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

(caption continued on inside cover)

BRIEF OF *AMICI CURIAE* THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, BROADCAST MUSIC, INC., THE NATIONAL MUSIC PUBLISHERS ASSOCIATION, THE ASSOCIATION OF INDEPENDENT MUSIC PUBLISHERS, THE CHURCH MUSIC PUBLISHERS ASSOCIATION, THE NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, THE RECORDING ACADEMY, SESAC, INC., THE SOCIETY OF COMPOSERS & LYRICISTS, THE SONGWRITERS GUILD OF AMERICA, INC., AND SOUNDEXCHANGE, INC. IN SUPPORT OF APPELLANTS AND REVERSAL

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12-2807-cv

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 as follows:

1. The American Society of Composers, Authors and Publishers (ASCAP) has no parent corporation, and no publicly held company holds more than 10% of its stock.

2. Broadcast Music, Inc. (BMI) has no parent corporation. The only publicly held company that directly or indirectly owns 10% or more of its stock is Gannett Co., Inc., through an indirect, wholly owned subsidiary.

3. The National Music Publishers' Association (NMPA) has no parent corporation, and no publicly held company holds more than 10% of its stock.

4. The Association of Independent Music Publishers (AIMP) has no parent corporation, and no publicly held company holds more than 10% of its stock.

5. The Church Music Publishers Association (CMPA) has no parent corporation, and no publicly held company holds more than 10% of its stock.

6. The Nashville Songwriters Association International (NSAI) has no parent corporation, and no publicly held company holds more than 10% of its stock.

7. The Recording Industry Association of America (RIAA) has no parent corporation, and no publicly held company holds more than 10% of its stock.

8. The Recording Academy has no parent corporation, and no publicly held company holds more than 10% of its stock.

9. SESAC, Inc. (SESAC) has no parent corporation, and no publicly held company holds more than 10% of its stock.

10. The Society of Composers & Lyricists (SCL) has no parent corporation, and no publicly held company holds more than 10% of its stock.

11. The Songwriters Guild of America, Inc. (SGA) has no parent corporation, and no publicly held company holds more than 10% of its stock.

12. SoundExchange, Inc. has no parent corporation, and no publicly held company holds more than 10% of its stock.

DATED: September 21, 2012

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CONSENT

All parties consented to *Amici Curiae* filing this brief.[1]

INTERESTS OF *AMICI CURIAE*

Amici Curiae are associations and organizations whose members create and disseminate a wide variety of musical compositions and sound recordings. *Amici* also disseminate music to the public through a variety of various third parties, including live-performance venues, radio and television broadcasters, cable television services, satellite television and radio services, sports arenas, mobile communications services, and Internet companies. Collectively, *Amici* represent hundreds of thousands of songwriters, composers, music publishers, recording artists, record labels, and others who own millions of copyrights.[2] A more detailed description of each *Amicus Curiae* is in Schedule A attached hereto.

Amici and their members currently license a broad array of digital services to publicly perform music and audiovisual works containing music. Since the dawn

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[1] Pursuant to F.R.A.P. 29(c)(5) and Local Rule 29.1, *Amici* state that counsel for the parties have not authored this brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no one other than *Amici* and their members has contributed money that was intended to fund preparing or submitting this brief.

[2] *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 571 F.3d 69, 73 (D.C. Cir. 2009) ("Recorded music may be protected by two copyrights. One copyright protects the 'musical work' written by a composer and usually owned by a music publisher. The other protects the 'sound recording' and is owned by the producer of the sound recording.").

of the digital revolution, commentators have predicted that digital streaming, whether via the Internet or wireless networks, is likely to supplant, in large part, purchases of digital copies of recorded music. *See, e.g.*, Jane C. Ginsburg, *Copyright Legislation for the Digital Millennium*, 23 COLUM.-VLA J. L. & ARTS 137, 170 (1999) ("In the digital environment, sales of phonorecords may well persist (including via the Internet), but performances of recorded music, whether by on-demand interactive services, or by webcasting, are likely to displace acquisition of retention copies.").

Now, these predictions are becoming reality, with the number of digital streams growing at an increasingly rapid pace as more and more consumers turn to online streaming services as their primary source for music. *See* Press Release, Strategy Analytics, *Global Digital Music Sales to Top $8.6 Billion in 2012: Streaming Revenues Up 40% Compared to 8.5% for Downloads*, Aug. 15, 2012 ("Online streaming revenues will grow at almost five times the rate of download revenues in 2012 …");[3] Glenn Peoples, *Business Matters: Nearly A Third of Consumers Using Streaming Services: Report*, BILLBOARD.BIZ, July 9, 2012 ("Nearly a third of consumers in 25 countries around the world now use a music

[3] The press release and report are available here: http://www.strategyanalytics.com/default.aspx?mod=pressreleaseviewer&a0=5268

streaming service.");[4] *Online Radio Audience Jumps 30 Percent in Past Year: Study*, BILLBOARD.BIZ, Apr. 10, 2012 ("A new study … found that the online weekly radio audience is now at an estimated 76 million Americans. The figure represents a more than 30% increase from a year ago and is 29% of the U.S. population.").[5] In fact, many consumers are electing to view televised content exclusively online via streaming services, such as Netflix and Hulu. *See* Shalini Ramachandran, *Evidence Grows on TV Cord-Cutting*, WALL ST. J., Aug. 7, 2012, at B3.[6]

In the digitally networked environment, the ability to license the public performance of music (17 U.S.C. §§ 106(4) and 106(6)) is the lifeblood of the music industry. On behalf of songwriters, composers, and music publishers, *Amici* SESAC, BMI, and ASCAP offer "blanket" licenses that allow Internet-streaming services such as Pandora (audio streaming) and YouTube (video streaming) to play broad catalogues of musical compositions for set fees.[7] *Amicus* SoundExchange,

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[4] The article is available here: http://www.billboard.biz/bbbiz/industry/digital-and-mobile/business-matters-nearly-a-third-of-consumers-1007531352.story.

[5] The article is available here: http://www.billboard.biz/bbbiz/industry/digital-and-mobile/online-radio-audience-jumps-30-percent-in-1006720952.story.

[6] The article is available here: http://online.wsj.com/article/SB10000872396390443792604577574901875760374.html.

[7] The licensing activities of BMI and ASCAP are governed by consent decrees entered into by each organization with the Department of Justice. *United States v. Broad. Music, Inc., et al.*, 1996 Trade Cases (CCH) 71,941 (S.D.N.Y. 1966),

on behalf of record labels and musicians, collects sound recording performance royalties from certain similar services. However, as relevant here, rather than issuing privately-negotiated, blanket licenses, SoundExchange collects royalties under a statutory licensing scheme created by Congress for certain non-interactive, online streams of sound recordings. *See* 17 U.S.C. § 114(d)-(j); *see also* 2 Paul Goldstein, GOLDSTEIN ON COPYRIGHT § 7.8.6 (3d ed. 2012) (describing the contours of statutory licensing of the digital audio transmission right).[8] This system is anchored by the express, statutory recognition that such individual streams of sound recordings constitute public performances. *See* 17 U.S.C. §

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amended by 1996-1 Trade Cases (CCH) 71,378 (S.D.N.Y. 1994); *United States v. Am. Soc'y of Composers, Authors and Publishers*, 2001-2 Trade Cases (CCH) 73,474 (S.D.N.Y 2001). These consent decrees provide, among other things, that music users desiring to obtain repertoire-wide licenses from ASCAP or BMI may automatically do so upon written request. If the parties cannot negotiate a rate, the rate will be set by judges in the Southern District of New York. BMI and ASCAP blanket licenses are thus readily available to Internet services that publicly perform music.

[8] Pursuant to the statute, the Copyright Royalty Judges of the Library of Congress designated SoundExchange as the "collective" responsible for collecting digital audio transmission royalties. *Intercollegiate*, 571 F.3d at 90. Since 2000, SoundExchange has distributed over $1 billion in digital public performance royalties to performers and producers of sound recordings (and is on-track for a record breaking year in 2012). *See* Press Release, SoundExchange, Inc., *SoundExchange Announces $204.4 Million in Digital Royalties Paid Since Beginning of 2012 to Artists and Labels*, Aug. 23, 2012, *available at* http://www.soundexchange.com/2012/08/23/soundexchange-announces-204-4-million-in-digital-royalties-paid-since-beginning-of-2012-to-artists-and-labels/.

106(6) (providing an exclusive right, "in the case of sound recordings, to perform the copyrighted work publicly by means of digital audio transmission").[9]

The district court's decision will harm *Amici*'s members by sharply reducing the scope of the public performance right for retransmission of music or television programs containing music, especially through the Internet, and invite other services to market "user storage based" services designed to evade the public performance right. As consumers increasingly forego owning physical copies of musical recordings and audiovisual works, and instead access this copyrighted content through digital streaming transmissions, the exploitation of these public performances is the fastest growing sector of the music business. The continued ability to authorize interactive and non-interactive Internet and wireless streams of music and audiovisual works that contain *Amici*'s music is thus critically important to the vitality – and the very economic survival – of *Amici* and their members.

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[9] The separate exclusive right applicable to digital audio transmissions was necessary because owners of rights in sound recordings have not traditionally benefitted from a public performance right in other contexts, such as terrestrial radio and television broadcasting. *SoundExchange, Inc. v. Librarian of Congress*, 571 F. 3d 1220, 1222 (D.C. Cir. 2009); *Intercollegiate*, 571 F. 3d at 73. The creation in 1995 of a digital audio transmission right for producers of sound recordings in no way diminishes the pre-existing exclusive public performance right for owners of rights in musical compositions. In fact, the statute specifically states the opposite. 17 U.S.C. § 114(d)(4)(B) ("Nothing in this section annuls or limits in any way – (i) the exclusive right to publicly perform a musical work, including by means of digital audio transmission, under section 106(4) … .").

The district court's decision will also directly harm *Amici*'s members by allowing businesses like Defendant/Appellee Aereo, Inc. ("Defendant" or "Aereo") to profit from retransmitting broadcast television programming without paying broadcasters for the privilege to do so. This threatens to dramatically reduce payments received by *Amici*'s members from broadcasters who use music in their programming. Such payments currently represent many millions of dollars in revenue for *Amici*'s members. Moreover, if cable and satellite service providers believe they can turn public performances into private performances through technological tricks, they may well also be inspired to stop paying into the Copyright Act's compulsory licensing systems (17 U.S.C. §§ 111, 119), from which *Amici* also currently receive significant payments.

Amici respectfully ask the Court to reverse.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Copyright Act of 1976 (17 U.S.C. § 101, *et seq.*) and the international treaties and agreements to which the United States is a party, copyright owners have the exclusive right to transmit their works over the Internet to members of the public. *See* sections I and III, *infra*. This Court recently underscored the importance of this exclusive right. *See generally WPIX, Inc. v. ivi, Inc.*, No. 11-788-cv, 2012 U.S. App. LEXIS 18155, at **33-4 (2d Cir. Aug. 27, 2012) ("Plaintiffs' desire to create original television programming surely would

be dampened if their creative works could be copied and streamed over the Internet in derogation of their exclusive property rights."). Below, the district court lost sight of the broad nature of this important exclusive right. *See generally Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 12 Civ. 1540 (AJN), 2012 U.S. Dist. LEXIS 96309 (S.D.N.Y. Jul. 11, 2012). The district court's decision allows Defendant, without authorization from, or compensation to, rightsholders, to charge its subscribers fees to view online, real-time (*i.e.*, "live") retransmissions of the Plaintiffs' broadcast-television programming.

This is a textbook case of infringement of the public performance right. And yet the district court, purportedly relying on this Court's opinion in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"), concluded that Defendant managed to convert a classic public performance – the broadcast of television programs to households – into a private performance through an act of technical contrivance. *Cablevision*, however, should not be read to control this case. In *Cablevision*, this Court held that a licensed cable operator could offer a "remote DVR" service without obtaining an additional public performance license. Here, by stark contrast, Aereo – an entirely *unlicensed* service – is not merely facilitating remote recording of television programs that a paying subscriber has otherwise lawfully received; Aereo is

transmitting those programs to its very own paying subscribers in the very first instance, in real time and wholly without permission.

The district court's decision illustrates the concern raised by many commentators after *Cablevision* was issued – namely, that this Court's decision could be misconstrued by district courts to gut the Copyright Act and, in particular, the public performance right that is so crucial to *Amici* and the creators that they represent. *See, e.g.*, 2 GOLDSTEIN ON COPYRIGHT § 7.7.2; Jane C. Ginsburg, *Recent Developments in U.S. Copyright Law – Part II, Caselaw: Exclusive Rights on the Ebb?*, *for* REVUE INTERNATIONALE DU DROIT D'AUTEUR (Oct. 2008), at 26.[10]

In this case, the district court applied *Cablevision* far outside of its own specific factual setting, leading to an interpretation of the public performance right, unsupported by the text and legislative history of the Copyright Act. The district court ignored this Court's clear admonition that its *Cablevision* "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." *Cablevision*, 536 F.3d at 139. *See also* Brief for the United States as *Amicus Curiae*, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 129 S. Ct. 2890 (2009) (authored by Solicitor General, now Justice, Kagan:

[10] The article is available here: http://lsr.nellco.org/columbia_pllt/08158/.

"[A]lthough scattered language in the Second Circuit's [*Cablevision*] decision could be read to endorse overly broad, and incorrect, propositions about the Copyright Act, the court of appeals was careful to tie its actual holdings to the facts of this case.").

Affirmance by this Court could spawn many other businesses resting on technological trickery to "avoid all copyright liability," and inspire many Internet services, that currently pay for the right to stream music in digital formats, to cobble together digital capture and delivery systems to avoid making payments, seriously harming the property rights of songwriters, musical composers, performers, music publishers and sound recording producers. The only beneficiaries of such an outcome would be the profiteers who, like Defendant, charge consumers for their services even as they deprive artists and their legitimate business partners of the revenues needed to spur and fund the creation and dissemination of new and existing works. *See Golan v. Holder*, 132 S. Ct. 873, 888-889 (2012) ("Our decisions … recognize that 'copyright supplies the economic incentive to create *and disseminate* ideas.'") (emphasis in original).

Amici urge the Court to reverse the district court in this case, and to explicitly limit *Cablevision* to its specific facts.

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ARGUMENT

I. The District Court Wrongly Extended the Fact-Specific *Cablevision* Decision to Allow Aereo's Technical Gimmick to Thwart Copyright Protection Against Internet-Based, Unauthorized, Real-Time Retransmission of Works.

A. Aereo's Retransmissions Are Clearly Public Performances Under the Plain Language Of The Copyright Act, A Fact Underscored by Congress' Expansion of the Rights of Owners of Copyrights in the Age of New Technologies.

The plain language of the Copyright Act and its legislative history compel a ruling that Aereo's retransmissions constitute public performances. "To 'perform' a work means to recite, render, play, dance, or act it, either directly or *by means of any device or process* or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101 (emphasis added). The parties here agree that Defendant's subscribers view *performances* of television shows, and thus the only question is whether the relevant performances are "public." *Aereo*, 2012 U.S. Dist. LEXIS 96309, at *23.

The plain language of the Copyright Act makes it clear that Aereo is engaged in the public performance of television programs. The "transmit clause" is the crux of this case, and provides as follows:

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> To perform or display a work 'publicly' means – . . . 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*.

17 U.S.C. § 101 (emphasis added). The statutory language is controlling. *See Monroe Cider Vinegar & Fruit Co. v. Riordan*, 280 F. 624, 626 (2d Cir. 1922) ("It is a familiar rule of statutory construction that the legislative body is not presumed to use meaningless language, or, putting the rule another way, that in ascertaining the legislative intent due consideration and weight shall be given to the words and phrases of a statute."). Clearly, Aereo's technology transmits "by any device or process" performances of copyrighted content to the public without authorization.

The Copyright Act's legislative history also confirms Congressional intent that the conduct at issue here is a public performance.

> A performance may be accomplished 'either directly or by means of any device or process,' including all kinds of equipment for reproducing or amplifying sounds or visual images, *any sort of transmitting apparatus, any type of electronic retrieval system*, and any other techniques and systems not yet in use or even invented.
>
> . . .
>
> The definition of 'transmit' – to communicate a performance or display 'by means of any device or process whereby images or sounds are received beyond the place from which they are sent' – is broad enough to *include all conceivable forms and combinations of wired or wireless communications media*, including but by no means limited to radio and television broadcasting as we know them.

Report of the House of Representatives Committee on the Judiciary on Copyright Law Revisions, H.R. Rep. No. 94-1476, at 63-64 (94th Cong., 2d Sess. 1976) (emphasis added). The breadth of this language is wholly inconsistent with the conclusion that Congress intended for Defendant's business to fall outside of the scope of the public performance right. *See David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D.N.Y. 1988) ("[I]t would strain logic to conclude that Congress would have intended the degree of copyright protection to turn on the mere method by which television signals are transmitted to the public.").

The district court's cramped and erroneous ruling that the creation of unique copies prior to transmission converts public performances to private ones conflicts with the Copyright Act's express recognition that online, public performances are facilitated by unique copies of works. *See* 17 U.S.C. § 112(e). The statutory-licensing scheme under which *Amicus* SoundExchange operate covers the making of "the temporary copies necessary to facilitate the transmission of sound recordings during Internet broadcasting" as a part of the delivery system of streaming public performances. *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939, 942-43 (D.C. Cir. 2005), *interpreting* 17 U.S.C. § 112(e). In fact, these "temporary" copies may be retained up to six months after the original transmission. 17 U.S.C. § 112(e)(1)(C). Congress understood that Internet streaming requires making copies of sound recordings to facilitate delivery to

individual consumers. And Congress provided a statutory license for making such copies, but with the clear understanding that the use of such copies to generate streams, each to a single consumer over the Internet, is a public performance.[11] The district court's decision is inconsistent with this statutory structure. If the decision stands, a service provider analogous to Defendant might argue that the same theory would permit it to capture broadcast radio transmissions containing music, retransmit them to subscribers, and facilitate live streaming, without obtaining any license at all. In that case, the public performance right that so many songwriters and musicians depend on would be a virtual dead letter.

B. Neither Congress, Nor This Court through the *Cablevision* Decision, Granted a Free Pass to Unlicensed Retransmitters of Copyrighted Content.

Defendant styles itself a technological innovator. But, Defendant's sole "innovation" is its attempt – rendered successful by the district court – to exploit a technological loophole that it perceived to have been created by the *Cablevision* decision. The illegality of Defendant's business model – unlicensed retransmission of broadcast programming to the public for profit – is clear under the Copyright Act of 1976, which, as discussed above, Congress expressly drafted to provide a

[11] Congress expressly amended the statute to allow for the creation of multiple copies (as many as are technologically necessary) to facilitate Internet streaming. *See* 2 GOLDSTEIN ON COPYRIGHT § 7.2.2; 2 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 8.06[G] (2012).

"broad" exclusive right that stopped parasitic businesses from exploiting copyrighted works without permission.

In doing so, Congress overruled two pre-1976 Act Supreme Court cases that held that retransmitting broadcast television programming to the public via community-antenna/cable systems did not implicate the public performance right. *See WGN Cont'l Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 624 (7th Cir. 1982) ("It used to be that a cable system that picked up and retransmitted a broadcast signal containing a copyrighted program was not an infringer. … But the Copyright Act of 1976 changed this …") (internal citations omitted). Those cases, *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 403-04 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400-402 (1968), reasoned that a business that retransmitted broadcast signals through a system to individual members of the public was more akin to a viewer of a broadcast than to the broadcaster itself. Congress rejected that reasoning and endorsed an earlier Supreme Court decision, *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 197-98 (1931). *See* H.R. Rep. No. 94-1476, at 87.

In *Jewell-LaSalle*, a hotel operator captured radio broadcasts and used a series of wires, loudspeakers and headphones to re-route music throughout the hotel. *Jewell-LaSalle*, at 283 U.S. at 195. The defendant argued that it

should not have to pay for the music it retransmitted because the copyright owners exhausted their rights by licensing the initial broadcasts. *Id*. The Supreme Court concluded otherwise, stating that, "the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer." *Id.* at 197-98.

The same reasoning controls this case. Defendant's service enables Defendant's subscribers to view retransmissions of broadcast programming "live" on the Internet. *Aereo, Inc.*, 2012 U.S. Dist. LEXIS 96309, at **6-7 ("Selecting 'Watch' causes Aereo's system to transmit a web page to the user in which the program starts after a short delay, allowing the user to view the program 'live,' *i.e.*, roughly contemporaneous with its over-the-air broadcast."). Defendant cannot profit from operating such a service without first obtaining a license.

Defendant puts forward the same argument made by the defendants in *Jewel-LaSalle*, *Teleprompter*, and *Fortnightly* – *i.e.*, retransmitting broadcast signals for profit is private, not public, because Defendant is merely standing in the shoes of individual consumers who could receive broadcasts via other means. By overruling *Teleprompter* and *Fortnightly* and endorsing *Jewel-LaSalle*, however, Congress explicitly intended to prohibit such profiteering. *See* H.R. REP. NO. 94-1476, at 89 ("In general, the Committee believes that cable systems are

commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs."); 2 GOLDSTEIN ON COPYRIGHT § 7.7.2 ("In defining 'perform' broadly to encompass every conceivable aspect of performance, Congress adhered to a central copyright principle: all who derive value from using a copyrighted work should pay for that use…").

Congress' decision to endorse *Jewel-LaSalle* in the 1976 Act followed over a decade of debate and negotiation with the entertainment and cable industries. H.R. Rep. No. 94-1476, at 88-89. Ultimately, Congress elected to create a statutory-licensing system for certain retransmissions (and retained an exclusive public performance right for all other retransmissions) whereby cable system operators avoid negotiating with myriad different copyright owners to license qualified retransmissions of a program. *See* 17 U.S.C. § 111; *see also* 2 NIMMER ON COPYRIGHT § 8.18[E] (describing contours of statutory licensing scheme). Later, Congress created a similar regime for certain satellite television retransmission system operators. *See* 17 U.S.C. §§ 119 and 122; *see also* 2 NIMMER ON COPYRIGHT § 8.18[F] (describing contours of statutory licensing scheme). However, Congress has thus far declined to create any analogous statutory-licensing system for Internet-based services, such as Defendant's, thus

leaving content owners' exclusive control of works in this new medium intact. *See ivi*, 2012 U.S. App. LEXIS 18155, at *18 ("Congress did not intend for § 111's compulsory license to extend to Internet retransmissions.").[12]

Contrary to the district court's ruling, *Cablevision* did not and could not disturb this statutory structure and long-settled law. *Cablevision* was a fact-specific decision that focused on whether an otherwise licensed cable operator could offer a "remote DVR" service without obtaining a public performance license. *Cablevision*, 536 F.3d at 123-24. This Court held that the defendant did not need to pay for additional licenses to publicly perform programs recorded by subscribers because the remote DVR did not transmit performances of the recorded programs "to the public." *Id.* at 134-40. Instead, the subscriber who made the copy using the remote DVR, the Court reasoned, only transmitted performances of the recorded programs to him or herself in a manner that was indistinguishable from common, home-based DVR usage. *See* 2 GOLDSTEIN ON COPYRIGHT § 7.7.2

[12] The cable compulsory license reflects a carefully negotiated compromise that requires cable systems to, among other things: (1) file semi-annual statements of account detailing the signals they retransmit; (2) refrain from altering the signal content; (3) comply with numerous Federal Communications Commission regulations such as network non-duplication and syndicated exclusivity rules; and (4) pay royalties for out of market signal importation. Violation of these requirements results expressly in the retransmission being deemed infringement. *See* 17 U.S.C. § 111(c). The Satellite Carrier compulsory license has its own detailed requirements. *See* 17 U.S.C. § 119.

(In *Cablevision*, "functionally, if not technologically, the dedicated recording was akin to one made on a user's home DVR").

There are thus critical and controlling factual distinctions between this case and *Cablevision,* which should have led the district court to decide that Aereo's service results in public performances. Aereo captures over-the-air broadcasts, converts them into a format suitable for retransmission over the Internet, and then rebroadcasts that programming, in real time, to its paying subscribers – all without a license of any kind from the content owners. By transmitting real time programming to its paying subscribers, Aereo functions exactly like a cable operator – simply because it interposes unique and temporary copies of the content prior to transmission, it should not be exonerated from liability for what is clearly a transmission to the public under the Copyright Act. The district court turned the Copyright Act on its head by appearing to hold that a classic public performance – the broadcast of a television program from a television station to multiple households – could be magically transformed into a private performance by inserting the step of making unique and temporary copies of the programming prior to transmission. *Aereo*, 2012 U.S. Dist. LEXIS 96309, at **34-66. By doing so, the district court transgressed the Supreme Court's *dictum* in *Jewel-LaSalle*, that the "novelty of the means used" (283 U.S. at 197-98) to deliver programming to members of the public should not absolve a defendant of liability.

The district court missed the critical distinction between the copies generated by Defendant and those at issue in *Cablevision*. *Cablevision* did not involve real-time, Internet streaming, which requires the creation of temporary copies of content as it is being streamed to individual members of the public. *ivi*, 2012 U.S. App. LEXIS 18155, at *2 n.1 ("'Streaming' generally involves compressing a file to a size small enough to be transmitted over the Internet and then allowing the receiving computer to start playing packets of the file while the remaining packets are being transmitted."). Defendant's service merely routes programming to consumers in real time through a different medium. The copies at issue in *Cablevision* were analogous to copies resident on the in-home DVRs of subscribers of licensed cable and satellite services; but the copies at issue here are merely part-and-parcel of any online transmission of programming to the public. This Court should clarify that the *Cablevision* decision is limited to its facts.

II. Permitting Aereo a Free Pass Will Have Devastating Consequences for Copyright Owners Who Depend on Robust Copyright Protection and the Licensing Revenues That Stem From It.

To "innovate" is "to introduce (something new) for or as if for the first time." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 984 (2d ed. 2001). Defendant is no innovator. Myriad service providers offered consumers Internet access to televised content (including in real time) before Defendant ever opened up shop. *ivi*, 2012 U.S. App. LEXIS 18155, at *34; *Aereo*, 2012 U.S. Dist. LEXIS

96309, at *76; *Warner Bros. Entm't, Inc. v. WTV Systems, Inc.*, 824 F. Supp. 2d 1003, 1013 (C.D. Cal. 2011). Defendant's only "innovation" was to try to exploit a statutory escape clause that it believed was opened by this Court in *Cablevision* and offer this service, for a fee to consumers, without paying copyright owners for the privilege to do so. This kind of destructive parasitism is the opposite of what the Copyright Act is intended to foster for the creation or dissemination of works. *See* William M. Landes & Richard A. Posner, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 40 (2003) ("In the absence of copyright protection the market price of a book or other expressive work will eventually be bid down to the marginal cost of copying with the result that the work may not be produced in the first place because the author and publisher may not be able to recover the costs of creating it.").

Defendant argues that it is entitled to profit from retransmitting television shows because consumers can legitimately receive broadcast programming for free via other lawful means – *i.e.*, antennas, or "rabbit ears." That argument is a red herring. Congress fully addressed this argument in 1976, when it affirmed that a retransmission service for broadcast programming itself publicly performs the programming, and created the cable compulsory license. *See* 17 U.S.C. § 111. Moreover, Defendant does not sell a standalone product like rabbit ears – instead, Defendant offers its service on a subscription basis and maintains an ongoing

profitable relationship with its customers much in the same way a cable or satellite operator does. Indeed, the very purpose of Defendant's business is to exploit the reality that most households – including in particular those who live in the urban canyons of New York – receive broadcast television programming from licensed cable and satellite operators. They do not – or cannot – receive television programming over the air and depend instead on a cable or satellite operator for the programming. Defendant simply wants to profit from competing with these authorized entities without paying for the privilege. *Cf. Princeton Univ. Press v. Mich. Doc. Servs. Inc.*, 99 F.3d 1381, 1385 (6th Cir. 1996) (*en banc*) ("What the publishers are challenging is the duplication of copyrighted materials for sale by a for-profit corporation that has decided to maximize its profits – and give itself a competitive edge over other copyshops – by declining to pay the royalties requested by the holders of the copyrights.").

The negative consequences of judicial approval of Defendant's business model are already apparent. Some cable-system operators have already suggested that the district court's decision may undermine the retransmission consent regime that Congress has established – placing at risk billions of dollars in the aggregate due to broadcasters for the retransmission of their programming. *See* Eriq Gardner, *Aereo Court Ruling Impact Could Be Swift*, THE HOLLYWOOD REPORTER,

July 12, 2012;[13] Steve Donohue, *Britt: Aereo Could Help Time Warner Cable Stop Paying Retransmission-Consent Fees*, FIERCECABLE, Apr. 26, 2012;[14] *see also* 47 U.S.C. § 325(b) (requiring cable services and other multi-channel video programming distributors ("MVPDs") to license retransmissions of broadcast signals, irrespective of any copyright issues related to such retransmissions). The impact of such decisions would be felt widely in the entertainment community. The licensing fees received by *Amici* for over-the-air television broadcasts containing *Amici*'s music are based, in part, on the broadcasters' revenues, which consist, in part, of billions of dollars of retransmission consent fees. If retransmitters, such as cable and satellite operators, followed Defendant's lead and stopped paying broadcasters retransmission consent fees, *Amici's* members would stand to lose a significant part of their livelihood. In addition, if such operators believe they can convert public performances into private performances through technological contortions, they may well also be emboldened to stop paying into the Copyright Act's compulsory licensing systems (17 U.S.C. §§ 111, 119), from which *Amici* also currently receive substantial income.

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[13] The article is available here: http://www.hollywoodreporter.com/thr-esq/aereo-court-case-348542.

[14] The article is available here: http://www.fiercecable.com/story/britt-aereo-could-help-time-warner-cable-stop-paying-retransmission-consent/2012-04-26.

The district court correctly observed that such a change would not benefit the American public. *See Aereo*, 2012 U.S. Dist. LEXIS 96309, at **90-91 ("There is a strong public interest in the copyright system's function of motivating individuals to make available their creative works and increase the store of public knowledge."). It would instead reduce incentives for creative production and dissemination of new or existing works, while lining Defendant's pockets. *See ivi*, 2012 U.S. App. LEXIS 18155, at *32-33 ("[T]he public has a compelling interest in protecting copyright owners' marketable rights to their work and the economic incentive to continue creating television programming.").

Defendant's CEO has bragged that his goal is to "dismantle the television industry as we know it." Cecilia Kang, *Aereo CEO Challenges TV Ecosystem,* WASH. POST, July 28, 2012.[15] If the Court affirms the district court's decision, this brash objective may be achievable. Eventually, Defendant's efforts, and similar efforts by other businesses, may dismantle far more than just the television industry. In that event, content producers would continue to bear the costs of creating and producing new music and motion pictures, while parasitic businesses, like Defendant's, would reap many of the rewards. This unsustainable state of

[15] The article is available here: http://www.washingtonpost.com/business/aereo-ceo-challenges-tv-ecosystem/2012/07/27/gJQAGzqvGX_story.html.

affairs would drastically reduce the nation's output of professionally-produced content, including music.

New York is the home of the music industry. Yet, ironically, Defendant limited its business to New York in order to take advantage of a loophole that Defendant perceived *Cablevision* to have created, and that the court below has now dramatically expanded. *Amici* implore the Court to prevent overly broad readings of *Cablevision* from continuing to make the Second Circuit the forum of choice for free riders, like Defendant, who strive, *not* to develop new technologies that offer consumers innovative entertainment experiences, but instead to design mechanisms that enable delivery of copyrighted content, for profit, without paying license fees.

III. The District Court's Interpretation of *Cablevision* Threatens to Place the U.S. Out of Compliance with Its International Treaty Obligations and Invite Retaliation by Other Countries.

The district court's reading of the Copyright Act is also inconsistent with the international obligations with which Congress intended the Act to comply. Since the passage of the Copyright Act of 1976, the United States has increasingly harmonized its own copyright laws with those of its trading partners. *See Eldred v. Ashcroft*, 537 U.S. 186, 195 (2003); *Golan*, 132 S. Ct. at 889. The United States now has international copyright treaty and trade agreement obligations to provide a broad public performance right (generally referred to internationally as a right to "communicate to the public") that clearly encompasses Defendant's conduct. *See*

1 Sam Ricketson & Jane C. Ginsburg, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 702-54 (2d ed. 2006) (hereinafter "RICKETSON").

The Berne Convention (Sept. 9, 1886, as revised at Paris July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221), the preeminent international copyright treaty, requires member states to provide copyright owners with an exclusive right to authorize retransmissions of broadcasts containing underlying works, such as musical compositions.[16] 1 RICKETSON at 737 ("[A] third party's secondary transmissions of broadcasts, for example by webcasting, come within the scope of the [Berne Article] 11*bis*(1)(ii) right.").[17] The U.S. is further obligated to do so under the Article 9 of the World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS") (Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 81), which incorporates the relevant provisions of the Berne Convention.[18]

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[16] The United States joined the Berne Convention in 1989. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

[17] Related communication to the public rights for musical works and cinematographic works *(i.e.*, a motion picture, such as a television show) that contain other works (such as music) are provided by articles 11(1) and (2) and 14(1)(ii) and 14*bis*(1) of the Berne Convention. 1 RICKETSON at 717-18, 731.

[18] The United States agreed to join the WTO, and thus to comply with the TRIPS Agreement effective January 1, 1996. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

In addition, the World Intellectual Property Organization Copyright Treaty ("WCT") (Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65) obligates the U.S. to provide owners of copyrights in musical compositions "the exclusive right of authorizing any communication to the public of their works, by wire or wireless means." WCT Art. 8. *See* 1 RICKETSON at 718, 744. The World Intellectual Property Organization Performers and Phonograms Treaty ("WPPT") (Ap. 12, 1997, S. Treaty Doc. No. 105-17, 36 I.L.M. 76) guarantees sound recording producers "equitable remuneration … for any communication to the public" of their recordings. WPPT Art. 15(1). *See* 2 RICKETSON at 1264-67.[19]

More recently, a number of Free Trade Agreements between the United States and its trading partners also specifically require the United States to provide copyright owners with an exclusive right to authorize Internet-based retransmissions of broadcast television programs (including any works contained therein). For example, article 17.4.10(b) of the United States-Australia Free Trade Agreement, which entered into force on January 1, 2005, states: "Neither Party may permit the retransmission of television signals (whether terrestrial, cable, or

[19] The U.S. implemented the WCT and the WPPT in 1998. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

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."[20]

Since none of these treaties or trade agreements is self-executing, the United States is required to include all of the obligated rights in its national laws at the time of ratification or accession to the treaties or agreements. 1 NIMMER ON COPYRIGHT § 1.12. In the case of the public performance right, Congress concluded that no further amendments to Title 17 were necessary for treaty or trade agreement compliance, because the existing right in U.S. law was broad enough to meet these obligations. *See, e.g.*, Report of the Committee on the Judiciary of the House of Representatives on the WIPO Copyright Treaties Implementation and On-Line Copyright Infringement Liability Limitation Act, H.R. REP. NO. 105-551, pt. 1, at 9 (105th Cong., 2d Sess. 1998) ("The treaties [WCT and WPPT] do not require any change in the substance of copyright rights or exceptions in U.S. law.").[21]

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[20] The FTA is available here: http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta. The U.S.-Korea FTA contains nearly identical language in Article 18.4.10(b). It is available here: http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta.

[21] The Executive Branch also confirmed that the U.S. was in compliance with the treaties and agreements in ratification proclamations and statements. *See* William J. Clinton, Statement on Signing the Digital Millennium Copyright Act, Oct. 28, 1998, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=55169; William J. Clinton, Proclamation 6780 – To Implement Certain Provisions of the Trade Agreements Resulting From the Uruguay Round of Multilateral Trade

The Court should defer to Congressional judgment on this question. *See NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 275 (1974) ("We have also recognized that subsequent legislation declaring the intent of an earlier statute is entitled to significant weight."). Rejecting Congress' conclusions regarding the scope of the public performance right may cause American copyright owners, including *Amici* and their members, to lose income from licensing activities abroad. Foreign laws can and do authorize retaliation against U.S. copyright owners in such circumstances.[22] Moreover, the United States itself could be the subject of enforcement actions and sanctions at the World Trade Organization if the United States fails to comply with its obligations under TRIPS. *See* 1 RICKETSON at 158.[23]

Negotiations, and for Other Purposes, Mar. 23, 1995, *available at* http://www.gpo.gov/fdsys/pkg/WCPD-1995-03-27/pdf/WCPD-1995-03-27-Pg468.pdf; Ronald W. Reagan, Remarks on Signing the Berne Convention Implementation Act of 1988, Oct. 31, 1988, *available at* http://www.reagan.utexas.edu/archives/speeches/1988/103188b.htm.

[22] For example, because the United States currently does not provide owners of rights in sound recordings with an exclusive public performance right with respect to terrestrial radio broadcasts, certain trading partners withhold payments for U.S. sound recordings when they are played on terrestrial radio in those countries. *See* John R. Kettle III, *Dancing to the Beat of a Different Drummer: Global Harmonization - And the Need for Congress To Get in Step with a Full Public Performance Right for Sound Recordings*, 12 FORDHAM INTEL. PROP. MEDIA & ENT. L.J. 1041, 1078 (2002).

[23] This is not just an abstract possibility. The United States lost a TRIPS case pertaining to the public performance right and has had to financially compensate

These undesirable consequences are easily avoided. The text and legislative history of the Copyright Act clearly express Congressional intent to prohibit Defendant's conduct, absent authorization from rightsholders. In fact, even if this Court concludes that Congress' intent is ambiguous, the Court should read the Copyright Act in a manner that avoids conflict with international obligations binding on the United States. *See United States v. Weingarten*, 632 F.3d 60, 64-65 (2d Cir. 2011) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."), *quoting Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); Restatement (Third) of Foreign Relations Law of the U.S. § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or an international agreement of the United States.").

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other countries as a result. *See generally* Jo Oliver, *Copyright in the WTO: The Panel Decision on the Three-Step Test*, 25 COLUM. J.L. & ARTS 119 (2002).

CONCLUSION

Amici respectfully ask the Court to reaffirm the viability of the public performance right by reversing the district court's ruling.

DATED: September 21, 2012

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 6,735 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii),

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DATED: September 21, 2012

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SCHEDULE A

DESCRIPTIONS AND INTERESTS OF *AMICI CURIAE*

1. The American Society of Composers, Authors and Publishers (ASCAP), the first performing rights organization (PRO) in the United States, was formed in 1914 at the behest of composing legends Victor Herbert, Irving Berlin, and John Phillip Sousa. Its mission is to enable American music authors to receive fair remuneration for the public performance of their work. ASCAP's over 450,000 songwriters, lyricists, composers, music publishers, and foreign society members grant the society a nonexclusive right to license non-dramatic public performances of their many millions of copyrighted works. ASCAP in turn offers blanket licenses to parties seeking to perform these works, conferring the right to perform, for the stated term, any and all of the millions of musical works composed by ASCAP members. ASCAP licenses public performance rights to a wide variety of users, including Internet service providers, wireless providers and websites, television and radio stations, restaurants, hotels, and sports arenas.

2. Broadcast Music, Inc. (BMI) is also a PRO as defined in the Copyright Act, 17 U.S.C. § 101. BMI issues blanket licenses to music users for the public performance rights of its affiliated songwriters', composers', and music publishers' musical works, collects license fees on behalf of its affiliates, and distributes those fees as royalties to BMI affiliates whose works have been

performed on media such as cable television, radio, and the Internet. BMI licenses the non-dramatic public performance right in approximately 7.5 million musical works on behalf of its affiliates, which comprise over 500,000 American songwriters, composers, lyricists, and music publishers. Through affiliation with foreign performing rights societies, BMI also represents in the U.S. thousands of works of many of the world's foreign writers and publishers of music. Typical BMI licensees include Internet music services and websites, mobile entertainment services, television and radio broadcasting stations, broadcast and cable/satellite television networks, cable system operators and direct broadcast satellite services, concert promoters, background music services, municipalities, sports arenas, and others that publicly perform music.

3. The National Music Publishers' Association (NMPA) is the largest U.S. music publishing trade association with over 2,500 members. Its mission is to protect, promote, and advance the interests of music's creators. The NMPA is the voice of both small and large music publishers, the leading advocate for publishers and their songwriter partners in the nation's capital and in every area where publishers do business. The goal of NMPA is to protect its members' property rights on the legislative, litigation, and regulatory fronts.

4. The Association of Independent Music Publishers (AIMP), established in 1977, is dedicated to serving the independent music publishing

community by providing continuing professional education and analyses of trends and developments in creative, business, and legal areas relating to the exploitation of music copyrights. AIMP's primary focus is to educate and inform music publishers about current industry trends and practices by hosting seminars on pertinent copyright and licensing issues and providing a forum for the discussion of various issues confronting the music publishing industry.

5. The Church Music Publishers Association (CMPA) is an organization of religious music publishers founded in 1926 that works to support and promote worldwide copyright protection and education. Among CMPA's 55 member companies are nondenominational independent publishers, as well as the major denominational publishing companies for various churches. The wide range of sacred, gospel and contemporary Christian music products created and licensed by CMPA companies include hymnal and praise songs, and choral, instrumental, handbell, keyboard and children's music.

6. The Nashville Songwriters Association International (NSAI), established in 1967, is a trade organization of approximately 6,500 members dedicated to serving songwriters of all genres of music. NSAI advocates for the legal and economic interests of songwriters, who derive income from licensing their copyright works. NSAI includes songwriter members who directly publish and license their own music.

7. The Recording Industry Association of America (RIAA) is the trade organization that supports and promotes the creative and financial vitality of the major recorded music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. In support of its members, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conduct consumer, industry and technical research; and monitor and review state and federal laws, regulations and policies. The RIAA protects the ability of the music business to invest in new bands and new music and, in the digital arena, to give online services space to continue to prosper.

8. The Recording Academy, established in 1957, is an organization of musicians, songwriters, producers, engineers and recording professionals that is dedicated to improving the cultural condition and quality of life for music and its makers. Internationally known for the GRAMMY Awards – the preeminent peer-recognized award for musical excellence and the most credible brand in music – The Recording Academy is responsible for groundbreaking professional development, cultural enrichment, advocacy, education and human services programs. The Academy continues to focus on its mission of recognizing musical

excellence, advocating for the well-being of music makers and ensuring music remains an indelible part of our culture.

9. SESAC, Inc. (SESAC) is a PRO that services both the creators and the users of nondramatic musical works through licensing and royalty collection and distribution. SESAC licenses the public performance of more than 250,000 songs on behalf of its many thousands of affiliated songwriters, composers, and music publishers. SESAC is one of three PROs recognized under the Copyright Act. Established in 1930, SESAC is the second oldest and fastest growing PRO in the United States. Like ASCAP and BMI, SESAC licenses public performance rights to a wide variety of music users.

10. The Society of Composers & Lyricists (SCL) is a non-profit organization representing professional film, television and video game composers and lyricists, with a distinguished 60-year history in the fine art of creating music for motion pictures, television and video games. The predecessor organization, the Screen Composers Association, began in 1945 with such legendary icons as Max Steiner, Bernard Herrmann, Erich Wolfgang Korngold, Dimitri Tiomkin and David Raksin among others. Current SCL Members include the top creative professionals whose experience and expertise is focused on many of the creative, technological, legal, newsworthy and pressing issues of the film/television/game music industry today. Work for hire is the primary method by which music is

acquired for motion picture and television productions. As a result, SCL's membership consists predominantly of composers who do not own or enjoy the right of copyright, and receive compensation by contract. Composers are often paid a nominal fee upfront by the production company for composing the music. Their main source of income is at the 'backend' through the performance royalties distributed by the performing rights organizations when the composer's music is included in a production that is broadcast or transmitted on television or via the Internet.

11. The Songwriters Guild of America, Inc. (SGA) is the nation's oldest and largest organization run exclusively by and for songwriters, with more than five thousand members nationwide and over eighty years of advocacy experience concerning songwriters' rights. SGA is a voluntary association comprised of composers and the estates of deceased members. It provides a variety of services to its members, including contract analysis, copyright renewal and termination filings, and royalty collection and auditing to ensure that members receive proper compensation for their creative efforts. SGA's initiatives on behalf of all U.S. music creators includes advocacy before the U.S. Congress to obtain favorable legislation for songwriters, and participating as a party or as *amicus curiae* in litigation of significance to the creators of the American canon of popular music.

12. SoundExchange, Inc. is a non-profit performing rights organization representing tens of thousands of recording artists and record labels. SoundExchange was designated by the Copyright Royalty Board to collect and distribute statutory royalties owed by service providers for the public performance of sound recordings made via satellite radio, Internet radio, cable television's music channels and similar platforms. Pursuant to the Copyright Act, SoundExchange collects royalties, not just for the owners of copyrights in sound recordings, but also for both featured and non-featured performers on those sound recordings. SoundExchange also works with many foreign performance rights organizations to collect and distribute sound recording performance royalties throughout the world on its members' behalf. Digital music services are a major source of revenue for the music industry as a whole and a crucial source of income for artists and rights owners. The statutory royalties for streaming radio on the Internet – also known as webcasting – are substantial and have been growing by leaps and bounds. These royalties currently represent a crucial portion of the revenues earned by recording artists and rights owners.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of September, a true and correct copy of the foregoing *Amici Curiae* Brief was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h).

DATED: September 21, 2012 By: /s/ Paul V. LiCalsi
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