No. 13-461

In The
Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
Petitioners,
v.
AEREO, INC., F/K/A BAMBOOM LABS, INC.,
Respondent.

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

BRIEF OF AMICI CURIAE INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (IFPI); ASOCIACIÓN MEXICANA DE PRODUCTORES DE FONOGRAMAS Y VIDEOGRAMAS (AMPROFON); ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE DU CANADA (ALAI CANADA); AUSTRALIAN COPYRIGHT COUNCIL (ACC); BRITISH COPYRIGHT COUNCIL (BCC); CANADIAN MEDIA PRODUCTION ASSOCIATION (CMPA); INTERNATIONAL CONFEDERATION OF MUSIC PUBLISHERS (ICMP); INTERNATIONAL CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS (CISAC); INTERNATIONAL FEDERATION OF ACTORS (FIA); INTERNATIONAL FEDERATION OF MUSICIANS (FIM); MUSIC CANADA; SOCIETY OF COMPOSERS, AUTHORS AND MUSIC PUBLISHERS OF CANADA (SOCAN); INTERNATIONAL COPYRIGHT SCHOLARS, ET AL., IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

This brief is filed by a number of international and foreign associations with economic or professional stakes in the proper interpretation of copyright law, including international copyright treaties, and by a number of scholars engaged in researching, writing and teaching about international copyright law issues. More detailed descriptions of each of the *amici* may be found in the Appendix.

Amici wish to bring to the attention of the Court a number of international treaties and other agreements into which the United States has entered. These commitments impose obligations on the United States that must be taken into account when interpreting domestic copyright law. International rights holders – including the associations joining this brief – rely upon the rights guaranteed by the international agreements, which provide a legal framework that promotes the creation and dissemination of copyright works worldwide. *Amici* include associations based in Canada and Mexico, parties to the

[1] No counsel for a party (and no party) authored this brief in whole or in part or 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. *Amici* von Lewinski (a legal scholar based outside the United States) and the British Copyright Council rely on counsel and other *amici* in relation to the U.S. law discussed in Part I, but directly endorse the submissions set out in Parts II to IV. The parties have consented to the filing of this brief.

North American Free Trade Agreement discussed herein, and Australia, a party to the U.S.-Australia Free Trade Agreement discussed herein, as well as associations representing authors, performers and rightholders internationally and scholars from various countries.

SUMMARY OF ARGUMENT

Copyright law is an increasingly harmonized international system supported by bilateral, regional and multilateral treaties. These treaties help creators and businesses in the United States disseminate copyright works worldwide. They also reflect an agreement among the treaty parties on the minimum standards for copyright protection of works.

One of the most important underpinnings of this international system is technological neutrality. Starting in the 1990s, the United States negotiated important bilateral, regional and multilateral treaties and trade agreements in the knowledge that new communications technologies were transforming the ways in which copyright works were consumed. With an eye to the unpredictability of these technologies, these treaties were drafted to apply reliably and comprehensively to the provision of access to content, regardless of the specific mechanism used to deliver it. These treaties were entered into by the Executive Branch, ratified by the Senate and implemented by domestic legislation. The trade agreements were

entered into by the Executive Branch, approved in public laws enacted by both Houses of Congress, and signed by the President. In each case, Congress confirmed its satisfaction that the scope of the domestic copyright law fulfilled international standards.

Numerous international agreements provide a right of communication to the public, which applies even when the technology used to effect the transmissions enables members of the public to access works or performances of works "from a place and at a time individually chosen by them." WIPO Copyright Treaty art. 8, Dec. 20, 1996, S. Treaty Doc. 105-17 (1997), 36 I.L.M. 65 ("WCT"); WIPO Performances and Phonograms Treaty arts. 10, 14, Dec. 20, 1996, S. Treaty Doc. 105-17 (1997), 36 I.L.M. 76 ("WPPT"); Free Trade Agreement, U.S.-Australia, art. 17.5, May 18, 2004, K.A.V. 7141. The North American Free Trade Agreement requires the United States to ensure that the term "public" includes "any aggregation of individuals intended to be the object of, and capable of perceiving, communications or performances of works" *even if* those individuals engage with the works "at the same or different times or in the same or different places." North American Free Trade Agreement, art. 1721(2), Dec. 17, 1992, H.R. Doc. No. 103-159, vol. 1 ("NAFTA") (definition of "public"). These agreements render the particular method of transmission irrelevant.

Even before the treaties were executed, this core concept of technological neutrality was long embedded in U.S. copyright law. Passed in 1976 to reverse

technology-specific outcomes reached by this Court in a trio of cases under the prior copyright statute, the definitions section of the Copyright Act confirms that to perform or display a work "publicly" means, *inter alia*:

> to transmit or otherwise communicate a performance or display of the work * * * to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. §101 (2012) (defining "To perform or display a work 'publicly'").

The definition of "transmit" – to communicate a performance or display – in what has become known as the "Transmit Clause," was intended to be "broad enough to include all conceivable forms and combinations of wired or wireless communications media." H.R. Rep. No. 94-1476, at 64 (1976). "Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a 'transmission,' and if the transmission reaches the public in any form, the case comes within the scope of clauses (4) or (5) of section 106." S. Rep. No. 94-473, at 61 (1975).

As has been observed by respected commentators, the decision of the Second Circuit neglected to consider important elements of this statutory definition. By

following its prior, incorrect test of examining "who precisely is 'capable of receiving' a particular transmission of a performance," the Second Circuit read out the "at different times" criterion from the Act. It also ignored the "by means of any device or process" language that is at the heart of the technologically neutral definition of the Transmit Clause.[2] In doing so, the Second Circuit failed to construe the public performance right consistently with the treaty obligations of the United States. These obligations require protection for the transmissions of performances to the public even when they are delivered by numerous separate transmissions.

The highest courts of America's major trading partners have construed these treaties in analogous cases. They have recognized that these treaties anticipated and dealt with services that claim as "private" a series of performances delivered to the public at large. Such decisions have closed the door to all "Rube Goldberg-like contrivances" (Pet. App. 40a, dissent of Judge Chin) that seek to bypass the communication to the public right by using point-to-point technologies.

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[2] Jane C. Ginsburg, *WNET v. Aereo: The Second Circuit Persists in Poor (Cable)Vision*, Media Inst., Apr. 23, 2013, www.mediainstitute.org/IPI/2013/042313.php.

The Petitioners have extensively described how the Second Circuit's decisions in *Cablevision*[3] and *Aereo* have misconstrued the Copyright Act. This brief does not repeat their arguments. The purpose of this brief is to describe how the technology-specific outcome in *Cablevision* and *Aereo* is fundamentally at odds with the international treaty commitments entered into by the United States and with its domestic legislative history, each of which demonstrates the understanding that existing public performance rights comply with those obligations.

ARGUMENT

I. THE *CHARMING BETSY* DOCTRINE REQUIRES CAUTION IN DEVIATING FROM TREATY COMMITMENTS

More than two hundred years ago, Chief Justice Marshall articulated what has become a fundamental canon of U.S. statutory construction: "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804). This principle extends to avoidance of conflict with the treaty commitments of the United States. "If the United States is to be able

[3] *Cartoon Network LP, LLLP v. CSC Holdings, Inc.,* 536 F.3d 121 (2d Cir. 2008), *cert. den. sub nom., Cable News Network v. CSC Holdings, Inc.,* 129 S. Ct. 2890 (2009) ("*Cablevision*").

to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar Seguros y Reaseguros, SA v. M/V Sky Reefer,* 515 U.S. 528, 539 (1995); *Benz v. Compania Naviera Hidalgo, S.A.,* 353 U.S. 138, 147 (1957) (cautioning against courts "run[ning] interference in such a delicate field of international relations * * * [without] the affirmative intention of Congress clearly expressed."). The same canon applies to trade agreements. *Luigi Bormioli Corp. v. United States,* 304 F.3d 1362, 1368 (Fed. Cir. 2002).

Such an approach is especially appropriate in interpreting domestic copyright law, which has gone through a process of increasing harmonization with international treaty standards over the years. As this Court recently recognized in rejecting a constitutional challenge to legislation that removed foreign copyrights from the public domain, Congress has "adopted measures to ease the transition from a national scheme to an international copyright regime" and "ensured that most works, whether foreign or domestic, would be governed by the same legal regime," as part of a "trend toward a harmonized copyright regime." In doing so, "Congress determined that U.S. interests were best served by our full participation in the dominant system of international copyright protection. Those interests include ensuring exemplary compliance with our international obligations, securing greater protection for U.S. authors abroad,

and remedying unequal treatment of foreign authors." *Golan v. Holder,* 585 U.S. ___, ___, ___, 132 S. Ct. 873, 891, 893, 894 (2012). *See also Eldred v. Ashcroft,* 537 U.S. 186, 205-206 (2003); *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.,* 24 F.3d 1088, 1097 (9th Cir. 1994) (en banc) (cautioning that an impolitic approach might "undermine Congress's objective of achieving effective and harmonious copyright laws among all nations").

The clear import of treaty language controls this Court's assessment. *Maximov v. United States,* 373 U.S. 49, 54 (1963) (holding that it is "particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty * * * when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories"). It is also settled that the Executive Branch's interpretation of a treaty "is entitled to great weight." *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 184-185 (1982).

Last, a treaty's drafting and negotiating history and the post-ratification understanding of the contracting parties may serve as aids to its interpretation. *Zicherman v. Korean Air Lines Co.,* 516 U.S. 217, 226 (1996).

As described below, the Second Circuit's interpretation of the Transmit Clause cannot be squared with the 210-year old *Charming Betsy* doctrine. While *amici* believe that the language of the Transmit

Clause unambiguously leads to the conclusion that Aereo's transmissions are public performances, the treaty obligations entered into by the United States on multiple occasions would require the same conclusion even if the statutory text was ambiguous.

II. THE DECISION BELOW PLACES THE UNITED STATES IN VIOLATION OF ITS MULTILATERAL TREATY COMMITMENTS

This Court has acknowledged that copyright involves an international system in which the United States is now a full partner. Since the 1970s, a deliberate Congressional and Executive Branch policy has allowed the United States to "'play a leadership role' in the give-and-take evolution of the international copyright system." *Eldred*, 537 U.S. at 195, 205-206 n. 13; *Golan*, 585 U.S. at ___, 132 S. Ct. at 879-883.

The first international treaty commitment of the United States bearing examination arises under Arts. 11, 11*bis,* 11*ter*, 14, and 14*bis* of the Berne Convention.[4] Each of these articles contains language designed to capture innovations in technology. Article 11 grants authors of dramatic, dramatico-musical and musical works the exclusive right of authorizing "(i) the public performance of their works, including such public performances *by any means or process;* [and]

[4] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 (Paris Text 1971, as amended Sept. 28, 1979), 828 U.N.T.S. 221.

(ii) any communication to the public of the performance of their works." (Emphasis added.) The second part of the right is understood to encompass "any technology by which a performance can be transmitted other than broadcasting."[5]

Art. 11*bis*(1) of Berne grants authors an exclusive right of authorizing:

> (i) the broadcasting of their works or the communication thereof to the public *by any other means* of wireless diffusion of signs, sounds or images;
>
> (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;. . . .[6]

Art. 11*bis*(1)(ii) encompasses both cable retransmission (communication to the public by wire) and rebroadcasting (communication to the public by wireless means "over the air" of broadcast works in all cases where such secondary communication (transmission) is made "by an organization other than the original one.") As a result, a third party's

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[5] Paul Goldstein & P. Bernt Hugenholtz, *International Copyright* 327 (2013); *see also* Berne Art. 11*ter* (covering recitations of literary works through communications technologies).

[6] Emphasis added. Art. 11*ter*(1) contains, *mutatis mutandis*, the same provisions on public recitation of literary works and the communication to the public of such recitations as Art. 11(1).

retransmissions of broadcasts come within the scope of the Berne rights.[7]

Separately, Art. 14(1)(ii) gives authors a right to authorize "the public performance and communication to the public by wire" of cinematographic adaptations and reproductions of their works. Under Art. 14*bis*(1) of Berne, the owner of copyright in a cinematographic work such as a television program or movie must also be given the same rights as the author of an original work.[8]

The committee convened by the State Department in 1988 to study Berne implementation raised no questions as to the compliance of the existing U.S. law with these requirements.[9]

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[7] Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights – The Berne Convention and Beyond* 12.37-12.51 (2006); Silke von Lewinski, *International Copyright Law and Policy* 5.144 (2008).

[8] WIPO, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* 89 (Nov. 2003) ("WIPO Guide"); Ricketson & Ginsburg, *supra* note 7 at 12.32, 12.40.

[9] The Committee reported that the only conflicts involving Art. 11*bis* were (i) an exemption for instructional television transmissions granted under 17 U.S.C. §110(2) and (ii) a public broadcast compulsory license imposed under 17 U.S.C. §118. *See* William Belanger, *U.S. Compliance with the Berne Convention*, 3 Geo. Mason L. Rev. 373, 395-396 (1995); *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 Colum.-VLA J.L. & Arts 513, 519-520, 526-527 (1986).

In passing the Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853, Congress declared, "The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention." *Id.* §2(3) (*quoted in Golan,* 132 S. Ct. at 879). Given this unambiguous statement, it must be taken that the Executive Branch and Congress were satisfied that sections 101 and 106 fulfilled the Berne broadcasting, retransmission, and communication rights.

The United States became a party to Berne in 1989. By ratifying the TRIPs Agreement in 1994, the United States imported this Berne obligation into the WTO dispute settlement regime, giving "teeth" to Berne's requirements.[10] *Golan*, 132 S. Ct. at 881.

The United States' alignment with the international community was taken a step further when it acceded to the WIPO Copyright Treaty ("WCT"). A key purpose of the WCT was to ensure adequate worldwide protection of copyrighted works "at a time when borderless digital means of dissemination [were] becoming increasingly popular." H.R. Rep. No. 105-551, at 9 (1998). The WCT also strengthened legal frameworks enabling rights holders to fight

[10] Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9(1) Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 81 (requiring compliance with Arts. 1 through 21 of Berne).

"pirates who aim to destroy the value of American intellectual property." *Id.* at 10.

In Article 8, the WCT provided for a "technologically neutral and all-encompassing" communication to the public right that united the scattered Berne rights and applied regardless of the means by which the communication is made or the nature of the protected work.[11] It was agreed that the right had to be "technologically neutral" in order to support evolving delivery models enabled by advances in technology in order to avoid being rendered obsolete by any particular change in communications technology.[12] It also had to apply consistently to different kinds of works which Berne treated under separate headings.[13]

A "main achievement" of the WCT was its inclusion within the authors' communication to the public right of a right of "making available to the public of

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[11] Ricketson & Ginsburg, *supra* note 7 at 12.54, 12.17, 12.43, 12.46-12.51; Goldstein & Hugenholtz, *supra* note 5, at 335.

[12] Ricketson & Ginsburg, *supra* note 7 at 12.59; Jörg Reinbothe & Silke von Lewinski, *The WIPO Treaties 1996* 109 (2002); WIPO Guide, at 208; WIPO Committee of Experts, *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference,* WIPO/CRNR/DC/4 at 10.10-10.11, 10.14 (Aug. 30, 1996) ("Basic Proposal").

[13] Basic Proposal at 10.05, 10.09; Ricketson & Ginsburg, *supra* note 7, at 12.43, 12.56.

their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."[14] This "making available" right was crafted to be broad enough to enable rightholders to control all means of making works available over the Internet and other digital technologies, including by making available access to streams, downloads, and other hybrid or future forms of consumption by members of the public from different places and at different times.[15] It was intended to cover *any* process of providing public *access* to works,

[14] Goldstein & Hugenholtz, *supra* note 5 at 335 (celebrating the second portion of Article 8 as "one of the treaty's 'main achievements,' that for many countries has charted new territory by securing the right to control individualized, interactive uses of copyrighted works"); Ricketson & Ginsburg, *supra* note 7 at 12.54, 12.43, 12.46-12.51. Analogous rights were granted for fixed performances and sound recordings in Arts. 10 and 14 of the WPPT and in Art. 10 of the WIPO Audiovisual Performances Treaty (Jun. 24, 2012), http://www.wipo.int/treaties/en/text.jsp?file_id=295837, which the United States has signed but not yet ratified. Art. 6 of the WCT relates to the making available of *tangible* copies of an author's work; it is not relevant to the online setting. Art. 15 of the WPPT gives performers and producers of phonograms a right to equitable remuneration for the broadcasting or communication to the public of phonograms.

[15] WIPO Guide, at 208-209; Basic Proposal at 10.05, 10.10-10.11; Mihály Ficsor, *Copyright in the Digital Environment*, WIPO/CR/KRT/05/7 ¶59 (Feb. 2005); Mihály Ficsor, *The Law of Copyright and the Internet* 496-499 (2002); Goldstein & Hugenholtz, *supra* note 5, at 335-336.

including through numerous discrete transmissions to individual members of the public.[16]

This purpose was fulfilled by Article 8 of the WCT,[17] which provided:

> Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

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[16] Basic Proposal at 10.10-10.11; Reinbothe & von Lewinski, *supra* note 12, at 108-110; Ricketson & Ginsburg, *supra* note 7, at 12.58; Goldstein & Hugenholtz, *supra* note 5, at 335.

[17] The WPPT, which enumerates rights of producers and performers of phonograms (the term used to describe what are called phonorecords under U.S. law), also provides for a right of making available, using similar language to the "making available" language in Art. 8 of the WCT, but provides for a separate right of equitable remuneration for communication to the public. WPPT, Arts. 10, 14, and 15. To the extent that the words "perform . . . publicly" in 17 U.S.C. §106(6) (establishing the right to perform sound recordings publicly "by means of a digital audio transmission") have the same meaning as the identical words in 17 U.S.C. §106(4) (establishing the right to perform certain other kinds of words publicly), the WPPT plays the same role in interpreting the section 106(6) right that the WCT and Berne play in interpreting the section 106(4) right.

Article 8 removed any doubt remaining under Berne as to coverage for on-demand transmissions of performances: it required all member states to extend the communication to the public right to all such transmissions, even if the recipients were separated both in space and in time. Article 8 also put to rest any doubts as to whether member states must cover on-demand digital technologies. It required member states to provide coverage regardless of whether members of the public are separated in space or in time.[18] It also covered interactive transmissions that are initiated by users of a service.[19]

A leading international copyright scholar succinctly describes the broad, technologically neutral nature of the right:

> The making available right targets on-demand transmissions (whether by wire or wireless means), for it makes clear that the members of the public may be separated both in space and in time. The technological means of 'making available' are irrelevant; the right is expressed in technologically neutral terms. The right covers offering the work to members of the public on an individualized basis; "the public" includes subsets of the general public, such as aficionados of tango music, or members of a particular performer's fan club. As is clear from the

[18] Ricketson & Ginsburg, *supra* note 7, at 12.54-12.61.

[19] WIPO Guide at 207-208.

> formulation "such a way that members of the public *may* access" (emphasis supplied), the right is triggered when the public is invited to access, rather than when any member of the public in fact *has* accessed. Equally importantly, the right applies to the "work"; it is not limited to "performances" of the work. Thus it covers making the work available both as download and as a stream.[20]

Professors Reinbothe and von Lewinski confirm that "the wording and also purpose of Article 8 WCT * * * aims at covering *all situations* involving an individual time and place of access." (Emphasis added.) They conclude that it makes "no difference" whether one uses "push-technology" or "pull-technology," each of which is fully covered under the broad meaning of communication to the public.[21]

Together, the Berne Convention and WCT cover all aspects of the Aereo service. The "Watch" function in which performances are streamed to members of the public over the Internet is a communication to the public which is required to be protected under Berne and through the opening clause of WCT Art. 8. The

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[20] Jane C. Ginsburg, *Recent Developments in U.S. Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?,* Revue Internationale du Droit d'Auteur 37 (2008); *see also* Ricketson & Ginsburg, *supra* note 7, at 12.50; Goldstein & Hugenholtz, *supra* note 5, at 335.

[21] Reinbothe & von Lewinski, *supra* note 12, at 110. *See also* Ficsor, *The Law of Copyright and the Internet* at 405; J.A.L. Sterling, *World Copyright Law* 9.33 (2008).

"making available" wording in the latter part of WCT Art. 8 removes any doubt that the "Record" function is covered, as it permits members of the public to access works from a place and at a time individually chosen by them, at the convenience of the person receiving the transmission.[22]

Member states may comply with the obligation to provide a making available right through a variety of means. They may do so either by including it as part of their communication rights, by having a separate free standing right of making available, or, for those countries like the United States which have applied the distribution right to transmissions of digital copies, through a combination of a right of public performance and a right to digitally distribute copies. This "umbrella solution" was adopted at the urging of the United States during the drafting period.[23]

The United States took the path of implementing the communication to the public right, including the making available right, by using its existing public performance and distribution rights, depending on

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[22] Pet. App. 7a (describing Aereo's functions); Ricketson & Ginsburg, *supra* note 7, at 12.40 (confirming Berne 11*bis,* 14 and 14*bis* application to retransmissions), 12.51-12.52 and 12.56-12.61 (confirming WCT application to on-demand digital transmissions of broadcasts); von Lewinski, *supra* note 7, at 5.138, 17.72-17.78; Goldstein & Hugenholtz, *supra* note 5, at 335-336.

[23] Ricketson & Ginsburg, *supra* note 7, at 12.59; Ficsor, *The Law of Copyright and the Internet* at 4.130, 4.135, 4.140; Reinbothe & von Lewinski, *supra* note 12, at 108; WIPO Guide at 209.

the circumstances surrounding a particular communication. It thereby avoided having to amend the Copyright Act to establish a new right of making available for works.[24]

There is compelling evidence that both Congress and the Executive Branch were satisfied that Article 8 was fully consistent with U.S. law. While the WCT and WPPT were ratified by the required two-thirds majority of the Senate, the President could not deposit instruments of ratification with WIPO until the U.S. enacted domestic legislation implementing the treaties. *See* S. Treaty Doc. No. 105-17, at III (1997).

Accordingly, it was necessary for both the House and the Senate to hold extensive hearings, draft legislation, and commission committee reports.

While the Senate Report confirmed that "[w]ith this constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials," it did *not* recommend any changes to exclusive rights in

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[24] Ginsburg, *Recent Developments, supra* note 21, at 37; U.S. Dep't. of Commerce*, Copyright Policy, Creativity, and Innovation in the Digital Economy* 14-16 (July 2013); Ficsor, *The Law of Copyright and the Internet* at 496-504; David O. Carson*, Making the Making Available Right Available: 22nd Annual Horace S. Manges Lecture, February 3, 2009,* 33 Colum.-VLA J.L. & Arts 135, 143-148, 150-151 (2010); Jane C. Ginsburg, *Aereo in International Perspective: Individualized Access and U.S. Treaty Obligations*, Media Inst., Feb. 18, 2014 ("*U.S. Treaty Obligations*").

order to implement the WCT's "broad right of communication to the public that includes the Internet." S. Rep. No. 105-190, at 2, 10 (1998). Rather, as the House Report confirmed, "The treaties do not require any change in the substance of copyright rights or exceptions in U.S. law." H.R. Rep. No. 105-551, at 9.

Based on these conclusions, Congress enacted the WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 as part of the Digital Millennium Copyright Act of 1998, 105 Pub. L. 304, §§101-105, 112 Stat. 2860 (1998). President Clinton then deposited with WIPO ratifications of the WCT and WPPT on September 14, 1999.[25]

As with Berne, TRIPs, and the bilateral and regional treaties discussed directly below, the United States' accession to the WCT and WPPT required a Presidential determination, ratified by the Senate, that United States law fulfilled all treaty obligations. None of the domestic enactments altered the public performance right or the distribution right – nor did the United States add an explicit right of communication to the public or making available right – reflecting the determination of Congress and the Executive Branch that no legislative amendments were necessary to implement that obligation. *See generally*

[25] Ratification by the United States of America, WCT Notification No. 10, http://www.wipo.int/edocs/notdocs/en/wct/treaty_wct_10.html

Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860 (1998); Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809 (1994); Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853 (1988).

Under the principle stated by this Court in *Vimar Seguros*, 515 U.S. at 539, these determinations should be assigned great weight because they link to binding commitments with numerous international partners. They are not merely domestic in nature, but also have significant international repercussions.

III. THE DECISION BELOW PLACES THE UNITED STATES IN VIOLATION OF ITS BILATERAL AND REGIONAL AGREEMENTS

The United States is also bound internationally by a series of bilateral and regional treaty commitments similar in scope to its WCT commitment.

The first of these is the North American Free Trade Agreement (NAFTA), concluded with Canada and Mexico in 1992, signed into law on December 8, 1993, and effective January 1, 1994. *See* 19 U.S.C. §3311(a), approving NAFTA and the statement of administrative action submitted to the Congress on November 4, 1993.

NAFTA's intellectual property chapter extends Arts. 11, 11*bis,* 11*ter,* 14 and 14*bis* of Berne by requiring all parties to protect any communication of works to the public. The NAFTA protection applies to:

> any aggregation of individuals intended to be the object of, and capable of perceiving, communications or performances of works, regardless of whether they can do so at the same or different times or in the same or different places, provided that such an aggregation is larger than a family and its immediate circle of acquaintances or is not a group comprising a limited number of individuals having similarly close ties that has not been formed for the principal purpose of receiving such performances and communications of work.

NAFTA art. 1721(2) (defining "public"); *see also* art. 1705(2)(c) (requiring that authors be provided the right to authorize or prohibit the communication of a work to the public).

By focusing on communication of a work to an "aggregation of individuals *intended to be the object of* * * * communications or performances of works" regardless of whether those individuals are separated in time or space, NAFTA makes it clear that what counts is the communication to such individuals, and *not* the technological methods used to do so. (Emphasis added.) Further, it clarified that the relevant "public" need not be vast in size.[26] It applies as an

[26] *See* Ysolde Gendreau, *Intention and Copyright Law* in *Internet and Copyright Law* 1, 18 (1999) (explaining that NAFTA looks to the communicator's intention to reach out to "small groups of listeners or watchers in more or less private surroundings," which together "form a public."); von Lewinski,

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independent international commitment of the United States, which should not be departed from under the *Charming Betsy* canon.

After NAFTA, and following its accession to the WCT and WPPT on September 14, 1999, the United States engaged in a series of bilateral Free Trade Agreements (FTAs), each requiring the parties to provide a communication to the public right, including a making available right. For example, the 2005 U.S.-Australia FTA requires the parties to provide an:

> exclusive right to authorise or prohibit the communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.[27]

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supra note 7 at 11.11 (confirming that NAFTA was the first multilateral treaty specifically capturing on-demand uses and similar interactive communications within the communication right); 5.147 (explaining why "public" should not be undermined by a narrow interpretation).

[27] Free Trade Agreement, U.S.-Austl. Art 17.5, May 18, 2004, K.A.V. 7141. Similar FTAs requiring provision of the making available right have also been concluded with Bahrain, Sept. 14, 2004, K.A.V. 6866; Chile, Jun. 6, 2003, K.A.V. 6375; Jordan, Oct. 24, 2000, K.A.V. 5970; Morocco, Jun. 15, 2004, K.A.V. 7206; Oman, Jan. 19, 2006, K.A.V. 8673; Panama, Jun. 28, 2007, K.A.V. 9546; Peru, Apr. 12, 2006, K.A.V. 8674; Singapore, May 6, 2003, K.A.V. 6376 and South Korea, Feb. 10, 2011, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text. In 2004, the U.S. also negotiated a making available

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The U.S.-Australia FTA also provided that "neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal."[28] There is no question that retransmission technologies such as Aereo are encompassed within this treaty obligation.

Each of these FTAs required review by the Executive Branch and Congress of whether sections 101 and 106 of the Copyright Act provided the agreed-upon making available right. Before FTAs enter into force, the President must present to Congress (1) the final legal text of the FTA, (2) a statement of any administrative action proposed to implement the FTA, (3) proposed implementing legislation that conforms U.S. law to the agreement, and (4) an explanation as to how the implementing bill and proposed administrative action will change or affect existing law. 19 U.S.C. §§3805(a)(1)(C), (a)(2)(A).

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right in Art. 15.6 of the Dominican Republic-Central America-U.S. Free Trade Agreement (CAFTA-DR), K.A.V. 7157, entered into with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic.

[28] U.S.-Australia FTA at Art. 17.4.10(b). Similar prohibitions exist in the Bahrain FTA at 14.4.10(b); South Korea FTA at 18.4.10(b); Morocco FTA at 15.5.10(b); Oman FTA at 15.4.10(b); Panama FTA at 15.5.10(b); Peru FTA at 16.7.9; Singapore FTA at 16.4(2)(b); CAFTA-DR at 15.5.10(b).

In respect of the U.S.-Australia FTA, the President confirmed that "No statutory or administrative changes will be required" to implement the Intellectual Property Rights chapter dealing with*, inter alia,* the making available right and the prohibition against the unauthorized retransmission of television signals on the Internet.[29] Congress then passed, and the President signed, the U.S.-Australia Free Trade Agreement Implementation Act, in which Congress approved the President's statement of administrative action containing the assurances with respect to making available. Pub. L. 108-286 at §101(a)(2), 118 Stat. 919 (2004). Like approvals have been provided in respect of the other bilateral FTAs requiring that a making available right be embodied in domestic law.[30]

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[29] *Statement of Administrative Action, U.S.-Austl. Free Trade Agreement,* http://waysandmeans.house.gov/media/pdf/australia/hr4579saa.pdf at 25-26.

[30] *See* §101(a)(2) of: U.S.-Bahrain Free Trade Agreement Implementation Act, Pub. L. 109-169, 119 Stat. 3581 (2006); U.S.-Chile Free Trade Agreement Implementation Act, Pub. L. 108-177, 117 Stat. 909 (2003); U.S.-Jordan Free Trade Area Implementation Act, Pub. L. 107-143, 115 Stat. 243 (2001); U.S.-Korea Free Trade Agreement Implementation Act, Pub. L. 112-141, 125 Stat. 428 (2011); U.S.-Morocco Free Trade Agreement Implementation Act, Pub. L. 108-302, 118 Stat. 1103 (2004); U.S.-Oman Free Trade Agreement Implementation Act, Pub. L. 109-283, 120 Stat. 1191 (2006); U.S.-Panama Trade Promotion Agreement Implementation Act, Pub. L. 112-143, 125 Stat. 497 (2001); U.S.-Peru Trade Promotion Agreement Implementation Act, Pub. L. 110-138, 121 Stat. 1455 (2007); U.S.-Singapore Free Trade Agreement Implementation Act, Pub. L. 108-178, 117 Stat. 948 (2003); Dominican Republic-Central America-U.S. Free

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Consequently, Congress has now enacted and the President has signed numerous laws recording Presidential confirmations that then-existing U.S. law provided a required making-available right. These confirmations should also be given deference.

IV. THE UNITED STATES ADOPTED A TECHNOLOGY-NEUTRAL PATH *PRIOR* TO ENTERING INTO THE INTERNATIONAL AGREEMENTS

Long before U.S. accession to the aforementioned international obligations, Congress faced the problem raised by Aereo and defined the exclusive copyright rights in technology-neutral terms so that they would continue to apply in the face of dramatic technological developments. The technologically neutral norms reflected in the agreements were adopted in United States copyright reforms before the United States made those commitments.[31]

Trade Agreement Implementation Act, Pub. L. 109-153, 119 Stat. 462 (2005).

[31] This reform effort dates at least to 1965, when a Report of the Register of Copyrights noted:

> Obviously no one can foresee accurately and in detail the evolving patterns in the ways author's works will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight, the bill should, we believe, adopt a general approach aimed at providing compensation to the author for future as well as present uses of his work that materially affect the value of his copyright. * * * A real danger to be guarded against is

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As this Court has recognized, the Copyright Act of 1976 was "the culmination of a major legislative reexamination of copyright doctrine." *Harper & Row Pubs., Inc. v. Nation Ent.,* 471 U.S. 539, 552 (1985).

One important trigger for this legislative re-examination involved *Fortnightly Corp. v. United Artists Tel., Inc.,* 392 U.S. 390 (1968) and *Teleprompter Corp. v. Columbia Broad. Sys., Inc.,* 415 U.S. 394 (1974), where this Court found that cable-television systems retransmitting distant broadcast television programs were not engaging in performances. *See also Twentieth Century Music Corp. v. Aiken,* 422 U.S. 151 (1975). Congress viewed these decisions as a "narrow construction of the word 'perform' in the 1909 statute," which was "completely overturned by the present bill and its broad definition of 'perform' in section 101." H.R. Rep. No. 94-1476, at 86-87.

While spurred chiefly by the *Fortnightly, Teleprompter* and *Aiken* trilogy, Congress was mindful of earlier cases in which unanticipated technological advances had led to gaps in protection.

> that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.

Staff of House Comm. on The Judiciary, 89th Cong., 1st Sess., *Copyright Law Revision PART 6: Supplementary Report of The Register of Copyrights on the General Revision of the U.S. Copyright Law*, 13-14 (Comm. Print 1965).

In confirming that "Copyright protection subsists in any tangible medium of expression, now known or later developed" under §102(a), the House Report explained that:

> This broad language is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith Publishing Co. v. Apollo Co.,* 209 U.S. 1 (1908), under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed.

H.R. Rep. No. 94-1476, at 52.

The expansive §101 definition of "perform" under the 1976 Act reflected the Berne Art. 11 provisions protecting performances "by any means or process," the Berne Art. 11*bis*, Art. 14 and Art. 14*bis* rights of communication to the public, and anticipated the WCT Art. 8 commitment to give rightholders the exclusive right of communication to the public including making available to the public of works "in such a way that members of the public may access these works from a place and at a time individually chosen by them." It did so by confirming that performances of works may be rendered "*either directly or by means of any device or process,* whether the members of the public capable of receiving the performance or display *receive it in the same place or in separate places and at the same time or at different times.*" (Emphasis added.) Likewise, the definition of the verb "transmit" confirmed that a performance or

display can be communicated "*by any device or process* whereby images or sounds are received beyond the place from which they are sent."[32] (Emphasis added.) The legislative history further confirms that, as of 1976, technological neutrality was desired, with the House Report confirming that the term "any device or process" was meant to capture "any sort of transmitting apparatus," including "techniques and systems not yet in use or even invented."[33]

The Second Circuit misinterpreted the Transmit Clause including by failing to construe it in accordance with the United States' treaty obligations. According to a leading scholar:

> Thus, "to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process" means to communicate the work in a way that members of the public can immediately listen to or view its performance, whether or not they are separated in space

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[32] This Court has previously observed that even before the United States acceded to Berne in 1989, the 1976 Copyright Act brought United States law into compliance with Berne standards in some respects. *See Eldred,* 537 U.S. at 195 (1976 Act aligned United States law with Berne with respect to term of copyright protection), 206 n.13 (isolationist approach rejected); *see also* H.R. Rep. No. 100-609, at 21 (1988), confirming that "It can safely be stated that Congress drafted and passed the 1976 Act with a 'weather eye' on Berne. * * * [M]any obstacles to adherence were removed by the 1976 revision and a willingness to modify further our laws in order to join the Union."

[33] H.R. Rep. No. 94-1476, at 63-64.

> or time. The Second Circuit deviated from the international norm by incorrectly reading "whether the members of the public capable of receiving the performance or display receive it in the same place, or in separate places and at the same time or at different times" as a limitation on the scope of the communication, rather than as confirmation of the coverage of individualized transmissions. The court compounded the error by rewriting "it" to mean a particular transmission from a particular copy of a performance, rather than adhering to the grammatical referent, the statutory phrase performance of the work – that is, a communication that permits the members of the public to view or listen to the work as it is being communicated to them. Only the latter reading of "it" corresponds to the scope of the right in both the U.S. statute and the WCT.[34]

In reviewing this case, this Court should thus appreciate that the concept of technological neutrality is a principle that was not only embraced by the United States through treaties, but was also long ago embedded within U.S. law as the result of a deliberate Congressional determination.

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[34] Ginsburg, *U.S. Treaty Obligations*; *see also* Mihály Ficsor, *The WIPO 'Internet Treaties' and Copyright in the "Cloud"* 17-18 ALAI Congress, Kyoto (Oct. 16-18, 2012), http://bit.ly/1fnP0WX

V. INTERNATIONAL CASE LAW CONFIRMS THE BREADTH OF THE TRANSMIT CLAUSE

In interpreting treaty text or to support its reading, the Court may also turn to authorities from foreign jurisdictions that have confronted the question before the Court. *Abbott v. Abbott,* 560 U.S. ___, 130 S. Ct. 1983, 1993-1994, 2007 (2010). Such decisions have been rendered in the European Union and Canada, each with direct reference to the multilateral treaties that also bind the United States.

In the *TVCatchup* case, the Court of Justice of the European Union (CJEU) considered a service that permitted its users to receive, via the Internet, 'live' streams of free-to-air television broadcasts. As in this case, viewers could obtain access only to content which they were already legally entitled to watch. As well, the defendant's server allowed only a "one-to-one" connection for each subscriber whereby each individual subscriber established his or her own internet connection to the server and every data packet sent by the server onto the internet was addressed to only one individual subscriber. Case C-607-11, *ITV Broadcasting Ltd. v. TVCatchup Ltd.,* 2013 ECR I-___, [2013] 3 C.M.L.R. 1 (CJEU), ¶9-10, 18(2)(a).

The CJEU was called upon to interpret Art. 3(1) of the InfoSoc Directive,[35] which incorporates Art. 8 of the WCT by requiring that:

> Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

It also considered Recital 23 to the Directive, which explains that the right of communication to the public:

> should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover *any* such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.

(Emphasis added.)

The CJEU noted that a terrestrial broadcast was being converted into technical means different from that of the original communication, an act that would

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[35] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 O.J. (L.167) 10.

require permission if to a "public." *Id.* at ¶26, 39.[36] It rejected the view that the "one-to-one" nature of the transmissions could convert a "public" activity into a plurality of individual and private communications.

In construing the term "public," it held that regard must be paid to "the cumulative effect of making the works available to potential recipients * * * it is in particular relevant to ascertain the number of persons who have access to the same work at the same time and successively." *id* at ¶33. Accordingly:

> it is irrelevant whether the potential recipients access the communicated works through a one-to-one connection. That technique does not prevent a large number of persons having access to the same work at the same time.

Id. at ¶34.

In so concluding, the CJEU relied on its earlier *Rafael Hoteles* decision. This decision is notable because it concludes, in harmony with *Charming*

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[36] At ¶39, the CJEU found that when a broadcast is retransmitted using a "different technical means" – that is, different than the means originally used to transmit it, such as from terrestrial to Internet – it is not necessary to consider whether the retransmission reaches a "new public." This distinguishes *TVCatchup* from the recent CJEU decision in Case C-466/12, *Svensson v. Retriever Sverige AB,* 2014 ECR I- ___ (February 13, 2014), a linking case involving the "same technical means," where the CJEU found at ¶24 that providing an ordinary hyperlink to a file posted at a website by the copyright holder made the file available to the public, but not a "new public."

Betsy, that "Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement." Case 306/05, *Sociedad General de Autores y Editores de Espana (SGAE) v. Rafael Hoteles SA,* [2006] ECR I-11519, [2006] All ER (D) 103 (CJEU), ¶35. With that principle in mind, the CJEU held that the communication to the public right "must be interpreted broadly" in order to protect authors and allow them to obtain "an appropriate reward for the use of their works." *Id.* at ¶36. It considered the cumulative economic effects of making the works available to potential television viewers, and refused to interpret Article 8 of the WCT in a way that would render it "meaningless." *Id.* at ¶39, 43, 50-51.

In February, the CJEU again affirmed a broad and technologically neutral interpretation of the communication to the public right, confirming that "the concept of 'communication' must be construed as referring to any transmission of the protected works, irrespective of the technical means or process used." Case C 351/12, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v. Léčebné lázně Mariánské Lázně a.s.*, [2014] ECR 1-___ (February 27, 2014).

Similarly, the Supreme Court of Canada recently construed Article 8 of the WCT in the broadest possible terms. In *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*,

2012 SCC 35, the Supreme Court of Canada was called upon to decide whether music streamed on demand by separate transmissions to individual subscribers over the Internet was a communication to the public.[37]

The appellants in *Rogers* adopted the *Cablevision*/*Aereo* position of contending that "each transmission must be analyzed on its own, as a separate transaction, regardless of whether another communication of the same work to a different customer may occur at a later point in time." *Id.* at ¶27.

The Supreme Court of Canada unanimously rejected this stance. It concluded that viewing the question from the perspective of the recipient of each transmission would "produce arbitrary results," and thus create an incentive to avoid copyright simply by executing a task serially rather than through a mass transmission. In its view, "If the nature of the activity in both cases is the same, albeit accomplished through different technical means, there is no justification for distinguishing between the two for copyright purposes." *Id.* at ¶29; *see also* ¶40. "Focusing on each individual transmission loses sight of the true character of the communication activity in question and makes copyright protection dependent

[37] A stream is a transmission of data that allows the user to listen to or view the content transmitted at the time of the transmission, resulting only in a temporary copy of the file on the user's hard drive. *Id.* at ¶1.

on technicalities of the alleged infringer's chosen method of operation." *Id.* at ¶30.[38]

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[38] Although the Supreme Court of Canada declined to follow *Cablevision*, partly on the basis of differences between the Canadian communication right and the U.S. Transmit clause, *id.* at ¶50-51, the Court clearly rejected the arguments based on *Cablevision* that would prevent individual transmissions of the work from being communications that are to "the public." The *Rogers* decision focuses on "the true character of the communication activity in question," and rejected an approach that did not provide "principled" copyright protection. *Id.* at ¶30, 40. It is also noteworthy that the Japanese Supreme Court also rejected the "one to one" argument in the "Maneki TV" case, *NHK (Japan Broadcasting Corporation), et al. v. Nagano Shōten Co. Ltd.* (65-1 Minshū 121, Case No. 653 (ju) of 2009, January 18, 2011). It found that one-to-one transmissions of television programming over the Internet to individual customer's personal viewing devices were to the "public" under Article 23 of the Japanese Copyright Act which grants the author "the exclusive right to effect a public transmission of his work (including, in the case of automatic public transmission, making his work transmittable)."

In Australia, the Full Court of the Federal Court adopted a similar position in *National Rugby League Investments Pty. Ltd. v. Singtel Optus Pty. Ltd.* [2012] FCAFC 59, although its ruling was based on the reproduction right. It ruled that a communications provider was jointly and severally liable with its subscribers for infringement of the reproduction right by recording free to air television programs which were then used to transmit the programming for viewing at the time and place of the subscriber's choosing on a mobile device or personal computer. *See Telstra Corporation Limited v. Australasian Performing Right Association* (1997), 146 ALR 649, 656-659, 686-695 (High Court of Australia found music on hold was "to the public" even though it was transmitted to each caller individually by means of his or her mobile telephone and could be received in private or domestic circumstances.).

In so concluding, the Court considered the obligations flowing between the United States and Canada via the Canada-U.S. Free Trade Agreement, which required both parties to implement a technologically neutral communication to the public right to deal with evolutions in cable technologies. *Id.* at ¶37. In remarkably similar language to the House and Senate reports in the 1976 U.S. reform, the Court affirmed that "the *Copyright Act* should continue to apply in different media, including more technologically advanced ones. . . . [I]t exists to protect the rights of authors and others as technology evolves." *Id.* at ¶39, citing *Robertson v. Thomson Corp.*, 2006 SCC 43 at ¶49.

Although Canada was not a WCT member at the time of the *Rogers* decision, the Court also assessed whether its approach was consistent with its norms. It concluded that the WCT "resolves an ambiguity as to whether the old communication to the public rights [under the Berne Convention] accommodated or excluded 'pull technologies'" and made it clear that it "targets on-demand transmissions" regardless of whether members of the public are "separated both in space and in time." *Id.* at ¶46, 48.[39] Accordingly, the

[39] In so concluding, the Supreme Court of Canada cited Ricketson & Ginsburg, *supra* note 7 at 12.57, and Jane C. Ginsburg, *The (New?) Right of Making Available to the Public*, in *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish,* 234, 246 (David Vaver and Lionel Bently, eds. 2004).

Supreme Court was satisfied that its interpretation was consistent with an agreement which Canada had signed but not yet ratified.

The import of the *Rogers* decision is twofold. The first crucial point is that it locates technological neutrality in treaty commitments with the United States that tracked the 1976 reforms that reversed *Fortnightly*, *Teleprompter* and *Aiken*. This is another instance in which the doctrine of technological neutrality was an innovation *exported* by the United States to its trading partners, and not vice-versa. The second crucial point is the clear unwillingness of the Canadian Supreme Court to accept a situation "where the existence of copyright protection depends merely on the business model that the alleged infringer chooses to adopt rather than the underlying communication activity." *Id.* at ¶40. Faced with the same problem, and with international comity in mind, this Court should adopt the same solution.

CONCLUSION

Aereo's use of thousands of antennas to make over-the-air broadcasts available to members of the public does not transform them into private performances merely because they are accessed by members of the public at a time or place of their choosing. When all is said and done, Aereo's audience is the general public, notionally anyone able to pay to have broadcasts streamed over the Internet.

The statutory language in the Copyright Act, its legislative history, and treaty history make clear that Congress intended to enact a broad technologically neutral public performance right that would not leave open the loophole argued for by Aereo. It did so by clarifying that a public performance may be made by transmitting or otherwise communicating a performance of a work "by means of any device or process" *regardless* of whether the members of the public "receive it in the same place or in separate places and at the same time or at different times." That is the only conclusion that is consistent with the United States' international obligations. Viewed against this entire backdrop, the Second Circuit's decision in *Aereo* cannot stand.

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APPENDIX

LIST OF AMICI CURIAE

This *amicus* brief is joined by the following international copyright scholars and associations:

International Copyright Scholars*

Amicus Professor F. Jay Dougherty is a tenured professor at Loyola Law School Los Angeles, and Director of its Entertainment & Media Law Institute. He teaches Copyright Law and is the author of published articles on the subject in the U.S., Europe and China, as well as an article about comparative right of publicity laws, among others. He teaches International Copyright & Neighboring Rights at the Loyola International IP Institute in London, and international and comparative Entertainment Law at the Munich Intellectual Property Law Center, and in Paris and London. He is the Co-Editor in Chief of the Journal of the Copyright Society of the USA, and co-author of an Entertainment Law casebook. A former President of the Los Angeles Copyright Society, he has also been a Trustee of the Copyright Society of the USA.

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Amicus Dr. Mihály Ficsor was Assistant Director General of the World Intellectual Property Organization (WIPO) during the preparation and adoption of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty and played a decisive role in the working out and adoption of the provisions on a technology-neutral general right of communication to the public. Since then he has published a number of books and articles on this topic. Dr. Ficsor is currently the Chairman of the Central and Eastern European Copyright Alliance (CEECA), a professional organization with permanent observer status at WIPO. The Alliance's objective is to promote well-balanced but effective copyright protection in that part of Europe where the creators and small- and medium-size producers are particularly vulnerable to online infringements.

Amica Professor Ysolde Gendreau has been a professor at the Faculty of Law of the Université de Montréal since 1991, where she teaches intellectual property law and competition law. Her main field of expertise is copyright law, especially comparative and international issues. She is a member of the Bar of Quebec. She has also taught at McGill University, Université de Paris II, Université de Paris XII, Université de Nantes, Université de Strasbourg III, Université de Lyon 2, University of Victoria (summer programme in Victoria and Oxford), University of San Diego (summer programme in Florence), and Monash University (Australia). She has published extensively, both in Canada and abroad. Among her more recent

publications are contributions to two books she has edited: *A Shifting Empire: 100 Years of the Copyright Act 1911* (2013) (edited with U. Suthersanen) and *Langues et droit d'auteur/Language and Copyright* (2009) (edited with A. Drassinower). She has been the President of ATRIP (Association for the Advancement of Teaching and Research in Intellectual Property) (2003-2005) and of ALAI Canada (2006-2011). She is a member of the Executive Committee of ALAI and an associate member of the International Academy of Comparative Law.

Amicus Justin Hughes is the William H. Hannon Professor of Law at Loyola Law School in Los Angeles, where he teaches intellectual property and international trade courses. From 2002 until 2013, he taught at Cardozo Law School in New York, where he remains a Senior Lecturer and Co-Director of the SIPO-Cardozo Program. From 2009 until 2013, Professor Hughes also served as Senior Advisor to the Undersecretary of Commerce for Intellectual Property. In that capacity, he was chief negotiator for the U.S. at the Diplomatic Conferences that completed the Beijing Treaty on Audiovisual Performances (2012) and the Marrakesh Treaty to Facilitate Access to Printed Works for the Blind (2013).

Amicus Professor Marshall Leaffer is Distinguished Scholar in Intellectual Property Law and University Fellow at Indiana University School of Law. He received his J.D. at the University of Texas and his LLM in Trade Regulation at New York University Law School. In addition to his law review

articles, he is the author of *Copyright Law: Cases and Materials* (2013), *Understanding Copyright* (2010), and *International Treaties on Intellectual Property* (1997). Before becoming a full time teacher, Professor Leaffer practiced trademark law in New York City with American Home Products Corporation, and the firm of Haseltine, Lake and Waters. He also served in the United States government as Attorney-Advisor in the United States Patent and Trademark Office, and as staff member with the General Counsel of the United States Copyright Office. He represents the United States on the International Executive Board of the Association Littéraire Artistique Internationale (ALAI), a non-governmental organization that defends authors' rights worldwide.

Amica Professor Silke von Lewinski is tenured at the Max Planck Institute for Innovation and Competition, Department of Intellectual Property and Competition Law, Munich and specializes in international and European copyright law. She is also Adjunct Professor at Franklin Pierce Center for Intellectual Property at the University of New Hampshire Law School, Concord, New Hampshire. Her book publications include *The WIPO Treaties 1996* (2002) (with J. Reinbothe); the treatise *International Copyright Law and Policy* (2008); *European Copyright Law* (2010) (with M. M. Walter et al.); and, as editor, *Copyright throughout the World* (2008, with annual updates). Dr. von Lewinski is also an Adjunct Professor at the Munich Intellectual Property Law Center, Munich. She has been a visiting professor at

many universities worldwide, including Paris XI, Toulouse 1; Université Laval, Québec, and University of Melbourne. She was the first Walter Minton Visiting Scholar at Columbia University School of Law, New York; the First Distinguished Visitor to the Intellectual Property Research Institute of Australia (IPRIA); and The Hosier Distinguished Visiting IP Scholar, DePaul University, Chicago, July 2005. Professor von Lewinski frequently has been an expert consultant for the European Commission, in particular regarding the WIPO Diplomatic Conference 1996 (preparation, and member of the EC delegation).

Amicus Professor Victor Nabhan has taught at Laval University (Canada) as a full-time professor since 1999. His areas of expertise are intellectual property, contract law and consumer protection. He has advised the Canadian Government with respect to the drafting of four revisions of the Copyright Act, as well as the Quebec Ministry of Culture on copyright matters. From 1999-2005, he served as a WIPO consultant, assisting a number of developing countries in drafting their copyright laws in compliance with TRIPS and/or WCT and WPPT. Since 2005, he has been a guest professor at the University of Ottawa (Canada), Osgoode Hall Law School (Toronto), Institut des Études Politiques (Paris) and Nottingham University (UK). He also acts as a consultant with different organizations and developing countries. He is Counsel with the law firm of Kimbrough and Associés (Paris) and Chairman of ALAI (Association Littéraire et Artistique Internationale). He has

authored a number of articles and publications and has exhibited as an occasional artist.

Amicus Professor Barry Sookman is the author of the leading six-volume treatise, *Sookman: Computer, Internet and E-Commerce Law* (1999-2013); *Copyright: Cases and Commentary on the Canadian and International Law,* co-authored with Steven Mason (2013); *Intellectual Property Law in Canada: Cases and Commentary,* co-authored with Steven Mason and Daniel Glover (2012); *Computer, Internet and E-Commerce Terms: Judicial, Legislative and Technical Definitions* (2001-2013); and *Sookman: Computer Law: Acquiring and Protecting Information Technology* (1989-1999). He is a contributing author to other books including Gordon Henderson *Copyright Law in Canada* (1994). He is a senior partner with McCarthy Tétrault LLP and is the former head of its Intellectual Property Group. He is also an adjunct Professor of intellectual property law at Osgoode Hall Law School in Toronto, Canada.

International Associations

Amicus International Federation of the Phonographic Industry (IFPI) represents the recording industry worldwide, with a membership comprising some 1300 record companies in 66 countries and affiliated industry associations in 55 countries. IFPI's mission is to promote the value of recorded music, campaign for the rights of record producers and expand the commercial uses of recorded music

worldwide. IFPI also represents the recording industry before courts, national legislatures, executive authorities and international organizations.

Amicus Alliance of Canadian Cinema, Television and Radio Artists (ACTRA) is the national organization of professional performers working in the English-language recorded media in Canada. ACTRA represents the interests of 22,000 members across Canada – the foundation of Canada's highly acclaimed professional performing community.

Amicus Asociación Mexicana de Productores de Fonogramas y Videogramas (Amprofon) represents, coordinates and defends the rights and common interests of producers of phonograms and videograms in Mexico; it is an IFPI member. Amprofon conducts the necessary negotiations and arrangements with national and foreign authorities, as well as with international organizations for the benefit of its members, regarding any matter of general or particular nature involving the interests of all or some of its members. The association studies and addresses issues related to promoting the development of the recording industry and fostering the development of music culture. It cooperates with the Government of Mexico in the regulatory process to protect the intellectual property rights of phonogram producers. Its members comprise 13 major and independent recording companies, having over 70% of the Mexican market.

Amicus Association Littéraire et Artistique Internationale du Canada (ALAI Canada) is the Canadian branch of ALAI, an international organization founded in Paris in 1878 by La Société des Gens de Lettres de France under the sponsorship of Victor Hugo. ALAI's efforts gave rise to the Berne Convention signed on September 9, 1886, established in view of protecting literary and artistic works. The Canadian branch was founded in 1978. ALAI's purpose is to promote and protect copyright as well as to study questions regarding the protection and applicability of copyright. ALAI Canada holds conferences and seminars. As well, it publishes and distributes documents dealing with copyright. These activities combine a strict scientific analysis with a practical approach to the various topics considered. They are available to specialists as well as to the public at large.

Amicus Australian Copyright Council (ACC) is an independent, non-profit organization. Founded in 1968, it has 24 members consisting of associations representing professional artists and content creators working in Australia's creative industries and Australia's major copyright collecting societies. In addition to providing advice and information on copyright, the ACC is an advocate for Australian copyright owners.

Amicus British Copyright Council (BCC) is a not-for-profit organization that provides a forum for discussion of copyright law and related issues at UK, European and International levels. The BCC is independent, receives no government funding and is

the only organization of its kind in the UK. The BCC aims to provide an effective, authoritative and representative voice for the copyright community. It represents those who create, hold interests in or manage rights in literary, dramatic, musical and artistic works, films, sound recordings, broadcasts and other material in which there are rights of copyright or related rights; and those who perform such works. In the UK the BCC is consulted by government departments, agencies and regulators. It follows copyright developments in the European Union and is an NGO Observer Member of the World Intellectual Property Organization. It maintains links with similar bodies in other countries.

Amicus Canadian Media Production Association (CMPA) represents the interests of Canadian screen-based media companies engaged in the production and distribution of Canadian English-language television programs, feature films, and new media content in all regions of Canada. The CMPA is also a founding member of the Canadian Retransmission Collective (CRC), which collects and distributes copyright royalties pursuant to a Canadian Copyright Board-approved tariff when Canadian independently-produced programs in over-the-air broadcast signals are retransmitted into distant Canadian markets by Canadian cable, satellite and telecommunications companies.

Amicus International Confederation of Societies of Authors and Composers (CISAC) is the umbrella organization representing collective management

organizations for authors worldwide. Founded in 1926, CISAC is a non-governmental, not-for-profit organization based in Paris, France, with regional offices in Hungary, Chile, Burkina Faso and China. CISAC counts 227 authors' societies as its members. These societies are based in 120 countries, including the US. Together, CISAC societies around the world represent over 3 million creators from all artistic disciplines including music, film, literature, drama and visual arts. The majority of royalties collected by CISAC societies on behalf of creators come from public performance and communication rights (75% of all royalties collected, for all categories of repertoire, around the world), hence CISAC's and its members' interests in these proceedings.

Amicus International Confederation of Music Publishers (ICMP) is the world trade association representing the interests of the music publishing community internationally. Constituent members of ICMP are music publishers' associations from Europe, Middle East, North and South America, Africa and Asia-Pacific. Included are the leading independent, multinational, and international companies and regional and national music publishers, mainly small and medium enterprises, throughout the world. As the voice and point of reference of music publishers, and the community of composers and songwriters, ICMP's mission is to increase copyright protection internationally, encourage a better environment for the music business, and act as an industry forum for consolidating global positions.

Amicus International Federation of Actors (FIA) represents some 80 trade unions, guilds and associations in more than 70 countries around the world voicing the interests of professional performers in the audiovisual sector. FIA serves as a membership forum to promote good practices and as an advocate of performers' social and economic rights internationally. FIA campaigns vigorously for the intellectual property rights of performers as they serve to enhance their livelihood and protect their reputation.

Amicus International Federation of Film Producers Associations (FIAPF) is a trade organization dedicated to the defense and promotion of the legal, economic and creative interests of film producers throughout the world. FIAPF's members are 33 national producers' organizations from 28 countries from Africa, Asia-Pacific, Europe, North and Latin America.

Amicus International Federation of Musicians (FIM), founded in 1948, is the international organization for musicians' unions, guilds and professional associations, with about 70 members in 60 countries throughout the world. FIM's main objective is to protect and further the economic, social and artistic interests of musicians represented by its member unions. To achieve that objective, FIM engages in a number of activities, including the promotion of national and protective legislation and other initiatives in the interests of musicians, working with collecting societies administering performers' rights, working with other international organizations in the

interests of member unions and of the profession, and close collaboration with the World Intellectual Property Organization (WIPO), which administers the Berne Convention for the Protection of Literary and Artistic Works, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, as well as with the International Labour Office (ILO) and UNESCO.

Amicus International Video Federation (IVF) unites associations representing companies active in all segments of the film and audiovisual sector in Europe. Their activities include the development, production, and distribution of films and audiovisual content as well as the publication of film and audiovisual content on digital media and in online channels.

Amicus Music Canada is a non-profit trade association that represents major music companies in Canada and a number of the leading Canadian independent recording and music distribution companies. Music Canada's members are engaged in all aspects of the recording industry, including the manufacture, production, promotion and distribution of music. Music Canada member companies actively develop and nurture Canadian talent throughout the world. Music Canada also works with some of the leading recording studios, live music venues, concert promoters, managers and artists in the promotion and development of its members' music.

Amicus Societies' Council for the Collective Management of Performers' Rights (SCAPR) is an international organization focused on the development of the practical cooperation between sound recording and audiovisual performers' collective management organizations. Founded in 1986 and with 50 collective management organization members from 40 countries, SCAPR's primary aim is to develop strategies, formats, and administrative systems to improve the exchange of data and performers' rights payments across borders.

Amicus Society of Composers, Authors and Music Publishers of Canada (SOCAN) is a not-for-profit organization that represents the Canadian performing rights of millions of Canadian and international music creators and publishers. SOCAN is proud to play a leading role in supporting the long-term success of its more than 100,000 Canadian members, as well as the Canadian music industry. SOCAN licenses more than 125,000 businesses in Canada and distributes royalties to its members and peer organizations around the world. SOCAN also distributes royalties to its members for the use of Canadian music around the world in collaboration with its peer societies.