

No. 13-461

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IN THE  
**Supreme Court of the United States**

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AMERICAN BROADCASTING COMPANIES,  
INC., ET AL.,

*Petitioners,*

—v.—

AEREO, INC., F/K/A BAMBOOM LABS, INC.,

*Respondent.*

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

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**BRIEF FOR THE NEW YORK INTELLECTUAL  
PROPERTY LAW ASSOCIATION AS  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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## **QUESTION PRESENTED**

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?

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## INTEREST OF AMICUS CURIAE

The New York Intellectual Property Law Association (the “NYIPLA” or “AMICUS”) respectfully submits this brief amicus curiae in support of Petitioners, American Broadcasting Companies, Inc., *et al.* (“Petitioners”).<sup>1</sup>

The arguments set forth in this brief *amicus curiae* were approved on February 28, 2014 by an absolute majority of the officers and members of the Board of Directors of the NYIPLA, including any officers or directors who did not vote for any reason, including recusal, but do not necessarily reflect the views of a majority of the members of the Association, or of the law or corporate firms with which those members are associated. After reasonable investigation, the NYIPLA believes that no officer or director or member of the Amicus Briefs Committee who voted in favor of filing this brief, nor any attorney associated with any such officer, director or committee member in any law or corporate firm, represents a party in this litigation. Some officers, directors, committee members or associated attorneys may represent entities, including other *amici curiae*, which have an interest

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<sup>1</sup> Petitioners consented to the filing of *amicus curiae* briefs in support of either party or neither party in a docket entry dated Feb. 7, 2014, and Respondents consented to this filing in correspondence dated Feb. 12, 2014. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than NYIPLA, its members, or its counsel made a monetary contribution to its preparation or submission.

in other matters which may be affected by the outcome of this litigation.

NYIPLA is a professional association of more than 1,500 attorneys whose interests and practices lie in the area of patent, copyright, trade secret, privacy and other intellectual property law.

NYIPLA members include a diverse array of attorneys specializing in copyright law, from in-house counsel for businesses that own, enforce and develop copyrighted works, to attorneys in private practice who represent copyright holders in various proceedings. A substantial percentage of Association attorneys participate actively in copyright litigation, representing both copyright owners and accused infringers. NYIPLA members frequently engage in copyright licensing matters, representing both copyright licensors and licensees.

NYIPLA's members have a strong interest in this case because their day-to-day activities depend on the consistently-applied and longstanding broad scope of the public performance right under the Copyright Act. As a result, NYIPLA's members have a strong interest in ensuring that the Court reverses the Second Circuit decision in the *WNET v. Aereo, Inc.* case, as well as the aspect of *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* relied upon by the Second Circuit below in support of its decision. NYIPLA's member also have a strong interest in ensuring that this Court protects the performance right that Congress enacted in the 1976 Copyright Act and that this Court has been construing in various decisions since.

## SUMMARY OF ARGUMENT

The Second Circuit's decision below is wrong for several reasons. First, the plain meaning of the transmit clause within the definition of the public performance right in the Copyright Act is rendered meaningless under the Second Circuit's interpretation of it. Second, allowing the Second Circuit's decision to stand would preclude copyright holders from enforcing their rights against free-riders and other copyright infringers operating under the guise of "innovation," "entrepreneurship," and "technological advances."

Moreover, transmitters of copyrighted works have never been permitted to "launder" their signals in a transparent effort to avoid the obligation to pay licensing fees for the public performance right. In such a world, there will be minimized incentive for the creation of new works, which is antithetical to the goals of the Copyright Act. Since the dawn of the modern Internet, and well before the *Cablevision* decision, various actors have attempted to build services and businesses around the unlicensed delivery of copyrighted content over the Internet, and in most instances the courts, including this one, have ultimately held that the law and equities favored the authors of copyrighted works. Those decisions, including this Court's important decision in *Grokster*, stand for the proposition that parties should not be permitted to use technology to "design around" the Copyright Act.

**ARGUMENT**

- I. Aereo is Publicly Performing Copyrighted Content Without a License Under the Plain Meaning of the Transmit Clause.**
- A. The Second Circuit Has Misconstrued the Transmit Clause and Seriously Undermined the Public Performance Right.**

*Amicus* endorses the position of the petitioners that the Copyright Act not only prohibits Aereo’s public performance of copyrighted content, but was designed specifically to do so. Among the exclusive rights of copyright holders is, “in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.” 17 U.S.C. § 106(4). “Publicly,” in turn, is defined as follows:

To perform or display a work “publicly” means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or 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.

The disagreement in *Aereo*, derived from the Second Circuit’s earlier decision in *Cablevision*, turns in substantial part on the proper understanding of the “transmit” clause of the Copyright Act. *Aereo*’s use of dime-sized antennas is a contrivance with no function other than an effort to qualify for *Cablevision* treatment, and does not change the fact that *Aereo* is transmitting copyrighted works to its subscribers for free. It does not matter if the individual subscribers are receiving the performance “in the same place or in separate places and at the same time or at different times.”

As discussed at length in Petitioners’ opening brief, Pet. Br. at 23–37, the 1976 Copyright Act contained this language in order to cover services, such as cable television and radio broadcasting, that perform copyrighted works to the general public, even if each particular performance is ultimately viewed in a private setting. *On Command Video v. Columbia Pictures*, 777 F. Supp. 787, 790 (N.D. Cal. 1991), citing H.R. Rep. No. 83, 90th Cong., 1st Sess. at 29 (1967). Judge Chin’s ruling in the *Cablevision* case at the district court level was consistent with this understanding, concluding that when *Cablevision* made the transmission available to its subscribers, it was performing it publicly. *Twentieth*

*Century Fox Film Corp. v. Cablevision Sys. Corp.*,  
478 F. Supp. 2d 607, 624 (S.D.N.Y. 2007)  
 (“*Cablevision I*”).

The Second Circuit incorrectly rejected this position, explaining that in their view the proper focus was upon “the potential audience of a given transmission by an alleged infringer” – if only one person is capable of receiving the particular transmission, the performance is not “to the public.” Because Cablevision’s system functioned by creating a separate copy for each subscriber before playback, the Second Circuit held that the transmission of those copies was private, not public. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 137 (2d Cir. N.Y. 2008) (“*Cablevision II*”). The Second Circuit specifically tried to limit that holding to the facts of that case:

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. This, however, is precisely what Aereo did, for the sole and express purpose of building a content-delivery service without having to pay the copyright owners, and the district court and Second Circuit have ruled in Aereo’s favor, based on their

overly broad interpretations of *Cablevision*.<sup>2</sup>

Taken to its not-so-distant extreme, this interpretation of the public performance right would swallow the Transmit Clause in its entirety. For example, it would literally mean that any public performance of copyrighted content could be laundered by making a buffer copy before transmission, and it would eviscerate the right of public performance in all situations where such a technological workaround could be applied.

Supporters of Aereo's position are expected to criticize the television networks (much as they have criticized the recording industry over the years) of trying to prop up an antiquated business model and argue that the role of the Court is to interpret the Copyright Act and not to keep "dinosaur" industries

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<sup>2</sup> Outside of the Second Circuit, by contrast, several courts looking at Aereo and a technologically-equivalent service have come to the same conclusions as Judge Chin did when he was sitting on the district court. These courts have applied the correct understanding of the Transmit Clause. *See, e.g., Community Television of Utah, LLC dba KMYU v. Aereo*, No. 13-910, Memo. Decision & Order (D. Utah Feb. 19, 2014) (rejecting *Cablevision II's* interpretation of the transmit clause and enjoining Aereo from operating in the Tenth Circuit); *Fox Television Stations, Inc. v. FilmOn X LLC*, \_\_ F. Supp. 2d \_\_, 2013 WL 4763414 (D.D.C. Sept. 5, 2013) (rejecting *Cablevision II's* interpretation of the transmit clause and enjoining service functionally identical to Aereo from operating everywhere except the Second Circuit); *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1145 (C.D. Cal. 2012) (rejecting *Cablevision II's* interpretation of the transmit clause and enjoining service functionally identical to Aereo from operating in the Ninth Circuit).

on life support. That type of rhetoric, however, has no place here, because it is both irrelevant to the interpretation of the Copyright Act and because the business models Aereo is competing with are built directly upon the foundations of long-standing copyright law. An affirmance of the Second Circuit's *Aereo* decision would preclude copyright holders from enforcing their rights against free-riders and other copyright infringers operating under the guise of "innovation," "entrepreneurship," and "technological advances."

As mentioned above and explained in greater detail in Petitioners' opening brief, Pet. Br. at 38–46, the definition of "perform," and its references to "separate places" and "different times" were added to the 1976 Copyright Act in anticipation of one-to-many services and the unknown technologies that would be employed in the future. The statutory licensing scheme in place, and the business relationships between the cable distribution industry and television networks are based on this understanding of the law – not the other way around – and the certainty of the law is what allows for the stable business relationships that are in place. *See* H.R. Rep. No. 94-1476, at 88-89 (1976) ("cable 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.").

This Court is not being asked to engage in protectionism, but rather to reiterate the

understanding of the public performance right of the Copyright Act that has been in place for nearly 40 years.

Upholding the Second Circuit's rulings in *Aereo* and *Cablevision II*, limiting the public performance right to a particular transmission, as opposed to the transmission of the underlying work, would be particularly pernicious in the current technological environment. Remote storage and transmission for individuals, practically unheard of at the time the Copyright Act of 1976 was drafted, has become commonplace. All forms of media protected by the Copyright Act can easily be stored in cloud structures, artificially segmented into a user's cloud drive and transmitted at will.

Rather than stifling innovation, a holding that reverses *Aereo* (and, expressly or implicitly, *Cablevision II*) and protects the performance right also promotes the most efficient technology. Companies will provide legal, licensed services using technology that is designed to provide the best service, as opposed to skirting liability for infringing a creator's performance rights. Moreover, industries in general, and those based upon intellectual property particularly, rely on certainty in copyright law. Businesses and licensing regimes have grown up based on that certainty, and a corrective ruling by this Court would serve to solidify that reliability.

**B. Even if *Cablevision II* Were Upheld, *Aereo* May Not Rely On It.**

As noted above, in 2008 the Second Circuit in *Cablevision II* specifically stated that its holding was

limited to the facts before it, and then in 2013 appeared to ignore its own limitation by endorsing Aereo's service, apparently feeling bound by the earlier decision. While *amicus* is of the view that *Cablevision* was wrongly decided, the *Aereo* decision should be reversed, even under the *Cablevision* standard.

The Aereo system is not entitled to the *Cablevision* exception, if there is one, because of the fundamental differences between Cablevision's remote DVR and Aereo's streaming services. Cablevision, unlike Aereo, already held a license to transmit the content at issue in that case. While the defendant was testing the bounds of that license by moving its technology from the consumer's residence to its own facilities,<sup>3</sup> "Cablevision primarily reasoned that the RS-DVR was no different than a set-top DVR, and that Cablevision should not have additional liability for transmitting the RS-DVR copies to its subscribers when it *already paid*

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<sup>3</sup> "At the outset of the transmission process, Cablevision gathers the content of the various television channels into a single stream of data." *Cablevision II*, 536 F.3d at 124. "Under the [] RS-DVR, this single stream of data is split into two streams. The first is routed immediately to customers," meaning that it is "processed and transmitted to Cablevision's customers in real time." *Id.* This transmission of copyrighted content is provided to Cablevision customers through "negotiated and statutory (i.e., required by law) licenses or 'affiliation agreements.'" *Cablevision I*, 478 F. Supp. 2d at 610. The second stream was sent through the RS-DVR's "complex system requiring numerous computers, processes, networks of cables, and facilities staffed by personnel twenty-four hours a day and seven days a week." *Cablevision II*, 536 F.3d at 125.

*licensing fees to retransmit the material live.” WNET v. Aereo, Inc.*, 722 F.3d 500, 511 (2d Cir. 2013) (en banc) (Chin, J., dissenting) (emphasis added).

Aereo, by contrast, comes to the table with no preexisting license from the copyright owners, and no willingness to enter into one. Aereo *pays absolutely nothing to rights holders* and transmits their copyrighted content to its customers for both live viewing *and* recorded later viewing. Indeed, the initial broadcast of copyrighted content that Cablevision *paid for the right to transmit* to its customers live is the *same copyrighted content* that Aereo’s system transmits live to its customers, without payment to the copyright holders. This is a patently incorrect outcome. Indeed, as suggested above, if *Aereo* were to be upheld, it would incentivize all other competitors, including Cablevision and other cable distribution competitors, to “launder” their signals in the same way and avoid the obligation to pay any licensing fees for the public performance of the networks’ programming. In such a world, there will be minimized incentive for the creation of new works.

The Second Circuit improperly disregarded this distinction. *WNET v. Aereo, Inc.*, 712 F.3d 676, 691 (2d Cir. 2013) (“*Aereo II*”). *Amicus* urges, however, that this Court consider the inherent differences between the Cablevision RS-DVR and Aereo copyright-avoidance models. While *amicus* maintains that *Cablevision* was wrongly decided, the follow-on decisions in *Aereo* are even more obviously incorrect.

The Supreme Court’s landmark decision in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), is instructive. That case involved essentially the same content at issue in *Aereo* – free over-the-air network television content. And at first blush, that case might suggest to some that just as Sony was not liable for providing the means for consumers to take expanded advantage of the content the networks was giving them, *Aereo* is doing the exact same thing. There is one very critical difference, however: the holding in *Sony* fundamentally relied on a finding that the underlying consumers were engaged in fair use when they “time-shifted” the plaintiffs’ programming using Sony’s video tape recorders. In the absence of a finding of fair use, the implication is that this Court would have found the consumers primarily liable, and Sony potentially secondarily liable, for copyright infringement in the plaintiffs’ works.<sup>4</sup>

The Second Circuit, however, did not address any fair use defense by *Aereo*, nor could it, as the issue is whether *Aereo* is engaged in primary copyright

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<sup>4</sup> The holding in *Sony* is not directly applicable here because that case involved the reproduction right, while here the proper interpretation of the transmit clause is at issue. Sony did not transmit the television signals to the users of their devices; the dispute was over Sony’s responsibility for those users’ recordings of the original transmissions. By contrast, here *Aereo* is making new transmissions to its subscribers without the permission of the copyright owners. Although the *Aereo* system does allow consumers to “time shift” their programming, that particular aspect of the system is not part of the dispute now before the Court.

infringement through the delivery of content by transmission to its subscribers, collecting fees from its subscribers but not paying the copyright owners for that commercialization.

## **II. Non-Productive Technology Designed Solely to Circumvent Copyright Should Not be Endorsed.**

*Aereo* should not be considered in a vacuum, but in the context of two very important converging lines of litigation addressing (i) the unlicensed distribution of content over the Internet; and (ii) the use of non-productive technologies solely to circumvent the strictures of the Copyright Act. In many ways, those two lines of cases converged in this Court's important 2005 decision in *Grokster*, holding that neither of those things should be tolerated.

Since the dawn of the modern Internet, and well before the *Cablevision* decision, various actors had attempted to build services and businesses around the unlicensed delivery of copyrighted content over the Internet, and in most instances the courts issued decisions holding that the law and equities favored the content creators. For example, *Twentieth Century Fox Film Corp. v. iCraveTV*, No. 00-121, 2000 U.S. Dist. LEXIS 11670, at \*4 (W.D. Pa. Feb. 8, 2000), concerned a service that was converting broadcast television signals into digital format and retransmitting them over the Internet with added advertising. The district court made swift work of that service and issued a preliminary injunction. A few months later, content owners brought a case

against a company offering a service that would record over-the-air television programming for later playback to customers. *See* Complaint, *Metro-Goldwyn-Mayer Studios Inc. v. RecordTV.com*, No. CV 00-06443 MMM (MANx) (C.D. Cal. June 15, 2000). That case quickly settled and the service was discontinued.<sup>5</sup> The following year, movie studios sued ReplayTV, an early provider of a DVR service, over new features that included the ability to send recorded shows across the Internet. *See* Complaint, *Paramount Pictures Corp. v. ReplayTV, Inc.*, No. CV 01-09358 FMC (C.D. Cal. Oct. 31, 2001). That case also settled quickly and the features were dropped.<sup>6</sup>

Recent years have seen a resurgence of these types of cases, possibly in response to the *Cablevision* decision and efforts to take advantage of its rulings. *Warner Bros. Enter. Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011), concerned the “Zediva” service, which offered subscribers the opportunity to “rent” DVDs and DVD players, then view the rented films over the Internet. The court rejected defendants’ arguments that they were running the equivalent of a DVD rental service, instead finding them liable for the public performance of the content. And in *WPIX, Inc. v. ivi*,

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<sup>5</sup> *See* Anna Wilde Mathews, *Web Site RecordTV to Curb Movie Use, Marking Legal Victory for the Studios*, Wall St. Journal, Apr. 17, 2001, at B4; Stip. for Entry of Consent Judgment and Permanent Injunction, *RecordTV.com*, No. 00-06443 (C.D. Cal. Apr. 16, 2001).

<sup>6</sup> *See* Nick Wingfield, *ReplayTV to Drop Features Opposed by TV Networks*, Wall St. Journal, Jun. 10, 2003; Stip. of Dismissal, *ReplayTV*, No. CV 01-09358 (Nov. 17, 2003).

*Inc.*, 691 F.3d 275, 287 (2d Cir. 2012), the district court and then the Second Circuit rejected the argument that a service that streamed television content over the Internet qualified as a cable system under § 111 of the Copyright Act, and rejected the argument that the service should be allowed to pay the same statutory license fees as traditional cable system operators.

Unlicensed music services typically met a similar fate. For example, in *UMG Recordings v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000), the district court held that MP3.com’s “ripping” of “tens of thousands of popular CDs in which plaintiffs held the copyrights . . . onto its computer servers so as to be able to replay the recordings for its subscribers” was not a fair use under the Copyright Act. While that case turned on the unlicensed reproductions (*i.e.*, “ripped” copies) MP3.com made to launch the service, at the heart of the service was an attempt by the defendant to provide consumers with new access to content to which they presumptively already had lawful access (in the form of their purchased music CDs).

Somewhat more recently, a district court held that XM Satellite Radio had exceeded its license by “permit[ting] subscribers to record, retain and library individually disaggregated and indexed audio files from XM broadcast performances,” even though XM was already paying for the right to perform the music live to its subscribers, and its subscribers were allowed to record the live performances. *Atl. Recording Corp. v. XM Satellite Radio, Inc.*, No. 06

Civ. 3733 (DAB), 2007 U.S. Dist. LEXIS 4290, \*6 (S.D.N.Y. Jan. 19, 2007). The additional XM functionality effectively gave consumers fully-interactive on-demand access to plaintiffs' musical works.

There was a second theme building through these cases: parties should not be permitted to use technology, or more increasingly software, to “design around” the Copyright Act. The restrictions and limitations chosen by the creators and programmers were often challenged, and the “technology”-based defendants were not permitted to evade infringement just because they made a technological innovation in the manner in which they transmitted the works.

As noted, the leading example of the rejection of this sort of thinking can be found in this Court's decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), the culminating opinion in a series of cases addressing secondary copyright infringement arising from peer-to-peer file sharing services. In many respects the history of the *Grokster* case began five years earlier with the first district court decision in the *Napster* case.

After Napster tried and failed to raise a defense under the safe harbors of the Digital Millennium Copyright Act, see *A & M Records, Inc. v. Napster, Inc.*, No. C 99-05183, 2000 WL 573136 (N.D. Cal. 2000), the district court went on to grant the plaintiffs a preliminary injunction, finding them likely to prevail against Napster on their claims of contributory and vicarious copyright infringement, citing the classic tests for both types of secondary

liability. *A&M Records, Inc. v. Napster, Inc.*, 114 F.Supp.2d 896 (N.D. Cal. 2000). In the case of contributory infringement, the court found that Napster had the requisite (i) knowledge and (ii) material contribution (*id.* at 918-20), and for vicarious liability, the court held that Napster had (i) the right and ability to control and (ii) a direct financial interest in the acts of infringement. *Id.* 920-22. With some modifications and variations, these holdings were essentially followed by the Ninth Circuit in *Napster*<sup>7</sup> and the district court and Seventh Circuit in *In re Aimster Copyright Litigation*.<sup>8</sup>

The *Grokster* case, however, followed a different path. Both the District Court for the Central District of California and the Ninth Circuit Court of Appeals held that *Grokster* was not liable as either a contributory or vicarious infringer. The reasoning turned on the particular architecture of the peer-to-peer systems at issue in that case. Due to the structures of their networks, in the view of the lower courts the defendants in *Grokster* did not qualify for either test because they never possessed knowledge when they could act upon it, nor control when they could stop any infringements. As the Ninth Circuit explained, quoting the district court with approval, “Plaintiffs’ notices of infringing conduct are irrelevant,” because ‘they arrive when Defendants do

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<sup>7</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. Feb. 12, 2001).

<sup>8</sup> 252 F. Supp. 2d 634 (N.D. Ill. 2002), *aff’d*, 334 F.3d 643 (7th Cir. Jun. 30, 2003).

nothing to facilitate, and cannot do anything to stop, the alleged infringement’ of specific copyrighted content.” *Grokster*, 380 F.3d at 1162 (quoting *MGM Studios, Inc. v. Grokster*, 259 F. Supp. 2d 1029, 1037 (C.D. Cal. 2003)). Likewise, “given the lack of a registration and log-in process, even Grokster has no ability to actually terminate access to filesharing functions...It is also clear that none of the communication between defendants and users provides a point of access for filtering or searching for infringing files, since infringing material and index information do not pass through defendants’ computers.” *Id.* at 1165.

The lower courts both concluded that the design of the software – which intentionally stripped the defendants of requisite knowledge or control – allowed the defendants to evade both of the traditional tests for contributory and vicarious infringement. Although the district court expressly recognized “the possibility that Defendants may have intentionally structured their businesses to avoid secondary liability for copyright infringement, while benefitting financially from the illicit draw of their wares,” *id.* at 1046, nevertheless the practice was permitted until it reached this Court.<sup>9</sup>

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<sup>9</sup> In the *Aimster* litigation by contrast, the Seventh Circuit compared the defendant’s use of encryption to a drug trafficker who looked away to try to avoid knowledge: “He did not escape liability by this maneuver; no more can Deep by using encryption software to prevent himself from learning what surely he strongly suspects to be the case: that the users of his service-maybe all the users of his service-are copyright infringers.” *In re: Aimster*, 334 F.3d at 650.

This Court took a more pragmatic approach in line with the purpose of the Copyright Act's incentive structure. Without disturbing or even addressing the conclusions of the lower courts that the *Grokster* defendants had designed systems that skirted the traditional two-part tests for contributory and vicarious infringement, this Court ascribed copyright liability based on the motivations of the defendants:

For the same reasons that *Sony* took the staple article doctrine of patent law as a model for its copyright safe-harbor rule, the inducement rule, too, is a sensible one for copyright. We adopt it here, holding that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.

*Grokster*, 125 S.Ct. at 2780.

The *Aereo* case presents a very similar pattern, and, indeed, an even stronger one for assigning liability. *Aereo* does not seriously dispute that it followed what this Court said was impermissible in *Grokster* by “intentionally structur[ing] [its] business[] to avoid [] liability for copyright infringement, while benefitting financially from the illicit draw of [its] wares.” *See id.*

*Aereo* deliberately designed an otherwise ineffecient “system employ[ing] thousands of individual dime-sized antennas, [without any]

technologically sound reason to use a multitude of tiny individual antennas rather than one central antenna” for the purpose of avoiding copyright liability. *Aereo II*, 712 F.3d at 697 (“[I]ndeed, [Aereo’s] system is 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.”) (Chin, J., dissenting). The use of the antennas has no productive reason other than to skirt the Copyright Act.

The only difference between Aereo transmitting the copyrighted content live through its “Watch” feature and any other properly licensed content delivery network providing the same copyrighted content live to users is that Aereo’s stream of the copyrighted content over the Internet is a copy streamed to individual antennas assigned to each of its customers. Because it employs a technological workaround, designed to compete with licensed services but with no practical use other than the avoidance of license fees, the Aereo service should not have been endorsed by the Second Circuit.

*Amicus* urges this Court to approach Aereo with the same pragmatism it approached the *Grokster* defendants, and once again decline to endorse those who seek to use technology for the sole purpose of designing around the strictures of copyright.

## CONCLUSION

For the foregoing reasons, the Court should reverse the decisions of the Second Circuit and

reaffirm the value of the public performance right in the Copyright Act of 1976.

Respectfully submitted,

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