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

## BRIEF OF NATIONAL FOOTBALL LEAGUE AND MAJOR LEAGUE BASEBALL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIAE* [1]

The National Football League ("NFL") and Major League Baseball ("MLB") (collectively, the "Leagues") are unincorporated associations whose member clubs own and operate professional football and baseball teams, respectively. The Leagues have developed successful businesses licensing rights to televise their games and to retransmit those copyrighted telecasts over various media, both domestically and internationally. Their business models rely on a well-established, statutorily-created legal regime that requires commercial services to obtain copyright licenses in order to retransmit programming on broadcast television stations.

The decision below significantly alters that legal regime and unsettles the marketplace for licensing rights to broadcast television programming. A divided panel of the Second Circuit held that copyright licenses are unnecessary when a service uses "mini antennas" and individual subscriber-associated copies of programs to make broadcast retransmissions. This judicially created loophole allows such services to avoid the force of the Leagues' copyrights in broadcasts of their games, eroding the value of one of the Leagues' most important assets.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties were timely notified ten days before the filing of this brief. Letters from the parties consenting to the filing of *amicus curiae* briefs have been filed with the Clerk of the Court.

## INTRODUCTION

The Second Circuit's decision permits technological gimmickry that serves no valid purpose to nullify critically important copyright rights—rights that the Leagues fought hard to secure and that have become an integral part of their businesses during the past four decades.

1. Beginning in the early 1960s, the Leagues urged Congress to clarify that the copyright laws protect telecasts of live sports events. The Leagues sought copyright protection specifically to ensure that they would have the right to authorize the retransmission of over-the-air broadcasts of their games. *See, e.g.*, *Copyright Law Revision: Hearing Before Subcomm. No. 3 of the H. Comm. of the Judiciary*, 89th Cong. 455-57 (1965) (statement of Pete Rozelle, Commissioner of National Football League); *Copyright Law Revision: Hearing on S. 1361 Before the Subcomm. on Patents, Trademarks and Copyrights of the S. Comm on the Judiciary*, 93rd Cong. 533-37 (1973) (statement of Bowie Kuhn, Commissioner of Baseball).

In the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.,* Congress determined that live sports telecasts, recorded simultaneously with their transmission, are copyrighted works. *See* H.R. Rep. No. 94-1476, at 52-53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665-66 ("1976 Report"); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997). Congress also determined that commercial retransmissions of sports and other programming on broadcast stations are "public performances" that require copyright licenses. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709 (1984). The Copyright Act reflects Congress' judgment that it is inequitable for commercial

broadcast retransmission services to profit from selling access to copyrighted programming without compensating those who create that programming at great expense, effort, and risk. *See* 1976 Report at 88-90.

2. Several different types of broadcast retransmission services have emerged during the thirty-seven years since Congress passed the Copyright Act. These services use technologies that vary significantly from the technology available in 1976. *See* U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act: Section 109 Report* at 19-34 (June 2008), *available at* http://www.copyright.gov/reports/section109-final-report.pdf ("Section 109 Report") (discussing the use of microwave, satellites, open video, fiber, Internet Protocol TV, and other technological advances to retransmit broadcast programming). All of these new technologies, however, engage in the same commercial broadcast retransmission activity that, Congress determined, requires copyright licenses. For that reason, they all have obtained such licenses.

Services that retransmit broadcast programming over the Internet are no different. A decade ago, in a copyright action brought by the NFL and others, a court enjoined the first service that retransmitted broadcast signals over the Internet without authorization. *See Twentieth Century Fox Film Corp. v. iCraveTV*, Nos. 00-121, 00-120, 2000 WL 255989, at *1 (W.D. Pa. Feb. 8, 2000) (unpublished). More recently, the Second Circuit affirmed a preliminary injunction against a similar service in a copyright infringement action brought by several content owners, including MLB. *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 277 (2d Cir. 2012), *cert. denied*, 133 S. Ct.

1585 (2013). Other courts likewise have restrained the unauthorized Internet retransmission of broadcasts, including services that use technology nearly identical to that used by the defendant in this case, Aereo, Inc. ("Aereo"). *See* Pet. 25.

At Congress' direction, the Register of Copyrights has considered whether Internet services are, or should be, eligible for "compulsory" licenses that would allow such services to retransmit broadcast programming without copyright owner authorization. The Register "has consistently concluded" that Internet services are not—and should not be—permitted to do so. *ivi*, 691 F.3d at 283-84 (citing authority). The Second Circuit in *ivi* likewise concluded that Internet retransmission services are ineligible for compulsory licensing and therefore must obtain authorization from copyright owners. As the Second Circuit also explained, "live retransmissions of copyrighted television programming over the Internet without consent . . . threaten to destabilize the entire industry," "substantially diminish the value of the programming," and "drastically change the industry, to [copyright owners'] detriment." *Id*. at 285-86.

In short, until the decision below, the law was clear that Internet retransmissions of broadcast programming require copyright licenses. Even the chairman of the International Webcasting Association—whose members include Internet streaming media companies such as Microsoft, Apple, and RealNetworks—recognized that "Internet webcasters . . . are required to negotiate with each individual copyright holder before retransmitting a television broadcast signal over the Internet." *Copyrighted Webcast Programming on the Internet: Hearing Before the Subcomm. on Courts and*

*Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong., 2d Sess. 88 (2000) (statement of Peggy Miles). Accordingly, the Executive Branch (with congressional approval) executed treaties that prohibit U.S. trading partners and the United States from adopting laws that allow Internet retransmissions of broadcast stations without the consent of broadcast stations and program owners. *See infra* Part II.B.

3. The decision below departs from these well-settled legal principles, international commitments, and sound congressional policy. In a 2-1 decision, a panel of the Second Circuit concluded that Aereo may lawfully retransmit broadcast stations over the Internet to paying subscribers without securing licenses from program or station owners. The court reached that conclusion solely because Aereo uses thousands of dime-sized "mini-antennas" and subscriber-associated copies of programs to make individualized retransmissions to each subscriber. It is undisputed that Aereo's "Rube Goldberg-like contrivance" (Pet. App. 40a) is neither technologically efficient nor innovative. It has no purpose other than to avoid compensating the copyright owners whose programming Aereo exploits.

According to the Second Circuit, when a service using Aereo's technology retransmits the same copyrighted broadcast of a program to millions of paying subscribers, the service does not make a "public performance;" it makes millions of "private performances" that are not within a copyright owner's exclusive right of public performance. And because there is no public performance, an Aereo-like service may simultaneously retransmit the broadcast of a program to millions of viewers located across the

country—indeed, anywhere in the world—without obtaining the consent of, or paying compensation to, the program owner or anyone else.

## SUMMARY OF ARGUMENT

The Second Circuit's reasoning cannot be squared with the language, structure, and legislative intent of the Copyright Act. *See* Pet. 23-31. For nearly forty years following passage of the 1976 Copyright Act, commercial services have been required to obtain licenses to retransmit broadcast signals. The decision below upends this legal regime. It unsettles a stable set of rules that the courts, Copyright Office, Executive Branch, and Congress have repeatedly reinforced in multiple contexts; and it replaces those rules with a set of judicially-created "guideposts" that have no basis in the statutory language. *See* Pet. App. 22a. Such a significant legal shift away from the meaning and purpose of the Copyright Act should occur, if at all, at the direction of Congress, not a split panel of the Second Circuit. As reflected by the multiple pending lawsuits involving the same issue raised in this case, the legal, practical, and international implications of the decision below are exceedingly pressing and important. This Court should grant the petition for certiorari.

## ARGUMENT

### I. The Decision Below Creates Substantial Uncertainty In The Marketplace And Impairs The Ability Of The Leagues To Engage In An Important Segment Of Their Businesses.

The Leagues are an important source of very popular programming for free over-the-air broadcast television. The NFL, for example, currently licenses

CBS, FOX, and NBC the rights to televise (collectively) all of its playoff games, including the Super Bowl, and approximately 90% of its regular season games. Telecasts of the remaining 10% of NFL regular season games (by non-broadcast cable networks ESPN and the NFL Network) are aired over broadcast television stations in the local markets of the participating teams. MLB and its member clubs license broadcasters the rights to televise approximately 400 games each year, culminating with the telecasts of the World Series over the FOX broadcast network.

A prime consideration in licensing telecasting rights to over-the-air broadcast stations has been the ability of the Leagues to derive important revenue from the retransmission of those telecasts by various media, both domestically and internationally. The decision below, however, unravels the foundation of this business model by giving broadcast retransmission rights to unlicensed commercial strangers that inefficiently engineer distribution systems to avoid copyright liability.

### A. The Decision Below Upends The Marketplace For Licensing Internet Retransmission Rights Of The Leagues' Telecasts.

The Leagues recognize that many of their fans want access to telecasts of all NFL and MLB games, not only those available on local over-the-air broadcast stations. Fans also increasingly wish to view television programming, including sports programming, on a variety of Internet-connected devices. And fans located abroad want the same access to NFL and MLB telecasts as fans located in the United States. To meet these demands, the Leagues have licensed rights to provide a variety of innovative

subscription products that include retransmissions of broadcasts of their games.

For example, the NFL has authorized licensees to offer the following packages:

- NFL Sunday Ticket, which allows DirecTV subscribers (and those in geographic areas where DirecTV's satellite service is unavailable) to view out-of-market telecasts of NFL games on Sunday afternoons.
- NFL Sunday Ticket Max, which allows NFL Sunday Ticket subscribers to view out-of-market games on Internet-connected computers, tablets, and smartphones.
- NFL Sunday Ticket Online, which allows subscribers to certain Canadian cable systems to view NFL telecasts online.
- NFL Game Pass, which allows viewers located in many foreign countries to view NFL preseason and regular season NFL telecasts.
- NFL Mobile, which allows customers of Verizon to view on their smartphones telecasts of NFL games on Sunday, Monday, and Thursday nights.

MLB provides comparable packages, *i.e.*, MLB Extra Innings and MLB.tv. The objective of the Leagues' packages is to allow fans worldwide to view all telecasts of the Leagues' games over a combination of media, including broadcast television, cable, satellite, and Internet-connected devices. The revenues from these packages are an important source of income that permits the Leagues and their member clubs to provide the entertainment product that millions of fans worldwide are able to enjoy.

As a practical matter, it is not difficult for an Aereo-like service to replicate any of the NFL packages because all NFL games are generally available on one or more broadcast television stations. Aereo is currently streaming more than 100 broadcast television stations from across the country. By streaming nine or ten stations from select markets, an Aereo-like service could offer to Internet-connected devices precisely the same package of telecasts that DirecTV offers with NFL Sunday Ticket Max. And because the service would pay nothing for the retransmission rights (under the decision below), it could provide its unlicensed version of the NFL packages at a price substantially less that which DirecTV charges for its licensed product.

The decision below allows Aereo-like services to sell packages that are even more attractive and valuable than those made available by the NFL's licensees, without paying for the right to do so. For example, beginning next season, the NFL has licensed Verizon to provide its customers with smartphone access to NFL telecasts available locally off-air. In return, Verizon pays the NFL a substantial licensing fee. That fee does not include the right to offer the NFL telecasts on tablets; the NFL has licensed that right to its broadcast partners beginning next season, subject to various conditions. Under the decision below, Aereo-like services can offer NFL telecasts from local and distant markets on both smartphones and tablets, regardless of whether their subscribers are customers of Verizon or one of its competitors.

Because most of the games made available via MLB's subscription packages are televised by non-broadcast regional sports networks (such as MASN and Comcast SportsNet), an Aereo-like service could

not fully replicate those products. However, it could offer a package containing any or all of the approximately 400 MLB telecasts available on broadcast television each year. The decision below allows Aereo and comparably-engineered services to expropriate, for their own commercial gain, any of these MLB telecasts and make them available to subscribers throughout the world—without paying any licensing fee and without complying with any marketplace-negotiated terms or conditions applicable to MLB-licensed products.

Although Aereo currently confines its unlicensed service to retransmitting broadcast signals locally (offering New York City signals to New York subscribers), the legal theory adopted by the Second Circuit does not require Aereo to do so. Any Aereo-like service can use the same technological artifice to stream, for example, New York City signals to subscribers in Los Angeles or Sydney, Australia, claiming that it is not engaged in a public performance under the Second Circuit's rationale. Even if the legal theory adopted below encompasses only Aereo's current service, that service entails the retransmission over the Internet, without authorization, of the very same games that the Leagues or their member clubs authorize licensed services to televise, or to retransmit, on an exclusive basis. The decision below judicially empowers Aereo and similar services to destroy marketplace-negotiated exclusivity.

Third parties might have little incentive to negotiate for licenses if they can enter the loophole created by the Second Circuit and receive the same, comparable, or even more lucrative rights—without any terms or conditions—simply by employing the convoluted Aereo

technology. Regardless of whether any services do so, the mere specter of such offerings, sanctioned by an influential court of appeals, causes considerable uncertainty in the industry. And that uncertainty affects the ongoing negotiations and renegotiations between the Leagues and their telecast partners, such as those involving the NFL Sunday Ticket agreement with DirecTV that expires at the end of next season. Moreover, allowing unlicensed services like Aereo to entrench their market positions over time makes it exceedingly more difficult to restore the marketplace to one that, consistent with Congress' policy determination in the Copyright Act, requires commercial retransmission services to obtain licenses. Thus, it is particularly important that the Court clarify the law in this area without delay.

### B. The Decision Below Adversely Affects The Fees That The Leagues And Others Receive From Licensed Cable Operators and Satellite Services.

Cable systems (*e.g.*, those operated by Time Warner Cable and Comcast) and satellite carriers (*e.g.*, DirecTV and DISH) currently pay more than $300 million annually in "compulsory licensing" fees for the right to retransmit broadcast programming. The copyright owners of sports programming (including the NFL and MLB) collectively receive about $100 million of that $300 million annually. In addition, the Leagues and other content owners indirectly receive a share of the several billion dollars that cable systems and satellite carriers pay broadcasters for the right to retransmit broadcast signals. Those retransmission consent fees help fund the license fees that broadcasters pay content owners.

The decision below provides cable systems and satellite carriers with a roadmap to avoid paying these retransmission royalties. Cable systems and satellite carriers already have signaled their interest in following Aereo's lead, should Aereo prevail. *See* Andy Fixmer *et al.*, *DirecTV, Time Warner Cable Are Said to Weigh Aereo-Type Services*, Bloomberg, Oct. 26, 2013, *available at* http://www.bloomberg.com/news/2013-10-25/directv-time-warner-cable-said-to-consider-aereo-type-services.html; *see also* Pet. 34-35. Even without cloning Aereo's technological contrivance, cable systems and satellite carriers might seek to leverage the decision below in efforts to avoid paying (or at least reducing) retransmission royalties. In that way, the decision below injects further uncertainty and confusion into the marketplace.[2]

Furthermore, the objective of Aereo and similar services is to take subscribers away from cable systems and satellite carriers and to attract the so-called "cord cutters." To the extent these Aereo-like services succeed, the retransmission fees that the Leagues and other content owners receive from satellite and cable will ultimately be less than they would otherwise be, perhaps drastically so. That is

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[2] The Second Circuit concluded that Aereo is exempt from copyright liability because it makes an individualized retransmission of each program to each subscriber at the subscriber's request. *See* Pet. App. 23a. Traditional cable systems likewise make individualized retransmissions when they use certain technologies (*e.g.*, Internet Protocol TV ("IPTV") and "switched video") to distribute programming. With IPTV and switched video, cable systems retransmit to a particular subscriber only the programming that the subscriber specifically requests. Cable systems using IPTV and switched video routinely obtain (and for several years have obtained) broadcast retransmission licenses.

because the total amount of such fees is tied to the number of cable and satellite subscribers. Once lost, those fees will not be recouped.

## II. This Case Raises An Issue Of Recurring And Exceptional Importance.

At the heart of this case is the scope of the public performance right in the Copyright Act of 1976. The Court has never before construed the public performance provisions of the 1976 Act. In several cases, the Court considered the public performance right in an earlier statute, the 1909 Copyright Act—including twice in the context of commercial retransmissions of broadcast programming. *See Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974). But those decisions provide no guidance today because Congress expanded the public performance right in the 1976 Act, with the express intent of overruling *Fortnightly* and *Teleprompter*. *See* 1976 Report at 88-89; *Crisp*, 467 U.S. at 709-10.

The Court's intervention is now necessary to restore clarity and certainty in this area and to prevent the unraveling of a marketplace built upon the licensing of rights rather than the expropriation of such rights through technological chicanery. A proper understanding of the performance right is critical given technological developments that facilitate the easy and instantaneous transmission of video programming over the Internet to millions of viewers worldwide. It is especially critical given the impact of the narrow (and incorrect) statutory construction adopted by the court below.

### A. The Decision Below Will Limit The Availability Of Valuable Programming On Broadcast Television.

Allowing Aereo-like technology to avoid the dictates of the Copyright Act will irreparably harm not only copyright owners like the NFL and MLB; it also will undermine the "important federal interest" in protecting over-the-air broadcasting. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 663 (1994). If copyright holders lose their exclusive retransmission licensing rights and the substantial benefits derived from those rights when they place programming on broadcast stations, those stations will become less attractive mediums for distributing copyrighted content. The option for copyright holders will be to move that content to paid cable networks (such as ESPN and TNT) where Aereo-like services cannot hijack and exploit their programming without authorization.

The decision below places broadcast television at a significant disadvantage to non-broadcast cable networks in terms of its ability to acquire valuable programming. That, in turn, adversely impacts the more than eleven million households in the United States that do not subscribe to cable or satellite and thus do not receive non-broadcast cable networks. FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming; Fifteenth Report* 5 (July 22, 2013), *available at* https://www.fcc.gov/document/fcc-adopts-15th-report-video-competition-0.

### B. The Decision Below Places The United States In Violation Of Its International Obligations.

The United States has ratified several treaties requiring it to prohibit retransmission of broadcast stations over the Internet without the consent of the program and station owners. For example, a free trade agreement between the United States and Australia provides that "neither party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders, if any, of the content of the signal and of the signal." Free Trade Agreement, U.S.-Austl., art. 17.4.10(b), May 18, 2004, 43 I.L.M. 1248, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf. Other treaties contain similar language. *See generally* Section 109 Report at 188-89.

Our trading partners have met their obligations under these agreements. *See, e.g.*, *ITV Broad. Ltd. v. TVCatchup Ltd.*, Case C-607/11 (European Court of Justice, Mar. 7, 2013), *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=134604&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=279461 (concluding that European Union copyright law prohibits the unauthorized retransmission of broadcast signals over the Internet); *Nat'l Rugby League Invs. Pty. Ltd. v Singtel Optus Pty. Ltd.* [2012] FCAFC 59 (Austl.) (holding that an Aereo-like service that allowed subscribers to stream individual copies of sports programming over the Internet and smartphones infringed on the copyrights of the Australian Football League and the National Rugby League). The decision below, however, not only

places the United States in violation of its international obligations; it also makes the United States an outlier in the world community in terms of failing to safeguard copyright owners' right to authorize Internet retransmissions of their broadcast programming.

The decision below weakens the credibility of the United States in negotiating treaties involving copyright protection. And it impairs the ability of copyright owners to obtain, worldwide, the effective copyright protection that Congress envisioned when it enacted the Copyright Act. If other countries believe that the United States—the world's leading exporter of copyrighted works and one of the world's most vocal proponents for strong copyright protection—fails to comply with its own international copyright commitments, copyright owners will have an even more difficult time attempting to secure such protection abroad.

It is a fundamental maxim of statutory interpretation that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (quoting *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)). "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995). The decision below does not heed those admonitions.

The Copyright Act can reasonably be construed to require Aereo to obtain licenses before retransmitting

broadcast signals over the Internet, consistent with this country's treaty obligations. Indeed, other courts have already held that this construction is not only *reasonable*, it is *correct*. *See* Pet. 25. But the Second Circuit made no effort to reconcile the language of the U.S. Copyright Act with U.S. international commitments. Instead, the court solely relied on a statutory interpretation in a case that dealt with the copyright liability of an entirely different service (remote storage digital video recorders), *i.e.*, *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), ("*Cablevision*"), *cert. denied*, 129 S. Ct. 2890 (2009). Leading copyright scholars, including Professor Ginsburg of Columbia and Professor Goldstein of Stanford, have explained that *Cablevision* misconstrues the Copyright Act. *See* Pet. 26.

The Solicitor General, in recommending against this Court's review of *Cablevision*, concluded that "while some aspects of the Second Circuit's reasoning on the public-performance issue are problematic," the court's decision "should not be understood to reach . . . other circumstances beyond those presented in this case," including "situations in which a party streams copyrighted material on an individualized basis over the Internet." Brief of the United States as Amicus Curiae at 21-22, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 129 S. Ct. 2890 (2009) (No. 08-448), 2009 WL 1511740 at *21-22. The Second Circuit has extended *Cablevision* to precisely such a situation, disregarding this country's international commitments and well-established copyright law regarding broadcast retransmissions.

## CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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November 12, 2013