No. 13-461

IN THE

Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC., DISNEY ENTERPRISES, INC., CBS BROADCASTING INC., CBS STUDIOS INC., NBCUNIVERSAL MEDIA, LLC, NBC STUDIOS LLC, UNIVERSAL NETWORK TELEVISION, LLC, TELEMUNDO NETWORK GROUP LLC, AND WNJU-TV BROADCASTING LLC, WNET, THIRTEEN, FOX TELEVISION STATIONS, INC., TWENTIETH CENTURY FOX FILM CORPORATION, WPIX, INC., UNIVISION TELEVISION GROUP, INC., THE UNIVISION NETWORK LIMITED PARTNERSHIP, AND PUBLIC BROADCASTING SERVICE,

Petitioners,

v.

AEREO, INCORPORATED, f/k/a BAMBOOM LABS, INCORPORATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* RALPH OMAN, FORMER REGISTER OF COPYRIGHTS OF THE UNITED STATES IN SUPPORT OF PETITIONERS

RALPH OMAN
Counsel of Record
PRAVEL PROFESSORIAL LECTURER IN INTELLECTUAL PROPERTY AND PATENT LAW
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 H Street, NW, E403
Washington, DC 20052
(202) 994-2122
roman@law.gwu.edu

Attorney for Amicus Curiae

252328

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

I. INTEREST OF THE *AMICUS CURIAE* 1

II. SUMMARY OF ARGUMENT 3

III. ARGUMENT 7

A. The Copyright Act Should Be Interpreted In Keeping With The Act's Broad Objectives.. 7

B. The Copyright Act Should Be Interpreted To Allow The United States To Comply With Its International Commitments 15

IV. CONCLUSION 20

TABLE OF CITED AUTHORITIES

Page

CASES

Cartoon Network LP v. CSC Holdings, Inc.,
536 F.3d 121 (2d Cir. 2008) 6, 7, 19

Fortnightly Corp. v. United Artists Television,
392 U.S. 390 (1968). 9

Harper & Row Publishers v. Nation Enters.,
471 U.S. 539 (1985). 8

Harrison v. PPG Indus., Inc.,
446 U.S. 578 (1980). 7, 10

Mills Music, Inc. v. Snyder,
469 U.S. 153 (1985). 8

Murray v. Schooner Charming Betsy,
6 U.S. (2 Cranch) 64 (1804) 19

Sony Corp. of Am. v. Universal City Studios, Inc.,
464 U.S. 417 (1984) 14

Teleprompter Corp. v. Columbia Broad. Sys., Inc.,
415 U.S. 394 (1974) 9

U.S. v. Turkette,
452 U.S. 576 (1981) 7, 10

WNET et al. v. Aereo, Inc.,
712 F.3d 676 (2d Cir. 2013) 5, 17

Page

WPIX, Inc. et al. v. ivi, Inc.,
691 F.3d 275 (2d Cir. 2012) 12, 20

WPIX, Inc. et al. v. ivi, Inc.,
765 F. Supp. 2d 594 (S.D.N.Y. 2011) 11

STATUTES AND REGULATIONS

17 U.S.C. § 101 . . . . *passim*

17 U.S.C. § 102(a) 4

17 U.S.C. § 106 2

17 U.S.C. § 106(4) 3, 5

17 U.S.C. § 106(5) 5

17 U.S.C. § 111 10

17 U.S.C. § 111(c) 3

17 U.S.C. § 114 . . . . 12, 13

17 U.S.C. § 114(d)(2) 13

17 U.S.C. § 119 . . . . 3, 11

57 Fed. Reg. 3284 (Jan. 29, 1992) 11

Copyright Act of 1976 . . . . *passim*

Page

LEGISLATIVE HISTORY

Copyright and New Technologies: Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the H. Comm. on the Judiciary, 99th Cong. 4 (1985) 4

H.R. Rep. No. 94-1476 (1976) 8, 9-10

H.R. Rep. No. 105-551 (1998) 15, 16

Performers' and Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary, 103d Cong. 4 (1993). 13

S. Rep. No. 94-473 (1975) 9

S. Rep. No. 102-92 (1992) 9

FOREIGN AND INTERNATIONAL LAW AUTHORITIES

Case C-607/11, *ITV Studios Ltd. et al. v. TV Catchup Ltd.*, [2013] E.C.R. ____ (E.C.J.) 16, 17

Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., (Dec. 14, 2011) 16

Free Trade Agreement, U.S.-Austl., May 18, 2004, 43 I.L.M. 1248 19

Page

Free Trade Agreement, U.S.-Bahr., Sept. 14, 2004, Hein's No. K.A.V. 6866 19

Free Trade Agreement, U.S.-Chile., June 6, 2003, 42 I.L.M. 1026 19

Free Trade Agreement, U.S.-Jordan, Oct. 20, 2000, Hein's No. K.A.V. 5970 19

Free Trade Agreement, U.S.-Morocco, June 15, 2004, 44 I.L.M. 544 19

Free Trade Agreement, U.S.-Oman, Jan. 19, 2006, Hein's No. K.A.V. 8673 19

Free Trade Agreement, U.S.-Sing., May 6, 2003, 42 I.L.M. 1026 19

Free Trade Agreement, U.S.-S. Korea, Apr. 1, 2007, 46 I.L.M. 642 18

Nat'l Rugby League Invs. Pty. Ltd. v. Singtel Optus Pty. Ltd. (2012) 201 F.C.R. 147 (Austl.), *rev'g* 199 F.C.R. 300 16

NHK (Japan Broadcasting Corp.), et al. v. Nagano Shōten Co. Ltd., 65-1 MINSHŪ 121 (Sup. Ct. Jan. 18, 2011) (Japan), *unofficial translation available at* http://www.softic.or.jp/en/cases/manekiTV.pdf 16

Page

Record TV Ptc Ltd. v. Media Corp. TV Sing. Ptc Ltd., 1 SLR 830 (2011) 19

Rogers Commc'ns, Inc. v. Soc'y of Composers, Authors and Music Publishers of Can., [2012] 2 S.C.R. 283 (Can.) 16, 17

Trade Promotion Agreement, U.S.-Pan., June 28, 2007, Hein's No. K.A.V. 9546 18

Trade Promotion Agreement, U.S.-Peru, April 12, 2006, Hein's No. K.A.V. 8674. 18-19

WIPO Copyright Treaty art. 8, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997). 15, 17

OTHER AUTHORITIES

Bush Administration Releases Report on Intellectual Property Enforcement and Protection, U.S. Newswire, Sept. 29, 2006 18

Jane C. Ginsburg, *Aereo in International Perspective: Individualized Access and U.S. Treaty Obligations*, The Media Institute (Feb. 18, 2014) 16, 17

Paul Goldstein, Goldstein on Copyright § 7.7.2 (3d ed. Supp. 2013-1) 5

Page

Press Release, Office of U.S. Trade Representative, USTR Ron Kirk Joins Vice President Joe Biden to Announce the Joint Strategic Plan on Intellectual Property Enforcement, (June 22, 2010) 18

Register of Copyrights, Supplementary Reg.'s Report on the Gen. Revision of the U.S. Copyright Law (H. Comm. Print 1965) 9

Register of Copyrights, The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis (1992) 11

Restatement of Foreign Relations Law § 114. 20

Statement on Signing the Digital Millennium Copyright Act, 2 Pub. Papers 1902 (Oct. 28, 1998) .18

Sup. Ct. R. 37(6). 1

U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act Section 109 Report (2008) 12

I. INTEREST OF THE *AMICUS CURIAE*

I, Ralph Oman, am one of only two living former U.S. Registers of Copyrights.[1] Prior to my tenure as Register (from 1985 to 1993), I was counsel to the U.S. Senate Judiciary Committee, with a special focus on copyright legislation. I served as Chief Minority Counsel on the Subcommittee on Patents, Trademarks and Copyrights, from 1975 to 1977. During that time, I was personally involved in the drafting and passage of what became the Copyright Act of 1976, 17 U.S.C. §§ 101, *et seq.* (the "Copyright Act"). From 1982 to 1985, I served as Chief Counsel of that reconstituted Subcommittee, renamed the Subcommittee on Patents, Copyrights and Trademarks. Subsequent to my tenure as Register of Copyrights, I have taught copyright law at the George Washington University Law School, now in my twenty-first year.

After stepping down as Register, I participated in the series of preparatory meetings at the headquarters of the World Intellectual Property Organization ("WIPO") in Geneva, Switzerland intended to modernize the Berne Convention for the Protection of Literary and Artistic Works, U.S. adherence to which I had helped bring about during my tenure as Register. At those meetings, I represented the U.S. creative community, and I advised the head of the U.S. delegation, Bruce Lehman, the Commissioner of Patents and Trademarks. Finally, in December of 1996, the WIPO convened a diplomatic

1. Petitioners and respondent have consented to the filing of this brief through blanket consent letters filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part and no person or entity other than me made a monetary contribution to the preparation or submission of this brief. S. Ct. R. 37(6).

conference in Geneva that adopted the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty. At that conference, I participated in the public discussions and ultimate adoption of the "making available" right which, with respect to performances of copyrighted audio-visual works, is analogous to the public performance and distribution rights in Section 106 of the U.S. Copyright Act.

I have a compelling interest in ensuring that the purpose and meaning of several provisions of the Copyright Act – including those with which I had direct involvement in my capacity as Chief Minority Counsel, Chief Counsel, Register, and Delegate to the WIPO diplomatic conference – are explained and put in their proper context for purposes of this appeal. As a former Register of Copyrights and *amicus* in this case, I care deeply about how the courts interpret the Copyright Act. The fact that this appeal is to the Supreme Court of the United States magnifies that concern exponentially.

Aereo captures the Petitioners' over-the-air broadcast programs and retransmits them, over the Internet, to subscribers for a fee. That is a classic public performance under the Copyright Act. Sound principles of copyright law, adherence to U.S. international treaty obligations and common sense all dictate that it makes no difference that Aereo uses many antennas instead of one to capture that programming and makes many user-associated copies instead of one to accomplish its Internet retransmissions.

The Second Circuit's holding to the contrary conflicts with the intent of Congress, as expressed both by the plain language of the Copyright Act and its legislative

history, with which I was directly involved in connection with the Senate Committee Report that accompanied its enactment. Moreover, affirming the Second Circuit's narrow and unsupported reading of the transmit clause would place the United States in violation of its international treaty obligations.

I submit this *amicus* brief in the hope that it will assist this Court in addressing a misreading of the Copyright Act that presents a serious threat to its goals. I support the view that the holding of the Second Circuit should be reversed because Aereo's unlicensed retransmissions of Petitioners' broadcast programming over the Internet are performances to the public under Section 106(4) of the Copyright Act.

II. SUMMARY OF ARGUMENT

This case presents the issue of whether a cleverly-engineered television retransmission service can side-step the carefully considered protections for broadcasting that Congress built into the Copyright Act. Those protections are embedded in a number of provisions, such as Section 106(4) (exclusive right of public performance), Section 101 (defining public performance), Section 111(c) (compulsory license for cable retransmissions) and Section 119 (compulsory license for satellite retransmissions).

The tension between technology and copyright law in general is not new. It has been with us since the beginnings of copyright law and the widespread use of the printing press. Specifically with respect to the public performance right, businesses like Aereo have attempted over the years to capitalize on the copyrighted works of broadcasters as

new technologies, including first cable, then satellite and finally the Internet, have developed to distribute that content to the public.

Congress, when it enacted the present Copyright Act, both addressed existing conflicts and anticipated future technological developments. It took pains to ensure that the statute was technology neutral and emphasized that the broad rights it intended authors to enjoy should not be circumvented and infringed by new technologies.[2]

In that vein, Congress adopted a broad definition of a public performance in Section 101 to include transmissions to the public by "any device or process." 17 U.S.C. §§ 101, 102(a); *see Copyright and New Technologies: Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the H. Comm. on the Judiciary*, 99th Cong. 4 (1985) ("Since the Copyright Act's concept of public performance is not technology-specific, the act covers all of these new distribution services.") (statement of Ralph Oman, Register of Copyrights and Assistant Librarian of Congress).

The Copyright Act was drafted to protect works, not the medium through which they are expressed or the means by which they are exploited. That is why Congress drew a distinction between "works," 17 U.S.C. § 102(a), and

---

2. Examples of the concept of technological neutrality that pervade the Copyright Act include the definition of a copyrighted work itself in Section 102(a) (work is distinct from a copy and is protectable when it is fixed in any medium "now known or later developed") and the definition of a copy in Section 101 (copies are distinct from works and are "material objects . . . in which a work is fixed by any method now known or later developed").

performances or displays of works. 17 U.S.C. §§ 106(4) & (5). The two are not the same and should not be conflated. *See* Paul Goldstein, Goldstein on Copyright § 7.7.2 at 7:168 (3d ed. Supp. 2013-1) ("The error in the Second Circuit's construction of the transmit clause [in *Cablevision*] was to treat 'transmissions' and 'performance' as synonymous, where the Act clearly treats them as distinct[.]"); *WNET et al. v. Aereo, Inc.*, 712 F.3d 676, 689-90 (2d Cir. 2013) ("[T]he potential audience of each Aereo ***transmission*** is the single user who requested that a program be recorded.") (emphasis added).

Congress deliberately drafted the Copyright Act to prevent the creative efforts of authors from being usurped by new technologies. That core principle is at the heart of the Copyright Act. The language of the statute, which reflects congressional intent, is undercut by a decision, such as that of the Second Circuit, that sanctions the use of technologies that could be used indirectly to undermine the Copyright Act's goals. Congress enacted a forward-looking statute that would protect those who create precisely so they have incentives to create.[3]

---

3. A technologically neutral respect for authors' rights is why we, as a country, enjoy the most popular and singularly creative store of copyrighted content in the world. That is especially true when it comes to television programming. Quite simply, the unprecedented popularity of the United States entertainment industry could not exist without the robust copyright protection Congress specifically intended when it enacted our present copyright law.

The question on which this Court granted certiorari is:

> Whether a company "publicly performs" a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers over the Internet.

As someone who grappled with very similar issues years ago, as they were percolating though the courts and Congress, I view the answer as straightforward. Based on what Congress intended by defining a public performance, Aereo's streaming of television programming to its subscribers over the Internet plainly qualifies.

The Second Circuit reached its result below by relying on its prior decision in *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (hereinafter *Cablevision*). That case involved a very different, remote-DVR service that essentially allowed cable subscribers to store and access copies of programs they were licensed to receive on the cable provider's remote hard drives, instead of on their set-top boxes.

The feature of the Aereo technology challenged on this appeal is the one by which Aereo streams broadcasts over the Internet in (essentially) real time to its subscribers. Aereo also offers a so-called remote DVR service, but based on my review of the public record, that seems to me to be a commercial afterthought. The core of Aereo's business plan is the real-time retransmissions of broadcast television signals, and it is on that issue that Congress spoke most clearly. To the extent that Aereo offers an unauthorized equivalent of a real-time retransmission service, it is infringing the copyright owner's public performance right as defined by Congress.

Regardless of one's view as to whether *Cablevision* is analytically sound, the Second Circuit erred by applying its holding to Aereo's retransmission business. That holding simply cannot be squared with congressional intent, Copyright Office policy, or U.S. international obligations.

III. ARGUMENT

A. The Copyright Act Should Be Interpreted In Keeping With The Act's Broad Objectives.

The relevant statutory provision, Section 101 of the Copyright Act, is unambiguous. It plainly covers transmissions by "any device or process," language that encompasses Aereo's retransmission service for all the reasons stated in the Petitioners' brief. *See* Pet. Br. 23-25; *see also* 17 U.S.C. § 101 (the "Transmit Clause"); *see Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 589 (1980) (noting "expansive" sweep of "any" in statute "offers no indication whatever that Congress intended [a] limiting construction"); *U.S. v. Turkette*, 452 U.S. 576, 580 (1981) ("any person" and "any individual" admit of "no restriction upon the associations embraced by the definition").

To the extent there is any ambiguity in the application of the plain language of the Copyright Act to a service like Aereo, I respectfully urge the Court to do as little damage as possible to the basic concepts of the copyright law by finding in favor of the copyright holder (absent, of course, a statutory exception) when it is reasonable to do so. Any countervailing position is hostile to the overall purposes and goals of copyright.

In structuring the Copyright Act, Congress intentionally made the exclusive rights of copyright owners as broad as possible, precisely to avoid the kind of copyright arbitrage in which Aereo engages. H.R. Rep. No. 94-1476, at 61 (1976) ("The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow"). Had Congress intended to curtail the level of protection afforded to copyright owners to permit Aereo-like services, it would have had to do so expressly in a statutory exception or limitation. But it emphatically has refused to do so with respect to Internet retransmissions of over-the-air broadcast signals.

It is instructive to look at the legislative history of the Copyright Act, with which I have had a first-hand view and which is extraordinarily well-documented. *See Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 552 (1985) ("The Copyright Act represents the culmination of a major legislative reexamination of copyright doctrine."); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 156 (1985) (uniquely informative legislative history of the Copyright Act can aid in "understanding of the phrase" in dispute).

Over forty years ago, the courts tried to shoehorn what was then new cable television technology into the Copyright Act of 1909. For example, in 1968 and 1974, two Supreme Court decisions held that community antenna television ("CATV") systems (the precursors of modern-day cable systems) were not "performing" broadcast programming when retransmitting that programming to their customers, and, therefore, they were not infringing any copyrights under the 1909 law.

Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974) (retransmission of distant television station signals); *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968) (retransmission of local television station signals).

Congress viewed this result as essentially giving the cable systems a free pass that allowed them to retransmit broadcast television programming without incurring any costs for that programming. S. Rep. No. 102-92, at 35 (1992) (noting that, prior to the Copyright Act, cable retransmitters could "use these signals without having to seek permission of the originating broadcaster or having to compensate the broadcaster for the value [of] its product").

In the Copyright Act that followed these decisions, Congress dealt decisively, in a technologically-neutral way, with retransmissions using community antenna television technology. It declared unambiguously that a CATV company—which built an antenna on the top of a mountain in rural areas to intercept and retransmit, over a cable wire to its customers in the valley below, the copyrighted over-the-air broadcasts of television programs—was publicly performing that programming. *See* S. Rep. No. 94-473, at 78-82 (1975) (discussing how community antenna or cable providers that fail to comply with the compulsory license created by the Copyright Act would infringe broadcaster's rights of public performance); Register of Copyrights, Supplementary Reg.'s Report on the Gen. Revision of the U.S. Copyright Law, at 42 (H. Comm. Print 1965) ("[W]e believe that what community antenna operators are doing represents a performance to the public of the copyright owner's work."); H.R. Rep.

No. 94-1476, at 89 (1976) ("[C]able systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and . . . copyright royalties should be paid by cable operators to the creators of such programs.").

Had the technology at the time required the CATV company to install an individual antenna for every customer in the valley below or even retransmit the performances through copies made for each individual, rather than using a single antenna serving the entire community or a single "master" copy, it is inconceivable Congress still would not have viewed that retransmission business to be making a public performance. Congress plainly was focused on the business model, not the technology underlying it. It defined performances to include "any device or process," meaning that it anticipated there would be variations in transmission technology and deliberately included them as performances to the public. To be plain, it was not the means of retransmission but rather the retransmission itself that Congress cared about, because that is what caused the harm to copyright owners.

To ensure that all such retransmissions were within the Transmit Clause, Congress included, in the governing provision at issue in this case, the broadest, most technologically-neutral language conceivable – transmission by "any device or process" – to define the scope of the public performance right. 17 U.S.C. § 101; *see Harrison*, 446 U.S. at 589; *Turkette*, 452 U.S. at 580.

It also enacted a narrowly-drawn compulsory license for cable systems engaging in the retransmission of broadcast television programming. 17 U.S.C. § 111. In the

late 1980s, nascent satellite television services, recognizing that Congress' broad definition of public performance foreclosed an argument that their retransmissions were non-infringing, attempted to argue that they were eligible for the Section 111 compulsory license. As the Register of Copyrights at the time, I strongly advocated a literal reading of the statute in the definition of "cable system." *See* Register of Copyrights, The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis, at 54 (1992) ("[T]he Copyright Office issued a final regulation on January 29, 1992 affirming the position . . . that satellite carriers . . . were not eligible for the cable compulsory license."). Along the same lines, the Copyright Office issued a regulation while I was Register, which states: "As the owners of exclusive rights in a work, copyright holders possess a property grant which entitles them to negotiate and bargain for use of the work. This property right is limited only in well articulated exceptions appearing in the statute." *Cable Compulsory License; Definitions of Cable System*, 57 Fed. Reg. 3284, 3293 (Jan. 29, 1992).

The view I advocated in my official capacity as Register as well as on behalf of other affected individuals and industries ultimately prevailed. Congress enacted a stand-alone, narrowly-tailored license for the satellite services—Section 119 of the Copyright Act.[4]

---

4. That same approach was endorsed by my successor as Register of Copyrights, Marybeth Peters, and by the Copyright Office's "consistent and ardent" position against an exception to the public performance right for Internet streaming. *WPIX, Inc. et al. v. ivi, Inc.*, 765 F. Supp. 2d 594, 617 (S.D.N.Y. 2011).

As retransmission technology continued to evolve, Internet retransmission services also attempted to argue they fit within the compulsory license for cable systems. The Copyright Office disagreed with that view and the courts ultimately rejected it as well. *See* U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act Section 109 Report, at 188 (2008) ("[t]he [Copyright] Office continues to oppose an Internet statutory license that would permit any website on the Internet to retransmit television programming without the consent of the copyright owner"); *WPIX, Inc. et al. v. ivi, Inc.*, 691 F.3d 275, 283 (2d Cir. 2012) ("The Copyright Office has consistently concluded that Internet retransmission services are not cable systems and do not qualify for § 111 compulsory licenses").

The exclusive rights under the Copyright Act are broad, any derogations from them are narrow and furthermore, exceptions should be granted, if at all, only by Congress, the body institutionally able to balance the interests of the various parties – both owners and users – in copyright commerce. That logic applies to whether or not the Aereo retransmissions constitute a public performance. To contend that Internet retransmissions are not a public performance is not a minor technical reinterpretation of the Copyright Act. It is nothing less than a major new exception, which could permit unauthorized streaming of copyrighted works over the Internet through a technical artifice.[5]

5. Congress has specifically acted with respect to Internet transmissions of digital audio content. When Congress acted in 1995 to establish a digital audio transmission right for sound recordings, it amended Section 114 of the Copyright Act. Section 114 creates legislative exemptions to, and compulsory licenses

Aereo argues that its individual antennas and subscriber-associated copies change the fundamental choices Congress made in the copyright equation. That cannot be correct because those technical contrivances do not and cannot change the fundamental math that underlies that equation.

If Congress wants to permit Internet streaming (and deal with the international repercussions thereafter), it is free to do so, but the burden should not be placed on copyright owners in Petitioners' circumstances to get some sort of congressional confirmation that the Transmit Clause applies to Internet retransmissions. Congress drafted the Copyright Act to operate automatically to grant such businesses protection in the first instance.

Moreover, as a practical matter (from my having spent ten years on Senate staff, most of them on the Judiciary Committee's Subcommittee on Patents, Copyrights and Trademarks), I recognize that it is much easier to stop legislation than to move it through the process. Courts

---

for, the exercise of rights in sound recordings. *See, e.g.,* 17 U.S.C. § 114(d)(2) (statutory licensing of certain transmissions of sound recordings); *see also Performers' and Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary*, 103d Cong. 4 (1993) ("[I]f you cannot . . . recognize broad public performance rights [in sound recordings], then Congress should consider treating digital transmissions differently and create a digital transmission right that grants the owner of the sound recording the exclusive right to authorize or prevent the transmission.") (statement of Ralph Oman, Register of Copyrights, Library of Congress). Internet transmissions of sound recordings are within the rights of copyright owners subject to the Section 114 statutory license.

should not saddle the copyright owner with the task of moving legislation through Congress with every wave of new technology. Whenever possible, when the law is ambiguous or silent on the issue at bar, the courts should let those who want to market new technologies carry the burden of persuasion that a new exception to the broad rights enacted by Congress in 1976 should be established. That is especially so if that technology poses grave dangers to the exclusive rights that Congress has given copyright owners. Commercial exploiters of new technologies should be required to convince Congress to exempt them from normal copyright liability. That is what Congress intended.

As Justice Blackman noted in his dissent in *Sony Corp. of Am. v. Universal City Studios, Inc.*:

> Like so many other problems created by the interaction of copyright law with a new technology, there can be no really satisfactory solution to the problem presented here, until Congress acts. But in the absence of a congressional solution, courts cannot avoid difficult problems by refusing to apply the law. We must take the Copyright Act as we find it and *do as little damage as possible to traditional copyright principles until the Congress legislates*. [emphasis supplied].

464 U.S. 417, 500 (1984) (internal quotations omitted).

In this case, the Court should "do as little damage as possible to traditional copyright principles" by finding in favor of the authors and enjoining the infringing activity. Congress can intervene to clarify the law if it chooses.

B. The Copyright Act Should Be Interpreted To Allow The United States To Comply With Its International Commitments.

In 1996, at the urging of the United States and its trade partners, the World Intellectual Property Organization ("WIPO") convened a Diplomatic Conference in Geneva to draft two new treaties. A key purpose of the Conference was to develop an international consensus on treaties that would update copyright law so that authors could meet the challenges of a rapidly-evolving technological landscape. H.R. Rep. No. 105-551, at 9 (1998). The two treaties – the WIPO Copyright Treaty and the WIPO Performance and Phonogram Treaty, known collectively as the Internet Treaties – made clear that copyright extends to digital forms of exploitation, and recognized, if properly managed, that the new digital technologies could multiply authors' opportunities to reach a public eager to enjoy their creative output. Both treaties created an explicit new right intended to ensure that authors could continue to control uses of their works in a digital era – the "making available" right. *See* WIPO Copyright Treaty art. 8, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997) ("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").

During the debate, the United States delegation, including the U.S. Copyright Office, supported the adoption of the "making available" right, confident that the United States already provided the equivalent of that

right in its domestic law – namely, the distribution right combined with the public performance right. *See* H.R. Rep. No. 105-551, pt. 1, at 9 (1998) ("The treaties do not require any change in the substance of copyright rights or exceptions in U.S. law").

The "making available" right has been determined almost universally by courts in foreign jurisdictions to prohibit unauthorized retransmission services like Aereo's. *See generally* Jane C. Ginsburg, *Aereo in International Perspective: Individualized Access and U.S. Treaty Obligations*, The Media Institute (Feb. 18, 2014), *available at* http:// http://www.mediainstitute.org/IPI/2014/021814.php ("Ginsburg") (summarizing international case law; "Courts in Europe, Australia, and Japan have all overturned various elements of the *Cablevision/Aereo* edifice, either by rejecting the designation of the user as the sole 'maker' of the source copy of the transmission, or by concluding that the purportedly 'personalized' nature of the transmission is irrelevant"); Case C-607/11, *ITV Studios Ltd. et al. v. TV Catchup Ltd.*, [2013] E.C.R. ___ (E.C.J.); *Rogers Commc'ns, Inc. v. Soc'y of Composers, Authors and Music Publishers of Can.*, [2012] 2 S.C.R. 283 (Can.); *Nat'l Rugby League Invs. Pty. Ltd. v. Singtel Optus Pty. Ltd.* (2012) 201 F.C.R. 147 (Austl.), *rev'g* 199 F.C.R. 300; *NHK (Japan Broadcasting Corporation), et al. v. Nagano Shōten Co. Ltd.*, 65-1 Minshū 121 (Sup. Ct. Jan. 18, 2011) (Japan), *unofficial translation available at* http://www.softic.or.jp/en/cases/manekiTV.pdf; Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., (Dec. 14, 2011).

The reasoning of the courts interpreting language implementing the "making available" right of the Internet Treaties is completely at odds with the rationale of

the Second Circuit in *Aereo* – *i.e.*, that if a particular ***transmission*** is from a unique copy to an end-user (one-to-one), it is private regardless of how many members of the public are capable of receiving the copyrighted performance. *See Aereo*, 712 F.3d at 689 ("if the potential audience of the ***transmission*** is only one subscriber, the transmission is not a public performance") (emphasis added). For example, the Court of Justice for the European Union emphasized that it is "the cumulative effect of making the works available to potential recipients" that matters, not whether "the potential recipients access the communicated works through a one-to-one connection." *TV Catchup* at ¶¶ 33-34. Because one-to-one transmissions do not "prevent a large number of persons having access to the same work at the same time," the real-time retransmission of broadcast television programming was held to infringe the making available right. *Id.* In other words, the "public" character of the "making available" right turns on whether the defendant is in the business of offering performances of a work to a "large number of persons," not on the technical nature of the transmission path used to convey that programming. *See* Ginsburg at 2; *see also Rogers* at ¶ 40 ("Focusing on each individual transmission loses sight of the true character of the communication activity in question and makes copyright protection dependent on technicalities of the alleged infringer's chosen method of operation").[6]

6. Notably, the Agreed Statement to Article 8 of the WIPO Copyright Treaty makes clear that "the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication." *See also TV Catchup* at ¶ 3. This draws the distinction between businesses that offer storage and delivery facilities for users who create or otherwise acquire content from other sources, and those, like Aereo, that offer performances of content to the public.

It would come as a surprise, if not a shock, to a generation of copyright lawyers to learn twenty years after the Internet Treaties that United States law does not give copyright owners, either U.S. or foreign, the right to prevent a business from offering to stream their works to thousands of viewers over the Internet. Such a holding would render the Internet Treaties an empty promise. It could also trigger legal challenges to the United States in the World Trade Organization ("WTO"), which, if decided against the United States, could have negative consequences for the United States.

A finding by this Court that the United States does not afford authors the right to control the public performance or streaming of their works to a large audience over the Internet also would result in great embarrassment to the Executive Branch. President Clinton, President Bush and President Obama have all pursued a policy of increasing the level of copyright protection internationally. *See*, *e.g.*, Press Release, Office of U.S. Trade Representative, USTR Ron Kirk Joins Vice President Joe Biden to Announce the Joint Strategic Plan on Intellectual Property Enforcement, (June 22, 2010); *Bush Administration Releases Report on Intellectual Property Enforcement and Protection*, U.S. Newswire, Sept. 29, 2006; Statement on Signing the Digital Millennium Copyright Act, 2 Pub. Papers 1902 (Oct. 28, 1998). To do so, with strong congressional support, they have negotiated numerous bilateral agreements with our trade partners, all of which include language that mandates the "making available" right. *See, e.g.*, Trade Promotion Agreement, U.S.-Pan., June 28, 2007, Hein's No. K.A.V. 9546; Free Trade Agreement, U.S.-S. Korea, Apr. 1, 2007, 46 I.L.M. 642; Trade Promotion Agreement, U.S.-Peru, April 12, 2006,

Hein's No. K.A.V. 8674; Free Trade Agreement, U.S.-Oman, Jan. 19, 2006, Hein's No. K.A.V. 8673; Free Trade Agreement, U.S.-Bahr., Sept.14, 2004, Hein's No. K.A.V. 6866; Free Trade Agreement, U.S.-Morocco, June 15, 2004, 44 I.L.M. 544; Free Trade Agreement, U.S.-Austl., May 18, 2004, 43 I.L.M. 1248; Free Trade Agreement, U.S.-Chile., June 6, 2003, 42 I.L.M. 1026; Free Trade Agreement, U.S.-Sing., May 6, 2003, 42 I.L.M. 1026; Free Trade Agreement, U.S.-Jordan, Oct. 20, 2000, Hein's No. K.A.V. 5970.

It would be ironic if these trade partners were to learn that we in the United States were deemed not to have in our own law the "making available" right that we insist our trade partners adopt. Such a decision would embolden judges in foreign courts – always eager to limit the rights and royalties of American authors – to take the same pinched view of the "making available" right or the distribution/public performance right, to the disadvantage of all authors. For example, the courts in Singapore adopted the Second Circuit's rationale in *Cablevision* in limiting the public performance rights of copyright owners in the context of a live streaming television service similar to Aereo's. *Record TV Ptc Ltd. v. Media Corp. TV Sing. Ptc Ltd.*, 1 SLR 830 (2011).

Like most of the lower courts to have addressed Aereo or its copycat services, I am convinced that current United States copyright law allows Petitioners to enjoin the infringing activities of Aereo based on the plain language of the Transmit Clause. If, however, the Court were to find some ambiguity in the statute, I would urge the Court to apply the *Charming Betsy* rule, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)

("an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains") (Marshall, C.J.), to spare the United States the discomfort of reneging on its international commitments. At a minimum, it would be reasonable, or, in the words of the RESTATEMENT OF FOREIGN RELATIONS LAW § 114, "fairly possible," to conclude in this case that the Aereo business model infringes the public performance right. Such a reading of the statute would comport with the intention of Congress, the understanding of United States trade negotiators, and the assumptions of all of our trade partners.

IV. CONCLUSION

If Aereo prevails in this case, "[p]laintiff's desire to create original television programming surely would be dampened if their creative works could be copied and streamed over the Internet in derogation of their exclusive property rights." *ivi*, 691 F.3d at 288. Yet that free pass is exactly what Aereo is asking this Court to sanction in this appeal.

The Aereo system was not designed for the purpose of speed, convenience and efficiency. With its thousands of dime-sized antennae and its electronic loop-the-loops, it appears to have been designed by a copyright lawyer peering over the shoulder of an engineer to exploit what appeared to Aereo to be a loophole in the law. It is contrary to what I have spent my career trying to prevent, by advocating for the system that Congress enacted—broad copyrights that protect authors and incentivize creative activities—albeit with narrow exceptions to account for competing public interests. Aereo's commercial Internet

retransmission service simply does not come within any exception recognized by Congress, or otherwise.

I am persuaded that Petitioners have the stronger—indeed, the only copyright-principled—argument. That Aereo interposes "individual" copies of copyrighted works in an Internet retransmission system should make no difference in a sound copyright analysis. The transmissions by Aereo to its numerous subscribers are public performances, and they are infringing under the plain text of the Transmit Clause. The Second Circuit's reading of the Transmit Clause to permit Aereo's retransmissions without authorization is contrary to the intent of Congress, as it was informed by the Copyright Office in the process of enacting the Copyright Act, and they place the United States at odds with its obligations under the Internet Treaties. If Congress wants to exempt Internet transmissions based on the use of unique copies, that is up to Congress.

For all these reasons, I support the position of Petitioners that the decision of the Second Circuit should be reversed.

March 3, 2014

Respectfully submitted,

RALPH OMAN
Counsel of Record
PRAVEL PROFESSORIAL LECTURER IN
INTELLECTUAL PROPERTY AND PATENT LAW
THE GEORGE WASHINGTON UNIVERSITY
LAW SCHOOL
2000 H Street, NW, E403
Washington, DC 20052
(202) 994-2122
roman@law.gwu.edu

Attorney for Amicus Curiae