Case Nos. 13-55156, 13-55157, 13-55226 and 13-55228

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FOX TELEVISION STATIONS, INC., ET AL.,	NBCUNIVERSAL MEDIA LLC, ET AL.,
Plaintiffs-Appellees,	*Plaintiffs-Appellees,*
v.	v.
AEREOKILLER LLC, ET AL.,	AEREOKILLER LLC, ET AL.,
Defendants-Appellants.	*Defendants-Appellants.*

On Appeal From The United States District Court
For The Central District Of California
Hon. George H. Wu, District Judge
No. CV12-6921-GW (JCx); CV 12-06950-GW (JCx)

BRIEF OF *AMICUS CURIAE* THE CONSUMER FEDERATION OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS SUPPORTING REVERSAL

GLUSHKO-SAMUELSON INTELLECTUAL PROPERTY LAW CLINIC

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Consumer Federation of America certifies, pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, it has no parent corporation and no publicly held company owns 10 percent or more of its stock.

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The Consumer Federation of America respectfully submits this brief as *amicus curiae* with the consent of all parties.[1] *See* Fed. R. App. P. 29(a).

CERTIFICATE OF INTERESTS OF *AMICUS CURIAE*

The Consumer Federation of America ("CFA") is the largest consumer advocacy group in the nation, composed of nearly three hundred affiliates, representing some fifty million individual members. CFA includes organizations with a special focus on issues in legislative, regulatory, and judicial arenas, at the federal and state level. CFA works to advance the consumer interest through research, advocacy, and education. For over two decades, CFA has been the leading analyst of and advocate for consumer benefits of digital technologies brought about through a trend termed "digital disintermediation," which refers to the use of technology to eliminate cost-increasing intermediaries in a supply chain. For example, new digital technologies are capable of helping consumers to view, read or hear the information products they want to receive, when and where they choose, without purchasing additional, unwanted products and services.

An analysis published by CFA in 1990 foresaw the digital revolution as creating a dynamic, consumer-friendly communications space, which fosters

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) counsel for the parties have not authored any part of this brief; no party or a party's counsel contributed money for the brief; and no one other than *Amicus* and its members and counsel have contributed money for this brief.

digital disintermediation, based on "the fact that a great deal of the necessary intelligence is currently located on the periphery of the information age network and has led to a pragmatic, decentralized pattern of development." Mark Cooper, *Expanding the Information Age for the 1990s: A Pragmatic Consumer View*, 5 (1990). A recent analysis of two decades of experience across a number of content industries demonstrates that this expectation has been borne out, finding that "[d]igital technologies can lower production and distribution costs and give consumers much greater flexibility and choice, thereby dramatically improving the fit between what is produced and what is consumed." Mark Cooper & Jodie Griffin, *The Role of Antitrust in Protecting Competition, Innovation and Consumers as The Digital Revolution Matures: The Case Against The Universal-EMI Merger And E-Book Price Fixing*, PUB. KNOWLEDGE, 16 (2012).

The Consumer Federation of America have a compelling interest in ensuring that copyright law remains responsive and hospitable to beneficial consumer uses of new technologies. The flexibility inherent in copyright doctrine is the primary means by which the law promotes innovation and the increased availability of information. Technologies that allow consumers more choices about how they access information serve the fundamental goals of copyright law and should be encouraged.

INTRODUCTION

Access to information matters. *See* Richard Calland, *Access to Information: How Is It Useful and How Is It Used?*, *in* ACCESS TO INFORMATION: A KEY TO DEMOCRACY 15, 15 (2002) ("Information is power . . . . Information is vital for individual citizens, communities, and citizen's organizations if they are to fully participate in the democratic process."). The trend toward digital disintermediation clearly indicates consumers' strong preference for direct access to information on their own terms. Content providers should not attempt to thwart this trend in order to preserve the status quo. Facilitating consumer choice in information access is consistent with the purposes of the First Amendment and the Copyright Act, and can be accomplished in ways that balance the competing interests of rights-holders, providers, and consumers. As new information technologies have developed, copyright law has been interpreted to provide consumers with increased control over how they use available information, such as the socially and culturally important content provided in free, over-the-air television broadcasts. This case tests whether these established principles will be upheld.

The importance of access to information is enshrined throughout the Copyright Act, particularly in Congress' reservation of a personal right to engage in private performance of copyright content; likewise, the consumer interest in personal information access is recognized in the doctrine of fair use. Because

technologies like Aereokiller's can empower consumers' choices about how and when they enjoy broadcast content, the precedents of this Court and others favor recognizing it as lawful under the Copyright Act. In granting a preliminary injunction, the district court failed to give appropriate weight to the fundamental public interest imperatives that underlie copyright and guide its application to important new technologies. This Court should take the opportunity to reinforce those consumer interests by overturning the lower court's decision.

ARGUMENT

I. By Promoting Freedom of Choice in Modes of Access to Information, This Court Can Enable American Consumers' Full Participation in Their Culture.

Information consumers do not seek to disestablish copyright law, nor to get "something for nothing," by way of copyright piracy or otherwise. Consumers do want the ability to make flexible, beneficial use of material they acquire by lawful means. They understand that in the scheme of copyright, assuring that information industry firms can derive reasonable income from content they produce promotes the ultimate public interest. Over-the-air television broadcasts are not free at all; they are paid for, indirectly, by the individuals and households that enjoy them. *See* J.H. Snider, *The Myth of 'Free' TV*, NEW AM. FOUND. PUB. ASSETS PROGRAM, 1, 13 (2002) (consumers ultimately fund broadcast television by patronizing businesses that advertise on-air). Information consumers have a stake in ensuring

that legislators, regulators, and courts "take account of new technologies and changing marketplace conditions," (Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 26 FCC Rcd. 17489, 17489, 17498 (2011)) because allowing new technologies that enable consumer choice affirmatively promotes copyright balance.

A. Both Consumers' First Amendment Right to Access Information and the Copyright Act's Purpose to Promote Information Dissemination Deserve Great Weight.

Choice and flexibility in accessing information is essential to every consumer's ability to participate in media-intensive contemporary society. The Universal Declaration of Human Rights provides that "[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). The United States Constitution recognizes this right through the First Amendment's protection of participation in the marketplace of ideas. 4-19E NIMMER ON COPYRIGHT § 19E.02 (2012) (First Amendment recognizes the public's right to be informed of matters of general interest).

Congress recognized broadcasters' duty to further the public's interest in receiving information by directing them to provide consumers with free access to a limited number of over-the-air signals. *Red Lion Broadcasting Co. v. F.C.C.*, 395

U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . ."). However, in this case the district court concluded the public interest was best served only by providing strong protection for companies that generate broadcast programming, *Fox Television Stations v. BarryDriller*, 2012 WL 6784498, at *7 (C.D. Cal. Dec. 27, 2012), without considering consumers' important stake in accessing information products at reasonable prices and under flexible conditions. This narrow view of the public interest neglects the settled proposition that copyright law promotes consumers' rights in cultural participation by balancing the need to incentivize creativity with the need to promote access to creative works. As Justice Stewart emphasized:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). Differently stated, "[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works . . . ." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). As the Supreme Court recognized, new consumer information technologies play an important role in advancing the overall public interest in

copyright. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429-32 (1984).

B. Advances in Technology Increase Cultural Participation; Thus the Copyright Monopoly Should Not Be Employed to Suppress Efficient New Consumer Services.

Choice-empowering forms of consumer information technology change over time. However, the purpose of each iteration of new technology remains the same: to advance citizens' participation in culture and society. Scholars have noted consumers' increased participation, observing that "[p]eople are no longer passive participants in the economy, as they were in the media available in the 20th century. When offered the opportunity to participate and communicate in the digital information age, people quickly accept." Mark Cooper, *From Wifi To Wikis And Open Source*, 5 J. TELECOMM. & HIGH TECH. L. 125, 126-127 (2006). Within the limits imposed by the statute and subsequent judicial interpretation, the institutions of copyright should enable this kind of consumer choice, not interfere with it. Aereokiller's technology does not disincentivize creativity: it simply provides consumers with added choices for accessing lawfully acquired content. Like other new information technologies, Aereokiller adds to consumer value without upsetting the balance of copyright's competing interests.

C. Consumers Need Meaningful Choices Regarding When and How They Access Information In Order to Fully Participate in Our Information-Age Society.

The proliferation of broadband Internet and other new technologies has dramatically impacted how consumers access information. While daily newspapers and scheduled broadcasts once were sufficient resources to keep people informed about public affairs and cultural events, members of fast-paced modern society require diverse methods of accessing information to participate fully. UNDERSTANDING THE PARTICIPATORY NEWS CONSUMER, PEWRESEARCHCENTER, 1, 2 (2010) (92% of Americans use multiple platforms daily to get news). Consumer choice in accessing information is a necessity, not a luxury, in part because work life now runs 24/7. NETWORKED WORKERS, PEWRESEARCHCENTERS, i, iii (2008) (information tools make it harder to disconnect from work).

New social conditions have given rise to new forms of media consumption. Consumer households are shifting from relying on several free-standing televisions to relying on one primary screen supplemented with mobile devices that provide access to content throughout the home and beyond. ERICSSON CONSUMERLAB, TV AND VIDEO: AN ANALYSIS OF EVOLVING CONSUMER HABITS 1 (2012). This trend reflects consumers' growing preference for accessing the information of their choice at a convenient time and place.

Despite changing preferences about the viewing experience, information consumers continue to rely on broadcast content to a significant extent. THE CROSS-PLATFORM REPORT, NIELSEN, 1, 10 (2012) (finding more than 11 million households use only broadcast television). A significant proportion of cable subscribers only watch retransmitted broadcast programming. *See* Matthew Flamm, *Movers & Shakers: Chet Kanojia: Sending cable a message*, CRAIN'S NEW YORK BUS. (June 17, 2012), http://www.crainsnewyork.com/article/20120617/SUB/306179985. However, watching over-the-air television when it is broadcast no longer provides consumers with sufficient control over accessing content. A recent report shows that many consumers employ digital video recorders ("DVRs") to choose when they watch broadcast content. *See* John Consoli, *It's Early, But Viewers Again Watch Broadcast Primetime Series on DVR in Droves*, BROADCASTING & CABLE (2012). Further, consumers often complain of their limited ability to receive high-quality signals from broadcast stations in their service areas. *Quarterly Reports – Consumer Inquiries and Complaints*, FCC, http://www.fcc.gov/encyclopedia/quarterly-reports-consumer-inquiries-and-complaints (last visited March 21, 2013) (combined 2011 quarterly reports cite over 7,000 complaints and inquiries regarding digital television broadcast service and signal interference).

A DVR creates a permanent copy of a program after the user chooses the record function and then allows the user to watch the copy any time following the initial broadcast, thus "time-shifting" the content. *Fox Broad. Co. Inc. v. DISH Network, LCC*, 2012 WL 5938563, at *1 (C.D. Cal. Nov. 7, 2012). In addition, some stand-alone technologies provide the capability to choose the device on which content will be viewed, thereby "space-shifting" content to a location different from the primary source. *Cf. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999) (rejecting challenge under the Audio Home Recording Act to space-shifting of music using portable MP3 players).

Although many subscription video services offer reliable high-quality signals and time or space shifting capabilities, they do so only on terms that leave consumers dissatisfied with the inflexibility and expense of accessing desired content through incumbent technologies. Thus, cable and satellite subscription services have consistently ranked among the lowest of forty-seven sectors in the American Customer Satisfaction Index, often finishing dead last. SCORES BY INDUSTRY, AMERICAN CONSUMER SATISFACTION INDEX, *available at* http://www.theacsi.org/acsi-results/scores-by-industry-popup-all (in 2011 these services ranked 45th out of 47).

In particular, subscription video services and partnering broadcasters do not provide consumers with adequate choice about when and how to access the broadcast content on which many viewers rely. Compounding the problem, subscription services typically package low-rated, largely unwatched channels with those (such as broadcast programming) that consumers actually do want. *See Cablevision Says Viacom Threatened Billion-Dollar Penalty*, BLOOMBERG NEWS, March 8, 2013, http://www.bloomberg.com/news/2013-03-07/cablevision-says-viacom-threatened-billion-dollar-penalty.html. The reality for many consumers is that industry business practices present them with a "Morton's Fork," in which they are forced to choose between two undesirable options.

The first requires consumers to pay extra to have meaningful choices in accessing content by "bundling" the features enabling time and space shifting functionality into expensive packages that include many unwanted channels. For example, in Los Angeles, Time Warner Cable gives consumers DVR functionality for only one TV if they subscribe to a digital package and rent equipment at a total cost of $72.98 per month (plus tax and fees). *See Packages*, TIMEWARNERCABLE, http://www.timewarnercable.com/content/twc/en/residential-home/packages/packages.html (last visited Mar. 12, 2013) (providing a 12-month introductory price for "Digital TV" at $49.99 per month and DVR functionality for an additional $22.99 per month). For the subscriber who watches primarily

broadcast content, this means a yearly cost of $875.76 for the ability to time-shift content that is available over-the-air without charge. Space-shifting is similarly costly—DISH Network offers a basic satellite television package with its "Hopper" device for $34.99 per month in Los Angeles for one television, which comes out to $419.88 over a 12-month introductory offer. *See DISH Hopper*, DISH NETWORK, http://www.dish.com/technology/hopper/ (last visited Mar. 20, 2013) (the Hopper allows subscribers to watch live and recorded content on personal devices). Since cable rates were deregulated in 1984, the Consumer Price Index for "Cable/Satellite" has increased fourfold, about twice as fast as the general rate of inflation. These rates have increased faster than almost every other major category in the Index. CPI DETAILED REPORT DATA FOR SEPTEMBER 2012, BUREAU OF LAB. STATISTICS, 12 (2012), *available at* http://www.bls.gov/cpi/cpid1209.pdf.

In the second undesirable option, consumers could buy a digital antenna (approximately $45), a stand-alone digital DVR (approximately $350), and combine these with a video "space-shifting" product like Slingbox ($180). *See* ChannelMaster CM 2016 HDTV Antenna and TV CM 7400R HD DVR, CHANNELMASTER, http://www.channelmasterstore.com (last visited Mar. 13, 2013); Slingbox 350 Product Page, SLINGBOX, http://www.slingbox.com/go/buy#.UH8Jwm_oSKI (last visited Mar. 13, 2013).

When connected to a primary video source, such a device enables the user to play a roughly live or recorded version on any of several possible screens. Sling Media, *Placeshifting: Set Your TV Free*, 9 (2011). Unfortunately, spending over $500 upfront is unrealistic for many consumers; especially given 25% of American households earn less than $25,000 per year. *See* U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: TABLE S1901-INCOME IN THE PAST 12 MONTHS (2010).

Without low-cost services giving consumers meaningful choices about how and when they receive broadcast television, many will be forced to forego full participation in modern information society. Broadband availability and adoption has dramatically increased in recent years. THREE SCREEN REPORT, NIELSEN, 1, 3 (2010) (in 2010, 63.5% of households had broadband internet, a 24% increase from 2008). However, content industry efforts to monetize and monopolize consumer choice may signal the opening of a new "digital divide" between members of the public who can take advantage of new tools that enable choice about how and when to access content, and those who are relegated to restrictive "basic" distribution models. *See* Lateef Mtima, Copyright, Social Justice, and the Digitization of Knowledge, INST. OF IP & SOC. JUST. (July 2009). This new digital divide has the most deleterious effect on low-income people, those with less education, the elderly, and the disabled—the very groups that most need

information access to become full participants in society. *See* DIGITAL DIFFERENCES, PEWRESEARCH, 1, 2-6 (2012).

By contrast, the freedom of choice that technologies like Aereokiller offer, at a reasonable cost, empowers consumers and can help close the digital divide, thus enabling more consumers to become active and informed participants in society.

D. Aereokiller is Representative of the Technological Trend Toward Services that Meet Consumer Demand for Choice.

Technologies like Aereokiller can fulfill the important goal of promoting consumer choice in accessing information by combining a number of separate and independently legitimate technological functions. Aereokiller provides consumers with access to their local broadcast programming content through individualized antennas and hard drive systems located at Aereokiller's facilities. *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 2012 WL 6784498, at *1 (C.D. Cal. Dec. 27, 2012). Consumers can watch live programming on various devices through a miniaturized antenna allocated for their sole usage at that time. *Id.* Subscriber-specific hard drive profiles at Aereokiller's facilities function as DVRs to enable both "live" viewing and time-shifted playback of broadcast programming. *Id.* at Exhibit A.

Each component function Aereokiller's technology is legitimate when undertaken separately. Receiving over-the-air broadcast signals is obviously lawful, and the antenna that enables it is a legitimate device. The same applies to

the DVR that enables time-shifting. *See Sony*, 464 U.S. at 455. Similarly, space-shifting broadcast content has been possible at least since the launch of the first Slingbox device in 2005, and there have been no reports of copyright litigation in the eight years that it has been available.

A consumer with a personal digital antenna, DVR, and Slingbox can choose what broadcast content to watch, and when and where to watch it, just like an Aereokiller subscriber who makes use of hardware dedicated to that subscriber's use at Aereokiller's facility. In *American Broadcasting Companies v. Aereo*, a similar remote-storage broadcast recording technology withstood a copyright-based challenge. 874 F. Supp. 2d 373 (S.D.N.Y. 2012). That decision was simply the latest in a long line of legislative and judicial actions that interpret copyright law in favor of new technologies that promote consumer choice.

II. Copyright Law Promotes Consumer Choice by Permitting Consumers to Utilize Efficient New Technology, and Should Not Be Interpreted to Unnecessarily Restrict Choice.

Consumer interests have been paramount in its shaping copyright law since its earliest days. *See* Ronan Deazley, *The Myth of Copyright at Common Law*, CAMBRIDGE L.J. 108 (2003) (the Statue of Anne balanced interests to ensure the dissemination of useful works). The popularization of movable type, a disruptive new technology of reproduction, caused publishers to call for new protections. William C. Warrant, *Foreword* to BENJAMIN KAPLAN, AN UNHURRIED VIEW OF

COPYRIGHT vii–viii (1967). In response, Parliament enacted the Statute of Anne, which responded to those calls with copyright law that served the publishers' private interests, while consciously promoting the public interest in increased access to information by regulating only the *misuse* of information technology, rather than the new technology itself. *See* Craig Joyce & L. Ray Patterson, *Copyright in 1791*, 52 EMORY L.J. 909, 913-915 (2003) (statute incorporated conditions for regulating publishers in the public interest). Following the lead of British legislators, subsequent lawmakers, including those in the United States, have moved cautiously when invited to apply copyright to suppress beneficial new information technologies.

As detailed in Part III, Congress wrote the importance of consumer access into the Copyright Act of 1976. However, faced with changes in patterns of consumption that upset incumbent methods of content distribution, contemporary copyright holders have repeatedly sought to snuff out incipient new technologies that expand consumers' choices. The courts, however, generally have interpreted copyright law to validate these new technologies.

A. When Analyzing New Technologies, Courts Have Consistently Interpreted the Copyright Act to Favor Legitimate Consumer Uses of Those Technologies.

When interpreting copyright law and evaluating new uses of technologies, courts attempt to balance consumer interests and copyright holder's property

interests. *See supra* Part I.A. They have not hesitated to endorse new technologies, expanding consumer access to copyrighted works without invading copyright owners' statutory rights.

In *Sony Corp. of Am. v. Universal City Studios, Inc.*, the Supreme Court demonstrated sensitivity to the consumer perspective on new information technologies. 464 U.S. 417 (1984). Owners of television program copyrights brought an infringement suit to block the manufacture and sale of video recorders that allowed consumers to record and time-shift over-the-air programming, freeing them from the schedules imposed by broadcast. *Id.* at 423. The Court held that consumer time-shifting constituted "fair use" and that the enabling technology was permissible because it was "capable of [this] substantial noninfringing use[]." *Id.* at 442. The *Sony* decision makes evident that courts should facilitate consumer choice when the technology is "widely used for legitimate, unobjectionable purposes." *Id.*

Even when the Supreme Court has imposed liability on certain technology providers for inducing copyright infringement, it safeguarded other permissible consumer uses of new technology. The Supreme Court recently affirmed *Sony*'s pro-consumer perspective on technology in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), a copyright infringement action brought against the distributors of peer-to-peer file sharing software. The Court held that a

technology's substantial non-infringing uses do not shield its distributors from liability where evidence exists that they intended to foster infringement by third parties. *Id*. at 936. Although the Court found the distributors liable for inducing infringement, it made clear that it was the defendants' *conduct*, not the technology itself, which triggered liability; copyright law should not discourage "the development of technologies with lawful and unlawful potential." *Id*. at 936-37. As in *Sony*, the Court emphasized that the availability of a technology should depend *primarily* on its potential for legitimate use. Aereokiller's technology, exists *exclusively* to enable lawful end-uses by consumers. *See supra* Part I.B.

B. Congress and the Courts Have Historically Worked in Tandem to Allow Consumers to Make Reasonable Use of Technologies that Improve Access to Content.

Attempts to employ copyright to suppress new information technologies are nothing new. Where close questions are presented by such efforts, courts tend to narrowly construe prohibitions within the copyright statute, thus favoring the challenged technology and its consumer beneficiaries. Courts exercise their duty to apply the law as it stands, but they also defer to Congress' authority to subsequently modify the legal regime to meet the technological challenges, should it choose to do so. *Sony*, 464 U.S. at 431. For example, in *White-Smith Music Publishing v. Apollo*, sales of player piano rolls, which allowed consumers to hear professional-grade performances of keyboard music in their homes, were permitted

on the technical ground that the rolls were not "copies" protected under early twentieth century law. 209 U.S. 1 (1908). Congress responded the following year by modifying the statutory definition of a "copy," while protecting consumers' interests by introducing provisions for compulsory licensing of "mechanical reproductions" of music (including newly popular phonograph records). Copyright Act of 1909, Pub. L. 60-349 § 1(e) (Mar. 4, 1909; *repealed* Jan. 1, 1978); *see also* 17 U.S.C. § 115. The net effect assured broad consumer access to recorded music for decades to come.

Congress' revision of copyright law after *White-Smith* illustrates the special legislative role in regulating technologies that improve consumer access to content. Where Congress has not plainly marked the course, courts should conservatively construe the scope of copyright protections. *Sony*, 464 U.S. at 431. For example, after the Supreme Court interpreted copyright law to favor newly developed technologies that enabled consumers to receive retransmissions of over-the-air content via emergent cable television systems, Congress created a new scheme to balance providers' and consumers' interests in the Copyright Act of 1976. *See* 17 U.S.C. §§ 111(d)(2)(B), 111(d)(5); *Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968); *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974). In the same legislation, Congress corrected an older, and atypically aggressive, judicial application of copyright to technology that restricted consumers' ability to enjoy

content retransmitted by a hotel to private guest rooms. *Compare Buck v. Jewell-La Salle Realty Co*., 283 U.S. 191 (1931), *with* 17 U.S.C. § 111(a)(1).

III. The History and Congressional Intent of the Copyright Act of 1976 Expressly Protect Consumer Autonomy.

When drafting the 1976 Copyright Act, Congress balanced the interests of creators, owners, and consumers to encourage creative production and commerce. By limiting copyright owners' public performance and display rights, Congress recognized and safeguarded the private sphere of information use—the zone within which consumer choice regarding content access occurs. *See* R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM "Copies,"* 2001 U. ILL. L. REV. 83, 86 (2001). Congress thereby facilitated the technological developments of coming years, allowing copyright owners reasonable control over works they own without unnecessarily diminishing consumer access to those works or burdening technological development.

Congressional treatment of the performance right provides a salient example. Section 106 of the Act defines the full extent of the exclusive rights granted to copyright owners, which include the "rights to do and to authorize any of the following . . . in the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work *publicly*." 17 U.S.C. § 106 (emphasis added).

Rights that are not enumerated are automatically excluded. *See* 2-8 NIMMER ON COPYRIGHT § 8.01 (2012).

The 1976 Copyright Act was considered for over fifteen years before being presented for a final vote. *See* Barbara Ringer, *First Thoughts on the Copyright Act of 1976,* 22 N.Y.L. SCH. L. REV. 479 (1977). The previous copyright law contained language that restricted copyright owners' rights to performances made "for profit," and distinguished the public and private spheres of performance and display. *See* Copyright Act of 1909, Pub. L. 60-349 § 1(e) (Mar. 4, 1909; *repealed* Jan. 1, 1978). Although the final legislation removed the words "for profit" from the definition of the performance right, it retained the phrase "to the public"—a distinct Congressional choice in favor of promoting consumers' interest in personal access to content. Copyright Act of 1976, Pub. L. 94-553 § 106 (Oct. 19, 1976).

According to the Act, a public performance only occurs when an assembled audience is physically present, or by "transmit[ting] or otherwise communicat[ing] a performance or display of the work . . . to the public . . . . " 17 U.S.C. § 101. If Congress had intended the statute to encompass all performances, wherever or by whatever means they occur, it would have so stated. The legislative history makes clear that considerations beyond the location and size of the audience influence the characterization of a performance as "public" or "private." *See Columbia Pictures*

Industries, Inc. v. Prof'l Real Estate Investors, Inc., 866 F.2d 278, 281 (9th Cir. 1989) (citing H.R. Rep. No. 1476, 64, 94th Cong., 2d Sess.).

This public-private distinction is observed throughout the Copyright Act. *See* 17 U.S.C. §§ 109, 111. The first sale doctrine in section 109(a) shows that Congress contemplated what happens to copies of protected works once they exit the public channels of commerce. Congress concluded that the copyright owner's control generally should cease at that point, and that consumers' *private* choices about whether to sell or otherwise dispose of lawfully acquired copies should be protected. *See Kirtsaeng v. John Wiley & Sons, Inc*., 2013 WL 1104736, at *4-5 (U.S. Mar. 19, 2013).

Similarly, the corrective provision that followed *White Smith* (*see supra* Part II.B.), section 111(a), states that secondary transmission from "a hotel[room], apartment house, or similar establishment, of signals transmitted by a broadcast station licensed . . . to the private lodgings of guests or residents of such establishment . . . " is non-infringing. 17 U.S.C. § 111(a). The plain language of this exception is predicated on the acceptance of a significant distinction between public and private space.

Given that so much of the Copyright Act reflects Congress' intentional safeguarding of a meaningful private sphere, it is no surprise that this Court's jurisprudence reflects the same concern. In *Columbia Pictures*, this Court

recognized Congressional intent by maintaining consumers' right to enjoy private performances and to choose how they access content, and its principles can readily be applied to technologies like Aereokiller.

IV. Aereokiller's Performance of Broadcast Content to Facilitate Consumer Choice and Access to Content is Non-Infringing Under This Court's Jurisprudence.

Technologies like Aereokiller fit squarely within the legal paradigms this Court's precedents establish for assessing new consumer-oriented information technologies under the Copyright Act. The fundamental public interest in access to information, *see supra* Part I.A., II., was realized, in part, through Congress' definition of a private space in which consumers control how they experience performances of content. *See supra* Part III. This Court's decisions regarding personal consumer technology have extended our understanding of the statutory concept of private performance and have embraced fair use as way of liberating valuable new technologies that benefit the public through increasing access to and control over information.

To warrant a preliminary injunction, a plaintiff must demonstrate that an injunction would be in the public interest, that without an injunction irreparable harm is likely, that the balance of equities tips in its favor, and that it is likely to succeed on the merits. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The district court's decision failed to appropriately balance the public's

interests with those of rights holders. In defining a "public performance," the district court misinterpreted this Court's precedents and effectively foreclosed the possibility for consumers to enjoy private performances in any situation where electronic transmission is involved.

A. The District Court's Interpretation of the "Public Performance" Right in the Copyright Act is Inconsistent with the Pro-Consumer Purposes of the Copyright Act.

In analyzing the "public performance" right under section 106(4), the district court stated that the express language of the Copyright Act requires determining whether a *performance* of a work is public, and not whether a *transmission* of that work is public. *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC.*, 2012 WL 6784498, at *8 (C.D. Cal. Dec. 27, 2012) (emphasis in original). The district court's analysis breaks down when it concludes that the public or private nature of a single actual performance of a particular work by means of a unique transmission should be determined by the potential audience of all transmitted performances of that work. *Id.*

The Copyright Act intends that the public or private nature of a performance be considered from the perspective of whether members of the public are "capable of receiving" the performance, irrespective of whether they receive the work in the same or different times and locations. 17 U.S.C. § 101. However, the district court failed to consider any aspects of a performance *beyond* the inclusion of

members of the public in the performance's potential audience. In determining whether a performance is public or private, this Court looks to multiple practical characteristics of the performance, including size of the potential audience for a performance, the nature of the locations of where a performance was received, and the limitations inherent in the method of performance. *Columbia Pictures v. Prof'l Real Estate Investors*, 866 F. 2d 278, 281 (9th Cir. 1989); *see also supra* Part IV.A.2.

The district court's disregard for the *Columbia Pictures* methodology is a function of its reliance on *On Command Video Corp. v. Columbia Pictures Industries* to support its aggregation of the audiences of all transmitted performances of a particular work. *On Command* held that several successive transmissions and viewings of the same work by a sequence of different hotel guests in different rooms, from a hotel's central bank of VCRs, could reasonably be component parts of a single public performance. *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991). The court in *On Command* reached this conclusion because it assumed that, on the facts before it, the successive individual transmissions could themselves be characterized as public, and that successive public *transmissions* of the same work could therefore be aggregated. However, the district court specifically disclaim the possibility that a transmission, as such, can itself have public or private character. *BarryDriller,*

2012 WL 6784498, at *4. Thus, its reliance on *On Command* to conclude that successive, independently transmitted *performances* can be aggregated for the purpose of "public performance" analysis is improper.

The district court then reasons that the extent of the potential cumulative audience of the aggregate performance is conclusive on the question of whether the aggregate performance is public or private. The district court's methodology is akin to stating that a consumer who watched a recorded tape of a newscast three days after the initial broadcast, and another who watched it a year later, had both been part of the audience for same performance experienced by one who tuned in live.

1. The District Court's Expansive Definition of Public Performance Contradicts Congressional Intent on Numerous Grounds and is Unworkable in Practice.

The foremost danger of the district court's expansive definition of public performance is that under it, any transmission of a performance from a source point will be considered public because it is potentially capable of reaching multiple recipients, directly or indirectly, at some time. This interpretation would make the "to the public" language in section 101 of the Copyright Act superfluous, at least where transmissions are concerned. As discussed, Congress' inclusion of this language was designed to create a space for private performances of works by consumers. *See supra* Part III. Extending the district court's interpretation of

public performance to its logical conclusion means no space would remain within copyright for consumers to enjoy private performances of a work transmitted by technological means. An example involving Apple's iTunes store and its former .mac remote storage service illustrates this point:

> If 100 consumers each purchased the same Miles Davis song from Apple's iTunes store, separately stored the song on Apple's .mac remote-storage backup service, and separately listened to their respective copies of the song by streaming the song to themselves from the remote server, no one would think Apple had publicly performed the song.

Brief in Opposition at 30, Cable News Network, Inc. v. CSC Holdings, Inc., 129 S. Ct. 2890 (2009) (No. 08-448), 2008 WL 5168381. If the district court's public performance definition is applied to these facts, then the separate private performances enjoyed by consumers—through their independent use of technology—become public performances simply because the same work is involved and numerous consumers had (or could have) enjoyed it.

In explicating its decision to provide consumers with a space to enjoy private performances, Congress stated (as noted by this Court) that the number of persons in the potential audience for a performance should not be the sole factor in evaluating whether that performance is public or private. *See* H.R. Rep. No. 1476, 64, 94th Cong., 2d Sess.; *Columbia Pictures*, 866 F.2d at 281. Yet the district court's definition of a public performance makes this hypothetical audience projection functionally determinative. By conflating separate performances by

transmission into a single, on-going performance, the district court effectively guarantees that the potential audience will be large enough to qualify as "public."

2. Aereokiller's Performances Are Private Under This Court's Standard for Evaluating the Nature of the Performance of a Copyrighted Work.

The absurd results produced by the district court's expansive interpretation of the public performance right demonstrate that some genuine limitation on what is considered "public" in the case of performances by transmission is necessary if the public-private distinction proposed by Congress is to remain relevant.

In a case considering an earlier iteration of performance by electronic means, this Court interpreted copyright holders' "public performance" right within the Copyright Act to reserve a space for private performance by consumers. In *Columbia Pictures* this Court looked to the legislative history of the Copyright Act in finding that the in-room videodisc movie showings initiated by hotel guests are not public performances because they "do not occur at a place open 'to the public.'" 866 F. 2d at 281.

In reaching its conclusion, this Court highlighted that Congress intended neither the number of persons nor the location of the performance to be determinative of the public character of a performance. *Id.* Instead, this Court considered the sum total of all the circumstances of a performance, including the limitations on access inherent in how and where that performance was viewed, to

assess its character. Both the fact that a performance's audience was restricted at most to a gathering of a guest's social acquaintances, and the fact that hotel rooms are inherently private spaces contributed to this Court's finding that the in-room videodisc showings were private performances. Notably, the possibility that other guests could have watched the same discs in other rooms at other times did not even enter into the analysis.

A similar multi-factor analysis of the various aspects of consumer use of Aereokiller's technology should yield the same conclusion—that it merely allows consumers to enjoy private, non-infringing performances. Consumers use technologies like Aereokiller's in personal spaces and through personal devices over which they have control, thus effectively limiting the potential audience, at any one time or place, for any performed work. Only a user with login credentials can access a live or recorded version of a work from his or her personal Aereokiller account from their mobile phones, tablet computers, or personal computers. Moreover, each Aereokiller user chooses which programs to watch or record from broadcast content that he or she can already legitimately access, via an antenna subject exclusively to his or her own control, separately from any other users doing the same with their own antennas.

Any one of these characteristics may not be enough in itself to determine that each consumer's viewing of the content he or she selected and recorded is

private performance, rather than a component of a public one. In the aggregate, however, the characteristics of technologies like Aereokiller provide more than sufficient indicia of exclusivity, from which one should conclude that the performances Aereokiller facilitates are private.

B. In Addition to Being Non-Infringing, Technologies Like Aereokiller Can Also Be Justified as Fair Use.

This Court has recognized that the "[f]air use doctrine to copyright infringement permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 (9th Cir. 2007). The Copyright Act is designed to foster and balance both creativity in expression and creativity in innovation. The abundant public benefits of technologies like Aereokiller that enhance consumer experience enable them to facilitate both types of creativity contemplated the Act.

In *Sony*, the Supreme Court reminded us that consumers' access to new personal information technology should be promoted when possible. 464 U.S. at 447-56. Since that time, this Court has followed the Supreme Court's lead by applying the fair use doctrine, which helps properly balance rewarding individual authors with benefiting the public, to promote both cultural creativity and innovation in the development of new techology.

1. This Court's Precedents Dictate That Uses that Facilitate Consumer Experience and Control of Content are Fair Uses.

This Court's precedents have identified a group of "fair use technologies" that advance consumer interests and promote robust competition. Beginning with *Sega Enterprises. v. Accolade*, this Court carefully applied traditional fair use analysis to find that operators of disruptive technologies are fair users of copyrighted material when the technologies provide sufficient public and consumer benefit. 977 F.2d 1510 (9th Cir. 1992).

In *Sega*, a video game developer in competition with the manufacturer of the Sega Genesis console used decompilation technology to analyze Sega's "lock out" software and find ways to make its own cartridges compatible with Sega's proprietary hardware. *Id.* at 1514-16. This Court found that the independent developer's unauthorized reproduction of Sega's copyrighted object code was fair because it promoted increased creative expression (through the wider dissemination of creative works) and improved competition within the video game market—both fundamental public policy imperatives underlying the Copyright Act. *See id.* at 1523-24, 27.

With those fundamental aims of copyright in mind, in *Kelly v. Arriba Soft* and *Perfect 10 v. Amazon* this Court gave prominence to the public benefit of technology in its fair use analyses. In *Kelly v. Arriba Soft*, this Court found that the

use of copyrighted images as thumbnails in a search engine was a fair use based on the transformative nature of the search function and the benefit conferred upon consumers, highlighting that "Arriba's use of the images serve[d] a different function than [the original photographer's] use—improving access to information on the [I]nternet versus artistic expression." 336 F.3d 811, 818-22 (9th Cir. 2003). Additionally, this Court found that the use of the images "benefit[s] the public by enhancing information gathering techniques on the internet." *Id.* at 820. Although specialized search engines were a relatively new and even disruptive technology at the time, this Court recognized the public benefits of the tool brought it within the fair use doctrine.

In *Perfect 10 v. Amazon*, this Court solidified its view that technologies that implicate copyright owners' exclusive rights can nevertheless qualify as fair uses—if those technologies facilitate public access to creative expression. 508 F.3d 1146 (9th Cir. 2007). This Court determined that Internet users' interests in accessing thumbnails of images to facilitate searches outweighed owners' interests in asserting copyright control over those images. *Id*. at 1168. Although *Perfect 10* was decided in the context of the public display right, rather than the performance right, this Court closely examined the same competing interests currently at stake: the authority of the copyright owner versus public access to information.

Even where a technology has a significant commercial application that benefits its provider, this Court has found the commercial aspects are outweighed by the benefits to consumers and the public-at-large. For example, in *Sega*, even though the defendant's copying was undertaken to produce commercial products, this Court found it to be a fair user because of the resulting promotion of creative expression and competition. *Sega*, 977 F.2d at 1522. Likewise, in *Perfect 10*, commercial benefits of the defendant's search engine were outweighed by the public benefits of its consumer-oriented use. *Id.* at 1166.

Technologies like Aereokiller provide significant public benefits by allowing consumers to choose when and where they experience broadcast content to which they have legitimate access. This facilitates improved public access to information and expressive content (as envisioned by the Copyright Act), which in turn promotes increased societal participation. The availability of such technologies guarantees that the consumer video services market will remain truly competitive, rather than being dominated by the incumbent subscription services—just as the use of decompilation in *Sega* promoted competition in the game market. Competition, in turn, gives consumers more choices, often at lower cost. *See.* MEDIA BUREAU, F.C.C., DA 12-1322, REPORT CABLE INDUSTRY PRICES 3 (2012).

Because Aereokiller's technology enables access to information, expands consumer choice, and promotes competition, it is just the kind of technology the

Copyright Act and this Court have encouraged. This Court should find that because the public benefit derived from technologies like Aereokiller's service far outweighs any harm to content owners, the fair use doctrine applies here with full force.

CONCLUSION

Technologies like Aereokiller's serve a fundamental public interest, promoting consumers' access to lawfully acquired content and freedom of choice in how to use it. Such technology conforms to the copyright statute and this Court's principles regarding private performances and fair use of copyrighted content. By recognizing that these technologies (1) facilitate private rather than public performance and (2) are entitled to protection under fair use, this Court will continue to support the development and distribution of technologies that serve consumers' interests without unnecessarily invading those of content owners. On the other hand, to endorse the district court's conclusion that infringement of the public performance right on the facts is implicated here, would signal a shift favoring monopolistic incumbents at the expense of efficient, disintermediating technologies. The resulting imbalance between copyright protection and consumer choice in accessing content would weigh heavily on many members of the public, which is the ultimate intended beneficiary of copyright. This Court should

maintain the balance that envisioned by Congress and reverse the district court's order granting a preliminary injunction.

DATED: March 22, 2013

GLUSHKO-SAMUELSON INTELLECTUAL PROPERTY LAW CLINIC

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