

ORAL ARGUMENT NOT YET SCHEDULED

Case No. 13-7145 (consolidated with 13-7146)

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FOX TELEVISION STATIONS, INC., ET AL.

Plaintiffs-Appellees,

v.

FILMON.TV NETWORKS INC., ET AL.

Defendants-Appellants.

*On Appeal From The United States District Court
For The District Of Columbia*

**BRIEF OF *AMICUS CURIAE* THE CONSUMER FEDERATION OF
AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS SUPPORTING
REVERSAL**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the district court and this Court are listed in the Brief for the Appellants.

1. Consumer Federation of America

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellants.

C. Related Cases

References to related cases appear in the Brief for Appellants.

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Consumer Federation of America certifies, pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, that it has no parent companies and no publicly held company owns 10 percent or more of its stock.

The Consumer Federation of America certifies that it is a consumer advocacy group with the purpose of working to advance consumer interests through research, advocacy, and education.

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GLOSSARY OF ABBREVIATIONS

Aereo I	<i>American Broadcasting Companies, Inc. v. AEREO, Inc.</i> , 874 F. Supp. 2d 373, 399–400 (S.D.N.Y. 2012)
Aereo II	<i>WNET, Thirteen v. Aereo, Inc.</i> , 712 F.3d 676 (2d Cir. 2013)
The Broadcasters	Plaintiffs-Appellees Fox Television Stations, Inc., Twentieth Century Fox Film Corporation, Fox Broadcasting Company, NBC Subsidiary (WRC-TV) LLC, NBC Studios LLC, Universal Network Television LLC, Open 4 Business Productions LLC, Telemundo Network Group LLC, American Broadcasting Companies, Inc., Disney Enterprises, Inc., Allbritton Communications Company, CBS Broadcasting Inc., CBS Studios, Inc. and Gannet Co., Inc.
Copyright Act	Copyright Act of 1976, 17 U.S.C. § 101, <i>et seq</i>
Cablevision	<i>Cartoon Network LP, LLLP v. CSC Holdings, Inc.</i> , 536 F.3d 121(2d Cir. 2008), <i>cert. denied</i> 557 U.S. 946 (2009)
DVR	Digital Video Recorder
FilmOn	Defendants-Appellants FilmOn X, LLC, FilmOn.TV Networks, Inc., FilmOn.TV, Inc., and FilmOn.com, Inc.
Hearst Stations	<i>Hearst Stations, Inc., d/b/a WCVB-TV v. Aereo, Inc.</i> , No. 13-cv-11649-NMG (D. Mass. July 9, 2013).
Sony	<i>Sony Corp. of America v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984)
Transmit Clause	17 U.S.C. § 101

STATUTES AND REGULATIONS

All applicable statutes and regulations are included in the Brief for the Appellants.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

The Consumer Federation of America respectfully submits this brief as *amicus curiae* with the consent of all parties. Pursuant to Federal Rule of Appellate Procedure 29(c)(5) counsel for the parties have not authored any part of this brief; no party or a party's counsel contributed money for the brief; and no one other than *Amicus* and its members and counsel have contributed money for this brief. *See* Fed. R. App. P. 29(a)

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

The Consumer Federation of America (“CFA”) is the largest consumer advocacy group in the nation, composed of nearly three hundred affiliates, representing some fifty million individual members. CFA includes organizations with a special focus on issues in legislative, regulatory, and judicial arenas at the federal and state level. CFA works to advance the consumer interest through research, advocacy, and education. For over two decades, CFA has been the leading analyst of, and advocate for, consumer benefits of digital technologies brought about through a trend termed “digital disintermediation,” which refers to the use of technology to eliminate cost-increasing intermediaries in a supply chain.

For example, new digital technologies are capable of helping consumers to view, read, or hear the information products they want to receive, when and where they choose, without purchasing additional, unwanted products and services.

An analysis published by CFA in 1990 foresaw the digital revolution as creating a dynamic, consumer-friendly communications space, which fosters digital disintermediation based on “the fact that a great deal of the necessary intelligence is currently located on the periphery of the information age network and has led to a pragmatic, decentralized pattern of development.” Mark Cooper, *Expanding the Information Age for the 1990s: A Pragmatic Consumer View*, 5 (1990). A recent analysis of two decades of experience across a number of content industries demonstrates that this expectation has been borne out, finding that “[d]igital technologies can lower production and distribution costs and give consumers much greater flexibility and choice, thereby dramatically improving the fit between what is produced and what is consumed.” Mark Cooper & Jodie Griffin, *The Role of Antitrust in Protecting Competition, Innovation and Consumers as The Digital Revolution Matures: The Case Against The Universal-EMI Merger And E-Book Price Fixing*, PUB. KNOWLEDGE, 16 (2012).

The Consumer Federation of America have a compelling interest in ensuring that copyright law remains responsive and hospitable to beneficial consumer uses of new technologies. The flexibility inherent in copyright doctrine is the primary

means by which the law promotes innovation and the increased availability of information. Technologies that allow consumers more choices about how they access information serve the fundamental goals of copyright law and should be encouraged.

INTRODUCTION

Access to information matters. *See* Richard Calland, *Access to Information: How Is It Useful and How Is It Used?*, in ACCESS TO INFORMATION: A KEY TO DEMOCRACY 15, 15 (2002) (“Information is power Information is vital for individual citizens, communities, and citizen’s organizations if they are to fully participate in the democratic process.”). The trend toward digital disintermediation clearly indicates consumers’ strong preference for direct access to information on their own terms. Content providers should not attempt to thwart this trend in order to preserve the status quo. Facilitating consumer choice in information access is consistent with the purposes of the Copyright Act, and can be accomplished in ways that balance the competing interests of rights-holders, providers, and consumers. As new information technologies have developed, copyright law has been interpreted to provide consumers with increased control over how they use available information, such as the socially and culturally important content provided in free, over-the-air television broadcasts. This case tests whether these established principles will be upheld.

Courts hearing intellectual property cases apply the same four-factor test that all courts in equity use to determine whether a preliminary injunction should issue; the movant must establish that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief;

(3) the balance of equities tips in his or her favor; and (4) an injunction is in the public interest. *See Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also eBay Inc. v. MercExchange L.L.C.*, 547 U.S. 388, 391 (2006). The D.C. Circuit insists that a movant must also show that *all four factors* weigh in his or her favor. *See Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011); *see also Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). In defining a “public performance” broadly, and failing to appropriately balance the public’s interests with those of rights holders, the district court failed to recognize the importance of access to information enshrined throughout the Copyright Act, particularly in Congress’ reservation of a personal right to engage in private performance of copyright content. Technologies like FilmOn’s can empower consumers’ choices about how and when they enjoy broadcast content. This Court should take the opportunity to advance consumer interests by overturning the district court’s decision.

ARGUMENT

I. The District Court’s Interpretation of the Transmit Clause is Inconsistent with the Pro-Consumer Purposes of the Copyright Act and Fails to Recognize that Consumers are Entitled to Engage in Private Performances.

When determining whether the broadcasters were likely to succeed on the merits, the district court in analyzing the “public performance” right under section 106(4), argued that a broad reading of the Copyright Act’s transmit clause forbids

FilmOn's technology. *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758(RMC), 2013 WL 4763414, at *13 (D.D.C. Sept. 5, 2013). To decide whether a technology facilitates performances "to the public," the district court concluded that the potential audience of *all* transmitted performances of a work is determinative and that it is irrelevant that each transmission is made from a separate copy made at the direction of a separate consumer. *Id.* This reading is inconsistent with the plain text of the Copyright Act and the intent of the Congress that passed it. The district court's expansive definition of public performance eradicates the space Congress created for private performance within the Copyright Act.

A. The Text and Legislative History of the Copyright Act of 1976 Show Congress's Intent to Protect Consumer Autonomy In Making Private Performances.

To reach its conclusion, the lower court argued that the plain text of the Copyright Act of 1976 was clear; however, the lower court disregarded Congress' intent to limit copyright owners' public performance and display rights by recognizing and safeguarding a private sphere of information use—the zone within which the consumer choice about how and when to access content occurs. *See R. Anthony Reese, The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM "Copies,"* 2001 U. ILL. L. REV. 83, 86 (2001)

(discussing how the Copyright Act's display right and its legislative history applies to transmissions over computer networks).

The 1976 Copyright Act was considered over a period of fifteen years before it was presented for a vote. *See* Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 479 (1977). The 1909 Act had contained language restricting copyright owners' rights to performances made "for profit," as well as distinguishing the public and private spheres of performance and display. *See* Copyright Act of 1909 § 1(e). The limitation on copyright owners' exclusive display and performance rights to the public sphere survived throughout the many iterations of the draft legislation. *See, e.g.*, S. 1006, 89th Cong. (1965); H.R. 2512, 90th Cong. (1967); S. 1361, 93d Cong. (1973). The final deletion of "for profit" from the language of the section 106 performance right, as well as the inclusion of "to the public," represents a distinct congressional choice. Copyright Act of 1976, Pub. L. 94-553 § 106 (Oct. 19, 1976).

Section 106 of the Act defines the full extent of the exclusive rights granted to copyright owners; rights that are not explicitly provided are automatically excluded. The rights granted include the "rights to do and to authorize any of the following . . . in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work *publicly*." 17 U.S.C. § 106 (*emphasis added*). The congressional limitation on the scope of protection housed in the definition of

“public performance” affirms the importance of a consumer space in the proper functioning of copyright. According to the Act, a public performance only occurs when an assembled audience is physically present, or by “transmit[ing] or otherwise communicat[ing] a performance or display of the work . . . to the public.” 17 U.S.C. § 101 (emphasis added). If Congress had intended the statute to encompass all performances, wherever or by whatever means they occur, it would have so stated. Instead, it indicated clearly that the public or private nature of a performance be determinative.

More generally, the public-private distinction is observed throughout the Copyright Act. *See* 17 U.S.C. §§ 109, 111. The codification of the first sale doctrine in § 109(a) shows that Congress contemplated what happened to copies of protected works once they exited the public channels of commerce, and concluded that the copyright owner’s control generally should cease at that point. In most instances, first sale protects consumers’ private choices about whether to sell or otherwise dispose of lawfully acquired copies. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).

Likewise, section 111(a) states that secondary transmission from “a hotel[room], apartment house, or similar establishment, of signals transmitted by a broadcast station licensed . . . to the private lodgings of guests or residents of such establishment . . .” is non-infringing. 17 U.S.C. § 111(a). The plain language of

this exception (“private lodgings”) reflects a core distinction between public and private space.

Given that so much of the Copyright Act reflects Congress’ intentional safeguarding of a meaningful private sphere, it is surprising that the district court’s analysis does not reflect the same concern. By conflating separate performances by transmission into a single, on-going performance, the district court effectively guarantees that the potential audience will always be large enough to qualify as “public,” thus making the “to the public” language in section 101 of the Copyright Act superfluous, at least where transmissions are concerned.

B. The Transmit Clause Should Be Applied to Find that FilmOn’s Technology Allows Consumers to Engage in Private Performances.

In 2008, the Second Circuit recognized Congress’ intent to protect a private sphere of lawful use when analyzing whether Cablevision “transmit[s] ... a performance ... of the work ... *to the public*” by allowing individual consumers to use its RS-DVR system to watch programming at times later than those at which content is made available to the public. *Cartoon Network, LP v. CSC Holdings, Inc.* 536 F.3d 121, 134 (2d Cir. 2008) [hereinafter *Cablevision*] (emphasis added). In *Cablevision*, the court interpreted the transmit clause to reserve private performances for consumers and found that Cablevision’s RS-DVR service was not a regulated “public performance.” The *Cablevision* interpretation of the transmit clause should be afforded great weight when considering whether the

transmit clause permits FilmOn's technology because it took account of traditional tenets of statutory interpretation, such as Congressional intent, and properly balanced the need to protect creative works with consumers' interest in broad, flexible access to content.

The Second Circuit recognized the significance of these limiting considerations when defining a performance and found that Congress intended to reserve a space for private performance in the transmit clause. *Cablevision*, 536 F.3d at 135-36. When defining a performance, the court determined that a "transmission of a performance is itself a performance," recognizing that the statute uses the phrase "capable of receiving a performance" rather than "capable of receiving the work." *Id.* at 134, 136. Defining a performance as a given transmission rather than all transmissions of a work is further bolstered by the legislative history of the transmit clause which directs courts to consider who is "capable of receiving" or who constitutes "the potential audience of" a given *transmission* to determine whether a performance is private. H.R. REP. NO. 94-1476, at 64-65 (1976) (emphasis added). The opinion emphasized that a definition that focuses on who is capable of receiving the work rather than who is capable of receiving the performance "would render the 'to the public' language surplusage." *Cablevision*, 536 F.3d at 138.

Thus, when determining whether the technology enabled public or private performances under the transmit clause, the *Cablevision* court properly made three inquiries: who was the potential audience of a given transmission or who was capable of receiving it, whether the transmission was made from a unique copy; and to whom the downstream transmission was delivered. It concluded that each transmission is sent to a single recipient; each transmission uses a unique copy of the relevant program; and each transmission is made solely to the person who made that unique copy. *Cablevision*, 536 F.3d at 121. Importantly, the court found it determinative that each consumer-subscriber directs the creation of unique copies for his or her use, thus limiting the potential audience for a given transmission. *Id.* The court noted that conflating lateral transmissions could potentially mischaracterize performances as “to the public,” even when the final recipient is a private consumer of a unique copy. *Id.* at 137. Thus, the court distinguished *Cablevision*’s RS-DVR from other services by noting that “*if the same copy . . . of a given work is repeatedly played (i.e., ‘performed’) by different members of the public, albeit at different times, this constitutes a ‘public’ performance.*” *Id.* at 138; NIMMER ON COPYRIGHT § 8.14[C][3] (2012).

Like *Cablevision*’s RS-DVR, FilmOn’s technology is designed to enable transmissions to a device controlled by the single subscriber requesting them, from a unique copy made at the direction of that subscriber, and never a group or

community. *See Cablevision*, 536 F.3d at 137; *FilmOn X*, 2013 WL 4763414, at *3. The Second Circuit recognized Congress's intent to authorize technologies like Cablevision's which do not infringe on copyright owners' right of public performance. By applying its interpretation of the transmit clause to FilmOn's technology, this Court would properly acknowledge the interests of information consumers and preserve consumers' ability to perform copyrighted works in the private sphere, which increases consumers' freedom of choice in accessing media content.

II. The District Court Erred in Crediting the Broadcasters' Claims of Irreparable Harm.

While the District Court did not grant a presumption of irreparable harm in so many words, its inquiry into the broadcasters' claims was unduly deferential. Applying the *eBay* test in the context of copyright injunctions, the Second and Ninth Circuits have stated that the plaintiff must provide more than speculative claims that it might suffer some harm in the future. *See Perfect 10, Inc. v. Google Inc.*, 653 F.3d 976, 978-79 (9th Cir. 2011); *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010). While the district court correctly considered whether the broadcasters' categories of irreparable harm were likely, it came to the wrong conclusion because it failed to consider whether the categories of harm described by the broadcasters would materialize before the case was decided on the merits to justify the use of a preliminary injunction.

This concern was noted by the courts in *American Broadcasting Companies, Inc. v. AEREO, Inc.*, 874 F. Supp. 2d 373, 399–400 (S.D.N.Y. 2012) [hereinafter *Aereo I*], *aff'd sub nom. WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013) [hereinafter *Aereo II*] and *Hearst Stations Inc. v. Aereo, Inc.*, No. 13-11649-NMG, 2013 WL 5604284, at *8 (D. Mass. Oct. 8, 2013). In *Aereo I*, the court determined that the harm to broadcasters would not reach its “full magnitude” by the time the case was decided. *Aereo I*, 874 F. Supp. 2d at 399. Similarly, in *Hearst Stations* when considering whether the broadcasters’ ability to negotiate retransmission fees would suffer, the court noted that the prospect of harm was real, but the harm would take several years to materialize. *Hearst Stations*, 2013 WL 5604284, at *8. Due to the speculative character of the broadcasters’ alleged harm, the courts concluded that the irreparable harm alleged was insufficient to justify the use of “extraordinary and drastic remedy.” *Munaf v. Geren*, 553 U.S. 674, 688-90 (2008). Thus, given the distant nature of the broadcaster’s alleged harm and the real and immediate harm a nationwide preliminary injunction imposes on not only on FilmOn, but on consumers who will suffer if this injunction is upheld, the district court erred in stating that this factor favors the broadcasters.

III. The Preliminary Injunction Imposes a Severe Hardship on FilmOn, Far Beyond What Fox Television Would Suffer by Lifting the Injunction.

In a copyright context, a movant will satisfy the balance of hardships factor if it tips in his or her favor. *See Winter*, 555 U.S. at 20; *eBay*, 547 U.S. at 391; *District of Columbia v. Group Ins. Admin.*, 633 A.2d 2, 23 (D.C. 1993).

The district court believed that the hardship to FilmOn was irrelevant, saying that FilmOn had “no cognizable interest in continuing to infringe Plaintiffs’ copyrights and thus cannot complain of the harm it will suffer if ordered to cease doing so.” *FilmOn X*, 2013 WL 4763414, at *17 (citing *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*, 915 F. Supp. 2d 1138, 1148-49 (C.D. Cal. 2012)). The district court applied the wrong test. The Supreme Court has spoken directly on this issue, and has “consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.” *eBay*, 547 U.S. at 392-93. Though we do not believe that any infringement occurred here, *supra* Part I, alleged infringement is considered under the first factor, and cannot be treated as determinative of the other three. *See Winter*, 555 U.S. at 23-24 (noting that a finding of likelihood of success on the merits can be outweighed by the other factors). In support, the district court looked to a case involving a permanent injunction, where infringement had already been established. *FilmOn X*, 2013 WL 4763414, at *17 (citing *Walt Disney Co. v. Powell*, 897 F.2d 565, 567 (D.C. Cir.

1990)). However, issuing a permanent injunction is a different act entirely, as a court will have decided the case on the merits and made an official determination as to whether infringement exists. The rationale given in a permanent injunction analysis should not directly apply when weighing the factors in a preliminary injunction analysis.

In reality, the balance of hardships is decidedly in favor of FilmOn. There is relatively little evidence that Fox Television would suffer any real immediate harm prior to decision of the case on the merits, *supra* Part II; however, the injunction severely harms FilmOn in many ways.

The preliminary injunction harms FilmOn by (1) suffocating its business and cutting off its revenue stream and (2) damaging its long-term viability by shifting its current and potential customer base to alternative sources of the same service. Technology evolves rapidly, and technology providers have to provide consistently compelling services in order to grow their businesses; even minor setbacks can have a severe effect on FilmOn's ability to compete in the market. This injunctive strategy has been successfully employed by copyright infringement plaintiffs as a way of stifling businesses before they have an opportunity to prove their cases on the merits. *See UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099 (C.D. Cal. 2009), *aff'd sub nom. UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F.3d 1006 (9th Cir. 2013) (holding that Veoh Networks was

protected under the DMCA from copyright infringement); Eliot Van Buskirk, *Veoh Files for Bankruptcy After Fending Off Infringement Charges*, WIRED (Feb. 12, 2010, 3:49 PM), <http://www.wired.com/business/2010/02/veoh-files-for-bankruptcy-after-fending-off-infringement-charges/> (reporting that despite dismissal of the action against them, Veoh had to file for Chapter 7 bankruptcy due to loss of revenue during the suit); *Warner Bros. Entm't Inc. v. WTV Sys., Inc.* 824 F. Supp. 2d 1003 (C.D. Cal. 2011) (issuing a preliminary injunction against Zediva after balancing the four factors); Ryan Singel, *Streaming Movie Service Zediva Pays Hollywood \$1.8M, Shuts Down*, WIRED (Oct. 31, 2011, 8:18 PM), <http://www.wired.com/threatlevel/2011/10/streaming-movie-service-zediva-pays-hollywood-1-8m-shuts-down/> (reporting that the preliminary injunction robbed Zediva of revenue necessary for it to properly defend itself, and it was forced to close two months after the injunction was issued and settle out of court).

FilmOn's main competitor, Aereo, has had continued success in avoiding preliminary injunctions, even though they offer a service nearly identical to FilmOn. *See Aereo I*, 874 F. Supp. 2d at 405, *aff'd sub nom. Aereo II*, 712 F.3d at 696; *see also Hearst Stations*, 2013 WL 5604284 at *9. Not only will FilmOn lose revenue, but there is a very real threat that FilmOn will lose a significant portion of its current customer base to its competitors. This loss is incredibly hard to quantify, and an injunctive bond will not remedy the problem because without a customer

base, FilmOn's business is effectively destroyed. Starting a new business presents obstacles, but those obstacles become insurmountable when you are enjoined from competing with your main competitor. By obtaining this injunction, the broadcasters get their desired outcome without proving their case on the merits.

IV. The Public Interest Is Served By Promoting Freedom of Choice in Modes of Access to Information, Enabling American Consumers' Full Participation in Their Culture.

Information consumers do not seek to disestablish copyright law, nor to get “something for nothing,” by way of copyright piracy or otherwise. Consumers do want the ability to make flexible, beneficial use of material they acquire by lawful means. They understand that in the scheme of copyright, assuring that information industry firms can derive reasonable income from content they produce promotes the public interest. Over-the-air television broadcasts are not free at all; the individuals and households that enjoy them pay for them, albeit indirectly, by patronizing the businesses advertised on air. *See* J.H. Snider, *The Myth of 'Free' TV*, at 13 (New Am. Found. Pub. Assets Program, Spectrum Series Working Paper No. 5, 2002) *available at* http://www.newamerica.net/files/Pub_File_877_1.pdf. At the same time, information consumers have a stake in ensuring that legislators, regulators, and courts “take account of new technologies and changing marketplace conditions,” (Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,

26 FCC Rcd. 17489, 17489, 17498 (2011)) because allowing new technologies that enable consumer choice affirmatively promotes copyright balance.

A. Both Consumers' First Amendment Right to Access Information and the Copyright Act's Purpose to Promote Information Dissemination Deserve Great Weight.

Choice and flexibility in accessing information is essential to every consumer's ability to participate in media-intensive contemporary society. The Universal Declaration of Human Rights provides that "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). The United States Constitution recognizes this right through the First Amendment's protection of participation in the marketplace of ideas. 4-19E NIMMER ON COPYRIGHT § 19E.02 (2012) (The First Amendment recognizes the public's right to be informed of matters of general interest).

Broadcasters are able to benefit from spectrum licenses and earn advertising revenue because they further an important public interest by providing consumers with access to a limited number of over-the-air signals. *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . ."). However, in this case the district court did not even address this important public interest, instead concluding that it is in the best interest of the public to enjoin even

a hint of infringing activity. *FilmOn X*, 2013 WL 4763414, at *17. That analysis is in error because it presupposes infringement, *supra* Part III, and the court relied on case law where a permanent injunction was granted *after* deciding the case on the merits. *See Walt Disney*, 897 F.2d at 567. There was no consideration of consumers' important stake in accessing information products at reasonable prices and under flexible conditions. The Court in *eBay* specifically rejected this type of thinking, and insisted that intellectual property injunctions be issued only when the four factors, measured independently of each other, favor an injunction. *eBay*, 547 U.S. at 394. This narrow view of the public interest neglects the settled proposition that copyright law promotes consumers' rights in cultural participation by balancing the need to incentivize creativity with the need to promote access to creative works. As Justice Stewart emphasized:

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). Differently stated, “[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). As the Supreme Court recognized, new consumer information technologies play an important role in advancing the overall public interest in

copyright. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429-32 (1984).

B. The Copyright Monopoly Should Not Be Employed to Suppress Efficient New Consumer Services That Increase Cultural Participation.

Choice-empowering forms of consumer information technology change over time. However, the purpose of each new technology remains the same: to advance citizens' participation in culture and society. Scholars have noted consumers' increased participation, observing that "[p]eople are no longer passive participants in the economy, as they were in the media available in the 20th century. When offered the opportunity to participate and communicate in the digital information age, people quickly accept." Mark Cooper, *From Wifi To Wikis And Open Source*, 5 J. TELECOMM. & HIGH TECH. L. 125, 126-127 (2006); *see also* Brett M. Frischmann, *Cultural Environment and the Wealth of Networks*, 75 U. CHI. L. REV. 1083, 1088 (2007) (noting that there is a "shift from an industrial information economy to a networked information economy) (citing Yochai Benkler, *Wealth of Networks*, at 3). Within the limits imposed by the statute and subsequent judicial interpretation, the institutions of copyright should enable this kind of consumer choice, not interfere with it. FilmOn's technology does not discourage creativity: it simply provides consumers with added choices for accessing lawfully acquired content. FilmOn adds to consumer value without upsetting the balance of copyright's competing interests.

C. Copyright Law Promotes Consumer Choice by Permitting Consumers to Utilize Efficient New Technology, and Should Not Be Interpreted to Unnecessarily Restrict Choice.

Consumer interests have been paramount in shaping copyright law since its earliest days. *See* Ronan Deazley, *The Myth of Copyright at Common Law*, CAMBRIDGE L.J. 108 (2003) (the Statute of Anne balanced interests to ensure the dissemination of useful works). The popularization of movable type, a disruptive new technology of reproduction, caused publishers to call for new protections. William C. Warrant, *Foreword to BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT* vii–viii (1967). In response, Parliament enacted the Statute of Anne, which responded to those calls with copyright law that served the publishers’ private interests, while consciously promoting the public interest in increased access to information by regulating only the *misuse* of information technology, rather than the new technology itself. *See* Craig Joyce & L. Ray Patterson, *Copyright in 1791*, 52 EMORY L.J. 909, 913-15 (2003) (statute incorporated conditions for regulating publishers in the public interest). Following the lead of British legislators, subsequent lawmakers, including those in the United States, have moved cautiously when invited to apply copyright to suppress beneficial new information technologies.

As detailed in Part I.A, Congress wrote the importance of consumer access into the Copyright Act of 1976. However, faced with changes in patterns of

consumption that upset incumbent methods of content distribution, contemporary copyright holders have repeatedly sought to snuff out incipient new technologies that expand consumers' choices. The courts, however, generally have interpreted copyright law to validate these new technologies.

D. When Analyzing New Technologies, Courts Have Consistently Interpreted the Copyright Act to Favor Legitimate Consumer Uses of Those Technologies.

Courts evaluating new uses of technologies have sought to strike a balance between consumer interests and copyright holder's property interests. *See supra* Part I.B. They have not hesitated to endorse new technologies, expanding consumer access to copyrighted works without invading copyright owners' statutory rights.

In *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court demonstrated sensitivity to consumer interests. 464 U.S. 417 (1984). Owners of television program copyrights brought an infringement suit to block the manufacture and sale of video recorders that allowed consumers to record and "time-shift" over-the-air programming, freeing them from the schedules imposed by broadcast. *Id.* at 423. The Court held that consumer time-shifting constituted "fair use" and that the enabling technology was permissible because it was "capable of [this] substantial noninfringing use[]." *Id.* at 442. The *Sony* decision

emphasizes that courts should facilitate consumer choice when the technology is “widely used for legitimate, unobjectionable purposes.” *Id.*

Even when the Supreme Court has imposed liability on certain technology providers for inducing copyright infringement, it safeguarded other permissible consumer uses of new technology. The Supreme Court affirmed *Sony*’s pro-consumer perspective on technology in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), a copyright infringement action brought against the distributors of peer-to-peer file sharing software. The Court held that a technology’s substantial non-infringing uses do not shield its distributors from liability where evidence exists that they intended to foster infringement by third parties. *Id.* at 936. At the same time, the Court focused on conduct, and not the technology itself, when determining infringement, noting that they are “mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential.” *Id.* at 937. As in *Sony*, the Court emphasized that the availability of a technology should depend *primarily* on its potential for legitimate use. FilmOn’s technology exists *exclusively* to enable lawful end-uses by consumers. *See supra* Part I.B.

E. Consumers Need Meaningful Choices Regarding When and How They Access Information In Order to Fully Participate in Our Information-Age Society.

The proliferation of broadband Internet and other new technologies has had a dramatic impact on how consumers access information. While daily newspapers and scheduled broadcasts once were sufficient resources to keep people informed about public affairs and cultural events, members of fast-paced modern society require diverse methods of accessing information to participate fully.

UNDERSTANDING THE PARTICIPATORY NEWS CONSUMER, PEWRESEARCHCENTER, at 2 (2010) (92% of Americans use multiple platforms daily to get news). Consumer choice in accessing information is a necessity, not a luxury, in part because work life now runs 24/7. NETWORKED WORKERS, PEWRESEARCHCENTERS, at iii (2008) (information tools make it harder to disconnect from work).

New social conditions have given rise to new forms of media consumption. Consumer households are shifting from relying on several free-standing televisions to relying on one primary screen supplemented with mobile devices that provide access to content throughout the home and beyond. ERICSSON CONSUMERLAB, TV AND VIDEO: AN ANALYSIS OF EVOLVING CONSUMER HABITS 1 (2012). This trend reflects consumers' growing preference for accessing the information of their choice at a convenient time and place.

Despite changing preferences about the viewing experience, information consumers continue to rely on broadcast content to a significant extent. THE CROSS-PLATFORM REPORT, NIELSEN, at 10 (2012) (finding more than 11 million households use only broadcast television). A significant proportion of cable subscribers only watch retransmitted broadcast programming. See Matthew Flamm, *Movers & Shakers: Chet Kanojia: Sending cable a message*, CRAIN'S NEW YORK BUS. (June 17, 2012), <http://www.crainsnewyork.com/article/20120617/SUB/306179985>. However, watching over-the-air television when it is broadcast no longer provides consumers with sufficient control over accessing content. A recent report shows that many consumers employ digital video recorders ("DVRs") to choose when they watch broadcast content. See John Consoli, *It's Early, But Viewers Again Watch Broadcast Primetime Series on DVR in Doves*, BROADCASTING & CABLE (2012). Further, consumers often complain of their limited ability to receive high-quality signals from broadcast stations in their service areas. *Quarterly Reports – Consumer Inquiries and Complaints*, FCC, <http://www.fcc.gov/encyclopedia/quarterly-reports-consumer-inquiries-and-complaints> (last visited Nov. 29, 2013) (combined 2011 quarterly reports cite over 7,000 complaints and inquiries regarding digital television broadcast service and signal interference).

A DVR creates a permanent copy of a program after the user chooses the record function and then allows the user to watch the copy any time following the initial broadcast, thus “time-shifting” the content. *See Cablevision*, 536 F.3d at 137. In addition, some stand-alone technologies provide the capability to choose the device on which content will be viewed, thereby “space-shifting” content to a location different from the primary source. *See Fox Broad. Co. Inc. v. Dish Network, L.C.C.*, 905 F. Supp. 2d 1088 (C.D. Cal. 2012) [hereinafter *Dish I*] *aff’d sub nom. Fox Broad. Co. Inc. v. Dish Network, L.L.C.*, 723 F.3d 1067 (9th Cir. 2013) [hereinafter *Dish II*]. *Cf. Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999) (rejecting challenge under the Audio Home Recording Act to space-shifting of music using portable MP3 players).

Although subscription video services offer reliable signals and time- or space-shifting capabilities, they do so only on terms that leave consumers dissatisfied with the inflexibility and expense. Thus, cable and satellite subscription services have consistently ranked among the lowest of forty-seven sectors in the American Customer Satisfaction Index, often finishing dead last. SCORES BY INDUSTRY, AMERICAN CUSTOMER SATISFACTION INDEX, *available at* <http://www.theacsi.org/acsi-results/scores-by-industry-popup-all> (in 2011 these services ranked 45th out of 47).

In particular, subscription video services and partnering broadcasters do not provide consumers with adequate choice about when and how to access the broadcast content on which many viewers rely. Compounding the problem, subscription services typically package low-rated, largely unwatched channels with those (such as broadcast programming) that consumers actually do want. *See Cablevision Says Viacom Threatened Billion-Dollar Penalty*, BLOOMBERG NEWS (March 8, 2013, 12:01 AM), <http://www.bloomberg.com/news/2013-03-07/cablevision-says-viacom-threatened-billion-dollar-penalty.html>. The reality for many consumers is that industry business practices present them with a “Morton’s Fork,” in which they are forced to choose between bloated and expensive programming packages, or more affordable content with limited flexibility and few channels.

For example, in Los Angeles, Time Warner Cable gives consumers DVR functionality for only one TV if they subscribe to a digital package and rent equipment at a total cost of \$64.98 per month (plus tax and fees). *See Packages*, TIMEWARNERCABLE, <http://www.timewarnercable.com/en/residential-home/packages/cable-internet-packages.html> (last visited Nov. 25, 2013) (providing a 12-month introductory price for “Digital TV” at \$39.99 per month and DVR functionality for an additional \$24.99 per month). For the subscriber who watches primarily broadcast content, this means a yearly cost of \$779.76 for the

ability to time-shift content that is available over-the-air without charge. Space-shifting is similarly costly—DISH Network offers a basic satellite television package with its “Hopper” device for \$29.99 per month in Los Angeles for one television, which comes out to \$359.88 over a 12-month introductory offer, requiring a 24-month commitment and not including additional monthly taxes and fees. *See DISH Hopper*, DISH NETWORK, <http://www.dish.com/technology/hopper/> (last visited Nov. 25, 2013) (the Hopper allows subscribers to watch live and recorded content on personal devices). Since cable rates were deregulated in 1984, the Consumer Price Index for “Cable/Satellite” has increased fourfold, about twice as fast as the general rate of inflation. These rates have increased faster than almost every other major category in the Index. CPI DETAILED REPORT DATA FOR SEPTEMBER 2012, BUREAU OF LAB. STATISTICS, at 12 (2012), *available at* <http://www.bls.gov/cpi/cpid1209.pdf>.

Alternatively, consumers could buy a digital antenna (approximately \$50) a stand-alone digital DVR (approximately \$350), and combine these with a video “space-shifting” product like Slingbox (\$180). *See ChannelMaster CM 2016 HDTV Antenna and TV CM 7400R HD DVR*, CHANNELMASTER, <http://www.channelmasterstore.com> (last visited Nov. 25, 2013); Slingbox 350 Product Page, SLINGBOX, http://www.slingbox.com/go/buy#.UH8Jwm_oSKI (last visited Nov. 25, 2013). When connected to a primary video source, such a device

enables the user to play a roughly live or recorded version on any of several possible screens. Sling Media, *Placeshifting: Set Your TV Free*, 9 (2011).

Unfortunately, spending over \$500 upfront is unrealistic for many consumers; especially given 25% of American households earn less than \$25,000 per year. *See* U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: TABLE S1901-INCOME IN THE PAST 12 MONTHS (2010). That is why FilmOn's service is so beneficial to the public—it allows a consumer to choose amongst plans ranging from \$1 for three hours of recorded television a month to \$199 for an entire year of unlimited service. *See* FilmOn.TV Subscriptions, FILMON.TV, <http://www.filmson.com/subscriptions> (last visited Nov. 30, 2013).

Without low-cost services giving consumers meaningful choices about how and when they receive broadcast television, many will be forced to forego full participation in modern information society. Broadband availability and adoption has dramatically increased in recent years. THREE SCREEN REPORT, NIELSEN, at 3 (2010) (in 2010, 63.5% of households had broadband internet, a 24% increase from 2008). However, content industry efforts to monetize and monopolize consumer choice may signal the opening of a new “digital divide” between members of the public who can take advantage of new tools that enable choice about how and when to access content, and those who are relegated to restrictive “basic” distribution models. *See* Lateef Mtima, *Copyright, Social Justice, and the*

Digitization of Knowledge, INST. OF IP & SOC. JUST. (July 2009). This new digital divide has the most deleterious effect on low-income people, those with less education, the elderly, and the disabled—the very groups that most need information access to become full participants in society. *See* DIGITAL DIFFERENCES, PEWRESEARCH, at 2-6 (2012).

By contrast, the freedom of choice that technologies like FilmOn offer, at a reasonable cost, empowers consumers and can help close the digital divide, thus enabling more consumers to become active and informed participants in society. Unfortunately, the injunction levied against FilmOn limits consumers once again. Aereo offers a nearly identical service to FilmOn, but has not been slapped with a nationwide injunction in any cases brought against it. Were this injunction to stand, there is a very real concern that Aereo will be the only choice for consumers. This lack of choice for the consumer increases prices and dulls Aereo's incentive to innovate and improve. Not only are consumers limited by a rejection of these new technologies, but they are further limited by access to only a single provider.

F. FilmOn is Representative of the Technological Trend Toward Services that Meet Consumer Demand for Choice.

Technologies like FilmOn can fulfill the important goal of promoting consumer choice in accessing information by combining a number of separate and independently legitimate technological functions. FilmOn provides consumers with access to their local broadcast programming content through individualized

antennas and hard drive systems located at FilmOn's facilities. *FilmOn X*, 2013 WL 4763414, at *2. Consumers can watch live programming on various devices through a miniaturized antenna allocated for their sole usage at that time. *Id.* Subscriber-specific hard drive profiles at FilmOn's facilities function as DVRs to enable both "live" viewing and time-shifted playback of broadcast programming. *Id.* at *3.

Each component function in FilmOn's technology is legitimate when undertaken separately. Receiving over-the-air broadcast signals is obviously lawful, and the antenna that enables it is a legitimate device. The same applies to the DVR that enables time-shifting. *See Sony*, 464 U.S. at 455. Even further, members of the public can remotely store that DVR device if they so choose. *See Cablevision*, 536 F.3d at 137. So what argument really exists for denying the public the right to remotely store both the DVR device and the antenna? Similarly, space-shifting broadcast content has been possible at least since the launch of the first Slingbox device in 2005, and its use has been affirmed as legitimate in the Ninth Circuit. *See Dish II*, 723 F.3d at 1080.

A consumer with a personal digital antenna, DVR, and Slingbox can choose what broadcast content to watch, and when and where to watch it, just like a FilmOn subscriber who makes use of hardware dedicated to that subscriber's use at FilmOn's facility. It is as if FilmOn sold the DVR, sold the antenna, then housed

the combined unit for the consumer. The owner of the combined unit is the only person to receive a transmission, and it must be done upon request of the owner. Denying the public these technological advancements of accepted practices is a disservice.

V. The District Court Erred In Granting a Nationwide Injunction.

Since the Second Circuit issued its *Cablevision* decision, studio broadcasters have had many years during which they could have brought actions in each district and circuit court of the United States in order to seek an injunction against Cablevision, but they did not do so. *See BarryDriller*, 915 F. Supp. 2d at 1148 (“[The *Cablevision* Plaintiffs] had every reason to seek rulings contrary to *Cablevision*’s public performance analysis in the other circuits in the four years after *Cablevision*, and do not appear to have done so.”). This implies that the Second Circuit reached the correct decision, and recent opinions have only buoyed this support of technological advancements in media consumption. *See Grokster*, 545 U.S. at 913; *Dish II*, 723 F.3d at 1067; *Aereo II*, 712 F.3d at 676.

Even though the court in *BarryDriller* reached the wrong conclusion on the merits, it rightly saw that each Circuit should be able to make its own decision whether to side with its interpretation of the FilmOn technology or the Second Circuit’s. *Id.* (“[T]he Court would not assume that the other Circuits would agree with a decision from this Court rather than *Cablevision*.”). By granting a

nationwide injunction here, the district court is not merely saying that Fox Television has a likelihood of success on the merits here in the District of Columbia; it is saying that Fox Television will be successful under the law of every circuit in America. That simply cannot be the case when two other circuits to this point have had nearly identical fact patterns and have come to hold that no injunction should be issued at all, let alone a national one. *See Aereo II*, 712 F.3d at 676; *Hearst Stations*, 2013 WL 5604284, at *9. At this point, it is more likely to say that no injunction should be levied against FilmOn; by issuing a nationwide injunction here, the court has allowed Fox Television to effectively forum shop until it found a court willing to speak for all the others.

CONCLUSION

The Supreme Court has cautioned, "[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." *Sony*, 464 U.S. at 429. FilmOn's technology conforms to the law and the Copyright Act's principles regarding private performances of copyrighted content. Consumers require lawful access to content and freedom of choice in how to use it: technology like FilmOn's thus serves a fundamental public interest. By recognizing that FilmOn enables private performances, this Court will support the development and distribution of technologies that serve consumers' interests without unnecessarily invading those of content owners. Failing to

embrace the transmit clause interpretation outlined in *Cablevision* would favor monopolistic incumbents at the expense of efficient, disintermediating technologies. The resulting imbalance between copyright protection and consumer choice would weigh heavily on many members of the public, who are the ultimate intended beneficiaries of copyright. This Court should overturn the district court's order by denying a preliminary injunction.

DATED: December 11, 2013

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CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(b) and 29(d) because it contains 6861 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th of December, 2013, I electronically filed the foregoing with the Clerk of the Court in the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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