

Responses to Questions for the Record from Mr. Edward L. Munson

Questions from the Honorable Bobby Rush

- 1. Do you believe that technologies and industry models have changed or are changing dramatically enough for Congress to consider redefining or revising the term, “multichannel video programming distributor” (MVPD) in the Communications Act?**

Answer:

The FCC currently has an open proceeding on the appropriate scope of the “multichannel video programming distributor” definition. While it is clear that new technologies and services are changing the way viewers consume video content, NAB does not believe Congress should intervene at this time. If Congress were to consider any revision to the term “MVPD” it should ensure that new technologies and services are prohibited from expropriating broadcast signals. Broadcasters must maintain the ability to control the distribution of their signals over the internet and to negotiate for compensation from broadband video providers seeking to retransmit broadcast signals.

- 2. As many of you know, the DC Circuit Court of Appeals heard oral arguments this week in the case of Verizon vs. FCC, which challenges the Commission’s authority under the Communications Act to promulgate “so-called” net neutrality rules.**

If the DC Circuit were to VACATE or to order the Commission to revise its rules substantially, how might that affect parties’ abilities to negotiate retransmission consent agreements “in good faith” and at arms-length?

Would there be resulting business uncertainties and would those uncertainties be good or bad for consumers? Why?

Answer:

NAB does not believe that the FCC’s rules on net neutrality and retransmission consent are interrelated, or that the court’s decision has any relation to the ability of parties in a retransmission consent negotiation to bargain “in good faith.”

- 3. Regarding another line of cases, it appears that the DC Circuit and the US Second Circuit are in some disagreement over when and whether emerging video networks can retransmit over-the-air broadcast content.**

I know that the DC Circuit ruling is only a few days old and you may not have fully reviewed it, but which of the courts’ interpretations of federal communications and copyright law is more defensible?

Answer:

NAB agrees with the courts that have noted that creating inefficient systems purely to avoid copyright law is not good policy and circumvents the law. NAB's position is more fully explained in the attached *amicus* brief filed by NAB in support of a recent petition to the Supreme Court in the *American Broadcast Companies, Inc. v. Aereo, Inc.* litigation.

- 4. If one circuit court's application of the law and legal reasoning is more compelling or defensible than the other circuit court's ruling, please explain why.**

Answer:

NAB agrees with the courts that have noted that creating inefficient systems purely to avoid copyright law is not good policy and circumvents the law. A more detailed legal argument is contained in the attached *amicus* brief filed by NAB in support of a recent petition to the Supreme Court in the *American Broadcast Companies, Inc. v. Aereo, Inc.* litigation.

- 5. Mr. Munson pointed out in his testimony that added regulations on broadcasters "stem from what some have characterized as a 'social contract' between the government and the broadcasting industry: broadcasters use licensed spectrum to serve the public interest and offer their service free to American consumers."**

Many of these broadcast TV consumers and watchers are minorities. In the 2013 Ownership Survey and Trend report, it was cited that 22 percent of all African-American households and 25 percent of Hispanic households are broadcast-only homes. Additionally, minorities comprise 41 percent. Notwithstanding this fact, minority and female ownership of television stations and cable systems has shrunk dramatically over the years.

Do any of you challenge or take issue with the proposition that minority TV broadcasters and cable system owners can be just as if not more responsive to the needs of their minority viewers and audiences?

Answer:

NAB shares your desire for broadcast ownership to better reflect our diverse society. The transition from analog to digital television has offered a new opportunity for increased diversity on the broadcast dial. For the first time, stations can offer new, innovative and niche streams on their multicast channels. Multicast channels offer new diverse programming options for viewers, such as the minority-owned Bounce TV and Soul of the

South television networks, which air programming that targets African American viewers. Many markets have seen multicast broadcast programming options specifically tailored to Latino, Indian, Chinese, Japanese and other audiences.

One of the potential obstacles to increased diversity, however, may be the upcoming incentive auction which could reduce the diversity of programming on broadcast television. By design, the incentive auction will reduce the number of full power and low power broadcast stations, which will thereby reduce the opportunity for minorities to own television stations. Furthermore, according to press reports, television stations that choose to participate in the auction will likely be those less profitable stations, some of which could be stations that program to minority populations and offer unique minority-centric programming. When designing the incentive auction, NAB is hopeful the FCC will take into consideration the potential impact on diversity.

6. Other than the reinstatement of the minority tax certificate, which NAB has supported, what measures can Congress take so that more programming and news meeting the critical needs of minority viewers and consumers gets carried over the public airwaves, using public rights-of-way?

Answer:

NAB has supported reinstatement of the tax certificate for the purpose of promoting greater diversity in ownership of broadcast television and radio stations. NAB also has advanced several proposals before the FCC that are intended to promote ownership diversity. These include: (i) an incubator or waiver program that would give broadcasters incentives to provide technical and financial assistance to qualifying businesses entering broadcast ownership; and (ii) modifying FCC rules to allow sellers of broadcast stations to hold a reversionary interest in broadcast licenses pursuant to certain guidelines to incentivize sellers to be more willing to finance a station purchased by a qualifying owner by retaining the ability to reacquire the station in the event of a default. Such measures also could be taken up by Congress to encourage increased minority ownership of broadcast outlets.

7. Mr. Munson says in his testimony that broadcasters are more regulated than any other video platform, including cable and satellite. He goes further to say that FCC public filing rules, including a requirement for local broadcast TV stations to place sensitive pricing information online should also apply to cable systems.

Assuming for argument that this requirement was made applicable to other video providers, couldn't it lead to more good faith negotiation over retransmission consent agreements?

Answer:

The current public file rules require television broadcasters to place sensitive advertising price information online. This is a rule that is ONLY applicable to broadcasters, not any other video platform that competes directly with broadcasters, such as cable, satellite or teleco companies. NAB believes that if broadcasters must comply with this regulation, then other competitors in the video marketplace should have to fulfill the requirement as well. NAB does not believe there is any connection between whether retransmission consent negotiations are meeting the good faith standard and whether or not this public file requirement is placed upon our competitors.

No. 13-461

IN THE
Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC., *et al.*
Petitioners,
v.
AEREO, INC., F/K/A BAMBOOM LABS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT

**BRIEF OF THE NATIONAL ASSOCIATION OF
BROADCASTERS, THE ABC TELEVISION
AFFILIATES ASSOCIATION, THE CBS
TELEVISION NETWORK AFFILIATES
ASSOCIATION, THE NBC TELEVISION
AFFILIATES, AND THE FBC TELEVISION
AFFILIATES ASSOCIATION, AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICI CURIAE

The National Association of Broadcasters, the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the FBC Television Affiliates Association (collectively, the “Broadcaster Associations”) are associations representing the interests of television broadcasters.¹ The National Association of Broadcasters (NAB) is a non-profit, incorporated association of radio and television stations and broadcasting networks. NAB serves and represents the American broadcasting industry, advocating before Congress, the Federal Communications Commission, and the courts on behalf of its members. The majority of NAB’s members are not large entities; they are local, independent stations.

The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the FBC Television Affiliates Association represent hundreds of local television stations affiliated with the national ABC, CBS, NBC, and FOX television networks, respectively. Together, the Broadcaster Associations’

¹ Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*’s intention to file this brief, and their letters consenting to the filing of all *amicus curiae* briefs have been filed with the Clerk.

members serve millions of viewers in every state in the country.

The Broadcaster Associations have a compelling interest in promoting adherence to copyright and communications laws that govern public performances of television programming and retransmission of broadcast signals to the viewing public. Without adherence to these laws, broadcasters could not fulfill their obligation to offer television programs that meet the needs and interests of the communities they are licensed to serve. Unauthorized retransmissions of broadcast programming siphon viewers away from lawfully authorized sources, which include over-the-air broadcasts, cable and satellite subscription services, and authorized online distributors. As a result, the Broadcaster Associations' members lose advertising revenues and retransmission fees essential to recouping the significant costs of acquiring, producing, and distributing local and national programming. This undermines broadcasters' ability to create new innovative programming and distribution mechanisms, and threatens existing programs, such as original local news and community affairs programming, that are costly to produce.

INTRODUCTION AND SUMMARY OF ARGUMENT

Quality broadcast television, delivered for free over the air by local stations, is a public good, as Congress has long recognized. But free over-the-air television is not cost-free and cannot be taken for granted. Aereo and others following in its footsteps seek to subvert a carefully constructed legal framework with a technological gimmick, and the federal judiciary is divided on whether Aereo has succeeded. This is an important, cleanly presented question of federal law, and there is little to gain – and much to be lost – if review by this Court is delayed.

1. Broadcast stations serve their communities by delivering quality programming, including local news programs, on which the public relies. Nearly 60 million Americans, including many low-income households, rely exclusively on over-the-air broadcast signals. Still more watch broadcast programming through multichannel video programming distributors (MVPDs). Over-the-air broadcasting involves substantial costs, including capital expenses, network affiliation fees, licenses for popular syndicated programs, and the personnel, equipment, and facilities needed to produce informative news programs and emergency coverage.

Congress has struck a careful balance that protects the interests of broadcasters and others. Overriding earlier decisions of this Court, Congress decided that cable systems may not retransmit copyrighted broadcast programs without consent, but created a compulsory licensing system to facilitate

these systems' access to such programming. Separately, Congress granted broadcasters rights in their signals, including the right to negotiate with MVPDs for the ability to retransmit those signals. Together, this interlocking set of provisions assigns distinct benefits and burdens to broadcasters, MVPDs, and copyright owners.

The decision below subverts this balance by allowing Aereo to exploit broadcasters' creative efforts and investment by retransmitting their programs and signals for a profit, without producing anything and without paying broadcasters anything. Aereo does this through a technological gimmick, using thousands of dime-sized antennae and identical digital copies to simultaneously retransmit live television programming and signals to its paying subscribers, while claiming these are not "public performances." As Judge Chin explained, this system clearly constitutes an unauthorized public performance under the plain text of the Copyright Act: it is a "device or process," used to transmit copyrighted television programming, *i.e.*, the "performances," to "paying strangers," *i.e.*, "the public."² The panel majority's view that the system is saved by its "technical details" is foreclosed by the text of the statute and is inconsistent with its purpose and legislative history.

2. Courts are divided over the legality of Aereo and similar systems. Some courts have rejected challenges to it, while others have issued

² Pet. App. 43a-44a (Chin, J., dissenting).

injunctions covering large portions of the country; the issue is currently pending in three circuit courts, all on substantially identical and virtually undisputed facts. Although the Second Circuit is the only court of appeals that has ruled on the issue to date, the judiciary has developed two well-articulated but competing readings of the Copyright Act. Delaying review of the cleanly presented question of law in this case would not aid this Court in vetting additional issues or otherwise assist this Court.

Instead, delay would only exacerbate the significant harms being suffered by broadcasters. As several courts have found, Aereo and similar schemes:

(i) seriously undermine the value of network and local advertising, the largest revenue stream supporting free, over-the-air broadcasting;

(ii) impair broadcasters' ability to negotiate for retransmission consent fees, their second-most important revenue stream;

(iii) interfere with authorized online distribution of broadcast programming, an increasingly important issue for broadcasters; and

(iv) threaten to cause a migration of popular network programming to subscription services, and present local broadcasters with difficult financial decisions with respect to costly programming on which their communities rely.

This Court should consider the legality of Aereo's "Rube Goldberg-like contrivance"³ now, before the economic foundations of free, over-the-air local broadcasting are irrevocably weakened.

ARGUMENT

I. Aereo Subverts Congress' Careful Balance Through Technological Contrivance.

A. Broadcasters Provide Important Services To Their Communities At Substantial Cost.

1. "[T]he importance of local broadcasting outlets can scarcely be exaggerated."⁴ As of September 30, 2013, there were 1,387 full-power commercial stations operating in the United States,⁵ each licensed by the Federal Communications Commission (FCC) to serve the needs and interests of a particular geographic area.⁶ Some commercial broadcast television stations are owned and operated

³ Pet. App. 40a (Chin, J., dissenting).

⁴ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 177 (1968) (internal quotation mark omitted)).

⁵ News Release, FCC, Broadcast Station Totals as of September 30, 2013 (Oct. 24, 2013), <http://tinyurl.com/FCC9-30-13>.

⁶ See FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, 28 FCC Rcd. 10,496, 10,573 (2013) [hereinafter *Video Competition Report*].

by the network with which they are affiliated, but the majority are independently owned.⁷

The most-watched broadcast television stations make three principal forms of programming available. *First*, most of these stations obtain a significant amount of their programming from the national network with which they are affiliated, such as ABC, CBS, NBC, and FOX.⁸ *Second*, stations obtain syndicated programming from content providers.⁹ And *third*, stations broadcast locally-produced news, sports, public affairs, and related programming of particular interest to the station's community of license.¹⁰

Broadcasters' role in delivering the news is especially significant, and "[i]n many ways . . . more important than ever," according to a recent FCC report.¹¹ On a "typical" day, "78% of Americans get news from a local TV station."¹² These stations

⁷ *Id.* at 10,573-74.

⁸ *Id.*

⁹ *Id.* at 10,574.

¹⁰ *Id.*; see also National Association of Broadcasters, *Broadcasters' Public Service: TV Stories*, <http://tinyurl.com/TVStories> (last visited Nov. 7, 2013) (compiling examples of public service provided in broadcast news and other programming).

¹¹ Steven Waldman, FCC, *The Information Needs of Communities* 13 (July 2011), *available at* <http://tinyurl.com/FCCWaldman>.

¹² Pew Research Center, *Understanding the Participatory News Consumer* 10 (March 1, 2010), *available at* <http://tinyurl.com/PewNewsConsumer>.

increasingly “fill the void” in investigative journalism left by changes in other media sectors.¹³ And broadcast news plays an irreplaceable role in emergency situations, when the viewing public as well as law enforcement authorities rely on the wall-to-wall coverage provided by local stations.¹⁴

2. Local broadcasters make this programming available to the general public free of charge through over-the-air service. Approximately 22.4 million American households, accounting for nearly 60 million people, rely exclusively on over-the-air broadcast signals, including 30 percent of households with annual incomes under \$30,000.¹⁵ As the FCC has noted, “[f]or many people, free, over-the-air television is their primary source of news, information and emergency alerts – not to mention entertainment.”¹⁶

¹³ Barb Palser, *A Promising New Venue: TV stations and their digital outlets may play a more prominent role in investigative reporting*, *American Journalism Review*, Aug. 27, 2012, <http://tinyurl.com/AJRPalser>.

¹⁴ For example, the FCC and FEMA called on citizens to “[t]une in to your local television or radio stations . . . for important news alerts” related to Hurricane Sandy. Advisory, FCC, FCC Provides the Public With Important Tips for Communicating in the Aftermath of Hurricane Sandy (Oct. 31, 2012), <http://tinyurl.com/FCCSandy>.

¹⁵ Press Release, National Association of Broadcasters, *Over-the-Air TV Renaissance Continues as Pay TV Cord-Cutting Rises* (June 21, 2013), <http://tinyurl.com/NABRenaissance> (citing GfK Media & Entertainment, *The Home Technology Monitor* (2013)).

¹⁶ Press Release, FCC, *Ten Days and Counting to DTV Transition* (June 2, 2009), <http://tinyurl.com/DTV10Days>; *see* (continued...)

Millions more watch broadcast television stations as retransmitted – with authorization – by a cable system, satellite carrier, or other multichannel video programming distributor (MVPD) to which viewers pay a monthly fee.¹⁷ Because the most popular local and national television programs appear on broadcast stations, MVPDs typically are willing to pay for the right to retransmit popular stations.¹⁸

also Rethinking the Children’s Television Act for a Digital Media Age: Hearing Before the S. Comm. on Commerce, Science, and Transportation, 111th Cong. 7 (July 22, 2009) (Statement of Julius Genachowski, Chairman, FCC) (“Broadcast television remains an essential medium, uniquely accessible to all Americans.”).

¹⁷ About 100 million television households subscribe to an MVPD. Some households receive local television signals both over-the-air and via an MVPD for different television sets within the household. Nearly 18 million households subscribing to an MVPD service have one or more television sets unconnected to the service. See Comments of the National Association of Broadcasters, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, at 2 (Sept. 10, 2012), available at <http://tinyurl.com/NABComments> (citing GfK-Knowledge Networks, Home Technology Monitor, 2012 Ownership Survey and Trend Report (Spring 2012/Mar. 2012)).

¹⁸ See *Video Competition Report*, 28 FCC Rcd. at 10,521-23. MVPDs routinely label top broadcast programming as “must-have” in their advocacy before the FCC. See Joint Reply Comments of Broadcasters, *Amendment to the Commission’s Rules Related to Retransmission Consent*, FCC MB Docket No. 10-71, at 6 & n.27 (June 27, 2011), available at <http://tinyurl.com/RetransComments>; see also TVB, TV Basics 11 (June 2012), <http://tinyurl.com/TVBasics> (broadcasters aired 96 of the top 100 most-watched programs in 2011-12).

3. Bringing top-quality national and local programming to the public entails significant costs for broadcasters. Local stations face substantial capital expenses for their transmission facilities and invest heavily in innovation.¹⁹ They pay network affiliation fees and other compensation to acquire exclusive rights to popular network programming in their local markets, as well as licensing fees to acquire exclusive local rights to syndicated programming.²⁰ Broadcasters may pay syndication fees of up to \$2.5 million in barter and cash for a single episode of top shows such as *Modern Family* and *The Big Bang Theory*.²¹ Stations also incur significant costs to produce local programming, including hiring reporters and camera crews, purchasing news vans and other equipment, and maintaining production facilities. A survey of television stations reported that, on average, they spend over \$4 million per year in their news operating budgets and over \$700,000 in their news capital budgets.²² Finally, stations provide expensive-to-produce news coverage on which the

¹⁹ See *Video Competition Report*, 28 FCC Rcd. at 10,605-06. For example, as of the end of 2011, over 80% of full-power stations were broadcasting in high-definition. *Id.* at 10,500.

²⁰ *Id.* at 10,587-88, 10,599.

²¹ *Id.* at 10,588.

²² See Comments of the National Association of Broadcasters, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, FCC GN Docket No. 10-25, at 5-6, 33 (May 7, 2010), available at <http://tinyurl.com/FutureNewMedia>.

public depends, such as commercial-free reporting during times of emergency.²³

B. Congress Has Struck A Balance To Protect Local Broadcasters, MVPDs, Copyright Holders, And Ultimately, The Public.

Broadcast television is available for free over the air to viewers; it is not and could not be free to all entities for all purposes. Like any business, commercial television broadcasters would suffer devastating harm if other commercial enterprises could appropriate their product freely and without compensation. Congress has crafted a comprehensive statutory scheme to ensure that this does not happen.

The right to authorize public performances of a copyrighted audiovisual work is an exclusive right secured to copyright holders.²⁴ Prior to 1976, decisions of this Court held that retransmissions of broadcast programming by cable systems were not “performances” of that programming, allowing cable systems to retransmit broadcast television for free.²⁵ But Congress concluded that these decisions posed a serious threat to the broadcast industry and

²³ See *id.* at 16 (reporting that a single season’s hurricane coverage cost one local station \$160,000 even before accounting for lost advertising revenue).

²⁴ 17 U.S.C. § 106(4).

²⁵ See *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

abrogated them in the Copyright Act of 1976.²⁶ As the legislative history confirms, Congress specifically decided that a “commercial enterprise[]” – like Aereo – “whose basic retransmission operations are based on the carriage of copyrighted program material” – again, like Aereo – should pay “copyright royalties” to the “creators of such programs.”²⁷

At the same time, Congress was concerned that individual negotiations with every copyright owner would be “impractical and unduly burdensome.” It therefore created a narrowly tailored compulsory licensing regime, *not* universally applicable, but limited to cable operators and later satellite providers.²⁸ Thus, Congress struck a balance: copyright holders receive robust protection that applies to retransmission of broadcast programming, but select entities – cable and satellite systems – are granted a streamlined licensing mechanism.²⁹

²⁶ Pub. L. No. 94-553, 90 Stat. 2541; *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709-10 (1984).

²⁷ H.R. Rep. No. 94-1476, at 89 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5704.

²⁸ *See Capital Cities Cable, Inc.*, 467 U.S. at 709 (quoting H.R. Rep. No. 94-1476, at 89); 17 U.S.C. §§ 119, 122. In determining to “act as narrowly as possible,” Congress highlighted the importance of not derogating from the “property rights” of copyright holders more than necessary. S. Rep. No. 106-42, at 10 (1999).

²⁹ These congressionally-created compulsory licenses also include conditions on MVPDs, violation of which results in full copyright liability. *See* 17 U.S.C. § 111(c)(2)-(4); 17 U.S.C. § 119(a)(4)-(7); 17 U.S.C. § 122(d)-(f).

Distinct from the copyright interests in broadcast programming, Congress enacted the Cable Television and Consumer Protection and Competition Act of 1992,³⁰ and the Satellite Home Viewer Improvement Act of 1999.³¹ These statutes created a separate right for broadcasters in their signals and allowed commercial television stations to bargain regarding the right of MVPDs to retransmit those signals.³²

Together, these interlocking statutory provisions strike a careful balance designed to serve the public interest:

- *Over-the-Air Broadcasts*: Each local broadcast station receives a license from the FCC to transmit program services on a particular frequency, and is required to operate the station in a manner that serves the public interest.
- *Retransmission Consent*: Local commercial broadcast stations have control over retransmission of their signals by MVPDs. Because of the demand for the mix of programming they make available,³³ network-

³⁰ Pub. L. No. 102-385, 106 Stat. 1460.

³¹ Pub. L. No. 106-113, 113 Stat. 1501.

³² See 47 U.S.C. § 325(b)(1).

³³ See Reply Comments of the National Association of Broadcasters, *Amendment of the Commission's Rules Related to Retransmission Consent*, FCC MB Docket No. 10-71, Ex. A., Reply Declaration of Jeffrey A. Eisenach and Kevin W. Caves, at 15 n.28 (June 27, 2011), available at <http://tinyurl.com/EisenachCaves>.

affiliated television stations typically negotiate compensation from MVPDs for the right to deliver the broadcast signal to subscribers (“retransmission consent”).³⁴

- *Copyright Owners:* Copyright holders authorize broadcasters to publicly perform their works over the air, but this permission does not necessarily carry over to other platforms. Only cable systems and satellite carriers may bypass direct negotiations with rights holders through a statutory compulsory licensing system; other would-be retransmitters must obtain individualized consent.³⁵

C. Aereo’s “Rube Goldberg-Like Contrivance” Violates The Plain Text Of The Copyright Act and Circumvents Its Purpose.

Unauthorized streaming of copyrighted programming to the public over the Internet is illegal.³⁶ To its subscribers, Aereo functions just like

³⁴ See *Video Competition Report*, 28 FCC Rcd. at 10,521.

³⁵ See *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 278-87 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1585 (2013). *ivi* held that an online service that streamed live, copyrighted broadcast programming without consent could be held liable for publicly performing such programming. As Judge Chin recognized, the litany of harms the Second Circuit identified with respect to *ivi* “appl[ies] with equal force” to Aereo. Pet. App. 57a (Chin, J. dissenting).

³⁶ See, e.g., *ivi*, 691 F.3d at 275; *Warner Bros. Entm’t, Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011); (continued...)

the indisputably infringing services that came before it. Aereo, however, claims it is different because it employs a convoluted technological ruse: in making live television programs available to its subscribers, it claims to use “thousands of individual dime-sized antennas” to make identical “unique copies” that it then transmits simultaneously to as many subscribers. This “Rube Goldberg-like contrivance, over-engineered . . . to take advantage of a perceived loophole in the law,” does not change the basic fact that Aereo is “publicly performing” copyrighted works in violation of the Copyright Act.³⁷

The exclusive right to “perform the copyrighted work publicly” includes the right to “transmit or otherwise communicate a performance . . . to the public, by means of any device or process” (the “Transmit Clause”).³⁸ The expansive language of the Transmit Clause makes clear that a performance is public “whether the members of the

Stipulated Consent Judgment and Permanent Injunction, *CBS Broad. Inc. v. FilmOn.com, Inc.*, 10-cv-7532-NRB (S.D.N.Y. Aug. 9, 2012), ECF No. 49; *Twentieth Century Fox Film Corp. v. ICraveTV*, Nos. Civ.A. 00-120, Civ.A. 00-121, 2000 WL 255989 (W.D. Pa. Feb. 8, 2000); see also *Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act and Illegal Streaming: Hearing Before the Subcomm. on Intellectual Prop., Competition and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 6, 11 (2011) (statement of Maria A. Pallante, Register of Copyrights) (“As streaming becomes an increasingly popular means of accessing creative works . . . , it will continue to be attractive to infringers. Unfortunately, the problem of unauthorized streaming is here to stay.”).

³⁷ Pet. App. 40a (Chin, J., dissenting).

³⁸ 17 U.S.C. § 101.

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.”³⁹ As Judge Chin explained, Aereo fits squarely within the statute: its “system of thousands of antennas” is a “device or process,” and it uses that system to transmit copyrighted television programming, *i.e.*, the “performances,” to “paying strangers,” *i.e.*, “the public.”⁴⁰ This common-sense interpretation is also supported by the legislative history of the Copyright Act of 1976, which explains that Congress intended to cover “all conceivable forms and combinations of wired or wireless communications media,” in order to anticipate future technological developments.⁴¹

The panel majority incorrectly reasoned that the “technical details” of Aereo’s system allow it to thwart this straightforward application of the law.⁴² According to the majority, the Transmit Clause applies only if “a *particular transmission of a performance*” can be received by the public; each “transmission sent by Aereo” to its subscribers is “generated from [a] unique copy” of the television program, so that copy is not transmitted to “the public.”⁴³ But the Act says nothing about whether the underlying “performance” is “transmitted” to “the

³⁹ *Id.*

⁴⁰ Pet. App. 43a-44a (Chin, J., dissenting).

⁴¹ H.R. Rep. No. 94-1476, at 64.

⁴² Pet. App. 33a.

⁴³ Pet. App. 18a (quoting *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 135 (2d Cir. 2008) (“*Cablevision*”).

public” using one copy or multiple (technologically unnecessary) copies. To the contrary, the Transmit Clause “does not use the terms ‘copy’ or ‘copies’” at all.⁴⁴ Instead, in language that is remarkable for its comprehensiveness and breadth, the statute applies to “*any* device or process,” without regard to whether the underlying work is transmitted to members of the public “in separate places” or “at different times.” Nothing in this statutory text accords talismanic significance to the “technical details” of the device or process used to transmit a copyrighted television program to paying subscribers.

Beyond its lack of textual justification, Aereo’s contrivance plainly subverts the balance Congress struck. Like broadcasters, Aereo transmits programming to the public. But unlike broadcasters, it pays nothing for that programming and has no duty to serve the public. Like MVPDs, Aereo retransmits broadcast signals and profits from charging monthly subscription fees to viewers.⁴⁵ But unlike MVPDs, it does not negotiate with rights holders, pay any fees, or comply with any of the

⁴⁴ Pet. App. 146a (Chin, J., dissenting from denial of reh’g en banc).

⁴⁵ In this respect, Aereo’s commercial retransmission service is not remotely similar to an individual viewer recording copyrighted programming for personal viewing at a later time, or even to a retailer whose products can be used by others for that purpose. Cf. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Analogizing the actions of a for-profit retransmitter to those of an individual viewer was the exact approach Congress rejected when it abrogated *Teleprompter Corp.* and *Fortnightly Corp.*

statutory conditions Congress imposed upon MVPDs.⁴⁶ Like copyright holders, Aereo profits from valuable programming. But unlike copyright holders, it does none of the innovation, supplies none of the creativity, and contributes none of the financial investment. This is not a legitimate function contemplated by Congress's carefully calibrated regime; it is simply free-riding.

II. This Court's Review Is Necessary To Bring Stability And Certainty To The Broadcasting, MVPD And Content-Producing Industries.

Although only one court of appeals has ruled on the legality of Aereo's scheme to date, the state of the law is now in considerable disarray, and there is little reason to expect the circuits to converge on a single consensus view. The legal status of Aereo and its ilk is literally all over the map: challenges to Aereo have been rejected in the Second Circuit and in Boston,⁴⁷ while a competitor with a virtually identical service has been enjoined from operating in the Ninth Circuit⁴⁸ and *separately* enjoined from

⁴⁶ In addition to payment of fees, these conditions include compliance with certain FCC rules, reporting requirements, prohibitions against alterations in programs, and prohibitions or other limitations against the importation of distant signals into a broadcast station's local market. *See supra* note 29.

⁴⁷ *Hearst Stations Inc. v. Aereo, Inc.*, No. 13-11649, 2013 WL 5604284 (D. Mass. Oct. 8, 2013), *appeal docketed*, No. 13-2282 (1st Cir. Oct. 16, 2013).

⁴⁸ *Fox Television Stations, Inc. v. BarryDriller Content Systems, PLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012), *appeal docketed* (continued...)

operating anywhere outside the Second Circuit.⁴⁹ Appeals are pending in the First, Ninth, and D.C. Circuits. Just days before the petition in this case was filed, local broadcasters and a national network filed a copyright infringement suit against Aereo in Utah.⁵⁰ Aereo's aggressive expansion plans foretell even further expansion of this legal playing field.⁵¹

This is not a case where further percolation would aid this Court in vetting legal issues or identifying a suitable vehicle for review. Across the country there are now two competing readings of the Copyright Act being applied to virtually identical and almost entirely undisputed facts. One view – that a copyrighted television program may not be artificially sliced into discrete “transmissions,” and each one delivered to paying subscribers without authorization – has been adopted by two appellate judges and two district courts.⁵² The contrary view has been defended at length by two appellate judges and two district courts. Delaying review would

sub nom. Fox Television Stations, Inc. v. Aereokiller, LLC, Nos. 13-55156, 13-55157 (9th Cir. Jan. 25, 2013).

⁴⁹ *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758, 2013 WL 4763414 (D.D.C. Sept. 5, 2013), *appeal docketed*, No. 13-7146 (D.C. Cir. Sept. 17, 2013).

⁵⁰ Complaint, *Community Television of Utah, LLC v. Aereo, Inc.*, No. 2:13-cv-00910 (D. Utah Oct. 7, 2013).

⁵¹ Press Release, Aereo, Inc., Aereo Announces Expansion Plans for 22 New U.S. Cities (Jan. 8, 2013), <http://tinyurl.com/AereoExpansion>.

⁵² Judge Wesley endorsed Judge Chin's interpretation of the Transmit Clause. See Pet. App. 128a (Chin, J., joined by Wesley, J., dissenting from denial of reh' en banc).

achieve little more than allowing additional courts to line up behind one fully developed approach or the other, without vetting new issues, resolving factual disputes, or otherwise improving the record for this Court's ultimate review.

Delay in reviewing Aereo's illegal conduct will instead only exacerbate the significant – and, as several courts have found, irreparable⁵³ – harms faced by broadcasters. And the harm to local stations points to a broader harm: to the system of national and local broadcast television service that has long benefited the public.

1. Aereo's technological contrivance undermines the largest revenue stream supporting free, over-the-air television: advertising. Aereo audiences are “not measured by Nielsen” ratings, meaning broadcasters cannot command advertising revenues commensurate with their viewership.⁵⁴ Since 88 percent of broadcast revenue is derived from

⁵³ See *FilmOn X LLC*, 2013 WL 4763414, at *29-32 (identifying several categories of irreparable harm broadcasters will suffer without preliminary injunction); *BarryDriller Content Systems, PLC*, 915 F. Supp. 2d at 1147 (same). Even the district court in this case agreed that broadcasters would suffer various irreparable harms in the absence of an injunction. Pet. App. 109a-116a.

⁵⁴ Pet. App. 110a. The industry “relies on [the] Nielsen [Company's] data to measure broadcast television station audiences” and thereby determine advertising rates. *Video Competition Report*, 28 FCC Rcd. at 10,592.

advertising, even small differences in ratings points can have a huge financial impact on local stations.⁵⁵

Aereo and services like it may further diminish advertising revenues by diverting viewers out of their local markets. Aereo's purported controls against out-of-market viewing are illusory – customers are invited to watch programming from any available market so long as they click a button that says, “I swear, I am in market.”⁵⁶ More fundamentally, the Second Circuit's reasoning allows Aereo and its sister services to offer streaming of out-of-market stations. If an unauthorized streaming service allows Californians to watch New York programs – three hours early, and with commercials for New York car dealerships instead of California ones – it would further “reduce the value of . . . local advertisements.”⁵⁷ Enabling this viewing of out-of-market television stations would also destroy local stations' bargained-for program exclusivity rights. These are the very harms Congress sought to prevent in significantly restricting, and in some

⁵⁵ *See id.* at 10,583.

⁵⁶ Decl. of Dr. John P.J. Kelly ¶¶ 74-75, *Am. Broad. Cos., Inc. v. Aereo, Inc.* (S.D.N.Y. Apr. 30, 2012) (reproduced in the joint appendix before the Second Circuit at A-1838). By clicking the “in market” button, the viewer is invited to state that she is located within the authorized viewing area for the station in question, even if she is actually outside that area.

⁵⁷ *ivi*, 691 F.3d at 286.

cases outright prohibiting, the importation of out-of-market stations.⁵⁸

2. Aereo also directly jeopardizes retransmission consent fees, broadcasters' second-most important revenue stream. These fees represent a "substantial and growing revenue source for the television programming industry."⁵⁹ The threat to this revenue comes not only from Aereo, which retransmits broadcast programming for profit without paying these fees; large MVPDs are already exploring ways to take advantage of a legal regime in which paying for programming is apparently optional.⁶⁰ Aereo's very existence gives cable companies "leverage to negotiate deals with

⁵⁸ See 17 U.S.C. § 111(c)(1) (requiring cable systems to comply with FCC rules, including those enforcing limitations on the importation of distant signals); 47 C.F.R. §§ 76.92, 76.101, 76.120; see also 17 U.S.C. § 119(a)(6) (restricting "violations of territorial restrictions" by satellite carriers).

⁵⁹ *ivi*, 691 F.3d at 285; see also *Video Competition Report*, 28 FCC Rcd. at 10,599-600 (retransmission consent fees represent \$2.36 billion in broadcast station industry revenues in 2012, up from \$1.76 billion in 2011).

⁶⁰ See Andy Fixmer et al., *DirecTV, Time Warner Cable Are Said to Weigh Aereo-Type Services*, Bloomberg, Oct. 26, 2013, <http://tinyurl.com/DirecTVAereo> ("DirecTV, Time Warner Cable Inc. (TWC) and Charter Communications Inc. (CHTR), taking a page from Aereo Inc., are considering capturing free broadcast-TV signals to avoid paying billions of dollars in so-called retransmission fees."); Shalini Ramachandran, *TV Service Providers Held Talks With Aereo*, Wall St. J., Apr. 1, 2013, at B1 (reporting that Aereo has discussed partnerships with major pay-TV distributors, including AT&T and DISH Network).

broadcasters on more favorable terms.”⁶¹ Even if the Court eventually rejects the Second Circuit’s flawed construction of the Copyright Act, the fundamental economics of broadcast television will already have been undermined by years of bargaining in the shadow of Aereo.

3. Aereo is also undermining broadcasters’ negotiating position with respect to authorized online distribution. Ensuring that broadcasters have the exclusive “first run” of popular programming ahead of Internet sources is an important point of negotiation between broadcast television stations and their programming suppliers, including the networks with which they are affiliated.⁶² “[N]egotiated Internet retransmissions – for example, on Hulu.com – typically delay Internet broadcasts so as not to disrupt plaintiffs’ broadcast distribution models, reduce the live broadcast audience, or divert the live broadcast audience to the Internet.”⁶³ Aereo subverts the carefully negotiated balance between first-run live broadcasts and authorized Internet viewing.

4. In combination, the harms described above will reduce broadcasters’ ability to continue offering costly and diverse national and local programming free over-the-air. Aereo’s free riding creates a

⁶¹ See Steve Donohue, *Britt: Aereo Could Help Time Warner Cable Stop Paying Retransmission-Consent Fees*, FierceCable, Apr. 26, 2012, <http://tinyurl.com/BrittAereo>.

⁶² See *Video Competition Report*, 28 FCC Rcd. at 10,607-10.

⁶³ *ivi*, 691 F.3d at 285.

substantial danger that quality programming will migrate from broadcast television to pay services.⁶⁴ Local broadcasters will also face difficult choices. As entities licensed to serve their local communities, broadcasters strive to avoid scaling back programming on which the public depends. However, with both advertising and retransmission consent revenues jeopardized, expensive-to-produce local news coverage, such as wall-to-wall emergency reporting, faces clear financial challenges.⁶⁵

All of these costs are real and immediate, and their confluence “threaten[s] to destabilize the entire industry,” not just one market or one company.⁶⁶ In addition to Aereo’s own expansion, other would-be free-riders are likely to follow the Second Circuit’s roadmap for unauthorized retransmission. Indeed, the derivatively-named “Aereokiller” service (since re-named FilmOn X) was consciously “designed to take advantage of the logic of the recent court ruling

⁶⁴ For example, in the wake of the Second Circuit’s decision, News Corp. President and COO Chase Carey stated that FOX may convert to a subscription-only model, explaining that “[w]e simply cannot provide the type of quality sports, news, and entertainment content that we do from an ad supported only business model.” Ira Teinowitz, *FOX-Aereo Dispute Could Force Network Off Broadcast TV, Says Chase Carey*, The Wrap, Apr. 8, 2013, <http://tinyurl.com/CareyAereo>. Executives at CBS and Univision have echoed these sentiments. Brian Stetler, *Broadcasters Circle Wagons Against A TV Streaming Upstart*, N.Y. Times, Apr. 9, 2013, <http://tinyurl.com/CBSAereo>.

⁶⁵ See *supra* Part I.A.3.

⁶⁶ *ivi*, 691 F.3d at 286.

in the Aereo litigation.”⁶⁷ Until this Court intervenes, unauthorized streaming services are likely to proliferate, and so too will the harms to broadcast television.

Before this Court is a cleanly presented and important question of law: whether an unauthorized retransmission service is legal simply because it uses thousands of technologically unnecessary antennae and digital copies instead of one. The Court should resolve that important question now, before the economic pillars of free, over-the-air local broadcasting are compromised.

⁶⁷ Ted Johnson, *NBC, ABC, CBS Board Suit Against Barrydriller.com*, *Variety*, Aug. 13, 2012, <http://tinyurl.com/VarietyBD>.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition for writ of certiorari, the Court should grant the petition.

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