**ORAL ARGUMENT NOT YET SCHEDULED**

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

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

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FILMON X, LLC, *et al*.,

*Defendants-Appellants,*

v.

FOX TELEVISION STATIONS, INC., *et al*.,

*Plaintiffs-Appellees.*

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On Appeal from the United States District Court
for the District of Columbia, Case No. 13-cv-00758-RMC (Collyer, J.)

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# BRIEF OF AMICI CURIAE ELECTRONIC FRONTIER FOUNDATION, PUBLIC KNOWLEDGE, AND ENGINE ADVOCACY IN SUPPORT OF NEITHER PARTY

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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 in this Court are listed in the Brief for Defendants-Appellants:

Electronic Frontier Foundation, Public Knowledge and Engine Advocacy are *amici curiae* in this appeal.

**B. Rulings under Review.** References to rulings at issue appear in the brief for Defendants-Appellants.

**C. Related Cases.** References to related cases appear in the Brief for Defendants-Appellants.

Dated: December 12, 2013

*/s/ Mitchell L. Stoltz*
Mitchell L. Stoltz

## CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, *Amici* submit the following corporate disclosure statement:

*Amicus* Electronic Frontier Foundation ("EFF") is a non-profit organization. EFF has no parent corporation, and does not issue stock.

*Amicus* Public Knowledge ("PK") is a non-profit organization. PK has no parent corporation, and does not issue stock.

*Amicus* Engine Advocacy ("Engine") is a non-profit organization. Engine has no parent corporation, and does not issue stock.

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## INTEREST OF AMICI[1]

The Electronic Frontier Foundation (EFF) is a member-supported, non-profit public interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990, EFF has more than 25,000 members and maintains one of the most linked-to websites in the world (http://www.eff.org). EFF promotes the sound development of copyright law as a balanced legal regime that fosters creativity, innovation, and the spread of knowledge. EFF's interest with respect to copyright law reaches beyond specific industry sectors and technologies to promote well-informed copyright jurisprudence.

Public Knowledge is a non-profit public interest 501(c)(3) corporation, working to defend citizens' rights in the emerging digital culture. Its primary mission is to promote online innovation, protect the legal rights of all users of copyrighted works, and ensure that emerging copyright and telecommunications policies serve the public interest. Applying its years of expertise in these areas,

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. Letters of the Parties' general consent to the filing of amicus briefs are on file with the Court.

Public Knowledge frequently files amicus briefs in cases that raise novel issues at the intersection of media, copyright, and telecommunications law.[2]

Engine Advocacy is a non-profit organization that supports the growth of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues. As part of its advocacy efforts, Engine has built a coalition of more than 500 high-growth businesses and associations, pioneers, innovators, investors, and technologists from all over the country, committed to taking action on the policy issues that affect the way they run their businesses.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Intellectual property laws balance important public and private interests. Sound policy and clear precedent forbid any axiomatic bias in favor of one interest over another, especially when new technologies are at issue. That is because "the monopoly privileges that Congress has authorized . . . are limited in nature and *must ultimately serve the public good*." *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 526 (1994) (emphasis added).

*Amici* are organizations that work to promote the public interest in the progress of lawful information technologies. The district court's opinion threatens

[2] Public Knowledge would like to acknowledge Stephen Wang's contributions to this brief.

to thwart that progress. The court misapplied the preliminary injunction standard, invoking categorical presumptions forbidden by Supreme Court precedent and factual assumptions that, if affirmed, could create a systematic bias against emerging technologies, suppressing investment and vital risk-taking. Regardless of the outcome of this case, this Court should disavow these errors and reaffirm an injunction standard that furthers the Constitutional goal of copyright and patent law to "Promote the Progress of Science and useful Arts."

# ARGUMENT

## I. THE DISTRICT COURT'S USE OF CATEGORICAL PRESUMPTIONS AND PERFUNCTORY ANALYSIS IN THE APPLICATION OF THE PRELIMINARY INJUNCTION FACTORS WAS ERRONEOUS.

The district court improperly applied the preliminary injunction standard by giving impermissibly formulaic treatment to the balance of harms and the public interest. It also ignored a substantial piece of the public interest at issue in this case—public access to free-to-air programming.

### A. eBay and Its Progeny Forbid Categorical Approaches and Presumptions in the Injunction Analysis.

In *eBay*, the Supreme Court ruled that courts could not apply "general rules" to the "traditional equitable principles" underlying the grant of injunctive relief. *eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388, 392-93 (2006). Criticizing the lower courts for applying overly formulaic analyses to a question of whether or not an injunction should issue against a patent infringement, the Court faulted the district court for "adopt[ing] . . . expansive principles suggesting that injunctive relief could not issue" when the patentee was not practicing the invention because such a "categorical rule . . . cannot be squared with the principles of equity adopted by Congress." *Id.* at 393. The Court was equally critical of the Federal Circuit's "general rule" that "'a permanent injunction will issue once infringement and validity have been adjudged.'" *Id*. at 393-94 (quoting *MercExchange L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1338 (Fed. Cir. 2005)). Invoking the same concerns in copyright cases, the Court emphasized that it "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." *Id.* at 392-93. Rejecting "broad classifications" and "general rule[s]," the Court focused on the *entire* four-factor test when it vacated the judgment. *Id*. at 393-94.

*eBay* stands for the proposition that a court may not apply categorical rules to the injunction analysis. Quite the contrary: the entire enterprise of injunctive relief is based on principles of equity, and the same principles that prohibit mechanical presumptions regarding irreparable harm likewise bar courts from mechanical application of categorical rules to questions of the public interest and the balance of hardships. *See Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010) ("[A]t minimum, we must consider whether irreparable injury is *likely* in the absence of an injunction, we must balance the competing claims of injury, and we must pay particular regard for the public consequences in employing the extraordinary remedy of injunction.") (citation omitted); *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543-47 (4th Cir. 2007). The courts of appeal have since applied *eBay*'s prohibition against categorical rules in a variety of patent and copyright cases.[3] The overwhelming weight of authority counsels against endorsing any form of categorical approach to the injunction analysis– precisely what the district court did here.

### B. The Injunction Analysis Must Consider Harm to the Defendant Assuming Defendant Prevails on the Merits.

The district court's preliminary injunction analysis boiled down to a conclusion that the defendant "has 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." Dist. Ct. Op. 17. That glib conclusion effectively disregarded the balance of harms analysis required by *eBay*.

That requirement helps ensure that copyright does not impede legitimate innovation. In essence, the preliminary injunction factors exist to give a district

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[3] *See, e.g., Salinger*, 607 F.3d at 78 n.7; *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011); *Phelps,* 492 F.3d at 543; *Bethesda Softworks*, *L.L.C. v. Interplay Entertainment Corp.*, 452 Fed. Appx. 351 (4th Cir. 2011); *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.* 654 F.3d. 989 (9th Cir. 2011).

court the opportunity to minimize the costs of its being mistaken. *Am. Hosp. Supply Corp. v. Hosp. Prod, Ltd.*, 780 F.2d 589, 593-94 (7th Cir. 1986); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1000 (10th Cir. 2004). Even if a plaintiff has a high likelihood of success, potential harms to a defendant might be so great as to caution against the granting of an injunction. Careful analysis of all four factors helps account for that possibility. Such care is especially important where the defendant is a new entrant in the market and injunctive relief may mean the end of the defendant's business. In balancing harms, therefore, a court must consider the harms of a continuing infringement upon the plaintiff, but must also ensure that an injunction would not burden the defendant's property unrelated to the infringement, or serve an unduly punitive purpose. *Phelps*, 492 F.3d at 545.

The district court's cursory analysis of the balance of harms fell short of that obligation, because it was rooted in two problematic assumptions. First, the court assumed that FilmOn X's service is infringing. *See* Dist. Ct. Op. 17. Of course, FilmOn X may be found to be non-infringing at trial or on appeal, as other courts have found for services similar to FilmOnX's. *See Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008); *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013); *Hearst Stations, Inc. d/b/a WCVB-TV v. Aereo, Inc.*, No. 13-cv-11649-NMG, 2013 WL 5604284 (D. Mass. Oct. 8, 2013). Second, the court assumed that harm caused to the defendant by a preliminary injunction that stops conduct later found to be infringing can never be cognizable. That assumption effectively rendered the "balance of harm" factor redundant of the "likelihood of success" factor. In other words, by assuming that the defendant's conduct is infringing and that stopping that conduct would cause no cognizable harm, the district court effectively circumvented the balance of harms component of the analysis.

Numerous appellate courts have rejected similarly simplistic approaches in light of *eBay*. *See, e.g.*, *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 755 (7th Cir. 2012) ("the district judge . . . erred at the outset by saying that 'as a practical matter, the analysis boils down to a single factor—the plaintiff's likelihood of success'"). The Ninth Circuit, for example, has recognized that courts should not "allow[] the collapse of factors that plaintiff must prove down to one." *Flexible Lifeline Sys., Inc. v. Precision Lift*, Inc., 654 F.3d 989, 999-1000 (9th Cir. 2011). Likewise, the Second Circuit found that courts cannot "presume that a party has met an element of the injunction standard." *Salinger*, 607 F.3d at 78 n.7 (2d Cir. 2010) (citing *eBay*, 547 U.S. at 391-94). And the Fourth Circuit has emphasized that, in *eBay*, "the Supreme Court rejected any notion that 'an injunction automatically follows a determination that a copyright has been infringed.'" *Phelps*, 492 F.3d at 543 (4th Cir. 2007) (quoting *eBay*, 547 U.S. at 392-93).

Indeed, a general rule discounting hardships resulting from an injunction grant removes the court's proper exercise of discretion from the equitable inquiry. *See Perfect 10*, 653 F.3d at 980. If equity is to consist of considerations apart from law, then there must be room for a court to acknowledge a plaintiff's likelihood of success on the merits and yet also find for defendants on the balance of hardships. *eBay* and its progeny caution against just such a removal of a court's equitable discretion.

### C. The Court Erred In Presuming That The Public Interest in Copyright Is Always Served by Granting an Injunction.

The court below erred in relying on the statement in *Apple Computer, Inc. v. Franklin Computer Corp.* that "[i]t is virtually axiomatic that the public interest can only be served by upholding copyright protections and correspondingly, preventing the misappropriation of skills, creative energies, and resources which are invested in the protected work." 714 F.2d 1240, 1255 (3rd Cir. 1983).

Such an axiom is precisely the sort of "broad characterization" that *eBay* forbids. If a general presumption of irreparable harm is contrary to the principles of equity, a general presumption that a class of injunctions is always in the public interest is also contrary to these principles. What is worse, the *Apple* court linked its determination of the public interest to the same specific presumption of irreparable harm later rejected by the Supreme Court in *eBay*. *See Apple Computer*, 714 F.2d at 1255. The case cannot sustain the weight the district court put on it.

Moreover, the axiom in question is incorrect. The public interest is not always best served through injunctive relief in copyright cases. Copyright law operates through a balance between the interests of the author (being compensated for creating the work) and the interests of the public (having the ability to access the work):

> The limited scope of the copyright holder's statutory monopoly . . . 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); *see also Salinger*, 607 F.3d at 82 ("The public's interest in free expression, however, is significant and is distinct from the parties' speech interests."). The public interest lies not merely in protecting as strenuously as possible the bounds of the plaintiffs' copyrights, nor even in protecting the legitimate interests of the defendant's ability to do business. The public has a strong interest in, inter alia, lawful access to creative works, competition among technology providers, and the public interest in innovation.

### D. The Public Interest in Promoting Public Reception of Broadcasting Would Be Harmed by an Injunction.

If the district court had given the public interest appropriate consideration, it would have come to a very different conclusion. That is because broadcasters are not typical private rightsholders. They are public trustees, given significant public benefits with the expectation that they will reciprocate. Specifically, they are expected to serve the longstanding public interest in fostering access to free over-the-air programming.[4] Thus, the district court's public interest analysis should have started with a recognition of this longstanding commitment to protecting public access to broadcast programming. To the extent that FilmOn X furthers that aim, and helps ensure that viewers can access free broadcast programming, it too serves that public interest.

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[4] The failure of broadcasters to come to terms with the burdens as well as the benefits of their office is nothing new. As future Chief Justice Warren Burger lamented:

> A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot . . . [T]he broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust.

*Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

### 1. Broadcast Frequencies Are a Public Trust.

"[B]roadcast frequencies are limited and, therefore, they have been necessarily considered a public trust." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 382 (1969) (citing S. Rep. No. 86-562, at 8-9 (1959)). As the Supreme Court explained,

> [T]he fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government.

*Id.* at 400. Because licenses to use the airwaves are scarce "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount" because regulators determine how to allocate them. *Id.* at 390. To promote "the right of the public to receive suitable access" to ideas and information, *Id.* at 390, policymakers took numerous steps "to ensure that every individual with a television set can obtain access to free television programming." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 647 (1994). These include regulations such as must-carry, distant signal importation, network non-duplication, and syndicated exclusivity rules. John Bergmayer, Tomorrowvision, http://www.publicknowledge.org/ tomorrowvision (2012). Taken together, these help "assur[e] that the public has access to a multiplicity of information sources," which is a "a governmental purpose of the highest order." *Turner Broadcasting*

*System, Inc. v. FCC*, 512 U.S. at 663; *see also United States v. Midwest Video Corp.*, 406 U.S. 649, 668, n.27 (1972) (plurality opinion); *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978).

### 2. To Promote the Public Interest, Broadcasters Receive Numerous Subsidies.

Another aspect of the bargain is public subsidies, including "those given directly via taxpayers," such as spectrum access, and "those given indirectly via regulations imposed upon buyers, suppliers, and competitors," J.H. Snider, *Speak Softly and Carry a Big Stick: How Broadcasters Exert Political Power* 37 (2005), such as the regulatory privileges like syndicated exclusivity, and copyright-specific special protections, including an exemption from paying public performance royalties to songwriters.

In terms of monetary value, broadcasters' largest subsidies are spectrum rights. Broadcasters were first allocated prime spectrum "real estate"—frequencies that can cover wide areas with a minimum of broadcast towers, and that can pass easily through trees, buildings, and other obstructions—at a time when TV broadcasting was the height of communications technology, and before auctions became the typical way to allocate licenses to the exclusive use of public airwaves.

Even though technology and public policy have since moved on, broadcasters have not. As economist Thomas Hazlett has explained, "Today, the social opportunity cost of using the TV Band for television broadcasting – 294 MHz of spectrum with excellent propagation characteristics for mobile voice and data networks, including 4G technologies – is conservatively estimated to exceed $1 trillion (in present value)." Comment of Thomas Hazlett, in A National Broadband Plan for Our Future, GN Dckt. No. 09-51, Federal Communications Commission (filed Dec. 18. 2009).[5]

In recent years, broadcasters have lobbied for, and won, yet more free spectrum. In the late 1990s, when new "digital" spectrum was set to be allocated to the broadcasting industry and proposals were floated to allocate it on an auction basis, the broadcasting industry lobbied heavily against it. *See* Snider, *supra* at 346-47. The president of NBC even called the idea that broadcasters (like other commercial spectrum users) would pay for the right to use the airwaves like "taxing the right to build churches." *Id*. at 347 (citing Ralph Kinney Bennett, *The*

[5] More conservatively, CTIA – The Wireless Association and the Consumer Electronics Association have concluded that the FCC's broadcast incentive auctions, where only a few broadcasters would give up their licenses for more productive uses, could produce more than $33 billion in revenue for the U.S. Treasury. *See* Press Release, "CTIA and CEA Study Finds Broadcast Incentive Auction Will Net U.S. Treasury More Than $33 Billion," Feb. 15, 2011, *available at* http://www.reuters.com/article/2011/02/15/idUS195792+15-Feb-2011+BW20110215.

*Great Airwaves Giveaway*, Reader's Digest, June 1996, at 150). In the end, Congress decided not to go forward with the plan. As a result,

> [n]o auction took place, even though some estimates of the spectrum's value have ranged between $20 and $132 billion. No lottery took place, even though that process might permit those without broadcast licenses to gain access to the airwaves. No distribution to any new entrant took place, even though licensed competitive newcomers might rush in with bold new plans for digital services. Instead, after years of intense lobbying by the broadcast industry, Congress directed the FCC to limit eligibility for digital licenses to those who already held analog licenses or construction permits.
>
> Congress and broadcasters justified this massive benefit, in substantial part, on the grounds that existing broadcasters deserved it because of their unique service to the American people, through the programming they provide. According to one of the rationalizations offered for the spectrum give-away, incumbent broadcasters are steeped in the tradition of public service.

Gretchen Craft Rubin, *Quid Pro Quo: What Broadcasters Really Want*, 66 Geo. Wash. L. Rev. 686, *694 (1997).

### 3. In Exchange for Subsidized Control of the Airwaves, Broadcasters Historically Recognized an Obligation to Foster *Free* Access to Broadcast Programming.

As a variety of courts have recognized, "A licensed broadcaster . . . is burdened by enforceable public obligations.'" *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (citing *United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966)). Accordingly, "[i]n the Communications Act of 1934, Congress created a system of *free broadcast service* . . . ." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 633 (1994) (citing Communications Act of 1934, § 307(b), 48 Stat. 1083, 47

U.S.C. § 307(b)) (emphasis added). Congress has found that there is a "substantial government interest in promoting the continued availability of . . . free television programming, especially for viewers who are unable to afford other means of receiving programming." Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 2(a)(12), 106 Stat. 1460, 1461 (codified as amended at 47 U.S.C. § 521 (2000)). The Supreme Court has likewise found that "preserving the benefits of *free*, over-the-air local broadcast television" is an important government interest. *Turner Broadcasting System*, *Inc. v. FCC*, 520 U.S. 180, 189 (1997) (emphasis added).

Historically, broadcasters have agreed that the "free service" they provide is one of their defining characteristics. Edward Fritts, 19th President of the National Association of Broadcasters, once wrote that "[s]erving the public interest is more than a mandate handed down by Congress. It is a self-imposed credo by which successful broadcasters operate their stations. It is the touchstone of American broadcasting." *Broadcasters and the Public Interest*, in *Public Interest and the Business of Broadcasting* 53 (Jon T. Powell & Wally Gair, eds.) (Quorum Books 1988).

As Snider explains,

> Broadcasters came to claim that they provided a 'free' service while their competitors provided a 'pay' service. As a consequence, broadcasters argued that they deserved an array of government subsidies (e.g., free spectrum) and regulatory privileges (e.g., free cable and satellite carriage of broadcast

> programming) because of this free service to the public. Looking back at 15 years of NAB's legislative issue papers (talking points to use with legislators), I couldn't find a single one that didn't mention 'free TV' as a worthy goal for Congress to pursue. In broadcasters' Congressional testimony and FCC comments, the term 'free TV' is endlessly repeated.

Snider, *supra* at 308. For example, NBC Universal, as a condition of its merger with Comcast, agreed to maintain free access to over-the-air broadcast programming. Applications and Public Interest Statement of Comcast Corporation, General Electric Company, and NBC Universal, Inc., *In the Matter of Applications for Consent to the Transfer of Control of Licenses*, 26 FCC Rcd. 4238, ¶¶ 109, 134, 156-62 (2010).

#### 4. Injunctive Relief That Impairs Public Access to the Airwaves Thwarts the Public Interest.

With this well-established public interest in mind, the district court should have considered whether enjoining the FilmOn X service helps or hinders public access to television. Unfortunately, the deployment of digital television, which was supposed to provide better service to customers,[6] in many cases resulted in a degradation or loss of over-the-air reception.[7] This is because digital television

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[6] Advanced Television Sys. & Their Impact upon Existing Television Broad. Serv., Fifth Report & Order, 12 F.C.C.R. 12,809, ¶¶ 3, 5 (1997).

[7] Peter Svensson, *Reception Problems Linger After DTV Transition*, USA Today (June 16, 2009), http://usatoday30.usatoday.com/money/media/2009-06-16-dtv-reception-problems_N.htm.

signals can suffer from significant "multipath" interference issues[8] (interference from reflected signals), the "digital cliff" effect[9] (where signals are all-or-nothing, without the gradual degradation that typifies analog broadcasts), and other issues.

In light of these problems, many viewers turn to cable, satellite, and other subscription TV services (which, unlike FilmOn X, unquestionably engage in "public performances" of broadcast programming and package it with large bundles of non-broadcast content). But those alternatives do not serve the public interest goal of *free* access to broadcast programming: today, fewer than 7% of American households solely watch over-the-air television.[10] Typical subscription TV customers must pay ever-higher bills for programming packages even when much popular programming is available free over-the-air.

Antennas that enhance viewers' capacity to receive free broadcast programming can provide a better alternative. This includes antennas located in

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[8] FCC Office of Engineering and Technology, DTV Report on COFDM and 8-VSB Performance 3 (1999), http://transition.fcc.gov/Bureaus/Engineering_Technology/Documents/reports/dtvreprt.pdf

[9] Michael Grotticelli, *Avoiding the Digital Cliff is Harder*, Broadcast Engineering Blog, (Jan. 3, 2013), http://broadcastengineering.com/blog/avoiding-digital-cliff-harder.

[10] "Only Seven Percent of TV Households Rely on Over-the-Air Signals, According to CEA Study," News Release, Consumer Electronics Association, July 30, 2013, at http://www.ce.org/News/News-Releases/Press-Releases/2013-Press-Releases/Only-Seven-Percent-of-TV-Households-Rely-on-Over-t.aspx.

remote locations, accessed over the Internet, which can receive programming that is within the viewer's television market area, *see* 47 C.F.R. § 76.55, but which the viewer, due to interference issues, might not be able to receive at home. As various major news outlets have reported,[11] sales of antennas are up, as viewers are realizing that they can save money by accessing "free TV" as it was meant to be accessed—for free.[12] Internet antenna rental services such as FilmOn X are part of this trend, which is helping achieve the long-recognized public interest goal of "free TV."

The Supreme Court has "acknowledged the public interest in making television broadcasting more available," and found that "to the extent time-shifting [recording programming for later playback] expands public access to freely broadcast television programs, it yields societal benefits." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 454 (1984). Just as the Supreme Court has given weight to "the public interest in increasing access to television programming," *Id.* at 425, the district court should have considered whether an

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[11] Christopher S. Stewart, *Over-the-Air TV Catches Second Wind, Aided by Web*, Wall St. J. (Feb. 21, 2012), http://online.wsj.com/news/articles/SB10001424052970204059804577229451364593094; Josh Sanburn, *The Return of Television Rabbit Ears?*, Time (Feb. 21, 2012), http://business.time.com/2012/02/21/the-return-of-television-rabbit-ears.

[12] Of course, viewers pay for their antennas at the store, just as they might pay to rent an antenna and access it remotely.

Internet antenna rental service like FilmOn X, by making broadcast programming easier to access, yields societal benefits and promotes the public interest.

#### 5. Injunctive Relief Also Impairs the Public Interest in Competition and Innovation in the Video Market.

The district court should also have considered the public interest in promoting innovation and competition. In particular, the creation and development of Online Video Distributors (OVDs) serves vital public interests. [13] As both the Department of Justice and the Federal Communications Commission have observed, OVDs are a promising source of competition in a video distribution market subject to increasing horizontal and vertical integration. *See* Competitive Impact Statement of the Department of Justice 11-30, *United States v. Comcast Corp.*, 1:11-cv-00106 (D.D.C. Jan. 18, 2011) [hereinafter "DoJ Analysis"];[14] Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees,

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[13] This subsection uses the terminology adopted by the Department of Justice and the Federal Communications Commission. Classifying FilmOn X as an "OVD" for these purposes means only that it enables viewers to watch video via the Internet, not that it is a "distributor" for copyright purposes.

[14] *Available at* http://www.justice.gov/atr/cases/f266100/266158.pdf.

*Memorandum Opinion & Order*, 26 FCC Rcd 4238 ¶¶ 60-109 (2011) [hereinafter "FCC Analysis"].[15]

The Justice Department conditioned the 2011 merger of Comcast and NBC on the joint entity supplying programming to OVD competitors. This condition exists because the Justice Department recognized that OVDs provided beneficial competition to the video distribution market, and that incumbent video distributors and content producers would both have incentives to discriminate against OVDs. DoJ Analysis 11.

In noting the public benefits of OVDs, the Justice Department found that they were meeting increased consumer demand for on-demand viewing, and that the competitive pressure from OVDs was stimulating incumbent video distributors such as cable networks to offer more on-demand choices. DoJ Analysis 15. New OVDs entering the market not only broaden the number of competitors for video distribution, they also expand the field of methods and technologies for providing content to consumers. The Justice Department stated that among OVDs, "[n]ew developments, products, and models are announced on almost a daily basis by companies seeking to satisfy consumer demand." DoJ Analysis 15-16. The FCC likewise states that OVDs "can provide and promote more programming choices,

[15] *Available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf.

viewing flexibility, technological innovation and lower prices." FCC Analysis ¶ 78. Preventing more OVDs from reaching the market would therefore

> have a substantial anticompetitive effect on consumers and the market. Because [an incumbent video distributor] would face less competition from other video programming distributors, it would be less constrained in its pricing decisions and have a reduced incentive to innovate. As a result, consumers likely would be forced to pay higher prices to obtain their video content or receive fewer benefits of innovation. They would also have fewer choices in the types of content and providers to which they would have access, and there would be lower levels of investment, less experimentation with new models of delivering content, and less diversity in the types and range of product offerings.

DoJ Analysis 27. Despite their small current market share, the Justice Department found that the emergence and growth of OVDs, of which FilmOn X is but one example, was extremely significant, saying that OVDs "represent the most likely prospect for successful competitive entry into the existing video programming distribution market." DoJ Analysis 28.

The FCC recognizes a further public interest in the spread of OVDs. In its Order on the Comcast/NBC merger, the FCC said that, in addition to enhancing available content, lowering prices, and driving innovation, "[a] robust OVD market also will encourage broadband adoption, consistent with the goals of the Commission's National Broadband Plan." FCC Analysis ¶ 62. By stimulating demand for broadband, OVDs create market incentives for Internet access providers to bring the attendant benefits of broadband connectivity to communities that currently lack that connectivity.

Additional small competitors in the OVD space may lead to new programming networks for consumers and markets for new programming producers. Thus, courts should hesitate before depriving consumers and the competitive landscape of a new entrant such as FilmOn X. More broadly, injunctions such as this one threaten to chill other potential startups and their investors from entering the market. If merely colorable disputes about the complexities of copyright can prevent a business from reaching the market pending lengthy litigation, companies would be discouraged from going beyond "traditional" methods of video distribution, leaving the television market in the hands of a limited number of incumbents.

## II. THE DISTRICT COURT'S IRREPARABLE HARM ANALYSIS WOULD LEAD TO TECHNOLOGICAL AND ECONOMIC STASIS.

The district court made three unwarranted assumptions about the alleged harm that a technology like FilmOn X's could cause to the broadcaster plaintiffs while the lawsuit is pending. First, implicit in the court's analysis of harm was the erroneous notion that the plaintiffs' commercial arrangements with advertisers, audience measurement firms, and other video distributors such as cable operators are legally protected against broader market forces. Second, the court cited the plaintiffs' "loss of control" over their programming as a form of irreparable harm even though plaintiffs' programming is broadcast in the clear over the public airwaves, and in any instance, copyright does not grant control over the "quality" of a performance or reproduction. Third, the court referenced FilmOn X's likely inability to pay maximum statutory damages of $150,000 per work as a form of irreparable harm to the plaintiffs, even though that maximum amount—which would likely represent *hundreds of millions of dollars* of liability for FilmOn X—is in part a punitive sanction and not a rational measure of any actual harm to the broadcasters.

If the district court's analysis were to be taken as precedent, it would privilege the broadcasters' particular business models in the marketplace, insulating them from competition and the effects of technological advancement. It would also create a categorical bias in favor of injunctions to shut down competitors. In short, it would thwart copyright's Constitutional goal of promoting the progress of knowledge.[16]

### A. The Opinion Privileges Commercial Arrangements That Enjoy No Statutory Protection from Competition.

The broadcaster plaintiffs in this case presented a narrative of a new, relatively small company doing *irreparable* harm to an entire large, well-established industry merely by entering the market and continuing to operate while litigation proceeds. The broadcaster plaintiffs portray themselves as having fragile

[16] To the Framers, "the Progress of Science" meant knowledge or learning in a broad sense. *See* Lawrence B. Solum, *Congress's Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 Loy. L.A. L. Rev. 1, 47-53 (2002).

business models at the mercy of larger forces. The district court erred in its uncritical acceptance of these representations, because they effectively hold FilmOn X responsible for the cumulative effects of sweeping changes in technology and customer behavior, and because they raise private commercial arrangements–in particular, broadcasters' use of data gathered by the Neilsen Company–to the stature of public law.

This Court "has set a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297-98 (D.C. Cir. 2006); *see also Petties ex rel. Martin v. D.C.*, 662 F.3d 564, 570 (D.C. Cir. 2011).

> The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.

*Chaplaincy*, 454 F.3d at 297-98. Irreparable harm implicitly includes a causation requirement: alleged irreparable harm must be caused by the defendant's challenged conduct. *See*, *e.g.*, *Apple Inc. v. Samsung Electronics Co., Ltd.*, 2013-1129, 2013 WL 6050986, at *5 (Fed. Cir. Nov. 18, 2013) ("[T]he district court was correct to require a showing of some causal nexus between Samsung's infringement and the alleged harm to Apple as part of the showing of irreparable harm.").

In crediting the plaintiffs' sweeping prognostication that FilmOn X would "impede Plaintiffs' ability to negotiate retransmission consent agreements with cable, satellite, and telecommunications providers" and "interfere with Plaintiffs' ability to develop a lawful market for Internet distribution of television programming" the district court mistook plaintiffs' alarmism for evidence of actual future harm FilmOn X might cause. Dist. Ct. Op. 15. In fact, retransmission consent payments are an increasingly uncertain revenue source for television broadcasters, as many viewers return to over-the-air reception and divide their attention among many new forms of home and mobile entertainment. Video distribution on the Internet is an increasingly competitive field in and of itself, with purely Internet-based video providers like Netflix, Amazon, and FilmOn X providing their own exclusive programming that competes directly with traditional broadcasting, as well as cable and satellite. In light of these downward price pressures on retransmission fee income and Internet distribution revenues, the district court should have been more skeptical of declarations from the plaintiffs' employees attributing significant loss of revenue to FilmOn X.

In particular, the district court's finding that "diverting viewers from distribution channels measured by Nielsen ratings" is a form of irreparable harm gives a single market research company and a single means of audience measurement an unwarranted and unnecessary degree of legal protection. There are many ways of measuring viewing audiences, and many firms that could do so where there is a demand for such measurement. The shift to viewing video over the Internet—a trend that goes far beyond FilmOn X—presents new ways of measuring audience demographics even more accurately than can be done with broadcast television. The assumption that broadcast TV viewers who switch to new viewing technology like FilmOn X's will not be counted by advertisers ignores market reality. Nielsen itself has begun measuring Internet TV viewership. *See* William Laudner, *Nielsen Aims to Gauge Online TV Viewing*, Wall St. J. (Feb. 21, 2013).[17] Even if Nielsen did not, others would quickly fill this need, as such measurement is of direct and immediate value to both advertisers and producers of programming.

### B. Plaintiffs' Alleged "Loss of Control" Over Programming Already Broadcast on the Public Airwaves is Illusory.

The district also erred in holding that the plaintiff broadcasters' alleged "loss of control over the distribution and quality of their copyrighted programs" was irreparable harm that has been or will be caused by FilmOn X. Dist. Ct. Op. 16. This holding overstates the "control" that copyright gives to broadcasters at the

[17] *Available at* http://online.wsj.com/news/articles/SB10001424127887323864304578318593596681934.

expense of the public, and it vastly overstates the causal connection between FilmOn X's business and alleged "viral infringement" by unknown others.

First, one can't be harmed by loss of control one never had. The law does not grant copyright holders complete control over the "distribution and quality" of their works. The first sale doctrine permits anyone to distribute lawfully made copies of works regardless of quality. 17 U.S.C. § 109. Fair use allows the public to make copies of varying quality in many circumstances, including home recordings of TV programs. *See Sony,* 464 U.S. at 454-55. And the over-the-air television broadcasts at issue in this case can be received and viewed lawfully on many kinds of equipment, from brand-new plasma displays to old black-and-white TV sets. The "quality" of a used book, personal videotape, or the picture that appears on an old TV set with a poor antenna are no concern of copyright law, and neither is the "quality" of the programming viewed through services like FilmOn X. The consuming public doesn't consider the copyright holder responsible for the quality of these presentations. And such considerations of commercial goodwill are addressed, if at all, by trademark law.

Second, any "vast viral infringement" that might follow from "digital copies . . . available and released on the Internet," Dist. Ct. Op. 30, is not infringement caused by FilmOn X. Over-the-air television broadcasts reach thousands of people and are not encrypted or protected against copying. Saving a broadcast TV program to a file that can be transmitted over the Internet is a trivial matter, within the capabilities of many home computer systems. The existence of services like FilmOn X, reaching a small fraction of all TV watchers, does not appreciably increase the risk of a broadcast program being redistributed illegally on the Internet by third parties. It may even *reduce* that risk by providing new ways to watch live broadcast TV without creating a permanent copy capable of easy redistribution.

### C. Maximum Statutory Damages Should Not Be A Basis For Finding Irreparable Harm At The Preliminary Stage.

Finally, irreparable harm cannot be based on the fact that "FilmOn X is a startup company that would likely be unable to pay statutory copyright damages of $150,000 *per work* if Plaintiffs prevail." Dist. Ct. Op. 15. Maximum statutory damages, and the ability to pay them, are not an appropriate measure of harm in this or any case.

Copyright law allows a prevailing plaintiff to elect a statutory damages award in lieu of actual damages and profits. 17 U.S.C. § 504(c)(1). The maximum award is $30,000 per infringed work, unless "the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully," in which case "the court in its discretion may increase the award . . . to a sum of not more than $150,000." § 504(c)(2). Congress intended that the enhancement for willful infringement be for "exceptional cases" only. S. Rep. No. 94-473, at 144-45 (1975). Enhanced damages are a punishment and deterrent, not mere compensation for harm. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439, 459 (2009) 459-62 & n.89 (collecting cases). And courts have held that statutory damages require no proof of harm suffered by the plaintiff. *See, e.g.*, *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 643 (8th Cir. 1996) ("[s]tatutory damages are by definition a substitute for unproven or unprovable actual damages.")

Here, there was no reason to assume maximum damages will be awarded. The court made no finding on the question of willfulness and did not identify any special circumstances that would make this case a likely candidate for the highest possible statutory damage award. Further, because enhanced statutory damages are punitive rather than compensatory (at least in part), and often require no proof of harm, even an amount less than the maximum is simply not a measure of the plaintiff's harm.

Applying the maximum statutory damages rationale for irreparable harm would create a systemic bias towards granting injunctions against Internet-based services, which often touch hundreds or thousands of copyrighted works. Copyright claims against such services frequently raise the possibility of aggregate statutory damages so high that even wealthy businesses could not afford to pay them. For example, the music service MP3.com was ordered to pay $118 million in statutory damages when its arguments for non-infringement were rejected, and the company shut down. *See UMG Recordings, Inc. v. MP3.com, Inc.*, No. 00 Civ. 472 (JSR), 2000 WL 1262568, at *1, *6 (S.D.N.Y. Sept. 6, 2000). The record labels who sued software maker Lime Group in 2011 demanded statutory damages totaling trillions of dollars; the court limited damages to a mere $1.5 billion. Jonathan Stempel, *LimeWire Wins Limit On Damages to Record Labels*, Reuters Canada (Mar. 11, 2011), *available at* http://ca.reuters.com/article/technologyNews/idCATRE7274O520110311.

If the district court's rationale were adopted, the very real possibility of ruinously large statutory damage awards would create a bias towards granting injunctions against services that touch digital content. Copyright law does not, and should not, stack the deck against such businesses.

## CONCLUSION

Intellectual property laws serve broader purposes than simply granting compensation and control to rightsholders – they serve the public interest in the progress of knowledge. The injunction analysis must take careful account of those purposes. Therefore, the Court should require thorough and independent consideration of the balance of harms, the public interest, and irreparable harm in light of copyright's purposes.

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Respectfully submitted,

*/s/ Mitchell L. Stoltz*

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on December 12, 2013.

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