

No. 13-461

In The Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, et al.,
Petitioners,

—v—

AEREO, INC., f/k/a BAMBOOM LABS, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

**BRIEF OF AMICUS CURIAE
THE PATENT, TRADEMARK, & COPYRIGHT
SECTION OF THE BAR ASSOCIATION
OF THE DISTRICT OF COLUMBIA
IN SUPPORT OF NEITHER PARTY**

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Bar Association of the District of Columbia is a non-profit organization that has a Patent, Trademark, & Copyright Section which monitors intellectual property developments in both the law and practice. This section includes members of the bar who specialize in intellectual property law, including copyright law and have substantial interest in the adjudication of significant issues defining U.S. Copyright law and enforcement policies.

Other than an interest in seeking consistent, precise and well-founded interpretations of copyright law and remedies associated with copyright law, the Patent, Trademark & Copyright Section of the Bar Association of the District of Columbia supports neither party, and respectfully requests that this Court considers the arguments contained herein.¹

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a). Copies of the requisite consent letters have been filed with the Clerk by both parties.

¹ None of the parties or their counsel has contributed either substantively or monetarily to the preparation of this brief, only this amicus curiae made a monetary contribution to the preparation and submission of this brief. Counsel for Amicus Curiae prepared this brief on a pro bono basis.

SUMMARY OF ARGUMENT

The question presented in this case is whether the retransmission of television broadcasts offered by Aereo, Inc. is considered a “public performance” and therefore copyright infringement. But a related and equally important issue this Court should consider is the treatment of the remaining factors in determining the grant or denial of a preliminary injunction.

Once a likelihood of success is established, a court must consider whether a plaintiff has shown it would suffer irreparable harm that cannot be remedied by monetary damages. This Court’s decision in *eBay, Inc. v. MercExchange, LLC* revoked categorical presumptions of irreparable harm in patent cases. 547 U.S. 388 (2006). Various circuit courts have also interpreted the *eBay* Court’s ban on categorical presumptions of irreparable harm to copyright cases.² The application of what is sufficient irreparable harm in a copyright case, however, has not been consistent among the circuits or even the five district courts that have ruled on the facts of the lawsuits filed by the Broadcasters against Aereo and FilmOn X, LLC (which operates a service nearly identical to Aereo and has sought to intervene in this appeal). The district courts did not properly

² *Salinger v. Colting*, 607 F.3d 68, 78 n.7 (2d Cir. 2010); *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011); *Christopher Phelps & Assoc., LLC v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007); *Bethesda Softworks, L.L.C. v. Interplay Entm’t Corp.*, 452 Fed. Appx. 351 (4th Cir. 2011); *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989 (9th Cir. 2011).

engage in the analyses of the three remaining factors of a preliminary injunction for three reasons: 1) the courts did not properly consider monetary damages recoverable by the Broadcasters in determining irreparable harm claimed by the Broadcasters; 2) the courts did not sufficiently take into account potential harm to Aereo and FilmOn X should a preliminary injunction issue; and 3) the courts did not adequately consider the various public interests at issue.

Irreparable harm must be harm that cannot be repaired by economic damages alone and must outweigh the harm to the enjoined party. If monetary damages can sufficiently compensate a plaintiff and the defendants are likely to go out of business in the event of a preliminary injunction, should injunctive relief still be granted?



ARGUMENT

I. EBAY REJECTED CATEGORICAL PRESUMPTIONS OF IRREPARABLE HARM

In 2006, the Court significantly altered the analysis for the grant of injunctive relief in intellectual property cases, rejecting the use of “general” or “categorical” rules and presumptions, and requiring courts to consider the traditional four-factor equity test. *eBay, Inc.*, 547 US 388 at 391. The *eBay* Court rejected the “general rule” traditionally applied by the Federal Circuit in patent cases, which was that “a permanent injunction will

issue once infringement and validity” have been found. *Id.* at 393-94 (quoting *MercExchange LLC v. eBay, Inc.*, 401 F.3d 1323, 1338 (Fed. Cir. 2005)). Instead, the Court held that a party seeking an injunction must show i) that it has suffered an irreparable injury; ii) that monetary damages and other remedies at law are inadequate to compensate for the injury; iii) that an equitable remedy is warranted in light of the balance of hardships between the plaintiff and the defendant; and iv) that the public interest would not be disserved by an injunction. *eBay*, 547 U.S. at 391.

Although on its face, *eBay* applied only to permanent injunctions, the Court’s subsequent decision in *Winter v. Nat’l Resources Defense Council, Inc.* affirmed that preliminary injunctions are extraordinary remedies that must be evaluated equitably under the same standard set forth in *eBay*, and that injunctive relief should never issue automatically. 555 U.S. 7, 24 (2008). Subsequent courts have thus interpreted *eBay* as applying to all types of injunctive relief, including preliminary injunctions.

Likewise, although *eBay* was a patent case, the reasoning applies equally well to other types of intellectual property cases, including infringement claims arising under the Copyright Act. In fact, the *eBay* Court relied on several copyright cases as precedent, and noted that it had “consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.” *eBay*, 547 U.S. at 392-

393. Subsequent Circuit and District Courts have thus also extended the reasoning of the *eBay* decision to trademark and copyright cases.

In the most notable copyright case following *eBay*, the Second Circuit concluded that the Court's ruling in *eBay* is also applicable to preliminary injunctions in copyright cases. *Salinger*, 607 F.3d at 79. In *Salinger*, the Second Circuit reversed the district court's grant of a preliminary injunction, which was based upon the general presumption of irreparable harm previously presumed upon a demonstration of a likelihood of success on the merits, and instead stated that a plaintiff must satisfy all four factors set forth by the court in *eBay*, even if a likelihood of success on the merits has already been found. *Id.* The *Salinger* decision stated that courts cannot "presume that a party has met [any] element of the injunction standard." *Id.* at 78 n. 7. Several other circuits have also stated that the four-factor *eBay* test also applies in copyright cases. *See, e.g., Coxcom, Inc. v. Chaffee*, 536 F.3d 101, 111-12 (1st Cir. 2008); *Peter Letterese & Assocs., Inc. v. World Inst. Of Scientology Enters., Int'l*, 533 F.3d 1287, 1322 (11th Cir. 2008); *Christopher Phelps & Assocs.*, 492 F.3d at 543-44.

There is thus a well-developed body of law across multiple Circuits stating that categorical approaches and presumptions are inappropriate in determining whether a copyright infringement plaintiff is entitled to preliminary injunctive relief, and that a plaintiff seeking injunctive relief under the Copyright Act must satisfy the four-factor test set forth by the Court in *eBay*.

However, despite this significant body of precedent prohibiting the use of “categorical” rules and presumptions in considering injunctive relief in copyright cases, three district courts considering the same type of technology at issue before the Court in this case have failed to properly consider and apply *eBay* in their analysis of irreparable harm.

II. THE COURTS SHOULD CONSIDER WHETHER THE BROADCASTERS’ ALLEGED IRREPARABLE INJURIES COULD BE COMPENSATED FULLY THROUGH MONETARY DAMAGES

Irreparable harm, in a preliminary injunction context, is harm that a plaintiff would suffer during the pendency if an injunction is not issued and which cannot be compensated by monetary damages at the end of the litigation.

Five separate District Courts have made determinations on motions of preliminary injunctions brought by the Broadcasters and/or other plaintiffs in the broadcasting industry against both Aereo and FilmOn X (which was formerly known as BarryDriller Content Systems, PLC).³ Three of these courts have found that the plaintiffs were likely to

³ *Fox Television Station, Inc. v. BarryDriller Content Sys., PLC*, 915 F.Supp.2d 1138 (C.D. Cal. 2012); *Fox Television Stations, Inc. v. FilmOn X, LLC*, __F.Supp.2d__, No. 13-758, 2013 WL 4763414 (D.D.C. Sep. 5, 2013); *Community Television of Utah, LLC v. Aereo, Inc.*, __F.Supp.2d__, No. 13-910, 2014 WL 642828 (D. Utah Feb. 19, 2014); *American Broadcasting Co. v. Aereo, Inc.*, 874 F.Supp.2d 373 (S.D.N.Y. 2012); *Hearst Stations Inc. v. Aereo, Inc.*, __ F. Supp.2d__, No. 13-11649, 2013 WL 5604284 (D. Mass. Oct. 8, 2013).

succeed on the merits, that they were likely to suffer irreparable harm, and that any harm suffered by Aereo or FilmOn X as the result of an injunction did not outweigh the harm that the plaintiffs would suffer in the absence of injunctive relief.⁴ However, none of the district courts specifically considered if monetary damages available under the Copyright Act would fully compensate the Broadcasters should they ultimately succeed on the merits.

In each of the District Court cases, the plaintiffs alleged approximately five distinct irreparable injuries:

1. Aereo or FilmOn X would affect the plaintiffs' abilities to negotiate with advertisers due to lack of tracking of viewership by Nielsen;⁵
2. Aereo's or FilmOn X's activities would damage the plaintiffs' ability to negotiate retransmission agreements with cable or other companies;
3. Cable subscribers would cancel their subscriptions due to their subscriptions to Aereo or FilmOn X;

⁴ *BarryDriller Content Sys.*, 915 F.Supp.2d 1138; *FilmOn X*, __F.Supp.2d__, No. 13-758, 2013 WL 4763414; *Community Television of Utah*, __F.Supp.2d__, No. 13-910, 2014 WL 642828;

⁵ The District Court of Massachusetts recently ruled that Nielsen is starting to collect online viewership data. It appears that the Broadcasters will unlikely suffer this alleged irreparable harm. *Hearst Station*, __ F.Supp.2d __, 2013 WL 5604284, at *8.

4. The plaintiffs' own web broadcasts could be harmed due to Aereo's activities;
5. The plaintiffs would not be able to enter the mobile viewing market.

Three district courts have found that all of these alleged irreparable injuries justified finding the irreparable harm factor in the Broadcasters' favor,⁶ and one district court found the first three alleged harms to be irreparable.⁷

One of these cases which found that the Broadcasters were likely to suffer irreparable harm is the decision recently issued by the District of Utah in a case involving the Broadcasters against Aereo.⁸ In that case, the District Court issued an order on February 19, 2014, granting a preliminary injunction to the plaintiffs, finding that Aereo's retransmission of copyrighted television broadcasts to individual subscribers constituted copyright infringement and that preliminary injunctive relief was appropriate.⁹

⁶ *BarryDriller Content Sys.*, 915 F.Supp.2d 1138; *FilmOn X, LLC*, __F.Supp.2d__, No. 13-758, 2013 WL 4763414; *Community Television of Utah*, __F.Supp.2d__, No. 13-910, 2014 WL 642828.

⁷ *American Broadcasting Co.*, 874 F.Supp.2d 373.

⁸ *Community Television of Utah, LLC*, __F.Supp.2d__, No. 13-910, 2014 WL 642828.

⁹ The case was stayed pending the outcome of this appeal, *id.* at *14, and the preliminary injunction was subsequently stayed for 14 days pending the outcome of Aereo's emergency appeal to the 10th Circuit.

Even though the *Community Television* court gave lip service to the “high burden required to demonstrate irreparable harm,” *id.* at *8, it did not cite *eBay* or any cases relying on *eBay*. As a result, the court failed to adequately consider whether monetary damages would be sufficient to compensate for any injury suffered by the plaintiffs, or to properly weigh the balance of hardships between the parties. Moreover, although the court briefly discussed whether an injunction would serve the public interest, *id.* at *9, it relied upon precisely the type of general categorical rule criticized by the *eBay* Court, stating that the public interest “normally weighs in favor of the issuance of an injunction because the public interest is the interest in upholding copyright protections.” *Id.* (quoting *Autoskill Inc. v. Nat’l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1498-99 (10th Cir. 1993)).

Another case failing to properly apply the *eBay* test in a copyright infringement claim involving the same type of retransmission of television broadcasts at issue here is *Fox Television Stations, Inc. v. FilmOn X LLC*.¹⁰ As in the *Community Television* case in Utah, the District Court of D.C. also failed to consider whether monetary damages would be sufficient to compensate for any injury suffered by plaintiffs, or to adequately weigh the relative harms that would be suffered by the parties. The *FilmOn X* court resorted to general presumptions and axioms in its cursory discussion of the public interest, relying solely on a pre-*eBay* Third Circuit decision from 1983 which stated that “it is virtually axiomatic that the

¹⁰ *FilmOn X LLC*, ___ F. Supp. 2d ___, 2013 WL 4763414.

public interest can only be served by upholding copyright protections.” *Id.* at *17 (quoting *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983)).

In a third case, which was decided by the Central District of California, the Court cursorily addressed the availability of monetary damages should the plaintiffs ultimately succeed, but concluded that because BarryDriller (the former name of FilmOn X) was a start-up company, it therefore may not have been able to pay the substantial statutory damages available.¹¹ Although the court recognized that on the one hand the statutory damages available in the event of a finding of infringement would be significant, the court failed to reconcile why the large statutory damages would not be sufficient to compensate the plaintiffs, except by making the assumption that the defendant would not likely be able to pay a significant award of damages.

The analysis of the irreparable harm factor in these cases does not comply with the equitable principles required by the *eBay* court in a preliminary injunction determination.

Section 504 of the Copyright Act provides the Broadcasters the option to recover either actual damages plus any additional profits of the infringer, or statutory damages of \$750-\$30,000 per work or in the case of willful infringement up to \$150,000 per work. 17 U.S.C. § 504. The present factual situation is unique because unlike some copyright

¹¹ *BarryDriller Sys.*, 915 F.Supp. at 1147.

infringement cases where actual damages may be difficult to assess, the Broadcasters would be able to determine their loss in retransmission license fees from Aereo and FilmOn X because the Broadcasters know the license fees due to them based on contracts with third-party companies for the same copyrighted works. With the aid of discovery, the Broadcasters would also be able to determine if there are any additional profits earned by Aereo or FilmOn X that are in excess of the license fees owed to the Broadcasters. Alternatively, the Broadcasters could opt for the statutory damages if the Broadcasters do not believe that actual damages and/or profits are sufficient to compensate them.

The main motivation behind the Broadcasters' claim of copyright infringement is that Aereo and FilmOn X did not pay for the right to retransmit the copyrighted content. In fact, one of the main arguments presented by the Broadcasters to differentiate the present factual situation from the factual situation in *Cablevision* and the present factual situation is that Cablevision was already a licensee of the content, but Aereo and FilmOn X are not. Moreover, the only aspect of the technology that the Broadcasters have raised in the preliminary injunction stage is the "watch live" feature. If Aereo or FilmOn X are found to ultimately be infringers of the Broadcasters' copyright, the Broadcasters will likely be able to recover either actual damages in the form of licensee fees or claim the statutory damages provided by 17 U.S.C. § 504 (b).

III. THE EFFECTS OF AN INJUNCTION ON AEREO SHOULD BE BALANCED AGAINST THE BROADCASTERS' ALLEGED INJURIES

Balance of harm analysis in copyright cases often accord no weight to the harm that a potential infringer may suffer because of the assumed conclusion that the alleged infringer has no cognizable interest in continuing to infringe the copyrighted works and therefore cannot complain about the harm it may suffer should it be required to cease. Three district courts that have ruled on the type of technology at issue here have discounted the harm to both Aereo and FilmOn X.¹²

However, this categorical assumption that alleged infringers cannot suffer harm is inappropriate under *eBay*. In order to make this sweeping assumption, there has to be a finding of infringement. At the preliminary injunction stage, the only finding a court has made is that the plaintiff has shown a likelihood of success, but the ultimate determination has not yet been made by a trier of fact. To categorically discount defendants' harm at the preliminary injunction stage is equivalent to eliminating this separate element altogether because a finding of likelihood of success on the part of the copyright holder automatically discounts the potential infringer's harms.

¹² *BarryDriller Content Sys.*, 915 F.Supp.2d 1138; *FilmOn X, LLC*, __F.Supp.2d__, No. 13-758, 2013 WL 4763414; *Community Television of Utah*, __F.Supp.2d__, No. 13-910, 2014 WL 642828.

The district courts' continuous and consistent refusal to fully consider the harm that a defendant may suffer leads to inequitable results: the showing of a likelihood of success, often without the benefit of full discovery, is the finding of infringement. The inequity falls fully on the shoulders of the defendants, who may suffer immediate and irreparable harm that a bond will not resolve at the end of the litigation.

The harm that a defendant may suffer should always be considered at the preliminary injunction stage and weigh the harm against the irreparable harm that a plaintiff may suffer during the pendency of the litigation.

Aereo's alleged harm, should a preliminary injunction issue, is its inability to operate its business and exit the competitive landscape. This very real harm should be balanced against the harm that the Broadcasters would suffer should Aereo were allowed to operate as is until the final determination of the merits of the case. And if the Broadcasters can be sufficiently compensated monetarily, then the harm to Aereo would outweigh the harm to the Broadcasters.

The principles of equity in the determination of preliminary injunctions require the balance of harm between the parties to be carefully weighed so that one party does not get unfairly punished without having had all the facts presented to a trier of fact. A preliminary injunction should only be issued if the harm to the enjoined does not outweigh the plaintiff, because the ultimate decision of the facts on the

merits has not yet been determined, and a decision to put a company out of business is simply premature.

IV. THE PUBLIC'S INTEREST NEEDS TO BE FULLY CONSIDERED

Finally, in cases involving copyright infringement allegations in the field of broadcast television, it is particularly important for courts applying the four factor *eBay* test to thoroughly and carefully consider all of the various public interests involved. As discussed above, the district courts in *Community Television*, *FilmOn X* and *BarryDriller* conducted only a cursory analysis of the public interest factor, both essentially concluding that since the public interest favored the enforcement of copyright laws, the public interest factor weighed in favor of the copyright owners seeking injunctive relief.

In the present case, although the district court considered the arguments of the defendant and amici regarding public interest, it concluded that the interest in “maintaining the copyright system and protecting the content that [copyright owners] generate” outweighed the other public interest arguments advanced by the defendant. *American Broadcasting Co.*, 874 F. Supp. 2d at 404. The Second Circuit did not consider the public interest, although its analysis may have been truncated by the fact that it agreed with the district court that the plaintiffs were unlikely to succeed on the merits.

Although enforcing the copyright laws is certainly an important public interest, there are other public interests involved in cases involving the

types of technology at issue here (and in *Community Television* and *FilmOn X*), namely i) promoting public access to over-the-air programming; and ii) promoting the development of new technology as a result of competition among providers.

First, there is a significant public interest in promoting public access to over-the-air broadcast transmissions. The Court has noted the “right of the public to receive suitable access” to the ideas and information contained in broadcast transmissions. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). The Court has even referred to the airwaves as “a public trust,” *id.* at 382, and stated that it is “a governmental purpose of the highest order” to assure that the public has access to these and other information sources. *Turner Broadcasting System, Inc. v. FCC*, 512 US 622, 663 (1994).

This public interest would certainly be implicated by granting the injunctive relief sought by Appellants. As Appellee and others have pointed out, many of Appellee’s customers subscribe to its service because they are unable to receive over-the-air transmissions via traditional antennas, due to buildings, hills, and other features that block the signals, as well as restrictive provisions in apartment leases and rental agreements. In fact, Appellee’s service has become so popular in New York City that it recently ran out of antennas and stopped accepting new customers (<http://arstechnica.com/business/2014/01/want-to-join-aereo-in-nyc-too-bad-company-has-hit-capacity/>). It is likely that many of these consumers signed up for Appellee’s service because

they were unable to receive transmissions via traditional antennas.

The district court in the present case considered this argument and concluded that it did not outweigh the public interest in enforcing copyright laws, since there are “numerous other methods through which the public can receive access to Plaintiffs’ content,” such as cable television service and licensed streaming services. *American Broadcasting Cos.*, 874 F. Supp. 2d at 404. This conclusion may very well be correct; however, the decisions of the district courts in *Community Television* and *FilmOn X*, which did not even consider the interest of the public in having access to broadcast transmissions, and instead relied solely on general rules and axioms, clearly failed to apply the proper level of analysis to the public interest factor, as required by this Court in *eBay*.

Moreover, there is also an important public interest in promoting technological innovation in the field of online and streaming video. The Department of Justice recognized this interest in 2011, when it allowed the merger of Comcast and NBC Universal, provided that the joint entity agreed to provide programming to competing providers of online and streaming video services. 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), at 11. The FCC also determined that there was a compelling public interest in promoting innovation among these services in its analysis of the same merger, stating that such services “can provide and promote more programming choices, viewing flexibility,

technological innovation, and lower prices,” as well as stimulating demand for broadband Internet service. Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd 4238 ¶¶ 62, 78.

Again, it may be that the public interest in the enforcement of copyright laws outweighs the interest in promoting innovation in the field of online and streaming video. However, by failing to even consider this interest and instead relying solely on outdated pre-*eBay* axioms about the public interest in copyright infringement cases, decisions such as *Community Television* and *FilmOn X* could be stifling the development of new and innovative types of online and streaming video distribution services.

Therefore, it is important for this Court, and future courts considering similar technologies, to carefully consider and weigh all of the relevant public interests at issue, rather than merely resorting to general rules or categorical presumptions.



CONCLUSION

For the foregoing reasons, the Association respectfully submits that this Court's finding that the grant or denial of a preliminary injunction requires the consideration and balancing of all four equitable factors.

Respectfully Submitted,

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