No. 08-448

In The Supreme Court of the United States

CABLE NEWS NETWORK, INC., *et al.*,

Petitioners,

v.

CSC HOLDINGS, INC. AND CABLEVISION SYSTEMS CORP.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* COPYRIGHT ALLIANCE IN SUPPORT OF PETITIONERS

Steven J. Metalitz
Counsel of Record
Eric J. Schwartz
J. Matthew Williams
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street, N.W.
8th Floor
Washington, DC 20036
(202) 355-7900

November 5*, 2008** ***Counsel for Amicus Curiae

THE LEX GROUP[DC] ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦www.thelexgroupdc.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISION

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTERESTS OF *AMICUS CURIAE*

The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) educational organization dedicated to promoting copyright as an engine for creativity, jobs, and growth. It is a membership organization of individual artists and institutions, including corporations, trade associations, sports leagues, and unions. Its members come from a full range of creative industries, including musical composition, music publishing and sound recordings; book, magazine and newspaper publishing; business and entertainment software; visual arts, including illustration, graphic arts and photography; and motion pictures and broadcasting. Counsel of record for all parties have received timely notice of the intent to file this brief. All parties have given written consent to the submission of this brief.[1]

The Copyright Alliance has never before filed a brief in any court, but is impelled to do so in this case because the decision below could be so detrimental to the health of our copyright system. Cablevision's attempt to avoid paying for the right to provide its customers with copies and transmissions of copyrighted works undercuts the values that the Copyright Alliance exists to advocate. The decision

---

[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Only *amicus curiae* made such a monetary contribution. Some Alliance members are, or are affiliates of, petitioners in this matter. Some may join other amicus briefs supporting the petition.

below threatens to undermine the markets for licensing of copyrighted works that have contributed so substantially to the culture, economy, workforce, and international competitiveness of the United States. For this reason, this case deserves this Court's attention.

The Copyright Alliance has over forty institutional members, including the American Federation of Television & Radio Artists (AFTRA); American Society of Composers, Authors and Publishers (ASCAP); American Society of Media Photographers (ASMP); American Intellectual Property Law Association (AIPLA); Association of American Publishers (AAP); Association of Independent Music Publishers (AIMP); Attributor; Broadcast Music, Inc. (BMI); Business Software Alliance (BSA); CBS Corporation; Church Music Publishers Association (CMPA); Directors Guild of America (DGA); Entertainment Software Association (ESA); Graphic Artists Guild; Imageline, Inc.; Imagery Alliance; Langley Productions; Magazine Publishers of America; Major League Baseball; Microsoft; Motion Picture Association of America (MPAA); National Association of Stock Car Auto Racing (NASCAR); National Collegiate Athletic Association (NCAA); National Football League; National Music Publishers' Association; NBC Universal; News Corporation; Newspaper Association of America; Picture Archive Council of America; Professional Photographers of America (PPA); Professional School Photographers Association; Recording Industry Association of America (RIAA); Reed Elsevier; SESAC; Software & Information Industry Association; Time Warner;

Universal Music Group; Viacom; Vin Di Bona Productions; The Walt Disney Company; and Writers Guild of America, West.

Two other Copyright Alliance members, the National Association of Broadcasters (NAB) and AT&T Inc. (AT&T), do not support the petition for certiorari because they believe the decision below was correctly decided.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Copyright Alliance members believe that copyright protection spurs innovation and gives incentives for cultural and technological progress that benefits the public. This Court has consistently endorsed that philosophy, and has also consistently instructed that Congress, rather than the courts, should craft copyright policy. The decision below deviates unjustifiably from that well-marked path. It threatens to render copyright incentives ineffective in myriad technological contexts, and will encourage the practice of using technology, not to deliver innovative products and services to consumers, but to navigate around the boundaries of copyright protection in order to avoid paying for uses that otherwise require licenses. It narrows beyond recognition, and in contravention of the plain language of the Copyright Act, the scope of two critical exclusive rights—reproduction and public

---

[2] A third Alliance member, PPL, does not operate in the United States, and is not participating in this brief.

performance—that Congress accorded to creators. If left unreviewed, the decision will also undermine critical precedents of this Court that have kept the copyright law vital and fit for its constitutional purpose of promoting the "progress of science and useful arts."

Although this case arose in the context of reproduction and public performance of audio-visual works by a cable systems operator, its potential impact is much broader. First, by creating uncertainty regarding the applicability of the reproduction right to temporary copies, the decision below upsets the long-standing consensus view of other circuits and unnecessarily raises questions about U.S. compliance with international treaty obligations. Second, the Second Circuit's holding that attributes copying to Cablevision's customers rather than to Cablevision is not only entirely inconsistent with established precedents of this Court; it also validates a well-worn stratagem for evading responsibility and undermining licensing. The model of designing an elaborate technological system for unauthorized copying in a way that requires the customer to "push the button" is easily adaptable to other contexts, and will proliferate if this case is not reviewed. Finally, the Second Circuit's crabbed reading of the public performance right, which runs counter to the language of the statute and clear legislative intent, invites further use of technology to game the copyright licensing system, not only for audio-visual works but also for other works, such as music, that depend upon a robust exclusive right of public performance.

The Copyright Alliance respectfully asks this Court to decide the important issues presented in the petition.[3] If the Court declines to do so, the vitally important stamp of approval that this Court has consistently placed on the premise underlying article 1, section 8, clause 8 of the U.S. Constitution and Congress' exercise of the power granted therein will be diminished, along with the policies Congress chose to codify in the Copyright Act.

ARGUMENT

I. THE DECISION BELOW UNDERMINES OUR COPYRIGHT SYSTEM

The Constitution authorizes Congress to pass laws to "promote the progress of science and the useful arts." U.S. CONST. art. 1, § 8, cl. 8. "The economic philosophy behind the [Copyright] clause … is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors ..." *Mazer v. Stein*, 347 U.S. 201, 219 (1954). This constitutional philosophy is codified in the Copyright Act of 1976. 17 U.S.C. § 101, *et seq.*

In the 1976 Act, Congress sought to provide authors with broadly defined exclusive rights to

[3] In the Second Circuit, *amicus* briefs were filed on both sides on behalf of a plethora of nonprofit groups, entertainment companies, library associations, Internet companies, consumer advocates, sports leagues, publishers, and other organizations. This underscores that both sides believe this case raises extremely important issues.

engage in or to authorize certain uses of their works, regardless of the technological method involved. *See* Marybeth Peters, *The National Information Infrastructure: A Copyright Office Perspective*, 20 COLUM.-VLA J.L. & ARTS 341, 344 (1996) ("The drafters of the statute sought to be technology-neutral and forward-looking in their choice of terms and definitions.");[4] *Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill*, 89th Cong., 1st Sess., Copyright Law Revision, pt. 6, 14 (Comm. Print 1965) (hereinafter "1965 Supp. Report") ("A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology ...").[5] Congress' approach was, in part, a response to difficult cases confronted by this Court involving methods of delivering works to members of the public that were unanticipated at the time the previously applicable Copyright Act was written. *See, e.g.*, *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394

[4] Ms. Peters is Register of Copyrights.

[5] Although the Register of Copyrights' revision reports were not drafted by Congressional committees, they played a key role in the revision process that resulted in the passage of the 1976 Copyright Act, and this Court has repeatedly relied on them as explications of the statute. *See, e.g.*, *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 355 (1991); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 746 & 748 (1989); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 160 (1985); *see also Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 462 n.9 (1984) (Blackmun, J., dissenting).

(1974); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).[6]

"[I]t is generally for Congress, not the courts, to decide how to best pursue the Copyright Clause's objectives." *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003). In the 1976 Act, Congress decided to provide authors with exclusive rights that apply across all delivery methods in an effort to ensure that our copyright system would remain healthy and able to produce a vibrant cultural marketplace during what it anticipated to be a coming explosion of technological progress. *See* 1965 Supp. Report at xiv-xv (discussing "the revolution in communications"). In many ways, copyright protection itself has served as a catalyst of that explosion. Ingenious new means of disseminating material would be of little value to the public without the creative content they make available, content for whose production the copyright system gives powerful incentives. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928-29 n.8 (2005) (warning against overstating the "mutual exclusivity" of "the respective values of

[6] In this way, the 1976 Act embodies Congress' preference for this Court's approach to exclusive rights in *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 198 (1931), and the conclusion that "the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly … Congress has secured to the [copyright owner]." *See* H.R. REP. NO. 94-1476, at 87 (1976) ("The Committee … accepts the traditional, pre-*Aike*n, interpretation of the *Jewel-LaSalle* decision, under which public communication by means other than a home receiving set, or further transmission of a broadcast to the public, is considered an infringing act.").

supporting creative pursuits through copyright protection and promoting innovation in new communication technologies").

The public has benefitted most concretely from such technological innovation when it is deployed in the context of copyright licensing arrangements. The Copyright Act reflects this fact by requiring the providers of innovative delivery channels to compensate copyright owners if they engage in conduct reserved to authors. Put another way, the requirements of the Copyright Act prevent the symbiotic relationship between creative authors and providers of innovative delivery mechanisms—a relationship that increases public access to ideas and entertainment—from degenerating into parasitism.

In this case, Cablevision, while firmly anchored in symbiotic relationships with copyright owners through a complex web of licensing arrangements, devised a new method for delivering its licensed cable television programming to its subscribers on-demand. In itself, this is not objectionable, and should indeed be encouraged. The only reason that the parties are now before this Court is that Cablevision refused to pay for the right to implement this new delivery method, even though it involves reproducing and publicly performing copyrighted material, conduct that Congress has deemed copyright infringement when unauthorized. 17 U.S.C. §§ 106(1) & (4). Although Cablevision plans to receive payment from its subscribers for the privilege of viewing programming on-demand, *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*, 478 F. Supp. 2d 607, 612 (S.D.N.Y.

2007), *rev'd, Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 133 (2d Cir. 2008). Cablevision wants to keep the money for itself rather than compensating copyright owners.

To justify its behavior, Cablevision, before the courts below, pointed to superficial similarities between the programming delivery service Cablevision developed and the technology at issue when this Court decided *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the VCR.[7] Brief of Defendants-Counterclaimants-Appellants at 16-18, *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008). Essentially, Cablevision argued that under *Sony* any service that enables consumers to view television programming at a time of their choosing rather than at the time the programming is originally transmitted to the public must be treated under a secondary liability rubric rather than as direct infringement. *Id.* at 17. Cablevision offered strained interpretations of the broad reproduction and public performance rights in order to explain why Cablevision's conduct requires a secondary liability analysis.

[7] These superficial similarities are greatly outweighed by the distinctions between Cablevision's service and a VCR. Cablevision's service much more resembles typical video on-demand ("VOD") services, routinely carried out under license, than it does the sale of an electronics product to consumers. *See Twentieth Century Fox Film Corp.*, 478 F. Supp. 2d at 619 ("The RS-DVR, contrary to defendants' suggestions, is more akin to VOD than to a VCR, STS-DVR, or other time-shifting device. In fact, the RS-DVR is based on a modified VOD platform.").

Neither the *Sony* opinion nor the Copyright Act lines up with Cablevision's arguments. *Sony* nowhere instructs lower courts that companies that enable delayed viewing of television programming can only qualify as infringers under theories of secondary liability. *See Grokster*, 545 U.S. at 934 (it is error to convert *Sony* from a case "about liability resting on imputed intent to one about liability on any theory"). Indeed, no claim that Sony, as the manufacturer of the VCR, was a direct infringer was ever before this Court in that case. *Sony*, 464 U.S. at 435 n.17. Instead, this Court applied a secondary liability analysis in *Sony* because that case involved what this Court called "unprecedented" claims focused on imposing liability for sales of "an article of commerce that is not the subject of copyright protection." *Sony*, 464 U.S. at 421. *See also Grokster*, 545 U.S. at 931 (*Sony* involved "a claim that secondary liability . . . can arise from the very distribution of a commercial product").

In contrast, this case involves Cablevision's direct sales of copyrighted programming to consumers at subscription prices.[8] In addition, the *Sony* opinion was an effort to find the appropriate "balance between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly and the rights of others to engage in substantially unrelated areas

---

[8] *Sony* is also distinguishable from this case because in *Sony* "the material was broadcast free to the public at large," *Sony*, 464 U.S. at 425, whereas Cablevision provides programming only to its paying subscribers.

of commerce." *Sony*, 464 U.S. at 442. That balancing challenge is not present here since Cablevision's activities are not only substantially related to the rights of copyright owners, but also consist primarily of the unauthorized exercise of those rights.

The district court rightly rejected Cablevision's arguments as baseless attempts to justify an effort to design around compensating copyright owners. *See Twentieth Century Fox Film Corp.*, 478 F. Supp. 2d at 618 ("Cablevision's reliance on *Sony* is misguided."). However, on appeal, the Second Circuit adopted Cablevision's interpretation of *Sony* wholeheartedly, *Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121, 133 (2d Cir. 2008), and then appeared to reason its way backward to cramped views of the reproduction right and the public performance right that conflict with Congress' technology-neutral approach.[9] If the Second Circuit's decision stands, its misreading of *Sony* will likely proliferate and encourage technologists to focus their efforts on designing methods of delivering creative material to their customers without paying for the privilege. It will encourage providers of delivery services, both within and beyond the sphere of cable television, to devote their ingenuity, less to better means of delivery and more to circumvention of the perimeters of copyright protection. Such conduct does not promote the "progress of science and useful arts" that the Framers sought to encourage through copyright law.

[9] This brief discusses the reproduction right and the public performance right at more length in Part II, *infra*.

This case is not the first to bring before this Court a lower court decision that misread the *Sony* precedent in a way that encourages the channeling of technological ingenuity into the evasion of copyright protections. In *Grokster*, the lower court's erroneous reliance on *Sony* in a case where liability could be properly premised on an inducement theory impelled this Court to review the lower court opinion, and ultimately to reverse it unanimously. *Grokster*, 545 U.S. at 934. This case, where the lower court also misapplied *Sony*, this time to deny a direct infringement remedy, calls for this Court's scrutiny as well.

This Court has previously warned that "[t]he promise of copyright would be an empty one if it could be avoided" merely by crafting a creative legal argument. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 557 (1985). Yet the decision below encourages and propagates just such a strategy in the sphere of technological innovation. If companies that are in the business of selling copyrighted material to their customers can avoid paying copyright owners for the right to do so by designing complicated delivery systems, "our engine of free expression" may begin to underperform. *Id.* at 558. The result will be injury to the public due to a reduced marketplace of ideas that no longer inspires the creation of either interesting content or innovative delivery methods. *See Eldred*, 537 U.S. at 213 n. 18 (Public and private "ends are not mutually exclusive; copyright law serves public ends by providing individuals with incentive to pursue private ones.").

As Justice Breyer stated in his concurring *Grokster* opinion, "[n]o one disputes that 'reward to the author or artist serves to induce release to the public of the products of his creative genius.'" *Grokster*, 545 U.S. at 961 (Breyer, J., concurring) (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948)). The decision below rewards a creative method of undermining copyright protection and gaining profit from the works of others, rather than rewarding the creation of expression itself. For this reason, above all others, the decision calls out for review by this Court.

II. SERIOUS ERRORS IN THE SECOND CIRCUIT'S ANALYSIS MERIT REVIEW

The petition for certiorari seeks this Court's review of three major holdings of the Second Circuit Court of Appeals. The Copyright Alliance submits that on each of these issues, the decision below invites the sort of technological gamesmanship described in the preceding section, which our technology-neutral copyright law system is intended to discourage. *Amicus* also submits that the repercussions of each holding may extend well beyond the context of cable delivery services for audio-visual works, presenting an unjustifiable risk of de-stabilizing well-established licensing markets.

A. The Second Circuit's Treatment of Temporary Copies Conflicts With Long Settled Case Law and International Agreements

The Second Circuit held that the copyright owner's reproduction right does not extend to a complete copy of a work, even one that is sufficiently permanent or stable to be further reproduced or communicated, if the copy does not satisfy a "duration requirement" that the court believed to be imposed by the statute. *Cartoon Network*, 536 F.3d at 127-130. This conflicts with a long line of cases from several circuits, beginning with *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993). These cases have held that a copy falls within the scope of the reproduction right so long as that copy can be "perceived, reproduced, or otherwise communicated," a test clearly satisfied in this case. *Cartoon Networks*, 536 F.3d at 128.[10] The decision below did not spell out any test for determining whether a particular copy of a work satisfies its "duration requirement"; it simply concluded that "a fleeting 1.2 seconds" was not long enough. *Id.* at

[10] The Second Circuit claimed its holding was compatible with *MAI Systems*, but its construction of that case is untenable. It concluded that *MAI Systems* did not hold, "as a matter of law, [that] loading a program into a form of RAM *always* results in copying." *Id.* at 128 (emphasis in original). However, this reading of *MAI Systems* conflicts with the Ninth Circuit's own description of the holding in that case. *See Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1333-34 (9th Cir. 1995) ("we held that the loading of MAI's operating system software into RAM [random access memory] makes a 'copy' under the Copyright Act").

129. The decision below thus injects a high degree of uncertainty into an aspect of the fundamental exclusive right of reproduction that most courts have treated as long settled. *See, e.g.*, *Stenograph LLC v. Bossard Assocs., Inc.*, 144 F.3d 96, 101 (D.C. Cir. 1998) ("Courts that have addressed the issue agree that the loading of software … to the computer's random access memory ('RAM') when the software is 'booted up' causes a copy to be made."). While other circuits may still apply the objective, bright line rule of *MAI Systems* and its progeny, in the Second Circuit a case-by-case evaluation must now be made, without clear standards, to determine whether a particular unauthorized copy of a work even implicates the copyright owner's reproduction right. *See Cartoon Network*, 536 F.3d at 130 (calling its approach to temporary copies "fact-specific").[11]

The question "how long is long enough?" is not an academic nicety; it has real-world consequences. Increasingly, the full economic value of a copyrighted work can be realized without ever making a permanent copy. This phenomenon is particularly advanced with regard to computer programs, which are protected by copyright as literary works,

[11] This rule also is at odds with the Register of Copyrights' interpretation of the reproduction right. *See* U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT, at 111 (Aug. 2001) ("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."), *available at* http://www.copyright.gov/reports/studies/dmca/dmca_study.html.

Computer Associates Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 702 (2d Cir. 1992), and which are increasingly distributed to end-users only as temporary copies. For instance, it has been the case for some years that employees of a company that meets some of its software needs through an application services provider ("ASP") model will, when they need a particular application, access it on a remote server operated by a third party; download the program into the RAM of their workstations only as long as it is needed for a particular task; and then make that portion of computer memory available for overwriting as soon as the task is completed. *See* Carole Levitt and Thomas B. Fleming, *Application Service Providers Are Gaining Acceptance*, 24 LOS ANGELES LAW. 56 (2001). A more current and powerful version of this model, known as "cloud computing," envisions that not only computer programs, but also other resources, such as discrete works contained in databases, will normally be stored remotely, accessed only when and as long as needed, with no permanent copy ever being made by the user. *See* Stephen Baker, *Google and the Wisdom of the Clouds*, BUSINESSWEEK, Dec. 24, 2007, at 48, 49-53.

The copies that users obtain in both the ASP and cloud computing models are clearly stable enough to be used for their intended purpose, but may not exist long enough to satisfy the Second Circuit's additional "duration requirement" for copyright protection. Thus, the decision below may call into question the ability of a copyright owner to enter into an enforceable license for these "fleeting," short-term uses of its works, as well as its capability to bring infringement actions against those who access these works without a license, or in excess of licensing provisions, solely for the purpose of extracting their value through making a short term copy. Furthermore, the decision provides an incentive for users to design their systems so as to minimize the time during which they retain a copy of a work, in order to be able to claim that at least some of the copies they make fall outside the scope of the reproduction right altogether, and thus do not constitute a licensable transaction.

Ensuring that the scope of the reproduction right in the copyright statutes of our trading partners fully covers temporary copies has been a major goal of U.S. trade negotiators in recent years. For example, article 17.5.1 of the U.S.—Chile Free Trade Agreement[12] requires each party to "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)*." Including such language in our trade agreements is consistent with the requirements of other multilateral copyright treaties that the U.S. has implemented, which have long recognized the need to include temporary copies within the scope of the reproduction right. *See, e.g.*, Berne Convention

[12] The U.S.—Chile Free Trade Agreement was signed on June 6, 2003. The full text is available at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

for the Protection of Literary and Artistic Works, art. 9(1), Sept. 9, 1886, (Paris Text 1971, as amended Sept. 28, 1979), 828 U.N.T.S. 221 (hereinafter "Berne Convention") (obligation to protect "the exclusive right of authorizing the reproduction of works, *in any manner or form*") (emphasis added); WIPO Copyright Treaty, art. 1(4), Dec. 20, 1996, 36 I.L.M. 65 (hereinafter "WCT") (containing "agreed statement" that article 9 of the Berne Convention "fully appl[ies] in the digital environment"). Although these treaty obligations are not directly enforceable in federal court, *see, e.g.*, Berne Convention Implementation Act of 1998, § 3, Pub. L. No. 100-568, 102 Stat. 2853 (1988), they reinforce the fact that the Second Circuit's decision will, if unreviewed, upset well-established law, increase uncertainty in global as well as domestic markets for copyrighted works, and bring the U.S. into potential conflict with our trading partners.

B. The Second Circuit's View of the Reproduction Right Conflicts with *New York Times Co. v. Tasini*

Unlike the temporary copies discussed in the preceding section above, there was no dispute below that the unauthorized copies of audio-visual works that will reside on Cablevision's system and facilitate Cablevision's transmissions of programs to its subscribers meet all the requisites to be covered by the copyright owner's exclusive reproduction right. *See Twentieth Century Fox Film Corp.*, 478 F. Supp. 2d at 617. Thus, the Second Circuit focused its analysis on who makes these copies, "Cablevision [or] the customer." *Cartoon Network*, 536 F.3d at

130. Although the court found that Cablevision engaged in the volitional conduct of "designing, housing, and maintaining a system that only exists to produce a copy," *Id.* at 131, it concluded that Cablevision's customers were the only ones actually making the copies. Essentially, the court below absolved Cablevision of any liability for direct infringement of the reproduction right because Cablevision's copying system responds to customer requests at the push of a button. *Id.* (focusing on "the person who actually presses the button").

This holding touches on a critical aspect of copyright law development in the digital environment. Technological progress in a host of fields shares the common characteristic of transforming repetitive tasks that used to be done by human beings into the work of machines. While the input and the output may be the same in both cases, the agency role of human and machine has shifted. But as this Court has held, the introduction of machinery into the mix should not in itself allow a business to sell copyrighted material directly to its customers without paying for the privilege. *See New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 504 (2001) (defendants "are not merely selling 'equipment'; they are selling copies").

The Second Circuit's error was that it focused too much on what it believed to be a "significant difference . . . between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct."

Cartoon Network, 536 F.3d at 131-32. In fact, the difference is much less significant than the court thought, and certainly ought not be dispositive.[13] Instead, under this Court's decision in *Tasini*, the court should have focused on whether Cablevision was the source of the programming being copied. *See Twentieth Century Fox Film Corp.*, 478 F. Supp. 2d at 619 ("Cablevision would not only supply a set-top box for the customer's home, but it would also decide which programming channels to make available for recording and provide that content . . . .").

This conflict with *Tasini,* unacknowledged by the court below, fully merits review by this Court because similar issues are likely to arise throughout the copyright marketplace. Eliminating the human employee from the copying process is an economic imperative, for the same reason that we no longer have elevator operators or gas station attendants. It does not follow that a provider of services that include copying of works should reap not only the savings in personnel costs, but also the windfall of no longer having to obtain a license in order to achieve exactly the same result: a copy requested by a customer. Even less should such businesses be given

[13] One of the leading cases on this issue in the digital environment is a district court decision from thirteen years (and several Internet generations) ago. *See Religious Tech. Center v. Netcom Online Communications Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995). That decision arose from automated copying as a core function of the Internet. Whatever its validity in that context, it should not control the analysis on the very different facts of this case.

further incentives to design elaborate technological systems for unauthorized copying, from which they can evade copyright liability simply by requiring the customer to "push the button."

Even when a provider continues to enter into a licensing arrangement, the position espoused in the decision below could encourage evasions of responsibility. For instance, commercial photographers increasingly license "online proofing services" to produce prints during a stated time period for the photographers' clients, particularly those physically distant from the photographers' studio. A service that allowed copying by clients outside the predetermined time frame, or by non-clients, could rely on the decision below to claim that any copying that occurred was done by its customer, not by it. Similarly, publishers license online services to distribute electronic copies of books (i.e., "e-books") to consumers. The ruling below could empower such a service to offer its customers unauthorized channels to access the same material—for example, through online searches that generate advertising revenue for the service, but not for the copyright owner.

As these examples indicate, the repercussions of the decision below are in no way confined to the facts of this case, but will instead affect a wide range of copyright owners in a broad spectrum of settings. Automated copying is an increasingly ubiquitous feature of the copyright landscape. The decision below opens the door to evasions of responsibility by centralized service providers who choose, through technological design decisions that have no relationship to optimal functionality, to transfer responsibility to thousands of anonymous end users. This Court has long been concerned that the copyright law must provide an "effective—not merely symbolic" means for enforcement of the exclusive rights of authors. *Sony*, 464 U.S. at 442. This is precisely the concern that motivated this Court in *Grokster* to clarify the applicability of theories of indirect infringement; it should take the corresponding opportunity here to clarify the applicability of *Tasini* to Cablevision's efforts to design around the reproduction right.

C. The Second Circuit's Interpretation of the Public Performance Right Conflicts with the Plain Language of the Copyright Act as Well as the Legislative History

The decision below gives an unprecedented narrow reading to an exclusive right that Congress clearly intended to have a broad scope. The court held that nothing in the Cablevision programming delivery system infringed the public performance right because Cablevision "only makes transmissions to one subscriber using a copy made by that subscriber." *Cartoon Network*, 536 F.3d at 137. In other words, under the decision below, a service provider's transmission of a copyrighted work to paying customers does not infringe the public performance right if the service provider enables each customer to request the creation of a unique copy of the work to facilitate the transmission viewed by that customer.

The public performance right is one of the strongest examples of Congressional intent that the copyright law be applied in a technology-neutral fashion, and that technological gamesmanship to design around the boundaries of exclusive rights should not be condoned. Both in the definition of "perform," and in the key "transmit" clause of the definition of the public performance right, the statute makes it clear that the type of "device or process" employed is irrelevant, so long as the same performance of a work is capable of reaching members of the public. 17 U.S.C.§ 101. The legislative history is even more forceful, asserting that "*[e]ach and every method* by which the images or sounds comprising a performance … 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 right. H.R. REP. NO. 94-1476, at 64 (1976) (emphasis added).[14] The Second Circuit's carve-out of Cablevision's transmissions because each of them is associated with a specific and unique unauthorized copy of the programming in question is completely unmoored from the statute, which nowhere even hints that the

[14] The Register of Copyrights has also endorsed the broad scope of the public performance right. *See Music Licensing in Restaurants and Retail and Other Establishments: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. 17 (1997) (statement of Marybeth Peters, Register of Copyrights) ("With respect to music, the public performance right is the most important of the copyright bundle of rights … The present copyright law, which was enacted in 1976, recognizes the importance of this right: section 106(4) gives copyright owners a very broad public performance right.").

number of copies used could ever disqualify a particular transaction from coverage under this capacious right.

The decision below provides a clear roadmap that other businesses could use to evade their obligations under the public performance right. The Second Circuit's closing caveat does not even attempt to argue otherwise, merely reminding the reader that the elimination of liability under the public performance right does not necessarily apply to other claims. *Cartoon Network*, 536 F.3d at 139-40. But Congress intended to create, not a single right with a single owner, but a "bundle of rights" that could be "subdivided indefinitely." H.R. REP. NO. 94-1476, at 61. The theoretical viability of other claims will be of cold comfort to copyright owners dependent on the public performance right, such as musical composers represented by Copyright Alliance members ASCAP, BMI, and SESAC. If this Court does not grant the petition, these creators could forfeit the efficiencies these collective administration organizations provide in the collection and disbursement of public performance royalties.

To the extent that other service providers, especially in the online environment, make the same technological choice as Cablevision, they will reap the same financial benefit—the ability to stop paying license fees for streaming delivery of performances of musical and other works. These deliveries would clearly constitute public performances, but for a decision to associate the stream to each customer with a unique copy. There may or may not be technological advantages to such a choice; but under the decision below, the financial windfall of liberation from the strictures of copyright licensing could weigh heavily in the balance. In order to vindicate the contrary intent of Congress when it enacted the technology-neutral 1976 Copyright Act, and in particular the broadly phrased public performance right, this Court should grant review.[15]

CONCLUSION

For the reasons set forth herein, amicus respectfully asks the Court to grant the petition.

Respectfully submitted,

Steven J. Metalitz
Counsel of Record
Eric J. Schwartz
J. Matthew Williams
Mitchell Silberberg & Knupp LLP
1818 N Street, N.W., 8th Floor
Washington, D.C. 20036
(202) 355-7900

Nov. 5, 2008

---

[15] As with the temporary copies issue discussed above in Section II(a) *supra*, the Second Circuit's public performance right ruling raises serious questions about U.S. compliance with its international treaty obligations. *See, e.g.*, Berne Convention, art. 11 & 14*bis*; WCT, art. 8.