ORAL ARGUMENT NOT YET SCHEDULED

No. 13-7145 (Consolidated with 13-7146)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILMON X, LLC, *et al*.,
Defendants-Appellants,

v.

FOX TELEVISION STATIONS, INC., *et al*.,
Plaintiffs-Appellees.

On Appeal from the United States District Court
for the District of Columbia, No. 13-cv-00758
Hon. Rosemary M. Collyer, U.S. District Judge

BRIEF *AMICI CURIAE* OF CENTER FOR DEMOCRACY & TECHNOLOGY, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, CTIA-THE WIRELESS ASSOCIATION, UNITED STATES TELECOM ASSOCIATION, AND INTERNET INFRASTRUCTURE COALITION IN SUPPORT OF NEITHER PARTY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* Center for Democracy & Technology ("CDT"), Computer & Communications Industry Association ("CCIA"), CTIA-The Wireless Association® ("CTIA"), United States Telecom Association ("USTelecom"), and Internet Infrastructure Coalition ("i2Coalition") hereby submit their Certificates as to Parties, Rulings, and Related Cases as follows:

A. Parties and *Amici*. Except for CDT, CCIA, CTIA, USTelecom, and i2Coalition, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Defendants-Appellants FilmOn X LLC, *et al.*

B. Rulings Under Review. Rulings under review are identified in the Brief for Defendants-Appellants FilmOn X LLC, *et al*.

C. Related Cases. Related cases are identified in the Brief for Defendants-Appellants FilmOn X LLC, *et al*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1:

- *Amicus* Center for Democracy & Technology states that it has no parent corporation and no publicly held corporation has an ownership stake of 10% or more in it;
- *Amicus* Computer & Communications Industry Association is a § 501(c)(6) trade association which has no parent corporation and no publicly held corporation has an ownership stake of 10% or more in it;
- *Amicus* CTIA-The Wireless Association® is a § 501(c)(6) not-for-profit corporation organized under the laws of the District of Columbia and represents the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA has not issued any shares or debt securities to the public, and CTIA has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public;
- *Amicus* United States Telecom Association is a § 501(c)(6) not-for-profit corporation organized under the laws of Illinois and represents the facilities-based communications industry. USTelecom has not issued any shares or debt securities to the public, and USTelecom has no parent companies,

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- *Amicus* Internet Infrastructure Coalition is a § 501(c)(6) not-for-profit corporation organized under the laws of Delaware and represents key demographics in web hosting, data centers and cloud infrastructure providers. i2Coalition has not issued any shares or debt securities to the public and i2Coalition has no parent companies, subsidiaries or affiliates that have issued any shares or debt securities to the public.

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GLOSSARY

Cablevision	*Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)
CCIA	*Amicus* Computer & Communications Industry Association
CDT	*Amicus* Center for Democracy & Technology
CTIA	*Amicus* Cellular Telecommunications Industry Association-The Wireless Association
DVR	Digital Video Recorder
i2Coalition	*Amicus* Internet Infrastructure Coalition
IT	Information Technology
RS-DVR	Remote Storage Digital Video Recorder
Transmit Clause	17 U.S.C. § 101; definition of "publicly", clause (2)
USTelecom	*Amicus* United States Telecom Association

STATUTES AND REGULATIONS

Except for 17 U.S.C. § 512(a)-(d) and 47 U.S.C. § 230(c)(1), which are appended to this brief, all applicable statutes and regulations are contained in the principal parties' briefs.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE OF *AMICI CURIAE*

The Center for Democracy & Technology is a nonprofit public interest group that seeks to promote free expression, privacy, individual liberty, and technological innovation on the open, decentralized Internet. CDT advocates balanced copyright policies that provide appropriate protections to creators without curtailing the unique ability of the Internet to empower users, speakers, and innovators. Cloud computing services play an increasingly central role in facilitating online speech and innovation.

The Computer & Communications Industry Association represents over twenty companies of all sizes, which provide high technology products and services, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services—companies that collectively generate more than $250 billion in annual revenues.[1]

CTIA-The Wireless Association® is an international nonprofit membership organization that has represented the wireless communications industry since 1984. Membership in the association includes wireless carriers and their suppliers, as well as providers and manufacturers of wireless data services and products. The association advocates on behalf of its members at all levels of government. CTIA

[1] A list of CCIA members is available at http://www.ccianet.org/members.

also coordinates the industry's voluntary efforts to provide consumers with a variety of choices and information regarding their wireless products and services.

The United States Telecom Association is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom's member companies offer a wide range of services across communications platforms, including voice, video and data over local exchange, long distance, wireless, Internet, and cable. These companies range from large, publicly traded companies to small rural cooperatives. USTelecom advocates on behalf of its members before Congress, regulators, and the courts for policies that will enhance the economy and facilitate a robust telecommunications industry.

The i2Coalition is a trade association of companies from the Internet infrastructure industry with key demographics in web hosting, data centers and Cloud infrastructure providers, formed to undertake the following key initiatives: represent the interests of our industry on Capitol Hill and relevant regulatory agencies; educate members of Congress and other key legislative and regulatory stakeholders on the complexities and workings of the Internet; develop & share best business practices with fellow members; educate the media about the Industry; and promote the industry's messages to internal and external constituencies.

Amici are trade associations and public interest organizations with a broad range of interests and expertise in the technology and communications sectors.

The proper interpretation of the Copyright Act's public performance right is critical to the future of those sectors. Communicating information and content from one physical place to another is at the heart of what Internet-based technologies do. Key legal principles, especially those reflected in the Second Circuit's interpretation of the Copyright Act's Transmit Clause (17 U.S.C. § 101) and the public performance right (17 U.S.C. § 106(4)) in the *Cablevision* decision, have allowed businesses represented by *amici* CCIA, CTIA, USTelecom, and i2Coalition to invest significant resources in the development and operation of a wide variety of innovative and important services with transmission functions, including cloud computing. *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (hereinafter "*Cablevision*"). A wide range of users, from businesses to individual consumers, rely on ubiquitous access to these services. Accordingly, *amici* are increasingly concerned about the growing number of cases evaluating the Transmit Clause and the risk that improper or overly broad interpretations will result in substantial legal inconsistency and business uncertainty on questions of major importance to cloud computing and related services.

Counsel for all parties have consented to the filing of this brief.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No counsel for any party authored this brief in whole or part; no such party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amici*, their members, and counsel made such a contribution.

SUMMARY OF ARGUMENT

While "television" appears on both sides of the caption, this dispute extends far beyond the television, implicating the entire Internet economy. *Amici* do not in this brief offer an overall opinion on the outcome of this case or urge that any particular side prevail. Rather, this brief stresses several basic and straightforward principles regarding the public performance right that are essential to the ongoing growth and development of "cloud computing."[2] Whatever this Court's ultimate decision here, it should at a minimum approach this case in a way that preserves the holding in *Cablevision* and respects and reflects these principles.

The Internet comprises computers that "transmit or otherwise communicate" information, and the Copyright Act provides that "to transmit or otherwise communicate" a copyrighted work "*to the public*" may intrude on the exclusive rights granted to copyright owners. 17 U.S.C. § 101 (clause (2) of the definition of "publicly"; "the Transmit Clause"). Accordingly, the boundary between public

[2] "Cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction." *See* Peter Mell & Timothy Grance, Recommendations of the Nat'l Inst. of Standards & Tech., U.S. Dep't of Commerce, *NIST Special Publication 800-145: The NIST Definition of Cloud Computing* (2011), at 2, *available at* http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf.

and private performances establishes which Internet functions may be regulated by the Copyright Act and which may not.

The Second Circuit's *Cablevision* decision provided essential guidance in drawing this line correctly. Above all, it established that the transmission of a user's lawful copy of a work *to that same user in a manner not capable of being received by others* is a private performance that infringes no exclusive right of the rights holder in the underlying work. *Cablevision*, 536 F.3d at 133-34. Innovators and investors alike have relied on this in bringing new Internet products and services to market. For example, several companies (including Google and Amazon) have launched personal music locker services, allowing individuals to upload their personal music collections "to the cloud" and enabling them to transmit that music back to their own computers, phones, and tablets when, where, and how they find most convenient.

Certain approaches to this case, however—including the "same-work, same-performance" theory urged by appellees—would overturn or subvert this and related principles upon which cloud computing relies. *See infra* Part II.C. Adopting an overly broad approach would call into question a variety of established and mainstream services, impair technological progress by establishing an irrational legal preference for local technologies over networked ones, and

threaten the great promise of cloud computing for individual users, businesses, and economic growth. Congress intended no such result.

In short, the Court should address the public performance questions raised in this case in a manner consistent with the *Cablevision* decision and avoid any legal theories that would cast a pall over wide swaths of the modern technological landscape, including the burgeoning cloud computing industry.

ARGUMENT

I. CLOUD COMPUTING IS INCREASINGLY CENTRAL TO MODERN TECHNOLOGY AND IS BROADLY BENEFICIAL TO CONSUMERS, BUSINESSES, AND THE ECONOMY.

Cloud computing refers to the practice of remotely accessing a network of remote computer servers on the Internet to store, manage, and process data.[3] Cloud computing unlocks enormous new value for businesses, consumers, and the economy as a whole. At a high level, it makes computing resources available in a more efficient, secure, flexible, and scalable manner. It makes powerful computer resources once available only to large entities now broadly available via shared platforms. And it gives people the ability to access their own documents, emails, music collections, and other data across multiple wired and wireless devices, remotely and seamlessly, without having to worry about their own computer malfunctioning and losing their files, and without having to worry about frequent

[3] *See supra* n.2.

updates to client-side software. For example, a busy lawyer might begin the day drafting a brief on her office desktop computer, continue revising it on a laptop while aboard the commuter train in the evening, and then edit the same document at night from home, via a tablet computer.

Cloud computing is also becoming an increasingly important sector of the U.S. economy. In 2011, spending on public cloud information technology ("IT") services made up an estimated $28 billion of the $1.7 trillion spent globally on all IT products and services.[4] A recent study projected that revenue growth at cloud computing companies will exceed $20 billion per year for each of the next five years.[5] It also found that cloud computing services present a potential cost savings of more than $625 billion over the next five years for businesses that invest in cloud computing.[6] Additionally, the study found that cloud computing investments will create 213,000 new jobs in the United States and abroad over the next five years.[7]

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[4] John F. Gantz, *et al.*, *Cloud Computing's Role in Job Creation*, IDC White Paper (2012), at 1, *available at* http://people.uwec.edu/HiltonTS/ITConf2012/NetApp2012Paper.pdf.

[5] Sand Hill Group, *Job Growth in the Forecast: How Cloud Computing is Generating New Business Opportunities and Fueling Job Growth in the United States* (2012), *available at* http://www.news-sap.com/files/Job-Growth-in-the-Forecast-012712.pdf (also available at http://sandhill.com/article/sand-hill-group-study-finds-massive-job-creation-potential-through-cloud-computing/).

[6] *Id.* at 11, 14.

[7] *Id.* at 8, 13.

As the marketplace trends toward cloud computing, any legal decision casting doubt on this technological development would undermine innovation and cast a pall over wide swaths of the modern technological landscape. For the reasons set forth below, that is a serious risk in this case.

II. CLOUD COMPUTING DEPENDS UPON BASIC PRINCIPLES REGARDING THE PUBLIC PERFORMANCE RIGHT.

Cloud computing, by its nature, empowers users to store content remotely and then transmit it back to themselves on demand. In offering such capabilities, cloud computing services depend heavily on the legal understanding that such transmissions are not "public performances" under copyright law.

If that understanding were thrown into doubt, cloud computing services would face a serious predicament: their core functions would become susceptible to copyright claims from a virtually limitless class of possible claimants, with the potential for ruinous statutory damages. For cloud computing to thrive, providers need to be able to continue to depend on several basic principles regarding the public performance right. Those principles are set forth below.

A. When a user directs a computer to store a personal copy of a work, a subsequent transmission of that copy back to that same user is a *private* performance, not a *public* one.

The statutory language of the Transmit Clause makes it clear that not every transmission of a performance of a work constitutes an infringement. Only

transmissions "to the public" are within the exclusive rights of a copyright holder. Some performances must therefore be non-public, or private. The statute's description of the exclusive right plainly places these transmissions outside the scope of the copyright holder's exclusive rights. The *Cablevision* court confirmed what the statute itself says, namely, that "the transmit clause obviously contemplates the existence of non-public transmissions; if it did not, Congress would have stopped drafting that clause after 'performance.'" *Cablevision*, 536 F.3d at 136.

It would be hard to envision a more classic example of a private performance than a one-to-one transmission of a consumer's personal copy of a work back to that same consumer. By any plain interpretation of language, such a transmission is "private" rather than "public." This was the core of *Cablevision*'s public performance holding. The Second Circuit's ruling provided critical guidance regarding the Transmit Clause: "[I]t is evident that the transmit clause directs us to examine who precisely is "capable of receiving" a particular transmission of a performance." *Id.* at 135. It therefore followed that a transmission made by a user from a "remote storage DVR" back to herself was a private performance, and not a public performance, even if many users made their own copies of the same work and subsequently separately viewed their own copies of that work. *Id.* at 134-37.

In the years since *Cablevision*, multiple cases have endorsed and followed its holdings regarding the Transmit Clause. *See United States v. Am. Soc'y of Composers, Authors & Publishers*, 627 F.3d 64, 75 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 366 (2011) (applying *Cablevision*); *American Broadcasting Cos. v. Aereo*, 874 F. Supp. 2d 373, 382-96 (S.D.N.Y. 2012) (same); *In re Cellco P'ship*, 663 F. Supp. 2d 363, 371-74 (S.D.N.Y. 2009) (same).

This unanimous jurisprudence establishes that when an Internet user accesses her own digital files (whether music, video, text, or software) over the Internet, the resulting transmission is not treated as a *public* performance within the meaning of the Copyright Act. Thus, when a consumer uses a cloud-based service like an online backup or storage locker for his lawful copies of copyrighted works and transmits those copies back to himself, in a manner not accessible to others, the public performance right is not being exercised.

The Court should take care not to analyze the present case in a manner that would undercut, ignore, or reject this crucial principle regarding one-to-one transmissions of personal copies. In particular, it should avoid any suggestion that the transmission to users of their own, lawfully acquired personal copies constitutes public performance.

That means that if the FilmOn X service in fact operates in a way that creates lawful personal copies, it would necessarily follow that the subsequent

transmissions of those individual copies to those same individual customers represent private performances, not public ones. To be clear, this brief takes no position on the nature of the copies associated with FilmOn X's service; *amici* may have independent views on how to analyze those copies and in any event have insufficient technical knowledge concerning how FilmOn X's service actually operates. But any holding that the copies are personal yet their transmissions to individual owners are public would cast into doubt the legal foundation for cloud computing.

B. In assessing whether a performance is public or private, the physical location of the computers (or other devices) involved is irrelevant.

The entire point of cloud computing is to enable users to access and take advantage of computing resources without regard to location. Powerful services become ubiquitously available when people everywhere can use the Internet to tap into physically distant computers. There is no legal or policy basis for undercutting this arrangement by making the public performance analysis turn on the physical location of the equipment used.

This principle, too, is reflected in the *Cablevision* decision. The RS-DVR at issue in that case was, in essence, just a regular DVR with a "long cord"—it provided consumer functionality in all respects identical to a DVR, but it stored programs in a remote computer rather than one located in a set-top box in the

consumer's home. The Second Circuit correctly took the view that moving the DVR function from a local computer to a remote one did not change a fundamentally private performance into a public one.

Any approach to this case that would make the public versus private nature of performance depend on the physical location of FilmOn X's computers or antennas would likewise be misplaced.

C. The fact that multiple users may store or transmit the same work does not transform otherwise individual private performances into a single, public one.

Broadcast networks, in this case and elsewhere, criticize the Second Circuit's *Cablevision* decision for treating individual transmissions of a work as separate performances. *See* Memorandum of Law in Support of Plaintiffs' Joint Motion for Preliminary Injunction at 20, *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-cv-00758 (filed Aug. 8, 2013) (hereinafter "Plaintiffs' Memorandum"); Petition for Writ of Certiorari at 26, *American Broadcasting Cos. v. Aereo*, No. 13-461 (filed Nov. 12, 2013) ("Had Congress intended the inquiry to focus on a particular *transmission* rather than the underlying *performance* being transmitted, it would have said so.").

Broadcasters contend that when the same work is the subject of multiple, otherwise private performances, those performances automatically should be treated as comprising a single, public performance. *See* Plaintiffs' Memorandum

at 21 ("one can transmit a copyrighted program to the public either by transmitting a performance of it at one time to many people (like a television broadcast) or by transmitting the same performance at different times to many different people..."). The broadcasters' position might be termed the "same-work, same-performance" theory, since it calls for aggregating separate transmissions from different times and places whenever they involve the same work. Plaintiffs' Memorandum at 21. Footnote 12 of the district court opinion below arguably could be read to support this theory, since it refers to multiple persons watching "a single performance, *i.e.,* the same television show." *Fox Television Stations, Inc. v. FilmOn X*, No. 13-cv-00758, 2013 WL 4763414, at 28 n.12 (D.D.C. Sept. 5, 2013) (order granting preliminary injunction).

Adopting a legal fiction that automatically aggregates all users' private performances into one joint act of public performance, however, would result in unintended consequences for industry and users that are harmful and untenable.

First, by aggregating all users' private performances together, the status of a particular performance would be perpetually uncertain. Whether one person was an infringer would depend on the actions of other, unknown persons. All performances in the cloud would simultaneously occupy two potential states, both public and private, infringing and non-infringing, until discovery were conducted to inspect the relevant network traffic. Only then could it be known how many

private users had streamed their copies of a work to themselves and whether some unstated threshold had been crossed. Under this legal rule, "a hapless customer who records a program in his den and later transmits the recording to a television in his bedroom would be liable for publicly performing the work simply because some other party had once transmitted the same underlying performance to the public." *Cablevision*, 536 F.3d at 136. This is no mere hypothetical—today, consumers have many consumer electronics devices to choose from that enable the recording and retransmission of television programming both in the home and to Internet-connected mobile phones, tablets, and computers.[8]

Indeed, the same-work, same-performance theory would render the status of a performance fundamentally unknowable at the time the performance occurs, even if a person somehow had visibility into the behavior of other parties on the network. A communication that appears to be a private performance today could

[8] *See*, *e.g.,* David Pogue, *TiVo Goes Wandering, on the Road and at Home*, N.Y. TIMES, Mar. 13, 2013, *available at* http://www.nytimes.com/2013/03/14/technology/personaltech/pogue-tivo-mini-stream-review.html?pagewanted=all (describing new devices that allow a TiVo DVR to transmit recorded broadcast programs to mobile devices); Suzanne Kantra, *4 Ways to Take Your Shows and Movies To Go*, USA TODAY, Feb. 24, 2013, *available at* http://www.usatoday.com/story/tech/2013/02/24/tv-shows-movies-on-the-go/1928795/ (describing TiVo and Slingbox devices that transmit recorded broadcast programs to mobile devices); Harry McCracken, *Top 10 Everything of 2012: Simple.TV*, TIME, Dec. 4, 2012, *available at* http://techland.time.com/2012/12/04/top-10-tech-lists/slide/iphone-5/ (describing Simple.TV DVR that streams recorded broadcast programming over the Internet to mobile devices).

later be rendered public if other people eventually use the same technology platform to communicate the same work. A person's direct liability under copyright law cannot turn on the actions of other parties, much less on the unknowable *future* actions of others.

Given the uncertainty it would create, the practical effect of the same-work, same-performance theory would be to cast serious doubt over cloud computing by leaving virtually no room for private performances. A provider of cloud computing services would have to assume that nearly every transmission of a publicly published work would be (or would eventually become) a public performance, regardless of that transmission's potential audience—because sooner or later, some other users would likely transmit *their* own copies of the work from their dens to their bedrooms, thus rendering all such transmissions part of a single, public performance.

The Court should therefore firmly reject the same-work-based approach to the public performance analysis. There may well be factual circumstances under which multiple transmissions are sufficiently linked that they should be treated as part of the same performance. But such aggregation makes no sense as an across-the-board rule. For example, on the facts of *Cablevision*, the court was correct to hold that users' private playbacks of their own recordings constituted separate private performances—even though multiple users often play back the same

underlying works. *See Cablevision*, 536 F.3d at 135-38. For many cloud computing services, users' private retrieval of their own stored content should likewise be treated as private, even if other users choose to store and retrieve their own copies of the same works.

D. Volitional conduct is a necessary element of direct liability.

When a computer system is used to reproduce or perform a work in a way that may infringe, direct liability is reserved for parties whose volitional conduct is sufficiently proximate to the infringement. Where the key volitional conduct lies with the computer system's users, the legal responsibility of the computer system is analyzed under principles of *secondary* liability. *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004) ("While the Copyright Act does not require that the infringer know that he is infringing or that his conduct amount to a willful violation of the copyright owner's rights, it nonetheless requires *conduct* by a person who causes in some meaningful way an infringement. Were this not so, the Supreme Court could not have held, as it did in *Sony*…"); *Religious Tech. Ctr. v. Netcom Online Comm. Servs. Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) ("Although copyright is a strict liability statute, there should still be 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.").

The *Cablevision* case applied the volitional conduct test to the act of copying. On the facts of that case, the court held that the user engages in the volitional conduct that causes a specific program to be recorded. Users therefore were deemed to be the ones who "do" the copying. *See Cablevision*, 536 F.3d at 131-32. The Second Circuit expressly declined to reach the question of whose volitional conduct triggers the subsequent playback, because it held the resulting performances to be private in any event. *See id.* at 135-38. That made the volitional conduct question moot. But as a general matter, volitional conduct is an important additional element of the public performance analysis.

For cloud computing systems, there will often be a strong argument that users' volitional conduct is the proximate cause of particular copyright-relevant actions such as copying and transmitting, while the cloud computing provider is more accurately seen as the supplier of the tools or mechanisms the user employs. In such circumstances, cloud providers are akin to the manufacturers of photocopiers or copy shops offering photocopiers for use by the public. Accordingly, their liability should be analyzed under principles of *secondary* rather than direct liability. Erroneously subjecting such technology providers to claims of *direct* infringement—a strict liability offense—would imperil a wide array of technologies (whether photocopiers or cloud computing) that are used primarily for noninfringing purposes. Congress did not intend for providers of online services to

be strictly liable for the actions of their users; indeed, it has enacted safe harbor provisions to make this clear. 47 U.S.C. § 230(c)(1) (protecting online services from being treated as the publisher or speaker of information provided by users); 17 U.S.C. § 512(a)-(d) (protecting specified categories of online service providers from monetary liability for infringing material transmitted or posted by users, subject to certain conditions).

In short, the volitional conduct requirement draws the line between (a) volitional actors whose overt acts incur direct responsibility for infringement and (b) providers of tools or instrumentalities, who may be secondarily liable for the acts of others, in appropriate circumstances. Here, the Court should not assume, without analyzing the volitional conduct question, that the copyright exposure of a service like FilmOn X is properly analyzed under principles of direct liability rather than secondary liability. It is important to cloud-based services that legal doctrine in this area recognizes the volitional conduct test and the distinction between direct and secondary liability.

E. A performance need not always be licensed in order to be private.

Broadcaster plaintiffs in various cases have stressed the fact that the defendant in *Cablevision* had a license to rebroadcast programming, in an attempt to suggest that the *Cablevision* holding applies only to parties who have secured

such a license. This argument did not appear to motivate the district court below, and there is no basis for restricting private performances to licensing in this way.

The *Cablevision* court concluded that the transmissions at issue in that case were private performances, not licensed public performances. *Cablevision*, 536 F.3d at 137-39. The Second Circuit nowhere suggested that this holding was based on the fact that Cablevision had a license to retransmit programming or that the remote DVR service was somehow tied to a licensed cable service.[9] *Id.* Nor did the Second Circuit rely on an implied license theory—in fact, the Fox parties specifically and vehemently rejected the argument that Cablevision's original license for retransmission in any way, shape, or form justified the RS-DVR service. *See* Brief of Plaintiffs-Counter-Defendants-Appellees Twentieth Century Fox Film Corp., *et al*. at 5, *Cablevision*, No. 07-1480, 2007 WL 6101619 (2d Cir. June 20, 2007) ("None of Cablevision's negotiated licenses, nor any statutory licenses, authorizes Cablevision to transmit or to reproduce copyrighted programming through RS-DVR.").

[9] In an *amicus* brief in the Second Circuit appeal of *Aereo*, Cablevision itself emphasized that its remote DVR service was "[i]n addition to and separate from" its licensed cable system. Brief for *Amicus Curiae* Cablevision Systems Corp. in Support of Reversal at 16, *American Broadcasting Cos. v. Aereo*, Nos. 12-2786, 12-2807 (2d Cir. brief filed Sept. 21, 2012). It explained that "the recordings that subscribers make with the RS-DVR perform a function that is both operationally meaningful and independent from Cablevision's real-time, licensed transmission of cable content." *Id.* In short, the remote DVR service was separate and independent from the licensed service.

From the perspective of businesses involved in cloud computing, limiting *Cablevision*'s application to entities that possess rebroadcast licenses would be tantamount to holding that all performances are public. The statutory language defining the public performance right does not pick out "broadcast programming" for special treatment. Thus, if transmissions of broadcast programming were held to require a license to qualify for private performance status, it would raise the specter of licenses being required for transmissions of other types of content as well—including personal transmissions of music, computer software, text, or video files. There would be no practical way for cloud computing services to navigate such a regime. Cloud computing services cannot possibly enter licensing relationships with each and every rights holder in each and every piece of content users choose to store or transmit. Nothing in Title 17 would guide cloud computing providers or investors in how to satisfy this unexpected and unspecified licensing requirement, which would more closely resemble an artifact of prior business models than a principle of copyright law. Such a cramped interpretation of *Cablevision* must be avoided.

The lack of a licensing relationship between FilmOn X and broadcasters does not preclude a finding that the performances associated with FilmOn X's service are private. However the Court resolves the question of public versus

private performance in this case, we urge the Court not to establish a rule that makes licensing a prerequisite for performances to be treated as private.

III. UNDERMINING THESE PRINCIPLES WOULD ESTABLISH A HARMFUL LEGAL BIAS AGAINST REMOTELY-PROVIDED SERVICES.

The principles set forth above establish a level, technologically neutral playing field for the remotely-provided computer functions that are at the heart of the trend towards cloud computing. Given this kind of unbiased legal environment, cloud computing thrives.

This can be seen clearly in the reaction of innovators and investors to the *Cablevision* decision, which reflected and confirmed key elements of the legal framework. A November 2011 study by Harvard Business School Professor Josh Lerner found that after the decision, the average quarterly investment in cloud computing in the United States increased by approximately 41 percent.[10] That study also concluded that *Cablevision* led to additional incremental investment in U.S. cloud computing firms of between $728 million and $1.3 billion over the two-and-half years after the decision. When coupled with the study's findings regarding enhanced effects of venture capital investment in this space, the author

[10] Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies*, Nov. 1, 2011, at 9, *at* http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Lerner_Fall2011_Copyright_Policy_VC_Investments.pdf.

concluded that such sums may be the equivalent of two to five billion dollars in traditional investment in research and development.[11]

By contrast, any decision subverting the legal principles on which cloud computing relies would undermine innovation and investment in the technology sector. In particular, embracing any legal doctrine that would convert the routine functions of cloud computing services into public performances under copyright law would effectively establish an irrational, across-the-board legal bias against technologies that store content remotely and in favor of technologies that store content locally and hence minimize the need for transmission.

Congress intended no such bias against remotely-provided services. Moreover, such a bias would run directly contrary to the direction the technology marketplace is moving. The ability of many services to continue operating in their current form would be thrown into question, and the industry's growth would be curtailed.

[11] *Id*. at 24.

CONCLUSION

We urge the Court not to question the validity of the *Cablevision* decision or otherwise articulate a test that would undermine cloud computing and broadly chill the progress and promise of networked technologies.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 4,929 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the types style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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December 12, 2013

CERTIFICATE OF SERVICE

I hereby certify, that on this 12th day of December 2013, a true and correct copy of the foregoing Brief *Amici Curiae* of the Center for Democracy & Technology, the Computer & Communications Industry Association, CTIA-The Wireless Association®, United States Telecom Association, and Internet Infrastructure Coalition in Support of Neither Party was timely filed in accordance with FRAP 25(a)(2)(D) and served on all counsel of record via CM/ECF pursuant to Circuit Rule 25(c).

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STATUTORY ADDENDUM

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17 U.S.C. § 512

(a) Transitory Digital Network Communications.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.

(b) System Caching.—

(1) Limitation on liability.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which—

(A) the material is made available online by a person other than the service provider;

(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and

(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A),

if the conditions set forth in paragraph (2) are met.

(2) Conditions.—The conditions referred to in paragraph (1) are that—

(A) the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person described in paragraph (1)(A);

(B) the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available,

except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;

(C) the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology—

> (i) does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;
>
> (ii) is consistent with generally accepted industry standard communications protocols; and
>
> (iii) does not extract information from the provider's system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

(D) if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and

(E) if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification

of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if—

(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

(c) Information Residing on Systems or Networks At Direction of Users.—

(1) In general.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

(A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) Designated agent. - The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) Elements of notification. –

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed

or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B)(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

(d) Information Location Tools. - A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider –

(1)(A) does not have actual knowledge that the material or activity is infringing; (B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

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47 U.S.C. § 230(c)(1)

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(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

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