

Nos. 13-55156, 13-55157, 13-55226 and 13-55228

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

FOX TELEVISION STATIONS, INC., et al.,

Plaintiffs-Appellees,

v.

AEREOKILLER LLC, et al.,

Defendants-Appellants.

(Caption Continued on Inside Cover)

Appeal from the United States District Court, Central District of California
Nos. 2:12-cv-06921-GW (JCx); 2:12-cv-06950-GW (JCx)
Hon. George H. Wu, United States District Judge

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

With the consent of all parties (9th Cir. R. 29-2(a)), *amici curiae* Paramount Pictures Corporation, Warner Bros. Entertainment Inc., Directors Guild of America (“DGA”), International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC (“I.A.T.S.E.”), Screen Actors Guild-American Federation of Television and Radio Artists (“SAG-AFTRA”), Writers Guild of America, West, Inc. (“WGAW”), Metro-Goldwyn-Mayer Studios Inc. (“MGM”) and the Independent Film & Television Alliance (“IFTA”) respectfully submit this brief supporting appellees.¹

Amici Paramount, Warner Bros. and MGM produce and/or distribute motion pictures and television programs. *Amicus* IFTA is the trade association for the independent film and television industry worldwide. The studio *amici* and IFTA’s members all depend on compensation from the public performances of their works to underwrite the significant costs of creating and disseminating movies and television shows.

Amici DGA, SAG-AFTRA, WGAW and I.A.T.S.E. represent the hundreds of thousands of men and women who write, direct, act in and provide below-the-

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

line services for motion picture and television content. The members' livelihoods depend on remuneration for the licensed use of the content that they work to create. This includes residuals and royalties—deferred compensation based on the continuing use of the creative works—as works are released in different media. Residuals and royalties are an important source of income for creative artists and help determine their eligibility for benefits such as health insurance and pensions.

All *amici* have a direct interest in the proper interpretation of public performance right.

SUMMARY OF ARGUMENT

Like Aereo, whose design (and name) it shamelessly copies, Aereokiller argues that because it uses thousands of mini-antennae rather than just one to capture broadcast signals, Aereokiller transforms its virtually live streaming of televised programs from a performance to an indisputably public audience into thousands of non-actionable private performances. If Aereokiller used a single reception antenna to capture the same content and retransmit it to thousands of internet subscribers, it is undisputed that Aereokiller would need licenses, just as numerous legitimate services like Hulu and Netflix negotiate for so they can stream copyrighted content to their internet subscribers. What Aereokiller is doing is not technological innovation. There is nothing innovative about having 10,000 antennae do the work of one in order to attempt to skirt a license requirement. This is a lawyer-driven attempt to use gimmickry and inefficient technology to evade

the public performance right. Dissenting from the Second Circuit's recent *Aereo* decision, Judge Chin called this type of system for what it is: "a sham" and "a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law." *WNET, Thirteen v. Aereo, Inc.*, ___ F.3d ___, 2013 WL 1285591, at *15 (2d Cir. Apr. 1, 2013) (Chin, J., dissenting). The district court in this case likewise saw through Aereokiller's sham. It correctly held that Aereokiller was blatantly violating the public performance right and should be enjoined so as to "prevent[] the misappropriation of skills, creative energies, and resources which are invested in the protected work[s]." *Fox Television Stations, Inc. v. Barrydriller Content Sys., PLC*, ___ F. Supp. 2d ___, 2012 WL 6784498, at *7 (C.D. Cal. Dec. 27, 2012) (quotation omitted). *Amici* respectfully urge this Court to affirm.²

Aereokiller is trying to get away with retransmitting live performances of copyrighted works to a mass public audience without obtaining or paying for the licenses that the law requires for such retransmissions. This is contrary to Congress's intent as set forth in the Copyright Act. The Act is clear that a public performance includes the "transmi[ssion of] ... a performance ... of the [copyrighted] work ... to the public, *by means of any device or process*, whether the members of the public capable of receiving the performance ... receive it in the

² *Amici* believe that plaintiffs are correct that the preliminary injunction should be nationwide, but *amici* do not address that issue in this brief.

same place or in separate places and at the same time or at different times.” 17 U.S.C. § 101(2) (emphasis added) (definition of “[t]o perform ... a work ‘publicly’”) (the “Transmit Clause”). The Act does not distinguish between the type of technology one uses to transmit performances to the public—“any device or process” counts—which is why from radio to television to cable to satellite, a license is required. *Id.* (emphasis added). The fact that Aereokiller uses a different “device or process”—the internet—to effect its transmissions makes no difference. Public performances transmitted via the internet also require a license. *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 278-79 (2d Cir. 2012). Businesses that retransmit broadcast programming without paying the required license fees “effectively wrest control away from program producers who make significant investments in content and who power the creative engine in the U.S. economy.” *Id.* at 283 (quoting U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act Section 109 Report, at 188 (2008) (“SHVERA Report”)).

Aereokiller nevertheless insists that this Court should validate its disingenuous attempt to avoid obtaining licenses by adopting the Second Circuit’s interpretation of the public performance right in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (“*Cablevision*”) and *Aereo*. The Court should resist Aereokiller’s invitation. The court in *Cablevision* effectively rewrote the Transmit Clause to hold that the transmissions of thousands of

performances of exactly the same works to widely dispersed public audiences were private, not public, performances. The court's holding did *not* involve a service like Aereo's, which makes live broadcast retransmissions. *Cablevision* involved a very different service that was claimed—and found to be—functionally indistinguishable from a set-top video-cassette recorder (“VCR”) or digital video recorder (“DVR”) used for “time-shifting” purposes. The court held that each playback at a later time from what the court described as “a single unique copy produced by” the receiving subscriber was a private performance. *Cablevision* expressly said that its reading of the Transmit Clause provided no license for other services that imitated *Cablevision*'s playback functionality. The majority in *Aereo*, however, did not heed that limitation. Notwithstanding its recognition of *Cablevision*'s shortcomings, the majority believed that *Cablevision* did not leave it room to find Aereo liable for violating the public performance right. As a result, the *Aereo* majority held that a service that has no retransmission license can simply capture broadcast signals and retransmit them instantaneously to thousands of paying subscribers, and so long as the service is using thousands of antennae rather than one, the public performance right is not implicated.

Aereo vividly shows why *Cablevision*'s misadventure in rewriting the public performance right was misguided from the start. This Court, unlike the *Aereo* majority, is not bound by *Cablevision*'s erroneous interpretation of the Copyright

Act. The Court should apply the Transmit Clause as Congress wrote it and as the Clause has been interpreted by this Court and others. Under the proper interpretation of the Transmit Clause, the district court's conclusion that Aereokiller makes unauthorized public performances is clearly correct.

The proper construction of the public performance right is not a matter of mere semantics. The public performance right is an important and valuable right that Congress has reserved to copyright owners. The fees from licensed public performances provide just remuneration to those who underwrite the considerable expense of creating copyrighted works in the first instance. Those fees also support the funding of the salaries and pensions of the thousands of men and women who work in all facets of the content-creation chain. If not enjoined, Aereokiller's service and others that would engage in similar technological gimmickry threaten to undermine the incentives for creating copyrighted content and to usurp new and emerging markets for lawfully disseminating that content.

Aereokiller and its *amici* assert that adopting *Cablevision*'s misconstruction of the public performance right is essential to preserve the "cloud computing" industry and technological innovation. These arguments are unfounded, exaggerated and deeply cynical. The true threat to innovative content-dissemination systems comes from services like Aereokiller, which unabashedly

copies a technologically inefficient design for the purpose of end-running the public performance right. The preliminary injunction should be affirmed.

ARGUMENT

I. This Court Should Not Adopt the Second Circuit’s Erroneous Construction of the Public Performance Right

A. Aereokiller Clearly Infringes the Public Performance Right

This Court can and should resolve this case with a straightforward reading of the public performance right and well-reasoned precedent supporting it. Whether Aereokiller’s unlicensed internet streaming of thousands of performances of exactly the same copyrighted works renders it liable for infringing the public performance right turns on the answers to two questions:

First, is Aereokiller “transmitting” performances of copyrighted works, *i.e.*, is Aereokiller “communicat[ing]” such performances “by any device or process whereby images or sounds are received beyond the place from which they are sent”? 17 U.S.C. § 101 (definition of “[t]o ‘transmit’”). As this Court has explained, where a party uses a device or process “to transmit a signal, employs a central transmission device, and the signal is received at places beyond the place from which it is sent,” that activity “falls squarely within the transmit clause of the Act.” *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278, 282-83 n.7 (9th Cir. 1989) (“*PREP*”). The fact that Aereokiller uses the internet rather than wires or the broadcast spectrum to communicate its

performances does not change the indisputable fact that Aereokiller is “transmitting” performances of copyrighted works. *See* *ivi*, 691 F.3d at 278-79 (internet streams transmit public performances).

Second, is Aereokiller transmitting such performances “to the public”? 17 U.S.C. § 101 (definition of “[t]o perform or display a work ‘publicly’”). Under the Transmit Clause, “the public” refers to an audience that is “capable of receiving the performance” and that is comprised of “a substantial number of persons outside of a normal circle of a family and its social acquaintances.” *Id.*; *see also* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.14[C][2], at 8-192.6 & n.64.1 (Matthew Bender, Rev. Ed.). The fact that members of the potential audience can receive the performances “in separate places” or “at different times” does not change the public nature of the transmitted performances. 17 U.S.C. § 101; *see also* *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984) (“[T]he transmission of a performance to members of the public, even in private settings such as hotel rooms or Maxwell’s viewing rooms, constitutes a public performance.”); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991) (“[W]hether the number of hotel guests viewing an On Command transmission is one or one hundred, and whether these guests view the transmission simultaneously or sequentially, the transmission is still a public performance since it goes to members

of the public.”). Indeed, a performance is “to the public” under the Transmit Clause “even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission.” H.R. Rep. No. 94-1476, at 64-65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678 (“1976 House Report”).

Aereokiller obviously transmits performances “to the public.” As Judge Chin explained, when the Aereo service “retransmit[s] ... the Super Bowl ‘live’ to 50,000 subscribers,” the transmissions “are very much *public* performances.” *Aereo*, 2013 WL 1285591, at *15 (Chin, J., dissenting). The same is exactly true of performances that Aereokiller would transmit using exactly the same technology: they are performances “to the public.”

Under the straightforward reading of the public performance right and longstanding precedent construing that right, Aereokiller’s liability is clear.

B. *Cablevision* Adopted a Tortured and Unprecedented Interpretation of the Public Performance Right

Aereokiller’s entire response to the foregoing analysis rests on the Second Circuit’s rewriting of the public performance right in *Cablevision*. *Cablevision*’s misinterpretation of the law reflects an attempt to make the statute fit a particular result. *Cablevision*’s reading of the public performance right does great violence to the text of the Copyright Act and undermines Congress’s clear intent. This Court should not repeat the Second Circuit’s mistake.

Cablevision involved a so-called “remote-storage” digital video recorder (“RS-DVR”) service, which allowed subscribers to request copying of shows on Cablevision’s central servers and the later replay of those shows back to the requesting subscribers. *See Cablevision*, 536 F.3d at 124-25. Cablevision argued that because it had licenses to retransmit content to its subscribers, the RS-DVR was functionally equivalent to VCRs and set-top DVRs that permit users to “time-shift” programs. In all these cases, Cablevision argued, the fact that Cablevision’s subscribers had the right to watch the programs when originally aired (because their cable provider, Cablevision, was licensed to retransmit those programs) meant the subscribers should also have the right to use a recording and playback device to watch the programs at a more convenient time. Cablevision insisted that the only difference between the RS-DVR and VCRs/set-top DVRs was the location of the recording and playback device. *Id.* at 123-25. Cablevision argued that its potential liability for “Creating the Playback Copies” (based on the Copyright Act’s reproduction right) and “Transmission of RS-DVR Playback” (based on the Act’s public performance right) should be no different than the potential liability of a VCR or set-top DVR manufacturer. *Id.* at 130, 134.

The Second Circuit agreed. Regarding Cablevision’s liability for copying the shows, the court held that only the individual end-user—whether of a VCR or the RS-DVR—who pressed the “record” button engaged in the “volitional”

conduct that the court held was required for direct liability. *Id.* at 131-33. The court said that Cablevision might be subject to secondary liability for its subscribers' direct infringements (there was no secondary liability claim in the case), but that Cablevision's liability under such a claim would have to be judged under the standards applied to VCR manufacturers for their customers' copying. *See id.* at 132-33 (discussing *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 437-42 (1984)).

Having concluded that Cablevision was not directly liable for the creation of the "Playback Copies," the court had to decide whether Cablevision nevertheless was liable when it played the copies back to the subscribers as intended. It was undisputed, of course, that subscribers requested the copies to be made so they could be watched at a later time. The court declined to resolve Cablevision's contention that its "volitional" conduct argument applied to the public performance right, *i.e.*, that Cablevision's subscribers were transmitting performances to themselves. As the court observed, "[t]he definitions that delineate the contours of the reproduction and public performance rights vary in significant ways[.]" and so the court's reproduction right holding did "not dictate a parallel conclusion" on the public performance right. *Id.* at 134. The court nevertheless held that Cablevision's transmissions over and over of the same performances of exactly the

same works to huge numbers of subscribers were not performances “to the public”, but rather were numerous, separate *private* performances.

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

Cablevision’s reading of the public performance right has been aptly described by a leading copyright scholar as “peculiar if not perverse.” Jane C. Ginsburg, *Recent Developments in US Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?*, Colum. Pub. L. & Legal Theory Working Papers, No. 08158 at 26 (2008), *available at* http://lsr.nellco.org/columbia_pllt/08158 (last visited May 2, 2013) (“Ginsburg”). The Transmit Clause defines a “public”

performance as the transmission of “a *performance ... of the work*,” not the performance of an individual *transmission*. 17 U.S.C. § 101 (emphasis added). “The transmission does not *itself* ‘perform’ (as in ‘play’ or ‘render’) the work; it communicates a work so that its performance will be perceived as the member of the public receives the communication.” Ginsburg, *supra*, at 26 (footnote omitted). As the district court in this case correctly observed: “Very few people gather around their oscilloscopes to admire the sinusoidal waves of a television broadcast *transmission*. People are interested in watching the *performance* of the work.” *Fox Television Stations*, 2012 WL 6784498, at *4. *Cablevision*’s holding that “transmissions” are the “performances” that count under the Transmit Clause was plainly wrong.

Cablevision’s interpretation of the Transmit Clause, taken literally, also reads out of the Transmit Clause the provision that transmissions of performances are “to the public” “whether the members of the public capable of receiving the performance ... receive it ... *at different times*.” 17 U.S.C. § 101 (emphasis added). By definition, non-simultaneous recipients cannot receive the same transmission stream, so the Second Circuit’s interpretation rendered the highlighted words meaningless. The Second Circuit tried to rationalize this result on the ground that Congress intended the “capable of receiving” portion of the Transmit Clause to *narrow* the potential public audience, and thus the scope of the

public performance right. *Cablevision*, 567 F.3d at 137. But the court had Congress's intent backwards. Congress intended the "capable of receiving" portion of the Transmit Clause "to clarify that a transmission is still 'to the public' even if its receipt is individualized." Ginsburg, *supra*, at 26 (emphasis added) (citing 1976 House Report at 64-65).

The *Cablevision* court asserted that its holding was consistent with the Third Circuit's decision in *Redd Horne*, because in that case multiple transmissions were made from the same copy, whereas in *Cablevision*, each separate transmission was made from a different user-requested copy. *Cablevision*, 536 F.3d at 138. In fact, no two transmission streams from the same individual copy of a work will be identical. Hence, if *Cablevision*'s interpretation of the Transmit Clause were applied literally, that case could not possibly be squared with *Redd Horne*; each individual transmission stream would have been a "private" performance under *Cablevision*'s rationale. Even assuming that *Cablevision*'s one copy/many copies rationale was a distinction of convenience, the distinction produces perverse incentives. It means that the more technologically inefficient the content delivery service—by having thousands of copies, each of which is assigned inflexibly to one user—the better the service's chances for avoiding liability under the public performance right. Perhaps recognizing the tenuousness of its analysis—and the incentives that its holding could create—the Second Circuit was careful to limit its

ruling. The court emphasized several times that the only copy of a work used to effect any transmission to a subscriber was the “copy made by that subscriber,” and that this fact narrowed the potential audience for the transmissions. *Id.* at 137; *see also id.* at 138, 139. And, at the conclusion of its opinion, the court wrote: “This holding, we must emphasize, does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies.” *Id.* at 139.³

Limited or not, the Second Circuit’s interpretation of the public performance right was fundamentally flawed and would not be entitled to this Court’s respect, even if *Cablevision* was the Second Circuit’s last word on the subject.

³ In recommending that the Supreme Court deny the *Cablevision* plaintiffs’ petition for certiorari, then-Solicitor General Kagan acknowledged that “some aspects of the Second Circuit’s reasoning on the public-performance issue are problematic,” and “*could threaten to undermine copyright protection in circumstances far beyond those presented [in the *Cablevision* case], including with respect to [video-on-demand (“VOD”)] services or situations in which a party streams copyrighted material on an individualized basis over the Internet.”* Brief for the United States as Amicus Curiae, *Cable News Network, Inc. v. CSC Holdings, Inc.*, No. 08-448, at 20-22 (emphasis added), available at www.justice.gov/osg/briefs/2008/2pet/6invt/2008-0448.pet.ami.inv.pdf (last visited May 2, 2013). The Solicitor General, however, cited the Second Circuit’s admonition about the limits of its holding as a basis for urging denial of certiorari on the public-performance issue. *Id.* at 22. The Supreme Court denied certiorari. *See* 129 S. Ct. 2890 (2009).

C. *Aereo* Compounded the Errors of *Cablevision*'s Misconstruction of the Public Performance Right

Cablevision, of course, was not the Second Circuit's last word. In *Aereo*, a two-Judge majority held that *Cablevision*'s public performance holding was not limited to devices that played back copies of programs created for ostensible time-shifting purposes. Rather, the court held that *Cablevision* extended to a service that initiated copying and virtually simultaneous retransmissions, even though the service had no retransmission license. *Aereo* thus extends *Cablevision*'s holding to its most extreme conclusion. The decision provides further proof that *Cablevision*'s construction of the public performance right was wrong from the start.

It bears repeating that *Aereo* (like *Aereokiller*, but unlike *Cablevision*) had no license to retransmit programs broadcast on over-the-air television. Its subscribers therefore had no right to use *Aereo*'s facilities to capture the broadcast signals transmitting those programs in the first instance. *Aereo* nevertheless argued that because it utilized *Cablevision*'s one-copy-assigned-to-one-subscriber transmission system, *Aereo* could retransmit not time-shifted programs but essentially live broadcasts.

The *Aereo* majority accepted this argument, notwithstanding the fact that there were many ways to distinguish *Cablevision*. *Cablevision*, as noted, expressly said that its holding did not automatically apply to any service that transmitted

performances from individual copies to associated subscriber accounts.

Cablevision, 536 F.3d at 139. And Aereo's service was readily distinguishable from *Cablevision*'s, because the latter had licenses to retransmit content to its subscribers whereas Aereo had no such licenses. The majority, however, found this and other distinctions to be irrelevant. *See Aereo*, 2013 WL 1285591, at *9.

The *Aereo* majority opinion was striking not simply because it took *Cablevision*'s errors to their logical (but extreme) conclusion, but because the majority did so even though it acknowledged the *illogic* of the *Cablevision* approach. Thus, the majority conceded that *Cablevision*'s emphasis on transmissions being made from one copy (one public performance) as opposed to multiple copies (multiple private performances) was "in some tension with" *Cablevision*'s conclusion "that the relevant inquiry under the Transmit Clause is the potential audience of the particular transmission," since each transmission from a single copy of a work will be different than any other transmission from the same copy. *Id.* at *8 n.11. The majority also recognized that, if *Cablevision*'s holding that each transmission is a performance was applied consistently to each such transmission, this "would essentially read out the 'different times' language" from the Transmit Clause. *Id.* And, in response to the plaintiffs' argument that holding Aereo's performances to be private would "exalt[] form over substance," the majority acknowledged that, "[p]erhaps the application of the Transmit Clause

should focus less on the technical details of a particular system and more on its functionality.” *Id.* at *12. The majority nevertheless concluded that, under *Cablevision*, “technical architecture matters.” *Id.*

Notwithstanding all of the shortcomings it perceived in *Cablevision*, the *Aereo* majority believed that *stare decisis* and claimed reliance by companies like *Aereo* required following *Cablevision* in the case of a completely different service. *Id.* at *13. In essence, the majority held that *Cablevision* had painted the Second Circuit into a corner in construing the public performance right. Regardless of whether the majority was right in assessing *Cablevision*’s precedential sweep within the Second Circuit, *Cablevision* is not controlling in this Circuit. With respect, *amici* submit that the manifest errors in *Cablevision*’s analysis—including errors that the *Aereo* majority recognized but deemed itself powerless to correct—should lead this Court to reject *Cablevision*’s interpretation of the public performance right.

D. Longstanding Case Law in the Ninth Circuit Supports Construing the Public Performance Right as Written, not as Erroneously Rewritten by the Second Circuit

This Court’s decision in the *PREI* case points to the correct result in this case. In *PREI*, the hotel rented physical discs that guests could then take back to their individual rooms for viewing on in-room players. This Court held that because the hotel did “not ‘communicate’ the in-room performances at all”—the movies were played by the guest on a machine in his or her hotel room—the

Transmit Clause simply did not apply *PREI*, 866 F.2d at 281; *see id.* at 282 (no “images or sounds [were] received beyond the place from which they [were] sent”) (quoting 17 U.S.C. § 101 (definition of “[t]o ‘transmit’”). The Court made it clear, however, that if performances of the movies *had been transmitted* to the hotel rooms, then there would have been an infringement of the public performance right under the Transmit Clause. An *amicus* in that case, Spectradyne, *did* have a service that transmitted movies from a central location to individual guest rooms. Spectradyne asked this Court to hold that it was not making public performances. *Id.* at 282 n.7. This Court “*reject[ed]* all of Spectradyne’s arguments,” and said that its system, which “uses wires to transmit a signal, employs a central transmission device, and [where] the signal is received at places beyond the place from which it is sent,” “*falls squarely within the transmit clause.*” *Id.* (emphasis added). Aereokiller’s transmissions use the internet instead of wires, but that fact makes no difference under the Transmit Clause, which covers transmissions “by means of any device or process.” 17 U.S.C. § 101. Aereokiller’s performances also fall squarely within the Transmit Clause.⁴ *See*

⁴ *Amicus* Consumer Federation of America (“CFA”) insists that *PREI* stands for the proposition that the number of persons in the potential audience for performances of a work does not determine whether a *transmission* is “to the public” under the Transmit Clause. CFA *Amicus* Br. at 25-26. CFA, however, takes out of context the *PREI* Court’s analysis of whether a performance in a hotel room was in a public place, and therefore within the first clause (the “Public Place Clause”) of the public performance right. For purposes of the *Public Place Clause*,

Warner Bros. Entertainment Inc. v. WTV Sys., Inc., 824 F. Supp. 2d 1003, 1011-12 n.7 (C.D. Cal. 2011) (*PREI*'s discussion of Spectradyne system shows that transmissions from central locations fall within Transmit Clause).

Aereokiller's liability also is clear from *On Command Video*, which interpreted the Transmit Clause as this Court did when discussing Spectradyne's system. The On Command Video service involved a central bank of video cassette players, and transmissions of performances of movies from those central players to individual hotel rooms. *See On Command Video*, 777 F. Supp. at 788. Because the hotel guests comprised "the public," and because On Command Video transmitted performances to those guests, the court held that the service violated the public performance right, regardless of the fact that guests viewed the performances in separate places and at different times. *Id.* at 789-90. For purposes of the Transmit Clause, Aereokiller's transmissions of performances to its public audience are no different.

"Congress intended neither the number of persons at a performance nor the location of the performance to be determinative of the public character of the performance." *PREI*, 866 F.2d at 281. That was *not* the basis for the Court's decision on the Transmit Clause, which is at issue in this case. The key issue under the Transmit Clause is whether the audience "capable of receiving the [transmission]" is a "public" audience. 17 U.S.C. § 101 (Transmit Clause); *see Redd Horne*, 749 F.2d at 159 ("the *transmission* of a performance to members of the public, even in private settings such as hotel rooms ... constitutes a public performance") (emphasis added).

In sum, the case law in this Circuit is consistent with the straightforward, logical reading of the public performance right. The Court should adhere to this reading and decline to follow *Cablevision*'s erroneous reading of the Act.

II. Aereokiller's Service Threatens Significant Harms to the Entire Content Creation and Dissemination Ecosystem

Aereokiller argues that the harm its infringing service causes is "speculative," "prolonged," and "hypothetical." Aereokiller Br. at 31-32. Amplifying this argument, Aereokiller's *amici* insist that this Court should take the "claims of irreparable harm with a beaker of salt," purportedly because Aereokiller and other services like it are "much more likely to *benefit*" content creators by "creat[ing] new markets for film and television." Electronic Frontier Foundation Amicus Br. at 18, 21.

These arguments are rhetorical smokescreens for the significant harms that Aereokiller, and other services that end-run the public performance right, cause throughout the chain of creating and disseminating copyrighted content. These harms affect not only the broadcaster-plaintiffs in this case but the creators who supply the programming that is broadcast over the air. The dollars that advertisers pay to broadcasters, and that cable companies and other retransmitters pay for the right to publicly perform works, go toward the payments broadcasters make to copyright owners to acquire programs for broadcast, and through them to the individuals who write, act in, direct and provide all of the other services that go

into creating movies and television shows. A diminution in advertising rates and re-transmission fees caused by unlicensed retransmission services negatively affects all participants in the lawful creation and distribution chain. The court in the *ivi* case recognized precisely this point:

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

ivi, 691 F.3d at 286.

These same harms arise from Aereokiller's unauthorized and illegal service. But there is more. Aereokiller threatens to undermine existing and developing aftermarkets, or distribution "windows," for the authorized use of content originally broadcast over the air. "Windowing" provides different modes of exhibition and distribution that aim to match consumer offerings with consumer demand for accessing content in different ways. The consumer offerings vary as to, among other things, when (on first release or later), where (in a theater, at home on a television or on a mobile device), how (on demand or according to a set schedule; transactional or through a subscription), and for how much (a variety of

price points) consumers view or obtain copies of copyrighted content. *See generally WTV Sys.*, 824 F. Supp. 2d at 1005-06 (overview of windowing process); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 309 (S.D.N.Y. 2000) (same).

Windowing enables consumers to obtain access to copyrighted content through a rich and varied range of authorized offerings. Consumers can buy a physical copy of a movie or television program (on DVD or Blu-ray Disc); rent a physical copy (at a bricks-and-mortar store or through a mail subscription service like Netflix); download or rent a copy through a service like Amazon or iTunes; access it on demand for a fixed period of time through a cable, satellite or internet delivered VOD platform, like Comcast, DirecTV or Vudu; view it through subscription VOD streaming services like Netflix; watch it on a scheduled subscription cable television channel like HBO (or via HBO's television and internet-based on-demand service); or watch it through an advertising-supported, authorized internet site, such as Hulu or channel-specific sites (*e.g.*, *comedycentral.com* or *thewb.com*). *See WTV Sys.*, 824 F. Supp. 2d at 1005. Moreover, the broadcast networks themselves operate their own internet sites (*abc.com*, *cbs.com*, *fox.com*, *nbc.com*) that make many programs originally broadcast over the air available for on-demand streaming, under authorized terms and conditions. Hence, an over-the-air broadcast of a made-for-television movie or

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

Windowing is critical to the ecosystem for content creation and distribution. Through windowing, content producers have the opportunity to earn a return on the significant investments—often in the millions of dollars—they must make to create new motion pictures and television shows. And windowing inures to the benefit of all involved in the content-creation chain, not only financiers and production entities, but also the thousands of writers, directors and cast and crew members represented by *amici* Guilds and I.A.T.S.E., all of whom depend on a robust and continuing revenue stream, which Aereokiller's infringing actions usurp.

Under the Guilds' collective bargaining agreements, as a creative work is licensed to new markets or re-runs on television, actors, directors and writers receive deferred compensation in the form of residuals. These residuals frequently are based on a percentage of revenue that the copyright owner obtains from authorizing the work's use in that market. Residuals are a crucial source of income that can be the lifeblood of individuals whose work is intermittent by its very nature. This is particularly true in difficult economic times. Moreover, revenue from the aftermarket use of content first broadcast over the air directly funds the pension and healthcare plans of the members of *amici* Guilds and I.A.T.S.E. When unauthorized services interrupt the revenue stream from licensed uses of

copyrighted works, this directly affects the livelihood of the many hard-working men and women in the content-creation process.

Aereokiller also threatens to undermine new and innovative content dissemination services. Increasing numbers of consumers are interested in having their primary viewing of content occur through their mobile or other internet-connected devices. Content owners have authorized numerous innovative services, such as Hulu and Netflix, to deliver content in this manner. Aereokiller's unauthorized (and uncompensated) internet retransmissions undercut these legitimate, licensed services. Moreover, to the extent content owners' licenses to these partners are exclusive, Aereokiller further "interfere[s] with [content owners'] grants of exclusivity to their licensees," and "[content owners'] ability to negotiate similar agreements in the future (because potential licensees will not be willing to pay a premium for a non-exclusive period)." *WTV Sys.*, 824 F. Supp. 2d at 1012. More generally, Aereokiller threatens content owners' "relationships, including the goodwill developed with their licensees, and [their] overall ability to control the use and transmission of their Copyrighted Works." *Id.* And Aereokiller's presence threatens to confuse consumers and to create wrong but hard-to-dislodge impressions about what constitutes lawful internet re-transmission. *Id.* at 1013.

In short, the harms caused by Aereokiller's service are significant, palpable and widespread. These are not harms that either the plaintiffs in this case or the many others involved in the content creation and distribution process should have to bear. Aereokiller must be enjoined.

III. Holding Aereokiller Liable for Infringing the Public Performance Right Does Not Threaten “Cloud” Computing or Technological Innovation

Aereokiller and its *amici* also argue that rejecting *Cablevision*, and enjoining Aereokiller, threatens to destroy the “cloud computing” industry and to “undermine the public interest in technological innovation.” Aereokiller Br. at 36-37; *see also* Computer & Communications Industry Assoc. (“CCIA”) Amicus Br. at 5-8. These arguments are cynical and mendacious.

In the first place, Aereokiller's near-simultaneous streaming of live broadcasting is not “cloud computing,” whatever definition one might give to that term. This case has nothing to do with an end-user “storing” an electronic copy of a document or music file on some remote server. Aereokiller's essentially live streaming of broadcast content is retransmission, pure and simple. *See ibi*, 691 F.3d at 278-79.⁵ Nor is Aereokiller in any sense an “innovator.” Its service—right

⁵ Aereokiller does not cease being a retransmission service simply because it uses internet facilities, rather than broadcast spectrum, satellite signals, or cable facilities to do the transmitting. *See ibi*, 691 F.3d at 278-79. Notably, when Congress amended the Communications Act to require cable operators and other multichannel video programming distributors to obtain the consent of local broadcasting stations to retransmit their programming, *see* 47 U.S.C. § 325(b), Congress recognized that the prior rule exempting such entities from having to

down to its monikers (including “BarryDriller.com”)—is a blatant knock-off of Aereo’s service. And the service that Aereokiller admittedly copies is not technologically innovative but technologically inefficient—and inefficient for the purpose of evading the public performance right. *See Aereo*, 2013 WL 1285591, at *15 (Chin, J., dissenting).

The arguments about “cloud computing” and innovation are not just inapplicable to Aereokiller; they also are greatly exaggerated. *Amicus CCIA*, for example, essentially argues that *Cablevision*’s public performance holding is to cloud computing as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is to judicial review. CCIA ominously warns that rejecting *Cablevision* would imperil a multi-billion dollar industry. CCIA Amicus Br. at 5-8. CCIA’s sole support for this hyperbolic argument is a study that found a rise in investments in cloud computing businesses in the years after *Cablevision* was announced compared to the years before.

obtain retransmission consents had “created a distortion in the video marketplace which threaten[ed] the future of over-the-air-broadcasting.” S. Rep. No. 102-92, at 35 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168. Congress believed that public policy did not “support[] a system under which broadcasters in effect subsidize the establishment of their chief competitors.” *Id.* The fact that *Cablevision* and *Aereo* allow an internet retransmission service to similarly distort the video marketplace simply underscores how wrong those decisions are.

CCIA neglects to tell the Court many things about this “study,” starting with the fact that *CCIA funded it*.⁶ And the study does not prove that *Cablevision’s* interpretation of the public performance right caused a subsequent increase in cloud computing investments. Neither CCIA in its brief nor the study it funded cites a single example of a company that received additional funding because it utilized *Cablevision’s* (or *Aereokiller’s*) model of one-copy-of-content-uniquely-associated-with-one-end-user. The idea that *Cablevision*, which involved a deliberately *inefficient* technological mode of linking content to consumers, was responsible for a boon in investment in services that use *efficient* means of delivering content, is absurd. There are numerous types of services that fall under the umbrella of “cloud computing,” including remote storage word processing services, business support applications, and others that do not mimic *Cablevision’s* technologically inefficient set-up. A critical analysis of CCIA’s study notes that numerous other events from 2008—including Google’s April 2008 launch of “App Engine,” Microsoft’s October 2008 announcement of “Windows Azure,” and a rash of new feature releases from Amazon Web Service—had far more to do with increased investment in cloud computing companies than the *Cablevision* decision did. *See* Derrick Harris, *No, a copyright case didn’t spur cloud investment* (Nov.

⁶ Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies*, Nov. 1, 2011, at n.1, available at http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Lerner_Fall2011_Copyright_Policy_VC_Investments.pdf (last visited May 2, 2013).

11, 2011), *available at* <http://gigaom.com/2011/11/11/no-a-copyright-case-didnt-spur-cloud-investment/> (last visited May 2, 2013). Rejecting *Cablevision*'s erroneous interpretation of the Copyright Act does not remotely threaten to bring the "cloud computing" industry crashing down.

Fundamentally, *Aereokiller* and its *amici* present the Court with a false dichotomy between the affirmation of copyright rights as enacted by Congress and technological innovation. Numerous services, including Hulu, Netflix, Apple's iTunes, and others, make copyrighted content widely available in ways that are innovative and further consumer choice. These services—including many services that store and transmit works from remote servers—do so legitimately, with authorization from the owners of content and compensation to those in the content-creation chain.⁷ This question in this case is whether *Aereokiller* can gain an unfair advantage, and deprive copyright owners of a lawful return on their investments, by inserting itself as an unauthorized intermediary in the dissemination of copyrighted content.

⁷ *See, e.g.*, <http://www.androidcentral.com/paramount-pictures-content-coming-prime-instant-video> (May 23, 2012) (Amazon's announcement of Amazon Prime streaming agreement with Paramount Pictures) (last visited May 2, 2013); <http://www.businesswire.com/news/home/20120720005134/en/Prime-Instant-Video-Amazon-Announces-Digital-Video> (July 20, 2012) (Amazon's announcement of Amazon Prime streaming agreement with Warner Bros. Domestic Television Distribution) (last visited May 2, 2013).

CONCLUSION

Amici respectfully urge this Court to reject the Second Circuit's erroneous and detrimental misconstruction of the public performance right, and to affirm the district court's holding that Aereokiller infringes that right.

DATED: May 3, 2013

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