No. 13-461

IN THE

Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
Petitioners,

v.

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

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE INTERNATIONAL CENTER FOR LAW & ECONOMICS AND THE COMPETITIVE ENTERPRISE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The International Center for Law & Economics ("ICLE") is a nonprofit, non-partisan global research and policy center. ICLE's roster of more than fifty affiliated scholars and research centers from around the globe use evidence-based methodologies to build the intellectual foundations for sensible, economically grounded policy that will enable businesses and innovation to flourish.

The Competitive Enterprise Institute ("CEI") is a nonprofit public interest organization dedicated to the principles of limited constitutional government and free enterprise. CEI engages in research, education, litigation, and advocacy on a broad range of regulatory and constitutional issues.[1]

SUMMARY OF ARGUMENT

Respondent ("Aereo") deploys a system of tiny antennas and large computer servers to capture, transcode, and retransmit live television broadcasts online without authorization or, indeed, any contractual relationship with copyright holders at all.

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[1] The parties have consented to this brief through blanket consent letters filed by the petitioner and the respondent with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

The inelegant complexity of its retransmission system is entirely a function of Aereo's efforts to evade copyright law; it makes no sense from a technological standpoint. Despite its efforts to engineer its way around the Copyright Act, Aereo cannot escape copyright liability. By providing unlicensed television broadcasts to its subscribers—a subset of the public—Aereo plainly violates the exclusive public performance rights held by copyright holders in its unauthorized transmissions.

Although Aereo's technological machinations are cleverly designed to create sufficient ambiguity as to their legality, Aereo's business model is clear: to offer the public the same online access to broadcast television programming that is readily available elsewhere, but without incurring the cost of compensating copyright holders of that programming. In so doing, Aereo effects a simple—and illegitimate—wealth transfer from copyright holders to itself, without creating any appreciable countervailing consumer benefits. In so doing, it undermines the ability of copyright holders to enter into voluntary transactions to license their content and thus subverts the constitutionally and congressionally protected right of creators and their licensees to market their creative works.

Aereo describes its multi-antenna system as an efficient, disruptive innovation. Opp'n. Cert. 21–22. Disruptive innovations that force industries to move from old to new technologies or that create new business models to deploy old technology are valuable

when they are "both better and cheaper than the products and services against which [they] compete[]."[2] But Aereo's technology is not transformative in this way, and its fundamental innovation does not improve upon existing technologies or business models in a manner meriting protection by the courts.

Aereo's innovation is not a technological one. Rather, its novelty is in the imaginative application of an age-old technology (the antenna) in order to engineer around the Second Circuit's interpretation of the Copyright Act in *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d at 121 (2d Cir. 2008), *cert. denied mem.*, 557 U.S. 946 (2009) ("*Cablevision*"). It does not offer an otherwise-unavailable alternative to existing technologies or business models that is more efficient, faster or better. If anything, Aereo's core technology is cumbersome, redundant and absurd, carefully designed to attempt to occupy that "strange place where wasting resources on thousands of tiny

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[2] Larry Downes & Paul Nunes, *Big Bang Disruption: Strategy in the Age of Devastating Innovation* 19 (2014).

antennas [makes] you legal—but where using one antenna [breaks] the law."[3]

Aereo's impact on copyright holders and the market for their works is little different from that of a black market reseller of pirated copyrighted material. But it is a mistake to simply view the fruits of Aereo's endeavors as an expansion of end-user access to copyrighted works. To access content delivered by Aereo, a consumer must not only pay for the service, but must also own a device capable of displaying the content and an Internet connection to retrieve it. Thus, Aereo does not serve chiefly to enhance consumer access to creative works; rather, it rather merely transfers rents from content creators to Aereo itself:

> Examining the technology problem from this perspective reveals that it is really less about people getting things for free than about a redistribution of the rewards for creative activity. This technology-induced redistribution has shifted the reward from

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[3] James Grimmelmann, *Why Johnny Can't Stream: How Video Copyright Went Insane*, Ars Technica (Aug. 30, 2012), http://arstechnica.com/tech-policy/2012/08/why-johnny-cant-stream-how-video-copyright-went-insane/.

> creators to copyists and to the makers of the technology that makes copying possible.

Ronald A. Cass & Keith N. Hylton, *Laws of Creation: Property Rights in the World of Ideas* 219 (2013). Meanwhile, with device and Internet connection in hand, consumers can already duplicate the entirety of Aereo's product offering, accessing content delivered by legitimate online services like Hulu and Netflix that compensate creators for their works. Aereo adds nothing particularly novel to this market but, like any Internet piracy website, it simply transfers revenue from content creators and their licensees—and, with it, some of the incentive to invest in the creation and marketing of high-cost, high-value video programming.

So long as Aereo neither pays royalties nor offers a new way to access content or better functionality, it confers no special social benefit, regardless of whether it violates copyright law. But the conclusion that it confers no special social benefit, in turn, *does* support the argument that Aereo is violating the Copyright Act. To the extent that the legality of ambiguous, novel conduct under the Copyright Act turns in part on its ability to overcome the potential costs of "monopoly stagnation" alleged to arise from intellectual property protection. Aereo fails to pass this test.

ARGUMENT

I. Aereo's Retransmission of Broadcast Programming Infringes Upon Copyright

Owners' Exclusive Rights to Publicly Perform Their Creative Works.

Aereo accesses live television broadcasts as they are transmitted over the airwaves, then it retransmits this broadcast programming to consumers for a fee. Pet. App. 128a. Aereo does not obtain permission from any copyright holders who own or license these programs before it sells their content for private financial gain. *Id*. This business model plainly and directly infringes upon the exclusive rights afforded to owners of television programs by the U.S. Copyright Act. 17 U.S.C. § 106(4). The Copyright Act secures to owners of original works of authorship the exclusive right, among others, to publicly perform their audiovisual works, including television programs. *Id*. Thanks to Aereo, however, any member of the public can view unlicensed broadcast television by signing up for Aereo's service, which retransmits broadcasts in pristine digital form over the Internet. Pet. App. 152a.

Despite Aereo's efforts to engineer around the Copyright Act, the company cannot escape copyright liability through technological machinations. Aereo argues that its retransmission of television broadcast programming is non-infringing because it does not perform these programs *to the public*. Pet. App. 81a (emphasis added). Because Aereo transmits to each of its subscribers a distinct transmission, received over the airwaves by one of the company's many antennas, Aereo argues that its performances are not public. *Id*. Yet, taken as a whole, Aereo's system for

delivering broadcast television to its subscribers is nothing short of a large-scale means of performing copyrighted television programs to the public. Pet. App. 137a. In other words, Aereo's system is a "device or process" through which the firm shows its subscribers the very images and sounds that air on broadcast television. *Cf.* 17 U.S.C. § 101 (defining what it means to "perform" a work).

When Congress amended this provision in 1976, it realized it could not foresee all technologies capable of transmitting performances. It thus defined a "device" or "process" as "one now known *or later developed*." *Id.* (emphasis added). "Indeed, it is fairly clear from the legislative history of the 1976 Act that Congress meant to change the old pattern and enact a statute that would cover new technologies, as well as old." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 457–8 (1984) (Blackmun, J., dissenting) ("*Sony*"). No matter how many miniature antennas Aereo deploys and temporarily assigns to each of its subscribers, these antennas form part of a larger, interconnected system—a "device" that "performs" copyrighted works "to the public." Aereo cannot dodge the law by using an idiosyncratic technology to transmit television programs.

In denying Petitioners' request for a preliminary injunction against Aereo, the Second Circuit panel relied on its 2008 decision in *Cablevision*, 536 F.3d at 139. Finding that "the transmit clause [of the Copyright Act] directs us to identify the potential audience of a given transmission," the court held that

any transmission "made to a single subscriber using a single unique copy produced by that subscriber" is a private performance so long as no one else can receive it. *Id*. Applying this reasoning to Aereo, the Second Circuit panel concluded that because each performance the service transmits is capable of being received by only a single, unique user, Aereo's performances are private, not public. Pet. App. 23a.

But the *Cablevision* court's interpretation of the Copyright Act wrongly conflates a "performance or display" of a work with the "transmission" of a performance of a work.[4] Under the Copyright Act's Transmit Clause, transmitting a performance of a work to the public is a public performance, regardless of "whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101. Yet the Second Circuit's interpretation of this language effectively reads "at different times" out of the statute, as two different individuals cannot receive the same transmission of a performance at different times. *See*

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[4] *See Cablevision*, 536 F.3d at 134 ("The fact that the statute says 'capable of receiving the *performance*,' instead of 'capable of receiving the *transmission*,' underscores the fact that a transmission of a performance is itself a performance.") (emphasis added).

Pet. App. 21a. n.11. The Second Circuit also wrongly focused on who is capable of receiving each transmission made by Aereo, rather than who is capable of receiving each of the *underlying performances* retransmitted by Aereo. Pet. App. 133a.

As this Court has stressed, "[i]t is our duty to give effect, if possible, to every clause and word of a statute . . . ." *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (citations omitted). Had Congress intended to exempt from copyright liability someone who makes unauthorized transmissions of the same performance to thousands of viewers, it would have said so in the Transmit Clause. Instead, as Congress emphasized, whether a performance is to the public depends on the audience capable of receiving the performance—not on who can receive each transmission.

II. Aereo's Conduct Is Inimical to the Economic Basis of Copyright Protection.

Aereo's business model not only infringes upon creators' exclusive rights under the Copyright Act, but it also threatens the "Progress of Science" that the Constitution empowers Congress to promote by "securing for limited Times to Authors . . . the exclusive Right to their respective Writings." U.S. Const. art. I, § 8, cl. 8. Copyright is often viewed chiefly as a means of rewarding authors; however, its "ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Aereo's unauthorized commercial

exploitation of broadcast television programs is certainly harmful to artists. But its ultimate victims are members of the general public, who spend on average over ten hours each week watching broadcast television and considerably more watching video content on cable and online.[5]

A. Congress Intended the Copyright Act to Establish Markets for Creative Works.

Even if this Court finds that the Copyright Act's text is ambiguous as regards the legality of Aereo's specific technology for retransmitting broadcast programming, Congress's purpose in enacting the statute strongly suggests that Aereo's business model infringes upon Petitioners' public performance rights. Although this Court does not "resort to legislative history to cloud a statutory text that is clear," *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994), it is axiomatic that "[a]ll statutes must be construed in light of their purpose." *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940). Aereo can find no solace in Congress's intent in enacting the Copyright Act, which confers upon creators of original works and

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[5] FCC Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fifteenth Report*, 28 F.C.C. Rcd. 10496, paras. 132, 199 (2013).

their assignees "a marketable right to the use of [their] expression[s] . . . ." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985). By reselling broadcast television shows without their owners' permission, Aereo usurps creators' marketable rights in these programs.

The circumstances surrounding the enactment of the Copyright Act of 1976 further undercut Aereo's claim that its service is not infringing.[6] Before 1976, the Copyright Act was silent as to whether the transmission of a television broadcast constituted a "performance" of a work.[7] In the 1960s, two owners of programming aired over broadcast television separately brought copyright infringement suits against cable companies that—like Aereo—retransmitted television broadcasts of the plaintiffs' works without compensating the owners. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390,

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[6] *Cf.* 2 B. Norman Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 49:1 (7th ed. 2007) ("Statutes are documents with practical effects, and *cannot be divorced from the historical framework in which they exist*. Where an act's language is ambiguous, then, courts may find interpretive guidance in . . . the circumstances surrounding a bill's enactment . . . .") (emphasis added).

[7] Pub. L. No. 60-349, 35 Stat. 1075 (1909) (codified as amended at 17 U.S.C. § 101 et seq.).

393 (1968); *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394, 396 (1974). In both cases, this Court found for the defendants, holding that a cable company's retransmission of a television broadcast signal did not constitute a "performance" of that program under the Copyright Act in force at the time.

Dissatisfied with these rulings, Congress effectively abrogated *Fortnightly* and *Teleprompter* in the Copyright Act of 1976,[8] defining a transmission of a performance as a performance itself. 17 U.S.C. § 101. Although Congress's immediate reason for making this change was to bar cable companies from retransmitting broadcast television programs without compensating their owners,[9] the law was written so as to be as future-proof as possible. Congress defined the word "transmit" so it would be "broad enough to include all conceivable forms and combinations of wired and wireless communications

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[8] Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-810).

[9] Congress also established a compulsory statutory license whereby a cable company may retransmit broadcast signals without permission if it remits to the Register of Copyrights a royalty fee that depends, among other things, on the company's gross receipts and how many signals it retransmits to subscribers outside the originating station's local service area. 17 U.S.C. § 111. A similar compulsory license is available to satellite carriers. 17 U.S.C. §§ 119, 122.

media, including but by no means limited to radio and television broadcasting as we know them," even extending to "any other techniques and systems *not yet in use or even invented*." H.R. Rep. No. 94–1476, at 63 (emphasis added). As this language illustrates, Congress sought in the 1976 Act to prevent video distributors from appropriating the market value of broadcast television content. *See*, *e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709 (1984; *Sony*, 464 U.S. at 469 n.17.

According to Aereo's reading of the statute, however, the law does *not* actually bar the uncompensated commercial retransmission of broadcast television; rather, it merely erects cumbersome, inefficient technological hurdles to such retransmissions. If Aereo is correct, therefore, cable companies could have skirted copyright royalties for broadcast programming all these years by simply installing many more antennas. Such an illogical regime would produce the very sort of absurd results this Court seeks to avoid when it construes a statute with a clear purpose. *See Helvering*, 308 U.S. at 389. ("A literal reading of [a statute's words] which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose.").

B. Aereo's Business Model Short-Circuits Market Transactions Between Copyright Holders and Consumers.

In concluding that Aereo does not publicly perform broadcast television programs, the Second Circuit relied upon its 2008 *Cablevision* decision holding that a cable company's remote RS-DVR was similarly non-infringing. *Cablevision*, 536 F.3d at 121. Importantly, however, the individual cable subscribers to whom Cablevision transmitted copies of plaintiff Cartoon Network's television programming *were already paying for lawful access to it*. Cartoon Network voluntarily agreed to license its copyrighted works to Cablevision and, in turn, to each Cablevision subscriber whose cable package included the Cartoon Network channel. The dispute in *Cablevision* thus involved a copyright holder and a licensee with a preexisting contractual relationship; the parties simply disagreed on the terms by which Cablevision was permitted to transmit Cartoon Network's content. Pet. App. 40a–41a.

Despite its unsuccessful copyright infringement lawsuit against Cablevision, however, Cartoon Network remained (and remains) free to terminate its licensing agreement with Cablevision—thereby depriving the cable company of lawful access to the television channel. Or Cartoon Network could demand more compensation for its channel, perhaps because Cablevision subscribers who pay for RS-DVR service may derive greater value from Cartoon

Network programming given their ability to view it at more convenient times.

Cartoon Network's ability to renegotiate the terms of its carriage agreement even after *Cablevision* provides the channel a crucial means of recouping any revenue it might otherwise have lost due to the remote DVR service. Ultimately, this dynamic of voluntary exchange mitigates *Cablevision*'s impact on the market for television programming, as copyright holders and cable companies settle on a new equilibrium. Because cable companies still need to obtain copyright licenses to access cable channels that are not freely distributed in any form, applying the *Cablevision* holding to the circumstances present in that case poses no serious threat to the Copyright Act's purpose of securing to copyright holders a marketable right in expressive works. But the same cannot be said of the Second Circuit's application of its *Cablevision* holding to the facts here.

Unlike the cable company in *Cablevision*, Aereo and its ilk have neither sought nor received permission from any holders of copyrights in broadcast television programming before retransmitting their works to paying subscribers. Pet. App. 40a–41a. The "safety valve" enjoyed by Cartoon Network and other cable channels—a cable company's need to obtain copyright licenses to access each channel owner's content—is unavailable to owners of broadcast television programming whose works are transmitted over the airwaves. To

effectuate the purpose of the Copyright Act, therefore, it is essential that this Court interpret the law to preserve the rights of copyright holders whose content Aereo usurps by allowing them to enjoin Aereo's unlicensed retransmissions of their creative works.

C. Aereo's Harmful Repercussions Extend Throughout Markets for Financing, Producing, and Distributing Creative Video Content.

Importantly, Aereo's harm to the market for video programming does not stop at the owners of these programs. Many economic actors collaborate to create, market, and distribute broadcast television content: national networks; local affiliate stations; independent film and television production companies; unaffiliated studios, cable, satellite, and online providers; and syndicators, among many others. Crucially, advertisers also participate in this market, helping finance original programming by purchasing television advertising time and paying for product placement.

Were Aereo to seek permission from copyright owners to retransmit their film and television programs, it might find a place in this market. Instead, by circumventing the complex commercial relationships that enable the market for copyrighted video content, Aereo disrupts these relationships and broadly jeopardizes the legitimate financing, production, and distribution of video content.

The financing of video content is tenuous enough without being threatened by Aereo. Indeed, "it is no wonder that success of [video] is highly variable, risk is extreme, and that assorted financing schemes have evolved to try and combat the problem . . . . It is because risk cannot be fully mitigated that participants (studios, producers) have evolved varying financing mechanisms as a way of distributing that risk."[10] For example, major broadcast networks typically license the right to air a feature film at a price equivalent to about fifteen percent of the film's domestic box office gross receipts.[11] Thus, broadcast licensing revenue represents a significant portion of a feature film's expected return, while securing top-dollar advertising is crucial for networks to recoup multi-million dollar licensing costs.[12]

As Aereo draws viewers away from broadcast and cable networks, advertising revenues will decrease. But advertisers are also extremely sensitive to the composition of audiences. The amount that advertisers will pay for broadcast television

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[10] Jeff Ulin & Chris Simpson, *The Business of Media Distribution* 80–81 (2009) ("Ulin & Simpson").

[11] *Id.* at 236.

[12] *Id.*

commercials depends in large part on the audience demographics, with most advertising dollars tied to a select group of key demographics.[13] For advertisers, it is important that "[b]roadcasters know that a certain percentage of X demographic will watch the nightly news at 6:00 pm versus Y demographic for a sitcom . . . [a]nd the game is all about that sole fact: how many eyeballs of which type . . . will see the program."[14] Aereo not only reduces the number of broadcast viewers, but it makes this crucial information less reliable: Because demographic data and audience ratings provided by the Nielsen Company do not reflect Aereo subscribers, Pet. App. 109a–10a, the information these ratings impart is less reliable and, thus, less valuable due to Aereo's distortions.

Meanwhile, initial production costs for scripted primetime television programming reached $17 million in the 2011–12 TV season.[15] These programs are typically financed by debt, much of which is

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[13] *See* Jeffrey Logsdon, Jeffrey B. Hoskins & Kara Anderson, *Perspectives on the Filmed Entertainment Industry 2012*, at 158–62 (2012), *available at* https://www.bmocm.com/conferences/moviecontest-2012/images/FilmedEntertainment2012Report.pdf.

[14] Ulin & Simpson, *supra*, at 241.

[15] *Id*. at 158–62.

recouped through revenues from syndication and, increasingly, online distribution. "Network primetime shows are the most expensive to produce with budgets in the millions of dollars; network license fees rarely cover the budget. . . . Accordingly, a [television] production is usually faced with a healthy deficit."[16] Moreover, for every twenty primetime pilots produced, approximately only one ever makes it to a meaningful syndication run. Television program productions depend significantly on network licensing, syndication and retransmission revenue. As Aereo siphons viewership from both broadcasters and cable systems, these revenues are imperiled. And given that cable and satellite companies are already considering adopting Aereo's model, *see*, *e.g.*, Pet. App. 130a–31a, the prospective loss of revenue could be staggering.

If Aereo prevails and similar services proliferate,[17] broadcasters may vacate the airwaves entirely, joining the ranks of cable networks acces-

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[16] *Id.* at 102.

[17] Aereo has already spawned at least one competitor, FilmOn X LLC. *Fox Television Stations, Inc. v. FilmOn X LLC*, No. CIV.A. 13–758 RMC, 2013 WL 4763414 (D.D.C. Sept. 5, 2013.

sible only to paying subscribers.[18] For the nation's eleven million "broadcast-only households,"[19] this shift would deprive them of access to broadcast television on terms suitable to copyright owners. Although such disruptive change is commonplace and often beneficial in competitive markets characterized by rapid technological innovation,[20] whatever disruptive effects result from Aereo's slick attempt to evade copyright law will only detract from truly innovative disruptions. Shrinking the umbrella of copyright protection so as to discourage creators from producing content in the first place or offering their works free of charge—whether to all consumers or only a subset of them—would undermine the Copyright Act's objective of "giv[ing] the public

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[18] Some major broadcasters are already considering ceasing over-the-air transmission and becoming pay-television channels if Aereo prevails. *See*, *e.g.*, Sam Gustin, *Murdoch's News Corp. Threatens to Pull Fox Off the Air in Aereo Dispute*, Time (Apr. 9, 2013), *available at* http://business.time.com/2013/04/09/news-corp-threatens-to-pull-fox-off-the-air-in-aereo-dispute/.

[19] FCC, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fifteenth Report*, 28 F.C.C. Rcd. 10496, para. 198 (2013).

[20] *See generally* Larry Downes, *The Laws of Disruption: Harnessing the New Forces that Govern Life and Business in the Digital Age* (2009).

appropriate access to their work product." *Sony*, 464 U.S. at 429.

D. Aereo Does Not Meaningfully Expand the Public's Access to Creative Works.

Aereo depicts itself as an innovator that is making creative works available to consumers in ways that were never before possible. Opp'n. Cert. 21–22. Instead of relying on spotty over-the-air reception or paying a hefty monthly fee for a cable television package, consumers who subscribe to Aereo can view every major broadcast television network with nothing more than a computer and Internet access. This portrayal of Aereo as a pioneer in television distribution, however, cannot be reconciled with the realities of today's video marketplace.

Although "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright," *Sony*, 464 U.S. at 451, not every unauthorized commercial use of a copyrighted work is infringing. Indeed, numerous business models that exploit creative works for commercial purposes without permission from copyright holders have been found exempt from copyright liability under the fair use doctrine. 17 U.S.C. § 107. For instance, Google's image search engine, which caches and displays small thumbnails of copyrighted images, has been judged to be fair use due to its "significantly transformative nature" and its "public benefit" that

"outweighs Google's superseding and commercial uses" of the thumbnails. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164–67 (9th Cir. 2007). Similarly, in considering whether Sony's Betamax machine constituted fair use, this Court explained that "to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits." *Sony*, 464 U.S. at 454 (citing *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 508 n. 12 (1983)). While the Copyright Act "affords protection to authors as an incentive to create," this protection is limited "so as to avoid the effects of monopolistic stagnation." *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)). In applying the Copyright Act to new technologies and business models, courts must consider the possibility that novel circumstances may serve the public by significantly expanding legitimate access to creative works, and weigh this against the presumption in favor of protection.

Yet Aereo does not transform the copyrighted material it retransmits, nor does it meaningfully expand the public's ability to access creative works. Using the Internet—the very platform over which

Aereo redistributes broadcast programming—consumers in the United States can *lawfully* access nearly every show aired on a broadcast network, even if they lack a television and a cable subscription.[21] Each major broadcast network streams much of its content for free on its website, while dozens of online video distributors sell broadcast television programming on a bundled or a la carte basis. Hulu, for instance, offers most broadcast television shows within hours of their first airing. Many other popular platforms—including Amazon Instant Video, Apple iTunes, Google Play, Microsoft Xbox Video, and Netflix—sell episodes and seasons of practically every program aired on broadcast television. At best, Aereo's only advantage over these services is its price, which undercuts competing video distributors that actually pay to license the copyrighted works they sell.

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[21] *See The Satellite Television Law: Repeal, Reauthorize, or Revise?, Hearing Before the H. Comm. on Energy and Commerce*, 113th Cong. 17–25 (2013) (statement of Geoffrey Manne, Executive Director, International Center for Law & Economics), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Manne-CT-Satellite-TV-Law-2013-6-12.pdf.

For each consumer who subscribes to Aereo, an authorized distributor loses an actual or potential subscriber—which, in turn, harms the copyright owners who license their works for online distribution. On the other hand, some consumers who subscribe to Aereo might not otherwise watch broadcast television whatsoever. This Court grappled with the implications of unauthorized distribution of broadcast television in *Fortnightly*, 392 U.S. at 390, and *Teleprompter,* 415 U.S. at 394. In those cases, this Court assumed the retransmission of television broadcasts by cable companies would, if anything, benefit owners of broadcast programming by expanding their audiences.

Yet today's broadcast market is not the monolithic entity it was four decades ago. Although some consumers still rely on antennas to view broadcast programming, most do not; instead, they pay for a cable or satellite subscription, or they watch broadcast television shows online using lawful distributors. As copyright owners improve their ability to engage in price discrimination, consumers will likely access television shows through a more diverse array of outlets. But Aereo undercuts this price discrimination—a practice that most economists believe is usually beneficial to social

welfare, as it is more likely to expand output than to reduce it.[22]

E. If Aereo's Legal Blueprint Is Upheld, Emerging and Future Markets in Creative Works Will Suffer.

The Second Circuit's *Cablevision* holding was not ultimately cabined to just the cable companies directly implicated in that case. Although the question of law on which this Court granted a writ of certiorari here implicates only broadcast television retransmissions, a ruling in favor of Aereo would extend far beyond the television broadcasts immediately at issue. Aereo argues that any transmission of a performance of a copyrighted work is not a public performance, no matter how many members of the public receive the performance. Taken to its logical conclusion, this reading of the Copyright Act would endanger all Internet platforms that make available performances of copyrighted audiovisual works to the public. Aereo's legal blueprint, if upheld, would logically extend to any

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[22] William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 40 (2001); *see also* Jerry A. Hausman & Jeffrey K. MacKie-Mason, *Price Discrimination and Patent Policy*, 19 RAND J. Econ. 253 (1988).

one-to-one performances of *non-broadcast* content, as well.

Many copyright holders, including owners of broadcast television programs, make some or all of their content available to the public free of charge—often accompanied by advertising—over the Internet, on network websites and on platforms such as Hulu. But under Aereo's reading of the Copyright Act, any company that retransmits video programming initially transmitted online does not implicate the public performance right, so long as only a single user receives each stream. Thus, a company that rented a cluster of computer servers—each running an operating system connected to Hulu's website—could lawfully retransmit the platform's video programming without permission from the copyright owners—and could even strip out Hulu's ads in lieu of Aereo's own ads, for which the latter would have no obligation to compensate the underlying content owners.

Such a business model is legally and economically indistinguishable from Aereo as it operates today. The same dynamic could also apply to other types of creative audiovisual work, whether distributed online or over a medium that has yet to emerge—with similarly devastating consequences for the market for creative works.

CONCLUSION

The Copyright Act should not be interpreted so formalistically as to frustrate Congress's clear intent

to secure to creators the marketable right in their expressions by allowing a cunning technical design to circumvent copyright protection. Aereo's business model is predicated on infringing the copyrights of content creators, yet it confers no appreciable countervailing benefits to the public. For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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March 3, 2014