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,

v.

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

(Caption Continued on Inside Cover)

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

BRIEF OF *AMICI CURIAE* AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.; ASSOCIATION OF AMERICAN PUBLISHERS; ASSOCIATION OF AMERICAN UNIVERSITY PRESSES; DIRECTORS GUILD OF AMERICA, INC.; ENTERTAINMENT SOFTWARE ASSOCIATION; INDEPENDENT FILM & TELEVISION ALLIANCE; NATIONAL FOOTBALL LEAGUE; NATIONAL MUSIC PUBLISHERS' ASSOCIATION; OFFICE OF THE COMMISSIONER OF BASEBALL; PROFESSIONAL PHOTOGRAPHERS OF AMERICA; RECORDING INDUSTRY ASSOCIATION OF AMERICA; SCREEN ACTORS GUILD, INC.; SESAC, INC.; AND WRITERS GUILD OF AMERICA, WEST, INC. IN SUPPORT OF AFFIRMANCE

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v.

TURNER BROADCASTING SYSTEM, INC., CABLE NEWS NETWORK LP, LLLP, TURNER NETWORK SALES, INC., TURNER CLASSIC MOVIES, L.P., LLLP, TURNER NETWORK TELEVISION LP, LLLP,
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CORPORATE DISCLOSURE STATEMENT

In accordance with FRAP 26.1, *amici* state as follows.

Amicus American Society of Media Photographers, Inc. (ASMP) is the premier trade association for professional photographers who make images primarily for publication. ASMP promotes photographers' rights through industry, judicial, and legislative advocacy; information and publications; and education. ASMP was founded in 1944 and now has more than 5000 members around the world. ASMP has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Amicus Association of American Publishers (AAP), as the principal national trade association of the U.S. book publishing industry, represents some 300 member companies and organizations that include most of the major commercial book and journal publishers in the United States, as well as many small and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books and journals in every field of human interest. In addition to publishing literary works for sale in hard-copy book formats, AAP members are active in the markets for e-books and audiobooks, and also in producing and licensing the use of computer programs, databases, Web sites, and a variety of multimedia works for use in online and other digital formats. AAP is a nonprofit association that does not offer any stock, and is not a subsidiary or affiliate of any publicly traded company.

Amicus Association of American University Presses (AAUP) is a membership organization representing 128 not-for-profit scholarly publishers. These publishers are affiliated with research universities, scholarly societies, foundations, museums, and other research institutions. AAUP members publish books and journals in the humanities, social sciences, scientific/technical/medical, and professional fields. The AAUP has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Amicus Directors Guild of America, Inc. (DGA) was founded in 1936 to protect the economic and creative rights of directors. Over the years, its membership has expanded to include all members of the directorial team. Today, through the collective voice of over 13,400 members, the Guild seeks to protect the rights of directorial teams, to contend for their creative freedom, and to strengthen their ability to develop meaningful and lifelong careers in film, tape, and digital media. The DGA has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Amicus Entertainment Software Association (ESA) is the U.S. trade association dedicated to serving the business and public affairs needs of companies that publish video games for game consoles, personal computers, handheld devices, and the Internet. The ESA works to protect the intellectual property interests of its members through, among other things, a worldwide anti-piracy program designed to combat piracy of entertainment software. ESA members collectively account for more than 90 percent of the $7.4 billion in entertainment software sales in the U.S. in 2006, and billions more in export sales of entertainment software. The ESA, a nonprofit trade association, has no parent corporation, no stock and hence no shareholders.

Amicus Independent Film & Television Alliance (IFTA) is the trade association representing over 155 independent producers and distributors of motion pictures and television programming, as well as affiliated financial institutions that provide funding for independent production. IFTA is also the owner of the American Film Market, the largest commercial film market in the world. IFTA has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Amicus National Football League (NFL) is an unincorporated association of thirty-two Member Clubs, each of which owns and operates a professional football team. The NFL is responsible for the production of and/or owns the copyright in various audio and video products that are marketed to the public. The NFL has no parent corporation, and neither the NFL nor any of its member clubs has publicly traded stock.

Amicus National Music Publishers' Association (NMPA) is the principal trade association representing the interests of music publishers in the United States. The approximately 700 music publisher members of NMPA, along with their subsidiaries and affiliates, own or administer the majority of U.S. copyrighted musical works. For nine decades, NMPA has served as the leading voice of the American music publishing industry in Congress and in the courts. The NMPA has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Amicus Office of the Commissioner of Baseball is an unincorporated association, also doing business as Major League Baseball, whose members are the 30 Major League Baseball Clubs. The Office of the Commissioner of Baseball, on behalf of its members, has responsibility for administrative and operational matters relating to Major League Baseball. One of its responsibilities is to grant national video and audio media rights to Major League Baseball events, including regular season and post-season games. The Office of the Commissioner of Baseball has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Amicus Professional Photographers of America (PPA), the world's largest photographic trade association, represents photographers and photographic artists from dozens of specialty areas including portrait, wedding, commercial, advertising, and art. The professional photographers represented by the PPA have been the primary caretakers of world events and family histories for the last 150 years, and they have shared their creative works with the public secure in the knowledge that their rights in those works would be protected. PPA has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Amicus Recording Industry Association of America (RIAA) is a trade group representing the American recording industry. The RIAA's record company members create, manufacture, and/or distribute approximately ninety percent of all legitimate sound recordings produced and sold in the United States. Each RIAA member owns thousands of valuable copyrights. The RIAA has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Amicus Screen Actors Guild, Inc. is the nation's largest labor union representing working actors. Established in 1933, the Guild represents more than 120,000 working actors in film, television, industrials, commercials, music videos, and new media. The Guild exists to protect and enhance actors' working conditions, compensation and benefits and to be a powerful, unified voice on behalf of artists' rights. The Guild has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Amicus SESAC, Inc. (SESAC) is a musical performing rights society, which serves both the creators and the users of nondramatic musical works through licensing and royalty collection and distribution. SESAC licenses the public performance of more than a quarter of a million songs on behalf of its thousands of affiliated songwriters, composers, and music publishers. SESAC is one of three performing rights societies recognized under the Copyright Act. Established in 1930, SESAC is the second oldest and fastest growing performing rights society in the United States. SESAC has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Amicus Writers Guild of America, West, Inc. (WGAW) is a labor organization and the collective bargaining representative of approximately 11,000 professional writers in the motion picture, television, and new media industries. As the bargaining representative of the creators of audiovisual content, the WGAW has a significant interest in the protection of copyrighted material against infringement. The WGAW has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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Amici are individual companies, sports leagues, trade associations, labor unions, and others that own or create (or whose members own or create) substantial numbers of valuable copyrighted works, including music, books, photographs, video games, sports programming, motion pictures, and television programming. As owners and creators of content in the digital age, *amici* and their members work to marry content and technology to foster lawful services that use digital media to provide consumers with new means of accessing copyrighted content. Unfortunately, as these new means of authorized content delivery have emerged, so too have unprecedented levels of digital piracy. Copyright owners' ability to commercially exploit their works is under constant attack as others devise new means of copying and delivering content to consumers for profit without compensating those who created the works. Cablevision's RS-DVR service is just one example.

Although *amici* own or receive income from a diversity of copyrighted content, they are united in the view that the district court's decision was correct: a business that profits from reproducing and transmitting copyrighted content without permission cannot escape liability for its direct infringement merely by "automating" its reproduction and transmission functions, or by seeking to offload responsibility to its users for the services it has designed, maintains, and operates.

The contrary position advanced by Cablevision and its *amici* would undermine the development of lawful businesses that both respect copyright and harness the powerful potential of new technologies, and it would eviscerate the economic incentives that copyright law enshrines as the engine for the creation of content.

This brief is filed with the consent of the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

The legal theory that Cablevision advances would radically destabilize copyright law in defiance of the Copyright Act's plain text and in derogation of its core purposes. Cablevision delivers copyrighted content to its subscribers by making copies, storing the copied content on its servers, and transmitting that content through its cables and set-top boxes. Because Cablevision has no license to do so, the RS-DVR directly usurps the copyright owners' exclusive statutory rights to control the reproduction and public performance of their works. *See* 17 U.S.C. § 106(1), (4). The district court was thus correct to conclude that Cablevision, which designed, maintains, and operates the RS-DVR service, directly infringes plaintiffs' copyrights.

Cablevision seeks to avoid this obvious result under established law on the counterintuitive theory that Cablevision's subscribers, rather than Cablevision itself, should be deemed to have committed the unlicensed acts of reproduction and public performance at issue. Cablevision advances two related lines of argument. First, analogizing itself to a mere seller of copying equipment, Cablevision contends that it cannot be liable for direct infringement because it has "automated" its service and is thus a mere passive conduit for content, so that the only "volitional" acts of copying and performance are those of its subscribers. Second, Cablevision contends that its subscribers have a "right" to the "fair use" of plaintiffs' copyrighted content, and that Cablevision should incur no liability for merely providing an allegedly more "efficient" means for its subscribers to exercise that supposed right. Thus, Cablevision claims that it should be allowed to run a commercial business that delivers copyrighted content to subscribers without any obligation to obtain a license – even though the content Cablevision provides via its RS-DVR is the same content that Cablevision has been licensed to transmit via its standard cable services and through its video-on-demand service.

No court has ever accepted Cablevision's contention that a business can engage in the unauthorized exploitation of copyrighted works for profit so long as it automates the provision of those works to consumers. Of course, on the facts here, any automation exception would be particularly inapt, because Cablevision creates a buffer copy of the content *whether or not any user even seeks to record a program*; thus the copying at issue is not remotely close to being entirely user-driven. Regardless, Cablevision cannot avoid liability even if all of the copying and transmission of content accomplished by the RS-DVR service were triggered by Cablevision's subscribers. Indeed, it could hardly be otherwise. Cablevision is no mere passive conduit. Rather, Cablevision chooses the content available on its RS-DVR service and then *copies and provides* that content to its subscribers for a fee. That is the epitome of directly infringing conduct.

Under Cablevision’s contrary theory, Apple might be free to distribute music and television programming through its iTunes service without a license because an iTunes subscriber (rather than Apple itself) selects the works to download and receives the downloads through an automated process. Similarly, interactive music streaming services such as Rhapsody might operate free of any obligation to license the music they offer because, once again, subscribers choose the music, which is then is delivered via an automated process. Such results would wreak havoc in the market for copyrighted content. In the digital age, content holders routinely license businesses to employ new and emerging technologies to distribute content for a fee via automated processes. However, unlike Apple, Rhapsody, and other content-based services such as GameTap and Movielink, Cablevision has chosen to launch its business without obtaining licenses. Cablevision competes directly with licensed, content-based services, providing *both* the content *and* the means to access that content. Allowing Cablevision to appropriate copyrighted content would create a massive exception to the Copyright Act and would eviscerate the economic incentive system upon which copyright law is based.

Nor can Cablevision escape liability by characterizing its business as an allegedly “more efficient” means of facilitating its subscribers’ “fair use.” The end uses to which consumers put Cablevision-provided content are irrelevant in the context of plaintiffs’ *direct* infringement action: only secondary infringement claims, which plaintiffs are not asserting here, rely on end-user infringement. Moreover, the basic premise of Cablevision's argument is unproven: nothing in this record or the case law establishes that the recording of cable programming by Cablevision's subscribers is fair use.

Lacking any persuasive legal argument, Cablevision and its *amici* spend page after page predicting that any affirmance of the ruling below would chill emerging technology. The facts on the ground refute those dire warnings. Services such as iTunes and Rhapsody have seized the promise of digital technology while also respecting rights of copyright owners and artists to compensation for their works. Indeed, Cablevision could launch its RS-DVR service tomorrow if it negotiated appropriate licenses – just as it has done for video-on-demand and the rest of its video cable offerings. Simply put, this suit is about Cablevision's *conduct* in copying and publicly performing programming for profit; it does not concern the sale or distribution of copying *technology*, and it does not concern the passive ownership of mere data conduits. It is Cablevision that designed, maintains, and operates the web of cables, computers, and servers that constitute the RS-DVR service, and it is Cablevision that provides the content. It is likewise Cablevision that created a buffering mechanism that copies each program – whether or not any user activates the record function. Requiring Cablevision to license this use of copyrighted content will not stifle technology; it will simply require Cablevision to obtain a license before it copies and then provides to its subscribers copyrighted programming that it does not own.

In short, as the district court properly determined, Cablevision is liable as a direct infringer.

I. CABLEVISION'S AUTOMATION OF THE COPYING AND TRANSMISSION OF COPYRIGHTED MATERIAL DOES NOT RELIEVE IT FROM LIABILITY AS A DIRECT INFRINGER.

The central issue that Cablevision presents is whether its decision to "automate" the copying and the performance of copyrighted content – so that the user's push of a button engages the web of computers, cables, and servers that Cablevision has engineered, maintains, operates, and (for the most part) houses – relieves Cablevision from liability. It does not.

A. Mere Automation Is Insufficient To Eliminate Direct Infringement.

At the outset, it is important to note that Cablevision's system is not fully "automated." Cablevision elides the fact that it creates unauthorized "buffer" copies, without any actions by its subscribers, before Cablevision transmits any unlicensed content. *See* D. Ct. Op. 13 (Cablevision makes buffer copies "before any customer requests anything"). These copies are not unavoidable incidents of Cablevision's lawful (and licensed) initial transmission. Rather, Cablevision volitionally creates the buffer copies for the exclusive purpose of enabling its infringing RS-DVR copies and transmissions. If not for Cablevision's RS-DVR service, the buffer copies would not exist. As the district court noted, the buffer copy is created solely “so that if a customer requests that a particular program be recorded, the appropriate packets can be retrieved from buffer memory.” *Id.* For all of the reasons advanced in the Turner Brief and the ATR *amicus* brief, that buffered copying – which is indisputably volitional and attributable to Cablevision – renders Cablevision a direct infringer. *See* Turner Br. 48-55; ATR *Amicus* Br. 8-22.[1]

But even if Cablevision’s RS-DVR were fully automated as Cablevision suggests, that would be no defense. To begin with, the text of the Copyright Act forecloses any automation defense. A defendant, for example, “performs” an audiovisual work when it shows images “either directly *or by means of any device or process*.” 17 U.S.C. § 101 (emphasis added). The text itself thus expressly

[1] The efforts of Cablevision and *amici* to dismiss the copying here as insubstantial are unavailing. This buffer copy is what enables Cablevision to create an unlicensed copy of a program for the user to view at his leisure. This copying, which is undertaken for the express purpose of – and is essential to – subsequent unlicensed copying and exploitation of copyrighted content, cannot be dismissed as insubstantial, and it is thus unlawful under the Copyright Act. Moreover, Congress’ decision to treat buffer copies in this fashion makes good sense. Buffers come in all sizes, from a few frames to ten-minute buffers that can contain an entire song, show, or program. *See* U.S. Copyright Office, *DMCA Section 104 Report*, at 30-31 (2001). Congress could have (as Cablevision seeks to do here) exempted buffer copies from claims of infringement based on their size, but it chose instead to make infringement turn on whether the buffer copies can be used – as the buffered copies here plainly can – to create other more permanent copies. *See* 17 U.S.C. § 101; *cf. id.* § 117(a)(1). As the Copyright Office has recognized, this position has none of the untoward consequences that Cablevision and its *amici* posit. *See DMCA Section 104 Report*, at 140-41.

contemplates that a defendant may "perform" a work – and thus be liable for infringement – even though the defendant does not perform the work "directly"; it need only perform the work by means of *any* device or process. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning."). Similarly, the Act makes clear that owners of "interactive" services perform works when they transmit or retransmit them via automated processes upon request by a user – regardless of the mechanism by which the user's request is implemented. *See* 17 U.S.C. § 114(d)(1), (j)(7); S. Rep. No. 104-128, at 14 (1995), *as reprinted in*, 1995 U.S.C.C.A.N. 356, 361 (stating that interactive services include audio-on-demand and celestial jukebox services). The argument that an automated system immunizes its creators and operators from direct liability thus flies in the face of the Act.[2]

Against this backdrop, it is unsurprising that case after case has rejected the argument that a defendant's decision to automate the copying and performance functions insulates him from direct liability. In *New York Times Co. v. Tasini*, 533

[2] Section 111(c) of the Copyright Act similarly cuts against Cablevision here. Cablevision's section 111(c) compulsory licenses allow it to retransmit broadcast programming *simultaneously* with its airing by the broadcast station, but do not allow Cablevision to record the programming for later retransmission. *See* 17 U.S.C. § 111(c), (f). Consequently, to provide video-on-demand service, Cablevision had to obtain negotiated licenses that permit it to maintain copies of specified programming and transmit the programming upon request. By creating both buffered and permanent copies of programming, and transmitting that programming to subscribers at times of their choosing, Cablevision is committing exactly the acts that its statutory licenses forbid.

U.S. 483 (2001), for example, the defendants argued that they had merely made available a virtual “library” of periodicals, and that because the subscribers selected individual articles for automatic retrieval and copying, the subscriber was the sole infringer. *See* Br. for Petitioners in *Tasini* at 45, 47. The Supreme Court rejected defendants’ strained effort to invoke the automated features of their business to shift the focus from the defendants to their customers, stating that defendants “are not merely selling ‘equipment’; they are selling copies of the Articles.” *Tasini*, 533 U.S. at 504. Focusing on the substance of the defendants’ conduct rather than the automated features of the service and the role played by subscribers, the Court concluded that the defendants were liable for direct infringement based both on their reproduction of the copies included in the database and on the distribution of those copies to subscribers via automated download processes. *Id.*

This Court’s decision in *Infinity Broadcasting Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998), makes the same point. Defendant Kirkwood offered a service that enabled subscribers to listen over the telephone to contemporaneous radio broadcasts in remote cities. Like Cablevision’s RS-DVR, Kirkwood’s service was entirely automated, allowing the user to choose the stations by entering commands through the telephone keypad. Kirkwood selected the stations that were available, but “exercise[d] no control over the selection of stations by the callers.” *Id.* at 106;

see also Infinity Broadcasting Corp. v. Kirkwood, 965 F. Supp. 553, 554-55 (S.D.N.Y. 1997) (describing the system). Nevertheless, this Court had little trouble finding direct infringement, reasoning that notwithstanding the automation, "*Kirkwood himself* performs the allegedly infringing acts of retransmission." 150 F.3d at 109 n.3 (emphasis added).

On Command Video Corp. v. Columbia Pictures Industries, 777 F. Supp. 787 (N.D. Cal. 1991), reaches the same conclusion. At issue there was the on-demand transmission of movies to individual hotel guests. Defendant On Command had created a fully automated movie delivery system: the guest used a remote control in his room to request a particular movie, and then "the computer identifie[d] the [video cassette player] containing that movie, switche[d] the VCP to that particular room, and start[ed] the movie video." *Id.* at 788. On Command argued that, because the automated system was "operated" by the hotel guest, the system involved not transmission by On Command but rather "'electronic rentals' similar to patrons' physical borrowing of videotapes." *Id.* at 789. The court rejected that argument and found the defendant directly liable for public performance of the videos: "The fact that hotel guests initiate this transmission by turning on the television and choosing a video is immaterial." *Id.* at 790.

Similarly, in *Playboy Enterprises, Inc. v. Webbworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997), *aff'd*, 168 F.3d 486 (5th Cir. 1999) (table decision), Webbworld's "ScanNews" software searched the Internet for images, which it then made available to its subscribers automatically. Webbworld argued, as Cablevision does here, that the automated nature of the operation rendered Webbworld immune from direct liability. The court emphatically rejected that argument, holding that "having developed and launched the ScanNews software for commercial use, Webbworld cannot now evade liability by claiming helplessness in the face of its 'automatic' operation." *Id.* at 553. *Cf. Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 396, 404 (2d Cir. 2004) (imposing trespass liability for "intentionally … us[ing]" plaintiff's property where defendant accessed plaintiff's database using an "automated software program, or robot").

In short, courts have repeatedly held that simply automating one's own system so that the final step is taken by a customer is no defense to liability for direct infringement.

B. *Netcom* Does Not Immunize Cablevision From Liability For Direct Infringement.

Cablevision's response relies heavily on *Religious Technology Center v. Netcom On-line Communications Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) ("*Netcom*"), in which the plaintiffs sought to hold liable an Internet service provider ("ISP") and the operator of a computer bulletin board service for infringing content posted by users. But *Netcom* does not remotely establish the "automation" exception to primary liability that Cablevision seeks here.

At the outset, as Judge Chin correctly noted, *Netcom* has no application outside the unique confines of the Internet, where ISPs provide passive conduit service to the millions of users constantly exchanging data. *See* D. Ct. Op. 28 (*Netcom* was "premised on the unique attributes of the Internet"). As the *Netcom* court emphasized, "billions of bits of data flow through the Internet and are necessarily stored on servers throughout the network," and thus "it is practically impossible to screen out infringing bits from noninfringing bits." 907 F. Supp. at 1372. The situation here is the polar opposite of *Netcom*. Cablevision engineered, maintains, and operates a closed proprietary cable system in which it dictates what content will be available and on what terms. Moreover, when *Netcom* was decided in 1995, Congress had not yet enacted the DMCA, with its carefully-defined legislative safe harbors for ISPs and similar entities. Now that Congress, through the DMCA, has weighed the competing interests, judicial manipulation of the Copyright Act to forestall perceived threats to the nascent Internet, such as that in *Netcom*, is no longer appropriate, if indeed it ever was.

In any event, *Netcom* provides no harbor for Cablevision here. *Netcom* creates not a broad defense for "automation," but rather a targeted defense for passive conduits. As the Fourth Circuit explained in *CoStar Group, Inc. v. LoopNet, Inc.*, the defendants shielded from direct liability by *Netcom* are those that are "totally indifferent to the material's content," *i.e.*, those who are mere "conduits from or to would-be copiers and have no interest in the copy itself." 373 F.3d 544, 551 (4th Cir. 2004); *cf.* 17 U.S.C. § 111(a)(3) (limited exemption for certain retransmissions by "communications channels" that have "no direct or indirect control over … content").

Cablevision gamely tries to analogize itself to an ISP, asserting that, "like [an] ISP," it is "totally indifferent" to the content of material on its system. Cablevision Br. 32-33. That contention is preposterous. Cablevision operates a closed system in which it chooses the vast majority of the content that will be carried. Indeed, the Supreme Court has repeatedly held, at the urging of the cable industry, that "cable operators exercise a significant amount of editorial discretion regarding what their programming will include." *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986) (internal quotation marks omitted); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (cable operators receive First Amendment protection because, "by exercising editorial discretion over which stations or programs to include in its repertoire," they "see[k] to communicate messages on a wide variety of topics"). Thus, Cablevision is no mere "conduit." Cablevision's initial transmissions carry only the content that Cablevision, exercising its constitutionally-protected (and economically-motivated) editorial discretion, has decided to license or that is subject to a statutory carriage requirement; and Cablevision's RS-DVR service, which is not subject to mandatory transmission requirements at all, provides only programming that Cablevision has chosen to make available.

Cablevision's analogies and citations to cases involving pipes, machines, links, and copier centers are thus beside the point: those defendants provided only the means to copy, not the content itself – the content providers operated independently of the defendants. In *Netcom*, for example, the defendants were an ISP and a bulletin board operator, and the content was provided by a user; in *CoStar*, the defendant was an ISP, while the content was provided by independent brokers; in *Sony*, the defendant provided the VCR, the content came from broadcasters; and in the *Google* cases, the defendant was a broad search engine, while the content was provided by independent sites. Thus, even assuming that the outcomes in those cases were correct, they offer Cablevision no support. When an entity provides not just a means to copy but the content itself, it is a direct infringer, whether or not the provision of content is plausibly described as "automated."

Playboy Enterprises, Inc. v. Webbworld, Inc. is again instructive. There, the court rejected Webbworld's effort to invoke the *Netcom* defense because "Webbworld did not function as a passive conduit of unaltered information. Instead, Webbworld functioned primarily as a store, a commercial destination within the Internet." 991 F. Supp. at 552; *see also id.* ("Webbworld did not sell access; it sold adult images.”). Similarly, Cablevision’s service is not about selling access to someone else’s content, but is instead precisely about delivering to its customers particular content – content that Cablevision has previously licensed and performed over its cable systems, and that Cablevision now seeks to copy and perform again without a license.

Cablevision, in short, distorts the case law when it seeks to derive an automation defense. The “meaningful volition and causation” that *CoStar* and *Netcom* describe is not the difference between automation and human intervention (as Cablevision and its *amici* posit); it is the difference between active involvement in the copying and performance *process* and the “passive ownership and management” of copying or transmission *facilities*.[3] The design, maintenance, and operation of an integrated service for the supply of content and the means to copy it, all for profit, is more than sufficient for “meaningful volition and causation,” and it constitutes “actual infringing conduct with a nexus sufficiently close and causal to the illegal copying” that one could conclude that Cablevision “trespassed on the exclusive domain of the copyright owner.” *CoStar*, 373 F.3d at 550. That

[3] For instance, courts have held that copyshops are directly liable for infringing copies made using their facilities where the shops exercise “control” over the copying process. *See, e.g.*, *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1546 (S.D.N.Y. 1991). By contrast, a shop that simply provides copying facilities for its customers, without exercising any control or playing any role in the copying process, is arguably more like the mere conduit described in *Netcom* or the VCR provider in *Sony*.

is all the more so given Cablevision's decision to create buffer copies, without user intervention, solely to enable its later unauthorized reproductions and performances. The fact that Cablevision had the technological sophistication to automate those functions does not relieve it from liability for its direct and unauthorized commercial reproduction and exploitation of copyrighted content. *See American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 921-22 (2d Cir. 1995) (noting that courts are more likely to find infringement "when the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material"); *Perfect 10, Inc. v. Amazon.com, Inc.,* 487 F.3d 701, 720 n.8 (9th Cir. 2007) (contrasting one who "intentionally misappropriated the copyright owners' works for the purpose of commercial exploitation" with one who "is operating a comprehensive search engine that only incidentally indexes infringing websites").

C. The Policies Of The Copyright Act Require Liability Here.

Cablevision and its *amici* also contend that their unprecedented automation exception is consistent with – even required by – the policies of copyright. But just the opposite is true. Well-established copyright policies foreclose any such exception.

To begin with, although purporting to focus on the "recurring theme[s] of copyright jurisprudence," CDT Br. 26, Cablevision and its *amici* ignore entirely the innovation incentives of content creators, a remarkable omission as encouraging content creation is the very purpose of copyright. As the Supreme Court has observed, "[t]he economic philosophy behind the [Copyright C]lause is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003). Or, as Judge Leval put it, "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." *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1995).

Cablevision's automation exception cannot be squared with this central purpose of copyright. As demonstrated by this case, as well as *On Command*, *Webbworld*, and *Kirkwood*, there is no shortage of entrepreneurs with the technical savvy, legal sophistication, and economic incentive to minimize the appearance of direct human intervention, while nevertheless profiting from the copying or performance of copyrighted material. And doing so will be even easier if Cablevision has its way. Allowing a commercial entity to build a business that exploits the economic value of copyrighted content simply because the business has chosen to automate the last step in the process or because a business has labeled its unlawful copies "fair use" or "de minimis" would create a gaping hole in the Copyright Act, allowing Cablevision and others to appropriate economic value that the Act properly accords to content holders and which provides income to the artists who create that content.[4]

Nor are defendants correct that relegating plaintiffs to theories of secondary rather than direct infringement is of little consequence. Secondary liability is, of course, a critically important part of copyright law. But Congress has determined that, where a defendant itself exploits copyrighted content, copyright owners should be able to avail themselves of the advantages that the Act accords to direct infringement claims, including (among others) strict liability and the inability of defendants to rely on the fair use of their subscribers. To deprive content holders of the direct infringement framework that Congress enacted would thus undermine the incentive system that copyright law seeks to maintain.

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[4] Congress recognized as much when, in enacting the 1976 Copyright Act, it overruled *Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968), which held that cable retransmitters functioned as passive receivers of programming and therefore did not "perform" copyrighted programming within the meaning of the 1909 Act. *See* Wu Br. 17-18. In Congress's view, the Court's holding overlooked the crucial characteristic of cable retransmissions: "In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs." H.R. Rep. No. 94-1476, at 89; *see* 17 U.S.C. § 111(c). Here, Cablevision is directly liable for the same reasons articulated by Congress in overturning *Fortnightly*: the "function" of the RS-DVR service, 392 U.S. at 397, is to facilitate Cablevision's provision of plaintiffs' content to subscribers for its own profit.

That result, troubling in any event, is especially so when the defendant itself procures and provides the content. The direct provision of content is indisputably at the core of copyright protection. For that reason (among others, *see infra*), Cablevision's invocation of the policies articulated in *Sony* is entirely off-base. *Sony* involved the one-time sale of a machine that could be used for many noninfringing purposes – a far cry from the continuous service here, which by design copies and transmits unauthorized content. But more to the point, *Sony* sought to balance "a copyright holder's legitimate demand for effective – not merely symbolic – protection of the statutory monopoly" against "the rights of others freely to engage in substantially unrelated areas of commerce." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984). The direct copying and performance of content for profit is simply not a "substantially unrelated area of commerce." To the contrary, it is the precise "area of commerce" in which the content owners engage.

Cablevision and its *amici* fare no better when they invoke the specter of a chill of emerging "technology." This case is not about "dual-use technology," as Cablevision's *amicus* characterizes the RS-DVR service, Wu Br. 8, that (according to that *amicus*) must be evaluated under *Sony*'s secondary-liability doctrine in order to avoid stifling development of new technology. Rather, plaintiffs challenge only Cablevision's *conduct*. When direct infringement is at issue, copyright holders are not challenging the placement of technology into the stream of commerce; rather, they are challenging infringing exploitation of their content. The true issue, then, is not whether Cablevision must pay royalties on technology that has substantial noninfringing uses, but whether it must obtain a license when it copies, transmits, and exploits copyrighted content.

On that issue, the policies of the Copyright Act strongly favor the copyright holders. As Judge Rakoff noted in rejecting the efforts of infringers to imbue the use of new technology with talismanic significance, some companies "have a misconception that, because their technology is somewhat novel, they are somehow immune from the ordinary applications of laws of the United States, including copyright. They need to understand that the law's domain knows no such limits." *UMG Recordings, Inc. v. MP3.com, Inc.*, No.00 CIV. 472(JSR), 2000 WL 1262568, at *6 (S.D.N.Y. Sept. 6, 2000). Indeed, the Supreme Court made the same point: "[S]peculation about future harms [to new technologies] is no basis for this Court to shrink authorial rights Congress established" in the Copyright Act, because the "parties … may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution." *Tasini*, 533 U.S. at 505-06. Where defendants use new technology to copy and transmit recordings to consumers, copyright holders are entitled to "remuneration the law reserves for them as holders of copyrights on creative works." *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000).

Moreover, the policies favoring innovation in technology are by no means one-sided. Cablevision's approach undermines technological innovation by companies that seek to engage in legitimate commerce in copyrighted content. Companies such as Apple, RealNetworks (Rhapsody), and others who innovate while obtaining and complying with licenses are placed at a substantial disadvantage. Cablevision's arguments thus do not favor technology and innovation *per se*; instead, they favor innovators who seek to evade licensing obligations over innovators who comply. But that is one preference that the copyright laws forbid.

In short, both the Copyright Act and the decision below sensibly distinguish between challenges to copying and distribution *technology*, and challenges to the defendant's own *conduct* in exploiting copyrighted material by copying it and transmitting it to paying subscribers. The latter – of which this is a classic case – involve direct, rather than secondary, infringement.

II. CABLEVISION'S ATTEMPT TO RELY ON THE PURPORTED FAIR USE OF ITS SUBSCRIBERS IS UNAVAILING.

Cablevision attempts to save itself by invoking the alleged "fair use" of its users and contending that it is immune from direct liability because it assertedly renders more efficient its subscribers' non-infringing conduct. Because

Cablevision expressly waived any fair use argument, it cannot rely on its users' alleged fair use. In any event, the alleged "fair use" of Cablevision's subscribers is beside the point, because Cablevision is liable as a direct infringer.[5] When a defendant directly engages in commercial exploitation of consumer demand for copyrighted content, it invades the exclusive rights of the copyright owners, regardless of the end uses to which the content is put. As courts have repeatedly held, the asserted social utility of the end uses of the appropriated material is irrelevant to claims of direct infringement.

Moreover, Cablevision is wrong to insist that the record here establishes an unassailable "*right* to record television programs for later home viewing" under *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Cablevision Br. 2-3 (emphasis added). *Sony* requires a fact-specific fair-use analysis that considers the specific conduct and content at issue, along with the relevant business models, technology, and markets. No record exists to permit that fact-specific analysis here, because Cablevision expressly waived any reliance on fair use.

[5] Cablevision may also be liable under theories of secondary liability. That liability, however, has no effect on whether Cablevision is also liable for direct infringement. *See, e.g.*, *Tasini*, 533 U.S. at 504. Similarly, the fact that Cablevision's subscribers may commit direct infringement (or engage in fair use) by using the RS-DVR service does not relegate Cablevision to the role of secondary infringer. *See id.*

A. The Legal Status Of The Conduct Of Cablevision's Subscribers Is Irrelevant To Plaintiffs' Direct Infringement Claims.

Because plaintiffs contend that Cablevision is a direct, not a secondary, infringer, Cablevision's subscribers' conduct – whether or not unlawful – is irrelevant to the only question here: whether Cablevision itself must obtain a license for *Cablevision's* uses of plaintiffs' works.

Settled case law answers that question: where a middleman profits by providing consumers with copies or transmissions of copyrighted content, it must account to the copyright holder even if the consumers could make private, non-commercial copies of the content without incurring liability. In other words, direct infringers may not "stand in the shoes of their customers." *Princeton Univ. Press. v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (en banc) (copy shop liable for copying course packages for student use). Thus, in *Kirkwood*, the defendant claimed that its subscribers utilized the retransmissions for personal and research purposes. This Court rejected that argument: "[I]t is Kirkwood's own retransmission of the broadcasts, not the acts of his end-users, that is at issue here and all Kirkwood does is sell access to unaltered radio broadcasts." 150 F.3d at 108; *see also, e.g., Zomba Enter., Inc. v. Panorama Records, Inc.*, No. 06-5013, __ F.3d __, 2007 WL 1814319, at *6 (6th Cir. June 26, 2007) (in context of defendants' provision of unauthorized copies of songs for karaoke, "end-users' utilization of the product [was] largely irrelevant"); *Los*

Angeles News Service v. Tullo, 973 F.2d 791, 797 (9th Cir. 1992) (fact that users "buy[] the tape [recorded by defendant from broadcast] to watch … at home at a convenient time will not shield [defendant] from liability; the ultimate use to which the customer puts the tape is irrelevant"); *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1496-97 (11th Cir. 1984) (defendant's sale of tapes for personal use was infringing because the copyright owner "could itself sell" a "significant number of copies" "if it so desired").

Thus, Cablevision's focus on its users' purported fair use, like its argument that it does not act "volitionally," is simply an ill-conceived attempt to shift responsibility to its subscribers that is foreclosed by the policy choices embodied in the Copyright Act. The direct infringement provisions of the Act prohibit conduct that appropriates a market that otherwise could be occupied by copyright owners. *Kirkwood*, 150 F.3d at 111; *MP3.com*, 92 F. Supp. 2d at 352. That is precisely the conduct in which Cablevision is engaged. Regardless of whether individual users are entitled to copy plaintiffs' content without a license, Cablevision profits from consumer demand for such content by providing it, in a manner that allows Cablevision to reap the value of the works without compensating the copyright owners. *See* H.R. Rep. No. 94-1476, at 90 (1976), *as reprinted in*, 1976 U.S.C.C.A.N. 5659, 5704-05 (cable operator's transmission of programming beyond the scope of its license both "adversely affects the ability of the copyright owner to exploit the work" and is "of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues").

Nor does Cablevision gain from its argument that its RS-DVR technology is allegedly a more "efficient" method for consumers to obtain copies they could make themselves under fair-use principles. Cablevision Br. 29; *but cf.* Fox Br. 26 n.3 (noting inefficiencies in RS-DVR service). Because plaintiffs challenge Cablevision's *conduct* in providing "efficient" copying for its own profit, the issue is not whether Cablevision might be providing a useful service (it has, after all, waived its fair use defense), but whether it needs a license for its exploitation of content. *See Princeton Univ. Press*, 99 F.3d at 1389 (defendants' argument that "they can profitably produce multiple copies for less than it would cost the professors or the students to make the same number of copies" was irrelevant); *MP3.com*, 92 F. Supp. 2d at 352 (rejecting direct infringer's efficiency argument because "[c]opyright … is not designed to afford consumer protection or convenience but, rather, to protect the copyrightholders' property interests"); *On Command*, 777 F. Supp. at 789 (imposing direct liability despite argument that defendant merely facilitated more efficient videotape borrowing).

For similar reasons, the accusations of Cablevision's *amici* that the district court's decision creates a "regulatory asymmetry" that results in "different rules for competing technologies," Wu Br. 4, is a red herring. A VCR, a machine launched into the world where the manufacturer has no further contact with the customer, is not the same as Cablevision's RS-DVR, which offers an integrated service as part of a continuous economic relationship with the customer and provides the content directly to users. As *Tasini*, *MP3.com*, *Kirkwood*, and other decisions holding copiers liable as *direct* infringers make clear, copyright law will not blind itself to the realities of a business just because that business claims similarity to a lawful technology.

In sum, Cablevision's attempt to distract from its conduct by emphasizing its subscribers' uses and interests fails. *See* William Patry, *Fair Use Privilege in Copyright Law* 491-92 (2d ed. 1995) (rejecting arguments of the type made by Cablevision as "sophistry"). That its users are purportedly protected by the doctrine of fair use, or that Cablevision may make that alleged fair use easier by providing copies "more efficiently," is simply irrelevant in light of Cablevision's for-profit appropriation of plaintiffs' content.

B. The Record Does Not Demonstrate That Cablevision's Subscribers Are Engaged In Fair Use.

Though ultimately irrelevant to Cablevision's direct liability, Cablevision's conclusory assertion that RS-DVR users are engaging in fair use demands a response.

Contrary to Cablevision's contentions, *Sony* did not create a "right to record television programs for later viewing," Cablevision Br. 16, that immunizes any technology that arguably facilitates time-shifting of any type of television programming. Rather, *Sony* applied the fact-specific fair-use analysis to the record amassed in the context of broadcast-television based on the technology and economics as they existed in 1978. *See* Patry, *supra*, at 239 (characterizing *Sony* as a fact-based decision). That record showed that using a VCR to time-shift broadcast-television programs that viewers had been "invited to witness in [their] entirety free of charge" did not create "any likelihood of nonminimal harm to the potential market for, or value of, [plaintiffs'] copyrighted works." 464 U.S. at 423, 425, 449, 456.

Indeed, the *Sony* Court explicitly limited its decision to the facts at hand. Because the conduct there involved one-time viewing of content that the audience had been invited to view for free, the Court noted that its reasoning did not address "copying of programs transmitted on pay or cable television systems," *id.* at 425, or the practice of "librarying," *i.e.*, storing recorded programs indefinitely to view them repeatedly, *id.* at 453 n.39. The Court also stressed that fair use is an "equitable rule of reason" to be applied anew to the facts of each case, noting that "courts must be free to adapt the doctrine to particular situations on a case-by-case basis." *Id.* at 448 n.31 (internal quotation marks omitted); *Campbell v. Acuff Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

Cablevision's arguments therefore run counter to *Sony*'s own emphasis on the fact-specific nature of the fair-use doctrine. Even if it were relevant – and, as demonstrated, it is not – Cablevision subscribers' use of the RS-DVR service to record cable and pay programming rather than free over-the-air programming must be evaluated on its own merits, applying the statutory fair-use factors. *See Tullo*, 973 F.2d at 797 (rejecting defendant's attempt to have subscribers' use of copies of television clips "automatically be deemed fair").

There are, moreover, substantial differences between the capabilities and purposes of Cablevision's proprietary, integrated RS-DVR service and the VCR at issue in *Sony*. Most significantly, using the RS-DVR to record cable programming is a commercial use, as Cablevision seeks to capitalize on an existing market for authorized viewing of recently-aired cable programming. Users may pay an additional fee to receive video-on-demand capability – a service for which Cablevision is required to pay royalties to copyright owners. Consumers may also use licensed download services to view cable programming hours after it has first been aired. RS-DVR recording directly displaces these authorized uses, harming the market for plaintiffs' works. In the context of copying sound recordings, courts have unanimously held that similar commercial displacement precludes any analogy to *Sony* time shifting. *See, e.g., BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005) (rejecting analogy to *Sony* because illegally downloaded songs substitute for purchased copies); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016-18 (9th Cir. 2001) (same); *MP3.com*, 92 F. Supp. 2d at 352 (content owners had right to develop new market for "space shift[ing]" of sound recordings). In addition, the RS-DVR service allows consumers to library plaintiffs' programming, threatening to displace the market for licensed viewing of older programming as well. *See Gonzalez*, 430 F.3d at 891 (possession of unauthorized copy of recording for an unlimited amount of time "diminish[es] the urge to pay for the music in the end"); *but cf. Sony*, 464 U.S. at 453 & n.39 (because VCR time shifting did not involve librarying, no risk of diminishing future sales).

In short, there is no basis for Cablevision's blithe assumption that *Sony* mandates the conclusion that Cablevision's subscribers are engaged in fair use, and Cablevision's decision to waive fair use (and the resulting absence of any adequate record) precludes a finding of fair use here. The alleged fair use of Cablevision's customers thus provides no basis for overturning the district court here.

* * *

Copyright law seeks to harness economic incentives to encourage the creation of content. As the district court recognized, allowing a business such as Cablevision to profit from unauthorized copying and transmission of content simply by invoking automation or raising a "blame the users" defense would undermine this system. The Copyright Act does not permit such a result. Cablevision is liable as a direct infringer for the design, operation, and maintenance of its RS-DVR service.

CONCLUSION

The decision of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and 32(a)(7)(C), the undersigned certifies that this brief complies with the applicable type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B)(i). This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 6,993 words, according to the word count function of Microsoft Word (2003).

Respectfully submitted,

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Ian Heath Gershengorn

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 32(a)(1)(E)

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Respectfully submitted,

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I certify that on July 11, 2007, I caused two copies of the foregoing to be served on each of the parties listed below via UPS overnight mail, postage prepaid. I also caused these persons to be served with electronic copies of the brief by email.

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