No. 13-461

IN THE

Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC., *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 *AMICUS CURIAE* OF THE MEDIA INSTITUTE IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE MEDIA INSTITUTE IN SUPPORT OF PETITIONERS

Amicus Curiae The Media Institute respectfully submits this Brief in Support of the Petitioners. All parties have consented to the filing of this Brief.[1]

INTERESTS OF *AMICUS CURIAE*

The Media Institute is a nonprofit research foundation specializing in communications policy issues. The Institute exists to foster such values as freedom of speech, a competitive media and communications industry, excellence in journalism, and protection of intellectual property. Founded in 1979, The Media Institute pursues an active program agenda that encompasses virtually all sectors of the media, ranging from traditional print and broadcast outlets to newer entrants such as cable, satellites, and online services. The Institute publishes books and monographs, prepares regulatory filings and court briefs, convenes conferences, and sponsors a luncheon series in Washington for journalists and communications executives. The organization has evolved into one of the country's leading organizations focusing on the First Amendment and communications policy. The Media Institute takes a strong interest in the protection of intellectual property, especially focusing on copyright protection, pursuant to the vision of the Framers of the Constitution that robust protection for intellectual

1. Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party authored this Brief in whole or in part and that no entity or person, aside from *Amicus Curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this Brief.

property under the Patent and Copyright Clause acts to enhance the marketplace of ideas.

SUMMARY OF ARGUMENT

If a picture tells a thousand words, a thousand antennas tell the picture. Aereo's bizarre engineering, employing thousands of antennas to do the work of one, reveals to all what is really going on. New technologies often disrupt existing economic and legal arrangements. When the disruption is the product of ingenious invention or entrepreneurial pluck that does not run afoul of settled property, contractual, statutory, or constitutional rights, the victor in the marketplace is entitled to the spoils. In the marketplace, however, there are not just winners and losers. There are also those who play by the rules, and those who do not. No rewards are justified for those who disrupt settled economic and legal arrangements by invading the legal rights of others and mocking the rule of law.

The Petitioners collectively generate a major share of all the copyrighted news, information, and entertainment content shown on television in the United States. The Respondent Aereo retransmits the copyrighted works of the Petitioners through technological contrivances that serve no purpose other than to provide a pretext of legal cover, allowing Aereo to traffic in copyrighted content without paying for it.

Aereo's model, and the Second Circuit's decision endorsing it, threatens the existence of the American broadcast industry as the nation has come to know it, an industry built on sound and settled understandings of copyright law.

ARGUMENT

I. AEREO'S MODEL POSES A MASSIVE THREAT TO THE SETTLED ECONOMIC AND LEGAL ARRANGMENTS THAT UNDERGIRD THE BROADCAST INDUSTRY

A. Aereo's Model Threatens Massive Disruption of the Television Industry

Setting aside the technological conduit used to view the television signal—setting aside, that is, whether the signal reaches a viewer through over-the-air reception, cable, satellite, microwave, or the Internet—the importance of the actual *content* delivered by broadcasters cannot be overstated. *See* Steven Waldman, FCC, *The Information Needs of Communities* 13 (July 2011), available at http://tinyurl.com/FCCWaldman.

The value of broadcast television to the enhancement of an informed democracy has long been understood by this Court. "Broadcast television is an important source of information to many Americans." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 194 (1997). Consumers of broadcast news are especially dependent on the content produced by local broadcasters in emergencies, such as severe storms, and the public is heavily dependent on local broadcast stations for comprehensive crisis coverage during such events. *See* Pew Research Center, *Understanding the Participatory News Consumer* 10 (March 1, 2010), available at http://tinyurl.com/PewNewsConsumer. For good reason, federal policy has thus long favored the preservation of broadcast television in America, recognizing that "by tradition and use for decades now

it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression." *Turner*, 520 U.S. at 194.

The Petitioners have invested creativity and capital to promote the progress of science and the useful arts, in reliance on the protection of federal law against the free-riding exploitations of those who trammel on those exclusive rights. Congress has provided that protection by vesting in the Petitioners the exclusive rights to their works contemplated by the Constitution. U.S. Const., Art. I, § 8, Cl. 8.

Television programming is not created for free. Like most creative works protected by copyright, as Justice Holmes long ago observed, it costs to create it, and it is created for the profit that may in turn be received. In *Herbert v. Shanley Co.*, 242 U.S. 591 (1917) Justice Holmes, writing for the Court, held that an orchestra's performance of Victor Herbert's musical compositions in a hotel lobby was a public performance that invaded the composer's copyright interests. As with Aereo, the defendants' performances, Justice Holmes observed, were "not eleemosynary." *Id.* at 594. To the contrary, the defendants made a profit they did not earn, and cut into a profit they did not deserve: "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." *Id*. Broadcasters today often invest heavily in the cost of production, and pay heavily for broadcast content. *See* FCC, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 12-203, 28 FCC Rcd. 10,496, 10,587-88 (2013) ["FCC Annual Assessment"].

And indeed, again to Justice Holmes' point, what hurts the content-providing investors in television programming ultimately hurts the writers, artists, and composers downstream. A business model that will not allow television programmers to recoup the costs of production will not allow creators to recoup for the costs of creation.

Broadcasters, cable system operators, and satellite distribution systems have operated for decades on the assumption that federal law vested copyright ownership in the original creative television programming generated by broadcasters and other content providers in *copyright owners*, who could in turn charge fees negotiated at arm's length for the license to retransmit their copyrighted works. A vast regime of contractual arrangements apportioning the revenue generated by these copyrighted television works has been constructed on these settled economic expectations, buttressed by the assumptions of the major institutional economic players that the underlying intellectual property interests in this marketplace were protected by the rule of law. Congress envisioned that broadcasters and other television content providers would negotiate at arm's length with those who retransmit television content. In these negotiations each side has its leverage, as the retransmitters—cable systems, satellite providers, and the like—are willing to pay the freight to obtain popular programming. *See* FCC Annual Assessment, 28 FCC Rcd. at 10,521-23.

The District Court below correctly recognized that the harm visited upon the television broadcast industry by Aereo is irreparable and staggering. Retransmission fees are fundamental to the economic viability of the broadcast industry, and the fees generated by retransmission

agreements "amount to billions of dollars of revenue for broadcasters." *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 398 (S.D.N.Y. 2012). Notwithstanding its recognition of the magnitude of the harm posed by Aereo to the broadcast industry, the District Court felt constrained by Second Circuit precedent to rule against the broadcasters. That Second Circuit jurisprudence, as Judge Denny Chin demonstrated in his dissent from the denial of rehearing en banc below, now poses a grave threat to television broadcasting in America as we know it. *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500, 502–03 (2d Cir. 2013) (Chin, J., dissenting from the denial of rehearing en banc).

The disruptive impact of Aereo's model will be nothing short of catastrophic for the industry. The disruption will not only harm television's large institutional players, but the myriad small businesses and individuals who contribute investment and creativity. Income earned from retransmission fees, including fees earned from licensed internet and mobile services (such as Netflix and Hulu) is passed on to the countless entrepreneurial producers who invest in new projects, and to the thousands of writers, editors, actors, technicians, and other workers who turn ideas into actual television content. The *public* is the ultimate beneficiary of this current regime, enjoying richer programming, as the retransmission consent fees generated by the negotiated license deals allow for the development and acquisition of new programming. *See Fox Television Stations, Inc. v. BarryDriller Content Sys.*, PLC, 915 F. Supp. 2d 1138, 1147-48 (C.D. Cal. 2012).

There is no Chicken-Little cry to the claim that this disruption will wreak havoc on the regime of local

broadcasting that Congress in law and policy has always supported. If Aereo's parasitic business model goes legally unchecked, copycat businesses will proliferate, multiplying like Aereo's own profligate antennas. *See* Jane C. Ginsburg, *Copyright 1992-2012: The Most Significant Development?*, 23 Fordham Intell. Prop. Media & Ent. L.J. 465, 476-77 (2013) (Observing the possible "spawning [of] a host of new copyright-avoiding business models"). Aereo, and various copycat companies employing similarly exploitative technologies and business models, threaten to expand to all major American markets, ruining the regime of local broadcasting favored by Congress and protected by both the nation's communications policies and copyright laws. *WNET, Thirteen*, 722 F.3d at 502–03 (Chin, J. dissenting).

If Aereo's model is not arrested, not only will many "sons of Aereo" emerge, but the other major players in the retransmission ecosystem—the likes of DirectTV or DISH or Charter Communications—will naturally move to Aereo-imitative platforms to themselves avoid paying retransmission fees. *See* Andy Fixmer, Alex Sherman, and Jonathan Erlichman, *DirecTV, Time Warner Cable Are Said to Weigh Aereo-Type Services*, Bloomberg (Oct. 26, 2013), http://www.bloomberg.com/news/2013-10-25/directv-time-warner-cable-said-to-consider-aereo-type-services.html.

So too, the broadcast networks will be pressured to give up the ghost, convert to cable channels, and deprive the many millions of Americans who receive television through free over-the-air broadcasting of that over-the-air content. *Id.* If allowed to stand, the Second Circuit's decision "will encourage other companies that retransmit

public television broadcasts to seek elimination of, or a significant reduction in, their retransmission fees." *WNET, Thirteen*, 722 F.3d at 502 (Chin, J. dissenting) (citing John M. Gatti & Crystal Y. Jonelis, *Second Circuit Deals Blow to Rights of Broadcasters Under the Copyright Act*, Intell. Prop. & Tech. L.J., July 2013, at 16, 18) ("This decision is a significant setback for broadcasters, who maintain that their works are being stolen by Aereo, and may very well embolden Aereo and other similar start-up ventures."); Tristan Louis, *Aereo: The Future of TV Is Here Today*, Forbes, Apr. 13, 2013, available at http://www.forbes.com/sites/tristanlouis/2013/04/13/aereo-the-future-of-tv-is-here-today/. As Judge Chin recognized, faced with the demoralizing prospect that businesses such as Aereo will have carte blanche to appropriate and retransmit their copyrighted broadcasts for free, the major broadcasters in the United States may be forced to abandon free broadcasting altogether and move their content to paid cable. *WNET, Thirteen*, 722 F.3d at 502 (Chin, J. dissenting) (citing Louis, *supra*; Aimee Ortiz, *Fox Threatens to Leave Network TV in Protest Over Aereo Lawsuit*, Christian Sci. Monitor, Apr. 11, 2013, available at http://www.csmonitor.com/Innovation/Pioneers/2013/0411/Fox–threatens–to–leave–network–TV–in–protest–over–Aereo–lawsuit; Brian Stelter, *Broadcasters Circle Wagons Against a TV Streaming Upstart*, N.Y. Times, Apr. 9, 2013, available at http://www.nytimes.com/2013/04/10/business/media/aereo-has-tv-networks-circling-the-wagons.html).

B. Broadcasters Have Justly Relied on Settled Law Regarding Copyright and Retransmission Rights

Stable legal protection for settled expectations is one of the oldest and most sacred principles of Anglo-American law, predating by centuries the very founding of the Republic. "'Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.'" *INS v. St. Cyr*, 533 U.S. 289, 316 (2001) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J. concurring).

A foundational premise of copyright law is that securing to authors a fair return for their creative labor acts to foster creativity, not stifle it, and thereby serves not just the interests of the individual author, but the broader public good. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("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."). This is the animating premise of the Constitution's Patent and Copyright Clause. *Mazer v. Stein,* 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

If the underpinning of our constitutional and statutory commitment to the protection of copyright is that stable legal rules protecting intellectual property work to *enhance* creativity in the marketplace, the same may be stated more generally about the broader network of law that protects well-settled economic expectations. "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf v. USI Film Products*, 511 U.S. 244, 265–66 (1994).

II. THE DECISION OF THE SECOND CIRCUIT IS CONTRARY TO THE CLEAR INTENT OF CONGRESS TO PROTECT THE COPYRIGHT INTERESTS VESTED IN BROADCASTERS FROM UNFAIR EXPLOITATION ACCOMPLISHED THROUGH MANIPULATIVE TECHNOLOGICAL EXPLOITATION

A. Aereo's Model is an Affront to the Fundamental Purposes of Copyright Protection

As stated at the outset, if a picture tells a thousand words, a thousand antennas tell the picture. Aereo is a ridiculous engineering platform, and would be almost comical if it were not so dangerous. *See* Farhad Manjoo, *Don't Root for Aereo, the World's Most Ridiculous Start-up*, PandoDaily (July 14, 2012), http://pando.com/2012/07/14/dont-root-for-aereo-the-worlds-most-ridiculous-start-up/ (Criticizing Aereo as "ridiculously inefficient".); Shalini Ramachandran and Amol Sharma, *Electricity Use Impedes Aereo's March: Streaming-Video service Has Other Challenges Besides Broadcasters'*

Lawsuits, Wall. St. J. (Oct. 28, 2013) at http://online.wsk.com/news/articles/SB10001424052702304470504579163383906312194/ (stating that Aereo could "easily" ramp up its subscriber base in New York to 350,000 subscribers, noting that "[i]n power terms, that translates to between 1.75 and 2.1 megawatts, nearly as much power as it would take to light up two NFL football stadiums," or "about $2 million a year in New York alone"). Aereo's bizarre engineering, employing thousands of antennas to do the work of one, reveals to all what is really going on. Once again, Judge Chin saw the matter exactly right. As he observed in his dissent from the panel decision below:

> The system employs thousands of individual dime-sized antennas, but there is no technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna; indeed, the system 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.

WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 697 (2nd Cir. 2013) (Chin, J., dissenting).

This Court in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005), addressed the critical importance of striking a "sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement." The peer-to-peer file-sharing software at issue in *Grokster*

was a highly valuable technology, with many lawful uses. Thus, unlike the technology used by Aereo, which speaks for itself as an obvious contrivance, the *technology itself* in *Grokster* was not manifestly illicit. This Court in *Grokster*, however, went beyond the surface of the technology itself, to examine Grokster's business behavior, putting substance above form, holding that a case for inducement of copyright infringement could be established through circumstantial evidence of culpable intent. *Id.* at 941. The Court thus held that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." *Id.* at 936–37. *See also Aiken*, 422 U.S. at 158 (copyright laws "'should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.").

Aereo's opportunistic, freeloading business model is an affront to the foundations of copyright, which are grounded in fundamental notions of the social compact and the essential justice of providing a fair reward for the fruits of labor, notions that undergird society's most basic commitment to the rule of law. *See* Robert P. Merges, *LOCKE REMIXED ;-)*, 40 U.C. Davis L. Rev. 1259, 1265 (2007) ("John Locke based his account of the legitimate origin of property rights on a simple foundational concept: labor. . . . I will make a straightforward statement, and proclaim the centrality of Locke's insight--that one who works hard to make something original deserves some rights and, therefore, a chance at a reward for the work. . . .").

Aereo's unlicensed retransmission of copyrighted works not only deprives the lawful owners of those works the retransmission fees to which they are entitled, it creates an unfair and illegal advantage for Aereo over the law-abiding retransmission services who do obey the manifest intent of Congress and letter of the Copyright Act by paying license fees for retransmission rights. If Aereo genuinely believes that the equities of economics, justice, and public policy are on its side, it may seek an amendment of the Copyright Act by petitioning Congress to modify the law to let Aereo freely appropriate copyrighted works to retransmit, charging its own customers for the service. Yet it is difficult to conjure any cogent economic or policy argument favoring free-riders over those who have invested in the creation and ownership of copyrighted works. *See* Paul Goldstein, *Goldstein on Copyright* § 7.7.7.2, (2005) ("In defining 'perform' broadly to encompass every conceivable aspect of performance, Congress adhered to a central copyright principle: all who derive value from using a copyrighted work should pay for that use. . ."); William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 40 (2003) ("In the absence of copyright protection the market price of a book or other expressive work will eventually be bid down to the marginal cost of copying with the result that the work may not be produced in the first place because the author and publisher may not be able to recover the costs of creating it.").

B. The *Teleprompter*, *Fortnightly*, and *Aiken* Trilogy

In an earlier technological epoch, Congress plugged a loophole created by two decisions of this Court that

Congress perceived as inconsistent with its intended policies, *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974) and *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). *Teleprompter* and *Fortnightly* likened the retransmission of broadcast signals to individual members of the public to the mere viewing of a broadcast. *See Fornightly*, 392 U.S. at 400. ("If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set. . . . The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur."). *Teleprompter* and *Fortnightly* in turn gave rise in 1975 to *Twentieth Century Music Corp. v. Aiken*, in which the Court held that no copyright infringement occurred when a fast food restaurant in downtown Pittsburgh played music from a radio over speakers for its customers, without any performing license. *Aiken*, 422 U.S. at 162–64.

C. Congress' Rejection of *Teleprompter*, *Fortnightly*, and *Aiken*

Congress disapproved of *Teleprompter*, *Fortnightly*, and *Aiken* in the Copyright Act of 1976, wisely perceiving a fundamental difference between a major institutional entrepreneur siphoning profits as a free-rider, and the random acts of household individuals stringing connective cable to an antenna on a hill. Instead, "Congress concluded that cable operators should be required to pay royalties to the owners of copyrighted programs retransmitted by their systems on pain of liability for copyright infringement." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709 (1984). The 1976 Copyright Act thus "reset the

rules for so-called secondary transmissions, treating some unauthorized transmissions as a copyright infringement but coupling that with a statutory mandatory licensing scheme." Randal C. Picker, *The Digital Video Recorder: Unbundling Advertising and Content*, 71 U. Chi. L. Rev. 205, 215 (2004).

D. Congress Resurrects the Rule of *Jewell-LaSalle*

The legislative history of the Copyright Act of 1976 makes it clear that Congress supplanted the reasoning of *Teleprompter*, *Fortnightly*, and *Aiken* with the sounder principles that had previously animated Copyright Law, as articulated in cases such as *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 197–98 (1931), in which this Court, in an opinion by Justice Brandeis, held that a hotel engaged in an infringing "performance" of copyrighted musical works when the hotel played copyrighted works received by radio through loudspeakers, for the entertainment of guests.

Congress clearly lamented the erosion of the *Jewell-LaSalle* rule. *See* Report of the House of Representatives Committee on the Judiciary on Copyright Law Revisions, H.R. Rep. No. 94-1476, at 86–87, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5701 (94th Cong., 2d Sess. 1976) ("H.R. Report") ("For more than forty years the *Jewell-LaSalle* rule was thought to require a business establishment to obtain copyright licenses before it could legally pick up any broadcasts off the air and retransmit them to its guests and patrons."). It was the reasoning of *Jewell-LaSalle*, not *Teleprompter*, *Fortnightly*, and *Aiken*, that Congress installed as the policy of the Copyright Act. The House Report clearly reflects the view of Congress that

commercial enterprises engaged in the retransmission of copyrighted television content should pay for that retransmission:

> Cable television systems are commercial subscription services that pick up broadcasts of programs originated by others and retransmit them to paying subscribers. . . . In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs.

H.R. Report at 88–89.

Aereo is simply a new iteration of an old business model, cleverly manufactured for the sole purpose of attempting an end run around the law. Aereo, like the cable operators Congress knew in 1976, is a commercial enterprise that poaches the copyrighted programs of other content providers and retransmits them to customers who pay to subscribe to its service. *See also WGN Cont'l Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 624 (7th Cir. 1982) ("It used to be that a cable system that picked up and retransmitted a broadcast signal containing a copyrighted program was not an infringer. But the Copyright Act of 1976 changed this. . . .") (citation omitted).

E. The Second Circuit's Errant Jurisprudence

The Second Circuit's idiosyncratic stretch upsets the appropriate balance between the legislative and judicial

branches, working a massive systemic change in one of the nation's most important economic and cultural industries through a salvo shot from the bench. Yet "it is generally for Congress, not the courts, to decide how to best pursue the Copyright Clause's objectives." *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003). The Second Circuit's misguided decision in *Aereo* is traceable to an antecedent misstep, in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008), in which the Second Circuit held that Cablevision's "remote DVR" service, through which customers could select programs to store on Cablevision servers individualized for each customer for later viewing, did not constitute a "public performance" under the 1976 Copyright Act. The court in *Cartoon Network* conceded that "the transmit clause is not a model of clarity," but nonetheless held that "when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission." *Id.* at 136. Thus, the court reasoned, "HBO transmits its own performance of a work when it transmits to Cablevision, and Cablevision transmits its own performance of the same work when it retransmits the feed from HBO." *Id.* The court went on to hold that given technical characteristics of Cablevision's system, only one person was "capable of receiving" the performance transmitted, and it was therefore not a performance "to the public." *Id.* at 137–38 The court thus concluded: "Given that each RS–DVR transmission is made to a given subscriber using a copy made by that subscriber, we conclude that such a transmission is not 'to the public,' without analyzing the contours of that phrase in great detail." *Id.* at 138. The panel decision of the Second Circuit in *Aereo* deemed the Second Circuit's previous decision in *Cartoon Network* controlling.

Aereo and *Cartoon Network* effectively provide an instruction book for how to circumvent the Copyright Act for unlicensed profit, at least within the Second Circuit. Any parasitic business seeking to make money from the copyrighted works of another without obtaining a license should design a technological system in which the transmission may be characterized as sent to only one subscriber. *See* Jane C. Ginsburg, *WNET v. Aereo: The Second Circuit Persists in Poor (Cable)Vision*, The Media Institute IP Viewpoints, April 23, 2013, available at http://www.mediainstitute.org/IPI/2013/042313.php.

So what is wrong with this picture? The answer, as Judge Chin's dissent in *Aereo* drove home, is that the entire system is a sham, a mockery of congressional intent that employs a contrived manipulation under which what is *in reality* transmission to millions of members of the public is transformed into a "non-public" transmission through nothing more than clever ruse. "Under Aereo's theory, by using these individual antennas and copies, it may retransmit, for example, the Super Bowl 'live' to 50,000 subscribers and yet, because each subscriber has an individual antenna and a 'unique recorded cop[y]' of the broadcast, these are 'private' performances." *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 697 (Chin, J., dissenting).

The Copyright Act grants a copyright owner the exclusive right, "in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly." 17 U.S.C. § 106(4) (2012). "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to

show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101 (2012). In turn, § 101 of the Act defines what it means to perform a work "publicly":

> To perform or display a work "publicly" means (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display 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 or display receive it in the same place or in separate places and at the same time or at different times.

Id.

F. Congress' Forward-Looking Vision Anticipated Future Sham Technologies

It is not the mode of retransmission technology that mattered to Congress, but the underlying creative and economic equities. Indeed, in the decades since the Copyright Act of 1976 was passed, technologies come and go, waxing and waning in their popularity and competitive success. Americans receive television content over the air, through microwave transmission, satellites, internet protocols, and fiber, among others, and new technologies will surely emerge. *See* U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act: Section

109 Report at 19-34 (June 2008), available at http://www.copyright.gov/reports/section109-final-report.pdf. Congress anticipated such technological change. The intent of Congress, however, was that the intellectual property rights of the copyright holders who generate television content would remain constant, despite the evolution of new delivery methods.

Congress' use of the phrase "to the public by means of any device or process" is an indication that Congress was forward-thinking—"Congress was trying to think ahead, to anticipate new technologies." Ginsburg, *WNET v. Aereo*, The Media Institute IP Viewpoints, *supra*. This forward-looking vision is confirmed in the Copyright Act's legislative history:

> A performance may be accomplished 'either directly or by means of any device or process,' including all kinds of equipment for reproducing or amplifying sounds or visual images, *any sort of transmitting apparatus*, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.
>
> The definition of 'transmit' - to communicate a performance or display 'by means of any device or process whereby images or sounds are received beyond the place from which they are sent' - is broad enough to include all conceivable forms and combinations of wired or wireless communications media, *including but by no means limited to radio and television broadcasting as we know them*.

H.R. Rep. No. 94-1476, at 63–64 *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677–78 (emphasis added).

This forward-looking congressional vision is important, for in anticipating the evolution of new technologies Congress must be presumed to have intended that the *same balance of competing interests* would be applied to future technologies as those in existence in 1976. Moreover, in using the telling phrase "whether the members of the public" Congress evidenced an intent to treat every individual recipient as a "member of the public" when that recipient receives the content via *any transmission service*, whether known to the world in 1976 or not. Congress in the Copyright Act thus "conceived of the exclusive rights broadly [and] encouraged courts to interpret them so as to avoid their erosion as a result of unforeseen technological changes . . . ." Peter S. Mennell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 2012 J. Copyright Soc'y of U.S.A., at 63 (Feb. 15, 2012), available at http://papers. ssrn.com/sol3/papers. cfm?abstract_id=1679514.

The Second Circuit wrongly conflated the concepts of transmission and performance. The statute's phrase "capable of receiving the performance or display receive it" requires interpretation of what is meant by the word "it," and revels the profound error of the Second Circuit. For the Second Circuit, the "it" was not the performance of the underlying work, but the transmission of the performance. This is poor construction of grammar pressed to an even poorer interpretation of congressional policy and intent. *See* Jane C. Ginsburg, *Recent Developments in US 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 (describing how the Cablevision decision wrongly confused the concepts of "transmission" and "performance"); *see also* Jeffrey Malkan, *The Public Performance Problem in Cartoon Network LP v. CSC Holdings, Inc.*, 89 Or. L. Rev. 505, 536, 553 (2011) ("[The court] thought that the words 'performance' and 'transmission' were interchangeable . . . [but] a transmission and a performance remain, technically and legally, two distinct things . . . . The principal error in the court's interpretation of the transmit clause was that it substituted the word 'transmission' for the word 'performance' in the phrase 'capable of receiving the performance . . . .'"). The phrase "at different places and different times" is critical language making it clear that "Congress was covering both simultaneous, and 'asynchronous' transmissions." Ginsburg, *WNET v. Aereo*, Media Institute IP Viewpoints, *supra*. The Second Circuit's construction of the statute, however, effectively eliminates the "different times" provision, and in doing so is unfaithful to "Congress's clear intent to bring pay-per-view and other individualized forms of transmission within the scope of the Copyright Act." *Id.* For in conflating "performance" with "transmission" the Second Circuit ensures that the meaning of "different times" loses all coherence:

> The individual/common source distinction is a red herring because a reading of the statute that requires members of the public to receive *the same particular transmission* would exclude *all* asynchronous transmissions no matter how shared the source. If one member of the public receives an on-demand

> transmission of a performance of a given work at 12 o'clock, and another receives from the same transmission service an on-demand transmission of a performance of the same work at 1 o'clock, only one person can receive each on-demand transmission. Reading the statute to equate "transmission" with "performance" reads "different times" out of the statute.

Id. (Emphasis in original).

G. Congress Distinguished Between Small-Scale Domestic Settings and Large-Scale Commercial Settings

The Second Circuit's jurisprudence fails to take into account Congress' careful attention to scale, visible throughout the definition of public performance, and well-embedded in prior copyright case law. Clause (1) of the passage defining public performance thus draws a common-sense distinction between a performance or display inside a home with one's family and friends, and gatherings in other settings deemed more "public" in ordinary language usage, stating that to perform a work publicly is to "perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." 17 U.S.C. § 101 (2012). If Congress employed this homespun common-sense distinction for clause (1), why would we presume that Congress suddenly lost all common sense when it got to clause (2)?

The far more plausible reading was that the real Congressional intent was alignment and parallelism. The Second Circuit, beginning with *Cartoon Network*, entirely missed this point. The *Cartoon Network* opinion thus gave an example of what it *correctly* posited would not violate the Copyright Act: The "hapless customer" who records a program in his den and later transmits the recording to a television in his bedroom, the *Cartoon Network* court reasoned, surely ought not be "liable for publicly performing the work simply because some other party had once transmitted the same underlying performance to the public." *Cartoon Network*, 536 F.3d at 136. This conclusion was right, but the rationale was wrong. The reason Mr. Hapless Customer does not violate the Copyright Act has nothing to do with the fact that the source copy for the transmission inside his home was made from a television broadcast. Rather, the reason Mr. Hapless Customer does not violate the Copyright Act is because the television program he recorded was later displayed in his home, for viewing by himself, his family, or social acquaintances. *See* Ginsburg, *WNET v. Aereo*, Media Institute IP Viewpoints, *supra*. The common-sense distinction employed by Congress does not treat either Mr. Hapless Customer or his in-home viewers as "members of the public." In contrast, the massive distribution contemplated by the businesses operated by Aereo clearly constitutes transmissions "to the public" in the common sense of that phrase, whether those members of the public happen to be in their homes or out on the town when they receive it. *Id; see also David v. Showtime/ The Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D.N.Y. 1988) ("[I]t would strain logic to conclude that Congress would have intended the degree of copyright protection to turn on the mere method by which television signals are transmitted to the public.").

CONCLUSION

Amicus Curiae The Media Institute respectfully urges this Court to reverse the judgment below and rule in favor of the Petitioners.

Respectfully Submitted,

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