, is entitled to demand disclosure, from the Designated Telecommunications Service Provider which uses the Designated Telecommunications Facilities made available for use of the said Designated Telecommunications (the “Subject Disclosing Service Provider”), of the Sender Identity Information (the name, the address and other information conducive to identification of the Sender of the Impairing Information, as stipulated by a Ordinance of the Ministry of Public Management, Home Affairs, Posts and Telecommunications) relating to the said impairment of the rights in the possession of the said Subject Disclosing Service Provider, *if*:

- (1) The rights of the party demanding the said disclosure have been obviously impaired by distribution of the Impairing Information;
and
- (2) The said Sender Identity Information is necessary for the pursuit of the right to compensation for damages of the party demanding the said disclosure, or there is otherwise justifiable ground for disclosure of the Sender Identity Information.

2. Upon receipt of the demand of disclosure under the preceding paragraph, the Subject Disclosing Service Provider shall hear the opinion of the said Sender regarding the disclosure, unless the Provider is unable to contact the Sender of the Impairing Information relating to the said demand of disclosure or there are otherwise special circumstances.
3. The party who received disclosure of the Sender Identity Information under paragraph 1 shall not take any action which unjustifiably damages the honor or the peace of life of the said Sender, misusing the Sender Identity Information.
4. The Subject Disclosing Service Provider shall not be liable for compensation of damages caused by refusal of the disclosure under paragraph 1, on the party who demanded the said disclosure, *unless* the Provider has acted with wrongful intent or in gross negligence.

Supplemental Provisions

This Law shall be enforceable from the date to be determined by a Cabinet Order which shall be within six months of the date of promulgation thereof.

EXHIBIT B

MUNICH REGIONAL COURT I Lenbachplatz 7, 80316 München/Munich

Pronounced on 13 March 2008

Clerk of the Court

**IN THE NAME OF THE PEOPLE
JUDGMENT**

In the interim injunction proceedings

Kabushi Kaisha Sony Computer Entertainment Inc., represented by its President, 2-6-21 Minamiaoyama, Minato-ku, JP-Tokyo, 107-0062, Japan,

- Applicant 1 -

Sony Computer Entertainment Europe Ltd., represented by its President David Reeves, 10 Great Marlborough Street, GB-W1F 7LP, London, United Kingdom

- Applicant 2 -

versus

Lidia Maltos, acting under the business name of “Game World”, Bartholomäus-Str. 47, 42277 Wuppertal

* * *

JUDGMENT

I. The interim injunction issued by the Chamber on 14 September 2007 shall remain upheld.

II. The Respondent shall bear the further costs of these proceedings.

FACTS OF THE CASE

* * *

Applicant 1, according to its submission a company registered under the laws of Japan in the legal form of a "Kabushiki Kaisha", produces game consoles and in particular "PlayStation", "PSone", "PlayStation2" and "PSP" (PlayStation Portable). Applicant 2 distributes games produced by Applicant 1 in Europe under an exclusive licence; in addition, Applicant 1 also produces own games.

The Respondent runs a business distributing entertainment electronics of all kinds. At the address www.the-gamers-world.de, she also operates an online shop (Exhibit AST 9).

The PlayStation2 game console manufactured by Applicant 1 and obtainable in Germany since November 2000 is controlled by a so-called controller, an input device including joysticks and key switches. The image and sound generated by PlayStation2 can be displayed by a usual television set. The basic model does not have any games stored on it. A CD or DVD containing a game must be loaded via a CD/DVD drive. The operating system installed in the platform verifies whether the inserted data carrier is an original game. If so, the data parts of the programme required for execution of the game are loaded into and executed in the internal memory of the console, the user can now play the video game.

In order to prevent games other than original ones being played on PlayStation2, each CD/DVD of an original game has a so-called "lead-in area", which contains additional coded information. The remaining area of the data carriers, where the actual games software is stored, essentially corresponds to the structure of conventional data carriers. It is possible to produce copies of this data part on blank DVDs by using customary DVD burning equipment. These copies are frequently called "back-ups". The widely available burning devices are, however, not able to write the coded information in the lead-in area.

Each time a new data carrier is inserted, the PlayStation2 will verify whether or not the coded information exists in the lead-in area. If it does not, the data carrier is rejected. Consequently, copies of original games are as a rule not able to be played on PlayStation2.

Polyphony Digital Inc., Japan, which is the subsidiary company of Applicant 1, developed the game Gran Turismo 3. Applicant 1 claims to own the relevant exclusive copyrights that it has licensed to Applicant 2 for Europe. There is a copyright notice on the game with the text "Copyright 2001 Sony Computer Entertainment". The game Eye Toy Play was developed by Applicant 2, who claims to own the relevant exclusive copyrights. The game bears the copyright notice "Copyright 2003 Sony Computer Entertainment Europe Ltd.". There are also third

party companies that produce and offer games for PlayStation2 on an independent basis and that pay a corresponding royalty to Applicant 1.

By purchasing the data carrier containing a game, the user acquires a licence to use such game. The conditions of the licence can be inferred from the copyright notice printed visibly on each game package; the notice on the game Gran Turismo 3 reads as follows:

“Game (c) 2001 Sony Computer Entertainment Inc. Library Programs (c) 1997-2001 Sony Computer Entertainment Inc. exclusively licensed to Sony Computer Entertainment Europe. FOR HOME USE ONLY. Unauthorised copying, adaption, rental, lending, distribution, extraction, re-sale, arcade use, charging for use, broadcast, public performance and internet, cable or any telecommunications transmission, access or use of this product or any trademark or copyright work that forms part of this product are prohibited. Published by Sony Computer Entertainment Europe. Developed by Polyphony Digital Inc. ... All rights reserved.”

A corresponding note can also be found on the game Eye Toy Play.

Copies of hundreds of PlayStation2 games are in circulation on the Internet via the well-known exchange platforms, which can be downloaded illegally there. Any such copies can, however, not be played in a PlayStation2 in its original state.

The Respondent offers so-called “modchips” for sale. These are circuit boards to be installed as hardware in the game consoles. Many of these modchips consist materially of an integrated switching circuit, colloquially called chip. Modchips are, as a general rule, connected to the circuit board of the console with the help of short wires. As a rule, between 4 and 25 points on the circuit board of the console have to be soldered. Illustrative instructions for installation are available on the Internet (Exhibit Ast 7). The modchips contain either permanently programmed micro controllers or programmable logical components. If and to the extent the modchips are programmable, they are either distributed as ready programmed chips or are programmed by the user himself with the help of the instructions available on the Internet.

The modchips in dispute are programmed in a way that they deceive the operating system of PlayStation2. If a copied game is inserted, the modchip feigns for the operating system the presence of the coded information that is additionally located in the lead-in area in case of original DVDs. The copy of the game can then be played like an original one. The price of a modchip plus installation is in the region of €70- 80.

* * *

In addition to allowing copies of games to be played, the modchips in dispute also permit playing of so-called import games, i.e. of original games published in another region of the world, and the playing of so-called homebrew software. According to the Applicants' pleading, there is no technical connection of the playing of copies with these functions and can be realised also separately.

* * *

REASONS FOR THE DECISION

The Chamber's interim injunction of 14 September 2007 was to be endorsed as the existence of a claim and a reason for injunction was still substantiated.

A.

The Applicants are entitled to issuance of an interim injunction pursuant to Sections 97 (1) 1st sentence of the UrhG, 95 a (3) first sentence of the UrhG, 823 (2), 1004 of the BGB.

* * *

3. Even though individual cases in the past have neither been stated nor evidenced, it must be assumed that the Respondent has unlawfully infringed upon the Applicants' exclusive copyrights by aiding and abetting illegal reproduction (Section 97 (1) 1st sentence of the UrhG). In any event, however, there is a danger of first infringement (cf. also Federal Court of Justice (Bundesgerichtshof) GRUR 2007, 708 para. 30, 41 - Internet-Versteigerung II). The fact that a definite risk does exist of those very games being reproduced for which the Applicants have the rights has not been denied by the Respondent.

a) The use as provided by the owners of game consoles of the modchips offered by the Respondent constitutes a breach of the right to reproduction of Applicant 2 in terms of Section 15 (1) No. 1, Section 16 of the UrhG. Admittedly, the modchip is not used in producing a so-called backup, i.e. a copy of an original game on a CD or DVD. The fact that the copy is made at all only with regard to possibilities of being used via modchips does not justify any participation of the Respondent in this reproduction operation.

By making modchips available, the Respondent is nevertheless aiding and abetting illegal reproduction of the games in the memory of the game console. Likewise, the loading of works stored electronically into the memory of a computer constitutes an act of reproduction pursuant to Section 16 (1) of the UrhG. Admittedly, this is not clear from the wording of the Act, which in addition also includes temporary acts of reproduc-

tion, but results nonetheless from an appraising interpretation of the text of the law (left open in BGH GRUR 1991, 449, 453 - Betriebssystem; GRUR 1994, 363, 365 - Holzhandelsprogramm). The interpretation must be oriented on the legitimate interest of the holder of the right in participating in the economic advantages involved in the use of its work. Accordingly, in the legal sense a reproduction is always present if the technical reproduction operation leads to increased utilisation of the work.

* * *

The fact that the game is not in each case loaded in its entirety into the working memory is harmless. For one, as already stated the Respondent has not denied that the Applicants' games also contain individual components protected by copyright such as graphics, images and works of music. Secondly, also in respect of the total work of the game, irrespective of its classification into a certain type of work, no fading of the individual characteristics as set forth in the concept policy of Section 24 of the UrhG is to be assumed with regard to the respective part loaded into the working memory. This is already opposed by the fact that the user of a certain game has to be able to identify individual game sequences as definitely belonging to the overall context, as otherwise the game would be unable to be sold in the market for console games due to the chain of irrelevant game sequences.

* * *

b) The Respondent is aiding and abetting these unlawful acts of reproduction by distributing the modchips, which render these very acts possible. The Respondent is also acting with conditional intent of aiding and abetting these unlawful acts of reproduction. The Respondent is aware that the modchips in dispute are as a rule used to run so-called backups on the PlayStation2 (cf. BGH GRUR loc. cit. para. 31 – Internet-Versteigerung II).

c) The claim is not opposed by the fact that the modchips in dispute contain other functions besides the playing of copies of games. Admittedly, according to case law (BGH GRUR 1965, 104, 106 - Personalausweise), the assertion of a cease and desist claim under copyright law can be excluded under the precept of good faith if it cannot be ruled out that a - possibly only slight yet unable to be completely disregarded - part of the acquiring parties uses the items (in the decision in question tape recorders were concerned) for purposes not affecting the rights of the Petitioner. In the case in point, this prerequisite is not fulfilled. The part of the acquiring parties using modchips for purposes not affecting the rights of the Applicants may be disregarded. In practice, no importance can be ascribed to the functions of playing import games and "home-

brew". The Applicants have presented well-founded arguments that virtually no user would purchase a modchip solely for this purpose.

II. The Plaintiffs are also entitled to a cease and desist claim with the same content under Sections 95 a (3) No. 2 and No. 3 of the UrhG.

According to Section 95 a (3) No. 2 of the UrhG, it is prohibited to produce, import, distribute, sell and use for advertising and commercial purposes any devices that apart from circumventing effective technical measures only have a restricted economic purpose or use. Pursuant to No. 3 of the regulation, such items are prohibited that were mainly designed, produced or modified to render possible or facilitate the circumvention of technical measures. Under Section 95 a (2) of the UrhG, technical measures shall mean such technologies, devices or components, which are designed in normal operation to prevent or restrict acts relating to works protected by copyright that have not been authorised by the holder of the right. Compliance with these prerequisites is made by the distribution of the modchips in dispute.

1. The games Gran Turismo 3 and Eye Toy Play constitute works protected under the law on copyright (see above). The reproducing of copies of these games in the working memory of the PlayStation2 is not authorised by the Applicants as the holders of rights.

2. The software and hardware components of the PlayStation2, which verify the presence of the so-called lead-in area, comply with the requirements on technical measures as they prevent the reproduction of the games in the working memory that was not authorised by the Applicants (see above). They are also effective even if they can be circumvented by the use of a modchip. In this context, the law does not require any control to one hundred percent, since in this case a circumvention would be impossible anyway and legal protection against circumvention not required (Dreier/Schulze, UrhG, 2nd ed., § 95 a para. 15).

3. The modchips in dispute are designated for circumventing control of the presence of a lead-in area. As already stated, apart from this, they have virtually no economic purpose or use (Section 95 a (3) No. 2 of the UrhG). They were also mainly produced to this end (Section 95 a (3) No. 3 of the UrhG).

--- end of excerpt from Munich court decision ---

EXHIBIT C

THE CARTOON NETWORK LP, LLLP and CABLE NEWS NETWORK L.P., L.L.L.P., v. CSC HOLDINGS, INC. and CABLEVISION SYSTEMS CORPORATION

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
536 F.3d 121 (2008)

[*discussion of transmission of stored copies of works back to subscriber*]

OPINION

JOHN M. WALKER, JR., *Circuit Judge*:

* * *

III. Transmission of RS–DVR Playback

Plaintiffs’ final theory is that Cablevision will violate the Copyright Act by engaging in unauthorized public performances of their works through the playback of the RS–DVR copies. The Act grants a copyright owner the exclusive right, “in the case of ... motion pictures and other audiovisual works, to perform the copyrighted work publicly.” 17 U.S.C. § 106(4). Section 101, the definitional section of the Act, explains that

[t]o perform or display a work “publicly” means (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Id. § 101.

The parties agree that this case does not implicate clause (1). Accordingly, we ask whether these facts satisfy the second, “transmit clause” of the public performance definition: Does Cablevision “transmit ... a performance ... of the work ... to the public”? *Id.* No one disputes that the RS-DVR playback results in the transmission of a performance of a work—the transmission from the Arroyo Server to the customer’s television set. Cablevision contends that (1) the RS-DVR customer, rather than Cablevision, does the transmitting and thus the performing and (2) the transmission is not “to the public” under the transmit clause.

As to Cablevision’s first argument, we note that our conclusion in Part II that the customer, not Cablevision, “does” the copying does not dictate a parallel conclusion that the customer, and not Cablevision, “performs” the copyrighted work. The definitions that delineate the contours of the reproduction and public performance rights vary in significant ways. For example, the statute defines the verb “perform” and the noun “copies,” but not the verbs “reproduce” or “copy.” *Id.* We need not address Cablevision’s first argument further because, even if we assume that Cablevision makes the transmission when an RS-DVR playback occurs, we find that the RS-DVR playback, as described here, does not involve the transmission of a performance “to the public.”

The statute itself does not expressly define the term “performance” or the phrase “to the public.” It does explain that a transmission may be “to the public ... 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.” *Id.* This plain language instructs us that, in determining whether a transmission is “to the public,” it is of no moment that the potential recipients of the transmission are in different places, or that they may receive the transmission at different times. The implication from this same language, however, is that it is relevant, in determining whether a transmission is made to the public, to discern who is “capable of receiving” the performance being transmitted. The fact that the statute says “capable of receiving the performance,” instead of “capable of receiving the transmission,” underscores the fact that a transmission of a performance is itself a performance. *Cf. Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 197–98, 51 S.Ct. 410, 75 L.Ed. 971 (1931).

The legislative history of the transmit clause supports this interpretation. The House Report on the 1976 Copyright Act states that

[u]nder the bill, as under the present law, a performance made available *by transmission to the public at large* is “public” even though the recipients are not gathered in a single place, and even if there is no proof that any of the *potential recipients* was operating his receiving apparatus at the time

of the transmission. The same principles apply whenever the *potential recipients of the transmission* represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service.

H.R.Rep. No. 94–1476, at 64–65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678 (emphases added).

* * *

From the foregoing, it is evident that the transmit clause directs us to examine who precisely is “capable of receiving” a particular transmission of a performance. Cablevision argues that, because each RS–DVR transmission is made using a single unique copy of a work, made by an individual subscriber, one that can be decoded exclusively by that subscriber’s cable box, only one subscriber is capable of receiving any given RS–DVR transmission. This argument accords with the language of the transmit clause, which, as described above, directs us to consider the potential audience of a given transmission. We are unpersuaded by the district court’s reasoning and the plaintiffs’ arguments that we should consider a larger potential audience in determining whether a transmission is “to the public.”

The district court, in deciding whether the RS–DVR playback of a program to a particular customer is “to the public,” apparently considered all of Cablevision’s customers who subscribe to the channel airing that program and all of Cablevision’s RS–DVR subscribers who request a copy of that program. Thus, it concluded that the RS–DVR playbacks constituted public performances because “Cablevision would transmit the *same program* to members of the public, who may receive the performance at different times, depending on whether they view the program in real time or at a later time as an RS–DVR playback.” *Cablevision I*, 478 F.Supp.2d at 623 (emphasis added). In essence, the district court suggested that, in considering whether a transmission is “to the public,” we consider not the potential audience of a particular transmission, but the potential audience of the underlying work (i.e., “the program”) whose content is being transmitted.

* * *

Doubtless the *potential* audience for every copyrighted audiovisual work is the general public. As a result, any transmission of the content of a copyrighted work would constitute a public performance under the district court’s interpretation. But the transmit clause obviously contemplates the existence of non-public transmissions; if it did not, Congress would have stopped drafting that clause after “performance.”

On appeal, plaintiffs offer a slight variation of this interpretation. They argue that both in its real-time cablecast and via the RS-DVR playback, Cablevision is in fact transmitting the “same performance” of a given work: the performance of the work that occurs when the programming service supplying Cablevision’s content transmits that content to Cablevision and the service’s other licensees. See Br. of Pls.-Appellees Twentieth Century Fox Film Corp. et al. at 27 (“Fox Br.”) (“The critical factor ... is that the same *performance* is transmitted to different subscribers at different times ... more specifically, the *performance* of that program *by HBO or another programming service.*” (third emphasis added)).

Thus, according to plaintiffs, when Congress says that to perform a work publicly means to transmit ... a performance ... to the public, they really meant “transmit ... the ‘original performance’ ... to the public.” The implication of this theory is that to determine whether a given transmission of a performance is “to the public,” we would consider not only the potential audience of that transmission, but also the potential audience of any transmission of the same underlying “original” performance.

Like the district court’s interpretation, this view obviates any possibility of a purely private transmission. Furthermore, it makes Cablevision’s liability depend, in part, on the actions of legal strangers. Assume that HBO transmits a copyrighted work to both Cablevision and Comcast. Cablevision merely retransmits the work from one Cablevision facility to another, while Comcast retransmits the program to its subscribers. Under plaintiffs’ interpretation, Cablevision would still be transmitting the performance to the public, solely because Comcast has transmitted the same underlying performance to the public.

* * *

In sum, none of the arguments advanced by plaintiffs or the district court alters our conclusion that, under the transmit clause, we must examine the potential audience of a given transmission by an alleged infringer to determine whether that transmission is “to the public.” And because the RS-DVR system, as designed, 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.

Plaintiffs contend that it is “wholly irrelevant, in determining the existence of a public performance, whether ‘unique’ *copies* of the same work are used to make the transmissions.” Fox Br. at 27. But plaintiffs cite no authority for this contention. And our analysis of the transmit clause suggests that, in general,

any factor that limits the *potential* audience of a transmission is relevant.

Furthermore, no transmission of an audiovisual work can be made, we assume, without using a copy of that work: to transmit a performance of a movie, for example, the transmitter generally must obtain a copy of that movie. As a result, in the context of movies, television programs, and other audiovisual works, the right of reproduction can reinforce and protect the right of public performance. If the owner of a copyright believes he is injured by a particular transmission of a performance of his work, he may be able to seek redress not only for the infringing transmission, but also for the underlying copying that facilitated the transmission. Given this interplay between the various rights in this context, it seems quite consistent with the Act to treat a transmission made using Copy A as distinct from one made using Copy B, just as we would treat a transmission made by Cablevision as distinct from an otherwise identical transmission made by Comcast. Both factors—the identity of the transmitter and the source material of the transmission—limit the potential audience of a transmission in this case and are therefore germane in determining whether that transmission is made “to the public.”

Indeed, we believe that *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir.1984), relied on by both plaintiffs and the district court, supports our decision to accord significance to the existence and use of distinct copies in our transmit clause analysis. In that case, defendant operated a video rental store, Maxwell’s, which also housed a number of small private booths containing seats and a television. Patrons would select a film, enter the booth, and close the door. An employee would then load a copy of the requested movie into a bank of VCRs at the front of the store and push play, thereby transmitting the content of the tape to the television in the viewing booth. *See id.* at 156–57.

The Third Circuit found that defendants’ conduct constituted a public performance under both clauses of the statutory definition. In concluding that Maxwell’s violated the transmit clause, that court explicitly relied on the fact that defendants showed the same copy of a work seriatim to its clientele, and it quoted a treatise emphasizing the same fact:

Professor Nimmer’s examination of this definition is particularly pertinent: “if the same copy ... of a given work is repeatedly played (*i.e.*, ‘performed’) by different members of the public, albeit at different times, this constitutes a ‘public’ performance.” 2 M. Nimmer, § 8.14[C][3], at 8–142 (emphasis in original)... Although Maxwell’s has only one copy of each film, it shows each copy repeatedly to different members of the public. This constitutes a public performance.

Id. at 159 (first omission in original).

Unfortunately, neither the *Redd Horne* court nor Prof. Nimmer explicitly explains *why* the use of a distinct copy affects the transmit clause inquiry. But our independent analysis confirms the soundness of their intuition: the use of a unique copy may limit the potential audience of a transmission and is therefore relevant to whether that transmission is made “to the public.” Plaintiffs’ unsupported arguments to the contrary are unavailing.

Given that each RS-DVR transmission is made to a given subscriber using a copy made by that subscriber, we conclude that such a transmission is not “to the public,” without analyzing the contours of that phrase in great detail. No authority cited by the parties or the district court persuades us to the contrary.

* * *

In sum, we find that the transmit clause directs us to identify the potential audience of a given transmission, i.e., the persons “capable of receiving” it, to determine whether that transmission is made “to the public.” Because each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, we conclude that such transmissions are not performances “to the public,” and therefore do not infringe any exclusive right of public performance. We base this decision on the application of undisputed facts; thus, Cablevision is entitled to summary judgment on this point.

This holding, we must emphasize, does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies. We do not address whether such a network operator would be able to escape any other form of copyright liability, such as liability for unauthorized reproductions or liability for contributory infringement.

End of Exhibits – end of examination #####