

07-1480-cv(L)

07-1511-cv(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE CARTOON NETWORK LP, LLLP, and
CABLE NEWS NETWORK L.P., L.L.L.P.,
Plaintiffs-Counterclaim-Defendants-Appellees,

TWENTIETH CENTURY FOX FILM CORPORATION, UNIVERSAL CITY
STUDIOS PRODUCTIONS LLLP, PARAMOUNT PICTURES
CORPORATION, DISNEY ENTERPRISES, INC., CBS BROADCASTING
INC., AMERICAN BROADCASTING COMPANIES, INC.,
NBC STUDIOS, INC.,
Plaintiffs-Counterclaim-Defendants-Appellees,
(Caption Continued on Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE AMERICANS FOR TAX REFORM IN SUPPORT
OF APPELLEES URGING AFFIRMANCE

Steven J. Metalitz
J. Matthew Williams
Mitchell Silberberg & Knupp LLP
2300 M Street, NW, Suite 800
Washington, DC 20037-1434
(202) 973-8132
*Counsel for Amicus Curiae
Americans for Tax Reform*

v.

CSC HOLDINGS, INC. and CABLEVISION SYSTEMS CORP.,
*Defendants-Counterclaim-Plaintiffs-Third-Party
Plaintiffs-Appellants,*

v.

TURNER BROADCASTING SYSTEM, INC., CABLE NEWS NETWORK LP,
LLP, TURNER NETWORK SALES, INC., TURNER CLASSIC MOVIES, L.P.,
LLLP, TURNER NETWORK TELEVISION LP, LLLP,
Third-Party-Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

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U.S.-Singapore Free Trade Agreement, art. 16.4.1 18

World Intellectual Property Organization, *Guide to the Copyright and Related Rights Treaties Administered by WIPO* (2003) 16, 17

LIST OF ABBREVIATIONS

Cablevision Br.	Brief of Cablevision dated May 30, 2007
Fox Br.	Brief of Fox Plaintiffs dated June 29, 2007
Profs. Br.	Brief of Amici Curiae Law Professors dated June 8, 2007
Turner Br.	Brief of Turner Plaintiffs dated June 29, 2007

IDENTITY AND INTEREST OF AMICUS CURIAE

Americans for Tax Reform is a non-profit 501(c)(4) organization that represents the interests of American taxpayers at the federal, state, and local levels. Founded at the request of President Reagan in 1985, ATR's mission is to reduce the overall size and scope of government, and to promote freedom and economic liberty at every opportunity. As a part of its mission, ATR has promoted free trade since its founding, pressing for NAFTA and CAFTA, as well as more limited bi-lateral free-trade agreements. ATR's interests in this case include its support for voluntary free-market licensing of copyrighted materials and compliance with free trade agreements. This *amicus* brief is filed with the consent of all parties.

INTRODUCTION

While this case requires the courts to apply the statutory provisions of the Copyright Act to the conduct of defendant Cablevision, it arises in a context dominated by licensing. The copyright law addresses the default situation in which the parties have not entered into a license, but in practice the digital networked environment depends on licensing as the chief means of disseminating copyrighted works to the public. All copyright owners – including the plaintiffs in this case and some of their supporting *amici* – engage extensively in licensing of rights in this environment.

Cablevision had licenses from the plaintiffs covering a number of uses of their copyrighted materials. In Cablevision's core cable television business, some of these licenses were imposed by statute, *see* 17 U.S.C. § 111 (statutory license for public performance of works contained in certain broadcast signals); most were voluntarily negotiated. Cablevision also entered into licenses allowing the public performance of some of these works through a video on demand ("VOD") service. But Cablevision wished to make additional uses of plaintiffs' works without paying additional license fees – in essence, a modified form of VOD in which subscribers were invited to request that Cablevision make copies of programming in real time, and transmit it to subscribers at a later time. It is undisputed that the service Cablevision wished to offer was not covered by any of the licenses it held, voluntary or statutory. Thus, its legality turns on application of the Copyright Act, not on interpretation of license terms.

To accomplish its goals, Cablevision devised a system in which it could plausibly claim that its subscribers, not it, made unlicensed copies of plaintiffs' works, and the subsequent unlicensed transmissions of those works. It evidently hoped that this would not only enable it to evade license fees, but also to shift the locus of copyright infringement from Cablevision to its millions of individual customers, a much less attractive or practical target for enforcement actions.

The District Court correctly declined to accord legitimacy to this license evasion technique. It did so by applying well-established principles of copyright law. These include the principle of strict liability for direct infringement of copyright, and a recognition of the full scope of the exclusive rights of reproduction and public performance. Its conclusion should be affirmed, both to reinforce the ongoing validity of the principles on which the decision below rests, and to discourage other users of copyrighted material who may otherwise be tempted to employ similar license evasion stratagems. If this court were to endorse a firm application of the well-established principles articulated by the District Court, it would be neither discouraging technological innovation, nor intervening inappropriately in competition among different distribution systems. Rather, it would be encouraging the most effective means – the means Cablevision should have employed – of bringing the fruits of creative expression to the public: voluntary licensing.

ARGUMENT

I. The District Court Correctly Attributed Direct Infringement Liability to Cablevision, and Properly Applied *Netcom*

The principal briefs of the appellees, as well as the Brief Amici Curiae of the American Society of Media Photographers et al., have fully discussed why the District Court was correct to conclude that “the copying at issue ... would be done not by the customer but by Cablevision, albeit at the customer’s behest.”

Twentieth Century Fox Film Corp. v. Cablevision Systems Corp., 478 F. Supp. 2d 607, 621 (S.D.N.Y. 2007). This brief focuses on why the District Court was also correct to conclude that Cablevision's "reliance on *Netcom* and its progeny is ... misplaced." *Id.* at 620.

Cablevision is correct that the twelve-year-old District Court decision in *Religious Tech. Center v. Netcom Online Communications Services, Inc.*, 907 F. Supp. 1361 (N. D. Cal. 1995), has been influential. But it has been "widely followed," Cablevision Br. at 21, only in the specific context in which it arose: the infringement liability of an Internet service provider ("ISP") for unauthorized copies automatically made in the course of providing its customers with access to the Internet. The courts generally have not applied *Netcom* in other contexts. The facts in this case are strikingly different from those before the *Netcom* court, in ways that weigh strongly against relying upon this precedent to resolve this case.

Perhaps the most significant difference between this case, and *Netcom* and its progeny, is how the works that were copied without authorization came into the system in the first place. Both *Netcom* itself, and many of the cases that have followed it, involve "user-generated content." *Netcom* had no control over what Dennis Ehrlich chose to post to Tom Klemesrud's bulletin board system ("BBS"); and everything that was posted to Klemesrud's BBS was automatically copied "onto *Netcom*'s computer and onto other computers on the Usenet." 907 F. Supp.

at 1367. Some crude tools were available that might have allowed Netcom to “screen postings containing particular words or coming from particular individuals,” *id.* at 1368; but clearly there was no way that Netcom could have distinguished whether the copies posted by Ehrlich via Klemesrud were authorized or unauthorized, and it was “practically impossible to screen out infringing bits from noninfringing bits.” *Id.* at 1372-3. Deluges of data flooded through the conduit Netcom provided, and there was no practical means to fish from this stream the particular copies that may have been infringing. To a greater or lesser extent, the same situation obtained in virtually all the cases that Cablevision cites as having relied on *Netcom*. *See, e.g., Field v. Google*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006) (millions of websites of third parties automatically cached).

It was in this sense that the *Netcom* court focused on the search for “some element of volition or causation” as the predicate for direct liability. Netcom no more “caused” infringing copies to flood into its system than King Canute caused the North Sea’s waves to batter the British coast; and Netcom’s “volition” was no more able to manage the tide it faced than was Canute’s will. The facts in this case could hardly be more different. Every single tributary that streamed into the Cablevision system was known to it and indeed under its control; in fact, it held licenses (either voluntarily negotiated, or, to a limited extent, imposed by statute) for the reception of the entire river.

Cablevision intentionally split this river of licensed material in two, and diverted one stream into a channel to be copied, first in a series of buffers, then (for those copies which customers had indicated they would like to receive later) onto servers for more permanent storage. No other content could enter the system to be copied except through this diverted stream – user-generated content is entirely absent, and indeed impossible. Cablevision was not King Canute, seeking to hold back the tide, but rather a civil engineer exercising complete control over the river of data, damming and diverting it at will. Cablevision also knew that every copy made in the diverted stream lacked authorization from the copyright owner, who had not even authorized the diversion in the first place. In other words, here Cablevision, by abusing its licensed access to the programming, selected and provided the choices made available to its customers for their requests to copy and transmit. This was not user-generated content; it owed its presence in the RS-DVR system to Cablevision’s volitional acts. The pervasive involvement of Cablevision in all aspects of the design, operation and maintenance of the “machine” provide ample evidence of sufficient “volition” to meet the strict liability standard.

Furthermore, the *Netcom* decision turned, to a great extent, on the potential repercussions for the entire Internet: “The court does not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred.” *Netcom*, 907 F. Supp. at 1369 at 1372. Indeed, the court

described the system in which the copying at issue took place as itself “necessary for the functioning of the Internet.” *Id.* Whether or not that statement was accurate in the context in which it was made, it is completely inapplicable to the closed system established by Cablevision. Affirmance of the District Court would have no repercussions for the Internet, but would benefit consumers to the extent that imposing direct infringement liability will discourage future instances of license evasion.

Of course, *Netcom*’s continuing persuasiveness even within the realm of ISP liability is open to serious question. Soon after the decision was issued, Congress considered codifying it as the rule for analyzing direct infringement claims against ISPs, but decided against it, preferring to let the substantive law continue to evolve. *See CoStar v. Loopnet*, 373 F.3d 544, 553 (4th Cir. 2004) (Congress “allow[ed] the courts to continue defining what constitutes a prima facie case of copyright infringement against an ISP.”). Congress’s ultimate decision to adopt what is now 17 U.S.C. § 512 implicitly endorses the view that even ISPs acting as “mere conduits” could, under some circumstances, be liable for direct infringement, although their compliance with the “safe harbor” criteria in the statute, notably those in § 512(a), could drastically reduce the remedies to which they were exposed. *A fortiori*, *Netcom* cannot be read as a bar to direct infringement liability in a non-ISP situation.

Even within the sphere of ISP liability, *Netcom*'s ongoing viability is open to question. Far more powerful and discriminating tools for filtering and identifying infringing material are becoming available. Whether it is "workable" to impose direct liability on ISPs for infringements carried out over a network – a door Congress clearly left open in the DMCA – may be answered differently in 2007 than it was in 1995. *Compare Netcom*, 907 F. Supp. at 1366 (“[I]t would be impossible to prescreen Erlich’s postings...”) with Kevin J. Delaney, *YouTube to Test Software To Ease Licensing Fights*, Wall St. J., June 12, 2007, at B2 (companies are now developing online audio and video “fingerprinting”). At a time when the viability of *Netcom* even in the ISP environment is a legitimate subject of scrutiny and debate, the District Court properly declined to extend this precedent to other environments to which its principles clearly do not apply.

II. The District Court Properly Held That the Buffer Copies Came Within the Scope of the Plaintiffs’ Exclusive Reproduction Rights

The District Court held Cablevision liable for direct infringement of the reproduction right, not only for the copies stored in the hard drives of Cablevision’s servers, but also for temporary copies made “at several points during the operation of the RS-DVR.” 478 F. Supp. 2d at 613. Moreover, Cablevision creates these copies “before any customer requests anything...” because they enable Cablevision to respond to customer requests for permanent copies of programs. *Id.* at 13. While Cablevision’s defense as to the hard drive copies is

that it did not make them, it asserts as to the “buffer” copies that they are not copies at all for purposes of the Copyright Act, because they are not “fixed.”¹ In rejecting this argument, *id.* at 621-22, the District Court reached a result that is compelled by the unchallenged case law, buttressed by the expert opinion of the Copyright Office, and consistent with the international obligations that the U.S. has taken on as a party to a number of treaties.

A. Case Law

Numerous courts have grappled with whether a copy of a work made in a computer’s Random Access Memory (“RAM”) is subject to the copyright owner’s exclusive reproduction right. All have answered the question the same way: yes. The question has recurred, in part, because technological changes have made it possible for the value of a copyrighted work to be fully exploited through a process that depends on the making of temporary copies, as is the case here,² or even without a more permanent copy being made at all. While Cablevision seeks to distinguish these precedents, mainly because they may have involved temporary copies that persisted for a longer duration than those made in the RAM of its

¹ Cablevision also argues that its buffer copies are *de minimis* and noninfringing. Cablevision Br. at 45. *See* Turner Br. at 54-5 for a sound refutation of this assertion.

² For instance, in the “application service provider” (“ASP”) model, the full value of a computer program may be enjoyed by a customer who never obtains a permanent copy, but simply runs a temporary copy in RAM when and as needed.

servers, Cablevision Br. at 41-2, the Law Professor *amici* ask this Court to reach a conclusion contrary to prior cases. *See* Professors' Br. at 11-12 ("[T]o the extent these authorities can be read to make the duration of a RAM reproduction legally irrelevant to the question of whether the reproduction is sufficiently 'fixed,' ... they ... should not be followed by this Court."). Neither argument should persuade this Court, which should instead apply the well-reasoned precedents.

It is clear that the cases on which the District Court relied, 478 F. Supp. 2d at 621-2, are at odds with Cablevision's interpretations, starting with *MAI Systems Corp. v. Peak Computers, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993), the "seminal case on the subject." U.S. Copyright Office, DMCA Section 104 Report at 118 (Aug. 2001) ("DMCA Report").³ Contrary to Cablevision's argument, none of these cases turned on the fact that these copies may have persisted longer than the copies involved in this case, and that is not a ground for distinguishing them from this case. Rather, these decisions applied the reproduction right because the copies in question were capable of being perceived, reproduced or communicated, and thus satisfied the fixation requirement.⁴ The same is true in this case, in which the

³ Cases not explicitly relied on by the District Court also favor Appellees. *See* DMCA Report at 119 (listing cases). Even Cablevision's most treasured opinion, *Netcom*, states: "In the present case, there is no question after MAI that 'copies' were created..." 907 F. Supp. at 1368.

⁴ The following definitions from 17 U.S.C. § 101 are relevant to this discussion:

(...continued)

buffer copies not only were capable of being reproduced, they were in fact reproduced and were “used to make permanent copies of entire programs on the Arroyo servers.” *Cablevision*, 478 F. Supp. 2d at 621.

Cablevision asserts that the court's holding in *MAI* turns on the fact that the copy lasted long enough for the repairmen to view the system error log and diagnose the problem. *Cablevision Br.* at 41. But the *MAI* opinion states that "it is generally accepted that the loading of software into a computer constitutes the creation of a copy under the Copyright Act[,]" without qualifying this broad conclusion. 991 F.2d at 519 (“[S]ince we find that the copy created in the RAM can be ‘perceived, reproduced, or otherwise communicated,’ we hold that the loading of software into the RAM creates a copy under the Copyright Act.”).

(...continued)

“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration...

In its subsequent decision in *Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1333-4 (9th Cir. 1995), the 9th Circuit summarized the holding of *MAI* as follows: "we held that the loading of MAI's operating system software into RAM makes a 'copy' under the Copyright Act." There is no basis for assuming that the specific duration of the copy's persistence made any difference to this determination.

The court in *Marobie FL, Inc. v. National Association of Fire Equipment Distributors*, 983 F. Supp. 1167 (N.D. Ill. 1997), also saw no need to consider the specific duration of the copies at issue to find infringement. Cablevision wrongly argues that *Marobie* "does not address whether data passing through transient buffers is fixed[.]" However, the court there clearly found that the defendant's buffer copies existed for "more than transitory duration" for the simple reason that they were capable of being perceived. *Id.* at 1178.

Cablevision also claims that "the issue of momentary buffering appears nowhere in" *Stenograph LLC v. Bossard Associates, Inc.*, 144 F.3d 96, 100 (D.D.C. 1998), and that the court's finding that copying occurred was based on the use of software without a license "for months." Cablevision Br. at 42. However, the court there clearly found that the defendants "copied the software when it was booted up for use for its principal purpose, and thereby loaded into RAM." *Id.* In fact, the court's extensive analysis dismisses criticism of *MAI* and its progeny by

commentators, including one of the Law Professor *amici*. *Id.* at 102 (referencing criticism of *MAI* by Jessica Litman, *The Exclusive Right to Read*, 13 *Cardozo Arts & Ent. L.J.* 29 (1994), but citing with approval Jane C. Ginsburg, *Putting Cars on the 'Information Superhighway'*, 95 *Colum. L. Rev.* 1466, 1476 (1995) ("Copies of a work are made...when a temporary copy is received into the memory of a computer.")).

B. Copyright Office Report

The District Court was also right to defer to the analysis by the Copyright Office in its DMCA Section 104 report.⁵ Contrary to the Law Professor *amici*, that analysis did not read the “transitory duration” language out of the statutory definition of a “copy,” but instead provided a definition for that phrase which is clear, objective, easy to apply, and consistent with the legislative history, case law, and international standards. By contrast, Cablevision and its *amici* propose no

⁵ This Court has noted that the Copyright Office’s “interpretation on an issue never before decided should not be given controlling weight.” *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 946-47 (2d Cir. 1975) (footnotes omitted). But here the issue has been decided repeatedly by the courts, in the cases discussed above; the Copyright Office report simply synthesizes those cases and explicates why they are well grounded in the text of the statute and its legislative history. Furthermore, in *Morris v. Business Concepts*, 283 F.3d 502 (2d Cir. 2002), this Court followed the Office’s statutory interpretation which it found “persuasive” because even when *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is inapplicable, “an agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency.” *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134(1944)).

standard for evaluating whether a copy meets the “more than transitory duration” test. They simply assert that the copies here had too short a lifespan to qualify – even though they were the basis for widespread copying.

Cablevision's objections to the findings of the Copyright Office reported in the Office's DMCA Section 104 report also stem from its misreading of the above cases and the Copyright Act. The Office noted that “the statute does not define ‘transitory duration’ directly, but concluded that “a general rule can be drawn from the language of the statute.” DMCA Report at 110-111. That rule was stated as follows:

Unless a reproduction manifests itself so fleetingly that it cannot be copied, perceived or communicated, the making of that copy should fall within the scope of the copyright owner’s exclusive rights. The dividing line, then, can be drawn between reproductions that exist for a sufficient period of time to be capable of being “perceived, reproduced, or otherwise communicated” and those that do not.

Id. at 111.

This definition is objective and easily applied, particularly in this case. By contrast, Cablevision proposes no standard whatever, simply asserting that, “by any standard, [up to 1.2 seconds] is not a ‘period of more than transitory duration’”. Cablevision Br. at 39. Nor do the Law Professors provide any meaningful answer to the problem posed by the Copyright Office: that if its practical and objective standard is not the right one, “attempting to draw a line based on duration may be impossible.” DMCA Report at 113.

C. U.S. International Obligations

As the United States, over the past two decades, has integrated its copyright system more fully with those of its global trading partners, it has taken on international obligations that can only be fulfilled through a broad application of the reproduction right to cover temporary copies that can be further reproduced (e.g., the buffer copies here). While these treaty obligations may not be directly enforceable in federal court, *see* Berne Convention Implementation Act of 1988, § 3, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (Berne Convention not directly enforceable), they further buttress the interpretation of the fixation requirement that the Copyright Office has articulated.

Under the premier international copyright agreement of the pre-Internet era, the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised July 24, 1971, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 (“Berne”), the United States (along with the other 163 signatories to Berne) has committed to providing to copyright owners “the exclusive right of authorizing the reproduction of [their] works, *in any manner or form.*” Berne Art. 9(1) (emphasis added).⁶ The authoritative Guide to the Copyright and Related Rights Treaties Administered by WIPO, issued by the World Intellectual Property Organization (WIPO), the administrator of the Berne Convention, explains that this broad

⁶ The Berne Convention entered into force for the U.S. on March 1, 1989.

language provides “coverage of the right of reproduction [that] is absolute” and “cannot be extended any further,” and that the treaty provision is based on the concept that “*reproduction is a fixation of a work on the basis of which the work may be indirectly communicated to the public or may be further copied (reproduced).*” World Intellectual Property Organization, Guide to the Copyright and Related Rights Treaties Administered by WIPO, 55-6, BC-9.4, BC-9.10 (2003) (emphasis in original) (“WIPO Guide”). This, of course, parallels the Copyright Office explication of fixation, and makes no reference to the duration of the copy as a criterion for determining whether or not it is subject to the exclusive reproduction right.

The international understanding on this issue was further clarified in the WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 (1996) (“WCT”), adopted in 1996 in an effort to update international copyright standards for the Internet age.⁷ Article 1(4) of the WCT includes an “agreed statement” spelling out that Article 9 of the Berne Convention “fully appl[ies] in the digital environment, in particular to the use of works in digital form.” It goes on to state, in its second sentence, that “the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of

⁷ The U.S. was an original signatory of the WCT. It ratified it on September 14, 1999, and the WCT entered into force with respect to the U.S. on March 6, 2002.

Article 9 of the Berne Convention.” This is a reaffirmation of the international standard with which the Copyright Office’s (and the courts’) interpretation of U.S. law is consistent, but which is contradicted by the views of Cablevision and its *amici*. The WIPO Guide explains that while a few delegations to the Diplomatic Conference opposed the second sentence of the agreed statement, based on the “idea ... that ‘too temporary, too transient’ reproductions must not be recognized as reproduction,” such an interpretation “would have been in conflict with Article 9 of the Berne Convention, under which *the duration of the fixation (including the storage in electronic memory) – whether it is permanent or temporary – is irrelevant* (as long as, on the basis of the [new] fixation, the work may be perceived, reproduced, or communicated.” WIPO Guide at 195, CT-1.44 (emphasis added).

Finally, in the years since the U.S. signed the WCT in 1996, the U.S. has entered into a number of bilateral agreements containing virtually the same commitment, in even more explicit terms. *See, e.g.*, U.S.-Chile Free Trade Agreement, art. 17.5.1, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/as_set_upload_file912_4011.pdf (“Each Party shall provide that authors of literary and artistic works have the right to authorize or prohibit all reproductions of their works, in any manner or form, permanent or temporary (*including temporary*

storage in electronic form.)” (emphasis added).⁸ All these agreements convincingly demonstrate that the interpretation given by the District Court not only accords with the statute and the case law, but also is in step with the rest of the world. By contrast, adopting the interpretation proposed by Cablevision and its *amici* would raise serious questions about U.S. compliance with its treaty obligations.

D. The Parade of Horribles

Perhaps recognizing that the courts, like the Copyright Office, have shown no sign of being persuaded that the Copyright Act discriminates between reproductions based on their duration in terms of whether they fall within the copyright owner’s exclusive rights, the Law Professor *amici* fall back on policy arguments about why, even if a comprehensive reproduction right *is* the law, it should not be. They accuse the District Court of enabling “a radical and unwarranted expansion of the rights of copyright owners over digital works,” and of “subject[ing] to potential copyright liability innumerable day-to-day activities” such as turning on a television set, holding a telephone conversation, or reading e-

⁸ See also U.S.-Singapore Free Trade Agreement, art. 16.4.1, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf; U.S.- Australia Free Trade Agreement, art. 17.4.1, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file469_5141.pdf. The U.S. became bound by the Chile and Singapore agreements in 2004, and the Australia agreement in 2005.

mail. Professors' Br. at 20, 23. But this parade of horrors trips over several salient facts.

First, as the *amici*'s reference to "potential" liability indicates, even if a reproduction has not been authorized, that does not necessarily mean that it is infringing. A number of defenses remain available, notably fair use. 17 U.S.C. § 107. The happenstance that, in this case, Cablevision has waived any fair use defense to direct infringement does not mean that the courts should apply a cramped and insufficient interpretation of the scope of the reproduction right. This Court's ruling will set a precedent in other cases in which alleged infringers have not chosen to forswear such defenses.

The *amici* insist it is impractical to give the reproduction right its full scope and then determine permissible copying through application of case-by-case defenses such as fair use. Professors' Br. at 24-25. But this approach is not only practical, there is precedent for it, in an area in which the economic stakes are quite high and business growth quite dynamic – decompilation and reverse engineering of computer programs.

The courts have consistently treated temporary copies made in the course of reverse engineering as copies subject to the reproduction right, but have also spelled out in detail the circumstances in which such unauthorized copying will be excused as fair use. In the leading case of *Sega Enterprises Ltd. v. Accolade, Inc.*,

977 F.2d 1510 (9th Cir. 1992), the Ninth Circuit considered whether infringement occurs where the defendant engages in temporary copying for the purpose of “gain[ing] access to the ideas and functional elements embodied in a copyrighted computer program,” in order to create its own computer program performing a similar function. Although the court recognized that “the placement of any copyrighted work into a computer is the preparation of a copy [since the program is loaded into the computer's memory,]” *id.* at 1520, and thus a prima facie violation of the reproduction right when carried out without authorization, the court ultimately concluded that it is a fair use as a matter of law to make such copies in the course of reverse engineering in order to create a competing product, under specified circumstances. *See also Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000) (finding fair use after stating that reverse engineering “require[s] that the person seeking access load the target program on to a computer, an operation that necessarily involves copying the copyrighted program into the computer’s random access memory or RAM.”). The *Sega-Connectix* line of cases has given rise to a stable body of law which has permitted innovation and protection of rights to coexist constructively. This body of case law has even been indirectly codified. *See* 17 U.S.C. 1201(f) (creating exception to anti-circumvention provision for reverse engineering, under conditions closely paralleling those found essential in *Sega* and its progeny for fair

use). Thus, to seize upon the uncertainty inherent in fair use as a pretext to deny the right holder's exclusive rights their full scope is not only unfair, it is unnecessary.

The most problematic examples raised by *amici* arise from situations in which an assertedly unauthorized buffer copy is made in the course of an otherwise licensed and authorized transaction.⁹ That is most assuredly not this case. No one disputes that Cablevision's actions, from the moment that it split the programming stream in two and diverted one stream to the RS-DVR "machine," were unauthorized by any license it had entered into with plaintiffs, nor by the statutory licenses under 17 U.S.C. § 111(c). Had a license been in place to cover Cablevision's overall system, the applicability of that license (in express or implied terms) to buffer copies necessary to carry out the licensed activity would present entirely different considerations than those that obtain here.

It is worth noting that nearly all the marchers in *amici*'s parade of horrors seem to be individual consumers or end-users who, according to *amici*, face "potential" infringement liability under the District Court decision. Since the District Court simply applied well-established precedent with respect to RAM

⁹ That was also the case in the specific situation addressed in the Register of Copyrights' DMCA Report – buffer copies made in the course of authorized streaming of musical compositions. DMCA Report at 132. It was only in that context – not present here – that the Register concluded that reliance on fair use "may be too uncertain." *Id.* at 141; *cf.* Professors' Br. at 25, n. 22.

copies, it is striking that *amici* can point to no case in which that “potential” has been realized to date. Moreover, no consumer or end-user is accused of infringement in this litigation. Unless and until that occurs, speculation about the impact of the case on consumers tends toward the hypothetical. Surely if any lawsuit were brought against an end-user in this situation, the impact of factors such as fair use or implied license is very likely to be much different than it would be against a defendant who, like Cablevision, makes the copy in question for purely economic reasons, in order to offer to paying customers a service he is not authorized to offer under existing licenses with the same copyright owners. It is probable that the risk of a lawsuit against an end user is essentially zero so long as Cablevision’s strategy of license evasion, and its efforts to shift exposure for infringement liability to its customers, is not allowed to succeed. The best outcome for consumers in this case would be affirmance, so that the responsibility to obtain a license for the RS-DVR form of VOD service is placed squarely where it belongs – on Cablevision’s shoulders.

III. Cablevision Publicly Performs Copyrighted Works By Delivering Programming to Its Subscribers On Demand

For the reasons set forth in Section I above, and in the Appellees’ briefs, it is clear that the District Court correctly concluded that the party that performs copyrighted programming as part of the RS-DVR service is Cablevision. Cablevision nevertheless claims that these performances are not “public,” even

though they result from commercial transactions between Cablevision and the subset of its millions of customers who are willing to pay to enjoy viewing copyrighted programs on demand.

Cablevision intentionally designed the RS-DVR system to utilize thousands of copies to achieve the performances rather than a single copy, in an attempt to circumvent the Copyright Act's definition of "publicly." However, a long line of cases, including cases within this Circuit, have rejected similar arguments based on "artificially narrow" interpretations of the public performance right. *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D.N.Y. 1988). This Court should apply these precedents to Cablevision's activities and affirm the District Court's ruling that Cablevision infringes the public performance rights of the Appellees.

Cablevision argued below, as it does here, that the performances emanating from its RS-DVR service do not qualify as "public" under the Copyright Act because "each streaming emanates from a distinct copy of a program uniquely associated with one customer's set-top box and intended for that customer's exclusive viewing in his or her home." *Cablevision*, 478 F. Supp. 2d at 622. The District Court found this argument to be "flawed" because the "plain language" of the Copyright Act states that "a transmission 'to the public' is a public performance, even if members of the public receive the transmission at separate

places at different times.” *Id.* at 622-23 (quoting 17 U.S.C. § 101 (to publicly perform includes “to transmit or otherwise communicate a performance or display of the work... 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.”)).

The Fox brief persuasively explains why the District Court found Cablevision to be indistinguishable from the copyright infringers in *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991), and *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984). Fox Br. at 28-33; *Cablevision*, 478 F. Supp. 2d at 623. Both of those cases stand for the principle that there is nothing “private” about a business – like Cablevision – that sells to its customers the ability to view copyrighted programming on demand, regardless of how far the business goes to try to design its delivery mechanism around the Copyright Act.

However, Cablevision argues that it is different from the defendants in *On Command* and *Redd Horne* because it creates thousands of copies of the Appellees' works in order to facilitate thousands of performances, whereas the defendants in *On Command* and *Redd Horne* apparently utilized single copies to engage in multiple performances. This is a distinction without a difference for the purposes of copyright law, and Cablevision points to nothing in the text or legislative history

of the Copyright Act that suggests otherwise. To the contrary, the legislative history could hardly be more explicit that technological end-runs around the public performance right are doomed to failure:

The definition of “transmit” – to communicate a performance or display “by any device or process whereby images or sound[s] are received beyond the place from which they are sent” – is broad enough to include *all conceivable forms and combinations* of wired or wireless communications media, including *but by no means limited to radio and television broadcasting as we know them*. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a “transmission,” and if the transmission reaches the public in [any] form, that case comes within the scope of [the public performance right].

H.R. Rep. No. 94-1476 at 64 (1976) (emphasis added).

Cablevision chose to ignore this emphatic Congressional warning, and to devise a system based on a speculative theory from a treatise instead.¹⁰ Although Congress clearly intended to create a public performance right broad enough to cover “all conceivable forms and combinations of ... communications media,” Cablevision asks this Court to hold that its RS-DVR service falls outside of this

¹⁰ Although the author of that treatise does speculate that Congress added the “at different times” language to the definition of when a performance by transmission qualifies as “public” in order to address the circumstance in which “the same copy of a given work gives rise to numerous performances by different members of the public[,]” see 2 M.B. Nimmer & D. Nimmer, *Nimmer on Copyright*, § 8.14[C][3] (2006), the section 101 definition of public performance does not even contain the word “copy.” In addition, the *Redd Horne* court, which relied on the *Nimmer* treatise, nowhere stated that public performances must always involve repeated transmissions of one copy. 749 F.2d at 159.

broad right.¹¹ Surely a service still qualifies as a “conceivable form[or] combination of communications media” no matter how many copies are involved in each transmission.

Moreover, Cablevision’s claim that each performance at issue would emanate from distinct copies is inaccurate. All of the Arroyo server copies used for the performances have a single common source – the buffer copy of the program that Cablevision makes in every case, whether or not any customer has requested it. *Cablevision*, 478 F. Supp. 2d at 613. Thus, Cablevision’s assertion that “recordings on the RS-DVR are uniquely associated with the customer who made them” is misleading at best. *Cablevision Br.* at 57.

David v. Showtime/The Movie Channel, 697 F. Supp. 752, 758 (S.D.N.Y. 1988) endorsed a “preference for an expansive reading of the Copyright Act” when it comes to interpreting the public performance right. *David* has been relied upon by other courts, including this Court in *National Football League v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000) (calling *David* “the most logical

¹¹ The same Congress that enacted the public performance definition also enacted 17 U.S.C. § 113(e)(1), explicitly stating that “nonsimultaneous secondary transmissions by a cable system ... are actionable as an act of infringement under section 501,” unless they meet a series of detailed conditions which are not present here. Since Cablevision is a “cable system” within the meaning of section 111(f), this provision seems to foreclose any argument that it is not an infringer when it provides a delayed transmission to its subscribers of any programming that it obtains for retransmission under the section 111 compulsory license.

interpretation of the Copyright Act”). *See, e.g., National Cable Television Ass’n, Inc. v. Broadcast Music, Inc.*, 772 F. Supp. 614, 650-51 (D.D.C. 1991); *Coleman v. ESPN, Inc.*, 764 F. Supp. 290, 294 (S.D.N.Y. 1991); *Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Servs.*, 746 F. Supp. 320, 328-29 (S.D.N.Y. 1990).

In *David*, Judge Tenney considered whether a programming provider that transmitted material containing copyrighted musical works to cable system providers who thereafter retransmitted it to members of the public engaged in a public performance of the works. Judge Tenney reasoned that “in recognition of rapid technological developments in the copyright area, courts have interpreted the Copyright Act flexibly to reduce the need for frequent Congressional amendments.” *Id.* at 759. Based on this approach, Judge Tenney concluded that “Congress intended the definitions of ‘public’ and ‘performance’ to encompass each step in the process by which a protected work wends its way to its audience.” Moreover, Judge Tenney remarked, relying on the legislative history quoted above, that “it would strain logic to conclude that Congress would have intended the degree of copyright protection to turn on the mere method by which television signals are transmitted to the public.” *Id.*

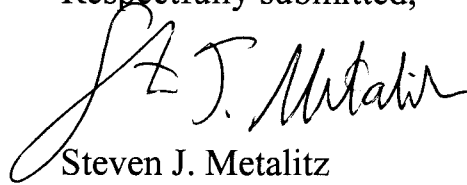
Cablevision’s arguments are similar to the “artificially narrow” arguments presented by the defendants in *David*. *Id.* Just as “[i]t made little difference to the

copyright holders [in *David*] whether [the defendant] intended to route the protected work to the public's living rooms through a local cable company or through a transmitter atop a mountain," *id.*, it makes little difference to the Appellees for the purposes of the public performance right whether Cablevision designs its RS-DVR service to perform using multiple copies of their works or one copy. Either way, Cablevision is performing the Appellees' copyrighted material for its own profit without paying for the privilege. This is infringement under the law because "each step in the [RS-DVR] process by which a protected work wends its way to [Cablevision's] audience" is "public." As noted above, because the buffer copies which are the source of copies used for transmission are not unique to individual subscribers, at least one "step in the process by which a protected work wends its way" involves a single copy that is the source for multiple performances. Thus, under Cablevision's own reading of the statute, the RS-DVR infringes the public performance right.

CONCLUSION

For the reasons discussed above, *amicus* urges the Court to affirm to District Court's rulings.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S.J. Metalitz". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Steven J. Metalitz

J. Matthew Williams

Mitchell Silberberg & Knupp LLP

2300 M Street, NW, Suite 800

Washington, DC 20037-1434

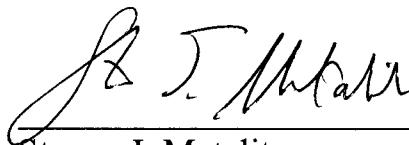
(202) 973-8132

Counsel for Amicus Curiae

Americans for Tax Reform

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Steven J. Metalitz
Mitchell Silberberg & Knupp LLP
2300 M Street NW, Suite 800
Washington, DC 20037-1434
(202) 973-8132 (phone)
(310) 231-8432 (fax)
met@msk.com (email)
*Counsel for Amicus
Americans for Tax Reform*

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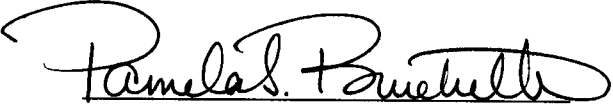
Timothy A. Macht
Law Offices of Timothy A. Macht
99 Hudson St., 8th Floor
New York, NY 10013

Jeffrey A. Lamken
Robert K. Kry
Joshua A. Klein
Baker Botts LLP
1299 Pennsylvania Ave., NW
Washington, D.C. 20004

Peter L. Zimroth
Elenor M. Lackman
Arnold & Porter LLP
399 Park Avenue
New York, NY 10022

Robert Alan Garrett
Hadrian R. Katz
Jon Michaels
Arnold & Porter LLP
555 Twelfth St., NW
Washington, D.C. 20004

Katherine B. Forrest
Anthony L. Ryan
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Ave.
New York, NY 10019


Pamela S. Burchette