Nos. 13-55156, 13-55157 and 13-55228

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOX TELEVISION STATIONS, INC., et al.,

Plaintiffs-Appellees,

v.

AEREOKILLER LLC, et al.,

Defendants-Appellants.

(*Caption Continued on Inside Cover*)

On Appeal from the United States District Court for the Central District of California, Nos. CV 12-06921-GW (JCx); CV 12-06950-GW (JCx)
Hon. George H. Wu, U.S. District Judge

BRIEF *AMICUS CURIAE* OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF REVERSAL

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March 22, 2013

(*Caption Continued from Front Cover*)

NBCUNIVERSAL MEDIA LLC, et al.,

Plaintiffs-Appellees,

v.

AEREOKILLER LLC, et al.,

Defendants-Appellants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the Computer & Communications Industry Association states that it has no parent corporation and no publicly held corporation has an ownership stake of 10% or more in it.

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INTEREST OF *AMICUS*[1]

The Computer & Communications Industry Association ("CCIA") represents more than twenty large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services—companies that collectively generate more than $250 billion in annual revenues.[2] Members include many leaders in the Internet sector, including Google, Yahoo!, Facebook, eBay, and Pandora.

It is no exaggeration to say that the proper interpretation of the Transmit Clause is critical to the future of the Internet. The legal clarity provided by the Second Circuit's opinion in *Cablevision* and its progeny has allowed the CCIA's members to invest significant resources in the development and operation of a wide variety of services, including cloud computing.[3] Accordingly, the CCIA has participated by filing briefs *amici*

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

[2] A complete list of CCIA members is available at http://www.ccianet.org/index.asp?bid=11.

[3] "Cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing

curiae in many of the cases addressing the interpretation of the Transmit Clause, including *American Broadcasting Companies v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012), and *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"). By casting aside *Cablevision* and the unbroken line of cases that have followed it, the District Court below has jeopardized multiple industries far removed from television.

INTRODUCTION

The Internet comprises computers that "transmit or otherwise communicate" information. 17 U.S.C. § 101 (Transmit Clause of the definition of "publicly"). The Copyright Act provides that "to transmit or otherwise communicate" a copyrighted work "*to the public*" may intrude on the exclusive rights granted to copyright owners. *Id*. Private performances, in contrast, are not subject to control by copyright owners. Accordingly, a great deal hangs on a consistent, principled judicial interpretation of "to the

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resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction." *See* Peter Mell & Timothy Grance, Recommendations of the Nat'l Inst. of Standards & Tech., U.S. Dep't of Commerce, NIST Special Publication 800-145: The NIST Definition of Cloud Computing, at 2 (Sept. 2011), *available at* http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf.

public," as it marks the boundary between public and private performances on the Internet.

The Second Circuit's ruling in *Cablevision* provided critical guidance regarding the Transmit Clause: "[I]t is evident that the transmit clause directs us to examine who precisely is 'capable of receiving' a particular transmission of a performance." *Cablevision*, 536 F.3d at 135. The Court also confirmed what the statute itself says, namely, that "the transmit clause obviously contemplates the existence of non-public transmissions; if it did not, Congress would have stopped drafting that clause after 'performance.'" *Id.* at 136. In the years since *Cablevision*, multiple cases have endorsed and followed these central holdings regarding the Transmit Clause. *See United States v. Am. Soc'y of Composers, Authors & Publishers*, 627 F.3d 64, 75 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 366 (2011) (applying *Cablevision*); *ABC v. Aereo*, 874 F. Supp. 2d at 382-96 (same); *In re Application of Cellco P'ship*, 663 F. Supp. 2d 363, 371-74 (S.D.N.Y. 2009) (same).

This unanimous jurisprudence establishes that when an Internet user accesses her own digital files (whether music, video, text, or software) over the Internet, the resulting transmission is not "to the public." Innovators and investors alike have relied on this in bringing new Internet products and services to market. For example, several companies (including Google and

Amazon) have launched "personal music locker" services, allowing individuals to upload their personal music collections "to the cloud" and enabling them to transmit that music back to their own computers, phones, and tablets when, where, and how they find most convenient.

The ruling below, however, upends this understanding, jeopardizing far more interests than just those of Appellant Aereokiller LLC ("Aereokiller"). Given their sustained attack on *Cablevision* in previous cases, Appellees will likely urge this Court to render *Cablevision* a dead letter or to make its central reasoning subject to ad hoc, industry-specific exceptions. Acceptance of these misguided arguments (which are better addressed to Congress than to this Court) would destabilize settled expectations and investment for a wide array of Internet industries.

Every time a consumer uses an Internet cloud-based backup system or online storage locker, both the consumer and the company providing that system rely on *Cablevision*'s clear holdings that (1) it is the user—not the provider of that system[4]—who copies the underlying work; and (2) the

[4] Because this "volitional act" aspect of *Cablevision* does not appear to be an issue in this appeal, this brief does not address it further, other than to note its independent importance to Internet innovators. Should Appellees attempt to attack this aspect of *Cablevision*, CCIA would direct the Court to the brief *amici curiae* filed by CCIA, The Internet Association, and the

transmission of a performance of that work *to that same user in a manner not capable of being received by others* is a private performance that infringes no exclusive right of the rightsholder in the underlying work. *Cablevision*, 536 F.3d at 133-34.

ARGUMENT

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

Cloud computing refers to the practice of remotely accessing a network of remote computer servers on the Internet to store, manage, and process data. Cloud computing unlocks enormous new value for businesses and consumers alike, giving people the ability to access their own documents, emails, music collections, and other data across multiple devices, remotely and seamlessly, without having to worry about their own computer malfunctioning and losing their files, and without having to worry about frequent updates to client-side software. For example, a lawyer can begin work on a brief on her laptop, then continue working on it on her mobile phone, and later edit the same brief from home via a tablet computer.

Consumer Electronics Association in *Fox Broadcasting Co. v. DISH Network LLC*, No. 12-57048 (9th Cir. brief *amici curiae* filed Jan. 24, 2013), where that issue has been squarely presented to this Court.

Cloud computing is also becoming an increasingly important sector of the economy. In 2011, spending on public cloud information technology ("IT") services made up an estimated $28 billion of the $1.7 trillion spent globally on all IT products and services.[5] A recent study projected that revenue growth at cloud computing companies will exceed $20 billion per year for each of the next five years.[6] It also found that cloud computing services present a potential cost savings of more than $625 billion over the next five years for businesses that invest in cloud computing.[7] Additionally, the study found that cloud computing investments will create 213,000 new jobs in the United States and abroad over the next five years.[8]

Companies in the cloud computing sector, including the CCIA's members, have relied on *Cablevision*'s explication of the public performance right when making investments in the kinds of cloud

[5] John F. Gantz, Stephen Minton, Anna Toncheva, "Cloud Computing's Role in Job Creation," IDC White Paper sponsored (March 2012) at 1, *available at* http://people.uwec.edu/HiltonTS/ITConf2012/NetApp2012Paper.pdf.

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

[7] *Id.* at 11, 14.

[8] *Id.* at 8, 13.

computing products and technologies described above. A crucial aspect of that ruling was the Second Circuit's holding that a transmission made by a user from a "remote storage DVR" back to herself was a private performance, and not a public performance, even if many users made their own copies of the same work and subsequently separately viewed their own copies of that work. *Cablevision*, 536 F.3d at 134-37. This interpretation of the public performance right is critical for cloud computing, as it ensures that a user's watching, listening to, or reading copies of works she stored is not treated as a *public* performance within the meaning of the Copyright Act.

Recent research demonstrates the importance of *Cablevision* to innovators and investors. A November 2011 study by Harvard Business School Professor Josh Lerner found that after the decision, the average quarterly investment in cloud computing in the United States increased by approximately 41 percent.[9] That study also concluded that *Cablevision* led to additional incremental investment in U.S. cloud computing firms of between $728 million and $1.3 billion over the two-and-half years after the decision. When coupled with the study's findings regarding the enhanced

[9] Josh Lerner, "The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies," Nov. 1, 2011, at 9, *available at* http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Lerner_Fall2011_Copyright_Policy_VC_Investments.pdf.

effects of venture capital investment in this space, the author concluded that such sums may be the equivalent of two to five billion dollars in traditional investment in research and development.[10]

Simply put, the *Cablevision* rule provides certainty and the cloud computing industry relies on it. The District Court, however, explicitly rejected the interpretation of the Transmit Clause set out in *Cablevision* and endorsed by the cases following it. Given the growing importance of cloud computing, and the reliance on *Cablevision* and its progeny by investors in this sector, this Court should reverse the District Court and restore national uniformity to federal copyright law's understanding of the Transmit Clause.

II. THE DISTRICT COURT'S READING OF THE TRANSMIT CLAUSE OBVIATES THE POSSIBILITY OF A PRIVATE PERFORMANCE

The statutory language of the Transmit Clause makes it clear that not every transmission of a performance of a work constitutes an infringement. Only transmissions "to the public" are within the exclusive rights of a copyright owner. This language plainly marks off transmissions that are *not* to the public as private performances outside the scope of the copyright owner's exclusive rights.

[10] *Id*. at 24.

The District Court here, however, rejected any consideration of the potential audience of a particular transmission, instead focusing on the potential audience for the particular work in question. ER5-6 (*Fox*); ER17-18 (*NBC*). This analysis of the Transmit Clause precludes the possibility of a private performance, thereby reading "to the public" out of the statute. The District Court thereby erred in exactly the same manner as the district court in *Cablevision*, as explained by the Second Circuit:

> We cannot reconcile the district court's approach with the language of the transmit clause. That clause speaks of people capable of receiving a particular "transmission" or "performance," and not of the *potential* audience of a particular "work." Indeed, such an approach would render the "to the public" language surplusage. Doubtless the potential audience for every copyrighted audiovisual work is the general public. As a result, any transmission of the content of a copyrighted work would constitute a public performance under the district court's interpretation. But the transmit clause obviously contemplates the existence of non-public transmissions; if it did not, Congress would have stopped drafting that clause after "performance."

Cablevision, 536 F.3d at 135-36. Appellees make the same mistake when they categorically assert in their brief below that "Congress enacted the Transmit Clause and mandated that a retransmission service engages in a public performance, requiring a copyright license, when it retransmits broadcast programming to subscribers." ER706 (*Fox*); ER820 (*NBC*). Appellees have, like the District Court, overlooked the possibility of *private*

performances, such as retransmissions of performances made by a user from a copy that is accessible solely to that user.

In an era of personal connected devices, private transmissions—those that are not "to the public" within the meaning of the statute—are becoming increasingly common and important. The consequences of endorsing the District Court's approach would be severe for consumers and industry alike. For example, as recognized by the Second Circuit, this analysis would mean that "a hapless customer who records a program in his den and later transmits the recording to a television in his bedroom would be liable for publicly performing the work simply because some other party had once transmitted the same underlying performance to the public." *Cablevision*, 536 F.3d at 136. This is no mere hypothetical—today, consumers have many consumer electronics devices to choose from that enable the recording and retransmission of television programming both in the home and to Internet-connected mobile phones, tablets, and computers.[11]

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[11] *See, e.g.*, David Pogue, TiVo Goes Wandering, on the Road and at Home, N.Y. Times, Mar. 13, 2013 *available at* http://www.nytimes.com/2013/03/14/technology/personaltech/pogue-tivo-mini-stream-review.html?pagewanted=all (describing new devices that allow a TiVo DVR to transmit recorded broadcast programs to mobile devices); Suzanne Kantra, 4 Ways to Take Your Shows and Movies To Go, USA Today, Feb. 24, 2013 *available at* http://www.usatoday.com/story/tech/2013/02/24/tv-shows-movies-on-the-

The District Court's approach would not only put consumers "time-shifting" and "space-shifting" television in jeopardy, but also inhibit innovation by cloud providers intent on giving consumers ubiquitous online access to digital assets that have nothing to do with television. The statutory language defining the public performance right does not pick out "broadcast programming" for special treatment. Thus, if it is a public performance to transmit to a single person from a unique copy of a television program made from a broadcast source, it would also be a public performance to transmit to a single person music, computer software, text, or video files in the same manner. In this way, the District Court's ruling imperils new digital locker services, as well as cloud-based personal back-up services, all of which are premised on a user transferring her personal files (including lawfully-acquired music, video, text, and software files) to "the cloud," thereby making those files accessible to that same user from any Internet-connected device.

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go/1928795/ (describing TiVo and Slingbox devices that transmit recorded broadcast programs to mobile devices); Harry McCracken, Top 10 Everything of 2012: Simple.TV, TIME, Dec. 4, 2012 *available at* http://techland.time.com/2012/12/04/top-10-tech-lists/slide/iphone-5/ (describing Simple.TV DVR that streams recorded broadcast programming over the Internet to mobile devices).

III. APPELLEES' EFFORTS TO DISTINGUISH *CABLEVISION* AND *AEREO* ARE UNAVAILING.

As they have in other cases, Appellees will doubtless urge this Court to reject *Cablevision* or limit the Second Circuit's ruling to its facts. However, with the exception of the District Court below, all of the courts to have considered Appellees' arguments have rejected them. The CCIA anticipates Appellees will nevertheless renew many of those same arguments here. These arguments should be rejected and recognized for what they are: an improper invitation to this Court to take up the legislative pen to engraft ad hoc, industry-specific exceptions onto the definition of "to the public."

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

Appellees in their briefing below attempt to distinguish *Cablevision* on the grounds that the defendant there had a license to rebroadcast programming, while Aereokiller does not. ER708-710 (*Fox*); ER822-824 (*NBC*). In *Cablevision*, however, the Second Circuit concluded that the transmissions at issue were private performances, not licensed public performances. *Cablevision*, 536 F.3d at 137-39. The Second Circuit nowhere suggested that its holding was based on the fact that Cablevision had a license to retransmit programming or that the remote DVR service was

somehow tied to a licensed cable service.[12] *Id.* The existence of a license was entirely immaterial to the question presented and resolved in *Cablevision*—once a court concludes that a transmission is a private performance, no license is needed to authorize it and the absence of a license cannot make it somehow a public performance.

Nor did the Court rely on an implied license theory—in fact, the Fox Appellees specifically and vehemently rejected the argument that Cablevision's original license for retransmission in any way, shape, or form justified the RS-DVR service. *See* Brief of Plaintiffs-Counter-Defendants-Appellees Twentieth Century Fox Film Corp., et al. at 5, *Cablevision*, No. 07-1480, 2007 WL 6101619 (2d Cir. June 20, 2007) ("None of Cablevision's negotiated licenses, nor any statutory licenses, authorizes Cablevision to transmit or to reproduce copyrighted programming through RS-DVR.").

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[12] In an amicus brief in the pending Second Circuit appeal of the *Aereo* case, Cablevision itself emphasized that its remote DVR service was "[i]n addition to and separate from" its licensed cable system. Br. for Amicus Curiae Cablevision Systems Corp. in Support of Reversal at 16, *ABC v. Aereo*, Nos. 12-2786 CV, 12-2807 CV (2d Cir. brief filed Sept. 21, 2012). It explained that "the recordings that subscribers make with the RS-DVR perform a function that is both operationally meaningful and independent from Cablevision's real-time, licensed transmission of cable content." *Id.* In short, the remote DVR service was separate and independent from the licensed service.

Any effort to limit *Cablevision*'s application to entities that possess rebroadcast licenses also underscores the ad hoc, industry-specific nature of Appellees' objections to Aereo and Aereokiller. How is a provider of cloud computing services to make sense of such a rule? Would a provider of online music lockers be required to purchase a terrestrial radio station as a condition of making transmissions that qualify as private performances under *Cablevision*? Or would this "rebroadcasting licensure requirement" be limited only to private performances derived from broadcast sources? Nothing in Title 17 would guide cloud computing providers or investors in satisfying these requirements, which more closely resemble artifacts of existing business models than principles of copyright law.

B. Copyright Law's "Technology Agnosticism" Does Not Assist Appellees.

Appellees repeatedly invoke the notion that Congress intended that the 1976 Copyright Act be "technology agnostic." ER 707, ER1331 (*Fox*); ER 821, ER1642 (*NBC*). To the extent this is true, it undermines, rather than supports, Appellees.

It is certainly true that many core concepts contained in the Copyright Act of 1976 were drafted to be "technology agnostic," in that they would

apply to many different technologies.[13] So, for example, "copies" are defined as "material objects…in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101. This definition encompasses everything from pencil and paper to digital files. Similarly, the Transmit Clause is couched in terms that are not tied to particular technologies: "To perform … a work 'publicly' means … to transmit or otherwise communicate a performance … to the public, by means of any device or process…." *Id.*

Nothing about this statutory language, however, suggests that the way a particular technology operates is irrelevant or can be dismissed as a "gimmick." This Court's ruling in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278 (9th Cir. 1989) ("*PREI*"), is illustrative. In that case, movie studios challenged, under the

[13] Of course, much of the Copyright Act is not "technology agnostic," as made clear by the extremely detailed, technology specific provisions relating to webcasting of digital music, 17 U.S.C. § 114, satellite transmissions of television and audio programming, 17 U.S.C. § 111, and even specific mandates for analog VHS recorders, 17 U.S.C. § 1201(k). In fact, measured by pages of statutory text, the technology specific provisions of the Copyright Act today far outnumber the provisions that strive for "technological agnosticism."

Transmit Clause, a hotel's provision of in-room laser disc players, along with the option to rent titles from the front desk. This Court held that, in light of the statutory language of the Transmit Clause, the defendant was not publicly performing by offering these amenities to guests. *PREI*, 866 F.2d at 281-82. It so held, notwithstanding the fact that such a service was the functional equivalent of a closed-circuit hotel video service, recognizing that different technologies can yield different results under the Transmit Clause. *Id.* at 282 n.7 (distinguishing a closed circuit system from defendant's laser disc rental approach, based on difference in technology). In other words, differences in the manner in which technology functions can result in differing results under the Copyright Act—a court must carefully consider how the challenged technology operates in applying the statutory text. *See Cablevision*, 536 F.3d at 135 (analyzing operation of technology at issue, recognizing that application of Transmit Clause turns on "who precisely is 'capable of receiving' a particular transmission of a performance"); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159-62 (9th Cir. 2007) (analyzing operation of technology at issue, recognizing that identifying the computers transmitting copies of works was essential for determining that, under the "server test," in-line linking of images by websites does not infringe the public display right).

Appellees' "technology agnosticism" argument amounts to the same sort of special pleading rejected in *Columbia v. PREI*. Appellees' view appears to be that any technology that retransmits broadcast content over the Internet should fall within the scope of their exclusive rights. This view has no foundation in the statutory language, which does not grant an *absolute* retransmission right to owners of broadcast content or any other copyright owner, but instead limits the exclusive right to transmissions "to the public," leaving private performances unregulated. Thus, just as in *PREI*, if an innovator develops technology that facilitates private performances, the "technology agnostic" qualities of the Transmit Clause should not prevent such a development.

IV. APPELLEES' ARGUMENTS ARE BETTER DIRECTED TO CONGRESS THAN THIS COURT.

The distinctions that Appellees manufacture to set this case apart from *Cablevision* are, in essence, a plea that this Court craft a narrow, industry-specific rider onto the statutory definition of "to the public," declaring that there is no such thing as a private performance where retransmissions of broadcast content is concerned. This plea is appropriately directed to Congress, not to this Court. As the Supreme Court and this Court have recognized, expanding the protections for copyright owners in the face of changing technology is a task best left to the legislative process:

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

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984) (internal citations omitted); *accord PREI*, 866 F.2d at 282 ("[W]e are aware that technology has often leapfrogged statutory schemes. Nevertheless, it is for Congress, not for the courts, to update the Copyright Act…").

Only Congress has the flexibility to amend the Copyright Act to address the interests of Appellees without creating collateral uncertainty regarding the meaning of the Transmit Clause for Internet innovators and investors. Congress can craft new statutory licenses, *see* 17 U.S.C. § 114(d) (compulsory license for Internet music streaming), expand exclusive rights, *see* 17 U.S.C. § 101 (definition of "fixed" amended to include live broadcasts), or narrowly legislate with respect to a particular technology, *see* 17 U.S.C. § 110(11) (statutory exception for DVD players that allow home viewers to automatically skip certain movie content). This panoply of

options is simply not available to the courts when interpreting statutory language of more general application.

The Register of Copyrights, Maria Pallante, testified before Congress just this week, calling for a comprehensive legislative overhaul of the Copyright Act, including the public performance right.[14] Appellees are among the best-represented interests in the copyright firmament—Congress will doubtless give their concerns a full airing.

V. NEITHER *FORTNIGHTLY* NOR THE STATUTORY HISTORY SUPPORTS APPELLEES' CONCEPTION OF THE TRANSMIT CLAUSE.

To support their interpretation of the Transmit Clause, Appellees assert that the provision was adopted in response to the Supreme Court's 1968 decision in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). ER705 (*Fox*); ER819 *(NBC*). In *Fortnightly*, the Court held that a cable system did not perform the television programming at issue and hence was not an infringer. Appellees allege that the enactment of the Transmit Clause was a direct repudiation of *Fortnightly*. *Id*. at 4. But the

[14] The Register's Call for Updates to U.S. Copyright Law, Hearing before the Courts, Intellectual Property and the Internet Subcommittee of the House Committee on the Judiciary, 113th Cong., 1st Sess., Mar. 20, 2013 *available at* http://judiciary.house.gov/hearings/113th/03202013/Pallante%20032013.pdf.

relevant language of the Transmit Clause was written before *Fortnightly*, and could not have been a response to it.

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

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

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

Appellees also invoke *Fortnightly*, and the Congressional "reaction" to it, as somehow establishing that a service provider may not "stand in the shoes" of its customer when defending an infringement action. ER705 (*Fox*); ER819 *(NBC*). Yet the language in *Fortnightly* that Appellees cite actually undermines their position: it confirms that a purely private performance—such as an individual setting up a remote hilltop antenna to transmit a signal to herself—was not infringing under the 1909 Act. *Fortnightly*, 392 U.S. at 400 ("If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set."). Nothing in the 1976 Act changed that—setting up your own antenna on your rooftop or on a nearby hill remains a quintessential private performance today. In any event, this language is a red herring because the question of whether a service provider may "stand in the shoes" of its customer is entirely irrelevant to resolution of this case. Aereokiller, like Aereo and Cablevision before it, is asserting that it is, itself, only making private performances

when it transmits performances to a user from a unique copy made by that user. With respect to the claim of direct infringement by public performance, whether it would be legal for the user herself to engage in the activity directly is beside the point.[15]

In short, nothing Congress did in the 1976 Copyright Act altered the historic limitation of performance rights to *public* performances. No United States copyright law has ever given copyright owners the right to control private performances. The Second Circuit's approach in *Cablevision* recognized the limited scope of the Transmit Clause and drew the correct legal boundary between private and public performances. This Court should embrace the Second Circuit's view, reverse the district court, and restore national uniformity to federal copyright law.

CONCLUSION

The CCIA respectfully requests that the Court reject Appellees' attempt to limit and obscure the holding of *Cablevision*. That holding has paved the way for innovation and investment in Internet cloud-based technologies. Cloud computing's potential in terms of job creation,

[15] Though the legal status of the user's activity might well be relevant in a secondary liability context, no secondary liability claim is presented in this appeal.

economic growth, and consumer empowerment is growing by the day. That potential will not be realized if Appellees are successful here in hamstringing *Cablevision* in a way that allows new technologies to exist only in so far as they resemble old ones.

Respectfully submitted,

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 22, 2013.

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