No. 13-461

IN THE

Supreme Court of the United States

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,

Petitioners,

v.

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

Respondent.

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

BRIEF OF VIACOM INC., METRO-GOLDWYN-MAYER STUDIOS INC., INDEPENDENT FILM & TELEVISION ALLIANCE, DIRECTORS GUILD OF AMERICA, INC., SCREEN ACTORS GUILD-AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, WRITERS GUILD OF AMERICA, WEST, INC., AND ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC AS *AMICI CURIAE* SUPPORTING PETITION FOR CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

All *Amici* participate in the ecosystem for the lawful creation and distribution of filmed content, both motion picture and television, in the United States.

Amici Viacom Inc. ("Viacom") and Metro-Goldwyn-Mayer Studios Inc. ("MGM") produce and/or distribute motion pictures and television programs. *Amicus* Independent Film & Television Alliance ("IFTA") is the trade association for the independent film and television industry worldwide. Viacom, MGM, and the members of the IFTA depend on compensation for the public performance of their works to underwrite the significant costs of creating and disseminating those works. They also license the transmission of the same works through multiple additional distribution channels, including by way of Internet streaming through licensed services, such as Hulu or Netflix.

Amici Directors Guild of America, Inc., Screen Actors Guild-American Federation of Television and Radio Artists, Writers Guild of America, West, Inc., and the Alliance of Theatrical Stage Employees,

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[1] The parties have consented to the filing of this brief. Letters from the parties consenting to the filing have been filed with the Clerk of the Court. Counsel of record for both parties received notice at least 10 days prior to the due date of *Amici Curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (and no party) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC ("IATSE") represent the hundreds of thousands of men and women who direct, write, act in and provide below-the-line services for motion picture and television content. The members' livelihoods depend on remuneration for the licensed use of the content that they work to create. This includes 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 determine their eligibility for benefits such as health insurance and pensions.

Amicus Viacom's subsidiary, Paramount Pictures Corporation ("Paramount"), was an appellant and petitioner before this Court in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 557 U.S. 946 (2009) ("*Cablevision*"). Paramount and the other plaintiffs argued there that a holding that Cablevision's transmissions of performances were "private," not "public," would cause considerable mischief. They further 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 copyright owners' exclusive rights and thereby undermine legitimate efforts to develop Internet-based content delivery systems and other video-on-demand ("VOD") markets. The Second Circuit's opinion stated that, if another service mimicked some of Cablevision's functionality, that would not guarantee an exemption from copyright

liability. *Id*. at 139. And the United States, in recommending that this Court deny certiorari (as it did), pointed to the Second Circuit's limitation as a ground for reading *Cablevision* to be "less far-reaching than" *Amici* and other petitioners warned it would be read. Brief for the United States as Amicus Curiae at 22, *Cable News Network, Inc. v. CSC Holdings, Inc.*, No. 08-448 (U.S. May 29, 2009) ("United States Amicus Brief in *Cablevision*").

Paying these admonitions no mind, Aereo attempted to do exactly what Paramount 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 retransmission license requirement. And Aereo succeeded in persuading the district court and the Second Circuit that *Cablevision* compelled the denial of injunctive relief that otherwise would have been granted on the longstanding interpretation of the public performance right that Congress enacted.

Amici have a significant interest in the interpretation of the public performance right. *Amici* are part of an important ecosystem of existing and emerging distribution platforms for the licensed dissemination of copyrighted content. Aereo and services that follow its blueprint deliberately stand outside this ecosystem; they bypass the lawful system of retransmission licensing; and they threaten widespread disruption to the interests of *Amici*, their employees and many others who invest in or depend upon innovative distribution services that respect copyright and the rule of law.

SUMMARY OF ARGUMENT

Amici respectfully urge the Court to grant the petition for certiorari.

The Second Circuit has confirmed its adherence to an unprecedented interpretation of the Copyright Act's public performance right that allows companies to retransmit live performances of copyrighted works to mass audiences without obtaining or paying for the licenses that the law requires for such retransmissions. The Second Circuit's flawed construction of the important and economically significant public performance right began in *Cablevision*. There, a panel of that court effectively rewrote the Copyright Act to mean that the transmissions of thousands or even millions of performances of exactly the same works to widely dispersed public audiences were private, not public, performances. Although the *Cablevision* court expressly said that its decision should not be taken as carte blanche for future services that mimicked Cablevision's contrived technological architecture, the Second Circuit in this case compounded the errors of *Cablevision* and took that decision to its logical (but erroneous) conclusion.

Under the Second Circuit's rule, a single public performance may be transformed into limitless non-actionable private performances because a service assigns a single mini-antennae for each viewer, rather than just one antenna for all viewers, to capture broadcast signals and retransmit them. If Aereo used a single reception antenna to capture broadcast signals and retransmit them to thousands

of Internet subscribers for viewing, Aereo indisputably would need a license, just as numerous legitimate online services negotiate for and obtain to stream broadcast content, including copyrighted movies and television shows to their subscribers. According to the Second Circuit, the copyright laws allow this technologically inefficient gimmick to end-run the right of public performance.

This absurd consequence is contrary to Congress's intent as set forth in the Copyright Act. The Act does not distinguish between the type of technology one uses to transmit performances—it applies to any transmission of a copyrighted work "to the public, *by means of any device or process*, *whether the members of the public capable of receiving the performance … receive it in the same place or in separate places and at the same time or at different times*." 17 U.S.C. § 101 (emphasis added) (the "Transmit Clause"). This is why from radio to television to cable to the Internet, a license is required for transmissions to the public.

The Second Circuit's rule has no basis in the Copyright Act or in any appeal to technological "innovation," notwithstanding Aereo's description of itself as a "modern and innovative" technology. There is nothing innovative about having thousands of antennae do the work of one in order to skirt the license requirement. Judge Chin, in dissent, called Aereo's system for what it is: "a sham" and "a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law."

WNET, Thirteen v. Aereo, Inc., 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting).

The Second Circuit's rule threatens substantial and widespread economic harm and disruption not only to the Petitioner broadcasters, but to the producers who underwrite and the millions of individuals who work to create the copyrighted works that Aereo (and copycat services that have sprung up in its wake) appropriate for free. The public performance right is among the most critical rights secured by copyright to the owners of audio-visual content. The right is especially important, and will only become more important, as movies and television shows increasingly are disseminated and viewed through Internet streams to the public.

The time for review is now. Following the *Cablevision* and *Aereo* decisions, other services that follow the *Cablevision-Aereo* blueprint have started to emerge. District courts in the D.C. Circuit and the Ninth Circuit have declined to follow the Second Circuit's erroneous construction of the public performance right and have enjoined one of these services. On the other side, a district court in the First Circuit has followed *Cablevision* and *Aereo* and refused to enjoin Aereo. The growing split amongst courts on the proper interpretation of the statute, including conflicting injunctive relief measures, has compounded the confusion in this important area of the law. The patchwork of conflicting rules in different states regarding the need to seek a license to retransmit copyrighted content through Internet streaming technologies has created, and will continue to create, substantial uncertainty in the marketplace.

The delay engendered by further percolation will not change the underlying arguments, but will only cause further destabilization in a critically important segment of the American economy.

Although the Court properly reserves its resources for cases of exceptional importance, *Amici* submit that this is such a case, and that the time for this Court to resolve the issue is now.

ARGUMENT

I. THE SECOND CIRCUIT'S READING OF THE TRANSMIT CLAUSE IS WRONG AND THREATENS IMMEDIATE AND SUBSTANTIAL HARM TO *AMICI* AND OTHERS IN THE CONTENT CREATION AND DISTRIBUTION CHAIN

A. The Public Performance Right Embodies Congress's Considered Judgment That Content Owners Deserve Remuneration for the Transmission of Performances of Their Works "To The Public"

The Copyright Act gives owners of copyrighted works the "exclusive right ... to perform the copyrighted work publicly." 17 U.S.C. § 106(4).

By covering the transmission of a performance to the public "by means of *any* device or process," the Transmit Clause applies broadly to *all* technological "device[s]" or "process[es]" used to transmit performances of copyrighted works to public audiences. 17 U.S.C. § 101 (emphasis added). "A 'device,' 'machine,' or 'process' is one now known [*i.e.*,

in 1976] or later developed." *Id*. The legislative history underscores and reinforces what the text makes clear: that Congress intended "device or process" in the Transmit Clause to include "*all kinds of equipment* for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented." H.R. Rep. No. 94–1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677 ("House Report") (emphasis added).

Further, the Transmit Clause applies regardless of whether "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," which plainly applies to asynchronous streaming of works to public audiences over the Internet. *Id*. at 65. Prior to the Second Circuit's decision in *Cablevision*, the Transmit Clause always had been construed in accordance with Congress's intent to reach asynchronous performances of the same works to members of the public audience receiving such performances in different places. *See, e.g., Columbia Pictures Indus., 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."); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991) (same).

Congress enacted the Transmit Clause because, "[p]ursuant to two decisions of the Supreme Court (*Fortnightly Corp. v. United Artists Television, Inc.*,

392 U.S. 390 (1968), and *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974)), under the 1909 copyright law, the cable television industry ha[d] not been paying copyright royalties for its retransmission of over-the-air broadcast signals." House Report at 88-89 (footnotes omitted). Aereo and services like it—commercial services retransmitting copyrighted content—are not in any meaningful way different than the cable television companies at issue in the *Fortnightly* and *Teleprompter* decisions that were the primary motivation for the 1976 Act's Transmit Clause and compulsory licensing regime for certain types of retransmissions. *See Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 602-03 (D.C. Cir. 1988).

B. The Second Circuit's Unprecedented Interpretation of the Transmit Clause in *Cablevision*

The panel majority in this case concluded that its holding was compelled by *Cablevision*. In that case, the Second Circuit adopted an unprecedented interpretation of the public performance right in conflict with the text and purpose underlying the Transmit Clause.

Cablevision involved a so-called "remote-storage" digital video recorder ("RS-DVR") service, which allowed subscribers to request copying of shows on Cablevision's central servers and the later replay of those shows back to the requesting subscribers. *See Cablevision*, 536 F.3d at 124-25. Numerous copyright owners (including *Amici* or their affiliates) sued,

alleging the RS-DVR violated the exclusive rights of reproduction and public performance.

Cablevision argued that because it had licenses to retransmit content to its subscribers, the RS-DVR was functionally equivalent to VCRs and set-top DVRs that permit users to "time-shift" programs, and that its potential liability should be no different than the potential liability of a VCR or set-top DVR manufacturer. *Id*. at 130-31.

The Second Circuit agreed. As to the reproduction right challenge, the court held that only the individual end-user—whether with a VCR, a set-top DVR or the RS-DVR—who pressed the "record" button engaged in the "volitional" conduct that the court held was required for direct liability. *Id*. at 131-33. The court said that Cablevision might be subject to secondary liability for its subscribers' direct infringements (there was no secondary liability claim in the case), but that Cablevision's liability under such a claim would have to be judged under the standards applied to VCR manufacturers for their customers' copying. *See id*. at 132-33 (discussing *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 437-42 (1984)).

Having concluded that Cablevision was not directly liable for the creation of the playback copies, the court had to decide whether Cablevision nevertheless was liable when it played the copies back to the subscribers as intended. The court held that Cablevision's transmissions over and over of the same performances of exactly the same works to huge numbers of subscribers were not performances "to the

public," but rather were numerous, separate *private* performances. *See id*. at 132-34.

The Second Circuit reached this result through an extraordinary construction of the Transmit Clause. In particular, the court held that under the Transmit Clause, the "transmission of a performance *is itself a performance*." *Id*. at 134 (emphasis added). From this premise, the court reasoned that the words "the members of the public capable of receiving the performance" in the Transmit Clause made the dividing line between "public" and "private" performances the size of the audience that was "'capable of receiving' *a particular transmission* of a performance." *Id*. at 134-35 (emphasis added). The court said that "because the RS-DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber, we believe that the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission." *Id*. at 137.

Cablevision's reading of the public performance right has been aptly described by a leading copyright scholar as "peculiar if not perverse." Jane C. Ginsburg, *Recent Developments in US Copyright Law – Part II,* Colum. Pub. L. & Legal Theory Working Papers, No. 08158 at 26 (2008), *available at* http://lsr.nellco.org/columbia_pllt/08158. The Transmit Clause defines a "public" performance as the transmission of "a *performance … of the work*," *not* the performance of an individual *transmission*. 17 U.S.C. § 101 (emphasis added). As the district court in an action involving an Aereo copycat service

correctly observed: "Very few people gather around their oscilloscopes to admire the sinusoidal waves of a television broadcast *transmission*. People are interested in watching the *performance* of the *work*." *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC,* 915 F. Supp. 2d 1138, 1148 (C.D. Cal. 2012).

Cablevision's interpretation of the Transmit Clause, taken literally, also reads out of the statute the provision that transmissions of performances to public audiences remain public "whether the members of the public capable of receiving the performance … receive it *in the same place or in separate places and at the same time or at different times*." 17 U.S.C. § 101 (emphasis added). By definition, non-simultaneous recipients cannot receive the same transmission stream, so the view that separate transmission streams constitute different performances renders the "at different times" language meaningless with respect to any technology with separate transmission streams.

Perhaps recognizing the tenuous nature of its analysis—and the perverse incentives that its holding could create—the Second Circuit was careful to limit its ruling. The court emphasized several times that the only copy of a work used to effect any transmission to a subscriber was the "copy made by that subscriber," and that this fact narrowed the potential audience for the transmissions. *Id*. at 137; *see also id.* at 138, 139. And, at the conclusion of its opinion, the panel wrote: "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.

Concerned that the Second Circuit's qualification would not deter later parties from trying to take unjustified advantage of the Second Circuit's holding, *Amici* and the other *Cablevision* plaintiffs urged this Court to grant certiorari. These petitioners argued that, "[i]f unchecked, this new free-riding business model will quickly become entrenched and difficult to dislodge through retroactive judicial repudiation." Petition for Writ of Certiorari at 3, *Cable News Network, Inc. v. CSC Holdings, Inc.*, No. 08-448 (U.S. Oct. 6, 2008). In recommending that the Supreme Court deny the *Cablevision* plaintiffs' petition for certiorari, the United States agreed that "some aspects of the Second Circuit's reasoning on the public-performance issue are problematic," and "*could threaten to undermine copyright protection in circumstances* far beyond those presented [in the *Cablevision* case], including with respect to VOD services or situations *in which a party streams copyrighted material on an individualized basis over the Internet*." United States Amicus Brief in *Cablevision* at 20-22 (emphases added). The United States, however, cited, *inter alia*, the Second Circuit's language regarding the limits of its holding as a basis for urging denial of certiorari on the question regarding the public performance right. *Id*. at 22. This Court denied certiorari. 557 U.S. 946 (2009).

C. The Second Circuit Compounded the Errors of *Cablevision* in *Aereo*

In *Aereo*, a two-Judge majority held that *Cablevision*'s public performance holding was not limited to devices that played back copies of programs created for ostensible time-shifting purposes, as Cablevision had justified its service. Rather, the majority held that *Cablevision* extended to a service that initiated copying and virtually simultaneous retransmissions, even though the service had no retransmission license. The absence of a retransmission license means that Aereo's subscribers have no right to use that service to receive over-the-air broadcasts in the first instance, and thus no conceivable justification for using that service to time-shift. *Aereo* thus extends *Cablevision*'s holding to its most extreme conclusion. The decision provides further proof that *Cablevision*'s construction of the public performance right is incorrect.

The Aereo system captures, copies and simultaneously retransmits the copies of television broadcasts through a system that (as of now) is comprised of tens of thousands of miniature antennae, each assigned to an individual user. Aereo has no license to retransmit programs broadcast on over-the-air television. Its subscribers therefore have no right to use Aereo's facilities to capture the broadcast signals transmitting those programs in the first instance. Aereo nevertheless argued that because it utilized Cablevision's one-copy-assigned-to-one-subscriber transmission system, Aereo could

retransmit not time-shifted programs but essentially live broadcasts.

The district court below found "itself constrained" by *Cablevision*, and noted that "[b]ut for *Cablevision's* express holding" regarding the "meaning" of the Transmit Clause, "Plaintiffs would likely prevail on their request for a preliminary injunction." *American Broadcasting Companies, Inc. v. AEREO, Inc.*, 874 F. Supp. 2d 373, 375, 385 (S.D.N.Y. 2012). On appeal, the *Aereo* majority likewise believed itself constrained by *Cablevision*, notwithstanding the fact that there were many ways to distinguish *Cablevision*. *Cablevision*, as noted, expressly said that its holding did not automatically apply to any service that transmitted performances from individual copies to associated subscriber accounts. *Cablevision*, 536 F.3d at 139. And Aereo's service was readily distinguishable from Cablevision's, because the latter had licenses to retransmit content to its subscribers whereas Aereo had no such licenses. The majority, however, found these and other distinctions to be irrelevant. *See Aereo*, 712 F.3d at 689-93.

The *Aereo* majority not only took *Cablevision's* errors to their most extreme conclusion, but did so even while acknowledging the *illogic* of the *Cablevision* approach. Thus, the majority conceded that *Cablevision*'s emphasis on transmissions being made from one copy (one public performance) as opposed to multiple copies (multiple private performances) was "in some tension with" *Cablevision*'s conclusion "that the relevant inquiry under the Transmit Clause is the potential audience of the particular transmission," since each

transmission from a single copy of a work will be different than any other transmission from the same copy. *Id*. at 688 n.11. The majority also recognized that if *Cablevision's* holding that each transmission is a performance was applied consistently to each such transmission, this "would essentially read out the 'different times' language" from the Transmit Clause. *Id*. And, in response to the plaintiffs' argument that holding Aereo's performances to be private would "exalt[] form over substance," the majority acknowledged that, "[p]erhaps the application of the Transmit Clause should focus less on the technical details of a particular system and more on its functionality." *Id*. at 693-94. The majority nevertheless concluded that, under *Cablevision*, "technical architecture matters." *Id*. at 694.

In dissent, Judge Chin correctly concluded that the *Cablevision-Aereo* interpretation of the Transmit Clause "conflicts with the text of the Copyright Act, its legislative history, and [Second Circuit] case law." *Id*. at 697. Judge Chin noted that, "[e]ven assuming Aereo's system limits the potential audience for each transmission, and even assuming each of its subscribers receives a unique recorded copy, Aereo still is transmitting the programming 'to the public'" under the Transmit Clause. *Id*. at 698. Judge Chin also cogently demonstrated that Aereo is not a model of technological innovation. To the contrary, it is a "sham" and a "Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law." *Id.* at 697.

Amici submit that the manifest errors in the Second Circuit's rule including errors that the *Aereo* majority recognized in *Cablevision* but deemed itself powerless to correct—combined with the importance of the issue and the context in which it arises—call for this Court's grant of certiorari and rejection of the Second Circuit's misguided rule.

D. The Second Circuit's Rule Will Cause Significant and Immediate Harm to the Entire Content Creation and Dissemination Ecosystem

The Second Circuit's rule portends substantial and immediate economic harm and disruption to the entire content creation and dissemination ecosystem.

In the wake of Aereo's unveiling of its "Rube Goldberg-like contrivance," and the decisions in the Second Circuit validating that service under compulsion of a now-entrenched *Cablevision-Aereo* rule, copycat services, whose entire business models are premised on the unauthorized retransmission of copyrighted content, have started to emerge nationwide. *See Fox Television Stations, Inc. v. FilmOn X LLC*, 2013 WL 4763414 (D.D.C. Sept. 5, 2013); *BarryDriller,* 915 F. Supp. 2d at 1138. Moreover, major cable and satellite TV providers—such as DirecTV and Charter Communications Inc.—are reportedly considering utilizing similar technologies "to avoid paying billions of dollars" in retransmission fees.[2]

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[2] Andy Fixmer, *DirecTV, Time Warner Cable Are Said to Weigh Aereo-Type Services,* Bloomberg (Oct. 25, 2013),

The harms engendered by Aereo and these copycat services affect not only the Petitioner broadcasters, but also the content creators. The dollars that advertisers pay to broadcasters, and that cable companies and other retransmitters pay for the right to publicly perform works, go toward the payments broadcasters make to copyright owners to acquire programs for broadcast, and through them to the individuals who write, act in, 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 retransmission services negatively affects all participants in the lawful creation and distribution chain. As the Second Circuit itself has noted, this would

> encourage current and prospective retransmission rights holders, as well as other Internet services, to follow [the defendant'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

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http://www.bloomberg.com/news/2013-10-25/directv-time-warner-cable-said-to-consider-aereo-type-services.html.

> retransmissions of copyrighted television programming over the Internet without consent would thus threaten to destabilize the entire industry.

WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 286 (2d Cir. 2012); *see also FilmOn X*, 2013 WL 4763414, at *15; *Aereo*, 874 F. Supp. 2d at 397-98.

The Second Circuit's rule directly undermines the copyright protection and remuneration that are critical to the success of the motion picture and television industries. Content producers like *Amici* invest substantial sums in the creation and distribution of copyrighted content; the average major motion picture can easily cost tens of millions of dollars to produce.

Content producers earn their return on investment through authorizing exploitation of public performances through "windowing." "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 view or obtain copies of copyrighted content. *See generally Warner Bros. Entm't Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1005-06 (C.D. Cal. 2011); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 309 (S.D.N.Y. 2000).

Windowing enables consumers to obtain access to copyrighted content through a rich and varied range of authorized offerings. 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. Moreover, the broadcast networks themselves operate their own Internet sites (abc.com, cbs.com, fox.com, nbc.com) that make many programs originally broadcast over the air available for on-demand streaming, under authorized terms and conditions. Hence, 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 inures to the benefit of all involved in the content-creation chain, not only financiers and production entities, but also the thousands of writers, directors and cast and crew members represented by *Amici* Guilds and IATSE, all of whom depend on a robust and continuing revenue stream, which Aereo's

infringing actions usurp. 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. Moreover, revenue from the aftermarket use of content first broadcast over the air directly funds the pension and healthcare plans of the members of *Amici* Guilds and IATSE. When unauthorized services interrupt the revenue stream from licensed uses of copyrighted works, this directly affects the livelihood of the many hard-working men and women in the content-creation process.

Aeoro's service is particularly harmful as increasing numbers of consumers view content through their mobile or other Internet-connected devices. Indeed, online streaming is the fastest growing sector of consumer video consumption in the United States, and it is expected to increase in the future.[3] Over the last decade, revenues from online streaming sources have increased by several fold, and

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[3] *See, e.g.,* Chris Osika, *Streaming Is Going Mainstream*, Cisco Blogs (Dec. 18, 2012), http://blogs.cisco.com/sp/streaming-is-going-mainstream-the-upward-arc-of-online-video/ ("48 percent of consumers have increased their streaming of professionally produced video content in the past two years, making it the fastest-growing category of video use.").

are expected to double by 2017.[4] Numerous services, including Hulu, Netflix, and others, make copyrighted content widely available through Internet streaming in ways that are genuinely innovative, exciting, and further consumer choice. These services do so legitimately, with authorization from the owners of content and compensation to those in the content-creation chain.[5] The rule of the Second Circuit directly undermines the public performance rights for these online streaming transmissions, which are extraordinarily valuable to content creators like *Amici* and will be increasingly important over time.

E. Aereo and Similar Services Constitute Wildly Inefficient Means to Exploit a Perceived Legal Loophole

In urging the Second Circuit to affirm the district court's denial of a preliminary injunction, Aereo described itself as a "modern and innovative technology" that supports the public interest in "effectuat[ing]" consumers' "right to over-the-air broadcasts." Consolidated Brief of Aereo, Inc. at 79, *WNET, Thirteen v. Aereo, Inc.,* No. 12-2786 (2d Cir. Oct. 19, 2012). Aereo—and like services that follow

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[4] Erik Gruenwedel, *Online Video Distribution Revenue Projected to Double by 2017*, Home Media Magazine (Aug. 27, 2012), http://www.homemediamagazine.com/streaming/online-video-distribution-revenue-projected-double-2017-28163.

[5] *See, e.g.*, *Paramount Pictures content coming to Prime Instant Video*, Android Central (May 23, 2012), http://www.androidcentral.com/paramount-pictures-content-coming-prime-instant-video.

its blueprint—however, are far from models of technological innovation, as Judge Chin persuasively observed. *Aereo*, 712 F.3d at 697 (Chin, J., dissenting).

Aereo streams individual copies of content utilizing tens of thousands of miniature antennae devoted to each separate user in an entirely redundant and wasteful manner. It devotes significant resources to building up its inefficient and duplicative network, instead of paying compensation to the owners of copyrighted content and those in the content-creation chain whose works it exploits without authorization.

As technology writers have observed, Aereo is "ridiculously inefficient and monstrously unscalable, a fact that you can discern from Aereo's high price."[6] Indeed, "[e]ven in dot-com years, not many firms ever came close to wasting so much money," in "a manner so spectacularly inefficient, ending up building a product that most people don't need."[7] That Aereo is "[c]ompletely inefficient (and potentially unreliable) from a technology standpoint"[8] is not surprising,

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[6] Farhad Manjoo, *Don't Root for Aereo, the World's Most Ridiculous Start-up*, PandoDaily (July 14, 2012), http://pandodaily.com/2012/07/14/dont-root-for-aereo-the-worlds-most-ridiculous-start-up/.

[7] *Id*.

[8] *By Putting Over-the-Air Online Legally, Aereo Clears The Way For ALL TV Everywhere*, Forbes (Apr. 10, 2013), http://www.forbes.com/sites/anthonykosner/2013/04/10/by-putting-over-the-air-online-legally-aereo-clears-the-way-for-all-tv-everywhere/.

given that its *raison d'être* is not technological innovation, but rather, the exploitation of a perceived legal loophole, stemming from the Second Circuit's erroneous decision in *Cablevision*.

In contrast to Aereo's convoluted system, efficient streaming technologies will stream a single copy of content across a distributed network of multiple servers. As the senior vice president of networks and operations at Akamai Technologies—a firm that provides download and streaming services for Apple's iTunes service—has observed, streaming a single copy of a work from servers in various countries "creates a very efficient overlay multicast network." [9]

Unlike Aereo, numerous authorized services utilizing such distributed technologies make copyrighted content widely available today in ways that are truly innovative and further consumer choice.

II. THE GROWING SPLIT AMONGST COURTS ON THE SCOPE OF THE PUBLIC PERFORMANCE RIGHT COMPOUNDS THE CONFUSION AND UNCERTAINTY IN THE LAW AND WARRANTS THIS COURT'S IMMEDIATE INTERVENTION

The growing split amongst courts on the proper interpretation of the public performance right has compounded the confusion and uncertainty in the law

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[9] Steven Cherry, *Downloading a Million Lions in a Day,* IEEE Spectrum (July 29, 2011), http://spectrum.ieee.org/podcast/computing/networks/downloading-a-million-lions-in-a-day.

and the marketplace, warranting this Court's immediate intervention.

Two district courts have issued decisions involving an Aereo copycat service that are in direct conflict with the Second Circuit's decision in *Aereo*, the District Court of the District of Columbia, and the District Court of the Central District of California. *See FilmOn X*, 2013 WL 4763414; *BarryDriller,* 915 F. Supp. 2d at 1138. On the other side, the District Court of the District of Massachusetts recently issued an order denying a motion for a preliminary injunction to enjoin Aereo in the Boston metropolitan area, adopting the Second Circuit's construction of the Transmit Clause as set forth in *Aereo* and *Cablevision*. *See* Memorandum & Order at 12-13, *Hearst Stations Inc. d/b/a WCVB-TV v. Aereo, Inc.*, No. 13-11649-NMG, Dkt. No. 72 (D. Mass. Oct. 8, 2013).

Hence, there are a growing number of conflicting decisions in the federal courts on the proper interpretation of the public performance right in the context of Internet streaming technologies. As the District Court for the District of Columbia noted, its "decision conflicts with the law of the Second Circuit under *Aereo*," 2013 WL 4763414, at *18, and that decision now conflicts with a decision from the District of Massachusetts. The court in the District of Columbia entered a preliminary injunction enjoining the copycat "FilmOn X" service throughout the entire United States, except the Second Circuit, where *Aereo* is "binding precedent." *Id*. The court in the Central District of California issued a preliminary injunction enjoining the copycat

"Aereokiller" service (owned by the same defendants as FilmOn X) in the Ninth Circuit. *BarryDriller,* 915 F. Supp. 2d at 1148. The Aereo service itself has not been enjoined by any court, and the FilmOn X/Aereokiller service has not been enjoined in the Second Circuit.

The absence of nationwide, uniform rules governing the public performance right in online streaming transmissions has created, and will continue to create, substantial uncertainty in the marketplace. Having different rules in different states regarding whether the streaming of online content through systems like Aereo requires a license threatens the financial stability of a critically important sector of the U.S. economy. As described above, and as one court has observed, some content distributors already are seeking to renegotiate retransmission fees—collectively worth billions of dollars—based on these decisions. *See FilmOn X,* 2013 WL 4763414, at *15.

Awaiting the possible development of a split at the Circuit level will not lessen the substantial uncertainty in the marketplace these cases presently are causing. Nor will additional Circuit decisions add to or refine the opposing arguments on this issue. As the aforementioned cases demonstrate, the arguments are fully developed, and there now are a number of conflicting decisions on each side. The ongoing and ever-increasing disarray in the law regarding the scope of the public performance right and the significant economic destabilization it has produced counsel strongly in favor of immediate review by this Court.

CONCLUSION

Amici respectfully submit that the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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