

12-2786-cv 12-2807-cv

United States Court of Appeals
for the
Second Circuit

WNET, THIRTEEN, FOX TELEVISION STATIONS, INC.,
TWENTIETH CENTURY FOX FILM CORPORATION, WPIX, INC.,
UNIVISION TELEVISION GROUP, INC., THE UNIVISION NETWORK
LIMITED PARTNERSHIP and PUBLIC BROADCASTING SERVICE,
Plaintiffs-Counter-Defendants-Appellants,

- v. -

AEREO, INCORPORATED, f/k/a BAMBOOM LABS, INCORPORATED,
Defendant-Counter-Claimant-Appellee.

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF *AMICUS CURIAE* RALPH OMAN, FORMER REGISTER
OF COPYRIGHTS OF THE UNITED STATES**

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NETWORK TELEVISION, LLC, TELEMUNDO NETWORK GROUP LLC
and WNJU-TV BROADCASTING LLC,

Plaintiffs-Counter-Defendants-Appellants,

- v. -

AEREO, INC.,

Defendant-Counter-Claimant-Appellee.

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I. STATEMENT OF INTEREST

I, Ralph Oman, am one of only two living former U.S. Registers of Copyrights.¹ Prior to my tenure as Register (from 1985 to 1993), I was Chief Minority Counsel on the Subcommittee on Patents, Trademarks and Copyrights, from 1975 to 1977. During that time, I was personally involved in the drafting and passage of what became the Copyright Act of 1976, 17 U.S.C. §§ 101, *et seq.* (the “Copyright Act”). From 1982 to 1985, I served as Chief Counsel of that reconstituted Subcommittee, then known as the Subcommittee on Patents, Copyrights and Trademarks.

I have a compelling interest in ensuring that the purpose of several provisions of the Copyright Act, including those with which I had direct involvement in my capacity as Chief Minority Counsel and Register, are explained and put in their proper context for purposes of this appeal. As a

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and this Court’s Rule 29.1(b), I am the sole author of this brief and no counsel for a party authored this brief in whole or in part. I purposely did not even read any of the appellants’ briefs in this matter prior to the time of this submission. I did, however, receive and adopt certain editorial suggestions from counsel to the appellants in 12-2807-cv. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than the amicus curiae contributed money intended to fund preparation or submission of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.

former Register of Copyrights and amicus in the case, I care deeply about how the Copyright Act is interpreted by the courts.

The District Court's conclusion that *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"), can be applied to other "performances" beyond the narrow context of the remote-storage DVR system ("RS-DVR") in that case is incorrect. It is inconsistent with sound principles of copyright law, public policy and common sense to find that an unauthorized television retransmission service like Aereo is not engaged in a public performance. It also conflicts with the intent of Congress, as expressed both by the plain language of the Copyright Act and its legislative history, with which I was directly involved in connection with the Senate Committee Report that accompanied its enactment.

I submit this *amicus* brief in the hope that it will assist this Court in addressing a serious threat to the goals of the Copyright Act. I support the view that the order of the District Court should be reversed because Aereo's unlicensed retransmissions of Appellants' broadcast programming over the Internet are, in fact, performances to the public under Section 106(4) of the Copyright Act.

II. ARGUMENT

A. Introduction

There can be no serious dispute as to whether rights under the Copyright Act are broad, subject only to specific, narrow limitations enacted by Congress and that new developments in technology are not supposed to be able to truncate those rights. That alone, even in a close case, should be sufficient to confine prior precedents like *Cablevision* to their facts and the circumstances that gave rise to the litigation.

This case presents the issue of whether a cleverly-engineered television retransmission service can side-step the carefully considered protections for broadcasting Congress built into the Copyright Act. Those protections are embedded in a number of provisions, such as Section 106(4) (exclusive right of public performance), Section 101 (defining public performance), Section 111(c) (compulsory license for cable retransmissions) and Section 119 (compulsory license for satellite retransmissions).

The tension between technology and copyright law in general is not new. It has been with us since the beginnings of copyright law and the widespread use of the printing press. Congress, when it enacted the present Copyright Act, both addressed existing conflicts and anticipated future

technological developments. It took pains to ensure that the statute was technology neutral and emphasized that the broad rights it intended authors to enjoy should not be circumvented and infringed by new technologies.

Examples of the concept of technological neutrality that pervade the Copyright Act include the definition of a copyrighted work itself in Section 102(a) (work is distinct from a copy and is protectable when it is fixed in any medium “now known or later developed”) and the definition of a copy in Section 101 (copies are distinct from works and are “material objects . . . in which a work is fixed by any method now known or later developed”). Most significant, for purposes of this case, Congress adopted a broad definition of a public performance in Section 101 to include transmissions to the public by “any device or process.” 17 U.S.C. §§ 101, 102(a); *see Copyright and New Technologies: Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the H. Comm. on the Judiciary, 99th Cong. 4 (1985)* (“Since the Copyright Act’s concept of public performance is not technology-specific, the act covers all of these new distribution services.”) (statement of Ralph Oman, Register of Copyrights and Assistant Librarian of Congress).

The Copyright Act was drafted to protect works, not the medium through which they are expressed. That is why Congress drew a distinction

between “works,” 17 U.S.C. § 102(a), and performances or displays of works. 17 U.S.C. §§ 106(4) & (5). The two are not the same and should not be conflated. *See* PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.7.2 (3d ed. 2005 & Supp. 2012) (“The error in the Second Circuit’s construction of the transmit clause was to treat ‘transmissions’ and ‘performance’ as synonymous, where the Act clearly treats them as distinct[.]”); *cf.* *Cablevision*, 536 F.3d at 135 (“[The transmit] clause speaks of people capable of receiving a particular ‘transmission’ or ‘performance,’ and not of the potential audience of a particular ‘work.’”).

Indisputably, Congress drafted the Copyright Act to prevent the creative efforts of authors from being usurped by new technologies. That core principle is at the heart of the Copyright Act. Congressional intent would be undercut by any decision that would sanction the use of technologies which could be used indirectly to undermine its goals. Congress enacted a forward-looking statute that would protect those who create precisely so they have incentives to create.

A technologically neutral respect for authors’ rights is why we, as a country, enjoy the most popular and singularly creative store of copyrighted content in the world. That is especially true when it comes to television programming. Quite simply, the unprecedented popularity of the United

States entertainment industry could not exist without the robust copyright protection Congress specifically intended when it enacted our present copyright law.

The District Court should not have applied *Cablevision* to protect Aereo because, in doing so, it extended the *Cablevision* holding well beyond its limited facts to essentially create an exception Congress did not intend to the broad grant of copyrights. The District Court's opinion elevated form over function. In so doing, it committed a fundamental error of law by missing the bigger picture because it mistakenly credited Aereo's *Cablevision*-driven defenses to infringement.

I express no opinion as to whether the decision in *Cablevision* was properly decided. I must note, however, that there is at least one troubling aspect to the *Cablevision* opinion. It suggests that an entity involved in “designing, housing, and maintaining a system that exists only to produce a copy” does not have sufficient “volitional conduct” to be directly liable for violating the exclusive right of reproduction. *Cablevision*, 536 F.3d at 131. That is another example of permitting technology to triumph over congressional intent.

It is clear, for example, that copy shop owners are directly liable for making copies at the request of their patrons. *See, e.g., Princeton Univ.*

Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1386 (6th Cir. 1996). To be consistent with that entirely correct analysis, if, instead of a subscriber sending an electronic instruction to Cablevision or Aereo to make a copy by pressing a “record” button, the customer had sent an email to one of their employees with instructions to make a copy and transmit a performance, there would be no question as to the direct liability of Cablevision or Aereo. Copyright liability should not turn on minor technical features as to whether “record” instructions are communicated by verbal commands, pressing a button, sending an email or as a result of automated functions.

Regardless of one’s view as to whether *Cablevision* is analytically sound, it cannot be applied to Aereo’s retransmission business in a manner consistent with my understanding of Copyright Office policy or the purposes underlying the Copyright Act.

As someone who grappled with very similar issues years ago, as they were percolating through the courts and Congress, I view the question presented in this case as straightforward: Is Aereo’s streaming of television programming to its subscribers over the Internet a public performance as Congress intended that concept to be defined? The answer plainly is yes.

The feature of the Aereo technology challenged on this appeal is the one which allows an Aereo subscriber to stream broadcasts over the Internet in real-time. Aereo also offers a so-called remote DVR service, but based on my review of the public record, that seems to me to be a commercial afterthought. The core of Aereo's business plan is the real-time retransmissions of broadcast television signals and it is on that issue that Congress spoke most clearly. To the extent Aereo offers an unauthorized, but functional equivalent of a real-time retransmission service, that clearly amounts to a public performance as defined by Congress. *Cablevision* was based on a very different service essentially offering the equivalent to consumers of a remotely-located VCR/DVR. It has no application to real-time retransmissions. To permit Aereo to continue to offer that retransmission service is outside any reasonable interpretation of what this Court could have intended when it decided *Cablevision* and is contrary to Congress' intention.

B. The Copyright Act Should Be Interpreted In Keeping With The Act's Broad Objectives.

The relevant statutory provision, Section 101 of the Copyright Act, is unambiguous. It plainly covers transmissions by "any device or process," language that encompasses Aereo's retransmission service for all the reasons stated in the Appellants' briefs. 17 U.S.C. § 101 (the "Transmit Clause");

see Harrison v. PPG Indus., Inc., 446 U.S. 578, 589 (1980) (noting “expansive” sweep of “any” in statute “offers no indication whatever that Congress intended [a] limiting construction”); *United States v. Turkette*, 452 U.S. 576, 580 (1981) (“any person” and “any individual” admit of “no restriction upon the associations embraced by the definition”).

To the extent there is any ambiguity in the application of the plain language of the Copyright Act to a service like Aereo’s, I respectfully urge the courts to do as little damage as possible to the basic concepts of the copyright law by finding in favor of the copyright holder (absent, of course, a statutory exception) when it is reasonable to do so. Any countervailing position is hostile to the overall purposes and goals of copyright. Congress intentionally made the exclusive rights of copyright owners to be as broad and exclusive as possible, precisely to avoid the kind of game-playing Aereo engages in. Had Congress intended to curtail the level of protection afforded to copyright owners, it would have to do so expressly in a statutory exception or limitation. But, it emphatically has refused to do so with respect to Internet, or any other, retransmissions of over-the-air broadcast signals.

It is instructive to look at the legislative history of the Copyright Act, with which I have had a first-hand view and which is extraordinarily well-documented. See *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 552 (1985) (“The Copyright Act represents the culmination of a major legislative reexamination of copyright doctrine.”); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 156 (1985) (uniquely informative legislative history of Copyright Act can aid in “understanding of the phrase” in dispute).

Forty years ago, the courts tried to shoehorn what was then new cable television technology into the Copyright Act of 1909. For example, in 1968 and 1974, two Supreme Court decisions held that cable systems were not “performing” broadcast programming when retransmitting that programming to their customers, and, therefore, they were not infringing any copyrights under the 1909 law. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974) (retransmission of distant television station signals); *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968) (retransmission of local television station signals). Congress viewed this result as essentially giving the cable systems a free pass that allowed them to retransmit broadcast television programming without incurring any costs for that programming.

In the Copyright Act that followed these decisions, Congress dealt decisively, in a technologically-neutral way, with retransmissions using community antenna technology. It determined that a CATV company—which built an antenna on the top of a mountain in rural areas to intercept and retransmit, over a cable wire to its customers in the valley below, the copyrighted over-the-air broadcasts of television programs—was publicly performing that programming. *See* S. REP. NO. 94-473 at 78-82 (1975) (discussing how community antenna or cable providers that do not comply with the compulsory license created by the Copyright Act infringe broadcaster’s rights of public performance); REGISTER OF COPYRIGHTS, SUPPLEMENTARY REG.’S REPORT ON THE GEN. REVISION OF THE U.S. COPYRIGHT LAW, at 42 (H. Comm. Print 1965) (“[W]e believe that what community antenna operators are doing represents a performance to the public of the copyright owner’s work.”); H.R. REP. NO. 94-1476, at 89 (1976) (“[C]able systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and . . . copyright royalties should be paid by cable operators to the creators of such programs.”). Had the technology at the time required the CATV company to install an individual antenna for every customer in the valley below or even retransmit through a single copy made for each

individual, rather than using a single antenna serving the entire community or a single “master” copy, it is inconceivable Congress still would not have viewed that retransmission business to be making a public performance. Indeed, that it defined performances to include any device or process means that it actually anticipated such variations in transmission technology and included them as performances to the public. To be plain, it was not the means of retransmission but rather the retransmission itself that Congress cared about. That is what caused the harm to copyright owners.

To ensure that all such retransmissions were within the Transmit Clause, Congress included, in the governing provision at issue in this case, the broadest, technologically-neutral language conceivable – transmission by “any device or process” – to define the scope of the public performance right. 17 U.S.C. § 101; *See Harrison*, 446 U.S. at 589; *Turkette*, 452 U.S. at 580.

Now, thirty-six years later, Aereo introduces a different technology that serves the same retransmission purposes. It argues, based on *Cablevision*, that individual antennae and subscriber-associated copies change the fundamental choices Congress made in the copyright equation. That cannot be correct because those technical contrivances do not and cannot change the fundamental math that underlies that equation. Judge

Buchwald, in her opinion in *ivi*, affirmed just last month by this Court, made clear why Aereo is engaged in a public performance, as a matter of law, common sense and what Congress plainly intended:

It is ‘axiomatic . . . that in fulfilling our responsibility in interpreting legislation, we are not guided by a single sentence or member of the sentence but (rather) look to the provisions of the law, and to its object and policy.’ *Langhorne v. Ashcroft*, 377 F.3d 175, 180 (2d Cir. 2004) (parentheses in original) (quoting *Richards v. United States*, 369 U.S. 1, 11, 82 S. Ct. 585, 7 L. Ed. 492 (1962)). The need to analyze congressional objectives and policy is particularly important when evaluating the limited exceptions to the public performance right found in Section 111. . . . [W]e are ‘obliged to take into account’ the ‘common sense’ of the statute and ‘practical considerations of the suggested interpretations.’ *Infinity Broadcasting Corp. v. Kirkwood*, 63 F. Supp. 2d 420, 426 (S.D.N.Y. 1999) (quoting *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 127 (2d Cir. 1982)). In that case, Judge Kaplan declined to allow a businessman engaged in the retransmission of copyrighted materials to seek refuge under the carrier exception, noting that to hold otherwise would ‘threaten considerable mischief’ in a world undergoing an ‘era of rapid technological change’ and ‘would do violence to a fundamental premise of the 1976 revision to the copyright law.’ *Id.*

WPIX, Inc. v. ivi, Inc., 765 F. Supp. 2d 594, 603 (S.D.N.Y. 2011).

This Court should apply the same fundamental approach to this case in deciding whether or not the Aereo transmissions constitute a public performance, just as it did when it affirmed Judge Buchwald’s sound reasoning in *WPIX, Inc. v. ivi, Inc.*, ___ F.3d ___, 2012 WL 3645304 (2d Cir.

Aug. 27, 2012). It took pains to make the larger purpose of the Copyright Act clear in its *ivi* decision.

In the opinion resolving the *ivi* appeal, Judge Chin accurately recounted the battle in the late 1980s over whether or not satellite services qualified for the compulsory license under Section 111 of the Copyright Act. *See id.* at *6-7 As the Register of Copyrights at the time, I strongly advocated a literal reading of the statute in the definition of “cable system.” *See REGISTER OF COPYRIGHTS, THE CABLE AND SATELLITE CARRIER COMPULSORY LICENSES: AN OVERVIEW AND ANALYSIS*, at 54 (1992) (“[T]he Copyright Office issued a final regulation on January 29, 1992 affirming the position . . . that satellite carriers . . . were not eligible for the cable compulsory license.”). I did so because the exclusive right of public performance granted to copyright owners was meant to be broad, and the compulsory license was meant to be a narrowly drawn exception to that right. The view I advocated in my official capacity as well as on behalf of other affected individuals and industries ultimately prevailed. Congress enacted a stand-alone license for the satellite services—Section 119 of the Copyright Act.²

² That same approach is reflected by the Copyright Office’s “consistent and ardent,” *ivi*, 765 F. Supp.2d at 617, position against an exception to the public performance right for Internet streaming.

This Court in *ivi* provided a very thoughtful analysis of the underlying purpose of the Copyright Act, and how the courts, whenever possible, should defer to that broader purpose in construing the Copyright Act.

To support its narrow reading of the statute, the District Court in *ivi* noted that the expert agency—that is, the Copyright Office—agreed with its reading: “It is the unwavering opinion of the Copyright Office that a distributor of broadcast programming over the Internet does not qualify for a compulsory license as a cable system under Section 111.” *ivi*, 785 F. Supp. 2d at 604.

This Court in the *ivi* appeal also noted that “[t]he [Copyright] Office continues to oppose an Internet statutory license that would permit any website on the Internet to retransmit television programming without the consent of the copyright owner.” *ivi*, 2012 WL 3645304, at *7 (quoting U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT 188 (2008)). Along the same lines, the court quoted a Copyright Office regulation, *see id.*, which was issued while I was Register, and which states: “As the owners of exclusive rights in a work, copyright holders possess a property grant which entitles them to negotiate and bargain for use of the work. This property right is limited only in well articulated exceptions appearing in the statute.” *Cable*

Compulsory License; Definitions of Cable System, 57 Fed. Reg. 3284, 3293 (Jan. 29, 1992).

ivi is one-hundred percent accurate in stating that the exclusive rights under the Copyright Act are broad, that any derogations from them are narrow and, furthermore, that exceptions should be granted, if at all, only by Congress, the body institutionally able to balance the delicate interests of the sometimes-competing interests involved in high-stakes copyright matters. The logic of this Court in *ivi* applies to whether the Aereo retransmissions constitute a public performance. To contend that retransmissions are not a public performance is not a minor technical reinterpretation of the Copyright Act. It is nothing less than a major new exception, which could permit streaming of copyrighted works over the Internet.³

³ Congress has specifically acted with respect to Internet transmissions of digital audio content. When Congress acted in 1995 to establish a digital audio transmission right for sound recordings, it amended Section 114 of the Copyright Act. Section 114 creates legislative exemptions to and compulsory licenses for the exercise of that right. *See, e.g.*, 17 U.S.C. § 114(d)(2) (statutory licensing of certain transmissions of sound recordings); *see also Performers' and Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary*, 103d Cong. 4 (1993) (“[I]f you cannot . . . recognize broad public performance rights [in sound recordings], then Congress should consider treating digital transmissions differently and create a digital transmission right that grants the owner of the sound recording the exclusive right to authorize or prevent the transmission.”) (statement of Ralph Oman, Register of Copyrights, Library of Congress).

If Congress wants to permit Internet streaming, it is free to do so, but the burden should not be placed on businesses in Appellants' circumstances to get some sort of congressional reaffirmation that the Transmit Clause applies to Internet retransmissions. The Copyright Act was drafted to operate to grant such businesses protection in the first instance and, as a practical matter, from having spent ten years on Senate staff, most of them on the Judiciary Committee's Subcommittee on Patents, Copyrights and Trademarks, I recognize that it is much easier to stop legislation than to move it through the process. The courts should not saddle the copyright owner with having to convince Congress to act to prohibit unauthorized Internet retransmissions. Whenever possible, when the law is ambiguous or silent on the issue at bar, the courts should let those who want to market new technologies carry the burden of persuasion that a new exception to the broad rights enacted by Congress should be established. That is especially so if that technology poses grave dangers to the exclusive rights that Congress has given copyright owners. Commercial exploiters of new technologies should be required to convince Congress to sanction a new delivery system and/or exempt it from copyright liability. That is what Congress intended.

Internet transmissions of sound recordings are within the rights of copyright owners subject to the Section 114 statutory license.

As Justice Blackman noted in his dissent in *Sony Corporation of America v. Universal City Studios, Inc.*:

Like so many other problems created by the interaction of copyright law with a new technology, there can be no really satisfactory solution to the problem presented here, until Congress acts. But in the absence of a congressional solution, courts cannot avoid difficult problems by refusing to apply the law. We must take the Copyright Act as we find it and *do as little damage as possible to traditional copyright principles until the Congress legislates*. [emphasis supplied].

464 U.S. 417, 500 (1984) (internal quotations omitted).

In this case, the Court should “do as little damage as possible to traditional copyright principles” by finding in favor of the authors and enjoining the infringing activity. Congress can intervene to clarify the law if it chooses.

C. Cablevision Should Be Limited To Its Facts.

Judge Nathan expressed her frustration in the opening paragraph of her opinion:

But for *Cablevision's* express holding regarding the meaning of the provision of the Copyright Act in issue here—the transmit clause—Plaintiffs would likely prevail on their request for a preliminary injunction. However, in light of that decision, this Court concludes that it is bound to DENY Plaintiffs' request.

Am. Broad. Cos., Inc. v. Aereo, Inc., Nos. 12 Civ. 1540 (AJN), 12 Civ. 1543, 2012 WL 2848158, at *1 (S.D.N.Y. July 11, 2012).

The District Court in this case, feeling constrained by the *Cablevision* case, essentially blessed what is tantamount to a new exemption by adhering to an overly-literal reading of *Cablevision*. This Court could not have intended the quite limited facts before it in *Cablevision* to be applied in a very different context, such as Aereo's retransmission service, given that Congress, with the Copyright Office's support, expressly prohibited unauthorized retransmission in the Transmit Clause.

In the *Cablevision* case, without specific direction from the statute, this Court permitted a remote DVR, controlled by the subscriber, to make temporary copies of the broadcaster's programming so the subscriber could play them back at a later time. In the Court's opinion, that time-shifting scenario did not implicate the public performance right, and it concluded that the subscriber, if anyone, had acted to cause the reproductions to be made.

Just as it did in the *ivi* case, the Second Circuit should construe narrowly the limited exception to the exclusive right it created in *Cablevision*. In this case, Aereo goes well beyond the technology at issue in *Cablevision*. If it prevails, that would bring about the result this Court worried about: “[p]laintiff’s desire to create original television programming surely would be dampened if their creative works could be copied and streamed over the Internet in derogation of their exclusive property rights.” *ivi*, 2012 WL 3645304 at *11. Yet that free pass is exactly what Aereo has asked this Court to sanction in this case.

The Aereo system was not designed for the purpose of speed, convenience and efficiency. With its thousands of dime-sized antennae and its electronic loop-the-loops, it appears to have been designed by a copyright lawyer peering over the shoulder of an engineer to exploit what appeared to Aereo to be a loophole in the law and shoehorn the Aereo business model into the *Cablevision* decision. It is contrary to what I have spent my career trying to prevent, by advocating for the system that Congress enacted—broad copyrights that protect authors and incentivize creative activities with narrow exceptions to account for competing public interests. Aereo’s commercial retransmission service simply does not come within any exception, recognized by Congress or otherwise.

III. CONCLUSION

I am persuaded that Appellants have the stronger—indeed, the only copyright-principled—argument. That Aereo interposes copies in an Internet retransmission system should make no difference in a sound copyright analysis. The transmissions by Aereo to its subscribers are public performances and are infringing under the plain text of the Transmit Clause and the intent of Congress, as it was informed by the Copyright Office, in the process of enacting the Copyright Act. If Congress wants to exempt Internet retransmissions based on the use of copies, it is for Congress to do so.

For all these reasons, I support the position of Appellants that the order of the District Court should be reversed.

Dated: September 21, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned certifies that:

1. The brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4527 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as determined by the word processing system used to generate the brief.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared proportionally spaced typeface using Microsoft Office Word 97 in 14 point, Times New Roman font.

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