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 VIACOM INC., METRO-GOLDWYN-MAYER STUDIOS INC., INDEPENDENT FILM & TELEVISION ALLIANCE, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC, THE NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS-THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

All *Amici* participate in the lawful creation and distribution of filmed content, both motion pictures and television, in the United States.

Amici Viacom Inc. ("Viacom") and Metro-Goldwyn-Mayer Studios Inc. ("MGM") produce and/or distribute motion pictures and television programs. *Amicus* Independent Film & Television Alliance ("IFTA") is the trade association for the independent film and television industry worldwide. Viacom, MGM, and the independent production companies who are members of IFTA depend on compensation paid by authorized licensees for the public performance of their works to incentivize their undertaking of the significant costs of creating and disseminating those works. These producers also license the transmission of the same works through multiple additional distribution channels, including by way of Internet streaming through licensed services, such as Hulu, Amazon Prime or Netflix.

Amicus International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC ("IATSE") represents thousands of rank-and-file men and women who

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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.

provide below-the-line services for motion picture and television content.[2] *Amicus* The National Association of Broadcast Employees and Technicians-The Broadcasting and Cable Television Workers Sector of the Communications Workers of America ("NABET-CWA") represents more than 10,000 workers in broadcasting and related industries. *Amicus* International Brotherhood of Electrical Workers, AFL-CIO ("IBEW") is a labor organization representing over 10,000 members in various classifications in the motion picture and television production industry. *Amicus* International Brotherhood of Teamsters ("IBT") is a labor organization with 1.3 million members in the United States and Canada. It has affiliates in Hollywood, New York and other cities that represent thousands of workers employed on motion picture and television productions across the United States.

These *Amici's* members' livelihoods depend on remuneration for the licensed use of the content that they work to create and distribute. In the case of IATSE and IBEW members, this remuneration includes residuals, *i.e.*, deferred compensation based

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[2] "Below-the-line" services encompass "the technical expenses and labor . . . involved in producing a film (*i.e.*, relating to mechanical, crew, extras, art, sets, camera, electrical, wardrobe, transportation, raw-film stock, printing and post-production.) Below-the-line personnel include the production manager, cinematographer, set designer, special effects persons, wardrobe person and makeup artist. The phrase 'below-the-line' refers to the location of the specific expense item/person on the film budget." John W. Cones, *Dictionary of Film Finance and Distribution: A Guide for Independent Filmmakers*, at 47 (2013).

on the continuing use of the creative works as they are released in different media. Residuals are an important source of funding for workers' health insurance and pensions.

Amici have a significant interest in the interpretation of the public performance right. *Amici* are part of an important ecosystem of existing and emerging platforms for the licensed distribution of copyrighted content. Aereo and services that have followed—and that, if the Second Circuit's holding is affirmed, will follow—Aereo rely upon a blueprint that deliberately bypasses the system of licensing that Congress intended as expressed through the plain language of the Copyright Act. Aereo and its ilk threaten to eviscerate the interests of *Amici*, their employees or members and many others who invest in or depend upon innovative distribution services that respect copyright and the rule of law.

SUMMARY OF ARGUMENT

Amici respectfully submit that the decision of the Court of Appeals should be reversed.

The Second Circuit in this case reaffirmed its adherence to an erroneous interpretation of the Copyright Act's public performance right that allows companies to retransmit live performances of copyrighted works to mass audiences without obtaining or paying for the licenses that the law requires. Under the Second Circuit's rule, the transmissions of thousands or even millions of performances of exactly the same works to widely dispersed public audiences are private, not public,

performances if the service assigns a single copy for each viewer, rather than just one copy for all viewers. According to the Second Circuit, the copyright laws allow this technologically inefficient gimmick to end-run the right of public performance.

As Petitioners, the dissent in the Court of Appeals, and other courts that have disagreed with the Second Circuit all have explained, the Second Circuit's interpretation of the public performance right is contrary to the express language and purpose of the Copyright Act. The exclusive right of a copyright owner to "perform the [copyrighted work] publicly" includes the exclusive right "to transmit . . . a performance . . . of the work . . . to the public." 17 U.S.C. § 101 (the "Transmit Clause"). A legislative overruling of this Court's decisions in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974), the Transmit Clause embodies Congress's considered judgment that the standard for whether a copyrighted work is being performed publicly through transmissions is whether a performance of "the work" may reach a public audience. The test does *not* turn on whether a particular transmission stream of that same performance is directed only to a single receiver. Indeed, Congress made clear that a performance "to the public" remains public "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 (emphasis added).

The Second Circuit, first in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir.

2008) ("*Cablevision*"), and reaffirmed in the decision below, contorted the Transmit Clause by concluding that the "transmission of a performance *is itself a performance*," such that the phrase "capable of receiving the performance" refers to the audience for an individual transmission rather than the audience for the performance as a whole. *Id*. at 134 (emphasis added); *see WNET, Thirteen v. Aereo, Inc*., 712 F.3d 676, 687 (2d Cir. 2013). This interpretation cannot be squared with the Transmit Clause's plain language, which defines the transmission that counts as a public performance as the transmission of "*a performance . . . of the work*"—not a transmission of a transmission. 17 U.S.C. § 101 (emphasis added); *see Cmty. Television of Utah, LLC v. Aereo, Inc.*, 2:13CV910DAK, --- F. Supp. 2d ---, 2014 WL 642828, at *6 (D. Utah Feb. 19, 2014) ("[I]nstead of examining whether the transmitter is transmitting a performance of the work to the public, the *Cablevision* court examined who is capable of receiving a particular transmission. This court agrees with Plaintiffs that the language of the Transmit Clause does not support such a focus.") (citation omitted).

The Second Circuit's rewriting of the Transmit Clause is not only linguistically wrong but nonsensical as well. As one court, in disagreeing with the Second Circuit, aptly put it: "Very few people gather around their oscilloscopes to admire the sinusoidal waves of a television broadcast *transmission*. People are interested in watching the *performance* of the *work*." *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC,* 915 F. Supp. 2d 1138, 1144-45 (C.D. Cal. 2012).

Amici submit this brief not to rehash the manifest errors in the Second Circuit's statutory interpretation, but rather to describe the substantial and widespread economic harm that the Second Circuit's rule inflicts on producers and their authorized distributors who are partners in the financing, production and distribution of copyrighted works. This harm extends to the millions of individuals who work to create the copyrighted works that Aereo and others seeking to wrongfully capitalize on the Second Circuit's rule misappropriate for free. And by permitting the transmission of copyrighted works to the public without payment of any license fees, the Second Circuit's rule threatens emerging, authorized and genuinely innovative distribution platforms.

The public performance right is among the most critical rights secured by copyright to the owners of audio-visual content. It encompasses not only the public exhibition of motion pictures in movie theaters, but also the transmission of performances of the same content "to the public." 17 U.S.C. § 101. Congress was unmistakably clear that the transmissions covered by the public performance right include those made "by means of *any* device or process," which include not only those "device[s]" or "process[es]" known in 1976, but those "*later developed*" as well. *Id*. (emphases added). As technology has increasingly facilitated the transmission of performances of movies and television shows through Internet streams to public audiences, the public performance right continues to be a critically important right under the copyright system that Congress enacted.

The Second Circuit's anomalous interpretation of the Transmit Clause is not cabined to the specific architecture of the Cablevision and Aereo services. As the decision below makes clear, the Second Circuit has now recognized general "guideposts that determine the outcome" of a case under the Transmit Clause, including that "if the potential audience of the transmission is only one subscriber, the transmission is not a public performance," and that it is "irrelevant to the Transmit Clause analysis whether the public is capable of receiving the same underlying work or original performance of the work by means of many transmissions." *WNET*, 712 F.3d at 689.

These propositions have no basis in the Copyright Act or in any appeal to technological "innovation," notwithstanding Aereo's description of itself as a "modern and innovative" technology. There is nothing innovative about having thousands of antennae do the work of one in order to skirt the license requirement. Judge Chin, in dissent, correctly called Aereo's system for what it is: "a sham" and "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." *Id.* at 697 (Chin, J., dissenting).

The Second Circuit's rule is the true threat to innovative content-dissemination systems. From services as diverse and creative as Hulu, Netflix, Amazon Prime, iTunes, HBOGo and more, innovation abounds in today's content delivery ecosystem. Like Aereo, these legitimate services make use of Internet streaming technology. Unlike Aereo, however, lawful

services do not waste resources replicating the physical antenna infrastructure that Internet streaming is replacing in order to avoid paying to license copyright owners' performance rights. Instead, these services pay for publicly performing copyrighted works. The fact that lawful services have made more works available to a larger public audience than ever before confirms that respect for the rights that Congress vested in copyright owners fuels true technological innovation. Without investment in production and compensation for receiving transmissions of public performances, producers cannot produce and crew members cannot do their jobs bringing to audiences the motion pictures and television programs that they enjoy watching.

ARGUMENT

I. THE SECOND CIRCUIT'S READING OF THE TRANSMIT CLAUSE THREATENS SUBSTANTIAL HARM TO *AMICI* AND CONSUMERS IN THE CONTENT CREATION AND DISSEMINATION CHAIN

By undermining the copyright protections that are critical to the success of the motion picture and television industries, the Second Circuit's rule portends substantial economic harm to the entire content creation and dissemination system—from those, like *Amici*, who are responsible for creating and disseminating content and onward to the millions of Americans who enjoy consuming that content.

Services like Aereo, which arrogate to themselves the copyright owners' exclusive right to publicly perform their works, threaten to undermine the entire system of incentives and rewards that the Copyright Act fosters. Content producers like *Amici* Viacom, MGM and the independent production companies that are members of IFTA invest billions of dollars per year in the creation and distribution of copyrighted content. The average major motion picture released between 2004 and 2008 cost $137 million to produce, market and distribute globally.[3]

Content producers earn their return on these substantial investments and/or borrowing required to produce motion picture and television content through a system of sequential distribution or "windowing." In a windowing system, the copyright owner may provide different modes of exhibition and distribution in order to match consumer offerings with consumer demand to access content in different ways. The consumer offerings vary as to, among other things, when (on first release or later), where (in a theater, at home on a television or on a mobile device), how (on demand or according to a set schedule; transactionally or through a subscription), and for how much (a variety of price points) consumers view or obtain copies of copyrighted content. *See generally Warner Bros. Entm't Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1005-06 (C.D. Cal. 2011); *Universal City Studios, Inc. v. Reimerdes*,

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[3] *See* SNL Kagan, *Economics of Motion Pictures* 3 (2009). The study defined "major studio films" as those that played on at least 1,000 screens in the United States. SNL Kagan examined 764 such films in the 2004-2008 period.

111 F. Supp. 2d 294, 309 (S.D.N.Y. 2000). Services like Aereo usurp authorized distribution windows—in Aereo's case, usurping not only the over-the-air broadcast window, but the window for authorized Internet streams of the same content—and thereby undermine the entire framework for authorized content delivery.

Aereo and its *Amici* portray copyright owners and broadcasters as citadels of entrenched business models that depend for their survival on calcified options for consumers. That rhetoric is completely belied by the foundational underpinning of the copyright laws and the reality of the world of content creation and distribution today. "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see also Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758 (RMC), --- F.Supp.2d ----, 2013 WL 4763414, at *17 (D.D.C. Sept. 5, 2013) ("'It is virtually axiomatic that the public interest can only be served by upholding copyright protections and correspondingly, preventing the misappropriation of skills, creative energies, and resources which are invested in the protected work.'") (quoting *Apple Computer, Inc. v. Franklin Computer Corp*., 714 F.2d 1240, 1255 (3d Cir. 1983)).

The windowing framework for disseminating content and securing returns and further incentives to creation is a testament to these fundamental copyright principles. Windowing enables consumers

to obtain access to copyrighted content through a rich and varied range of authorized offerings:

- They can buy a physical copy of a movie or television program (on DVD or Blu-ray Disc).

- They can rent a physical copy (at a brick-and-mortar store or through a mail subscription service like Netflix).

- They can download or rent an electronic copy through a service like Amazon or iTunes.

- They can watch content on a scheduled subscription cable television channel like HBO (or via HBO's television and Internet-based on-demand service).

- They can access content for a fixed period of time via Video-on-Demand ("VOD") television services through which cable or satellite television providers such as Comcast or DirecTV offer motion pictures or television programs that have already aired through the same connections that subscribers use to watch live television.[4]

- They can also view content on Internet-based VOD services such as Netflix,

[4] *See*, *e.g.*, Todd Spangler, "Comcast Opens Digital Storefront to Sell Movies and TV Shows," *Variety* (Nov. 20, 2013), http://variety.com/2013/digital/news/comcast-opens-digital-storefront-to-sell-movies-and-tv-shows-1200859232/#.

Amazon Instant Video or Vudu, which enable subscribers to watch motion pictures or television programs that have already aired—and even original content—on a streaming basis through an Internet connection on a smartphone, a tablet or an Internet-enabled television.[5]

- And they can watch content on websites such as Hulu, abc.com, cbs.com, fox.com, or nbc.com, where broadcasters, cable channels or content producers make television programs that were originally broadcast over the air available with advertisements, during a so-called "catch-up" period and under authorized terms and conditions. *See WTV Sys.*, 824 F. Supp. 2d at 1005.

In short, the public performance right fuels a vibrant and dynamic array of consumer offerings and simultaneously provides remuneration to copyright owners and the incentives to create new content. Backed by the Second Circuit's erroneous construction of the public performance right, Aereo and services like it improperly and unfairly undermine all of these significant public benefits. Indeed, just as sequential distribution inures to the benefit of all involved in the chain from content creation to consumption, Aereo's upending of the windowing system will cause harm to all involved in that process.

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[5] *See generally* Ken Auletta, *Outside the Box: Netflix and the future of television,* The New Yorker, at 54.

First, allowing a company to transmit copyrighted works to the public through a particular technical artifice without paying for a license to do so threatens the entire "windowing" framework. Systems exploiting the Second Circuit's rule can take content from the over-the-air broadcast window and distribute it to their customers, who otherwise would be part of the Internet streaming window, all without paying any license fees in any window. Such services can undermine other windows as well, for example by streaming entire libraries of copyrighted works from individual copies to different users, all without paying for the obvious performance of those works to a public audience. The Second Circuit's rule thus undermines a content distribution system that permits content creators to earn additional revenue from responding to consumers' demand for convenience and flexibility in content viewing.

That revenue—from the dollars that advertisers pay to broadcasters and that cable companies and other retransmitters pay for the right to publicly perform works—goes toward the payments broadcasters make to copyright owners to acquire programs for broadcast, and through them to the individuals who write, act in, direct and provide all of the other services that go into creating movies and television shows. Hence, a diminution in advertising rates and retransmission fees caused by unlicensed streaming services negatively affects all participants in the lawful financing, production and distribution chain. As the Second Circuit itself has noted, this would

> encourage current and prospective retransmission rights holders, as well as other Internet services, to follow [the defendant's] lead in retransmitting plaintiffs' copyrighted programming without their consent. The strength of plaintiffs' negotiating platform and business model would decline. 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 Internet without consent would thus threaten to destabilize the entire industry.

WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 286 (2d Cir. 2012); *see also Cmty. Television of Utah*, 2014 WL 642828, at *8; *FilmOn X LLC*, 2013 WL 4763414, at *15; *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 397-98 (S.D.N.Y. 2012).

Second, the Second Circuit's rule also threatens harm to thousands of individuals involved in the creation and dissemination of copyrighted content, including the members of *Amici* IATSE, NABET-CWA, IBEW, and IBT. The livelihoods of these members and the thousands of employees and production personnel at Viacom, MGM and the members of IFTA depend on a robust and continuing revenue stream, which Aereo's infringing actions

usurp. Moreover, revenue from the aftermarket use of content first broadcast over the air directly funds the pension and healthcare plans of the members of *Amici* IATSE and IBEW. When unauthorized services interrupt the revenue stream from licensed uses of copyrighted works, this directly affects the livelihood of the many hard-working men and women in the content-creation process.

Third, the harm to the public interest is particularly acute in this case as consumers increasingly view content through mobile and other Internet-connected devices. Indeed, online streaming is the fastest growing sector of consumer video consumption in the United States, and it is expected to increase in the future.[6] Over the last decade, revenues from online streaming sources have increased by several fold, and are expected to double by 2017.[7] Numerous services, including Hulu, Netflix, and others, make copyrighted content widely available through Internet streaming in ways that are genuinely innovative, exciting and further consumer choice. These services do so legitimately,

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[6] *See, e.g.,* Chris Osika, *Streaming Is Going Mainstream: The Upward Arc of Online Video, Driven By Consumers*, Cisco Blogs (Dec. 18, 2012, 5:00 AM), http://blogs.cisco.com/sp/streaming-is-going-mainstream-the-upward-arc-of-online-video/ ("48 percent of consumers have increased their streaming of professionally produced video content in the past two years, making it the fastest-growing category of video use.").

[7] Erik Gruenwedel, *Online Video Distribution Revenue Projected to Double by 2017*, Home Media Magazine (Aug. 27, 2012), http://www.homemediamagazine.com/streaming/online-video-distribution-revenue-projected-double-2017-28163.

with authorization from the owners of content and compensation to those in the content-creation chain.[8]

By absolving Aereo of the obligation to pay for the content on which its business is built, the Second Circuit's rule gives Aereo and other unlicensed services an unfair competitive advantage over the lawful streaming business model. The rule thus threatens the authorized services that millions of Americans use to watch motion pictures and television programs. Indeed, because a large and steadily growing number of viewers enjoy content via Internet streaming services, content creators like *Amici* increasingly rely on revenue from streaming performance rights to recoup the enormous investments necessary to produce motion pictures and television programs. Hampering lawful streaming services will harm the value proposition for producing works for viewers to enjoy and for investing in new and innovative online dissemination models.

Aereo is not the only service that portends these harms to *Amici* and consumers. As the United States recognized in its brief to this Court in *Cablevision*, the logic of the Second Circuit's jurisprudence—that the public performance right is a matter of technological means rather than audience scope—"*could threaten to undermine copyright protection in*

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[8] *See, e.g.*, *Paramount Pictures content coming to Prime Instant Video*, Android Central (May 23, 2012), http://www.androidcentral.com/paramount-pictures-content-coming-prime-instant-video.

circumstances far beyond those presented [in the *Cablevision* case], including with respect to VOD services or situations *in which a party streams copyrighted material on an individualized basis over the Internet*." Brief for the United States as Amicus Curiae (recommending denial of certiorari) at 20-22, *Cable News Network, Inc. v. CSC Holdings, Inc.*, No. 08-448 (U.S. May 29, 2009), 2009 WL 1511740 (emphasis added).

Indeed, in the wake of Aereo's unveiling of its "Rube Goldberg-like contrivance," and the decisions in the Second Circuit validating it, other companies have developed methods designed to pass through the loopholes in copyright law adopted by the Second Circuit. FilmOn, an Aereo copycat, streams copyrighted works using the same multi-antennae system that Aereo does. *See FilmOn X LLC*, 2013 WL 4763414, at *2; *BarryDriller Content Sys.,* 915 F. Supp. 2d at 1141 n.5. Just recently, FilmOn launched a new service called Teleport Technology which streams content from "remote desktops connected to FilmOn's remote antenna and DVR system." According to FilmOn, "[h]undreds of thousands of mini desktop computers are already available in thirteen cities across the USA."[9]

Similarly, NimbleTV recently launched a service that streams live television programs to cable subscribers' computers and other mobile devices such

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[9] *FilmOn Revolutionizes US Independent Television Industry With Launch of Teleport Technology*, Yahoo! Finance (Feb. 11, 2014), http://finance.yahoo.com/news/filmon-revolutionizes-us-independent-television-110000185.html

as iPads or smartphones—even though NimbleTV does not pay owners any retransmission fees.[10] Major cable and satellite TV providers—such as DirecTV and Charter Communications Inc.—are also reportedly considering utilizing similar technologies "to avoid paying billions of dollars" in license fees.[11]

In short, the Second Circuit's rule creates a powerful incentive to exploit copyrighted works for free. That result undermines the incentive that Congress actually intended to create by recognizing the exclusive right of public performance in the first place: that content creators are entitled to remuneration when others publicly perform their copyrighted works.

II. THE PROPER INTERPRETATION OF THE TRANSMIT CLAUSE FOSTERS INNOVATION IN THE DELIVERY OF CREATIVE CONTENT

Aereo and its *Amici* defend the Second Circuit's rule as one that supports efficient technology and warn that a contrary reading of the Transmit Clause will stifle technological innovation. Such arguments do not change the proper interpretation of the

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[10] Todd Spangler, *TV's Latest Internet Disruption? NimbleTV Launches in NYC by Piggybacking on Pay TV*, Variety (Dec. 10, 2013), http://variety.com/2013/digital/news/tvs-latest-internet-disruption-nimbletv-launches-in-nyc-by-piggybacking-on-pay-tv-1200939746/#.

[11] Andy Fixmer, et al., *DirecTV, Time Warner Cable Are Said to Weigh Aereo-Type Services,* Bloomberg (Oct. 25, 2013), http://www.bloomberg.com/news/2013-10-25/directv-time-warner-cable-said-to-consider-aereo-type-services.html.

Transmit Clause. They also are wrong as a matter of fact.

First, Aereo's virtually simultaneous streaming of live broadcasting is not "cloud computing," whatever definition one might give to that term. This case has nothing to do with an end-user "storing" an electronic copy of a document or music file on some remote server. There are numerous types of services that fall under the umbrella of "cloud computing," including remote storage word processing services, business support applications, and others that do not mimic Aereo's technologically inefficient set-up. By essentially live streaming broadcast content, Aereo is retransmitting copyrighted works, pure and simple.

Second, the fact that the Transmit Clause requires licenses for services that transmit performances of copyrighted works "to the public" has not impeded innovation in content-delivery over the Internet. On the contrary, numerous licensed services—including Hulu, Netflix, Amazon Prime, Google Play and Apple's iTunes, to name a few—obtain licenses to perform copyrighted works and, at the same time, have given consumers a panoply of choices for how to watch motion pictures and television programs. The producer *Amici* and others have been a driving force behind such innovations in television viewing such as on-demand viewing; cloud storage and access to TV shows and movies (including through consumer offerings supported by UltraViolet technology or the recently announced Disney Movies Anywhere service); and, most recently, a system of viewing called TV Everywhere, which allows consumers to watch their favorite TV shows and

movies whenever they want to watch them on televisions, computers or mobile or game devices (including, for example, through the award-winning HBO GO app).

Third, from the standpoint of technological efficiency, streaming services whose business models are built on respecting content are far more efficient than Aereo and its imitators, because they stream a single copy of content across a distributed network of multiple servers. As a major Internet network executive has explained, this "creates a very efficient overlay multicast network."[12] Indeed, this is the chief efficiency of Internet streaming: content distributors can disseminate a single copy of a copyrighted work to a mass audience while using minimal physical infrastructure.

Aereo sacrifices this efficiency by streaming individual copies of content utilizing tens of thousands of miniature antennae devoted to each separate user. As such, while Aereo claims that its service stands at the vanguard of Internet innovation, Aereo is actually devoting significant resources to replicating the physical infrastructure of antennae that Internet streaming and other technologies are rendering obsolete. As technology commentators have observed, Aereo is "ridiculously inefficient and monstrously unscalable."[13] Indeed,

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[12] Steven Cherry, *Downloading a Million Lions in a Day,* IEEE Spectrum (July 29, 2011), http://spectrum.ieee.org/podcast/computing/networks/downloading-a-million-lions-in-a-day.

[13] Farhad Manjoo, *Don't Root for Aereo, the World's Most Ridiculous Start-up*, PandoDaily (July 14, 2012),

"[e]ven in dot-com years, not many firms ever came close to wasting so much money," in "a manner so spectacularly inefficient, ending up building a product that most people don't need."[14] That Aereo is "[c]ompletely inefficient (and potentially unreliable) from a technology standpoint"[15] is not surprising, given that its *raison d'être* is not technological innovation, but rather, the exploitation of a perceived legal loophole.

At bottom, Aereo's only "innovation" is its faulty legal theory that it can transmit copyrighted works aired on "live TV" without paying for the right to do so. It is hard to conceive of a proposition that is more dangerous to the content creation system that for decades has produced countless works that millions of Americans continue to enjoy. That is exactly why Congress enacted the Transmit Clause. And that is why this Court should reverse the Second Circuit's interpretation of the Transmit Clause, which has no basis in the Clause's text, history or purpose and would eviscerate core copyright protections that sustain this nation's system for creating and distributing copyrighted content.

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http://pandodaily.com/2012/07/14/dont-root-for-aereo-the-worlds-most-ridiculous-start-up/.

[14] *Id*.

[15] *By Putting Over-the-Air Online Legally, Aereo Clears The Way For ALL TV Everywhere*, Forbes (Apr. 10, 2013), http://www.forbes.com/sites/anthonykosner/2013/04/10/by-putting-over-the-air-online-legally-aereo-clears-the-way-for-all-tv-everywhere/.

CONCLUSION

Amici respectfully submit that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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