12-2786-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WNET, THIRTEEN, FOX TELEVISION STATIONS, INC., TWENTIETH CENTURY FOX FILM CORPORATION, WPIX, INC., UNIVISION TELEVISION GROUP, INC., THE UNIVISION NETWORK LIMITED PARTNERSHIP, AND PUBLIC BROADCASTING SERVICE,

Plaintiffs-Counter-Defendants-Appellants,

v.

AEREO, INCORPORATED, F/K/A BAMBOOM LABS, INCORPORATED

Defendant-Counter-Claimant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF OF *AMICI CURIAE* THE CONSUMER FEDERATION OF AMERICA AND CONSUMERS UNION IN SUPPORT OF APPELLEES

GLUSHKO-SAMUELSON INTELLECTUAL PROPERTY LAW CLINIC

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AMERICAN BROADCASTING COMPANIES, INC., DISNEY ENTERPRISES, INC., CBS BROADCASTING INC., CBS STUDIOS INC., NBCUNIVERSAL MEDIA, LLC, NBC STUDIOS, LLC, UNIVERSAL NETWORK TELEVISION, LLC, TELEMUNDO NETWORK GROUP LLC AND WNJU-TV BROADCASTING LLC,

Plaintiffs-Counter-Defendants-Appellants,

v.

AEREO, INC.

Defendant-Counter-Claimant-Appellee.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, to enable judges and magistrates of the Court to evaluate possible disqualification or recusal, the undersigned attorney of record for *Amici Curiae* certifies that the Consumer Federation of America and Consumers Union have no parent corporations. No publicly held company owns ten percent or more of the stock of the Consumer Federation of American and Consumers Union.

/s/ Peter Jaszi
Peter Jaszi

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The Consumer Federation of America and Consumers Union respectfully submit this brief as *amici curiae* with the consent of all parties.[1] See Fed. R. App. P. 29(a).

INTERESTS OF *AMICI CURIAE*

The Consumer Federation of America ("CFA") is the largest consumer advocacy group in the nation, composed of nearly three hundred affiliates and representing some fifty million individual members. CFA includes organizations with a special focus on issues in legislative, regulatory, and judicial arenas, at the federal and state level. CFA works to advance the consumer interest through research, advocacy, and education. For over two decades, CFA has been the leading analyst of and advocate for consumer benefits of digital technologies brought about through a trend termed "digital disintermediation."

Consumers Union, the policy and advocacy division of *Consumer Reports*, works for health reform, food and product safety, financial reform, and other consumer issues in Washington, D.C., the states, and in the marketplace. *Consumer Reports* is the world's largest independent product-testing organization.

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1, counsel for the parties have not authored any part of this brief; no party or a party's counsel contributed money for the brief; and no one other than *Amici* and its members and counsel have contributed money for this brief.

An analysis published by CFA in 1990 foresaw the digital revolution as creating a dynamic, consumer-friendly, citizen-friendly communications space based on "the fact that a great deal of the necessary intelligence is currently located on the periphery of the information age network and has led to a pragmatic, decentralized pattern of development." Mark Cooper, *Expanding the Information Age for the 1990s: A Pragmatic Consumer View*, 5 (1990). Analysis of two decades of experience across a number of content industries demonstrates that this expectation has been borne out, finding that "[d]igital technologies can lower production and distribution costs and give consumers much greater flexibility and choice, thereby dramatically improving the fit between what is produced and what is consumed." Mark Cooper & Jodie Griffin, *The Role of Antitrust in Protecting Competition, Innovation and Consumers as The Digital Revolution Matures: The Case Against The Universal-Emi Merger And E-Book Price Fixing*, PUB. KNOWLEDGE, 16 (2012).

The Consumer Federation of America and Consumers Union have a compelling interest in ensuring that copyright law remains responsive to beneficial consumer uses of new technologies. The flexibility inherent in copyright doctrine is the primary means by which the law promotes innovation and the increased availability of information. Technologies that allow consumers more choices

about how they access information serve the fundamental goals of copyright law and should be encouraged.

The technology at issue in this proceeding not only exhibits the fundamental characteristics of the growing list of such choice-enabling technologies; it fits squarely within the legal framework that Congress and the courts have established to ensure that consumers and the economy reap the full benefits of digital disintermediation.

INTRODUCTION

Access to information matters. *See* Richard Calland, *Access to Information: How Is It Useful and How Is It Used?*, *in* ACCESS TO INFORMATION: A KEY TO DEMOCRACY 15, 15 (2002) ("Information is power . . . . Information is vital for individual citizens, communities, and citizen's organizations if they are to fully participate in the democratic process."). The trend toward digital disintermediation clearly indicates consumers' strong preference for direct access to information on their own terms. Content providers should not attempt to thwart this trend in order to preserve the status quo. Facilitating consumer choice in information access is consistent with the purposes of the First Amendment and Copyright Act and can be done in a way that balances competing interests of rights-holders, providers, and consumers. At its core, copyright law serves to balance consumer interest by incentivizing creativity with increasing access to information. Congress and the

courts have long recognized that in the face of new technologies, the balance should be struck in favor of enabling access by otherwise lawful means. As new information technologies have developed, copyright law has been written and interpreted to provide consumers with increased control over how they use available information, particularly the socially and culturally important content provided in free, over-the-air television broadcasts. This case tests whether these established principles will be upheld.

The importance of public access to information is enshrined throughout the Copyright Act, particularly in Congress' reservation of a right to engage in private performance for consumers. Technology can empower consumers' choice in how and when they enjoy broadcast content, using technologies lawful under this Court's authoritative interpretation of the Copyright Act found in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"). The district court recognized the legitimacy of Aereo's technology under *Cablevision* in denying a preliminary injunction, and this Court should do the same by affirming that decision.

ARGUMENT

I. By Promoting Freedom of Choice in Modes of Access to Information, this Court Can Enable American Consumers' Full Participation in their Culture.

Information consumers do not seek to disestablish copyright law, nor to get "something for nothing," by way of copyright piracy or otherwise. Consumers do want the ability to make flexible, beneficial use of material they acquire by entirely lawful means. They understand that in the scheme of copyright, assuring that information industry firms can derive a reasonable income from content they produce promotes the ultimate public interest. Of course over-the-air television broadcasts are not free at all; they are paid for, indirectly, by the individuals and households that enjoy them. *See* J.H. Snider, *The Myth of 'Free' TV*, NEW AM. FOUND. PUB. ASSETS PROGRAM, 1, 13 (2002) (consumers ultimately fund broadcast television since they patronize the businesses that advertise on-air). Information consumers have a stake in ensuring that legislators, regulators, and courts "take account of new technologies and changing marketplace conditions," (Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 26 FCC Rcd. 17489, 17489, 17498 (2011)) because allowing new technologies that enable consumer choice affirmatively promotes copyright balance, rather than threatens it.

A. Consumers' First Amendment Right to Access Information and the Copyright Act's Purpose to Promote Information Dissemination Both Deserve Great Weight.

Choice and flexibility in accessing information is essential to every consumer's ability to participate in media-intensive contemporary society. The Universal Declaration of Human Rights provides that "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). The United States Constitution recognizes this right through the First Amendment's protection of participation in the marketplace of ideas. MICHAEL D. BIRNHACK, "Freedom of Speech," NIMMER ON COPYRIGHT § 19E.02 (2012) (First Amendment recognizes the public's right to be informed of matters of general interest).

Congress recognized broadcasters' duty to further the public's interest in receiving information by directing them to provide consumers with free access to a limited number of over-the-air signals. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . ."). Likewise, copyright law promotes consumers' rights of cultural participation by balancing the need to incentivize creativity with the need to promote access to and

dissemination of information. As Justice Stewart put it succinctly in *Twentieth Century Music Corp. v. Aiken*:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). Differently stated, "[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works . . . ." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). As the Supreme Court also recognized, new consumer information technologies can play an important role in advancing the overall public interest in copyright. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429-32 (1984).

B. Advances in Technology Increase Public Participation in Culture, and the Copyright Monopoly Should Not Be Employed to Suppress Efficient New Consumer Services.

Choice-empowering forms of media technology change over time. However, the purpose of each iteration of new technology remains the same: to advance participation in culture and society. Scholars have noted consumers' increased participation, observing that "[p]eople are no longer passive participants in the economy, as they were in the media available in the 20th century. When offered the opportunity to participate and communicate in the digital information

age, people quickly accept." Mark Cooper, *From Wifi To Wikis And Open Source: The Political Economy Of Collaborative Production In The Digital Information Age*, 5 J. TELECOMM. & HIGH TECH. L. 125, 126, 127 (2006). Within the limits imposed by legislation and its judicial interpretation, copyright law should enable this kind of consumer choice, not interfere with it. Aereo's technology does not disincentivize creativity because it simply provides consumers with additional choices for accessing content that is already lawfully acquired. Like other new information technologies, Aereo adds to the sum total of consumer value without upsetting the balance of competing interests that informs copyright law.

C. Consumers Need Meaningful Choices Regarding When and How They Access Information In Order to Fully Participate in Our Information-Age Society.

The proliferation of broadband Internet and other new technologies has had a dramatic impact on how consumers access information. While daily newspapers and scheduled broadcasts once were sufficient resources for people to stay informed about public affairs and cultural events, members of fast-paced modern society require diverse methods of accessing information to fully participate. UNDERSTANDING THE PARTICIPATORY NEWS CONSUMER, PEWRESEARCHCENTER, 1, 2 (2010) (92% of Americans use multiple platforms daily to get news). Consumer choice in accessing information is a necessity, not a luxury, because work life now

runs twenty-four/seven. NETWORKED WORKERS, PEWRESEARCHCENTERS, i, iii (2008) (information tools make it harder to disconnect from work).

New social conditions have given rise to new forms of media consumption. Consumer households are shifting from relying on several free-standing televisions to relying on one television supplemented with mobile devices that provide access to content throughout the home and beyond. ERICSSON CONSUMERLAB, TV AND VIDEO: AN ANALYSIS OF EVOLVING CONSUMER HABITS 1 (2012). This trend reflects consumers' growing preference for accessing information at a convenient time and place.

Despite the shift in viewing preferences, information consumers continue to rely on broadcast content to a significant extent. THE CROSS-PLATFORM REPORT, NIELSEN, 1, 10 (2012) (finding more than 11 million households use only broadcast television). However, watching over-the-air television no longer provides consumers with sufficient control over accessing content in the information age. A recent report shows that many consumers employ digital video recorders ("DVR's") to choose when they watch broadcast content. *See* John Consoli, *It's Early, But Viewers Again Watch Broadcast Primetime Series on DVR in Droves*, BROADCASTING & CABLE (2012). In fact, a significant proportion of cable subscribers only watch broadcast. *See* Matthew Flamm, *Movers & Shakers: Chet*

Kanojia: Sending cable a message, CRAIN'S NEW YORK BUSINESS (June 17, 2012), http://www.crainsnewyork.com/article/20120617/SUB/306179985.

A DVR creates a permanent copy of a program after the user chooses the record function and then allows the user to watch the copy any time following the initial broadcast, thus "time-shifting" the content. *American Broad. Companies, Inc. v. Aereo, Inc.*, 2012 WL 2848158, at *2 (S.D.N.Y. July 11, 2012). Although many subscription video services offer time-shifting capabilities, and some stand-alone devices provide the capability to choose the screen on which content will be viewed, consumers are dissatisfied with the inflexibility and expense associated with accessing desired content through incumbent technologies. These services have consistently been ranked among the lowest of 47 sectors covered by the American Customer Satisfaction Index, often ranking dead last. SCORES BY INDUSTRY, AMERICAN CONSUMER SATISFACTION INDEX, *available at* http://www.theacsi.org/acsi-results/scores-by-industry-popup-all. In 2011 these services ranked 45th out of 47. *Id.*

Subscription video services and partnering broadcasters do not provide consumers with adequate choice about when and how to access broadcast content. The reality for many consumers is that industry business practices present them with a "Morton's Fork," in which they are forced to choose between two undesirable options.

The first requires consumers to pay extra to have meaningful choices in accessing content, by "bundling" these essential features into expensive packages including many channels consumers do not want. In New York, Time Warner Cable is illustrative of this practice because it gives consumers DVR functionality only if they subscribe to a digital package and rent equipment at a total cost of $73.19 per month (plus tax and fees). *See Packages*, TIMEWARNERCABLE, http://www.timewarnercable.com/content/twc/en/residential-home/packages/packages.html (last visited Oct. 24, 2012) (providing a 12-month price for "Digital TV" at $49.99 per month and DVR functionality as an additional $23.20 per month). The yearly costs of $878.28 for the ability to time-shift content is a substantial increase over the free signal already available to consumers. Since cable rates were deregulated in 1984, the Consumer Price Index entry for "Cable/Satellite" has increased fourfold, about twice as fast as the general rate of inflation. These rates have increased faster than every other major category in the Index except for medical costs and some educational costs (e.g. tuition and books). CPI DETAILED REPORT DATA FOR SEPTEMBER 2012, BUREAU OF LAB. STATISTICS, 12 (2012), http://www.bls.gov/cpi/cpid1209.pdf.

In the second undesirable option, consumers could buy a digital antenna (approximately $45), a stand-alone digital DVR (approximately $350), and combine these with a product like Slingbox ($180). *See* ChannelMaster CM 2016

HDTV VHF High Band and UHF Antenna Product Page, CHANNELMASTER, http://www.channelmasterstore.com/Digital_HDTV_Outdoor_TV_Antenna_p/cm-2016.htm (last visited Oct. 26, 2012); ChannelMaster TV CM 7400R HD Product Page, CHANNELMASTER, http://www.channelmasterstore.com/HD_DVR_with_no_subscription_p/cm7400r.htm (last visited Oct. 26, 2012); Slingbox 350 Product Page, SLINGBOX, http://www.slingbox.com/go/buy#.UH8Jwm_oSKI (last visited Oct. 26, 2012). When connected to a primary video source, Slingbox copies and transcodes content in order to play a roughly live or recorded version on other screens at the user's request. Sling Media, *Placeshifting: Set Your TV Free*, 9 (2011). "Space-shifting" is analogous to time-shifting; consumers with this capability can enjoy content in a location different from the primary source—similar to listening to MP3's transcoded from previously purchased CD content on a portable music player. Unfortunately, spending over $500 upfront may be unrealistic for many consumers, especially given 25% of American households earn less than $25,000 per year. *See* U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: TABLE S1901-INCOME IN THE PAST 12 MONTHS (2010).

The absence of low-cost services giving consumers meaningful choices about how and when they receive broadcast television will force many to forego full participation in modern information society. Broadband availability and

adoption has dramatically increased in recent years. THREE SCREEN REPORT, NIELSEN, 1, 3 (2010) (in 2010, 63.5% of households had broadband internet, a 24% increase from 2008). Despite this progress, content industry efforts to monetize and monopolize consumer choice may signal the opening of a new "digital divide" between members of the public who can take advantage of new tools that enable choice about how and when to access content, and those who are relegated to restrictive "basic" distribution models. This new digital divide has the most deleterious effect on low-income people, those with less education, the elderly, and the disabled—the very groups that most need information access to become full participants in society. *See* DIGITAL DIFFERENCES, PEWRESEARCH, 1, 2-6 (2012).

By contrast, the freedom of choice that technologies like Aereo offer, at a reasonable cost, empowers consumers and can help close the digital divide, enabling more consumers to become active and informed participants in social and cultural life.

D. Aereo is Representative of the Technological Trend Toward Services that Meet Consumer Demand for Choice.

A technology such as Aereo's can fulfill the important and legitimate goal of promoting consumer choice in accessing information by combining a number of separate and independently legitimate technological functions. Aereo provides consumers with access to their local broadcast programming content through individualized antennas and hard drive systems located at Aereo's facilities.

American Broad. Companies, Inc. v. Aereo, Inc., 2012 WL 2848158, at *3 (S.D.N.Y. July 11, 2012). Consumers can watch "live" programming on various devices through a miniaturized antenna allocated for their sole usage at that time. *Id.* at *3 (watching "live" is roughly contemporaneous with the over-the-air broadcast). Subscriber-specific hard drive profiles at Aereo's facilities function as DVRs that save temporary or permanent copies of broadcast programs selected by a user, thus enabling both "live" viewing and time-shifted playback. *Id.* at *2, *4.

Each of the component functions that constitute Aereo's technology is legitimate when undertaken separately. Receiving over-the-air broadcast signals is obviously lawful consumer behavior. So too is the user's exercise of the ability to record and time-shift broadcast programming. *See Sony*, 464 U.S. at 455. Similarly, space-shifting of broadcast content has been possible at least since the launch of the first Slingbox device in 2005. In the seven years since Slingbox's original launch, there have been no reports of copyright litigation, and Slingbox remains on the market. *Cf. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079-81 (9th Cir. 1999) (challenge to space-shifting of music using portable MP3 players rejected).

A consumer with a personal digital antenna, DVR, and Slingbox can choose what content to watch, and when and where to watch it, just as can an Aereo subscriber who makes use of hardware dedicated to that subscriber's use at

Aereo's facility—centered on the drives that store copies of broadcast content at the user's direction. This Court upheld similar remote-storage digital video recording (RS-DVR) technology against a copyright-based challenge in *Cablevision*. *Cablevision*, 536 F.3d 121. That decision was simply the latest in a long line of legislative and judicial actions that interpret copyright law in favor of new technologies that promote consumer choice.

II. Copyright Law Promotes Consumer Choice by Permitting Consumers to Utilize Efficient New Technology, and Should Not Be Interpreted in Ways that Unnecessarily Restrict Such Choice.

Since the earliest days of copyright law, consumer interests have been a paramount consideration in the shaping of the law. *See* Ronan Deazley, *The Myth of Copyright at Common Law*, CAMBRIDGE L.J. 108 (2003) (the Statue of Anne struck a balance of interests to ensure the dissemination of useful works). The popularization of movable type, a disruptive new technology of reproduction, gave rise to calls for new protection from established publishers. William C. Warrant, *Foreword* to BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT vii–viii (1967). In response, Parliament enacted the Statute of Anne, which sought to regulate the *misuse* of information technology, not technology itself. *See* Craig Joyce & L. Ray Patterson, *Copyright in 1791*, 52 EMORY L.J. 909, 913-915 (2003) (statute incorporated conditions for regulating publishers in the public interest). Following the lead of the British legislators in 1710, later lawmakers have moved

cautiously when invited to apply copyright to suppress beneficial new information technologies.

Congress wrote the importance of consumer access into the Copyright Act. However, when faced with changes in patterns of consumption that upset incumbent methods of content distribution, copyright holders have repeatedly sought to snuff out incipient new technologies that expand consumers' choices. The courts, however, generally have interpreted copyright law to validate consumer uses of new technologies.

A. When Analyzing New Technologies, Courts Have Consistently Interpreted the Copyright Act to Favor Legitimate Consumer Uses of Those Technologies.

As noted, when interpreting copyright law and evaluating the uses of new technologies, courts attempt to strike an appropriate balance between consumer interests and the property interests of copyright holders. *See supra* Part I.A. They have not hesitated to validate new technologies that expand consumer access to copyrighted works without invading copyright owners' statutory rights.

In *Sony Corp. of Am. v. Universal City Studios, Inc.*, the Supreme Court demonstrated a distinct sensitivity to the consumer perspective on new information. 464 U.S. 417 (1984). Owners of copyrights in television programs brought a copyright infringement suit to block the manufacture and sale of video recorders that allowed consumers to record and time-shift over-the-air

programming, freeing them from the rigid schedules imposed by broadcast. *Id.* at 423. The Court held that consumer time-shifting constituted "fair use" and that the technology that enabled it was permissible because it was "capable of [this] substantial noninfringing use[]," among others. *Id*. at 442. The *Sony* decision makes evident that courts should rule favorably with respect to technologies that facilitate consumer choice where the technology is "widely used for legitimate, unobjectionable purposes." *Id.*

Even when the Supreme Court has imposed liability on technology providers for inducement of copyright infringement, it has safeguarded other permissible consumer uses of new technology. The Supreme Court recently affirmed the *Sony* decision's pro-consumer perspective on technology in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), a copyright infringement action brought against the distributors of peer-to-peer file sharing software. The Court held that a technology's substantial noninfringing uses do not shield its distributors from liability for copyright infringement where there is evidence of conduct on their part knowingly intended to foster infringement by third parties. *Id*. at 936. While the Court found the software distributors liable for their actions inducing infringement, it made clear that it was the defendants' *conduct*, not the software technology itself, that triggered liability, and that copyright law should not discourage "the development of technologies with lawful and unlawful potential."

Id. at 937. As in *Sony*, the Court emphasized that the availability of a technology should depend *primarily* on its potential for legitimate use. Aereo's technology, as noted above (*see supra* Part I.B.), exists *exclusively* to enable lawful end-uses by consumers.

The Supreme Court is not alone taking account of legitimate consumer uses of new technologies. In addition to this Court's recent decision in *Cablevision*, the Ninth Circuit validated a useful space-shifting technology, the MP3 player, that allowed consumers to create personal, portable digitized copies of previously purchased records. *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999).

B. Congress and the Courts Have Historically Worked in Tandem to Allow Consumers to Make Reasonable Use of Technologies that Improve Access to Content.

Attempts to employ copyright to suppress new information technologies are nothing new. Where close questions are presented by such efforts, courts tend to read the copyright statute narrowly and even literally, thus favoring the challenged technology and its consumer beneficiaries. Courts exercise their duty to apply the law as it stands, but they also defer to Congress' authority to subsequently modify the legal regime to meet the technological challenges, should Congress choose to do so. *Sony*, 464 U.S. at 431. For example, in *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908), sales of player piano rolls were permitted because

the rolls were not "copies" of protected music under early twentieth century law. Congress responded the following year by modifying the statutory definition of a "copy," while protecting consumers' interests by introducing provisions for compulsory licensing of so-called "mechanical reproductions" of music (including the newly popular medium of phonograph records). Copyright Act of 1909, Pub. L. 60-349 § 1(e) (Mar. 4, 1909; *repealed* Jan. 1, 1978); *see also* 17 U.S.C. § 115.

White-Smith implicitly acknowledges that Congress has a unique role to play in regulating technologies that improve consumer access to content. Where Congress has not plainly marked the course, courts should generally be conservative in accepting invitations to construe the scope of copyright protections against technology. *Sony* at 431. For example, when the Supreme Court interpreted copyright law in favor of newly developed technologies that enabled consumers to receive retransmissions of over-the-air content via emergent cable television systems, Congress created a new scheme to balance providers' and consumers' interests in the Copyright Act of 1976. *See* 17 U.S.C. §§ 111(d)(2)(B), 111(d)(5); *Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968); *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974). In the same legislation, Congress corrected an atypically aggressive judicial application of copyright to technology that had restricted consumers' ability to enjoy content retransmitted by a hotel to private

guest rooms. *Compare Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191 (1931), *with* 17 U.S.C. § 111(a)(1).

Copyright's historically flexible approach to new information technologies promotes innovation to benefit law-abiding consumers. Any requirement for pre-implementation legislative review of new technologies turns this time-tested approach on its head, running the risk of stifling technological innovation and unnecessarily restraining consumer choice about how and when to access information.

III. The History and Congressional Intent of the Copyright Act of 1976 Expressly Protect Consumer Autonomy.

When drafting the 1976 Copyright Act, Congress struck a delicate balance among the interests of creators, owners, and consumers to encourage creative production and commerce. By limiting copyright owners' public performance and display rights, Congress recognized and safeguarded the private sphere of information use—the zone within which consumer choice about how and when to access content occurs. *See* R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM "Copies,"* 2001 U. ILL. L. REV. 83, 86 (2001). Congress thereby facilitated the technological developments of coming years, allowing copyright owners reasonable control over works they own without unnecessarily diminishing consumer access to those works or burdening technological development.

The 1976 Copyright Act was considered over a period of fifteen years before it was presented for a vote. *See* Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 479 (1977). The 1909 Act had contained language restricting copyright owners' rights to performances made "for profit," as well as distinguishing the public and private spheres of performance and display. *See* Copyright Act of 1909 § 1(e). The limitation on copyright owners' exclusive display and performance rights to the public sphere survived throughout the many iterations of the draft legislation. *See e.g.* S. 1006, 89th Cong. (1965); H.R. 2512, 90th Cong. (1967); S. 1361, 93d Cong. (1973). The final deletion of "for profit" from the language of the section 106 performance right, as well as the inclusion of "to the public," represents a distinct congressional choice. Copyright Act of 1976, Pub. L. 94-553 § 106 (Oct. 19, 1976).

Section 106 of the Act defines the full extent of the exclusive rights granted to copyright owners; rights that are not explicitly provided are automatically excluded. The rights granted include the "rights to do and to authorize any of the following . . . in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work *publicly*." 17 U.S.C. § 106 (*emphasis added).*

The congressional limitation on the scope of protection housed in the definition of "public performance" affirms the importance of a consumer space in the proper functioning of copyright. According to the Act, a public performance

only occurs when an assembled audience is physically present, or by "transmit[ting] or otherwise communicat[ing] a performance or display of the work . . . to the public." 17 U.S.C. § 101. If Congress had intended the statute to encompass all performances, wherever or by whatever means they occur, it would have so stated.

More generally, the public-private distinction is observed throughout the Copyright Act. *See* 17 U.S.C. §§ 109, 111. The codification of the first sale doctrine in § 109(a) shows that Congress contemplated what happened to copies of protected works once they exited the public channels of commerce, and concluded that the copyright owner's control generally should cease at that point. In most instances, first sale protects consumers' private choices about whether to sell or otherwise dispose of lawfully acquired copies. *See Quality King Distributors, Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135 (1998).

Likewise, in the corrective provision mentioned above, *see supra* Part II.B., section 111(a) states that secondary transmission from "a hotel[room], apartment house, or similar establishment, of signals transmitted by a broadcast station licensed . . . to the private lodgings of guests or residents of such establishment . . . " is non-infringing. 17 U.S.C. § 111(a). The plain language of this exception is predicated on the acceptance of a significant distinction between public and private space.

This court's opinion in *Cablevision* again recognized Congress' protection of the private space by maintaining consumers' right to receive private performances and to choose how they access content.

IV. This Court's Choice-promoting Analysis of the "Transmit Clause" in *Cablevision,* Recognizing that Consumers are Entitled to Engage in Private Performances, is Broadly Applicable to Aereo's Technology Among Others.

Judicial determinations about how new modes of access to content fit within the current statutory scheme prescribed by Congress act as guidance for the next wave of disruptive information technology, directing the flow of investment in innovation. As previously established, the legislative history of the Copyright Act indicates Congress' intent to reserve the right to engage in private performance for the consumer. *See supra* Part III. In 2008, this Court recognized that intent in determining that Cablevision's RS-DVR did not infringe upon content owners' exclusive right of public performance. The *Cablevision* decision is widely regarded as an authoritative understanding of the law, and the district court relied on this Court's reasoning below, treating it as "equally applicable here" and "control[ling in] this case." *American Broadcasting Companies, Inc. v. Aereo, Inc*., 2012 WL 2848158, at *12 (S.D.N.Y. July 11, 2012).

This Court's reasoning in *Cablevision* provides an exemplary analysis, which takes account of traditional tenets of statutory interpretation and properly balances the need to protect creative works with consumers' interest in broad,

flexible access to content. The *amici* who argue that *Cablevision* should be confined to its facts fail to grant the appropriate weight to this Court's interpretation of the statute at issue and fail to advance any compelling argument that the district court's application of *Cablevision* to Aereo's technology was improper. *See, e.g.*, Brief for Am. Soc'y of Composers, Authors and Publishers as *Amicus Curiae*, 12-2786-cv, 8-10; Brief for Ralph Oman as *Amicus Curiae*, 12-2786-cv, 3–6, 18-20.

This Court reviews denial of a preliminary injunction for an abuse of discretion. *NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 476 (2d Cir. 2004). Because this Court's authoritative interpretation of the statute provided the direct basis for the district court's decision in *Aereo*, great weight should be afforded to its conclusion that the plaintiff's claims were insufficient to prove a likelihood of success on the merits to justify preliminary injunctive relief. *Aereo*, 2012 WL 2848158, at *1 (citing *Cablevision*'s holding, 536 F.3d at 121). The transmit clause should be interpreted to reflect Congress' intent to protect private performance, and should be applied to find that Aereo's technology merely allows consumers to engage in private performances.

A. This Court's Interpretation of the Transmit Clause is Broadly Applicable and Consistent with the Pro-Consumer Purposes of the Copyright Act.

This Court interpreted the transmit clause to reserve private performances for consumers. It analyzed whether Cablevision "transmit[s] . . . a performance . . . of the work . . . *to the public*" by allowing individual consumers to use its RS-DVR system to watch programming at times later than those at which the content is made available to the public. *Cablevision*, 536 F.3d at 134 (*emphasis added*). The *Cablevision* interpretation of the transmit clause gave weight to a number of factors: each transmission would be sent to a single recipient; each transmission would be made using a unique copy of the relevant program; and each transmission would be made solely to the person who had previously made that unique copy. *Id.* at 121.

On this basis, this Court found that Cablevision's RS-DVR service was not a regulated "public performance." This Court emphasized that the transmit clause "obviously contemplates the existence of non-public transmissions," as other cases have recognized. *Id.* at 135-36; *see supra* Part II.A. In arriving at its conclusion, this Court applied traditional canons of statutory interpretation and analyzed the plain language, legislative intent, and practical effect of the statute in light of the purpose of copyright law. Its determinations relating to the scope of the transmit

clause represent a clear precedent upon which the district court properly premised its decision.

1. The Plain Language and Legislative Intent of the Statute Clearly Reserve Private Performances for Consumers.

The Supreme Court has recognized that "the meaning of statutory language, plain or not, depends on context." *Bailey v. United States*, 516 U.S. 137, 145 (1995). Although the transmit clause lacks an express definition of the terms "performance" and "to the public," this Court defined "performance" by finding a "transmission of a performance is itself a performance," recognizing that the statute uses the phrase "capable of receiving the performance" rather than "capable of receiving the work." *Cablevision*, 536 F.3d at 134, 136. Likewise, the legislative history of the transmit clause directs courts to consider who is "capable of receiving" or who constitutes "the potential audience of" a given transmission to determine whether a performance is private. H.R. REP. NO. 94-1476, at 64-65 (1976). This Court recognized the significance of these limiting considerations and found that Congress intended to reserve a space for private performance in the transmit clause. *Cablevision*, 536 F.3d at 135-36.

To determine the intended meaning of "to the public," this Court construed the Copyright Act to require an "examin[ation of] who precisely is 'capable of receiving' a particular transmission of a performance." *Id. at* 135. This Court distinguished Cablevision's RS-DVR from other services by noting that "*if the*

same copy . . . of a given work is repeatedly played (*i.e.*, 'performed') by different members of the public, albeit at different times, this constitutes a 'public' performance." *Cablevision*, 536 F.3d at 138; NIMMER ON COPYRIGHT § 8.14[C][3] (2012). Notably, this Court found it determinative that each consumer-subscriber directs the creation of unique copies for his or her own use, because this limited the potential audience for a given transmission; the opinion emphasized that another interpretation "would render the 'to the public' language surplusage." *Cablevision*, 536 F.3d at 138. (the transmit clause speaks of people capable of receiving a particular "transmission" or "performance," not the potential audience of a "work").

The district court in this case relied on this Court's authoritative interpretation of the clear language of the transmit clause to find that Aereo's technology does not constitute a "public performance," and this Court should affirm the interpretative logic of its prior decision by finding the same. *Aereo*, 2012 WL 2848158, at *1. In *Cablevision* this Court recognized Congress' intention to authorize technologies like Cablevision's, which do not infringe on copyright owners' rights of public performance. Aereo's is another such technology, and it falls within the clear congressional intent to enable greater consumer access to protected content within the private sphere.

2. Reading the Public's Right to Engage Private Performances Out of the Transmit Clause Would Result in an Overly Protective Scheme.

In *Cablevision*, this Court interpreted the transmit clause so as to avoid an absurd result, *see United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000) (citing *United States v. Hendrickson*, 26 F.3d 321, 336 (2d Cir. 1994)), and concluded that the potential downstream audience is the crucial consideration in determining whether a performance is "public." *See Cablevision*, at 536 F.3d 136. By contrast, conflating upstream or lateral transmissions with the downstream performance transmission would potentially mischaracterize performances as "to the public," even when the final recipient is a private consumer. *Cablevision*, 536 F.3d at 137 (distinguishing *NFL v. Primetime Joint Venture*, 211 F.3d 10 (2d Cir. 2000)). This Court found no reason to interpret the phrase "to the public" "out of existence," and therefore gave weight to operational factors, such as the final discrete transmission, that effectively limit the potential audience. *Cablevision*, 536 F.3d at 136 (citing *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984).

Similarly, the district court in this case emphasized that the Aereo technology's use of a unique copy as the source of the downlink transmission to a single consumer rendered the performance not one made "to the public." *Aereo*, at *14. Relying on this Court's reasoning in *Cablevision*, the *Aereo* district court

distinguished *NFL v. Primetime 24 Joint Venture* from *United States v. American Society of Composers*, which also found that transmissions made from unique copies were not "to the public." *NFL*, 211 F.3d at 13; *United States v. Am. Soc'y of Composers*, 627 F.3d 64, 74 (2d Cir. 2010); *Aereo*, 2012 WL 2848158, at *16.

As discussed above, the plain language and legislative intent of the Copyright Act clearly reserve a right to engage in private performance for consumers. The district court applied this Court's authoritative interpretation of the transmit clause to a new technology and distinguished inapplicable or inaccurate transmit clause jurisprudence of other courts. It properly made three inquiries to determine whether the technology enabled public or private performances: who was the potential audience of a given transmission or who was capable of receiving it; whether the transmission was made from a unique copy; and to whom the downstream transmission was delivered. Like Cablevision's RS-DVR, Aereo's technology is designed to enable transmissions to a device controller by the single subscriber requesting them, from a unique copy made at the direction of that subscriber, and never to a group or community. *See Cablevision*, 536 F.3d at 137. This Court should now re-apply each element identified in its previous interpretation of the relevant factors under the statute in analyzing Aereo's technology. The *Cablevision* interpretation of the transmit

clause is both correct and directly applicable to Aereo's technology; it neither should be nor can be confined to its facts or narrowed in application.

B. This Court's Reading of the Transmit Clause Ensures that the Broadcast Medium Provides Consumers with Choice in Access to Information.

Urging the denial of Supreme Court *certiorari* in *Cablevision*, then-Solicitor General Elena Kagan noted,

> For the last 30 years, consumers have been able to record televised programs and to play back the recorded programming at a later time. Respondents' proposed RS-DVR service is part of a broader transition from analog to digital recording and playback, and from business models where consumers purchase a tangible item to those where they pay for a service.

Brief for the United States as *Amicus Curiae*, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 129 S. Ct. 2890 (2009). This Court's interpretation of the transmit clause in *Cablevision* preserved consumers' ability to perform copyrighted works in the private sphere, which increased consumers' freedom of choice in accessing media content. The Copyright Act has always protected consumers, but the current proliferation of technologies, such as RS-DVR, required this Court to address the scope of consumers' rights in the new digital environment. In *Cablevision*, this Court properly acknowledged the interests of information consumers, and it should do so again in applying its interpretation of the transmit clause to Aereo's technology.

Consumer advocates and legal scholars support this Court's interpretation of the transmit clause as a "huge victory for consumers and all video service providers, not just cable." Gigi Sohn, *Supreme Court Declines to Hear Cablevision Case: Video Providers, Consumers and Innovation All Win,* PUB. KNOWLEDGE, June 29, 2009, http://www.publicknowledge.org/node/2509 (RS-DVR service saves consumers money, allows greater flexibility in accessing content, and promotes innovation by calming fears about roadblocks to cloud and web-based technologies); Peter Jaszi, *Is There Such a Thing as Postmodern Copyright*?, 12 TUL. J. TECH. & INTELL. PROP. 105 (2009) (lauding this Court's "emphasis on safeguarding private choices about information consumption"); Brief of *Amici Curiae* Law Professors in Support of Defendants-Counterclaimants-Appellants and Reversal, *Cartoon Network LP, LLLP v. CSC Holdings, Inc*., 536 F.3d 121 (2d Cir. 2008), 2007 WL 6101595 at *7 (reminding this Court that "[t]he Copyright Act should not be interpreted to . . . severely limit the public's access to and use of digital information and undermine the basic policies of the Copyright Act").

CONCLUSION

The Supreme Court has cautioned, "[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors." *Sony*, 464 U.S. at 429. Similarly, the district court here

correctly concluded that it "must be guided by the law as it has been written by Congress and, importantly for present purposes, how that law has been interpreted by the Second Circuit." *Aereo*, 2012 WL 2848158, at *20. Aereo's technology conforms to the law and this Court's principles regarding private performances of copyrighted content. Consumers require lawful access to content and freedom of choice in how to use it: technology like Aereo's thus serves a fundamental public interest. By recognizing the Aereo technology as enabling private performances, this Court will support the development and distribution of technologies that serve consumers' interests without unnecessarily invading those of content owners. Modifying the transmit clause precedent established in *Cablevision* would signal a shift by this Court favoring monopolistic incumbents at the expense of efficient, disintermediating technologies. The resulting imbalance between copyright protection and consumer choice in accessing content would weigh heavily on many members of the public, which is the ultimate intended beneficiary of copyright. This Court should maintain the balance that it found in *Cablevision* and affirm the district court's order denying a preliminary injunction.