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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

BRENDA M. COTTER
GENERAL COUNSEL
DANIEL BROWN
DEPUTY GENERAL COUNSEL
AEREO, INC.
280 Summer Street
4th Floor
Boston, MA 02210
(617) 861-4290

December 12, 2013

DAVID C. FREDERICK
Counsel of Record
AARON M. PANNER
CAITLIN S. HALL
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

(Additional Counsel Listed On Inside Cover)

DAVID R. HOSP
MARK S. PUZELLA
FISH & RICHARDSON P.C.
One Marina Park Drive
Boston, MA 02210-1878
(617) 542-5070

SETH D. GREENSTEIN
CONSTANTINE CANNON LLP
One Franklin Square
1301 K Street, N.W.
Suite 1050 East
Washington, D.C. 20005
(202) 204-3500

QUESTION PRESENTED

Whether Aereo "perform[s] publicly," under Sections 101 and 106 of the Copyright Act, by supplying remote equipment that allows a consumer to tune an individual, remotely located antenna to a publicly accessible, over-the-air broadcast television signal, use a remote digital video recorder to make a personal recording from that signal, and then watch that recording.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Aereo, Inc. states the following:

Aereo, Inc. has no parent corporation. USANi LLC, a subsidiary of IAC/InterActiveCorp, a publicly traded company, owns 10% or more of Aereo, Inc.'s stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

LEGISLATIVE MATERIALS

OTHER MATERIALS

The core issue in this case is whether a consumer can access and control an individual, remotely located antenna and digital video recorder, owned by a third party, to record and view local, over-the-air broadcast television programming without subjecting the third party to liability for infringing copyright owners' exclusive right to perform works "publicly." It is well settled that a consumer can deploy such equipment at home without infringing copyright. The Second Circuit here affirmed that consumers also may access and operate the same types of equipment remotely through the Internet without infringing petitioners' exclusive public-performance rights. Even though the Second Circuit decided that issue correctly, petitioners have signaled their intention to wage a war of attrition by re-litigating this issue in every market to which Aereo expands its business. Accordingly, Aereo believes it is appropriate for this Court to grant review to affirm the decision below. Respondent notes, however, that the question presented in the petition is not faithful to the district court's findings and the undisputed facts, and so has reformulated it.

The decision below is correct. The essential bargain that petitioners made to obtain, for free, public spectrum worth billions of dollars was that, once they have broadcast their programming, consumers have a right to receive and to view that programming using an antenna and to copy that programming for their personal use. The district court found that "Aereo's *system* allows *users* to access free, over-the-air broadcast television through antennas and hard disks located at Aereo's facilities." Pet. App. 62a (emphases added). Each consumer has access to a remotely located individual antenna that only receives a broadcast signal when a user requests to tune to

a particular channel. The consumer uses Aereo's equipment to create a unique copy of that programming, and the individual user can view their copy using an Internet-connected device shortly thereafter. No other person can access that copy. Under these circumstances, as the district court held and the Second Circuit affirmed, Aereo's system is used by an Aereo individual user to make a transmission only to himself, not "to the public." 17 U.S.C. § 101; *see id.* § 106(4). Moreover, it is equally clear that Aereo's users, not Aereo, exercise the volitional control over the system that is necessary for any finding of direct liability for copyright infringement.

Nevertheless, petitioners aggressively have pursued claims that Aereo is infringing copyright owners' exclusive right, under 17 U.S.C. § 106(4), to perform their works "publicly." To date, plaintiffs have commenced such claims in five cases in three states. None of the claims against Aereo has succeeded. The Second Circuit rejected petitioners' claim for a preliminary injunction on the merits, as did the federal district court in Massachusetts. Petitioners note, however, that two district courts have ruled against one of Aereo's purported competitors, FilmOn. Because of the extensive evidentiary record and careful fact-finding by the district court below, this case (and not the cases involving FilmOn) provides an appropriate vehicle for this Court to resolve this issue. Therefore, although Aereo disagrees with petitioners' presentation in their petition, it does agree that review is warranted now, on this established factual record.

Accordingly, the Court should grant certiorari to decide the question as reframed in this response and affirm the Second Circuit's judgment in this case.

STATEMENT

1. Aereo's Technology

Aereo simplifies public access to free broadcast television by making it easier[1] for consumers to record and watch broadcast programming using an individual antenna and DVR that they control via a laptop, tablet, or smartphone. A user accesses that equipment by logging onto Aereo's website with an Internet-connected device and selecting a locally broadcast program just as that user might do using a home DVR. *See* Pet. App. 62a; Horowitz Report ¶ 56; Lipowski Decl. ¶ 6. The user may then choose to "Watch" or "Record" the program.[2] *See* Pet. App. 62a-63a.

In either event, the user causes an antenna assigned solely to that user to tune to the broadcast signal for the station that is broadcasting the selected program. *See id.* at 65a; Horowitz Report ¶ 64. Each antenna in Aereo's system consists of a pair of metal loops roughly the size of a dime. *See* Pet. App. 67a. Eighty such antennas can be packed on one end of a circuit board, and 16 boards can be stored parallel to one another in a metal housing. *See id.* at 67a-68a. In a factual finding that petitioners have not challenged

---

[1] A consumer can use an antenna, digital video recorder ("DVR"), and media-shifting device to obtain this functionality using equipment deployed at the user's home. *See* Pet. App. 64a; Horowitz Report ¶¶ 71-77. The expert report of Paul Horowitz (Dkt. No. 78-1) and the declarations of Joseph Lipowski (Dkt. No. 80) and Chaitanya Kanojia (Dkt. No. 79) were submitted to the district court and are short-cited in this brief to the pertinent paragraphs of their submissions.

[2] This manner of operation is comparable to that of a home DVR. When a consumer uses a home DVR, all content – including "live" content – is played back by the consumer from a recording, to enable pause and rewind functionality.

on appeal, the district court rejected petitioners' contention that "Aereo's antennas function collectively as a single antenna." *Id.* at 67a. The court determined, based on extensive expert discovery and testimony, that "each antenna functions independently." *Id.* at 71a, 73a.

When a user tunes an antenna to receive a broadcast signal, an individual copy of the programming carried by that signal is recorded to hard drive disk storage, comparable to the hard-disk storage in a home DVR. *See id.* at 6a-7a. The user can then view the recording over the Internet via a compatible Internet-connected device. *See id.* at 66a. Those processes occur only at the direction of the user. *See* Lipowski Decl. ¶¶ 12, 14, 35.

There is no relevant distinction between the "Watch" mode and the "Record" mode. *See* Pet. App. 67a; Lipowski Decl. ¶ 6. In either case, the user causes a unique digital recording of the selected content to be made from a signal that is received by an individual antenna assigned solely to that particular user. *See* Pet. App. 6a-7a. The user then plays back and views that individual digital recording. *See* Horowitz Report ¶ 64. A consumer using Aereo's equipment, like any DVR, does not, strictly speaking, watch content "live," because a delay (of at least six seconds and sometimes longer) occurs between the recording and the eventual playback. *See* Pet. App. 66a; Lipowski Decl. ¶¶ 7, 51; Horowitz Report ¶ 57. The two modes differ in only two ways: (1) on certain but not all consumer devices, playback begins automatically when a user selects "Watch" mode (rather than requiring the user also to press "Play"), and (2) a digital recording made while the equipment is in "Watch" mode is not saved after the user finishes

watching that program, unless the user selects the "Record" mode before the program ends. *See* Pet. App. 5a, 67a; Lipowski Decl. ¶¶ 6 n.1, 48, 52, 54.

From the beginning to the end of this process, the data stream received by an antenna is available only to the user who tuned the antenna by selecting a program to watch.[3] *See* Pet. App. 8a, 65a; Horowitz Report ¶ 63 & Fig. 11; Lipowski Decl. ¶¶ 5, 41, 47. The digital recording made from that individual data stream is exclusively associated with that user and can be played back only by that user. *See* Pet. App. 8a; Lipowski Decl. ¶¶ 5, 41-43. Even if two users choose to view the same television program at the same time – as they often will – they will never share an antenna, data stream, or digital recording. *See* Lipowski Decl. ¶¶ 43, 56. The same would be true if two neighbors on a street were using individual rooftop antennas and home DVRs. As a result, each recording made using Aereo's equipment is unique – not only in the sense that it is personal, but also because, owing to electrical interference, technical glitches, and occasional equipment failure, no two copies are identical. *See* Pet. App. 71a; Lipowski Decl. ¶ 43.

2. The District Court Decision

Petitioners are broadcast networks and broadcast licensees that produce and exhibit programming for dissemination through over-the-air signals. *See*, *e.g.*, Horowitz Report ¶¶ 30-31. Petitioners do so by exploiting the broadcast spectrum, a public asset worth billions of dollars, which they are allowed to use for free once they have obtained a license from the Fed-

---

[3] When not in use, the antennas are not tuned to a broadcast signal. *See* Horowitz Report ¶ 58; Lipowski Decl. ¶¶ 14, 36.

eral Communications Commission. *See* Communications Act of 1934, ch. 652, § 301, 48 Stat. 1064, 1081 (providing for "use" of radiowave channels, "but not the ownership thereof"); *id.* § 309(b)(1), 48 Stat. 1085 (providing for license term that confers specified rights to use designated spectrum). Traditionally, and still today, broadcasters make programming available over the airwaves for "free" by selling broadcast time to advertisers. *See Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 411 (1974); *see* Local Affiliates' Br. 20-21 (noting that 88% of broadcasters' revenues come from advertising).

a. Petitioners moved for a preliminary injunction based on Aereo's alleged direct infringement of their public-performance right. The district court denied that motion, relying on the text of the statute and the Second Circuit's earlier decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"), *cert. denied*, 557 U.S. 946 (2009). A description of *Cablevision* helps to place petitioners' arguments into proper context.

Cablevision concerned a cable provider that offered its subscribers the ability to use a DVR that was located at Cablevision's facility, rather than at the user's home, a technology known as a "remote storage DVR" or RS-DVR. *Id.* at 124-25. Cablevision's system, in response to a user's request, created a copy of programming for that customer on a Cablevision remote hard drive. *Id.* at 124. As with Aereo's system, only the customer who requested that Cablevision's RS-DVR record the program could access the copy that he created. *Id.* at 135.

Copyright holders (many of them petitioners here) sued, arguing that Cablevision's RS-DVR system

infringed their copyrights "by engaging in unauthorized public performances of their works through the playback of RS-DVR copies." *Id.* at 134. After the district court (Chin, J.) granted the injunction, the Second Circuit reversed. The court first determined that consumers, not Cablevision, created the copies, notwithstanding that Cablevision had designed the RS-DVR system, owned the equipment, and maintained the equipment at its own head-end facilities. The court then construed the Transmit Clause, which provides in pertinent part that "'[t]o perform . . . "publicly" means . . . to transmit . . . a performance . . . of the work . . . to the public,'" to mean that "a transmission of a performance is itself a performance." *Id.* (quoting 17 U.S.C. § 101). In determining whether a performance is "to the public" under the Transmit Clause, the court reasoned, the statute "directs us to examine who precisely is 'capable of receiving' a particular transmission." *Id.* at 135. Because "each RS-DVR transmission is made using a single unique copy of a work, made by an individual subscriber, one that can be decoded exclusively by that subscriber's cable box, only one subscriber is capable of receiving any given RS-DVR transmission." *Id.*

The *Cablevision* court rejected then-District Judge Chin's analysis, which considered not "the potential audience of a particular transmission, but the potential audience of the underlying work (i.e., 'the program') whose content is being transmitted." *Id.* The Second Circuit deemed that reading to be inconsistent with the statutory language, which "speaks of people capable of receiving a particular 'transmission' or 'performance,' and not of the potential audience of a particular 'work.'" *Id.*

b. The district court below found that "Aereo's service falls within the core of what *Cablevision* held lawful," based on three facts. Pet. App. 84a. "First, Aereo's system creates a unique copy of each television program for each subscriber who requests to watch that program, saved to a unique directory on Aereo's hard disks assigned to that user." *Id.* at 83a. "Second, each transmission that Aereo's system ultimately makes to a subscriber is from that unique copy." *Id.* "Third, the transmission of the unique copy is made *solely* to the subscriber who requested it; no other subscriber is capable of accessing that copy and no transmissions are made from that copy except to the subscriber who requested it." *Id.* at 83a-84a (footnote omitted).

The district court rejected petitioners' argument that it should not consider whether a particular performance initiated by the consumer's direction using Aereo's system is "to the public" but should instead "look back . . . to the point at which Aereo's antennas obtain the broadcast content to conclude that Aereo engages in a public performance." *Id.* at 85a-86a. The district court noted that the court of appeals in *Cablevision* had rejected the same argument, concluding that there was a "dividing line" between the "transmissions made by the content providers" and the transmissions made by Cablevision's system. *Id.* at 86a. The district court further found that, "in light of [its] factual determination that each antenna functions independently, in at least one respect the Aereo system is a stronger case than *Cablevision* . . . because . . . each copy made by Aereo's system is created from a *separate* stream of data." *Id.*

3. The Court of Appeals Decision

The Second Circuit affirmed.

a. The court found unpersuasive petitioners' claim that the transmissions made using Aereo's system should be equated with "the original broadcast made by the over-the-air network rather than treating Aereo's transmissions as independent performances," because that argument "is nothing more than the *Cablevision* plaintiffs' interpretation of the Transmit Clause." Pet. App. 25a. As for petitioners' argument that "all of Aereo's discrete transmissions [should] 'be aggregated and viewed collectively as constituting a public performance,'" the court found that argument foreclosed by *Cablevision*'s holding that "the relevant inquiry under the Transmit Clause is the potential audience of a particular transmission, not the potential audience for that underlying work or the particular performance of that work being transmitted." *Id.* at 25a-26a. "[W]e cannot accept [petitioners'] arguments that Aereo's transmissions to a single Aereo user, generated from a unique copy created at the user's request and only accessible to that user, should be aggregated for the purposes of determining whether they are public performances." *Id.* at 26a-27a.

The court likewise rejected petitioners' argument that the result in *Cablevision* depended on analogizing Cablevision's RS-DVR to a conventional DVR, noting that the court had already "followed *Cablevision*'s interpretation of the Transmit Clause" in a different context (Internet music downloads). *Id.* at 27a (citing *United States v. American Soc'y of Composers, Authors & Publishers*, 627 F.3d 64, 73-76 (2d Cir. 2010)). "And even if such analogies were probative, Aereo's system could accurately be analo-

gized to an upstream combination of a standard TV antenna, a DVR, and a Slingbox." *Id.* at 27a n.13.[4]

In addition, the court found that petitioners' argument failed "to account for Aereo's user-specific antennas. . . . [E]ven if we were to disregard Aereo's copies, it would still be true that the potential audience of each of Aereo's transmissions was the single user to whom each antenna was assigned." *Id.* at 30a-31a. "It is beyond dispute that the transmission of a broadcast TV program received by an individual's rooftop antenna to the TV in his living room is private, because only that individual can receive the transmission from that antenna . . . . [Petitioners] have presented no reason why the result should be any different when that rooftop antenna is rented from Aereo and its signals transmitted over the internet." *Id.* at 31a.

The court further disagreed with petitioners' claim that "holding that Aereo's transmissions are not public performances exalts form over substance," because the Second Circuit already had rejected that contention in *Cablevision*. *Id.* at 32a. And the court noted that Aereo is not "alone in designing its system around *Cablevision*, as many cloud computing services . . . appear to have done the same." *Id.* at 32a-33a.

The court also found misplaced petitioners' reliance on the legislative history of the Copyright Act of

---

[4] "A Slingbox is a [media-shifting] device that connects the user's cable or satellite set-top box or DVR to the internet, allowing the user to watch live or recorded programs on an internet-connected mobile device, such as a laptop or tablet." Pet. App. 3a n.2. Alternatively, a Slingbox may be directly connected to a rooftop antenna to allow streaming of over-the-air signals to a mobile device. *See* Horowitz Report ¶ 77.

1976. In particular, it found that petitioners ignored Congress's determination to exempt *private* performances, including performances accomplished through transmissions, from copyright liability. "In the technological environment of 1976, distinguishing between public and private transmissions was simpler than today." *Id.* at 34a. The court reasoned that the "transmissions" at issue in this case "closely resemble the private transmissions" from devices such as RS-DVRs and Slingboxes. *Id.* Accordingly, the court concluded that, because Aereo's system operated differently from a cable television system, "we cannot disregard the contrary concerns expressed by Congress in drafting the 1976 Copyright Act. And we certainly cannot disregard the express language Congress selected in doing so." *Id.* at 35a.

b. Judge Chin, whose decision as a district court judge was reversed in *Cablevision*, dissented. He asserted that Aereo's "'technology platform' is . . . a sham," a "Rube Goldberg-like contrivance, overengineered in an attempt to avoid the reach of the Copyright Act." Pet. App. 40a. Without addressing the district court's factual findings that describe the actual operation of Aereo's system, Judge Chin insisted that "Aereo still is transmitting . . . programming 'to the public.'" *Id.* at 44a.

Petitioners' petitions for rehearing en banc were denied, with Judge Chin, joined by Judge Wesley, dissenting. *Id.* at 127a-128a.

ARGUMENT

I. THE DECISION BELOW IS CORRECT

The Second Circuit correctly ruled that Aereo's system does not infringe petitioners' copyrights under the Transmit Clause. As both courts below correctly found, a consumer using Aereo's system captures a signal through an antenna available only to a particular user and enables that user to make an individual copy from a unique data stream that can be viewed solely by that user at the user's direction. That technology does not cause infringement because Aereo does not engage in any performance "to the public."

Like the dissent below, petitioners argue that this Court should treat Aereo's system as analogous to a cable system and impose liability because cable systems engage in public performance. But Aereo is not and does not operate like a cable system; cable systems receive broadcast content in a single feed and continuously retransmit that same content to each of their customers, whether the customer has tuned to that signal or not. The language of the Copyright Act, its history, and the undisputed factual findings about how Aereo's technology actually operates preclude treating Aereo as if it were something it is not.

A. Aereo's System Does Not Transmit A Performance "To The Public"

1. The Copyright Act grants to creators the exclusive right, "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly." 17 U.S.C. § 106(4). The Act further specifies:

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. § 101.

The statute's text thus indicates that "to transmit . . . a performance . . . of [a] work" is itself to "perform" the work. *See* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.14[B][1], at 8-190 (rev. ed. 2013) ("[T]he act of broadcasting a work is itself a performance of that work."). At the same time, not every transmission is a *public* performance: that determination turns on whether the transmission is made "to the public."

The Second Circuit correctly reasoned that, under the terms of the statutory definition, the "performance" that must be made "to the public" to implicate the exclusive public-performance right is the transmission itself.[5] Under the statute, "[t]o 'transmit' a performance . . . is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."

---

[5] *See* 2 *Nimmer on Copyright* § 8.14[C][2], at 8-192.6 ("[I]f *a transmission* is only available to one person, then it clearly fails to qualify as 'public.'") (emphasis added).

17 U.S.C. § 101. Section 101 specifies that a performance is "to the public" so long as "members of the public [are] capable of receiving the performance." That provision would make no sense if the performance in question were some other, underlying performance rather than the transmission itself. In that case, liability could be imposed for purely private transmissions simply because multiple consumers each wanted their own personal copies of the same work.

Under the correct construction of the statute, the undisputed facts concerning the design and operation of Aereo's system foreclose petitioners' claims. A unique copy of a performance of a work, created at the direction of the user, is transmitted only by and to that user. That transmission – the relevant performance – can be received by no one else.

2. There is no inconsistency between this construction of the Transmit Clause and the statutory clarification that a transmission may be to the public "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." 17 U.S.C. § 101. The *Cablevision* court noted that this language has been applied in circumstances where a defendant has transmitted a single copy (of, for example, a movie) to multiple viewers at different times. *See Cablevision*, 536 F.3d at 138-39 (citing *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 156-57 (3d Cir. 1984)). By contrast, the Second Circuit's construction of the statute "accord[s] significance to the existence and use of distinct copies in [its] transmit clause analysis." *Cablevision*, 536 F.3d at 138.

Petitioners argue that, although a single transmission may be received at separate places, it cannot be received at "different times"; they further contend that the Second Circuit's construction of the statute fails to give independent significance to the "different times" language in the definition. But petitioners' argument ignores the distinction that the statute draws between being "capable of receiving" a transmission and actually "receiv[ing]" it. *Cf. Flava Works, Inc. v. Gunter*, 689 F.3d 754, 760 (7th Cir. 2012) (Posner, J.) (suggesting that a "public performance occurs when [a] video is uploaded [to a public website] and the public becomes capable of viewing it," even if members of the public actually view the video at different times). The "different times" language in the statute still has a role to play.

3. Nothing in the legislative history of the Copyright Act supports limiting Aereo's users' right to copy and play back petitioners' over-the-air performances in their homes using remotely located antenna and DVR equipment. Section 106(4) of the Copyright Act strikes a balance by reserving to creators the exclusive right to perform their works publicly while reserving to all the right to perform works privately. The definitions in Section 101 likewise provide that not all transmissions are public performances – when only one member of the public is capable of receiving a particular transmission, the transmission is private, and not restricted under the Copyright Act.

Petitioners' assertion (at 5-6) that the relevant provisions of the Copyright Act were passed in part to address decisions of this Court in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), and *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400-01 (1968),

does not support their claim that Aereo infringes the exclusive public-performance right. In both *Teleprompter* and *Fortnightly*, the systems at issue used a common antenna to capture over-the-air broadcasts and then transmitted them to all subscribers on the system (whether or not the subscribers were viewing the broadcasts). That is simply not the way that Aereo's system operates: a user is assigned an individual antenna; no signal gets transmitted at all unless the user initiates that transmission; and each transmission is directed solely by and to that user. Petitioners quote language from a House Report referring to the Judiciary Committee's "belie[f] that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material." H.R. Rep. No. 94-1476, at 89 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5704. But the Report is just as clear that, "[a]lthough any act by which [an] initial performance or display is transmitted, repeated, or made to recur would itself be a 'performance' or 'display' . . . , it would not be actionable as an infringement unless it were done 'publicly,' as defined in section 101." *Id.* at 63, 1976 U.S.C.C.A.N. 5677. Congress may well have anticipated advances in video distribution to the public; but it equally would have anticipated advances in private reception of broadcast television.[6] Aereo represents the latter, not the former.

---

[6] Aereo's technology is not, as petitioners claim, inefficient; to the contrary, it provides a highly efficient alternative for consumers who wish to view over-the-air broadcasts without the cost and inconvenience of purchasing and installing television sets, digital antennas, and DVRs in their homes. *See* Kanojia Decl. ¶ 10.

B. Aereo's Users – Not Aereo – "Transmit" Content Using Aereo's System

The decision below is correct for the additional reason that the *user* is in control of the remote individual antenna and DVR that enables the user to receive and copy programming from over-the-air broadcasts. The Aereo system responds automatically to user requests. Accordingly, direct liability for infringement cannot be imposed against Aereo. Although Aereo believes no actor that uses its system directly infringes, under Aereo's system only the Aereo *user* who employs Aereo's system to transmit broadcast programming to herself could possibly infringe directly petitioners' copyrights.

1. The Aereo system is designed and engineered to mirror the operation of a traditional, in-home antenna and DVR, and thus to allow the user to control every aspect of the transmission of a broadcast program. When not in use, the antennas housed on Aereo's premises are tuned to a frequency without any broadcast signals and are therefore idle. *See* Horowitz Report ¶ 58; Lipowski Decl. ¶¶ 14, 36. When a user logs on to the system and selects a program, an individual antenna is automatically assigned to that user; that antenna then automatically responds to the user's commands by electronically tuning to the frequency of the broadcast channel selected by the user. *See* Horowitz Report ¶ 64. The program is then automatically recorded and the user determines when and how the recording will be transmitted to the user's device – whether at the time it is being recorded or at a later time. *See* Lipowski Decl. ¶¶ 12, 14, 50. And the user likewise has the ability to control the playback by pausing, rewinding, and fast-forwarding the program, even if

later portions of the program are still being recorded. *See* Horowitz Report ¶ 56.

These undisputed facts make clear that, if any infringement is occurring at all, it derives from the user's commands to cause Aereo's equipment to operate in a particular way. In that circumstance, only the user, not Aereo, could be directly liable for infringement.

2. The volitional-conduct test appropriately reflects the actual operation of Aereo's system, which makes equipment located on Aereo's premises available for customers' use. If a landowner offered space on a hilltop where individuals could place a conventional antenna, no one would argue that the landowner was engaged in a public performance, even if hundreds of individuals placed individual antennas there and watched the same World Series game. The owner of a copier available for public use is not liable for direct infringement when a customer uses the copier to reproduce a copy of a popular book, even though the owner maintains the copier, provides electric power for its operation and instructions on the copier's use, and charges a per-page fee for making the copies.

II. THIS CASE PROVIDES AN APPROPRIATE VEHICLE FOR RESOLVING THE IMPORTANT QUESTION OF FEDERAL LAW PRESENTED

A. The decision below is correct, and no court of appeals has ruled to the contrary. For four reasons, however, Aereo nevertheless believes that the Court should grant the petition to resolve the important issue of federal law at issue in this case.

First, petitioners have shown every intention of pursuing litigation in every circuit in the nation in

an effort to impede consumers' access to remote antennas and DVRs via Aereo's technology.[7] The need to litigate multiple cases has not only imposed a direct financial burden on Aereo but also created uncertainty that undermines Aereo's efforts to expand its footprint and further develop its business. The risk of protracted and unnecessary litigation warrants this Court's resolving the legality of Aereo's system at the earliest practicable time.

Second, as the lead case in the series of lawsuits filed by petitioners and their supporters against Aereo, this case has a well-developed factual record, with expert reports and declarations explaining difficult technical concepts in clear terms. The district court's detailed findings of fact were not challenged before the court of appeals and therefore should not be subject to dispute before this Court. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, . . . cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."). That factual record will facilitate this Court's consideration of the copyright issues.

---

[7] Petitioners claim that they have taken this aggressive approach because Aereo's technology somehow affects their retransmission rights. That argument, however, deflects attention from the deficiencies of their challenge to Aereo under the Copyright Act. Petitioners have no right to collect retransmission fees from consumers who use antennas and DVRs. Congress specifically dealt with retransmission rights for cable television under statutes separate from copyright law. In any event, if this Court grants certiorari, respondent reserves its right to argue about why petitioners incorrectly have contended that Aereo's service affects their retransmission rights.

Third, although there is no division of authority among the circuits at present, two district courts have ruled in petitioners' favor in cases involving one of Aereo's purported competitors.[8] *See Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012), and *Fox Television Stations, Inc. v. FilmOn X LLC*, Civil Action No. 13-758 (RMC), 2013 WL 4763414 (D.D.C. Sept. 5, 2013). If a circuit conflict were to develop out of one of those cases, the resulting decision would not reflect nearly so detailed a factual record as this case.

That deficiency is particularly acute in the *BarryDriller* case now under submission after oral argument in the Ninth Circuit, where the district court issued no findings of fact. Instead, the court noted, without resolving the issue, that defendant FilmOn described its system as "technologically analogous" to Aereo's, a characterization that "Plaintiffs dispute[d]" by arguing that "there are a number of elements that are present in the Aereo system that Defendants have not identified as part of their system." 915 F. Supp. 2d at 1140, 1141 n.5, 1143. Argument in the appeal from the California federal court's decision was heard in August 2013. Were that case to come before this Court, it would not provide an appropriate vehicle to resolve the important public-performance copyright issue.

---

[8] A company called FilmOn (formerly known as "BarryDriller" or "Aereokiller") purports to offer technology "analogous" to Aereo's. FilmOn has been enjoined by district courts in California and Washington, D.C., and has been held in contempt of court by the latter for commencing operations in Boston in spite of that injunction. *See* Deadline Hollywood, *FilmOn X Found In Contempt Of Court But Not Fined Over Ban Violation* (Nov. 25, 2013), *at* http://www.deadline.com/2013/11/filmon-x-found-in-contempt-of-court-but-no-fine-over-ban-violation/.

Fourth, this case presents but one example of the way that fast, inexpensive communications technology is allowing consumers to enjoy efficiently deployed functionalities. Instead of through an antenna, DVR, personal computer, or other dedicated electronic equipment located in the home, these new forms of technology operate "in the cloud" – that is, technology that is remotely located but readily accessible and operated by the consumer through an Internet-connected device. The Second Circuit's correct interpretation of the Copyright Act in *Cablevision* allowed those innovations – a vast array of efficient and user-directed information storage and communication technologies – to flourish in the past five years.[9] Petitioners' renewed efforts to force consumers to use less convenient, more expensive equipment to accomplish the same ends as these new technologies threaten that progress and will stifle further innova-

---

[9] *See* Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (Nov. 4, 2011), *at* http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Lerner_Fall2011_Copyright_Policy_VC_Investments.pdf (estimating $1.3 billion investment in cloud computing in the first three years after *Cablevision*, growing quarterly by 40%). Industry analysts estimated in 2012 that more than 500 million people worldwide store content using cloud services, *see* Jagdish Rebello, Ph.D., iSuppli Corp. Press Release, *Subscriptions to Cloud Storage Services to Reach Half-Billion Level This Year* (Sept. 6, 2012), *at* http://www.isuppli.com/Mobile-and-Wireless-Communications/News/Pages/Subscriptions-to-Cloud-Storage-Services-to-Reach-Half-Billion-Level-This-Year.aspx; and Apple Computer announced in April 2013 that its "iCloud" service has more than 350 million users, *see* Anthony Ha, *Apple's iCloud Grew 20 Percent in Q2, to 300M Users*, TechCrunch (Apr. 23, 2013), *at* http://techcrunch.com/2013/04/23/icloud-q2/.

tion.[10] Instead of purchasing a home DVR, an antenna for over-the-air broadcasts, and a media-shifting device (such as a Slingbox) to transmit those signals to Internet-connected devices, a consumer can purchase access to functionally equivalent Aereo equipment for a fraction of that cost. Because of rapid technological development, this case raises an important issue of law that is better resolved by this Court now than later.

B. Although Aereo acquiesces in petitioners' request for review, it does not agree that the question presented in the certiorari petition is properly formulated. That question is based on the erroneous premise that Aereo "retransmits a broadcast" to "thousands of paid subscribers." Pet. i. That premise is simply false. It finds no support in the district court's findings of fact, which petitioners are not free to challenge in this Court. The district court expressly found that Aereo's users, *not* Aereo, use the system to access over-the-air broadcasts. Pet. App. 62a. That conclusion rested on the express finding that each user employs a separate, independent antenna to receive broadcast signals; the user likewise controls the recording and transmission of a unique, individual copy of that program content. *Id.* at 65a-66a, 73a. That is part of the reason why the district court found that "the Aereo system is a stronger case than *Cablevision*." *Id.* at 86a.

---

[10] Although petitioners state that they are not seeking to overturn *Cablevision*, they cannot seriously contend that the decision below can be reversed without this Court rejecting *Cablevision*'s analysis. To the contrary, the petition is a direct assault on *Cablevision*, which they have characterized as "def[ying] both the text of the statute and Congress' intent," Pet. 11, and petitioners claim that this case was wrongly decided because of "path dependency" from the *Cablevision* decision, Pet. 29.

Furthermore, there is no district court finding that Aereo – as opposed to Aereo's users – transmits anything within the meaning of the Copyright Act. That issue, should the Court reach it, is one that can be resolved based on the underlying factual findings of the district court, which make clear that Aereo's users, not Aereo, exercise volitional control over the functioning of Aereo's system. *Cf. id.* at 28a (noting that users exercise "volitional control" by "choos[ing] when and how" programming "will be played back").

CONCLUSION

The petition for a writ of certiorari, with the Question Presented as reformulated in this response, should be granted.

Respectfully submitted,

BRENDA M. COTTER
GENERAL COUNSEL
DANIEL BROWN
DEPUTY GENERAL COUNSEL
AEREO, INC.
280 Summer Street
4th Floor
Boston, MA 02210
(617) 861-4290

DAVID R. HOSP
MARK S. PUZELLA
FISH & RICHARDSON P.C.
One Marina Park Drive
Boston, MA 02210-1878
(617) 542-5070

DAVID C. FREDERICK
Counsel of Record
AARON M. PANNER
CAITLIN S. HALL
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

SETH D. GREENSTEIN
CONSTANTINE CANNON LLP
One Franklin Square
1301 K Street, N.W.
Suite 1050 East
Washington, D.C. 20005
(202) 204-3500

December 12, 2013