

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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,)

Case No. 1:12-cv-01543-AJN

ECF Case

Plaintiffs,

[Related Case No. 1:12-cv-01540-AJN]

v.

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

Defendant.)

**BRIEF OF AMICI CURIAE ELECTRONIC FRONTIER FOUNDATION
AND PUBLIC KNOWLEDGE**

Mitchell L. Stoltz (*Pro Hac Vice*)
Kurt Opsahl
Corynne McSherry
ELECTRONIC FRONTIER
FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Tel: (415) 436-9333
mitch@eff.org

Gigi B. Sohn
John Bergmayer
Sherwin Siy
PUBLIC KNOWLEDGE
1818 N Street, NW
Suite 410
Washington, DC 20036
Tel: (202) 861-0020
john@publicknowledge.org

Attorneys for Amici Curiae Electronic Frontier Foundation and Public Knowledge

Dated: May 23, 2012

TABLE OF CONTENTS

INTEREST OF AMICI 1

INTRODUCTION 2

ARGUMENT..... 3

 I. The Public Has A Vital Interest in Both the Substantive and Procedural Aspects
 of Plaintiffs’ Injunction Motions. 3

 II. Individuals’ Personal Transmissions Are Private Performances..... 4

 III. The Scope of the Public Performance Right is Not Determined by Existing
 Licensing Arrangements..... 9

 IV. The Remaining Factors Favor Denying an Injunction. 12

 A. Aereo’s Lawful Business Will Not Irreparably Harm Plaintiffs. 13

 1. Plaintiffs Cannot Claim Harm from Technological “Disruption.” 14

 2. Aereo Will Not Interfere with an Advertising-Based Business
 Model..... 15

 3. Aereo Does Not Eliminate Plaintiffs’ Ability to Collect Fees
 from Cable Systems..... 15

 4. Aereo Does Not Prevent Plaintiffs from Exploiting Their
 Content..... 16

 B. The Public Interest Would Not Be Served by Shutting Down an
 Innovative New Service..... 16

 1. The Public Interest in Copyright Law Would Not Be Served by
 an Injunction. 17

 2. The Public Interest in Promoting Public Reception of
 Broadcasting Would Be Harmed by an Injunction..... 19

 3. The Public Interest in Competition and Innovation in the Video
 Market Would Be Harmed by an Injunction. 19

CONCLUSION 22

TABLE OF AUTHORITIES

FEDERAL CASES

Apple Computer, Inc. v. Franklin Computer Corp.,
714 F.2d 1240 (3d Cir. 1983) 17

Cartoon Network LP v. CSC Holdings, Inc.,
536 F.3d 121 (2d Cir. 2008) *passim*

Columbia Pictures Indus., Inc. v. Redd Horne Inc.,
568 F. Supp. 494 (W.D. Pa. 1983) 8

eBay v. MercExchange,
547 U.S. 388 (2006). 2, 12, 13, 17

Feist Pubs., Inc. v. Rural Tel. Svc. Co.,
499 U.S. 340 (1991) 11

Fogerty v. Fantasy, Inc.,
510 U.S. 517 (1994) 11

Nat’l Football League v. PrimeTime 24 Joint Venture,
211 F.3d 10 (2d Cir. 2000) 9

Office of Communication of United Church of Christ v. FCC,
359 F. 2d 994 (D.C. Cir. 1966)..... 19

Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys.,
180 F. 3d 1072 (9th Cir. 1999) 14

Red Lion Broad. Co. v. FCC,
395 US 367 (1969) 19

Sony Corp. of Am. v. Universal City Studios, Inc.,
464 U.S. 417 (1984) 5, 10, 14

Turner Broadcasting System, Inc. v. FCC,
520 U.S. 180 (1997) 19

Twentieth Century Music Corp. v. Aiken,
422 U.S. 151 (1975) 10

UMG Recordings v. Shelter Capital Partners,
667 F.3d 1022 (9th Cir. 2011) 14

Wheaton v. Peters,
33 U.S. (8 Pet.) 591 (1834) 10

Winter v. Natural Res. Def. Counsel,
555 U.S. 7 (2008) 12, 17

FEDERAL STATUTES

17 U.S.C. § 106 10, 11

17 U.S.C. § 111 9

17 U.S.C. § 114 12

LEGISLATIVE HISTORY

S. Rep. No. 86-562 (1959)..... 19

The Copyright Royalty and Distribution Reform Act of 2004,
Pub L. No. 108-419, 118 Stat. 2341 12

The Copyright Royalty Judges Program Technical Corrections Act of 2006,
Pub. L. No. 109-303, 120 Stat. 1478 12

The Digital Performance Right in Sound Recording Act of 1995,
Pub. L. No. 104-39, 109 Stat. 336 12

INTEREST OF AMICI

The Electronic Frontier Foundation (“EFF”) is a member-supported, nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990, EFF represents over 19,000 contributing members. On behalf of its members, EFF promotes the sound development of copyright law as a legal regime that balances incentives for creativity with public access, individual empowerment, and innovation. EFF’s interest with respect to copyright law reaches beyond specific industry sectors and technologies to promote well-informed copyright jurisprudence. In this role, EFF has contributed its expertise to many cases applying copyright law to new technologies, as *amicus curiae*, as party counsel, and as court-appointed attorneys *ad litem*.¹

Public Knowledge (“PK”) is a non-profit public interest 501(c)(3) corporation, working to defend citizens’ rights in the emerging digital culture. Its primary mission is to promote online innovation, protect the legal rights of all users of copyrighted works, and ensure that emerging copyright and telecommunications policies serve the public interest. Applying its years of expertise in these areas, Public Knowledge frequently files *amicus* briefs in cases that raise novel issues at the intersection of media, copyright, and telecommunications law.

¹ Mitchell Stoltz, counsel for EFF, was formerly an associate at Constantine Cannon LLP, which represents Aereo in these actions. Mr. Stoltz has no present affiliation with Aereo.

INTRODUCTION

Although Aereo is the defendant, this case is in fact about the right of individuals—Aereo’s customers and ultimately all residents of the U.S.—to watch free local broadcast television with the technology of their choosing. *Amici* are concerned about the impact an injunction against Aereo will have on this right. As organizations that work to promote the development of copyright law as an engine for innovation, balancing the needs of copyright owners, add-on innovators, and the public interest, *amici* seek to assist the Court’s analysis of both the merits and the appropriate standard for preliminary injunctions in a copyright case such as this one.

Amici believe that *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) is controlling in this case, and shelters Aereo’s business model. Under *Cartoon Network*, the transmission of a copyrighted work is a private performance outside the exclusive rights of the copyright owner when it is one-to-one, that is, made to a single individual or family and social acquaintances. Notably, in *Cartoon Network*, the source of the transmission was one to which the customer already had lawful access, meaning that no infringement occurred upstream. No preliminary injunction is warranted here because Aereo’s system has the same characteristics as the systems found to be noninfringing in *Cartoon Network*.

In *eBay v. MercExchange*, 547 U.S. 388, 391 (2006), the Supreme Court returned the injunction standard in copyright and patent cases to “traditional equitable considerations,” forbidding presumptions of irreparable harm and other “broad classifications.” *eBay* at 391. Accordingly, following *eBay* and *Salinger v. Colting*, 607 F.3d 68, 79-80 (2d Cir. 2010), this Court should consider the plaintiffs’ likelihood of success independently of the balance of harms flowing from an injunction, and from the public interest. As discussed below, Plaintiffs cannot meet the standard set by the Supreme Court and this Circuit.

ARGUMENT

I. The Public Has A Vital Interest in Both the Substantive and Procedural Aspects of Plaintiffs' Injunction Motions.

Copyright law has a tremendous and longstanding impact on how the public is able to access electronic media. This is especially so in the digital age, when any use, transfer, or manipulation of media—including uses which by law and tradition are *not* reserved to the copyright owner—involve a nominal “copy,” a nominal “transmission,” or both. Thus, judicial interpretation of the exclusive rights of copyright, enumerated in Section 106 of the Copyright Act, can grow or shrink the sphere of personal uses that individuals can make of the copyrighted works to which they have access.

Specifically, Plaintiffs' motions for preliminary injunction turn on the definition of a public performance under Section 106 of the Copyright Act. Individuals, including the members of PK and EFF, make private performances every day, in every interaction with digital video and audio. Private performances, in addition to fair use and other exceptions and limitations on copyright, give autonomy and choice to individuals who use and interact with digital media. Because the public values this autonomy and choice, there exists a vital public interest in sound judicial interpretation of the performance right.

The public, and *amici*, also have a strong interest in careful, fact-driven application of the traditional four-factor preliminary injunction test. Cases that test the application of statutory copyright law to new technologies often involve startup companies, like Aereo, whose businesses challenge incumbent industries. As discussed in part IV, the public has an interest—independent of the parties' interests—in access to new ways of receiving broadcast television, and in promoting competition among lawful video transmission technologies and businesses. *Amici* seek to promote careful consideration of these interests as part of the preliminary

injunction analysis. Loose application of the preliminary injunction standard would undermine that interest. Thus, Amici urge the court to consider the range of public interests at stake in this litigation.

II. Individuals' Personal Transmissions Are Private Performances.

As Plaintiffs acknowledge, Pltfs. Mem. at 20-21, *Cartoon Network* confirms that the TV viewer's perspective is key to defining a private performance. 536 F.3d at 125 ("To the customer, however, the processes of recording and playback . . . are similar to that of a standard set-top DVR."). Plaintiffs prefer a public performance right that limits viewers to narrow, outdated, and technology-specific means of accessing the public airwaves. But nothing in the text of the Copyright Act or the actual practice of broadcast TV viewing justifies this cramped reading. Rather, *Cartoon Network* makes clear that a television transmission is a non-actionable private performance when it is sent only to an individual or family and their social acquaintances. In addition, if the source of the private transmission is one to which the ultimate viewer has no lawful access, infringement would be present notwithstanding the private transmission. *Cartoon Network* distinguishes *making a public performance* from *enabling a private performance*, a distinction which preserves the role of copyright as an economic incentive for creativity while preserving the public's right to experience that creativity in the manner of their choosing, maximizing its public benefit.

Consider the following activities:

- Watching broadcast TV from the living room with a 'rabbit ears' antenna;
- Watching broadcast TV from the living room with a roof-mounted antenna;
- Watching broadcast TV on a bus using a handheld TV receiver;

- Watching broadcast TV received by a roof-mounted antenna at the customer's home, which is then sent over the Internet or a home network from a device in the home to a handheld device;²
- Adding a time-shift to any of these activities by recording and playing back a personal copy of a TV program;³ and
- Adding pause, slow-motion, and rewind capabilities to otherwise "real-time" TV viewing through use of a recording buffer.

Each of these activities is a common, widely accepted and lawful *private* transmission of a television program from an individual to herself with the assistance of an equipment manufacturer, equipment provider, or an Internet service sending data from one location to another at the viewer's command. The first four are functionally equivalent to the classic form of TV reception with a living-room set and a personal antenna, with the only difference being the length of the wire between antenna and set (or the replacement of that wire with an equivalent self-to-self transmission over the Internet). The last two are personal time-shifting of the type found to be noninfringing in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

Using existing technologies, television viewers today can transmit over-the-air broadcasts to any number of networked devices, including mobile devices.⁴ These devices are critical to the functioning of home media center software from companies such as Microsoft.⁵ Other devices allow tuning and viewing over-the-air broadcast television on a computer. These tuners come in

² The Slingbox, EyeTV, and Windows Media products do this. See <http://www.slingbox.com/go/home>; <http://www.elgato.com/elgato/na/mainmenu/home/what-is-eyetv.en.html>; <http://windows.microsoft.com/en-us/windows/products/windows-media-center>.

³ This may occur on a digital video recorder in the home, such as a TiVo device, <http://www.tivo.com>, or by a personal device provided by a service provider and located at the provider's facility. See *Cartoon Network*, 536 F.3d at 124.

⁴ See SiliconDust's HDHomeRun, <http://www.silicondust.com/products/hdhome-run/atsc>, (last accessed May 16, 2012).

⁵ See Microsoft, Windows Media Center Record TV, <http://www.microsoft.com/windows/windows-media-center/learn-more/recordtv/default.aspx> (last accessed May 16, 2012).

the form of an internal card that must be installed inside the computer case,⁶ or a small external device.⁷ Still other devices allow consumers to remotely view freely available over-the-air broadcast television outside of a broadcaster's home market. Products such as the Slingbox⁸ and EyeTV⁹ allow a consumer to transmit local broadcast television from other television markets and other time zones via the Internet.

Moreover, all of these activities are part of the evolving public perception of what it means to "watch TV." The technologies that enable these forms of private viewing, from a portable TV to a digital video recorder (DVR) to a Slingbox, are, to the viewer, part of the personal viewing equipment that was once limited to a furniture-sized console television with cumbersome "rabbit ears." At the same time, the distinction between "live" and delayed viewing has been blurred. Fifteen percent of television viewers watch programs at a different time from when they were broadcast,¹⁰ and many of those who do watch "live" contemporaneous broadcasts use simultaneous recording with a local or remote DVR to enable pause, rewind, and slow-motion functions. The Nielsen Company now tracks delayed viewership as part of its television ratings, in addition to real-time viewers.¹¹

In each of these activities, the source of the programming is over-the-air broadcast, which anyone within range has a right to receive on the personal equipment of their choice. Any private

⁶ See, e.g. Hauppauge's WinTV-HVR-2250, http://www.hauppauge.com/site/products/data_hvr2250.html (last accessed May 16, 2012) (comes with two tuners that allow a consumer to watch one channel and record another, in addition to a remote control to facilitate distance viewing).

⁷ See, e.g. Hauppauge's WinTV-HVR-950Q, http://www.hauppauge.com/site/products/data_hvr950q.html (last accessed May 16, 2012).

⁸ Sling Media, Slingbox, <http://www.slingbox.com/> (last accessed May 16, 2012).

⁹ Elgato, EyeTV,

<http://www.elgato.com/elgato/na/mainmenu/products/software/EyeTV-app.en.html> (last accessed May 16, 2012).

¹⁰ Pat McDonough, *As TV Screens Grow, So Does U.S. DVR Usage*, Nielsen Wire, Feb. 29, 2012, http://blog.nielsen.com/nielsenwire/media_entertainment/as-tv-screens-grow-so-does-u-s-dvr-usage/ ("85% of TV content is viewed live.").

¹¹ *Television Measurement*, The Nielsen Company, <http://www.nielsen.com/us/en/measurement/television-measurement.html> ("Our tools capture not only what channel is being watched, but also who is watching and when, including 'time-shifted' viewing.").

transmissions that occur after the broadcast signal is received are not “to the public” under any reasonable understanding of that term.

Aereo’s system differs from the examples above in only one respect—the antenna and certain transmission equipment (the functional equivalent of the wire between antenna and TV set) are physically located at Aereo’s facility, not the viewer’s home. Future technologies will undoubtedly create new ways for individuals to receive and experience the broadcast television that they could have received on a traditional TV set. Such technologies may, like Aereo, involve a personal transmission from a remote, operator-owned facility. Under *Cartoon Network*, as in the common-sense view of the typical TV viewer, this distinction does not transform a private, personal transmission into a transmission “to the public.”

As the Second Circuit explained in *Cartoon Network*, Section 106 of the Copyright Act “contemplates the existence of non-public transmissions,” and an interpretation of that section that “obviates any possibility of a purely private transmission” cannot be valid. 536 F.3d at 136. The system recognized as legal in *Cartoon Network* had two salient characteristics. First, the transmissions it made were separate and unique to each subscriber; no two subscribers could view the same *transmission* even if they might be viewing the same *work*. *Id.* at 135 (Section 106 “speaks of people capable of receiving a particular ‘transmission’ or ‘performance,’ and not of the potential audience of a particular ‘work’”). Second, each “transmission” began from a source to which the viewer had lawful access—in that case, a licensed cable broadcast for which the viewer had paid. *Id.* at 136.¹² This second characteristic allowed “the right of reproduction [to] reinforce and protect the right of public performance,” *Id.* at 138, because the performance at

¹² “[W]e believe it would be inconsistent with our own transmit clause jurisprudence to consider the potential audience of an upstream transmission by a third party when determining whether a defendant’s own subsequent transmission of a performance is ‘to the public.’” 536 F.3d at 136.

issue originated from a copy that was itself subject to copyright. If the user had no legal right to access the cable broadcast, infringement would be present notwithstanding the private transmission to the viewer. *See id.*

Aereo tracks these critical characteristics in every important aspect. Each user views a separate transmission from Aereo's facility; they are never shared among customers. And the origin of each transmission is a lawful, user-made copy *taken from the public airwaves*, a source to which the user would have lawful access by set-top antenna, roof antenna, or any of the other means listed above. As in *Cartoon Network*, the presence of both these characteristics means that Aereo neither splits a single transmission among multiple subscribers en route, as did the system found to be infringing in *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594 (S.D.N.Y. 2011), nor makes transmissions from a copy that the viewer has not validly made, purchased or rented, as in *Columbia Pictures Indus., Inc. v. Redd Horne Inc.*, 568 F. Supp. 494, 500 (W.D. Pa. 1983).

Together, these conditions mean that a copyright owner is never deprived of its right to deliver a television program to a viewer. *Cartoon Network* thus preserves both the copyright owner's right to compensation and individuals' right to watch a television signal to which they have lawful access with the technology of their choosing.

Plaintiffs argue that the holding of *Cartoon Network* must be limited to time-shifted recordings "limited to the same place" where the real-time broadcast can be seen. Pltfs. Mem. 17. That erroneous interpretation is not supported by any authority, and would place unjustified limits on future television-viewing technology. Nothing in the Copyright Act or in the Second Circuit's holding transforms a private transmission into a public performance when it is viewed at the same approximate time as the original television broadcast. Nor does viewing a broadcast—live or time-shifted—in "different places, through different media and for reception

on different devices,” Pltfs. Mem. 19, alter the application of the Second Circuit’s legal conclusion.

A copyright owner has no greater rights when a viewer watches a baseball game on a portable TV from a park bench than when he watches on his living-room TV. And, limiting the holding of *Cartoon Network* to the facts of Cablevision’s particular system would, in effect, limit personal TV receiver technology to that which a court has already explicitly deemed lawful. Such an interpretation would deny to the public the benefit of advances in technology, contrary to the purpose of the Copyright Act.

Plaintiffs worry that “if all it took to create private performances were unique buffers, virtually all Internet performances of audio and video works could be deemed ‘private.’” Pltfs. Mem. 21. This overlooks the second characteristic of the Cablevision system—a lawful private performance must originate from a copy or signal to which the customer *already has* lawful access. An “Internet performance” originating from an infringing copy, or from an unlicensed cable or satellite feed, would be an infringing performance regardless of the technology used for the final transmission to the viewer, as in *Nat’l Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10, 12 (2d Cir. 2000).

III. The Scope of the Public Performance Right is Not Determined by Existing Licensing Arrangements.

Plaintiffs erroneously argue that Aereo infringes because it “competes with cable and satellite operators” and because it “does not pay . . . for the right to retransmit [plaintiffs’] content.” ABC Compl. ¶ 5. Plaintiffs also point to the absence of a statutory license for Internet retransmissions analogous to the Section 111 license for cable transmissions.¹³ Pltfs. Initial Pre-Hrg. Mem. 3. These arguments fail because they assume the conclusion, attempting to use their

¹³ 17 U.S.C. § 111.

own premise as proof. No license or payment is needed if Aereo does not create public performances, and Plaintiffs cannot assume away their burden to prove that Aereo creates public performances within the bounds of Section 106 of the Copyright Act.¹⁴

In determining the likelihood of Plaintiffs' success on the merits, *Amici* urge the Court to decline invitations to consider whether and how Aereo competes with licensed retransmitters (who perform Plaintiffs' works publicly), and the scope and structure of licenses for such performances. These can have no bearing on the only issue relevant to the merits: whether a transmission from one of Aereo's digital video recorders to a customer is a private performance outside the scope of copyright law.

"[T]he protection given to copyrights is wholly statutory." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) (quoting *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661-62 (1834)). Applying this longstanding principle, the Supreme Court has affirmed the district courts' reluctance to expand the bounds of copyright's exclusive rights:

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, 464 U.S. at 43. Activities omitted from the exclusive rights of Section 106 are not legislative oversights. They are as much part of Congressional intent, and the Copyright Act's constitutionally mandated purpose, as the activities that are defined as infringing. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The limited scope of the copyright

¹⁴ 17 U.S.C. § 106.

holder's statutory monopoly . . . reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) (“the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement. . . . the monopoly privileges that Congress has authorized . . . are limited in nature and must ultimately serve the public good.”).

It is immaterial whether Aereo “competes” with retransmitters engaged in licensed public performances. *See Feist Pubs., Inc. v. Rural Tel. Svc. Co.*, 499 U.S. 340, 349 (1991) (“It may seem unfair that much of the fruit of the compiler’s labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not ‘some unforeseen byproduct of a statutory scheme.’ . . . It is, rather, ‘the essence of copyright.’”) (citations omitted). That a product or service enabling private performances is valuable to consumers does not make it any more a public performance.

For similar reasons, the complex and technology-specific parameters of the statutory licenses for cable and satellite retransmissions, which Aereo does not rely on, cannot impact the interpretation of the public/private performance distinction, which long predates the cable and satellite technologies covered by those licenses. *Cf.* Pltfs. Pre-Hrg. Mem. 3 (“Congress has had ample opportunity to create a statutory license or another limitation to the public performance right to authorize Internet retransmissions of television broadcasts.”). The Copyright Act enumerates the exclusive rights of a copyright owner. Because copyright is purely a creation of statute, unenumerated rights are reserved to the public. Thus, the statutory licenses do not define or delimit a public performance under the technology-neutral Section 106, and the absence of a

statutory license for public performance via Internet retransmission has no relevance to private performances for which no license is needed.

Where Congress has intended to create an exclusive right to a particular use of a copyrighted work, it has done so explicitly.¹⁵ If Congress had intended to place personal transmissions from personal copies within the bounds of a public performance, it would have done so explicitly and not by enacting a statutory license for cable systems.

IV. The Remaining Factors Favor Denying an Injunction.

There are four criteria that a plaintiff's demand must meet before a court issues an injunction. *eBay v. MercExchange*, 547 U.S. 388, 391 (2006). In addition to a likelihood of success on the merits, the plaintiff must show "that he is likely to suffer irreparable injury in the absence of an injunction." *Salinger*, 607 F.3d at 80, quoting *Winter v. Natural Res. Def. Counsel*, 555 U.S. 7, 20 (2008). The court must also consider the balance of hardships between the plaintiff and defendant and issue the injunction only if the balance tips in the plaintiff's favor. *Salinger*, 607 F.3d at 80, citing *Winter*, 555 U.S. at 20; *eBay*, 547 U.S. at 391. Finally, the court must ensure that the public interest would not be disserved by the issuance of a preliminary injunction. *Salinger*, 607 F.3d at 80, citing *eBay*, 547 U.S. at 391; *accord Winter*, 555 U.S. at 20.

Contrary to much of the precedent antedating *eBay* and *Salinger*, courts may no longer assume that infringement of copyrights automatically triggers the issuance of an injunction. The prior rule was overturned by the Supreme Court's mandate in *eBay* to "reject[] invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a

¹⁵ For example, before 1995, copyright owners in sound recordings had no exclusive right of public performance. In that year, Congress enacted such a right, limited to "performance by means of a digital audio transmission" and including a statutory license for "non-interactive" uses. The Digital Performance Right in Sound Recording Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, codified at 17 U.S.C. §§106(6), 114(d)(2)(A)(i). Later enactments modified the scope of the statutory license but not the underlying right. See, e.g., The Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341, 2362-2364; The Copyright Royalty Judges Program Technical Corrections Act of 2006, Pub. L. No. 109-303, 120 Stat. 1478, 1481-82.

determination that a copyright has been infringed.” 547 U.S. at 392-93. *Salinger* followed this mandate in the Second Circuit, also holding that *eBay*’s rule should apply with equal force to copyright preliminary injunctions. *Salinger*, 607 F.3d at 77-78.

A thorough and careful consideration of each of these factors, without presumptions or “broad categories,” is essential in cases such as this where the law must be applied to new technology. *Amici* respectfully submit that, taken together, these factors weigh against injunctive relief.

A. Aereo’s Lawful Business Will Not Irreparably Harm Plaintiffs.

Plaintiffs list particular examples of harms allegedly brought about by Aereo’s conduct, and claim them as being irreparable and substantial. However, the only cognizable harms amount to Aereo’s failing to pay licensing fees Plaintiffs presume that they are entitled to. Even assuming that Plaintiffs are successful on the merits, any resulting harm can be remedied through the payment of damages, which, given the robust licensing market that Plaintiffs allege, can be reasonably calculated.

Plaintiffs allege (1) loss of advertising revenue, (2) interference with their ability to collect retransmission fees from cable operators, and (3) disruption of the potential development of future markets. Market disruptions such as these may be caused by lawful, beneficial introductions of new technologies to the marketplace. Assuming that copyright infringement is found, the harms flowing from infringement can be difficult to separate from those caused by beneficial innovation and competition. Pending litigation, the Court should not presume that the harms identified by Plaintiffs flow from infringement, or that they are not compensable through payment of damages.

1. Plaintiffs Cannot Claim Harm from Technological “Disruption.”

Amici do not deny that Aereo has the potential to challenge the established norms, business practices, and expectations of the television industry. However, such competitive challenges are not a violation of any law, and in fact are generally events to be encouraged where, as here, innovation and competition go hand in hand. For the past several decades, media incumbents have often had to adapt their business models to fit new market realities enabled by new and lawful technologies.¹⁶ Whatever marketplace Congress might assume when it passes laws regarding a particular industry, technological changes within that industry, however unexpected and potentially challenging to incumbents, are never presumptively illegal. Congress has not yet seen fit to legislate Aereo’s specific activities.

Furthermore, much of the competitive pressure of which Plaintiffs complain would take place even absent any activity by Aereo. Aereo is not unique in allowing users to view broadcast television on their computers via Internet connections. As discussed in Part II, a wide range of consumer devices help bridge the gap between over-the-air broadcast signals and computers and other networked devices. Thus, while Aereo’s product adds to the array of technologies poised to shake up the television industry, it is hardly “alone,” *Pltfs. Mem.* at 26, in providing a service that makes use of copyrighted content.

Just as Plaintiffs cannot claim infringement for activities that do not infringe a right granted to them under section 106, they cannot obtain injunctive relief to prevent harms that result from legal activities. These “harms” must be remedied through competition.

¹⁶ *Cf. Sony*, 464 U.S. 417 (1984) (home recording of television programs is a fair use); *UMG Recordings v. Shelter Capital Partners*, 667 F.3d 1022 (9th Cir. 2011) (user-generated video content site is entitled to safe harbor); *Lexmark Intern. v. Static Control Components*, 387 F. 3d 522 (6th Cir. 2004) (copyright does not protect a manufacturer's business model); *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys.*, 180 F. 3d 1072 (9th Cir. 1999) (mp3 players are legal).

2. Aereo Will Not Interfere with an Advertising-Based Business Model.

Aereo cannot cause Plaintiffs to lose advertising revenue, and even if it could, such damages are easily calculated and thus not irreparable. With regard to advertising, an Aereo viewer is situated identically to an over-the-air viewer. Neither can be directly measured for the purpose of determining the viewership of a program, but in both cases indirect methods suffice.

Plaintiffs have claimed that they cannot directly measure viewership of programs viewed by Aereo. Pltfs. Mem. at 27. This may be true. But it is also true that Plaintiffs cannot directly measure the number of televisions tuned to an over-the-air broadcast at any given time. Information on viewership generally is acquired by survey. Just as the Nielsen Company is updating its measurement techniques to account for online viewership, it is likely that prevailing survey methods can easily accommodate Aereo and similar antenna providers.¹⁷

3. Aereo Does Not Eliminate Plaintiffs' Ability to Collect Fees from Cable Systems.

Broadcasters have an obligation to provide a free service to the public in return for their use of the public airwaves. This service is traditionally supported by advertising revenue. The extent to which a broadcaster may supplement its income with payments from cable and other pay television services does not change the mandatory, free nature of a broadcaster's service.

There is neither evidence nor cause to assume that Aereo will lessen the amount copyright owners collect in retransmission fees. Cable and satellite TV service offer access to a bundle of programs and networks not available through Aereo, often packaged with telephone, broadband, or wireless service. Aereo does not offer this range of services and so does not directly compete with these incumbents. Rather, Aereo allows people to watch over-the-air

¹⁷ *Television Measurement*, The Nielsen Company, <http://www.nielsen.com/us/en/measurement/television-measurement.html>; *Online Measurement*, The Nielsen Company, <http://www.nielsen.com/us/en/measurement/online-measurement.html>.

television more conveniently, and appeals to “cord-cutters” who predominantly watch video online. These viewers do not pay cable bills and do not contribute to the retransmission fee system. Broadcasters can no more claim that Aereo viewers harm them in this regard than they can claim that over-the-air viewers do.

4. Aereo Does Not Prevent Plaintiffs from Exploiting Their Content.

Aereo’s existence in no way prevents Plaintiffs from licensing their content to new services, or from exploiting it themselves. There are already countless ways in which consumers legally make use of broadcasters’ content absent the broadcasters’ permission, such as time-shifting programming via DVRs or VCRs; space-shifting content onto their computers or tablets; using content for certain library or educational purposes; or excerpting content for the purposes of commentary or criticism. While all of these activities may reduce the amount consumers are willing to pay for content (thus depressing the licensing fees Plaintiffs can charge), those legitimate activities are not a legally cognizable harm, but simply the reality of copyright law and the market. Regardless of the economic impact these lawful activities may have, they do not interfere with copyright owners’ ability to lawfully exploit their works. Even if Plaintiffs succeed on the merits, any harms can be remedied by requiring Aereo to pay damages, *e.g.*, the fair value of a public performance license. These damages would fully account for any lost revenue.

B. The Public Interest Would Not Be Served by Shutting Down an Innovative New Service.

In considering whether granting an injunction would harm the public interest, the Court should consider the public’s stake in maintaining copyright law’s balance between maintaining incentives for creativity and public access to the products of that creativity. The Court should also take into account the public policies expressed by Congress, the Department of Justice, and

the Federal Communications Commission that favor access to free over-the-air television broadcasting and vigorous competition in the emerging market for online video.

1. The Public Interest in Copyright Law Would Not Be Served by an Injunction.

Plaintiffs claim that the public interest begins and ends with the *ivi* court's maxim that "It is axiomatic that an infringer of copyright cannot complain about the loss of ability to offer its infringing product." Pltfs. Mem. at 34; *ivi*, 765 F. Supp. 2d at 621. Contrary to Plaintiffs' claims, an axiom such as this cannot suffice to measure the public interest in a copyright injunction.

This analysis of the public interest is the sort of "broad characterization" that *eBay* and *Salinger* caution against. If a general presumption of irreparable harm is contrary to the equitable principles underlying injunctive relief, a general presumption that a category of injunctions is always in the public interest must also be contrary to these principles. If the decision of whether or not to issue an injunction "rests within the equitable discretion of the district courts, and . . . such discretion must be exercised consistent with traditional principles of equity," then the district court's findings on the public interest cannot withstand review. *See eBay*, 547 U.S. at 394. If the decision in *eBay* is to mean anything, it must mean that equity cannot be decided through axioms.

The quoted language in the *ivi* court's public interest analysis comes from *Apple Computer, Inc. v. Franklin Computer Corp.*, a Third Circuit case long predating the *eBay* and *Winter* decisions. 714 F.2d 1240 (3d Cir. 1983). Not only is the categorical nature of its public interest analysis suspect in light of these later decisions, but *Apple* also applied the now-impermissible presumption of irreparable harm in deciding to issue an injunction. Moreover, the *Apple* court links its determination on the public interest to that presumption. *Apple*, 714 F.2d at 1254 ("Normally, however, the public interest underlying the copyright law requires a

presumption of irreparable harm.”). Considering the explicit overruling of the irreparable harm presumption, a public interest determination that rests upon that presumption cannot be sustained.

The public interest in the enforcement of copyright law consists of more than the interests of copyright holders generally, and cannot be considered coextensive with the interests of copyright-holding plaintiffs. In fact, copyright law itself operates through a balance between the interests of the author (being compensated for creating the work) and the interests of the public (having the ability to access the work):

The public’s interest in free expression, however, is significant and is distinct from the parties’ speech interests. “By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public’s interest in receiving information.” Every injunction issued before a final adjudication on the merits risks enjoining speech protected by the First Amendment.

Salinger, 607 F.3d at 82 (citation omitted). The public interest is not merely in protecting as strenuously as possible the outer boundaries of Plaintiffs’ copyrights, nor even in protecting the legitimate interests of Defendant’s ability to do business, but in the public’s ability to access lawful content. *Aiken*, 422 U.S. at 156.

The separate injunction factors mean that the public interest and the parties’ interest must be considered independently. The public has an interest in access to television broadcasts. Enjoining Aereo’s operation would not only harm the interests of Aereo’s current customers, but also the general public whose access to other new means of accessing broadcast television and online video would also be limited. Members of the public both current and future have a strong interest in not only a competitive video distribution marketplace, but also broad access to the marketplace of ideas.

2. The Public Interest in Promoting Public Reception of Broadcasting Would Be Harmed by an Injunction.

Broadcasters have an obligation to serve the public. “[B]roadcast frequencies are limited and, therefore, they have been necessarily considered a public trust.” *Red Lion Broad. Co. v. FCC*, 395 US 367 (1969) (citing S. Rep. No. 86-562, at 8-9 (1959)). The failure of broadcasters to come to terms with the burdens as well as the benefits of their office is nothing new. As future Chief Justice Warren Burger lamented:

A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot . . . [T]he broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust.

Office of Communication of United Church of Christ v. FCC, 359 F. 2d 994, 1003 (D.C. Cir. 1966). To fulfill their public trust broadcasters are obligated to provide a free service to the public. Indeed, the Supreme Court has held that “preserving the benefits of *free*, over-the-air local broadcast television” is an important government interest. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997) (emphasis added). By providing an antenna to viewers, Aereo does nothing more than make it easier for viewers to access a broadcaster’s free service. By making free TV better Aereo improves and does not disrupt the television industry, and helps carry out the important public goal of preserving the ability of viewers to watch free-to-air TV.

3. The Public Interest in Competition and Innovation in the Video Market Would Be Harmed by an Injunction.

The creation and development of Online Video Distributors (OVDs) serves vital public interests. As both the Department of Justice and the Federal Communications Commission have

observed,¹⁸ OVDs are a promising source of competition in a video distribution market subject to increasing horizontal and vertical integration. *See* Competitive Impact Statement of the Department of Justice, *United States v. Comcast Corp.*, 1:11-cv-00106, (D.C. Cir. Jan. 18, 2011) (“DoJ Analysis”) 11-30; Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion & Order*, 26 FCC Rcd 4238 (2011) (“FCC Analysis”) ¶¶ 60-109.¹⁹ Additional small competitors in the form of OVDs may lead to new networks for consumers and markets for new programming producers. A preliminary injunction against Aereo would not only deprive consumers and the competitive landscape of a new entrant, it also would chill other potential startups and their investors from entering the market.

Both the Justice Department and the FCC have affirmed the critical role that OVDs can play in furthering competition in video distribution. The Justice Department recently conditioned the merger of Comcast and NBC upon the joint entity supplying programming to OVD competitors. This condition exists because the Justice Department recognized (1) that OVDs provided beneficial competition to the video distribution market, and (2) that incumbent video distributors and content producers would both have incentives to discriminate against OVDs. DoJ Analysis 11.

In noting the public benefits of OVDs, the Justice Department found that they were meeting increased consumer demand for on-demand viewing, and that the competitive pressure from OVDs was stimulating incumbent video distributors such as cable networks to offer more

¹⁸ For convenience, this subsection uses the terminology adopted by the Department of Justice and the Federal Communications Commission. Classifying Aereo as an “OVD” for these purposes means only that it enables viewers to watch video via the Internet, not that it is a “distributor” for copyright purposes.

¹⁹ The FCC Analysis is available at <http://bit.ly/erx8Jr> (http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf), and the DoJ Analysis is available at <http://bit.ly/fP0dPY> (<http://www.justice.gov/atr/cases/f266100/266158.pdf>).

on-demand choices to compete. DoJ Analysis 15. New OVDs entering the market not only broaden the number of competitors for video distribution, they also expand the field for methods and technologies for providing content to consumers. The Justice Department states that among OVDs, “[n]ew developments, products, and models are announced on almost a daily basis by companies seeking to satisfy consumer demand.” DoJ Analysis 15-16. The FCC likewise states that OVDs “can provide and promote more programming choices, viewing flexibility, technological innovation and lower prices.” FCC Analysis ¶ 78. Preventing more OVDs from reaching the market would therefore

have a substantial anticompetitive effect on consumers and the market. Because [an incumbent video distributor] would face less competition from other video programming distributors, it would be less constrained in its pricing decisions and have a reduced incentive to innovate. As a result, consumers likely would be forced to pay higher prices to obtain their video content or receive fewer benefits of innovation. They would also have fewer choices in the types of content and providers to which they would have access, and there would be lower levels of investment, less experimentation with new models of delivering content, and less diversity in the types and range of product offerings.

DoJ Analysis 27. Despite their currently-small market share, the Justice Department found that the emergence and growth of OVDs, of which Aereo is but one example, was extremely significant, saying that OVDs “represent the most likely prospect for successful competitive entry into the existing video programming distribution market.” DoJ Analysis 28.

The FCC recognizes a further public interest in the spread of OVDs. In addition to the benefits to competition and innovation, a robust OVD market would serve an important public interest in establishing a nationwide broadband infrastructure. In its Order on the Comcast/NBC merger, the FCC said that, in addition to enhancing available content, lowering prices, and driving innovation, “[a] robust OVD market also will encourage broadband adoption, consistent with the goals of the Commission’s National Broadband Plan.” FCC Analysis ¶ 62. By stimulating demand for broadband, OVDs create market incentives for Internet access providers

to bring the attendant benefits of broadband connectivity to communities that may currently lack it.

If merely colorable disputes about the complexities of copyright can prevent a business from reaching the market pending lengthy litigation, companies would be discouraged from going beyond “traditional” methods of video distribution, leaving the market in the hands of a limited number of incumbents.

CONCLUSION

In ruling on the preliminary injunction motion, *amici* urge the Court to evaluate Aereo’s system from the point of view of television viewers and their legal and customary rights, and not be swayed by imprecations to judicially expand the scope of copyright simply to capture the value created by a new, user-empowering technology. *Amici* also request that the Court give thorough and independent consideration to each of the injunction factors, guided by the principle that copyright seeks a balance between the artist’s incentives and the public’s right.

Dated: May 23, 2012

Respectfully submitted,

By: /s/ Mitchell L. Stoltz
Mitchell L. Stoltz (*Pro Hac Vice*)
Kurt Opsahl
Corynne McSherry
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Tel: (415) 436-9333
mitch@eff.org

Gigi B. Sohn
John Bergmayer
Sherwin Siy
PUBLIC KNOWLEDGE
1818 N Street, NW
Suite 410
Washington, DC 20036
Tel: (202) 861-0020
john@publicknowledge.org

*Attorneys for Amici Curiae Electronic Frontier
Foundation and Public Knowledge*

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States District Court, Southern District of New York by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: May 23, 2012

By: /s/ Mitchell L. Stoltz
Mitchell L. Stoltz (*Pro Hac Vice*)
Kurt Opsahl
Corynne McSherry
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Tel: (415) 436-9333
mitch@eff.org