

**Nos. 13-55156, 13-55157, 13-55226, and 13-55228**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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FOX TELEVISION STATIONS, INC., et al.,  
*Plaintiffs-Appellees / Cross-Appellants,*

v.

AEREOKILLER, LLC, et al.,  
*Defendants-Appellants / Cross-Appellees*

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On Appeal from the United States District Court  
for the Central District of California  
Case Nos. CV-12-6921-GW and CV-12-6950-GW  
District Judge George H. Wu

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**BRIEF AMICUS CURIAE  
FOR THE MEDIA INSTITUTE  
IN SUPPORT OF  
PLAINTIFFS-APPELLEES / CROSS-APPELLANTS**

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Rodney A. Smolla  
3300 Poinsett Highway  
Greenville, S.C. 29617  
*Attorney for Amicus Curiae*

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Rodney A. Smolla, the undersigned Attorney of Record for Amicus Curiae The Media Institute, certifies that the Media Institute is a nonprofit corporation with no parent company or no publicly held company holding more than 10% of its stock

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## **BASIS FOR FILING OF BRIEF AMICUS CURIAE**

Amici have filed a Motion for Leave to file this Brief, and have filed this Brief with the court conditionally upon the granting of that pending Motion, filing both the Motion and this Brief within the time limits for the filing of the Brief.<sup>1</sup>

## **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 "think tanks" focusing on the First Amendment and communications policy. The Media Institute takes a strong interest in the protection of intellectual property, including

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<sup>1</sup> Pursuant to F.R.A.P. 29(c)(5), Counsel for Amicus states that counsel for the parties have not authored this brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no one other than Amici and their members has contributed money that was intended to fund preparing or submitting this Brief.



especially copyright protection, pursuant to the vision of the Framers of the Constitution that robust protection for intellectual property under the Patent and Copyright Clause acts to enhance the marketplace of ideas.

## ARGUMENT

### I. AEREOKILLER'S UNLICENSED RETRANSMISSIONS UNDERMINE SETTLED ECONOMIC EXPECTATIONS PROTECTED BY THE COPYRIGHT ACT AND FUNDAMENTAL TO THE RULE OF LAW

#### A. Aereokiller's Model Undermines Settled Economic Expectations

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.

Stable legal protection for such 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.”  
*Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 316 (2001),  
quoting *Kaiser Aluminum & Chemical 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).

**B. Aereokiller’s Model Violates the Rights of Copyright Holders and Creates an Unfair Advantage over Law-Abiding Retransmission Licensees**

Aereokiller’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 Aereokiller 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.

**C. Aereokiller’s Technology is Transparently a Sham**

Aereokiller’s parasitic business model, like that of Aereo, its East Coast cousin, uses an exotic technological sham to defeat the rule of law. If a picture tells a thousand words, a thousand antennas tell the picture. Aereokiller’s bizarre engineering, employing thousands of antennas to do the work of one, reveals to all what is really going on. As Judge Denny Chin observed in his dissent from the Second Circuit’s panel decision in *WNET, Thirteen v. Aereo, Inc.*, --F.3d --, 2013 WL 1285591 (2<sup>nd</sup> Cir. 2013) (*petition for rehearing en banc pending*), the technology used by platforms such as Aereokiller and Aereo “is a sham.” *Id.* at \*15

(Chin, J., dissenting). “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.” *Id.*

**D. Aereokiller’s Model is an Affront to the Fundamental Purposes of Copyright Protection**

Aereokiller’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 Merges, *Copyright, Creativity, Catalogs LOCKE REMIXED*;-, 40 U.S. 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. . .”).

If Aereokiller 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 Aereokiller freely pilfer copyrighted works to retransmit, charging its own customers for the service. Aereokiller may

be wished good luck with that project, as 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 2 Goldstein On Copyright* § 7.7.7.2 (“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.”).

## **II. THE LEGISLATIVE HISTORY OF THE 1976 ACT IS AGAINST AREOKILLER**

### **A. The *Teleprompter*, *Fortnightly*, and *Aiken Trilogy***

Congress has been here before. In an earlier technological epoch, Congress plugged a loophole created by two Supreme Court decisions that Congress perceived as errant, *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 403-04 (1974) and *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400-402 (1968). *Teleprompter* and *Fortnightly* likened the retransmission of broadcast signals to individual members of the public to the mere viewing of a broadcast. *See Fortnightly*, 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*, *supra*, 422 U.S. 151, 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.

#### **B. 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). As Professor Randal Picker has explained:

What we now know as cable TV started as CATV. Think of these as shared antenna systems with local distribution over a network of landlines. You and I live in the middle of nowhere and thus get lousy free broadcast TV reception or none at all. We could each build a very

large antenna to get better reception, but such an antenna could easily be shared by a number of users. CATV faced many legal uncertainties, but two were critical. First, did the antenna owner owe anything to the broadcast stations for the use of their signal? Second, did the antenna owner owe anything to the copyright owners for the use of their content? These are basic property right and communications law questions. Answers in favor of broadcasters or copyright owners obviously would have made entry substantially more difficult, as, at a minimum, CATV entrants would have needed to negotiate for rights with many broadcasters and content owners. Early case law favored the copyright owners, but two key Supreme Court decisions established that cable operators were more like viewers than broadcasters and therefore did not “perform” the works that they carried. That regime lasted less than two years, as the Copyright Act of 1976 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 Picker, *The Digital Video Recorder: Unbundling Advertising and Content*, 71 U. Chi. L. Rev. 205, 214-15 (2004)

### **C. Congress Resurrects of 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 the Supreme 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 86-88 (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.

Aereokiller is simply a new iteration of an old business model, cleverly manufactured for the sole purpose of attempting an end run around the law. Aereokiller, like the cable operators Congress knew in 1976, is a commercial enterprise that lifts 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 (7<sup>th</sup> 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).

### **III. THE SECOND CIRCUIT’S DECISIONS IN *AEREO* IS WRONG AND SHOULD BE REJECTED BY THIS COURT**

#### **A. The Antecedent Mistaken Reasoning in *Cartoon Network***

This Court should not be misled by the Second Circuit panel decision in *WNET, Thirteen v. Aereo*, a decision unfaithful to the text, legislative history, and fundamental policies of the Copyright Act of 1976.

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 (2<sup>nd</sup> 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 the 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.” 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.

### **B. The Flaws in *Aereo***

The panel decision of the Second Circuit in *Aereo* deemed the Second Circuit’s previous decision in *Cartoon Network* controlling. *See* Jane C. Ginsburg, *WNET v. Aereo: The Second Circuit Persists in Poor (Cable)Vision*, Media Institute “IP Viewpoints”, April 23, 2013, at <http://www.mediainstitute.org/IPI/2013/042313.php>

### **C. The Second Circuit’s Jurisprudence Provides an Inappropriate Safe-Harbor for Free-Riders**

*Aereo* and *Cartoon Network* effectively provide an instruction manual 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. As Professor Ginsburg explains, in shaping a business model

to avoid the shoals of the Transmit Clause, an enterprising free-rider in the Second Circuit should be mindful of four principles:

First and most important, the Transmit Clause [of the statutory definition of public performance] directs courts to consider the potential audience of the individual transmission. If that transmission is “capable of being received by the public” the transmission is a public performance; if the potential audience of the transmission is only one subscriber, the transmission is not a public performance, except as discussed below. Second and following from the first, private transmissions – that is those not capable of being received by the public – should not be aggregated. It is therefore 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. Third, there is an exception to this no-aggregation rule when private transmissions are generated from the same copy of the work. In such cases, these private transmissions should be aggregated, and if these aggregated transmissions from a single copy enable the public to view that copy, the transmissions are public performances. Fourth and finally, “any factor that limits the potential audience of a transmission is relevant” to the Transmit Clause analysis.

*Id.*

So what is wrong with this picture? The answer, as Judge Chin’s powerful dissent in *Aereo* so eloquently drove home, is that the entire system is a sham, a mockery of congressional intent employing a contrived manipulation, purporting to transform what is *in reality* transmission to millions of members of the public 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.” *Aereo* at \*15 (Chin, J., dissenting).

To grant the contrivance employed by platforms such as Aereo and Aereokiller a free pass under the Copyright Act surely could not have been what Congress intended. Nor is it what Congress enacted. The Second Circuit has read the statute wrong; Judge Chin and the District Court below have read it right.

#### **D. The Second Circuit has Wrongly Construed the Statutory Text**

##### **1. Public Performance**

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). “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. 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.*

## 2. Congress' Forward-Looking Vision

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*, 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 (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 Menell, *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 57-58 (Aug. 26, 2011) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1679514](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1679514)

### **3. The Second Circuit Conflated Transmission and Performance**

So too, as many scholars have noted, the Second Circuit wrongly conflated the concepts of transmission and performance. As Professor Ginsburg has noted, the statute’s phrase “capable of receiving the performance or display receive it” requires interpretation of what is meant by the word “it.” The profound error of the Second Circuit, as recognized by the District Court below, was that 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?*<sup>26</sup> (Colum. Pub. L. & Legal Theory Working Papers, No. 08158, 2008), available at [http://lsr.nellco.org/columbia\\_pllt/08158](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 . . . .’”).

As Professor Ginsburg argues, the congressional phrasing referring to “separate 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 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.*

#### **E. 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.” 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. 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 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 Aereokiller and Aereo clearly constitute 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.”).

**F. Aereokiller's Actions are Far More Egregious than Cablevision's, Because Aereokiller Obtain No Licenses Whatsoever**

Cablevision, it is worth noting, was at least in a position distinguishable from Aereokiller and Aereo, in that Cablevision had actually paid for and obtained lawful licenses to transmit the copyrighted works of the Cartoon Network and other content providers to Cablevision's customers. So Cablevision, unlike Aereokiller and Aereo, had at least lawfully obtained retransmission licenses in the first instance, enabling Cablevision to make the argument that its subscribers were thus in lawful receipt of Cablevision's lawful retransmissions, and thus that the RS-DVR system it used was not really much different from a DVR or VCR sitting on top of the customer's television at home. Cablevision was thus able to draw parallels to the sort of in-home time-shifting of programs recorded on VCRs, drawing on the notion that "timeshifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge." *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 449-50 (1984).

While the Second Circuit's reasoning in *Cartoon Network* was flawed, and led to the compounding its errors in *Aereo*, at least the Cablevision business model was not the utterly condemnable business model of Aereokiller or Aereo, who operate entirely as scrounging parasites retransmitting copyrighted works with no licenses at all. *Cartoon Network* is from a policy perspective, at least, a much closer case, upon which reasonable minds might differ. *Aereo*, however, extended

the already flawed statutory interpretation of *Cartoon Network* to the aid of a business set up entirely through subterfuge, in utter contempt of the fair-minded economic balance struck by Congress in the Copyright Act.

**IV. THIS COURT SHOULD PROTECT SETTLED ECONOMIC EXPECTATIONS AND BE FAITHFUL TO THE ANIMATING PRINCIPLES OF COPYRIGHT LAW, DECIDING THE INTRINSIC MERITS BY ELEVATING SUBSTANCE OVER FORM**

What should matter to this Court in this litigation is substance over form, particularly when the form is an obvious sham. This Court should weigh the merits on the intrinsic rights and wrongs of Aereokiller's manifest manipulations. *See Johnson v Williams*, 133 S.Ct. 1088, 1097 (2013), (“[T]he word ‘merits’ is defined as ‘[t]he intrinsic rights and wrongs of a case as determined by matters of substance, in distinction from matters of form.’”) *quoting Webster's New International Dictionary* 1540 (2d ed. 1954).

The settled economic expectations at issue here for television are similar to the settled economic expectations that long governed the music industry, which assumed that the rule of law would protect copyright in musical works, including all rights that comprise the bundle of interests protected under federal copyright law. The settled economic and legal expectations in the music industry were rattled when Internet peer-to-peer platforms such as Napster emerged to facilitate the illegal downloading of copyrighted musical works. *See A&M Records, Inc. v.*

*Napster, Inc.*, 239 F.3d 1004, 1028 (9<sup>th</sup> Cir. 2001). (In affirming the district court’s issuance of a preliminary injunction enjoining Napster’s infringing activity that “[w]e are at a total loss to find any “special circumstances” simply because this case requires us to apply well-established doctrines of copyright law to a new technology.”). *See also* Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 Harv. J.L. & Tech. 395, 404 (2003) (“Still, the opinion seems to get the basic logic right. Napster is different from a VCR manufacturer because it has low-cost ways of discouraging piracy without impinging on legitimate use.”).

Aereokiller is to television what Napster was to music. While the Internet technologies are different, and while different principles of copyright law are implicated, the essential economic and legal equities are parallel. Both the Aereokiller and Napster involved free-rider business models constructed to rob copyright holders of their rightful fees. Just as this Court cut through obfuscation to substance in sustaining the shutdown of Napster, it should now sustain the shutdown of Aereokiller. *See also Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S.913 (2005) (noting the importance of 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 Aereokiller, which has a kind of *res ipsa loquitur* capacity to speak for itself as an obvious contrivance, the *technology itself* in *Grokster* was not manifestly illicit. The Supreme Court in *Grokster*, however, went beyond the surface of the technology itself, to examine the Grokster's and Streamcast'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. 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).

## **CONCLUSION**

For the foregoing reasons, Amici urge the affirmance of the decision of the District Court granting the Plaintiff-Appellants appropriate preliminary injunctive relief.

May 1, 2013

Respectfully submitted,

By: /s Rodney A. Smolla

Rodney A. Smolla  
3300 Poinsett Highway  
Greenville, S.C. 29613  
*Attorney for Amicus*