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; WNJU-TV BROADCASTING LLC; WNET; THIRTEEN PRODUCTIONS, LLC; FOX TELEVISION STATIONS, INC.; TWENTIETH CENTURY FOX FILM CORPORATION; WPIX, LLC; UNIVISION TELEVISION GROUP, INC.; THE UNIVISION NETWORK LIMITED PARTNERSHIP; AND PUBLIC BROADCASTING SERVICE,
*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 SCREEN ACTORS GUILD-AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA, INC., WRITERS GUILD OF AMERICA, WEST, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICI CURIAE*[1]

*Amici* (collectively referred to herein as the "Guilds") are labor unions representing artists, including actors, directors, writers and other media professionals in the motion picture, television, commercial and new media industries

*Amicus* Screen Actors Guild-American Federation of Television and Radio Artists ("SAG-AFTRA") is the nation's largest labor union representing working media artists. SAG-AFTRA represents more than 165,000 actors, announcers, broadcasters, journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists and other media professionals. In 2012, SAG-AFTRA was formed through the historic merger of two labor unions: Screen Actors Guild ("SAG") and the American Federation of Television and Radio Artists ("AFTRA"). SAG-AFTRA members are the faces and voices that entertain and inform America and the world. SAG-AFTRA exists to secure strong protections for media artists.

*Amicus* Directors Guild of America, Inc. ("DGA") was founded in 1936 to protect the economic and creative rights of Directors. Over the years, its membership has expanded to include the entire

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[1] Pursuant to Rule 37.6, *Amici* state that 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 amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of amicus briefs.

directorial team, including Unit Production Managers, Assistant Directors, Associate Directors, Stage Managers, and Production Associates. DGA's over 15,000 members live and work throughout the United States and abroad, and are vital contributors to the production of feature films, television programs, documentaries, news and sports programs, commercials, and content made for the Internet and other new media. DGA seeks to protect the legal, economic, and artistic rights of directorial teams, and advocates for their creative freedom.

*Amicus* Writers Guild of America, West, Inc. (WGAW) is a labor organization and the collective bargaining representative of approximately 11,000 professional writers in the motion picture, television and new media industries. The WGAW's mission is to protect the economic and creative rights of the writers it represents. As the bargaining representative of creators of audiovisual content, the WGAW has a significant interest in the protection of copyrighted material against infringement.

The Guilds have collective bargaining agreements with all of the major motion picture and television production companies, television networks, and commercial producers. These collective bargaining agreements govern the wages, hours, and working conditions of the Guilds' members.

The Second Circuit's decision will have a significant negative impact on the Guilds' members. An unlicensed service such as Aereo has the potential to reduce the value of creative works by circumventing authorized distribution channels for media and entertainment content. The Guilds'

members, and their pension and health plans, rely on residuals – deferred compensation based on the continuing use of the creative works on which they were employed – as an important source of income. As the revenues generated by these works are diminished or eliminated, so too are the incomes, benefits, and jobs of the Guilds' members. Accordingly, the Guilds and their members have a significant interest in the outcome of this litigation.

## SUMMARY OF ARGUMENT

This case presents critical questions about the application of copyright law to new technologies that are rapidly changing the face of the entertainment industry. It follows a long line of past cases that had at their core the question of whether copyright holders have a right to protect their creative works when new business models exploit advances in technology to circumvent the owners' intellectual property rights. The outcome of this case will affect not just the copyright owners, but the artists who depend on the copyright owners for employment and for on-going compensation based on the legal exploitation of the copyrighted works.

The media and entertainment industry is a robust ecosystem composed of various interdependent relationships, rights and responsibilities. Over-engineered technologies that are designed to circumvent clearly established law and to profit from the unlicensed use of other parties' intellectual property disrupt this otherwise healthy and adaptive ecosystem. When services like Aereo unjustly enrich themselves from the fruit of others' labor, they violate both the spirit and plain language of the law.

For decades, the Guilds have collectively bargained for residuals, a form of deferred compensation based on the continuing use of the creative works over their lifetime. Guild members receive ongoing income as the copyright owners exploit their works in various markets, including broadcast and cable television and on the Internet. When parasitic technologies skirt the law to supplant the properly licensed distribution of content, it

jeopardizes the Guild members' livelihoods. This is of particular concern during difficult economic times.

By upholding Aereo's technically inefficient system, which was specifically designed to circumvent copyright law and the obligation to compensate copyright holders, the Second Circuit has helped introduce a dangerous mutation into to the entertainment ecosystem. This hyper-technical, and incorrect, interpretation of the transmit clause has real consequences beyond the litigants of the case. The effects will be felt not just by the copyright owners or licensees, but by tens of thousands of individuals whose careers and livelihoods depend at any given time on the copyright owners' ability to generate revenue from their content.

The Guilds therefore urge this Court to reverse the decision below.

## ARGUMENT

### I. Introduction

The opening sentence of the Statute of Anne, which was enacted in the United Kingdom in 1710 and is the predecessor to Article I, Section 8, Clause 8 of the United States Constitution, premises the establishment of copyright on the following statement:

> "Whereas Printers, Booksellers, and others have … frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their families: For preventing therefore such practices for the future, and for the Encouragement of Learned Men to Compose and Write Useful Books …."
> Statute of Anne, 1710, 8 Anne C. 19 (Eng.).

The technology may be different, but the story remains the same. Although over three hundred years have passed, the law should not stray from this fundamental principle: those who take or facilitate the taking of the creative works of others without consent cause detriment and ruin to the families that rely on revenues derived from those works and

undermine the economic incentive for the creation of new works.

The Guilds represent nearly 200,000 workers who rely on the revenues generated by copyrighted works to earn their livings and support their families and communities. The Guilds' members play a vital role in creating audiovisual works and sound recordings that are in demand both in the United States and around the world. Contrary to popular misconception, the Guilds' members are overwhelmingly middle-class workers whose careers are characterized by intermittent and unpredictable employment and who therefore rely on downstream revenues and royalties to provide them with an on-going flow of compensation and health and pension benefits that keep their families afloat and secure.

## II. The Media and Entertainment Industry is an Interdependent Structure of Relationships, Rights, and Responsibilities That is Reliant upon Robust Intellectual Property Laws

The media and entertainment industry is a complex ecosystem composed of various interdependent relationships, rights and responsibilities. At the ecosystem's core are copyrights in entertainment and media content, including the right and ability to license those works for consumption by the public. The copyright holders invest billions of dollars in creating that content by investing in intellectual property, equipment, materials, and wages for tens of thousands of working men and women, including the Guilds' members. Protection of the copyright holder's exclusive rights under the law is critical to ensuring

these investments bear fruit, allowing the entire ecosystem to thrive.

As new technologies develop, the industry ecosystem evolves, adapting to the change in a manner that balances the interests of all participants. Parasitic services that are designed to circumvent copyright holders' exclusive rights and to profit from the unlicensed use of other parties' intellectual property disrupt this otherwise healthy and adaptive ecosystem. Through inaccurate and hyper-technical readings of the law, the Second Circuit opened, and then expanded, a gap in the ecosystem's structure, ushering in technologies that feed off of and unjustly enrich themselves from the fruit of others' labor.[2]

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[2] Other companies have also attempted to launch services based on the unlicensed retransmission of broadcast television content resulting in litigation and, in most cases, injunctions in favor of the broadcasters. *See, e.g.* WPIX, Inc. v. ivi, Inc., 691 F.3d 275 (2d Cir. 2012) *cert. denied*, 133 S. Ct. 1585 (2013) (a company that streamed broadcast television programming over the Internet without authorization did not qualify as a cable system); *Community Television of Utah, LLC v. Aereo, Inc.*, No. 13-910, 2014 U.S. Dist. LEXIS 21434 (enjoining Aereo's service in Utah); *CBS Broad., Inc. v. FilmOn.com, Inc.*, No. 10-7532, 2013 U.S. Dist. LEXIS 130612 (S.D.N.Y. Sept. 10, 2013) (finding that online streaming service violated prior settlement and injunction); *Fox TV Stations, Inc. v. FilmOn X LLC*, No. 13-758, 2013 U.S. Dist. LEXIS 126543 (D.D.C. Sept. 5, 2013) (holding that a service that streamed television programming over the Internet violated plaintiffs' public performance right); *Fox TV Stations v. BarryDriller Content Sys.*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012) (enjoining "Aereokiller" service that streamed broadcast television programming over the Internet without authorization). *But see Hearst Stations Inc. v. Aereo, Inc.*, No. 13-11649, 2013 U.S. Dist. LEXIS 146825 (D. Mass. Oct. 8, 2013) (declining to preliminarily enjoin Aereo's service).

The economic value of entertainment and media content derives from revenues received from licensed exploitation throughout a work's life-cycle. Financiers and producers make decisions regarding what projects to "greenlight," as well as which writers and directors to hire, which actors to cast, and where to shoot, based on settled understandings about various markets and the revenues that can be generated from them. Long before a project begins production – often when it is still just an idea – its financiers and producers will forecast its value based on projections of potential revenue that will be earned during its life-cycle.

The media and entertainment industry ecosystem relies heavily on "downstream" revenue – revenue from the exploitation of projects subsequent to the theatrical release or first television run. This was never truer than it is today: 75% of a typical motion picture's revenues are earned from exploitation after the initial theatrical release and more than 50% of a television program's revenues come after the initial television run. Internet exhibition and distribution, in particular, are areas of potential downstream revenue that continue to develop, evolve, and expand as technology advances.

A typical television series, for example, will run first on a television or cable network and might re-run multiple times within that same season or in subsequent seasons. Frequently, episodes of the series will be made available on the Internet, sometimes as early as the day following its first run.[3]

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[3] There are several different models for Internet distribution, as described *infra*. Most major networks allow the

Successful television series typically will be syndicated to other broadcast or cable channels and released in foreign territories. Frequently, television series are also released in other media, such as DVD or Blu-ray. All of these types of exploitation generate residuals for the Guilds' members and pension and health plans.

As downstream revenues decrease due to unlicensed distribution, content owners become reluctant to invest in new work without guarantees of large up-front returns on their investment, causing harmful effects throughout the ecosystem, including for consumers. This is the case when motion pictures are illegally distributed online or pirated DVDs are sold at swap meets. It is also the case when technologies are over-engineered for the express purpose of attempting to take advantage of perceived loopholes in the law. And it is particularly problematic when the new technology resembles and threatens to supplant existing and developing licensed markets.

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viewer to watch episodes directly from the network's own website for a period of time. Many programs are also available from third party partners for free or for a nominal fee, via ad-supported or subscription services or through paid downloads (which may resemble a rental or a purchase).

Similarly, the typical life-cycle of a theatrical motion picture includes a window of theatrical release, followed by a release to DVD, Blu-ray and pay-per-view services. It then will be released to pay television, and finally broadcast and/or cable television. Internet distribution has also become an important part of the motion picture's life-cycle.

## III. By Intercepting Programming and Retransmitting It to Customers for a Subscription Fee, Aereo's Service Infringes Plaintiffs' Copyrights and Erodes the Media and Entertainment Ecosystem

Aereo is a commercial service by which subscribers, for a fee, can watch broadcast television over the Internet using a computer or other Internet-connected device. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 680-2 (2d Cir. 2013). The programming can be watched live (with a slight delay) or recorded for later. *Id.* at 681. Aereo equates its system to a subscriber having a television with a remote Digital Video Recorder ("DVR") and a Slingbox[4], which is how the subscriber perceives it. *Id.* at 680, 699-700. *See also*, *Community Television*, 2014 U.S. Dist. LEXIS 21434 at *20-1 (D. Utah 2014). Functionally, however, it more closely resembles "community antenna television ("CATV") systems[,] which captured live television broadcasts with antennas set on hills and retransmitted the signals to viewers" that prompted Congress to amend the Copyright Act

[4] A Slingbox is a set-top box that connects to a video source (such as a set-top cable box or a DVR) and to the Internet via a home network router. The user connects to his/her Slingbox, using proprietary software via a computer's web browser or a mobile device. *See How Placeshifting Works*, SLINGBOX.COM, http://www.slingbox.com/get/placeshifting-howitworks (last visited February 25, 2014). A Slingbox allows the viewer to "placeshift" - to "view[ ] and listen[ ] to live, recorded or stored media on a remote device over the Internet or a data network. Placeshifting allows consumers to watch their TV anywhere." *See Placeshifting*, Slingbox.com, http://www.slingbox.com/get/placeshifting (last visited February 25, 2014).

in 1976. *WNET, Thirteen*, 712 F.3d at 699 (Chin, C.J. dissenting) (citations omitted).

### A. *Fortnightly* and *Teleprompter* Provide Important Context for This Debate

Two landmark opinions by this Court, over four decades ago, laid the groundwork for the 1976 amendments to the Copyright Act that are at issue in this case. In *Fortnightly*, a CATV operator had installed antennas on hills and used coaxial cables to retransmit intercepted broadcast signals to individual subscribers. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 392 (1968). The copyright owner sued, alleging that the CATV operator violated their public performance right, as it was defined in the 1909 Copyright Act.[5] The lower

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[5] The applicable sections read, in pertinent part, as follows:

> "(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever…;" and
>
> "(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the

courts found in favor of the copyright owners. *Id.* at 193. The Court reversed, reasoning that if "an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary … equipment, he would not be 'performing' the programs he received on his television set …. The only difference in the case of CATV is that the antenna system is erected and owned … by an entrepreneur." *Id.* at 400. The Court rejected a request from the Solicitor General to craft a compromise decision, noting that that "job is for Congress… [w]e take the Copyright Act of 1909 as we find it." *Id.* at 401-2.

*Fortnightly* was soon followed by a similar case involving a CATV service that went a step further than its predecessor, using different technology that extended its reach to additional geographic areas that could not be reached over the airwaves. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974). A divided Court again upheld the service, noting that "[d]etailed regulation of the[ ] relationships [in the communications industry], and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress." *Id.* at 414. Justice Douglas, in a dissent joined by Justice Burger, warned that the "Court

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> making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever."
> *Fortnightly*, 392 U.S. at 394, fn. 9 (quoting 17 U.S.C. §1 (1909)).

today makes an extraordinary excursion into the legislative field" by expanding *Fortnightly*'s holding "to give immunity to… CATV organizations" that "are functionally equivalent to a regular broadcaster." *Id.* at 416 (Douglas, J. dissenting). Congress acted soon thereafter, taking an approach broad enough to encompass services like Aereo that, as their CATV predecessors did, parasitically draw on others' intellectual property to their own gain.

Justice Fortas' dissent in *Fortnightly* was quite prescient apropos to the present case. He argued that the CATV system was indistinguishable from a prior case, in which the court held that "a hotel which received a broadcast on a master radio set and piped the broadcast to all public and private rooms of the hotel had 'performed' the material". *Fortnightly*, 392 U.S. at 406 (Fortas, J. dissenting) (discussing *Buck v. Jewell-LaSalle Realty Corp.*, 283 U.S. 191 (1931)). He opined that the rule formulated by the majority "may well have disruptive consequences outside the area of CATV." *Id.* at 405. Justice Fortas described the *Fortnightly* majority's approach as "disarmingly simple" because it "merely identifie[d] two groups in the general field of television, one of which it believes may clearly be liable, and the other clearly not liable for copyright infringement on a 'performance' theory: 'Broadcasters perform. Viewers do not perform.'" *Id.* at 405-6.

This "disarmingly simple" approach is similar to that taken by the Second Circuit, first in *Cablevision* and then in the case at bar, in which it reasoned that, although "Aereo's service may resemble a cable system, it also generates transmissions that closely resemble the private

transmissions from" devices operated by the viewer that are not public performances. *WNET, Thirteen*, 712 F.3d at 695. This all-or-nothing approach, cautioned against by both the *Fortnightly* and *Teleprompter* dissents, once again "'legislat[es]' important features of the Copyright Act out of existence." *Teleprompter*, 415 U.S. at 421 (Douglas, J. dissenting). Although Congress intervened in defining this area subsequent to *Fortnightly* and *Teleprompter*, the Second Circuit ignored these developments, rendering Justices Fortas' and Douglas' warnings apt.

### B. The Plain Language of the 1976 Copyright Act Encompasses Aereo's Activities

Soon after the Court's decision in *Teleprompter*, Congress enacted the Copyright Act of 1976, expressly rejecting the *Fortnightly* and *Teleprompter* holdings and altering what it means to "perform" a work "publicly". *WNET, Thirteen*, 712 F.3d at 700 (Chin, J. dissenting) (citations omitted). As amended, the Copyright Act provides that Copyright owners have six exclusive rights, including among them the right "to perform the work publicly." 17 U.S.C. §106. The definition of "[t]o perform … a work 'publicly'" includes:

> "To transmit or otherwise communicate a performance or display of the work… to the public, by means of any device or process, *whether the members of the public capable of receiving the performance or display receive it in the same place*

> *or in separate places and at the same time or at different times*."[6]

17 U.S.C. §101 (emphasis added). The Act further defines what it means to "'transmit' a performance" as "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." *Id.* The plain language of the Act is unambiguous – "the use of a device or process to transmit or communicate copyright images or sounds to the public constitutes a public performance, whether members of the public receive [it] in the same place or in different places, whether at the same time or at different times." *WNET, Thirteen*, 712 F.3d at 698.

By any but the most strained reading of the definition, Aereo's service falls within the definition of the Transmit Clause. The service is a device or process whereby content is received, beyond the place from which it was sent. And it transmits or otherwise communicates a performance or display of that content to members of the public capable of receiving it, whether those members of the public are in the same place or in separate places and are viewing it at the same time or at different times.

The legislative history of the Act reinforces that it was intended to cover a service like Aereo, which is functionally similar to the CATV services in *Fortnightly* and *Teleprompter*. Congress passed the Copyright Act of 1976, with the intent of overhauling

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[6] This second clause in the definition of "perform or display a work publicly" is referred to as the "Transmit Clause." *FilmOn X*, 2013 U.S. Dist. LEXIS 126543 at *38.

existing law "to respond to 'significant changes in technology [that] affected the operation of the copyright law,'" including "the advent of cable television." *FilmOn X,* 2013 U.S. Dist. LEXIS 126543 at *36 (citing H.R. Rep 94-1476 at 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 569, 5660). The House Report made clear that Congress was responding to the *Fortnightly* and *Teleprompter* holdings pursuant to which "the cable television industry ha[d] not been paying copyright royalties for its retransmission of over-the-air broadcast signals." *Id.* at *36-37 (citations omitted) (alteration in original). The 1976 Act included new definitions of "perform" and "publicly" intended to render the unlicensed retransmission of intercepted broadcast signals illegal. *WNET, Thirteen*, 712 F.3d at 700 (Chin, J. dissenting) (citations omitted).

Congress drafted the Transmit Clause broadly to anticipate future advancements in technology. *Id.* "The definition of 'transmit' … is broad enough to include all conceivable forms and combinations of wires and wireless communications media …." *Id.* (quoting H.R. Rep. No. 94-1476, at 64, *reprinted in* 1976 U.S.C.C.A.N. at 6578). "Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a 'transmission,' and if the transmission reaches the public in [any] form, the case comes within the scope of" the copyright owner's exclusive right to perform the work publicly. *Id.* (alteration in original). The House Report elaborated further, making clear that a performance could be received in different places and at different times:

> "[A] performance made available by transmission to the public at large is 'public' even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever *the potential recipients of the transmission represent a limited segment of the public*, such as the occupants of hotel rooms or *the subscribers of a cable television service*." *Id.*

The House Report clarified that "[u]nder the definitions of 'perform,' 'display,' 'publicly,' and 'transmit' … the concepts of public performance… *cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public*." *FilmOn X*, 2013 U.S. Dist. LEXIS 126543 at *38-39 (quoting 1976 U.S.C.C.A.N. at 5676-77) (alteration in original). It included several examples of performances describing that "a broadcasting network is performing when it transmits [a] performance (whether simultaneously or [recorded]); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers …." *Id.* at 39. It also made clear that an "individual is performing whenever he or she plays a phonorecord embodying [a] performance or communicates the performance by turning on a receiving set," but clarified that it was only actionable

as an infringement if it was done publicly as defined in Section 101. *Id.*

To the extent there may be any ambiguity in the plain language of the Transmit Clause, the House Report makes clear that the Act was intended to be read broadly to respond to technological changes. As one prominent commentator opined, "there can be little doubt that the legislative intent was to regard a secondary transmission of a performance as itself an additional performance." 2 Nimmer on Copyright § 8.18[B]. Aereo's service, which functionally resembles a cable system, infringes upon the plaintiffs' public performance rights in their content.

Moreover, Congress specifically adopted a provision regarding the secondary transmission of primary transmissions. *See* 17 U.S.C. §111. Section 111 has three key subsections which are intended to encompass all secondary transmissions of primary transmissions. Subsection (a) of Section 111 provides that certain secondary transmissions are fully exempt from liability while Subsection (b) provides that certain secondary transmissions to controlled groups are fully liable. *Id.* Subsection (c) provides a statutory license for cable systems. *Id.* Congress' clear intent in crafting Section 111 was to cover all types of secondary transmissions and to provide for a full exemption, full liability, or a statutory license. Significantly, under Subsection (a) there is a provision relating to the secondary transmission of broadcast signals by master antennas on apartment houses, hotels, and similar establishments to the

rooms of guests or residents.[7] This provision provides that such secondary transmissions are fully exempt from liability provided that they are only "to the private lodgings of guests or residents" and "no direct charge is made to see or hear the secondary transmission." 17 U.S.C. §111(a)(1). Clearly, Aereo cannot bring itself within the scope of this exemption because it charges for its services.

Additionally, Aereo does not purport to be, nor is it, a cable system that would have a statutory license subject to all the reporting and other requirements of Subsection (d) and (e) of Section 111. Nor did Congress intend for Internet retransmission services to be treated as cable systems. *WPIX*, 691 F.3d at 282 ("the legislative history indicates that if Congress had intended to extend § 111's compulsory license to Internet retransmissions, it would have done so expressly – either through the language of §111 as it did for microwave retransmissions or by codifying a separate statutory provision as it did for

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[7] Pursuant to Section 111(a), "[t]he secondary transmission of a performance or display of a work embodied in a primary transmission is not an infringement of copyright if—

> "(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission."
> 17 U.S.C. §111(a).

satellite carriers.") Additionally, the Copyright Office has consistently taken the position that Internet retransmission services, such as Aereo, do not fall within the scope of Section 111's statutory license. *Id.* at 283. Notably, the Copyright Office has stated:

> "The 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. Such a measure, if enacted, would effectively wrest control away from program producers who make significant investments in content and who power the creative engine in the U.S. economy. In addition, a government-mandated Internet license would likely undercut private negotiations leaving content owners with relatively little bargaining power in the distribution of broadcast programming." [8]
>
> U.S. Copyright Office, *Satellite Home Viewer Extension and*

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[8] The Copyright Office further stated,

> "[t]o be clear, the Office is not against new distribution models that use Internet protocol to deliver programming, but only opposes the circumstance where any online content aggregator would have the ability to use a statutory license to sidestep private agreements and free from any of the limitations imposed on cable operators and satellite carriers by the Communications Act and the FCC's rules." SHVERA Report at 188.

*Reauthorization Act Section 109 Report* 1, 188 (2008) ("SHVERA Report").

Congress in 1976 specifically covered secondary transmissions of primary transmissions and established clear principles for exemptions for liability and for licensing. Being ineligible for either an exemption or a statutory license, Aereo must be liable for its transmissions. The law on this is clear. If Aereo thinks it merits an exemption, the proper redress is to seek it from Congress.

### C. *Cablevision* Misconstrued the Transmit Clause, Opening a Loophole that Threatens to Eviscerate It

Like the *Fortnightly* Court before it, the Second Circuit opened a Pandora's Box that encouraged development of over-engineered mutant technologies to take advantage of a perceived loophole in the law. *Cablevision* involved a cable operator that developed a "Remote Storage DVR system ("RS-DVR") that allocated space to its subscribers on centralized hard drives where they could record, store, and later play back programming. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 124-5 (2d Cir. 2008) ("*Cablevision*"). The programming available for recording was limited to channels offered by Cablevision, pursuant to its retransmission licenses with the various broadcasters. *Id.* at 125. *See also*, *WNET, Thirteen*, 712 F.3d at 702 (Chin, J. dissenting) ("Cablevision's RS-DVR system 'exist[ed] only to produce a copy' of material that it already had a license to retransmit to its subscribers"); *Community Television,* 2014 U.S.

Dist. LEXIS 21434 *20 ("[t]he cable company in *Cablevision* was licensed to transmit the performance to its paying customers").

Prior to its launch of the RS-DVR, Cablevision re-transmitted programming to its subscribers via a single stream of data. *Cablevision*, 536 F.3d at 124. With the RS-DVR service, the licensed data stream was split into two separate streams, with the first stream routed to subscribers, as before. *Id.* The second stream was routed through a system that would determine whether any subscriber wanted to record any of the programming and, if so, the applicable programming would be saved to a drive partition that had been allocated to that subscriber. *Id.* A group of copyright owners sued, arguing that the RS-DVR violated several of their exclusive rights under the Copyright Act, including their reproduction and public performance rights. *Id.*

The Second Circuit held that the RS-DVR did not infringe the copyright owners' rights to reproduce or publicly perform their works. *Cablevision*, 536 F.3d at 140. In addressing the public performance argument, the court concluded that "it is evident that the transmit clause directs us to examine who precisely is 'capable of receiving' a *particular transmission* of a performance." *Id.* at 135 (emphasis added). With that assumption, it held that "[b]ecause each RS-DVR transmission is made to a single subscriber using a single unique copy… such transmissions are not performances 'to the public,' and therefore do not infringe any exclusive right of public performance." *Id.* at 139.

*Cablevision*'s reading of the Transmit Clause does not square with the clause's plain language and has been the subject of criticism. *WNET, Thirteen v. Aereo, Inc.*, 722 F.3d 500, 506-07 (2d Cir. 2013) (Chin, J., dissenting from the denial of rehearing en banc) (citations omitted). Additionally, several cases decided in intervening years have rejected this interpretation including, most recently, a district court case involving Aereo. *See, e.g. Community Television*, 2014 U.S. Dist. LEXIS 21434; *FilmOn.com*, 2013 U.S. Dist. LEXIS 130612; *FilmOn X*, 2013 U.S. Dist. LEXIS 126543; *BarryDriller Content Sys.*, 915 F. Supp. 2d 1138. By focusing on individual transmissions of individual copies of each performance, the Second Circuit's analysis "appears to have changed the wording of the Transmit Clause from reading 'members of the public capable of receiving the *performance*' to 'members of the public capable of receiving the *transmission*." *Community Television*, 2014 U.S. Dist. LEXIS 21434 *17 (emphasis added). As Judge Chin noted,

> "it would be counterintuitive to conclude that 'transmission' is synonymous with 'performance' because 'the members of the public capable of receiving *the performance or display*… [can receive it] in the same place or in separate places and at the same time or at different times…' It is difficult to imagine a single transmission capable of reaching people 'in separate places' and 'at different times.'"

*WNET, Thirteen*, 722 F.3d at 508 (Chin, J., dissenting) (citations omitted) (alteration in original). Additionally, the Copyright Act's use of verbs such as "to perform … publicly" and "to transmit … to the public" make clear that it "is the transmitter's actions that render him liable, not the individual *transmissions*, and he can 'transmit' by sending one transmission or multiple transmissions." *Id.* at 509-10. In effect, the court incorrectly shifted its focus from "examining whether the transmitter is transmitting a performance of the work to the public" to "who is capable of receiving a particular transmission." *Community Television*, 2014 U.S. Dist. LEXIS 21434 *17-18.

### D The Second Circuit Exacerbated Cablevision's Flaws by Extending its Holding to Aereo's Service

Even if one were to concede that *Cablevision* was correct in concluding that the copies transmitted to subscribers via the RS-DVR were not public performances, that holding should not be extended to Aereo's service. The Aereo court began its discussion of *Cablevision*'s interpretation of the Transmit Clause, with the flawed assumption that it faced "a similar factual context." *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d at 686. To the extent that Aereo functionally resembles a cable system – intercepting broadcast signals and retransmitting them to subscribers for a fee – there may be some similarity. But the similarities in the services end when the transmission is received – Cablevision had the legal authorization to retransmit that content, Aereo did not. The factual context is therefore dissimilar.

*Cablevision*'s holding was based upon the fact that "each RS-DVR transmission is made to a given subscriber using *a copy made by that subscriber,*" of content licensed by Cablevision, as one might do with a set-top DVR in his or her own home. *Cablevision*, 536 F.3d at 138 (emphasis added). This interpretation was intended to be limited in scope and function. The Second Circuit stressed that its "holding … 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.

There is "no basis in the language of the Transmit Clause or the relevant legislative history suggesting that technical details [should] take precedence over functionality." *Community Television*, 2014 U.S. Dist. LEXIS 21434 *23. Aereo's functionality – intercepting broadcast signals and retransmitting them to subscribers – is the type of "device or process that could be developed in the future to transmit copyrighted works … to the public" to which Congress intended the Copyright Act to apply. *Id.* at *22. Aereo's argument that "it provides a service that its subscribers could do for themselves without infringing… through the use of [their] own antenna, television, [DVR], Slingbox, and computer or other mobile device" are "the same arguments from *Fortnightly* and *Teleprompter* which Congress specifically rejected when it passed the 1976 Copyright Act." *Id.* at *20-21.

By intercepting the broadcasters' signals and retransmitting them without negotiating and paying

appropriate license fees, Aereo has unjustly enriched itself – not just at the expense of the copyright owners, but also at the expense of the actors, directors, writers, and other creative professionals whose time, energy, and creative efforts went into creating the content. This case has the potential to be another *Fortnightly*, opening the door to future mutant technologies that are designed, not to innovate, but to squeeze into tiny cracks in the law and leech value from the intellectual property rights of others. But unlike the *Fortnightly* Court, this Court has clear guidance from a Congress that had the foresight to realize that technology was changing at a rapid pace and that the Copyright Act should be flexible enough to anticipate that.

## IV. The Guilds' Members Will Be Harmed by the Second Circuit's Decision

The Guilds' members receive compensation at various stages of a creative work's life-cycle. For decades, the Guilds have collectively bargained with the producers and distributors of creative works to ensure fair compensation for their members – the very talent without which the creative works could not be produced. Pursuant to the Guilds' collective bargaining agreements, actors, directors, and writers receive two primary types of compensation – initial compensation when the work is created and residuals, a type of deferred compensation for continued exploitation of the work.

Under the Guilds' collective bargaining agreements, as a creative work is licensed to new markets or re-run on television, the actors, directors, and writers receive additional compensation in the

form of residuals. Some residuals, particularly those for television series, are paid based on a formula whereby the creative talent receives payment each time an episode is aired.[9] Other forms of residuals, particularly for the home video, Internet, and cable and pay television markets, are based on a percentage of the revenue earned by the work's copyright owner or distributor for licensing the work to each market.[10] As a result, any reduction in that

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[9] For example, Section 18 of the 2005 SAG Television Agreement, as amended, provides that when a program is re-run on a network in prime time each principal performer shall receive "one hundred percent (100%) of his 'total actual compensation' for each such rerun" (subject to ceilings) while reruns in syndication and on a network other than during prime time are paid on a descending scale based on the performer's "total applicable minimum salary" (i.e. the minimum salary set forth in the Television Agreement).

Similarly, Article 15 of the 2011 WGA Theatrical and Television Basic Agreement provides that when a program is rerun on a network in prime time, each credited writer shall receive a fixed residual based upon the length of the program, while reruns in syndication and on a network other than during prime time are paid on a descending scale.

Article 11 of the 2011 DGA Basic Agreement provides that when a dramatic television program is rerun on a network in prime time, the director shall receive a fixed residual based upon the length of the program, while reruns in syndication and on a network other than during prime time are paid on a descending scale.

[10] For example, Section 18.1 of the 2005 SAG Television Agreement, as amended, provides that "upon release… to basic cable of product initially produced for free television, as to which free television residuals would otherwise be payable, Producer shall pay to… the performers, [a] percentage of distributor's gross receipts", as that term is defined, presently equal to six percent (6%). Section 20 provides a similar formula for television

revenue received by the copyright owner or distributor directly affects the residuals received by creative talent.

The Guilds and copyright owners, including most of the Petitioners, have collectively bargained residuals formulas for over seven decades. These formulas have frequently been the subject of heated negotiations and, on more than one occasion, strikes. In fact, residuals for new media exploitation of

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product released to pay-television. The Producer-SAG Codified Basic Agreement of 2005 provides similar formulas for the release of theatrical product to the free television (including basic cable) and pay television windows.

Similarly, Article 58 of the 2011 WGA Theatrical and Television Basic Agreement provides that "[u]pon release … to basic cable of product initially produced for free television, as to which free television residuals would otherwise be payable, Company shall pay, in the aggregate, to the credited writer or writers… [a] percentage of the Company's accountable receipts," as that term is defined, presently equal to two percent (2%) or one and two-tenths percent (1.2%) for theatrical product released to basic cable. Article 51 provides similar formulas for release of television and theatrical product to the pay television window and Article 15 provides the formula for theatrical product released to the free television window.

Paragraph 11-208 of the 2011 DGA Basic Agreement provides: "[U]pon release, on or after July 1, 2011, to basic cable of free television motion pictures, as to which free television residuals would otherwise be payable, Employer shall pay to the Director thereof the following percentage of the Employer's gross receipts obtained therefrom… with respect to free television motion pictures produced after July 1, 1984, said percentage shall be two percent (2%)." Article 18 provides similar formulas for release of theatrical and television product to pay television and Article 19 provides formulas for theatrical product released to free television.

television programs and feature films were at the forefront of the WGA strike in 2008 and in SAG's extended negotiations with motion picture and television studios that concluded in 2009.[11] Residuals formulas for Internet distribution and other forms of emerging technology have been the subject of considerable effort in the Guilds' negotiations with the content owners.

As technology has evolved, so have the residuals provisions in the Guilds' collective bargaining agreements. The concept of residuals was first discussed in the 1940s due to changes in television production and the growing ability to record programming for later re-broadcast. Residuals for re-runs of television programs were first recognized in the Guilds' collective bargaining agreements in the early 1950s and then in 1960 for motion pictures that were broadcast on television. By the early 1970s, the Guilds and content owners had collectively bargained provisions for the "Supplemental Markets" – pay television and home video (eventually including DVD and Blu-ray).[12] In the 1980s, residuals were negotiated for exploitation of content released to and created for basic cable.

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[11] The WGA's 2008 negotiations with the motion picture and television studios concluded with members ratifying an agreement on February 25, 2008 after a 100-day strike. SAG's negotiations with the motion picture and television studios lasted a full year, ending with ratification of its agreement on June 9, 2009. Certain residuals, particularly residuals for content distributed in new media and on DVD, were among the key points of discussion between the parties.

[12] The formula for calculating those residuals was altered in 1980 in response to changes in the industry.

In 2001 and 2002, the Guilds first negotiated sideletters to their respective agreements, under which content owners acknowledged the obligation to pay residuals for content, including broadcast television programs, distributed over the Internet. By 2008 and 2009, the sideletters provided comprehensive guidance relating to the reuse of television programs on the Internet and other new media platforms, including mobile devices and tablets. These sideletters prescribe residuals formulas for Internet exhibition and distribution.[13] The formulas vary based on the distribution model, but all recognize the importance of reasonable compensation when content is distributed online.

Residuals are a crucial source of income that can often be the lifeblood of the working actor and writer, particularly in difficult economic times and the periods between projects. Residuals are paid throughout the lifetime of a project, as that project is made available on different platforms. They can therefore provide a fairly continuous flow of income to creative employees whose work is freelance in nature, and often intermittent. Downstream revenues not only fund Guild members' residuals, but also play a significant role in funding their pension and health

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[13] All of the Guilds' sideletters to their basic agreements provide that when "the subscriber pays for the motion picture … on a subscription … basis…" the producer "shall pay" residuals in "an aggregate sum equal to" three and six-tenths percent (3.6%) for SAG and AFTRA and one and two-tenths percent (1.2%) for DGA and WGA, of the producer's licensing revenue. The formula differs when the use is advertiser-supported.

plans.[14] These benefits provide an important safety net for the members and their families, and are a fundamental part of the entertainment industry's long-established collectively bargained agreements.

This critical earnings stream is dependent on the content owners' ability to license rights, and to maximize revenues received for licensing rights, to other participants in the content ecosystem. When a service taps into and siphons off content with a disregard for copyright laws and licensed distribution models, its unauthorized distribution of content materially impacts the Guilds' members by depriving them of both compensation and pension and health benefits. This is particularly true when the infringing service blatantly usurps an existing market for which residuals and pension and health contributions otherwise would be paid.

## V. Widespread Implementation of a Service like Aereo's Could Have Significant Harmful Effects on All Participants in the Media and Entertainment Ecosystem, Including the Guilds' Members and Consumers

The advent and proliferation of time- and place-shifting technology – from the first VCRs to Slingbox and Internet distribution – has changed the way consumers receive and consume content. As technology has changed, the media and entertainment ecosystem has adapted. But Aereo's

[14] In 2011, for example, residuals derived from the sale of feature films to free television and features films and free television programs to "supplemental markets" (pay television, home video (e.g., DVD), etc.) funded 70% of DGA's Basic Pension Plan and 36% of SAG's Pension and Health Plan.

service is a technological development that can lead to drastic changes in the content that is created and made available to audiences. This service goes well beyond private time- or place-shifting by consumers in the home; it is a service that intercepts authorized feeds and retransmits them for profit. In the process it supplants an otherwise licensed form of distribution.

The outcome of the Second Circuit case has already started to cause ripple effects throughout the industry. Traditional cable and satellite companies are expected to use the threat of these technologies in negotiations to fight for lower retransmission fees, and they have started to explore adopting such technologies to avoid retransmission fees altogether.[15] Andy Fixmer et al., *DirecTV, Time Warner Cable Are Said to Weigh Aereo-Type Services*, BLOOMBERG TECHNOLOGY, Oct 25, 2013, http://www.bloomberg.com/news/2013-10-25/directv-time-warner-cable-said-to-consider-aereo-type-services.html (reporting that cable and satellite companies, including DirecTV, Time Warner Cable Inc, and Charter Communications, Inc., have begun exploring services similar to Aereo). Analysts argue that cable companies would be within their rights to

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[15] According to reports, during a contract dispute last year between Time Warner Cable and CBS over retransmission fees, Time Warner indicated it itended to suggest its New York subscribers use Aereo for CBS broadcast programming if programming was blacked out during the dispute. Brian Stelter, *Aereo as Bargaining Chip in Broadcast Fees Battle*, N.Y. TIMES, Jul. 21, 2013, *available at* http://www.nytimes.com/2013/07/22/business/media/with-prospect-of-cbs-blackout-time-warner-cable-to-suggest-aereo-as-alternative.html. *See also WNET, Thirteen*, 722 F.3d at 502 (Chin, J., dissenting)(citing multiple articles about the conflict).

follow Aereo's model, if it is found to be legal, noting the intellectual and legal inconsistencies of allowing Aereo to get free the same content for which the cable companies must pay. *Id.* At least some networks, for their part, have threatened to move their broadcast programming to non-broadcast services to prevent Aereo's parasitic retransmissions. *Id. See also,* Christopher Palmeri, *CBS Could Switch to Cable If Aereo Wins Case, CEO says*, BLOOMBERG TECHNOLOGY, Apr. 30, 2013, http://www.bloomberg.com/news/2013-04-30/cbs-could-switch-to-cable-if-aereo-wins-case-ceo-says.html (reporting comments that CBS and Fox would stop broadcasting and serve only pay-tv customers if Aereo is found legal).

The Second Circuit first raised these concerns in *WPIX*, decided about six months prior to *Aereo*, positing that unlicensed services that retransmit content over the Internet threaten to destabilize the entire industry. *WPIX*, 691 F.3d at 286. The Central District of California reached a similar conclusion several months later. *BarryDriller Content Sys.,* 915 F. Supp. 2d at 1147. The courts noted that "streaming copyright works without permission [] would drastically change the industry, to the… detriment" of the content owners and broadcasters, as well as to the Guilds' members. *WPIX*, 691 F.3d at 286 (citations omitted). Parasitic services like Aereo threaten the broadcasters' "ability to negotiate favorable retransmission consent agreements with cable, satellite and telecommunications providers." *BarryDriller Content Sys.,* 915 F. Supp. 2d at 1147. Similarly, existing and prospective licensees may seek to make up for the loss of viewership by demanding concessions from the broadcasters. *Id.*

Additionally, unauthorized Internet retransmission services, like Aereo, unfairly compete with the broadcasters' and content owners' efforts to develop their own Internet distribution channels. *Id.* Authorized Internet distribution channels have proliferated over the last several years. For example, several of the major broadcast networks allow users to watch their programming from the network's own website. Similarly, users can watch current-season programming on ad-supported services, such as Hulu, and subscription services, such as Hulu Plus and Netflix, which also allow users to watch programming from past seasons.[16] Services such as iTunes and Amazon Instant Video allow users to purchase and/or rent television programs and movies, which they can then watch on a computer or other Internet-enabled device.[17] Some broadcasters, as well as cable and satellite services, have also begun experimenting with their own services that allow their subscribers to

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[16] "Hulu is an online video service that offers a selection of hit TV shows, clips, movies and more on the free, ad-supported Hulu.com service, and the subscription service Hulu Plus." *See About Us*, HULU.COM, http://www.hulu.com/about (last visited Feb. 26, 2014). "Hulu Plus subscribers can access premium programming anytime on Internet-connected TVs, smartphones, game consoles, set top boxes and additional devices …." *Id.*

[17] *See What is Amazon Instant Video*, AMAZON.COM, http://www.amazon.com/gp/feature.html/ref=sv_atv_3?ie=UTF8&docId=1000739191 (last visited Feb. 26, 2014). Amazon Prime subscribers have free access to some Amazon Instant Video content. *Id. See also Features*, APPLE.COM, http://www.apple.com/itunes/features/ ("iTunes brings you more than 250,000 TV shows commercial-free — many in 1080p HD…[that] are instantly accessible in your iTunes library, where you can play them or download a copy to take with you.") (last visited Feb. 26, 2014).

watch television live from a computer or mobile device, in addition to watching previously-aired programming.[18]

Retransmission fees are paid by cable, satellite, and telecommunications providers for the right to retransmit broadcast and basic cable networks to their subscribers.[19] *WPIX*, 691 F.3d at 286. As technologies have changed, increasing competition for viewers and decreasing advertising revenues, broadcasters have come to rely more heavily on these fees to fund the development and acquisition of broadcast programming. *WNET, Thirteen*, 722 F.3d at 503 (Chin, J., dissenting); *BarryDriller Content Sys.,* 915 F. Supp. 2d at 1147 (citation omitted). The Guilds' members are indirectly compensated for retransmissions pursuant to their respective collective bargaining agreements. Like all members of the content ecosystem, they are impacted

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[18] See, e.g. *How to watch movies and shows on your computer, tablet, and cell phone*, DIRECTV.COM, https://support.directv.com/app/answers/detail/a_id/3890 ("With DIRECTV, you can choose from a huge selection of hit movies and shows to watch anytime, anywhere, on practically any device. Plus watch live TV on your tablet, or take your DVR recordings with you wherever you go. Here's a set of easy step-by-step guides to get you started.") (last visited Feb. 26, 2014; *Need more info?*, WATCH ABC, http://abc.go.com/watchabc-overview ("With WATCH ABC [subscribers of participating TV providers] can view the ABC network live or on demand on various devices such as smartphones, tablets, and your computer.") (last visited Feb. 26, 2014).

[19] Retransmission fees in 2013 totaled approximately $3.01 billion dollars and are estimated to double by 2018. Fixmer, *supra*, *DirecTV, Time Warner Cable Are Said to Weigh Aereo-Type Services*, BLOOMBERG TECHNOLOGY, (citing estimates by research firm SNL Kagan).

in several ways by any significant reduction in these fees. The Guilds' members create the content for copyright holders, who then license that content to the broadcasters. As the broadcasters' profitability decreases, so too does their ability to pay for licensed content. As license fees decrease, it becomes harder for content owners to fund content creation, which reduces job opportunities and residuals for the Guilds' members. Additionally, the content owners may seek to maximize their own profitability by releasing content to other markets for which they may gain higher license fees, but for which the Guilds' members receive lower residuals.

Allowing unlicensed streaming of broadcast content would also harm the public, as the Second Circuit noted in *WPIX*. While allowing some portion of the public more convenient access to programming may seem desirable at first blush, the public also "has a compelling interest in protecting copyright owners' marketable rights to their work and the economic incentive to continue creating television programming." *WPIX*, 691 F.3d at 287 (citations omitted). When copyright owners' content is not adequately protected, the motivation and resources to create content are decreased and the "quantity and quality of efforts put into creating television programming … would be adversely affected." *Id.* at 286. "[E]ncouraging the production of creative work thus ultimately serves the public's interest in promoting the accessibility of such works." *Id.* at 287. The Second Circuit recognized the "delicate distinction between enabling broad public access and enabling ease of access to copyrighted works," noting that the public will still have other means of access to content, even if ivi's service was enjoined. *Id.* at 288.

While ivi's technology differed from Aereo's the scope of distribution was broader, the delicate distinction and conclusion remains the same – parasitic services like Aereo's harm the entire content ecosystem, including the Guilds' members and consumers.

## CONCLUSION

For the foregoing reasons, we respectfully urge the Court to reverse the decision below.

Respectfully submitted,

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