No. 13-461

IN THE

Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,

Petitioners,

v.

AEREO, INC., FKA BAMBOOM LABS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* THE ELECTRONIC FRONTIER FOUNDATION, PUBLIC KNOWLEDGE, THE CONSUMER ELECTRONICS ASSOCIATION, AND ENGINE ADVOCACY IN SUPPORT OF RESPONDENT

SHERWIN SIY
PUBLIC KNOWLEDGE
1818 N Street NW, Suite 410
Washington, DC 20036
(202) 861-0020

JULIE P. SAMUELS
ENGINE ADVOCACY
156 2nd Street
San Francisco, CA 94105
(415) 735-6869

MITCHELL L. STOLTZ
Counsel of Record
CORYNNE MCSHERRY
KURT OPSAHL
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333
mitch@eff.org

Counsel for Amici Curiae

251690

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Contents

Page

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

INTEREST OF *AMICI CURIAE*[1]

The Electronic Frontier Foundation (EFF) is a member-supported, nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990, EFF represents more than 30,000 active donors. EFF promotes the sound development of copyright law as a balanced legal regime that fosters creativity and innovation. EFF's interest with respect to copyright law reaches beyond specific industry sectors and technologies to promote well-informed copyright jurisprudence. EFF has contributed its expertise to many cases applying copyright law to new technologies, as party counsel, as *amicus curiae*, and as court-appointed attorneys *ad litem*.

Public Knowledge is a non-profit public interest 501(c)(3) corporation, working to defend citizens' rights in the emerging digital culture. Its primary mission is to promote online innovation, protect the legal rights of all users of copyrighted works, and ensure that emerging copyright and telecommunications policies serve the public interest. Applying its years of expertise in these areas, Public Knowledge frequently files *amicus* briefs in cases that raise novel issues at the intersection of media, copyright, and telecommunications law.

---

1. Petitioners' and Respondent's letters granting blanket consent to the filing of *amicus* briefs have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

The Consumer Electronics Association (CEA) is the technology trade association representing the $208 billion U.S. consumer electronics industry. CEA's more than 2,000 companies make, distribute or sell innovative apps, services and products including wireless products, televisions, navigational devices, tablets, smartphones, entertainment services and recording and time-shifting products.

Engine Advocacy is a non-profit organization that supports the growth of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues. As part of its advocacy efforts, Engine has built a coalition of more than 500 high-growth businesses and associations, pioneers, innovators, investors, and technologists from all over the country, committed to taking action on the policy issues that affect the way they run their businesses. Engine and its members thus have a vested interest in ensuring that policies incentivize innovation and create a fertile environment for new companies and new technologies to thrive.

SUMMARY OF ARGUMENT

The question at issue in this case is not whether Aereo will harm the television industry. Nor is it whether there is commercial value in enabling live broadcast TV transmissions. The legal question is just this: *does Aereo's technology make public performances according to the words of the Copyright Act*? The Second Circuit answered this question correctly, finding that Aereo's system of personal antennas and video streams allows individuals to make *non-public* transmissions of free broadcast channels that they may already access in their private homes independent of anything Aereo does. This Court should do the same.

To be sure, the "Transmit Clause" of the public performance right, 17 U.S.C. § 106(4), is "not a model of clarity." *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 136 (2d Cir. 2008) ("*Cablevision*"). Its application to technologies like Aereo's has proved difficult because Congress, redrafting the Copyright Act in 1976, did not foresee that TV viewers would be able to transmit signals over a communications medium like the Internet for their own personal use. Nor did Congress foresee a means of transmitting video that was not a dedicated video distribution system regulated by the Federal Communications Commission.

But Congress nonetheless expressed a clear legislative intent. The Transmit Clause embodies two principles: (1) copyright holders have the right and ability to license their content to *cable systems* and *satellite TV services* that transmit to the public; but (2) copyright holders do not have a copyright interest in *private, personal transmissions by individuals*, regardless of the technology involved or the commercial nature of the technology provider.

The second principle was not a legislative oversight. Rather, it reflected Congress's longstanding policy of giving incentives for creativity while reserving many uses of creative work to the public.

Technological developments have put pressure on these two principles. Fortunately, this Court has an established approach to such challenges. Recognizing that copyright is a limited set of exclusive rights defined by statute, embodying a balance of interests between authors and the public, this Court has long declined to expand the statutory rights based on its own assessment of a new technology's social or economic worth, absent an express statutory instruction. *See Universal City Studios v. Sony Corp.*, 464 U.S. 417, 431 (1984) ("[Where] Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests.").

That wise approach should apply here. Instead of attempting to rebalance the various interests raised here based on a slim factual record and litigants' opinions of what constitutes "real" or "sham" innovation, this Court should decline the copyright expansion the broadcasters seek, and allow Congress to address the matter, *if it so chooses*. Only "Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology." *Id.*

Deference to Congress makes sense if copyright is to serve its purpose. Copyright law has never assigned *all* commercially valuable uses of creative works to rightsholders; many have always been reserved to the public. This creates breathing space for technological and business innovation by entrepreneurs who have no affiliation with rightsholders. As history shows, that leads in turn to new markets for creative work, increasing both rewards for authors and access to creative works in the long term.

By contrast, the predominant interpretive approach suggested by petitioners and their *amici*—that the Court should construe exclusive rights to include all financially valuable uses of copyrighted works—would strip away the commercial freedom that led to the home stereo, the videocassette recorder, all manner of personal audio and video technologies, and many Internet-based services. Petitioners would have the Court sit as a bureau of federal technology policy, deciding whether Aereo's technology offers "real advances" or is "efficient[]" enough to merit the law's forbearance. Pet. Br. 43.

The Court should refuse that invitation. The Court's longstanding approach in copyright cases has been to avoid acting as a technology regulator, avoid determining the worth of businesses, and leave it to Congress to determine whether a disruptive technology requires rebalancing of express statutory rights. That approach better serves copyright's purpose, and is the right guide here. The Court should affirm the Second Circuit's decision.

ARGUMENT

I. The 1976 Copyright Act Places Private Transmissions Outside the Scope of the Public Performance Right.

Copyright in the United States is a "creature of statute." *Stewart v. Abend*, 495 U.S. 207, 251 (1990). This Court, in its very first interpretation of copyright, determined that it "does not exist at common law—it originated, if at all, under the acts of [C]ongress." *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 663 (1834). Thus, the rights of authors are only those specifically enumerated in statute. All other rights remain with the public. "If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of [the] 'exclusive rights,' he infringes the copyright. If he puts the work to a use not enumerated [among the exclusive rights], he does not infringe." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155 (1975) (quoting *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 393-95 (1968)); *see also* 2 M. Nimmer, *Nimmer on Copyright* § 8.01[A] ("Nimmer") ("the rights of a copyright owner . . . are rights of express enumeration."). These limits on "copyright law ultimately serve the purpose of enriching the general public through access to creative works . . . ." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994).

Thus, the *only* question arising in this appeal is whether Aereo's technology, which allows customers to receive free over-the-air broadcasts on a unique antenna and to transmit the broadcasts to a device of the customer's choosing, falls within the Copyright Act's definition of performing a work "publicly":

> To transmit or otherwise communicate a performance or display of the work . . . 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.

17 U.S.C. § 101 (2013).

In answering this question, the Second Circuit held that when a TV viewer makes a unique copy of a broadcast captured independently from the public airwaves, and causes that copy to be transmitted to herself, the viewer has made a non-public performance. *WNET v. Aereo, Inc.*, 712 F.3d 676, 702 (2d Cir. 2013). This holding gives effect to all the words of the statute. It asks whether those "capable of receiving the performance or display" are "members of the public." It allows for the possibility of transmissions that are "to the public" although received "in separate places" or "at different times," as occurred in *Columbia Pictures Indus., Inc. v. Redd Horne Inc.*, 568 F. Supp. 494 (W.D. Pa. 1983) and *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594 (S.D.N.Y. 2011), *aff'd*, 691 F.3d 275 (2d Cir. 2012).

The appeals court's holding also saves the statute from becoming nonsensical, as it allows for the possibility of transmissions that are not "to the public." The language of the statute contemplates that a transmission to the public is a subset of transmissions—the language would become superfluous if all transmissions were "to the public."

II. Where the Statutory Scope of an Exclusive Right to Use a Copyrighted Work Is Unsettled, the Right to That Use Should Remain With the Public.

The Second Circuit's approach is consistent with two long-standing principles that have guided courts when changes in technology and business practices make for difficult interpretive questions.

The first principle is that the exclusive rights of the copyright holder are defined and limited by statute so as not to interfere with legitimate commerce by others, which can serve copyright law's Constitutional purpose by promoting access to knowledge and creating new markets for creativity. *See Sony*, 464 U.S. at 440-42.

The second principle is that Congress, not the courts, has the Constitutional authority and the best institutional ability to shape the boundaries of copyright law based on broad policy judgments about the impact of technologies and businesses. *Sony*, 464 U.S. at 431 ("The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme.") (citations omitted); *see also Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) ("[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."); *Stewart*, 495 U.S. at 230 ("[I]t is not our role to alter the delicate balance Congress has labored to achieve.").

These principles counsel a path of non-interference, allowing innovations like Aereo to continue, even if unpleasant for the petitioners, unless Congress makes a different judgment.[2]

A. What Copyright Omits Is as Important to the Statutory Scheme as What It Includes.

The Copyright Act gives effect to Congress's power "[t]o Promote the Progress of Science and useful Arts." U.S. Const. art. i, § 8, cl. 8. While the Constitution specifies a means for Congress to achieve this goal—"by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"—the exclusive rights, including the right of public performance, are interpreted in light of the law's ultimate objective:

2. There are at least two bills in the current Congress regarding Internet streaming of television: the Consumer Choice in Online Video Act (S. 1680) and the Television Consumer Freedom Act of 2013 (S. 912).

> The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary object in conferring the monopoly," this Court has said, "lie in the general benefits derived by the public from the labors of authors."

Aiken, 422 U.S. at 156 (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).[3]

In keeping with that objective, copyright law and policy sets many uses of copyrighted works beyond the rightsholder's control, requiring no permission or payment. Indeed, what the statute excludes from the rightsholder's exclusive domain—including by omission—must be considered equally as important to achieving the goals of the statute as what it includes. This is because "the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement." *Fogerty*, 510 U.S. at 526.[4]

---

3. The Copyright Act of 1976 did not abrogate the principle expressed in *Fortnightly* and *Aiken* that copyright is to be interpreted in light of its ultimate public purpose, and not simply to maximize control by rightsholders. Its application has continued with equal force since that Act took effect. *See Sony*, 464 U.S. 417; *Fogerty*, 510 U.S. at 526; *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 151 (1998); *Eldred*, 537 U.S. at 204.

4. *Amicus* former Register of Copyrights Ralph Oman suggests that "[w]henever possible, when the law is ambiguous

For example, a copyright holder's exclusivity over publication does not extend to control over the resale of copies, because such control "would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment." *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 351 (1908). This is true even where the result is to deny rightholders a potential source of income. Allowing copyright to place restraints on alienation of copies would have hindered the spread of knowledge, even if it increased rightsholders' potential income. *See* H.R. Rep. 98-987, at 2 (1984), *as reprinted in* U.S.C.C.A.N. 2898, 2899 (courts "distinguish[] between the owner's exclusive rights in the copyright and the rights of the owner of an object embodying a work that is under copyright").

By the same token, courts have consistently held that the Copyright Act preempts state laws that cover a broader range of conduct than Section 106 does. *See, e.g.*, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 201 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 849 (2d Cir. 1997); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 717 (2d Cir. 1992). In other words, state law cannot "make unlawful conduct that Congress intended to allow." *Motorola*, 105 F.3d at 849; Nimmer, *supra* § 1.01[B][1], at 1-11 ("The fact that the state-created right is either broader or narrower than its federal

---

or silent on the issue at bar, the courts should let those who want to market new technologies carry the burden of persuasion" Ralph Oman Br. 14. In fact, there is not, and has never been, a presumption that the exclusive rights be interpreted broadly.

counterpart will not save it from pre-emption."). Preemption applies with equal force to conduct *forbidden* or *permitted* to the public by the Copyright Act, including conduct permitted by virtue of its omission from Section 106.

In light of copyright's statutory nature and carefully delimited rights, petitioners' contention that "the central principle underlying copyright law" is to prohibit "third parties . . . reap[ing] the benefits" of "an author's creative labor" cannot be correct. Pet. Br. 38-39. Copyright has always allowed third parties to use and profit from the works of others by whatever means Congress has not assigned exclusively to rightsholders. As this Court has noted, although "[i]t may seem unfair that much of the fruit of the [petitioners'] labor may be used by others without compensation," this is "not 'some unforeseen byproduct of a statutory scheme'" but rather a fundamental principle. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (*quoting Harper & Row*, 471 U.S. at 589 (Brennan, J., dissenting)).

Here, Congress did not assign to rightsholders the exclusive right to control all transmissions of works. It did not define "public performance" to include "all transmissions," nor as "all transmissions enabled by a commercial intermediary." As the bounds of the Section 106 rights embody the balance of interests between rightsholders and the public, the Court should not alter the balance by declaring some private transmissions to be public.

B. That a Certain Use of a Copyrighted Work is Valuable Does Not Change the Statutory Interpretation.

Petitioners and their *amici* seek a new rule of interpretation that would tend to place business models that touch copyrighted works within the bounds of the Section 106 rights. Ignoring the copyright clause's mandate to promote progress, they would have the Court create a presumption of illegitimacy for any "commercial enterprise" that uses "the copyrighted programs of other content providers." Media Inst. Br. 16; *see also* Viacom Br. 16. But a copyright has never been a right to control over all commercially valuable uses of a work. Section 106(4) does not direct courts to consider the market value of a defendant's use.[5] It does not speak of "commercial" transmissions, and it does not distinguish a product, such as a home VCR or roof antenna, from a service involving an ongoing customer relationship. And the section omits private transmissions from its ambit regardless of whether the public's ability to make private transmissions without permission would allegedly harm a rightsholder. Indeed, petitioners' approach devolves

5. The fair use doctrine of 17 U.S.C. § 107, which explicitly directs courts to consider "the effect of the use upon the potential market for or value of the copyrighted work," is not at issue in this appeal. However, even in fair use cases, neither the commercial nature of the use nor its market impact automatically confer exclusivity of use on the rightsholder. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584, 591-92 (1994) (market harm caused by commercial parody did not defeat fair use); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 545 (6th Cir. 2004) (harm to market for printer cartridges embedding copyrighted software did not defeat fair use).

into circular reasoning: "[s]ince the issue is whether the copying should be compensable, the failure to receive licensing revenue cannot be determinative in the plaintiff's favor." *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1319 n.37 (11th Cir. 2008) (quoting *Ringgold v. Black Entm't Television*, 126 F.3d 70, 81 (2d Cir. 1977)).

The performance right is not unique in this regard. The public—including commercial actors—are free to make many uses of copyrighted works without permission or payment, even where the rightsholder could reap substantial income from control over the use. For example, an exclusive right to import copies into the United States of works made legally in other countries is valuable to rightsholders, but that commercial value did not drive this Court's interpretation of the distribution right and its ambiguously drafted first sale exception. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1371 (2013). And this Court has permitted wholesale copying of material deemed not to fall within the statutory subject matter of copyright, notwithstanding the significant commercial advantage the defendant gained by copying from a competitor. *Feist Publ'ns*, 499 U.S. at 349-50.

Moreover, many technology providers have "built an entire business around the unauthorized exploitation of . . . copyrighted content," Pet. Br. 39, including many businesses that enable consumers to better control their private viewing of copyrighted video. Yet, their legality is beyond doubt. Manufacturers and sellers of television sets, home audio equipment, and portable video players, including tablet computers, are all "[c]ommercial exploiters of new technologies" that derive much or all of their commercial value from the copyrighted works they process. Ralph Oman Br. 14. So are self-contained digital video recorder (DVR) units, which have been on the market since at least 1999 and are now ubiquitous. Peter H. Lewis, *State of the Art: Making Television Searchable*, N.Y. Times (Apr. 22, 1999); *December 2010 State of the Media: DVR Use in the US* 1 (Dec. 2010), The Neilsen Company, http://www.nielsen.com/content/dam/corporate/us/en/newswire/uploads/2010/12/DVR-State-of-the-Media-Report.pdf (over 38% of U.S. TV households own DVRs). Like Aereo's system and the remote DVR system that was at issue in *Cablevision*, many of these commonplace and lawful technologies involve an ongoing relationship between provider and customer. For example, home DVRs require regular updates of TV program information, and many can be updated and controlled remotely by the service provider.

The fatal circularity of petitioners' harm arguments is even more apparent when they are expressed in terms of petitioners' alleged "loss of control over their content." Pet. Br. 14. Copyright holders have never had "control" over uses of their works *except* to the extent that those uses fall within the Section 106 rights and no exception applies. For example, as the *Sony* case made clear, petitioners have never had the right to "control[] whether [their] content is made available in ways that advertisers do not measure." Pet. Br. 41. And while geography and the state of the art may once have given broadcasters *de facto* control over "whether [their content] is made available . . . to west coast viewers on the same schedule as east coast viewers," copyright law has never granted them that control, except where such viewing happened to constitute a public performance. *Id.*

C. Congress, Not the Courts, is Best Equipped to Make Policy Judgments About Whether Copyright Needs to be Rebalanced in Light of Technical Innovation.

The challenge presented here is not without precedent. Advances in technology have often created challenges of statutory interpretation, because they create new categories of use not easily analogized to previous uses. Before the late 1970s, most television viewers did not have the ability to record programs for later viewing, known as time-shifting. The TV broadcasting business developed in a world where linear viewing of entire programs at the time of broadcast was the only way to watch. The 1976 Copyright Act was devised in this world, without explicitly addressing time-shifting.

Then a disruptive innovation entered the mass-market: home videocassette recorders changed what the viewing public could do in a way not anticipated by Congress or industry. With a VCR, customers could watch a show later, build a "library" of past shows, and more easily avoid watching commercials. *Sony*, 464 U.S. at 458-59, 483 n.35. In the *Sony* case, broadcasters attempted to label the VCR a dangerous and economically harmful technology, much as they have labeled Aereo here. In 1982, the president of the Motion Picture Association of America famously compared the videocassette recorder to a serial killer, predicting that if Americans gained the ability to record television programs for later viewing, "[t]he investment of hundreds of millions of dollars each year to produce quality programs to theaters and television will surely decline." *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R.*

5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the H. Comm. on the Judiciary, 97th Cong. 13 (1982) (testimony of Jack Valenti, President, Motion Picture Association of America, Inc.), *available at* http://cryptome.org/hrcw-hear.htm.

The Court declined to "apply laws that have not yet been written" by expanding the statutory monopoly to include personal time-shifting. *Sony*, 464 U.S. at 456. In doing so, the Court rejected the dissent's proposed approach to difficult cases of statutory interpretation: that an independent application of "traditional copyright principles" gravitates towards a finding of liability. *Id.* at 500 (Blackmun, J., dissenting).

Congress, for its part, did indeed consider whether to impose a royalty on VCRs and an exclusive right to rent pre-recorded tapes; it ultimately did neither. James Lardner, *Fast Forward: Hollywood, the Japanese, and the VCR Wars* 224-27, 259-61, 294-300 (1987). When it did so, it was not limited to ruling on the facts in an appellate record. It held hearings and considered information from a broad variety of sources addressing the entire market and broader economic considerations. *Id.* Just two years after the *Sony* decision, videocassettes became the motion picture industry's largest source of revenue. Aljean Harmetz, *Hollywood Braces for Directors' Strike*, N.Y. Times (Apr. 11, 1987). A technology that copyright holders sought to have declared infringing, and thus illegitimate, created a lucrative new market for creative work. This result illustrates the wisdom of a hands-off approach, allowing new markets to develop in unanticipated directions, even if the economic benefits cannot be proven on the first step down the path. *See Sony*, 464 U.S. at 431 ("Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials.").

Indeed, Congress has rebalanced copyright law on many occasions in response to new technologies. It did so in 1909 at the dawn of recorded music, in part out of concern about monopoly control of recording technologies. *See* Copyright Act of 1909, P.L. 60-349, 35 Stat. 1075. It did so in 1976, enacting the Transmit Clause in response to the rise of cable television. And it did so again in 1992 for digital audio recording, explicitly imposing royalty obligations and technical mandates on technology providers. *See* Audio Home Recording Act, P.L. 102-563, 106 Stat. 4237 (1992).

Congress could consider doing the same in this case—or not. The advent of a new technology, personal transmission of video streams over the Internet, has changed television viewing in ways that Congress did not fully anticipate in 1976. The fundamental characteristic of Aereo's system is a private transmission path for each subscriber from a unique, unshared antenna to a video recorder and then to the subscriber's viewing device. *Aereo*, 712 F.3d at 682-83. Unlike a cable or satellite system, the video signal is never shared among subscribers anywhere between its capture from the public airwaves and its viewing. *Id.*

What makes a system with this characteristic commercially feasible is the Internet, a pre-existing communications infrastructure that can effectively transmit video to an individual user privately, at that user's request. Congress did not anticipate a system with this characteristic in 1976 because, while technically possible, it would have been commercially infeasible without the infrastructure of the modern Internet—just as there was no such thing as private, personal consumer time-shifting of TV programs before the home VCR. But as with the VCR, it is for Congress to adjust the law in response to technological change, or keep it as is.

D. The Scope of the Public Performance Right Does Not Turn On the "Efficiency" of Aereo's Technology.

Petitioners' claims notwithstanding, the supposed inefficiency of Aereo's multiple-antenna system as compared to cable systems has no bearing on whether Aereo's technology enables private or public performances. Aereo's critics deride its technology, which assigns a separate antenna to each customer, as a "contrivance, over-engineered," *Aereo*, 712 F.3d at 697 (Chin, J., dissenting), or as "sham technolog[y]," Media Inst. Br. at 19.

The Court should not base its statutory interpretation on such value judgments. Attempting to distinguish "legitimate" from "sham" innovation would place the Court in the role of technology regulator, attempting to decide the worth of a given technology rather than the legal question of how to interpret Section 106.

1. Many Valuable Innovations Are Initially Derided as "Sham" Technology.

Many new technologies have proved valuable despite having purportedly unnecessary features, inefficiencies, or even downright bizarre design from a technical expert's point of view. Important advances known in the business literature as "disruptive" innovations often open up new markets and create value even though, in the near term, they "result in *worse* product performance," offer "lower margins," and are "initially embraced by the least profitable customers in a market." Clayton M. Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* xviii, xx (2011).

Disruptive innovations sometimes involve radical advances in technology but can also be innovations in business models, or in transforming a niche market into a mass market. Michael Carrier, *Innovation for the 21st Century: Harnessing The Power of Intellectual Property and Antitrust Law* 27 (2009).

FM radio is an instructive example. When invented in the 1930s it was "minimized as a mostly unproven technology, experimental and of marginal utility." Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* 130 (2010). The skepticism of regulators kept FM out of widespread use until the 1970s. *Id.* at 133.

Likewise, cable TV was regarded as a sham during its first decades. Running costly wire to individual homes as an alternative to over-the-air reception "just didn't fit the mission" of the television industry as viewed by regulators, and was derided as the product of "a collection of small-town wheeler-dealers" rather than a "pedigreed institution." Wu, *supra*, at 180-81.

FM and cable are not the only valuable new technologies to be considered impractical at first. This phenomenon can be found in all sorts of industries. For example, minimill steelmaking began in the 1960s as a low-cost alternative to integrated steel mills, producing steel that was of "marginal quality" and not useful to the largest consumers of steel. It, too, could have been described as "sham" innovation. Instead, minimills advanced the state of the art and saved an industry. Due in part to fewer long-term supply and customer commitments, minimill technology came to serve some customers better than integrated mills. A technology widely seen as inferior eventually revitalized the ailing steel industry of the northeastern United States. Christensen, *supra*, at 101-106. Today a minimill company, Nucor Corp., is the largest steel producer in the United States. *See* Nucor, *Our Story; Prologue* (Mar. 27, 2014), http://www.nucor.com/story/prologue/.

Other examples abound. Disruptive technologies such as hydraulic earthmovers, arthroscopic surgery, online stock brokerage, and mobile telephony all overcame early technical criticism and perceived inferiority. Christensen, *supra*, at xxix, 69-83. Though experts at the time each of these was introduced could deem them inferior on purely technical grounds, each technology filled a market need well enough to survive and ultimately create entire new markets.

Only time will tell if Aereo fits this mold. However, it bears the hallmarks of a disruptive innovation. Aereo's technology enables access only to local broadcast channels that are generally available to consumers through traditional TV receivers. Based on broadcast reception alone, it cannot provide cable-only programming. Its picture quality is subject to over-the-air interference, unlike cable. It aspires to make over-the-air broadcasting, in some ways a niche market, more competitive with the larger market for pay-TV. Thus, Aereo can be described in part as a new business model as well as a new application of technology.

Aereo's technology has the potential to bring new viewers to broadcast TV, increasing advertising revenues and allowing broadcast programming to better compete against cable programming. If Aereo does not do so—if its technology and business model do not create more value for its customers than other video technology providers—then Aereo and businesses using similar technology will disappear from the market without the intervention of this Court.

Moreover, compliance with law and regulation is a major factor in the design of many new technologies and businesses, even where such compliance results in purported inefficiencies from an engineering standpoint. Early FM radio was designed to conform to strict regulatory limitations, including narrow spectrum allocations and power limits. Wu, *supra*, at 131-33. These limits made FM inferior to AM as a commercial medium. *Id.* Early FM technology was a "contrivance," in the words of Judge Chin's dissent, designed *not* for superior performance but *to comply with the law.* Aereo's use of multiple antennas is similar to early FM's spectrum and power limitations: both are more products of regulation than of technical efficiency. If FM had been deemed illegal by virtue of its "purpose . . . to take advantage of [a] perceived loophole in the law," Pet. Br. 12, then AM radio might have remained the state of the art today.

2. The Court Should Refrain from Becoming a Technology Regulator.

There is no legal basis for polluting the statutory analysis of the "public" nature of a transmission with an examination of the social or economic impact of technologies that enable such transmissions. Moreover, doing so would be poor policy because value judgments about technological design are poor predictors of social utility or economic impact. For the Court to choose "between incentivizing the development of technology that more efficiently transmits . . . content . . . or incentivizing technology that offers no real advances," Pet. Br. 43, would be to assume the mantle of a technology regulator, attempting to divine the future worth of a technology on the slim record of a preliminary injunction appeal, without the statutory authority or institutional capacity to do so.

The Court should also refrain from using predictions about "the future of broadcast television" as a basis for interpreting the public performance right. Pet. Br. 40-44. Such predictions are increasingly speculative and inaccurate the further removed they are from the parties to a case. Any speculative loss of revenue to nonparties, such as cable and satellite operators and sports leagues, suffers from serious problems of causation and uncertainty.

Broadcasters' reliance on retransmission consent fees from cable and satellite operators is a relatively recent phenomenon, deriving from the 1992 Cable Television Consumer Protection and Competition Act ("Cable Act"). *See* P.L. 102-385, 106 Stat. 1460 (codified as amended at 47 U.S.C. § 325). That Act requires licensed cable and satellite operators to obtain consent to retransmit broadcast television signals. Broadcasters' traditional source of revenue is advertising, and advertising remains their primary income source. Viewers who receive television signals over the air, including Aereo customers, view advertising, and thus contribute to broadcasters' revenues. Over-the-air viewers do not contribute to cable retransmission fees. Thus, any increase in over-the-air viewership potentially increases advertising revenue at the same time that it decreases retransmission fee revenue. *Any* technology, regardless of its legal status, that makes over-the-air viewing more attractive to consumers as compared to cable or satellite viewing will have these effects.

The transition to digital broadcasting was one such technological shift. The U.S. government spent $2 billion to subsidize consumers' purchases of digital converter boxes to encourage continued over-the-air viewing. Stephen Labaton, *Millions Face Blank Screens In TV Switch*, N.Y. Times (June 5, 2009). Under petitioners' theory, this expensive government promotion of over-the-air viewing as an alternative to cable and satellite would have caused a disaster for broadcasting. It did nothing of the kind.

It's not hard to imagine other new technologies that could make over-the-air viewing more popular. Improved home antenna designs or new TV sets with innovative features could easily enhance the over-the-air viewing experience. Such technologies would certainly not require a license from or payment to broadcasters.

Yet, these new technologies would have the same combination of effects as Aereo. Thus, to the extent petitioners base their predictions of doom on Aereo's potential to bring cable and satellite subscribers back to broadcast TV viewing, they have not shown that this effect would actually be harmful, nor that it would flow causally from Aereo's lack of a copyright license.

It is also far from obvious that inducing a move from cable to over-the-air viewing would in fact be harmful to the television industry at large. As with the VCR, DVR, digital audio players, and other technologies once accused of enabling 'free riding,' technologies like Aereo's that increase access to over-the-air broadcasts may increase the revenues of broadcasters and producers of programming in the long term.

Nor is increasing *access* to broadcast television the only possible way Aereo technology would promote creativity and the "Progress of Science." Businesses like Aereo have the potential to increase the commercial value of video entertainment by giving customers greater control over when and how they watch it, making it available on more types of devices, and integrating it with Internet applications such as message boards and real-time commentary—all far removed from copyright's core function of restricting the multiplication of copies. More versatile television programming is more valuable programming, with the potential for higher advertising rates. The ability to record programming for later viewing, enabled by the VCR, had a similar positive effect after the *Sony* decision removed legal uncertainty from it. *See* Bill Carter, *DVR, Once TV's Mortal Foe, Helps Ratings*, N.Y. Times (Nov. 1, 2009) (discussing how consumer time-shifting increases viewership of TV commercials); James Gallagher, "Duke study: TiVo doesn't hurt TV advertising," Triangle Bus. J., (May 3, 2010), *available at* http://www.bizjournals.com/triangle/stories/2010/05/03/daily6.html.

In sum, Aereo's service may offer many more benefits than costs. But either way, the Court should not attempt to predict the future of television. It should instead affirm the Second Circuit's consistent, value-neutral interpretation of the statute.

E. Growing the Statutory Rights by Interpretation Risks Economic Vitality.

1. New Entrants Like Aereo Should Be Able to Rely on Copyright Law's Limitations.

Both sides of this case have an interest in being able to build businesses in reliance on the letter of the law. But petitioners claim to have relied on an expansive interpretation of their rights that history, precedent, and the Constitution all contradict. In contrast, Aereo relied on copyright's limited, statutory nature in designing a business that falls outside the reach of the public performance right. The guarantee that exclusive rights are delimited by the statutory text and will not be expanded absent an act of Congress is an important reliance interest that the Court should not cast aside.

Petitioners argue that because "[t]he broadcast television industry has invested billions of dollars . . . in reliance on this legal regime," the Court should stop Aereo from providing a new technology for watching broadcast TV. Pet. Br. 21. But the "legal regime" on which petitioners claim to rely is "that third parties must pay for the rights to transmit performances of copyrighted works *to the public*." *Id.* (emphasis added). Television broadcasters and producers have never had the right to demand payment for personal transmissions that are not "to the public." Any purported reliance on a right that has never existed is not entitled to protection.

More broadly, the market for broadcast television has developed largely through a combination of communications law and private agreements among incumbents. As described above, broadcast television has been an advertising-supported medium for nearly its entire existence. The recent growth of so-called retransmission revenue to broadcasters coincides not with the 1976 Copyright Act but the 1992 Cable Act, which required cable operators to obtain consent from broadcasters to "retransmit" broadcasts. *See* 47 U.S.C. § 325. The Cable Act and its implementing regulations apply only to FCC-regulated cable operators. Petitioners do not claim that Aereo is subject to regulation as a cable operator, nor could they. *Cf. WPIX,* 765 F. Supp. 2d at 602 (holding that Internet TV streaming is not cable, even when it results in transmissions to the public).

Petitioners' reliance on the rules that cable and satellite operators, but not others, are bound to follow, and on long-term commercial arrangements made in the shadow of those rules, does not justify reliance on an additional unwritten and incorrect assumption that *no one* may provide technology to enable *any* kind of video transmission for profit. Indeed, the Cable Act concept of "retransmission" is not mentioned in Section 106 of the Copyright Act, nor in its definitions.

Aereo also has a right to rely on the rules. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994)("In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions."). Most immediately, Aereo relied on the Second Circuit's *Cablevision* decision to create a technology that is lawful without requiring licenses from petitioners. More broadly, Aereo relied on the nature of copyright law as a *limited* grant of rights to authors, defined in statute, and not an equitable doctrine.

Here, too, Aereo is not unique. Many technologies and businesses that have increased access to and created markets for creative work only developed because they could rely on the principle that copyright does not enjoin uses that are not enumerated in the statute. Such technologies include cable TV, which might not have developed into the dominant means for distributing video entertainment if the courts had declared it illegal for having "take[n] advantage of a perceived loophole in the law." *Aereo*, 712 F.3d at 697 (Chin, J., dissenting). After cable had proven itself valuable in the marketplace, Congress and regulators stepped in to apportion its benefits under communications law. If cable had required permission from broadcasters from the start, there may have been no benefits to apportion, because as incumbents, broadcasters would have every incentive to suppress a potential new competitor.

Likewise, most home audio and video recording technology of the past three decades developed in reliance on the Copyright Act's silence on the subject of private performances. Imagine a court had declared viewing broadcast television on a large screen to be a public performance on the grounds that large screens enabled larger groups of family and friends to watch together. Because "build[ing] an entire business" around the ability to entertain larger parties might diminish broadcasters' revenues, television manufacturers would have faced legal risk. Investment in television manufacturing would have diminished and screen technology advanced more slowly.

Fortunately, that did not happen, but it could have if a court had accepted the view that "settled expectations" trump the Copyright Act's actual provisions. *See generally Sony*, 464 U.S. at 456 ("One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home.").

2. The Copyright Act Does Not Privilege "Settled Economic Arrangements" Over Innovation.

The interpretive approach that petitioners urge would result would hinder "the Progress of Science" and lead to economic stagnation. Contrary to the views of some *amici*, copyright law does not protect "settled economic . . . arrangements" from lawful competition. Media Inst. Br. 3. Indeed, focusing only on settled arrangements is the opposite of progress.

The risk of a bias towards incumbents is not mitigated by the existence of some limited Internet TV products offered by petitioners and several licensees. Pet. Br. 43. Being licensed, these services are subject to conditions imposed at the whim of copyright owners, whose self-interest will generally be to minimize competition on price and features, and to maintain revenue streams from existing businesses and technologies at the expense of the next market-creating development like the VCR and DVR. And while some broadcast programming is available "through services such as Hulu, Netflix, Amazon, and Watch ABC," petitioners have, by and large, refused to offer the type of viewing that Aereo enables: access via the Internet to complete, live, free TV broadcasts from the viewer's local area. *Id*. With this appeal, petitioners seek not to eliminate a barrier to their own efforts to bring this business to the public, but rather to eliminate this mode of television viewing entirely, *limiting* the future relevance of free broadcast television.

More broadly, a judicial expansion of rightsholders' exclusive rights will harm competition and, ultimately, the public. Rightsholders will increase their ability to marginalize or ban otherwise lawful new competitors. Entrepreneurs, acting outside the institutional inertia, long-term contractual commitments, and status-based regulatory burdens of incumbents, often drive innovation, create markets, and challenge the incumbents to invest in their own innovation. Allowing incumbents to capture the value of independent innovation by new entrants like Aereo, or to simply exclude them from the market, through reinterpretation of the Copyright Act would cut off an important driver of progress. Copyright law was never intended to do that.

CONCLUSION

In upholding denial of a preliminary injunction against Aereo, the Second Circuit gave effect to both of the policies laid out in the public performance right: (1) cable and similar systems are subject to copyright, and (2) private, personal transmissions are not. This Court should preserve copyright's role as a limited, statutory grant of rights defined by Congress, and not expand or rebalance those rights based on ill-supported independent economic or policy determinations. The Court should affirm the Second Circuit's decision.

Respectfully submitted,

Sherwin Siy
Public Knowledge
1818 N Street NW, Suite 410
Washington, DC 20036
(202) 861-0020

Julie P. Samuels
Engine Advocacy
156 2nd Street
San Francisco, CA 94105
(415) 735-6869

Mitchell L. Stoltz
Counsel of Record
Corynne McSherry
Kurt Opsahl
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333
mitch@eff.org

Counsel for Amici Curiae

Dated: April 2, 2014