No. 13-461

In The
Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, *et al*.,

Petitioners,

v.

AEREO, INC., F/K/A BAMBOOM LABS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN CABLE ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The American Cable Association (ACA) is a non-profit trade association comprised of approximately 850 small and medium-sized cable operators that provide video, broadband Internet and phone services in all 50 states to nearly 7 million cable subscribers.[1] Members range from family-owned companies serving small cities and rural areas to multiple system operators serving urban areas.

The median number of their subscribers is 1,060 households and businesses, some of which have no other means of receiving these vital communications services.[2] These services are essential for the individuals, businesses, and other entities among their subscribers, such as schools and hospitals.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity other than *Amicus Curiae*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] By way of comparison, the 1,060 subscriber median size of ACA members is dwarfed by larger cable providers, such as *amicus curiae* Cablevision, Inc., which has over 3 million subscribers, according to its most recent annual report (SEC Form 10-K, filed February 26, 2014), and by those that are part of a media conglomerate, such as Comcast, the nation's largest cable operator, which today has 21.6 million subscribers and owns some of the petitioners here (Petitioners' Brief, at iii-iv), enjoying the roles of copyright holder, broadcaster and cable service provider within the same corporate family. *Cf. Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180, 198-213 (1997) (discussing the effects of vertical integration on broadcast programming availability).

The outcome of this litigation could have a substantial impact on the ability of ACA's members to employ the most efficient technologies, and to compete effectively with larger cable providers by partnering with third parties that develop technologies beyond ACA members' own in-house capabilities. These technologies are particularly compelling when they enable members of the public to use broadband Internet access to join the lawful audience of free, over-the-air broadcasts using the public's airwaves. ACA respectfully submits this brief as *amicus curiae* in support of Respondent.

SUMMARY OF ARGUMENT

There are two opposing narratives. Petitioner's narrative is that, in 1976, Congress "overturned" this Court's determination that providing access to free, over-the-air television broadcasts is not infringing, and created, in effect, a new right to "transmit" public performances that leaves no room for consumers to receive free over-the-air transmissions using anything other than their own home-based antenna. Reception through any other technology would fall within the copyright owners' control.

ACA advocates a narrative based on the principle that the exclusive right to perform a work publicly does not encompass a right to limit who can be in the audience, or to veto technologies used to gain reception of the licensed performance. Even though free,

over-the-air broadcasts are a viable alternative to cable television, ACA members welcome the development of new technologies that allow their customers to have better reception of free over-the-air local television broadcasts, thereby creating a modest safety-valve against what smaller cable companies consider to be unfair and oppressive retransmission consent rates extracted by threat of blackouts that would leave customers with a "dark" channel unless untoward price demands are met.

In ACA's view, Congress did not "overturn" *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). When the Communications Act and the Copyright Act are read together, it becomes clear that the definition of "publicly" in the Copyright Act of 1976 did not enlarge the rights of copyright owners; particularly not with respect to reception or retransmission of local broadcast signals into the licensed broadcaster's local service area. Instead, Congress was concerned with maintaining a healthy local broadcasting presence in communities where audiences for free over-the-air broadcasts might dwindle if viewers began receiving their television programming entirely through cable operators.

When Congress gave broadcasters the choice of compelling the local cable service to retransmit their signals at no cost, or compelling compensation in exchange for consent to retransmit, it was regulating commerce and communications, not copyrights. Those provisions changed the fundamentals of the television business, but the retransmission consent payments

are made directly to broadcast stations, not copyright owners, and the new structure did not change the public's freedom to enjoy all uses of copyrighted works that fall beyond the exclusive rights granted in 17 U.S.C. § 106. The principles underlying *Fortnightly* – such as that those who license the public performance of their works do not control the public's right to join the audience, or that *receiving* a free over-the-air broadcast transmission is not infringing no matter how complex the receiving equipment – remain good law.

Congress did not take away the public's right to tune in to free over-the-air transmissions of public performances, did not establish a new right of "transmission" in addition to the existing right to perform the work publicly, did not diminish the right to "time-shift" free over-the-air programs for later viewing, and did not grant a copyright in how television signal reception or DVR technology may develop. Congress intended to *encourage* commercial dissemination of local broadcasts.

The Second Circuit correctly understood the Aereo device as just one more technology that serves the public's right to tune in to signals broadcast over the public's airwaves and to do, remotely, what has long been permissible using the functional equivalent of home-based equipment. Although it may have given unnecessary attention to technical aspects of how the remote DVR functions when a user issues the "record" or "play" commands, this Court needn't

constrain competing devices to the Aereo's specific architecture.

Finally, Congress' exclusive constitutional power to grant exclusive rights to authors may not be supplanted by Executive Branch treaties or judicial gloss that seeks to harmonize an Act of Congress with international trends.

ARGUMENT

I. Freedom To *Receive* A Performance Must Not Be Sacrificed To Protect Existing Market Positions

A. There Is No Basis For Treating Aereo As A Cable Operator

1. Aereo Does Not Play The Role Of A Cable Operator

To a trade association of cable operators, it is clear that Petitioners miscast Aereo's role when they say "watching television over the Internet on Aereo is no different from watching television through a cable or satellite service." (Petitioner's Br. at 7.) First, Aereo functions more like a DVR retailer or antenna installer. By facilitating reception of broadcast programming, it may reduce demand for a cable television service subscription, but it does not function like cable.

Second, unlike cable operators' retransmissions in "real time" feeds through their own facilities to the

subscriber, Aereo simply provides its subscribers access to an antenna and tuner connected to a remote DVR, using connection facilities it does not own, namely, the Internet access supplied by others. Aereo's users only get to watch what they instruct the remote DVR to record. It is an Internet-based "over-the-top" (OTT) video device that, like any other OTT application, communicates using the Internet's communications protocol.[3] OTT applications ride on top of the "transport" layer accessed through the Internet service provider (*e.g.,* cable or telephone company). Cable operators, in contrast, use cable connections they own and maintain to deliver video programming that they have chosen (or have been compelled by law) to offer, as well as providing the basic Internet connection over which OTT applications run.

2. Cable Subscribers Will Not Confuse Aereo With A Cable Operator

In 1976, subscribers used cable services to "tune in" to whatever the cable service provider chose to offer as one-way, non-interactive transmissions. Cable connections were a new way of getting video programming onto the television screen, from more places, and in better quality. (Lawmakers were concerned only with cable's impact on local broadcasting,

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[3] *See, e.g.,* Brian Stelter, *Get Ready For 'Over-The-Top' TV*, CNNMoney, March 7, 2014, at http://money.cnn.com/2014/03/07/technology/over-the-top-tv/index.html?iid=SF_T_River (text and video).

not contemplating that the cable would eventually allow access to the Internet, allowing private performances of streamed movies, among innumerable other OTT applications.) But subscribers to broadband Internet access understand the difference between the cable service provider and the separate Internet-enabled functions (like Aereo's) that they access *through* the provider's broadband facilities.

3. Aereo Is Not Competing As A Cable Operator

Aereo is not, as Petitioners suggest, positioned as a cable operator capturing and retransmitting free local over-the-air broadcasts in its channel line-up. A search for "HD antenna" or "DVR recorders for TV" will each yield thousands of choices on Amazon.com, and it is the makers and sellers of those devices that are Aereo's market competitors. For the copyright owner who licenses public performances over broadcast television, Aereo simply adds one more option from which the intended broadcast audience may choose for tuning in and time-shifting.

If anything, by enabling access to over-the-air local broadcasts, Aereo and companies like it may *help* smaller cable operators become more competitive with larger ones, or cause broadcasters to offer more competitive retransmission rates. For example, ACA is currently asking the FCC to exercise greater authority over retransmission consent rules and what ACA believes is concerted anticompetitive conduct among broadcasters that results in cable operators

paying substantially higher rates.[4] Third-party technologies like Aereo's can benefit smaller cable operators by matching the functionality that larger cable companies such as Comcast and Cablevision can provide in-house, while at the same time giving their "cord-cutting" subscribers options for tuning in to local broadcasts. For the copyright owner, however, the size of the audience (and the accompanying advertiser-supported royalties extracted from the broadcaster) remains the same, if not greater.

B. The Aereo Device Is Closely Aligned With The Public's Broadcasting Interest

Aereo's device is closely aligned with the public interest recognized in the Communications Act, which is *unrelated* to copyright, and biased in favor of enhancing access to free over-the-air local broadcasts.

1. Congress Sought To Maintain The Public Benefit Of Free Over-The-Air Reception

In contrast to Petitioners' desire to suppress access, the Senate Report accompanying the 1992 Cable Act emphasized strongly that "broadcast signals will

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[4] *See, e.g.,* Notification of *Ex Parte* Communication of American Cable Association, Charter Communications, DIRECTV, DISH Network, and Time Warner Cable in *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, March 21, 2014, at http://apps.fcc.gov/ecfs/document/view?id=7521094642.

remain available over the air for anyone to receive without having to obtain consent; indeed, the intent . . . is to ensure that our system of free broadcasting remain vibrant, and not be replaced by a system which requires consumers to pay for television service." S. Rep. No. 92, 102nd Cong., 1st Sess. (1991) at 32.

Congress has repeatedly acted to guarantee that free over-the-air television broadcasting would remain accessible to everyone in the viewing area, even as new technologies threatened to draw viewers, and with them, advertisers, away. The "must-carry" and "retransmission consent" regulations in the Communications Act were in response to the public need for access to free over-the-air local broadcasts, not the copyright owner's need for protection from a non-paying audience. Notably, the retransmission consent and must-carry provisions do not involve the copyright owners at all.[5] They are consumer-facing provisions intended to maximize access to a wealth of

[5] Assuming Congress' authority to require cable companies to retransmit local television stations, or to regulate retransmission consent rates, it is not an exercise of Article I, Section 8 authority. Disputes concerning these provisions arise under the FCC's regulatory authority, which has jurisdiction to review disputes over "must-carry" (47 C.F.R. § 76.56) and retransmission consent (47 C.F.R. § 76.64). It is the FCC, not the Copyright Office, which must "annually report to Congress on the status of competition in the market for the delivery of video programming." 47 U.S.C. § 548(g).

information from a diversity of viewpoints offered through a healthy local broadcasting industry.

In contrast to the Copyright Act's provision that the § 106(4) right "to do or to authorize" the public performance is exercised at the point of authorization, in the Communications Act, Congress was intent on maximizing the public's ability to *receive* the programming broadcast into the public's airwaves, a concern recently exemplified in the transition to digital broadcasting. When Congress forced broadcasters to shift from analog to digital broadcasts, it provided vouchers to subsidize the cost of digital-to-analog converters so that everyone with an old analog television with an antenna could affordably continue to enjoy free local broadcasts.[6]

Aereo's device is consistent with maximizing opportunities to tune in to free over-the-air local broadcasts, and helps prevent that option from being eclipsed by Internet-based alternatives that exclude local broadcasts. Even the "cord cutters" who choose not to pay for television programming through a cable subscription still use their cable company's broadband Internet connection to access these other video sources of news, information and entertainment. Aereo offers another avenue for people to keep tuning in to their favorite local broadcasting station.

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[6] Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109-171, 120 Stat. 21, 109th Cong. (2006).

Petitioners' objective of suppressing public access to free over-the-air broadcasts may be calculated to generate more profit by relying less on ratings-based advertising revenue and more on direct licenses negotiated over the threat of black-outs, or perhaps, as the video report cited at n.3, *supra*, suggests, they see Aereo as a threat to their own future OTT video initiatives, currently at an experimental stage.[7] Whatever the motivation, this Court should reject the invitation to help micro-manage economic outcomes and, instead, leave broadcast television programming as freely accessible to local viewers as it has always been.

2. The Public Has An Absolute Right to "Tune In"

There is no unfairness or free-riding here because the public has no obligation to pay for access to local broadcast signals. Members of the public are *entitled* to watch and hear any over-the-air broadcast programming that they are capable of receiving. It is that simple. The copyright owner has no right to control who may join the audience.

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[7] *See*, *e.g.*, Alex Barinka and Joshua Fineman, *CBS May Create Its Own Internet-TV Service to Challenge Aereo*, Bloomberg, March 28, 2014, available at http://www.bloomberg.com/news/print/2014-03-28/cbs-may-create-its-own-internet-tv-service-to-challenge-aereo.html.

In addition to the Communications Act's *requirement* that cable operators carry local broadcasts, the fundamental Copyright Act principle – that the audience is beyond the control of the copyright owner – is so absolute that it applies even in cases involving otherwise *illegal* conduct. For example, sneaking into a theater without paying is not an infringement of the public performance right.

Joining the audience of a public performance, standing alone, can never be infringing as a matter of law, no matter how sophisticated the signal reception apparatus may be. The public's right to tune in is so strong that copyright owners have no right to prevent anyone from watching or hearing even an *infringing* public performance, other than stopping the performer.[8] Here, however, it is undisputed that the local broadcasters are authorized to perform the works publicly. There is, therefore, no need to distinguish *Cablevision*[9] on the grounds that Cablevision "already had a license to retransmit broadcast television" (Petitioners' Brief at 9). Likewise, we needn't distinguish "cloud" computing services that look to the "safe harbor" provisions of 17 U.S.C. § 512 for immunity from copyright liability for their users' infringing

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[8] The 1984 Cable Act prohibited cable signal theft, 47 U.S.C. § 553, but the prohibition has nothing to do with copyrights.

[9] *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 137 (2d Cir. 2008) ("*Cablevision*"), *cert. denied*, 447 U.S. 946 (2009).

actions (*Amicus* Copyright Alliance Brief at 30), because here, the users are lawfully tuning into an authorized public performance.

Because the public performances at issue here were licensed to be performed over the public's airwaves (and do not legally require a cable subscription), there is no basis for treating the "remote cable+DVR" at issue in *Cablevision* as having any firmer legal footing than the "remote free local broadcast antenna+ DVR" of Aereo.

3. Congress Did Not "Overturn" *Fortnightly*

Fortnightly and *Teleprompter*[10] drew a clear copyright line between broadcasting (performing a work publicly by means of a transmission to the public) and receiving (tuning in to a broadcast). Congress never disagreed. As discussed above, Congress' decision to address competition in the broadcasting, cable and (later) satellite industries was prompted by concern for the viability of local broadcasting in general, and not the economic impact on copyright owners or specific broadcasters. Congress has never recognized a copyright interest in the broadcast transmission, as such. Only the authority to perform the work publicly falls within the copyright owner's control.

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[10] *Teleprompter Corp. v. Columbia Broadcasting*, 415 U.S. 394 (1974).

Rather than disagree with this Court's reasoning in *Fortnightly*, Congress sought to mitigate the perceived threat to the viability of local broadcasting. The fact that Congress saw fit, through the Communications Act, to give broadcasters economic leverage with respect to cable operators[11] provides no basis for assuming that Congress meant to give copyright owners the exclusive right to authorize the reception of licensed broadcasts beyond the reach of the rooftop antenna, or using a more modern device. In adopting 17 U.S.C. § 111, for example, Congress was "cognizant of the interplay between the copyright and the communications elements of the legislation," and "carefully avoided" interfering with FCC rules affecting communications policy. H.R. Rep. No. 94-1476 at 89 (1976).

Just as this Court recognized in *Turner Broadcasting*, with respect to retransmission by cable systems, "The purpose was not to replace broadcast television but to enhance it." 512 U.S. at 627. The same holds true for Aereo's system. This Court's observation of twenty years ago is echoed in today's broadband Internet revolution:

> Given the pace of technological advancement and the increasing convergence between cable and other electronic media, the cable

[11] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661 (1994) (Congress' desire to prevent "the bottleneck of monopoly power" that might endanger "the viability of broadcast television" justified the "must-carry" provisions).

> industry today stands at the center of an ongoing telecommunications revolution with still undefined potential to affect the way we communicate and develop our intellectual resources.

Id. at 627. Copyright law is intended to develop our intellectual resources, not to insulate copyright owners from technological advancement.

II. Copyright And Communications Policy Must Not Be Conflated

A. The Retransmission Provisions Have More To Do With Communications Law Than Copyright Law

Back when this Court and Congress first considered retransmissions, cable television systems performed

> either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae.

United States v. Southwestern Cable Co., 392 U.S. 157, 163 (1968). (Apart from turning on the system and changing channels, there was no consumer control in content selection or transmission schedule.) The public interest was best served by embracing

cable services' capacity to enhance local reception of local broadcast signals because, "if the failure of a station 'leaves a community with inferior service,' this becomes 'a matter of real and immediate public concern.'" *Id.* at 178 n.38 (quoting S. Rep. No. 923, 86th Cong., 1st Sess., at 7).

Congress' approach to cable retransmission focused on protecting the public's interest in local broadcast signal reception so that the free over-the-air broadcasting medium would not wither.[12] Cable operators are *required* to make local broadcast signals available because it was in the public interest for them to do so. *See, e.g., United States v. Midwest Video Corp.*, 406 U.S. 649, 665-68 and nn.24-26 (1972).[13] There was never legislative interest in giving authors greater control over how viewers could receive licensed local broadcasts over the public's airwaves.

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[12] The concern over the health of *local* broadcasting (as opposed to the broadcasting medium as a whole) is also evident from the fact that Congress chose to give the local broadcaster (rather than the network) the choice whether to require retransmission at no cost ("must-carry") or negotiate a fee for retransmission consent. Neither the network that supplied programming nor the copyright owner in the works broadcast has any choice in the matter.

[13] Operators are further required to make them available to all subscribers (whether they want them or not), and prevent an operator from refusing to carry a broadcast signal upon request. 47 U.S.C. §§ 543(b)(7)(A)(i), 534(b)(7) and 535.

B. The "Transmit Clause" Was A Modest Nod To Modernity

Congress was not concerned with the copyright owner's welfare with respect to retransmission of local broadcasts within the local broadcaster's area. It tasked the FCC, rather than the Copyright Office, with regulatory control in that field. The drafters of the Copyright Act of 1976 were fully aware of what was happening in local broadcasting and cable, and consciously left copyright owners out of the equation. With respect to 17 U.S.C. § 111, they explained that

> there was no evidence that the retransmission of "local" broadcast signals by a cable operator threatens the existing market for copyright program owners. Similarly, the retransmission of network programming, including network programming which is broadcast in "distant" markets, does not injure the copyright owner. The copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly.

H.R. Rep. No. 94-1476, at 90. Consistent with *Fortnightly*, the Report concluded, "Thus, no royalty fees may be claimed or distributed to copyright owners for the retransmission of either 'local' or 'network' programs." Congress rejected the notion that use of modern technology to enable members of the public to receive local over-the-air broadcasts was infringing.

Against that backdrop, the phrase "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" (in the "transmit" clause of the definition of public performance in § 101) seems calculated as a minor nod to modernity. Public performances were no longer limited to live audiences gathered in one place for the duration of the performance. Broadcasting and cable communications meant that members of the audience may be far-flung[14] and, with their thumbs on the remote control (or fingers on the dial of old), could easily enter and leave the audience for the performance at any time.

C. The Copyright Act Does Not Take Sides

Arguments in this case seem more concerned with preserving business models than protecting copyrights. As cable operators have begun offering more robust broadband Internet access, a significant number of subscribers have re-examined the value proposition of using their cable connections both for cable television and Internet access, given that so many movies and television programs are available over the Internet. The so-called "cord cutters" who choose to keep their Internet access and forgo

[14] For example, 17 U.S.C. § 111(f) identifies Hawaiians as "nonsimultaneously" receiving a performance. H.R. Rep. No. 94-1476, at 91.

subscription video service[15] increase the risk that broadcasters that rely most heavily on cable retransmission for their Nielsen ratings might lose viewers, and with them, lose advertising revenue. But the Copyright Act offers no insulation from the effects of cord cutting and viewers have a right to "cut the cord" and use an antenna for local broadcasts.

Even so, it is hard to envision any scenario in which the copyright interest is hurt by an application such as Aereo's, which gives cord-cutters a place to go to rejoin the viewing audience for local over-the-air broadcasts. As more people tune in to the local broadcast, the higher ratings will translate to higher advertising revenues, and the copyright holder can demand a higher price for the public performance license.[16]

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[15] Jill Scharr, *Your Guide to Cable TV Cord-Cutting*, Tom's Guide US, March 11, 2014 (available at http://www.tomsguide.com/us/cord-cutting-guide,news-17928.html). It is imperative for cable companies to adapt to the practice by allowing subscribers to access their favorite programming the way they want to. Shalini Ramachandran, *Evidence Grows on TV Cord-Cutting*, The Wall Street Journal, August 7, 2012 (available at http://online.wsj.com/news/articles/SB10000872396390443792604577574901875760374).

[16] *Amici curiae* National Association of Broadcasters, Br. at 20 and n.51, states matter-of-factly that "Aereo audiences are 'not measured by Nielsen' ratings," quoting FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 28 FCC Red. 10,496, 10,583 (2013). It is a surprising statement given that the big news of 2013 was that Nielsen was, indeed, going to begin capturing

(Continued on following page)

Audience size influences whether the local broadcaster will choose the "must-carry" path to force a disinterested cable operator to carry its signal, or negotiate retransmission consent with a more motivated cable operator. The purpose of the law, however, is to protect the economic viability of having diverse programming broadcast free over the public's airwaves, and not to tilt the scales of copyright protection. As this court explained,

> By preventing cable operators from refusing carriage to broadcast television stations, the must-carry rules ensure that broadcast television stations will retain a large enough potential audience to earn necessary advertising revenue – or, in the case of noncommercial broadcasters, sufficient viewer contributions, . . . to maintain their continued operation. In so doing, the provisions are designed to guarantee the survival of a medium that has become a vital part of the Nation's communication system, and to ensure that every individual with a television set can obtain access to free television programming.

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that data, and the NAB responded by asking Nielsen to *delay* the measurement. John Eggerton, *NAB Asks Nielsen To Delay Hybrid Video Measurement*, B&C, Feb. 6, 2014 (available at http://www.broadcastingcable.com/news/washington/nab-asks-nielsen-delay-hybrid-video-measurement/129034). Audience measures are continually evolving alongside viewing technology, and we see no reason why Nielsen or any of its competitors would stop. In any event, Nielsen ratings are not part of the Copyright Act.

Turner Broadcasting, 512 U.S. at 647. That "guaranteed survival" plan has been so successful that broadcasters today enjoy significant economic leverage. As summarized by the Department of Justice,

> Popular programming and a loyal audience also allows television broadcasters to negotiate higher fees for the retransmission of their programs on cable and satellite. Although many millions of Americans continue to receive their television programming over-the-air, the majority of Americans who watch television today subscribe to a multichannel video programming distributor ("MVPD"), such as a cable company or direct broadcast satellite provider. These MVPDs typically pay per-subscriber fees to retransmit the broadcaster's signal, known as retransmission consent fees. The size of these fees affects the rates that consumers are charged for an MVPD subscription. Although MVPDs may carry hundreds of channels altogether, the local broadcast television stations usually have the highest viewership. Thus, advertisers still covet spots on broadcast television stations because they have the largest audience and can reach all the television viewers in an area – those who either use an antenna or subscribe to an MVPD.

In re Rules and Policies Concerning Attribution of Joint Sales Agreements In Local Television Markets, MB Docket No. 04-256, *Ex Parte* Submission of the

United States Department of Justice, at 9, Feb. 20, 2013.[17] Although this complex set of interrelated market factors will always be at work, § 106(4) of the Copyright Act offers the licensor of the audiovisual work's public performance no protection from broadcaster decisions with respect to retransmission, or from the free market response of advertisers and viewers.

Copyright holders do not have the right to force audiences to choose the theater seats that yield the highest margins.

III. All That Is Excluded From Copyright Must Be Considered

The teaching of *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526-27 (1994), is that what is beyond the scope of the copyright is just as important as what lies within. It may, therefore, be useful to consider what Congress placed beyond the reach of exclusive rights.

A. There Is No Exclusive Right To Transmit A Work

Petitioners' interpretation of their exclusive right to perform their works publicly under § 106(4) as coextensive with an exclusive right to transmit a work by any means now known or later developed must be rejected.

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[17] http://www.justice.gov/atr/public/comments/303880.pdf.

First, there is no exclusive right to "transmit" a work publicly. The word "transmit" comes up in the context of defining "publicly" with respect to the distinction between a performance of the work that is within the scope of exclusive rights, and one that is not. It does not prohibit private performances by means of a transmission of any kind.

Second, not all transmissions are performances or displays. Works may also be *reproduced* by means of a transmission that is *not* a public performance. *See, e.g.*, 17 U.S.C. § 115(d) (defining "digital phonorecord delivery" as "delivery of a phonorecord by digital transmission of a sound recording" that results in a *reproduction* of the work by or for a "transmission recipient . . . regardless of whether the digital transmission is also a public performance"); *United States v. American Soc. of Composers, Authors*, 627 F.3d 64 (2d Cir. 2010) (transmission resulting in a reproduction is not a public performance even though the work could be performed from the resulting reproduction). The "transmit" clause of the definition describing a possible *means* of performing a work publicly cannot derogate from the fundamental question of *whether* a copyrighted work is being "performed publicly."

B. There Is No Copyright In Broadcast Signals

"Congress granted broadcasters rights in their signals," declare *amici curiae* National Association of

Broadcasters and the major television networks, on page 4 of their brief. Whatever rights Congress may have granted to broadcasters, they are not copyrights, and they do not fall under Congress' Article I, Section 8 constitutional authority. Accordingly, any power to suppress Aereo based on borrowing concepts from the Communications Act must be subjected to normal First Amendment scrutiny because suppression of the freedom to receive a local broadcast implicates freedom of speech. To date, however, as discussed at note 21, below, no copyright interest has been recognized in broadcasts or transmissions, as such.[18]

C. There Is No Exclusive Right Over Reception Of A Public Performance

Just as the Copyright Act grants no "exclusive right to watch" a public performance, there is also no "exclusive right to receive" a televised broadcast, and "it was never contemplated that the members of the audience who heard the composition would themselves also be simultaneously [publicly] 'performing,' and thus also guilty of infringement." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 157 (1975).

[18] Although Petitioners include copyright holders who are also broadcasters, the Complaint only alleges infringement of their copyrights, not their broadcast signals. The copyright owner who is also the broadcaster may benefit if broadcasters are able to extract more revenue from the public performance of the copyright owners' works, but such conflated economics are no basis for also conflating copyright and communications jurisprudence.

Falling outside of the copyright grant, these rights belong to everyone without exclusivity.[19] Nothing in the Copyright Act authorizes federal courts to re-adjust the law to reach a better financial result for copyright owners by keeping certain prospective audience members from using disfavored forms of broadcast reception.[20]

D. There Is No Exclusive Right To Veto New Reception Technology

Petitioners view Aereo's innovation as a market disrupter, and argue (Br. at 5-6) that their right to perform publicly covers transmissions by means of every "device or process" that is "now known or later developed." But the phrase serves only to keep "device or process" current with technology, and cannot be read as modifying the substantive right to perform a work publicly. The limitations within which the

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[19] A person who "puts the work to a use" not enumerated in § 106 does not infringe, *Fortnightly*, 392 U.S. at 393-95. "Accordingly, if an unlicensed use of a copyrighted work does not conflict with an 'exclusive' right conferred by the statute, it is no infringement of the holder's rights." *Aiken*, 422 U.S. at 155.

[20] Given the "multimedia" makeup of Petitioners, it is fair to wonder whether copyright owners with no broadcasting or major cable interests would care how local audiences tap into the public airwaves to receive a local broadcast of an authorized public performance of their work. They continue to retain plenary authority to license the broadcaster to perform the work publicly (or not) on whatever terms the market will bear – and it will generally bear more as advertising revenue grows in tandem with the audience.

exclusive rights are cabined are substantive, too, and not to be ignored merely because technology allows it. When the Copyright Act delineates limited exclusive rights in § 106, it begins with the limitations: "Subject to sections 107 through 122." Congress could not have meant for the reach of narrowly defined copyrights to increase in step with modern technology to the point of swallowing all that, in 1976, had been left beyond their scope.

When a new technology comes along, the right of the audience to use it to tune in to a broadcast and maximize the free flow of information cannot be given any less importance than preventing infringing use. This Court has rejected "a one-sided view of the Copyright Act" that coddles copyright owners at the expense of the public's interest served by the copyright grant. *Fogerty*, 510 U.S. at 526-27. Accordingly, for any perceived threat from new technology to the exclusive right to perform a work publicly by means of a transmission, this Court must also consider the benefit to the public's enjoyment of its right to receive a local broadcast over the public's airwaves.

The right to watch a public performance is protected by the First Amendment. That right is not limited to the state of television reception technology of 1791. Accordingly, any conflict between the public's First Amendment right to tune in to the local television broadcast with the technology of choice and the copyright owner's mere statutory copyright over "methods now known or later developed" must be resolved in favor of the public's rights.

This principle is particularly important where the broadcaster's local audience does not enjoy the same level of access to the free over-the-air broadcast, and the newer technology serves to equalize that access, for it is essential to the welfare of the public not only that the widest possible dissemination of antagonistic broadcasters fill the airwaves, *Turner Broadcasting*, 520 U.S. at 192; *Associated Press v. United States*, 326 U.S. 1, 20 (1945), but also that their broadcasts be received.

IV. The Second Circuit's Holding Must Not Be Limited To The Technology Before It

For the foregoing reasons, we believe that the Second Circuit correctly decided this case and the *Cablevision* holding on which it relied. But care must be taken to avoid limiting the law to the specific technology used in this case.

A. Private Performances Must Not Be Limited To Copies Made By The Private Performer

The *Cablevision* court said, "because the RS-DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber, we believe that the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission." *Cablevision*, 536 F.3d at 137. It 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. But these observations must not be interpreted as a legal restraint on engineering design. The facts simply supported the conclusion that the user's performances were indeed private.

Neither the exclusive right to perform a work publicly nor the First Amendment right to perform a work privately turns on the existence of a copy, much less any particular copy's unique attributes. Section 106(4) grants the exclusive right "to perform the copyrighted work publicly" without reference to any copies of it, and § 202 admonishes that ownership of a copy carries with it no rights in the work embodied in it. Accordingly, non-public (private) performances must not be suppressed based on failure to privately perform the work from a copy of one's own making. But because "the use of a unique copy may limit the potential audience of a transmission and is therefore *relevant* to whether that transmission is made 'to the public,'" *Cablevision*, 536 F.3d at 138 (emphasis added), the court approached the issue as an evidentiary one (with respect to whether "the public" had access) and not as a determination that all competing devices must follow the same path to preventing public access. The user-specific nature of the copies may be *sufficient* to ensure that the performance is private, but not *necessary* as a matter of law.

Engineers should be free to design the most efficient means of keeping a private performance "non-public" by following a different path.

B. "Files" On A Server Are Not Necessarily "Copies" Of A Work

The Second Circuit approached *data files* as synonymous with *copies* of the work. But the Copyright Act defines "copies" in terms of *material objects* embodying the work, and not the number of times the work is written onto a single material object. Just as the ink in this brief would mean nothing without first being printed on the paper, there are no "digital files" apart from material objects. Reading the § 106(1) right to reproduce the work "in copies" together with the definition of "copies" in § 101 shows that while "copies" are material objects (the file servers, in this case), the term "files" remains undefined, and is not used to define substantive rights. In order to have two "copies" of a single work, one must have two material objects. "A copy must of necessity consist of some tangible material object upon which the work is 'fixed.'" *Walker v. University Books, Inc.*, 602 F.2d 859, 863 (9th Cir. 1979) (citations omitted).

Accordingly, although the method used by Aereo made it clear that users made only private performances in this case, there is no reason to restrict Aereo (or its future competitors) to using Aereo's particular method of file management. To illustrate, in the case of an ordinary home-based DVR, if one

family member records a program, and another family member records the re-run of the same program aired at a later time, the DVR would still be one "copy" (one material object) containing the work, and it would not matter which member of the household played back the work using which digital file, or whether the DVR was designed to recognize that, having already recorded the work, it needn't record it a second time using up twice the hard drive space just because two different people hit the "record" command.

The basic holding is sound. If a person may lawfully operate a television antenna on the rooftop connected to a television receiver and DVR in the living room, that same person should be permitted to operate a third-party's antenna and receiver in a better (but more remote) location to send the image to the same television. Like making copies on a photocopier in a public place, the focus of the inquiry should remain on who controls or authorizes the operations of reproduction and performance, and not who owns and maintains the equipment that carries out those operations.

V. Congress' Role Must Not Be Usurped

A. International Norms Cannot Supplant Congress' Exclusive Constitutional Role Over Copyright

It is argued that international treaties to which the United States is a party obligate federal courts to harmonize the U.S. Copyright Act with the Nation's

international obligations to other countries. Brief of *amici curiae* International Federation Of The Phonographic Industry (IFPI), et al. Such harmonization is the constitutional task of Congress, not the courts. Nor does the Executive Branch have authority to create or enlarge the exclusive rights of authors with just the advice and consent of the Senate.

The Constitution gives *Congress* sole authority to enact copyright protections. Both the Senate *and* the House of Representatives have a role. Since treaty-based obligations may not circumvent the constitutional role of the House of Representatives in enacting copyright law, any suggestion that international treaty obligations may serve to alter the Copyright Act balance without congressional action must be rejected.[21]

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[21] Omitted from the IFPI brief is the long international failure to agree on a broadcasting treaty, which has been under consideration in the World Intellectual Property Organization (WIPO) for many years without consensus. *See, e.g.*, William New, *WIPO Broadcasting Treaty Talks Break Down*, Intellectual Property Watch, June 22, 2007 (available at http://www.ip-watch.org/2007/06/22/wipo-broadcasting-treaty-talks-break-down-over-differences/); Catherine Saez, *Broadcasting Treaty Moving At WIPO; Library Copyright Exceptions Slower*, Intellectual Property, Dec. 22, 2013 (available at http://www.ip-watch.org/2013/12/22/broadcasting-treaty-moving-at-wipo-library-copyright-exceptions-slower/). The unsuccessful effort to reach consensus has been going on for over 50 years. *See* Knowledge Ecology International, *Timeline of WIPO negotiations on a Treaty for the Protection of Broadcasting Organizations*, a work in progress available at http://keionline.org/copyright/wipobroadcasting/timeline.

The Copyright Act would itself abridge the Constitution's First Amendment but for the "copyright clause" in Article I, Section 8. Accordingly, everything Congress left outside of the scope of exclusive rights granted in § 106 ("subject to" the limitations in §§ 107 through 122) is fully protected as though no copyrights existed. The First Amendment right to enjoy non-exclusive uses of a work, together with the constitutional role assigned to the *entire* Congress, cannot be satisfied by speculating that Congress intended for the courts to add judicial gloss to Title 17 when necessary to harmonize it with the international winds of change.

B. Congress Is Poised To Adopt Corrective Measures

In April of last year, the House Judiciary Committee Chairman announced the initiation of a comprehensive review of U.S. copyright law, with particular attention to whether updates are needed to better fit the digital age.[22] Several hearings have already been held.

Meanwhile, the 113th Congress (2013-2014) has before it various legislative proposals to alter the legal structure at issue here. The Consumer Choice in

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[22] House Judiciary Committee, *Chairman Goodlatte Announces Comprehensive Review Of Copyright Law*, April 24, 2013, at http://judiciary.house.gov/index.cfm/2013/4/chairmangoodlatteannouncescomprehensivereviewofcopyrightlaw.

Online Video Act (S. 1680) addresses consumer access to online video, prohibiting broadcasters from restricting online video services from making licensed content available to subscribers on the platform of their choice. It directly addresses the Aereo architecture by specifically authorizing antenna rental services to rent access to an individual antenna to a consumer for the purpose of viewing over-the-air broadcast television signals transmitted directly to the consumer over the Internet. It also authorizes individual data storage systems, including online remote systems, for recording and then playback to the renter through the Internet, exempt from retransmission consent fees.

Earlier this year, a House Subcommittee began marking up the Satellite Television Extension and Localism Act reauthorization legislation. The current draft would prohibit local broadcasting stations in the same market from jointly negotiating retransmission consent (Section 3(a)(3)) and require a study of the impact that *repeal* of the statutory copyright licensing provisions in 17 U.S.C. §§ 111, 119 and 122 (applicable to distant retransmission) would have "on consumer prices and access to programming" (Section 7).[23]

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[23] The Discussion Draft is available at http://docs.house.gov/meetings/IF/IF16/20140324/101989/BILLS-113pih-STELAReauthorization.pdf. The Subcommittee's statement of March 25, 2014, is at http://energycommerce.house.gov/press-release/draft-bill-reauthorize-nation%E2%80%99s-satellite-television-law-passes-subcommittee.

The pending Next Generation Television Marketing Act (H.R. 3720), Television Consumer Freedom Act of 2013 (S. 912) and the Video Consumers Have Options in Choosing Entertainment Act (or "Video CHOICE Act") of 2013 (H.R. 3719) would also address retransmission rules.

Even if none of these proposals are adopted, their consideration demonstrates that Congress is perfectly capable of adjusting copyright and communications law without the need for judicial speculation as to how the Congress of 1976 would have expected the law to be applied to technologies it did not contemplate. "Judgments about how competing economic interests are to be reconciled in the complex and fast-changing field of television are for Congress to make." *Turner Broadcasting*, 520 U.S. at 224. There is no crisis warranting interference with Congress' role over copyrights. It is up to Congress to settle the score.

CONCLUSION

The judgment below should be affirmed, preferably (in light of the discussion in Section IV, above) with clarification that next generation technologies

may depart from the engineering strictures that the Second Circuit might appear to have cast as requirements.

Respectfully submitted,

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