12-2786-cv

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, INC., f/k/a/ BAMBOOM LABS

Defendant-Counterclaimant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

(*caption and counsel continued on inside cover*)

BRIEF *AMICI CURIAE* OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION AND THE INTERNET ASSOCIATION IN SUPPORT OF AFFIRMANCE

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October 25, 2012

12-2807-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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-Counterclaimant-Appellee.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* the Computer & Communications Industry Association and the Internet Association state that neither entity has a parent corporation and no publicly held corporation has an ownership stake of 10% or more in either entity.

/s/ Jonathan Band

Jonathan Band

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INTEREST OF *AMICI*[1]

The Computer & Communications Industry Association ("CCIA") represents more than twenty large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services – companies that collectively generate more than $250 billion in annual revenues.[2]

The Internet Association serves as the public policy voice for some of the world's most innovative Internet companies on legislative and administrative proposals affecting the online realm. The Internet Association's members include Amazon.com, eBay, Facebook, Google, IAC, and Yahoo!.[3]

CCIA filed a brief *amici curiae* in *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"), as well as in the court below in this case. The legal clarity provided by the Second

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[1] No counsel for any party authored this brief in whole or part; no such party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amici* made such a contribution. All parties have consented to the filing of this brief.

[2] A complete list of CCIA members is available at http://www.ccianet.org/members.

[3] A complete list of Internet Association members is available at http://www.internetassociation.org. IAC did not participate in the preparation of this brief.

Circuit's decision in that case has allowed *amici*'s members to invest significant resources in the development and operation of a wide variety of services, including cloud computing.[4] It is no exaggeration to say that the proper interpretation and application of *Cablevision* is critical to the future of the Internet.

INTRODUCTION

The Internet is comprised of computers that "transmit or otherwise communicate" information. The Copyright Act provides that "to transmit or otherwise communicate" a copyrighted work "*to the public*" may intrude on the exclusive rights granted to copyright owners. Private performances, in contrast, are not subject to control by copyright owners. Accordingly, a great deal hangs on a consistent, principled judicial interpretation of "to the public," as it marks the boundary between public and private performances on the Internet.

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[4] "Cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction." *See* Peter Mell & Timothy Grance, Nat'l Inst. of Standards & Tech., U.S. Dep't of Commerce, Special Publication 800-145: NIST Definition of Cloud Computing (Draft), at 2 (2011), *available at* http://csrc.nist.gov/publications/drafts/800-145/Draft-SP-800-145_cloud-definition.pdf.

This Court's ruling in *Cablevision* provided critical guidance on this question, guidance on which Internet innovators and investors alike have relied in bringing new products and services to market. For example, several companies (including Google and Amazon) have launched "personal music locker" services online, allowing individuals to store their personal music collections "in the cloud," enabling those individuals to access and listen to their own music from multiple devices when, where, and how they find most convenient.

Now Appellants and their supporting *amici*, in their zeal to attack Aereo and preserve their existing business models, urge this Court to render *Cablevision* a dead letter or make its central reasoning subject to ad hoc, industry-specific exceptions. An acceptance of these misguided arguments (which are better addressed to Congress than to this Court) would destabilize settled expectations and investment for a wide array of Internet industries. For example, Appellants' call to limit *Cablevision* to "licensed retransmitters" would imperil personal music lockers, which are filled by users who are not "licensed retransmitters" but instead rely on fair use. Similarly, Appellants invent an exception to *Cablevision* for "near-live" transmissions that arguably would bar new services that enable "remote DVR" users to watch recorded programming from a mobile phone. How

long a delay from "live" is required before the transmission is no longer "to the public" on Appellants' theory is impossible to determine by consulting any relevant legal precedent. These kinds of industry-specific exceptions are best left to Congress, which is best equipped to draw these kinds of narrowly tailored remedies when new technologies pose challenges to existing industry arrangements. *See* 17 U.S.C. §§ 110(11), 111, 112(e), 114(d), 122 (statutory exceptions in the Copyright Act created for specific technologies and industries).

As the discussion above makes clear, the importance of *Cablevision*'s holding goes well beyond the technology involved in that case, the technology involved in this case, or even the medium of television. Every time a consumer uses an Internet cloud-based backup system or storage locker, both the consumer and the company providing that system rely on *Cablevision*'s clear holding that it is the user – not the provider of that system[5] – who copies the underlying work, and *Cablevision*'s clear holding that the transmission of a performance of that work *to that same user* is a

[5] Because the "volitional act" portion of the Court's ruling in *Cablevision* does not appear to be an issue in this appeal, *amici* do not address it further, other than to note its independent importance to Internet innovators. The focus on the user is crucial to ensuring legal parity between those who make technologies available to users in the offline world (like the copy shops described in *Cablevision*) and those who make technologies available to users remotely over the Internet.

private performance that infringes no exclusive right of the rightsholder in the underlying work.

ARGUMENT

I. THE *CABLEVISION* DECISION IS CRITICAL FOR CLOUD COMPUTING.

Cloud computing refers to the practice of using a network of remote servers hosted on the Internet to store, manage, and process data. Cloud computing represents a huge new economic opportunity as users realize the benefits of accessing their own documents, emails, music collections, and other data across multiple devices, seamlessly, without having to worry about their own computer malfunctioning and losing their files, and without having to worry about frequent updates to client-side software.

Cloud computing is becoming an increasingly important sector of the U.S. economy. In 2011, spending on public cloud information technology ("IT") services made up an estimated $28 billion of the $1.7 trillion spent globally on all IT products and services.[6] A recent study projected that revenue growth at cloud computing companies will exceed $20 billion per

[6] John F. Gantz, et al., "Cloud Computing's Role in Job Creation," IDC White Paper, March 2012, at 1, *available at* http://www.microsoft.com/en-us/news/download/features/2012/IDC_Cloud_jobs_White_Paper.pdf.

year for each of the next five years.[7] It also found that cloud computing services present a potential savings of more than $625 billion over the next five years for entities that invest in cloud computing. Additionally, the study found that cloud computing investments will create 213,000 new jobs in the United States and abroad over the next five years.

Companies in the cloud computing sector, including *amici*'s members, have relied on *Cablevision* when making investments in cloud computing products and technologies. As discussed above, a crucial aspect of that ruling was this Court's holding that a transmission made by a user from a "remote DVR" back to herself was a private performance, and not a public performance, even if many users made copies of the same work and subsequently viewed their own copies of that work. This interpretation of the public performance right is critical for cloud computing as it ensures that a user's watching, listening to, or reading copies of works she stored is not treated as a public performance within the meaning of the Copyright Act.

Recent research demonstrates the importance of *Cablevision* to innovators and investors. A November 2011 study by Harvard Business

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[7] Sand Hill Group, "Job Growth in the Forecast: How Cloud Computing is Generating New Business Opportunities and Fueling Job Growth in the United States," March 2012, *available at* http://www.news-sap.com/files/Job-Growth-in-the-Forecast-012712.pdf (also available at http://sandhill.com/article/sand-hill-group-study-finds-massive-job-creation-potential-through-cloud-computing/).

School Professor Josh Lerner found that after the decision, the average quarterly investment in cloud computing in the United States increased by approximately 41 percent.[8] That study also concluded that *Cablevision* led to additional incremental investment in U.S. cloud computing firms of between $728 million and $1.3 billion over the two-and-half years after the decision. When coupled with the study's findings regarding enhanced effects of venture capital investment in this space, the author concluded that such sums may be the equivalent of two to five billion dollars in traditional investment in research and development.[9]

Whatever one may think about Aereo, it is clear that *Cablevision* and the subsequent cases that have endorsed its holdings regarding the meaning of "to the public" have created settled expectations and have been relied upon by a wide array of Internet businesses that have nothing to do with television, Appellants, or their supporting *amici*. *See United States v. Am. Soc'y of Composers, Authors & Publishers*, 627 F.3d 64, 75 (2d Cir. 2010) (applying *Cablevision*); *In re Application of Cellco P'ship*, 663 F. Supp. 2d 363, 371-74 (S.D.N.Y. 2009) (same). Simply put, the *Cablevision* rule

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[8] Josh Lerner, "The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies," Nov. 1, 2011, at 9, *available at* http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000559/Cablevision%20white%20paper%20(11.01.11).pdf.

[9] *Id*. at 24.

works and the cloud computing industry relies on it. Given the growing importance of cloud computing, and the reliance on *Cablevision* among investors in this sector, this Court should reject Appellants' effort to undermine *Cablevision*'s interpretation of "to the public."

II. APPELLANTS CAN DISTINGUISH *CABLEVISION* ONLY BY LIMITING IT ARTIFICIALLY TO THE PRECISE FACTS AT ISSUE IN THAT CASE.

The district court correctly found that *Cablevision* controls this case. It rejected Appellants' contention that "there are factual distinctions between *Cablevision* and the present case that render that decision inapplicable." Slip op. at 13, 2012 WL 2848158 at *7. To the contrary, the District Court found that "on the key points on which *Cablevision* actually relied, . . . Aereo's system is materially identical to that in *Cablevision*." Slip op. at 19, 2012 WL 2848158 at *11. In their attempt to manufacture distinctions between this case and *Cablevision*, Appellants' focus on characteristics of Aereo's technology and business that are irrelevant to the statutory provision at issue. In essence, Appellants improperly urge this Court to take up the legislative mantle and engraft ad hoc, industry-specific exceptions onto the definition of "to the public."

A. *Cablevision* Is Not Limited To Companies Licensed To Rebroadcast Programming.

Both sets of appellants try to distinguish *Cablevision* on the grounds that Cablevision had a license to rebroadcast programming, while Aereo does not. *See* Brief for Plaintiffs-Counter-Defendants-Appellants at 31, No. 12-2786 (2d Cir. Sept. 14, 2012), ECF No. 86 ("Fox Br.") (stressing that Cablevision's remote DVR "was an adjunct to a licensed cable service."); Brief for Plaintiffs-Counter-Defendants-Appellants at 30, No. 12-2807 (2d Cir. Sept. 14, 2012), ECF No. 77 ("ABC Br.") (emphasizing that *Cablevision* involved the transmission of performances within an "otherwise licensed system."). Appellants' assertion amounts to the notion that otherwise public performances are transformed into private performances when transmitted by a licensed rebroadcaster.

The illogic of this view is plain. A license might expressly or impliedly *authorize* an otherwise infringing *public* performance, but it cannot transform it into a *private* performance. And in *Cablevision*, this Court concluded that the transmissions at issue were private performances, not licensed public performances. *Cablevision*, 536 F.3d at 137-39. The *Cablevision* panel nowhere suggested that its holding was based on the fact that the Cablevision had a license to retransmit programming or that the

remote DVR service was an "adjunct" to a licensed cable service.[10] *Id.* Nor did the Court rely on an implied license theory—in fact, the plaintiff-appellees in *Cablevision* vehemently rejected the argument that the original license for retransmission in any way, shape, or form justified the RS-DVR service. *See* Brief of Plaintiffs-Counter-Defendants-Appellees Twentieth Century Fox Film Corp., et al. at 5, in *Cartoon Network LP v. CSC Holdings, Inc.*, No. 07-1480 (2d Cir. June 20, 2007), 2007 WL 6101619, at *7 ("None of Cablevision's negotiated licenses, nor any statutory licenses, authorizes Cablevision to transmit or reproduce copyrighted programming through RS-DVR."). Appellants do not articulate any legal theory for why this Court should attach any significance to the licensed nature of the underlying programming in *Cablevision* in determining whether a performance is private or public.

Appellants' effort to limit *Cablevision*'s application to entities that possess rebroadcast licenses also underscores the ad hoc, industry-specific

[10] Moreover, Cablevision itself in its *amicus* brief in this case emphasizes that its remote DVR service was "[i]n addition to and separate from" its licensed cable system. Brief *amicus curiae* of Cablevision at 16, No. 12-2786, ECF No. 130; No. 12-2807, ECF No. 110 (2d Cir. Sept. 21, 2012). It explained that "the recordings that subscribers make with the RS-DVR perform a function that is both operationally meaningful and independent from Cablevision's real-time, licensed transmission of cable content." In short, the remote DVR service was not an "adjunct" to the licensed service, but was separate and independent from the licensed service.

nature of the exception they seek. How is a provider of cloud computing services to make sense of such a rule? Would a provider of online music lockers be required to purchase a terrestrial radio station as a condition of making transmissions that qualify as private performances under *Cablevision*? Or would this "rebroadcasting licensure requirement" be limited only to private performances derived from broadcast sources? Nothing in Title 17 would guide cloud computing providers or investors in satisfying these requirements that more closely resemble artifacts of incumbent business models than principles of copyright law.

B. There Is No "Live" Or "Near-Live" Exception To *Cablevision*.

The ABC Appellants' attempt to distinguish *Cablevision* by inventing a "live" or "near-live" exception fares no better. The ABC Appellants make this argument under the guise that Aereo's copies are "fundamentally different" from those in *Cablevision*. ABC Br. at 32. Although framed in the rhetoric of "breaking the chain," the only difference that Appellants allege between the "chain" of Aereo's activities and Cablevision's is that Aereo allows its users to access recordings in near-real-time ("near-live").

Regardless of the nature of the copyrighted work—television programs, software stored in a personal online backup service, music files accessed from a personal "cloud locker"—transmissions of performances

made by a user from a copy that is accessible solely to that user *are not to the public.* That is a core holding of *Cablevision*. Contrary to ABC Appellants' implication, neither *Cablevision* nor the Copyright Act's definition of "publicly" impose any "cooling off" period before which a playback is a public performance and after which it becomes a private performance.

III. APPELLANTS' ARGUMENTS ARE BETTER DIRECTED AT CONGRESS THAN THIS COURT.

This appeal turns on a single question—whether Aereo's technology enables transmissions "to the public" within the meaning of the "transmit clause" of 17 U.S.C. § 101. For this analysis, it is entirely irrelevant whether the transmission was of licensed or free over-the-air programming; or whether the transmission was of "live" or "previously recorded" material. The question is whether the transmission is "to the public," and this Court's ruling in *Cablevision* holds that a transmission of a performance made by a user solely to that user is not "to the public." As discussed above, that holding has been a legal bedrock on which innovators and investors have relied for numerous cloud computing investments that have nothing to do with the Internet transmission of television.

Appellants' arguments, in contrast, are rooted in the intricate business needs of the broadcast industry and the industry's concerns that Aereo might

disrupt existing arrangements. *See* Fox Br. 42-44; ABC Br. at 41-44. The distinctions that Appellants manufacture to set this case apart from *Cablevision* are in essence a plea that this Court craft a narrow, industry-specific rider onto the statutory definition of "to the public," declaring that there is no such thing as a private performance where near-live Internet transmission of broadcast content is concerned.

Appellants' request for an industry-specific, technology-specific provision to protect and reinforce existing business models is appropriately directed to Congress, not to this Court. As the Supreme Court has recognized, expanding the protections for copyright owners in the face of changing technology is a task best left to the legislative process:

> The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology. In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests.

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984) (internal citations omitted).

Only Congress has the flexibility to amend the Copyright Act to address the interests of Appellants without creating collateral uncertainty regarding the meaning of "to the public" for Internet innovators and investors. Congress can craft new statutory licenses, *see* 17 U.S.C. § 114(d) (compulsory license for Internet music streaming), expand exclusive rights, *see* 17 U.S.C. § 101 (definition of "fixed" amended to include live broadcasts); or narrowly legislate with respect to a particular technology, *see* 17 U.S.C. § 110(11) (statutory exception for DVD players that allow home viewers to automatically skip certain movie content). This panoply of options is simply not available to the courts when interpreting statutory language of more general application. The Appellants and their supporting *amici* are among the most powerful and best-represented interests in the copyright firmament—Congress will doubtless give their concerns a full airing.

IV. AEREO SHOULD NOT BE FAULTED FOR COMPLYING WITH *CABLEVISION*.

Appellants and their supporting *amici* indulge in colorful rhetoric that appears to fault Aereo for designing its system to comply with this Court's holdings in *Cablevision*. Fox Br. at 15-16 (observing that Aereo's system was "specifically designed" to "resemble the RS-DVR services at issue in *Cablevision*" and "used *Cablevision* as a blueprint for its system design");

ABC Br. at 16 (remarking that "Aereo specifically designed its system so it could argue it falls within its reading of *Cablevision.* . . ."). This contention is perplexing, as consulting with counsel to stay within the bounds of the law is generally viewed as socially desirable activity, whether engaged in by entertainment or technology companies.

For example, entire product categories in the consumer electronics and information technology industries are based on the holdings of the Supreme Court's ruling in *Sony v. Universal City Studios* (also known as the *Betamax* ruling) and its progeny: that time shifting and space shifting[11] are fair use, and that a provider of a technology is not contributorily liable for infringing uses of the technology so long as the technology is capable of substantial noninfringing use. *See Sony v. Universal*, 464 U.S. at 442, 454-55. Search engines rely on fair use to index and make useful the information from billions of websites. *Kelly v. Arriba Soft Corp*., 280 F.3d 934 (9th Cir. 2002); *Perfect 10 v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007). Fair use also allows software companies to achieve interoperability, *see Atari Games Corp. v. Nintendo of America, Inc*., 975 F.2d 832 (Fed. Cir. 1992), *Sega Enter. Ltd. v. Accolade, Inc*., 977 F.2d 1510 (9th Cir. 1992), *Sony Computer Entm't, Inc. v. Connectix Corp*., 203 F.3d 596 (9th Cir. 2000), and to

[11] *See Recording Industry Association of America v. Diamond Multimedia Sys*., 180 F.3d 1072, 1079 (9th Cir. 1999).

develop innovative products such as plagiarism detection software, *see A.V. v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

Appellants themselves rely on copyright lawyers regularly as they develop programming that relies on the works of others. WNET relies on the fair use "loophole," 17 U.S.C. § 107, when it includes images and film clips in the documentaries it produces and broadcasts. Thanks to the copyright public domain "loophole," 17 U.S.C. § 302 et. seq., Disney is able to produce films based on novels and music in the public domain for various technical reasons, such as lack of national eligibility (Stravinsky's "Rite of Spring" in "Fantasia"). The news divisions of Fox Television, Univision, ABC, CBS, and NBC, employ the fact/idea "loophole," *Feist Publications, Inc. v. Rural Telephone Serv. Co., Inc*., 499 U.S. 340 (1991), when they extract facts from newspapers, databases, magazines, books, and other news broadcasts. The idea/expression "loophole," 17 U.S.C. § 102(b), permits the entertainment divisions of these broadcasters to copy one another's programming ideas. Appellants' radio stations use the no-performance-rights-in-sound-recordings "loophole," 17 U.S.C. § 106(4), to broadcast music to millions of listeners without paying a cent in royalties to the performers, even though performers have loudly and long described such activity as theft.

In short, there is nothing suspicious or untoward about relying on the careful advice of copyright counsel when bringing products to market. We trust that Appellants' colorful rhetoric was not intended to suggest otherwise.

V. THE STATUTORY HISTORY DOES NOT SUPPORT APPELLANTS' INTERPRETATIONS OF *CABLEVISION*.

Appellants make one other argument for avoiding the clear applicability of *Cablevision*, asserting that Congress in the Transmit Clause gave them control over all transmitted performances in response to the Supreme Court's 1968 decision in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). *See* Fox Br. at 29-30. In *Fortnightly,* the Court held that a cable system did not perform the television programming at issue and hence was not an infringer. Appellants allege that Congress reacted to the *Fortnightly* opinion by "conclud[ing] that commercial enterprises, such as cable companies, should not be permitted to retransmit broadcast television programming without permission or compensation." ABC Br. at 24. Appellants thus seek to create a parallel between Congress's reversal of *Fortnightly* and Aereo's service. But the relevant language of the Transmit Clause was written before *Fortnightly*, and thus cannot be a response to it. Accordingly, any superficial similarity

between the facts in *Fortnightly* and the facts here are irrelevant in the interpretation of the Transmit Clause.

Unfortunately for Appellants, a little history is a dangerous thing: the current statutory language of the Copyright Act in the Transmit Clause was virtually settled in 1964 and finalized in 1966, two years *before* the Supreme Court's *Fortnightly* opinion. The language was proposed by the Copyright Office in 1964 and included in the bills introduced in 1964 and 1966. *See* William Patry, 4 Patry on Copyright § 14.13, § 14.51, § 14.53 (West, 2012 Supp., *available via Westlaw as Patrycopy*); Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 1965 Revision Bill, 89th Cong., 1st Sess. 186-187 (House Comm. Print). Congress, therefore, did not have the facts of *Fortnightly* in mind when it drafted the Transmit Clause.

To the extent that the *Fortnightly* litigation had any impact at all on the drafting of 1976 Act, it was actually to diminish, not expand, the public performance right. On May 23, 1966, Judge Herlands of the Southern District of New York issued his ruling in the *Fortnightly* litigation, finding the cable company fully liable. *United Artists Television, Inc. v. Fortnightly Corporation*, 255 F. Supp. 177 (S.D.N.Y. 1966), *aff'd*, 377 F.2d 872 (2d Cir. 1967), *rev'd*, 392 U.S. 390 (1968). The effect of this decision was swift and

momentous: the House Judiciary Committee, in reporting out the revision bill, amended the bill by including what is now the Section 111 compulsory license. *See* H.R. Rep. No. 2222, 89th Cong., 2d Sess. 80 (1966).

In any event, nothing Congress did in the 1976 Act altered the historic limitation of performance rights to public performances. No copyright act has ever given copyright owners the right to control private performances. This Court's approach in *Cablevision* drew the correct legal boundary between private and public performances. The district court was correct in its factual holding that Aereo's system is indistinguishable from the system in *Cablevision*, and thus should be affirmed.

CONCLUSION

Amici respectfully request that the Court reject Appellants' attempt to limit and obscure the holding of *Cablevision*. That holding has paved the way for innovation and investment in Internet cloud-based technologies. Cloud computing's potential in terms of job creation, economic growth, and consumer empowerment is growing by the day. That potential will not be realized if Appellants are successful here in hamstringing *Cablevision* in a way that allows new technologies to exist only in so far as they resemble old ones.

Respectfully submitted,

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October 25, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 4,065 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the types style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify, that on this 25th day of October 2012, a true and correct copy of the foregoing Brief of *Amici Curiae* the Computer & Communications Industry Association and the Internet Association was timely filed in accordance with Fed. R. App. P. 25(a)(2)(D) and served on all counsel of record via CM/ECF pursuant to Local Rule 25.1(h).

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