07-1480-cv(L), 07-1511-cv(CON)

IN THE UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

THE CARTOON NETWORK LP, LLLP, and
TWENTIETH CENTURY FOX FILM CORP.,
Plaintiffs-Counterclaim-Defendants-Appellees,

TWENTIETH CENTURY FOX FILM CORPORATION, UNIVERSAL CITY STUDIOS PRODUCTIONS LLLP, PARAMOUNT PICTURES CORPORATION, DISNEY ENTERPRISES INC., CBS BROADCASTING INC., AMERICAN BROADCASTING COMPANIES, INC., NBC STUDIOS, INC.,
Plaintiffs-Counterclaim-Defendants-Appellees,

– v. –

CSC HOLDINGS, INC. and CABLEVISION SYSTEMS CORP.,
Defendants-Counterclaim-Plaintiffs-Third-Party Plaintiffs –Appellants,

(Caption Continued on Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICI CURIAE CENTER FOR DEMOCRACY & TECHNOLOGY, ELECTRONIC FRONTIER FOUNDATION, PUBLIC KNOWLEDGE, BROADBAND SERVICE PROVIDERS ASSOCIATION, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, CONSUMER ELECTRONICS ASSOCIATION, CTIA – THE WIRELESS ASSOCIATION, INTERNET COMMERCE COALITION, NETCOALITION, USTELECOM, HOME RECORDING RIGHTS COALITION, AMERICAN LIBRARY ASSOCIATION, AMERICAN ASSOCIATION OF LAW LIBRARIES, ASSOCIATION OF RESEARCH LIBRARIES, MEDICAL LIBRARY ASSOCIATION, AND SPECIAL LIBRARIES ASSOCIATION IN SUPPORT OF APPELLANTS URGING REVERSAL

(Counsel Listed on Inside Cover)

– v. –

TURNER BROADCASTING SYSTEM, INC., CABLE NEWS NETWORK LP, LLP, TURNER NETWORK SALES, INC., TURNER CLASSIC MOVIES, L.P., LLLP, TURNER NETWORK TELEVISION LP, LLLP,

Third-Party-Defendants-Appellees.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae state that:

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. CDT has no parent companies, subsidiaries, or affiliates. No publicly held corporation has an ownership stake of 10% or more in CDT.

The Electronic Frontier Foundation ("EFF") 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. EFF has no parent companies, subsidiaries, or affiliates. No publicly held corporation has an ownership stake of 10% or more in EFF.

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 balance in intellectual property law and technology policy, ensuring that the public can benefit from new innovations, fast and affordable access, and the use of content. Public Knowledge has no parent companies, affiliates, or subsidiaries. No public company holds an ownership stake in Public Knowledge.

Members of the Broadband Service Providers Association ("BSPA") 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 BSPA, all of which are last-mile, facilities-based providers, are: Everest Connections, Hiawatha Broadband, Knology, PrairieWave Communications, RCN, and SureWest Communications. BSPA's mission, as a nonprofit, member-supported trade association, 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. BSPA has no parent companies, subsidiaries, or affiliates. No publicly held corporation has an ownership stake of 10% or more in BSPA.

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. No publicly held corporation has an ownership stake of 10% or more in CEA.

The Computer & Communications Industry Association ("CCIA") is 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. No publicly held corporation has an ownership stake of 10% or more in CCIA.

CTIA - The Wireless Association® (formerly known as the Cellular Telecommunications & Internet Association) is a Section 501(c)(6) not-for-profit organization 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 of 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. No publicly held corporation has an ownership stake of 10% or more in CTIA.

The Internet Commerce Coalition is a coalition of leading United States Internet service providers, such as Comcast and 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. No publicly held corporation has an ownership stake of 10% or more in the ICC.

NetCoalition serves as the public policy voice for some of the world's most innovative Internet companies, including Bloomberg, CNET Networks, Google, IAC/InterActiveCorp., 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

* ICC member Time Warner Inc. declined to join this brief.

of this dynamic new medium. No publicly held corporation has an ownership stake of 10% or more in NetCoalition.

The United States Telecom Association ("USTelecom") 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 that include consultants, communications equipment providers, banks and investors, and other parties with interests in the telecommunications industry. USTelecom has no parent companies, subsidiaries, or affiliates. No publicly held corporation has an ownership stake of 10% or more in USTelecom.

The Home Recording Rights Coalition ("HRRC"), an unincorporated association, is a leading advocacy group for consumers' rights to use home electronics products for private, non-commercial purposes. The members of HRRC include 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 the Betamax litigation, later overturned by the Supreme Court, that distribution of consumer video recorders constituted contributory copyright infringement. No publicly held corporation has an ownership stake of 10% or more in HRRC.

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. No publicly held corporation has an ownership stake of 10% or more in ALA.

The American Association of Law Libraries ("AALL") is a nonprofit educational organization with over 5,000 members nationwide. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy. No publicly held corporation has an ownership stake of 10% or more in AALL.

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. No publicly held corporation has an ownership stake of 10% or more in ARL.

The Medical Library Association ("MLA") is a nonprofit, educational organization with more than 4,500 health sciences information professional members worldwide. Founded in 1898, MLA provides lifelong educational opportunities, supports a knowledgebase of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public. No publicly held corporation has an ownership stake of 10% or more in MLA.

The Special Libraries Association ("SLA") is a nonprofit global organization for innovative information professionals and their strategic partners. SLA serves more than 12,000 members in 83 countries in the information profession, including corporate, academic and government information specialists. SLA promotes and strengthens its members through learning, advocacy and networking initiatives. No publicly held corporation has an ownership stake of 10% or more in SLA.

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INTEREST OF AMICI CURIAE

The law is clear that when one party provides the means for reproducing a copyrighted work and another party makes the decision to copy, only the party exercising control over the copying decision is potentially liable for direct copyright infringement. *See, e.g.*, *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004). Contrary to that rule, the district court deemed Cablevision a direct infringer because of its control over a means of copying. The district court focused on factors – such as the placement of equipment in Cablevision's offices, and Cablevision's offering of access to the equipment as a service rather than a product for purchase – that are unrelated to the correct inquiry whether Cablevision engaged in the volitional conduct necessary to be held liable for direct infringement. Focusing on these irrelevant factors, the district court imposed liability on Cablevision without any consideration of whether Cablevision's service has noninfringing uses or whether imposing liability would advance or undermine the purposes of copyright law.

Amici are trade associations and consumer and public interest groups that collectively represent a wide spectrum of industry, nonprofit, and consumer interests, with a particular focus on high-technology enterprises and issues. The amici trade associations, for example, represent leading (and smaller) companies in the computer, consumer electronics, Internet services, and wireless and wireline communications businesses, among others. Amici have a strong interest in this case because finding Cablevision liable for direct copyright infringement on the record facts would upset the balance that Congress and the courts have sought to achieve between protecting the legitimate interests of copyright holders on the one hand, and, on the other hand, accommodating innovative and socially useful products and services that make full use of modern communications networks.

In this brief, amici focus on two principal concerns. First, because the district court rested its finding of direct copyright infringement largely on the location of the recording device and Cablevision's offering of a network-based service rather than a stand-alone device, upholding its decision based on the record below would establish an unprincipled legal bias against remote and network-based services. Innovation and economic growth would suffer without any countervailing promotion of invention or creativity. Second, because the decision below gives no weight to consumers' lawful uses of Cablevision's remote DVR, it generally endangers fair uses of copyrighted material that employ similar remote and network-based technologies. Development of new technologies such as remote data storage and remote computing applications would be chilled. For these reasons, the decision below threatens harm to consumers, nonprofit institutions, and businesses, including amici and their members.

All parties have consented to the submission of this brief.

SUMMARY OF ARGUMENT

1. The question in this case is whether Cablevision directly infringes plaintiffs' copyrights when, in addition to distributing licensed video programming, it provides a service that enables the subscriber, solely at his or her option, to record the programming for viewing at a more convenient time. Contrary to the district court's holding, Cablevision is not a direct infringer in this situation.

Those who reproduce or publicly perform a copyrighted video work may be direct infringers under 17 U.S.C. § 106(1) or (4) unless their use is licensed or permitted under 17 U.S.C. §§ 107-122. But those who merely provide the means for engaging in activities covered by Section 106 can be liable only secondarily, if at all. As the Fourth Circuit explained in *CoStar*, "[t]o establish direct liability . . . something more must be shown than mere ownership of a machine used by others to make illegal copies." 373 F.3d at 550 (emphasis omitted). Therefore, a service provider "who owns an electronic facility that responds automatically to users' input is not a direct infringer." *Id.*

Cablevision's remote DVR carries out user commands on a fully automated basis, with no volitional action by any Cablevision employee. Regardless of the technical details or location of the system, Cablevision cannot be liable as a direct infringer because it lacks control over the customers' decision to copy.

The Supreme Court's decision in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984), establishes that the provider of a device that is "capable of substantial noninfringing uses" cannot be held secondarily liable for copyright infringement. Had the district court analyzed Cablevision's activities under the law of secondary liability, *Sony* would have provided Cablevision with a powerful defense. Surely for that reason, plaintiffs brought only a direct liability claim.

The district court seems not to have considered the implications of plaintiffs' end run around *Sony*. It concluded that facilitating consumer activities that may constitute socially desirable fair use – which cannot lead to secondary liability because there would be no direct infringer – is nevertheless a basis for finding direct infringement by Cablevision. The district court's implausible conclusion was incorrect under established principles of copyright.[1]

2. Unlike secondary liability, direct infringement is a strict liability offense that "does not require intent or any particular state of mind." *Religious Tech. Ctr. v. Netcom On-line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1367 (N.D.

[1] Because plaintiffs did not allege contributory infringement giving rise to attendant fair use issues, this case lacks the sort of factual record that would be necessary to evaluate a contributory infringement claim and provides no basis for questioning the legality of consumer time-shifting under *Sony*. *See* Opinion, *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, Dkt. Nos. 06-Civ.-3390, 06-Civ.-4092, at 18 (S.D.N.Y Mar. 22, 2007) ("Op."), reprinted at SPA-1 through SPA-37.

Cal. 1995). Moreover, innovators will not be held liable under secondary liability principles based on their design and distribution of a product that has substantial noninfringing uses. *See Sony*, 464 U.S. at 442. The rules governing secondary liability help to ensure that potential copyright liability does not "compromise legitimate commerce or discourage innovation having a lawful promise." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005). In finding direct liability, the district court undermined the protections of noninfringing uses that are built into the law of secondary liability.

The resulting threat to technological progress is immediate. The widespread availability of high-speed ("broadband") Internet connections has led to new forms of information processing, storage, and retrieval, all enabled by remote, interconnected computers owned and maintained by third parties and accessible to many. Rather than having to own, maintain, and upgrade devices in their own homes, consumers increasingly have remote access to services that provide the same or better capabilities more efficiently and conveniently, and that enable the sharing of information among all users. The interaction and interdependence of networked devices blurs lines between "devices" and "services."

Remote and network-based computing promote efficiency and economic growth, and benefit the public. If suppliers and operators of remote and network-based devices are potentially liable for direct copyright infringement based on the activities of their customers, including noninfringing uses, then new technologies and services will be discouraged for no legitimate copyright purpose.

ARGUMENT

I. CABLEVISION'S REMOTE DVR DOES NOT DIRECTLY INFRINGE PLAINTIFFS' COPYRIGHTS

Cablevision holds licenses that authorize it to deliver plaintiffs' programming to consumers. After that licensed delivery, the customer controls his or her own use of the programming. Because the decision to record and later view programming via Cablevision's remote DVR is entirely up to the customer, Cablevision could be liable, if at all, solely under principles of secondary liability.

A. Cablevision's Delivery of Video Programming to Devices Chosen by Its Customers Is Licensed and Non-Infringing

Cablevision is authorized, either by statute or through privately negotiated licenses, to deliver both over-the-air and non-broadcast programming to its customers. *See* 17 U.S.C. § 111 and 17 C.F.R. Part 256 (compulsory license for broadcast programming); 47 U.S.C. §§ 325(b), 534-535 (negotiated or compulsory carriage of local broadcast signals); Op. at 4.

Cablevision's delivery of video programming to the remote DVR is no different in substance than Cablevision's delivery of video programming to the same customer's television set, cable box, VCR, or home DVR. In using the remote DVR, Cablevision's customer specifically directs the recording of particular programming. *See* Op. at 14. Based on that instruction, the programming is directed automatically to a dedicated portion of the remote DVR that Cablevision has set aside for the individual customer's exclusive use. *See id.* at 10. Thus, "if 1000 customers want to record a specific episode of HBO's 'The Wire,' 1000 separate copies of that episode are made, each copy uniquely associated by identifiers with the set-top box of the requesting customer." *Id.* at 16. Only the particular user who decides to record the program on his or her assigned portion of the DVR has access to that copy. *See* Op. at 10. The customer's control over recordings he or she has stored on Cablevision's remote DVR is just as complete as if the recordings had been made on a home device. The customer can play or delete the recorded program at any time. *See id.* at 10, 17.

Cablevision does not infringe plaintiffs' copyrights when its customers receive video programming over the cable system at the device of their choosing. *See Sony*, 464 U.S. at 433 (an authorized user "is not an infringer of the copyright with respect to such use"); *Gilliam v. American Broad. Cos., Inc.*, 538 F.2d 14, 20 (2d Cir. 1976) (if a "work is licensed by the proprietor of the copyright . . . , those parties will, of course, suffer no liability for their use of the underlying work consistent with the license"). Moreover, Cablevision's licensed provision of programming to its customers does not result in infringement simply because

Cablevision *also* provides the customer with a means of recording that programming for fair use purposes.[2]

B. Because Cablevision Lacks Control Over the Copying Decision, It Is Not a Direct Infringer

Under the licenses described above, plaintiffs receive payment for the delivery of their programming into the control of Cablevision's customers. What plaintiffs want is to be *paid again* when the customer chooses to record the programming for viewing at a later time.

Fundamentally the same issue was presented in *Sony*, where the copyright holders, advancing a contributory infringement theory pursuant to the law of secondary liability, attempted to force Sony to pay royalties "for distributing [video recorders] to the general public." 464 U.S. at 421. Plaintiffs similarly would require Cablevision to pay royalties for providing a service that enables customers to view video programming at a later time of the customer's choosing – or to stop providing the service. Rather than making the rejected argument that

[2] During the district court's hearing on the cross-motions for summary judgment, counsel for plaintiff Twentieth Century Fox confirmed that Cablevision has licenses for "cablecasting" plaintiffs' programming, and that the plaintiffs' claims of infringement accordingly are limited to activities involving the sending of programming "through" the remote DVR, which are discussed in the next section of this brief. *See* Hearing Transcript, *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, Dkt. Nos. 06-Civ.-3390, 06-Civ.-4092, at 199-201 (S.D.N.Y Oct. 31, 2006).

consumers' recording of television programming for time-shifting purposes is not fair use, *see id.* at 442-56, however, plaintiffs allege direct copyright infringement.

In attempting to dodge *Sony*, plaintiffs run straight into a basic principle of copyright: Providing consumers the means by which they implement their own choices is not grounds for a direct infringement action. It is, instead, a description of grounds on which a claim of secondary liability might be pursued.

1. A Plaintiff Who Alleges Direct Infringement Must Show Copying by the Defendant Himself, Not Just Contribution to Copying Undertaken by Another

Liability for contributory infringement – which is the species of secondary liability that is relevant to this case – arises if defendant "induces, causes or materially contributes to the infringing conduct of another." *Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted) (finding party secondarily liable for contributory infringement because it "was in a position to police the infringing conduct" even though it "has not [it]self performed the protected composition"). But for the Supreme Court's determination in *Sony* that consumers' use of video recorders is permissible fair use, plaintiffs surely would have brought this case under a contributory infringement theory.[3]

[3] Vicarious infringement and possible other grounds for secondary liability are not pertinent here. *See generally Grokster*, 545 U.S. at 930-37 (discussing requirements for secondary liability).

By advancing only a direct infringement claim, plaintiffs have assumed the burden of making a particular showing. Only a party who "trespasses on [the copyright owner's] exclusive domain . . . 'is [a direct] infringer of the copyright.'" *Sony*, 464 U.S. at 433. "To prove infringement," the plaintiff "must demonstrate that defendants," themselves, "'copied' his work and that they 'improperly appropriated' his 'expression.'" *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1980).

There is a critical difference between direct and contributory infringement. Because contributory infringement requires "infringing conduct of another," *Gershwin Publishing*, 443 F.2d at 1162, fair use or other non-infringing activity by a defendant's customers provides an absolute defense to a claim of contributory infringement. "To prevail on a contributory . . . infringement claim, a plaintiff must show direct infringement by a third party." *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 911 (N.D. Cal. 2000), aff'd in part and rev'd in part, 239 F.3d 1004 (9th Cir. 2001). By contrast, the conduct of a defendant's customers "would be wholly irrelevant in an action for direct infringement." *Sony*, 464 U.S. at 446. In this action, therefore, plaintiffs seek to take off the table the fair use defense that prevailed in *Sony* and spawned the home-recording industry.

Given that plaintiffs are attempting to avoid a Supreme Court decision that has stood as good law for more than 20 years, it is not surprising that, as explained below, the district court strayed outside the boundaries of precedent when it accepted plaintiffs' arguments.

2. *Cablevision Is Not Liable for Direct Infringement of Plaintiffs' Reproduction Rights Because its Customers Decide What To Record on the Remote DVR and When To View Stored Programs*

The requirements for direct infringement in a case involving remotely provided services were stated by the Fourth Circuit in *CoStar*, 373 F.3d 544 – a leading case that the district court did not acknowledge. The Fourth Circuit explained that:

> [T]o establish direct liability . . . something more must be shown than mere ownership of a machine used by others to make illegal copies. There must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner.

Id. at 550. A service provider "who owns an electronic facility that responds automatically to users' input" therefore "is not a direct infringer." *Id.* This rule is consistent with the traditional requirements for direct infringement of a copyright holder's reproduction right (17 U.S.C. § 106(1)), and with the holdings of those courts that have faced similar claims.

Until the late 20th Century, engaging in "conduct with a nexus sufficiently close and causal to the illegal copying," *CoStar*, 373 F.3d at 550, was almost invariably a matter of physically undertaking the infringing activity. Today, however, copying instructions can be delivered via wired or wireless communications to a remote network server, personal computer, or other digital device located off of the copier's premises, and usually maintained by a third party. In response to this physical and legal separation between the party who controls the copying decision and the party who controls the copying equipment, courts have clarified that direct liability attaches, if at all, only to the party who controls the decision to copy. A party whose role is limited to providing the means by which copies are made is not liable for direct infringement.[4]

In one of the first of the network-oriented cases, an Internet service provider was accused of direct copyright infringement based on a customer's posting of copyrighted material to the service provider's computer servers. *See Netcom*, 907 F. Supp. at 1367-68. The Northern District of California rejected the direct infringement claim, holding that direct infringement requires "some element of *volition or causation* which is lacking where a defendant's system is merely used to create a copy by a third party." *Id.* at 1370 (emphasis added). Volitional control over the copying is necessary for direct infringement, the court explained, because

[4] This rule is consistent with the description of copyright infringement as a strict liability tort. "Strict liability" in this context means that intent is not an element of the prima facie case; the defendant must still engage in directly infringing conduct.

any other "theory would create many separate acts of infringement and, carried to its natural extreme, would lead to unreasonable liability." *Id.* at 1369.

In *CoStar*, the Fourth Circuit endorsed and further explained *Netcom*. CoStar owned copyrighted photographs of commercial real estate. It brought a direct infringement claim against an Internet service provider, LoopNet, that provided a Web hosting service for real estate listings. LoopNet's customers were loading CoStar's copyrighted photographs onto LoopNet's computers for display on the LoopNet website. *See CoStar*, 373 F.3d at 546-47. The Fourth Circuit held that because LoopNet only provided the means by which copyrights were being infringed and was not "an actual duplicator itself," LoopNet was "not *directly* liable for copyright infringement." *Id.* at 546. It explained that control of the decision to copy is required for direct infringement because "[w]ere this not so, the Supreme Court could not have held, as it did in *Sony,* that a manufacturer of copy machines, possessing constructive knowledge that purchasers of its machine may be using them to engage in copyright infringement, is not strictly liable for infringement." *Id.* at 549. *CoStar* is directly on point here: Plaintiffs are attempting to hold Cablevision liable for providing a service that enables consumers to decide what, if any, programming to store remotely for later viewing.

Consistent with *CoStar*, the court in *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 497 (E.D. Pa. 2006), could not discern "the necessary volitional element to