

March 17, 2009

The Honorable Edwin S. Kneedler
Acting Solicitor General
United States Department of Justice
950 Pennsylvania Avenue
Washington, DC 20530

Dear Mr. Kneedler:

We understand that the Supreme Court has asked the Solicitor General to provide the Court with the position of the United States on the petition for certiorari in *CNN v. Cablevision*. We write to express the strong view of the undersigned entities – entities ranging from nonprofit groups devoted to protecting the interests of the public in today’s technological environment to industry associations representing companies with billions of dollars in sales – that the decision of the U.S. Court of Appeals for the Second Circuit is correct on the facts of the case and does not in any way create a gap or loophole in the legal regime of copyright. Of crucial importance to the entities listed here, the decision properly avoids casting a legal cloud over a wide range of common network and computing technologies. Moreover, the case would be a poor vehicle for review because stipulations below artificially narrowed the legal questions raised. We urge you to advise the Supreme Court against granting certiorari in the case.

The Supreme Court held in *Sony v. Universal Studios* that consumers may lawfully record television programs for later viewing. Tens of millions do so today using VCRs or digital video recorders (“DVRs”). The technology at issue in this case, the remote-storage DVR (“RS-DVR”), is essentially a DVR hooked up to the user’s television through a very long wire. The only meaningful difference between a traditional DVR and the RS-DVR is the physical location of the hardware. The Second Circuit correctly held that this difference does not give rise to expanded copyright liability.

That holding is entirely consistent with existing copyright principles, in light of the facts of the case. The RS-DVR operates virtually identically to an ordinary DVR or VCR; it permits a consumer to record television programs only as they air, and to play back to himself for his own viewing in his own home only those recordings that he lawfully made. Consumers cannot play back each other’s recordings, or play back recordings of shows they failed to record, or record a show that they had no right to view.

The Second Circuit ruling in no way creates a blanket rule that providers of remote storage are immune from copyright liability. Cases with different facts – for example, involving copying that is not mere recording of lawfully acquired programs for personal use – could yield different outcomes. Product or service providers that play a different role in making particular copies potentially could be considered for direct liability. Product or service providers that promote or encourage illegal copying could be subject to secondary liability. Indeed, the Second Circuit decision does not even preclude

secondary liability in future cases with virtually identical facts, because plaintiffs in this case elected to pursue direct liability only.

By contrast, plaintiffs' theory – if adopted by the Supreme Court – would have broad consequences, threatening valuable and ubiquitous technologies. This is the reason such a diverse coalition of entities is joining this letter. Widespread Internet connectivity is leading to increasing use of remote data storage and processing, sometimes referred to as “cloud computing.” For an entire category of socially valuable technologies, plaintiffs seek to substitute the strict liability rules of direct infringement for the traditional secondary liability approach that the Supreme Court has embraced for the past 25 years. This radical shift would stifle many existing and emerging technologies. In addition, digital products of all kinds employ transitory data buffers as a necessary consequence of their operation. A ruling that saddles this common activity with increased legal risk makes no sense in the world of modern digital technology.

Finally, even if some of these legal questions merited further review, *CNN v. Cablevision* would be a poor vehicle for resolving them. A full treatment of the issues would need to include consideration of secondary liability and fair use, both of which were excluded from the case by stipulations of the parties. With the available legal theories artificially limited by these stipulations, Supreme Court intervention could sow more confusion than it resolves.

For these reasons, we believe the United States should urge the Supreme Court to deny the petition for certiorari in *CNN v. Cablevision*.

Thank you for considering these views.

Sincerely,

American Library Association
Association of Research Libraries
Broadband Service Providers Association
Center for Democracy & Technology
Computer and Communications Industry Association
Consumer Electronics Association
CTIA – The Wireless Association
Electronic Frontier Foundation
Free Press
Home Recording Rights Coalition
Internet Commerce Coalition
NetCoalition
Public Knowledge
TechAmerica
US Internet Industry Association
USTelecom

Attachment – Description of Signatories

The American Library Association (ALA) is the oldest and largest library association in the world, with over 66,000 librarians, library trustees, and other friends of libraries dedicated to improving library services and promoting the public interest in a free and open information society.

The Association of Research Libraries (ARL) is a nonprofit organization of 123 research libraries in North America. ARL's mission is to influence the changing environment of scholarly communication and the public policies that affect research libraries and the communities they serve.

Members of the Broadband Service Providers Association (BPSA) deploy and operate facilities-based, advanced, last-mile broadband networks for the delivery of innovative bundles of voice, multichannel/on-demand video, and high-speed data/Internet services directly to homes and small businesses across the country. The current members of BPSA are Everest Communications, Hiawatha Broadband, Knology, PrairieWave Communications, RCN, and SureWest Communications. BPSA's mission is to promote and support the development of a competitive, facilities-based, broadband industry that will increase infrastructure investment, create customer choice, lower prices, and provide critical network diversity.

The Center for Democracy & Technology (CDT) is a nonprofit public interest group that seeks to promote free expression, privacy, individual liberty, and technological innovation on the open, decentralized Internet. CDT advocates balanced copyright policies that provide appropriate protections to creators without curtailing the openness and innovation that have been vital to realizing the democratizing potential of new digital media.

The Computer and Communications Industry Association (CCIA) is a nonprofit trade association dedicated to open markets, open systems, and open networks. CCIA members participate in many sectors of the computer, information technology, and telecommunications industries and range in size from small entrepreneurial firms to the largest in the industry. CCIA member companies together employ nearly one million people and generate annual revenues exceeding \$200 billion. A complete list of CCIA's members is available at <http://www.ccianet.org/members.html>.

The Consumer Electronics Association (CEA) is the preeminent trade association of the U.S. consumer electronics industry. CEA members lead the consumer electronics industry in the development, manufacturing, and distribution of audio, video, mobile electronics, communications, information technology, multimedia, and accessory products, as well as related services, that are sold through consumer channels. CEA's more than 2,100 corporate members contribute more than \$125 billion to the U.S. economy.

CTIA – The Wireless Association (formerly known as the Cellular Telecommunications & Internet Association) represents the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry participants.

The Electronic Frontier Foundation is a member-supported, nonprofit public interest organization devoted to maintaining the traditional balance that copyright law strikes between the interests of copyright owners and the interests of the public. Founded in 1990, EFF represents more than 13,000 dues-paying members including consumers, hobbyists, computer programmers, entrepreneurs, students, teachers, and researchers united in their reliance on a balanced copyright system that ensures adequate protection for copyright owners while ensuring broad access to information in the digital age.

Free Press is a national, nonpartisan, nonprofit organization dedicated to reforming the media in the public interest. Through education, organizing, and advocacy, Free Press works to increase informed public participation in crucial communications policy debates. Free Press and its members have been

involved in a wide range of media policy debates and have played a lead role in network neutrality debates.

The Home Recording Rights Coalition (HRRC) is a leading advocacy group for consumers' rights to use home electronics products for private, non-commercial purposes. HRRC represents the voice of consumers, retailers, manufacturers, and professional servicers of consumer electronics products. The HRRC was founded in 1981, in response to the Ninth Circuit's ruling in *Sony Corp. of America v. Universal City Studios*, later overturned by the Supreme Court, that distribution of consumer video recorders constituted contributory copyright infringement.

The Internet Commerce Coalition is a coalition of leading United States Internet service providers, such as Verizon, e-commerce companies, such as eBay, and technology trade associations, such as the United States Telecom Association. The ICC's mission is to achieve a legal environment that allows service providers, their customers, and other users to do business on the global Internet under reasonable rules governing liability and use of technology.

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

Public Knowledge is a nonprofit public interest advocacy organization that represents consumers' rights in Washington, D.C. Public Knowledge works with consumer and industry groups to promote balanced intellectual property law and technology policy, ensuring that the public can benefit from new innovations, fast and affordable access, and the use of content.

TechAmerica is the leading voice for the U.S. technology industry. Representing approximately 1,500 member companies of all sizes from the public and commercial sectors of the economy, it is the industry's largest advocacy organization and is dedicated to helping members' top and bottom lines. It is also the technology industry's only grassroots-to-global advocacy network, with offices in state capitals around the United States, Washington, D.C., Europe (Brussels) and Asia (Beijing). TechAmerica was formed by the merger of AeA (formerly the American Electronics Association), the Cyber Security Industry Alliance (CSIA), the Information Technology Association of America (ITAA) and the Government Electronics and Information Technology Association (GEIA).

The US Internet Industry Association (USIIA) is the primary trade association for Internet Service Providers in the United States, representing the interests of more than 1,000 companies engaged in Internet commerce, content and connectivity. Formed in 1994, USIIA serves its members through legislative advocacy and professional services. The association is headquartered in Alexandria, Virginia.

USTelecom, the United States Telecom Association, is the premier trade association representing service providers and suppliers for the telecommunications industry. Its diverse membership includes smaller companies such as BEVCOMM, Inc. based in Blue Earth, Minnesota and SureWest Communications in Sacramento, California. Both companies offer advanced digital video programming to subscribers in their service territories. USTelecom's members also include some of the largest corporations in the U.S. economy, such as AT&T and Verizon, which are each deploying new, state-of-the-art video services to consumers. USTelecom also has international and associate members which include consultants, communications equipment providers, banks and investors, and other parties with interests in the telecommunications industry.