07-1480-cv(L), 07-1511-cv(CON)

THE UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

THE CARTOON NETWORK LP, LLLP, and
TWENTIETH CENTURY FOX FILM CORP.,
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,
-v.-
CSC HOLDINGS, INC. and CABLEVISION SYSTEMS CORP.,
Defendants-Counterclaim-Plaintiffs-Third-Party Plaintiffs-Appellants,

(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* THE PROGRESS & FREEDOM FOUNDATION IN SUPPORT OF APPELLEES URGING AFFIRMANCE

SOLVEIG SINGLETON
THE PROGRESS & FREEDOM FOUNDATION
1444 Eye St., NW, Suite 500
Washington, DC 20005
(202) 289-8928
Counsel for Progress & Freedom Foundation

-v.-

TURNER BROADCASTING SYSTEM, INC., CABLE NEWS NETWORK LP, LLP, TURNER NETWORK SALES, INC., TURNER CLASSIC MOVIES, LP, LLLP, TURNER NETWORK TELEVISION LP, LLLP,

Third-Party-Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae states that:

The Progress & Freedom Foundation ("PFF") is a nonprofit research and educational institution, as defined by the Code of the Internal Revenue Service, 26 U.S.C. 501(c)(3). The Foundation's principal mission is to study the impact of the digital and electronic revolution and its implications for public policy. PFF has no parent companies, subsidiaries, or affiliates. No publicly held corporation has an ownership stake of 10% or more in PFF.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The Progress & Freedom Foundation's principal mission as a nonprofit educational foundation is to study the impact of the digital and electronic revolution and its implications for public policy. PFF's interest in this case stems from the work of an internal project called the Center for the Study of Digital Property (CSDP), dedicated to developing and advancing market-based, property-rights-oriented approaches to issues of digital content. In furtherance of its mission, CSDP maintains a website called IPcentral.info,[1] which contains links to a variety of materials on intellectual property issues, including written materials, a weblog, and links to other sites with related interests.

New technology has often challenged existing theories of copyright liability, which involves our core interests in promoting markets in digital content *and* technology. In this atmosphere of change, there is room for disagreement about the exact contours of direct and secondary liability. But our view is that support for sound copyright principles—including a decision to uphold the ruling of the court below in this case, finding liability for direct

[1] The website may be found at http://www.IPcentral.info.

infringement—should not be seen as a decision "for" creators and "against" consumers and downstream distributors or technologies. Rather, all have a common "big picture" interest in supporting those principles, without which a viable market for content with healthy licensing mechanisms could not be maintained.

SUMMARY OF ARGUMENT

We argue that the District Court properly applied the case law concerning direct liability for infringement to Cablevision below. We anticipate that the parties and other *amici* will discuss the cases and statutes relevant to clarifying the significance of buffering, the definition of performance, and other elements of the claims in detail. Rather than duplicate those efforts, our brief will address larger concerns with the impact of the lower court's decision on innovation.

In a nutshell, the concern emphasized by those filing on behalf of Cablevision is that the service proposed in this case is the functional equivalent of a digital video recorder (DVR) and/or a remote storage service provided over the Internet. Therefore, they argue, this court ought to shoehorn the dispute into a broad interpretation of the Supreme Court's decision in *Sony Corp. v.*

Universal City Studios, Inc., 464 U.S. 417 (1984), involving the VCR, or, alternately, treat Cablevision exactly like an ISP.

But rough functional or technical equivalence is not necessarily legal nor economic equivalence. The level of control that Cablevision exercises over the stream of programming and Cablevision's superior understanding of the program's status under license takes this case well out of the realm of cases involving photocopy machines, the VCR, and the Internet. And ultimately, the finding of liability below suppressed no technology whatsoever; it simply restored the incentives of both sides to negotiate further licenses.

Skewing the inquiry to avoid imposing liability on a sophisticated business venture here is not necessary to keep the "balance" of copyright. Rather, it would exacerbate the difficulties faced by content owners today in developing new licensed distribution channels, without gain in the long run for consumers or new distribution technologies. Going forward, services like Cablevision's are of little value without licensed content, and consumers' ultimate interest is in preserving market mechanisms such as licensing that enable creators to get paid. Most importantly, broad exemptions from liability can disable licensing markets, which ultimately serve consumers and innovative distributors as well as content creators and producers.

ARGUMENT

I. LIABILITY IS PROPERLY DETERMINED BY CONTROL AND COGNITION, NOT TECHNOLOGY

From one standpoint, Cablevision's service is the equivalent of equipping each consumer with a DVR—like the VCR at issue in *Sony*. Alternately, one might portray the service as a very easy-to-use variant of the Internet—A DVR with a very very long wire[2]—with Comcast's "buffering" the equivalent of the practice of "caching" online. But the equivalence of these disparate products is far too weak to support arguments that their liability for copyright infringement should be decided by parallel reasoning, or the implication that the growth of each depends upon exemption from liability across the board.

Unlike an ISP or the seller of consumer recording equipment, Cablevision licenses and selects the content at issue as well as maintains physical control of the programming and the copies throughout. A review of the case law shows that even a lower level of cognition and understanding, coupled with physical control and a profit motive, properly gives rise to

[2] *See, e.g.* Steven Effros, "The Next 'Betamax' Case," *CableFAX Daily*, June 1, 2006, p. 5. (comparing capabilities of Cablevision's proposed service with those of a DVR box in the consumer's home, concluding, "[t]he only difference is that the storage, the hard drive, will not be on top of the consumer's television set, but at the headend of the cable operator.").

direct liability for infringement even when the customer also has a role in selecting the material;[3] and even when the customer arguably has a right to copy the material in question.[4] Like should be treated as like. But Cablevision's level of volition, control, and understanding of the programming and its legal status mean that this service is not really "like" the early ISP[5] or a VCR. Finding ground rules that make sense going forward means looking for cases involving a legal status, incentives, and

---

[3] *See, e.g.* Princeton University Press v. Michigan Document Service, 99 F.3d 1381, 1389 (6th Cir. 1996)(en banc):

> The defendants argue that the copying at issue here would be considered "nonprofit educational" if done by the students or professors themselves. The defendants also note that they can profitably make multiple copies for less than it would cost the professors or the students to make the same number of copies. . . . As to the proposition that it would be fair use for the students or professors to make their own copies, the issue is by no means free from doubt. We need not decide this question, however, for the fact is that the copying complained of here was performed on a profit-making basis by a commercial enterprise. And "the courts have . . . properly rejected attempts by for-profit users to stand in the shoes of their customers making nonprofit or noncommercial uses." [Citation omitted]

[4] *See, e.g., UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (D.C.S.D.N.Y. 2000) (service that made copies of CD's available to consumers online liable for direct infringement, even when consumers could show they owned the CD's in question).

[5] *See, e.g. Religious Tech. Center v. Netcom Online Communications Services*, Inc., 907 F. Supp. 1361 (N.D. Cal. 1995)(communications service provider not liable for user-created content posted to bulletin board and automatically distributed on Usenet).

level of understanding similar to Cablevision's, not to woodenly exempt any venture from liability that uses a certain technology.

Upholding the lower court's willingness to recognize the distinction between an informed actor with considerable involvement in the questionable copying and more peripheral actors also makes economic sense. First, the rollout of Cablevision's service to many consumers at once is likely to have a substantial economic impact on competing licensed distributors of the same content. By contrast, the uncoordinated sale of consumer equipment to disparate consumers, or the offering of communication services to disparate consumers, is likely to be much less, the difference between a shotgun blast at two feet and a pellet or two at 100 yards.

Second, consumers using a VCR, DVR, a Kinko's would find it extremely cumbersome to negotiate licenses for the content in question.[6] So would those offering recording devices for sale or copying services for hire, as they do not know in advance what is going to be copied. The role of customer volition and/or consumer defenses such as fair use is properly

[6] *Cf. American Geophysical Union* at 27 (finding that it was not practicable to expect medical professionals to seek out reprints of back issues of journal articles from publishers rather than making photocopies).

raised in those cases.[7] This is not to say that all inquiries will find fair use where *Sony* found it.[8] But in this case Cablevision might have anticipated concerns with its proposal in licensing discussions, many of which actually went forward in any case and more of which are clearly possible. There is no "market failure" of the licensing process here.

Permitting a content distribution and storage service with full awareness of the licensing status of the works it copies to evade direct liability for infringement is not necessary to avoid "chilling" general purpose technology. Rather, such a decision would allow factors of questionable legal and economic significance—the consumer's decision to enter this channel number instead of that, or the length of time a copy is held as a buffer—to eliminate content distributors' incentive to license new services that do not exactly fit the model of the old. The finding of liability below suppressed no technology whatsoever; it simply restored the incentives of both sides to negotiate a license.

---

[7] *See generally*, Wendy J. Gordon, "Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and Its Predecessors," 82 *Columbia Law Review* 1600 (1982) [Note that "Betamax" here refers to the Court of Appeals' decision, not the Supreme Court's].

[8] For further discussion of different interpretations of *Sony*, see below at p.10.

II. FINDING DIRECT LIABILITY HERE DOES NOT UPSET THE COPYRIGHT BALANCE

The section above shows that neither the case law nor policy considerations call for the court to obliterate the distinction between Cablevision's proposed service and offerings such as the VCR and the Internet. How can the bevy of law professors, among others, filing on the other side be wrong?

Obviously, many copyright disputes present conflicts between content producers and distributors (particularly those using new technologies), with the latter often asserting the rights of consumers to access the disputed material. Many of these disputes persist only in the short run; they involve a particular firm's business or technology or a particular consumer's actions, not Innovation in the abstract, or Consumers in general. But the conflicts can be bitter and highly publicized. One might easily fall into the way of thinking that copyright is a zero sum game, with a gain for content producers being a loss for consumers or innovative distributors, a loss for one distributor being a loss for all distributors. An economist might describe this as confusing the consumers' or distributors' "action interest"—his interest in a particular situation—with his "constitution interest"—his interest in choosing a rule that gives the best results for the group as a whole.[9]

[9] See Viktor Vanberg & James M. Buchanan, "Rational Choice and Moral Order," in 10 *Analyse & Kritik* 138 (1988).

But in the long run, distributors, consumers, and content producers alike have a common interest in ground rules for copyright that support viable markets in content. Distribution technologies gain in value when more high-quality content is available for distribution.[10] Consumers also have an ultimate interest in preserving market mechanisms such as licensing that enable creators to get paid. The Supreme Court recognized this in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), saying:

> "Copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. . . . The profit motive is the engine that ensures the progress of science." American Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 27 (SDNY 1992), aff'd F.2d 913 (CA2 1994). Rewarding authors for their creative labor and "promoting . . . Progress" are thus complementary; as James Madison observed, in copyright :[t]he public good fully coincides . . . with the claims of individuals." The Federalist, No. 43, p. 272 (C. Rossiter ed., 1961). [Brackets, ellipses, and emphasis in *Eldred*.]

---

[10] The positive downstream effects of flourishing content markets on other areas of the economy are described in a number of studies. See Stephen E. Siwek, Engines of Growth: Economic Contributions of the U.S. Intellectual Property Industries. Economists Incorporated (2005)(Commissioned by NBC Universal), *available at* http://nbcumv.com/corporate/Engines_of_Growth.pdf; International Chamber of Commerce, Intellectual Property: Source of innovation, creativity, growth, and progress (Aug. 2005), *available at* http://www.iccwbo.org/uploadedFiles/ICC/policy/intellectual_property/Statements/ BASCAP_IP_pub.pdf; Robert A. Shapiro & Kevin J. Hassett, The Economic Value of Intellectual Property, USA for Innovation (Oct. 2005), *available at* http://www.usaforinnovation.org/news/ip_master.pdf.

The Court concluded that "copyright law serves public ends by providing individuals with an incentive to pursue private ones."[11]

In a nutshell, content must be protected, or it will not be produced. But on the other hand, neither consumers nor innovators should be restricted unnecessarily. The Court most famously recognizes this qualification in *Sony*, which endeavors to "strike a balance between a copyright holder's legitimate demand for effective–not merely symbolic–protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce." *Sony*, 464 U.S., at 442. But even *Sony* gives more tentative protection to consumers than is often assumed; the Court emphasized that the content companies had not shown actual present harm from time-shifting, and that its ruling did not extend to library building for repeat viewing.

Finding exactly the right mix of rules is difficult, but one thing is clear: always drawing a bright line so that innovative distributors escape liability is a gross oversimplification of the supposed conflict between distributive technologies and content creators. Taking a broad perspective, there is generally no conflict between these interests; rather, they complement one another and add value to one another's ventures. Content

[11] 537 U.S. 212 note 18.

has no value if consumers cannot access it; distribution technologies have little value without quality content to distribute.

CONCLUSION

The lower court's decision below, finding that Cablevision proposed service infringes copyright, is consistent with sound copyright principles. The law has always and must continue to distinguish intentional copying by key players with almost complete control of output from and opportunities to license from more peripheral actors in commercial ventures, the value of which is largely unrelated to the value of the copied content. The decision below does not restrict a technology; rather, it maintains Cablevision's incentive to license.

Most importantly, broad exemptions from liability can disable licensing markets, which ultimately serve consumers and innovative distributors as well as content creators and producers. A downstream user or distributor of content has no reason to negotiate a license if she is not liable for infringement. Exemptions from liability thus belong where it is reasonably certain that negotiations are impracticable and will remain so in the near future. That is not the case here. Cable systems that wish to offer services such as the one contemplated by Cablevision might find the bargaining goes pretty well; for if content creators push too hard, they risk

being confronted by the more difficult problem of widespread consumer adoption of powerful DVRs.

July 10, 2007

Respectfully submitted,

_____

SOLVEIG SINGLETON
THE PROGRESS & FREEDOM FOUNDATION
1444 Eye St., NW, Suite 500
Washington, DC 20005
(202) 289-8928

Counsel for Progress & Freedom Foundation

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 2,494 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

July 10, 2007 By: _____

SOLVEIG SINGLETON
THE PROGRESS & FREEDOM FOUNDATION
1444 Eye St., NW, Suite 500
Washington, DC 20005
(202) 289-8928

Counsel for Progress & Freedom Foundation

ANTI-VIRUS CERTIFICATION FORM

Pursuant to Second Circuit Local Rule 32(a)(1)(E)

CASE Name: The Cartoon Network v. CSC Holdings

DOCKET NUMBER: 07-1480-cv(L), 07-1511-cv(CON)

I, Christopher R Dorsey, certify that I have scanned for viruses the PDF version of the Amicus Brief that was submitted in this case as an email attachment to briefs@ca2.uscourts.gov and that no viruses were detected.

Please print the name and the version of the anti-virus detector you used:

Date: July 11, 2007 By: _____

CERTIFICATE OF SERVICE

I hereby certify, pursuant to FRAP 25(d)(2), that the foregoing Brief was timely filed in accordance with FRAP 25(a)(2)(B) by sending it via courier (UPS) on to:

Catherine O'Hagan Wolfe, Clerk of Court
United States Courthouse
40 Foley Square, Room 1803
New York, N.Y. 10007

I further certify that, on July 11, 2007, I caused two copies of the foregoing brief to be served on the following parties via First Class Mail:

Arnold & Porter, LLP
Attorneys for Plaintiff-Counter-Defendants-Appellees
399 Park Avenue
New York, New York 10022
(212) 715-1000
Peter.Zimroth@aporter.com
Eleanor.Lackman@aporter.com

Cravath Swaine & Moore LLP
Attorneys for Plaintiff-Counter-Claimant-Defendants-Appellees
825 Eighth Avenue
New York, New York 10019
(212) 474-1000
kforrest@cravath.com
aryan@cravath.com
JHein@cravath.com

Timothy A. Macht
Law Offices of Timothy A. Macht
Attorney Defendants-Counterclaim, Plaintiffs-Third-Party Plaintiffs-Appellants CSC Holdings, Inc. and Cablevision Systems Corporation
99 Hudson Street, 8th Floor
New York, New York 10013
(212) 941-0494
Tmacht@gmail.com

Arnold & Porter, LLP
Attorneys for Plaintiffs-Counter-Defendants-Appellees
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Robert.Garrett@aporter.com
Hadrian.Katz@aporter.com

Jeffrey A. Lamken
Robert K. Kry
Joshua A. Klein
Baker Botts L.L.P.
Attorneys for Defendants-Counterclaim-Plaintiffs-Third-Party Plaintiffs-Appellants CSC Holdings, Inc. and Cablevision Systems Corporation
The Warner
1299 Pennsylvania Avenue, NW
Washington, DC 20004
(202)639-7700
Jeffrey.lamken@bakerbotts.com
Robert.key@bakerbotts.com
Joshua.klein@bakerbotts.com