

No. 13-461

IN THE
Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, *et al.*,
Petitioners,

v.

AEREO, INC., FKA BAMBOOM LABS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF COPYRIGHT ALLIANCE AND
VARIOUS PROFESSORS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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**BRIEF OF COPYRIGHT ALLIANCE AND
VARIOUS PROFESSORS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

The undersigned *amici curiae* respectfully submit this brief in support of the request of petitioners American Broadcasting Companies, Inc., *et al.*, that the decision of the United States Court of Appeals for the Second Circuit be reversed.¹

INTEREST OF *AMICI CURIAE*

The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) membership organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. It represents the interests of individual authors from a diverse range of creative industries – including, for example, writers, musical composers and recording artists, journalists, documentarians and filmmakers, graphic and visual artists, photographers and software developers – and the small businesses that are affected by the unauthorized use of their works. The Copyright Alliance’s membership encompasses these individual

¹ Pursuant to Sup. Ct. R. 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Only *amici curiae* made such a monetary contribution. Some Copyright Alliance members are, or are affiliates of, Petitioners in this matter. Some may join other *amicus* briefs in support of Petitioners. The Clerk has noted Respondent’s blanket consent to *amicus curiae* briefs, dated February 12, 2014, on the docket.

artists and creators, creative union workers, and small businesses in the creative industry, as well as the organizations and corporations that support and invest in them.

Those affected by the reach of copyright law, including the law that applies to television retransmission, extend far beyond the names of the parties involved in the present appeal. For example, even the lengthy credits displayed during a broadcast television program may not come close to fully capturing all of the names of those who provided writing, directing, design, recording, engineering, photography and editing contributions to make that program available for customers to enjoy. Similarly, those who invest in others' creation of copyrighted works, and the means of distributing them, must be protected from free-riding.

The concept of innovation is of fundamental importance to the Copyright Alliance. Just like the patent laws encourage the development of technology, the copyright laws spur the development of creative works for the benefit of public consumption through ensuring that those who contribute to creative works are fairly compensated for their efforts.

The Copyright Alliance encourages the development of new technologies that may be used to bring licensed works to the public in new ways, even if those new ways "disrupt" traditional business models. However, regardless of the ways in which

technology and business evolve, the Copyright Alliance's primary dedication is to ensuring that the policies in the Constitution and Congress' directions in the Copyright Act continue to provide meaningful protections to authors whose works may be reproduced, distributed, publicly performed or displayed or otherwise disseminated, and to the investments made to commercialize those works. The Copyright Alliance submits this brief to help the Court appreciate how the Second Circuit's decision below is inconsistent with those policies and directions. The Copyright Alliance also submits this brief to help the Court understand the negative impacts of affirmance to all of those who rely on the public performance and public display rights.

The various professors who join this brief are professors who teach, research, and have an interest in the theory, law and practice of copyrights, property rights, and contracts.² The professors have no other stake in the outcome of this case, but are interested in ensuring that copyright law develops in a way that best promotes creativity, innovation and competition in the digital world.

² The professors are Jon M. Garon, Hugh C. Hansen, Stan J. Liebowitz, Adam Mossoff, Raymond Nimmer, Sean M. O'Connor, Mark F. Schultz, and John L. Simson. Their biographies are included in the Appendix to this brief.

SUMMARY OF ARGUMENT

When the Founders incorporated Congress' right to enact copyright laws, they did so for the purpose of promoting progress in education, culture, technology, and other products of intellectual endeavors. Nearly two hundred years later, in the wake of rapidly developing technology, Congress crafted a broad public performance right designed to ensure that copyright protections and technological growth would always continue to develop symbiotically with each other, regardless of what the technology looked like or how it operated.

Today's copyright-related industries and means of bringing copyrighted works to the public have flourished beyond what even the Congress that drafted the 1976 Copyright Act could have imagined. As a result of strong copyright protections, investment in the creation of new works and the dissemination of those works has bolstered a broad ecosystem that includes participants in the cable, satellite and Internet industries; with the assurances of copyright protection, entrepreneurs are developing new means and methods of creating and enjoying copyrighted works. As consumers, the public shares in these benefits through diversity of creative expression and consumer choice in how they choose to access that expression.

A proper reading of the copyright laws ensures that innovation in creation of works and technologies continues. Here, however, the Second Circuit's

reading of the copyright law thwarts innovation. The *Aereo* decision takes a palpable misreading of the public performance right from *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009) [hereinafter “*Cablevision*”], and applies that error in a way that permits avoidance of the copyright law if a provider makes intermediate (and unnecessary) copies of transmitted works, even though to the consumer, the purpose for subscribing is to “watch live TV” – just as the consumer would do over cable or a licensed Internet service (albeit with technological drawbacks, as discussed herein).

The decision below has made Congress’ intent to have a broad and expansive law needlessly complicated and fraught with caveats, extra rules and “guideposts.” A broad array of industries, leading copyright scholars, and even several courts have voiced their disapproval of the Second Circuit’s continued misconstruction of a relatively simple section of the law. Clearly, error exists.

But this case is not simply about whether the court below correctly interpreted a statute. As a practical matter, upholding *Aereo* would have an impact on future cases and, ultimately, the public interest. The Second Circuit’s decision incentivizes lawyers to spend their energies on seeking out new “loopholes” for evading the law. It encourages technology developers to focus on the objective of creating complicated, sham architecture, rather than

a better product. This is not “progress.” It is mischief.

If this Court reverses, it means more than just a victory for sound statutory interpretation and compliance with Congress’ goals and intent. Reversal sends the message that no matter how a commercial service constructs its system – even if the service may “disrupt” old models – changes in delivery methods do not warrant subverting the framework of copyright law. Reversal also benefits the everyday public consumer: ensuring that technology does not leave copyright law behind perpetuates the promise that when a consumer tunes into a new service, she will always be able to find something new to watch.

A R G U M E N T

I. INNOVATION IN CREATIVE EXPRESSION, FOR THE BENEFIT OF THE PUBLIC, RELIES ON A STRONG AND ROBUST PUBLIC PERFORMANCE RIGHT.

A. Copyright Laws Are the Foundation for Many Successful American Industries.

The section of the Constitution known as the “Copyright Clause” gives Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. *See*

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (the purpose of copyright is “to secure a fair return for an ‘author’s’ creative labor” with “the ultimate aim . . ., by this incentive, to stimulate artistic creativity for the general public good.”). In furtherance of this goal of incentivizing the creation of new works, the current Copyright Act provides for a bundle of exclusive rights, including the right at issue in the present case – the right to perform works publicly. *See* 17 U.S.C. § 106(4).

Congress’ goal of spurring innovation in the creation of new works necessarily contemplates providing incentives to ensure the works’ dissemination as well. Indeed, it is integral to copyright principles that those who invest in the works’ commercialization and dissemination are also owed protection from free-riding on their investments. *See generally, e.g.*, Adam Mossoff, *How Copyright Drives Innovation in Scholarly Publishing*, 13-25 George Mason University Law and Economics Research Paper Series, *available at* <http://ssrn.com/abstract=2243264>. As this Court recently recognized, the promotion of “Progress” encompasses giving incentives toward making works available. *Golan v. Holder*, 132 S. Ct. 873, 888 (2012) (“[I]nducing *dissemination* – as opposed to creation – was viewed as an appropriate means to promote science.”); *see also Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (“By establishing a marketable right to the

use of one's expression, copyright supplies the economic incentive to create and *disseminate* ideas.”) (emphasis added); *American Geophysical Union v. Texaco*, 802 F. Supp. 1, 16 (S.D.N.Y. 1992) (“Copyright protection is vitally necessary to the dissemination of scientific articles [It] is essential to finance the publications that distribute them.”), *aff'd*, 60 F.3d 913 (2d Cir. 1994).

As a consequence, the exclusive right of public performance has catalyzed the development of a broad ecosystem that incorporates parties in a variety of industries. In the context of retransmission of broadcast television, licensing fees are an integral part of the ecosystem. These fees include the statutory license fees that Congress implemented under Sections 111, 119, and 122, as well as negotiated fees for video-on-demand and other television licenses, which are based wholly or primarily on the public performance right.

Within this ecosystem, cable, satellite, and other licensed services have worked in partnership with creators to build businesses that benefit the public interest and that return compensation to creative workers in a variety of ways. These businesses pay significant royalties to contributors whose works are used in the broadcasts that those businesses retransmit. Songwriters are paid for the performance of their works in cable broadcasts, union workers are paid residuals, and productions are “greenlit” on the basis of understanding how

various elements of the work will be paid for through licensed distribution. Retransmission consent fees provided under the communications laws supply additional substantial and vital support for the funding of the “development and acquisition of broadcast programming[.]” *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1147 (C.D. Cal. 2012). This funding is integral to the ability to fund original programming to local news reporting, and everything in between. Without the promise of compensation, there would be little to no incentive for the creation of these works.

The framework is no different in the context of new “cord-cutting” television distribution systems, both paid and unpaid. Licensed Internet and mobile services such as Netflix, Hulu, and MobiTV have flourished and thrived, consistent with the longstanding rubric under which licensing for public performances lies. The income earned from these licensed distribution systems translates into financial support for those to whom those distributed works owe their existence: from the producers who invest in the works, to the writers, actors, photographers, set designers, union workers, editors and others who provide their creative authorship, to the songwriters and recording artists that lend their talents to soundtracks. Moreover, particularly in an age where the present and future business of copyright dissemination, especially via the Internet,

is increasingly focused on dissemination via performance (including through on-demand music services such as Spotify and Rdio), the ability to reap benefits from the public performance right is one that has been, and needs to be, cautiously protected so that these industries can continue to thrive.

B. A Proper Reading of Copyright Law Protects the Incentives to Promote Progress in the Creation and Distribution of Works to the Public, Regardless of How They Are Distributed.

While the facts of the case at bar involve a new technology, it is neither novel nor controversial that any party desiring to exploit one of the exclusive rights of the copyright owner must obtain a license or otherwise provide fair compensation for such exploitation. Here, as in any case, the legions of authors and other contributors and investors in the works that give a service its value are owed compensation. *See, e.g., Herbert v. Shanley Co.*, 242 U.S. 591, 595 (1917) (Holmes, J.) (“If music did not pay, it would be given up. If it pays, it pays out of the public’s pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.”). Put simply, unless some express exception applies, all enterprises that engage in public performance of works must obtain a license.

And, uniformly, they do, *regardless* of means or method of transmission. As Petitioners note, the

retransmission of broadcast television transmissions – via *any* device or process – is subject to the public performance right under 17 U.S.C. § 106(4). To license such transmissions, cable systems may take advantage of the statutory license in Section 111, satellite providers may avail themselves of statutory licenses set forth in Sections 119 and 122, and – most relevant here – Internet retransmitters may (and must) negotiate a license fee with the rights owners. *See, e.g., WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012); *Warner Bros. Entm’t, Inc. v. WTV Sys.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011); Stipulated Consent Judgment and Permanent Injunction, *CBS Broad., Inc. v. FilmOn.com, Inc.*, 10-cv-7532-NRB, 2010 WL 4840091 (S.D.N.Y. Aug. 9, 2012), Dkt. #49; *Twentieth Century Fox Film Corp. v. iCraveTV*, Nos. Civ. A. 00-120, Civ. A. 00-121, 2000 WL 255989 (W.D. Pa. Feb. 8, 2000).

“Aereo is doing precisely what cable companies, satellite television companies, and authorized Internet streaming companies do – they capture over-the-air broadcasts and retransmit them to customers – except that those entities are doing it pursuant to statutory or negotiated licenses, for a fee.” Pet.App.41a (Chin, J., dissenting). As discussed below, Aereo’s ability to win special treatment hangs on a gossamer legal thread. But for those countless participants in the industries involved, the outcome of this Court’s review has a

real, practical impact: it is a matter that affects their daily lives and livelihoods.

If the trend of free-riding established by Aereo is allowed to continue, broadcasters – having been deprived of revenues – will be unable to pay for top-of-the-line programming, and the most popular shows will migrate from free over-the-air television to pay services that are able to protect them from Aereo-like services and are able to afford the license fees. Rumblings of such seismic shifts are already coming from major copyright owners, which, in order to preserve their own viability, may be forced to convert to subscription-only models if infringement services like Aereo are allowed to continue undermining the free over-the-air broadcast model. *See, e.g.,* Ira Teinowitz, *FOX-Aereo Dispute Could Force Network Off Broadcast TV, Says Chase Carey*, THE WRAP (Apr. 8, 2013), *available at* <http://tinyurl.com/CareyAereo>. Moreover, as the District Court in *BarryDriller* explained: “[i]f Defendants can transmit Plaintiffs’ content without paying a fee, Plaintiffs’ existing and prospective licensees will demand concessions to make up the loss of viewership to non-paying alternatives” *Fox Television Stations, Inc.*, 915 F. Supp. 2d at 1147.³

³ Contrary to what Respondents’ *amici* may argue, the painful impact on the industry is not a mere side effect of obsolescence: rather, allowing Aereo to avoid copyright liability creates an inherently unfair scenario where certain parties must include licenses as an expense and others need not. As in antitrust

The effects of this resulting loss of revenue to investors, creators, and distributors will inevitably trickle down to everyone who touches a work. This loss is not inflicted by “disruptive”-yet-licensed technologies that may challenge business models but not harm the incentives in copyright law. Rather, the trickle-down effect of copyright-avoiding competitors will shrink the pool of available work for all of those involved because the creators of those works will lose the incentive to bring new programming to the market. Without new works, consumers who enjoy and often rely upon these works will lose. And eventually, as explained below, even Aereo will lose.

The Second Circuit recognized these harms in its decision in *ivi*, explaining that permitting a company to stream copyrighted programming over the Internet without a license would cause serious harm:

The quantity and quality of efforts put into creating television programming, retransmission and advertising revenues, distribution models and schedules – all would be adversely affected. These harms would extend to other copyright holders of television programming. Continued live retransmissions of copyrighted television programming over the

law, however, copyright law does not choose between competitors.

Internet without consent would thus *threaten to destabilize the entire industry.*

ivi, 691 F.3d at 286 (citations omitted, emphasis added). Aereo's choice to create a more complicated structure "behind the scenes," while continuing to give the service the same appearance as the technology in *ivi*, does not diminish these threats at all.

II. AEREO CANNOT BE RECONCILED WITH THE LETTER OR THE SPIRIT OF THE LAW.

A. Aereo Is an Outlier That Is Premised on a Dangerous Misreading of the Law.

Under the Copyright Act, the public performance of a work arises in a variety of ways, as the definition of to perform a work "publicly," 17 U.S.C. § 101, shows. A work can be publicly performed live (as with a live concert or theatrical production) or via recorded means (such as showing a film in a movie theater) to a group of people gathered in the same public or semi-public space. 17 U.S.C. § 101.⁴ Under the second part of the definition, known as the "Transmit Clause," a work can also be publicly performed if the performance of that work is

⁴ To perform a work "publicly" means "(1) to perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered . . ." 17 U.S.C. § 101.

transmitted to a public or semi-public venue (such as the simulcast broadcasting of the New York Metropolitan Opera at a movie theater in West Palm Beach), or if the performance of the work is transmitted to members of the public, “by means of any device or process,” even if those members of the public are situated in different places or receive the performance at different times (such as with streaming a music video on YouTube or watching the Super Bowl on one’s iPad, or even turning on one’s television set at a different time as someone else). *Id.*⁵

Aereo captures performances of copyrighted works as they are being transmitted over the airwaves, and it sends those performances on an individualized basis over the Internet to members of the public. Those members of the public may be located in different places or view the performances

⁵ To perform a work “publicly” also means “(2) to transmit or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. § 101.

While the statute does not contain an express definition of “public,” the definitions of “to perform or display a work ‘publicly’” and “motion picture exhibition facility” indicate that the “public” is “a substantial number of persons outside of a normal circle of a family and its social acquaintances.” Nothing in the record indicates that Aereo (or any commercial enterprise) could survive financially by transmitting works to a single family and its social acquaintances.

at slightly different times from each other, but under the definition in the Copyright Act, those facts do not affect the outcome. Thus, under the plain statutory language of the Copyright Act, Aereo (and systems like it) must obtain a license. And, with the exception of the courts below and the District of Massachusetts, most courts addressing the issue have agreed. See *Community Television of Utah, LLC v. Aereo, Inc.*, 2:13CV910DAK, 2014 WL 642828, at *3 (D. Utah Feb. 19, 2014) (“the California and D.C. district court cases as well as Judge Chin’s dissent in the Second Circuit case are the better reasoned and more persuasive decisions with respect to the proper construction of the Transmit Clause;” injunction against Aereo granted); *Fox Television Stations, Inc. v. FilmOn X LLC*, 2013 WL 4763414 (D.D.C. Sept. 5, 2013); *BarryDriller Content Sys.*, 915 F. Supp. 2d at 1140.

Aereo’s primary justification for refusing to obtain a license capitalizes on an unfortunate and erroneous reading of the Copyright Act’s definitions in *Cablevision*. See *American Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 375 (S.D.N.Y. 2012) (finding that the plaintiffs would have prevailed “but for” *Cablevision*); see also *Community Television of Utah*, 2014 WL 642828, at *9 (“Aereo took a calculated risk in designing its business around the *Cablevision* decision and a perceived loophole in the 1976 Copyright Act.”). In reading the law, the Second Circuit in *Cablevision* asked whether, under

the Transmit Clause of the definition, “Cablevision ‘transmit[s] . . . a performance . . . of the work . . . to the public.’” 536 F.3d at 134. From there, the court opined that it is relevant “to discern who is ‘capable of receiving’ the performance being transmitted.” *Id.*

Yet, instead of answering the question, the *Cablevision* court took a detour through a variety of legislative history – and never came back to where it had started. By the time it had finished reciting that history, the court had entirely reframed the question, concluding that the law directed the court “to examine who precisely is ‘capable of receiving’ *a particular transmission* of a performance,” *id.* at 135 – rather than “the *performance being transmitted*” under its prior formulation, *id.* at 134 (emphases added). Then, relying on “intuition,” the Second Circuit concluded that if one copy of a performance is transmitted to only one person, then that single person cannot be the public, and hence no public performance. *See id.* at 138. Rather, the court reasoned, “under the transmit clause, we must examine the potential audience of a given transmission by an alleged infringer to determine whether that transmission is ‘to the public.’” *Id.* at 137. Thus, in *Cablevision*’s case, because multiple copies of the performance were made prior to retransmission, the retransmission of these copies of

performances to members of the public was not “to the public.”⁶

The court’s novel interpretation of the statute raised significant concerns among those who have come to rely on a performance right that encompasses individual transmissions at different places or at different times, such as video-on-demand and streaming of performances to individual devices. Thirty-six *amici* – including software creators, photographers, book publishers, sports leagues, distributors, guilds, music publishers, academic presses, record companies, performing rights organizations, and professors – raised concerns about the *Cablevision* ruling. The then-Solicitor

⁶ The *Cablevision* court seemed heavily motivated by the possibility – one not before the court at the time – that a “hapless customer” that sends a recorded program to another room of his house (presumably not one full of strangers) might be sued for copyright infringement. *See id.* at 136. Yet in doing so, the court disregarded the “through to the viewer” nature of licenses, the private nature of the retransmission, and the fact that copyright law and policy already reflect a much more nuanced approach than the court of appeals’ strained hypothetical scenario suggests. *See, e.g.*, H.R. REP. NO. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677 (“Certain other performances and displays, in addition to those that are ‘private,’ are exempted or given qualified copyright control under sections 107 through 118.”); 17 U.S.C. § 110(5)(A) (public performance exemptions pertaining to reception of performances on “a single receiving apparatus of a kind commonly used in private homes”); *cf. United States v. ASCAP (In re Muzak)*, Civ. A. No. 13-95(WCC), 1992 WL 142749, at *7 (S.D.N.Y. June 12, 1992) (commercial establishments that further communicate licensed broadcasts to the public require separate license).

General did as well. See Brief of the United States as Amicus Curiae, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 129 S. Ct. 2890 (2009) (No. 08-448), 2009 WL 1511740, at *6, *20-22 (identifying “problematic” aspects of the court’s reasoning on the public-performance issue). Even the *Cablevision* court itself struggled with the jurisprudential impact of its conclusions, expressly and pointedly limiting them to the facts of the case. *Cablevision*, 536 F.3d at 139.

When it came time for the *Aereo* court to address the question, it also did not take the straightforward approach that the law commands. Rather than asking whether *Aereo* (the party that transmits the performance of the work) sends that performance to any group of people who are not family or socially familiar to each other, the *Aereo* court picked up where the *Cablevision* court left off and crafted four complicated and convoluted guideposts that bear no resemblance to the broad statutory language or the intent of Congress in drafting the Copyright Act’s definitions.⁷

⁷ Now, not only must judges in future cases grapple with the Second Circuit’s substitution of “transmission” for “performance,” but they must also consider conflicting instructions – such as “guidepost two,” which says that transmissions should not be aggregated, and “guidepost three,” which creates an exception to “guidepost two” when transmissions are generated from the same copy of the work – as well as vague and unbounded instructions – such as “guidepost four,” which states that “any factor that limits the *potential* audience of a transmission is relevant” to the

These decisions have set law that was designed to be straightforward onto a complex path – one filled with perhaps more potentially perceptible loopholes of the type that *Aereo* exploited to build its system. The *Aereo* court’s election to depart from basic canons of legal interpretation sends a precarious message that the law will accommodate previously unseen loopholes if the facts before the court seem to merit it. Or, stated another way, if “any device or process” actually means “most devices or processes,” as the court below interpreted the language to say, such interpretation calls into question the reading of any statute similarly designed to include broad terms (such as in 17 U.S.C. §§ 101 and 106) and limited exceptions (such as in 17 U.S.C. §§ 107-122).

This is clearly not what Congress intended, nor is it what sound law or policy compels. See Pet.App.155a (“*Cablevision* does not provide ‘guideposts’ on how to avoid compliance with our copyright laws.”) (Chin, J., dissenting). This Court should not let a slip of phrase create uncertainty in the law. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (“Liberty finds no refuge in a jurisprudence of doubt.”). For if the Court ratifies such an error, it may mean a hazier future for the public performance right.

analysis. Pet.App.22a (emphasis in original, internal quotations omitted).

**B. The Principles Underlying *Aereo*
Have Been Subject to Extensive
Academic Criticism.**

When viewed at its essence, *Aereo*'s position seeks to relitigate, rewrite and remove the statutory changes made in the 1976 Copyright Act. But the case at bar – where *Aereo* is legal in the Second Circuit but comparable systems such as *ivi* are not – demonstrates that Congress intended *all* retransmission systems to require a license as a matter of fact, and that the language of the public performance right was to remain expansive as a matter of law even as methods of distribution developed or diversified. *See Community Television of Utah*, 2014 WL 642828, at *4-8 (discussing history of Transmit Clause and noting that Congress decided that “commercial broadcast retransmission services must obtain licenses and compensate copyright owners.”).

Not surprisingly, the reasoning below has troubled more than just those in the industry and particular courts: leading legal scholars have also extensively criticized the public performance analyses in *Cablevision* and *Aereo*, both for the courts' improper tinkering with the language of the law and the nonsensical results that judicial revision yields. With respect to the language, scholars have identified the narrow-yet-fateful issue of the *Cablevision* court's substitution of the word “performance” for “transmission” in its

interpretation of the statute. See 2 Paul Goldstein, GOLDSTEIN ON COPYRIGHT, § 7.7.2, at 7:168 (2011 Supp.) (“the word *it* in the definition refers to ‘performance or display,’ not transmission”) (emphasis in original); Jeffrey Malkan, *The Public Performance Problem in Cartoon Network LP v. CSC Holdings, Inc.*, 89 OR. L. REV. 505, 536, 553 (2010) (explaining error in court’s statutory reading in substituting the word “transmission” for the word “performance” and noting that the statute specifies that members of the public must be “capable of receiving the performance”). They have further pinpointed the fact that “performance” and “transmission” are neither synonymous nor interchangeable, making the *Cablevision* court’s initial misreading both material and profound. Jane C. Ginsburg, *Recent Developments in U.S. Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?* 26 (Colum. Pub. L. & Legal Theory Working Papers, No. 08158, 2008), available at http://lsr.nellco.org/columbia_pllt/08158 [hereinafter “Ginsburg, *Exclusive Rights*”]; Goldstein, *supra*, at 7:168; Malkan, *supra*, at 531, 536.

These scholars reject the courts’ narrow reading of “public,” explaining that the phrase “members of the public capable of receiving the performance” is actually designed to be broad, not limiting: “its role is to clarify that a transmission is still ‘to the public’ even if its receipt is individualized.” Ginsburg, *Exclusive Rights, supra*, at 26. In practice, if an

individual transmission needs to be seen by members of the public for a public performance to arise, then there can be – as a matter of technological reality – no scenario at all in which the Transmit Clause will cover performances received at “different times.” *See, e.g.*, Jane C. Ginsburg, WNET v. Aereo: *The Second Circuit Persists in Poor (Cable)Vision*, MediaInstitute.org, (Apr. 23, 2013), www.mediainstitute.org/IPI/2013/042313.php [hereinafter “Ginsburg, *Poor (Cable)Vision*”] (“Reading the statute to equate ‘transmission’ with ‘performance’ reads ‘different times’ out of the statute.”); Goldstein, *supra*, at 7:168.1 (“*Cablevision* effectively closed off a critical aspect of the transmit clause’s intended embrace . . .”).⁸

Academics have also pointed out the unjust consequences that can arise when decisions like *Cablevision* are followed: transmission services (like Aereo) are free to exist without paying license fees while other transmission services must bear the cost of negotiating and paying for licenses. *See*

⁸ Notably, the courts of United States treaty partners, including Europe, Australia, and Japan, “have all overturned various elements of the *Cablevision/Aereo* edifice.” Jane C. Ginsburg, *Aereo in International Perspective: Individualized Access and U.S. Treaty Obligations*, MediaInstitute.org (Feb. 18, 2014), <http://www.mediainstitute.org/IPI/2014/021814.php> (“It would be awkward, to say the least, were crabbed judicial interpretations of the scope of the right of public performance . . . to result in incomplete compliance with the international norms the United States purports not only to respect but even to demand that other nations enforce.”).

Ginsburg, *Exclusive Rights*, *supra*, at 1 (“[T]he Second Circuit’s recent decision in *Cartoon Networks v. CSC Holdings*, if followed, could substantially eviscerate the reproduction and public performance rights.”). And, tellingly, these scholars pinpoint the identical concerns that members of the copyright ecosystem identify to this Court. *See, e.g.*, Ginsburg, *Poor Cable(Vision)*, *supra* (“[T]he [*Aereo*] decision offered a roadmap that would considerably undermine the public performance right, possibly evading its application to new business models for digital content delivery.”); Ginsburg, *Exclusive Rights*, *supra*, at 27 (“*Cablevision*’s potential for eviscerating the public performance right may be even greater than the Second Circuit’s pious wish portends,” pointing out “the potential onslaught of new copyright-avoiding business models that [the *Cablevision* decision] might inspire”).

These cogent and common-sense observations demonstrate the importance of letting Congress’ instructions and statutory language drive the Court’s analysis, rather than trying to find ways to let specific technology lead the task that the Court faces. Indeed, as explained *infra*, adjudicating to reach an outcome for a specific party, in the context of a common law system, causes precedential problems and has unintended consequences for those who were never part of the proceedings.

**III. AFFIRMANCE WOULD UNDERMINE
COPYRIGHT POLICY AND RUN
COUNTER TO THE PUBLIC
INTEREST.**

**A. The Only Parties That Stand to
Benefit from Affirmance Are Risk-
Taking Lawyers and Creators of
Inefficient Technologies.**

Decisions like the one below make this country's system of justice complicit in the avoidance of law rather than the compliance with it. *See* Pet.App.58a (the *Aereo* decision "does not merely deny the broadcasters a licensing fee for Aereo's activity; it provides a blueprint for others to avoid the Copyright Act's licensing scheme altogether"). As Judge Chin observed, and as *Cablevision* has taught us, the effect of permitting demonstrably incorrect interpretations of the law emboldens others to capitalize on perceived legal loopholes. This, in turn, it inspires those who do not fall within the specific exceptions to spend their energies finding new ways to evade the law.

Beyond the impact on the creation and development of new works as discussed *supra*, the decision below threatens to have a profound impact on technological growth. The *Aereo* decision favors lawyer-created work-arounds and legal gamesmanship over the ideals of innovation and competition that should drive the development of new technological products and services. In that

way, the *Aereo* decision encourages another policy shift: one that incentivizes the development of delivery services in a way that is designed to game the copyright system, rather than develop better means of delivery. See Dennis S. Karjala, “*Copying*” and “*Piracy*” in *the Digital Age*, 52 WASHBURN L. J. 245, 263 (2013) (“Instead of the law adapting itself to meet the needs of society under conditions of new technology, these judicial interpretations [merely] push technology in odd directions as systems engineers seek to avoid falling on the wrong side of what is essentially an arbitrary line.”).

Fundamentally, the only difference between licensed retransmission services and *Aereo* is that *Aereo* makes hundreds of intermediate copies in the process of retransmission. These copies do not make *Aereo*’s system operate better, faster, more cheaply, or more efficiently. Rather, they are technological inefficiencies shamelessly designed to exploit what the creators of *Aereo* – or their lawyers – believed was a loophole in the law.

Aereo’s pretext was obvious to the Second Circuit panel on oral argument. The panel was never told any technological justification for *Aereo*’s inefficient model – only that *Aereo* had followed the “assembly instructions” that the *Cablevision* panel purportedly engineered. See Oral Argument in *WNET v. Aereo Inc.*, 12-cv-2786 (2d Cir.), Dkt. #243. The dissent below accurately described *Aereo*’s platform of thousands of tiny individual antennas as “a sham”

and called out the system for what it is: “a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law.” Pet.App.40a. Even those who have suggested that *Cablevision* reached the right result have drilled down on the technological waste involved in systems like Aereo’s. For example, in a piece on Aereo for the pro-technology blog *Ars Technica*, Professor James Grimmelmann described the design as “willfully perverse,” one that “makes no technical sense,” “wast[es] resources,” and “drive[s] up costs.” James Grimmelmann, *Why Johnny can’t stream: How video copyright went insane*, ARS TECHNICA, Aug. 30, 2012, <http://arstechnica.com/tech-policy/2012/08/why-johnny-can't-stream-how-video-copyright-went-insane/>. “Thousands of tiny antennas are a ridiculous way of capturing over-the-air TV. Storing a permanent copy rather than a buffer just large enough for streaming is a pessimization, not an optimization.” *Id.* The electrical energy required to power these technologically unnecessary antennas for 350,000 subscribers in New York alone yields roughly \$2 million in cost. Shalini Ramachandran & Amol Sharma, *Electricity Use Impedes Aereo’s March: Streaming-Video Service Has Other Challenges Besides Broadcasters’ Lawsuits*, WALL ST. J. (Oct. 28, 2013), *available at* <http://online.wsj.com/news/articles/SB10001424052702304470504579163383906312194/>. Aereo also

requires considerable bandwidth for its inefficient technology and, not surprisingly, has found itself with operational problems related to unspecified “capacity” issues. Mari Silbey, *Aereo Hits Capacity Crunch Again*, LIGHTREADING (Feb. 5, 2014), <http://tinyurl.com/AereoCrunch>.

Even putting these operational downsides aside, nothing about what lies “under the hood” compels consumers to choose Aereo: what they want is the programming transmitted over the Aereo system. *See United States v. Broad. Music, Inc. (Application of Music Choice)*, 316 F.3d 189, 195 (2d Cir. 2003) (“The customer pays the retail price because the customer wants the music, not because the customer wants to finance the laying of cable or the launching of satellites.”). Services like Netflix and Hulu, which lawfully deliver great quality programming along with flexible usage and pricing models, are innovative and promote consumer choice. In stark contrast, the opportunity to view programming through a shared Aereo antenna is not innovative and does not add consumer value. Nor is there a need to sustain Aereo on the ground that it is the only option for consumers. As detailed above, it is not. *See American Broad. Cos.*, 874 F. Supp. 2d at 404 (noting the “numerous other methods through which the public can lawfully receive access to [Petitioners’] content” – and rejecting the argument that the public has the right to access broadcast television from Aereo’s *particular* service); *see also*

Farhad Manjoo, *Don't Root for Aereo, the World's Most Ridiculous Start-Up*, PANDODAILY (July 14, 2012), <http://tinyurl.com/ManjooAereo>. The only so-called “benefit” to Aereo is that it does not carry licensing fees – and it is indeed a benefit *only* to Aereo, to the detriment of everyone else. Particularly when pitted against the irreparable harm that so many face by Aereo’s ability to operate without fees, it is clear that a parasitic technology like Aereo should receive no blessing from this Court.

B. If This Court Reverses, the Public Prevails.

Reversal would restore the public performance right to the strong right that helped launch a variety of industries that bring performances of copyrighted works to the public. It would send a message that regardless of the “device or process” used, copyright owners ought not to be cut out of the equation. Even where new services may “disrupt” or entirely supplant traditional models, the change in delivery method does not justify subverting the framework of copyright law. A healthy relationship between copyright and technology is central to everyone’s interests, and to argue to the contrary merely gives the moniker of “innovation” to what is in truth simple piracy.

Nonetheless, certain *amici* in support of Respondent are likely to argue, as they have in prior proceedings, that affirmance will damage the

development of cloud locker technologies. They are wrong, many times over. First, Aereo is not a cloud service any more than traditional cable is, and no party has yet put forth any explanation as to how or why Aereo falls within the category that applies to providers of off-site storage and access for subscriber-provided material. Cloud lockers used to remotely store and retrieve lawfully owned copies of documents and other works are a far cry from a concocted system designed to retransmit a network's copy of a program to various members of the public at large. Second, those that do provide cloud-type services may look to Section 512 of the Copyright Act – which was, notably, enacted a full decade before the *Cablevision* decision was handed down for the purpose of addressing liability for Internet service providers. And finally, it is difficult to say with a straight face that *Cablevision* catalyzed the development of cloud-based technologies when some of the most well-known services that rely on cloud computing (including Google, Yahoo!, eBay, and Amazon) were established long before *Cablevision*.

Contrary to what other parties may say, perpetuating the exploitation of *Cablevision's* “assembly instructions” for flouting copyright law works to the detriment of legitimate technologists, and the public in general. Indeed, the confusion created by the *Aereo* decision, along with the unfairness inherent in the decision, hampers investment in new and developing *legitimate*

technologies that are particularly vital to the creative industries in the digital age. The copyright law is designed to protect and reward these investments, which benefit the public as a whole. Conversely, giving a benefit to a niche industry focused on parasitic technology, which benefits the few, is anathema to the goals underlying copyright law and is nowhere to be found within it.

An unfortunate consequence of the decision below is to directly pit those that develop technology requiring licenses against those, like Aereo, that do not. If the misreading of the law in the decision below is not remedied, it could be the case that “this technology displace[s] traditional, compensated instances of public and broadcast performance with uncompensated private ones.” Goldstein, *supra*, at 7:168 (2011 Supp.). This result is a direct affront to Congress’ goals in enacting copyright laws consistent with the Copyright Clause of the Constitution: to ensure compensation in order to help “promote the Progress of Science and useful Arts.” U.S. CONST. art. I, § 8, cl. 8.

And, ultimately, the perverse incentives left by *Aereo* make no logical sense for *anyone* in the long term – not even for factitious systems like Aereo. It is in the interest of those who use copyrighted works to have them available. A “crafty” new way to distribute works of authorship will have little chance of survival if the incentives to creators of those works, and to those who distribute and invest in

commercialization of such works, are whittled away to the point that no new expressive works are created. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928-929 n.8 (2005) (warning against overstating the “mutual exclusivity” of “the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies”). In other words, creative and technological innovations thrive when the relationship between the two is symbiotic. When it becomes parasitic, they die. Indeed, with nothing to transmit over its system, Aereo, too, will perish.⁹

Notwithstanding all these principles, Aereo believes that it should be entitled to keep for itself all the benefits derived from the works it retransmits. The message this sends to subscribers is that Aereo would rather spend that money on cumbersome antenna boards than develop better services that acknowledge and encourage the creation of copyrighted works for Aereo’s customers to enjoy. This short-sighted business plan has nothing in common with what the public interest compels or what the public itself – as consumers of

⁹ Given that Aereo is “innovative” only that it purports to “solve” a legal obstacle that would otherwise prevent its free-riding scheme, the desire to balance as described in *Grokster* is less compelling here. The licensed retransmitters are those who are innovating: they are providing copyrighted works to the public in new ways, including over the Internet. Aereo seeks to provide works over the Internet as well, but through a law-avoiding architecture that helps nobody but Aereo.

technology and cultural expression – wants, namely, innovation and sound investments in both the sciences and the useful arts.

CONCLUSION

The decision of the Second Circuit should be reversed.

Respectfully submitted.

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March 3, 2014

APPENDIX

APPENDIX

This amicus brief is joined by the following professors:

Jon Garon is the inaugural director of the NKU Chase Law + Informatics Institute where he teaches informatics, entertainment, intellectual property, and business law. He has extensive practice experience in the areas of entertainment law, data privacy and security and related fields. His teaching and scholarship often focus on business innovation and structural change to media, education and content-based industries. He is the author of three books and numerous book chapters and articles, including *The Independent Filmmaker's Law & Business Guide to Financing, Shooting, and Distributing Independent and Digital Films* (A Cappella Books, 2d Ed. 2009); *Own It – The Law & Business Guide to Launching a New Business Through Innovation, Exclusivity and Relevance* (Carolina Academic Press 2007); and *Entertainment Law & Practice* (Carolina Academic Press 2005) (2d ed. 2014). Immediately prior to joining Chase, Professor Garon served as dean and professor of law at Hamline University School of Law in St. Paul from 2003-2011. He also served as Interim Dean of the Graduate School of Management in 2005-06. Before Hamline, Professor Garon taught entertainment law and copyright at

Franklin Pierce Law Center in Concord, New Hampshire and Western State University College of Law in Orange County, California.

Hugh C. Hansen is the Founder and Director of the Fordham Intellectual Property Institute and a Professor of Law at Fordham University Law School. He teaches courses in copyright, trademark, and international intellectual property Law. He has been recognized twice as one of the 50 most influential people in intellectual property in the world. The Fordham Annual Conference on Intellectual Property Law and Policy, an event he founded, is now in its twenty-second year. His contributions to the IP field include distinguished public lectures, author and editor of IP books, articles, and a forthcoming casebook.

Stan Liebowitz is the Ashbel Smith Professor of Economics and Director of the Center for the Analysis of Property Rights and Innovation at the University of Texas at Dallas. He received his Ph.D. in economics from the University of California at Los Angeles, and he has been on the faculties of North Carolina State University, University of Chicago, University of Rochester, and the University of Western Ontario. Professor Liebowitz is the author of the widely acclaimed books, *Winners, Losers & Microsoft: Competition and Antitrust in High Technology*, as well as *Re-thinking the Networked Economy*. He was the president of the Society for Economic Research on Copyright Issues in 2005 after being asked to provide the first keynote address in 2001. *He* has authored government studies such as *Copyright Obligations for Cable Television: Pros and Cons*, *The Relative Efficiency of*

Private and Public Broadcasting in Canada, and *The Impact of Reprography on the Copyright System*. He is the author of scholarly articles related to broadcasting and copyright that has appeared in academic journals such as the *American Economic Review*; *the Journal of Political Economy*, *the Review of Economics and Statistics*, *the Harvard Journal of Law and Technology*, and *the Canadian Journal of Economics*, in addition to numerous articles on other subjects. He is on the editorial boards of several journals including the *Journal of Media Economics* and the *Review of Economic Research on Copyright Issues*. In addition, his articles for popular publications have appeared in outlets such as *The Wall Street Journal*, *Christian Science Monitor*, *Dallas Morning News*, *Investor's Business Daily*, *Reason Magazine*, *San Francisco Chronicle*, *Seattle Times*, and *CIO Magazine*.

Adam Mossoff is Professor of Law at George Mason University School of Law, and he is also Co-Director of Academic Programs and a Senior Scholar in the Center for Protection of Intellectual Property at George Mason. He teaches and writes in the areas of copyright law, patent law, property law, and Internet law. He has published extensively on the theory and history of how intellectual property rights are fundamental property rights, with his articles appearing in the *University of Pennsylvania Law Review*, *Cornell Law Review*, *Boston University Law Review*, and other journals. Professor Mossoff is Co-Chairman of the Intellectual Property Committee of the IEEE-USA, a member of the Public Policy Committee of the Licensing Executives Society, a member of the Amicus

Committee of the AIPLA, and a member of the Academic Advisory Board of the Copyright Alliance. Professor Mossoff graduated with honors from the University of Chicago Law School, where he was a research assistant to Richard A. Epstein and held the Bradley Governance Fellowship. Following law school, he was a John M. Olin Fellow in Law and Visiting Lecturer at Northwestern University School of Law, and he clerked for the Honorable Jacques L. Wiener, Jr. of the U.S. Court of Appeals for the Fifth Circuit. He holds an M.A. in philosophy, specializing in legal and political philosophy, from Columbia University and a B.A. with High Distinction and High Honors in philosophy from the University of Michigan.

Raymond Nimmer is the Leonard Childs Professor of Law at the University of Houston Law Center and co-director of the Houston Intellectual Property and Information Law Institute. He is also a Distinguished Chair in Residence at Universidad Catolica in Lisbon, Portugal and former Dean of the Law Center. Admitted to practice in Illinois, Texas, and the U.S. Supreme Court, Nimmer was a Fulbright Distinguished Chair of International Commercial Law. He has been Of Counsel to the law firms Weil, Gotshal & Manges and Sheinfeld, Maley & Kay. He was the co-Reporter to the Drafting Committee on Revision of U.C.C. Article 2 and the Reporter for the Uniform Computer Information Transactions Act (UCITA). Professor Nimmer is the author of over twenty-five books and numerous articles, including a three-volume treatise on Information Law, a multi-volume book on the Law of Computer Technology, and a treatise on Modern

Licensing Law. He is a member of the American Law Institute, the Texas Bar Foundation, and the American College of Commercial Finance Attorneys. The first edition of his book *The Law of Computer Technology* received a national book award from the Association of American Publishers in 1985. Prof. Nimmer is listed in *The Best Lawyers in America* in the practice areas of: Copyright Law, Information Technology Law, Litigation - Intellectual Property. He is also one of 700 lawyers listed in the International Who's Who of Business Lawyers in the category of Information Technology Law. He has been recognized in 2011 by his peers as the Best Lawyer in Houston in Information Technology Law. In 2013, his peers voted him the Best Lawyer in Houston in Copyright Law.

Sean O'Connor is Professor of Law and Founding Director of the Entrepreneurial Law Clinic at the University of Washington School of Law in Seattle. His research focuses on how legal structures and strategies facilitate innovation. His teaching and law practice specialize in transactions and the role of the general counsel in start-up companies. Professor O'Connor received his law degree from Stanford Law School, a master's degree in philosophy from Arizona State University, and a bachelor's degree in history from University of Massachusetts. He is currently working on *Method+ology and the Means of Innovation* to be published by Oxford University Press.

Mark Schultz is the Co-Director of Academic Programs and Senior Scholar at the Center for the

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John Simson is currently the Executive in Residence and Business and Entertainment Program Director at the Kogod School of Business at the American University in Washington, D.C. where he teaches and develops entertainment industry curriculum. Simson has also been an Adjunct Professor of Entertainment Law at Georgetown Law School, as well as at American University's Washington College of Law. He has lectured on entertainment, intellectual property, and business issues at numerous universities. He makes frequent media appearances and has been quoted in the *New York Times*, *Los Angeles Times*, *Billboard Magazine*, *Washington Post*, and *Wall Street Journal*. Prior to academia, Simson managed Grammy-winning artists Mary-Chapin Carpenter and Harry Belafonte, and he was instrumental in creating SoundExchange, serving as its Executive Director from 2001-2010. He has been nominated for an Emmy Award for his work supervising the music of the PBS series, "American Roots Music." He was also selected as "Outstanding Volunteer Attorney" during

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the 10th Anniversary celebration of the Washington
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