

Case Nos. 13-55156, 13-55157, 13-55226, and 13-55228

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOX TELEVISION STATIONS, INC.,
et al.,

Plaintiffs-Appellees,

v.

AEREOKILLER LLC, *et al.*,

Defendants-Appellants.

NBCUNIVERSAL MEDIA LLC., *et*
al.,

Plaintiffs-Appellees,

v.

AEREOKILLER LLC, *et al.*,

Defendants-Appellants.

On Appeal From The United States District Court
For The Central District of California
Case Nos. 12-cv-06921 GW (JCx); 12-cv-06950 GW (JCx)
Honorable George H. Wu District Judge

**BRIEF AMICUS CURIAE OF ELECTRONIC FRONTIER FOUNDATION
IN SUPPORT OF DEFENDANTS-APPELLANTS**

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**DISCLOSURE OF CORPORATE AFFILIATIONS AND
OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN
LITIGATION**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae Electronic Frontier Foundation states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of the stock of amicus.

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STATEMENT OF INTEREST

The Electronic Frontier Foundation (EFF) is a member-supported, nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990, EFF represents more than 21,000 contributing members. On behalf of its members, EFF promotes the sound development of copyright law as a balanced legal regime that fosters creativity, innovation, and the spread of knowledge. EFF's interest with respect to copyright law reaches beyond specific industry sectors and technologies to promote well-informed copyright jurisprudence. In this role, EFF has contributed its expertise to many cases applying copyright law to new technologies, as *amicus curiae*, as party counsel, and as court-appointed attorneys *ad litem*.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no one, except for undersigned counsel, has authored the brief in whole or in part, or contributed money towards the preparation of this brief.

All counsel consent to the filing of this brief.

INTRODUCTION

Amicus Electronic Frontier Foundation files this brief because there is much more at stake in this litigation than the continued operation of one Internet video company. The underlying issue raised here is whether copyright holders should be permitted to reach beyond their statutory rights to prohibit follow-on innovation, and to regulate personal, everyday uses of free television broadcasts. Also at stake is whether preliminary injunction decisions in copyright cases can be premised on unsupported assumptions favoring copyright holders, contrary to the public interest and the Supreme Court's instructions in *eBay Inc. v. MercExchange, L.L.C.*¹ These issues are of profound importance to the public.

The district court's decision turns on its firm rejection of the Second Circuit's holding in *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008). Thus, Appellees ask this Court to create a split with that Circuit.

Amicus urges the Court to decline that invitation, for three reasons. First, such splits are particularly dangerous for copyright law; rightsholders and secondary users alike need uniformity, particularly in a digital age when copyrighted works can cross geographic boundaries in an instant. Second, and contrary to the district court's contention, the Second Circuit's interpretation of the

¹ 547 U.S. 388, 392-93 (2006).

scope of copyright law's public performance right is legally correct, and not contradicted by any authority that is binding on this Court. Third, the *Cartoon Network* ruling has served the purposes of copyright, by sparking innovation, fostering new markets for copyrighted works, and revitalizing broadcast television as a medium. This Court should embrace the reasoning in *Cartoon Network*, not reject it.

The development of copyright law as an engine of progress, with respect for its text and Constitutional purpose, is ultimately more important than the fate of a single business. For purposes of this brief, Amicus assumes that Aereokiller's system of antennas, recording, and transmission is similar in all material respects to that of Aereo, the New York video system that was found to be non-infringing under the *Cartoon Network* holding.² But even if the Court finds that genuine disputes exist as to these facts, the Court should not create a circuit split and geographically restrict future innovation by rejecting *Cartoon Network* as a matter of law.

In addition, Amicus urges the Court to reject the district court's injunction analysis, both because it gave improper weight to the Plaintiff's claims of irreparable harm, and because it overlooked the public's interest in being able to watch television using the technology of their choosing, including technology not

² See *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012).

pre-approved by broadcasters.

ARGUMENT

I. THIS COURT SHOULD NOT CREATE A SPLIT WITH THE SECOND CIRCUIT.

The district court erred in rejecting *Cartoon Network*. No precedent of this Court is in conflict with *Cartoon Network*, and the Court should not create a circuit split here.

A. Sound Policy and Precedent Counsel Against Unnecessary Circuit Splits.

As this Court has recognized, “the creation of a circuit split would be particularly troublesome in the realm of copyright.” *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F. 3d 881, 890 (9th Cir. 2005). Sitting *en banc*, this Court explained:

As we have phrased it, “[c]ongressional intent to have national uniformity in copyright laws is clear.” *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002). That admonition makes sense, given the nature of intellectual property. Inconsistent rules among the circuits would lead to different levels of protection in different areas of the country, even if the same alleged infringement is occurring nationwide.

Silvers, 402 F. 3d at 890. The district court’s decision to reject *Cartoon Network*, coupled with its injunction of limited geographic scope,³ does exactly what this

³ Amicus does not disagree with the district court’s conclusion that “Courts should not issue nationwide injunctions where the injunction would not issue under the law of another circuit.” Injunction Ruling 2 (citing *United States v. AMC Entm’t*,

Court has warned against, creating different substantive copyright law in different jurisdictions.

More importantly, this Court should take guidance from the Second Circuit because the *Cartoon Network* decision was right on the law. Thus, this Court should apply – or at least not contradict – the sound holding of its sister circuit.

B. *On Command Video Does Not Create A Circuit Split.*

The district court asserted that *Cartoon Network* “expressly disagreed” with *On Command Video Corp. v. Columbia Pictures Industries*, 777 F. Supp. 787 (N.D. Cal. 1991), and therefore conflicted with Ninth Circuit precedent. Tentative Final Ruling on Motion for Preliminary Injunction 5 (“Injunction Ruling”). The court was incorrect on both counts.

On Command does not, of course, bind this Court. But neither does it conflict unavoidably with the holding of *Cartoon Network*. *On Command* held that a system transmitting movies to hotel rooms from a bank of videocassette players made infringing public performances. That decision has not been adopted or even cited by any panel of this Court. The Second Circuit distinguished *On Command* on a key point – the system challenged in *On Command* served multiple members of the public from a single videotape copy of each movie, while the system at issue

Inc., 549 F.3d 760, 773 (9th Cir. 2008)). Instead, Amicus respectfully suggests the correct ruling here will align the Circuits and avoid this difficulty.

in *Cartoon Network* made transmissions from a copy created by and personal to each customer. *Cartoon Network*, 536 F.3d at 139. The distinction is significant because transmission from a personal copy serves to limit the potential audience of each transmission, such that they are not “to the public.” *Id.* at 135.

C. Copyright Law Applies To Public Performances, Not Commercial Performances.

Section 106 of the Copyright Act lists six exclusive rights granted to copyright holders. 17 U.S.C. 106. With respect to performances, it grants copyright holders an exclusive right only in those transmissions that are “to the public.” *Id.*, *see also* 17 U.S.C. § 101. Copyright is defined exclusively by statute. *Stewart v. Abend*, 495 U.S. 207, 251 (1990); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 663 (1834) (copyright “does not exist at common law – it originated, if at all, under the acts of [C]ongress”). Thus, copyright holders have no right to control or profit from transmissions that are not “to the public.”

The Second Circuit correctly applied this fundamental principle in *Cartoon Network*. Cablevision’s remote digital video recorder (DVR) makes private performances. As Section 106 contains no exclusive right of private performance, use of a remote DVR is outside copyright holders’ control. *Cartoon Network*, 536 F.3d at 140. That the ability to enable that use was valuable, that Cablevision profited from it, and that the copyright holder plaintiffs had no control over it, did not change the court’s decision. Neither the commercial value of a challenged use,

nor the plaintiffs' lack of control over that use, nor the defendants' commercial exploitation of that use, have any bearing on the infringement question, because none of those criteria appear in Section 106.

Making or enabling *private* performances, even for profit, is not wrongful. There is no exclusive right to commercial exploitation of a copyrighted work as such. Uses of works, and businesses built around those uses, require permission and payment only when those uses fall within the enumerated rights. As the Supreme Court observed, “[i]t may seem unfair that much of the fruit of the [plaintiff’s] labor may be used by others without compensation. . . . [T]his is not ‘some unforeseen byproduct of a statutory scheme.’ . . . It is, rather, ‘the essence of copyright[.]’” *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (citations omitted); *see also* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.01[A] (2005) (“[N]ot every unauthorized exploitation of a work . . . necessarily infringes the copyright. . . . Thus, the suggestion in certain cases that use alone constitutes infringement is in error.”). Television manufacturers build a business on the back of broadcasters’ valuable programming, but no one would suggest they owe royalties as a result. Movie theaters would sell no popcorn were it not for the popular appeal of the movies they exhibit, yet movie producers have no right under copyright law to any cut of popcorn profits.

As the Second Circuit pointed out, a transmission “to the public” is not equivalent to a transmission “for commercial purposes.” *Cartoon Network*, 536 F.3d at 139. Transmissions to the public may be noncommercial, but nonetheless trespass on an exclusive right. Conversely, transmissions enabled by technology that is provided as a commercial service to customers can fall outside the Act’s definition of public performance and be noninfringing. Congress chose to draw the bounds of copyright at public performances, not commercial transmissions. To treat all commercial transmissions as public performances would “rewrite[] the language of the statutory definition[,]” which a court may not do. *Id.* The district court’s decision to depart from strict adherence to “the text of the Copyright Act” to apply its own interpretation of first principles contradicts the Supreme Court’s firm instructions. *See Stewart*, 495 U.S. at 251 ([C]opyright is a creature of statute[.]”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product.”).

D. Private Transmissions Cannot Infringe the Public Performance Right.

Aereokiller is liable if, and only if, it publicly performs the broadcasters’ works. If the “performances” at issue here are private, Aereokiller is not liable.

1. Only the Viewer Perspective is Relevant to the Public/Private Distinction.

As *Cartoon Network* cogently held, a “transmission” is a lawful private performance when it is sent from remote facilities to a household, because it is legally indistinguishable from the “transmission” from a rooftop antenna to a TV screen. *Cartoon Network* distinguishes making a public performance from enabling a private performance, a distinction which preserves the role of copyright as an economic incentive for creativity while preserving the public’s right to experience that creativity in the manner of its choosing, maximizing the public benefit.

Consider the following activities:

- Watching broadcast TV from the living room with a ‘rabbit ears’ antenna;
- Watching broadcast TV from the living room with a roof-mounted antenna;
- Watching broadcast TV on a bus using a handheld TV receiver;
- Watching broadcast TV received by a roof-mounted antenna at the customer’s home, which is then sent over the Internet or a home network from a device in the home to a handheld device.

Each of these involves a lawful *private* transmission of a television program from

an individual to herself with the assistance of a device or third-party service. All are functionally equivalent to the classic form of TV reception with a living-room set and a personal antenna, with the only difference being the length of the wire between antenna and set, or the replacement of that wire with an equivalent self-to-self transmission over the Internet.

Using existing technologies, television viewers today can transmit over-the-air broadcasts to any number of networked devices, including mobile devices.⁴ These devices are critical to the functioning of home media center software from companies such as Microsoft.⁵ Other devices allow tuning and viewing over-the-air broadcast television on a computer. These tuners come in the form of an internal card that must be installed inside the computer case,⁶ or a small external device.⁷ Still other devices allow consumers to remotely view freely available over-the-air broadcast television outside of a broadcaster's home market. Products

⁴ See SiliconDust's HDHomeRun, <http://www.silicondust.com/products/hdhomerun/atsc> (last accessed Mar. 20, 2013).

⁵ See Microsoft, *Record TV in Windows Media Center* <http://windows.microsoft.com/is-is/windows-vista/record-tv-in-windows-media-center> (last accessed Mar. 20, 2013).

⁶ See, e.g. Hauppauge's WinTV-HVR-2250, http://www.hauppauge.com/site/products/data_hvr2250.html (last accessed Mar. 20, 2013) (comes with two tuners that allow a consumer to watch one channel and record another, in addition to a remote control to facilitate distance viewing).

⁷ See, e.g., Hauppauge's WinTV-HVR-950Q, http://www.hauppauge.com/site/products/data_hvr950q.html (last accessed Mar. 20, 2013).

such as the Slingbox⁸ and EyeTV⁹ allow a consumer to transmit local broadcast television to Internet-connected devices via the Internet.

Moreover, all of these activities are part of the evolving public perception of what it means to “watch TV.” The technologies that enable these forms of private viewing are, to the viewer, part of the personal equipment that was once limited to a console television with cumbersome “rabbit ears.” In each of these activities, the source of the programming is over-the-air broadcast, which anyone within range has a right to receive on the personal equipment of their choice. Any transmissions to an individual user that occur *after* the broadcast signal is received are not “to the public” under any reasonable understanding of that term.

A system like Aereokiller’s differs from the examples above in only one respect—the antenna and certain transmission equipment (the functional equivalent of the wire between antenna and TV set) are physically located at a separate facility. Under *Cartoon Network*, this distinction does not transform a private, personal transmission into a transmission “to the public.”

2. User-Initiated Transmissions from a Private Copy To The User Are Private Performances.

The system recognized as noninfringing in *Cartoon Network* had two salient

⁸ Sling Media’s Slingbox, <http://www.slingbox.com/go/slingbox#.UUt43BysiSo> (last accessed Mar. 20, 2013).

⁹ Elgato’s EyeTV, <http://www.elgato.com/elgato/na/mainmenu/products/software/EyeTV-app.en.html> (last accessed Mar. 20, 2013).

characteristics. First, the transmissions it made were separate and unique to each subscriber; no two subscribers could view the same transmission even if they might be viewing the same work. *Cartoon Network*, 536 F.3d at 135 (Section 106 “speaks of people capable of receiving a particular ‘transmission’ or ‘performance,’ and not of the potential audience of a particular ‘work’”). Second, each “transmission” began from a source to which the viewer had lawful access – in that case, a licensed cable broadcast for which the viewer had paid. *Id.* at 136. This second characteristic allowed “the right of reproduction [to] reinforce and protect the right of public performance[,]” *Id.* at 138, because the performance at issue originated from a copy that was itself subject to copyright. If the user had no legal right to access the cable broadcast, infringement would occur notwithstanding the private transmission to the viewer. *See id.*

Under an Aereo-like system, each user views a separate transmission from a separate antenna at a central facility; the transmissions are never shared among customers. The origin of each transmission is a lawful, user-made copy taken from the public airwaves, a source to which the user would have lawful access by set-top antenna, roof antenna, or any of the other means listed above. As in *Cartoon Network*, the presence of both of these characteristics means that the system neither splits a single transmission among multiple subscribers en route, as did the system found likely to be infringing in *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 622

(S.D.N.Y. 2011), nor makes transmissions from a source that the customer has no legitimate access to, as in *Columbia Pictures Indus., Inc. v. Redd Horne Inc.*, 568 F. Supp. 494, 500 (W.D. Pa. 1983), and *On Command Video*. Thus, a copyright holder is never deprived of its ability to deliver a television program to a viewer.

3. The district court’s Aggregation of Transmissions Is Inconsistent With The Copyright Act And Not Compelled By Precedent.

According to the district court, because “the concern is with the performance of the copyrighted work,” infringement occurs whenever two or more members of the public receive “the performance of the work,” citing favorably to *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 196 (1931). Injunction Ruling 5. The district court’s interpretation would create potential copyright liability whenever two or more transmissions of the same work could be aggregated together, effectively eliminating the possibility of a non-public transmission.

This interpretation cannot be squared with the Copyright Act. It reads the word “publicly” out of Section 106(4) with respect to performances by transmission. It also transforms Section 101’s definition of a public performance by transmission from “to transmit or otherwise communicate a performance or display of the work” into “to transmit or otherwise communicate the work.” Congress could have created such a general right, such that any transmission of a work from place to place, no matter how private or personal, would be infringing,

but Congress has not.

Indeed, the history of the public performance right suggests precisely the opposite intent. In *Jewell-LaSalle*, the Supreme Court held that receiving a radio broadcast “for profit” infringed the public performance right under the 1909 Copyright Act. *Jewell-LaSalle*, 238 U.S. at 202. The Court reversed that ruling in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 396 n.18 (1968), finding that a cable company’s reception and transmission of over-the-air broadcasts was not a performance. Congress later overturned *Fortnightly* in the Copyright Act of 1976. But Congress did not resurrect the discredited reasoning of *Jewell-LaSalle*, eliminate the distinction between public and private transmissions, or create a general transmission right. Rather, Congress clarified that the act of “transmission to the public” itself constitutes a new public performance, while preserving the concept of a transmission that is not “to the public.”

Moreover, the Act’s language of technological neutrality (transmission “by means of any device or process”) supports the plain reading of the statute: Congress contemplated the existence of transmissions that are not “to the public” regardless of the transmission technology used. *See* 17 U.S.C. § 101. Congress explained that “[e]ach and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a ‘transmission,’ and if *the transmission* reaches the public in any form,” then the

Act applies. H.R. Rep. 94-1476, at 64 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678 (emphasis added). As this language shows, Congress contemplated that some “transmissions” of a work, regardless of the technology used, do not “reach[] the public.” *Id.* The test is not whether “the work” reaches the public, but a particular “transmission.” This is also consistent with the public expectation, described above, that the concept of private reception and viewing of broadcast TV persists throughout the evolution of technologies designed for that purpose.

E. Service Providers Are Not Liable For The Volitional Acts Of Their Users.

The district court’s decision also failed to consider the volitional act doctrine. Appellees claim that Aereokiller infringed their copyrights, *not* that Aereokiller induced, contributed to, or assisted infringement by customers. Under the Copyright Act, direct liability attaches, if at all, only to the party who makes the decision to copy or transmit. In the case of a remote antenna system like Aereokiller’s, that party is the user who initiates the reception or recording of a broadcast television program.

This doctrine was first recognized in the Internet context in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995). As Congress explained in 1998, *Netcom* was the “leading and most thoughtful judicial decision to date” in the subject of Internet liability. H.R. Rep. No. 105-551(I), at 11 (1998). Other courts followed, including

this Court. *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (4th Cir. 2004) (concluding “that *Netcom* made a particularly rational interpretation of § 106 when it concluded that a person had to engage in volitional conduct – specifically, the act constituting infringement – to become a direct infringer.”); *Cartoon Network*, 536 F.3d at 131 (agreeing with *CoStar* that *Netcom* was “particularly rational”); *see also Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006) (“plaintiff must also show volitional conduct on the part of the defendant in order to support a finding of direct copyright infringement.”); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 497 (E.D. Pa. 2006) (same).

In *Netcom*, an Internet service provider was accused of direct copyright infringement based on a customer’s posting of material to the service provider’s servers. *See Netcom*, 907 F. Supp. at 1367-68. The court rejected the direct infringement claim, holding that it requires “some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.” *Id.* at 1370. Volitional control over the copying is necessary because any other “theory would create many separate acts of infringement and, carried to its natural extreme, would lead to unreasonable liability” through the mere operation of the Internet. *Id.* at 1369.

While the volitional act requirement is tremendously important to the Internet, it is not a new rule. The Copyright Act has always required volition, as

embodied within its protection of the exclusive right “to do” one of the actions reserved for copyright holders in 17 U.S.C. § 106. *Netcom* simply interpreted § 106 for the digital age and has been widely followed.

The Fourth Circuit’s holding in *CoStar* is instructive. *CoStar* was a real estate listing service that took photos of commercial real estate offered by its customers. *CoStar Group*, 373 F.3d at 546. LoopNet provided an online hosting service for real estate listings. *Id.* at 547. Some of *CoStar*’s customers also wanted listings on LoopNet, and uploaded *CoStar*’s copyrighted photographs for display on the LoopNet website. *Id.* *CoStar* sued for direct infringement. *Id.* Following *Netcom*, the Fourth Circuit held that “[b]ecause LoopNet, as an Internet service provider, is simply the owner and manager of a system used by others who are violating *CoStar*’s copyrights and is not an actual duplicator itself, it is not directly liable for copyright infringement.” *Id.* at 546.

Likewise, in *Cartoon Network*, the Second Circuit correctly understood that in order to infringe the public performance right, a defendant must actually engage in a volitional act that begins a transmission. It does not matter if the defendant “manufactures, maintains, or . . . owns the machine” that users use for personal transmissions, *Cartoon Network*, 536 F. 3d at 131. Even if the defendant engaged in “conduct in designing, housing, and maintaining a system that exists only” to facilitate personal transmissions, as long as a user “actually presses the button” to

begin a transmission, it is the user that “supplies the necessary element of volition[.]” *Id.*

II. THE DISTRICT COURT’S PRELIMINARY INJUNCTION ANALYSIS WAS IN ERROR.

The district court’s preliminary injunction analysis was equally incorrect, largely because it made the common error of assuming that the only public interest at issue was the interest in copyright enforcement. This Court’s analysis should take a broader view. As an initial matter, the Court should take Appellees’ claims of irreparable harm with a beaker of salt. Further, in balancing those claims against the public interest, the Court should consider how the public benefits not just from increased access to programming, but also from disruptive innovation and greater choice in television viewing technologies.

A. The History of Litigation Against Video and Audio Technologies Counsels Skepticism of Plaintiffs’ Irreparable Harm Claims.

This Court should be skeptical of the dire picture painted by Appellees of Aereokiller’s future effect on the television industry. Three decades of history suggest Aereokiller is much more likely to *benefit* that industry.

Appellees’ hyperbole has precedent. In 1982, the president of the Motion Picture Association of America famously compared the videocassette recorder to a

serial killer.¹⁰ He predicted that if Americans gained the ability to record television programs for later viewing, “[t]he investment of hundreds of millions of dollars each year to produce quality programs to theaters and television will surely decline.”¹¹ Members of the association sued to enjoin its sale. The Supreme Court reversed that injunction, reasoning that “[s]ound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials.” *Sony*, 464 U.S. at 431. The VCR led to the birth of the home video market. Far from declining, investment in and revenues from film and television have grown steadily.¹²

Copyright holders also brought infringement suits against the first portable digital music player,¹³ one of the first digital video recorders,¹⁴ and Cablevision’s novel DVR, which moved the personal recording hardware to the cable company’s

¹⁰ *Home Recording of Copyrighted Works: Hearing Before the Subcomm. On Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. (1982) (testimony of Jack Valenti, President, Motion Picture Association of America, Inc.).

¹¹ *Id.*

¹² U.S. domestic box office revenues grew in 24 of the 32 years from 1981 to 2012. Box Office Mojo, *Yearly Box Office*, <http://boxofficemojo.com/yearly/?sort=year&order=DESC&p=.htm> (last accessed Mar. 20, 2013).

¹³ *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999).

¹⁴ *Paramount Pictures Corp. v. ReplayTV, Inc.*, No. CV-01-09358-FMC (C.D. Cal. 2001).

offices.¹⁵ In each case, copyright holders insisted that empowering individuals to control the time, place, and format for private viewing would spell for disaster for their industries. In *Cartoon Network*, amici warned that Cablevision’s RS-DVR would cause “individual songwriters, composers, lyricists, and publishers” to “go uncompensated.” Brief for the Am. Society of Composers, Authors & Publishers and Broad. Music, Inc. as *Amici Curiae* Urging Affirmance in Favor of Appellees at 12-13, *Cartoon Network*, 536 F.3d 121. Another *amicus* claimed that Cablevision’s invention would “disable licensing markets.” Brief of *Amicus Curiae* the Progress & Freedom Found. in Support of Appellees Urging Affirmance 3, *Cartoon Network*, 536 F.3d 121. Yet another claimed that failing to enjoin the RS-DVR would “create a gaping hole in the Copyright Act.” Brief of *Amici Curiae* Am. Soc. of Media Photographers, Inc., *et al.*, in Support of Affirmance 19, *Cartoon Network*, 536 F.3d 121.

In fact, the RS-DVR, the portable digital music player, and the VCR all enhanced the value of creative works – including their commercial value. They also led to the birth of new revenue sources for copyright holders, such as online music stores¹⁶ and expanded television audiences.¹⁷

¹⁵ *Cartoon Network*, 536 F.3d 121.

¹⁶ Revenues from digital music sales increased in 2011. *Peter Kafka, Pay Up? Okay. Music Buyers’ Numbers Increased In 2011*, AllThingsD (Mar. 6, 2012, 7:06 AM), <http://allthingsd.com/20120306/pay-up-ok-music-buyers-numbers-increased-in-2011/>.

Given this history, the district court should have treated Appellees' claims of irreparable harm with greater skepticism, rather than focusing on potential harms to retransmission licensing and revenues from Hulu.com and iTunes. Such harms are unlikely during the pendency of this lawsuit, as the district court in *Aereo* concluded.¹⁸ New technologies such as the VCR and DVR created new markets for film and television. Likewise, remote antenna systems have the potential to revitalize broadcast TV as a major distribution medium to compete with cable and satellite, and with non-broadcast programming. And in the long term, history suggests that revenues from multiple sources enabled by the progress of Internet-related technologies will render any single revenue source – including those discussed by the district court – irrelevant to any real measure of harm.

¹⁷ “‘For quite a few years people thought it was going to mean the demise of the television business,’ says Alan Wurtzel, president of research at NBC, an American broadcast network. Yet DVRs turn out to have done little damage. Indeed, DVRs (also known as personal video recorders, or PVRs) may even have protected television and made it more conservative.” *The Revolution That Wasn’t: DVRs Were Supposed to Undermine Television. They Have Done the Opposite*, (continued from previous page), *The Economist* (Apr. 23, 2009), available at <http://www.economist.com/node/13528310>.

¹⁸ Indeed, *Aereo* has operated for approximately a year in the country’s largest media market – New York City – and broadcasters there have not been appreciably harmed. Leslie Moonves, the chief executive officer of CBS, said those who claim that *Aereo* has caused a loss of retransmission consent payments are “exaggerating greatly.” *Deadline New York*, “CBS’ Les Moonves Says He’s Losing No Sleep Over *Aereo* (Aug. 2, 2012), <http://www.deadline.com/2012/08/les-moonves-aereo-cbs/>.

B. The Effects of Technological Change On The Industry Should Have No Bearing On An Injunction Against Aereo.

Technological change inevitably disrupts well-established markets and business arrangements. Clayton M. Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms To Fail* 42 (1997). Home audio recording, FM radio, and television itself all challenged the structure and revenues of the media and entertainment titans of their day. *See generally* Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (2011). The promise and the challenge of U.S. copyright law is to assure fair compensation for authors without interrupting or burdening the disruptive innovation that created nearly all of the existing markets for creative work.

In keeping with this commitment, this Court disregards claimed harms with only a “‘conjectural’ or ‘hypothetical’” connection to the challenged activity. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 557 (9th Cir. 1990); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (“speculative” harms disregarded); *Big Seven Music Corp. v. Lennon*, 554 F.2d 504, 509-10 (2d Cir. 1977) (applying the same principle in a copyright case).

Allegations of harm that flow from Appellees’ own future business decisions, such as decisions to withhold content from certain distribution platforms, are particularly speculative, as many such predictions have been disproved in the marketplace. For example, the parent company of CBS, one of

the plaintiffs in this case, stated unequivocally to the Federal Communications Commission in 2002 that it would “cease providing any programming in high definition for the 2003-2004 television season” unless the FCC mandated “broadcast flag” copy protection technology to be included in all broadcast television receivers.¹⁹ Others in the industry predicted that high-definition content would migrate away from broadcast television unless the “broadcast flag” was mandated. In fact, the mandate never came into force, but CBS and other networks continued broadcasting high definition programming nonetheless.²⁰ With this history in mind, the Court should discount claims of harm based on Appellees’ threats to withhold broadcast programming in the future.

Moreover, as was the case with other video technologies, the industry has largely adapted to customers’ desire to view broadcast programming at the times, locations, and on the devices of their choosing. For example, the Nielsen Company has altered its surveys to account for Internet viewing, and other audience and advertising metrics have arisen.²¹ Were this not the case, Appellees

¹⁹ *In the Matter of Digital Broadcast Copy Protection*, MB Docket No. 02-230, Comments of Viacom, available at <http://apps.fcc.gov/ecfs//document/view?id=6513394608> (last accessed Mar. 21, 2013).

²⁰ TVTechnology, *DTV Arrives With No Flag* (June 15, 2009), <http://www.tvtechnology.com/prntarticle.aspx?articleid=202442>.

²¹ Alex Ben Block, *Nielsen Agrees to Expand Definition of TV Viewing*, *The Hollywood Reporter* (Feb. 20, 2013, 7:15 PM), <http://www.hollywoodreporter.com/news/nielsen-agrees-expand-definition-tv->

and their peers could develop new means of audience membership that do not depend on requiring viewers to use incumbent viewing technologies; nothing in copyright law gives them the privilege of refusing to adapt such means. Thus, the district court's analysis of harm due to "divert[ing] users who would otherwise access Plaintiffs' content in a way that includes the users in the measurement of the audience for purposes of advertising revenue calculation," Injunction Ruling 7, is not just irrelevant, it is mistaken.

C. New Services Like Aereokiller Promote the Public Interest.

I. The district court's Presumption of Success on the Merits When Considering Harm to Aereokiller From An Injunction Is A Categorical Rule Forbidden by *eBay*.

The district court's analysis of the public interest was far too narrowly focused on the public interest in copyright enforcement. *See* Injunction Ruling 7. As a result, it entirely overlooked the public's interest in being able to watch television *using the technology of their choosing*, including technology not pre-approved by broadcasters.

The Supreme Court's admonition against "categorical" presumptions and shortcuts in equity determinations means that courts must consider the public interest independently of the parties' interests. *See eBay*, 547 U.S. at 394. The

422795 ("The Nielsen Co. is expanding its definition of television and will introduce a comprehensive plan to capture all video viewing including broadband and Xbox and iPads,").

public's interest may be separate and distinct from that of the parties. *Salinger v. Colting*, 607 F.3d 68, 82 (2d Cir. 2010) (rejecting the proposition that “the public’s interest may well be already accounted for by the plaintiff’s interest” in a copyright case) (citing *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986)).

The district court found that the “public interest can only be served by upholding copyright protections and correspondingly, preventing the misappropriation of skills, creative energies, and resources which are invested in the protected work.” Injunction Ruling 7. (citations and quotations omitted). This conclusion merely states the tautology that enforcing against violations of the law is in the public interest, without crediting the countervailing, equally tautological corollary that refraining from enjoining lawful activities is also in the public interest. Concluding that the public interest lies only in enforcing the law that controls the merits of the case is tantamount to collapsing the public interest inquiry into the merits inquiry and establishing a “categorical” rule forbidden by *eBay v. MercExchange*. In addition, the district court analyzed potential harm to Appellees on the assumption that Appellees win on the merits, and then analyzed potential harms to Aereokiller from an injunction on the assumption that Aereokiller *loses*. This asymmetry was error. This thumb on the scale in favor of copyright plaintiffs will discourage innovation in technologies that touch

copyrighted works, and the public will be poorer for it.

2. Competition in Video Distribution Is An Independent Public Interest.

As the U.S. government recognizes, online video distributors (“OVDs”) like Aereokiller are a promising source of competition in the video distribution market. See Competitive Impact Statement of the Department of Justice at 11-30, *United States v. Comcast Corp.*, 1:11-cv-00106, (D.C. Cir. Jan. 18, 2011) (“DoJ Analysis”); In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion & Order*, 26 FCC Rcd. 4238 ¶¶ 60-109 (2011) (“FCC Analysis”).²² In approving the merger of Comcast and NBC Universal in 2011, the Department of Justice required the merged companies to make programming available to Internet video services. This requirement, the Department concluded, would give television viewers more choices of how to receive programming, as well as more access to the programming itself. DoJ Analysis 10-11.

In noting the public benefits of OVDs, the Justice Department found that competitive pressure from OVDs was stimulating incumbents such as cable

²² The FCC Analysis is available at <http://bit.ly/erx8Jr> (http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf), and the DoJ Analysis is available at <http://bit.ly/fP0dPY> (<http://www.justice.gov/atr/cases/f266100/266158.pdf>).

networks to offer more on-demand choices. DoJ Analysis at 15. The Justice Department observed that, among OVDs, “[n]ew developments, products, and models are announced on almost a daily basis by companies seeking to satisfy consumer demand.” DoJ Analysis 15-16. The FCC also stated that OVDs “can provide and promote more programming choices, viewing flexibility, technological innovation and lower prices.” FCC Analysis ¶ 78. Preventing more OVDs from reaching the market would therefore “have a substantial anticompetitive effect on consumers and the market.” DoJ Analysis 27. Despite their currently-small market share, the Justice Department found that the emergence and growth of OVDs was extremely significant, saying that OVDs “represent the most likely prospect for successful competitive entry into the existing video programming distribution market.” DoJ Analysis 28.

Thus, there is a significant public benefit of increased competition in video distribution. That benefit should have weighed strongly against an injunction here.

CONCLUSION

The Second Circuit’s decision in *Cartoon Network* was faithful to the text, history, and overall Constitutional purpose of copyright law. In the absence of binding precedent to the contrary, this Court should adopt the *Cartoon Network* rule, or, at a minimum, avoid contradicting it. In considering whether to uphold the grant of preliminary injunction, the Court should keep in mind the ultimate

purpose of copyright – to promote progress – and avoid shortcuts or presumptions that will create a disincentive for future innovators.

Dated: March 22, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 22, 2013.

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