IN THE UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

FILMON.TV NETWORKS, INC., *et al.*, *Defendants-Appellants*	)
v.	) Nos. 13-7145, 13-7146
FOX TELEVISION STATIONS, INC., *et al.*, *Plaintiffs-Appellees.*	)

MOTION OF AEREO, INC.
FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
IN SUPPORT OF NEITHER PARTY

Aereo, Inc. ("Aereo") hereby moves this Honorable Court pursuant to Federal Rule of Appellate Procedure 29(b) for leave to file a brief *amicus curiae* in support of neither party. A copy of Aereo's proposed brief is submitted herewith. As set forth below, Aereo has a direct interest in and an important perspective on the issues in this appeal concerning the proper interpretation of the public performance right, 17 U.S.C. §106(4), and the definition of to perform "publicly," 17 U.S.C. §101.

Pursuant to Circuit Rule 29(b), Aereo endeavored to obtain consent from all parties to the filing of its brief. Aereo obtained the consent of the defendants/appellants ("FilmOn"), but the plaintiffs/appellees (the

"broadcasters") did not give consent. In support of this Motion, Aereo states as follows:

1. Aereo provides an innovative technology platform that enables consumers to use remotely-located equipment, including an individual antenna and digital video recorder ("DVR"), to create, access, and watch their own unique recorded copies of free over-the air broadcast television programming. Aereo designed its technology to comply with copyright law, and in particular with the text of the Copyright Act and case law principles distinguishing public and private performances under the Act including *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"). *Cablevision* has provided critical guidance to many "cloud computing" businesses that, like Aereo, allow consumers remote access to their stored individual content via the Internet. Thus, Aereo has a strong interest to assure that the courts clearly delineate and correctly define the scope of the Section 106(4) public performance right, 17 U.S.C. §106(4), so as to exclude *private* performances; that is, transmissions that a consumer makes only to herself from an individual copy that she made and stored remotely.

2. On March 1, 2012, major television broadcasting networks filed two complaints against Aereo in the U.S. District Court for the Southern District

of New York, asserting multiple theories of liability including infringement of the right of public performance. These plaintiffs subsequently moved for a preliminary injunction. The district court denied the injunction, finding that the consumer activities enabled by the Aereo technology constituted private performances, in accordance with the principles of *Cablevision*. *Am. Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012) ("*Aereo*"). That court found that Aereo's technology presented an even stronger factual basis for a finding of private performance than *Cablevision*, given that the unique copies made by each consumers originated from antennas individually assigned to them. The Second Circuit affirmed the holding and reasoning of the district court, and denied rehearing *en banc*. *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), *reh'g en banc denied*, 722 F.3d 500 (2d Cir. 2013). The broadcasters' petition for certiorari remains pending before the Supreme Court. *Id.*, *petition for cert. filed*, No. 13-461 (Oct. 11, 2013). Another district court subsequently agreed with *Cablevision* and *Aereo*, and denied that plaintiff broadcaster's motion for preliminary injunction on grounds that Aereo transmissions are private, not public, performances. *Hearst Stations Inc. v. Aereo, Inc.*, Civil Action No. 13-11649-NMG, 2013 WL 5604284 (D. Mass. Oct. 8, 2013).

3. Many of the same broadcasting networks that filed suit against Aereo have brought this suit against FilmOn, also alleging infringement of the public performance right. Although the district court's September 5, 2013, Opinion does not detail the technology offered by FilmOn,[1] what is clear is that the Opinion directly conflicts with, and explicitly rejects, the legal principles adopted by the Second Circuit in *Cablevision* and the decisions in all three *Aereo* decisions. The district court noted that its holding explicitly disagrees with the interpretation of the public performance right—specifically, clause (2) of the definition of "to perform 'publicly'" (the "Transmit Clause") that rejects the central holding of *Cablevision* and the Second Circuit decision in *Aereo* on that issue. *See* Opinion at 25 n.11 & 28 n.12. FilmOn has appealed to this Court from the district court's ruling on the public/private performance issue with respect to their specific technology.

5. Aereo has a direct interest in the legal principles to be determined by this Court in these appeals. Aereo's business model (and that of many other businesses) relies on existing precedent including the right of consumers to make private performances in accordance with the law as

[1] *Fox Television Stations, Inc. v. FilmOn X LLC*, Civ. No. 13-758, at 2, 4-6 (D.D.C. Sept. 5, 2013) (hereinafter "Opinion"). Aereo is unable to determine what, if any, factual application this case would have to it.

articulated by *Cablevision* and *Aereo*. The opinion of this Court could affect the ability of Aereo and other "cloud computing" internet services to expand their technology offering to consumers in the D.C. Circuit, as well as the incentives for future investment in these and related technology innovations. Consumers who use cloud-based storage of individual copies of their content deserve certainty as to their right to use such services.

6. Aereo's proposed amicus brief offers the Court an important perspective on the meaning of the Transmit Clause and its underlying legislative history, and on the historical safeguards under copyright law for private personal conduct. Aereo respectfully submits that this explication of the text, pertinent history and policies of the Copyright Act, and case law will assist the Court's analysis of the important copyright law issues presented in this case.

7. On December 3, 2013, Aereo asked counsel for appellees by electronic mail for their consent for Aereo to file a brief *amicus curiae* in favor of neither party. (Counsel for FilmOn had consented to the filing.) Counsel for the broadcasters denied consent, without explanation.[2]

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[2] In *Fox Television v. Aereokiller*, Nos. 13-55156, 13-55157, 13-55226, 13-55228 (9th Cir.) (notice of appeal filed Jan. 25, 2013), an appeal brought by FilmOn involving many of the same broadcaster/appellees as here, the appellees similarly denied Aereo consent to file a brief *amicus curiae*. There, the broadcasters asserted their belief that Aereo's interest is

8. Aereo has an independent interest in the issues of law under consideration by this Court. The district court and the parties themselves have acknowledged Aereo's interest – the Opinion notes specifically that the parties have repeatedly referenced Aereo's technology and its legal proceedings as relevant to the issues in this case. Indeed, the broadcasters themselves apparently argued to the district court that Aereo's technology operated in a way that was meaningfully distinct from the FilmOn system. *See* Opinion at 4 & n.4. And, as is clear from Aereo's proposed brief submitted herewith, Aereo's brief *amicus curiae* offers perspectives that are not cumulative of the brief for FilmOn.

"indistinguishable" or "cumulative" of the appellants' interest, and thus would not be "helpful" to the Court. Aereo's motion for leave to file in that appeal remains pending before the Court. It is Aereo's understanding that the broadcasters have objected only to Aereo filing an amicus brief. For that reason, Aereo also could not have joined a single *amicus* brief in this appeal, pursuant to Circuit Rule 29(d). Notwithstanding, for the reasons set forth herein, Aereo is in a unique position vis-à-vis all other amici such as would justify a separate brief.

WHEREFORE, Aereo Inc. respectfully requests leave of this Court to file the brief accompanying this Motion.

December 12, 2013

Respectfully submitted,

/s/ Seth D. Greenstein

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2013 I electronically filed the foregoing Motion of Aereo, Inc. for Leave to File Brief Amicus Curiae in Support of Neither Party, and proposed Brief Amicus Curiae of Aereo, Inc. in Support of Neither Party, with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 12, 2013

/s/ Seth D. Greenstein
Seth D. Greenstein
Attorney for *Amicus Curiae*