

FIXING RAM COPIES

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ABSTRACT

Scholars, litigants, and courts have debated the status of so-called “RAM copies” — instantiations of copyrighted works in the random access memory of computing devices — for decades. The Second Circuit’s decision in Cartoon Network v. CSC Holdings has recently reignited the controversy over these putative copies. There the court held that CSC did not create copies within the meaning of the Copyright Act when it buffered fleeting segments of television programs. In many respects, the Second Circuit’s holding is a straightforward application of the Act’s nested definitions of “copies” and “fixed.” But because the court declined to apply the bright line rule that emerged from MAI v. Peak and its progeny — that all temporary instantiations incidental to the use of digital technologies qualify as copies — Cartoon Network has met with vigorous disapproval from copyright industry representatives.

But Peak has faced sustained scholarly criticism for both expanding the scope of the copyright grant and misreading statutory language, legislative history, and precedent. By backing away from the categorical holding in Peak, the Second Circuit sidestepped many of its faults. But Cartoon Network gives rise to another set of concerns, chief among them the absence of a clear standard for distinguishing transitory instantiations from those sufficiently permanent to qualify as copies. While Peak offers a uniform, predictable, but overly inclusive rule for RAM copies, Cartoon Network provides an outcome more consistent with sound statutory interpretation and copyright policy, but lacking in predictive power.

The difficulties inherent in both Peak and Cartoon Network flow in part from their treatment of the statutory requirement that fixed copies persist for longer than a “transitory duration.” Peak ignored this requirement altogether, while Cartoon Network treated it as determinative without articulating its contours. Without a clearer conception of the outer bounds of transitory duration, courts are ill equipped to undertake the more nuanced analysis of RAM instantiations Cartoon Network suggests.

This paper attempts to bring the contours of “transitory duration” into sharper focus. It draws on three sets of considerations: the application of the transitory duration requirement in the context of copyrightability; qualitative considerations related to the function of RAM instantiations; and a comparison of the work RAM copies do in the copyright system and the traditional role of the reproduction right. On the basis of these considerations, this paper offers a set of concrete factors courts should take into account when classifying RAM instantiations. These factors will lend greater predictability to the RAM instantiation analysis without sacrificing consistency with the text of the Copyright Act and the policies that underlie it.