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.,

Plaintiff-Counter-Claimant-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-Counter-Defendants-Appellees,

(*For Continuation of Caption See Inside Cover*)

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

**BRIEF OF AMICUS CURIAE PROFESSOR TIMOTHY WU
IN SUPPORT OF REVERSAL**

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Professor Timothy Wu*

—against—

CSC Holdings, Inc. and Cablevision Systems Corporation,

Defendants-Counterclaim-Plaintiffs-
Third-Party Plaintiffs-Appellants,

—against—

Turner Broadcasting System, Inc., Cable News Network LP, LLLP,
Turner Network Sales, Inc., Turner Classic Movies, L.P., LLLP,
Turner Network Television LP, LLLP,

Third-Party-Defendants-Appellees.

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I. STATEMENT OF INTEREST

Amicus curiae Timothy Wu is a professor of copyright and telecommunications law at the Columbia University School of Law. Much of Professor Wu's scholarship concerns the effect of copyright on competition in the communications and technology industries. *See, e.g.*, Timothy Wu, *Copyright's Communications Policy*, 103 Mich. L. Rev. 278 (2004); Timothy Wu, *The Copyright Paradox*, 2005 Sup. Ct. Rev. 229 (2005).

Professor Wu has received no compensation for preparing this brief, and has not consulted on the substance of the brief or taken direction from any of the parties to this litigation. Professor Wu also has no personal stake or financial interest in the outcome of this case. This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a) and with the consent of the parties hereto.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below should be reversed for two reasons.

The principal problem with the lower court's decision is that it creates an end-run around the Supreme Court's secondary liability doctrines for copyright, as set forth in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and *MGM Studios, Inc., et al. v. Grokster, Ltd., et al.*, 545 U.S. 913 (2005). The Supreme Court's secondary liability jurisprudence represents its best effort to balance content owners' rights against the public's interest in innovation. By creating a new form of direct liability, the district court's holding would upend the Supreme Court's careful work in this area and introduce new uncertainties for technological innovators.

Cablevision's liability under *Sony/Grokster*, if any, is an open question. Were this dispute presented as a secondary liability problem, this Court would be forced to engage in a careful analysis of the social costs and benefits of the technology in question, weighed through the various safe harbors created by *Sony* and *Grokster*. Unfortunately, because of plaintiffs' waiver of secondary liability claims, such matters are not before this Court, making this case a "bad vehicle" for the questions presented. The Court should not respond to this waiver, though, by creating a new form of direct liability that would side-step the Supreme Court's rules in this area.

Second, and more broadly, the holding below creates a "regulatory asymmetry" – an unjustifiable difference in the legal status of competing solutions for providing DVR services. Copyright law unavoidably plays a major role in setting the conditions of competition in communications and technology markets.[1] *See* Wu, *Copyright's Communications Policy*, 103 Mich. L. Rev. 278. Given two

[1] Copyright's role as a communications policy tool typically appears in disputes involving claims that, on an industry-wide basis, a particular technology or device contributes to the violation of copyright. *See, e.g.*, *Sony*, 464 U.S. 417 (assessing whether VCR technology violated copyright in television programming); *Grokster*, 545 U.S. 913 (assessing copyright liability of particular use of peer-to-peer filesharing technology). This is in contrast to the more classical understanding of copyright as a doctrine that prevents the unauthorized reproduction or other use of the specific works of individual creative authors.

competing and functionally similar means of communicating information, where one is held to infringe copyright and the other is not, the resulting regulatory asymmetry distorts competition. Here, the district court's approach would create a major advantage for Device DVR technologies (or "STS-DVRs" in the district court's terminology), by holding Network DVRs (or "RS-DVRs") subject to a different and more stringent legal standard.

There is no reason that copyright law should chose a winner in the DVR market. Both Network and Device DVRs should be subject to the same standard – namely, the secondary liability standard set forth in *Sony* and *Grokster*.

For these reasons, *amicus curiae* Professor Wu respectfully suggests that this Court reverse the district court's ruling that Cablevision's proposed DVR program would directly violate the copyright laws, and suggests that liability, if any, lies under the secondary doctrines of *Sony* and *Grokster*.

III. ARGUMENT

A. Current Approaches to DVR Design

DVRs are "time-shifting" devices as that phrase is used in *Sony*, used to record television programming. The present case concerns the potential copyright liability of one of two competing technological approaches to providing DVR services, namely "Network DVRs." As is set forth in generous detail in the district court's opinion, Network DVRs store recorded programming in a central location rather than on hard drives in machines located in individual customers' homes. *Twentieth Century Fox Film Corp., et al., v. Cablevision Systems Corp., et ano.*, 478 F.Supp.2d 607, 609 (S.D.N.Y. 2007). In the present case, programming is stored on computer servers owned by Cablevision and located at its premises, but material is stored only after it is designated for recording by the individual Cablevision customer. *Id*.

The alternative and now-dominant model for DVR design is known as the "Device DVR," which consists of set-top equipment owned or rented by individual viewers and located in viewers' homes. With Device DVRs, there is no link to a separate storage location; the recorded programs are saved on the users' home equipment. TiVo is the best-known manufacturer of such devices, though Cablevision itself also offers a Device DVR. *Id.* at 612.

B. The Decision Below Creates an End-Run Around Copyright's Secondary Liability Doctrine

Like *Sony*, *Grokster* and a host of other secondary liability cases, the present dispute arises from the invention of a new device for manipulating copyrighted materials. Such innovations often give rise to claims that at least some uses infringe copyright, and that the device's distributor should bear some responsibility for this infringement. *See, e.g.*, *Sony*, 464 U.S. 417; *Grokster*, 545 U.S. 913; *Religious Tech. Ctr. v. Netcom On-Line Commc'n. Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995). These claims create a difficult question of balancing innovation against the legitimate interests of copyright owners. As the *Grokster* Court explained the dilemma, "[t]he more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright is an exercise in managing the trade-off." 545 U.S. at 928.

In order to manage this trade-off, courts throughout the country, including both the United States Supreme Court and this Court, have spent decades trying to establish tests that respect content holders' rights and incentives but that do not simultaneously stifle technological innovation. *See, e.g., Sony*, 464 U.S. 417; *Grokster*, 545 U.S. 913; *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159 (2d Cir. 1971); *Shapiro, Bernstein & Co. v. H. L. Green Co.* 316 F.2d 304 (2d Cir. 1963). Uniformly, the approach taken in these cases has been to analyze a defendant's conduct under the rubric of secondary liability. The jurisprudence of secondary liability has been crafted to balance content owners' rights against the dangers to innovation that would occur from over-protection.

Sony, *Grokster* and their progeny take the potential direct infringer to be the actor who decides that a copy of the work be made. *Sony*, 464 U.S. at 433. *See also* 17 U.S.C. §501(a). The cases then create potential secondary liability for the manufacturer of the enabling technology depending on various factors, including any knowledge of infringing uses to which the technology is put, the existence of inducing behavior, whether the defendant exceeded the safe harbors designed to protect devices that have substantial non-infringing uses, or whether any efforts have been made to prevent piracy. *See Sony*, 464 U.S. at 490-491; *Grokster*, 545 U.S. at 939 n. 12. While it is possible to imagine a jurisprudence constructed differently – one that tried, *ab initio*, to create a direct liability regime with *Sony/Grokster*-like safeguards – that is simply not the approach the Supreme Court has adopted. Rather, *Sony/Grokster* today is copyright's system for assessing the market entry of user-directed copying technologies. At this point the Court should respect that fact, rather than allow plaintiff's waiver of secondary liability claims to be an excuse to create a new jurisprudence of direct liability.

1. **<u>The District Court's Opinion</u>**

The district court has created a new form of direct liability that is open-ended and that effectively displaces established tests of secondary liability.

With due respect for the district court's opinion, it is difficult to identify with any precision what that court believed gave rise to Cablevision's potential direct liability for its RS-DVR program. The district court at times appears to have taken the view that the *customer's* decision to record a program, and his or her taking steps to effect that recording, are merely 'ministerial acts' and that therefore the actual copying is done by Cablevision. *Twentieth Century Fox Films*, 478 F.Supp.2d. at 621. A rule that entirely non-volitional actors may be direct infringers of copyright creates a new and open-ended theory of liability that is without precedent.

While Cablevision's involvement in helping its users record programs may be complex, it seems perverse to conclude that the only volitional act involved in the RS-DVR – *i.e.*, the customer selecting material to be recorded – is merely "ministerial." Even where there is staggering complexity in the execution of a very simple command, there should be no difficulty in identifying what constitutes the command, to which primary liability rightly attaches, and what constitutes the means of executing that command, to which secondary liability alone has traditionally attached. *Netcom*, 907 F. Supp. 1361; *Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968). Many contemporary technologies – cameras, photocopiers, computers, internet browsers – engage in extraordinarily complex operations in order to make a copy. But copyright law has never regarded the technologies themselves – as opposed to their operators – as the ones making the copy. *Netcom*, 907 F.Supp. at 1368-1369 ("[T]he mere fact that Netcom's system incidentally makes temporary copies of plaintiffs' works does not mean Netcom has caused the copying.") To hold otherwise makes even the humble typewriter the potential bearer of copyright liability.

Alternatively, the district court appears at times to have simply "eyeballed" the relationship between Cablevision and its customers and decided that that relationship constitutes a "system" or the provision of a "service," and that it therefore gives rise to direct liability. *Twentieth Century Fox Films*, 478 F.Supp.2d at 610. The holding seems simply to be that whenever an innovator retains "too much" control over its product, it risks having that product labeled a "system" and thereby subject to direct liability. From a doctrinal perspective this is an even more troubling approach. A rule that a product developer can be found directly liable where its product crosses some unspecified (and unspecifiable) line of complexity and control seems largely unworkable, and again is simply an evasion of the secondary liability jurisprudence created by the Supreme Court.

The doctrinal difficulty is compounded by the fact that the court below failed to consider that at least one party to this "system," the Cablevision customer, has a right to time shift copies of plaintiffs' programs. *Sony*, 464 U.S. at 442. This omission admittedly arises from the odd posture of the case. By limiting the issues to direct liability, the uses to which customers actually put Cablevision's technology do not get factored into the analysis.[2] But finding liability in a dual-use case without considering the nature of the use a device is put to creates difficulties in the jurisprudence. Nowhere does the opinion below address the substantial tension inherent in finding direct liability for participating in a "system" where the

[2] Note that while the customer's right to time shift is a fair use right, this is different from the fair use defense waived by Cablevision. It is the doctrinal implications of failing to consider the customer's right to time shift – and the possibility that it raises that there may be no copyright violation here in the first place – that is presently under discussion.

product of that system – a time-shifted program – arguably does not itself violate any copyright. *Sony*, 464 U.S. at 442. The answer to this doctrinal difficulty is not that the district court should have taken the nature of the end-uses into account in its direct liability analysis. Rather, it is that doctrines of direct liability simply fail to ask the proper questions for circumstances such as those in the present case, and that by finding direct liability the holding below needlessly distorts established copyright jurisprudence.

2. Implications of the District Court's Opinion

While the basis of the district court's finding of direct liability is unclear, the potential results of that ruling are not. If the ruling is allowed to stand, substantial industry uncertainty, doctrinal confusion and harm to technological innovation will likely follow.

The main problem with the district court's holding is that it confuses established copyright doctrine by providing an end-run around the Supreme Court's secondary liability jurisprudence. The rule that a manufacturer of a dual-use product who retains "too much" control over it forfeits the protections of the secondary liability doctrine appears to be without precedent. Indeed, such a rule may be flatly incompatible with existing Supreme Court rulings.

The district court based its finding that the RS-DVR would violate the copyright laws almost exclusively on a close analysis of how the system is designed. *See, e.g.*, *Twentieth Century Fox Films*, 478 F.Supp.2d at 619 ("The RS-DVR may have the look and feel of an STS-DVR, but 'under the hood' the two types of DVRs are vastly different.") Given the depth of the technical detail in the opinion, in fact, it is hard to imagine a clearer example of a design-based decision. *See id.* at 610-616. However, by finding liability based solely on the device's design, the decision below is arguably contrary to *Sony* and *Grokster*.

Sony and *Grokster* make plain that a manufacturer of dual-use devices cannot be held secondarily liable based on product design alone; for liability to attach there must also be a finding of inducement, culpable knowledge or an absence of substantial non-infringing uses. *Sony*, 464 U.S. at 418 (distribution of a facilitating device "does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses"); *Grokster*, 545 U.S. at 939 n. 12 ("Of course, in the absence of other evidence of intent, a court would be unable to find contributory infringement merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the *Sony* safe harbor.") Furthermore, under *Grokster,* affirmative steps to *prevent* copyright infringement may be relevant to secondary liability. Wu, *The Copyright Paradox*, 2005 Sup. Ct. Rev. 229, 247 ("[*Grokster*] suggests that a product that does filter is presumptively not a product that is intended to promote infringement, even if it does, in practice, facilitate infringement. In other words, *Grokster* is good news for Apple's iPod and iTunes download store which . . . do lead to infringement, but also make some effort to prevent illegally copying.") Unfortunately, none of these critical matters are placed into consideration by the district court's new theory of direct liability.

In short, the district court's holding would bypass *Sony* and *Grokster* and allow a content owner to establish copyright liability based on product design alone. All a plaintiff need do under the district court's reasoning is claim that a product is designed in such a closely-networked way that it constitutes *direct* infringement. Under this theory, there is no requirement that a plaintiff establish any of the additional factors required by *Sony* or *Grokster*. This end-run around the technology-protective elements of *Sony* and *Grokster* cannot be compatible with the law.

To avoid this doctrinal confusion, this Court should make clear that traditional approaches to liability for technologists, enumerated in *Sony* and *Grokster*, still govern. Cablevision's liability, if any, should be adjudicated under secondary liability rules. Any other approach would needlessly upset a decades-old jurisprudential balance.

C. The Court Should Not Use Copyright Law to Choose a Winner in the DVR Industry, but Rather Let the Market Decide

1. Whether End-User or Network Design is Preferable is an Important and Recurring Issue in Electronics and Communications Industries

The decision below represents an unfortunate example of copyright "choosing a winner" in a technology market. Today, in the market and as a technological matter, it is an open question as to whether a Device or a Network DVR design is more efficient or provides consumers with more appealing functionality. *See* Jeff Baumgartner, *Balance of Power*, CEDMagazine.com, June 1, 2006 (describing the advantages of Network DVRs and the possible downsides that such systems must overcome) (available at http://www.cedmagazine.com/article.aspx?id=68184) By holding that locating recording capacity on the network is crucial for copyright purposes, the district court is creating a "regulatory asymmetry" – effectively giving an enormous market advantage to Device DVRs over Network DVRs without good reason.

The trade-offs between user-based and network-based designs are very familiar in the electronics and communications industries. These industries have constantly struggled with whether various services are better situated on networks or placed in a user-owned device. The network-versus-device question is not unlike the question of whether front-wheel or rear-wheel drive is a "better" design for cars. Both approaches, obviously, have their advantages and disadvantages, and only time and experimentation can determine which is better for what kinds of vehicles. It would seem absurd for a federal court to grant a regulatory advantage to front-wheel drive cars for no good reason, but the district court here has done essentially the same thing.

The history of the electronics and computing industries is full of examples of functionality migrating from networks to devices and back again. Perhaps the most dramatic example of a shift from a network-oriented approach to a device approach can be found in computing. In the 1960s and 1970s, network models of computing dominated and "mainframe" computers located their systems' intelligence at the center of their networks. Early personal computers, such as the Apple II and the IBM PC, were innovative and successful precisely because they took a "device"-based approach and moved the system intelligence to the user end. *See* Roy Allan, *A History of the Personal Computer: The People and the Technology* (2002).

Likewise, at the birth of the telephone era in the early 20th century, device "intelligence" was placed at the center of the network. The paradigmatic example of a network with its intelligence at the center may well have been AT&T's centrally-switched phone system. Today, however, Voice-Over-IP programs such as those offered by Skype and Vonage provide phone service through a system that, in some of its iterations, does away entirely with centralized switching and instead routes communications over the public Internet. Many observers believe that such innovations will eventually substantially replace the centralized switched phone network and effectively transform telephony into an "end user" system. *See* Phillip Weiser and Jon Nuechterlein, *Digital Crossroads: American Telecommunications Policy in the Internet Age* (2005).

The trend, however, has not always been one of moving functionality to end-user devices. For example, email has migrated from the network to the user and back again. In the early days of computing, email was a central service; it then became a program that resided on users' computers, in the form of programs such as Microsoft Outlook and Eudora. Then, over the last decade, network-based "Web-mail" has again become popular through programs like Yahoo Mail and Google's Gmail. Similarly, firms like Microsoft and Google have begun exploring "software as service" business models, which entail placing functions that were previously resident on end-user machines, like word-processing software, onto networks so that they can be managed at a centralized site. *See* John Markoff, *Competing as Software Goes to the Web*, N.Y. Times, June 5, 2007 (describing strategies of Apple and Microsoft to move operating system functions traditionally located on end-users' computers to the Web).

In all of these examples, it is hard, if not simply impossible, to say whether the network or end-user model provides the "better" approach. In most circumstances, both have benefits and drawbacks, different approaches may suit different consumers, and the choice is therefore valuable in and of itself. But one thing is clear. Since the market often cannot decide between different design approaches – indeed since it frequently values both methods of designing the same product – it makes very little sense for a court to use copyright law to choose a winner.

2. The Court Should Strive to Avoid Creating Regulatory Asymmetry – Different Rules for Competing Technologies

Copyright is an important tool for subsidizing the creative industries. In the famous formulation of Lord Macaulay, copyright is a "tax on readers for the purpose of giving a bounty to writers." Thomas Macaulay, *Speeches on Copyright* (C. Gaston, ed. 1914). But as such, the Court should ensure that the copyright "tax" is placed where it attracts revenue while distorting competition the least. In this case, that means preventing the use of copyright to create a "regulatory asymmetry."

In communications policy, asymmetric regulation refers to the application of different regulatory constraints to firms competing within the same market. *See, e.g.*, John Haring, *Implications of Asymmetric Regulation for Competition Policy Analysis* (FCC Office of Plans & Policy, Working Paper No. 14, 1984). For example, if front-wheel drive cars were forced to comply with a stricter set of federal emissions rules, the result would be a regulatory asymmetry in favor of rear-wheel drive vehicles.

This is not to say that regulatory asymmetry is always undesirable. It may be desirable when it is employed in the service of an important policy objective. As Professor Rob Friedman has written, "The FCC tolerates regulatory disparity between competitive providers where necessary to fulfill legislative or public policy purposes like those articulated in the Telecommunications Act of 1996." Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach*, 55 Fed. Comm. L.J. 207, 220 (2003). Similarly, regulators will sometimes grant a new technology favorable regulatory treatment to ensure wider adoption at an early stage. For example, in the 1980s and 1990s the Internet was largely left free from many of the regulatory constraints that the phone system and other networks were placed under, leading to its explosive growth. Kevin Werbach, *A Layered Model for Internet Policy*, 1 J. Telecomm. & High Tech. L. 37, 43 (2002) ("[T]he FCC labeled its approach toward the Internet 'unregulation.' This approach fostered the growth of pro-competitive and innovative new services by leaving many essential questions unanswered.")

In this case, however, there is no obvious policy justification for creating a regulatory asymmetry favoring Device over Network DVRs. Any putative lost revenue for the copyright owner is lost whether the consumer uses a device or records over a network. The regulatory asymmetry created by the district court thus appears to be arbitrary and perhaps even accidental. This Court should therefore find that the liability for both Network and Device DVR, if any, lies under the *Sony/Grokster* framework discussed above.

3. The Supreme Court Has Refused to Use Copyright to Choose a Winner Between Direct Competitors in Similar Circumstances

The Supreme Court's cable television decisions from the 1960s provide importance guidance for this case. In a series of copyright cases, the Supreme Court was asked to intervene in the dispute between the incumbent broadcast television industry and the then-new cable industry. Recognizing that it was being asked to use copyright law to choose an industry champion and a preferred technology, the Court refused the invitation to find liability, thereby preventing the cable industry from being killed off by copyright law before it even had a chance to compete in the marketplace. *See Fortnightly Corp. v. United Artists*, 392 U.S. 390, 401 (1968) ("We have been invited by the Solicitor General in an *amicus curiae* brief to render a compromise decision in this case that would, it is said, accommodate various competing considerations of copyright, communications, and antitrust policy. We decline the invitation."); *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974) ("Detailed regulation of [business and commercial relationships between broadcast and cable television], and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress.") Eventually, a compromise was reached in Congress allowing both industries to flourish, to the benefit of consumers. *See* 17 U.S.C. §111. The Supreme Court's rulings in these cases recognized that an overarching principle is at stake when copyright is being invoked as a communications policy tool: so long as a technology is not threatening the core of copyright's subsidy regime (*cf. A&M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir. 2001); *Grokster*, 545 U.S. 913), courts should avoid using copyright to gratuitously advantage one competitor over another.

In fact, *Fortnightly* reached its holding by rejecting a test that was very much like the one applied by the district court here. *Fortnightly* examined the potential copyright liability of cable providers for erecting antennas to capture broadcast signals in order to transmit them to subscribers. The Court of Appeals there examined whether the cable industry infringed the performance rights of the content-holder plaintiffs by asking "[H]ow much did the [cable providers] do to bring about the viewing and hearing of a copyrighted work?" 392 U.S. at 396. Similarly, here the court below assessed liability through an examination of how much Cablevision did to bring about the recording of programs, primarily through an examination of its ownership and control of the machines on which copies are made and of the intricacies of Cablevision's back-end procedures. *Twentieth Century Fox Films*, 478 F.Supp.2d at 610-622.

In rejecting this approach, the Supreme Court held that

> mere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. If it were, many people who make large contributions to television viewing might find themselves liable for copyright infringement . . . . Rather, resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception.

Fortnightly, 392 U.S. at 397.

Thus, the district court erred in failing to understand Cablevision's function in the present dispute: it provides copying technology that enables customers to time-shift programming. As in *Fortnightly*, the fact that the technology it supplies is complicated does not change the nature of its function.

In short, in its refusal to allow copyright law choose an winner in the television industry, and in its rejection of a broad theory of direct liability, *Fortnightly* provides important guidance for this Court as it addresses the questions of copyright and communications policy in the present dispute.

IV. CONCLUSION

For the foregoing reasons, *amicus curiae* Professor Timothy Wu respectfully suggests that this Court reverse the district court's ruling.

June 8, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Henry Lanman, attorney for *amicus curiae* Professor Timothy Wu, do hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,568 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportional spaced typeface using Microsoft Word in Times New Roman 14 point font.

Dated: New York, New York
June 8, 2007

Henry A. Lanman (HL 6095)

ANTI-VIRUS CERTIFICATION

Case Name: Cartoon Network v. Turner

Docket Number: 07-1480-cv(L)

I, Samantha Collins, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 6/8/2007) and found to be VIRUS FREE.

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Dated: June 8, 2007