No. 13-461

IN THE
Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC. 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 TIME WARNER INC. AND WARNER BROS. ENTERTAINMENT INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Time Warner Inc., through its operating divisions – Warner Bros. Entertainment Inc., HBO and Turner Broadcasting System, Inc. – is one of the largest producers of television shows and movies in the world. Of particular relevance to this case, Warner Bros. is the largest supplier of television shows to the U.S. broadcast networks. Many of the most popular television shows ever broadcast on network television – *e.g.*, Friends, The West Wing, ER, Two and a Half Men, and The Big Bang Theory – were produced and are owned by Warner Bros. It is thus clear that Warner Bros., like the broadcast networks in this case, has a strong interest in not allowing any third party, such as Aereo, to make copies of its television shows and movies and to perform them publicly for money without a license from Warner Bros. Other operating divisions of Time Warner also have an interest in the issues raised by this case, even though they do not produce shows for broadcast networks. For example, HBO has consistently produced the most popular and critically acclaimed shows on subscription television – including The Sopranos, Game of Thrones, Sex and The City, True Blood, The Wire, Six Feet Under, and Boardwalk Empire, just to name a few. Similarly, Turner both produces its own

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[1] The parties have consented to the filing of this brief. Letters from the parties consenting to the filing have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel for a party (and no party) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

shows and acquires the rights to exhibit new and older shows from Warner Bros. and other producers of television shows. As such, these other divisions of Time Warner also have a strong interest in the correct determination of when it is permissible to make and distribute copies of, and to publicly perform, copyrighted works.

ARGUMENT

In this brief, we will not dwell on the dispositive point that Petitioners ably cover: transmitting a copyrighted television show like the Super Bowl to millions of unrelated people spread out all over the country is a quintessential "public performance" of the Super Bowl, no matter how many transmission copies are used to engage in that public performance. That common sense conclusion is entirely consistent with, and indeed compelled by, the Copyright Act. The Court of Appeals' contrary conclusion would require this Court to endorse the bizarre notion that, in defining a "public performance," Congress specifically provided that the *device* used does not matter, the *process* used does not matter, and the *location* of the individual members of the public does not matter; but, oh, the *number of transmission copies* used to reach the public, now that one is outcome determinative. That is simply too silly to impute to Congress.

Rather, in this brief, we wish to emphasize a more fundamental problem with the approach that the Court of Appeals has followed in this case and in the *Cablevision* case, *Cartoon Network, LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), which is

the origin of the present unfortunate detour in copyright law. In both of these cases, the Court of Appeals gave contorted and crabbed readings that defy common sense of purposely broad statutory concepts – when a company has made a "copy" and when a company has engaged in a "public performance." But a tortured and unduly restrictive reading of these fundamental and broad statutory terms is *not* the proper way for a court to make nuanced judgments concerning when a concededly unauthorized copy or performance of a work is legal or not. Indeed, contorting them in order to try to transform these broad concepts into more nuanced filters is both contrary to the Copyright Act and, as we have now seen, quite dangerous.

As this Court made clear now 30 years ago, the appropriate doctrine for making such judgments is the fair use doctrine that is embodied in Section 107 of the Copyright Act. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Sony Betamax*"). *That* is the doctrine that focuses on a variety of factors that is purposely designed to weigh the nature of the unauthorized use against the legitimate rights of the copyright holder. And *that* is the doctrine that is sufficiently nuanced in its application to new facts and new technologies to result in an appropriate balance and outcome. Thus, in *Sony Betamax*, this Court correctly recognized that unauthorized copies were being made, and then went on to apply what the Court described as the "equitable rule of reason" approach of the multi-factored fair use doctrine, *id.* at 448, to conclude that, at least for the function of limited time shifting of free-to-air television shows, the VCR was capable of

substantial non-infringing use. In performing the fair use analysis, this Court focused in great detail on the nature of the use to which the copies were being put as well as the harm (or lack thereof in that case) of the use of the authorized copies to "the potential market for, or the value of, [copyright holders] copyrighted works." *Id.* at 456.

The alternative path that the Court of Appeals has followed in these cases is, in our view, quite misguided for a number of reasons:

First, the Court of Appeals' contorted readings of the Copyright Act are legally incorrect and defy any reasonable notions of common sense. In *Cablevision*, it made no sense – and did not give a fair reading to the statutory reproduction right – to hold, as the Court of Appeals did, that when a copy of a copyrighted work is made at the cable company's premises, on equipment built and operated by the cable company precisely in order to charge consumers an incremental fee for making and transmitting copies to them publicly, that the cable company has *not* made a copy or engaged in a public performance. Similarly, in this case, it is too much to believe that Congress, in the context of passing an amendment designed to cover exactly what is occurring in this case – the retransmission of broadcast television programming – purposely defined a "public performance" to be agnostic as to the "process" and "device" used to transmit the performance, and also to the number and location of the various unrelated persons who receive the performance, but to depend entirely on the most arcane of technological issues –

namely, the number of transmission copies used to deliver the performance to the public.

Second, the Court of Appeals' approach elevates – to outcome-determinative significance – factors that are irrelevant to balancing the legitimate rights of copyright holders versus the interest of third parties in making use of copyrighted works. Under the Court of Appeals' approach, the entire structure of copyright protection in the television and film industry now turns on a fiction-producing analysis about at whose "volition" a commercial for-profit enterprise has made a concededly unauthorized copy, *see Cablevision*, 536 F.3d at 131, or how many antennae and separate transmission copies a commercial for-profit company uses to make and transmit copies to the public, *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 690 (2d Cir. 2013). The fair use doctrine, by contrast, considers factors that are precisely focused to the task of weighing and balancing the true interests of the parties at stake in these cases – factors such as the nature of the use to which the unauthorized copies are being put, the amount of unauthorized copying that is occurring, and the harm caused by the authorized use to the potential market for and value of the copyright holder's protected works. *See* 17 U.S.C. Section 107; *see also Sony Betamax*, 464 U.S. at 448-456.

Third, the Court of Appeals' misconstruction of the basic statutory terms of reproduction and public performance is a blunt and highly inappropriate "black or white," "in or out," "legal or not" approach to addressing incremental developments of technology in the context of copyright law. Worse, the Court of

Appeals' approach results in black and white decisions only in *one* direction – *against* the interest of copyright holders. For if, unlike what happened in the *Cablevision* case and this case, a court were to correctly read the statutory concepts governing copying and public performance to give them their natural and broad reading, that would not necessarily be the end of the legal analysis because, in a fully litigated case,[2] the defendant would remain free to argue that its own copying and performance was a fair use, the copyright holder would be free to oppose those arguments, and the court would make a reasoned decision based on the factors in Section 107, which are designed to strike the proper balance of copyright protection. But the same second-step balanced analysis is not available *at all* when the Court of Appeals misreads the basic statutory concepts of copying and public performance against copyright holders.

As a result, the Court of Appeals' approach has the impact of immunizing from reasoned, balanced analysis entire technologies and new business models – provided that the lawyers who work for those companies involved are careful enough to inform the businesspeople how to navigate the loopholes created by the Court of Appeals of non-volitional copies and separate transmission copies.[3] By contrast, the fair

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[2] In the Cablevision case, Cablevision waived the fair use defense for purposes of that litigation. *Cablevision*, 536 F.3d at 124.

[3] For example, in light of this case and the *Cablevision* case, some cable companies are under the misimpression that both headend (copies made and stored at the cable company) and set-top box (copies made and stored at a consumer's home on a set-

use doctrine neither immunizes nor prohibits per se entire classes of technology and business models from assessment under balanced copyright principles.

In the present case, we believe Aereo could not possibly establish that its business is protected by fair use. They are a for-profit enterprise, and they are charging consumers a fee precisely for the service of making unauthorized copies and transmitting to them on demand. They have no licenses from the holders of the relevant copyright. And they are copying virtually unlimited amounts of entire television shows and movies.

Moreover, it is clear that what Aereo is doing is likely to cause "nonminimal harm to the potential market for, [and] the value of, [the networks and studios] copyrighted works." *Sony Betamax*, 464 U.S. at 456. The economics of television production operates as follows: A producer of television shows, such as Warner Bros. Television, will produce a show for any of the broadcast networks (*e.g.*, ABC, CBS, NBC, and Fox). The network will pay Warner Bros. a portion of the production costs of that show through license fees. The broadcast network will in turn recoup at least some of the costs it pays to Warner

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top box provided by the cable company) DVR technology are immune from effective copyright challenge because, under the Court of Appeals' reasoning, the consumer, not the cable company, has the "volition" to make the copy. But that belief is badly misplaced. The legality of this and any other technology depends significantly on the functionality that it allows, the use to which it puts the copies, and the impact to the legitimate market value of the copyright holder's work – *i.e.*, the traditional fair use considerations.

Bros. through advertising revenues (commercials) and through affiliate "retransmission" fees it charges to cable and satellite providers. Warner Bros. will also grant to the networks the right to exhibit the television shows on an on-demand basis to consumers for a period of time (over either the traditional cable and satellite delivery platforms or over the Internet), and the networks will in turn attempt to further cover the costs of their rights by granting on-demand licenses to traditional cable providers or Internet-based companies like Hulu. In addition, at the end of a certain period (a season or two), Warner Bros., as the producer of the show, is free to license the show involved in non-broadcast outlets. Because it is often true that license fees received by Warner Bros. from the broadcast networks do not cover all of the show's production costs, Warner Bros. must further license the show through later downstream sales. These critically important downstream sales include: selling syndication rights to local broadcast stations, selling downstream rights to basic cable channels (such as TBS, TNT, USA Network, etc.) for reruns, selling DVDs in both physical and electronic form, and increasingly selling exhibition rights to so-called subscription on demand services such as Netflix and Amazon Prime. Warner Bros. estimates that by the end of 2014, more than 50% of its home entertainment revenue will come not from DVD sales, but from online and mobile revenues.

It seems quite obvious that to allow a complete interloper like Aereo to offer a service that it explicitly markets as an alternative to cable television service, and which is also an alternative to authorized DVR services as well as subscription-on-

demand viewing – *all without paying a penny into the content-production ecosystem* – is, in the words of this Court in *Sony Betamax*, likely to cause more than "nonminimal harm to the potential market for, or the value of, the[] copyrighted [television shows]." 464 U.S. at 456. Just to identify a few examples of these harms: it harms the ability of networks to recoup retransmission fees from licensed cable and satellite operators, which revenues are needed to pay for the production of the television shows by studios like Warner Bros. It also directly harms both the licensed DVR revenues of cable operators, as well as other video on demand revenues received by the broadcaster from the cable and satellite operators (as part of the affiliate fee or otherwise). In addition, particularly since Aereo is providing online on-demand access to programming at precisely the same time that the networks are authorized to do so, it also directly harms the revenues received by the networks from Internet-based video on demand providers such as Hulu and Amazon Prime. Moreover, allowing Aereo to exploit the content for a fee from consumers without paying any money for its exhibition also undermines to some degree the value of downstream syndication of the shows, DVD and electronic digital sales, as well as revenues from downstream subscription on demand services, such as Netflix.

In short, Aereo is simply a blatant free rider trying to make a quick buck without paying anything towards the true costs of what it misappropriates, and its only innovation is literally the legal one of designing a system that winds its way through the loopholes created by the Court of Appeals in the

Cablevision case. In our view, the Aereo service is a poster child for what is *not* a fair use.

Lest our point be mischaracterized by Respondent, however, we are *not* asking this Court to rule on fair use in this case. Rather, we are simply asking this Court to rule that the appropriate approach to evaluating these ever-developing technologies and business models is *not* to do what the Court of Appeals has done in this case and in the *Cablevision* case – to give a contorted and legally unsupported and unduly narrow reading to the broad statutory rights of reproduction and public performance – but instead to recognize that entities such as Aereo have clearly engaged in the making of unauthorized copies and unauthorized public performances, but that such a determination is not necessarily the end of the analysis of whether or under what circumstances such technologies and business models require a license. Copyright law has the fair use doctrine to make such nuanced judgments, but it is most assuredly not appropriately accomplished by torturing the definition of a "public performance."

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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