

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  
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,*  
*(Caption Continued on Inside Cover)*

---

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

---

**BRIEF OF AMICI CURIAE CENTER FOR DEMOCRACY & TECHNOLOGY,  
ELECTRONIC FRONTIER FOUNDATION, PUBLIC KNOWLEDGE,  
BROADBAND SERVICE PROVIDERS ASSOCIATION, COMPUTER &  
COMMUNICATIONS INDUSTRY ASSOCIATION, CONSUMER  
ELECTRONICS ASSOCIATION, CTIA – THE WIRELESS ASSOCIATION,  
INTERNET COMMERCE COALITION, NETCOALITION, USTELECOM,  
HOME RECORDING RIGHTS COALITION, AMERICAN LIBRARY  
ASSOCIATION, AMERICAN ASSOCIATION OF LAW LIBRARIES,  
ASSOCIATION OF RESEARCH LIBRARIES, MEDICAL LIBRARY  
ASSOCIATION, AND SPECIAL LIBRARIES ASSOCIATION IN SUPPORT OF  
APPELLANTS URGING REVERSAL**

---

*(Counsel Listed on Inside Cover)*

---

– v. –

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

---

DAVID SOHN  
CENTER FOR DEMOCRACY & TECHNOLOGY  
1634 I Street, N.W., Suite 1100  
Washington, DC 20006  
(202) 637-9800 x317

*Counsel for Center for Democracy &  
Technology*

SHERWIN SIY  
PUBLIC KNOWLEDGE  
1875 Connecticut Ave, NW, Suite 650  
Washington, DC 20009  
(202) 518-0020

*Counsel for Public Knowledge*

JONATHAN BAND PLLC  
policybandwidth  
21 Dupont Circle NW  
8th Floor  
Washington, D.C. 20036  
(202) 296-5675

*Counsel for Computer & Communications  
Industry Association, NetCoalition,  
American Library Association, American  
Association of Law Libraries, Association  
of Research Libraries, Medical Library  
Association, and Special Libraries  
Association*

FRED VON LOHMANN  
ELECTRONIC FRONTIER FOUNDATION  
454 Shotwell St.  
San Francisco, CA 94110  
(415) 436-9333 x123

*Counsel for Electronic Frontier  
Foundation*

WILLIAM P. HEASTON  
Chairman, Broadband Service Providers  
Association Regulatory Committee  
PrairieWave Communications, Inc.  
5100 S. Broadband Lane  
Sioux Falls, SD 57108  
(605) 965-9894

*Counsel for Broadband Service Providers  
Association*

JULIE KEARNEY  
CONSUMER ELECTRONICS ASSOCIATION  
1919 S. Eads Street,  
Arlington, VA 22202  
(703) 907-7644

*Counsel for Consumer Electronics  
Association and Home Recording Rights  
Coalition*

MICHAEL F. ALTSCHUL  
ANDREA D. WILLIAMS  
CTIA-THE WIRELESS ASSOCIATION®  
1400 16th Street, NW Suite 600  
Washington, DC 20036  
(202) 785-0081

*Counsel for CTIA – The Wireless  
Association®*

MICHAEL K. KELLOGG  
AUSTIN C. SCHLICK  
EVAN T. LEO  
MICHAEL E. JOFFRE  
KELLOGG, HUBER, HANSEN,  
TODD, EVANS & FIGEL, P.L.L.C.  
1615 M Street, N.W., Suite 400  
Washington, D.C. 20036  
(202) 326-7900

*Counsel for USTelecom*

JONATHAN BANKS  
Senior Vice President, Law & Policy,  
USTelecom – Member  
607 14th St. NW, Suite 400  
Washington, DC 20005  
(202) 326-7272

*Counsel for Internet Commerce Coalition*

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae state that:

The Center for Democracy & Technology (“CDT”) is a nonprofit public interest group that seeks to promote free expression, privacy, individual liberty, and technological innovation on the open, decentralized Internet. CDT advocates balanced copyright policies that provide appropriate protections to creators without curtailing the openness and innovation that have been vital to realizing the democratizing potential of new digital media. CDT has no parent companies, subsidiaries, or affiliates. No publicly held corporation has an ownership stake of 10% or more in CDT.

The Electronic Frontier Foundation (“EFF”) is a member-supported, nonprofit public interest organization devoted to maintaining the traditional balance that copyright law strikes between the interests of copyright owners and the interests of the public. Founded in 1990, EFF represents more than 13,000 dues-paying members including consumers, hobbyists, computer programmers, entrepreneurs, students, teachers, and researchers united in their reliance on a balanced copyright system that ensures adequate protection for copyright owners while ensuring broad access to information in the digital age. EFF has no parent companies, subsidiaries, or affiliates. No publicly held corporation has an ownership stake of 10% or more in EFF.

Public Knowledge is a nonprofit public interest advocacy organization that represents consumers' rights in Washington, D.C. Public Knowledge works with consumer and industry groups to promote balance in intellectual property law and technology policy, ensuring that the public can benefit from new innovations, fast and affordable access, and the use of content. Public Knowledge has no parent companies, affiliates, or subsidiaries. No public company holds an ownership stake in Public Knowledge.

Members of the Broadband Service Providers Association ("BSPA") deploy and operate facilities-based, advanced, last-mile broadband networks for the delivery of innovative bundles of voice, multichannel/on-demand video, and high-speed data/Internet services directly to homes and small businesses across the country. The current members of BSPA, all of which are last-mile, facilities-based providers, are: Everest Connections, Hiawatha Broadband, Knology, PrairieWave Communications, RCN, and SureWest Communications. BSPA's mission, as a nonprofit, member-supported trade association, is to promote and support the development of a competitive, facilities-based, broadband industry that will increase infrastructure investment, create customer choice, lower prices, and provide critical network diversity. BSPA has no parent companies, subsidiaries, or affiliates. No publicly held corporation has an ownership stake of 10% or more in BSPA.

The Consumer Electronics Association (“CEA”) is the preeminent trade association of the U.S. consumer electronics industry. CEA members lead the consumer electronics industry in the development, manufacturing, and distribution of audio, video, mobile electronics, communications, information technology, multimedia, and accessory products, as well as related services, that are sold through consumer channels. CEA’s more than 2,100 corporate members contribute more than \$125 billion to the U.S. economy. No publicly held corporation has an ownership stake of 10% or more in CEA.

The Computer & Communications Industry Association (“CCIA”) is dedicated to open markets, open systems, and open networks. CCIA members participate in many sectors of the computer, information technology, and telecommunications industries and range in size from small entrepreneurial firms to the largest in the industry. CCIA member companies together employ nearly one million people and generate annual revenues exceeding \$200 billion. A complete list of CCIA’s members is available at <http://www.ccianet.org/members.html>. No publicly held corporation has an ownership stake of 10% or more in CCIA.

CTIA - The Wireless Association<sup>®</sup> (formerly known as the Cellular Telecommunications & Internet Association) is a Section 501(c)(6) not-for-profit organization organized under the laws of the District of Columbia and represents

the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA has not issued any shares of debt securities to the public, and CTIA has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. No publicly held corporation has an ownership stake of 10% or more in CTIA.

The Internet Commerce Coalition is a coalition of leading United States Internet service providers, such as Comcast and Verizon, e-commerce companies, such as eBay, and technology trade associations, such as the United States Telecom Association.\* The ICC's mission is to achieve a legal environment that allows service providers, their customers, and other users to do business on the global Internet under reasonable rules governing liability and use of technology. No publicly held corporation has an ownership stake of 10% or more in the ICC.

NetCoalition serves as the public policy voice for some of the world's most innovative Internet companies, including Bloomberg, CNET Networks, Google, IAC/InterActiveCorp., and Yahoo! NetCoalition provides creative and effective solutions to the critical legal and technological issues facing the Internet. By enabling industry leaders, policymakers, and the public to engage directly, NetCoalition has helped ensure the integrity, usefulness, and continued expansion

---

\* ICC member Time Warner Inc. declined to join this brief.

of this dynamic new medium. No publicly held corporation has an ownership stake of 10% or more in NetCoalition.

The United States Telecom Association (“USTelecom”) is the premier trade association representing service providers and suppliers for the telecommunications industry. Its diverse membership includes smaller companies such as BEVCOMM, Inc. based in Blue Earth, Minnesota and SureWest Communications in Sacramento, California. Both companies offer advanced digital video programming to subscribers in their service territories. USTelecom’s members also include some of the largest corporations in the U.S. economy, such as AT&T and Verizon, which are each deploying new, state-of-the-art video services to consumers. USTelecom also has international and associate members that include consultants, communications equipment providers, banks and investors, and other parties with interests in the telecommunications industry. USTelecom has no parent companies, subsidiaries, or affiliates. No publicly held corporation has an ownership stake of 10% or more in USTelecom.

The Home Recording Rights Coalition (“HRRC”), an unincorporated association, is a leading advocacy group for consumers’ rights to use home electronics products for private, non-commercial purposes. The members of HRRC include consumers, retailers, manufacturers, and professional servicers of consumer electronics products. The HRRC was founded in 1981, in response to

the Ninth Circuit’s ruling, in the Betamax litigation, later overturned by the Supreme Court, that distribution of consumer video recorders constituted contributory copyright infringement. No publicly held corporation has an ownership stake of 10% or more in HRRC.

The American Library Association (“ALA”) is the oldest and largest library association in the world, with over 66,000 librarians, library trustees, and other friends of libraries dedicated to improving library services and promoting the public interest in a free and open information society. No publicly held corporation has an ownership stake of 10% or more in ALA.

The American Association of Law Libraries (“AALL”) is a nonprofit educational organization with over 5,000 members nationwide. AALL’s mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy. No publicly held corporation has an ownership stake of 10% or more in AALL.

The Association of Research Libraries (“ARL”) is a nonprofit organization of 123 research libraries in North America. ARL’s mission is to influence the changing environment of scholarly communication and the public policies that affect research libraries and the communities they serve. No publicly held corporation has an ownership stake of 10% or more in ARL.

The Medical Library Association (“MLA”) is a nonprofit, educational organization with more than 4,500 health sciences information professional members worldwide. Founded in 1898, MLA provides lifelong educational opportunities, supports a knowledgebase of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public. No publicly held corporation has an ownership stake of 10% or more in MLA.

The Special Libraries Association (“SLA”) is a nonprofit global organization for innovative information professionals and their strategic partners. SLA serves more than 12,000 members in 83 countries in the information profession, including corporate, academic and government information specialists. SLA promotes and strengthens its members through learning, advocacy and networking initiatives. No publicly held corporation has an ownership stake of 10% or more in SLA.

## TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF AUTHORITIES .....	vii
INTEREST OF AMICI CURIAE .....	1
SUMMARY OF ARGUMENT .....	3
I. CABLEVISION’S REMOTE DVR DOES NOT DIRECTLY INFRINGE PLAINTIFFS’ COPYRIGHTS.....	6
A. Cablevision’s Delivery of Video Programming to Devices Chosen by Its Customers Is Licensed and Non-Infringing.....	6
B. Because Cablevision Lacks Control Over the Copying Decision, It Is Not a Direct Infringer .....	8
1. <i>A Plaintiff Who Alleges Direct Infringement Must Show Copying         by the Defendant Himself, Not Just Contribution to Copying         Undertaken by Another</i> .....	9
2. <i>Cablevision Is Not Liable for Direct Infringement of Plaintiffs’         Reproduction Rights Because its Customers Decide What To         Record on the Remote DVR and When To View Stored Programs</i> .....	11
3. <i>Cablevision Is Not Liable for Direct Infringement of Plaintiffs’         Performance Rights</i> .....	18
II. THE DISTRICT COURT’S APPROACH UNDERMINES STRONG POLICY INTERESTS .....	21
A. Remote Processing and Network-Based Services Benefit Consumers and the Economy .....	21
B. The District Court’s Approach Would Curb This Beneficial Innovation .....	24
C. Holding Cablevision Liable as a Direct Infringer Would Contravene Policies Underlying Copyright Law .....	26
CONCLUSION .....	28
CERTIFICATE OF COMPLIANCE .....	31

## TABLE OF AUTHORITIES

CASES	Page
<i>A &amp; M Records, Inc. v. Napster, Inc.</i> , 114 F. Supp. 2d 896 (N.D. Cal. 2000), aff'd in part and rev'd in part, 239 F.3d 1004 (9th Cir. 2001).....	10
<i>A &amp; M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001).....	27
<i>Basic Books, Inc. v. Kinko's Graphics Corp.</i> , 758 F. Supp. 1522 (S.D.N.Y. 1991).....	15
<i>Columbia Pictures Indus., Inc. v. Redd Horne, Inc.</i> , 749 F.2d 154 (3d Cir. 1984) .....	16
<i>Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.</i> , 866 F.2d 278 (9th Cir. 1989) .....	19
<i>CoStar Group, Inc. v. LoopNet, Inc.</i> , 373 F.3d 544 (4th Cir. 2004).....	passim
<i>Field v. Google Inc.</i> , 412 F. Supp. 2d 1106 (D. Nev. 2006).....	14
<i>Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.</i> , 443 F.2d 1159 (2d Cir. 1971) .....	9, 10
<i>Gilliam v. American Broad. Cos., Inc.</i> , 538 F.2d 14 (2d Cir. 1976) .....	7
<i>Hoehling v. Universal City Studios, Inc.</i> , 618 F.2d 972 (2d Cir. 1980) .....	10
<i>Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005).....	5, 9, 15, 27
<i>National Football League v. PrimeTime 24 Joint Venture</i> , 211 F.3d 10 (2d Cir. 2000) .....	20
<i>Parker v. Google, Inc.</i> , 422 F. Supp. 2d 492 (E.D. Pa. 2006) .....	13-14

<i>Princeton University Press v. Michigan Document Servs., Inc.</i> , 99 F.3d 1381 (6th Cir. 1996) .....	15
<i>RCA Records v. All-Fast Sys., Inc.</i> , 594 F. Supp. 335 (S.D.N.Y. 1984) .....	15-16
<i>Religious Tech. Ctr. v. Netcom On-line Commc'n Servs., Inc.</i> , 907 F. Supp. 1361 (N.D. Cal. 1995).....	4-5, 12, 13, 17
<i>Sony Corp. of America v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	passim

### STATUTES AND REGULATIONS

17 U.S.C. § 101 .....	20
17 U.S.C. § 106(1) .....	3, 11
17 U.S.C. § 106(3) .....	15
17 U.S.C. § 106(4) .....	3, 20
17 U.S.C. §§ 107-122.....	3
17 U.S.C. § 107(1) .....	25
17 U.S.C. § 111 .....	6
17 U.S.C. § 111(c)(3).....	19
17 U.S.C. § 510(b) .....	19
17 U.S.C. § 512 .....	26
17 U.S.C. § 512(a)-(d).....	26
17 U.S.C. § 512(j) .....	26
17 U.S.C. § 512(k) .....	26

17 U.S.C. § 512(d) ..... 26

47 U.S.C. § 325(b) ..... 6

47 U.S.C. §§ 534-535..... 6, 17

17 C.F.R. Part 256..... 6

**OTHER MATERIALS**

Jessica E. Vascellaro, *The Online Storage Wars: New Services Roll Out Deals To Entice People to Move Their Backup Files to the Web*, The Wall Street Journal Online (Feb. 13, 2007), [http://online.wsj.com/public/article\\_print/SB117132942506806612-AFbBCIbeoOSA2\\_HtbG4fBCYa57A\\_20070219.html](http://online.wsj.com/public/article_print/SB117132942506806612-AFbBCIbeoOSA2_HtbG4fBCYa57A_20070219.html) ..... 23

Rob Hof, *Amazon’s Virtual Computer*, Business Week Tech Beat (Aug. 24, 2006), [http://www.businessweek.com/the\\_thread/techbeat/archives/2006/08/amazons\\_virtual.html](http://www.businessweek.com/the_thread/techbeat/archives/2006/08/amazons_virtual.html) (describing Amazon’s EC2 service) ..... 22

Walgreens Press Release, *Fujifilm Adds In-Store Photo Pickup Option at 5,500 Walgreens Nationwide* (Nov. 13, 2006) [http://news.walgreens.com/article\\_display.cfm?article\\_id=2039](http://news.walgreens.com/article_display.cfm?article_id=2039)..... 22

## INTEREST OF AMICI CURIAE

The law is clear that when one party provides the means for reproducing a copyrighted work and another party makes the decision to copy, only the party exercising control over the copying decision is potentially liable for direct copyright infringement. *See, e.g., CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004). Contrary to that rule, the district court deemed Cablevision a direct infringer because of its control over a means of copying. The district court focused on factors – such as the placement of equipment in Cablevision’s offices, and Cablevision’s offering of access to the equipment as a service rather than a product for purchase – that are unrelated to the correct inquiry whether Cablevision engaged in the volitional conduct necessary to be held liable for direct infringement. Focusing on these irrelevant factors, the district court imposed liability on Cablevision without any consideration of whether Cablevision’s service has noninfringing uses or whether imposing liability would advance or undermine the purposes of copyright law.

Amici are trade associations and consumer and public interest groups that collectively represent a wide spectrum of industry, nonprofit, and consumer interests, with a particular focus on high-technology enterprises and issues. The amici trade associations, for example, represent leading (and smaller) companies in the computer, consumer electronics, Internet services, and wireless and wireline

