12-2786-cv

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellants,

- v. -

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

Defendant-Appellee.

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

BRIEF FOR PARAMOUNT PICTURES CORPORATION, WARNER BROS. ENTERTAINMENT INC., DIRECTORS GUILD OF AMERICA, INC., ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC, SCREEN ACTORS GUILD-AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, WRITERS GUILD OF AMERICA, WEST, INC., INDEPENDENT FILM & TELEVISION ALLIANCE AND METRO-GOLDWYN-MAYER STUDIOS INC. AS *AMICI CURIAE* SUPPORTING REHEARING EN BANC

KELLY M. KLAUS
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071
(213) 683-9100
Counsel for Amici Paramount Pictures Corporation, Warner Bros. Entertainment Inc., Directors Guild of America, Inc. and Metro-Goldwyn-Mayer Studios Inc.

SAMANTHA DULANEY
I.A.T.S.E. IN HOUSE COUNSEL
1430 Broadway, 20th Floor
New York, New York 10018
(212) 730-1770
Counsel for Amicus Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC

DUNCAN W. CRABTREE-IRELAND
CHIEF ADMINISTRATIVE OFFICER & GENERAL COUNSEL
SAG-AFTRA
5757 Wilshire Boulevard, Suite 700
Los Angeles, California 90036
Counsel for Amicus Screen Actors Guild-American Federation of Television and Radio Artists

ANTHONY R. SEGALL
ROTHNER, SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, California 91101
(626) 796-7555
Counsel for Amicus Writers Guild of America, West, Inc.

SUSAN CLEARY
VICE PRESIDENT & GENERAL COUNSEL
INDEPENDENT FILM & TELEVISION ALLIANCE
10850 Wilshire Boulevard
Los Angeles, California 90024
(310) 446-1003
Counsel for Amicus Independent Film & Television Alliance

12-2807-cv

United States Court of Appeals

for the

Second Circuit

AMERICAN BROADCASTING COMPANIES, INC., DISNEY ENTERPRISES, INC., CBS BROADCASTING INC., CBS STUDIOS INC., NBCUNIVERSAL MEDIA, LLC, NBC STUDIOS, LLC, UNIVERSAL NETWORK TELEVISION, LLC, TELEMUNDO NETWORK GROUP LLC and WNJU-TV BROADCASTING, LLC,

Plaintiffs-Counter-Defendants-Appellants,

- v. -

AEREO, INC.,

Defendant-Counter-Claimant-Appellee.

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

BRIEF FOR PARAMOUNT PICTURES CORPORATION, WARNER BROS. ENTERTAINMENT INC., DIRECTORS GUILD OF AMERICA, INC., ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC, SCREEN ACTORS GUILD-AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, WRITERS GUILD OF AMERICA, WEST, INC., INDEPENDENT FILM & TELEVISION ALLIANCE AND METRO-GOLDWYN-MAYER STUDIOS INC. AS *AMICI CURIAE* SUPPORTING REHEARING EN BANC

KELLY M. KLAUS
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071
(213) 683-9100
Counsel for Amici Paramount Pictures Corporation, Warner Bros. Entertainment Inc., Directors Guild of America, Inc. and Metro-Goldwyn-Mayer Studios Inc.

SAMANTHA DULANEY
I.A.T.S.E. IN HOUSE COUNSEL
1430 Broadway, 20th Floor
New York, New York 10018
(212) 730-1770
Counsel for Amicus Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC

DUNCAN W. CRABTREE-IRELAND
CHIEF ADMINISTRATIVE OFFICER & GENERAL COUNSEL
SAG-AFTRA
5757 Wilshire Boulevard, Suite 700
Los Angeles, California 90036
Counsel for Amicus Screen Actors Guild-American Federation of Television and Radio Artists

ANTHONY R. SEGALL
ROTHNER, SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, California 91101
(626) 796-7555
Counsel for Amicus Writers Guild of America, West, Inc.

SUSAN CLEARY
VICE PRESIDENT & GENERAL COUNSEL
INDEPENDENT FILM & TELEVISION ALLIANCE
10850 Wilshire Boulevard
Los Angeles, California 90024
(310) 446-1003
Counsel for Amicus Independent Film & Television Alliance

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure:

Amicus Paramount Pictures Corporation certifies that it is a wholly owned subsidiary of Viacom Inc., a publicly held company.

Amicus Warner Bros. Entertainment Inc. certifies that it is ultimately and indirectly wholly owned by Time Warner Inc., a publicly held company.

Amicus Directors Guild of America, Inc. certifies that it is a California non-profit corporation doing business as a labor organization; it does not offer stock; and it has no parent corporation.

Amicus Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC certifies that it is an unincorporated labor organization; it does not offer stock; and it has no parent corporation.

Amicus Screen Actors Guild-American Federation of Television and Radio Artists certifies that it is a Delaware non-profit corporation; it does not offer stock; and it has no parent corporation.

Amicus Writers Guild of America, West, Inc. certifies that it is a California non-profit corporation doing business as a labor organization; it does not offer stock; and it has no parent corporation.

Amicus The Independent Film & Television Alliance certifies that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

Amicus Metro-Goldwyn-Mayer Studios Inc. certifies that it is a wholly owned subsidiary of Metro-Goldwyn-Mayer Inc., a privately held company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

INTEREST OF *AMICI CURIAE*[1]

Amici consist of individuals and production and distribution companies that collectively comprise the entire chain for the creation of film and television content.[2] *Amici* Guilds and Unions represent hundreds of thousands of men and women who write, direct, act in and provide below-the-line services for motion picture and television content. The members' livelihoods depend on remuneration for the licensed exploitation of the content that they work to create. This includes residuals and royalties—deferred compensation based on the continuing use of the creative works—as works are released in different media. Residuals and royalties are an important source of income for creative artists and help determine their eligibility for benefits such as health insurance and pensions. *Amici* studios and distribution companies depend on compensation for the public performance of their works to underwrite the significant costs of creating and disseminating

---

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Second Circuit Rule 29.1(b), *amici* state that (i) no counsel for a party has written this brief in whole or in part and (ii) no person or entity other than the *amici* has made a monetary contribution that was intended to fund the preparation or submission of this brief. *Amici* submitted a brief at the Panel stage. Case No. 12-2786, Dkt. No. 147; Case No. 12-2807, Dkt. No. 121 ("*Amici* Panel Br.").

[2] *Amici* studios and distribution companies are Paramount Pictures Corporation, Warner Bros. Entertainment Inc., Independent Film & Television Alliance, Independent Film & Television Alliance, and Metro-Goldwyn-Mayer Studios Inc. *Amici* Guilds and Unions are Directors Guild of America, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC, Screen Actors Guild-American Federation of Television and Radio Artists, and Writers Guild of America, West, Inc.

movies and television shows. These entities also license the transmission of the same works through multiple additional distribution channels, including by way of internet streaming through licensed services, such as Hulu or Netflix. All *amici* have a significant interest in the interpretation of the public performance right.

ARGUMENT

Amici respectfully urge the Court to grant en banc rehearing. The Majority Opinion misconstrues an important and economically significant right under the Copyright Act. It does so by reading a prior decision of this Court, *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"), to require the holding in this case, even though the Court in *Cablevision* expressly said that its decision should not be taken as carte blanche for future services that mimicked Cablevision's technological architecture, as Aereo does. The decision therefore creates material inconsistency with the very precedent the Court in this case relied on. Further, the decision threatens significant harm not only to Appellants-Broadcasters but to the producers who underwrite and the hundreds of thousands of individuals who work to create the copyrighted works that Aereo appropriates for free. The public performance right is among the most critical rights secured by copyright to the owners of audio-visual content. The right is especially important, and will only become more important, as movies and television shows increasingly are disseminated and viewed through

internet streams to the public. While the Court properly reserves its en banc resources for cases of surpassing importance, *amici* submit this is such a case.

It is undisputed that Aereo re-transmits through internet streams to thousands of paying subscribers content as it is broadcast over the air. The law is clear that re-transmitting broadcast signals through internet streams is a public performance, which requires a negotiated license. *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 278-79 (2d Cir. 2012). The Copyright Office has emphasized that businesses that re-transmit broadcast programming without paying the required license fees "'effectively wrest control away from program producers who make significant investments in content and who power the creative engine in the U.S. economy.'" *Id*. at 283 (quoting U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act Section 109 Report, at 188 (2008) ("SHVERA Report")). Aereo argues that because it uses tens of thousands of mini-antennae rather than just one, Aereo transforms its undisputed public performance into tens of thousands of non-actionable private performances. If Aereo used a single reception antenna to capture broadcast signals and re-transmit them to thousands of internet subscribers for viewing, it is undisputed that Aereo would need a license, just as numerous legitimate services, such as Hulu and Netflix, negotiate for and obtain to stream broadcast content, including copyrighted movies and television shows to their subscribers. Judge Chin, in dissent, called Aereo's system for what it is: "a sham" and "a Rube Goldberg-like contrivance, over-engineered in an

attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law." Dissent at 2.

The Majority, however, said that *Cablevision* compelled it to accept Aereo's argument. *Cablevision* did not compel that holding. *Cablevision* involved a very different service. It was advocated for and decided on different grounds. And the Court in *Cablevision* said that its opinion did not provide a blueprint for services to end-run the public performance right with technological contrivances. The Majority's conclusion that *Cablevision required* immunizing Aereo from public performance liability based on its architecture thus creates a material inconsistency between these decisions. En banc review is warranted.

I. *Cablevision* Expressly Limited Its Public Performance Holding

Cablevision was a licensed re-transmitter of broadcast programming. *See Cablevision*, 536 F.3d at 123. Its proposed "remote-storage" digital video recorder ("RS-DVR") service was presented to this Court as the functional equivalent of "set-top" DVR or video-cassette recorder ("VCR") machines, with the only difference being that the recording media (computer servers) were located at Cablevision's headquarters rather than on top of its subscribers' television sets. Cablevision argued that, because the RS-DVR was functionally equivalent to these home-based devices, Cablevision's copyright liability should be no different from that of manufacturers of VCRs or set-top DVRs.

This Court rejected the copyright challenges to the RS-DVR and relied heavily on an "equivalence" rationale in doing so. In holding that Cablevision at most could be secondarily, and not primarily, liable for the copying done on its computer servers, this Court emphasized the similarities between the RS-DVR and the set-top DVR. *See id*. at 132-33 (finding that *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984), which dealt with VCR copying, "buttressed" Court's "refusal to find Cablevision directly liable on these facts").

Having found that Cablevision could not be directly liable for copies made at its subscribers' request, the Court had to decide whether Cablevision could be liable for transmitting the recorded shows when subscribers decided to watch them. The Court concluded, on the very specific facts of the RS-DVR service, that the playback function did not involve any "public performance" of the copyrighted works because "the RS-DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber." *Id*. at 137.

Cablevision's public performance holding was expressly limited. The Court "emphasize[d]" that its holding on the scope of the public performance right did "not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network." *Id*. at 139.

II. The Court Should Review En Banc the Majority Opinion's Needless and Erroneous Expansion of *Cablevision*'s Limited Decision

Contrary to the suggestion by the Majority, *Cablevision* has not painted this Circuit into a corner in construing the public performance right, but rather left other Panels of the Court, including the Panel in this case, with multiple ways to reach a different result. The Majority could have found that *Cablevision*'s examination of the legality of the RS-DVR functionality as part of an otherwise licensed service was factually distinguishable, since Aereo's mass retransmission activities are conducted without any authorization from copyright owners. *Cablevision*, 536 F.3d at 123. The Majority, however, ignored the fact that the type of service at issue in *Cablevision* was fundamentally different from that in Aereo, and moreover found the absence of a license "not relevant" to Aereo's liability for making unauthorized retransmissions. Maj. Op. at 24. The Majority could have accepted an argument that *Cablevision* had not "explicitly rejected," *id*. at 26, namely, that because Aereo was transmitting exactly the same performances of exactly the same works to multiple members of its public audience, it would be appropriate to aggregate those transmissions and find that Aereo was making them "to the public." 17 U.S.C. § 101(2) (transmit clause). The Majority instead said that it could not accept that argument, because doing so would have required a different result in *Cablevision*. Maj. Op. at 25-26. The Majority could have heeded *Cablevision*'s admonition that its holding did not provide guaranteed

immunity for any service that associates unique copies with individual network subscribers. *Cablevision*, 536 F.3d at 139. Instead, the Majority held that "the creation of user-associated copies" "under *Cablevision* means that Aereo's transmissions are not public"; that "technical architecture matters" (even if that places "form over substance"); and that it was important to validate Aereo's reliance on *Cablevision* in designing the Aereo service, even though *Cablevision* made it clear that such reliance was unwarranted. Maj. Op. at 29, 30-31, 33-34.

With respect, *amici* submit that the Majority Opinion's construction of the public performance right is manifestly erroneous and threatens to cause significant and unjustified harm to numerous stakeholders in the content-creation and distribution ecosystems.[3] The critical questions for Aereo's liability for infringing the public performance right are (1) whether Aereo is "transmitting" performances, *i.e.*, "communicating [them] by any device or process whereby images or sounds are received beyond the place from which they are sent," 17 U.S.C. § 101 (definition of "transmit"); and (2) whether Aereo is transmitting those performances "to the public," which means any "substantial number of persons outside of a normal circle of a family and its social acquaintances." *Id.* § 101(1) (definition of "perform … 'publicly'"). Judge Chin's trenchant Dissenting Opinion demonstrates that the clear statutory language and the legislative history

[3] To avoid burdening the Court with duplicative briefing, *amici* refer the Court to their prior briefing on the issues of harm in this case. *See Amici* Panel Br. at 26-31.

both lead to the conclusion that, when Aereo transmits exactly the same performances of exactly the same works to thousands of different subscribers, Aereo is performing the works publicly. Dissent at 5-15.

En banc rehearing would provide this Court the chance to re-set the bounds of the public performance right as Congress intended, without any actual or perceived straightjacket from the *Cablevision* decision. *Amici* submit that this is one of the rare cases that justifies the extraordinary use of this Court's limited en banc resources.

DATED: April 16, 2013

Respectfully submitted,

/s/ Kelly M. Klaus

KELLY M. KLAUS
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071
(213) 683-9100
Counsel for Amici Paramount Pictures Corporation, Warner Bros. Entertainment Inc., Directors Guild of America, Inc. and Metro-Goldwyn-Mayer Studios Inc.

SAMANTHA DULANEY
I.A.T.S.E. IN HOUSE COUNSEL
1430 Broadway, 20th Floor
New York, New York 10018
(212) 730-1770
Counsel for Amicus Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, AFL-CIO, CLC

DUNCAN W. CRABTREE-IRELAND
CHIEF ADMINISTRATIVE OFFICER & GENERAL COUNSEL
SAG-AFTRA
5757 Wilshire Boulevard, Suite 700
Los Angeles, California 90036
Counsel for Amicus Screen Actors Guild-American Federation of Television and Radio Artists

ANTHONY R. SEGALL
ROTHNER, SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, California 91101
(626) 796-7555
Counsel for Amicus Writers Guild of America, West, Inc.

SUSAN CLEARY
VICE PRESIDENT & GENERAL COUNSEL
INDEPENDENT FILM & TELEVISION ALLIANCE
10850 Wilshire Boulevard
Los Angeles, California 90024
(310) 446-1003
Counsel for Amicus Independent Film & Television Alliance

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32

Pursuant to Rule 32 of the Federal Rules of Appellate Procedure, I certify that:

1. This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 1,794 words (based on the Microsoft Word word-count function), excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman type.

Dated: April 16, 2013

/s/ Kelly M. Klaus
KELLY M. KLAUS
Counsel for Amici Paramount Pictures Corporation, Warner Bros. Entertainment Inc., Directors Guild of America, Inc. and Metro-Goldwyn-Mayer Studios Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2013, a true and correct copy of the foregoing Brief for *Amici Curiae* Supporting Petition for Rehearing En Banc was served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Rule 25.1(h)(1)-(2).

Dated: April 16, 2013

/s/ Kelly M. Klaus
KELLY M. KLAUS