

12-2786-CV

United States Court of Appeals

for the

Second Circuit

WNET, THIRTEEN, FOX TELEVISION STATIONS, INC., TWENTIETH CENTURY FOX FILM CORPORATION, WPIX, INC., UNIVISION TELEVISION GROUP, INC., THE UNIVISION NETWORK LIMITED PARTNERSHIP, and PUBLIC BROADCASTING SERVICE,

Plaintiffs-Appellants,

- v. -

AEREO INC., f/k/a BAMBOOM LABS, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PARAMOUNT PICTURES CORPORATION, WARNER BROS. ENTERTAINMENT INC., DIRECTORS GUILD OF AMERICA, INC., ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC, SCREEN ACTORS GUILD-AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, WRITERS GUILD OF AMERICA, WEST, INC., INDEPENDENT FILM & TELEVISION ALLIANCE, LIONS GATE ENTERTAINMENT, INC. AND METRO-GOLDWYN-MAYER STUDIOS INC. AS *AMICI CURIAE* URGING REVERSAL

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United States Court of Appeals

for the

Second Circuit

AMERICAN BROADCASTING COMPANIES, INC., DISNEY ENTERPRISES, INC., CBS BROADCASTING INC., CBS STUDIOS INC., NBCUNIVERSAL MEDIA, LLC, NBC STUDIOS, LLC, UNIVERSAL NETWORK TELEVISION, LLC, TELEMUNDO NETWORK GROUP LLC and WNJU-TV BROADCASTING, LLC,

Plaintiffs-Counter-Defendants-Appellants,

- v. -

AEREO, INC.,

Defendant-Counter-Claimant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PARAMOUNT PICTURES CORPORATION, WARNER BROS. ENTERTAINMENT INC., DIRECTORS GUILD OF AMERICA, INC., ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC, SCREEN ACTORS GUILD-AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, WRITERS GUILD OF AMERICA, WEST, INC., INDEPENDENT FILM & TELEVISION ALLIANCE, LIONS GATE ENTERTAINMENT, INC. AND METRO-GOLDWYN-MAYER STUDIOS INC. AS *AMICI CURIAE* URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure:

Amicus Paramount Pictures Corporation certifies that it is a wholly owned subsidiary of Viacom Inc., a publicly held company.

Amicus Warner Bros. Entertainment Inc. certifies that it is ultimately and indirectly wholly owned by Time Warner Inc., a publicly held company.

Amicus Directors Guild of America, Inc. certifies that it is a California non-profit corporation doing business as a labor organization; it does not offer stock; and it has no parent corporation.

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INTEREST OF *AMICI CURIAE*

Amici curiae respectfully submit this *amicus curiae* brief with the consent of all parties.¹ *See* Fed. R. App. P. 29(a).

Amici Paramount Pictures Corporation and Warner Bros. Entertainment Inc. are two of the largest producers and distributors of motion pictures and television programs in the United States. They or their affiliates were plaintiffs in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (“*Cablevision*”). As appellees before this Court, and as petitioners before the Supreme Court on certiorari, these *Studio amici* argued that a holding that *Cablevision*’s transmissions of performances were “private,” not “public,” would cause considerable mischief. *Amici* argued that other parties, with services very different than *Cablevision*’s recording-and-playback service, would opportunistically use such a ruling as a license to infringe plaintiffs’ exclusive rights and thereby undermine legitimate efforts to develop internet based content delivery systems and other video on demand markets. The *Cablevision* Court made it clear in its opinion that, if another service mimicked some of *Cablevision*’s

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Second Circuit Rule 29.1(b), *amici* state that (i) no counsel for a party has written this brief in whole or in part and (ii) no person or entity other than the *amici* has made a monetary contribution that was intended to fund the preparation or submission of this brief.

functionality, that would not guarantee an exemption from copyright liability. *Id.* at 139. Paying this admonition no mind, Aereo attempted to do exactly what these *amici* and the other *Cablevision* plaintiffs feared. Aereo designed its otherwise very different live re-transmission service to mimic Cablevision's transmission-from-one-copy-to-one-subscriber mechanism in order to get around the re-transmission license requirement. And Aereo succeeded in persuading the District Court that *Cablevision* compelled the denial of injunctive relief that otherwise likely would have been granted. *Amici* believe that this Court did not intend such a disruptive narrowing of the public performance right that Congress enacted, as is clear from this Court's explicit admonition in the *Cablevision* opinion.

Amicus Directors Guild of America ("DGA") was founded in 1936 to protect the economic and creative rights of directors. Over the years its membership has expanded to include the directorial team: unit production managers, assistant directors, associate directors, stage managers and production associates. Today, through the collective voice of more than 15,000 members, the DGA seeks to protect the rights of directorial teams, fight for their creative freedom and strengthen their ability to develop meaningful and lifelong careers in film, television, commercials and digital media.

Amicus International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC (“I.A.T.S.E.”) is an international labor organization. It was formed in 1893. Presently, it is comprised of 383 local unions and has over 115,363 members who work in all forms of live theatre, motion picture and television production, trade shows and exhibitions, television broadcasting and concerts, as well as in the equipment and construction shops that support all these areas of the entertainments industry. The I.A.T.S.E. is party to a collective bargaining agreement with the Alliance of Motion Picture & Television Producers on behalf of motion picture and television producers covering below-the-line workers in motion picture, film and television. Among other things, the agreement provides for the payment of residuals, which fund the Motion Picture Industry Pension and Health Plans that provide health and pension benefits for the workers the I.A.T.S.E. represents.

Amicus Screen Actors Guild-American Federation of Television and Radio Artists (“SAG-AFTRA”) is the labor union representing more than 165,000 actors, announcers, broadcasters, journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists and other media professionals. SAG-

AFTRA members are the faces and voices that entertain and inform America and the world. SAG-AFTRA exists to secure the strongest protections for media artists in motion pictures, television and most other forms of media, including all forms of digital media. SAG-AFTRA's collective bargaining agreements with the major motion picture and television production companies, television networks, and television and radio commercials producers govern, among other things, the calculation of residuals and royalties—deferred compensation based on the continuing use of the creative works—as works are released in different media. Residuals and royalties are an important source of income for creative artists and help in determining their eligibility for benefits such as health insurance and pensions. As the value of the creative works is diminished or eliminated by new technologies that subvert recognized distribution models, so too are the incomes and benefits of SAG-AFTRA's members.

Amicus Writers Guild of America, West, Inc. (“WGAW”), is a labor organization and the collective bargaining representative of approximately 11,000 professional writers in the motion picture, television and new media industries. The WGAW's mission is to protect the economic and creative rights of the writers it represents.

Amicus Independent Film & Television Alliance (“IFTA”) is the trade association for the independent film and television industry worldwide, representing over 150 companies in 23 countries. IFTA’s Members are the world’s foremost independent production and distribution companies, sales agents and institutions engaged in film finance. As the voice and advocate for the independents, IFTA regularly provides input to governments around the world on a wide range of copyright, trademark, financing and export issues that directly affect the independents and their businesses. IFTA also produces the annual American Film Market (“AFM”), where more than 8,000 industry leaders and participants from over 70 countries come together to carry out worldwide film and television production and distribution deal-making. Over \$800 million in production and licensing deals are closed each year at AFM. The AFM provides a birds-eye view into the economic interactions that underpin the independent financing and worldwide distribution of audiovisual product and the impact of content theft on the health of the independent film and television industry. IFTA Collections provides a royalty collection service for over 120 independent companies and collects and disburses royalties pursuant to 17 U.S.C. § 111 for an extensive catalog of independent films and television programming.

Amicus Lions Gate Entertainment, Inc. is a leading independent motion picture and television producer and distribution company, responsible for distributing, among other works, “The Hunger Games” film franchise and the “Mad Men” series.

Amicus Metro-Goldwyn-Mayer Studios Inc. (“MGM”) owns a significant library of thousands of motion pictures and thousands of hours of television programming. MGM receives royalties pursuant to 17 U.S.C. § 111 for movies such as “Goldfinger,” “The Good, The Bad and The Ugly” and “Rocky,” that are broadcast by television station re-transmissions.

SUMMARY OF ARGUMENT

Aereo uses the internet to re-transmit to thousands of its paying subscribers copyrighted works that *amici* and their individual members create and/or own. Aereo does this without obtaining the licenses the law requires to exploit those works by copying and re-transmitting them to the public. By granting itself an unlawful license to exercise exclusive rights under copyright, Aereo deprives *amici* and all who invest in and create copyrighted content their just remuneration under the copyright system that Congress enacted. In addition, Aereo obtains an unfair and unlawful advantage over other services that respect copyright by obtaining licenses, and threatens to destabilize if not destroy existing and emerging businesses

that disseminate copyrighted content in accordance with the law. *Amici* respectfully submit that the District Court should have enjoined Aereo's unlawful service.

First, the District Court erroneously applied this Court's decision in *Cablevision*, in finding that the performances that Aereo transmits are "private," not "public." The District Court concluded that, because the Aereo service shares *some* features of Cablevision's "remote-storage" digital video recorder ("RS-DVR") service—namely, both services make transmissions from individual copies to individual requesting subscribers—this Court's ruling as to Cablevision necessarily applied to Aereo's service. The District Court overlooked, however, critical and material differences between Cablevision's service and Aereo's. First and foremost, Aereo offers access to essentially live performances of copyrighted programs that are carried by broadcast signals. Aereo captures and then re-transmits the programs to Aereo's subscribers on their mobile and other internet-connected devices. Cablevision also offered its subscribers access to copyrighted content carried by broadcast (as well as cable) signals, but it did so pursuant to re-transmission licenses. Aereo has no such licenses. Cablevision and its *amici* emphasized repeatedly that Cablevision's service was licensed to re-transmit programming, and that the issue in that case was

about treating the recording and subsequent playback through the RS-DVR equivalently to a “set-top” DVR or video-cassette recorder (“VCR”). The equivalence rationale was central to this Court’s decision, including its narrow construction of the public performance right in the context of the specific facts of Cablevision’s *licensed* service. This Court “emphasize[d]” that its holding on the scope of the public performance right did “not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network[.]” *Cablevision*, 536 F.3d at 139.

Aereo ignored this Court’s admonition about the limitations of its holding. Aereo instead selectively used the Court’s opinion as a blueprint for a service that relies on the inefficiency of making re-transmissions from thousands of individual copies as cover for bypassing the re-transmission license requirement. While Aereo—as an add-on—offers its subscribers the ability to record programs for later viewing, as the RS-DVR did, the copies that Aereo creates for subscribers who want to “Watch” programs as they are broadcast stand on a different footing. Aereo creates these individual copies not because of a consumer request to create a playback copy; the copying starts automatically, as soon as the customer selects “Watch.” The purpose of these copies instead is to facilitate the functionality of Aereo’s

internet re-transmission of live programming (pause, rewind and fast forward). And Aereo relies on these copies to support its cynical argument that its unlicensed re-transmission service is “like” Cablevision’s licensed service and should be held to constitute a “private” performance service.

It is no answer to say, as Aereo has repeatedly, that its antennae simply allow subscribers to receive over-the-air programming they otherwise could receive with their own antennae. Aereo is re-transmitting performances to the public through the internet. As this Court recently affirmed, internet re-transmissions require a negotiated license. *WPIX, Inc. v. ivi, Inc.*, ___ F.3d ___, 2012 WL 3645304, at *2 (2d Cir. Aug. 27, 2012). By flouting the license requirement, Aereo, in the words of the Copyright Office “effectively wrest[s] control away from program producers who make significant investments in content and who power the creative engine in the U.S. economy.’” *Id.* at *7 (quoting U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act Section 109 Report, at 188 (2008) (“SHVERA Report”)). The District Court erred in failing to recognize the critical distinctions between Cablevision’s and Aereo’s service. The District Court’s holding that Appellants failed to show a likelihood of success was wrong and should be reversed.

Second, while the District Court was right that Aereo’s service, if not enjoined, would cause significant irreparable harm to broadcasters who participate in the over-the-air broadcast market, the Court’s discussion understates the full extent of harm that Aereo causes in that market and many aftermarkets. The harms that the District Court discussed—lower advertising revenue and reduced rates in re-transmission licenses—also affect content producers and creators, whose investment and compensation flow from revenue that broadcasters receive. As this Court held in *ivi*, unauthorized internet re-transmissions “threaten to destabilize the entire industry” and to “adversely affect[]” “[t]he quantity and quality of efforts put into creating television programming, retransmission and advertising revenues, distribution models and schedules.” *Id.* at *9. And Aereo’s internet re-transmission and recording and storage services threaten to cause substantial and irreparable harm to the video aftermarkets that are a critical part of the content distribution ecosystem.

ARGUMENT

I. **CABLEVISION WAS ADVOCATED FOR, DECIDED AND DEFENDED BASED ON THE EQUIVALENCE OF DEVICES FOR RECORDING AND PLAYBACK OF CONTENT THAT CABLEVISION WAS LICENSED TO RE-TRANSMIT**

The District Court held that *Cablevision* compelled the conclusion that Aereo’s re-transmissions of performances to thousands of subscribers

were “private,” not “public.” The District Court believed that Aereo’s service was “materially identical to” Cablevision’s RS-DVR, and that *Cablevision’s* public performance ruling therefore necessarily applied to Aereo’s service. The District Court found such material identity because, in each case, the service made separate transmissions to individual subscribers using separate copies created as a result of subscriber action. *ABC, Inc. v. Aereo, Inc.*, ___ F. Supp. 2d ___, 2012 WL 2848158, at *11-*12 (S.D.N.Y. July 11, 2012).

Aereo’s and Cablevision’s services are *not* “materially identical.” The RS-DVR service that Cablevision defended before this Court was based on broadcast and cable transmissions that Cablevision was licensed to re-transmit to its subscribers in the first instance. Aereo has no re-transmission licenses. Cablevision insisted that (i) its service facilitated lawful recording and playback by subscribers who wanted to use remote hard drives, rather than set-top DVRs or VCRs, to time-shift programs; and (ii) all three types of recording and playback devices should be judged under equivalent copyright standards. Aereo, in contrast, automatically records any programs that its users “Watch” live, without regard to whether those subscribers want to time-shift. Cablevision’s service was about recording and playback. Aereo’s “Watch” service is (as its name suggests) about *watching* television

live, and doing so through unlicensed internet re-transmissions. Aereo's is an internet re-transmission service dressed up as a DVR service for the purpose of claiming safe harbor in a ruling that was predicated on, and carefully tethered to, a fundamentally different service.

The differences between Aereo's service and Cablevision's are not trivial technicalities. They are directly relevant to the arguments that Cablevision made to defend its service from infringement claims, to this Court's expressly limited ruling validating Cablevision's arguments and to the efforts of Cablevision in opposing certiorari review. Because Aereo has no re-transmission licenses, *Cablevision's* limited holding on the public performance right does not apply to Aereo.

A. Cablevision and Its *Amici* Defended the RS-DVR Service on the Ground that It Was Equivalent to Set-Top DVRs and VCRs, and That the Same Copyright Standards Should Apply to All Three

From start to finish in this Court, and beyond, Cablevision justified its RS-DVR service on the ground that it was functionally equivalent to television recording and playback effected with VCRs and set-top DVRs in its customers' homes. Cablevision insisted that, because of this equivalence, this Court should use the same legal standards to evaluate recording and playback for all three recording and playback systems.

The lynchpin of Cablevision's equivalence argument was that "Plaintiffs ha[d] licensed Cablevision to transmit their programs to its customers." Cablevision Opening Br. at 17 (filed May 30, 2007) (emphasis added). "Under the Copyright Act, television broadcasters 'generally [have] "exclusive rights" ... to authorize the public display of [their] copyrighted content, including the retransmission of [their] broadcast signal[s].'" *ivi*, 2012 WL 3645304, at *2 (quoting *EchoStar Satellite L.L.C. v. F.C.C.*, 457 F.3d 31, 33 (D.C. Cir. 2006)). A service that re-transmits broadcast or cable channel transmissions must have licenses to do so, either statutory (if the statute authorizes such a license), or privately negotiated. *Id.* See 17 U.S.C. § 111(c) (statutory license provision for cable systems); *id.* §§ 119, 122 (statutory license provisions for satellite carriers). A service that re-transmits without a license is an infringer. See *ivi*, 2012 WL 3645304, at *2.

Because Cablevision had re-transmission licenses, it was able to argue that all of its subscribers were receiving authorized re-transmissions, and that subscriber recording and playback should be evaluated equivalently without regard to whether the subscribers were using the RS-DVR, set-top DVRs or VCRs: "Plaintiffs already license Cablevision to provide content to subscribers, with full awareness that many consumers use VCRs or set-top DVRs to make time-shifting copies. To the extent content is more

valuable because consumers can time-shift it, *that additional value is already reflected in the price of the license.*” Cablevision Reply Br. at 19 (filed July 20, 2007) (emphasis added). Cablevision pressed its argument for equivalent treatment of such recording and playback devices throughout its briefing. *See* Cablevision Opening Br. at 17-18 (“The district court’s ruling ... produces irrational distinctions between technologies that are equivalent in every respect....Copyright holders have no right to demand that consumers conduct otherwise lawful time-shifting by inefficient means.”); *id.* at 27-28 (“The district court attempted to distinguish the RS-DVR from VCRs and set-top DVRs. But it could not deny that all three devices perform the same function—‘enabl[ing] a viewer to see’ at a different time ‘a work which he had been *invited to witness.*’”) (quoting *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 449 (1984)) (emphasis added); Cablevision Reply Br. at 38 (“Unlike VOD [video-on-demand services], the RS-DVR plays back only a subscriber’s *personal recordings*—programs he was *invited* to watch and *recorded* when they aired.”) (emphasis in original).²

² Cablevision was only able to argue that its subscribers had been “invited to witness” programming through Cablevision’s service because Cablevision had re-transmission licenses. The *Sony* Court’s conclusion that Betamax owners were “invited to witness” programs over-the-air, *Sony*, 464 U.S. at 449, is inapposite in the context of unlicensed re-transmissions of broadcast

Cablevision's *amici* in this Court likewise stressed the fact that Cablevision had re-transmission licenses in arguing that recording and playback through RS-DVRs and set-top DVRs and VCRs should be judged according to the same standards. *See* Amicus Br. of Center for Democracy & Technology et al. at 6 (filed June 8, 2007) (“*Cablevision holds licenses that authorize it to deliver plaintiffs’ programming to consumers.*”) (emphasis added); *id.* at 7-8 (“Cablevision’s *licensed* provision of programming to its customers does not result in infringement simply because Cablevision *also* provides the customer with a means of recording that programming for fair use purposes.”) (first emphasis added).

The fact that Cablevision was a party to re-transmission licenses thus was central to Cablevision’s equivalence defense of the RS-DVR service, and materially distinguishes Cablevision’s time-shifting service from Aereo’s internet re-transmission service.

signals. Regardless of whether a consumer could capture broadcast signals with his or her own antenna, there has been no “invitation” to anyone to watch a program for free through an unlicensed commercial re-transmission service, and there has been no invitation to receive an unlicensed internet re-transmission. *See* *ivi*, 2012 WL 3645304, at *5 (“Congress has not codified a statutory provision for Internet retransmissions, nor has it included the ‘Internet’ as an acceptable communication channel under Section 111.”). The *Sony* Court pointedly noted that the litigation in that case did *not* involve any issue of services that receive broadcast signals and then re-transmit them to others. *See* *Sony*, 464 U.S. at 425.

B. *Cablevision's* Holdings Were Tied to the Specific Facts of *Cablevision's* Licensed Service

The Court's opinion shows that *Cablevision's* equivalence arguments succeeded. At the very outset of its opinion, the Court observed that *Cablevision* re-transmitted broadcast and cable-channel programming "pursuant to numerous licensing agreements" with the plaintiffs—precisely the point that *Cablevision* and its *amici* emphasized in their briefing. *Cablevision*, 536 F.3d at 123. And, in its detailed factual description of the RS-DVR service—a discussion the Court said was "helpful to an understanding of our decision," *id.* at 124—the Court emphasized that, from the user's perspective, "the processes of recording and playback on the RS-DVR are similar to that of a standard set-top DVR." *Id.* at 125. In both cases, the customer used a remote control to direct the start of the recording process. *Id.* And, in both cases, the user could "only play content that they previously requested to be recorded." *Id.*

The Court's legal discussion analyzed the substantive reproduction and public performance claims, which corresponded, respectively, to the RS-DVR's recording and playback functions. *See id.* at 130-33, 134-40. The Court's discussion confirms that equivalence between technologies used for the recording and playing back of licensed transmissions was critical to the Court's legal analysis of both issues.

Regarding Cablevision’s “Direct Liability for Creating the Playback Copies,”³ the Court held that only the individual Cablevision subscriber—who pressed the “record” button on either a VCR or RS-DVR—engaged in the “volitional” conduct that the Court held was required for direct infringement liability. *Id.* at 131-33. In reaching this conclusion, the Court explained that it was appropriate to evaluate Cablevision’s liability for any direct infringement committed by the user of RS-DVR recording device under the standards for secondary liability—just as the Supreme Court had evaluated the VCR distributor’s potential liability in the *Sony* case. *See id.* at 132-33 (discussing *Sony*).

Equivalence in treatment between the different types of recording-and-playback devices likewise was pivotal to the Court’s evaluation of the plaintiffs’ public performance claim. The plaintiffs had argued, and the *Cablevision* District Court had agreed, that the separate on-demand transmissions of performances of the same copyrighted works to thousands of different users were “to the public,” and therefore were public performances, regardless of the fact that different users received those transmissions at different times and in different places. *See id.* at 126. The

³ The parties in *Cablevision* had stipulated that the plaintiffs would assert only claims for direct, not secondary liability; and that Cablevision would not assert the defense of fair use. *Cablevision*, 536 F.3d at 124.

plaintiffs argued that this conclusion followed from the definition of the public performance right in § 101 of the Copyright Act and from many cases construing the public performance right. *See Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984) (“[T]he transmission of a performance to members of the public, even in private settings ... constitutes a public performance. ... [T]he fact that members of the public view the performance at different times does not alter this legal consequence.”); *On Command Video Corp. v. Columbia Pictures Industries*, 777 F. Supp. 787, 790 (N.D. Cal. 1991) (“[W]hether the number of hotel guests viewing an On Command transmission is one or one hundred, and whether these guests view the transmission simultaneously or sequentially, the transmission is still a public performance since it goes to members of the public.”).⁴

⁴ *See also Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278, 282 nn. 6–7 (9th Cir. 1989) (recognizing that hotel makes public performances when it separately transmits performances to individual hotel rooms on request); *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 192 F. Supp. 2d 321, 332 (D.N.J. 2002) (“Because transmission of the clip previews to individual computers occurs when any member of the public selects an icon that redirects him or her to Video Pipeline’s website, from which the video clips are then shown, such actions by Video Pipeline constitute a ‘public performance.’”), *aff’d*, 342 F.3d 191 (3d Cir. 2003); *Twentieth Century Fox Film Corp. v. iCraveTV*, 2000 WL 255989, at *7 (W.D. Pa. Feb. 8, 2000) (internet transmissions of television programs violated plaintiffs’ public performance rights).

Cablevision, in response, again argued for functional equivalence among the playback component of recording-and-playback devices. Cablevision insisted that RS-DVR playback was functionally the same as a subscriber playing back a program that the subscriber had recorded on a VCR or set-top DVR: “No one would consider it a public performance if a consumer taped a program using a VCR and the program were later played to that consumer alone from a remote location.” Cablevision Reply Br. at 37. Cablevision told the Court that ruling for it on the public performance right “require[d] only a narrow and common-sense ruling: that a ‘public’ performance does not occur when a consumer records a program onto a central server where it is accessible only by him, and played back solely to him in his private home.” *Id.* at 38.

This Court accepted Cablevision’s argument.⁵ It held that the RS-DVR’s playback transmissions to Cablevision subscribers were “private,” not “public,” performances, “because *the RS-DVR system, as designed*, only makes transmissions to one subscriber using a copy made by that

⁵ The Court declined to resolve the public performance claim based on Cablevision’s argument that it could only be liable for violating that right secondarily, and not directly. The Court noted that there are “significant” differences in the statutory “definitions that delineate the contours of the reproduction and public performance rights,” and that the Court’s conclusion about who “does” the copying in the RS-DVR service “does not dictate a parallel conclusion” about who “does” the “performing.” *Cablevision*, 536 F.3d at 134.

subscriber.” *Cablevision*, 536 F.3d at 137 (emphasis added). *See id.* at 135, 138, 139 (same). The design of Cablevision’s system, of course, included the fact that Cablevision had licenses to re-transmit the content that its subscribers recorded and played back. *See id.* at 123. And, as the Court described at the outset of its opinion, RS-DVR playback to Cablevision subscribers was functionally equivalent to playback through VCRs, because “RS-DVR users can only play content that they previously requested to be recorded.” *Id.* at 125. Hence, this Court’s public performance holding, like its holding on the reproduction right, was tied to equivalent treatment of devices for recording and playing back content through Cablevision’s licensed re-transmission service.

As demonstrated above, and as reflected in the Court’s opinion, much of the dispute in *Cablevision* turned on whether the RS-DVR was more like existing recording-and-playback devices or emerging performance technologies, such as video-on-demand (“VOD”). *See id.* at 123-125. The Court’s holdings and reasoning reflect that it believed the RS-DVR was more like VCRs and set-top DVRs. At the conclusion of its discussion of the public performance issue, the Court made it clear that its holding would not automatically immunize from liability any service that transmitted performances from individual copies of copyrighted works: “This holding,

we must emphasize, does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies.”

Id. at 139.⁶

C. The District Court Erred in Unmooring *Cablevision’s* Public Performance Holding from the Specific Facts of *Cablevision’s* Licensed Service

The District Court erred by not seeing through the technical gimmickry that Aereo uses to try to analogize its internet re-transmission service to *Cablevision’s* recording-and-playback service. The District Court

⁶ In successfully opposing the plaintiffs’ petition for certiorari, *see* 129 S. Ct. 2890 (2009), *Cablevision* again emphasized that it delivered content to subscribers “under licenses with programmers,” and that the RS-DVR simply allowed similarly situated subscribers to that licensed service to utilize functionally equivalent recording-and-playback devices. *Cablevision* Brief in Opp’n to Pet. for Cert. at 4, www.scotusblog.com/wp-content/uploads/2008/12/08-448_bio.pdf (last visited Sept. 18, 2012). *See id.* at 1 (“For decades, consumers have lawfully used various technologies—from the Betamax, to VHS VCRs, to [DVRs]—to record television programs for later viewing. This case involves a challenge to *Cablevision’s* proposed [RS-DVR], which consumers would use for the same lawful purpose.”). The Solicitor General, in recommending against certiorari, argued that, from the user perspective, set-top DVRs, VCRs and the RS-DVR were functionally equivalent to one another: “Like a VCR or set-top DVR, the RS-DVR would permit subscribers to view only programs that already have been broadcast and that subscribers could have chosen to view in real time under *the terms of their cable packages.*” Brief of United States at 18 (emphasis added), www.justice.gov/osg/briefs/2008/2pet/6invt/2008-0448.pet.ami.inv.pdf (last visited Sept. 18, 2012). “The terms” of those cable packages derived from *Cablevision’s* re-transmission licenses.

agreed with Aereo that *Cablevision's* public performance ruling applied to Aereo's "Watch" service, because it transmits performances from individual copies of copyrighted works that the service associates with individual subscribers. In so holding, the District Court not only discounted this Court's express admonition regarding the limited nature of its holding, *Cablevision*, 536 F.3d at 139, but also misunderstood the equivalence rationale underlying the Court's entire opinion.

The District Court stated that, "[t]o the extent that the Second Circuit's holding in *Cablevision* was premised on an inability to distinguish *Cablevision's* system from otherwise lawful activities, Aereo's system deserves the same consideration." *Aereo*, 2012 WL 2848158, at *11. Aereo does not "deserve the same consideration" as *Cablevision*, because Aereo's "Watch" service is not equivalent to the recording-and-playback service in *Cablevision*, or to VCRs or set-top DVRs. The "Watch" service is an internet re-transmission service, pure and simple. Internet re-transmission services require licenses. *ivi*, 2012 WL 3645304, at *2. *Cablevision*—as it emphasized repeatedly, and as this Court noted on the first page of its opinion, 536 F.3d at 123—had re-transmission licenses. Aereo has no such licenses, and instead has simply exempted itself from the re-transmission license requirement. Absent those licenses, Aereo is an infringer.

Aereo's "Watch" service does record individual copies while the user is watching the re-transmitted broadcast. But the purpose of that copying is not for lawful playback at a later time, which was a central premise in Cablevision's equivalence argument. The Aereo subscriber using the "Watch" feature does not make any choice to record the content; Aereo makes that choice automatically, without regard to whether the "Watching" subscriber wants to watch the program at a later time. The copies that the "Watch" service thereby creates are thus fundamentally different than the RS-DVR playback copies, or copies made using a VCR or a set-top DVR, each of which is a copy that the user "previously requested to be recorded." *Id.* at 125. The copies that Aereo automatically makes serve only (i) to facilitate Aereo's internet re-transmission, by allowing subscribers to pause, rewind or fast forward through programs as they are viewed; and (ii) to allow Aereo to argue that its service has some of the elements of the RS-DVR and should obtain the same treatment for purposes of the public performance right.

The first of these purposes, related to convenience, does nothing to save Aereo's service, because Aereo's internet re-transmissions are unlicensed. The fact that Aereo wants its unlicensed service to be user-friendly does not excuse the requirement of obtaining a license. The second

of these purposes—to take shelter in *Cablevision*—is deeply cynical and legally misguided. This Court made it clear that its public performance ruling did not create a blueprint for services to evade the public performance right by making separate transmissions from separate copies. *Id.* at 139.⁷ In *Warner Bros. Entertainment Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011), the court saw through the sham configuration of a service that made internet transmissions of the same movies to numerous subscribers and tried to evade liability by labeling those transmissions “rentals” and “private” performances. *Id.* at 1009-11 & n.7. Aereo’s service deserves the same fate. Aereo’s “Watch” service re-transmits performances of the same copyrighted works to thousands of Aereo’s paying subscribers. The fact that Aereo’s subscribers receive those transmissions in different places, or even at different times (depending on when they start to “Watch”) is of no moment, as both the statute, 17 U.S.C. § 101 (definition of “[t]o perform ... a work ‘publicly’”), and the numerous cases construing the public performance right make clear. *See supra* at 17-18 & n.4.

⁷ If Aereo employed one or a handful of reception antennae to capture the broadcast signals and then re-transmitted them over the internet to its thousands of customers, the existence of an unauthorized re-transmission and public performance would be manifest. The fact that Aereo associates a mini-antenna at a centralized location for its each of its customers does not change that analysis.

It also is of no moment that Aereo's subscribers could obtain broadcast signals by using their own antennae. That fact does not give Aereo the right to set up a commercial re-transmission service that completely bypasses the public performance right and the requirement that services making internet re-transmissions obtain negotiated licenses to do so. *See ivi*, 2012 WL 3645304, at *2.

Aereo's unlicensed re-transmission service violates the public performance right and undermines the entire re-transmission framework that Congress enacted through § 111. In *ivi*, this Court deferred under the *Chevron* doctrine to the Copyright Office's "reasonable and persuasive" position that the statutory license for certain re-transmissions by defined "cable systems" does not apply to internet re-transmissions. The Copyright Office had previously urged Congress not to extend statutory licenses to internet re-transmissions. The Copyright Office explained that such a result "would effectively wrest control away from program producers who make significant investments in content and who power the creative engine in the U.S. economy." *ivi*, 2012 WL 3645304, at *7 (quoting SHVERA Report at 188). Congress has not extended the statutory license to internet re-transmissions. Aereo not only "wrest[s] control away from program producers"—a result the Copyright Office decried and that the Congress has

not sanctioned—but Aereo does so without *any* compensation (even at the statutory license rate) to broadcasters, and through them to creators and owners of the underlying content. Aereo’s service is flagrantly unlawful.

The District Court’s refusal to find that Appellants were likely to succeed on their infringement claim was error. The District Court’s decision should be reversed.

II. AEREO’S UNLICENSED SERVICE CAUSES IRREPARABLE HARMS BEYOND THOSE THE DISTRICT COURT IDENTIFIED

The District Court found that Aereo’s service, if not enjoined, would cause substantial irreparable harm to the market for over-the-air broadcasting. *Aereo*, 2012 WL 2848158, at *22. While the Court’s overall analysis shows that, but for that Court’s erroneous interpretation of *Cablevision*, Appellants likely would have prevailed on their request for a preliminary injunction, *see id.* at *1, *amici* believe it is important to emphasize that Aereo causes substantial and irreparable harms beyond those the District Court identified.

A. Aereo Causes Harms Related to the Over-the-Air Broadcast Market Beyond the Harms the District Court Identified

The District Court was right that Aereo causes harm related to the over-the-air broadcast market. But the Court’s explication of the harm that Aereo causes in that market was incomplete. The District Court focused on

the harms that Aereo directly causes to broadcasters, by reducing the amounts they can charge for advertising or obtain in re-transmission fees.

See Aereo, 2012 WL 2848158, at *22-*24.

These harms affect not only broadcasters but the creators and producers who supply the programming that is broadcast over-the-air. The dollars that advertisers pay to broadcasters, and that cable companies and other re-transmitters pay for the right to exploit the public performance right, go toward the payments broadcasters make to copyright owners to acquire programs for broadcast, and through them to the individuals who write, act, direct and provide all of the other services that go into creating movies and television shows. A diminution in advertising rates and re-transmission fees caused by unlicensed re-transmission services negatively affects all participants in the lawful creation and distribution chain. This Court in the *ivi* case recognized precisely this point:

The absence of a preliminary injunction would encourage current and prospective retransmission rights holders, as well as other Internet services, to follow *ivi*'s lead in retransmitting plaintiffs' copyrighted programming without their consent. The strength of plaintiffs' negotiating platform and business model would decline. The quantity and quality of efforts put into creating television programming, retransmission and advertising revenues, distribution models and schedules—all would be adversely affected. These harms would extend to other copyright holders of television programming. Continued live retransmissions of copyrighted television programming

over the Internet without consent would thus threaten to destabilize the entire industry.

ivi, 2012 WL 3645304, at *9.

This Court's conclusions about the harms caused by services like *ivi* are directly applicable to Aereo's service. Those conclusions should factor into and further support the finding of irreparable harm.

B. Aereo Threatens to Destroy Existing and Emerging Aftermarkets for the Lawful Distribution of Copyrighted Content

The unauthorized services that Aereo provides threaten to upend and destroy existing and developing aftermarkets, or distribution "windows," for the authorized use of content originally broadcast over the air.

"Windowing" provides different modes of exhibition and distribution that aim to match consumer offerings with consumer demand for accessing content in different ways. The consumer offerings vary as to, among other things, when (on first release or later), where (in a theater, at home on a television or on a mobile device), how (on demand or according to a set schedule; transactional or through a subscription), and for how much (a variety of price points) consumers are able to view or obtain copies of copyrighted content. *See generally* *WTV Sys.*, 824 F. Supp. 2d at 1005-06 (overview of windowing process); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 309 (S.D.N.Y. 2000) (same).

Windowing enables consumers to obtain access to copyrighted content through a rich and varied range of authorized consumer offerings. Familiar examples are, in the case of motion pictures, going to a movie theater; and in the case of made-for-television movies and television shows, to watch the content on over-the-air television. There are a variety of other established and emerging distribution windows through which consumers can access the same forms of content. Consumers can buy a physical copy of a movie or television program (on DVD or Blu-ray Disc); rent a physical copy (at a bricks-and-mortar store or through a mail subscription service like Netflix); download or rent a copy through a service like Amazon or iTunes; access it on demand for a fixed period of time through a cable, satellite or internet delivered VOD platform, like Comcast, DirecTV or Vudu; view it through subscription VOD streaming services like Netflix; watch it on a scheduled subscription cable television channel like HBO (or via HBO's television and internet-based on-demand service); or watch it through an advertising-supported, authorized internet site, such as Hulu or channel-specific sites (*e.g.*, comedycentral.com or thewb.com). *See WTV Sys.*, 824 F. Supp. 2d at 1005. As is apparent from even this brief list of examples, an over-the-air broadcast of a made-for-television movie or episodic show often

will be the first, but far from the last, window through which content can be accessed by consumers.

Windowing is critical to the ecosystem for content creation and distribution. Through windowing, content producers have the opportunity to earn a return on the significant investments—often in the millions of dollars—they must make to create new motion pictures and television shows. And windowing inures to the benefit of all involved in the production chain, not only financiers and production entities, but also the thousands of writers, directors and cast and crew members represented by *amici* Guilds and I.A.T.S.E., all of whom depend on a robust and continuing revenue stream, which Aereo's infringing actions would disrupt. Under the Guilds' collective bargaining agreements, as a creative work is licensed to new markets or re-runs on television, actors, directors and writers receive deferred compensation in the form of residuals. These residuals frequently are based on a percentage of revenue that the copyright owner obtains from authorizing the work's use in that market. Residuals are a crucial source of income that can be the lifeblood of individuals whose work is intermittent by its very nature. This is particularly true in difficult economic times. Moreover, revenue from the aftermarket exploitation of content first broadcast over the air directly funds the pension and healthcare plans of the

members of *amici* Guilds and I.A.T.S.E. When unauthorized services interrupt the revenue stream from licensed exploitations of copyrighted works, this directly affects the livelihood of the many hard-working men and women in the content-creation process.

Aereo undermines the windowing system and the critical support that system provides for the content creation and distribution ecosystem. Increasing numbers of consumers are interested in having their primary viewing of content occur through their mobile or other internet-connected devices. Content owners have authorized numerous innovative services to deliver content in this manner. Aereo's unauthorized (and uncompensated) internet re-transmissions undercut these legitimate, licensed services. Moreover, to the extent content owners' licenses to these partners are exclusive, Aereo further "interfere[s] with [content owners'] grants of exclusivity to their licensees," and "[content owners'] ability to negotiate similar agreements in the future (because potential licensees will not be willing to pay a premium for a non-exclusive period)." *WTV Sys.*, 824 F. Supp. 2d at 1012. More generally Aereo threatens content owners' "relationships, including the goodwill developed with their licensees, and [their] overall ability to control the use and transmission of their Copyrighted Works." *Id.*

In addition, Aereo enables subscribers to record and keep permanent copies of copyrighted content, *i.e.*, to “library” that content. While Aereo’s current maximum storage offering is 40 hours (which can accommodate several full-season episodes of first-run television shows), Aereo undoubtedly will move to increase storage capacity. Aereo’s use for librarying will diminish the value of copyrighted content in downstream distribution windows, since an Aereo subscriber who libraries a copy of a movie or television show will not demand aftermarket offerings of the same content.

Finally, Aereo’s presence threatens to confuse consumers and to create wrong but hard-to-dislodge impressions about what constitutes lawful internet re-transmission. *See id.* at 1013.

In short, the harms caused by Aereo’s service are manifest, palpable and overwhelming. These are not harms that either Appellants or others involved in the content creation and distribution process should be expected to bear. Aereo’s service must be enjoined.

CONCLUSION

Amici respectfully submit that the District Court's Order denying Appellants' motion for preliminary injunction should be reversed.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF
APPELLATE PROCEDURE 32**

Pursuant to Rule 32 of the Federal Rules of Appellate Procedure, I certify
that:

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 6,878 words (based on the Microsoft Word word-count function), excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman type.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2012, a true and correct copy of the foregoing Brief for *Amici Curiae* Supporting Appellants was served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Rule 25.1(h)(1)-(2).

Dated: September 21, 2012

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