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IN THE  
*Supreme Court of the United States*

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CABLE NEWS NETWORK, INC. ET AL.  
*Petitioners,*

v.

CSC HOLDINGS, INC. AND CABLEVISION SYSTEMS  
CORP.,  
*Respondents.*

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**On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Second Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether the Second Circuit's ruling that Cablevision is not legally responsible for its copying and performance of Petitioners' copyrighted works fundamentally destabilizes copyright law and inverts the proper relationship between direct and secondary copyright infringement, due to the court's expansive misreading of *Sony Corp. v. Universal Studios* and complete disregard of *New York Times v. Tasini*.

2. Whether the Second Circuit erred in ruling that Cablevision is not directly liable for its copying of Petitioners' programs because (1) Cablevision designed and operates its service to use computers, rather than human beings, to make copies for customers who request them, and (2) "buffer" copies that Cablevision itself admittedly creates in that process are not "fixed," under a misreading of the plain language of the Copyright Act that conflicts with the interpretation uniformly adopted by three other Circuits and the Copyright Office.

3. Whether the Second Circuit erred by holding – under an interpretation of the Copyright Act that conflicts with the plain statutory language and decisions of other Circuits – that Cablevision's performances of Petitioners' programs are not "public," and therefore not infringing, because Respondent designed its service to send separate on-demand transmissions generated from separate copies of the same program to members of the public.

**PARTIES TO THE PROCEEDING**

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The petitioners here and appellees below are The Cartoon Network, Inc. (formerly known as The Cartoon Network LP, LLLP); Cable News Network, Inc. (an entity formed following the merger of Cable News Network LP, LLLP into CNN Investment Company, Inc.); Turner Broadcasting System, Inc.; Turner Network Sales, Inc.; Turner Classic Movies, Inc.; Turner Network Television, Inc.; Twentieth Century Fox Film Corporation; Universal City Studios Productions LLLP; Paramount Pictures Corporation; Disney Enterprises Inc.; CBS Broadcasting Inc.; American Broadcasting Companies, Inc.; and NBC Studios, Inc.,

Respondents here and appellants below are CSC Holdings, Inc. and Cablevision Systems Corp.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioners state as follows:

Petitioner Twentieth Century Fox Film Corporation is a wholly owned subsidiary of Fox Entertainment Group, Inc. The parent of Fox Entertainment Group, Inc. is News Corporation, a publicly traded U.S. corporation. No publicly held company owns 10% or more of News Corporation's stock.

Petitioner Universal City Studios Productions LLLP is wholly and indirectly owned by NBC Universal, Inc. NBC Universal, Inc. is indirectly owned by General Electric Company, a publicly traded U.S. corporation, and Vivendi, S.A., a publicly traded French company. No publicly held company owns 10% or more of General Electric Company's or Vivendi S.A.'s stock.

Petitioner Paramount Pictures Corporation is wholly and indirectly owned by Viacom Inc., a publicly traded U.S. corporation. No publicly held company owns 10% or more of Viacom Inc.'s stock.

Petitioner Disney Enterprises, Inc. is a subsidiary of The Walt Disney Company, a publicly traded U.S. corporation. No publicly held company owns 10% or more of The Walt Disney Company's stock.

Petitioner CBS Broadcasting Inc. is an indirect, wholly owned subsidiary of CBS Corporation, a

publicly traded U.S. corporation. No publicly held company owns 10% or more of CBS Corporation's stock.

Petitioner American Broadcasting Companies, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly traded U.S. corporation. No publicly held company owns 10% or more of The Walt Disney Company's stock.

Petitioner NBC Studios, Inc. is wholly and indirectly owned by NBC Universal, Inc. NBC Universal, Inc. is indirectly owned by General Electric Company, a publicly traded U.S. corporation, and Vivendi, S.A., a publicly held French Company. No publicly held company owns 10% or more of General Electric Company's or Vivendi S.A.'s stock.

Petitioner The Cartoon Network, Inc. (formerly known as The Cartoon Network LP, LLLP) is owned entirely by TEN Network Holding, Inc., which is a wholly owned indirect subsidiary of Turner Broadcasting System, Inc. The Cartoon Network, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly held company owns 10% or more of Time Warner Inc.'s stock.

Petitioner Cable News Network, Inc. (an entity that was formed following the merger of Cable News Network LP, LLLP into CNN Investment Company, Inc.) is owned entirely by Turner Broadcasting

System, Inc. Cable News Network, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly held company owns 10% or more of Time Warner Inc.'s stock.

Petitioner Turner Broadcasting System, Inc. is jointly owned by Historic TW Inc., American Television and Communications Corporation, Warner Communications Inc., United Cable Turner Investment, Inc. and Time Warner Companies, Inc. Turner Broadcasting System, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly held company owns 10% or more of Time Warner Inc.'s stock.

Petitioner Turner Network Sales, Inc. is owned entirely by Turner Broadcasting System, Inc. Turner Network Sales, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly held company owns 10% or more of Time Warner Inc.'s stock.

Petitioner Turner Classic Movies, Inc. (formerly known as Turner Classic Movies LP, LLLP) is owned entirely by TEN Network Holding, Inc., which is a wholly owned indirect subsidiary of Turner Broadcasting System, Inc. Turner Classic Movies, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly held company owns 10% or more of Time Warner Inc.'s stock.

Petitioner Turner Network Television, Inc. (formerly known as Turner Network Television LP, LLLP) is owned entirely by TEN Network Holding, Inc., which is a wholly owned indirect subsidiary of Turner Broadcasting System, Inc. Turner Network Television, Inc. is ultimately and indirectly owned by Time Warner Inc., a publicly traded company. No publicly held company owns 10% or more of Time Warner Inc.'s stock.

## TABLE OF CONTENTS

QUESTIONS PRESENTED .....	i
PARTIES TO THE PROCEEDING .....	ii
CORPORATE DISCLOSURE STATEMENT .....	iii
TABLE OF AUTHORITIES .....	ix
OPINIONS BELOW .....	1
JURISDICTION .....	1
STATUTORY PROVISIONS INVOLVED .....	1
STATEMENT .....	1
A. Introduction .....	1
B. The Copyright Act of 1976.....	3
C. Automated Delivery of Copyrighted Works.....	6
D. Cablevision's Service .....	7
E. Proceedings Below .....	11
REASONS FOR GRANTING THE WRIT.....	15
I. This Case Presents Critically Important Questions About the Application of Copyright Law to Automated Delivery of Copyrighted Content.....	18
II. The Second Circuit's Reproduction Rulings Merit Review.....	23
A. The Second Circuit's Categorical Exemption from Direct Liability for Automated Services Presents a Question of Singular Importance.....	24
B. The Second Circuit's Buffer-Copy Holding Creates a Conflict with Other Circuits and the Copyright Office.....	29



III. The Second Circuit's Holding That Cablevision  
Does Not "Publicly" Perform Petitioners'  
Works Conflicts with the Plain Statutory  
Language and Prior Circuit Decisions. ....33  
CONCLUSION .....39

**Appendix A**

*Cartoon Network LP, LLLP v. CSC Holdings,  
Inc.*, 536 F.3d 121 (2d Cir. 2008) ..... 1a

**Appendix B**

*Twentieth Century Fox Film Corp. v.  
Cablevision Systems Corp.*, 478 F. Supp. 2d  
607 (S.D.N.Y. 2007)..... 43a

**Appendix C**

Constitutional and Statutory Provisions  
Involved ..... 81a

## TABLE OF AUTHORITIES

## CASES

<i>Cablevision Systems Development Co. v. Motion Picture Ass'n of America, Inc.</i> , 836 F.2d 599 (D.C. Cir. 1988).....	5
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	15
<i>Columbia Pictures Industries, Inc. v. Redd Horne, Inc.</i> , 749 F.2d 154 (3d Cir. 1984) .....	34
<i>Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.</i> , 866 F.2d 278 (9th Cir. 1989) .....	34
<i>CoStar Group, Inc. v. LoopNet, Inc.</i> , 373 F.3d 544 (4th Cir. 2004) .....	27
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003) .....	18
<i>Fortnightly Corp. v. United Artists Television, Inc.</i> , 392 U.S. 390 (1968) .....	38
<i>Harbor Motor Co. v. Arnell Chevrolet-Geo, Inc.</i> , 265 F.3d 638 (7th Cir. 2001) .....	19
<i>Jama v. Immigration &amp; Customs Enforcement</i> , 543 U.S. 335 (2005) .....	32
<i>MAI Systems Corp. v. Peak Computer, Inc.</i> , 991 F.2d 511 (9th Cir. 1993) .....	29, 30
<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005) ...	15-16, 21
<i>New York Times Co. v. Tasini</i> , 533 U.S. 483 (2001) .....	2, 15, 22

<i>On Command Video Corp. v. Columbia Pictures Industries</i> , 777 F. Supp. 787 (N.D. Cal. 1991) .....	34
<i>Playboy Enterprises, Inc. v. Webworld, Inc.</i> , 991 F. Supp. 543 (N.D. Tex. 1997), <i>aff'd</i> , 168 F.3d 486 (5th Cir. 1999) (unpublished table decision) .....	28, 29
<i>Princeton University Press v. Michigan Document Services, Inc.</i> , 99 F.3d 1381 (6th Cir. 1996).....	21
<i>RCA/Ariola International, Inc. v. Thomas &amp; Grayston Co.</i> , 845 F.2d 773 (8th Cir. 1988).....	19
<i>Religious Technology Center v. Netcom On-Line Communications Services, Inc.</i> , 907 F. Supp. 1361 (N.D. Cal. 1995) .....	13, 26, 27
<i>Sony Corp. of America v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984) . 2, 20, 21, 22	
<i>Stenograph L.L.C. v. Bossard Associates, Inc.</i> , 144 F.3d 96 (D.C. Cir. 1998) .....	30
<i>Storage Technology Corp. v. Custom Hardware Engineering &amp; Consulting, Inc.</i> , 421 F.3d 1307 (Fed. Cir. 2005).....	30
<i>Teleprompter Corp. v. Columbia Broadcasting System, Inc.</i> , 415 U.S. 394 (1974) .....	38
<i>Twentieth Century Music Corp. v. Aiken</i> , 422 U.S. 151 (1975) .....	19

*Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 192 F. Supp. 2d 321 (D.N.J. 2002), *aff'd*, 342 F.3d 191 (3d Cir. 2003)..... 34

*WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982) ..... 5, 39

**STATUTES**

17 U.S.C. § 101..... 1, 4, 5, 14, 17, 30, 32, 33, 36

17 U.S.C. § 106..... 3

17 U.S.C. § 106(1) ..... 4, 24

17 U.S.C. § 106(4) ..... 4

17 U.S.C. § 111(c)..... 5, 38

17 U.S.C. § 111(f) ..... 5, 38

17 U.S.C. § 114(d)(3)(A) ..... 34

17 U.S.C. § 114(j)(7) ..... 34

17 U.S.C. § 501(a) ..... 24

17 U.S.C. § 512..... 26

17 U.S.C. § 512(a) ..... 26, 27

17 U.S.C. § 512(b) ..... 26, 27

17 U.S.C. § 512(c) ..... 26, 27

17 U.S.C. § 512(d) ..... 26, 27

17 U.S.C. § 512(i)(1)(A) ..... 27

28 U.S.C. § 1254(1) ..... 1

**LEGISLATIVE MATERIAL**

<i>Supplemental Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, Copyright Law Revision Part 6, 89th Cong., 1st Sess. (Comm. Print 1965)</i> .....	4
---	---

**OTHER AUTHORITIES**

<i>Apple's iTunes Hits 5 Billion Mark</i> , CNETNews.com, June 19, 2008, available at <a href="http://news.cnet.com/8301-10784_3-9972528-7.html">http://news.cnet.com/8301-10784_3-9972528-7.html</a> .....	7
Brooks Barnes, <i>ABC, Cox Bar Ad Skipping in Video on Demand</i> , Wall St. J., May 8, 2007, at B1.....	6
Richard Bellamy, <i>Cablevision to Launch Network DVR</i> , Broadcasting & Cable (Sept. 12, 2008), available at <a href="http://www.broadcastingcable.com/article/CA6595928.html">http://www.broadcastingcable.com/article/CA6595928.html</a> .....	15
Jane C. Ginsburg, <i>Can Copyright Become User-Friendly? Review: Jessica Litman, Digital Copyright</i> , 25 Colum. J.L. & Arts 71 (2001).....	33
Jane C. Ginsburg, <i>Putting Cars on the "Information Superhighway,"</i> 95 Colum. L. Rev. 1466 (1995).....	30
Joel Russell, <i>The Age of Media On-Demand Looks Like It's Close at Hand</i> , L.A. Bus. J., May 29, 2006, at 16.....	6

Brian Stelter, *A Ruling May Pave the Way  
For Broader Use of DVR*, N.Y. Times,  
Aug. 5, 2008, at C8 ..... 22

U.S. Copyright Office, DMCA Section 104  
Report (Aug. 2001), *available at*  
[http://www.copyright.gov/reports/studies  
/dmca/sec-104-report-vol-1.pdf](http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf)..... 30-31

## OPINIONS BELOW

The court of appeals' opinion is reported at 536 F.3d 121 and reprinted at Pet. App. 1a-42a. The district court's opinion is reported at 478 F. Supp. 2d 607 and reprinted at Pet. App. 43a-80a.

## JURISDICTION

The court of appeals entered judgment on August 4, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Copyright Act, 17 U.S.C. § 101 *et seq.*, reproduced at Pet. App. 81a-103a.

## STATEMENT

### A. Introduction

This case presents critical questions about the application of copyright law to automated computerized services that are rapidly reshaping how copyrighted works are reproduced, delivered, and consumed. Respondent Cablevision – a cable television operator – is launching a new service that automatically copies Petitioners' copyrighted television programming and then transmits those programs to subscribers on request, without authorization from copyright owners. Cablevision copies, stores, and transmits the programs at its own central facility, on a system that it designed and operates and that is under its exclusive physical possession and control, using copyrighted works it

selects and supplies for this purpose. In essence, Cablevision is taking programs it has licensed for its cable television service and misappropriating that content for an additional *unlicensed* use.

The Second Circuit reached the remarkable conclusion that Cablevision itself is not doing anything that infringes the exclusive rights of copyright owners to reproduce and publicly perform their works. The court attempted to justify that conclusion by reference to *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), reasoning that a subscriber asking Cablevision to copy and transmit programming is not “sufficiently distinguishable from a VCR user to impose liability as a direct infringer on [Cablevision] for copies that are made automatically upon that customer’s command.” Pet. App. 21a. Therefore, Cablevision could at most be liable as a secondary infringer under the standards of *Sony*.

That ruling fundamentally distorts copyright law by inverting the proper relationship between direct and secondary infringement. The Second Circuit expansively misread *Sony* – which did not even address the line between direct and secondary infringement, much less exempt automated services from direct liability – while ignoring this Court’s ruling in *New York Times Co. v. Tasini*, 533 U.S. 483, 504 (2001), which considered and rejected the same argument the Second Circuit accepted here. Further, in order to implement its misguided immunity for Cablevision, the Second Circuit cast aside long-settled understandings of the



reproduction and public performance rights that are set forth in the plain language of the Copyright Act and decisions of other Circuits. As shown below, each of the conflicts and errors running through the Second Circuit's decision merits review in its own right. When they are all combined, the case for certiorari is especially compelling.

Practical considerations reinforce the pressing need for review. The Second Circuit has placed its influential imprimatur on what amounts to a blueprint for clever intermediaries to design and operate automated computer systems so as to evade the need for copyright licenses. That ruling undercuts investments in established *licensed* services made in reliance on settled law. If unchecked, this new free-riding business model will quickly become entrenched and difficult to dislodge through retroactive judicial repudiation. As automated delivery becomes the norm, the incentive to invest in the production of creative works and innovative mechanisms for their delivery will be jeopardized. The need for intervention by this Court could hardly be stronger.

#### **B. The Copyright Act of 1976**

Section 106 of the Copyright Act gives copyright owners "the exclusive rights to do and to authorize" the exploitation of their works in several ways. 17 U.S.C. § 106. In defining these rights, Congress used broad terminology to cover both anticipated and

unanticipated developments in technology, obviating the constant need for new legislation.<sup>1</sup>

Two exclusive rights are at issue here. The first is the right “to reproduce the copyrighted work in copies.” *Id.* § 106(1). “Copies” are defined broadly as “material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” *Id.* § 101. The standard for whether a work is “fixed” is similarly broad and functional to encompass new technology: the work’s “embodiment in a copy” must be “sufficiently permanent or stable to permit [the work] to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Id.*

The second exclusive right is the right “to perform the copyrighted work publicly.” *Id.* § 106(4). Again using broad language, Congress made clear that this right includes separate transmissions of performances to individual members of the public when and where they want it:

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<sup>1</sup> “A real danger to be guarded against is that of confining the scope of an author’s rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances. For these reasons, we believe that the author’s rights should be stated in the statute in broad terms . . . .” *Supplemental Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, Copyright Law Revision Part 6 at 13-14, 89th Cong., 1st Sess. (Comm. Print 1965).*

To perform . . . a work “publicly” means: . . .

(2) to transmit . . . a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.

*Id.* § 101.

That expansive definition also encompasses retransmission of television broadcasts by cable companies. *See, e.g., WGN Cont'l Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 624-25 (7th Cir. 1982) (describing how 1976 Act changed this aspect of law). At the same time, Congress gave cable companies a statutory license for certain “secondary transmissions” of broadcast television – but only when a secondary transmission takes place at the same time and in the same form as the broadcast. 17 U.S.C. § 111(c) & (f).<sup>2</sup>

Accordingly, a cable company must negotiate an additional license to make copies of a broadcast program or to delay or alter its transmission. Furthermore, because the § 111 statutory license covers only broadcast programming, a cable company must negotiate a license for *any* transmission or

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<sup>2</sup> Congress delegated to the Register of Copyrights the authority to administer § 111. *See Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 608 (D.C. Cir. 1988).

copying of programming from non-broadcast channels (*e.g.*, ESPN or CNN).

### C. Automated Delivery of Copyrighted Works

This case concerns the Copyright Act's application to new computerized commercial services that are transforming how businesses provide access to, and how the public receives, copyrighted works. Petitioners, and their licensed business partners, are aggressively moving to make their creative works available to the public via computerized systems that automatically respond to customer requests to copy, watch, or download a particular program when and where the consumer wants it.

Automated services have existed for some time, but their rate of growth is now accelerating exponentially. As early as 2005, the number of "intensive on-demand media consumers" (those who use networked on-demand services in multiple ways) doubled from 11% to 21% of the public. Joel Russell, *The Age of Media On-Demand Looks Like It's Close at Hand*, L.A. Bus. J., May 29, 2006, at 16. That same year, 23% of the U.S. audience used video on-demand ("VOD"), and 10% watched television programming via streaming video on the Internet. *Id.* This market sector has continued to experience exponential growth since then. See Brooks Barnes, *ABC, Cox Bar Ad Skipping in Video on Demand*, Wall St. J., May 8, 2007, at B1. Similarly, Apple's

well-known iTunes service is selling more than 50,000 movies a day.<sup>3</sup>

Unfortunately, this development also provides fertile ground for “intermediaries” who have access to copyrighted works for one purpose (such as an initial broadcast into the home), but take advantage of the possibilities of modern digital technology to profit from that content in other, unauthorized ways, such as streaming on-demand performances or distributing permanent copies. By exploiting creative works without a license, these commercial operations are able to appropriate the value of the works that would otherwise accrue to the copyright owner.

#### D. Cablevision’s Service

Cablevision offers a traditional cable service that allows its subscribers to view broadcast and non-broadcast programming. Pet. App. 4a. Its § 111 statutory license for broadcast stations and its negotiated licenses for non-broadcast programming authorize Cablevision to transmit these programs on a real-time basis directly to subscribers, in an uninterrupted and unaltered stream from Cablevision’s central facility (called a “head-end”) to each subscriber’s home.

In addition, Cablevision offers a VOD service that allows customers to watch certain programs on demand at times of their choosing. *Id.* at 49a.

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<sup>3</sup> *Apple’s iTunes Hits 5 Billion Mark*, CNETNews.com, June 19, 2008, available at [http://news.cnet.com/8301-10784\\_3-9972528-7.html](http://news.cnet.com/8301-10784_3-9972528-7.html).

Cablevision has negotiated additional licenses from copyright owners to include programs in this service. *Id.*

Cablevision also offers subscribers set-top digital video recorder (“DVR”) devices. *Id.* at 50a. The original DVR was a stand-alone copying device. Set-top DVRs reside in subscribers’ homes, where all copying and playback occurs. Cablevision never possesses copies made on a set-top DVR, and does not transmit anything to a subscriber’s home when a recorded program is replayed. *Id.*

More recently, Cablevision began developing the service at issue here. Cablevision’s internal engineering specifications described it as a “VOD network” using “VOD architecture.” 2d Cir. Joint Appendix C.A. 57-58, 352-53, 556-57, 626-27. In 2004, Cablevision indicated that all content offered by the service would be licensed from copyright owners. *Id.* at 61. By the time Cablevision announced the service, however, it had been relabeled as “Remote-Storage DVR” (“RS-DVR”), and Cablevision asserted it required no licenses.

Labels aside, Cablevision selects and supplies the range of copyrighted programs available on its “RS-DVR” service; makes copies of specific programs at Cablevision’s central head-end facility at the request of subscribers; and then transmits performances of those shows from Cablevision’s head-end to subscribers’ homes when they want to view them. Pet. App. 53a, 56a, 58a. In the process, Cablevision makes a separate copy of a program for each subscriber who requests it. If 100,000 subscribers

request the entire season of the hit show *24*, Cablevision makes 100,000 identical copies of each episode of that series as it airs, and “assigns” one copy of each episode to each requesting subscriber. *Id.* at 58a. When a subscriber wants to view a particular episode, Cablevision transmits it to that subscriber using the particular copy Cablevision made and assigned. *Id.* at 59a-60a. No technological purpose is served by Cablevision’s decision to make all these redundant copies. They exist only to support Cablevision’s legal theory, which is (paradoxically) that Cablevision is exempt from copyright liability precisely because it makes *so many* copies – one for each requesting subscriber.

The decisions below describe the operation of the “RS-DVR” service in detail. *Id.* at 4a-6a, 51a-60a. Briefly, to provide its “RS-DVR” service, Cablevision heavily manipulates the stream of digital data for programming before it leaves Cablevision’s head-end. Cablevision first splits the data stream in two. One stream flows to subscribers in real time pursuant to Cablevision’s licenses for traditional cable service, providing scheduled programming without delay or alteration of the signal supplied by the programmers. *Id.* at 4a-5a.

The second, unlicensed stream is used for the “RS-DVR” service. *Id.* at 5a. That stream initially flows to a device at Cablevision’s facility called a Broadband Multimedia-Service Router (“BMR”), where the data are copied and “buffered” — held in temporary random access memory (“RAM”) — in 1.2-second increments. *Id.* This buffering allows the

BMR to reformat the digital program files in a way that permits their reproduction in permanent copies at later stages. *Id.*

The reformatted data go next to the so-called "Arroyo server," where they are copied into a "primary ingest buffer." *Id.* at 55a-56a. This buffer copies and stores three frames of video at a time for up to one-tenth of a second, which permits Cablevision to check whether customers have requested copies of a program and then make permanent copies if they have. *Id.*

The BMR and Arroyo buffer copies play no part in Cablevision's licensed transmission of programming. *Id.* at 53a-54a. They exist solely to permit reproduction of programs in permanent copies for later unlicensed transmission over the "RS-DVR" service. Cablevision takes all of the steps described above regardless of whether it has received a "copy" request from a subscriber. *Id.* at 56a.

Subscriber requests for copies enter the scene only *after* the programming data are buffered in the Arroyo Server. If one or more subscribers have requested a copy of a program, Cablevision's system instructs the server to use the buffer copy data to make a permanent copy of that program for each requesting subscriber, and then stores those copies at Cablevision's head-end. *Id.* at 56a-58a. When a subscriber later wants to watch a recorded program, Cablevision transmits that program from its head-end to the subscriber's home, exactly as it would in fulfilling a request for VOD programming. *Id.* at 59a.



The complex network of equipment and software necessary to carry out this copying and transmission for the "RS-DVR" service is housed in a secure facility at Cablevision's head-end and is not accessible to subscribers. *Id.* at 52a-53a, 66a-67a. Cablevision employees must staff the "RS-DVR" system around the clock to operate and maintain it. *Id.* at 52a-53a.

The "RS-DVR" service can be used only for programming Cablevision supplies, and only for the particular copyrighted works Cablevision chooses to make available. *Id.* at 53a. In planning the service, Cablevision considered making available only a few channels, but eventually decided to make available all programming included in a given customer's cable subscription. *Id.* Unlike a VCR or other neutral copying device, the "RS-DVR" service does not allow subscribers to copy and replay programs other than what Cablevision chooses to supply, or to use copies in any manner other than over Cablevision's service. *Id.* at 67a-68a, 71a.

#### **E. Proceedings Below**

1. Petitioners are copyright owners of many of the most popular movies, series, and other programming available on television. They license that programming to Cablevision for its regular cable service (and, for some programs, its VOD service). *Id.* at 3a. When Cablevision announced in March 2006 its intent to offer "RS-DVR" service without obtaining licenses, Petitioners sued to block that unlicensed exploitation of their works. *Id.* at 60a. Because their complaint concerned Cablevision's own

infringing conduct, not the actions of Cablevision's subscribers, Petitioners asserted only direct infringement claims. Cablevision denied direct infringement, but stipulated it would not assert a fair use defense to a direct infringement claim. *Id.* at 61a.

2. The district court granted Petitioners' motion for summary judgment and enjoined Cablevision from using the "RS-DVR" service to reproduce or publicly perform Petitioners' copyrighted works without licenses. *Id.* at 80a. The court rejected Cablevision's primary argument that it is shielded from direct liability because its subscribers – not Cablevision itself – "do" the copying and performances by making requests to which Cablevision "automatically" responds. *Id.* at 70a-71a; *see also id.* at 76a. Examining all that Cablevision does to design and operate the service, maintain exclusive physical control of and access to the equipment, and select and supply the content available, the court ruled that the copying and public performances are "done . . . by Cablevision, albeit at the customer's request." *Id.* at 72a.

That conclusion was bolstered by the district court's holding that the buffer copying Cablevision performs prior to any customer request infringes the right to make "fixed" copies. Following the interpretation of "fixed" adopted by three Circuits and the Copyright Office, the court concluded that embodiments in the buffers are fixed because they permit reproduction of works into complete, permanent copies. *Id.* at 73a-74a.

Finally, the district court held that Cablevision performs Petitioners' works "publicly." Under the statutory language and established precedent, "a transmission 'to the public' is a public performance, even if members of the public receive the transmission at separate places at different times. Such is the case here." *Id.* at 77a.

3. The Second Circuit reversed, based on its understanding of the relationship between direct and secondary liability under this Court's *Sony* decision. The court noted that its "refusal to find Cablevision directly liable" was "buttressed by the existence and contours of the Supreme Court's doctrine of contributory liability in the copyright context." *Id.* at 24a. The court did "not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on [Cablevision] for copies that are made automatically upon that customer's command." *Id.* at 21a.

Proceeding from that premise, the Second Circuit held that Cablevision is not directly liable for making unauthorized copies of Petitioners' works. Purporting to apply a line of cases beginning with *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) ("*Netcom*"), the court focused on "the volitional conduct that causes the [specific] copy to be made." Pet. App. 20a. The Second Circuit concluded that the only "volitional conduct" that matters is a human being's decision to make a specific copy of a specific work. Therefore, the court found, "Cablevision's conduct in designing, housing, and

maintaining a system that exists only to produce a copy” is insufficiently “volitional” for direct liability. *Id.*

Next, the court held that the buffer copies Cablevision admittedly makes are not “fixed” and therefore do not infringe Petitioners’ reproduction right. *Id.* at 18a. To reach that conclusion, the court rejected the interpretation of the statute adopted by three other Circuits and the Copyright Office, adding an ill-defined “durational requirement” on top of the functional standard employed by prior decisions. *Id.* at 11a-13a, 15a-16a.

Turning to public performance, the Second Circuit reserved the question whether Cablevision “does” the performances for purposes of direct liability. *Id.* at 28a. The court held instead that the performances Cablevision transmits to its subscribers are not “public” – thereby eliminating the possibility of both direct *and* indirect liability. *Id.* The court adopted a novel test that requires different members of the public to receive the “same” transmission for a performance to be public. *E.g., id.* at 30a-31a. The court did not explain how that reading could be reconciled with the statute’s express coverage of transmissions “at different times.” 17 U.S.C. § 101. It sought to distinguish on their facts contrary cases finding public performance when members of the public received separate transmissions, because the transmissions in those cases were generated from one copy, instead of the separate copies created and used by the “RS-DVR” service. Pet. App. 37a-40a.

4. After the mandate issued, Cablevision announced the launch of the "RS-DVR" service "early next year." Richard Bellamy, *Cablevision to Launch Network DVR*, *Broadcasting & Cable*, Sept. 12, 2008, available at <http://www.broadcastingcable.com/article/CA6595928.html>.

#### REASONS FOR GRANTING THE WRIT

There is a pressing need for review of the decision below. Although Petitioners challenge Cablevision's own conduct, the Second Circuit shifted the focus to the conduct of Cablevision's customers and treated this case as though *Sony* supplied the controlling rule. But *Sony* is inapposite. Cablevision operates a centralized service that supplies, copies, and transmits Petitioners' programs on request. That conduct is completely unlike Sony's one-time sale of an in-home copying device as an article of commerce. Indeed, in *Tasini* this Court rejected the notion that *Sony* provides a shield from direct liability for services that automatically respond to user requests for copyrighted works. 533 U.S. at 504. By ignoring *Tasini* and viewing this case through the lens of *Sony*, the Second Circuit inverted the longstanding relationship between direct and secondary copyright infringement and permitted Cablevision to piggyback on any defenses (such as fair use) its customers might have, contrary to well-settled law. As it has repeatedly done before, this Court should intervene now to correct that misreading of the Court's own precedent. *Cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (correcting misreading of *Sony's* fair-use holding); *Metro-Goldwyn-Mayer Studios Inc.*

*v. Grokster, Inc.*, 545 U.S. 913 (2005) (correcting misreading of *Sony's* "substantial noninfringing use" defense).

To make this case fit the *Sony* mold, the Second Circuit was forced to distort key elements of copyright law. The court adopted and expanded the so-called "*Netcom*" rule, interpreting it as a categorical exemption from direct liability for copying by computerized services that automatically carry out user requests. Such a rule allows commercial services to engineer around direct liability by replacing human employees with computers. Under the rule as applied below, all of Cablevision's conduct in designing, housing, and operating its service, and selecting and supplying the copyrighted works available through it, is simply irrelevant to whether it is a direct infringer that "does" the copying. This sweeping ruling raises one of the most important issues in copyright law today. Computerized systems that automatically respond to consumer requests are becoming the dominant mode for delivering copyrighted works to the public, yet the Second Circuit has insulated them from direct liability. Particularly in light of the conflict with *Tasini*, this Court's guidance is needed on this critical issue.

The Second Circuit also had to reject the standard uniformly adopted by other Circuits and the Copyright Office for whether buffer copies are "fixed." Cablevision's buffer copies (which it indisputably makes without user input) meet the functional standard for fixation that prior authorities

have derived from the statutory language. But the Second Circuit imposed an additional, nebulous “durational requirement” for fixation, and held that Cablevision’s buffers are noninfringing under that novel requirement. That ruling creating a circuit split was outcome determinative, and merits review in its own right.

The Second Circuit’s ruling that Cablevision’s performances are not “public” (and are therefore exempt from both direct *and* secondary liability) also calls out for review. The court’s reasoning that a multitude of *separate* transmissions of the same program are by definition not public would eviscerate the public performance right by rendering all on-demand performances non-public. It flies in the face of the statutory language, which expressly encompasses performing a work by transmitting it “at different times.” 17 U.S.C. § 101. Nor can that reasoning be squared with decisions from other Circuits adhering to the plain statutory language and holding that public performances may occur through separate transmissions. The Second Circuit cannot distinguish away this circuit conflict on the ground that Cablevision uses separate *copies* for its transmissions, because that *ad hoc* distinction has no basis in the statute. This Court – which has never addressed the scope of the public performance right under the 1976 Act – should resolve the conflict and restore the plain meaning of the law.

These glaring errors cannot be left in place while these fundamental issues “percolate.” The stakes are simply too high, and the potential harms too severe.

The multiple errors below will begin right now to affect the development of industries delivering content to users, resulting in a host of new automated services that will become entrenched and extremely hard to dislodge if this Court disagrees with the Second Circuit years hence. These unlicensed services will undermine past and future investments in licensed services and severely erode the value of copyrights in the new era when creative works are delivered to consumers automatically and on demand. That, in turn, will undermine copyright's core function of providing an "engine of free expression" by "suppl[ying] the economic incentive to create and disseminate ideas." *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (quotation marks omitted).

**I. This Case Presents Critically Important Questions About the Application of Copyright Law to Automated Delivery of Copyrighted Content.**

The Second Circuit's decision undermines the very foundations of copyright law as it applies to computerized services that are reshaping how the public receives and consumes copyrighted works. As shown *infra*, each of the Second Circuit's individual holdings absolving Cablevision of responsibility for unauthorized copying and public performance rests on a serious misreading of copyright law that conflicts with other authorities and independently merits review. But the core problem goes much deeper. Misreading *Sony*, and ignoring *Tasini*, the



Second Circuit distorted the entire framework of copyright law.

1. Through its “RS-DVR” service, Cablevision takes copyrighted programs it has licensed for real-time transmissions and exploits them in an additional *unlicensed* way for profit. Such unauthorized commercial exploitation lies at the very heartland of direct copyright infringement. But the Second Circuit assessed Cablevision’s responsibility based not on its own conduct, but on that of its customers, and therefore treated this case as just like *Sony*. *E.g.*, Pet. App. 21a (court did “not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on [Cablevision]”).<sup>4</sup> Mapping this case onto *Sony*, the court ruled that copies of Petitioners’ programs are made solely by

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<sup>4</sup> In so ruling, the Second Circuit assumed that either the subscriber or Cablevision could be a direct infringer, but not both. That conflicts with prior cases. *E.g.*, *RCA/Ariola Int’l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 781 (8th Cir. 1988) (holding that retailers as well as customers are directly liable for making copies on retailers’ premises); *Harbor Motor Co. v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638, 643-45 (7th Cir. 2001) (holding that newspaper and advertiser could both be directly liable for infringing advertisement); *see also Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 157 (1975) (“An orchestra ... [that] performs a copyrighted musical composition ... without a license is thus clearly an infringer ... The entrepreneur who sponsors such a public performance ... is also an infringer – direct or contributory.”).

Cablevision's subscribers, who then view them in purely private performances.

But the conduct of Cablevision itself is completely unlike that of the manufacturer and seller of a VCR. In *Sony*, it was undisputed that the defendant was not a direct infringer, because its only link to infringing conduct "occurred at the moment of sale" of a product. 464 U.S. at 438; *see also id.* at 440 (claim "predicated entirely on the sale of an article of commerce"). Hence, *Sony* did not address where the line between direct and secondary infringement lies – much less suggest that a company like Cablevision, which selects, supplies, copies, and performs copyrighted works, is immune from direct liability for copying and from all liability for public performance.<sup>5</sup>

The Second Circuit's approach conflicts with well-settled law. As the en banc Sixth Circuit explained, when a commercial defendant is charged with direct infringement, it is *irrelevant* whether "it would be fair use for [its customers] to make their own copies," because "[t]he courts have . . . properly rejected

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<sup>5</sup> It is no accident that the conduct of the customers is similar in both cases because, like the time-shifting at issue in *Sony*, commercial on-demand delivery of copyrighted content allows consumers to view programs when they want them. The critical difference lies in what the commercial supplier does. Congress intended the exclusive rights of copyright owners to cover commercial on-demand services, and *Sony's* holding that certain in-home time-shifting is fair use did not override that congressional intent.

attempts by for-profit users to stand in the shoes of their customers.” *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1389 (6th Cir. 1996) (en banc) (quotation marks omitted).

The Second Circuit, however, has let Cablevision “stand in the shoes of [its] customers.” Because secondary liability is purely derivative and thus requires proof of direct infringement by customers, *Sony*, 464 U.S. at 434, any customer fair use defense would also be a defense to a secondary liability claim against Cablevision. Hence, by holding that Cablevision could be liable only as a secondary infringer (if at all), the decision below allows Cablevision to piggyback on any fair use defense its subscribers might have, contrary to the settled law reaffirmed in *Princeton*. In addition, secondary liability requires proof of elements like knowledge, intent, and financial interest, *Grokster*, 545 U.S. at 930, which are irrelevant to direct infringement as a strict-liability tort. Thus, the Second Circuit was wrong in saying that “contributory liability stands ready to provide adequate protection to copyrighted works” where – as here – courts “construe the boundaries of direct liability [too] narrowly.” Pet. App. 24a.

2. The Second Circuit’s misreading of *Sony* also conflicts with this Court’s decision in *Tasini*. That case involved a computerized database that made and distributed copies of newspaper articles when users of the service requested them. Exactly as here, the database operators “invoke[d] *Sony*” and argued that they “could be liable only under a theory of

contributory infringement, based on end-user conduct, which the [plaintiffs] did not plead.” *Tasini*, 533 U.S. at 504. Flatly rejecting that attempt to foist responsibility onto consumers, the Court held the database operator directly liable for its copying and distribution via an automated system. *Id.*

Inexplicably, the Second Circuit ignored *Tasini* altogether. Indeed, its ruling could have been lifted from the *dissent* in that case. *Compare* Pet. App. 26a-27a (“copies produced by the RS-DVR system are ‘made’ by the RS-DVR customer, and Cablevision’s contribution to this reproduction by providing the system does not warrant the imposition of direct liability”), *with* 533 U.S. at 518 & n.14 (Stevens, J., dissenting) (reasoning that under *Sony* “it would be more accurate to say that [the database service] makes it possible for users to make and distribute copies”).

3. Review of the Second Circuit’s decision is needed now because of the profound real-world consequences it threatens. The implications of the Second Circuit’s attempt to turn the indirect-liability exception into the rule by shifting the focus of copyright law onto consumers, while treating commercial intermediaries as presumptively immune from direct liability, go far beyond this case. Indeed, if that decision is not reviewed and corrected by this Court, it will fundamentally distort how the exploding market for automated services develops. *See* Brian Stelter, *A Ruling May Pave the Way for Broader Use of DVR*, N.Y. Times, Aug. 5, 2008, at C8 (analyst observing that Second Circuit’s decision has

“seismic implications across the media landscape”). The result will be an “installed base” of unlicensed Cablevision-like services that will drive legitimate competitors who pay license fees out of the market and prove almost impossible to eradicate after the fact.

This case is thus on a par with *Sony*, *Tasini*, and *Grokster* in terms of its significance to the development of new markets and technologies. In each case, the lower court decision had the potential to determine whether copyright owners should be compensated for new uses of their works that advances in technology made possible. In each case, this Court intervened because the consequences were important enough that the Court should determine the national rule. The stakes here are equally high. Most of the nation’s major video content providers are Petitioners. The case has been closely watched by content owners and service providers alike, and there was widespread *amicus* participation from interested parties on all sides in the Second Circuit – in recognition that this case will set a standard for copyright protection in the marketplace of automated access to and delivery of copyrighted works. This is manifestly a situation in which this Court should have the final say.

## **II. The Second Circuit’s Reproduction Rulings Merit Review.**

To implement its misguided notion that this case is just like *Sony*, the Second Circuit had to distort basic rules of copyright law to shield Cablevision from direct liability for infringing Petitioners’

exclusive reproduction rights. The court adopted a categorical exemption for operators of computerized services from direct liability when they automatically carry out user requests to make copies. And the court ruled that Cablevision's buffer copies are not "fixed" and thus not infringing, creating a conflict with the uniform interpretation of other Circuits and the Copyright Office. Both rulings merit review in their own right.

**A. The Second Circuit's Categorical Exemption from Direct Liability for Automated Services Presents a Question of Singular Importance.**

The Second Circuit's decision to exonerate Cablevision for the unauthorized copying of Petitioners' works raises an exceedingly important issue: whether operators of computerized services that automatically copy works when requested by users are ever directly liable for that infringement. The decision below adopted a sweeping categorical exemption from direct liability for such services. That exemption will eviscerate the exclusive right of authors to reproduce their creative works as human employees are increasingly replaced by computerized on-demand services.

The Copyright Act gives an author "the exclusive rights to do and to authorize" several things, including "to reproduce the copyrighted work in copies." 17 U.S.C. § 106(1). A direct infringer is "[a]nyone who violates any of the exclusive rights of the copyright owner." *Id.* § 501(a). Under any common understanding of this statutory language, Cablevision directly infringes ("violates") the

exclusive right “to do and to authorize” the reproductions of Petitioners’ works. Cablevision itself designed and operates the service, maintains exclusive physical control of and access to the equipment through which it operates, and selects and supplies the content that subscribers may request for on-demand recording and performances. As the district court recognized, the copying is “done . . . by Cablevision, albeit at the customer’s request.” Pet. App. 72a. Indeed, as explained above, in *Tasini* this Court flatly rejected the notion that computerized systems are immune from direct liability when they automatically copy works in response to user requests. *See supra* at 21-22.

The Second Circuit set aside all of “Cablevision’s conduct in designing, housing, and maintaining a system that exists only to produce a copy” as irrelevant, because it believed the only conduct sufficient to trigger direct liability is “volitional conduct” by a “human employee” at the moment when a subscriber selects a particular program for permanent copying. Pet. App. 20a, 22a. That holding ignores the reality that human employees engage in “volitional conduct” in designing and operating this service under the direction of Cablevision’s human management.

The court did not explain how its ruling could be squared with the statute’s broad, non-technical phrase – “to do and to authorize” – or with *Tasini*. Instead, building on its misreading of *Sony*, the court invoked a line of cases addressing direct liability for incidental copying over the Internet, starting with

the district court decision in *Netcom*. Pet. App. 19a. *Netcom* addressed the potential liability of an Internet Service Provider (“ISP”) whose servers temporarily hosted user-supplied copyrighted material in the course of providing basic Internet facilities. Against that backdrop, *Netcom* opined that “[a]lthough copyright is a strict liability statute, there should still be *some element of volition or causation*” for direct liability. 907 F. Supp. at 1370 (emphasis added). Thus, the *Netcom* decision excluded only purely involuntary or incidental involvement with copying from the scope of direct liability in a situation where a subscriber uploaded a file to his ISP that was then automatically transferred to another ISP. *Id.* at 1368-69 (concluding that “the mere fact that Netcom’s system incidentally makes temporary copies of plaintiffs’ works does not mean Netcom has caused the copying”).

In 1998, Congress enacted the Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512, to address the issue that had troubled the *Netcom* court by crafting carefully circumscribed safe-harbors from copyright liability for ISPs. Those safe-harbors extend only to ISPs – not non-Internet services like Cablevision’s “RS-DVR” – and only cover four specific aspects of basic Internet functionality, none of which involve actively exploiting copyrighted content. *Id.* § 512(a)-(d). Even then, the ISP must meet additional requirements to qualify for the safe-harbors, such as terminating repeat infringers and appropriately responding to notices of infringing conduct. *Id.*



§ 512(a)-(d), (i)(1)(A). If automated services were immune from direct liability when they automatically respond to user requests, there would have been no need for Congress to create very narrow and highly qualified ISP safe-harbors under these circumstances.

Nonetheless, the so-called *Netcom* rule has acquired a life of its own in the lower courts, unmoored from any statutory grounding, and without the limitations of § 512. In *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), for example, the Fourth Circuit held that *Netcom* precludes direct liability for a website that copies and displays infringing photographs submitted by its customers. *CoStar* granted this immunity even though the website's employees reviewed each photograph before it was displayed on the site. *Id.* at 555-56.

Now the Second Circuit has expanded *Netcom* in another direction, to immunize a closed on-demand system in which customers must choose among specific copyrighted works supplied to them by Cablevision itself. In *Netcom*, the openness of the Internet and the fact that the ISP had no role in supplying the copyrighted content weighed heavily against direct liability. 907 F. Supp. at 1372-73. Here, in contrast, Cablevision has complete discretion in selecting which copyrighted programs subscribers may choose for copying. Cablevision maintains control over the copies and allows subscribers to access them only using Cablevision's service. Yet, despite acknowledging that

Cablevision's conduct "is indeed more proximate to the creation of illegal copying than, say, operating an ISP or opening a copy shop, where all content was supplied by the customers themselves or other third parties," Pet. App. 23a, the Second Circuit still held that the only conduct that counts is "volitional" conduct by a human being at one specific point in the process: when a customer selects from among the programs supplied by Cablevision. *Id.* at 22a.

As the Second Circuit's analysis exemplifies, lower courts are treating *Netcom* as if it were a decision of this Court (while ignoring *Tasini*) and then extrapolating a growing loophole in copyright law from it. *Netcom's* context-sensitive holding is thereby expanding into a blanket immunity for all businesses that employ computers instead of humans to carry out customer requests for unauthorized copies – without the careful limitations enacted by Congress in § 512. Without any guidance from this Court, the legal landscape is largely being defined by the spread of that judge-made rule at the very time when automated delivery of copyrighted works is skyrocketing, both on the Internet and on closed services like Cablevision's.

To be sure, not every court has followed suit. The Fifth Circuit refused to recognize a categorical *Netcom* rule to immunize an on-demand Internet service from direct liability in an unpublished decision. *Playboy Enterprises, Inc. v. Webworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997), *aff'd*, 168 F.3d 486 (5th Cir. 1999) (unpublished table decision) (affirming on grounds stated in district court

opinion). The defendant service was held liable as a direct infringer in light of the totality of its conduct, including its discretion in selecting content available for copying. 991 F. Supp. at 552-53 (“Webbworld cannot now evade liability by claiming helplessness in the face of its ‘automatic’ operation.”). The existence of this divergent authority highlights the need for review of this fundamentally important question.

**B. The Second Circuit’s Buffer-Copy Holding Creates a Conflict with Other Circuits and the Copyright Office.**

To exempt Cablevision from direct liability, the Second Circuit also had to rule that the buffer copies Cablevision itself admittedly creates are not “fixed” and thus are noninfringing. Pet. App. 18a. That ruling conflicts with the standard employed by other Circuits and the Copyright Office.<sup>6</sup>

In deciding whether temporary buffer copies are “fixed,” prior cases have uniformly adopted the standard derived from the statutory definition in *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993). There the defendant argued that

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<sup>6</sup> Of course, even if the buffer copies were not themselves “fixed” copies, they are indisputably the first steps in making permanent copies when requested by subscribers, and Cablevision carries out these steps with no user input. *Supra* at 9-10. But the Second Circuit ignored Cablevision’s unilateral buffering conduct in holding that Cablevision does not directly infringe when it carries out subscriber requests for permanent copies.

buffer copies loaded into random access memory (“RAM”) were not “fixed” because they were temporary. Rejecting that argument, the Ninth Circuit held that all that is required to satisfy the statutory definition of “fixed” is that the embodiment be “*sufficiently* permanent or stable to *permit* [the work] to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” 17 U.S.C. § 101 (emphasis added); *see MAI*, 991 F.2d at 519 (“since we find that the copy created in the RAM can be ‘perceived, reproduced, or otherwise communicated,’ we hold that the loading of software into the RAM creates a copy under the Copyright Act”).

Under *MAI*’s definition, a work is “fixed” so long as its embodiment endures long enough (or in the statutory language, is “sufficiently permanent or stable”) to permit the work’s perception, reproduction, or communication. *MAI*, 991 F.2d at 517-18; *see also* Jane C. Ginsburg, *Putting Cars on the “Information Superhighway,”* 95 Colum. L. Rev. 1466, 1476 n.39 (1995). Two other circuits have adopted *MAI*’s reading. *See Stenograph L.L.C. v. Bossard Assocs., Inc.*, 144 F.3d 96, 101-02 (D.C. Cir. 1998); *Storage Tech. Corp. v. Custom Hardware Eng’g & Consulting, Inc.*, 421 F.3d 1307, 1311 (Fed. Cir. 2005).

The Copyright Office also adopted the *MAI* reading in a congressionally mandated report issued after notice and comment. U.S. Copyright Office, *DMCA Section 104 Report* (Aug. 2001), available at <http://www.copyright.gov/reports/studies/dmca/sec->

104-report-vol-1.pdf. Like the Ninth Circuit, the Copyright Office drew a “dividing line . . . between reproductions that exist for a sufficient period of time to be capable of being ‘perceived, reproduced, or otherwise communicated,’ and those that do not.” *Id.* at 111. It also rejected the notion of an independent requirement that the embodiment exist for some arbitrary additional period of time. *Id.* at 113.

The Second Circuit, however, added an extra requirement beyond what *MAI* requires. First, “the work must be embodied in a medium, i.e., placed in a medium such that it can be perceived, reproduced, etc., from that medium.” Pet. App. 11a. That is the very same requirement adopted by *MAI* – and Cablevision’s buffer copies indisputably meet *this* requirement. *Id.* at 16a. Thus, if the Second Circuit had adopted the *MAI* standard, it would necessarily have concluded that Cablevision’s buffers are “fixed.”

But the Second Circuit grafted on a second requirement: the work “must remain thus embodied ‘for a period of more than transitory duration.’” *Id.* at 11a. And the court held that Cablevision’s buffers fail that novel requirement, because “[n]o bit of data remains in [the] buffer for more than a fleeting 1.2 seconds.” *Id.* at 17a. Of course, 1.2 seconds is not “fleeting” for a computer. With twenty-first century technology, buffering for 1.2 seconds is sufficient to permit reproduction of the works in permanent copies – the standard *MAI* derived from the statutory language.

Thus, the court’s ruling that Cablevision’s buffer copies are not “fixed” flows directly from its

departure from the test adopted by all prior authorities. The Second Circuit recognized as much when it acknowledged that it was rejecting the Copyright Office's reading, Pet. App. 16a (court "not persuaded" by interpretation) – which is identical to the reading adopted by *MAI* and two other Circuit courts.

Moreover, the Second Circuit's ruling rests on an obvious misreading of the statute, which defines a copy as "fixed" "when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101. The court assumed the phrase "for a period of more than transitory duration" modifies the word "embodiment" – from which it is separated by several lines of text – instead of the immediate series of antecedents "perceived, reproduced, or otherwise communicated." That strained reading conflicts with ordinary usage and canons of statutory construction. Modifiers almost always modify the words immediately adjacent to them. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 344 & n.4 (2005). It would have been easy for Congress to draft a statute stating that the "embodiment" must exist "for a period of more than transitory duration," but it did not do so. The Second Circuit's outcome-determinative adoption of that reading in conflict with other Circuits plainly merits review.

### III. The Second Circuit's Holding That Cablevision Does Not "Publicly" Perform Petitioners' Works Conflicts with the Plain Statutory Language and Prior Circuit Decisions.

The Second Circuit also adopted an unsupportable interpretation of the public performance right to justify its conclusion that performances of Petitioners' works over Cablevision's "RS-DVR" service are (like time-shifting in *Sony*) purely private. That reading conflicts with the plain statutory language and decisions applying it. It also sets forth a blueprint for providers of on-demand services to design their systems to evade copyright liability, even as they profit from delivery of unauthorized performances to thousands or millions of subscribers.

1. The plain language of the Copyright Act leaves no doubt that separate on-demand transmissions of a performance to thousands of subscribers at different times constitute a "public" performance. To perform a work "publicly" means, *inter alia*, "to transmit or otherwise communicate a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it . . . at the same time or at different times." 17 U.S.C. § 101 ("transmit clause"). That definition plainly encompasses a performance completed via separate, non-simultaneous transmissions to individual customers who receive the performance on demand. Jane C. Ginsburg, *Can Copyright Become User-Friendly?*, 25 Colum. J.L. & Arts 71, 83 (2001) ("an

on demand audio- or videostream of a work falls squarely within the definition of a ‘public performance or display’).<sup>7</sup>

Prior to the decision below, every court to consider on-demand performances via separate transmissions held that they infringe the public performance right. In *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984), for example, the Third Circuit held that a video rental store publicly performed videos when it transmitted the recorded works to private viewing booths upon request — even though only one or two people could view each separate transmission of a video. *Id.*; see also, e.g., *Columbia Pictures Indus., Inc. v. Prof. Real Estate Investors, Inc.*, 866 F.2d 278, 282 nn.6-7 (9th Cir. 1989) (public performance by hotel that separately transmits works to individual hotel rooms on request); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991) (same); *Video Pipeline, Inc. v. Buena Vista Home Enter., Inc.*, 192 F. Supp. 2d 321, 332 (D.N.J. 2002) (Internet streaming of videos “to

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<sup>7</sup> That is confirmed by another section of the Copyright Act providing that “interactive services” that engage in the “performance of a sound recording publicly” must negotiate licenses to do so. 17 U.S.C. § 114(d)(3)(A). “Interactive services” are those that “enable[] a member of the public to receive . . . on request, a transmission of a particular sound recording.” *Id.* § 114(j)(7) (emphasis added). Thus, the Act consistently treats on-demand transmissions to individual members of the public as public performances.



individual computers” “constitute[s] a public performance”), *aff'd*, 342 F.3d 191 (3d Cir. 2003).

The Second Circuit departed from the plain statutory language and all prior case law. It reasoned that a performance is not public if individuals receive it via separate transmissions. The court thought that “the transmit clause directs us to identify the potential audience of a given transmission, i.e., the persons ‘capable of receiving’ it, to determine whether that transmission is made ‘to the public.’” Pet. App. 41a; *see also id.* at 34a (“when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission”). On this view, the fact that Cablevision transmits an identical performance to thousands of paying subscribers is irrelevant. Each particular point-to-point transmission must be examined separately in determining whether a performance is public. And because each “particular transmission,” Pet. App. 30a, runs from Cablevision solely to one subscriber, its performances are, in the Second Circuit’s view, private.

That reasoning is irreconcilable with *Redd Horne* and the other cases cited above, which hold that *performance* of a work is public even if it is received by each individual recipient via separate *transmissions*. Thus, the Second Circuit’s “conclusion that, under the transmit clause, we must examine the potential audience of a given transmission ... to determine whether that

transmission is “to the public,” Pet. App. 36a, creates a Circuit conflict.

To paper over that conflict, the Second Circuit tried to distinguish *Redd Horne* on its facts by narrowing its own holding to apply only where the separate transmissions of a work are generated from separate copies of the work. Pet. App. 37a-38a. But that logical *non sequitur* should not succeed in insulating the Second Circuit’s decision from review, because it is completely unmoored from the statute Congress enacted. The Act’s definition of public performance does not mention copies at all, much less the number of copies used to generate transmissions of a performance.<sup>8</sup> By piling the number of copies on top of the number of transmissions as defining criteria of a public performance, the Second Circuit’s reading moved beyond any plausible construction of the statutory text. Indeed, Congress provided that a public performance may be accomplished “by means of any device or process.” 17 U.S.C. § 101. Transmitting a work to the public by first making separate copies for each recipient and then generating transmissions from each copy is still transmission “by means of any . . . process.”

2. The Second Circuit’s tortured reading of the public performance right will have profoundly destabilizing effects on the emerging marketplace for

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<sup>8</sup> Indeed, a public performance can take place without the use of any copies – for example, when an opera is broadcast live over the radio.

services that perform works on demand. By focusing on the public or private nature of each "particular transmission," the Second Circuit threatens to place every on-demand service outside the scope of the public performance right. And even when the holding below is limited to services in which each transmission originates from a "distinct" copy, on-demand services will simply adopt the same "copy then play" two-step used by Cablevision. When a customer wants to view an on-demand program, she will simply send an electronic request first to "copy" and then to "play" the desired work. The service will make a unique copy of the work as an automatic response to the request, and transmit the program from that unique copy. Under the decision below, that requires no license, because the service provider is not directly liable for the automated copying, *see supra* Part II.A, and is not liable at all for the transmission made from the separate copy.

The scope of the Second Circuit's holding goes far beyond cable systems and includes the Internet or any other method of transmitting performances on demand. Any company with a digital copy of a work can readily avail itself of this gaping loophole. Copyright owners and others who have invested substantially in developing and licensing innovative automated offerings in reliance on settled law are at risk of having this investment undercut by the unlicensed services approved by the Second Circuit.

The decision will also distort technological innovation. Rather than requiring engineers to create more efficient ways to deliver content on

demand, companies will ask their lawyers to develop more creative ways to skirt the copyright laws. Multiple copies will be used by on-demand services, even when a single copy is more efficient, whenever the cost of the additional server space is less than the cost of negotiating and paying for a license. The result will be to undermine the incentive to invest in creative works and reward the use of inefficient technology.

The Second Circuit's only response is to note — apparently without intended irony — that copyright owners can enforce their exclusive reproduction right against services that make multiple copies to support their “copy then play” services. Pet. App. 37a. As discussed above, in the same opinion the court provided a roadmap for evading liability for making reproductions as well.

3. While the effect of the decision below goes far beyond cable television, review is appropriate here for the additional reason that the Second Circuit has blessed Cablevision's end run around the limitations of its § 111 license for secondary cable transmission of broadcast television. 17 U.S.C. § 111(c), (f). Congress included both the “transmit” clause of the public performance definition and the § 111 statutory license in the 1976 Act in response to this Court's decisions in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), which had held that cable transmissions do not infringe the public performance right under pre-1976 legislation. *See*

*WGN*, 693 F.2d at 624 (recounting history). The 1976 Act clarified that the public performance right encompasses cable transmissions, and granted cable companies a statutory license for *simultaneous* retransmission of broadcast television. The self-evident purpose of this legislation was to require cable companies to negotiate licenses for all other transmission of copyrighted programming – and in particular, for delayed programming. But that is exactly what the Second Circuit has now said Cablevision may do without obtaining a license.

This Court has never revisited the scope of the public performance right since the 1976 Act overturned *Fortnightly* and *Teleprompter*. Now, 34 years after *Teleprompter*, in the face of another decision exempting a cable company from licensing obligations, there is an urgent need for the Court's guidance concerning this issue, particularly in light of the other compelling questions presented by this case.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

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October 6, 2008

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