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 TIME WARNER INC. AND WARNER BROS. ENTERTAINMENT INC. AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

JOHN A. ROGOVIN
JEREMY N. WILLIAMS
CLARA A. (ZAZI) POPE
DEAN S. MARKS
WARNER BROS. ENTERTAINMENT INC.
4000 Warner Boulevard
Burbank, CA 91522
(818) 954-2867
john.rogovin@warnerbros.com

PAUL T. CAPPUCCIO
Counsel of Record
PAUL F. WASHINGTON
CINDY J. O'HAGAN
BRADLEY SILVER
TIME WARNER INC.
One Time Warner Center
New York, NY 10019
(212) 484-8000
paul.cappuccio@timewarner.com

November 12, 2013

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

INTEREST OF *AMICI CURIAE*[1]

Time Warner Inc., through its operating divisions—Warner Bros. Entertainment Inc., HBO and Turner Broadcasting System, Inc.—is one of the largest producers of television shows and movies in the world. Of particular relevance to this case, Warner Bros. is the largest supplier of television shows to U.S. broadcast networks. Many of the most popular television shows ever broadcast on network television—*e.g.*, Friends, The West Wing, ER and Two and a Half Men—have been produced and are owned by Warner Bros. It is thus clear that Warner Bros., like the broadcast networks in this case, has a strong interest in not allowing any third party, such as Aereo, to make copies of its television shows and movies and to perform them publicly for money, without a license from Warner Bros. Other operating divisions of Time Warner also have an interest in the issues raised by this case. For example, although neither HBO nor Turner produces television shows for broadcast networks, they produce their own television shows and thereby have a strong interest in the correct determination of when it is permissible

---

[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*'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.

to make, distribute and perform copies of copyrighted shows.

ARGUMENT

From the standpoint of the most basic principles of copyright law, and practical common sense, the result in this case is genuinely preposterous. With the help of some clever lawyering, Aereo, a commercial enterprise with no copyright license, is allowed to set up a business where it charges money for making up to millions of copies of a television show and transmitting those copies to millions of people because, we are told, legally speaking, transmitting copies of the show to millions of unrelated people is somehow *not* a public performance of the copyrighted show. To us, as it was to Judge Chin in this case, even to describe this result should be sufficient to condemn it as clearly incorrect.

We leave to the parties a more detailed discussion of the contours of the "transmit" clause of the Copyright Act. In our view, Petitioners persuasively explain in detail why what seems like a crazy result does indeed run afoul of the plain meaning and fundamental statutory provisions of copyright law. In this *amicus* brief, we merely offer our views on (i) how the law in the Second Circuit got to such a strange, incorrect and dangerous place, and (ii) why we believe this Court's intervention is urgently needed now to set this vital area of copyright law back on course.

I. HOW THIS IMPORTANT AREA OF COPYRIGHT LAW GOT BADLY OFF TRACK

The Time Warner family of companies, including Warner Bros., HBO and Turner, is a strong advocate, indeed initiator, of technological progress and innovative business ideas that increase consumer choice. Through licensing our programming in new ways to new outlets, we are helping to bring our television shows, movies and programming to consumers when and how they want to watch them. Our companies have provided much of the impetus for such innovations in television viewing as multiplexing of TV channels; on-demand viewing; UltraViolet storage and access to TV shows and movies; and, most recently, TV Everywhere viewing, such as the innovative and award winning HBO GO app that allows consumers to watch their favorite TV shows and movies whenever they want to watch them on televisions, computers or mobile or game devices.

There is a crucial difference, however, between genuine innovation and the phony so-called innovation of a company like Aereo, whose only real breakthrough is the avoidance of payment for copyright licenses. As this case illustrates, sometimes the temptation by courts to uphold what are perceived as advances in existing technologies can, over a long enough period, result in a series of seemingly small extensions of legal reasoning that nevertheless take the law to a very illogical place. That, we submit, is what has happened here.

Over a quarter century ago, this Court decided the *Sony Betamax* case, in which it held that a manufacturer of a videocassette recorder (VCR) could not be held liable for copyright infringement because a VCR had substantial non-infringing uses, including the limited recording and time-shifting of copyrighted movies and television shows by consumers for viewing at a later time. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

In the 1990s, magnetic tape VCRs began to be supplanted by DVRs—digital video recorders—that cable and satellite companies supplied to subscribers in their homes. DVRs allow a consumer to shift the time of viewing television shows by making copies of those shows that are stored on a set-top box provided by the cable or satellite operator. The legality of DVRs was not widely challenged by the owners of copyrighted television shows, in part because the DVR looked a good deal like a digital version of a VCR, and in part because the networks could ensure that the DVR capabilities were limited because the cable operators were dependent on networks by contract for access to their programming.

But in 2007, one cable operator—Cablevision—decided that it wanted to offer a DVR service where all the copying of shows was done by the cable operator in its "headend" plant, rather than on a set-top DVR box provided to the subscriber in his or her home. The relevant producers and distributors of television shows, such as Turner and HBO, were willing to license Cablevision the right to make copies in their headend and to transmit those shows on demand to its subscribers. Cablevision, however,

wanted to establish that it had the right to offer a headend-based DVR service even *without* a license from the copyright holders.

Here is where the law got badly off track.

In the resulting litigation, the Second Circuit sought to uphold what seemed to the court to be a relatively incremental change in the architecture of the DVR technology—from home to head-end copying—by creating two dangerous, result-oriented legal fictions. The first was that, in the case of a headend-based DVR system, it was the consumer and not the cable company that made the copy of the copyrighted work—even though the copy would indisputably be made by the cable operator in its plant on its equipment. According to the court, the cable operator was free to make thousands of copies of a protected work without a license because the decision to make an unlimited number of copies was (supposedly) the product of a volitional act of the consumer. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 130-33 (2d Cir. 2008) ("*Cablevision*"). That legal fiction is dead wrong in our view.

But even that fiction was not enough to save Cablevision from liability because it was also transmitting the shows to thousands of unrelated members of the public—which is the essence of unauthorized public performances of copyrighted works. To deal with this problem, the Second Circuit needed to create a second legal fiction—that because each transmission was linked to a separate copy allocated to each unrelated subscriber, Cablevision

had engaged only in a series of *private*, not *public*, performances of each work. *Id.* at 134-40.

And thus Pandora's Box was opened: No copies have been made by Cablevision, and there has been no public performance when thousands (or even millions) of copies are streamed to thousands (or millions) of unrelated members of the public.

All of the major producers of television shows and movies urged this Court to grant *certiorari* and reverse the decision of the Second Circuit in *Cablevision*, warning that the twin legal fictions in that case would create no end of mischief and harm to copyright holders. Petition for Certiorari, *Cable News Network, Inc. v. CSC Holdings, Inc.*, No. 08-448, at 24-29, 36-38. The Solicitor General, however, noted the "limited" nature of the *Cablevision* holding and recommended against granting *certiorari*. This was in part because, in the Solicitor General's view, the harms predicted by the copyright holders were, at least at that stage, speculative and could in any event be mitigated in the particular context of the *Cablevision* case by the fact that the copyright holders and the cable operators had to contractually agree to terms on which the programming would be made available to subscribers. Brief for the United States as Amicus Curiae, *Cable News Network, Inc. v. CSC Holdings, Inc.*, No. 08-448, at 19-22.

In the present case, the Aereo company and its business plan were created specifically to exploit the two legal fictions established in the *Cablevision* case. Aereo—a third-party commercial entity with *no* license of any kind from the creators of television

shows and movies—set up a system where, for each subscriber who pays money directly to Aereo, it captures by a separate mini-antenna the "over-the-air" broadcast signal of each of the major U.S. broadcast networks. Whenever any (and every) Aereo subscriber signs onto the system via the Internet to watch a television show, Aereo makes a copy of that television show (whether or not the subscriber wishes to watch it currently or later), which copy is then streamed, currently with a slight delay or later, to the subscriber. Aereo is literally a business and a technology designed in significant part by lawyers in order to take advantage of the erroneous loopholes created by the *Cablevision* case. It is not seriously disputed that no sane architect of a technology such as Aereo would design a system that had a separate antennae for each subscriber and make a separate copy of shows for each subscriber, except to attempt to argue that, under the reasoning of *Cablevision*, copying and transmission of a copyrighted show to an unlimited number of unrelated persons was neither an unlawful copying nor a public performance.

In deciding the *Aereo* case, the Second Circuit demonstrated, as the content producers predicted in seeking review of the *Cablevision* case, that that court is not willing to limit the impact of the twin legal fictions of the *Cablevision* case to the facts of that case. Instead, those fictions have now become the basis for a third party, who has no affiliation with, or license from, a television programming rights holder, to build a business model whereby it charges money for the service of making thousands, if not millions, of copies of a copyrighted television show

and then performs that copyrighted show for up to millions of unrelated people. As Judge Chin pointed out in his strong dissents, the system enables Aereo to transmit the Super Bowl to 50,000 people without paying a dime for the right to do it. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 697 (2d Cir. 2013) (Chin, J., dissenting). *See also WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500, 501 (2d Cir. 2013) (Chin, J., dissenting from denial of rehearing en banc) The audience could be five million and, in the Second Circuit, the performance of the show would still be deemed "private."

II. THIS CASE MAKES CLEAR THAT THE ERRORS IN THE *CABLEVISION* CASE CANNOT EASILY BE LIMITED TO THE FACTS OF THAT CASE, BUT INSTEAD WILL BE USED TO CREATE ILLEGITIMATE BUSINESS MODELS THAT WILL HARM COPYRIGHT HOLDERS, THE DEVELOPMENT OF NEW LEGITIMATE BUSINESS MODELS AND THE CONTINUED GROWTH OF GENUINE TECHNOLOGICAL INNOVATION THAT RESPECTS COPYRIGHT

As noted above, in opposing the petition for certiorari in the *Cablevision* case, the Solicitor General understandably expressed the view that any harm immediately caused by the Second Circuit's decision in *Cablevision* seemed limited for at least two reasons. On its face, the *Cablevision* ruling was limited to the rather unique facts of that case. *Cablevision*, 536 F.3d at 139-40. Moreover, the

parties in that case were in direct privity of contract—with the cable operators (such as Cablevision) getting their television content directly by license from the Plaintiffs-Petitioners. Therefore, any harm caused by that case could, at least in theory, be dealt with by the television producers and networks from whom the programming was being licensed in their negotiations with the cable operators to acquire the television programming in the first place.

The present case makes clear, however, that the Court of Appeals is unwilling to limit the erroneous reasoning of the *Cablevision* case. Instead, the Court of Appeals has now confirmed that its meaning would allow a third party to enter the marketplace to make copies of and publicly perform copyrighted shows for a fee without any license from the relevant copyright holders. This is exactly the sort of follow-on damage that the Petitioners in *Cablevision* predicted. Allowing an unlicensed third party to copy and perform copyrighted works for a fee is not merely plainly wrong, it is also harmful in a number of ways.

First, allowing an unlicensed third party to make copies of and perform copyrighted television shows for a fee undermines the legitimate economics of the production of television shows. Producers of television shows invest billions of dollars a year creating programming for broadcast network television. If producers are not compensated for the unlicensed exploitation of their shows by third parties, then those producers cannot continue to invest the large sums of money needed to produce those shows. That harms not only the producers but

the networks they supply, as well as the actors, the directors, the writers and everyone else who contributes to the production of broadcast television.

Second, the Court of Appeals' decision in this case also will frustrate the development of legitimate, already emerged and emerging business models. New Internet-based subscription video-on-demand services, such as Netflix and Amazon Prime, pay substantial and increasing compensation to the producers of television shows and movies for the right to offer programming to subscribers on an on-demand basis. In addition, broadcast and other cable networks are increasingly looking to license from television show producers expanded rights to perform shows for consumers on an on-demand basis. More than 90 legitimate services are making movies and television shows available in the United States over the Internet. Producers of television shows, such as Warner Bros., depend on such downstream revenue opportunities because the cost of producing a television show is often not completely covered by fees paid by networks to the production studios. If third-party interlopers, such as Aereo, are allowed to provide similar on-demand internet-based viewing services without compensating rights holders, the new legitimate services that are compensating rights holders could be undermined and stunted, and the economics of television production will be further undermined.

Third, this Court's intervention is needed earlier rather than later to remove *Cablevision*'s and *Aereo*'s perverse incentives that threaten true technological innovation. Through these two decisions, the Second

Circuit has created incentives for companies to design systems to satisfy lawyer-architected loopholes rather than real technological efficiencies and advances. As noted, no reasonable company would have deployed Aereo's armada of mini-antennae but for the desire to end-run the public performance right. Unless this Court intervenes now, there will be even more incentives for clever lawyers to construct new business models and technologies whose primary aim and achievement is to fit within the erroneous loopholes to fundamental copyright law principles created by the *Cablevision* and *Aereo* decisions. Neither technological innovation nor sound investment incentives are served by the dubious legal reasoning that underlies these cases.

* * *

Respondents will no doubt contend that this Court should not review this case so that technological innovation and consumer convenience can flourish. Nonsense. Capturing a broadcast signal with multiple antennae, making copies of shows and transmitting performances of the shows to a public audience is not innovation. The only innovations here are legal ones: the idea that making millions of copies of a television show is not making any copy, and the idea that transmitting a television show to millions of unrelated people is a private, not a public, performance of the show. These legal innovations are unsupportable by the plain text of the Copyright Act and common sense, and deserve no further protection.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN A. ROGOVIN
JEREMY N. WILLIAMS
CLARA A. (ZAZI) POPE
DEAN S. MARKS
WARNER BROS.
ENTERTAINMENT INC.
4000 Warner Boulevard
Burbank, CA 91522
(818) 954-2867
john.rogovin@
warnerbros.com

PAUL T. CAPPUCCIO
Counsel of Record
PAUL F. WASHINGTON
CINDY J. O'HAGAN
BRADLEY SILVER
TIME WARNER INC.
One Time Warner Center
New York, NY 10019
(212) 484-8000
paul.cappuccio@
timewarner.com